The Environmental, Democratic, and Rule-of-Law Implications of Harper's Environmental Assessment Legacy

*Jocelyn Stacey**

The article argues that Harper's dramatic changes to federal environmental assessment give rise to a two-dimensional legacy in environmental law: first, a legacy of impoverished environmental decision-making that reflects a narrow, resource-oriented vision of the environment, and second, a legacy of undermining democratic and rule-of-law values in environmental law. The crux of this latter legacy is the argument that environmental assessment law provides an essential framework for publicly-justified decision-making in the Canadian environmental context. Indeed, as I suggest in this article, environmental assessment presently performs a quasi-constitutional role in Canadian environmental decision-making in the sense that it is constitutive of legality; that is, it provides the means by which the federal government fulfills its obligation to govern the environment in accordance with the rule of law.

Dans cet article, l'auteure soutient que les modifications spectaculaires apportées par Harper à l'évaluation environnementale fédérale ont donné lieu à un héritage bidimensionnel en droit de l'environnement : premièrement, un processus décisionnel appauvri en matière d'environnement qui reflète une vision limitée de l'environnement, axée sur les ressources, et deuxièmement, une tendance à saper les valeurs démocratiques et les valeurs de la primauté du droit en droit de l'environnement. Le point essentiel de ce deuxième héritage est l'argument que la loi sur l'évaluation environnementale apporte un cadre essentiel pour la prise de décision justifiée publiquement dans le contexte environnemental canadien. En fait, comme l'auteure le suggère dans cet article, l'évaluation environnementale joue actuellement un rôle quasi constitutionnel dans le processus décisionnel canadien en matière d'environnement dans le sens qu'elle assure le moyen par lequel le gouvernement fédéral remplit son obligation constitutionnelle à administrer l'environnement selon la primauté du droit.

* Jocelyn Stacey is an Assistant Professor of law at the Peter A Allard School of Law at the University of British Columbia. Thanks to Steve Patten and two anonymous reviewers for helpful feedback and to Alexandra Catchpole for excellent research assistance. All errors remain my own.

Introduction

Canada's leading environmental law scholars have identified Harper's legacy as a full-scale attack on the environment,[1] one that simultaneously diminished the federal government's role in environmental protection and sought to increase federal influence over resource development. Indeed, the list of measures and actions taken by the Harper government that undermine environmental protection is striking: The federal role in conducting environmental assessment was radically reduced[2] as was its role in protecting navigable waters.[3] Fisheries protections were narrowed.[4] New regulation-making authority was exempt from ordinary procedural requirements, for no apparent reason.[5] Ocean dumping controls were relaxed.[6] Critical habitat requirements for species at risk were loosened.[7] The government systemically failed to develop recovery strategies for species at risk, contrary to legislative requirements.[8] The government formally withdrew from the Kyoto Protocol[9] and repealed the *Kyoto Protocol Implementation Act*.[10] The authority to deny interprovincial pipeline approvals was moved from the National Energy Board to the federal Cabinet.[11] The National Roundtable on Environment and Economy, a government advisory body on sustainable development, was disbanded.[12] Environmental non-gov-

1 Jason Maclean, Meinhard Doelle & Chris Tollefson, "The Past, Present and Future of Canadian Environmental Law: A Critical Dialogue" (2016) 1:1 Lakehead LJ 79; Lynda M Collins & David R Boyd, "Non-Regression and the *Charter* Right to a Healthy Environment" (2016) 29 J Envtl L & Prac 287.

2 This is the focus of this article, see Part II *infra* for an overview of the most significant changes.

3 Bill C-45, *A second Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures*, 1st Sess, 41st Parl, 2012, cls 173-78 (assented to 14 December 2012), SC 2012, c 31, online: <www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=5942521&File=4> [*Jobs and Growth Act*]; Amanda K Winegardner, Emma E Hodgson & Adrienne M Davidson, "Reductions in Federal Oversight of Aquatic Systems in Canada: Implications of the New Navigation Protection Act" (2015) 72 Can J Fisheries & Aquatic Science 602.

4 Bill C-38, *An Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures*, 1st Sess, 41st Parl, 2012, cls 132-56 (assented to 29 June 2012), SC 2012, c 19, online: <www.parl.gc.ca/HousePublications/Publication.aspx?Docid=5697420&file=4> [*Jobs, Growth, and Long-Term Prosperity Act*]; Jason Unger, "Lamenting What we HADD? A *Fisheries Act* Habitat Dirge or Much Ado about Nothing" (2016) 29 J Envtl L & Prac 1; Martin Z P Olszynski, "From 'Badly Wrong' to Worse: An Empirical Analysis of Canada's New Approach to Fish Habitat Protection Laws" (2015) 28 J Envtl L & Prac 1.

5 *Fisheries Act*, RSC 1985, c F-14, ss 35(4), 43(4).

6 *Jobs, Growth, and Long-Term Prosperity Act*, *supra* note 4 cls 316-50.

7 *Ibid* at cls 163-69; *Species at Risk Act*, SC 2002, C 29, s 77(1).

8 *Western Canadian Wilderness Committee v Canada (Fisheries and Oceans)*, 2014 FC 148 at para 85.

9 *Jobs, Growth, and Long-Term Prosperity Act, supra* note 4, cl 699.

10 *Ibid*.

11 *Jobs, Growth and Prosperity Act, supra* note 4, cl 104.

12 *Jobs, Growth, and Long-Term Prosperity Act, supra* note 4 at cls 578-94.

ernmental organizations were targeted for auditing on their charitable status.[13] The Experimental Lakes Area, a world-class research facility, was defunded.[14] Library materials from Fisheries and Oceans Canada were destroyed.[15] The RCMP and CSIS engaged in coordinated, covert surveillance of peaceful activities by environmental and Indigenous groups.[16] Government scientists were muzzled.[17] The budgets for Environment Canada and Fisheries and Oceans were slashed.[18]

Collectively these measures result in a radical reduction of the federal government's role in environmental protection. They appear to reflect an assumption of a zero-sum trade-off between resource development and environmental protection. Others have argued they are part of a concerted effort to subsume "the environment" under "a singular resource extraction paradigm."[19] The argument advanced here is that the precise changes to environmental law not only reflect this substantive vision of the environment, they also represent an attempt to exempt environmental decisions from the requirements of the rule of law. Underlying this argument is the premise that a democratic government committed to the rule of law must publicly justify its decisions on the basis of core constitutional principles, such as fairness and reasonableness. This rule-of-law requirement is most clearly reflected in section 1 of the *Charter*, but is also

13 Dora Tsao et al, *Tax Audits of Environmental Groups: The Pressing Need for Law Reform* (Victoria: University of Victoria Environmental Law Centre, 2015).

14 Diane Orihel & David Schindler, "Experimental Lakes Area is Saved, but it's a Bittersweet Victory for Science", *The Globe and Mail* (1 April 2014), online: <www.theglobeandmail.com/opinion/experimental-lakes-area-is-saved-but-its-a-bittersweet-victory-for-science/article17753956/> (the facility was later reopened under a new operator, The International Institute for Sustainable Development).

15 Gloria Galloway, "Purge of Canada's fisheries libraries a 'historic' loss, scientists say", *The Globe and Mail* (7 January 2014), online: <www.theglobeandmail.com/news/politics/purge-of-canadas-fisheries-libraries-a-historic-loss-scientists-say/article16237051/>.

16 Shawn McCarthy, "CSIS, RCMP monitored activist groups before Northern Gateway hearings", *The Globe and Mail* (21 November 2013), online: <www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/csis-rcmp-monitored-activists-for-risk-before-enbridge-hearings/article15555935/>.

17 See e.g. Jonathon Gatehouse, "When science goes silent", *Macleans* (3 May 2013), online: <www.macleans.ca/news/canada/when-science-goes-silent/>.

18 Environment and Climate Change Canada, *2014-2015 Report on Plans and Priorities*, online: <www.ec.gc.ca/default.asp?lang=En&n=024B8406-1&offset=3&toc=show#s3> and Peter O'Neil & Gordon Hoekstra, "Federal budget cuts $100 million from fisheries and oceans over three years", *The Vancouver Sun* (21 March 2013), online: <www.vancouversun.com/news/Federal+budget+cuts+million+from+fisheries+oceans+over+three+years/8133846/story.html>.

19 Jonathan Petyon & Aaron Franks, "The New Nature of Things? Canada's Conservative Government and the Design of the New Environmental Subject" (2016) 48:2 Antipode 453 at 456. See also Denis Kirchhoff & Leonard J S Tsuji, "Reading Between the Lines of the 'Responsible Resource Development' Rhetoric: The Use of Omnibus Bills to 'Streamline' Canadian Environmental Legislation" (2014) 32:2 Impact Assessment and Project Appraisal 108 at 110.

the core commitment contained within our common law constitution, realized in part through the courts' administrative law function of judicial review.[20]

The obligation to give publicly-regarding reasons (i.e. reasons that are not solely self-interested and that can be accepted by others) is also the consensus point amongst theorists of deliberative democracy, who espouse "an ideal of politics where people routinely relate to one another ... by influencing each other through the publicly valued use of reasoned argument, evidence, evaluation and persuasion."[21] Thus the requirement of public justification lies at the intersection of the rule of law and deliberative democracy.[22] Public justification takes seriously the capacity of legal subjects — those subject to the law — to "reason with the law."[23] It both respects and enables individual autonomy by protecting legal subjects from arbitrary decision-making and also facilitating their participation in the ongoing project of contesting (or not) and deliberating upon the content of the law. On this view, individual participation is inherent within legal authority.

The crux of this article is that environmental assessment law provides an essential framework for publicly-justified decision-making in the Canadian environmental context. This means that the Harper-led changes to environmental assessment can be understood as an attempt to exempt environmental decision-makers from the basic requirements of a democratic conception of the rule of law. The article focuses specifically on environmental assessment law, rather than a broader suite of Harper's environmental measures, for several reasons. Rewriting Canadian environmental assessment legislation was a cornerstone of the Harper government's environmental legacy. It was a comprehensive change to a single piece of legislation that nicely captures the Harper vision of a narrow federal role: a narrow understanding of environmental protection, and a capitulation to the federal government's resource development agenda. Furthermore, environmental assessment laws are often thought of as the "mainframe of environmental law."[24] Indeed, as I suggest in this article,

20 Evan Fox-Decent, "Democratizing Common Law Constitutionalism" (2010) 55 McGill LJ 513 at 513.

21 Amy Gutmann, "Democracy" in Robert Goodin, Philip Pettit & Thomas Pogge, eds, *A Companion to Contemporary Political Philosophy* (Oxford: Blackwell Publishing, 2007) 521 at 527.

22 Jocelyn Stacey, "The Promise of the Rule of (Environmental) Law" (2016) 53:2 Osgoode Hall LJ 681; David Dyzenhaus, "The Legitimacy of Legality" (1996) 46 UTLJ 129 [Dyzenhaus, "Legitimacy"]; Hoi Kong, "Election Law and Deliberative Democracy: Against Deflation" (2015) 9 JPPL 35 [Kong].

23 Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller* (Oxford & Portland: Hart Publishing, 2012) at 10; Kong, *supra* note 22 at 41.

24 Jane Holder, *Environmental Assessment: the Regulation of Decision-Making* (Oxford: Oxford University Press, 2004) at 1 [Holder, *Environmental Assessment*].

environmental assessment presently performs a quasi-constitutional role in Canadian environmental decision-making in the sense that it provides an indispensable framework for public justification.

The article argues that Harper's dramatic changes to federal environmental assessment give rise to a two-dimensional legacy in environmental law: first, a legacy of impoverished environmental decision-making that reflects a narrow, resource-oriented vision of the environment, and second, a legacy of undermining democratic and rule-of-law values in environmental law. This argument unfolds through three parts. The first part introduces the basic structure, purpose and practice of environmental assessment. It argues that environmental assessment is best understood as providing a framework for public justification in environmental decision-making. And it identifies how a misunderstanding of this justificatory function paved the way for criticism — from all sides — of Canadian environmental assessment law. The second part introduces Harper's major changes to Canadian environmental assessment. Drawing on existing literature, it argues that one aspect of the changes is poorer environmental decisions. The reduction in the scope and rigour of environmental assessment in Canada leaves our public decision-makers less informed about the environmental effects of their decisions. The third part extends on this existing environmental commentary. It argues that the changes to federal environmental assessment undermine the federal government's ability to offer adequate justification for its environmental decisions, and thus suggest an attempt to exempt the government from the ongoing project of democratic governance under the rule of law. The article concludes by observing that Harper's legacy in environmental law has created significant challenges for reinstating and then coordinating robust environmental assessment in the Trudeau era.

Environmental assessment: publicly justifying environmental decisions

Environmental assessment is the practice of studying, understanding and attempting to predict the potential environmental effects of certain activities (e.g. developing a new mine) before deciding whether these activities are allowed to proceed. It formalizes the common sense notion that we ought to "look before we leap." The Supreme Court of Canada has described environmental assessment as "a planning tool that is now generally regarded as an integral component of sound decision-making."[25] What these benign descriptions belie, how-

25 *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3, 88 DLR (4th) 1 [*Oldman*].

ever, is the fact that environmental assessment carries the weight of much of the hope and expectation for environmental law more generally. Environmental assessment is intended to promote sustainable development,[26] facilitate consultation with Aboriginal peoples, coordinate decision-making between levels of government, and encourage public participation.[27] But it is also an attempt to regularize and channel that which cannot easily be tamed. The very nature of environmental assessment brings to the surface heated debates about nature and natural resources, environmental protection and development, and scientific, Indigenous and all other ways of understanding our relationships with each other and the environment.

In broad strokes, environmental assessment is generally comprised of *anticipation*, *participation* and the *determination* of whether a proposal is likely to cause significant adverse environmental effects. Environmental assessment requires gathering information about the project and its possible effects in order to anticipate the environmental consequences of approving the project. It typically includes some form of public participation, which incorporates information from a range of sources. The extent and depth of the assessment varies with the nature of the proposed project. Major development proposals attract more rigorous assessments than minor proposals. The end result of the assessment is a determination of whether the proposal is likely to cause significant adverse environmental effects, and if so, whether the project can nonetheless be justified.[28] Because of this final determination, environmental assessment does not require decision-makers to reach any particular outcome (i.e. even projects with significant negative effects may be justified and then approved). For this reason, environmental assessment is often characterized as essentially procedural in nature.[29] At the same time, however, environmental assessment serves (or ought to serve) underlying substantive objectives by providing a forum for explicitly considering whether the risks of projects are acceptable and whether

26 *Canadian Environmental Assessment Act*, SC 1992, c 37 at s 4 [*CEAA 1992*] and *Canadian Environmental Assessment Act,* SC 2012, c 19, s 52 at s 4 [*CEAA 2012*]. Although arguably not in its current form: Meinhard Doelle, "The Role of EA in Achieving a Sustainable Energy Future in Canada: A Case Study of the Lower Churchill Panel Review" (2013) 25 J Envtl L & Prac 113; A John Sinclair, Alan Diduck & Patricia Fitzpatrick, "Conceptualizing Learning for Sustainability through Environmental Assessment: Critical Reflections on 15 Years of Research" (2008) 28 Environmental Impact Assessment Review 415 at 417 (sustainability as the normative end point of environmental assessment).

27 *CEAA 1992*, *supra* note 26, s 4; *CEAA 2012*, *supra* note 26, s 4.

28 *CEAA 1992*, *supra* note 26, ss 20(1)(b), 37(1); *CEAA 2012*, *supra* note 26, s 52(4).

29 Holder, *Environmental Assessment*, *supra* note 24 at 19-20; Matthew J Lindstrom, "Procedures Without Purpose: The Withering Away of the National Environmental Policy Act's Substantive Law" (2000) 20 J Land Resources & Envtl L 245.

proposals reflect the best use of our land and resources.[30] Often these processes lead to modifications in the project design and the incorporation of mitigating conditions intended to prevent and reduce anticipated environmental harm.[31]

Environmental assessment can also be understood as providing a framework for publicly justifying environmental decisions on the basis of underlying constitutional principles of fairness and reasonableness. The participatory component of environmental assessment — i.e. notice-and-comment or public hearings — creates the opportunity for those affected by the decision to be heard, analogous to the administrative law requirement of procedural fairness. At the same time, the assessment can generate a robust pool of information that provides a reasoned basis for the decision-maker's determination of whether a project ought to proceed and on what conditions. In the Canadian context, one need not look further than the language of the *Canadian Environmental Assessment Act 2012* (*CEAA 2012*) to see that environmental assessment ought to perform a justificatory role. Where a project is likely to result in significant adverse environmental effects, section 52(4) requires the Governor in Council to decide whether those effects "are justified in the circumstances."[32]

Environmental assessment legislation is distinct from other environmental statutes and regulations in that it "is a planning tool, not a regulatory tool."[33] The distinction is one of both timing and purpose: environmental assessment happens at an early stage in order to consider the need, alternatives, and design of the project. In contrast, environmental regulation governs the operation of the project. There is an additional and significant distinction, at least in the Canadian context, in that environmental regulatory decisions do not, at present, fulfill the rule-of-law requirement of public justification. Regulatory decisions at the federal level (e.g. issuing pollution permits, or authorizations to destroy fish habitat) are not, generally speaking, transparent, publicly accessible, reasoned, or subject to any meaningful form of review.[34] This means

30 *National Environmental Protection Act* 1969 (US) § 4331(b)-(6); Tsleil-Waututh Nation, "Tsleil-Waututh Stewardship Policy", online: <www.twnation.ca/About%20TWN/~/media/Files/Stewardship%20January%202009.ashx>.

31 Meinhard Doelle, *The Federal Environmental Assessment Process: A Guide and Critique* (Markham, Ont: LexisNexis, 2008) at 25, n 20 [Doelle, *Assessment Process*].

32 *CEAA 2012, supra* note 26, s 52(4).

33 Doelle, *Assessment Process*, *supra* note 31 at 18.

34 David Boyd, *Unnatural Law* (Vancouver: UBC Press, 2003) at 233, 245-48; Olszynski, *supra* note 4 (relying on freedom of information requests to access *Fisheries Act* authorizations); Jocelyn Stacey, "The Environmental Emergency and the Legality of Discretion in Environmental Law" (2015) 52:3 Osgoode Hall LJ 983 (on the reluctance of courts to interfere with environmental decisions on review). The Ontario Bill of Rights [*Environmental Bill of Rights*, SO 1993, c 28] establishes, at least on paper, more robust requirements for environmental decision-making. But see Mark Winfield,

that, in Canada, environmental assessment is the primary means by which the federal government meets its rule-of-law obligation to publicly justify its environmental decisions. Environmental assessment can thus be understood as having a quasi-constitutional role because it provides the means through which the government can fulfill its constitutional obligation to govern according to the rule of law.

The courts, however, have largely overlooked this justificatory function and have instead viewed environmental assessment in largely technical and formal terms. The first Supreme Court of Canada decision on environmental assessment upheld an expansive role for the federal government in conducting environmental assessment, even when predicted environmental effects pertained to matters of provincial jurisdiction.[35] At the same time, however, the Supreme Court emphasized the essentially procedural nature of environmental assessment. Indeed, a key distinction for the Court between environmental assessment and regulation (such as the *Fisheries Act*) was that the former "is fundamentally procedural while the other is substantive in nature."[36] The Federal Court of Appeal has a long history of narrowly interpreting the requirements of environmental assessment legislation. Prominent decisions include deference to federal decision-makers narrowly "scoping" the proposed project to include only features requiring federal approval (e.g. the bridge crossing fish habitat, not the entire logging operation),[37] and holding that an assessment will be unreasonable only if the decision-maker "gave no consideration at all to [the] environmental effects."[38] More recently, the Federal Court upheld as reasonable the Governor in Council's determination that the effects of the Site C Dam were "justified in the circumstances," despite the fact the decision did not explain *in any* fashion the basis for that conclusion.[39]

Construed as a formal pre-approval exercise, rather than a rule-of-law imperative, environmental assessment is easily vulnerable to criticism. Environmental groups argue that it is toothless and unmoored from advancing

"Decision-Making, Governance and Sustainability Beyond the Age of 'Responsible Resource Development'" (2016) 29 J Envtl L & Prac 129 at 141-43 (on the ways in which these requirements are being circumvented in practice).

35 *Oldman, supra* note 25; Doelle, *Assessment Process*, *supra* note 31 at 67-75.

36 *Oldman, supra* note 25 at 42; *MiningWatch Canada v Canada (Fisheries and Oceans)*, 2010 SCC 2 at para 14.

37 *Friends of the West Country Assn v Canada (Minister of Fisheries and Oceans)*, [2000] 2 FCR 263 [*West Country*]; *Prairie Acid Rain Coalition v Canada (Minister of Fisheries and Oceans)*, 2006 FCA 31.

38 *Ontario Power Generation Inc v Greenpeace Canada*, 2015 FCA 186 at para 130.

39 *Peace Valley Landowner Association v Canada*, 2015 FC 1027 [*PVLA*].

underlying substantive environmental goals.[40] Industry highlights its ineffectiveness at achieving environmental outcomes and argues that environmental assessment is wasteful, burdensome and leads to costly delays to development.[41] Joe Oliver, the Minister of Natural Resources at the time of the changes to federal environmental assessment law, stated "[u]nfortunately, our inefficient, duplicative and unpredictable regulatory system is an impediment [to diversifying Canada's markets]. It is complex, slow-moving and wasteful. It subjects major projects to unpredictable and potentially endless delays."[42] The stage was set for Harper's environmental assessment legacy.

The legacy part I: impoverished environmental decisions

Harper's changes to the federal environmental assessment process occurred in two waves. First the 2010 Budget Implementation Bill (Bill C-9) amended the *Canadian Environmental Assessment Act* (*CEAA*) to increase the discretionary powers of Ministers conducting environmental assessments[43] and to streamline various procedures.[44] In addition, the bill exempted from environmental assessment all infrastructure projects contained in the stimulus package for responding to the financial crisis.[45] The timing of these changes was odd because they coincided with the Act's legislated 7-year review.[46] It turned out that these changes were only a precursor to a second wave of changes that ushered in the complete reshaping of federal environmental assessment in 2012. After an abridged legislative review, conducted over only a few weeks by the Standing Committee on Environment and Sustainable Development, the repeal of *CEAA* and enactment of *CEAA 2012* were proposed in the 2012 Budget Implementation Bill (Bill C-38). After only two months in the House of Commons and the rejection of all proposed amendments to *CEAA 2012* provisions, Bill C-38 was passed in June 2012. Later in the same year, Bill C-45

40 This sentiment is especially strong in the US: Lindstrom, *supra* note 29. See arguments in the Canadian context in favour of sustainability assessment as a more substantive version of environmental assessment: Sinclair *supra* note 26; Robert B Gibson, "Sustainability Assessment: Basic Components of a Practical Approach" (2006) 24:3 Impact Assessment and Project Appraisal 170.

41 House of Commons, Standing Committee on Environment and Sustainable Development, Statutory Review of the Canadian Environmental Assessment Act: Protecting the Environment, Managing our Resources (March 2012).

42 Legislative Assembly, *Official Report of Debates (Hansard)*, 41st Parl, 1st Sess, No 115 (2 May 2012) at 1550.

43 This was a direct response to the Supreme Court's decision in *MiningWatch, supra* note 36.

44 Meinhard Doelle, "CEAA 2012: The End of Federal EA as We Know it?" (2012) 24 J Envtl L & Prac 1 at 1-2 [Doelle, "The End of Federal EA"].

45 *Ibid.*

46 *Ibid* at 2.

introduced additional changes to *CEAA 2012*, increasing the amount of discretion delegated to decision-makers under the Act.[47]

The previous version of *CEAA* was by no means perfect.[48] But the 2012 changes to environmental assessment are a dramatic retreat in the face of strong international trends and academic commentary in favour of a gradually expanding role for environmental assessment in terms of proposals considered, public participation and the objectives served.[49] For example, experience with project-specific environmental assessment revealed the need for strategic environmental assessment of higher-level policy and programmatic decisions in order to assess social and environmental effects systematically rather than through a piecemeal, project-by-project approach.[50]

In contrast to this trend of inclusivity, Harper's rewriting of federal environmental assessment created a highly exclusive assessment regime. This part focuses on three major ways in which federal environmental assessment was narrowed. [51] First, the Act substantially reduces the number of projects that require an environmental assessment. Second, the Act defines environmental effects narrowly to only include some effects within federal jurisdiction. Third, the Act reduces the role for public participation in environmental assessment. The legacy of these changes is impoverished public decision-making, which is now less informed by potential impacts on the environment.

Only projects that are specifically designated by regulations are subject to *CEAA 2012*'s environmental assessment requirements, subject to the residual discretion of the Minister of the Environment to order an environmental assessment for a project not otherwise designated.[52] However, even designated projects can be exempt from a federal environmental assessment if they un-

47 *Jobs and Growth Act, supra* note 3, ss 425-432.

48 For a brief summary of perennial issues, see: Robert B Gibson, "In Full Retreat: The Canadian Government's New Environmental Assessment Law Undoes Decades of Progress" (2012) 30:3 Impact Assessment and Project Appraisal 179 at 179-80 [Gibson, "In Full Retreat"].

49 *Ibid* at 179; Denis Kirchhoff, Holly L Gardner & Leonard J S Tsuji, "The Canadian Environmental Assessment Act, 2012 and Associated Policy: Implications for Aboriginal Peoples" (2013) 4:3 The International Indigenous Policy Journal 1 at 9 [Kirchhoff, Gardner & Tsuji]; Donald McGillivray & Jane Holder, "Taking Stock" in Jane Holder & Donald McGillivray, eds, *Taking Stock of Environmental Assessment* (Abingdon, UK: Routledge-Cavendish, 2006) 1 at 3.

50 Robert B Gibson et al, "Strengthening Strategic Environmental Assessment in Canada: An Evaluation of Three Basic Options" (2010) 20:3 J Envtl L & Prac 175; Bram F Noble, "Promise and Dismay: The State of Strategic Environmental Assessment Systems and Practices in Canada" (2009) 29:1 Environmental Impact Assessment Review 66.

51 For a more comprehensive account of the changes to the CEAA, see Doelle, "The End of Federal EA", *supra* note 44.

52 *CEAA 2012, supra* note 26, s 14(2).

dergo an equivalent provincial assessment.[53] The previous legislation essentially required an assessment for any project that required the exercise of federal authority (e.g. an approval from Fisheries and Oceans to alter fish habitat).[54] The default under the previous legislation, in other words, was that a project was included in the regime unless it was specifically excluded.[55] In contrast, *CEAA 2012* reverses this default rule; only projects specifically designated as "in" potentially require federal assessment.[56]

CEAA 2012 further narrows the role of environmental assessment by requiring the Canadian Environmental Assessment Agency (CEA Agency) to make an initial decision about whether any designated project in fact requires an assessment.[57] Even designated projects may not require an assessment if an initial determination is made that they will not cause significant, adverse environmental effects. This mechanism, in other words, contradicts the very purpose of environmental assessment by assuming that a decision-maker is able to confidently determine in advance, and without the benefit of an actual assessment, which projects are likely to cause significant environmental harm.

The result has been a striking reduction in the number of federal environmental assessments conducted each year. The immediate effect of *CEAA 2012* was to cancel approximately 3,000 ongoing assessments.[58] Since then, the number of completed federal environmental assessments has dropped from over 6,000 annually under the previous legislation[59] to only about a dozen each year.[60] This is because the lowest level of assessment, a "screening" that accounted for approximately 99% of assessments under the prior regime,[61] was eliminated by *CEAA 2012*. When a project is determined to require an assessment

53 *Ibid*, s 32.

54 *CEAA 1992*, *supra* note 26, s 5. The requirements for triggering the CEAA (1995) were in fact more complex because they were drafted in a way to preclude constitutional challenge. For a more detailed discussion see: Doelle, *Assessment Process*, *supra* note 31 at 86.

55 *Exclusion List Regulations, 2007*, SOR/2007-108; *Exclusion List Regulations*, SOR/94-639.

56 *Regulations Designating Physical Activities*, SOR/2012-147, ss 2-3. Again, it is slightly more complex than this because there is residual discretion of the Minister to order an assessment for something not on the list.

57 *CEAA 2012*, *supra* note 26, s 10. See also the requirements for projects on federal lands and outside of Canada: *ibid*, ss 67, 68.

58 Kirchhoff, Gardner & Tsuji, *supra* note 49 at 5.

59 These numbers are from the publicly-reported information on the CEAA Registry. In 2006, 2007, and 2008, respectively there were 5216, 6647, 3983 environmental assessments completed.

60 These numbers are from the CEA Registry. In 2013, 2014, and 2015, respectively, there were 15, 11 and 12 environmental assessments completed.

61 Doelle, "The End of Federal EA", *supra* note 44 at 4.

under *CEAA 2012*, it now proceeds either through a standard "assessment"[62] or a "panel review."[63]

Second, *CEAA 2012* redefines the "environmental effects" to be considered in an environmental assessment. The previous legislation defined environmental effects broadly to include "any change that the project may cause in the environment."[64] The courts have held that it was constitutionally permissible for federal departments to consider environmental effects even when those effects were subjects of provincial jurisdiction.[65] In contrast, *CEAA 2012* defines environmental effects only as some components of the environment within federal jurisdiction (e.g. fish and fish habitat, migratory birds, changes to federal lands, effects on Aboriginal peoples).[66] The definition of environmental effects "covers only a small fraction of the interconnected biophysical effects that are included in the minimum usual scope of environmental assessments globally."[67] The effect of such a change is that the federal decision-maker must now base his or her decision on a restricted understanding of environmental effects. In light of the specificity of the effects considered, it is much less likely that the decision-maker will make a finding of significant adverse environmental effects.[68] It is further unlikely that such a narrow understanding of environmental effects can provide a sufficient basis for determining whether a project can be justified in the circumstances.[69] As a result, only a joint environmental assessment by the province and federal government has the potential to result in a fulsome assessment of a proposal's environmental effects.

CEAA 2012 has extensive implications for public participation. The most significant change is the reduction in the number of environmental assessments, which removes consideration of these project proposals from the public sphere. Under the previous legislation, projects subject to screenings at least required online, publicly-accessible records of the project and assessment.[70] Since

62 *CEAA 2012*, *supra* note 26, ss 15-20.

63 *Ibid*, ss 39-48.

64 *Ibid*, s 2.

65 See e.g. *West Country*, *supra* note 37 at para 34.

66 *CEAA 2012*, *supra* note 26, s 5. Notably it leaves out climate change. Other factors are narrowed or eliminated: e.g. alternative means instead of alternatives to the project (s 19): Gibson, "In Full Retreat", *supra* note 48 at 184.

67 *Ibid* at 182.

68 *Ibid* at 184. In the case of panel reviews, which have a largely unchanged format, the assessment is "unrecognizable to anyone familiar with panel reviews under *CEAA* 1995": Doelle, "The End of Federal EA", *supra* note 44 at 10.

69 Gibson, "In Full Retreat", *supra* note 48 at 185.

70 *CEAA 1992*, *supra* note 26 at ss 55-55.6. Additional public participation for a screening was at the discretion of the Minister (s 18(3)). See *Inverhuron & District Ratepayers' Assn v Canada (Minister of*

the vast majority of these projects no longer fall under the scope of federal environmental assessment, there is no public notice of the proposal. And it is not safe to assume that provincial environmental assessment regimes will fill in these gaps, as the application of provincial legislation can also be quite narrow.[71] For projects subject to *CEAA 2012* requirements, public participation is constrained by tight legislated timelines. For example, the public only has 20 days to comment on whether a designated project should be assessed under the Act.[72] While projects that undergo an assessment are subject to public notice-and-comment requirements,[73] *CEAA 2012* narrowly redefines a class of participant, the "interested party."[74] Only if an individual is an interested party, that is "directly affected ... [or] has relevant information or expertise,"[75] is she or he entitled to full participation in a panel review.

The benefits of public participation in environmental assessment have been widely noted.[76] Historically, public participants have proven to be the "most motivated and often most effective in ensuring careful and critical review of project proposals and associated environmental assessment work."[77] Local knowledge and citizen concerns are an important counterbalance to the fact that the proponent is otherwise the sole source of information about the effects of the proposed project.

The massive reduction in public participation under *CEAA 2012* will lead to poorer environmental decisions, but it also sends a strong signal about whose interests really matter in Harper's vision of the environment. The changes disproportionately undermine Indigenous participation, groups who are often the most closely affected by development projects, and who often already face

The Environment), 2000 CanLII 15291 (FC); *Lavoie v Canada (Minister of The Environment)*, 2000 CanLII 15896 (FC).

71 See e.g. *Environmental Assessment Act*, SBC 2002, c 43 (where the thresholds for designated projects is quite high and subject to change for political expediency: Colin Payne, "BC Gov Backtracks on Environmental Assessment Exemption Decision", *The Castlegar Source* (15 April 2014), online: <www.castlegarsource.com/news/updated-bc-gov-backtracks-environmental-assessment-exemption-decision-30930>).

72 *CEAA 2012*, *supra* note 26, s 10.

73 *Ibid*, ss 17, 24.

74 *Ibid*, s 2(1).

75 *Ibid*, s 2(2). See also Geoffrey H Salomons & George Hoberg, "Setting boundaries of participation in environmental impact assessment" (2014) 45 Environmental Impact Assessment Review 69 at 70 (on how the "directly affected" requirement tends to privilege private property interests and geographic proximity which does not always reflect the nature of the environmental issues under assessment).

76 Doelle, *Assessment Process*, *supra* note 31 at 32; Alan Bond et al, "Impact Assessment: Eroding Benefits Through Streamlining?" (2014) 45 Environmental Impact Assessment 46 at 48; *Ibid*, at 70; Sinclair, *supra* note 26.

77 Gibson, "In Full Retreat", *supra* note 48 at 183-84; Sinclair, *supra* note 26 at 416

substantial barriers to participation due to remote locations and/or lack of resources and capacity to effectively intervene.[78] Moreover, *CEAA 2012* excludes or marginalizes individuals and groups with issue-specific concerns, such as climate change.[79] The result is that environmental decisions are based on skewed understandings of the possible environmental effects of a project, and have led to "a collapse in the role of formal decision-making processes as mechanisms for producing decisions which are seen as legitimate and therefore likely to win acceptance among the affected parties."[80] The formal decision-making processes, contrary to their original purpose, become yet another source of controversy and dispute.

In sum, the extent of the changes made to federal environmental assessment have leading commentators now arguing that what remains no longer counts as environmental assessment.[81] According to Doelle, the new regime simply gathers "information already required for existing federal regulatory decisions."[82] Similarly, Gibson notes that the new Act "positions assessment as a post-planning regulatory hoop inevitably under pressure for speedy decisions that do not require substantial changes to the established plans."[83] The Act, in his view, "gets its streamlining chiefly by undermining effectiveness."[84] The result, in other words, is a legacy of public decision-making that does not, in any robust way, attempt to anticipate the environmental consequences of the exercise of public authority.

The legacy part II: eroding the commitment to a democratic conception of the rule of law

Harper's legacy in environmental assessment is more fundamental than poorly-informed environmental decisions; it is also a legacy of undermining Canada's commitment to governing under a democratic conception of the rule of law. This part extends on existing critiques of *CEAA 2012* in three ways. First, it argues that informed decisions and public participation are internal to a democratic conception of the rule of law, at least when we understand the rule of

78 Kirchhoff, Gardner & Tsuji, *supra* note 49 at 10.

79 Kirsten Mikadze, "Pipelines and the Changing Face of Public Participation" (2016) 29 J Envtl L & Prac 83 at 87, 104-05; Dayna Nadine Scott, "Situating Sarnia: 'Unimgained Communities' in the New National Energy Debate" (2013) 25 J Envtl L & Prac 81.

80 Winfield, *supra* note 34 at 145-46.

81 Doelle, "The End of Federal EA", *supra* note 44 at 15; Gibson, "In Full Retreat", *supra* note 48 at 179.

82 Doelle, "The End of Federal EA", *supra* note 44 at 15.

83 Gibson, "In Full Retreat", *supra* note 48 at 183.

84 *Ibid* at 185.

law in a more demanding sense than minimal compliance with a statutory norm. Second, it argues that, because of the special quasi-constitutional role of environmental assessment law in enabling public justification, the changes to federal environmental assessment ought to be understood as an attempt to exempt environmental decision-making from the requirements of the rule of law. Third, reframing existing critiques of *CEAA 2012* in rule-of-law terms provides a basis for understanding the ongoing obligations of our public institutions with respect to the deficient legislation.

The rule of law, as is often noted, is an "essentially contested concept."[85] The conception of the rule of law advanced here is the idea that public officials must publicly justify their decisions on the basis of core constitutional principles. It is a conception elaborated by Dyzenhaus, who states that its basic content is that

> legislation must be capable of being interpreted in such a way that it can be enforced in accordance with the requirements of due process: the officials who implement it can comply with a duty to act fairly, reasonably and in a fashion that respects the equality of all those who are subject to the law and independent judges are entitled to review the decisions of these officials to check that they do so comply.[86]

This understanding of the rule of law is a version of common law constitutionalism, which posits that the common law is a source of deep-seated principles that are refined over time through the practice of giving reasons. Two of these common law principles are fairness and reasonableness, which are expressed through basic administrative law requirements enforced by judicial review. Together they give rise to an obligation on public officials to publicly justify their decisions on the basis of these principles. That is, public officials must demonstrate that their decisions are both fair and reasonable.

The requirement of public justification has been repeatedly, though imperfectly, identified by the Supreme Court of Canada. The fullest expression of a requirement of public justification was by the Court in *Baker*, which imposed an obligation on administrative officials, in some instances, to offer reasons for their decisions that demonstrate that they exercised discretion in accordance with core principles of Canadian law.[87] The Court's watershed decision in

85 W B Gallie, "Essentially Contested Concepts" (1955) 56 *Proceedings of the Aristotelian Society* 167 at 169.

86 David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (New York: Cambridge University Press, 2006) at 12-13 [Dyzenhaus, *The Constitution of Law*].

87 *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 56, 174 DLR (4th) 193.

Dunsmuir later highlighted the role of reasonableness review in ensuring "justification, transparency and intelligibility within the decision-making process."[88]

These core common law principles are constitutional in the sense that they are constitutive of law. In Dyzenhaus's words, "you cannot have rule by law without rule of law."[89] Put differently, it is compliance with the rule of law (i.e. public justification on the basis of common law principles) that gives a public decision the quality of law. Legislation that conforms to Fuller's well-known indicia of the rule of law (publicity, generality, prospectivity, etc.) is the first step in complying with the requirement of public justification because it puts the implementation of the legislation under the supervision of the courts. When a would-be lawmaker fails to comply with the rule of law, as in the case of Fuller's allegorical King Rex,[90] she fails to make law. And when a legislature attempts to exempt government action from judicial supervision, by for example clearly and explicitly suspending the application of basic due process requirements, such a law may be valid but it lacks the quality of law that gives it its legal authority.[91] On this view, the rule of law requires, not only that legislation possesses formal rule-of-law features, it also requires that whenever and however that legislation comes into contact with the lives of individuals, its implementation is publicly justified.

The rule of law, on this view, is constitutive of a particular relationship between legal subjects, the individual subject to the law, and lawmaker. Compliance with the rule of law means law is in a form that legal subjects can understand, deliberate upon and contest on the basis that it does not reflect core constitutional principles. It allows, in other words, individuals to "reason with the law."[92] Importantly, however, this conception of the rule of law can only be realized within a deliberative democracy,[93] in which individuals expect every exercise of power to be justified and "in which leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command."[94] It is therefore a democratic

88 *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47.

89 David Dyzenhaus, "Accountability and the Concept of (Global) Administrative Law" (2009) Acta Juridica 3 at 6.

90 Lon L Fuller, *The Morality of the Law*, revised ed (New Haven: Yale University Press, 1969) at 33-41.

91 Dyzenhaus analogizes this to the effect of section 33 of the *Charter*, where the unconstitutional law does not cease to be unconstitutional even though it is legally valid: Dyzenhaus, *The Constitution of Law*, *supra* note 86 at 211.

92 *Supra* note 23.

93 Dyzenhaus, "Legitimacy", *supra* note 22 at 162.

94 Etienne Mureinik, "A Bridge to Where? Introducing the Interim Bill of Rights" (1994) 10 SAJHR 31 at 32.

conception of the rule of law because individual participation is simultaneously essential to its realization and enabled by its fulfillment.

The public-justification conception of the rule of law imposes on environmental decision-makers obligations to demonstrate that their decisions are reasonable and fair.[95] In other words, reasonable, informed environmental decisions that are procedurally fair to those affected are requirements of the rule of law. When environmental decisions comply with these requirements they have the authority of law.[96] From this perspective, environmental assessment performs a quasi-constitutional role in the sense that environmental assessment, when it enables public participation and generates reasoned decisions, is constitutive of legal authority in environmental law. Recall that this is, at present, a unique role, because the vast majority of federal environmental decision-making is not meaningfully subject to the rule-of-law requirements of fairness and reasonableness.

We are now in a position to see how the extensive changes to federal environmental assessment law not only undermine environmental protection; they can also be interpreted as an attempt to exempt environmental decision-making from the fundamental rule-of-law requirement of public justification. The clearest evidence of this exemption from public justification is that the vast majority of federal environmental decisions now proceed without having first undergone a federal environmental assessment. The result is that these decisions are made with minimal legal constraints on environmental decision-makers. Permits and approvals for pollution and environmental degradation are made without any public notice, public input, or reasons for the decision and, consequently, no opportunity for independent review.[97]

Even where an assessment does occur, it is not clear that the legislative requirements can produce publicly-justified decisions. For example, the Act's explicit requirement that the effects of a project be "justified in the circumstances" cannot, in its current form, amount to adequate public justification. Public justification requires decisions to be reasonable, i.e. supported by reasons that

95 I have written elsewhere on how environmental principles, such as the precautionary principle, inform these requirements: Jocelyn Stacey, *The Constitution of the Environmental Emergency* (2016) [unpublished, archived at McGill University Faculty of Law Library].

96 This understanding of the rule of law provides an explanation for Winfield's observation that the changes to environmental assessment have undermined its legitimacy as a formal decision-making process: *supra* note 80.

97 This is true even when legislation imposes specific substantive requirements on the executive. For example, section 6 of the *Fisheries Act* lists factors that the Minister must consider, but there is no way to know whether this requirement is met because the approvals are not publicly accessible.

reflect the purposes of the legislation and relevant considerations. The narrow definition of environmental effects renders the Act's purpose, "to encourage federal authorities to take actions that promote sustainable development in order to achieve a healthy environment and a healthy economy"[98] meaningless. A "healthy environment" is one that includes far more than the highly circumscribed environmental effects defined in the Act. Moreover, any justification decision is inevitably based on a disproportionate balancing of economic benefits and environmental harm, where the government (presumably) takes into account all possible economic benefits[99] but only the environmental effects that engage federal authority. Absent some compelling argument for the differential inclusion of economic and environmental effects, an environmental assessment decision premised on such a skewed basis is not reasonable.

Framing *CEAA 2012* in rule-of-law terms also reveals that Harper's process of enacting new legislation through unprecedentedly large omnibus bills was entirely consistent with the substance of the new legislation. On one level, the rationale both for the use of omnibus legislation and the overhaul in environmental assessment was economic stimulus. On another level, they can both be understood as attempts to undermine the commitment to a democratic conception of the rule of law. The requirement of public justification sits at the interface between the rule of law and deliberative democracy. This means that legislators are not only political actors within a deliberative democracy that generate reasons that they hope their constituents will accept. They are also legal actors who perform a legal role by putting in motion a process of lawmaking whereby legal subjects are able to receive the public justification to which they are entitled. In other words, the legal obligation of legislators is to debate in a way that ensures that when government implements that legislation, it is capable of being implemented in a manner that complies with the requirement of public justification.[100]

What are the implications of reframing of Harper's changes to *CEAA 2012* in rule-of-law terms? After all, *CEAA 2012* is a legally valid statute even if, as this account argues, it has a questionable claim to legal authority. Yet, the public-justification conception of the rule of law imposes positive obligations on those public officials responsible for the administration and enforcement of the Act. Dyzenhaus writes, of judges:

98 *CEAA 2012*, *supra* note 26, s 4(1)(h).

99 How could one discern only the benefits that arise from the aspects of the project that engage federal jurisdiction?

100 David Dyzenhaus, "Deference, Security and Human Rights" in Ben Goold & Liora Lazarus, eds, *Security and Human Rights* (Oxford: Oxford University Press, 2007) 125 at 143.

> they must take the legal regime that Parliament has provided and read into it whatever legal protections they can … because they are working as judges within a legal order, and not as some other kind of official in some other kind of order; for example, the order Fuller described as managerial, in which the point of its structures is to make more efficient the transmission of commands from the top of the hierarchy to the bottom.[101]

Such a requirement extends not only to judges but all the legal actors working within the legal system. This means, for example, that those individuals appointed to conduct panel reviews (the most rigorous form of environmental assessment) have a legal obligation to justify decisions that exclude individuals on the basis that they are not "interested parties" under the legislation. That specific justification would have to reflect the Act's purpose of "provid[ing] for meaningful public participation,"[102] the information-gathering function of environmental assessment, and the potentially far-reaching environmental effects of a major development project.

Moreover, public justification requires the courts to play a reason-demanding role when conducting judicial review. On this view, it is unacceptable for a court to find that a justification decision under section 52 of *CEAA 2012* is reasonable in the absence of any reasons justifying that decision.[103] In instances where reasons have been offered and they demonstrate the legislated bias against a comprehensive consideration of environmental effects, then the court ought to make a clear statement that the decision formally complies with the legislation, but the legislation undermines the ability of the executive to make publicly justified decisions in accordance with the rule of law. The effect would be that the decision is legally valid, but much like in the case of an Act covered by the notwithstanding clause of the Canadian *Charter*, or a declaration of incompatibility made under the United Kingdom Human Rights Act, the court has alerted the public to the legislation's questionable claim to legal authority.

In sum, this part has argued that environmental assessment is quasi-constitutional in the sense that it is an indispensible site of public justification in federal environmental decision-making. It argued that part of Harper's legacy, by enacting *CEAA 2012*, fundamentally undermined the possibility of publicly justified environmental decisions. *CEAA 2012* can therefore be understood as an attempt, by the Conservative-dominated Parliament, to exempt environ-

101 David Dyzenhaus "Preventive Justice and the Rule-of-Law Project" in Andrew Ashworth, Lucia Zedner & Patrick Tomlin, eds, *Prevention and the Limits of the Criminal Law* (Oxford: Oxford University Press, 2013) at 113-14.

102 *CEAA 2012*, *supra* note 26, s 4(1)(e).

103 *PVLA*, *supra* note 39.

mental decision-making from democratic governance under the rule of law. Finally, understanding the changes to *CEAA 2012* in this way shows how it is possible, and indeed a rule-of-law imperative, for the institutions tasked with implementing and enforcing *CEAA 2012* to interpret the legislation in a way that preserves our commitment to a substantive and democratic conception of the rule of law.

Conclusion

This article argued that Harper's legacy in environmental law has been to undermine environmental protection and publicly-justified environmental decision-making. In conclusion, it is worth looking ahead to see what of this legacy might survive the next government, which campaigned on a radically different approach. I offer one prediction and one caution. The prediction is that we should expect to see a much stronger role for Indigenous environmental assessments in Canadian environmental law. A significant byproduct of Harper's environmental legacy was the galvanization of environmental resistance by Indigenous Canadians through the Idle No More movement.[104] Moreover, in a direct response to the changes to federal environmental assessment law, many Indigenous groups have begun to codify and enforce their own Indigenous environmental assessment laws, which unsurprisingly contain fundamentally different approaches to environmental assessment.[105] The Tsleil-Waututh Nation, for example, conceives of environmental assessment as a means to discharge responsibility to the environment and future generations and to determine the best use of land.[106] They call for comprehensive socio-ecological assessment that eschews any strong division between people and the environment.[107] This is a welcome development for Canadian environmental law, but one that undoubtedly poses further, deeper challenges for intergovernmental cooperation in environmental assessment, cooperation that has never been fully realized even at the level of provincial-federal relations.

The caution is that the changes to environmental assessment may not be as easy to undo as they may seem. Despite the overtness of Harper's environmental agenda, particularly with respect to major projects such as pipelines, many

104 See "The Story", *Idle No More*, online: <www.idlenomore.ca/story> ; "9 Questions on Idle No More", *CBC News* (5 January 2013), online: <www.cbc.ca/news/canada/9-questions-about-idle-no-more-1.1301843>.

105 See e.g. Tsleil-Waututh, *supra* note 30; Jessica Clogg et al, "Indigenous Legal Traditions and the Future of Environmental Governance in Canada" (2016) 29 J Envtl L & Prac 227.

106 Tsleil-Waututh, *supra* note 30 at 12.

107 *Ibid* at 11-12.

of the legal changes to environmental assessment are subtler. In addition, these changes are consistent with the well-worn characterization of environmental assessment as a purely formal and mechanical exercise. A "streamlined" federal environmental assessment regime is entirely consistent with this characterization. While the new government has promised environmental assessment reform,[108] the stop-gap measures proposed by the Trudeau government for two major interprovincial pipeline proposals may, in this vein, prove prophetic. These measures create an additional step, after the *CEAA 2012*-assessment, in which the government will conduct its own assessment of the upstream greenhouse gas emissions associated with the pipelines and conduct additional Aboriginal consultation.[109] In no way does this address the real problem of *CEAA 2012,* which is its inability to generate fair and reasoned decisions. This article suggests that the way for the Trudeau environmental legacy to supersede Harper's is to begin by conceiving of environmental assessment as the linchpin of its commitment to environmental governance under the rule of law.

108 Justin Trudeau, "Minister of Environment and Climate Change Mandate Letter", Office of the Prime Minister, online: <www.pm.gc.ca/eng/minister-environment-and-climate-change-mandate-letter>.

109 Natural Resources Canada, "Interim Measures for Pipeline Reviews", online: <www.news.gc.ca/web/article-en.do?mthd=tp&crtr.page=1&nid=1029989&crtr.tp1D=930>.

Enduring Eliminatory Logics, Market Rationalities, and Territorial Desires: Assessing the Harper Government's Legacy Concerning Aboriginal Rights

*Michael McCrossan**

This paper examines governmental policies surrounding issues of land and territory in the context of reconciliation between Indigenous peoples and the Canadian state. It traces not only a committed effort during Stephen Harper's tenure as Prime Minister to establish private property regimes on Aboriginal reserves, but also the creation of a policy framework surrounding land, energy infrastructure, and treaty rights which radiate with eliminatory rationalities. The paper argues that these logics not only undercut Indigenous jurisdictions and territorial claims in favour of existing constitutional structures and non-Aboriginal economic interests, but also serve to represent Aboriginal peoples as "Canadians" seeking forms of integration into the broader social and economic structures of settler society. Ultimately, this paper demonstrates that conservative discourses surrounding "marketization" and "reconciliation" have worked in tandem to dispossess Indigenous peoples and sustain the legal, social, and territorial boundaries of the Canadian state. It concludes by questioning the extent to which the newly elected Liberal government under Justin Trudeau will truly embrace Indigenous understandings of non-exploitative territorial relationships and responsibilities, or whether it will continue the policy trajectory strengthened by the Harper Conservatives of treating Indigenous territories as settler-colonial sites of unrealized economic potential for the benefit, and protection, of the larger "Canadian" nation.

L'auteur de cet article examine les politiques gouvernementales entourant des questions liées aux terres et au territoire dans le contexte de la réconciliation entre les peuples autochtones et l'État canadien. Il fait l'historique non seulement d'un effort engagé durant le mandat de Stephen Harper comme premier ministre pour établir des régimes de propriété privée sur des réserves autochtones mais aussi de la création d'un cadre stratégique entourant les terres, l'infrastructure énergétique et les droits issus des traités qui débordent de rationalités éliminatoires. L'auteur soutient que ces logiques sapent non seulement les compétences et les revendications territoriales autochtones au profit de structures constitutionnelles existantes et d'intérêts économiques non autochtones, mais servent également à présenter les peuples autochtones comme des « Canadiens » cherchant des formes d'intégration au sein des structures sociales et économiques plus large de la société colonisatrice. Au bout du compte, l'auteur démontre que les discours conservateurs entourant la « marchéisation » et la « réconciliation » ont travaillé en tandem pour déposséder les peuples autochtones et maintenir les limites juridiques, sociales et territoriales de l'État canadien. Il conclut l'article en se penchant sur la question à savoir dans quelle mesure le nouveau gouvernement libéral de Justin Trudeau embrassera vraiment les compréhensions autochtones des relations et des responsabilités territoriales qui ne sont pas exploitrices ou s'il continuera la trajectoire politique renforcée par les conservateurs de Harper qui consiste à traiter les territoires autochtones comme des sites colonisateurs (coloniaux) de potentiel économique non réalisé pour le bien et la protection de la nation « canadienne » en son ensemble.

* Michael McCrossan is an Assistant Professor in the Department of History and Politics at the University of New Brunswick (Saint John). This article is drawn from research initially conducted while the author was a postdoctoral fellow at Mamawipawin on the SSHRC funded Comparative Constitutional Law and Indigenous Politics project at the University of Manitoba. The author would like to thank William Biebuyck, Ajay Parasram, Steve Patten, and the journal's two anonymous reviewers for helpful comments and suggestions during the preparation of this article.

Introduction

While the relationship between Indigenous peoples and the Canadian federal government ostensibly appears to be changing with a renewed focus on the "recognition of rights," the long overdue calling of an inquiry into missing and murdered Indigenous women and girls, and the cessation of measures of compliance under the *First Nations Financial Transparency Act*, it remains to be seen to what extent the newly elected Liberal government under Justin Trudeau will truly transform the political and discursive legacies of former Prime Minister Stephen Harper and the Conservative government. In this regard, one particular area of emphasis under the previous government concerned a greater prominence given to invocations of "Canadian" territory and increasing "private property ownership" on Aboriginal reserves. While discursive maneuvers of this sort can signal efforts to both undermine Indigenous rights to land and ensure that those lands can more easily be acquired for developmental purposes, it is unclear to what extent the Liberal government will truly transform the institutional legacy left behind by the Conservative government. In this respect, it is still an open question as to how Prime Minister Justin Trudeau understands the "nation-to-nation" relationship that is to be at the centre of his government's approach to Indigenous issues. Will this "nation-to-nation" approach serve to recognize alternate territorial relationships, political systems, and legal orders, or will it continue to offer forms of "reconciliation" that ultimately serve to work Indigenous peoples further into existing "Canadian" legal, political, and economic structures?

In an effort to engage these questions, this paper will examine how political and legal actors during Stephen Harper's time in office both imagined and represented past historical events, present arrangements, and future possibilities in the context of Aboriginal rights and reconciliation. Indeed, in the domain of Indigenous constitutional politics, legal and political actors have regularly appealed to notions of "reconciliation" over the course of the last two decades when confronted with an ever-increasing number of Indigenous legal and political challenges. While the Supreme Court of Canada has utilized reconciliation in a multitude of ways — from attempts at restraining federal power[1] to efforts arguably aimed at reinforcing the sovereignty of the Crown[2] — Canadian governments, on the other hand, have tended to invoke the term

1 *R v Sparrow*, [1990] 1 SCR 1075, 70 DLR (4th) 385 [*Sparrow*].

2 See e.g. R v *Van der Peet*, [1996] 2 SCR 507, 137 DLR (4th) 289 [*Van der Peet*]; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193 [*Delgamuukw*]; *Mitchell v Minister of Natural Revenue*, [2001] 1 SCR 911, 199 DLR (4th) 385 [*Mitchell*].

as the animating framework or "goal" underpinning a variety of Aboriginal policy considerations.[3] However, due to spatial constraints, the primary focus of this paper will concern governmental policies surrounding issues of land and territory in the context of reconciliation. Given that Indigenous peoples have not only asserted pre-existing rights to land, but also rights to engage in practices and traditions that flow out of particular territorial relationships and alternate legal systems, this focus has the benefit of examining the extent to which foundational relationships to land have either been reflected or excluded within governmental policies.

While the focus of this paper is on the legacy of Stephen Harper in the area of Aboriginal policy, it is worthwhile to recall that many of the Conservative government's policies concerning Aboriginal rights to land and governance did not emerge overnight but rather found their origins in the long established desires of the "new right" to reduce governmental interventions — particularly in the areas of social policy and support for so-called "special interests" — in favour of free-market principles of private sector competition, transparency, and individual entrepreneurship.[4] As such, this paper will briefly trace a broad array and well-established set of discourses concerning land and territory in the context of Aboriginal rights. The paper will begin by outlining theories of settler-colonialism before turning its attention to conservative policies and understandings of reconciliation. The paper will show not only a committed effort during Stephen Harper's tenure as Prime Minister to establish private property regimes on Aboriginal reserves, but also the creation of a policy framework surrounding land, energy infrastructure, and treaty rights which radiate with eliminatory rationalities. This paper will argue that these logics not only undercut Indigenous jurisdictions and territorial claims in favour of existing constitutional structures and non-Aboriginal economic interests, but also serve to represent Aboriginal peoples as "Canadians" seeking forms of integration into the broader structures of settler society. Ultimately, this paper will show that conservative discourses surrounding "marketization" and "reconciliation" have

3 See Canada, Indian Affairs and Northern Development, "Address by the Honourable Jane Stewart Minister of Indian Affairs and Northern Development on the occasion of the unveiling of Gathering Strength — Canada's Aboriginal Action Plan" (7 January 1998), online: <https://www.aadnc-aandc.gc.ca/eng/1100100015725/1100100015726>; See also Prime Minister Stephen Harper, "Statement of apology to former students of Indian Residential Schools" (11 June 2008), online: <https://www.aadnc-aandc.gc.ca/eng/1100100015644/1100100015649>.

4 For a detailed account of some of the underlying ideological positions of the "new right" in Canada, see David Laycock, *The New Right and Democracy in Canada* (Don Mills Ontario: Oxford University Press, 2002).

worked in tandem to dispossess Indigenous peoples and sustain the legal, social, and territorial boundaries of the Canadian state.

Territorial logics of settler colonialism

When considering how territories are represented, demarcated, and controlled, it is useful to reflect upon the work of Patrick Wolfe and his writings on settler colonialism. For Wolfe, settler colonialism should be understood as "a structure rather than an event,"[5] given that ongoing rationalities of Indigenous elimination and territorial expropriation continue to fuel the development of those societies and their corresponding political regimes. In Wolfe's estimation, these "logic of elimination," driven as they are by an "insatiable" desire for territory, not only require the erasure of Indigenous peoples and claims to land in order to obtain control over their territories, but can also be located within a variety of discursive practices, institutional structures, and societal relations.[6] In effect, Wolfe's temporal severing of the territorial logics and violent effects of settler colonialism provides a means of tracing the various discursive continuities and complementary "logics of elimination" that continue to manifest and produce ongoing forms of territorial control and expropriation. Indeed, as Indigenous scholars such as Glen Coulthard have recently noted, the eliminatory logics of settler colonialism work through, and are inextricably linked to, capitalist relations and forms of accumulation. According to Coulthard, not only do "colonial-capital" relations require Indigenous lands for economic development and exploitation, but also the "interpellation" of Indigenous peoples into "subjects" of colonial rule.[7]

These eliminatory logics can be seen in the manner in which populist parties of the "new right" in Canada expressed their "support" for Indigenous claims during the 1990s. Not only did populist parties such as the Reform and Canadian Alliance parties trumpet the rights of "individual" Aboriginal entrepreneurs over the "collective" claims of Aboriginal communities, but they also consistently appealed to a territorial discourse that undermined Aboriginal claims to land by privileging the existing boundaries belonging to "Canada." For instance, on the one hand, party leaders on the right regularly argued that issues surrounding high rates of Aboriginal poverty, unemployment, and inadequate housing stemmed from the fact that Aboriginal peoples lacked fee-simple

5 Patrick Wolfe, "Settler Colonialism and the Elimination of the Native" (2006) 8:4 J of Genocide Research 387 at 402 [Wolfe, "Settler Colonialism"].

6 *Ibid.*

7 Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014).

title on reserves.[8] In their estimation, enabling individual Aboriginal people to acquire "private property rights" on reserves[9] and the ability to access the "market economy" would help to alleviate Aboriginal economic dependence and marginalization. However, while these proposals were presented as a means of ending the dependence and marginalization of Aboriginal peoples, they also function as a means of shoring up specific territorial concerns by demarcating present boundaries, interests, and areas of control. As the Reform Party's policies concerning Aboriginal land claims flatly stated: "Property owners forced to defend their property rights as a result of Aboriginal land claims will be compensated for defence of the claim."[10] In effect, under its policies dealing with Aboriginal affairs, the existing property "rights" of non-Aboriginal people were to be placed in a privileged position relative to the constitutionally entrenched rights of Aboriginal peoples. Regardless as to how such property "rights" may have been acquired in the past, the party's policies offered a clear vision of settler-colonial *territoriality* in which the already established boundaries[11] and economic interests of non-Aboriginal peoples were to be prioritized and vigorously defended.

Indeed, Wolfe has argued that settler colonialism is characterized by the following "insatiable dynamic": "settler colonialism always needs more land .... The whole range of primary sectors can motivate the project. In addition to agriculture, therefore, we should think in terms of forestry, fishing, pastoralism and mining ... . In this way, individual motivations dovetail with the global

8 See Preston Manning, *House of Commons Debates*, 36th Parl, 2nd Sess, No 11 (26 October 1999), online: <http://www.parl.gc.ca/HousePublications/Publication.aspx?pub=Hansard&doc=11&Language=E&Mode=1&Parl=36&Ses=2#T1055> at 1055-1155>[Manning, "Debates"].

9 Under the Indian Act, a "reserve" is defined as "a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band," see *Indian Act*, RSC 1985, c I-5, s 2. While reserves have been created in a number of ways — ranging from such means as treaty agreements to colonial allocations — the Supreme Court of Canada has noted the general inalienability of Aboriginal reserve lands: "The scheme of the Indian Act is to maintain intact for bands of Indians, reserves set apart for them regardless of the wishes of any individual Indian to alienate for his own benefit any portion of the reserve of which he may be a locatee," see *The Queen v Devereux*, [1965] SCR 567 at 572, 51 DLR (2d) 546. Of course, reserve lands should not be conflated with the traditional territories of Aboriginal peoples that, generally speaking, tend to refer to much larger geographic areas which Aboriginal peoples occupied, used, and governed prior to contact and which continue to hold cultural, social, political, and legal significance.

10 Reform Party of Canada, *Blue Book: Principles and Policies* (Reform Fund Canada, 1996-1997) at 24; see also Reform Party of Canada, *Blue Book: Principles and Policies* (Reform Fund Canada, 1999) at 10.

11 The Reform Party continually invoked references to "'our land'" and the need to "explore" and "develop" Canada's natural resources. See Reform Party of Canada, *Blue Book: Principles and Policies* (Reform Fund Canada, 1990) at 4; (1991) 1; (1995) at 6.

market's imperative for expansion."[12] This motivation and desire to both protect non-Aboriginal lands as well as develop and exploit Indigenous lands for economic gain can be observed in the reactions issued by Reform Party leader Preston Manning in the wake of the Nisga'a Treaty negotiated in 1999 between the Nisga'a Nation and the governments of Canada and British Columbia. Not only did Manning criticize the "special status" accorded to Aboriginal peoples and the lack of fiscally "accountable" forms of democratic governance, he also suggested that a fundamental flaw of the federal government's approach to Aboriginal affairs was a failure to provide "all the tools of the marketplace and private enterprise for economic development."[13] In Manning's estimation, it was imperative that Canadian governments "find ways and means of adapting private enterprise and market based tools of economic development to the needs of [A]boriginal people. That means finding a way to establish private property and contract rights on reserves. That would do more to stimulate economic development than all of the collectivism in the agreement put together."[14] In other words, the primary position advanced by Manning and the Reform Party was not simply a desire to enhance Indigenous economic prosperity within their reserve lands, but rather to open those lands up and bring "free markets to bear on [A]boriginal government and [A]boriginal economic development."[15] As such, the underlying logic surrounding the establishment of private property and "contract rights" on Aboriginal reserves serves as a further means of dispossession by enabling non-Aboriginal interests and private corporations to develop and exploit Aboriginal lands.[16]

I briefly draw attention to these desires to establish "private property regimes" and "contract rights" on Aboriginal reserves to highlight the fact that they have long been an established part of the "new right's" agenda in Canada.[17] This agenda did not substantially change upon the formation of the Conservative Party of Canada (CPC) in 2003. In fact, if anything, it is an

12 Wolfe, "Settler Colonialism" *supra* note 5 at 395. While it should be noted that Wolfe suggests that it is the "permanency" of agriculture that ultimately sustains the other sectors, his directive to consider a range of areas that may motivate the settler-colonial project is worthy of attention, especially as his list bears a remarkable resemblance to those specified by the Supreme Court of Canada as justifiable "infringements" of Aboriginal title, see *Delgamuukw*, *supra* note 2 at para 165.

13 Manning, "Debates" *supra* note 8 at 1100.

14 *Ibid* at 1145.

15 *Ibid.*

16 The prioritization granted to non-Aboriginal economic interests can also be seen in the founding policies of the Canadian Alliance. See Canadian Alliance, *Canadian Alliance Declaration of Policy* (The Alliance, 2000) at 7.

17 For more detailed discussion of the positions expressed by the Reform and Canadian Alliance parties in this area, see Michael McCrossan, "Delegating Indigenous Rights and Denying Legal Pluralism: Tracing Conservative Efforts to Protect Private Property Regimes and 'Canadian' Territory," in J.P.

agenda that became far more explicit and entrenched under the CPC and the leadership of Stephen Harper. Not only did the CPC continue this private property program through a variety of policy proposals and legislative enactments, it also created a policy framework whose underlying logic seemingly works Indigenous peoples further into the existing political, legal, and social structures of the Canadian state.

Private property regimes and settler colonial logics of elimination

The CPC's territorial focus and representations of Indigenous peoples can be observed in the party's 2004 electoral platform "Demanding Better." Under the section entitled "Better Communities," one can find not only a brief mention of the party's policy in relation to Aboriginal peoples, but also the areas of concern that would figure prominently over the course of the government's tenure. For instance, the party stated that they would "work to improve the economic and social conditions of all [A]boriginal Canadians and their communities."[18] In order to realize this objective, the party outlined the following plan:

> A Conservative government led by Stephen Harper will support the development of a property regime on reserves to allow individual property ownership that will encourage lending for private housing and businesses. A Conservative government will also create a matrimonial property code to protect spouses and children in cases of marriage breakdown.[19]

It is likely significant that these consecutive statements form a single paragraph in the party's plan. On the one hand, this desire to establish a "property regime" on reserves continues the former Reform objective of "bringing free markets to bear" on Aboriginal reserve land. However, when considered alongside the creation of a "matrimonial property code" it becomes clear that the CPC ultimately viewed Aboriginal reserve lands as objects that could potentially be severed from communities and historic relationships through forms of individual demarcation, distribution, and economic utilization.

For instance, in June 2006, during the Conservative government's first term in office, Wendy Grant-John was appointed as Ministerial Representative

Lewis and Joanna Everitt, eds, *The Blueprint: Conservative Parties and their Impact on Canadian Politics* (Toronto: University of Toronto Press, forthcoming).

18 Conservative Party of Canada, *Demanding Better*, (Conservative Party of Canada, 2004) at 33 [Platform 2004].

19 *Ibid.*

to "assist" and "advise" Indian and Northern Affairs Canada (INAC), the Assembly of First Nations (AFN), and the Native Women's Association of Canada (NWAC) in developing "a viable legislative solution" for addressing the issue of "matrimonial real property."[20] While provincial and territorial laws govern the division of property upon a marriage or relationship breakdown, for persons living on reserves, particularly First Nations women, such laws have not been accessible due to the constitutional division of powers granting the federal government jurisdictional authority under section 91(24) of the *Constitution Act, 1867* for "Indians and lands reserved for the Indians."[21] As such, given that the federally imposed *Indian Act* did not regulate the distribution of property assets in the event of marriage or relationship breakdowns on reserves, this legislative "gap"[22] produced situations where "women experiencing the breakdown of their marital relationship, experiencing violence at home, or dealing with the death of their partner [would] often lose their homes on reserve."[23] In an effort to rectify this "legislative gap," the Harper Conservatives announced in their 2011 Speech From the Throne that the government intended to "introduce legislation to ensure that people living on reserve have the same matrimonial real property rights and protections as other Canadians."[24] The government fulfilled this intention when Bill S-2, the "Family Homes on Reserves and Matrimonial Interests or Rights Act," was introduced on 28 September 2011. The legislation received Royal Assent on 19 June 2013. However, while the Act[25] does stipulate that First Nations can enact their own laws to govern the

20 Office of the Ministerial Representative, *Report of the Ministerial Representative: Matrimonial Real Property Issues on Reserve,* by Wendy Grant-John (Ottawa: Indian and Northern Affairs Canada, 2007) at Appendix A.

21 For an example of the operation of these divisions of powers in the context of matrimonial property on reserves, see *Derrickson v Derrickson*, [1986] 1 S.C.R. 285, 26 DLR (4th) 175.

22 Aboriginal Affairs and Northern Development Canada, "Matrimonial Real Property on Reserves," online: <https://www.aadnc-aandc.gc.ca/eng/1100100032553/1100100032557>. This, of course, is not to suggest that matrimonial property codes were completely absent on reserves. First Nations operating under the First Nations Land Management Act are required to establish a land management code that includes rules and procedures regarding the division of interests in land upon the breakdown of marriage, see *First Nations Land Management Act*, SC 1999, c24, s 6 (1)(f).

23 Native Women's Association of Canada, *Reclaiming Our Way of Being: Matrimonial Real Property Solutions Position Paper* (January 2007) at 5 [NWAC]. For further discussion of the gendered forms of inequality perpetuated by federal policy in this area, see Kiera L Ladner, "Gendering Decolonisation, Decolonising Gender" (2009) 13:1 Austl Indigenous L Rev 62 at 67-70.

24 Government of Canada, Privy Council Office, "Speech from the Throne to Open the First Session of the 41st Parliament of Canada," (3 June 2011), online: <http://www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=aarchives/sft-ddt/2011-eng.htm>.

25 *Family Homes on Reserves and Matrimonial Interests or Rights Act*, SC 2013, c 20 [*Matrimonial Property Act*]. The Act itself has a lengthy legislative history, see: Indigenous and Northern Affairs Canada, "Backgrounder - Family Homes on Reserves and Matrimonial Interests or Rights Act," online: <https://www.aadnc-aandc.gc.ca/eng/1371645998089/1371646065699>.

division of property in the event of a relationship breakdown or death of a common law partner or spouse,[26] it has been the subject of much criticism from Indigenous organizations and legal scholars.

For example, both NWAC and the AFN noted the lack of financial resources and limited access to lawyers and courts that First Nations women located on isolated reserves would still encounter when attempting to access the new remedies under the Act.[27] In fact, while NWAC has worked on addressing issues surrounding matrimonial real property since the 1990s,[28] representatives from the organization were opposed to the government's approach, characterizing the powers being granted to First Nations as simply a form of "delegated law-making authority" that did not respect inherent jurisdictions.[29] Both organizations also raised concerns regarding the consultation process that was used to develop the legislation, arguing that the timeframes were insufficient to adequately engage the issue with First Nations members in any substantive manner.[30] As well, Indigenous legal scholars such as Pamela Palmater were critical of the government's proposed bill, suggesting that it had the potential to ultimately create long-term interests on reserve lands for non-Aboriginal people. [31]

However, perhaps equally revealing is the fact that INAC's Ministerial Representative noted in relation to governmental understandings of the "legislative gap" surrounding matrimonial real property that "[t]he federal analysis of this gap is rooted in non-[A]boriginal notions of individual property ownership and the relationships of property, family and the proper role of law in regulating relationships to land and family relations."[32] This is an important assessment to consider. Given the long-established "private property" emphasis by the "new right" in relation to Aboriginal reserves, it is perhaps not sur-

26 *Ibid*, s 7.

27 Standing Committee on the Status of Women, *Committee Evidence,* 41st Parl, 1st Sess, No 74 (2 May 2013) at 2 (Jody Wilson-Raybould, AFN Regional Chief); see also Standing Committee on the Status of Women, *Committee Evidence,* 41st Parl, 1st Sess, No 76 (8 May 2013) at 2 (Michèle Audette, NWAC President).

28 NWAC *supra* note 23 at 5.

29 Senate Standing Committee on Human Rights, *Committee Evidence,* 40th Parl, 3d Sess, No 3 (31 May 2010) at 13 (Jeannette Corbiere Lavell, NWAC President); see also Audette, *supra* note 27 at 1. It should be noted that representatives from the AFN also highlighted similar concerns. See Wilson-Raybould, *supra* note 27.

30 NWAC, *supra* note 23 at 33; see also Senate Standing Committee on Human Rights, *Committee Evidence,* 40th Parl, 3d Sess, No 3 (31 May 2010) at 17 (Jody Wilson-Raybould, AFN Regional Chief).

31 Pamela Palmater, "Murdered, Missing and Still Excluded: Indigenous Women Fight for Equality," *Rabble.ca* (12 October 2011), online: <http://rabble.ca/blogs/bloggers/pamela-palmater/2011/10/murdered-missing-and-still-excluded-indigenous-women-fight-eq>.

32 Grant-John, *supra* note 20 at 19.

prising that the Harper Conservatives linked both individual property ownership and the creation of a matrimonial property code in their 2004 electoral platform. While the Minister claimed that the proposed bill would "strik[e] a practical balance between individual rights and collective interests,"[33] one could argue that the orientation observed by Grant-John above continued to structure the "preferred" content of "matrimonial real property" on reserves by not only privileging non-Aboriginal legal conceptions of "individual" ownership and corresponding rights of "exclusion" in the defaulting to provisional federal rules,[34] but also visions of the land itself as a principally commodified "object."[35]

In effect, what one can observe over the course of the last twenty years is a clear orientation on the part of conservative parties in Canada towards not only guarding and protecting non-Aboriginal property interests, but also a vision of the "proper" or "preferred" way of using land which dovetails with colonial-capital logics of territorial exploitation. For example, the continuing aspiration to open Indigenous territories up for development and "bring the free market to bear" on reserve lands became more explicit during the Conservative government's first majority term in office. For instance, in its March 2012 budget the government declared its aim "to explore with interested First Nations the option of moving forward with legislation that would allow private property ownership within current reserve boundaries."[36] This declaration of moving forward with "interested" First Nations not only bears a resemblance to former policies of the Reform and Canadian Alliance parties, but also to the writings of Tom Flanagan, Stephen Harper's former chief of staff and Conservative Party campaign manager. In 2010, Flanagan, along with André Le Dressay and Christopher Alcantara, argued that the federal government should work towards "a regime of fee-simple ownership that First Nations can opt into *voluntarily*."[37] In this respect, the authors were writing in support of the First Nation Property Ownership Act, a proposed piece of federal legislation advocated by C.T. (Manny) Jules, Chief Commissioner of the First Nations Tax Commission and former Chief of the Kamloops Indian

33 Senate Standing Committee on Human Rights, *Committee Evidence,* 40th Parl, 3d Sess, No 3 (31 May 2010) at 80 (Minister Chuck Strahl, Indian Affairs and Northern Development).

34 See also Brian Egan & Jessica Place, "Minding the gaps: Property, geography, and Indigenous peoples in Canada" (2013) 44 *Geoforum* 129 at 135.

35 *Matrimonial Property Act*, *supra* note 25 at s 28.

36 Canada, *Jobs, Growth, and Long Term Prosperity — Economic Action Plan* (March 2012) at 165.

37 Tom Flanagan, Christopher Alcantara & Andre Le Dressay, *Beyond the Indian Act: Restoring Aboriginal Property Rights* (Montreal & Kingston: McGill-Queen's University Press, 2010) at 53, emphasis in original [Flanagan et al, *Beyond the Indian Act*].

Band.[38] According to Flanagan, adopting "voluntary" forms of private property on reserves would not only help to "emancipate" Aboriginal peoples from the Indian Act, but also "strengthen the economies of First Nations by giving them access to modern, effective property rights."[39] However, while this push towards "voluntary" forms of property ownership was presented as a means of ending Aboriginal economic marginalization and colonial relations of power, it is clear that the proposal continues to advance a particular way of relating to land that is infused with an eliminatory or "disposable" logic.

For instance, in its literature surrounding the First Nations Property Ownership Initiative, the First Nations Tax Commission detailed the differences in land holding that would occur under its proposal. While under the Indian Act "First Nations or First Nation members cannot have full ownership rights," under their property proposal, First Nations hold title to land and "can choose to grant full ownership to individuals."[40] In other words, the preferred "choices" available to Aboriginal people under their proposal do not simply revolve around "First Nations members" obtaining ownership rights, but rather for First Nations to transfer those rights to "individuals," or possibly even to non-members. As Flanagan, Le Dressay, and Alcantara argue, "[t]he intended result is to enable First Nations to use their land and natural resources effectively in the modern economy. As they benefit from capitalizing on their assets, so will other Canadians; for a market economy is a wealth-creating, positive-sum game in which call [sic] can benefit from the progress of others."[41] In Shiri Pasternak's estimation, such "market-political rationalities" serve to produce "a landscape where ideal Indigenous citizens are constructed as enterprising, capitalizing subjects."[42] Indeed, although the proposal was billed as strengthening forms of self-governance through the "voluntary" choices available to Aboriginal peoples, it is clear that its underlying vision of the preferred or "effective use" of land is one where Aboriginal peoples would behave just like any other rational non-Aboriginal economic actor who can "exercise all the rights of ownership … exclude others, use and manage their property, and dispose of it … ."[43] Though the proposed legislation was never passed by

38 For an insightful account of the numerous alliances underpinning the Act and its relationship to neoliberal regimes, see Shiri Pasternak, "How Capitalism Will Save Colonialism: The Privatization of Reserve Lands in Canada" (2015) 47:1 Antipode 179 [Pasternak, "Capitalism"].

39 Flanagan et al, *Beyond the Indian Act*, *supra* note 37 at 5-6.

40 First Nations Tax Commission, "Background on the First Nations Property Ownership Initiative" (1 July 2012), online: <http://fntc.ca/background-on-the-first-nations-property-ownership-initiative/>.

41 Flanagan et al, *Beyond the Indian Act*, *supra* note 37 at 29.

42 Pasternak, "Capitalism," *supra* note 38 at 183.

43 Flanagan et al, *Beyond the Indian Act*, *supra* note 37 at 28.

Parliament, it was supported by an entrenched set of interests, including "right wing" scholars and organizations, mainstream journalists, and bureaucratic officials[44] who very well could continue to frame the discussion around logics that serve to make Aboriginal lands more easily disposed of and exploited by "other Canadians" within the larger free-market economy.

This settler-colonial conception of land as a commodity solely to be controlled and exploited does not accord with the understandings of land regularly presented by Indigenous scholars. For instance, Glen Coulthard has argued that the foundation of Indigenous worldviews are fundamentally "place-based" and "deeply *informed* by what the land *as a system of reciprocal relations and obligations* can teach us about living our lives in relation to one another and the natural world in nondominating and nonexploitive terms."[45] Likewise, Mary Ellen Turpel has also recognized this non-exploitative relationship in the context of the significance of the matrimonial home for Aboriginal women on reserves. According to Turpel, "[t]he significance of matrimonial property for [A]boriginal women must be understood in the context of what the reserve represents: it is the home of a distinct cultural and linguistic people .... The economic value of the land is secondary to its value as shelter within a larger homeland — the homeland of her people, her family."[46] However, under the policies espoused by conservative parties over the course of the past twenty years, these reciprocal relationships have attempted to be severed in favour of a perspective that treats Indigenous territories and homelands as spaces whose primary "value" resides in their ability to be individually demarcated, dominated, and ultimately thrust towards the volatile and extractive impulses of the marketplace. If there are any relationships that are recognized, it is the already existing property relations and rights to own and dispose of land possessed by non-Aboriginal people that are prioritized. In regards to Aboriginal people, on the other hand, these proposals work towards transforming Aboriginal peoples into similar property owners who can dispose of and "surrender" their rights to land in the name of economic development and "progress."[47] In effect, the underlying vision found within the policies of the Conservative Party under the leadership of Stephen

44 Pasternak, "Capitalism," *supra* note 38 at 183-7.

45 Coulthard, *supra* note 7 at 13, emphasis in original.

46 Mary Ellen Turpel, "Home/Land" (1991-2) 10 Can J Fam L 17 at 32-33.

47 Indeed, as Jeff Corntassel has noted, "[w]hen market transactions replace kinship relationships, Indigenous homelands and waterways become very vulnerable to exploitation by shape-shifting colonial powers ... one should be wary of any citizenship models grounded in capitalism/neoliberalism to the exclusion of responsibility-based governance": Jeff Corntassel, "Re-envisioning resurgence: Indigenous pathways to decolonization and sustainable self-determination" (2012) 1:1 *Decolonization: Indigeneity, Education & Society* 69 at 95.

Harper appears to be one that is premised upon the integration of Aboriginal peoples into the "freely competitive market economy"[48] while also undermining the potency of collective claims to land by limiting the authority of Aboriginal communities to determine how their lands will be used.[49]

Reconciliation, Indigenous elimination, and policy "renewal"

This priority granted to non-Aboriginal economic interests can be seen in the interim policy framework dealing with section 35[50] rights that Stephen Harper's Conservative government produced near the end of its tenure. The interim policy itself was bookended by two reports written by Douglas R. Eyford, a lawyer and former federal negotiator appointed by the government to provide advice on Aboriginal participation in west coast energy projects and to lead engagement with Aboriginal peoples on "renewing" and "reforming" Canada's comprehensive land claims policy. It is useful to consider all three documents together as they not only build upon and reference one another, but also produce a unified vision of "reconciliation" that is replete with eliminatory rationalities in relation to Aboriginal peoples and their territories. In fact, both the first and second Eyford reports deserve consideration as a policy framework for understanding the government's position in relation to Aboriginal rights as they still feature prominently on the departmental websites of Natural Resources Canada[51] and the newly renamed Indigenous and Northern Affairs Canada.[52]

48 Conservative Party of Canada, *Policy Declaration* (Amended 11 June 2011).

49 In 2012 the Harper Conservatives passed Bill C-45, a controversial omnibus budget bill that made significant amendments in a number of policy areas, including changes to the Indian Act which make it easier for bands to "surrender" their lands for economic purposes, see Department of Finance, "Background Document: Bill C-45 — Jobs and Growth Act, 2012," at part 4, div 8, pages 1-2, online: <http://www.fin.gc.ca/pub/c45/c45-eng.pdf>. The underlying logic of the Harper government during this period has been characterized as fundamentally premised upon 'termination.' See Russell Diabo, "Harper Launches Major First Nations Termination Plan: As Negotiating Tables Legitimize Canada's Colonialism," (2012) 10:7-10 *First Nations Strategic Bulletin* 1. However, it should be noted that Bill C-45 was one of the primary motivating factors behind the Indigenous grassroots social movement known as "Idle No More." For discussions of the movement, see The Kino-nda-niimi Collective, ed, *The Winter We Danced* (Winnipeg: ARP Books, 2014).

50 Section 35(1) of the Constitution Act, 1982 reads as follows: "The existing [A]boriginal and treaty rights of the [A]boriginal peoples of Canada are hereby recognized and affirmed" *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 s 35.

51 Douglas R Eyford, *Forging Partnerships, Building Relationships: Aboriginal Canadians and Energy Development* (29 November 2013), online: <http://www.nrcan.gc.ca/publications/1138> [2013 Eyford Report].

52 Douglas R Eyford, *A New Direction: Advancing Aboriginal and Treaty Rights* (Ministry of Natural Resources, 2015), online: <https://www.aadnc-aandc.gc.ca/eng/1405693409911/1405693617207> [2015 Eyford Report].

A reading of all three documents together ultimately reveals a commitment to maintaining and enlarging the existing legal and spatial boundaries of the Canadian state relative to the claims of Aboriginal peoples. The documents produce not only a representation of Aboriginal peoples that fundamentally undercuts their sovereignty and prior citizenship regimes, but also a narrative of reconciliation seemingly designed to merge Aboriginal peoples further into the legal, territorial, and economic spaces presently regulated by Canada.[53]

For instance, Douglas Eyford's first report presents Aboriginal peoples as "Canadians" seeking inclusion and integration into the broader Canadian economic environment. Noting Canada's desire to pursue energy opportunities in "expanding markets," Eyford declares the following:

> Aboriginal Canadians understand the value of the proposed energy projects to their communities. However, they emphasize that environmental sustainability and prevention of significant environmental harm are necessary conditions for their support ... . Aboriginal Canadians also expect long-term economic benefits for their communities and a meaningful role in project-related activities including environmental monitoring and protection.[54]

While "environmental sustainability" and "economic prosperity" are certainly significant values that many individuals would be likely to support, this reference to "Aboriginal Canadians" should not go unnoticed. Eyford consistently refers to "Aboriginal Canadians" throughout his report. In fact, outside of select Supreme Court citations interspersed throughout the text,[55] there is only one reference made by Eyford to "Aboriginal peoples."[56] Instead, substituted in its place are references to "Aboriginal Canadians," "communities," and individual Aboriginal "people." This representation of Aboriginal peoples as "Canadians" is significant as it situates Aboriginal peoples firmly within the all-encompassing authority of the Canadian state and its citizenship regime.[57] As such, this discursive construction eliminates the existence of alternate ex-

53 For discussions of the discursive logics of "reconciliation," see Michael McCrossan, "Shifting Judicial Conceptions of 'Reconciliation': Geographic Commitments Underpinning Aboriginal Rights Decisions," (2013) 31:2 Windsor YB Access Just 155 at 157-8 [McCrossan, "Judicial Conceptions"]; see also Coulthard, *supra* note 7 at 106-7.

54 2013 Eyford Report, *supra* note 51 at 3.

55 *Ibid* at 12, 32.

56 *Ibid* at 7.

57 Similar representations can be observed in the jurisprudence of the Supreme Court. See Kiera L. Ladner & Michael McCrossan, "The Road Not Taken: Aboriginal Rights after the Re-Imagining of the Canadian Constitutional Order," in James B. Kelly & Christopher P. Manfredi, eds, *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (Vancouver: UBC Press, 2009) at 273, 280. For a discussion of these logics in relation to 'the market system' and broader neoliberal policies, see Corntassel, *supra* note 47.

pressions of sovereignty and nationhood in favour of a unified understanding of Aboriginal identity as coterminous with Canadian identity.[58] In effect, much like Supreme Court characterizations of Aboriginal identity,[59] this construction takes the existing structures, boundaries, and economic interests of the state as the foundation for considering — and integrating — the rights available to Aboriginal peoples while at the same time treating Aboriginal perspectives as relatively undifferentiated and homogenous in scope.[60]

As the report notes, in the context of "pursu[ing] export opportunities in emerging markets" and "fostering" Aboriginal "inclusion" in oil pipeline projects, the following challenges need to be met:

> The challenge for governments, industry, and Aboriginal communities is integrating Aboriginal people into pipeline safety processes and plans given the differing jurisdictions of the federal and provincial governments, the varying stages of development for each of the proposed pipelines, and how project proponents implement regulatory requirements.[61]

In effect, it is the existing federal and provincial jurisdictions that are naturalized within a report dealing with resource extraction and energy development. There is no indication that Indigenous peoples might have their own laws governing the regulation and conservation of resources within their territories. Instead, Indigenous territories in the province of British Columbia, where relatively few treaties were signed with the Crown, are recast as "their *asserted* traditional territories"[62] while the ability of federal and provincial governments to exercise authority over those territories and the "Aboriginal Canadians" residing therein remains unquestioned.[63] More significantly, in the context of "Crown-Aboriginal Relations," Eyford's report notes that "Industry understands, perhaps more directly than governments, that Projects may be placed at risk if Aboriginal and treaty rights are not addressed. Industry questions why Canada is not doing more to address unresolved Aboriginal rights claims ..."[64]

58 Indigenous scholars have regularly questioned the imposition and conflation of Indigenous identity with Canadian identity. See Kiera L Ladner, "Treaty Federalism: An Indigenous Vision of Canadian Federalisms," in Francois Rocher & Miriam Smith, eds, *New Trends in Canadian Federalism* (Peterborough: Broadview Press, 2003) at 183-6.

59 See McCrossan, "Judicial Conceptions," *supra* note 53 at 174.

60 As the report declares, "...all Aboriginal Canadians want to share in the wealth and prosperity of this country." See 2013 Eyford Report, *supra* note 51 at 8.

61 *Ibid* at 17.

62 *Ibid*, emphasis added.

63 It should be noted, however, that Indigenous peoples have continued to question and resist settler-colonial forms of territoriality through a variety of strategies and tactics. See Coulthard, *supra* note 7.

64 2013 Eyford Report, *supra* note 51 at 8.

The fact that the misgivings of industry are highlighted and expressed in the context of "Crown-Aboriginal Relations" suggests that the primary concerns underpinning the report are not simply about a desire to "include" Aboriginal peoples within resource development projects, but rather to ensure that their presence does not act as a hindrance to the extractive projects themselves. To minimize this threat, Eyford's report not only recasts Aboriginal peoples as "Canadians" under the jurisdictional and territorial authority of the federal and provincial governments, but also as undifferentiated groups who "view natural resource development as linked to a broader reconciliation agenda."[65] It is this linkage between "resource development" and a "broader reconciliation agenda" that would be given far greater shape in both the government's interim policy and Eyford's second report.

For instance, the Harper government's September 2014 interim policy report begins by situating itself as a proposed "starting point" for dialogue and discussions with "Aboriginal partners across the country."[66] However, while Aboriginal peoples are presented as "partners" with Canada, they are also simultaneously represented as subjects of the Crown whose place within the territorial borders of Canada is already settled. In fact, it is "reconciliation" itself that serves as the lynchpin for this movement. Immediately following the discussion of "partnership" and the need to "renew" Canada's policy framework, the interim report notes the following:

> Aboriginal rights recognized and affirmed by Section 35(1) are best understood as, firstly, the means by which the *Constitution* recognizes the fact that prior to the arrival of Europeans in North America the land was already occupied by distinctive Aboriginal societies, and as, secondly, the means by which that prior occupation is reconciled with the assertion of Crown sovereignty over Canadian territory. The content of Aboriginal rights must be directed at fulfiling [sic] both of these purposes.[67]

While this draws from the Supreme Court's representation of "reconciliation" in *Van der Peet*,[68] it is also important to recognize that the Court's understanding of reconciliation is built upon a fundamentally spatialized conception of Canada "which fully locates Aboriginal people inside the geographic and temporal boundaries of the Canadian state."[69] Indeed, much like the first Eyford

65 *Ibid* at 1.

66 Aboriginal Affairs and Northern Development Canada, "Renewing the Comprehensive Land Claims Policy: Towards a Framework for Addressing Section 35 Aboriginal Rights" (September 2014) at 3, online: <https://www.aadnc-aandc.gc.ca/eng/1408631807053/1408631881247> [Interim Report].

67 Interim Report, *ibid* at 6-7.

68 *Van der Peet*, *supra* note 2 at para 36.

69 McCrossan, "Judicial Conceptions" *supra* note 53 at 173.

report — which the interim policy also acknowledges it is building upon[70] — Aboriginal people are constructed as Canadians whose economic interests coincide fully with those of the broader community.[71] With this construction in place, the interim policy then proceeds to advance a "renewed" understanding of reconciliation itself. According to the interim policy, "Canada recognizes that reconciliation can lead to economic prosperity. Reconciliation promotes a secure climate for economic and resource development that can benefit all Canadians and balances Aboriginal rights with broader societal interests."[72] However, given the concerns of industry expressed in the previous Eyford report, this recognition of the potential to realize forms of economic and resource "security" through processes of reconciliation appears designed specifically to address and assuage these concerns by privileging the economic interests of resource developers over the constitutionally protected rights of Aboriginal people. In fact, in the Supreme Court's historic *Tsilhqot'in Nation* decision where an Aboriginal title claim under section 35 was recognized for the first time, the Court noted that "[t]he issuance of timber licences on Aboriginal title land for example — a direct transfer of Aboriginal property rights to a third party — will plainly be a meaningful diminution in the Aboriginal group's ownership right and will amount to an infringement that must be justified in cases where it is done without Aboriginal consent."[73] However, both the interim policy and Eyford's first report sidestep such justification requirements and ensure that the interests of third party developers will ultimately be protected through the construction of a vision of reconciliation that implicitly suggests that Aboriginal consent has already been granted by presenting Aboriginal peoples as an undifferentiated totality of "communities" in Canada who "view natural resource development as linked to a broader reconciliation agenda."[74]

Representations of Aboriginal consent can also be found in Eyford's second report on "advancing Aboriginal and treaty rights." Although the government's interim policy did not reference the Supreme Court's recent *Tsilhqot'in Nation* decision, Eyford begins the introduction to his second report with a history concerning treaty making that is remarkably similar to the one found in the Court's decision: "[t]hroughout present-day Canada, the Crown entered

70 Interim Report, *supra* note 66 at 3.

71 As the Report notes, "It is in *our collective interest* to balance the rights and interests of *all Canadians* and enable Aboriginal communities to access development opportunities that create jobs, economic growth and prosperity," *ibid*, emphasis added.

72 *Ibid* at 8.

73 *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 124 [*Tsilhqot'in Nation*].

74 2013 Eyford Report, *supra* note 51 at 1; for a similar construction, see Interim Report, *supra* note 66 at 6.

into treaties with Aboriginal peoples who surrendered their claims to land in return for reserves and other consideration."[75] In effect, Eyford expands upon previous representations of Aboriginal consent to the economic objectives and social structures of Canada with a representation that views Aboriginal peoples as consenting to the existing territorial borders themselves. Suggesting that Aboriginal peoples "surrendered" claims to land in exchange for reserves not only ignores the manner in which reserve boundaries were often drawn up and limited by settler-colonial officials,[76] but also presumes that Aboriginal responsibilities and ongoing relationships to "Canadian" territories can be neatly bracketed-off and severed. However, given the territorial interests expressed in previous reports and governmental policies, it is perhaps not surprising that Eyford draws attention to the fact that while "the Court [in *Tsilhqot'in Nation*] reiterated that incursions on Aboriginal title land are permitted when justified by a 'compelling and substantial purpose,' there has been little acknowledgement or discussion of this important qualification, despite the current range of proposed resource development projects that may qualify."[77] In other words, Eyford specifically highlights the "legality" of justifiably "invading" Aboriginal title lands in order to realize broader developmental projects. Ultimately, in Eyford's estimation, "[r]econciliation is intended to address in a contemporary manner the historic fact that the Crown obtained control over the lands and resources that were in the control of Aboriginal peoples prior to European settlement of present-day Canada."[78] This vision of reconciliation contained in Eyford's report, and supported by previous Supreme Court jurisprudence, represents Aboriginal rights through the prism of existing territorial boundaries and refracts the "given" nature of the "colonial present"[79] back into the past. As such, the protection offered by section 35 — and the ability of Aboriginal peoples to maintain territorial relationships and responsibilities according to their own laws — appears to be effectively discounted and delegitimized by a politico-historical perspective which filters prior Aboriginal claims to land and governance through the lens of "present" constitutional structures, taken-for-granted territorial boundaries, and ongoing desires to realize the developmental "potential" of Aboriginal lands themselves. Lost within this myopic settler-colonial vision of the present, however, is any space for Aboriginal jurisdictions, governing institutions, and alternative understandings of territory.

75 2015 Eyford Report, *supra* note 53 at 8; see also *Tsilhqot'in Nation*, *supra* note 73 at para 4.

76 See Sharon Venne, "Understanding Treaty 6: An Indigenous Perspective," in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada* (Vancouver: UBC Press, 1997) at 197.

77 2015 Eyford Report, *supra* note 52 at 30.

78 *Ibid* at 34.

79 Derek Gregory, *The Colonial Present* (Malden, MA: Blackwell Publishing, 2004).

Conclusion

While this extractive and integrationist perspective pursued by Stephen Harper's Conservative government appears to provide little room for understandings of Indigenous nationhood, the 2015 Canadian federal election saw the reemergence of a "nation-to-nation" discourse amongst opposition party leaders in relation to Aboriginal peoples. For instance, during the campaign, Liberal leader Justin Trudeau promised to "renew" a "nation-to-nation relationship with Indigenous Peoples, based on recognition, rights, respect, cooperation, and partnership."[80] In fact, one month before the writ dropped, Trudeau spoke at the annual general meeting of the Assembly of First Nations where he promised to call a formal inquiry into the issue of missing and murdered Indigenous women and girls, to develop a "reconciliation" framework in "partnership" with Indigenous peoples, and to "conduct a full review of the legislation unilaterally imposed on Aboriginal Peoples by Stephen Harper's government."[81] While historically voter turnout amongst Aboriginal peoples in Canadian elections has tended to be significantly lower than non-Aboriginal people,[82] the 2015 federal election saw a substantial increase in Aboriginal participation rates.[83] This increase was likely due to a combination of factors, including not only the "positive" array of promises made by opposition leaders during the campaign, but also, and more importantly, a resounding effort within Aboriginal communities to mobilize voters in response to the policies of the Harper Conservatives.[84]

Upon winning the 2015 federal election and forming a majority government, the Liberals under Prime Minister Justin Trudeau have already begun to make policy changes in relation to Aboriginal peoples. Not only has the government launched an inquiry into missing and murdered Indigenous women and girls, but in addition to ending all compliance measures related to the *First*

80 Liberal Party of Canada, "A New Nation-to-Nation Process" (2015), online: <https://www.liberal.ca/realchange/a-new-nation-to-nation-process/>.

81 Liberal Party of Canada, "Remarks by Justin Trudeau at The Assembly Of First Nations 36th Annual General Assembly" (2015), online: <https://www.liberal.ca/realchange/justin-trudeau-at-the-assembly-of-first-nations-36th-annual-general-assembly/> [Trudeau Remarks].

82 Kiera L Ladner & Michael McCrossan, *The Electoral Participation of Aboriginal People* (Ottawa: Elections Canada, 2007).

83 Chinta Puxley, "Voter Turnout Up by 270 per cent in Some Aboriginal Communities," *The Toronto Star* (25 October 2015), online: < https://www.thestar.com/news/federal-election/2015/10/25/voter-turnout-up-by-270-per-cent-in-some-aboriginal-communities.html>.

84 Tanya Talaga, "Behind the Scenes on the Push to Rock the Indigenous Vote, " *The Toronto Star* (23 October 2015), online: <https://www.thestar.com/news/canada/2015/10/23/behind-the-scenes-on-the-push-to-rock-the-indigenous-vote.html>.

Nations Financial Transparency Act,[85] has also reinstated funding frozen under the Act itself. In fact, Carolyn Bennett, Minister of Indigenous and Northern Affairs Canada, announced that in keeping with the government's commitment to renewing a "nation-to-nation" relationship, "the Government of Canada will suspend any court actions against First Nations who have not complied with the Act."[86] However, it is still uncertain just how the government intends to define this "nation-to-nation relationship" or how it will ultimately develop over time.[87] Will this nation-to-nation relationship continue to seek forms of integration premised upon the territorial desires and authority of Canada, or will it offer understandings of territory and governance that are more aligned with Indigenous conceptualizations? For instance, what is interesting about the remarks made by Justin Trudeau during his speech in Montreal to the Assembly of First Nations is that he referenced the Two-Row Wampum treaty whose "renewal" could fundamentally reimagine Canada's current conceptions of territorial authority and control. According to Trudeau, the government's commitment to a renewed relationship will be centred upon a long history of relations "symbolized by treaties, and in this part of the country, by the two-row wampum."[88] As a number of scholars have noted, for the Haudenosaunee Confederacy, the Two-Row Wampum conveys an understanding of their treaty relationship with the Crown, or a relationship predicated upon mutual respect and peaceful coexistence in which neither culture or legal system would occupy a position of dominance over the other.[89] By invoking the Two-Row Wampum, Trudeau could have arguably signalled the beginning of a movement away from understandings of "reconciliation" premised upon Indigenous integration and settler-colonial forms of territorial control.

85 See *First Nations Financial Transparency Act*, SC 2013, C7.

86 Canada, "Statement by the Honourable Carolyn Bennett on the First Nations Financial Transparency Act" (18 December 2015), online: <http://news.gc.ca/web/article-en.do?nid=1024739&tp=980>.

87 Lynn Gehl has also recently raised similar questions in relation to the signing of an agreement in principle between the governments of Canada, Ontario, and the Algonquins of Ontario. See Lynn Gehl, "The ratification process for the Algonquin agreement in principle is an example of what is wrong with Canada's approach in land claims and self-government negotiations," *Policy Options* (15 November 2016), online: <http://policyoptions.irpp.org/magazines/november-2016/deeply-flawed-process-around-algonquin-land-claim-agreement/>.

88 Trudeau Remarks, *supra* note 81.

89 See Patricia Monture-Angus, *Journeying Forward: Dreaming First Nations' Independence* (Halifax: Fernwood Publishing, 1999) at 36-8. Likewise, in contrast to interpretations predicated upon strict separation, Susan Hill reminds that the agreement contains principles for enduring forms of connection: Susan M. Hill, "'Travelling Down the River of Life in Peace and Friendship, Forever': Haudenosaunee Land Ethics and Treaty Agreements as the Basis For Restructuring the Relationship with the British Crown," in Leanne Simpson, ed, *Lighting the Eighth Fire: The Liberation, Resurgence and Protection of Indigenous Nations* (Winnipeg: Arbeiter Ring, 2008) at 30.

However, in the same speech Trudeau also declared that the renewed nation-to-nation relationship would be "guided by the spirit and intent of the original Treaty relationship, and one that respects the decisions of our courts."[90] Not only has the Supreme Court constructed representations of Aboriginal identity and territory as "inescapably Canadian,"[91] but members of the Court have also advanced their own understandings of the Two-Row Wampum. According to former Justice Ian Binnie, the Two-Row Wampum is emblematic of the "modern" settler-colonial "realities" in which Indigenous peoples are presently situated:

> The modern embodiment of the "two-row" wampum concept, modified to reflect some of the realities of a modern state, is the idea of a "merged" or "shared" sovereignty. "Merged sovereignty" asserts that First Nations were not wholly subordinated to non-[A]boriginal sovereignty but over time became merger partners ... Whereas historically the Crown may have been portrayed as an entity across the seas with which [A]boriginal people could scarcely be expected to identify, this was no longer the case in 1982 when the s. 35(1) reconciliation process was established. The Constitution was patriated and all aspects of our sovereignty became firmly located within our borders ... ["merged sovereignty"] must include at least the idea that [A]-boriginal and non-[A]boriginal Canadians *together* form a sovereign entity with a measure of common purpose and united effort. It is this new entity, as inheritor of the historical attributes of sovereignty, with which existing [A]boriginal and treaty rights must be reconciled.[92]

Ultimately the challenge for both legal and political actors will be whether they can move beyond a "totalizing vision of Canadian sovereignty and territorial space"[93] which continues to recast Indigenous peoples as voluntarily agreeing to give up rights to sovereignty in favour of possessing membership within the borders of the "modern" Canadian community.[94] It remains to be seen whether Trudeau's invocation of the Two-Row Wampum will truly embrace Indigenous understandings of non-exploitative territorial relationships and responsibilities, or whether he will continue the policy trajectory strengthened by the Harper Conservatives of treating Indigenous territories as settler-colonial

90 Trudeau Remarks, *supra* note 81.

91 McCrossan, "Judicial Conceptions" *supra* note 53 at 179.

92 *Mitchell*, *supra* note 2 at para 129, emphasis in original.

93 Ladner & McCrossan, *supra* note 57 at 279.

94 For discussions of how notions of "consent" were represented in the *Mitchell* decision, see Mark D. Walters, "The Morality of Aboriginal Law" (2006) 31:2 *Queen's LJ* 470 at 511; see also Gordon Christie, "The Court's Exercise of Plenary Power," (2002) 16:2 SCLR 285 at 294.

sites of unrealized economic potential for the benefit, and protection, of the larger "Canadian" nation.[95]

95 Although this article was originally written during the Liberal government's first four months in office, it should be noted that Trudeau has perhaps signaled the continuation of a similar trajectory. For example, Trudeau's November 2016 announcement of an Oceans Protection Plan has been viewed by commentators as a sign that the government could very well be moving, in the face of "opposition" from "indigenous communities and environmentalists," towards the approval of major oil pipeline projects. See Josh Wingrove, "Trudeau Clears Path for Canada to Approve Kinder Morgan Pipeline" *Bloomberg.com* (14 November 2016), online: <http://www.bloomberg.com/news/articles/2016-11-14/trudeau-clears-path-for-canada-to-approve-kinder-morgan-pipeline>

A Failed Discourse of Distrust Amid Significant Procedural Change: The Harper Government's Legacy in Immigration and Refugee Law

Peter J Carver

This paper examines two legacies of the Harper government in immigration and refugee law. The first is a discursive legacy, that is, a legacy pertaining to the government's particular characterization of claimants for refugee and immigrant status seen through a series of its legal initiatives. The government engaged in a "discourse of distrust" with respect to claimants, repeatedly identifying them as persons trying to fool or take advantage of Canada's immigration and social welfare schemes. The second legacy pertains more to a number of institutional and procedural changes in the immigration system. These initiatives have not received the same attention given the higher profile measures that comprise the discourse of distrust. However, they embody trends in Canadian immigration law toward enhancing the authority of executive government in administering the country's immigration programs, together with a consequent loss of security for the prospective and recent newcomer to Canada.

In the end the discursive legacy of the Harper government appears to have outweighed its institutional legacy. The Conservative Government took a sword to many of the long-established understandings that informed Canada's immigration law — and it seems that the Government's truculence in matters dealing with immigrants and refugees served as one of the bases on which the election of October 2015 turned. For the foreseeable future, political discussions about immigration issues in Canada will start from a different place than the distrust and fear of the stranger.

L'auteur de cet article examine deux héritages du gouvernement Harper en immigration et en droit des réfugiés. Le premier est un héritage discursif, c'est-à-dire un héritage se rapportant à la caractérisation particulière des demandeurs du statut de réfugié ou du statut d'immigrant par le gouvernement, vu par une série de ses initiatives juridiques. Le gouvernement s'est lancé dans un « discours de méfiance » à l'égard des demandeurs, en les identifiant à plusieurs reprises comme des personnes essayant de berner le gouvernement ou de profiter des projets d'immigration ou d'aide sociale du Canada. Le deuxième héritage se rapporte davantage à de nombreux changements institutionnels et des changements de procédure dans le système d'immigration. Ces initiatives n'ont pas reçu la même attention étant donné les mesures très médiatisées qui constituent le discours de méfiance. Elles donnent également forme à des tendances en droit de l'immigration canadien à accroître l'autorité du gouvernement exécutif en matière d'administration des programmes d'immigration du Canada, conjointement avec une perte de sécurité consécutive à cet accroissement pour les éventuels nouveaux arrivants au Canada ainsi que pour les nouveaux arrivants récents. En fin de compte cependant, l'héritage discursif du gouvernement Harper semble l'avoir emporté sur son héritage institutionnel. Le gouvernement conservateur a attaqué de nombreuses vieilles compréhensions qui influençaient le droit de l'immigration du Canada et il semble que son agressivité relativement aux questions touchant les immigrants et les réfugiés a servi d'une des bases sur lesquelles a reposé l'élection d'octobre 2015. Dans un avenir prévisible, les débats politiques liés aux questions d'immigration au Canada auront un autre point de départ que la méfiance et la peur de l'étranger.

* Professor of Law in the Faculty of Law at the University of Alberta, Editor-in-Chief of the *Review of Constitutional Studies*. I wish to thank the John A Sproul Fellowship and the Canadian Studies Program at the University of California at Berkeley, and Program Director Professor Irene Bloemraad, for their generous support during a sabbatical stay in early 2016. My thanks also go to two anonymous reviewers for their helpful comments.

I. Introduction

The Government of Prime Minister Stephen Harper was remarkably active in the areas of refugee and immigration law throughout its nine years in office, and especially after attaining a majority in the federal election of 2011. This paper examines two legacies of the Harper government in immigration and refugee law. The first is a discursive legacy, that is, a legacy pertaining to the government's particular characterization of claimants for refugee and immigrant status seen through a series of its legal initiatives.[1] The second is a legacy pertaining more to institutional and procedural changes in the immigration system.

One thesis of this paper is that the government engaged in a "discourse of distrust" with respect to claimants, repeatedly identifying them as persons trying to fool or take advantage of Canada's immigration and social welfare schemes. This thesis is developed by examining five instances in which the government enacted legislation for the avowed purpose of attacking presumed dishonesty on the part of claimant groups. A second thesis of this paper is that the discourse of distrust failed. It failed on two principal levels: in the courts, and at the ballot box in the federal election of October 2015. Late in the life of the Harper government, it lost a series of court challenges to legislative amendments embodying distrust of immigrants and refugees, which were brought on constitutional and other grounds.[2] Moreover, the Conservative government lost the 2015 election to an opposition party, the Liberals, whose leader Justin Trudeau made a different discourse on immigration matters a central part of its platform and, in its first months in power, rolled back several elements of the Harper agenda. The Syrian refugee crisis, which occurred in the midst of the election campaign, highlighted this dramatic series of events.

1 This paper is not a treatise on "discourse theory," nor does it employ a methodology of measuring and analyzing (legal) text familiar to practitioners of discourse theory. The use of "discourse" here is, however, intended to have a meaning similar to that set out by political scientist Carol Bacchi in *Analysing Policy: What's the Problem Represented to Be?* (Pearson Australia: Frenchs Forest, New South Wales, 2009), a practical approach to exploring the social meaning of policy or legislation through its construction in language. Bacchi's approach involves asking a series of questions directed at ascertaining how the policy-maker has (and has not) framed the "problem" to which they are offering a solution. It is in this sense that "discourse" is meant here. The government of Stephen Harper repeatedly justified its immigration initiatives by pointing to problems of dishonest or fraudulent behaviour by newcomers to Canada.

2 In "How the *Charter* Has Failed Non-citizens in Canada: Reviewing Thirty Years of Supreme Court of Canada Jurisprudence" (2013) 58:3 McGill LJ 663, Catherine Dauvergne argues that through to 2012, foreign nationals and permanent residents had achieved relatively little success in bringing *Charter* claims. This perhaps underlines the significance of the court decisions discussed below, *infra* notes 24-29.

However, the story of the Harper legacy in Canadian immigration policy is not wholly captured by the idea of a discursive failure. In addition to the policy initiatives noted above, the Conservative government sought to make changes to a number of legal processes and institutions. The paper looks at three process changes: the reconfiguration of the refugee determination system, the use of Ministerial Instructions, and the introduction of the "Express Entry" system for selection of permanent residents. These initiatives have not received the same level of attention given the higher profile measures that comprise the discourse of distrust. They also embody trends in Canadian immigration law that, while accelerated by the Harper government, are likely to persist over the longer term. These trends include enhancing the authority and flexibility available to executive government in administering the country's immigration programs, together with a consequent loss of security for the prospective and recent newcomer to Canada.

The exercise of identifying a government's legacy in a certain area of concern is necessarily selective, but even more so in a case like this where there is so much to examine. If one was to discuss the legacy of the Harper government in immigration policy generally, the range of subjects would cover at least the following: increasing the role of temporary foreign workers in the Canadian workforce[3] (until sharply pulling back on that initiative in the last year of the government's life), increasing the numbers of economic class immigrants at the expense of the family class, and enhancing the role of provincial nominee programs and employer selection mechanisms in the process of selecting immigrants.[4] These are significant policy developments, but they lie outside the scope of this study. Rather, the specific focus here is on the Harper government's legacy in the legal domain, that is, on the areas of law-making, legal process, and jurisprudence.

The nature of immigration law is constitutional in the basic sense that it instantiates principles related to what constitutes membership in the national

3 The best single summary of the expansion of the Temporary Foreign Worker Program (TFWP) in the decade from 2001 to 2010, by both Liberal and Conservative governments, together with the major legal issues it raised is likely Delphine Nakache & Paul Kinoshita, "The Canadian Temporary Foreign Worker Program: Do Short-Term Economic Needs Prevail Over Human Rights Concerns?" (2010) 5 IRPP Study, online: <http://irpp.org/wp-content/uploads/assets/research/diversity-immigration-and-integration/new-research-article-3/IRPP-Study-no5.pdf>. For a brief account of the regulatory changes made by the Harper government in 2014 to rein in the TFWP following extensive media criticism, see Lisa Carty, "Changes Affecting Temporary Foreign Workers in Canada" (2014) 24 Employment and Labour Rev 69-71.

4 See Delphine Nakache & Catherine Blanchard, "Remedies For Non-Citizens Under Provincial Nominee Programs: Judicial Review And Fiduciary Relationships" (2014) 37:2 Dal LJ 527.

community and of the relationship between that community and foreigners or outsiders. Law in the form of the Constitution, international law, and federal legislation mediates this relationship by placing specified limits on arbitrary action by the state. This article examines issues arising in the areas of both refugee and immigration law. It does not cover developments in the related area of citizenship, which was also a *locus* of considerable activity by the Conservative government.[5] In terms of Canadian law, "refugee protection" represents a domain of state *obligation* to foreigners fleeing persecution,[6] while "immigration" represents a domain in which the state exercises *sovereignty* on behalf of Canadians to decide who it will allow to join, and remain in, the national community. The Supreme Court of Canada affirmed the latter idea when, in a case dealing with section 7 of the *Canadian Charter of Rights and Freedoms*,[7] it described the "basic tenet" of Canadian immigration law in these terms: "the most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country."[8]

The balance of the article proceeds as follows. Part II considers the discursive level of the Harper government's legacy. It looks at five instances where the government identified policy problems caused by foreign nationals seeking to take advantage of Canada's decision-making processes. In each instance, the government took legislative initiatives intended to promote its image as defender of Canadians and their interests. Three of the initiatives dealt with claimants for refugee status, while two were directed more at permanent residents. Part III of the paper discusses three policy initiatives of a procedural nature, two concerned with immigration and one with refugee determination. Part IV is a concluding section that considers the reasons why the measures discussed in Part II failed, while those discussed in Part III seem likely to endure.

5 See also Audrey Macklin, "Citizenship Revocation, The Privilege to Have Rights and the Production of The Alien" (2014) 40:1 Queen's LJ 1, and Craig Forcese, "A Tale of Two Citizenships: Citizenship Revocation for 'Traitors And Terrorists'" (2013) 39:2 Queen's L J 551.

6 The obligation is founded in the *United Nations Convention on the Status of Refugees*, which Canada ratified in 1969, and has incorporated into its domestic law, principally in section 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

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

8 *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 SCR 711 (per Sopinka J).

II. The Harper legacy in discourse: distrust of the stranger

In suggesting that the government engaged in a discursive campaign of this nature, one can start simply by listing the titles of several legislative initiatives: the *Preventing Human Smugglers from Abusing Canada's Immigration System Act;*[9] the *Protecting Canada's Immigration System Act;*[10] the *Faster Removal of Foreign Criminals Act;*[11] and the *Zero Tolerance for Barbaric Cultural Practices Act.*[12] Many of the initiatives represented by these and other legislative acts followed specific incidents that the government identified as being representative of a generalized problem that needed to be quickly addressed by dramatic policy changes. Most of the problems and policies dealt with claimants for refugee status. In reacting quickly and aggressively to highly publicized events involving refugee claimants, the Harper government both responded to and reinforced what it believed to be nativist strands in Canadian public opinion.

A. Refugee claimants

The refugee claimant is the ultimate outsider to the national community. By definition, she arrives in Canada unexpectedly and without invitation, and often without documents to establish identity or personal history. These circumstances make the claimant an easy target for feelings of distrust or even fear. The claimant's only legal status is that of being allowed to remain in Canada while the government determines whether she meets the requirements of being the subject of persecution in her home country on grounds of race, nationality, religion, political opinion, or being the member of a particular social group that is subject to persecution. Since the Supreme Court of Canada's 1985 ruling in *Singh v Canada,*[13] every refugee claimant is constitutionally entitled, as a matter of "fundamental justice," to an in-person hearing to determine their claim. This is an expensive process. In these circumstances, several tropes about

9 Canada Bill C-49, *Preventing Human Smugglers from Abusing Canada's Immigration System Act,* 3d Sess, 40th Parl, 2010. The Bill was subject to extensive criticism, and was not enacted prior to the prorogation of Parliament for the election held in 2011. Several elements of Bill C-49 were reintroduced and enacted in *Protecting Canada's Immigration System Act,* SC 2012, c 17.

10 *Ibid.*

11 *Faster Removal of Foreign Criminals Act,* SC 2013, c 16.

12 *Zero Tolerance for Barbaric Cultural Practices Act,* SC 2015, c 29. From an immigration standpoint, the "barbaric practice" in question was polygamy. The statute barred sponsorship of a spouse in a polygamous relationship, and barred permanent residence to anyone in a polygamous relationship. Both in its use of "zero tolerance" and "barbaric cultural practices," the title of this statute may well be the most hyperbolic in Canadian legislative history.

13 *Singh v Canada (Minister of Employment and Immigration),* [1985] 1 SCR 177.

the alleged motives of claimants have developed: (1) many claimants are in reality economic migrants, seeking to jump the immigration process by falsely claiming persecution; (2) claimants in Canada often come from "safe countries," where they could and should have claimed asylum, merely because they prefer the work, health and social benefits Canada offers; (3) individuals who lose their initial claims in Canada exploit delays in the domestic legal system to stay in the country an unreasonably long time, seeking to establish themselves so as to make their removal more difficult. All of these tropes may come to the surface at any particular moment. All were cited by the Harper government at different times as problems that needed to be addressed.

1. Human smuggling and "irregular arrivals":

In the refugee claims field, the Conservative government's first major reform proposal followed in response to dramatic news events: the arrival on Canada's West Coast of two rusty freighters — the Sun Sea in 2009 and the Ocean Lady in 2010 — carrying 76 and 490 Tamil passengers respectively, most of whom were fleeing from Sri Lanka after the end of that country's civil war. These events evoked a storm of media attention and public concern. Questions were raised about how well-prepared Canada was to deal with mass arrivals of undocumented people, whether Canada was about to experience an influx of boats carrying economic refugees as Australia had in recent years, and whether the country was going to be at the mercy of organized gangs of human smugglers. In response, the government introduced Bill C-49, the *Preventing Human Smugglers from Abusing Canada's Immigration System Act*. Bill C-49 proposed increases to criminal and civil sanctions for persons engaged in human smuggling, and introduced the concept of "irregular arrivals," applied to groups of more than 10 individuals arriving in Canada without prior authorization. Persons designated by the Minister as irregular arrivals were to be subject to one year's detention while awaiting the hearing of any refugee claims. Bill C-49 was vigorously opposed by lawyers and refugee groups supporting refugees, and was not enacted prior to the federal election in 2011. Upon returning with a majority, the Harper government reintroduced features of Bill C-49, but without the detention provisions, in the *Balanced Refugee Reform Act,*[14] which Parliament passed in 2010. Just prior to this statute's scheduled coming into force at the end of December 2012, Parliament enacted the *Protecting Canada's Immigration System Act*, which made further amendments to the human smuggling provisions and refugee claims process.

14 *Balanced Refugee Reform Act*, SC 2010, c 8.

A major upshot of the legislative amendments made in the 2010-2012 period was the Harper government's bringing into existence a system for administrative appeals of first-level refugee claims determinations. A new Refugee Appeal Division (RAD) of the Immigration and Refugee Board (IRB) took on this role. The creation of the RAD had been a promise of previous governments going back to the passage of *Immigration and Refugee Protection Act* [15]in 2002, but had never been fulfilled. With this reform, claimants whose claims are refused at first instance are no longer limited to the vagaries of applying for judicial review to the Federal Court of Canada.[16] The structuring of the RAD and the IRB is discussed further in Part III.

At the same time it created the administrative appeals process, however, the Harper government denied access to that process to several disfavoured categories of refugee claimants. This included "irregular arrivals," and refugees arriving directly or indirectly from a country subject to a Safe Third Country Agreement (see below) or who are nationals of a "designated country of origin."[17]

Section 20.1(2) of *IRPA* defines as "irregular" an arrival of a group of persons either where their identities are unlikely to be ascertained in a timely manner, or where it is reasonably suspected that their arrival was facilitated by human smuggling. Should the Minister designate an arrival as an "irregular arrival," the individuals involved become "designated foreign nationals," subject to a refugee determination process differing from that available to other claimants for refugee protection.[18] In particular, irregular arrivals are barred from appealing a rejected claim for refugee status to the Refugee Appeal Division of the Immigration and Refugee Board (see discussion below).

The legal legacy of the Sun Sea and Ocean Lady incidents included proceedings brought against several individuals with respect to "people smuggling" or "human smuggling" under two different sections of *IRPA*: section 117, which sets out a criminal offence, and section 37, which renders an indi-

15 *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

16 One of the vagaries of applying for judicial review is the requirement in section 72 of *IRPA* to first obtain leave of a Justice of the Federal Court of Canada. A recent study has shown that the chances of obtaining leave vary widely between individual Justices — see Sean Rehaag, "Judicial Review of Refugee Determinations: the Luck of the Draw" (2012) 38:1 Queens LJ 1. Judicial review, and the requirement to obtain leave, continue to be in place, but now for decisions of the Refugee Appeal Division.

17 *IRPA, supra* note 15, s 109.1.

18 Luke Taylor, "Designated Inhospitality: The Treatment of Asylum Seekers Who Arrive by Boat in Canada and Australia" (2015) 60:2 McGill LJ 333.

vidual found to have engaged in the "organized crime" of people smuggling to be inadmissible to Canada, and thus deportable. The issue under both sections was whether the provisions in question would apply to individuals who assist in bringing refugee claimants to Canada for motives other than profit. Refugee advocates argued that this broad reading, urged by the government, would make family members and members of refugee support groups liable to prosecution, and as such, would violate section 7 of the *Charter* for overbreadth. The Supreme Court of Canada agreed.[19]

2. Designated countries of origin:

In 2002, the Canadian government of Prime Minister Jean Chrétien entered into a formal Safe Third Country Agreement with the United States, pursuant to authority set out in section 102 of *IRPA*. Section 102 authorizes the government to share the "responsibility with governments of foreign states for the consideration of refugee claims," on the basis of being satisfied that the foreign state in question respects the Refugee Convention in substance and procedure. Under Canada's agreement with the US, each party agreed that it would return claimants to the first of the two countries in which the claimant had landed, for the purpose of having their claim for refugee status determined.[20] This worked greatly to Canada's advantage with respect to claims being made by prospective refugees coming through the US from Central and South America. The US remains the only country with which Canada has entered into an agreement pursuant to the mechanism set out in section 102 of *IRPA*.

The number of refugee claims in Canada dropped significantly following the making of the agreement with the US. Within a few years, however, the number of claims were rising again. In part, this reflected claims coming from Mexico, and by members of the Romany community in Eastern Europe, especially Hungary. The Harper government viewed many of these claims as being fraudulent, and pointed to higher-than-normal numbers of rejected claims coming from these sources. It responded by amending *IRPA* in 2012 to introduce a concept similar to that of the safe third country, "designated countries of origin" (DCOs).[21] The amendment authorized the Minister of Immigration to designate specific countries, on one of two bases: (1) that the percentage of failed refugee claimants in a specified period coming from that country has fallen below a percentage set by the Minister; or, (2) that the Minister deter-

19 *B010 v Canada (Citizenship and Immigration)*, [2015] SCC 58; *R v Appulonappa* [2015] SCC 59.

20 See text of the Agreement, online: <http://www.cic.gc.ca/english/department/laws-policy/safe-third.asp>.

21 *IRPA*, *supra* note 15, s 109.1.

mined that the country had an independent judicial system, and respected basic democratic and human rights. Within a short period after adoption of the DCO provisions, Minister Jason Kenney designated 38 countries as DCOs, including Mexico and Hungary.

The DCO system differs from the safe third country approach in two principal ways. First, the safe third country mechanism turns on Canada's assessment of whether a partner country abides by the terms of the UN Convention in providing asylum for genuine refugees. By contrast, the DCO process turns on whether countries can be presumed by Canada to provide state protection with respect to persecutory activities within their societies. Second, the safe third country approach results in those to whom it applies being ineligible to make a refugee claim in Canada. The DCO process does not deny eligibility to make a refugee claim, but was designed to result in expedited processing of refugee claims, and a denial of the right to appeal a failed claim to the Refugee Appeal Division of the IRB.[22]

The government's denial of the right to appeal to DCO claimants received a sharp judicial rebuke in mid-2015. In *YZ v Canada (Minister of Citizenship and Immigration)*, Justice Keith Boswell of the Federal Court of Canada ruled that this denial was unconstitutional as a violation of equality rights in section 15(1) of the *Charter*.[23] Equality rights claims require petitioners to establish two things. First, the impugned law must be shown to distinguish between groups on grounds enumerated in section 15(1), or analogous thereto. Justice Boswell found that section 110(2)(d.1) of *IRPA* differentiated between claimants on the basis of the enumerated ground of "national origin." Second, claimants must demonstrate that the distinction is discriminatory in the sense of perpetuating prejudice against, or adversely stereotyping the group in question. One of the government's stated purposes for denying appeals to claimants from "safe" DCOs was to discourage the making of bogus claims, which, in Justice Boswell's view, perpetuated a stereotype of refugee claimants as frequently engaging in fraud against the Canadian refugee determination system:

> The distinction drawn between the procedural advantage now accorded to non-DCO refugee claimants and the disadvantage suffered by DCO refugee claimants under paragraph 110(2)(d.1) of the IRPA is discriminatory on its face. It also serves to further marginalize, prejudice, and stereotype refugee claimants from DCO countries which are generally considered safe and "non-refugee producing." Moreover, it perpetuates a stereotype that refugee claimants from DCO countries are some-

22 *Ibid*, s 110(2)(d.1).

23 *YZ v Canada (Minister of Citizenship and Immigration)*, [2015] FC 892.

> how queue-jumpers or "bogus" claimants who only come here to take advantage of Canada's refugee system and its generosity... .[24]

3. Reduction of Health Care Benefits:

Similar policy concerns about claimants' taking advantage of Canada's purported generous health and social benefits schemes led the Harper government in 2014 to rewrite the Interim Federal Health Plan program, which had been in place since the 1950s. The changes limited access to public health care benefits to DCO claimants and to failed refugee claimants, in most instances leaving them with access to emergency health services only. Government officials explained that the reduction in benefits for these groups was again done with the intention of discouraging "bogus" refugees from coming to Canada in the first place, and encouraging individuals whose refugee claims were rejected to leave the country more quickly, irrespective of appeal or review rights.[25]

In *Canadian Doctors for Refugee Care et al v Canada (Minister of Citizenship and Immigration)*,[26] petitioners challenged the constitutionality of the measures restricting refugee claimants' access to public health care in Canada. Justice Mactavish dismissed their claim that the changes to the Interim Federal Health Plan violated refugee claimants' *Charter* section 7 rights.[27] However, she went on to make the extraordinary ruling that the government's withdrawal of health benefits for certain refugee classes constituted "cruel and unusual treatment" in violation of section 12 of the *Charter*. Justice Mactavish found that the word "treatment" was not limited strictly to medical issues, but also extended to deliberate, targeted government action, and that the IFHP changes constituted action of this type:[28]

> ... [T]he decision to change the IFHP was not a neutral decision taken by the Governor in Council that has only incidentally had a negative impact on historically marginalized individuals who were covered under the former IFHP. Rather, the executive branch of government has in this case intentionally targeted an admittedly vulnerable, poor and disadvantaged group for adverse treatment, making the 2012 changes to the IFHP for the express purpose of inflicting predictable and preventable physical and psychological suffering on many of those seeking the protection of Canada... .

24 *Ibid* at para 124.

25 As found by Mactavish, J in *Canadian Doctors for Refugee Care et al v Canada (Minister of Citizenship and Immigration)*, [2014] FC 651 at para 589 [*Canadian Refugee Doctors*].

26 *Ibid.*

27 *Ibid* at para 571.

28 *Ibid* at para 587.

The Court concluded that the program changes were "cruel," and that alleged but unproven cost savings argued by the Attorney-General of Canada could not justify the breach of section 12. The *Canadian Doctors* case remains the only instance in Canadian jurisprudence in which a federal or provincial government has been found to have engaged in cruel treatment with respect to a group of individuals.

B. Permanent Residents

Permanent residents, formerly known as "landed immigrants," occupy a much different position in the hierarchy of immigration status in Canada than do refugees. They have constitutional recognition in section 6(2) of the *Charter*, which guarantees them the rights to move to and reside and work in any province or territory. Permanent residents may become citizens of Canada after a certain period of residence in the country. The major difference between permanent residents and citizens is that the former may be removed or deported from the country as a result of specified misconduct, whereas citizens are not subject to removal. In the governing legislation, permanent residents are distinguished from "foreign nationals." Despite the fact that permanent residents enjoy a considerably more secure status than refugee claimants, actions taken by the Harper government extended a discourse of distrust to them as well. Two such actions will be discussed here.

1. Conditional permanent residence for sponsored spouses:

Canadian immigration law has long allowed citizens and permanent residents to sponsor the immigration of their close family members, especially of dependent partners and children. *IRPA* extends the concept of sponsorable partners to married spouses, common law partners, and conjugal partners, all terms understood to include same-sex relationships. Canada has long incorporated in its sponsorship laws barriers to the forming of spousal relationships strictly for immigration purposes, i.e., "marriages of convenience." Should an immigration officer form the belief that a relationship had been entered into for the purpose of obtaining permanent residence for the overseas partner, they can refuse the sponsorship application and deny a permanent resident visa, a decision that the sponsor can appeal to the Immigration and Refugee Board.[29]

The Conservative government decided that this process was an insufficient means for defending Canada against the practice of marriages of convenience. In 2013, it introduced Regulations to *IRPA* that made the newly-arrived per-

29 *IRPA*, *supra* note 15, s 63(1).

manent resident spouse's status *conditional*.[30] That is, the sponsored spouse could have his or her permanent residence status revoked, and face deportation from Canada, should the relationship with the sponsor terminate within two years of arrival in Canada:

> 72.1 (1) Subject to subsections (5) and (6), a permanent resident described in subsection (2) is subject to the condition that they must cohabit in a conjugal relationship with their sponsor for a continuous period of two years after the day on which they became a permanent resident.

Exceptions were made for what could be established to be legitimate relationship breakdowns, and for situations of spousal abuse. Nevertheless, these regulations introduced a new insecurity into the lives of permanent residents in Canada. It meant that they would be subject to scrutiny, including investigations by immigration officials, following their arrival in Canada. It also meant a corresponding increase in in-country enforcement resources.

2. Limiting access to the right to appeal removal orders:

In June 2013, the government brought the *Faster Removal of Foreign Criminals Act* into force.[31] The statute amended *IRPA* by reducing the eligibility of permanent residents convicted of criminal offences to appeal removal orders issued against them, and thereby retain a chance of remaining in Canada. Since the *Immigration Act, 1976*, Canadian law has provided permanent residents ordered removed from Canada for criminal conduct with an appeal right that goes to "all the circumstances of their case." This is a broad jurisdiction that authorizes the appeal body — the Immigration Appeal Division of the Immigration and Refugee Board of Canada (IRB) — to look at a range of factors that may (or may not) mitigate in favour of permitting the individual to have another chance to remain in Canada.

Permanent residents who commit criminal offences in Canada are subject to removal if their conduct meets a threshold for seriousness set out in section 36(1)(a) of *IRPA* — being convicted of an offence for which the maximum term of imprisonment is at least ten years or, alternatively, being sentenced to a term of imprisonment of at least six months. A removal order can be issued against a person meeting this threshold, to be enforced at the conclusion of any custodial sentence in Canada. However, the individual may have recourse

30 Canada SOR/2002-227, ss 72.1-72.4. Conditional status was limited to recent relationships, i.e., where the sponsorees had been in a conjugal relationship with the sponsor for less than two years at the time the application was filed — see section 72.1(2)(b).

31 *Faster Removal of Foreign Criminals Act*, SC 2013, c 16.

to appeal the removal order under section 63(3) of *IRPA*. In most appeals in criminal cases, the facts of the underlying offence and sentence (having been determined at trial) are not in dispute. Rather, the appellant is seeking a stay of removal for a specified period of time, on terms and conditions governing their conduct. This is a form of probation order. The Act provides that if, at the time the stay expires, the terms and conditions have been satisfied, the Immigration Appeal Division can quash the removal order and return the individual to unqualified permanent resident status.

Section 68(1) of *IRPA* states that all the circumstances of the case, including the best interests of children directly affected, must be considered in determining whether there are sufficient humanitarian and compassionate considerations to warrant special relief. Immigration Appeal Division jurisprudence, confirmed by the Supreme Court of Canada,[32] established six relevant factors (known as the *Ribic* factors[33]) for assessing such appeals:

- degree of remorse, and chance of rehabilitation
- seriousness of the facts of the offence
- degree of establishment in Canada, including length of time in Canada
- degree of support in the community
- harm to family members, including any children directly affected, of the individual's deportation
- harm to the individual resulting from deportation

This is an important appeal right, providing offenders with an opportunity to argue that despite what they have done that brought them into the criminal justice system, their ties and connections to Canada, especially to family members, should allow them to remain in the country, on good behaviour.

For several years prior to 2013, section 64(2) of *IRPA* limited eligibility for the "all the circumstances" appeal to those persons sentenced to less than two years in prison.[34] With the *Faster Removal of Foreign Criminals Act*, the Harper government reduced the threshold from two years to six months' imprison-

32 *Chieu v Canada*, [2002] 1 SCR 84 [*Chieu*].

33 *Ribic v Canada (Minister of Employment and Immigration)*, [1985] IADD No 4.

34 In *R v Pham*, 2013 SCC 15, the Supreme Court of Canada ruled that the consequence of removal from Canada of a criminal sentence is a "collateral consequence" that can and should be taken into account by trial judges when sentencing an accused person. For discussion of this case, and the interaction between criminal and immigration matters, see Eric Monkman, "A New Approach to the Consideration of Collateral Consequences in Criminal Sentencing" (2014) 72 UT Fac L Rev 38.

ment. This is a significant reduction. Imprisonment for two or more years is the dividing line between serving sentences in provincial prisons or federal penitentiaries. Reducing eligibility to a mere six months' imprisonment was tantamount to saying that persons who commit offences sufficiently serious to render them removable from Canada do not have a right to an "all the circumstances" appeal. The only permanent residents who currently retain the right of appeal are those whose offences make them liable to a sentence of ten years or more, but who receive an actual sentence of less than six months.

In *Chieu v Canada*,[35] the Supreme Court of Canada traced the history and importance of the appeal right being discussed. In a unanimous judgment, the Court pointed out that until 1966, Canadian immigration law provided for a status known as "domicile." Domicile was obtained by permanent residents after living in Canada for five years. Once a person had domicile, they were no longer subject to deportation from Canada except for the most serious of criminal offences. Domicile provided recognition, short of citizenship, that a person who had come to Canada and built their life in this country had acquired a form of tenure to remain here. The Court described how domicile status was removed from the immigration legislation in 1966, but that as a trade-off, the equitable appeal on all the circumstances was created. From then until the early 1990s, permanent residents subject to removal for criminal offences had the right to appeal, irrespective of the sentences they had received. In 1993, a threshold of sentences of five years or more was introduced. In 2002, this was reduced to two years. In 2013, Parliament reduced it to six months.

The use of the phrase "foreign criminals" is itself worth interrogating. It is a pejorative term that obscures a reality that underlies many removals for criminal conduct. While those subject to removal are, by definition, not Canadian citizens, and in that narrow sense "foreigners," many are permanent residents and thus not "foreign nationals." Permanent residents have chosen to live in Canada, or in many cases, have had that choice made for them by their parents when they were children. Canada is their home.

The phrase "foreign criminal" connotes someone who was already engaged in criminal activity when they entered Canada, or who started engaging in criminal activity soon after arrival. It implies that the individual intended to commit crimes before entering Canada. In either sense, the "foreign criminal"

35 *Chieu, supra*, note 32.

fooled Canada into letting them enter. They have little or no moral claim to remain in Canada, and the country will be safer once they are removed.[36]

This stereotype misses out on a whole host of circumstances that can lie behind any one instance of criminal conduct by a permanent resident. A not atypical scenario is the following. An individual comes to Canada as a minor accompanying his or her immigrant parents, often as an infant or toddler. The minor grows up in Canada, imbibing Canadian culture and education, as with any other child. For any number of reasons, however, the parents never arrange for the child to obtain citizenship. As the child moves through his or her teenage years and into young adulthood, he or she starts getting into trouble. Once a first criminal charge occurs, they can no longer apply for citizenship and attain its protection from removal. In many instances, the individual has few or only remote family ties in the home country. They do not speak its language. In their own minds, they are Canadians. In a real sense, they have been made or formed by Canada. In this kind of case, deportation looks much less like a form of "justice" or reparation for a wronged Canadian public, and much more like a means of unloading a Canadian social problem to another, often poorer, country, at the expense of imposing considerable suffering on Canadian family members. The equitable appeal in immigration was intended, and has long provided, a safety valve to mitigate these harsher consequences. With the reduction of eligibility to persons receiving sentences of less than six months, it is now available in many fewer instances.

The availability of this appeal recourse for permanent residents has not obtained constitutional protection. The issue was raised in *Chiarelli v Canada*, but not answered. In *Charkaoui v Canada*,[37] the Supreme Court of Canada ruled that where an individual has been found inadmissible and subject to removal for alleged involvement in terrorism, the removal implicates security of person because the allegation could well endanger the individual in their home country. The Court did not, however, disturb a ruling they had made three years earlier in *Medovarski v Canada*, a case brought after the eligibility for appeal

36 In introducing the *Faster Removal of Foreign Criminals Act*, the government largely focused public attention on several high-profile instances of convicted persons who had been able to "delay" removal by pursuing lengthy appeal and review processes, not so much the issue of raising the threshold for appeals. The assimilation of permanent residents with "foreigners" was underlined by Minister Kenney's publicly citing the case of Issa Mohammed, who he failed to note had permanent resident status in Canada — see Nicholas Keung, "Palestinian Terrorist's File Sat Idle in Ottawa for 8 Years," *Toronto Star* (13 May 2013), online: < https://www.thestar.com/news/canada/2013/05/13/palestinian_terrorist_deported_decades_after_arriving_in_canada.html>.

37 *Charkaoui v Canada (Minister of Citizenship and Immigration)*, 2008 SCC 38.

was reduced from five year to two year sentences.[38] In *Medovarski*, the Court ruled that deportation *per se* — i.e., a removal from Canada that does not carry with it a threat to the individual tantamount to persecution in the refugee sense — does not involve an interest of liberty or security of person sufficient to attract section 7 rights. In the right circumstances, one wonders whether section 12, cruel and unusual punishment, might be invoked with respect to deportation for criminal conduct without appeal. This argument would encounter the difficulty that it is a long-standing tenet of Canadian immigration law that removal is a civil sanction, and not considered "punishment."

III. The Harper legacy in processes of law-making and decision-making

The measures that we now move to examine have three things in common. First, they are noteworthy for having altered the institutions and processes by which Canadian immigration policy is carried out. Second, they involve expanding the authority of executive government, and reinforcing the idea that the Canadian state is sovereign in matters of immigration *per se* — i.e., the determination of who is entitled to join the Canadian community. A further feature of these three institutional and procedural measures is that they have received less public and scholarly attention than those that characterized the discursive legacy described above.

A. Refugee appeals and the immigration and refugee board

At the same time, the government altered the structure of the Immigration and Refugee Board as a whole. Previously, first level claims adjudication had been conducted by Members of the Refugee Protection Division (RPD), who were appointees of the federal Cabinet with the degree of independence from ministerial direction and control that this is intended to provide. The new legislation converted Refugee Protection Division decision-makers into civil servants within the department of Citizenship and Immigration Canada. Only Members of the Appeal Division are now Cabinet appointees. This change in status of first-level claims adjudicators came with a series of legislative provisions requiring claims to be processed and determined within tight time frames.[39]

38 *Medovarski v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51.

39 Angus Grant and Sean Rehaag provide an in-depth empirical analysis of 2013-1014, the first two years' performance of the administrative appeal system, in "Unappealing: An Assessment of the Limits on Appeal Rights in Canada's New Refugee Determination System" (2016) 49:1 UBCL Rev 203. They make a strong case that the barriers in *IRPA* to several categories of claimants from having access to the appeal system, including claimants from DCO countries, should be removed.

A major question pertaining to the impact of the new appeals system concerns the scope of the jurisdiction of the Refugee Appeal Division. An early decision of the Refugee Appeal Division itself determined that it should exercise only a limited appeal jurisdiction over RPD decisions, by deferring to the rulings of the latter unless those were found to be unreasonable. Such a deferential approach would have had the potential to reduce significantly the impact of the administrative appeal recourse. However, in a judicial review proceeding, the Federal Court of Canada, affirmed by the Federal Court of Appeal overturned this approach.[40] For a unanimous Court of Appeal, Justice Gauthier ruled that properly interpreted, section 110 of *IRPA* gives the RAD full authority to reverse decisions of the RPD where it disagrees with them. While the RAD should, like any appellate body, take the first level decision-maker's ruling into careful consideration, it owes that decision no deference. In coming to this conclusion, Justice Gauthier quoted Minister Kenney's own statement in the House of Commons during debate on the legislation:

> The proposed new system would also include, and this is very important, a full appeal for most claimants. Unlike the appeal process proposed in the past and the one dormant in our current legislation, the refugee appeal division, or RAD, would allow for the introduction of new evidence and, in certain circumstances, provide for an oral hearing.[41]

Other legal issues will also need to be determined in the courts. The new government of Prime Minister Trudeau has not indicated any intention to revise these arrangements. For this reason, it seems safe to say that the changes to refugee determination and appeal recourses instituted in 2012 by the Harper government are likely to be a significant legacy of its time in power.

B. Ministerial instructions

Ministerial Instructions ("MIs") are a form of legislative instrument introduced by the Harper government into Canadian immigration law in 2008, and relied on heavily in succeeding years. MIs have a status akin to that of other forms of subordinate legislation, but intended on their face to have a more limited scope. Subordinate legislation refers to written laws enacted by public bodies or persons under authority expressly delegated by Parliament. Statutory authority to make regulations is commonly given to Cabinet as a whole or to individual

40 *Huruglica v Canada (Minister of Citizenship and Immigration)*, [2014] FC 799 Phelan J, aff'd [2016] FCA 93.

41 *House of Commons Debates*, 40th Parl, 3rd Sess, No 33 (26 April 2010).

Ministers of the Crown. Regulations provide the specific detail necessary to implement the broader policy directives set out in the parent statute. They are enforceable by the courts. In contrast, policy guidelines are a form of "soft law" intended to guide public authorities in decision-making, but not to bind or fetter their decisions. Policy guidelines are not enforceable by courts. In form, Ministerial Instructions have the appearance of guidelines, principally in that they are addressed to civil servants, not to the public generally, and describe how applications are to be processed, a seemingly internal concern. However, as noted below, MIs have to date been treated as enforceable statements of subordinate law, fully enforceable by the courts.

The *Immigration and Refugee Protection Act* (*IRPA*) provides for the making of regulations in many areas. The *IRPA Regulations* presently contain 364 sections, compared to the 275 contained in *IRPA* itself, and are considerably more voluminous. When Parliament enacted *IRPA* in 2001, it included a provision intended to ensure transparency in the making of regulations. Section 5 provides that proposed regulations be brought to the attention of Parliament as a whole and discussed in Committees of the House and the Senate prior to being adopted. In the case of MIs, however, no advance notice to Parliament, nor to any interested constituency, is required.[42]

Since 2008, section 87.3 of *IRPA* has provided for Ministerial Instructions (MIs) that, in the opinion of the Minister will support the immigration goals of the Government of Canada, related specifically to the processing of applications under the IRPA, including conditions, categories, priorities, and annual quotas. Between 2008 and 2015, the government issued 19 Ministerial Instructions.[43] The stated reason for the earliest MIs was to reduce the backlog of applications for permanent residence in the system.[44] These Instructions provided for temporary but indefinite "pauses" or moratoria in receiving new

42 See France Houle, "Consultation During Rule-Making: a Case Study of the Immigration and Refugee Protection Regulations" (2010) 28:2 Windsor YB Access Just 395 for an interesting exercise in discourse analysis of submissions made to parliamentary committees during the consultative process on the *IRPA* Regulations in 2001-2002.

43 The full text of these 19 MIs can be accessed through the CIC website at <http://www.cic.gc.ca/english/department/mi/>.

44 The elimination of much of the backlog was the object of a new section 87.4 of *IRPA*, passed in 2012, which effected termination of applications received before February 27, 2008, and still unprocessed as of June 29, 2012. The significance of the February 2008 date is that MI 1, adopted in November 2008, retroactively changed categories eligible for processing as of February 27. A challenge on constitutional and other grounds brought by 1,400 applicants caught by section 87.4 was dismissed by the Federal Court of Canada in *Tabingo v Canada (Citizenship and Immigration),* 2013 FC 377 Rennie J, and on appeal by the Federal Court of Appeal in *Austria v Canada (Citizenship and Immigration),* 2014 FCA 191, leave to appeal to SCC refused, 2015 CanLII 22997 (SCC).

applications. Later MIs specified narrower categories of applications that could be received, and imposed limits on those categories. Instructions eliminated the investor and entrepreneur classes of business applicants for permanent residence,[45] which were replaced by the Start-Up Visa and the Venture Capital Investor classes, respectively.[46] Several MIs expressly overrode previously issued Instructions,[47] while others were stated to have retrospective effect on applications already in the processing system.

In Omnibus legislation enacted by Parliament in 2014, *IRPA* was amended to introduce an entirely new system for processing applications for the economic class — the "Express Entry" system, discussed below. A new section 10.3 of *IRPA* gave the Minister extensive authority to issue MIs to implement the new system.[48] The Express Entry system has subsequently been set out in its entirety in two lengthy and detailed MIs issued in January and May 2015, the latter replacing the former.[49]

This means that the Harper government accomplished a major rewriting of Canadian immigration law through a mechanism that provided it with a unique degree of flexibility and non-transparency. No advance notice of Ministerial Instructions to Parliament, nor to any interested constituency, was or is required. A second implication of the MI practice of the Harper government follows from the first: it greatly reduced the security, in the sense of predictability, for applicants for permanent residence to Canada. The impact this will have on Canada's efforts to attract permanent residents remains to be seen. But, one would expect some price to be paid for using unpredictable and non-

45 MIs 3 and 5 (July 1, 2011 and December 1, 2011, respectively).

46 MI 7 (March 30, 2013) and MIs 17, 18 and 19 (January 23, February 13, and May 23, 2015), respectively.

47 For instance, MI5 overrode or superseded measures set out in MI3.

48 *IRPA, supra* note 15 s 10.3 reads in part:

> (1) The Minister may give instructions governing any matter relating to the application of this Division, including instructions respecting
>
> (a) the classes in respect of which subsection 10.1(1) applies…
>
> (e) the criteria that a foreign national must meet to be eligible to be invited to make an application;
>
> (f) the period during which a foreign national remains eligible to be invited to make an application…
>
> (h) the basis on which an eligible foreign national may be ranked relative to other eligible foreign nationals;
>
> (i) the rank an eligible foreign national must occupy to be invited to make an application…

49 Ministerial Instructions governing Express Entry are currently found at a different location on the CIC website than the 19 MIs referred to above, at <http://www.cic.gc.ca/english/department/mi/express-entry.asp>.

transparent mechanisms like MIs for establishing "law," albeit subordinate law, on a foundation of such shifting sand.

Given the important role Ministerial Instructions have acquired over a short period in the administration of Canada's immigration system, and their often adverse impact on prospective immigrants to Canada, it was only to be expected that they would be challenged in the Federal Court of Canada. Indeed, a number of cases have been brought against specific Ministerial Instructions, and of greater interest here, against the nature of the authority they provide to Ministers of Immigration. To date, the challenges brought have been unsuccessful.[50]

C. Express entry: the expression of interest system

The Express Entry system for foreign skilled worker applicants was put in place through Ministerial Instructions that came into effect in early 2015. Express Entry represents a new relationship between prospective immigrants and the government of Canada. Since the introduction of the modern points system for immigration of "independent" or skilled workers and their dependent family members to Canada in the *Immigration Act, 1976*, the system operated roughly on a "first come, first served" basis. That is, foreign nationals who wished to come to Canada would file an application for permanent residence at the nearest Canadian consular location. Once in the system, an application would be subject to processing by immigration officers stationed abroad. Decision-making authority to allow or refuse applications was delegated to officers by the Minister. Officers assessed applications against a points system going to education, work experience, language ability, age, and certain adaptability factors. Officers were also accorded the discretion to decide for or against an applicant irrespective of the points scored, in view of an overriding assessment of the likelihood that the applicant would be able to establish herself economically in Canada.

Foreign nationals whose applications were refused by immigration officers had the recourse of applying for judicial review of the decision by the Federal Court of Canada. While applicants faced significant waiting times for the processing of their applications, varying widely depending on demand and on the resources devoted by Canada to particular countries or regions, they were assured that they were "in the queue" and would at some point receive a decision.

50 See *Esensoy v Canada (Citizenship and Immigration)*, 2012 FC 1343 Zinn J, and *Lukaj v Canada (Citizenship and Immigration)*, 2013 FC 8 Crampton CJFC.

Express Entry changes the process by introducing a form of pre-screening of applicants by Canada, to be accomplished largely by electronic means. Section 10.3(3) of *IRPA* reads:

> 10.3(3) A foreign national who wishes to be invited to make an application must submit an expression of interest to the Minister by means of an electronic system in accordance with instructions given under section 10.3 unless the instructions provide that they may do so by other means.

The first step in the Express Entry system, then, is the filing by the foreign national of an "expression of interest" (EOI). Only after the information provided in the EOI has been assessed by electronic means using a new 1200-point scale set out in the MIs, may this lead to an "invitation to apply" being sent to the foreign national. Employers will have access to information on the pool of high scorers at the EOI stage, and be able to make job offers that will lead to an invitation to apply being issued, and the government itself will from time to time issue applications to groups of high scorers.[51] Only at this stage may a foreign national make a formal application to immigrate, which application will be processed.

The Express Entry system is intended to have significant cost savings benefits for Canada. Harper claimed it would also benefit applicants for permanent residence, in that it would give them greater assurance that when they applied, they were more likely to be approved, and that they would have a much shorter wait to find out. That is likely true of the invitation to apply stage. At the EOI stage, however, applicants will be even less certain of their chances than prior to Express Entry.

On the legal side, the system likely means fewer refusals of applications for permanent residence. At the point an invitation to apply is extended, the expectation is that most applicants will be eligible and admissible. Decisions to refuse an application at that stage should remain subject to judicial review. However, the decision on scoring at the EOI stage appears much less amenable to legal challenge. The scoring is to be performed electronically, with little or no application of human discretion. Moreover, the points threshold for being eligible to receive an invitation to apply is a moving target set by frequently released Ministerial Instructions announcing a maximum number of invitations to be issued that meet the specified target. As of March 9, 2016, the Minister had released five MIs in 2016, roughly one every two weeks, providing these

51 Government of Canada, "How Express Entry Works" *Government of Canada, Immigration and Citizenship* (18 December 2015), online: <http://www.cic.gc.ca/english/express-entry/index.asp>.

numbers. The MI for March 9, for example, states that 1,013 invitations may be issued on March 9 or 10, 2016, and that invitations shall only be made to those assigned a total of 473 points or more under the Comprehensive Ranking System. It is difficult to conceive how individuals who fail to meet eligibility under this highly contingent and incremental system could obtain judicial review.

The test for whether Express Entry will succeed is much more likely to depend on how it works on the ground. The Harper government's stated intention was to maintain the annual number of federal skilled worker immigrants to Canada at its historic level of approximately 100,000, including dependent family members. The question is whether the new system will attract the same number of persons interested in making a new life in Canada as the former "first come, first served" system. This may well turn on whether prospective immigrants find the new system a sufficiently secure basis for making those life-changing plans.

IV. The Harper legacy in the Trudeau era

This article has identified two aspects of the Harper government's legacy in immigration and refugee matters: a public discourse casting migrants as untrustworthy, costly, and associated with criminal activity; and a policy of institutional change that strengthened the role of executive government, reducing security for prospective immigrants and permanent residents. The first turned out to be a failure — or to put this another way, the legacy of the Conservative government with respect to discourse around immigration issues is its failure. With respect to institutional changes, it may be too early to say a great deal, but there are reasons to believe this will be a more lasting legacy. Of these two aspects, the definitive failure of the government's attempt to craft the immigration discourse is more significant. This concluding section seeks to elaborate on these points.

With respect to the election in October 2015, immigration and refugee issues were front and centre. The differences between the Conservative government, and the Liberal and New Democratic opposition parties, were clear. Specifically and importantly, the Liberals under the leadership of Justin Trudeau made it a cardinal feature of their election campaign to reject what they identified as the government's negative and restrictive approach to multiculturalism, in favour of a more positive perspective.

The Harper government's policy initiatives with respect to immigration combined with three other policy initiatives pursued in 2015 to convey an impression of nativism and fear of the "stranger." First, there was the government's position, pursued through unsuccessful Federal Court litigation, that Muslim women could not cover their faces with the niqab when taking the citizenship oath.[52] Second, as a response to the rise of ISIS, the government moved to make the Canadian citizenship of dual nationals revocable should they be convicted of engaging in an armed conflict against Canadian forces.[53] Mr. Trudeau argued forcefully that this breached the long-standing principle that every citizen, whether acquiring citizenship by birth or by naturalization, must be treated equally. Third, the government enacted legislation with the easily ridiculed title of the *Zero Tolerance for Barbaric Cultural Practices Act*. The principal target of the statute was polygamy. A statement made during the election by Minister of Citizenship and Immigration Chris Alexander that the government intended to create a "tip line" for the reporting of barbaric cultural practices, only added to an overall impression of an exaggerated fear of the stranger.

Into the midst of a contest already defined in significant part by these positions occurred the international crisis of Syrian refugees flooding into Europe. The Harper government's series of program and legislative changes limiting refugee claims and benefits provided the context in which the Syrian refugee crisis occurred. The perceived slow response by the government to the humanitarian distress of Syrian refugees, including the death by drowning of the young boy Alan Kurdi, became a central issue in the election's closing weeks. The government's difficulty in changing that immediate perception undoubtedly followed from the fact that so much of its legislative agenda in the preceding years was built on a rhetoric of suspicion of refugees and recent immigrants.[54] To define its contrast in approach, Trudeau and the Liberals promised to permit 25,000 Syrian refugees to enter the country by the end of 2015.

There was an irony involved in the role played by Syrian refugees in the 2015 election campaign. The crisis in no way implicated Canada's refugee

52 *Ishaq v Canada (Citizenship and Immigration),* 2015 FC 156 Boswell J, aff'd 2015 FCA 194.

53 *Strengthening Canadian Citizenship Act*, SC 2014, c 22.

54 As just one example of many from Canadian media during this period, see Debra Black, "Immigration and refugee policies centre stage in federal election campaign" (15 September 2015), *Toronto Star,* online: <http://www.thestar.com/news/immigration/2015/09/18/immigration-and-refugee-policies-centre-stage-in-federal-election-campaign.html>, quoting Jason Kenney as saying: "More broadly, we need to make sure our efforts to crack down on illegal immigration, smuggling, fake asylum claims, crooked immigration consultants, fraudulent immigration marriages ... are properly enforced."

determination system, the subject of so much legislative activity by the Harper government. That system deals only with refugee claimants who arrive in Canada and make a claim for asylum within the country. The Syrian crisis concerned Canada's policies and programs directed at resettlement of refugees living outside their own countries, often in large refugee camps of a more or less temporary nature, and most often, a long way away from Canada's borders.

The Liberals won a majority victory, which it was possible to understand as a rejection of the Harper government's immigration and refugee discourse. Over its first several months in power, the Trudeau government moved to screen and admit the 25,000 refugees to which it had committed. With attendant publicity the government announced the arrival of the 25,000th refugee from Syria on March 1, 2016. The government has also cancelled, repealed or announced its intention to reverse the following initiatives of the Harper government that were animated by concerns about fraudulent refugee and immigrant claims:[55]

- The changes to the Interim Federal Health Plan, including withdrawing the appeal of the decision by Justice Mactavish in the *Canadian Doctors* case;
- The Regulations that introduced the conditional status for the first two years of permanent residence by sponsored spouses;
- The current configuration of the "designated countries of origin" concept, signalled by withdrawing the appeal of the ruling by Justice Boswell in the *YZ* case.

This leaves the question of what have been identified as the more procedural and institutional changes made by the Harper government. Here, the Trudeau government has to date done and said much less. In fact, its actions would suggest that it intends to maintain the course set by the Conservatives. This is true with respect to the use of Ministerial Instructions, and implementation of the Express Entry program. The Minister of Immigration, Refugees and Citizenship has issued numerous Instructions setting the required points score and the number of invitations to apply for immigration to be issued over short periods of time. No doubt the program, and its dependency on the Ministerial Instruction mechanism, had achieved significant bureaucratic momentum by

55 For the new government's statement of intentions in these areas, see Justin Trudeau, "Minister of Immigration, Refugees and Citizenship Mandate Letter," Office of the Prime Minister, online: <http://pm.gc.ca/eng/minister-immigration-refugees-and-citizenship-mandate-letter>. Note also that in this letter, the Prime Minister confirmed a change in the title from "Minister of Citizenship and Immigration" to "Minister of Immigration, Refugees and Citizenship."

the time of the election. Its future likely depends on the degree to which it succeeds in attracting the number and quality of economic class immigrants that were its original intention and justification. It would seem, however, only consistent with the Trudeau government's vision of a fair and open immigration process to limit the use of Ministerial Instructions as a tool for shaping and responding to the expectations of prospective immigrants to Canada.

These program changes reflect two longer-term trends in Canadian immigration law: enhancing the authority and flexibility available to executive government in administering the country's immigration programs, combined with a consequent loss of security for the prospective and recent newcomer to Canada. The use of Ministerial Instructions, and the Expression of Interest system, both reduce the legal status of applicants for permanent residence to Canada. They make the process of applying to immigrate to Canada less predictable, and less subject to assertion of rights by applicants. In a similar vein, the withdrawal of the right to appeal removal orders for all but the most minor criminal offences adds a significant degree of insecurity to the lives of families that have succeeded in immigrating to Canada. The more positive discourse advanced by the Trudeau government would suggest that it may be appropriate to reconsider this measure. The bar is currently set at a level that makes too many long-term permanent residents subject to peremptory removal from the country. It may even be time to look again to something like domicile status, which would reverse the current presumption that criminal conduct by immigrants to Canada is a problem mostly for their countries of origin to deal with. Convicted offenders and their families are not at any time, however, a strong constituency.

It might be said that the Conservative Government took a sword to many of the long-established understandings that informed Canada's immigration law. This would permit using the venerable saying that "they who live by the sword die by the sword" — for it appears that the Government's truculence in matters dealing with immigrants and multiculturalism served as one of the bases on which the election of October 2015 turned. And in the first year of the Liberal government of Prime Minister Trudeau, Canada has witnessed, with respect to immigration, one of the most emphatic rejections of a previous government's policy discourse in Canadian history.

The events of 2015 and 2016 have established one thing: the Harper government's approach to refugee and related issues strayed too close to a nativism and insularity that was uncomfortable for the preponderance of the Canadian electorate. This is important. It means that for the foreseeable future, political

discussions around immigration issues will start from a different place than the distrust and fear of the stranger. The government of Stephen Harper organized much of its agenda in an effort to change the national discourse in this area. It did so, it appears, as much or more for perceived political gain than to address real social problems. In the end, it was in this effort that the Harper government most clearly had its legacy shattered.

Plus ça Change? Labour-Relations Policy from Harper to Trudeau

*Alison Braley-Rattai**

This article focuses upon labour-relations policy in the federal jurisdiction, under Harper, and, to a more limited extent, under Trudeau. My enquiry is guided by the following: What was Harper's approach to labour-relations; what, if anything, has Trudeau done to resist the institutionalization of Harper's approach; and, was Harper's approach, in fact, new?

The Harper Government's relationship with organized labour was inarguably contentious. Whatever one thinks of the changes the Harper Government made to labour-relations policy, these changes negated the tripartite principle which underpins our labour-relations system, by ignoring the input of important stakeholders. Moreover, these changes appeared driven by a worldview that saw no role for organized labour. Despite this, we should be cautious about thinking that Harper's approach to labour-relations was vastly out of keeping with the changes that governments of all stripes have made in this policy area over the past thirty years.

Justin Trudeau pledged to fix governmental relations with public sector unions. To that end, Trudeau has already taken steps to repeal most of Harper's labour-relations statutes. However, it does not appear that Trudeau intends to introduce anything more substantive to champion the cause of labour.

L'article traite essentiellement de la politique de relations de travail dans la compétence fédérale sous Harper et, dans une moindre mesure, sous Trudeau. L'enquête de l'auteure est dictée par les questions suivantes : Quelle était l'approche de Harper des relations professionnelles? Qu'a fait Trudeau, s'il y a lieu, pour s'opposer à l'officialisation de l'approche de Harper? L'approche de Harper était-elle en fait nouvelle?

La relation du gouvernement Harper avec le travail organisé était incontestablement querelleuse. Quoi qu'on pense des modifications apportées à la politique de relations de travail par le gouvernement Harper, ces modifications ont réduit à néant le principe tripartite qui sous-tend notre système de relations du travail, en ne pas tenant compte de la contribution d'intervenants importants. De plus, ces changements semblaient être poussés par une vision du monde qui ne voyait aucun rôle pour le travail organisé. En dépit de cela, nous devrions être prudents en considérant l'approche de Harper des relations professionnelles comme complètement incohérente avec les changements apportés dans ce domaine de politique par les gouvernements de toutes allégeances au cours des trente dernières années.

Justin Trudeau s'est engagé à régler les relations gouvernementales avec les syndicats du secteur public. À cette fin, il a déjà pris des mesures afin d'abroger la majorité des lois de Harper en matière de relations du travail. Cependant, il ne semble pas que Trudeau ait l'intention de mettre en place quelque chose de plus considérable pour se faire champion de la cause du travail.

* Alison Braley-Rattai is an assistant professor of law and politics at the University of Toronto Scarborough. Thanks to Special Issue Editor Steve Patten (Associate Professor, Political Science, University of Alberta), and two anonymous reviewers for helpful feedback in the preparation of this article.

Introduction

The theme of this special issue of *Review of Constitutional Studies* (*RCS*) is the Harper legacy. A political legacy refers to a new approach or novel institutional arrangement that transforms governance in some meaningful, ongoing way. This contribution to this issue of *RCS* centres upon labour-relations policy under Harper and, to a more limited extent, under Trudeau. Three questions guide my inquiry. First, what was Harper's approach to labour-relations; second, what, if anything, has Trudeau done to resist the institutionalization of Harper's approach; and finally, was Harper's approach, in fact, new?

Labour-relations refers to the policy area that deals with the framework within which workers' associations (unions) and employers create the terms and conditions of work, via a process of collective bargaining. Underlying Canada's labour-relations system is the tripartite principle. This is the idea that labour, employers and government — as facilitator and as representative of the public interest — have an equal stake in the direction of policy in this area, and thus should be equal, consultative parties.

Labour-relations policy under Harper negated the tripartite principle by ignoring the input of labour (and often employers and disinterested experts alike). In doing so, it challenged the spirit of collective bargaining by altering the delicate balance of power between employers and labour. It was largely driven by a worldview that saw no role for organized labour at best, and at worst, viewed unions as inherently corrupt organizations. Despite this worldview, we should be cautious about thinking that Harper's approach to labour-relations was vastly out of keeping with the changes that governments of all stripes have made over the past thirty years. For his part, Trudeau has already introduced legislation to repeal most of Harper's labour-relations statutes. At this time, however, it does not appear that Trudeau intends to introduce anything more substantive to champion the cause of labour, despite his earlier rhetoric about the importance of organized labour to the creation of a stable middle class.[1]

The 2015 election

Although the Conservatives lost the 2004 election, they won a minority in 2006 in the wake of the Liberal sponsorship scandal. This was followed by a second minority in 2008, and a majority government in 2011. Many believed

1 The Liberal Party of Canada. 2015. *Real Change: A New Plan for a Strong Middle Class*, 16, online, <https://www.liberal.ca/files/2015/10/New-plan-for-a-strong-middle-class.pdf>.

that the 21st century would belong to the Conservatives, who would replace the Liberals as Canada's "natural governing party."[2] The federal election of 2015, in which the Liberals went from having the fewest seats of the three major parties to winning a decisive majority, dampened that view considerably.

One of the underlying themes of the 2015 election campaign was that voters had to "take Canada back" from a prime minister who, over his tenure, had solidified his reputation for secrecy, autocracy, a disregard for scientific evidence, and hostility to the *Charter,* the judiciary, and most anyone who did not share his ideological worldview.[3] Examples abound: the Conservatives' flouting the rule of law regarding cuts to refugee health care,[4] the consistent use of omnibus bills that made Parliamentary scrutiny of proposed legislation difficult,[5] the "tough on crime" agenda which failed, on numerous occasions, to pass constitutional muster,[6] Harper's public contretemps with the Supreme Court's chief justice,[7] cancellation of the long form census, — near universally condemned as the hallmark of Harper's lack of regard for scientific evidence[8] — his labeling of those who disagreed with his policies as "radical ideologues,"[9]

2 Darrell Bricker & John Ibbitson, *The Big Shift: The Seismic Change in Canadian Politics, Business* (Toronto: HarperCollins, 2013); Mark Kennedy, "The Conservative plan to become Canada's Natural Governing Party", *National Post* (14 October 2013), online: <http://news.nationalpost.com/news/canada/canadian-politics/the-conservative-plan-to-become-canadas-natural-governing-party>.

3 See e.g. Steven Marche, "The Closing of the Canadian Mind", *The New York Times* (14 August 2015), online: <www.nytimes.com/2015/08/16/opinion/sunday/the-closing-of-the-canadian-mind.html?_r=1>.

4 *Canadian Doctors for Refugee Health, et al. v Attorney General of Canada and Minister of Citizenship and Immigration,* 2014 FC 651; see Jennifer Bond, "Ottawa Ignores Rule of Law in Refugee Health Cuts Case", *The Toronto Star* (11 November 2014), online: <www.thestar.com/opinion/commentary/2014/11/11/ottawa_ignores_rule_of_law_in_refugee_health_cuts_case.html>.

5 So frustrated were the Liberals with this, that they sponsored an online petition asking Canadians to help stop Harper's "abuse of power": <http://petition.liberal.ca/harper-conservatives-omnibus-Bills/>; see also Bill Curry, "Conservatives table wide-ranging budget bills", *The Globe and Mail* (28 March 2014), online: <www.theglobeandmail.com/news/politics/conservatives-table-wide-ranging-omnibus-budget-Bill/article17719911/>.

6 *R v Summers*, 2014 SCC 26, [2014] 1 SCR 575; *R v Nur*, 2015 SCC 15, [2015] 1 SCR 773, *Canada (Attorney General) v Whaling*, 2014 SCC 20, [2014] 1 SCR 392. John Ibbitson, "In wake of Tory loss, questions remain about Harper's legacy", *The Globe and Mail* (19 October 2015), online: <www.theglobeandmail.com/news/politics/harpers-conservatives-trailing-liberals/article26879506/>. Even small 'c' conservatives like John Ibbitson, whose biography on Harper came out in 2015, opined that Conservative policies were, at times, "cruel".

7 International Commission of Jurists, "open letter to Gerald Heckman", (23 July 2014), online: <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/07/Canada-JudicialIndependenceAndIntegrity-CIJL-OpenLetter-2014.pdf>.

8 John Geddes, "Why Stephen Harper thinks he's smarter than the experts", *Maclean's* (9 August 2010), online: <www.macleans.ca/news/canada/cracking-eggheads/>.

9 Pearl Eliadis, "Dismantling Democracy" in Teresa Healy & Stuart Trew, eds, *The Harper Record 2008-2015* (Ottawa: The Canadian Centre for Policy Alternatives, 2015) at 48.

all capped by having earned the rare distinction of being a Parliamentary leader found "in contempt" of his own Parliament.[10]

Civil society groups — notably unions, environmentalists, and other activist groups on the political left, and even disgruntled civil servants themselves[11] — worked together in a loose coalition under the ABC (Anything But Conservative) banner. Sophisticated online schemes were developed that encouraged strategic-voting and vote-swapping. Whatever the wisdom of such practices, they represented the organizational pinnacle of the ABC strategy. Commenting on the 2015 election, Rex Murphy wrote: "[i]t is an election about whether Harper should stay or go as prime minister. Both his style and his major policies are the very core of the race."[12]

The Conservatives and labour-relations policy

The federal Conservatives did not campaign on a platform of making changes to labour-relations policy. Nonetheless, during the 2013 Conservative Party convention, nine motions relating to labour-relations were received from various Party chapters, and workshopped. Four of these were given priority and adopted into the agenda for general debate and voting, with the remaining five jettisoned as redundant. Voting delegates passed all four, including at least two that were more far-reaching than any presently enacted in any Canadian jurisdiction.[13] Since only 30 proposals, in total, made it to the convention floor, that four related to labour-relations — which are now part of the party's official policy — suggests that this was a policy area of some importance to the Conservatives.

10 House of Commons, Standing Committee on Procedure and House Affairs, *Question of Privilege Relating to the Failure of the Government to Fully Provide the Documents as Ordered by the House* (2011), online: <www.parl.gc.ca/HousePublications/Publication.aspx?DocId=5047570&Language=&Mode=1&Parl=40&Ses=3&File=18>.

11 Kathryn May, "Harperman protest song singer could make role of impartial civil service into an election issue", *National Post* (1 September 2015), online: <http://news.nationalpost.com/news/canada/canadian-politics/harperman-protest-song-singer-could-make-role-of-an-impartial-civil-service-into-an-election-issue>.

12 Rex Murphy, "This Election is about Stephen Harper — whether he should stay or go as Prime Minister", *National Post* (15 August 2015), online: <http://news.nationalpost.com/full-comment/rex-murphy-this-election-is-about-stephen-harper-whether-he-should-stay-or-go-as-prime-minister>.

13 Canadian Labour Congress, Report, "2013 Conservative Party Convention — Insider's Report", (6 November 2013); Steven Chase, "At Tory convention, Harper establishes himself as a leader set to fight", *The Globe and Mail*, (2 November 2013) online: </www.theglobeandmail.com/news/politics/at-tory-convention-harper-puts-future-battles-in-crosshairs/article15232705/>; Conservative Party of Canada, Policy Declaration (2014), online: <www.conservative.ca/media/documents/Policy-Declaration-Feb-2014.pdf>.

That labour-relations policy would be a focus is not, in and of itself, revelatory. Recently, political parties of different political stripes have emphasized the need to re-examine labour-relations policies. In Ontario, for example, the Liberal Government has convened the *Changing Workplaces Review*, whose mandate is to review several aspects of Ontario labour law, including the *Labour-Relations Act*. The Review's final report is not due until the end of 2016, thus it is too early to know what recommendations it will ultimately make and which, if any, the government will ultimately adopt. Yet it is notable that the review heeds the tripartite principle in its very make-up, in that it is led by two labour law professionals: one with a management-side and the other with a labour-side litigation background.[14] By contrast, the Conservatives introduced, in piecemeal fashion and without concerted input, a variety of bills that undermined integral aspects of our labour-relations system.[15] Instead, successive Conservative bills, including numerous pieces of back-to-work legislation, revealed a government that was contemptuous of the role of organized labour as a legitimate stakeholder (and often contemptuous of non-labour parties, as well).

Evidence of the Conservatives' lack of regard for tripartitism revealed itself early, with successive uses of back-to-work legislation to end work stoppages that otherwise conformed to the statutory framework that had been created, previously, through consultative processes with employers and labour. Within that broad framework, three "strike models" have been identified.[16] These are: the "unfettered" model, in which all workers within a particular group may strike (or be locked-out) subject to a handful of procedural requirements; the "no strike" model, in which no worker among a particular group may strike or be locked-out (commonly used for those public sector workers deemed inherently essential for purposes of public health and safety); and the "controlled strike" model, in which some workers among a particular group may strike or be locked-out, while others may not, in order to provide the minimum level of services deemed essential.

14 The tripartite principle is so important to our labour-relations system that in a 2003 case, an arbitrator, chosen by then Ontario minister of labour, was removed from the role by judicial order because he did not fulfill the implicit mandate of being satisfactory to both labour and management sides. See *CUPE v Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 SCR 539.

15 Not all of the Conservatives' policies were Harper's initiatives, *per se*. At least two bills with significant implications for labour-relations policy were private members' bills. However, it is well known that any private member's bill that does not have the prime minister's *imprimatur* will not be passed into law.

16 See generally Bernard Adell, Michel Grant & Allen Ponak, *Strikes in Essential Services* (Kingston: IRC Press, Industrial Relations Centre & Queen's University, 2001).

Between June 2011 and June 2012, then Federal Labour Minister Lisa Raitt repeatedly demonstrated what Bernie Adell has called "a fourth model, of sorts," that is, the "instant back-to-work" model.[17] Minister Raitt sponsored — or threatened to sponsor — back-to-work bills impacting Canada Post workers, three separate bargaining units at Air Canada, and workers at CP Rail, either before or very shortly after a work stoppage had begun, despite that fact that all proposed and actual work stoppages conformed to the relevant statutes. Adell observed that in the above cases, the back-to-work legislation did not conform to the criteria identified by statute for when workers could be made to return to work, and opined that the use of back-to-work legislation in the above cases represented the "federal government's repeated circumvention" of labour-relations law.[18]

Bill C-4 was another example of the Conservatives' insular approach to labour-relations policy. It was the Conservatives' fourth omnibus budget bill in the two years since they had secured a majority government. It made changes to over 70 laws, including the *Canada Labour Code* and the *Public Service Labour Relations Act*. Among other things, Bill C-4 authorized the government to unilaterally declare who was and was not to be considered essential on a case by case basis in the event of a labour dispute, while leaving the framework itself, un-assailed.[19] Notably, the changes to essential services made by Bill C-4 have since been overtaken by the Supreme Court of Canada decision in *Saskatchewan Federation of Labour v Saskatchewan*.[20] There, the Court indicated that unilateral declarations of essentiality by the government and the impossibility of neutral adjudication violate section 2(d) of the *Charter of Rights and Freedoms*.

Whatever one thinks of the Conservatives' proposals, they paid little heed to the tripartite principle. On the contrary, public sector unions complained of a "poisoned workplace" propelled by the "shroud of [secrecy]" under which the Conservatives operated. For example, the plan to alter the *Public Service Labour Relations Act* caught public service unions off-guard when it was revealed in the October 16, 2013 throne speech.[21] The Parliamentary committee examining the proposed changes in Bill C-4 agreed that they "were not the product of a

17 Bernard Adell, "Regulating Strikes in Essential (and Other) Services after the 'New Trilogy'" (2013) 17:2 CLELJ 413.

18 *Ibid* at 424.

19 *Public Service Labour Relations Act*, SC 2003, c 22, s 2, Division 8 ss 119-20.

20 *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4, [2015] 1 SCR 245 [*SFL v Sask*].

21 Kate Porter, "Clement defends move to limit civil servants' right to strike", *CBC News* (23 October 2013), online: <www.cbc.ca/news/canada/ottawa/clement-defends-move-to-limit-civil-servants-right-to-strike-1.2187767>.

consultative process" and recorded its disappointment that despite the committee's invitation, "ministers would not appear to explain the need for the proposed changes ... ."[22]

Bill C-59 was another omnibus bill that contained changes to multiple statutes. In particular, it empowered the Treasury Board to impose terms and conditions relating to sick-leave provisions even though such terms had historically been collectively negotiated.[23] More to the point, it proved to be highly provocative to the Public Service Alliance of Canada, the federal sector's largest public service union (henceforth PSAC). The PSAC regarded Bill-59 as the Conservative Government's negation of both the spirit of collective bargaining and its attendant constitutional right. Speaking about the bill, PSAC President Robyn Benson said it demonstrated that "[t]he government has decided to completely throw out any pretense that they intend to respect the collective bargaining rights of [sic] its workers."[24] Moreover, the Bill became the subject of a *Charter* challenge that was only suspended in view of the newly-elected Liberals' promise to repeal it.

Aside from eschewing tripartitism, Conservative policies often did not appear to be a response to a genuine problem, thus fueling speculation that these initiatives were more ideological than practical. One such example was Bill C-525, which changed the process for union certification and decertification in the federal jurisdiction, from a card-check to a vote-based process, despite the fact that there was no general desire on the part of stakeholders (unions, employers) to do so. In particular, Elizabeth McPherson, then Chair of the Canadian Industrial Relations Board (CIRB), underscored the tripartite principle to the proper functioning of Canada's labour-relations system. She testified before a Parliamentary committee that following the *Sims Report* in 1996, there were "numerous rounds of consultation [...] with labour and management over the amendments that would be made to the [Canada Labour] code." She further said that "with one exception there was total consensus on all these changes" and that these changes "worked very, very well."[25] The fact that the *Canada Labour Code* appeared to be working well as is prompted some

22 Senate, The Standing Committee on Social Affairs, Science and Technology, "2nd Report" (November 2013), online: <www.parl.gc.ca/Content/SEN/Committee/412/soci/rep/rep02nov13-e.htm>.

23 *Economic Action Plan 2015 Act, No 1*, SC 2015, c 36 Division 20.

24 CBC News, "Bill C-59: PSAC readies $5M campaign against sick leave reforms", (8 May 2015), online: <www.cbc.ca/news/politics/bill-c-59-psac-readies-5m-campaign-against-sick-leave-reforms-1.3066971>.

25 House of Commons, Standing Committee on Human Resources, Skills, Social Development and the Status of Persons with Disabilities, evidence, 41st Parl, 2nd Sess, No 12, (13 February 2014) at 915 (Elizabeth McPherson).

MPs to opine that it was not clear what problem Bill C-525 was meant to solve.[26]

According to the Bill's sponsor, Blaine Calkins, Bill C-525 was intended to reduce union-side intimidation and coercion in the context of certification drives, in order to resolve the "mountain of complaints that end up at the labour relations board."[27] However, this claim was not well supported by the evidence. In the 10 years prior, the CIRB had only received 23 complaints about intimidation and coercion in the context of a certification drive. The CIRB found six to have had merit and ruled as follows: against the union twice, and against the employer four times.[28] The sample size here makes it impossible to draw general conclusions, but at the very least the evidence does not support the need for any change to the certification process. On the contrary, it tends to support leaving the process as is, since the evidence suggests that employer-side, rather than union-side intimidation, is the greater threat. And just as card-check processes are said to enable union-side intimidation, vote-based processes are said to enable employer-side intimidation.[29]

The bill that perhaps most revealed the Conservatives' insularity and lack of regard for tripartism, though, was Bill C-377, which received royal assent on June 30, 2015. Bill C-377 was a private member's bill to amend the *Income Tax Act* to require labour organizations to disclose detailed information of their accounts on a publicly accessible website.[30] The putative reason for this was to create transparency and accountability with regard to how union dues are spent. The argument for providing this information to the public, and not solely to union members themselves, was that union dues are tax deductible, thus they are publicly funded, and thus all Canadians have a right to this information. Among myriad criticisms, it was noted that the bill did not apply to

26 See e.g. *ibid* at 10:42 (Jinny Jogindera Sims); *House of Commons Debates*, 41st Parl, 2nd Sess, Vol 147, No 71, (8 April 2014) at 1825-35 (Judy Sgro), online: <www.parl.gc.ca/HousePublications/Publication.aspx?DocId=6526323>.

27 *House of Commons Debates*, 41st Parl, 2nd Sess, Vol 147, No 10 (29 October 2013) at 1810 (Blaine Calkins), online: <www.parl.gc.ca/HousePublications/Publication.aspx?Pub=Hansard&Doc=10&Parl=41&Ses=2&Language=E&Mode=1#8113572> [House of Commons Debates, 29 Oct 2013].

28 House of Commons, Standing Committee on Human Resources, Skills, Social Development and the Status of Persons with Disabilities, 41st Parl, 2nd Sess, No 12 (13 February 2014) at 9:22 (Elizabeth McPherson).

29 See e.g. Sara Slinn, "Anti-union intimidation is real", *National Post* (7 December 2007) FP 15; Sara Slinn, "No Right (to Organize) without a Remedy: Evidence and Consequences of the Failure to Provide Compensatory Remedies for Unfair Labour Practices in British Columbia" (2008) 53:4 McGill LJ 687 [Slinn, "No Right Without Remedy"].

30 *An Act to amend the Income Tax Act (requirements for labour organizations)*, SC 2015, c 41.

businesses and professional associations, despite their also benefiting from tax exemptions.[31]

Opposition to Bill C-377 was broad-based, encompassing organizations as diverse as labour unions, law societies, provincial governments, insurance and financial associations, constitutional experts, and the former privacy commissioner. Opposition came also from within the ranks of the Conservative caucus itself. Conservative Senator Hugh Segal's speeches against a bill that he claimed revealed an "anti-labour bias running rampant,"[32] led 15 other Conservative senators to refuse to pass it without amendment.

There are a number of ways of assessing policy for its quality. We can assess policy by the clarity and soundness of its purpose, by its efficacy in achieving that purpose, by its over-breadth or under-reach, by its unintended consequences, by how likely it is to offend other policy instruments, laws or the Constitution itself. On virtually every one of these measures Bill C-377 was a failure.

From the beginning its very purpose was contested. While the bill's sponsor, Russ Hiebert, argued that the Bill's aim was to increase transparency and, thus, union accountability, unions believed the Bill was "driven by an anti-union ideology"[33] whose intended effect was to "alter the balance of labour-management relations across Canada."[34] According to this argument, the balance between labour and management would be altered because management would now have access to information about labour organizations, but labour organizations would not have access to comparable information about management. Noting this disparity, Senator Segal sarcastically pondered whether "Coca-Cola should be forced to disclose to Pepsi its marketing plan and expenditures [...]."[35]

31 See Doorey for a draft of the bill that includes businesses, and professional associations: David Doorey, "What Bill C-377 would look like if it actually treated unions the same as charities, businesses, and professional associations who receive tax benefits" (September 2014), *Law of Work* (blog), online: <http://lawofwork.ca/wp-content/uploads/2014/09/Bill-C-377-Revised1.pdf>.

32 *Debates of the Senate,* 41st Parl, 1st Sess, Vol 148, Issue 138 (14 February 2013) at 1500 (Hugh Segal), online: <www.parl.gc.ca/Content/Sen/Chamber/411/Debates/138db_2013-02-14-e.htm#40> [Senate Debates, 14 Feb 2013].

33 Canadian Teachers Federation, "Bill C-377: Overview to date on Bill C-377" (26 November 2012). To make their point crystal clear, the CFT titled their submission to the Senate Constitutional and Legal Affairs Committee, "Bill C-377: A Bill Designed to Stifle Voices of Opposition and Gut the Labour Movement." See Canadian Teachers' Federation, Brief Submitted to Senate Standing Committee on Legal and Constitutional Affairs (January 2015), online: <www.ctf-fce.ca/Research-Library/CTFSenateBriefC377.pdf>.

34 SEIU, Brief to Senate Standing Committee on Legal and Constitutional Affairs, (8 January 2015).

35 Senate Debates, 14 Feb 2013, *supra* note 32 at 1500.

Not only was the bill's putative aim brought into question, so too was the link between that aim and the means employed to achieve it. The Association of Canadian Financial Officers, for instance, claimed that the bill would fail to improve accountability.[36] Professor David Doorey explains why that would be, by reference to the American law upon which Bill C-377 was modeled (notably without the employer reporting requirements that the US law contains). Doorey says that the information produced by the American law is so dense and voluminous as to be almost "impenetrable to the average worker" and opines that it is mostly used by

> politicians and antiunion lobbyists, who are paid by corporations to campaign against and undermine unions. And by employers, who will scour the documents looking anything [sic] that could be used to attack a union trying to organize its workers or that can help them in their collective bargaining strategies.[37]

The bill was also problematic for its overreach. In this regard it was criticized by a series of law associations for its likelihood to require disclosure of information protected by solicitor-client privilege.[38] Similarly, the Investment Funds Institute of Canada and the Canada Health and Life Insurance Association raised concerns that the language of "labour trusts" contained in the Bill would trigger the Bill's onerous reporting requirements even when only one person in the entire trust fund was a union member.[39]

But perhaps most damning of all is that the Bill ran afoul of either the spirit or the letter of other legal enactments. For instance, former federal Privacy Commissioner Jennifer Stoddart expressed concerns that the particular requirements of the Bill did not strike the right balance between transparency and the privacy of individuals.[40] And the Bill would almost certainly have faced

36 Association of Canadian Financial Officers, Brief to the Senate Standing Committee on Legal and Constitutional Affairs, "C-377: Unnecessary and Unprecedented", (20 April 2015).

37 David Doorey, "Bill C-377: The Conservatives' Private Members Bill on Union Transparency" (October 2012), *Law of Work* (blog), online: <http://lawofwork.ca/?p=5739>.

38 Canadian Association of Labour Lawyers, Brief to Senate Standing Committee on Legal and Constitutional Affairs (April 2015) at 3-5; Association of Justice Counsel, Brief to Standing Senate Committee on Legal and Constitutional Affairs (23 April 2015), online: <www.parl.gc.ca/content/sen/committee/412/LCJC/Briefs/20150423_C-377_brief_AssocofJusticeCounsel_e.pdf>; Federation of Law Societies of Canada, Brief (25 September 2014), online: <www.parl.gc.ca/content/sen/committee/412/LCJC/Briefs/20140925_C-377_brief_FederationofLawSocietiesofCanada_e.pdf> [Federation of Law Societies Brief].

39 The Investment Funds Institute of Canada, Brief to the Senate Standing Committee on Legal and Constitutional Affairs (19 January 2015), online: <www.parl.gc.ca/content/sen/committee/412/LCJC/Briefs/20150121_C-377_brief_IFIC_e.pdf>.

40 Office of the Privacy Commissioner of Canada, Appearance before the House of Commons Standing Committee on Finance, on Bill C-377 - An Act to Amend the Income Tax Act (requirements for

— and likely not withstood — a constitutional challenge on a division of powers basis,[41] and possibly on a *Charter* basis as well.

In all, the Bill was almost certainly unconstitutional, and roundly criticized by labour stakeholders, and non-partisan observers for its impact upon not only labour-relations, but upon aspects of the financial, insurance and legal industries that one can only assume were not intended. For this reason, several amendments were proposed by various parties. For instance, the Canadian Life and Health Insurance Association suggested a simple amendment that would have defined "labour trust" so as to avoid reporting requirements for trusts that were not set-up for labour associations, but to which trust a person who also happened to be a member of a labour association, might belong.[42] The Federation of Law Societies suggested the addition of a simple clause specifying that nothing in the bill "shall require the disclosure of information protected by solicitor-client privilege."[43] In June 2013, the Senate passed the Bill with amendments (introduced by Senator Segal).[44] However, the Bill was re-introduced in the Senate later that year, in the exact form and particulars that it had been previously. This time, the Senate passed it without even the amendments it had previously adopted. If the Conservatives were at all interested in rebutting the view that this Bill was purely ideological in nature, the refusal to incorporate any of the numerous amendments proposed, belied that position.

The Conservatives and anti-union rhetoric

The negation of the tripartite principle and the anti-union bias that is evident in the Conservatives' labour-relations policies are not really surprising. In 1997, as then vice-president of the National Citizens Coalition (NCC) Harper gave a speech in Montreal to members of a US based organization called the US Council for National Policy, which many feel best captures his unadulterated political ideology. The basis of this speech was to provide these American visitors some insight into the Canadian political landscape from the perspective of a like-minded conservative. The speech opens by referring to the American conservative movement as a "light and an inspiration to people in this country

labour organizations) (7 November 2012), online: <www.priv.gc.ca/parl/2012/parl_20121107_e.asp>.

41 Bruce Ryder, Brief to the Senate Standing Committee on Legal and Constitutional Affairs, "The Constitutional Invalidity of Bill C-377" (7 June 2015).

42 Canadian Life and Health Insurance Association, Letter to the chair of the Senate Standing Committee on Legal and Constitutional Affairs (22 December 2014).

43 Federation of Law Societies Brief, *supra* note 38.

44 *Debates of the Senate*, 41st Parl, 1st Sess, Vol 149, Issue 181 (25 June 2013), online: <http://www.parl.gc.ca/Content/Sen/Chamber/411/Debates/181db_2013-06-26-e.htm?Language=E#23>.

and across the world." Harper then situates Canada on the political stage by referring to it as a "Northern European welfare state in the worst sense of the term." He derides the unemployed by stating that many of them "don't feel bad about it ... as long as they're receiving generous social assistance and unemployment insurance." And while he doesn't say much in this speech about organized labour (other than to identify the Canadian Labour Congress — Canada's largest umbrella labour organization — as "explicitly radical") he does identify the NCC as libertarian in ideology.[45]

The NCC's political leanings are relevant because libertarian theory has particular views about unions. Libertarian theory views unions as cartels, and equates their associational activity with those of companies that collude to price-fix.[46] Notably, the NCC's webpage identifies "corrupt union bosses" as one of the important issues about which they promote awareness.[47] Importantly, libertarian theory need not incorporate the notion that union leaders themselves are or tend to be corrupt. Rather, within libertarian theory it is simply in the nature of this type of association to interfere with market efficiency. It is unsurprising, then, that libertarians do not abide the legal framework within which unions in North America operate. Libertarian theory espouses that market efficiency and individual freedom are maximized when no restraints beyond those of commercial contract law mitigate what sellers and purchasers of labour-power may individually bargain. By contrast, the legal framework that regulates the interactions of organized workers and purchasers of labour-power, known in North America as the Wagner model,[48] codifies certain labour rights, including the right to certify into legally recognized trade unions for the purpose of bargaining collectively — with the concomitant duty of the employer to so engage. Thus, the Wagner model is anathema to the libertarian mindset. No arguments about union corruption are necessary.[49] In fact, the federal task force set-up to

45 Stephen Harper, (Address delivered at a meeting of the US Council for National Policy, June 1997); The Tyee, "Canada Through Stephen Harper's Eyes" (23 March 2011), online: <http://thetyee.ca/News/2011/03/23/StephenHarpersEyes>.
The conservative movement in the US, despite its Christian underpinnings, is highly influenced by libertarian economic thinking and well-funded by libertarian adherents. See e.g. Jane Mayer, "Covert Operations: The billionaire brothers who are waging a war against Obama", *The New Yorker* (30 August 2010), online: <www.newyorker.com/magazine/2010/08/30/covert-operations>.

46 See generally Richard Posner, *The Economic Analysis of Law*, 7th ed (New York: Aspen Publishers, 2007).

47 National Citizens Coalition, "About Us", online: <https://nationalcitizens.ca/index.php/about-us>.

48 Named after the senator who proposed the Act which created the framework, commonly known as the *Wagner Act* or, more formally, *The National Labor Relations Act*, 29 USC § 151-169 (49 Stat 449).

49 This is not to say that no union corruption exists (see generally the Charbonneau Report (2015) at <www.ceic.gouv.qc.ca/fileadmin/Fichiers_client/fichiers/Rapport_final/Rapport_final_CEIC_Integral_c.pdf>). It is to say, however, that there is nothing particular about unions that makes them

review the *Canada Labour Code* in 1996 culminating in the *Sims Report*,[50] concluded that "Canadian trade unions exhibit a high level of internal democracy and genuinely represent the interests and wishes of their membership."[51]

Notwithstanding, altering the Wagner model has been an ongoing project for conservative lawmakers in the US, (and increasingly so for those in Canada)[52] almost since the *Wagner Act* was passed.[53] Recently, noted political scientist Theda Skocpol has researched the rise of extreme right-wing politics in the US and notes the centrality of anti-union legislation to the agenda.[54] However, ideology is just one motivating factor and it is likely informed in complex ways by political factors. Charles Smith, for example, calls unions the "best financed social movement on the centre left" and notes that it has always been a "thorn in the side of Conservative [sic] parties" that "unions funnel some of that money into the political movement."[55] Nathalie Des Rosiers concurs, explaining that opposition to unions is best understood as a means to silence their long-standing advocacy of "economic welfare as a matter of right, and not only as a political choice [...]."[56]

If one were to take Harper and the Conservatives at their word, however, nothing could be further from the truth. The rhetoric of "union bosses" was regularly invoked in order to argue for piecemeal dismantling of the basic legal framework in which unions operate. "Union bosses" implies, as it is meant to do, that union leadership is dishonest and unethical, and uninterested in the workers it represents. For instance, during debate on Bill C-525, the bill's sponsor explained that the NDP would not support the bill because they were "in

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or their leadership more prone to corruption in the general case, and that evidence of corruption is the exception not the rule.

50 Commission of Inquiry to Review Part I of the Canada Labour Code, *Seeking a Balance* (Ottawa: Minister of Public Works and Government Services Canada, 1995).

51 *Ibid*, as quoted in Michael Lynk, "Union Democracy and the Law in Canada" (2002) 1 Just Labour 16 at 16.

52 Canadian Foundation for Labour Rights "Restrictive Labour Laws in Canada" (2016), online: <http://labourrights.ca/issues/restrictive-labour-laws-canada> [CFLR, "Restrictive Labour Laws"].

53 Douglas E Ray, Calvin William Sharpe and Robert N Strassfeld, *Understanding Labor Law.* 3rd ed (LexisNexis, 2011) 352.

54 Theda Skocpol, "Who Owns the GOP?", *Dissent* (3 February 2016), online: <www.dissentmagazine.org/online_articles/jane-mayer-dark-money-review-koch-brothers-gop>.

55 Teuila Fuatai, "Canadian unions celebrate defeat of C-377, international attacks agains unions intensify", *Rabble* (13 January 2016), online: <http://rabble.ca/news/2016/01/canadian-unions-celebrate-defeat-c-377-international-attacks-against-unions-intensify>.

56 Nathalie Des Rosiers, "Unions and Democratic Governance" in Matthew Behrens, ed, *Unions Matter: Advancing Democracy, Economic Equality, and Social Justice* (Toronto: Between the Lines, 2014) 93 at 100.

the pockets of the big union bosses who want to maintain their stranglehold on workers and muzzle their democratic voice."[57]

The rhetoric of "union bosses" places the focus upon the actions of individuals in a way that could attract the support of those who would otherwise want a legal framework for organized labour such as the Wagner model. This is why Russ Hiebert, the sponsor of Bill C-377, noted (however disingenuously) that support for the bill was high even among union members.[58] By contrast, it would be much more difficult to justify anti-union legislation by reference to the libertarian ideology that animates it (much less to a desire to silence political opposition) since by default the regulatory scheme in libertarian philosophy is simply the thrust and parry of market forces, of which many people are highly dubious.

In the end, the phrase "union bosses" elides an important distinction between, on the one hand, corrupt union leaders, and on the other hand, the mere fact of union organization in our labour-relations system. This is obvious when we examine the sort of things that are taken for examples of union corruption. For instance, in its brief to the Senate Banking and Trade Commerce Committee, REAL Women, a conservative interest group, derided the fact that unions have funded causes such as "abortion, feminism, homosexuality, as well the Palestinians in the current Israeli-Palestinian conflict [...]."[59] The corruption implied by the term "union bosses" refers to the (putative) fact that members neither know about nor desire these expenditures and object (or would do so) to the use of their dues to support such causes.

The implication of corruption, however, misunderstands that our *labour-relations* system maps the basic principles of our *political* system.[60] Whatever one thinks of the use of union dues to fund controversial political and social justice campaigns, there is nothing inherently corrupt or illegitimate in it. Representational democracy is majoritarian (in that there will usually be a minority that has not gotten what it wants) and non-direct (meaning that some

57 House of Commons Debates, 29 Oct 2013, *supra* note 27.

58 *House of Commons Debates*, 41st Parl, 1st Sess, Vol 146, No 95 (13 March 2012) at 1825 (Russ Hiebert), online: <www.parl.gc.ca/HousePublications/Publication.aspx?Pub=Hansard&Doc=95&Parl=41&Ses=1&Language=E&Mode=1>. Importantly, the polling was flawed, see generally Andrew Stevens & Sean Tucker, "Working in the Shadows for Transparency: Russ Hiebert, LabourWatch, Nanos Research, and the Making of Bill C-377" (Spring 2015) 75 Labour/le Travail 133.

59 REAL Women of Canada, Brief presented to the Senate Banking Trade and Commerce Committee, "Brief on Bill C-377" (May 2013) at 1.

60 Brian Langille & Josh Mandryk, "Majority, Exclusivity and the 'Right to Work': The Legal Incoherence of Ontario Bill 64" (2013) 17:2 CLELJ 475.

decisions are allocated to others to make, within a more general framework). The fact that union members often do not know about the allocation of their dues or that individual members do not always support how they are used is, in and of itself, non-revelatory. The analogy of our political system is helpful. The vast majority of Canadians do not know what bill is being debated in Parliament on any given day, or how much of our taxes will be required to fund the initiative should it pass. Nor do we all agree upon political outcomes.[61] The charge of corruption or the suggestion of illegitimacy do not follow from the recitation of these facts.

The labour movement has, historically, championed social justice causes.[62] This is so because concerns about the allocation of social resources and opportunities, which impel social justice advocacy and activism, are often viewed as inseparable from concerns about terms and conditions at work more narrowly construed. Unfairly, then, unions face a Catch-22: when they concern themselves narrowly with the workplace terms and conditions of their individual membership, they are accused of being a privileged elite whose privilege should be removed by dismantling the legal framework that supports it.[63] By contrast, when they embed themselves more broadly within various social movements, they are accused of ignoring the needs and interests of their membership, and thus the legal framework that supports them should be dismantled.

To conclude this section, labour-relations policy under Harper revealed a piecemeal and insular approach to a particularly controversial policy area, whose framework has been crafted over many decades. From a constitutional perspective, *Charter* challenges to Bills C-4 and C-59 had already been filed with the Ontario Superior Court when the Liberals came to power in 2015. Bill C-377 would surely have followed suit. From a policy perspective, many of these bills revealed either a failure to understand, or a willingness to repudiate, the broader principles that animate our particular labour-relations system.

61 Some may object to the fact that union dues can be compelled, and virtually all supporters of Bill C-377 on record, do. The issue of compulsory dues is, of course, a different matter, and one that is very well addressed in *ibid.* Either way, it is beside the point here, as Bill C-377 does not address the fact of compulsory dues.

62 This is not to imply that unions have always done so unproblematically. As with virtually all organizations, there have been historical issues with the inclusion of blacks, women, the LGBT community etc…This, however, is to say nothing more than that unions, being made-up of people, will reflect those people's general attitudes. Notwithstanding, in very many ways and for many reasons, unions have been champions of progressive causes beyond those that are explicitly class-based.

63 See e.g. LibertyPen, "Milton Friedman - The Real World Effects of Unions" (14 March 2014), online: <www.youtube.com/watch?v=xzYgiOC9cj4>.

The Liberals and a new agenda for labour-relations in Canada?

Given the focus of the 2015 election, it is no surprise that Trudeau's election night speech sought to reassure the world that "Canada was back."[64] However, a year into the Liberals' mandate, making comparisons between them and the Conservatives appears to be a journalistic pastime.[65] For some, there is considerable distance between Liberal rhetoric and Liberal action. Given the tenor of the entire election campaign, the Liberals are more than usually vulnerable to accusations of "plus ça change ... ." It is not obvious, however, that this is a reasonable assessment of the Liberals' actions to date. Rather, thus far the Liberals have committed to undo much of what was done by Harper's Conservatives in the area of labour-relations.

First, Prime Minister Trudeau has made good on an election campaign promise by introducing legislation to repeal Bills C-377 and C-525,[66] saying that doing so was necessary to restore a "fair and balanced approach to organized labour."[67] That Bill was passed by the House of Commons on October 19, 2016, and was before the Senate as of this writing.

Second, the head of the Treasury Board, Scott Brison, committed to the non-operationalization of those portions of Bill C-59 that removed sick leave provisions from collective bargaining and instead imposed a plan via legislative fiat. Brison deemed this necessary in order to "support the Government's commitment to bargain in good faith with Canada's federal public sector unions."[68] Although Trudeau made no secret of his desire to repair what he

64 Jim Bronskill, "'We're Back,' Justin Trudeau says in message to Canada's allies abroad", *The National Post* (20 October 2015), online: <http://news.nationalpost.com/news/canada/canadian-politics/were-back-justin-trudeau-says-in-message-to-canadas-allies-abroad>.

65 See e.g. Steven Chase, "Ottawa going ahead with Saudi arms deal despite condemning executions", *The Globe and Mail* (4 January 2016), online: <www.theglobeandmail.com/news/politics/ottawa-going-ahead-with-saudi-arms-deal-despite-condemning-executions/article28013908/>; Tonda MacCharles, "No vacancies for media at Liberals' cabinet retreat" *The Toronto Star* (14 January 2016), online: <www.thestar.com/news/canada/2016/01/14/no-vacancies-for-media-at-liberals-cabinet-retreat.html>.

66 Bill C-4, *An Act to amend the Canada Labour Code, the Parliamentary Employment and Staff Relations Act, the Public Service Labour Relations Act and the Income Tax Act*, 42nd Parl, 1st Sess (Committee reported without amendment on 12 May 2016).

67 Office of the Prime Minister, "Minister of Employment, Workforce Development and Labour Mandate Letter" (2015), online: <http://pm.gc.ca/eng/minister-employment-workforce-development-and-labour-mandate-letter>.

68 Professional Institute of the Public Service of Canada, "First Signs of Improved Labour Relations" (22 January 2016), online: <www.pipsc.ca/portal/page/portal/website/issues/legal/challenges/constitution/01222016> [PIPSC].

saw as the fractured relationship between the government and the civil service, the Liberals have been accused by the PSAC of acting like Conservatives in the present round of bargaining, notably by presenting a sick-leave plan virtually identical to that favoured by the Conservatives.[69] The Canadian Association of Financial Officers, another public sector union that was in negotiations with the federal Liberals as of this writing, initially appeared more amenable to the Liberals' approach than had the PSAC.[70] But as negotiations with both unions drag on,[71] general disenchantment with the Liberals' bargaining stance is evident.[72] Notably, unlike the Conservatives, the Liberals do not intend to impose their preferences via legislation, but to leave it to the thrust and parry of the collective bargaining process. In many ways, this is no less (and perhaps no more) than they had promised to do. It is presently unclear whether doubling-down on procedural guarantees will be sufficient to win the goodwill and trust of federal public sector unions.

Third, Bill C-4 made significant and myriad changes to the process for bargaining and arbitration. Initially, the Liberals resisted pleas to repeal, outright, those aspects of the bill relating to labour-relations, instead promising to "engage in consultations with public sector partners" about them.[73] However, a more recent promise to repeal Division 17 of Bill C-4 is not only consistent with the Supreme Court of Canada's ruling in *SFL*[74] (and coming on the eve of a scheduled court date, it had the effect of averting a judicial challenge), it also has the effect of reversing most of the changes to labour-relations policy made by the Bill.

As it stands, then, the Liberals have so far either introduced — or promised to introduce — legislation that would repeal Bills C-525 and 377 in their entirety, and most of those aspects of omnibus Bills C-59 and C-4 that public sectors unions found troubling. The Liberals have stated that doing so was necessary to restore fairness and balance to our labour-relations system. There seems to be little doubt that in the area of labour-relations, most of Harper's core

69 Kathryn May, "PS Bargaining with Liberal Government off to a Bumpy Start", *Ottawa Citizen* (5 February 2016), online: <http://ottawacitizen.com/news/politics/ps-bargaining-proposal>.

70 Association of Canadian Financial Officers, "Details on proposed short-term disability plan (2 June, 2016)." Accessed June 6, 2016. <http://www.acfo-acaf.com/2016/06/02/details-on-proposed-short-term-disability-plan/>.

71 Both unions have been without a contract for over two years.

72 Association of Canadian Financial Officers, "Collective Bargaining, Next Dates Set," (20, Oct. 2016)." Accessed Oct. 23, 2016. <http://www.acfo-acaf.com/2016/10/20/collective-bargaining-next-dates-set-2/>.

73 PIPSC, *supra* note 69.

74 *SFL v Sask*, *supra* note 21.

policy changes will not survive, nor will the Liberals adopt the Conservatives' anti-union rhetoric.

Gift horses or trojan horses?

Arguably, Trudeau is still settling in, and how he walks the line of "bringing balance to organized labour" remains to be seen. Trudeau's intention appears to be to restore the status quo: respecting the tripartite principle and paying appropriate heed to stakeholders' input. However, the status quo itself has been in flux for some time. The Canadian Foundation for Labour Rights identifies 218 restrictive labour laws that have been passed by both levels of government, and by all political parties, since 1982. Thirty-three of these were at the federal level, and approximately one third of these were passed with a Liberal majority.[75] And as Panitch and Swartz elaborate, the use of back-to-work legislation and other legislative means to "discipline" labour predates Harper.[76] My point in saying so is that while Trudeau appears to have largely rejected Harper's policies in the area of labour-relations, it would be naïve to see in Harper's approach a complete break from that of preceding governments, whether federal or provincial, and whether Conservative or not. While few parties have gone as far as proposing or adopting into their formal policy agenda items as far-reaching as did the Conservatives under Harper,[77] narrowing the scope of labour rights has been a common project across party lines for more than three decades.

In many respects, Trudeau benefits by simply not being Harper. For instance, after the federal election, noting that Canadians had voted for "change," PSAC President Robyn Benson blogged that there was "nowhere else to go but up."[78] According to political scientist Nelson Wiseman, most of what the Liberals did in their first six months was to repeal Conservative policies.[79] Beyond that, however, the Liberals' approach to labour-relations policy has been tepid.

75 CFLR, "Restrictive Labour Laws", *supra* note 53.

76 See generally Leo Panitch & Donald Swartz, *From Consent to Coercion: The Assault on Trade Union Freedoms*, 3rd ed (Aurora, Ont: Garamond Press, 2003).

77 For example, the Federal Conservatives adopted a formal stance against the Rand Formula and against union majoritarianism. As far as I know, only the Ontario Conservatives have so far taken a similar stand.

78 Robyn Benson, "Climate Change is a Union Issue" (26 November 2016), *Headwinds* (blog), online: <www.aec-cea.ca/>.

79 Monique Muise, "Has Justin Trudeau kept his promises six months after election day?", *Global News* (19 April 2016), online: <www.globalnews.ca/news/2647778/has-justin-trudeau-kept-his-promises-six-months-after-election-day/>.

In the spring, the Liberals introduced Bill C-7. This bill proposes a statutory scheme for bargaining within the RCMP, in response to a 2015 Supreme Court ruling.[80] So far, the bill has received considerable criticism from various police associations, mainly for how restricted it is. In particular, critics note that the bill excludes from collective bargaining any terms relating to the following: law enforcement techniques, transfers and appointments, appraisals, probation, discharge and demotion, conduct, basic requirements for carrying out duties, as well as uniform and dress.[81] In its landmark 2007 decision known as *Health Services*, the Supreme Court determined that, while freedom of association did not include the right to collectively bargain about every workplace issue, it did include the right to bargain over "fundamental" workplace issues.[82] Clearly, many of the excluded items constitute fundamental workplace issues. Therefore, the Bill has raised concerns that, unamended, it is too meager to withstand *Charter* scrutiny. Amendments to remove the exclusions, however, have been adopted in the Senate. The amended bill has been sent back to the House of Commons for consideration.[83] What the House will do with the amended Bill remains to be seen, but in any event, the Bill as passed by the Liberal majority could hardly be described as robust.

The Liberals also rejected an 'anti-scab' bill without even the benefit of committee hearings. Bill C-234 was a NDP private member's bill introduced in early 2016. The Bill introduced an amendment to the *Canada Labour Code* to prevent the use of replacement workers, commonly known as 'scabs', during a strike or lockout. Only BC and Québec have comparable legislation. That the Bill was defeated is not really surprising, but it is interesting to hear why Liberals claimed not to support it. Speaking on behalf of the Minister of

80 *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1, [2015] 1 SCR 3.

81 Bill C-7, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures*, 1st Sess, 42nd Parl (2016), cl 238.19 (c) (i)-(viii) (as passed by the House of Commons on 30 May 2016). See e.g. Mounted Police Professional Association of Canada, "Brief presented to the Standing Committee on Public Safety and National Security" (14 April 2016), online: <www.parl.gc.ca/Content/HOC/Committee/421/SECU/Brief/BR8172615/br-external/MPPAC2016-04-e.pdf>; Mounted Police Members' Legal Fund, "Brief presented to the Standing Committee on Public Safety and National Security" (14 April 2016), online: <www.parl.gc.ca/Content/HOC/Committee/421/SECU/Brief/BR8226355/br-external/MountedPoliceMembersLegalFund-e.pdf>; National Police Federation, "Brief presented to the Standing Committee on Public Safety and National Security" (17 April 2016), online: <www.parl.gc.ca/Content/HOC/Committee/421/SECU/Brief/BR8226374/br-external/NPF-FPNclauses-e.pdf>.

82 *Health Services and Support - Facilities Subsector Bargaining Assn v British Columbia* 2007 SCC 27 at para 19, [2007] 2 SCR 391.

83 *Debates of the Senate*, 42nd Parl, 1st Sess, Vol 150, Issue 54 (21 June 2016) at 1450, online: <www.parl.gc.ca/Content/Sen/Chamber/421/Debates/054db_2016-06-21-e.htm#34>.

Employment, Parliamentary Secretary Roger Cuzner adduced the very tripartite principle and necessity for broad consultation whose lack had been one of the reasons for labour's criticism of Conservative bills, particularly Bills C-525 and C-377. In other words, procedurally, the Liberals could not now support a private member's bill that made changes to the *Canada Labour Code*, without broader, tripartite consultation. In response, the NDP said that it would embrace broad consultations about the *Canada Labour Code*. So far, however, the Liberals have not indicated an intention to undertake the kind of in-depth and broad review of labour-relations policy that occurred with the *Sims Report* (and the all-but-ignored *Arthurs Report* in 2006)[84] and that is now happening, for example, in Ontario.

More to the point, it is not clear that the Liberals supported Bill C-234 in principle. Cuzner argued that the present provision, which allows employers to use replacement workers subject to certain conditions, was recommended in 1999 by the task force convened after the *Sims Report,* because it strikes the appropriate balance between the "competing views of unions and employers."[85] By contrast, Karine Trudel, Bill C-234's sponsor, argues that the capacity to hire replacement workers acts as a disincentive for employers to negotiate with unions, and that employers now appear much more willing to lockout their employees than they were previously.[86] This willingness is largely determined by the availability of other workers. Therefore, the rise of precarious forms of work in recent years challenges us to examine whether or not present policies are still equal to the task of achieving the appropriate balance between employers and labour. Given that, it might have proven fruitful to have the bill considered by committee where recent evidence about the state of labour-relations could have been brought to bear. Perhaps most disappointing of all, then, was that only a handful of Liberal MPs was willing to allow that. As such, it was defeated, arguably before it received a fair hearing.

84 The *Arthurs Report* was commissioned by the Federal Liberal Government, in 2004, and tasked with reviewing the *Canada Labour Code*. It was released in 2006 and all but ignored by the ruling Conservatives.

85 *House of Commons Debates*, 42nd Parl, 1st Sess, Vol 148, Issue 37 (12 April 2016) at 1805 (Roger Cuzner), online: <www.parl.gc.ca/HousePublications/Publication.aspx?Pub=Hansard&Doc=37&Parl=42&Ses=1&Language=E&Mode=1#8854196>.

86 *House of Commons Debates*, 42nd Parl, 1st Sess, Vol 148, Issue 37 (12 April 2016) at 1750 (Karine Trudel), online: <www.parl.gc.ca/HousePublications/Publication.aspx?Pub=Hansard&Doc=37&Parl=42&Ses=1&Language=E&Mode=1#8854196>.

Conclusion

Trudeau appears sincere in his desire to re-engage the tripartite principle and to take labour seriously as a legitimate stakeholder. However, if he wants to restore balance to labour-relations in the federal jurisdiction as he claims, he might need to do more than undo Conservative, anti-union bills. In the new industrial reality, where income inequality, precarious employment and the social and economic havoc that they wreak, is well documented,[87] measures that were seen to strike the appropriate balance between the interests of labour and employers even 15 years ago, may, upon re-examination, no longer appear to do so. By Trudeau's own admission, organized labour has a role to play in reducing income inequality and crafting decent work.[88] At this time, however, it is not clear that the Liberals intend to do any more to strengthen labour's hand, than to repeal the overtly hostile bills passed by a Conservative majority.

87 See, for example, Poverty and Employment Precarity in Southern Ontario Research Group. 2013. *It's more than Poverty*; Lewchuk, Wayne, Marlea Clarke and Alice de Wolff. 2011. *Working without Commitments: Precarious Employment and Health*, (Montreal: McGill Queen's University Press Law Commission of Ontario. 2012). Vulnerable Workers and Precarious Work: Interim Report. Law Commission of Ontario. Online: <http://www.lco-cdo.org/en/vulnerable-workers-interim-report>.

88 The Liberal Party of Canada, *supra* note, 1.

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

*Julián Castro-Rea**

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"[1] 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.

* Julián Castro-Rea is an Associate Professor in the Department of Political Science at the University of Alberta. He would like to thank the anonymous reviewers who contributed to improve earlier versions of this article.

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 expected, 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 Quebec'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. Quebec 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-npd-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 2 007), 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.

Book Notes

Dwight Newman, Book Review Editor

Emmett Macfarlane, ed., *Constitutional Amendment in Canada* (Toronto: University of Toronto Press, 2016).

Constitutional amendment has become effectively impossible in Canada, or has it? This edited collection engages with a range of legal and political facets of Part V of the *Constitution Act, 1982*. A variety of scholars examine the actors who could be involved in constitutional amendment, the legal procedures and formulae for amendment, and applications to some issues related to the Supreme Court of Canada, Senate, Crown, and secession.

Although in the form of an edited collection — rather than a monograph like Benoît Pelletier's wonderful but increasingly dated French-language book on amendment — Macfarlane's book is now the single most useful English-language book on constitutional amendment in Canada. In a variety of chapters, it offers an effectively comprehensive treatment of a topic that normally gets too many quick comments and not enough deeper reflections. It is a book that belongs on every constitutionalist's bookshelf.

Patrick Macklem, *The Sovereignty of Human Rights* (Oxford: Oxford University Press, 2015)

Patrick Macklem's latest book effectively critiques standard views concerning the intersection of international law and domestic rights instruments such as constitutional bills of rights. Macklem effectively roots international human rights in the need to respond to certain flaws in the international legal order, with many original consequences for the implicit primacy of different rights. For example, because Macklem's account is essentially oriented around the consequences of the legal organization of the international order in terms of sovereign states, rights like minority rights in international law, international Indigenous rights, and international labour rights take on a new primacy as vital responses to the consequences of state sovereignty.

Make no mistake. While having acknowledged parallels to aspects of thinking by some scholars like Allen Buchanan, this book is transformative.

Avoiding common conceptions of international human rights as growing out of basic moral claims or as stemming from global politics, he situates them as remedial parts of international law itself and as effectively responding to potential dangers in the way that international law ascribes legal sovereignty. This idea is original and provocative, and the book thus makes a significant contribution.

Because Macklem's account assigns a certain primacy to minority rights, Indigenous rights, and international labour rights, it more effectively explains their earlier historical origins as compared to international protections of paradigmatic civil and political rights. He also offers an explanation for why there is deep-seated ambivalence in many international rights bodies about these rights, showing how some of this ambivalence may stem from their thinking of international human rights in terms of a different (more orthodox) model.

In the course of that particular point, Macklem has an intriguing two-line reference to language rights. Particularly in the context of his writing from a Canadian standpoint that would allow interesting engagement with language rights, it would be genuinely interesting to see him do more on what the potential implications for language rights might be, as I would suggest that his approach might actually call for something more transformative in that arena than may be already apparent.

More generally, it would be fascinating to see more fully how Macklem sees the intersection of this account and domestic rights instruments that have deep-seated human rights protections that do seem to assume a priority to civil and political rights. A further-going account of the implicitly differentiated origins of human rights at the international and domestic levels would be a tremendously valuable extension of his project that would bear directly on constitutional law. Such an extension would aid meaningfully in how to integrate the international law requirements on states stemming from rights rooted in his account with existing constitutional law protections of rights, with an often different focus in those domestic constitutional contexts.

That such an extension is not present in this book speaks, of course, to no deficiency, but rather to the impossibility of doing everything in one book. Macklem's book is already an enormously significant contribution, and it is simply one that could ground many future research agendas. Any constitutionalists thinking about international law and its domestic implications quite frankly need to consider and take account of Macklem's claims.

Patrick Taillon, Eugénie Brouillet & Amélie Binette, eds., *Un regard québécois sur le droit constitutionnel: Mélanges en l'honneur d'Henri Brun et de Guy Tremblay* (Montréal: Éditions Yvon Blais, 2016)

The two solitudes of Canadian history find an unfortunate continuing life in constitutional scholarship. Quite simply, English-language constitutionalists fail to read enough of the French-language scholarship emanating principally from Québec. This book, itself functioning internally within Québec as a *festschrift* for two enormously influential Laval constitutionalists, could function for English-language readers as a very helpful introduction to some significant bodies of French-language constitutional scholarship.

The variety of authors within both reflect upon some of the scholarly legacy of Henri Brun and Guy Tremblay and engage in a series of original contributions across a range of topics bearing on federalism, rights instruments, and other matters of constitutional law. The very balance of topics is different than would ever be seen in an equivalent English-language collection. So has been that within the writings of Brun and Tremblay themselves. Québec constitutionalists have focused on constitutional topics in qualitatively and quantitatively different ways than English-language constitutionalists. In addition to its scholarly merits in general, and its role as a *festschrift*, this book is to be further recommended across Canada as a very valuable introduction to a range of Québécois constitutional scholarship.

LETTER TO THE BOOK REVIEW EDITOR

By David Schneiderman

I am writing about the 'book notes' review of my book *Red, White and Kind of Blue? The Conservatives and the Americanization of Canadian Legal Culture* by Professor Dwight Newman in Volume 20:1 of the *Review*. I appreciate that Prof. Newman found the book stimulating and to contain worthwhile material on constitutional cultures, which were two of my main goals. However, he also cited a number of purported shortcomings of the book, including subject matters he says were not addressed. With respect, I think this reveals a less than careful reading, and cite the following responses to Prof. Newman's criticisms to make this point:

#1: That I fail to engage with 'serious recent scholarly work on the monarchy by the likes of Phillip Lagassé.' In fact, I engage with Lagassé's work at p. 172. We might disagree about the amount of attention that work deserves — I chose to take Lagassé up when talking about Crown prerogatives. But to say that there is no 'engagement' is incorrect.

#2: That I do not compare the 'consolidation of Canadian executive power in recent years to the parallel phenomenon taking place in other countries such as the United States.' This is odd because this is a comparative study — I talk at length about executive power in the US in Chapter 2 (pp. 83-88). I also write about this in the context of Great Britain and, in passing, in 'western democracies' more broadly (at p. 89- 90). References to the body of literature dealing with concentration of executive authority appear throughout the footnotes.

#3: That I do not "really engage with the possibility that a modified nomination process [for the Supreme Court of Canada] flows inexorably" from the adoption of the Charter. I acknowledge this argument at pp. 238- 39. Much of chapter 5 is dedicated to addressing this very question.

#4: That I am too attached to '"great man" theories of politics.' I do not understand this point. I do not subscribe to a 'great man' theory of politics, nor do I refer to any such 'theory.' Perhaps Prof. Newman has confused that theory with observations, uncontroversial I should think, that power was concentrated, perhaps at unprecedented levels, in the office of the Prime Minister.

#5: Prof. Newman states that "the changes the Conservatives have pursued surely flow from broader political dynamics than Schneiderman acknowledges or even realizes." He does not, however, go on to identify any of these 'broader dynamics.' I appreciate that the book note is a short form, not given to providing a lot of evidence. However, it is unfair to make such an accusation, with its hint of condescension, without backing it up. This criticism is particularly dismaying because, in each of the four chapters in which I take up Conservative party innovations, I provide original empirical evidence in support of the argument, something not mentioned in the note.

Despite these disagreements, I thank Prof. Newman for having written a note on the book, and am glad he found it "well worth reading."

REPLY TO DAVID SCHNEIDERMAN

By Dwight Newman

I thank Prof. Schneiderman for taking the time to reply to my short book note. In my original book note, I was complimentary about his book in many respects but did express briefly some challenges. He has chosen to reply to some of these, and readers can examine my original note for others that have stood without issue. With respect, as for those replies he has put, I do not agree that they effectively challenge points in my review.

On #1, my point in my note was that claims in the book that the Conservatives sought to Americanize constitutional culture on a number of fronts did not sit neatly with very significant moves they also made to enhance the role of the monarchy, something discussed at length in a number of Philippe Lagassé's recent works. That Prof. Schneiderman can point to having included a footnote to Lagassé in the particular context of prerogatives does not answer that point.

On #2, that Prof. Schneiderman indicates he discussed a point "at length" over a particular six pages could almost come across as inadvertently humorous. I suggested he should have engaged in a fuller comparison on the point in light of how the presidentialization phenomenon related to needs of the contemporary state, and I stand by that.

On #3, I acknowledge that Prof. Schneiderman does mention the argument, but I stand by my original claim that he "does not really engage with it" — there are a lot of things going on in Chapter 5, and it is not focused closely on the point I raised.

On #4 and #5, I of course do not wish to ascribe to Prof. Schneiderman a view he does not hold. However, I used the well-known term, "great man theory", to refer to his underlying suggestion that the changes that he discussed flowed from particular political leadership. There are significant bodies of scholarship on what underlying forces led to such leadership being in place, which admittedly could not readily be cited in a short book note. With respect, I do not find it constructive for Prof. Schneiderman to speculate on alleged motives of "unfairness" and "condescension" on my part.

I thank Prof. Schneiderman for his reply and encourage readers to judge his arguments for themselves. I considered and continue to consider his book well worth the attention of readers.