Canadian Federalism, Abeyances, and Quebec Sovereignty

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Abstract

This dissertation examines the changing patterns of intergovernmental relations among political elites toward sensitive constitutional issues implicated in the Quebec sovereignty movement, in particular after the 1995 referendum on Quebec sovereignty-association. It extends David Thomas' concept of constitutional "abeyances" to suggest that areas of constitutional ambiguity over which there are strong enough disagreements to lead to a national breakup can be successfully managed given enough political will. This depends on their being enough political actors who otherwise share a common interest in national unity willing to keep abeyances from escalating into a crisis. The exposure and politicization of such abeyances in the middle of the 20th century raised the salience of constitutional disagreements in Canada nearly to the point of national disintegration. The decline in the salience of these abeyances and the waning of support for sovereignty in Quebec since the last referendum has reduced this possibility substantially. Using a mixed method approach within an historical institutionalist framework, this dissertation argues that, along with other social forces, this is partially explicable in light of the fact actors such as the courts, federalist political leaders, and their parties have been willing to avoid discussing sensitive constitutional abeyances and leave them unresolved in the interests of avoiding a constitutional crisis. This has certainly not resulted in end of the sovereignty movement in Quebec, which remains very much alive. However, along with other political and

social forces the willingness to keep deep constitutional disagreements camouflaged has permitted Canadian federalism to regain a measure of stability.

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Chapter 1

Puzzle, Methodological Approach and Concepts

1   Introduction

This dissertation seeks to explain how Canada initially confronted, was nearly destroyed by, and then ultimately learned to live with an aggressive sovereignty movement in the province of Quebec. For Canada this story is unquestionably the most important one of the latter half of the twentieth century, vastly overshadowing any other file or challenge in importance – none of the country's complex relationship with the United States, the management of its finances, or the development of its welfare state have ever posed the existential threat that the debate over Quebec's future did between the years 1968 and 1995. The challenge was unique in that it overshadowed any type of crisis that had come before it. Canadian history up to that point had been largely defined by the tensions between French and English, and it had occasionally been marred by violence. Up to that point there had been crises, and quite dramatic ones. Among these, the hanging of Louis Riel in the 1880s was perhaps the first major example and the Conscription Crisis during the First World War probably the most politically important. But they had never been able to put the country's existence into question.

1.1   The context and the puzzle

This dissertation explores how the federalist political actors at the federal and provincial level confronted the inflation of the crisis in Canadian federalism posed by Quebec secessionism and then eventually learned how to manage it successfully. The puzzle arose by comparing the very different eras that followed the two referenda, which were surprising given their results. In essence, the puzzle of this dissertation can be reduced to two questions: **Why did the 1980 referendum, which was such a clear win for the federalists usher in such an unstable period in Canadian federalism? Conversely, why was the period after 1995 comparatively so stable, given the close result?** The period when Canada's unity was seriously threatened is, if not over, clearly coming to a close for the time being. The evidence for this conclusion is manifest. On a superficial level, we can see evidence from the polling data. When Quebecers are asked, their support for sovereignty rarely garners much beyond 40%, and is in general mired in

the mid-thirties (see for example the following, although this is only a small sample of the material available: Dubuc 2012; Bourgault-Côté 2013; Barrs 2012; CBC News 2014). But one does not have to look at the polls, which can be volatile and change rapidly, to know that the changes have occurred on a much deeper level. Quebec sovereignty no longer dominates the debate in the province as it used to, and has disappeared somewhat from the national agenda. Many of the people who were active in that period are, if still alive, no longer particularly vocal and seem to have less interest in pursuing the project. Sovereignty consistently ranks as being one of the lowest priorities of the people who live in Quebec. It is simply no longer on the radar in the way that it once was.

1.2 Explanations for the decline of the sovereignty movement in Quebec

Broadly, one can identify five commonly cited, and deeply interrelated, reasons explaining the decline of the sovereignty issue in Quebec:

- The first is that of "constitutional fatigue." This is perhaps the least coherent argument and may be the one most in need of study. The argument is that people simply grew exhausted of the debate and just moved away from it. This raises the question of why everyone in Quebec is still so tired, almost twenty years after the referendum.

- The second is globalization. Writ large, the argument is that Quebecers have lost interest in the narrow aims of the national project and have become more involved with global questions regarding the environment, education, social justice, and the rise of neo-liberalism.

- The third involves identity. Here, the argument is that following 1995, Quebecers entered an inward looking period in which there was a loss of consensus as to who counted as a "Quebecer" and what sort of accommodations could be considered "reasonable" for new immigrants and outsiders. This new focus on accommodation resulted in a delegitimizing of the sovereignty movement, at least partially, as Quebecers embraced a more cosmopolitan view of citizenship that called into question the extent to which a "Quebec

homeland" was really needed.

- The fourth is generational change. The argument here is that the sovereignty movement was really the project of a single generation and succeeding generations are less engaged with the project than their parents were This is particularly associated with the work of Vincent Lemieux and his work on generational parties (see e.g. Lemieux 2011a; Lemieux 2011b).

- A fifth, more general argument has been advanced that the decline is attributable to the growth of Quebecers' "institutional security" in Canada - essentially that the problems that confronted Quebecers prior to the Quiet Revolution have now been addressed and hence removed any need for Quebec to pursue independence. A subset of this claim would also be that the "open federalism" practiced by the federal Conservatives since 2006 has helped them keep a lid on the sovereignist political project by respecting the traditional division of power. This might also help to explain why the supporters of the sovereignty project have started to go so grey: fewer people remember a time when there were legitimate reasons to vote "Yes." Overall, it is in this vein this project finds itself.

The *constitutional fatigue* argument has been among the most popular of the explanations offered. It was an argument that was easy for the federal Liberals to make after they took power in 1993. Roger Gibbins wrote at the time that "to the extent that a country had 'burnt out,' Canada had" (Gibbins 1999, 273). To be fair there never was any evidence that the constitution was a priority for the Liberals when they came into power, and Jean Chrétien made much of the new priorities with the famous slogan of "jobs, jobs, jobs" to capture the mood of the country when he was running for office. Certainly after the near death experience in 1995, there were those who could justifiably point out that there was a legitimate weariness of the crisis and with Quebec itself in the rest of the country (e.g. Mahler 1995, 465). The idea of a malaise in Quebec is not new, the idea has been around since at least the 1960s (e.g. Aquin 1962). Still it remains quite current (J. Pelletier 2007, 49; Jacques 2008; Laforest 2010, 11; Robitaille 2014a). In the world of practical politics, this sentiment is perhaps best phrased by Stephen Harper's insistence on avoiding the "*vieilles chicanes*" of the constitutional era, instead suggesting, perhaps with

reason, that the public has moved on to other issues. While this made sense in the 1990s, the question remains why the fatigue has persisted.

The other explanations share a singular focus on social forces acting inside the province of Quebec. The third one mentioned above, *globalization*, was among one of the first to appear and is tied into both economic and ideological changes that have occurred in the province in recent years. The Quebec left, in particular, is described as having become increasingly interested in questions surrounding education, global inequality, and the environment. Daniel Saleé of Concordia University made this argument as early as 2001, pointing to the intense opposition in Quebec to the Multilateral Treaty on Investment and the protests surrounding the Summit of the Americas in Quebec City as examples of the shifted discourse. He argues that people are transcending the national debate and becoming more engaged in contesting global economic and political structures in which the existence of Canada is largely irrelevant (Salée 2001, 185). Pascale Dufour of the Université de Montréal echoes this theme and has argued that the commitment of the PQ to free trade has pulled it away from its traditional supporters in the years since the 1995 referendum. This has opened up globalization as a "political space" where traditional sovereignist actors have now focused their attention, apart from the national question (Dufour 2007, 145).

> Sovereignty is no longer a "hot" subject, even for groups who were very engaged in the debate in 1995. Today, they are reasoning in terms of social justice, redistribution of wealth, and for some, radical political change. The development of globalization as a political space in Quebec has influenced the reappearance of the division between left and right and the delegitimization (at least partially) of the federalist/sovereignist debate (Dufour 2007, 145).

This line of thinking would seem to ring true, in particular in relation to the more recent emergence of socialist *Quebec Solidaire* in 2006 and the student strikes that rocked the province in the spring of 2012. In this context, Canada is a bit player, neither really loved nor hated, but seen more as an anodyne bystander given the scope of some of these issues. The argument that globalization is damaging to the sovereignist cause is not uncontroversial, however. Michel Venne has argued that globalization only makes sovereignty more important than ever, and has even given the movement new life (Venne 2005, 93), although he offers little evidence to

support this claim and he would seem to be in the minority in this view.

Furthermore, there are those who feel globalization is also a powerful check on sovereignty for those on the political *right* (although they tended to be more federalist anyway). This side of the debate was also summarized by Daniel Salée, who argued that once Francophone Quebecers had control over the economy they began looking outside of Quebec for both economic and financial reasons and neither the destruction of the Canadian state nor a narrow conception of Quebec citizenship served those purposes (Salée 2001, 169). A very similar argument was advanced recently in the forthrightly titled article "Why is Quebec Separatism off the Agenda? Reducing National Unity Crises in the Neoliberal Era" (2011). In it, authors Nadine Changfoot and Blair Cullen argue that neoliberal ideologies have increasingly formed the basis for intergovernmental cooperation with Ottawa. This neo-liberalism has created just enough asymmetry in Canada to allow for the sidelining of the sovereignty movement, as the governments of Quebec and Ottawa join a common commitment to pursue economic wellbeing based on common economic assumptions.

The argument that globalization has eroded the sovereignty movement is interesting, and convincing in many ways. But there is nothing that guarantees globalization would have such an effect on Quebec sovereignty. Other subnational regions have seen a rise in separatism over the same post-1995 period (Scotland, Catalonia, and Flanders, for example). Indeed, even if Quebec is increasingly economically and politically integrated with its neighbours, this does not mean, necessarily, that a decline in nationalism would be expected. This point was made in the aftermath of the 1995 referendum by Michael Keating, who wrote in *Nations Against the State: The New Politics of Nationalism in Quebec, Catalonia and Scotland*:

> In many ways, Quebec is thus becoming like the rest of North America. But this has not stilled nationalism. Quite the contrary. As a global society, it does not need to justify nationalism by pointing out differences with the wider society. The reference point for values becomes internalized and the society provides its own legitimacy. This is consistent with de Tocqueville's paradoxical finding that nationalism can become stronger even as cultural distinctiveness diminishes (Keating 1996, 106–7).

Furthermore, there is something unconvincing about the argument that Quebec really has taken a neoliberal turn, even if several prominent Quebec thinkers (e.g. the "*lucides*") have urged it to do

so. The Quebec welfare state has not seriously diminished in size and remains an aberration when compared to the rest of the Canadian federation (Marotte 2013). If neo-liberalism is the explanation, it is an incomplete one.[1]

The globalization argument is also deeply connected, but separate from, the idea of the evolving conception of a *Quebec identity* and the related idea of *generational change*. The different attachments that Quebecers have, and identity politics in general, have long been at the heart of scholarship in this field and in contributing to theories of secession more generally (e.g. Mendelsohn 2003; Beaulieu 2003; Maclure 2003; Hamilton 2004; Daniel 2012; Perrella and Éric Bélanger 2007; É. Bélanger and Perrella 2008; K. Gagnon 2014b; K. Gagnon 2014a). However, few issues have as overtly framed the political discourse in Quebec in recent years as who counts in Quebec society (e.g. Turgeon 2014). Appalled by incidents such as Jacques Parizeau's blaming of ethnic minorities for the 1995 referendum defeat and the Hérouxville debacle, much of the last decade in Quebec has been spent trying to nail down who is really a "Quebecer."[2] The clearest expression of this endeavour was probably the Bouchard-Taylor Commission, with its work on "interculturalism" and reasonable accommodation. The commission's recommendations reflected an urge on the part of many Quebecers to adopt a more cosmopolitan view of their community without losing their cultural distinctiveness. Arguably, this process has not been kind to the sovereignty movement, though, because to a large extent any nationalistic project depends on a narrower conception of membership for the project to make sense:

> Therein lies the crux of the problem for sovereignists. The unity of the political subject and the paradigm of citizenship and belonging that it entails are fast becoming targets of reprobation in modern-day politics. Quebec sovereignists are operating on the basis of a universalist, consensus-driven, Enlightenment discourse at a time when this kind of

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[1] There are those in the separatist camp who would disagree (Lisée 2001; Parizeau 2014; see Güntzel 2011 for the ongoing connections to organized labour, despite how frayed the links can be; see R. Séguin 2013 for reporting on the "de-Canadianization" of Quebec often alleged by the PQ).

[2] This refers to the well-publicized "code of conduct" that the municipality of Hérouxville introduced in 2007 that laid out religious practices that were banned for immigrants in the city. The code was widely criticized for playing on ethnic stereotypes and prohibiting conduct that was in no sense prevalent in Canada's ethnic communities. In particular, its prohibition on the stoning of women or female genital circumcision received international media attention and derision and was seen in Quebec as an example of the province's failure to adequately accommodate religious minorities.

political narrative, the institutional arrangements it favours and the social hierarchies it justifies are facing enormous resistance throughout the western world. Quebec sovereignty is being challenged not simply because it implies the dismantling of the Canadian state, an unacceptable option for many obviously, but also because insofar as it rests on the fundamental will to create an all-inclusive, universalistic and rationalist civic space, its conceptual underpinnings are under siege (Salée 2001, 173).

The challenge posed to sovereignists of creating an inclusive and universalistic civic space has not gone unnoticed by sovereignist thinkers themselves. The philosopher Serge Cantin, for example, has decried this trend as contributing to a slow loss of focus on the compelling underlying reasons behind "national liberation," an erosion of the dream of an independent Quebec (Cantin 2005, 60). More recently Mathieu Bôck-Coté attributes the decline in the sovereignty movement to the abandonment of traditional nationalist ideals (Bock-Côté 2007; Bock-Côté 2012). Although a committed sovereignist, both his books are premised on the fact that the nationalist movement has for now more or less run its course, and will not regain momentum until it has re-embraced a more nationalist dialogue. Bock-Côté argues that there is nothing fundamentally racist or intolerant about the need for the people of Quebec to maintain their own cultural identity, and that Quebec can be open and accommodating while nevertheless maintaining a strong and inflexible stance in favour of secularism, the defence of the French language and the requirement that newcomers accept the limits of Quebec culture. He argues that the sovereignty movement will continue to remain stuck until such time as it re-embraces a clearer form of nationalism, which is needed to both ground it and give it direction.

Finally, there are those who feel that sufficient progress has now been made by way of *institutional changes* to the Canadian federation to render the sovereignty movement a more or less "out-of-date" project. Indeed, the reforms that the PQ introduced in the 1970s on language, culture, and the economy would count among changes whose success may have ultimately served to defeat the long term goal of sovereignty. The importance of institutional factors, and the role they play in reassuring minorities in the Western context, has been found by a number of scholars who study secessionism (e.g. S. Dion 1996; Kelemen 2004; Sorens 2012). There has been work connecting the "open federalism" approach of the Harper government to that of the government of Jean Chrétien. Montpetit (2008) is perhaps the best known among these authors .

But there are many who feel that the reforms undertaken over time have had an important effect in diminishing support for sovereignty (Guindon 1978; Pratte 2008)

As part of the institutional argument, some argue the decline in support for sovereignty arises out of the belief that there is less space offered now for grievances to be expressed, for example, because of "summit" diplomacy shutting down. The role that grievances have played in supporting the sovereignty movement is something that has been long recognized by those studying Quebec (Pinard and Hamilton 1986; Mendelsohn 2003, 512). A significant number of people argue that much of the change in secessionist support reflects the style of government that Stephen Harper has brought in with his concept of "open federalism." His willingness to recognize Quebec as nation, give it additional latitude on the international scene, and his refusal to meddle in provincial jurisdictions are among the features of this approach. His approach would seem to reflect a more classical conception of federalism, one also demonstrated by Harper's willingness to work to address the "fiscal imbalance" and his refusal to get drawn into interprovincial fighting (G. Fox 2007, 45; Norquay 2012, 46–7; Harmes 2007, 418–22). This thesis is compelling and plays a role in the current project, but the combination of Harper's deep and persistent unpopularity in Quebec on the one hand, along with the low rate of sovereignty support on the other, remains a puzzle to be solved.

Nevertheless, of the work that has been done on federal tactics and strategy in managing the unity question, the material tends to be event specific and with little sense of the overall historic arc. The only serious exception to this is Russell's *Constitutional Odyssey,* an account that starts in 1867 and in its third edition ended in 2004. In general the questions posed are more like "what really happened at Meech Lake?" Or "how could Canada almost lose the 1995 referendum?" (e.g. Monahan 1991; McRoberts and Monahan 1993; Argyle 2004). Within these pieces the narrative tends to resemble that of a boxing match, focusing on who won a particular "round" or who did what to whom. Much is made of the emotions and betrayals of different people or the competing versions of events. Little attempt has been made to unify and explain the commonalties of tactics across governments. Furthermore, the assessment of tactics is usually bound up with certain individuals and their judgments, like the debate over the possible duplicity of Pierre Trudeau (Laforest 1995).

This is important as it touches in a key tension that rests in the study of federalism, on whether the system is best studied as the result of a created, elite driven and governed rationalist response to the problems of divided societies or if the federal framework really gains its energies from the underlying society itself, a population embracing federalism as a way of maintaining community distinctions within the greater whole. The first tradition is been associated in particular with the work of K.C. Wheare and the latter that of William S. Livingstone (D. E. Smith 2010, 4).

The latter line of thought has seen new life breathed into it from new-institutionalist/neo structuralists such as Jan Erk and Jörg Broschuck, both of whom look at how the social context governs and limits what elites can do (e.g. Erk 2008; Broschek 2014). In examining why politicians push into abeyances, changes in the underlying society will have an impact on the types of reforms that are possible or politically desirable. Work by Erk and Broscheck helps to explain the motivations of constitutional reform efforts. The debate over whether federalism is best studied as reflective of a protean underlying social context or through the top down design and shifting ambitions of political leaders will not be resolved here, but both lines of work can be drawn upon to explain what is and is not possible when it comes to pushing into abeyances. Depending on the issue, each factor will have a role to play. Suffice it to say however, actor agency will always be constrained and shaped by the social context in which both they and their political institutions are embedded.

Looking at the more limited scope of the formal political arena, of course significant work has been done on executive federalism and its institutions. The massive output of the Institute of Intergovernmental Relations at Queen's University alone leaps to mind. However, while there have been boatloads written on it, much of it is from the perspective of its ongoing activities, output and of the potential opportunities for intergovernmental relations to create better national policies (e.g. Bakvis and Skogstad 2012; Inwood 2011). Most are quite forgiving of the system, treating it as an inevitable reality whose shortcomings must be acknowledged but indulged. A leading exception is Donald Smiley, who warned in a 1979 article that executive federalism can serve to generate intergovernmental conflicts with little meaning for those not actually involved themselves (Smiley 1979). Picking up from Alan Cairns (Cairns 1977b) he worried about the growth of provincial governments and the implications for intergovernmental conflict. Even so, the creation of instability is only one of the six charges Smiley raises against the system, and he does not anticipate that it could be used strategically for this purpose. Along with Smiley, the

work of J. Stefan Dupré, as someone who wrote about the problems surrounding the system's workability, is also widely cited in this vein. Dupré was doubtful of the potential of executive federalism to resolve constitutional questions, seeing it as unlikely to succeed given the emotions, personalities, and scope of the issues (Dupré 1988, 247–8). R. Kent Weaver thought executive federalism certainly had the potential for destabilizing effects, although he still counted it as one of the more important institutions for reconciling conflict in Canada (Weaver 1992, 48–50). The ability of these conflicts to inflame sovereignist sentiment has also been discussed (R. Pelletier 1998; Howse 1998), but the role of these structures in the contemporary ebb of the sovereignist cause has not been seriously looked at (with Montpetit 2008 as a possible exception). And much of this work is old, predating even the first referendum in Smiley's case.

Given the competing explanations that exist for this phenomenon, it will be important to recognize that many forces are at play. This is ultimately a question of causation, something that is extremely hard to grapple with in the social sciences. It must be acknowledged at the outset that all of these explanations for the decline of the sovereignty movement do have some truth. People in Quebec *were* tired of the debate after the referendum in 1995, and had little appetite to have another referendum. Quebec *is* a more open economy than it was before and more exposed to the effects of globalization. Quebec *has* gone on an inward looking journey in recent years to better define who is a Quebecer how to reconcile minorities within its society. But are these complete explanations? Do they matter for the sovereignty movement?

Each of the above developments likely assisted the federal government, to some extent, in accomplishing its goals, as they did the Quebec Liberal Party to realize its goals. The identity debate proved highly fractious for the PQ, for example, and probably gave the federal government some traction among the cultural and linguistic minorities in Quebec. Globalization may have challenged conventional understandings of the nation state. Obviously, institutional reforms that reinforced French Canada would have counted in federalism's favour, and reluctance in the aftermath of 1995 to return immediately to the debate clearly gave Ottawa some breathing room. This has to be recognized. Examining the importance of different explanations is clearly important, even if it is hard to pin down which factor is doing what.

Even so, outside of the natural evolution of Quebec's political society, it would be wrong not to acknowledge that federalists had learned a great deal over the last several decades about the

inflammatory nature of constitutional questions in Canada and that those experiences would affect how they approached the national question in Quebec. Those experiences would shape their political strategies and how they addressed constitutional questions after 1995. Most critically, they have tried to avoid talking about it at all.

Research design and methodology

This project is fundamentally concerned with how constitutional abeyances with respect to Quebec's role in the federation were addressed by the policy elites over time with different consequences for the sovereignty movement in Quebec. As a result it suffers from many of the risks that arise from single case studies, although they can be mitigated through a careful research design. The independent variable is changes in political behaviour by elites with respect to the national question in Quebec, and the dependent variable is the strength and coherence of the sovereignty movement in Quebec. The concept of a "sovereignty movement" is quite broad, but additional conceptual clarity can be achieved by generating a composite set of indicators for measuring it, such as public opinion data on the national question, monetary and political support given for sovereignist parties, the electoral success of those parties, and perhaps information relating to the media climate in Quebec.

To achieve this, the dissertation will use a process tracing methodology. The process tracing approach is well known in political science and is one that is increasingly popular (Bennett and Elman 2006; Bennett 2008; Bennett 2010; Collier, Brady, and Jason 2010; Collier 2011). It has been used to study Canadian federalism in particular (Broschek 2010). This methodology recommends itself because the central problem of the dissertation is to provide a well-supported analytical account of the changing political behaviour of elites in a single case with variation over time. Process tracing is good for identifying the importance of specific mechanisms and has even been used to exploit some of the insights of Bayesian logic to isolate causes, as described by Andrew Bennett (Tarrow 2010, 239; Bennett 2008):

> Process tracing involves the examination of "diagnostic" pieces of evidence within a case that contribute to supporting or overturning alternative explanatory hypotheses. A central concern is with sequences and mechanisms in the unfolding of hypothesized explanations, often examining evidence at a finer level of detail or a lower level of analysis than that initially posited in the relevant theory. The goal is to establish whether

the events or processes within the case fit those predicted by alternative explanations (Bennett 2010, 208).

Subjective assessments are necessarily part of the process:

> In the Bayesian logic of inference, "subjective" choices are made explicitly and transparently, and they are less subjective than they appear because they are informed by existing scientific knowledge, documented for example in the form "based on sources X,Y, and Z, we have a relatively high level of prior confidence in theory A" (Beach and Pedersen 2013, 85).

Nevertheless, this methodology has a number of limits. In particular because it is so case specific, it may not lead to insights that can be generalized to other cases. "[P]rocess tracing" Bennett writes, "seeks a *historical explanation* of an individual case, and this explanation may or may not provide a theoretical explanation relevant to the wider phenomenon of which the case is an instance" (emphasis in original, Bennett 2008). As with all single case studies caution must surround judgements on whether the theory is falsifiable, whether single case evidence is suffering from selection bias, and avoiding confirmation bias arising from both developing and testing a theory out of a single case (Bennett 2008).

Process tracing requires an extremely intimate familiarity with the case and drawing on a wide variety of materials. To that end the dissertation will rely on a variety of sources:

Archival Materials: There is a considerable amount of material available for review for tracking the changes in the federal strategy over time. Good examples of this include the two volume set of these primary documents that has been collected by Anne Bayefsky (Bayefsky 1989), the Ministry of Intergovernmental Relations, Canadian Intergovernmental Conference Secretariat, and the Government Documents section of the University of Toronto.

Primary Documents: Major court decisions, legislation, parliamentary resolutions, work done by royal and other government commissions, reports, studies and other official material written by institutions or actors or otherwise commissioned by them are critically important.

Polling Data: Very extensive information is available here. The polling house CROP has maintained semi-monthly statistics on this question going back at least several years, and there is

a wealth of data available in the secondary literature about public reactions before, during, and after major events.

Hansards: The parliamentary record is important for tracking the evolution of federal policy, in particular during the 1996-98 period, as well as how the government of Quebec responded in the National Assembly;

Media Coverage and Editorial Material: Both scripted and unscripted comments in the media from policymakers, officials, and other relevant participants are an important element offering insights into events. In addition, the tone and content of editorial and opinion pieces can offer clues as to what the "attentive public" is thinking at a particular time and how effective actions of policymakers are proving to be;

Press Releases from Governments: These allow for some insight into what a government is thinking or at least what it wants the public to believe that it has prioritized;

The Secondary Literature: Significant use is also made of the vast amount of material available in the secondary literature. Much of it is interdisciplinary, involving a variety of historical, political, economic and sociological work. The work of Peter Russell, Alain-G Gagnon, David Cameron, Maurice Pinard, André Blais, Linda Cardinal and Richard Simeon, among others, has contributed much to this area, and the project will engage heavily with it.

Interviews: Thirty eight people were interviewed for this project. Under ideal circumstances, an interview-based project exhausts the population of involved people to gain their insights, and when not possible succeeds in generating a representative sample until "saturation" is reached, leading to a convergence on the truth given the repetition of the different sources. Practitioners often advise a "snowballing" technique, in that one interview leads to others. However, the sample here is non-representative, given the timescale, number of people potentially involved. Nevertheless, non-probability sample is useful when managed along with other evidence and particularly important given the focus on government strategy, and interviews are otherwise considered among the best types of evidence for process tracing (for uses of non-probability sampling see Tansey 2007). There are a number of people who have good firsthand knowledge of the events in question who have been interviewed for background knowledge, in particular for how contemporary IGR is conducted, they are listed in the chart in the attached appendix.

Memoirs and Recollections: There is a large amount of literature out there that has been written by people involved over the last 30 years. Extensive use will be made of their own published thoughts and recordings of the events that they lived through and their perspective of what they saw.

Historical institutionalism

Understanding the pattern of longer term, gradual institutional change that is also punctuated by brief and startling events makes this story ideal for study under an historical institutionalist (HI) lens, and that is what is going to be used here. But it also requires ensuring that actor behaviour is not "over determined" by the institutions so that agency is properly appreciated. A considerable amount of this story rests on the choices that parties (and in particular their leaders) made about evolving situations. While institutions structure actors' behaviour by creating opportunities and/or constraints on their actions, actors also have latitude to change institutions themselves. Institutions must be accepted for both their durability on the one hand and their susceptibility for change on the other.

Although more time will be spent on this in the next chapter, it is worth foregrounding how politicians are constrained in their actions and what motivates them. In a democracy, most politicians are driven by electoral considerations. They pursue the programs that they think will most likely get them and their parties elected. Indeed, those that do not tend not to last very long. Electoral considerations do not matter to the exclusion of all other motivations of course – some programs are introduced or ideas pursued out of a genuine belief that they are good or bad outside of whether or not they are popular – but electoral considerations ultimately tend to dominate. The electoral appeal of an idea or program is in turn deeply connected with the history of the political community, its culture and sense of self. In the constitutional arena, where the really "big ideas" tend to play out, the risks and rewards can be very high for a politician to try to make their mark. Whether or not they are reading the population right or if the public will agree with their view is something that is always a gamble, but one many are happy to try. Canada's constitutional evolution has created many opportunities for politicians to get involved in it is constitutional politics over the last several decades, with more or less urgency depending on the issue and moment in time. This is a story where actors forced institutions to change as new ideas came to the surface and others were discarded, even while they were constrained by these same

institutions. While the people involved were of course bound by the institutional setting, they were also agents within that structure who ended up reforming their environment when they realized that it was no longer meeting their needs. It was their interaction with, and reconceptualization of, the federal environment in Canada that conditioned their responses.

This "rounded" version of HI is one Stephen Bell recommends, as it takes advantage of the insights of constructivism but also takes into account the agency of different actors and how they can change their institutional environment. Political actors have "situated" agency, whereby actors interact with institutions in ways that both constitute their interests but also change those institutions with their decisions. Bell argues this happens in three ways: First, actors interpret and construct the experience of their institutional setting using subjective and inter-subjective cognitive and normative frameworks and discursive processes (Bell 2011, 893). Second, agents have contingently variable degrees of agential space or "bounded discretion" within institutional settings and can change institutions over time (Bell 2011, 894). Finally, institutions are not just sources of constraint but also have important empowering and enabling effects which interpretive agents may be able to exploit (Bell 2011, 895; Scharpf 1997). Bell's approach has much in common with the work of Paul Pierson (2004, 137), as well as Avner Greif and David Laitin (Greif and Laitin 2004).

This approach does vary somewhat from more traditional variants of HI. Importantly, the story here is one that does not fit the framework of "standard" HI that posits clear, short term, critical junctures between one set of institutions and another. The critical junctures here can take place over a period of many months to two or three years, depending on the reform. This is not really a serious problem for HI, however; indeed HI has been used to offer accounts of institutional change spanning centuries and without critical junctures at all, or at least quite different from how they are normally understood (for example, Mahoney and Thelen 2010 p. 1-3 remind us of recent work on the centuries long transformation of the British House of Lords. See also Thelen 2004; Hacker 2004). Change can be occurring under the surface, even while superficially it appears as though there is only continuity. And change can sometimes be hard to see; as Kathleen Thelen and James Mahoney have pointed out, it is important not to confuse the rule-conforming short term behaviour of actors with their long run strategies, given that the former often assists the latter (Mahoney and Thelen 2010, 22). In addition, there are many actors in this

story (e.g. political parties, courts), each of which is evolving in its own way and in reference to the others.

Furthermore, to appreciate longer term institutional change, path dependency must be broader than the analogy of ending up on a particular branch after climbing a tree, largely locked into whatever configuration you are in. *All* institutional arrangements are ultimately subject to the pressures of change. As Thelen and Mahoney write:

> …there is nothing automatic, self-perpetuating, or self-reinforcing about institutional arrangements. Rather, a dynamic component is built in; where institutions represent compromises or relatively durable though still contested settlements based on specific coalitional dynamics, they are always vulnerable to shifts. On this view, change and stability are in fact inextricably linked. Those who benefit from existing arrangements may have an objective preference for continuity but ensuring such continuity requires the ongoing mobilization of political support as well as, often, active efforts to resolve institutional ambiguities in their favour (Mahoney and Thelen 2010, 8).

In terms of the structure of the dissertation, there are four periods of distinct interest – 1960 to 1980; 1980 to 1995; 1995 to 2006, and 2006 to the present. Each of these periods represents a different point in the arc of the overall crisis and federal response to it. The choice to begin just prior to 1960 demonstrates how the crisis inflated following the arrival of the Lesage government by contrasting it with the conservatism of Maurice Duplessis, and serves as a foil for what happened subsequently and as a point of comparison with the contemporary situation.

Definitions

"Sovereignty Movement"

The dissertation depends on having a clear sense of what we mean by the "sovereignty movement" in Quebec, as well as what that means in other countries. This is not easy, because as Canadians are all too aware, this term has always been fraught with ambiguity. Several obvious questions immediately arise – are we only interested in studying those who are in favour of outright secession from Canada? Or do we include those interested in some vague idea of "sovereignty-association," a relationship that perhaps includes a monetary union? What about those who are simply "nationalists," who clearly identify as Quebecers first and vote for the PQ,

but may not vote "Yes" in a referendum? Simply asking citizens about how they would vote in a referendum is not always guaranteed to help either: it has been noted that even those who say that they would vote "Yes" in a referendum cannot always be relied upon as being truly separatists or to have a clear understanding about what they are saying (É. Bélanger and Chim 2012).

There are a number of ways to bring about clarity on the topic, though. At the highest level, we can say that the Quebec sovereignty movement counts as a "social movement" in the sense that term is used in the literature. Sidney Tarrow's definition of a social movement as being a "sequence of contentious politics that are based on underlying social networks and resonant collective action frames, and which develop the capacity to maintain sustained challenges against powerful opponents" would capture it (Tarrow 1998, 2). However, it cannot be left there for this study, because there are too many types of "separatists," ranging from violent extremists to those seeking close ties with Canada, so more clarification is needed.

Thus, this study defines a "sovereignty movement" as those actors and institutions seeking a fundamental break from the constitutional order of their existing state through democratic means, in that they demand a territory that can conduct its own foreign affairs, administer its own taxes, and pass legislation with the powers of an ordinary country, and be recognized as independent by the international community. While actors can also support continuing economic or other relationships with their former state, those relationships are voluntary and can be unilaterally terminated at the option of one of the successor states.

This definition is meant to be inclusive of supporters of sovereignty-association, as well as everyone further along the spectrum to hard nationalists. It does not include those who define themselves solely as members of a minority community but who would still not vote to bring about a rupture with the rest of their country. Note that this definition also specifies that separation can only happen through democratic means – those who would resort to violence as a legitimate method of pursuing this program are excluded.

The strength of a movement can be measured in various ways, (likely through public opinion data) and four dimensions are proposed here:

Priority: how important is the sovereignty question to the population as a political issue in relation to other issues?

Intensity: how strongly held are the beliefs of the supporters? Do these supporters contribute to sovereignist political parties?

Commitment: do sovereignists stay sovereignist over time?

Organization: how coherent is the leadership and institutions that guide it? This can be thought of as being akin to how clear the eye of a storm is on a weather map. Are the currents organized? Are they heading in the same direction? Is there a clear, institutionalized centre that provides direction? In the Quebec case, the movement was diffuse in 1968, with a variety of active groups that were poorly led and which had different agendas. By contrast it was highly organized in 1995, when there were three sovereignty parties actively collaborating to win the referendum.

There will be a number of resources used to give meaning to this concept. The following are particularly important:

Seats held by sovereignist parties: the percentage of seats held by those actively seeking to break up the country as a total of all available seats at the provincial level and those reserved for Quebec at the federal level. Naturally given the distortions of the electoral system this can only be one dimension of the assessment.

Public support for sovereignty: this information can be gleaned through polling data.

Major events or demonstrations: a media search would be the best way to get this information.

Editorial content: a look at the media climate in Quebec through an examination of editorial and opinion pieces in major newspapers.

Party commitments and coalitions: The shifting positions held by political parties on this issue. This could be determined through a review of their platforms and analysing their relationships to other political parties.

Scholarly and Popular Literature: A review of events and currents as they were experienced by the actors and public.

"Quiescence"

What does quiescence mean in the context of this project? "Quiescence" is defined as an absence of an issue from the political agenda, stemming from either a lack of proponents or their inability to make their issue a government priority or more popular. In this context, the absence of the following would suggest quiescence of sovereignty as a political issue, while their presence would suggest the issue has become active:

Referenda on a subject: are any scheduled, imminent, promised or under way? This can be determined from the secondary literature.

Political protests or demonstrations on the issue: discoverable through a media analysis.

Statements and actions by political elites on the subject: an analysis of both media and party platforms would be necessary.

Reports, commissions and conferences called by political actors into an issue to seek action: this information is available through archival work.

Public polling suggesting the public wishes to see more action and debate on a topic, or considers it a priority: available through archival work and publically available polling data.

Parliamentary discussions on a topic: available through Hansard.

"Stability" and "Instability"

A federal system is defined as "unstable" when its survival is plausibly placed in question by one or some of its members. This is distinct from a period of reform or change, which any system goes through in a continuous and natural way. Alternatively a federal system is "stable" when its existence is not in jeopardy. This decision is to some extent a subjective judgement on the part of the researcher, based on available evidence. Even so, one would expect the presence of or promise of imminent referenda, the election of governments which openly question the federal system, and public polling data antagonistic to its existence would be useful criteria for assessing the instability of a political system.

"Constitutionally Activist"

If a political actor no longer demonstrates abeyance preserving behaviour he, she or it has become "constitutionally activist" on that issue. The Quebec government, for example, demonstrated this shift after 1960, when the Liberals under Jean Lesage began to examine and seek reforms on questions that had previously been left in abeyance.

"Intergovernmental Relations"

This has been largely defined above, in particular with the distinction between normal and "Summit" IGR. In looking at this it will be necessary to consider whether the story being told here would have been the same had the relationships been less flexible and more institutionalized, or what would have happened if there had been venues such as the American or Australian Senate available to reconcile the deep tensions present in Canada (see for example Simeon 2006 for what the lack of institutions like an effective Senate has meant in Canada).

"Linguistic Accommodation"

"Linguistic accommodation" is defined here as the as the process through which political differences rooted in language are reconciled in a mutually acceptable way. Key determinates of whether this has been done successfully would include the willingness of publics to negotiate, accept adverse outcomes, and otherwise participate politically in the structures of the broader political community. This idea will be critical in assessing federal stability and instability, defined above.

Chapter 2 The Abeyance Concept

2 Abeyances

The dissertation looks at the crisis posed by the sovereignty movement in Quebec through the theoretical lens of the changing nature of "constitutional abeyances" at the heart of the Canadian constitutional and federal system. It suggests that part of the explanation for both the escalation of the crisis on the one hand and its deflation on the other is connected to the willingness of constitutional actors to keep certain fundamental disagreements off the table. Times of crisis and instability are emblematic of direct confrontation of fundamental political issues, whereas stability reflects an understanding by actors to leave the substance of those matters off the table.

2.1 Abeyances

This chapter develops the theoretical concept of abeyances. It distinguishes abeyances from other political concepts, theorizes how an abeyance can "collapse" and emerge as a political issue, how it might be restored, and how abeyances have been dealt with in Canada.

2.1.1 Definition and origins of abeyances

An abeyance is an unsettled, constitutive matter at the heart of a constitution. It is constitutive because it concerns what the political community is and how different institutions and actors relate to one another at the most basic of levels. Competing interpretations on abeyances are therefore more serious than ordinary "run of the mill" disagreements; they lead to existential questions for political communities about how they should be governed and by whom. When a stakeholder with an interest in resolving an abeyance tries to supply a "definitive" answer to one, it will almost always set up an existential clash with those who hold a competing view and will generate a constitutional crisis as the two visions collide. The crisis arises because to "lose" on the point would leave the vanquished party with a constitution it cannot accept or otherwise leave it unable to accept the basis of the political community as now constituted. Thus, abeyances are subjective in nature; it requires an actor to define them as constitutive from their perspectives. As a result, the specific content matters less than the perception of importance of what is at stake. Furthermore, because they are at root constitutional questions they touch the deep matters of identity and governance that are reserved for constitutions.

The sources of abeyances can vary. An abeyance might arise out of a logical tension in a constitution that had been overlooked at the time of drafting, for example. This may be especially so if the constitution is formed under pressure leading drafters to gloss over matters of disagreement in the interests of getting a deal. Abeyances may also develop over time as a constitution evolves and only come to light when the actions of a political leader lay bare a problem that had not been fully realized. This can happen as different institutions change, others are added or dropped, or the political culture of a community evolves. Abeyances may lurk unresolved in the constitution over a long period of time, doing little damage to an otherwise perfectly functional constitution. Because actors may be otherwise quite content with the constitutional order, there may be little interest in addressing the subject.

More often however actors will have a sense, even if it is unstated, of the trouble that awaits them if they start to push into the matter too deeply. They will try to avoid doing so, and from this one can discern a typical pattern of behaviour surrounding the management of an abeyance. In the ordinary course one expects actors to "hold a matter" in abeyance, in a sense showing a common willingness to avoid getting into a morass they would rather avoid. During these times of stability, one recognizes a mutual pattern of issue avoidance by the relevant parties, or attempts to de-politicize a matter being held in abeyance into a discrete, technical, unimportant or uninteresting question. At all times however, when the matter must be addressed for whatever reason, (perhaps on account of an external shock), one often finds a willingness among actors to resort to half measures in an effort to keep the problem camouflaged. This will entail appearing to entertain multiple visions of the question at once, acknowledging different positions without agreeing with them, or offering modest or superficial concessions without conceding what they see as the "true" interpretation on a deeper level.

The concept of a constitutional abeyance is particularly associated with the work of Michael Foley, who developed it in the British and American contexts in his book *The Silence of Constitutions: Gaps, 'Abeyances' and Political Temperament in the Maintenance of Government"* (Foley 1989). The central argument is that constitutions are important not just for what they say, but also for the things that they leave out. The material that is left out is often more than omissions or points that need clarification, but can actually have beneficial, ameliorative effects. In fact, confronting an abeyance can have a catastrophic effect if it is not handled correctly. Foley initially defined abeyances in this way:

Abeyances should not be thought of as empty constitutional 'gaps' to be filled in through the normal course of legal interpretation and political development. Neither should they be seen as constitutional 'deals' by which particular issues are attended to through a conscious form of mutual accommodation between contending parties, nor as 'conventions' demarcating expected behavior through informal but generally obligatory agreements. On the contrary, abeyances should be seen as akin to barely sensed disjunctions lodged so deeply within constitutions that, far from being susceptible to orderly compromise, they can only be assimilated by an intuitive social acquiescence in the incompleteness of a constitution, by a common reluctance to press the logic of arguments on political authority to conclusive positions, and by an instinctive inhibition to objecting to what is persistently omitted from the constitutional agenda (Foley 1989, 10).

He goes on to state that abeyances are valuable "not in spite of their obscurity but because of it" (Foley 1989, 10). Abeyances are gaps that "remain vacuous for positive and constructive purposes. They are not, in any sense, truces between two defined positions, but rather a set of implicit agreements to collude in keeping fundamental questions of political authority in a state of irresolution" (Foley 1989, 10).

Foley initially gave his examples as the fight of the Stuart monarchs with Parliament in the lead up to the English Civil War and the expansion of the powers of the U.S. President under Richard Nixon's "imperial presidency." The two cases show that abeyances reveal that there is less of a distinction between a "written" and "unwritten" constitution than one might think. Both share essential ""unsettlements" that help to make it function, in that those who hold competing visions of how the state works slide past one another while ensuring that the broader whole functions. But however subtle they may be, they are also tremendously important, and in the event that they are politicized they can lead to a major constitutional crisis. In the example of the early Stuart Constitution, the direct confrontation arose out of the ambiguity that surrounded the power of Parliament in a monarchial context, the idea of the "King" versus that of the "King-in-Parliament." The unlimited sovereignty implied by the first institution and the limits implied by the other were left unresolved, a point never seriously pushed and left to the complicity of the different parties involved. The constitution survived precisely because the matter was never addressed. "The constitution, therefore, did not just rest upon feasibility of unanswered

questions; it also survived by proceeding on the basis of the question remaining unasked"(Foley 1989, 31). It was only after Charles I began to assert his technical authority as he saw it that the abeyance was revealed and necessitated a response.

Something similar occurred in the American case under President Nixon. The constitution never really specified exactly what the President's powers were, and under Nixon the office began to reveal the extent to which it had not been clearly hindered by traditional "checks and balances" (Foley 1989, 64). Exemplified by the famous exchanges with David Frost, Nixon thought of the office as being able to take whatever actions it had to in order to defend the nation, including illegal ones. It would not be practicable to seek the consent of Congress. The office of the President could do it "by definition" (Foley 1989, 68). Foley points out that for most of the American public the actions of Congress and the subsequent resignation of the President in the face of almost certain impeachment gave the illusion that the constitution was in fact working as it should. Nevertheless, the point of the illustration is that Nixon was only able to take the actions he did because the range of the office, and its relationship to the other branches, had not been made entirely clear, and like Charles I, the crisis only emerges once the ambiguity is pressed to the office's advantage (Foley 1989, 72). [3]

2.1.2   Why do abeyances become politicized?

Abeyances help us to understand those voids in the constitution that are void for a reason, specifically because they represent zones of conceptual tension which cannot be reconciled in a

[3] It is important to distinguish this line of literature from "social movement abeyance" theory that is associated mostly with the sociological literature. It too is concerned with the rise and fall of social movements, but that theory is more concentrated on how social movements tend to survive in times when they appear to have subsided, and what links one movement upswing to the next. Developed initially by Verta Taylor, currently of the University of California Santa Barbara (Taylor 1989) it has been particularly associated with the periodic rise and fall of the women's rights movement in the United States. Nevertheless it has been applied to a variety of other contexts as well (Holland and Cable 2002; McAdam 1982 provides some overview of the literature and some examples). This literature would be most helpful for understanding how the movement is surviving during its current dry spell, but it is not the theoretical lens being applied here to study elite behaviour contributing to its current difficulties which is rooted more in law and political science than sociology.

way that would keep the rest of the constitution as it is otherwise understood satisfactorily intact. But they also differ from these other ideas because their existence is betrayed by a specific type of observable *behaviour*, one that exists when different political actors collectively avoid an intractable issue for fear of doing damage to the greater constitutional whole. When an abeyance emerges and becomes the subject of political conflict it can be said to have developed into a *political issue,* given that the avoiding behaviour is no longer there. Turning a constitutional abeyance into a political issue nearly always results in a constitutional crisis.

Abeyances can become politicized, or "collapse," for many different reasons but whether they do is ultimately dependent on one or more political actors making the calculation that they want to "push" into an area that had been kept off-limits in order to assert their particular vision over another. The motivation of political actors to make this calculation can vary, but in Canada it has almost always been electoral considerations on the part of political party leaders. A political leader who sees an advantage in making an abeyance into an issue can distinguish himself from his opponents or offer a vision that is compelling to followers. Conversely electoral considerations often dictate that abeyances be maintained, creating willingness by leaders to offer vague concessions on key points, political fig leaves, or to ignore questions altogether. Of course, at this point the sociological literature on federalism becomes important, and one inevitably must ask into the social context of abeyances. As per Erk and Broscheck, the abeyances will present themselves as contexts of ambiguity, making them attractive at times for actors to push into. They speak to different groups at different times. They will pre-exist the careers of most politicians. The success of their efforts will therefore depend on more than their innate skills or degree of planning in their designs. Furthermore, it will depend on which section of the electorate to whom they wish to speak – some abeyances can be quite technical. Thus the politicization of abeyances by elites and the success of that effort in public opinion are related phenomenon but not exactly the same. Indeed traditionally, more than anything, abeyances have been an intra-elite struggles among political leaders and institutions. In Foley's examples public opinion played a back seat role to a struggle among constitutionalized actors (King vs. Parliament; President vs. Congress). But in Canada, an advanced liberal democracy where the public is attuned to political debates and their place in them, then electoral considerations become the key consideration. The Quebec-Canada constitutional struggles to some extent started with debates among elites about the constitution, federalism, and the true nature of the

Canadian state, but perhaps inevitably public opinion became critically important in the resolution of abeyances and the way they were framed by political leaders.

This is not to detract from the authentic beliefs of the actors, however. For example, there was little public pressure on Pierre Trudeau to begin the patriation process in the late 1960s after he succeeded from Lester Pearson. He arrived with a federal vision clearly at odds with many provinces and that was of dubious popularity, as well as one that initially failed at Victoria. But it was up to Trudeau whether to proceed and he made the choice to make the constitution a political priority notwithstanding public opinion. However, even Trudeau only proceeded after he gambled, (correctly), that his actions would not prevent him from winning the next election, no matter the outcome. Similarly, the ardour that most *péquistes* feel for the independence project is beyond doubt – the commitment is solid and complete and for many utterly unshakable, notwithstanding the polls. But how to frame the matter, which issues to push and which to leave, and how to frame the narrative is a tactical decision. Here abeyances can play in the overall strategy, the purchase that one gets from exploiting them will vary depending on the time, the context, and the subject matter. As might be expected, in Canada their relevance and presence in the public debate has waxed and waned accordingly.

Electoral calculations are tricky. They are always rooted in the judgement a leader has of the mood of the society he or she is governing or seeking to govern at a particular time. The cost-benefit of action or inaction is never clear, and it often is only in hindsight when the true measure of a judgement and its wisdom can be reviewed. The forces that change public opinion are themselves influenced by a wide variety of factors. Beyond the natural evolution of public opinion, outside events and structural changes in society and its institutions can change the political calculus in myriad ways as well. For example, the addition of new provinces in Canada over the latter half of the 19th and early 20th centuries likely made it systemically more difficult for leaders to keep vague much of what had been kept vague in 1867 (such as an amending formula) from coming to the surface. Thus, a theory of abeyances—and the one used here – attributes much to the agency, judgement, managerial skill and political acumen of those who are charged with running a country that is often changing in front of their eyes.

To clarify, like other political issues, abeyances gain the greatest traction when the differences in vision are most acutely felt. The electorate will have an easier time understanding the problem if it is laid out before it and critical differences in opinion are given considerable attention by leaders. If an actor can bring clarity and salience to the abeyance, the increased understanding and sense of importance will lead to more polarization and galvanization of the electorate. Conversely, if the issue is unclear, treated as unimportant by leaders or hidden from the public, interest will wane in the abeyance under discussion. This decline of public attention is critical in their restoration.

2.1.3 Converting abeyances into taboos

Even if an abeyance has come to the surface and results in political conflict, it does not have to result in a political crisis. There may be overriding considerations that encourage actors to "forget that they ever brought it up." As a result, If it is subsequently dropped again as a political topic through the various actors' restoration of their previous behaviour on the topic, even without agreement on a solution, it can be said that the abeyance has returned to being an abeyance, and in such a case specifically in the form of a *taboo*. Under what conditions can we expect that political actors can restore a constitutional abeyance?

The work on abeyances suggests that once the conflict is exposed it will set up a zero-sum type of thinking, especially once it is a political issue. Given the high stakes involved, a climb-down is very difficult for the parties once the problem is out in the open. However, this dissertation seeks to demonstrate that such constitutional gaps can be maintained even after they are exposed. In essence, it is possible to restore an abeyance. This situation emerges if different actors realize that the problem cannot be resolved at an acceptable cost - in other words, winning the battle means losing the war. The conditions that lend themselves towards a conversion into a taboo rest on a political calculation. Much as how the emergence of abeyances as political issues hinges mostly on electoral calculations, these calculations will weigh heavily on those in a position to keep an issue alive when the incentives to do so dry up. Once a stalemate becomes the best option for those otherwise committed to the constitutional system, turning the matter into a taboo becomes the best solution. Thomas wrote that the notion of abeyances as taboos was suggested by David Cameron (Thomas 1997, 27; Cameron 1974, 126–9) when he talked about the taboo of discussing the post-Canada breakup scenarios in the 1970s. Such taboos occur at a higher order

of consciousness than abeyances still at the proto-level of awareness – an abeyance might be a disjuncture, laying barely felt in a constitution, or it can be recognized, but nevertheless maintained by the willingness of the parties to avoid confronting or acknowledging its presence. But how might that be done?

Restoring abeyances requires returning to a state similar to what prevailed before the abeyance collapsed. At the very least, it requires strategies to deescalate the situation, but in such a way that takes into consideration that this matter has already emerged and remains unresolved. As in a situation prior to an abeyance collapsing, the strategy for the restoration of an abeyance will manifest itself in the following ways: issue avoidance by political leaders, some level of moderate compromise in recognizing different visions without sacrificing one's own, and conflict isolation and de-politicization when the abeyance must be addressed. Politicians will adopt strategies to navigate the situation as best they can.

2.1.4   Abeyances as distinct from constitutional conventions, omissions, ambiguities, fictions and myths

For the concept of abeyances to have descriptive and explanatory power it is important to distinguish this particular aspect of constitutions from other ideas that are common in constitutional law. What do we get out of the idea of an abeyance? What explanatory purchase does it give us? And how do they differ from similar concepts? For example, how are they different from simple *conventions*? Why are they not *omissions*? Could they not also be thought of as nothing more than unconsidered *ambiguities*, the kind of which courts are set up specifically to address?

 "Abeyances" differ from "conventions" in that they are not overt political understandings, which conventions invariably represent. This point was made by Foley, who differentiated abeyances from conventions in that conventions amounted to forms of "expected behaviour" and that they were overt, whereas abeyances are the behaviours that people adhere to *in spite* of the fact that there is no agreement at all. Thus:

> The point about abeyances is that they posit another layer of the 'unwritten,' another dimension to the written-unwritten distinction, but one which is not the same as attributing everything to convention, pragmatism, and the common law. To mistake it as

such is to lose an important, indeed vital, perspective. A convention that becomes operative can usually be written down without disastrous results, even if it is open to dispute and the constitution does not have its source in a single document. But an abeyance is not only unwritten; the assumption is that it cannot and should not be written (Thomas 1997, 12).

Moreover, conventions are also usually not reflective of a contradiction in quite the same way. There is nothing contradictory about the Queen's absolute theoretical right to withhold her assent from parliamentary action on the one hand, and the convention that this will never occur on the other. It is how the Queen, who "reigns but does not rule," maintains her legitimacy in a liberal democracy. Nor is an abeyance necessarily revealed by different conventions coming into conflict, any more than when different laws might conflict and necessitate turning to an arbiter. For example, such a conflict arose during the prorogation crisis of 2008-9, where the issue was whether Governor General Michäelle Jean was required to grant Prime Minister Stephen Harper a prorogation when it appeared the government was on the cusp of losing the confidence of the House. There were two important conventions here. One was the idea of responsible government: the idea that the executive has legitimacy only insofar as it can command the confidence of a majority of the sitting members. The other was the right of the head of the government to prorogue the House whenever he or she saw fit, based on the convention that the Royal Prerogatives are exercised by the Queen on the advice of the Prime Minister. In the face of an almost certain loss of confidence, could the Prime Minister still prorogue the House of Commons in an effort to "save his skin?"

This question was up to the Governor General to decide. In the end, she resolved the point by finding that, absent an actual loss of confidence, the sitting government was still entitled to ask for such a temporary measure, and the Crown granted it. There was considerable argument over this point, although most scholars concluded that the Governor General was probably correct in this assessment, and that in any event she had the authority to interpret the contradiction as she wished (there is a considerable literature on this point, see Franks 2009, 46; Cameron 2009, 192; but see Walters 2011, 135–7). The point was bolstered somewhat in the weeks that followed when it became clear that the united bloc of opposition parties could not survive the necessary six weeks to push the point again. Nevertheless this did not amount to an abeyance, merely two conventions that were brought into conflict and which needed an arbiter to have them resolved.

Nor are abeyances merely *ambiguities*. Courts are routinely asked to supply clarity to conceptually vague constitutional ideas, some of which can be startlingly broad. Many parts of the constitution are in fact left intentionally vague with the idea that they can be resolved on a case by case basis – the language rights in section 23 the *Canadian Charter of Rights and Freedoms* provide an excellent example, guaranteeing minority language education rights to French and English communities "where numbers warrant" (Canada 2012b, sec. 23(3)). Section 15, the general equality provision in the document, is similarly vague in that it specifically includes some groups for protection against discrimination but is phrased generally enough so that additional groups may be found to be included following litigation in the courts (Canada 2012b, sec. 15). More often the ambiguity arises in cases that were not foreseen at the time of writing. The so called *Person's Case* was an instance in which the courts were called upon to decide on the right of women to be appointed to the Senate of Canada, and whether they fit into the legal definition of a "person" (*Edwards v. Canada*). Notable for creating the "living tree" doctrine of constitutional interpretation in Canada, the Judicial Committee of the Privy Council found that the evolution of Canadian society had expanded the meaning of that term, to the extent that it now included women. This right was unclear before the ruling and only solved through litigation. But it was not on account of an abeyance that the matter was not litigated. The change came from the progressive evolution of women's political consciousness in society, an evolution that changed what had been a political consensus about the proper role of women in society into a political issue and eventually a legal disagreement, which was then clarified and resolved in the courts to reflect changing circumstances.

The unwillingness to confront abeyances means that they are more than simple *omissions* as well. Much can (and must) be left out of constitutions for the sake of economy or as a result of oversight, and the residual clauses in many constitutions are a good example of a step framers take to confront their inevitable inability to see what it is that the future holds. An omission might be an abeyance if there is evidence that political actors are unwilling to solve it because doing so would bring competing or irreconcilable visions or values into tension. But in and of itself, and without more, an omission does not count. It needs the added reluctance by different actors to provide their solution when they know that it will be found unacceptable by another actor with a competing view.

Abeyances are related to constitutional *fictions* and *myths*. As Thomas notes, the former is usually sustained by the latter, but both are needed to maintain the credibility of a liberal democratic system (Thomas 1997, 27). Fictions are usually overt and accepted parts of constitutions: statements which are probably not literally true but accepted anyway. A key fiction in the United States is the idea of popular sovereignty, which suggests that the people are really in charge and their rulers are only their delegates expressing that will. One does not have to poke too deeply to see the problem with this but we accept it for what it is – a "constitutional truth," if not a scientific one. Such fictions are often taken to be "self-evident," and allow for the suspension of disbelief (Thomas 1997, 26; quoting Morgan 1988). A similar situation arises when a court makes a "finding of fact," a ruling that a situation which may be empirically false will nevertheless be considered true as far as the law is concerned. A good example is the laws surrounding parenting, in which people can be legally made into parents, regardless of any actual biological connection, by court orders. Fictions are usually sustained by more general constitutional "myths," such as those surrounding the intents of the founders of a constitution, or the inherent nature and values of the people in a political community. They focus on stories and actors and "help our fictions survive" (Thomas 1997, 27). But neither alone are an abeyance. "[F]ictions may conflict or contain glaring contradictions, abeyances remain silent" (Thomas 1997, 27).

2.1.5   Abeyances and the crisis of Canadian federalism

How does the abeyance concept apply to the Canadian case? Where did the abeyances implicated in the sovereignty movement in Quebec come from?

It is in the federal context that abeyances have received the most attention in the Canadian literature. This began with David Thomas, in his book "*Whistling Past the Graveyard.*" Thomas saw much to like in the theory of abeyances as it had been used in the British and American contexts, and, writing in 1997, used it as a useful framework for looking at the ongoing federal crisis between Quebec and the rest of the country. Centrally, for Thomas, much of the crisis that had evolved in Quebec was rooted in the direct confrontation of what had previously been the hidden, contrasting views of Canada that had coexisted without ever really being spoken about. The fact that so much could have been hidden for so long was the result less of the "unwritten" nature of the constitution than of the practices that political leaders used to skirt the ambiguities,

which Thomas closely identified with the beliefs of Edmund Burke. The Burkean tradition, with its emphasis on compromise, continuity, and organic evolution, as well as the goodwill of the different actors, had kept the British on track for hundreds of years and was a good lens through which to perceive the Canadian experiment. But the quality about Burke that Thomas admired the most was that he was explicitly *practical,* prepared to sacrifice nearly any principle in demonstrable service of a broader whole (Thomas 1997, 19). It was this attitude and practice that permitted the constitution to be written with so many holes. And they were numerous. Thomas includes a list of abeyances that are relevant to that discussion, and which I repeat, at some length:

- The future constitutional relationship with the United Kingdom;
- The status of French speakers and Catholics outside Quebec;
- The use to which certain key federal powers could be put;
- Whether provinces were equal;
- The future process of constitutional amendment;
- The role of the upper house;
- The locus of sovereign powers;
- The question of judicial supremacy;
- The contradictions between parliamentary sovereignty and federalism;
- The special status of Quebec;
- The right of secession;
- Constitutional equality between the centre and constituent units;
- Provincial participation in central institutions;
- The protection of rights.[4]

Combined, these clearly represent, nearly in total, the dispute that Quebec has had with what has uncharitably been called the "rest of Canada." Not all of these matters have remained abeyances over time, however. Arguably some, like judicial supremacy, are no longer really "unresolved"

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[4] These ambiguities have been adopted and repeated elsewhere as recognized and critical gaps in the Canadian constitution – see for example Gibbins 1999, 265-6.

but have over time been politically accepted by pretty much everyone, although the refusal of the Québec government to participate in the *Secession Reference* would hint that event this may not be completely the case. (Some of these abeyances have been giving a fuller treatment through the lens of abeyance theory. See for example Bateman 2000, 206 on constitutional interpretation; LeRoy 2004 on the Secession Reference; DiGiacomo 2010). Each of them are derivative from and implemented in a deeper constitutional ambiguity, however. This "mega-abeyance" is one that Thomas identifies and is one that is still very much alive**: the question of duality in Canada. Is the country a union of French and English or a compact of the provinces?** This is the "primary" abeyance in Canadian French-English relations and is the root abeyance of this project. Coming down definitively on one side or the other will invariably prove to be extremely controversial, even constitutionally fatal, as Canadians have learned over the years. But the additional questions identified above are also part of the story because resolving them will take different forms depending on the answer to the root abeyance. They are implicated in and derivative from this underlying problem. They are held in abeyance not on their own accord but because any discussion of them will expose the primary abeyance of duality. To attempt to bring clarity to them is to immediately confront the question of duality, and to immediately invite the crisis. Thus this project may refer to any or all of the above listed matters on their own, but their relevance arises from the fact that they are implicated in the deeper discussion about duality in Canada.

It is in this spirit that we can fit the "mega-constitutional politics" concept defined by Peter Russell in *Constitutional Odyssey* as being representative of the "constitutional crisis" that emerged as the primary abeyance and its derivatives were confronted. This concept now refers to a type of politics that afflicted Canada between about 1964 and 1995, right after the second referendum. This project similarly views these years as roughly the temporal boundaries of the true constitutional crisis in Canada, although not quite congruently. This project puts the beginning at 1960 with the election of Jean Lesage in Quebec and the true escalation in 1968 with the arrival of Pierre Trudeau, at which point different political leaders in Canada began to seriously confront the abeyance of duality and its derivatives, and the crisis inflated. Political leaders began to stop doing so around 1993 (Charlottetown Accord), more so after 1995 (the second referendum) and especially after 1998 (the *Secession Reference)*, when the primary and derivative abeyances were converted into taboos among successive federalist actors.

Russell saw the politics of the mega-constitutional era as being very different from that which came before it. In his view, there is "ordinary" and "mega" constitutional politics and they can be found not just in Canada but around the world. He described "ordinary" constitutional politics this way in a 1993 article in *Political Science & Politics*:

> Virtually all constitutional democracies are constantly engaged in low level, piecemeal constitutional change, whether through formal constitutional amendments, informal political practice, or judicial interpretation. This is ordinary constitutional politics. Canada's constitutional politics fits this pattern through most of its first century after Confederation in 1867 (Russell 1993, 33).

Ordinary constitutional politics is distinguished from "mega-constitutional politics:"

> Constitutional politics at the mega level is distinguished in two ways from normal constitutional politics. First, mega-constitutional politics goes beyond disputing the merits of specific constitutional proposals and addresses the very nature of the political community on which the constitution is based. Mega-constitutional politics, whether directed towards comprehensive constitutional change or not, is concerned with reaching agreement on the identity and fundamental principles of the body politic. The second feature of mega constitutional politics flows logically from the first. Precisely because of the fundamental nature of the issues in dispute – their tendency to touch citizens' sense of identity and self-worth – mega constitutional politics is exceptionally emotional and intense. When a country's constitutional politics reaches this level, the constitutional question tends to dwarf all other public concerns (Russell 2004, 75).

Russell's work is clearly closely related to the concept of abeyances, in so far as the material that he discusses (the constitutional disagreements) are largely congruent with them as they have been identified in this project, and the stakes of failure lead to the same result. The difference is that mega-constitutional politics focuses on stakes and emotions brought out by talking about fundamental issues of disagreement in constitutions, and is associated with a type of constitutional politics. Abeyances are more about the subject matter itself, in particular why it is unsettled at all, why the politics becomes so intense, and how it can be handled by the political elite.

Perhaps it can be said that the failure to settle the question of duality was the original sin of the Canadian constitution as it was developed in the 1860s, and that had this been answered we would have avoided a lot of trouble down the road. But it is unlikely that it was any clearer then than now. More charitably, it can be said that the refusal to squarely address that question in 1867 permitted the constitutional system to work, along Burkean lines, for nearly a century. And that question remains very much open in Canada today.

In answering the question of whether Canada is a union of French and English or a compact among provinces, and why so much else was left unresolved in 1867, Thomas says that the most common and straightforward explanation is pure practicality (Thomas 1997, 62). Relying in particular on the leadership of Sir John A. Macdonald, as described by Rod Preece, Thomas argues that abeyances allowed Macdonald to come to agreements on a union with George Étienne Cartier and Étienne-Pascal Taché. The latter were too frightened of the possibility of annexation into the US, and too unsure of the position of their community in Anglophone North America without some kind of an agreement with their fellow British colonists to go it alone. The pragmatic conception of Confederation was an "empirical rather than speculative" project led by Macdonald, who eschewed clarity in favour of compromise. It allowed both communities to cling to certain irreconcilable beliefs about the other – that Confederation was only an incremental step towards independence for the French Canadians on the one hand, and that assimilation would actually come to pass in the rest of the country, on the other hand. This conception finds support in such works as those of P.B. Waite, Edwin Black, and others, although it is rejected by Peter Smith (see Thomas 1997, 66 for an extended discussion on this point).

Related to this argument is that there may have been a moral dynamic to Canadian federalism that allowed it to persist, an idea that is closely connected to the work of Samuel LaSelva (LaSelva 1996). Federalism was built, he argued, to reflect a way of life, a vision that allowed differences to exist while also living within the same political community. This vision disintegrated over time and prevented the fraternal, consociational underpinnings of the country, especially after the atomistic Charter was introduced and the system entered a crisis (LaSelva 1996, 20, 176). These sorts of communal understandings could allow for political breathing space in the interest of national unity.

The overriding pressure to find a "deal" sets up conditions that are ideal for creating abeyances in constitutions. If drafters face an overwhelming political imperative to come to a constitutional "deal" there may be a strong incentive to ignore or gloss over comparatively smaller issues in favour of finding an overall workable solution. This incentive was clearly apparent in Canada, but as will be argued subsequently the Spanish constitution is similar in this regard. In that case, the need to democratize after the dictatorship of General Francisco Franco allowed drafters to leave unresolved many issues which are now returning to menace the unity of the country. The crisis of Scottish nationalism that is currently confronting Great Britain cannot be traced to abeyances, it will be argued, but the solutions currently being contemplated do appear to hinge on them to some extent (the "West Lothian" question in particular).

While political urgency does go some way to explain where abeyances come from when examining Canada, more recent scholarship likely gets at a more exact answer for why, even if it was pragmatic, such pragmatism was even possible, given the gaping holes of the abeyances: the answer is that, in 1867, Canada was not supposed to be a sovereign country, at least not one that had a completely independent existence outside of the British Empire. Asking the people who they are is fraught with problems and brought up questions that had never been squarely confronted; there was no urgency to define what the sovereignty of the nation was, given that we were all still British subjects. This argument is made in a fascinating recent doctoral dissertation by Gordon DiGiacomo (DiGiacomo 2010). In making this argument, DiGiacomo borrows much from Peter Russell, whose work *Constitutional Odyssey* is fundamentally about whether a people can move from a Burkean tradition to that of John Locke, where the sovereignty has always rested in the people (Russell 2004, 6). This was the position in *Liberty and Community,* by Robert Vipond, in which he argues that the unitary nature of British government was never disregarded but in unofficial ways adopted innovations like federalism. The federal idea came later in Canada. It never challenged the sovereignty of the Crown but grew to accept its expression through the democratic institutions as well. Canada could live with a level of constitutional ambiguity because it could rely on the structures and practices that prevailed at the time as part of the British Empire. It was not until Canada truly decided to break away from the United Kingdom and forge its own constitutional trail that much of this ambiguity/contradiction would come to light, and nearly break up the country.

Furthermore, early Canadian federalism was far less developed and had far fewer provinces than today. One must ask, what effect does adding additional units have on the likelihood of an abeyance becoming politicized and emerging? In the Canadian case, additional provinces had two effects for the emergence and politicization of abeyances. The first was to dilute Quebec's place in Canada on questions such as constitutional reform and exacerbate its claims to special status. The second was that none of the new provinces was Francophone and none, with the possible exception of Ontario, accepted a dualist conception of Canada. As a result, Quebec became increasingly outnumbered in its view of duality.

There is a surprising dearth of literature on how the addition of other provinces might have affected Canada's stability, perhaps because the nationalist movement in Quebec only came into its own after all the provinces had joined. But it should not be taken as a given that the addition of new provinces has no bearing on this question. The importance of the "ethnic map" in federations, and the role that it plays in both the creation and destruction of federations, has been looked at in a variety of ways by comparative scholars of federal stability in other contexts (Christin and Hug 2012, 118; for work on federal emergence, see Erk and Swenden 2010; Ziblatt 2004; Ziblatt 2006). Jason Sorens, in his recent book *Secessionism,* has done a large cross national comparison and found that the likelihood of secessionist forces in a country does rise with an increase in the number of units of a country (Sorens 2012, 70). In general, the territorial concentration of an ethnic minority and its lack of political dominance are absolutely required for the creation of a secessionist movement (Sorens 2012, 70). The decline in the relative position of the Québécois would square with this assumption, as other provinces were added to the country and the size of the Francophone minority shrank in relation to the rest of the population. In the advanced democracies, specifically, secessionist movements are more likely to occur, among other things, when they happen in places that have their own language, a history of independence, are ideologically distinctive, and have larger populations (Sorens 2012, 110). This set of factors is apparent in the Canadian case.[5]

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[5] Other factors that are less relevant to the Quebec case are geographical isolation, living in a country with other secessionist movements, and those with a multi-party structure (Sorens 2012, 110).

More direct and explicit work on how the number of units in a federation affects stability has been done by Thomas Christin and Simon Hug. In their article "Federalism, the Geographic Locations of Groups, and Conflict" Christin and Hug (2012) found that in ethno-federations the share of the units controlled by minorities had an impact on the hardening of ethnic divisions. Importantly, they found that if the share is small, then the divisions are likely to harden, but the possibility of violence is low because they are outnumbered in the country (Christin and Hug 2012, 96). The risks rise with more units, but then stabilize as the minority comes up on a majority. This interpretation would seem to work somewhat in the Canadian case over time, as there has never been much appetite for violence, and secessionist sentiment in Quebec grew over time as the country expanded.

These studies are large cross national surveys and however much they are intuitively satisfying in the Canadian case, a deep, country specific analysis of why the addition of provinces might have been destabilizing is at the moment lacking. While it may be hard to see on a decadal level, what might be required is an examination of the national development taking better stock of what Erk has referred to in this context as the *longue durée* of federalism.[6] Making an argument that is much in keeping with the tenor of this project, Erk argues that success cannot really be accounted for in one-off studies. "Students of comparative federalism committed to scholarly analytical goals have an innate understanding of how federalism in the developed world evolved over the *longue durée*, leading to informal practices that have come to be part of the day to day functioning of federal systems" (Erk 2013, 274–5). Canada was a terrific example of the importance that informal practices can play in government in its early years, when it was just gaining its independence from Britain. Abeyances surrounding constitutional amendment or the question of cultural duality were far easier to maintain when the country was limited to the original four provinces, if for no other reason than these provinces had held these exact questions in abeyance for most of the previous two decades.

In both Ontario and Quebec an *entente cordiale* between the English and French communities had been in existence since at least the time of the American Revolution and had become

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[6] Erk is making reference in particular to the work of Ferdinand Braudel regarding a general approach to the social sciences (Erk 2013, 274).

increasingly formalized in the following decades. The political arrangements that had emerged out of the 1837 rebellions had been, at least initially, designed to swamp the French Canadians and lead inevitably to their extinction (Cameron 1990, 6; McRoberts 1997, 6; but see Ajzenstat 1988 for her famous rebuttal, suggesting that Lord Durham was actually quite tolerant). Not only did Durham's plan for a United Canada leading to cultural homogeneity fail, it actually backfired, with the populations of Canada East and West seeking common objectives such as responsible government, better defense, and mutual protection of their respective religions. The agreements and practices that emerged among the local population during that period have been identified by Arend Lijphart as being "consociational," and achieved without input from London (Lijphart 1977, 124–5). The legislature was split down the middle with 42 seats for each half of the province, and the "double majority" principle ensured that laws only passed if more than half on either side accepted them (Lijphart 1977, 125; McRoberts 1997, 6). In addition, there were separate administrations maintained, with dual heads of government in both, which kept the colony working (Verney 1986, 197–9). The fact that there were even dual prime ministers has to be seen as the ultimate expression of consociationalism. Another indicator of consociationalism was that the capital moved several times over the life of the province, eventually alternating between Toronto and Quebec City on a four year cycle (see McRoberts 1997, 6–9 for a discussion of the different practices). French was more or less secured by the 1850s with the repeal of British legislation that records had to be in English only (McRoberts 1997, 7).

That this political arrangement eventually collapsed into a more federal structure did not derogate from the understandings that had been achieved up to this point. The choice of Ottawa as a capital, situated as it was half way between the two cultures, was an effective symbolic choice for everyone, and the preservation of both languages as being equally official for the federal and Quebec legislatures represented an important compromise for Anglophones and Francophones (Canada 2012a, sec. 133). Moreover, the mirroring protections for minority religious school boards in Ontario and Quebec bolstered what many considered to be one of the most important aspects of cultural protection in Canada (Canada 2012a, sec. 93). Other dualist institutions followed, such as the alternating aspect of the leadership of the Liberal Party between Anglophones and Francophones, cementing an electoral coalition that kept the party in power for most of the 20th century. And constitutional amendment was not a serious issue when the country

was part of the empire anyway and before the provinces had developed strong institutional identities.

The size of Ontario and Quebec preserved many of these understandings at the national level. Even when Oliver Mowat began to assert provincial rights more aggressively, his behaviour reflected a more muscular view of the powers under section 92 for all provinces, rather than a questioning of the deeper constitutional foundations on which the country was resting. In this all provinces could more or less agree with Mowat, and otherwise offer their support (Cairns 1971, 320–5). This policy continued through much of the early 20th century, with the two largest provinces working together, such as via the "Drew-Duplessis" axis, to keep Ottawa in check.

However, while these understandings worked east of the Manitoba border, they fell apart almost immediately as other provinces joined the country. It did not take long after Confederation for it to become apparent that while the French language was entitled to some difference in the east, it would not be entitled to the same treatment as one went further west. This is a story that has been told many times before, including when the regions were still territories and there were aggressive actions to stamp out French as an official language (Aunger 2001). The conflicts began relatively early, with the crises unleased by Louis Riel and the admission of Manitoba and, later, the Manitoba schools question. Thomas points to that experience as being one of several in which the different visions of the country began to collide, along with the conscription crises that would come later (Thomas 1997, 121). Throughout this period, and well into the 20th century, elites kept these issues off the agenda, but with each additional province it became harder and harder to keep the abeyances that had been created in 1867 from emerging `.

Alain Cairns has noted that with the creation of new provinces, they "quickly developed their own identities and distinct public purposes. Their populations grew. Their economies expanded. Their separate histories lengthened. Their governmental functions proliferated and their administrative and political competencies developed" (Cairns 1971, 321). This process became associated with the scholarship on "province building" that is usually connected with Black and Cairns (E. R. Black and Cairns 1966). While criticized to some extent by Young (Young, Faucher, and Blais 1984), the result of the growth in their individual identities detached them from the national conception of duality and the West became totally English speaking and contained none of the dualism that was common in the rest of the country. These provinces

developed constitutional positions that were based on a linguistically uniform, contractually centered view of the federation that is consistent with their own political experience since the late 1880s. As these provinces became more powerful, there was perhaps inevitably going to be a moment when the question about secessionism, veto, and biculturalism was going to come to the forefront of the political system.

Thus, while the rise of nationalism in Quebec has much to do with the internal political development of the province, the evolving federal context made the preservation of abeyances harder to achieve, and frankly, so too was national unity. A federation with ten strong, autonomous units existing outside of the British context was simply not something that the framers of the BNA Act had anticipated and was a situation with which the constitution was not prepared to deal. The gaps on questions such as constitutional amendment had not become political issues due in part of the willingness of the different actors to largely ignore the problem, which was possible in earlier eras, but had become more and more difficult to ignore as time went on.

In contrast to the cases of Charles I, who lost in the Glorious Revolution, and Nixon, who was forced to resign, the Canadian case has defied resolution. Rather, it has returned to a case of "settled unsettlement." It has achieved this state because the political elites, with the complicity of the public, have found this condition to be the most acceptable condition that was possible. This equilibrium has been based to some extent on the creation of new abeyances, which emerged after the referendum, specifically on those surrounding the *Clarity Act* and Quebec's response. The Supreme Court has been complicit in this story, leaving areas of abeyance unresolved but gradually providing just enough specificity to keep different communities sufficiently happy with the status quo. Such agreements fulfill the basic needs of an abeyance, in that it remains sufficiently vague and untroublesome to allow it to persist.

The shift that moves these abeyances from poorly understood shadows of the constitution to abeyances to those of taboos covers a lot of ground, however. The traditional understanding of abeyances is couched in the language of "disjuncture," of being "barely sensed" and in general hidden or at least generally unacknowledged. In Canada's case this definition does not hold. If anything abeyances are overexposed, they are problems that are now well defined and acknowledged problems. The game is up in this country and on this subject; the constitutional

Kimono is open. The gaps have been searched out, identified and paraded publically for decades, and they have swallowed up more than one politician who tried to fill them in. Subjected to excruciating bureaucratic, legal, and philosophical scrutiny, as well as several referenda in an effort to find a solution to the problem, in answering a question such as "where are the areas of ambiguity?" we can only cry out, right here. Thomas wonders if his list is perhaps not exhaustive on this subject but if it is not, it is close and these topics are quite clear to everyone.

In Canada, the experience has not led to resolution in the form of one actor simply losing the contest once it was brought. Rather, the abeyances, once exposed, have been restored by their transformations into taboos, maintained by those with an overriding interest in the stability and unity of the country. They are taboos because the troublesome and unbridgeable ambiguity has already been exposed, only now the danger is fully appreciated to the point no one wants to talk about it anymore. So the abeyance is replaced. Today the gaps are forbidden subjects in the political discourse. There is a broad consensus among governments, political parties and their leaders, the courts, and to no small extent the general public not to reopen the debate - not because these problems do not exist or are unimportant, but because *no one can resolve them at an acceptable cost.* The sole exceptions are the PQ, which has demonstrably been unable to take power on this account, and the BQ, which has little sway over the debate and may soon no longer exist as a result of this consensus. The result has been a return to what Thomas has called a "settled unsettlement" (Thomas 1997 chapter 3).

The next two sections will survey the roles of two institutions in particular which deserve special attention in this story of how the constitutional crisis inflated in Canada and then subsequently stabilized. The reason is that they each had different effects on public opinion. The first – executive federalism – must be mentioned for the role that it played in crisis escalation. The second – the Supreme Court of Canada – will be mentioned for the role it has played as a stabilizer in the years after 1995. The two have tended to have opposite effects because of the impact each has on how abeyances are perceived by the public. Executive federalism clarified and increased salience of abeyances, because it involved politicians and political vision, raised awareness, attracted long term media attention, and could appear zero-sum. As a result the process tended to bring different abeyances into clear and visible conflict. The Supreme Court, ironically a system based on adversarial thinking, had the opposite effect. The "surgical strike" nature of a court decision – its abrupt insertion into the debate, its technical basis and often self-

limited reach to the case at hand, along with the generally accepted neutrality of the bench deflected the ability of actors to attack one another or The Court. Even when a truly definitive ruling was issued, the public found itself with less to become polarized around or an actor to become polarized against. The role of the courts has increased over the past 15 years for abeyances given the decline of executive federalism. This runs somewhat counter to some writings that have argued that the role of the courts has declined in recent years, in particular in light of the rise in "collaborative federalism" (see for example Baier 2012).But whereas collaborative federalism is all about finding common ground on areas of agreement, abeyances are subjects from which the politicians will recoil, because agreement is out of reach. When an abeyance needs to be addressed it often ends up in the courts because political actors are unwilling to address it themselves.

2.1.5.1   Abeyances and Executive Federalism

In understanding how the mega-constitutional abeyance was addressed, executive federalism certainly has to be part of the story, given that it was the institutional median for confronting most of these abeyances. Russell has also identified the changing pattern of intergovernmental relations as being fundamental to understanding the politics of late 20th century Canadian federalism.

Constitutional Odyssey is not about intergovernmental relations directly; its fundamental point is that sovereignty has never rested in the citizens of Canada. Rather it rests in the Crown and is exercised by elites, often with little regard for the interests of the people. The mechanism that was emblematic of elites' exercise of power was the First Ministers' Meeting. The big story for Russell is Canadians repudiating not just this style of politics but the Burkean foundation of the constitution itself, in favour of one of popular sovereignty more closely associated with John Locke and the United States. The book begins prior to Confederation, when the constitution was first drafted. The hallmark of Canadian politics has always been the "traditional, elitist style of constitutional politics" that are part of what "political scientists refer to as consociational democracy" (Russell 2004, 5). This outlook is at times quite similar to that of David Thomas.

Russell saw executive federalism as being a process within this elitist style of management, and notes that it was peaking during the 1960s (Russell 2004, 81). He sees the modern practices of executive federalism as really a darker shade of grey, given the historical scope of his work. But

the arrival of mega-constitutional politics is more closely connected to the rise in executive federalism than Russell acknowledges, as it became the stage on which actors would ultimately play out much of the drama and both shape and be shaped by the unpredictable events it could unleash. What is particularly important in this regard is the effect of the summits in which politicians participated in raising the profile of federal issues and bringing grievances which had been dormant to light.

To that end Intergovernmental Relations (IGR) is further subdivided here to catch the apex interactions of first ministers who are the only ones in a position to genuinely convert an abeyance into an issue. "Summit IGR" is defined as the process through which first ministers seek to further and legitimize their objectives by gaining the consent of the other heads of orders of government. It is associated with such high profile meetings as the First Ministers Meetings, the Annual Premiers' Meetings, the "Council of the Federation" and the mega constitutional discussions of the 1980s. It involves political staff and is highly visible. There are few rules and little institutionalization of the process.

Why was Canada's system of executive federalism so attractive to political leaders as a forum for addressing these problems? Why was it such a powerful mechanism for exposing them? The central reason was executive federalism promised visibility for political actors to signal their effectiveness to their publics when fighting for deeply held beliefs. Since all political actors— federal and provincial-- thought that their vision was the "right one," they had every reason to think that they were acting reasonably and could find a solution. The ostensible "problem solving nature" of the IGR framework, and the fact that it was easy to address several issues together at once, added to the promise of effectiveness. These elements make executive federalism seem ideal when one actor wants to confront an abeyance with a minimum of risk to the more general constitutional whole. But it's an illusion. The unintended side effect of promoting one vision is to expose and refine the magnitude of its differences with other visions, thus bringing the conflict into the open. This is drastically exacerbated, as David Cameron and Jacqueline Krikorian have pointed out, when it leads to the problem of "linkage" – when so many issues are brought together the situation can become unmanageable (Cameron and Krikorian 2008). Actors preserving an abeyance are not conceding that their vision is anything but the right one; they are just refusing to address the problems raised by competing interpretations that they reject. In a context such as this when conflicts among visions can no

longer be hidden, and there is no apparent solution except for one vision to triumph over the others, the crisis in constitutional interpretations can begin to grow.

Summit IGR can be as much about preserving an abeyance as it can be about putting one on the political agenda. In the Canadian case it was the process through which most of the discussions surrounding the abeyances at the heart of the Canadian Constitution were first confronted and discussed, and it was in no small part through changing this process that they were subsequently restored. A considerable amount can be learned about the status of an abeyance by examining the agendas, press releases and content that issued from Summit IGR, as well as through an examination of the governments that decided to participate and those which stayed at home. As a result much attention will be paid to how this process has changed over time, in particular how it has diminished rather than actually seen true innovation (e.g. see Inwood 2011, 74–5) .

The uniqueness of the institution of executive federalism also has to be appreciated in light of what came before it and what came later. Other mechanisms for resolving conflict can prove to be far less inflammatory. The period before about 1960 has been variously divided up and labelled "quasi federalism" "bureaucratic federalism," "classical federalism," "emergency federalism," and "cooperative federalism" depending on the context (Mallory 1965; Woolstencroft 1982, 9–10; Dyck 2011, 473–77; the history of the scholarship can be most ably found in Simeon 2002, 8–13). The interactions were limited and controversial issues could be managed through a few key mechanisms. The federation operates through relatively few processes and policymakers are limited in how they can pursue their goals *vis-a-vis* one another. Examined this way, the structure of Canadian federalism before 1960, and certainly before 1945, can be collapsed into a stable constellation of processes which formed the basis for the resolution of conflict and the pursuit of common goals. Actors had essentially four separate processes to pursue their IGR agendas, which they used according to the problem under discussion:

1. **Direct negotiation and agreements**. In an early form of executive federalism, executives could come to agreement or settle on policies through line ministries, *ad hoc* conferences for coordination, or direct contact among premiers in an early version of "executive federalism." This process was often very fluid and quiet compared to today, as Smiley pointed out in the late 1970s (Smiley 1980, 92). These agreements were relatively rare and formal contact was quite low. The lack of formal contacts is actually

quite striking when examined today. J.A Corry, in his *Difficulties of Divided Jurisdiction* (Corry 1939), found that many areas lacked coordination, and even in areas where there was shared responsibility some of the programs used tools such as conditional grants that were of doubtful constitutionality (Corry 1939, 5). The situation in this area was exacerbated by the Second World War, and there was little growth in cooperation. In its immediate aftermath the Dominion-Provincial Conference on Reconstruction published a "reference book" as part of its work surveying intergovernmental arrangements at the time, which very effectively captures the lack of contact in many surprising areas, such as finance, insurance, and national revenue (Mundell and Delaute 1945). Agriculture stands out as a notable exception which is understandable given how much it made up of the economy at that time. Quite often agreements could not be reached, however, in which case there was a simple solution.

2. **Litigation.** In the cases where agreement was not possible, parties simply turned to litigation to resolve disputes (Russell 2004, 40). This was a perfectly valid and accepted method of resolving tensions and disagreements in Canada among differing federal actors who found they could not agree. The Judicial Committee of the Privy Council, and later the SCC, were both trusted and seen as sufficiently impartial to bring disputes to a just conclusion, notwithstanding the former's famously decentralizing tendencies which if anything increased its credibility as an arbitrator in the eyes of the provinces. While there was often a great deal of complaining about the bench from the federal level, at no time was the authority of the courts in question. Nor was a loss necessarily an insult, rather it was the result of a legitimate and effective process in which each party could compete on an level playing field.

3. The use of **royal commissions, or commissions of inquiry**, was also important. These were used to study policy areas, generate data to support political positions for elites, or were called by governments to apply pressure on other governments to act according to their own policy goals (Interview with Rocher 2014). These commissions were a significant part of mid-twentieth century Canadian management of federalism and public policy development. The Royal Commission on Dominion Provincial Relations (Rowell-Sirois Commission) was perhaps the most important. But they could also be quite issue specific, including questions of health services funding (Royal Commission on Health

Services, or "Hall Commission") or the inconsistencies in labour laws (Commission to Investigate Uniformity of Laws Regulating Industrial Work in Canada) among many others. Of course, their use extended to management of linguistic issues in Canada as well (Royal Commission on Bilingualism and Biculturalism, "B and B Commission" or the "Laurendeau-Dunton Commission").

4. Federally, **Parliament** managed problems on an issue by issue basis through the direct powers of disallowance and declaration, which it used routinely until, in the latter case, the early 1960s.

These mechanisms allowed the constitution to evolve in a more gradual, Burkean fashion, and the new commitment by the provinces and federal government to tackle the constitution head on and renew it through agreement was a significant departure from the earlier styles. From the beginning there were many who argued that the system of "government by conference" was not proving to be as fruitful as its practitioners thought (e.g. Dupré 1988; Cairns 1977a; Montpetit 2008). The apprehension was based on the belief that intergovernmental conferences would cause grievances to be raised by the different actors in a very public forum (Cameron and Krikorian 2008, 394).

Still, there is a wide world of practical IGR that goes on underneath the summit level and it must be considered as a vital part of the process for managing a federal system. A considerable amount has been written recently on this topic (see for example Schertzer and Woods 2011; E. T. Woods, Schertzer, and Kaufmann 2011; Montpetit 2008). Interviews for this project have tended to confirm the importance of intergovernmental contacts, and the lack of them in contemporary Canada is widely lamented. Schertzer and Woods have pointed out that all federations are inevitably incomplete and evolving, and represent necessary contested political structures (Schertzer and Woods 2011, 210):

> Federation is a normative framework; it is necessarily dynamic as an expression of, and focus of, ongoing struggles over the way identities are recognized by the governing norms and ensuing relationships which dictate the distribution of resources. Federation, then, is properly understood as the *process* by which the subscribers of the competing federal models have been accommodated and managed, and the resulting *structure* that stands as an expression of inherently imperfect agreements and compromises between the

competing actors. Accordingly, any one perspective on federation is only a partial, flawed view; and the promotion of a final fixed model based on a partial picture is inherently incorrect, as it failed to account for the contested nature of the federation (Schertzer and Woods 2011, 213).

They note that it is a real question to ask "why stability endures" in the face of so much conflict (Schertzer and Woods 2011, 215; see also Schertzer 2008).

These lower level meetings, without detracting from the critical policy work that they do, are much less important in this story than Summit IGR because they are less visible and hold less potential to trigger public disagreements on the basics. The changing nature of Summit IGR however is a critical part of the story on how abeyances are managed. In recent years, Summit IGR has been in decline at the federal-provincial territorial level and interprovincial meetings have moved away from questions about Quebec's place in Canada. This has been lamentable in some respects but also calming and a signal of the restoration of abeyances as taboo subjects. Thus, this dissertation posits that the effort to keep abeyances off the agenda necessarily meant ending an earlier style of negotiation. What has resulted is an approach that no longer seeks grand bargains and no longer suggests that the best way to recognize the Quebec nation is through its government. Rather, problems touching relevant constitutional subjects are usually avoided and, when necessary, handled discreetly, bilaterally, and behind closed doors.

A number of theorists are beginning to examine whether this policy of disengagement is working. Eric Montpetit has argued that there is a strong basis to argue theoretically that a more effective way of negotiating constitutional discussions is through what he calls "discrete incrementalism" (Montpetit 2008). At its most basic, discrete incrementalism appears to be able to better negotiate the problems of the federation by responding to the needs of the population over the long term. First, short term solutions are largely ruled out; only negotiated agreements that are done behind the scenes over a long time are allowed. This approach reduces the ability of politicians to claim credit but it also reduces the possibility of the deal being attacked. The "go slow" approach has also generated significant "creeping asymmetry." Since reforms are undertaken over such a long time, it is easy to miss how the federation is becoming increasingly lopsided in areas like foreign affairs, citizenship and immigration, and in equalization. While each policy might be somewhat controversial, it is less so if it remains "unlinked" to other issues.

Montpetit finds in "open federalism" much to like. In his view, this approach is a viable way to reduce the tensions that have existed in the country. To put it bluntly, he suggests that "If the problem of Canada, as a multinational federation, is one of intellectual confrontation over what the country should be, what could be the solution? From my reading of the problem, it would be easy to advance an anti-intellectual solution and simply advise politicians, and Canadians more generally, to stop taking cues from those who think, write and speak about what Canada ought to be" (Montpetit 2008, 19). If you were to look at it from a more nuanced perspective, the argument boils down to one that the system itself is probably ok *if* it is allowed to evolve according to policy driven issues rather than symbolic ones:

> At first sight, the changes made or contemplated by the Conservative government might appear modest and their lack of coherence might lack appeal. But over the long turn, if the strategy is applied steadily, the Conservative government might be able to change the federation significantly. Even if they are disconnected from a clear vision, these changes should still appeal to those who want change rather than the status quo. And as Canadians reflect on these changes, an attractive vision of Canada might emerge, enabling a formal constitutional amendment. Discrete incrementalism, if applied steadily, will attend to the distinctive values prominent in Quebec, in the West and perhaps elsewhere to an unprecedented extent. If applied steadily, the strategy will, at a minimum, reduce some of the dissatisfaction some Canadians feel about their country (Montpetit 2008, 25).

For him there is little doubt that this strategy is working. It was perhaps a little early in 2008 to have made this call, but we are increasingly in a position to examine some of its effects on the national question. This kind of incremental action greatly assists in preserving abeyances. In its adoption of open federalism/incrementalism, Ottawa began to go its own way on the national question and accommodate Quebec directly on many issues individually without broader provincial involvement. This strategy mirrored to a great extent the fact that Quebec had already decided that in many respects it was not going to play the intergovernmental game except for the places where it could score political points (Cameron and Simeon 2002, 61). Small asymmetries, often each in tension with different visions of the country, succeed in keeping the peace and allowing a variety of visions to flourish throughout the country.

2.1.5.2   Abeyances and the Courts

The Supreme Court as an arbiter in this story is absolutely vital. More than any other institution, it is implicated in the resolution of conflicts between different actors and orders of government, including on their most divergent views of the state. At several points in the story, the courts have been forced to rule on the roots of the abeyances. Courts serve as neutral arbiters where disagreements can be "punted," where a political issue can be converted into a legal one. The benefits of doing so can be that no party ends up being blamed for a result directly – they have the legitimacy of being vindicated in front of a trusted court. It also means the issue can be framed as having been a legal one all along, and less vulnerable to the charge that what is occurring is a clash of visions, rather than laws. And it keeps the question isolated, in that it can be hived off into a court case rather than linked into a broader constitutional discussion.

There is evidence that in the Canadian case, and in particular on the nature of the Canadian federation, the Court will not be painted into a corner. If the matter of whether Canada is a contract or a compact remains the "mega-abeyance" of Thomas's world, the Supreme Court has done little to make a definitive finding. Robert Schertzer, examining the way that the Supreme Court of Canada has viewed the federation, has noted that the Court has been neither unanimous nor consistent over time. Canada has been conceived as a multinational compact, a contract among the provinces, and as a broader "pan-Canadian" union that rejects the first two views. None of these positions has been definitively accepted by the courts (Schertzer 2012). Schertzer states of the *Secession Reference*: "Recognizing the contested nature of the norm [of what the federation is]," the Court went to considerable effort to highlight that there is no single way to approach federalism in Canada" (Schertzer 2008, 114–5; see also Schertzer and Woods 2011; E. T. Woods, Schertzer, and Kaufmann 2011; LeRoy 2004). Rather, federalism is a norm or process to navigate that ambiguity. The multinational, pan-Canadian and provincial equality visions are *all* relevant to some extent, and the country would never have united if there had not been space for each.

There are other examples. The rejection of Justice Marc Nadon's appointment to the Supreme Court of Canada on the grounds that he was not a member of the Quebec bench or bar was important not just for that specific point. The Court suggested that to appoint Nadon would upset a basic understanding of the Canadian constitutional structure which requires that French

Canadians feel secure that the Court protects not just their legal tradition but their social values as well (Reference re: Supreme Court Act, ss. 5 and 6 2014 at para. 59). This interpretation protects both the functioning and legitimacy of the Court (Reference re: Supreme Court Act, ss. 5 and 6 2014 at para. 49). While not proclaiming Canada a "dualist" society, such a ruling leaves that interpretation in play. Conversely, the finding that Quebec does not have a veto might be taken to negate a dualist interpretation, but the proviso of substantial provincial consent as a recognized convention did not mean that Canada was a true contract either (see Reference re: Amendment to the Canadian Constitution 1982).

The nature of common law judging makes it very useful for contributing to the maintenance of abeyances. To that extent they are being used to further the ends of a party who wants to make use of their assumed neutrality. The courts may not be entirely neutral but their legitimacy depends on that fiction being maintained, and there is an interest on all sides in remaining balanced, or appearing to be so. Superficially it is easy to reach for an explanation of the court's behaviour that sees it as complicit in maintaining these abeyances – and perhaps it has been. Occasionally, the courts have been forced into a position where it has to confront an abeyance head on, and make a definitive ruling. But usually courts have been more circumspect. It is no secret to legal scholars that the courts remain fundamentally conservative institutions, living up to the claim of Jefferson that they are "the least dangerous branch." Nor is it a surprise that they work to protect their legitimacy, which rests on a more tenuous ground than other political institutions. Vuk Radmilovic has observed that there is a vast legal scholarship on this point, in part reflecting the fact that, absent elections, courts must find other sources of legitimacy (Radmilovic 2010, 845–6). The lack of budgetary or coercive control leaves courts vulnerable and dependent on the other branches, and judges must be wary of not sacrificing their authority (Radmilovic 2010, 845–6; see also Spiller and Gely 2008; Gibson, Caldeira, and Baird 1998). Reflecting in part a need, first identified by Madison in the *Federalist* No. 78, that the lack of independent budgetary or coercive powers leaves courts dependent on other political actors to function, as well as the absence of periodic elections for legitimacy renewal, courts must be careful to maintain their position in the political system (Radmilovic 2010, 845).

This caution can shed light on the ways that courts assist in maintaining abeyances. Rarely will courts make sweeping, definitive rulings on abstractions when a partial ruling will do. As both Chief Justice Beverly McLachlin and Justice Ian Binnie noted in *R v. Beaulac*, "It is a well-

established rule of prudence that courts ought not to pronounce on constitutional issues unless they are squarely raised for decision" (*R. v. Beaulac*, para. 1). Cass Sunstein has written that this circumspection is essential in well-functioning legal systems, in which participants will try to cultivate "incompletely theorized arguments on particular outcomes" when there are many values in tension (Sunstein 1995, 1735). To give an example, one might support unions for a variety of reasons: they have a democratic character, they protect peace in the workplace, or they protect the rights of workers (Sunstein 1995, 1736). A judge may rule for a union because he or she supports all of these aspects but it is usually not necessary, and often counterproductive, to offer a complete theory justifying unions in a particular case. The failure to do so might reflect a fear by a judge of finding himself in the minority if the point is pressed, or perhaps out of a fear of the precedent that it might set. It may reflect an unwillingness to close the argument for good. Other examples come to mind – why a tort is considered tortious might rest on an action's damage to property, its dangers to the environment, and the fact that it is considered morally blameworthy all at the same time – but a finding of guilt of the tort may not need finding the true and final basis of why it is a tort at all (Sunstein 1995, 1736).

Sunstein points out that none of this is strange to courts. "Disagreement on foundations may produce disagreement on particulars," he notes. Further, "What I am emphasizing is that, when closure cannot be based on relative abstractions, the legal system is often able to reach a degree of closure by focusing on relative particulars. Examples of this kind are exceptionally common. They are the day-to-day stuff of law" (Sunstein 1995, 1737). The emphasis on what is before the Court, and the values that are implicated in the moment, can allow for an incompletely theorized argument:

> [Judges] may accept an outcome – reaffirming *Roe v. Wade*, protecting sexually explicit art – without knowing or converging on an ultimate ground for acceptance. Reasons are almost always offered, and in this sense something in the way of abstraction accompanies the outcome; reasons are by definition more abstract than the outcome to which they account. But the relevant actors seek to stay at the lowest level of abstraction necessary for the decision of the case. They hope that reasons that have been offered are compatible with an array of deeper possible reasons, and they refuse to make a choice among those deeper reasons if it is not necessary to do so (Sunstein 1995, 1736–38).

The tendency of courts to remain *in general* at the lowest level of abstraction allows for the preservation of abeyances *specifically*, and is likely a key part of why democratic federations, which depend on abeyances are able to stay together in spite of considerable disunity. Confronted with competing visions or justifications, the Court need not come down on one side; it must only resolve the matter in a way that is sufficiently clear for the matter at hand. The result is judicial decisions which are often partial, imbued with a level of ambiguity, and limited so that there is a range of future possible routes for an issue to develop. In 2005, surveying the role that the Supreme Court has played, James Kelly and Michael Murphy argued that the Court's role is essentially "meta-political" – in that it does not and has not usurped the role of the political actors on questions of division of power (Kelly and Murphy 2005, 218). Rather the court supplements these debates, assisting the actors where it can in the system and offering guidance, more than anything else, only when these political processes have failed. Kelly and Murphy argue that the court has fostered an inter-institutional dialogue that never closes off a particular interpretation but is something that "challenges the argument that judicial review represents the final word on the scope and content of constitutional provisions (Kelly and Murphy 2005, 219). Jan Erk and Alain-G Gagnon made a similar argument as far back as 2000, focusing on the extent to which the justices appear to have noticed that ambiguity is essential in maintaining the understandings that underpin Canadian federalism (Erk and Gagnon 2000). The Supreme Court was asked to rule on several clear questions in the 1998 *Reference Re: Secession of Quebec,* but what resulted was a decision that left a considerable amount unclear. While the Court found that it was true Quebec did not have a *unilateral* right to leave Canada, there was still a duty on the part of the rest of the country to negotiate in the event that the population gave its clear desire to go. What that threshold was the Court kept ambiguous.

Courts cannot do the job alone, though, as the restoration of abeyances is a political choice. If there is enough agreement on the overall constitutional system, then actors who have a stake in it will operate to play down their differences. One will see abeyances score lower on the political agenda than previously, differences of opinion will be tolerated and perhaps gestured to without genuine acceptance, and possible tricky questions will be hived off, de-politicized, and endlessly put off for resolution at some supposedly superior future date.

2.2   Conclusion

Taken together, as the project uses HI process tracing to examine Canada's unity crisis through the lens of abeyance theory, the institutions of the courts and executive federalism noted in the above two sections are critical. They are the two institutions most implicated in both the collapse and restoration of abeyances and they will appear again and again. While there is no denying the evolving social context and the constraints that it places on actors, it is through negotiation and judicial action that political elites responded to each other in this period – if they were responding at all.

The following chapter will begin with the beginning of the modern iteration of the constitutional crisis.

Chapter 3
Abeyances Collapse: 1960-80

3 Social evolution and politicization of abeyances

This chapter will examine why some of the constitutional questions that had been previously held in abeyance became politicized in the 1960s through 1980s. It does so by examining more closely some of the social forces and contexts that brought the competing visions of the Canadian constitution and cultural duality to the fore in this period. In essence, the chapter will outline the forces that transformed several abeyances from being the barely noticed "disjunctures" of Foley's parlance to recognized, politically charged disagreements (Foley 1989, 10).

Overall, the chapter argues that the breakdown in the traditional approaches to abeyances in Confederation emerged following three developments:

- A shift in approach by the Quebec parties (and governments) from being willing to preserve the unsettled status of abeyances to being constitutional activists, including by entering terrain that had previously been kept off the political agenda;

- The arrival of Pierre Trudeau, a constitutional activist who is antagonistic to the visions of the Quebec governments and seeking patriation and a Charter of Rights. These projects turned the questions that had been held in abeyance into acknowledged political issues;

- The rise of bureaucratic and Summit IGR and the related challenges of linkage.

These shifts reflected the changing ideological and electoral incentives of the time. Reacting to the new social context of the 1960s and the evolving Canadian and Quebec identities presented electoral opportunities to engage questions that had not been considered important or relevant up to this point. Doing so, and in particular in partnership with other governments, had the effect of revealing how far apart different visions of federalism could be. This gap had significant negative consequences for Canada's stability.

The federal response was to seek reform and clarification, often in a public forum. But this strategy threw disagreements into stark and public relief. The growth in the institutional

capacities of the other provinces meant that additional (provincial) actors had to be satisfied, something that had not been necessary for much of the country's first century. The lead up the referendum forced the country increasingly to make promises that it might not afford to make.

Because it is necessary to demonstrate the changes that took place beginning in the 1960s, the chapter starts with an examination of the Union Nationale (UN) and how it approached the constitution and its abeyances. From there it moves into an examination of the shifting cultural currents in Quebec during the 1960s and how they affected the motives of the different political parties in the province and at the federal level. The mega-abeyance of duality received much more attention during this time through the greater focus that linguistic issues received in Quebec and through the calling of the Royal Commission on Bilingualism and Biculturalism at the federal level. Furthermore, the decision of the federal government under Pierre Trudeau to take an aggressive, activist position on constitutional matters that was at odds with many provincial administrations greatly inflamed the conflict. Trudeau's assertion of a pan-Canadian vision of the country elicited provincial opposition on the specific issues of constitutional amendment, civil rights, and the equality of the provinces. Finally, the coincident rise in Summit IGR enhanced the publicity and stature of these constitutional abeyances, raising their salience for the public and reducing the ability of elected officials to control the narrative or keep the agenda limited.

Each of these developments contributed to the growth of the unity crisis by either exposing abeyances at the heart of the constitution or limiting the ability of elites to navigate around them. David Thomas, in his book *Whistling Past the Graveyard,* spends considerable time exploring how the changes in Quebec politics in the lead up to the 1960s changed the discourse on a number of the key abeyances that had existed up to that point (Thomas 1997 chapter 4). But these other forces must be examined in detail as well. Importantly for this chapter, the courts play much less of a role during the 1960s than closer to the first referendum in 1980. Russell points out that the near the close of this period a sign of how difficult federal provincial relations were getting was that between 1975 and 1982 the Supreme Court heard 80 constitutional cases, the vast majority of which dealt with the division of powers, which was two more than it had heard in the previous 25 years of it being the final court of appeal (Russell 2004, 97).

3.1   Abeyances and sovereignty support

When do the abeyances in the Canadian constitution become an important consideration in giving energy to the sovereignty movement? This section will canvas how they came to play a more central role over time. In the early 1960s, however, the politicization of abeyances was not driving sovereignty support as much as it would after they had been fully exposed. If anything, it was the other way around. A rising nationalism based on sociological factors was driving the need for constitutional change in much of the rest of the country. Abeyances were not as important for explaining sovereignty support at this time as they would be later for three reasons.

The first reason is that the competing views of the abeyances had yet to be clearly and visibly defined. The gaps in positions had not yet come into focus. The result was that the distance between Quebec and the other provinces was not as acutely felt as it would be later and when it contributed to a sense of grievance. When the Pearson government appeared to adopt a dualist narrative of the country, it did not appear as though the rest of the country was terribly out of step with Quebec opinion (see e.g. McRoberts 1997). This was a period before the *Quebec Veto Reference,* constitutional patriation, or the "Night of the Long Knives."[7] Trudeau's efforts at constitutional reform in Victoria during the constitutional round of 1971 and the capacity of Quebec to scuttle that deal suggested that there was room to negotiate in good faith and that Quebec would have a final say on any new deal. Instead, the grievances supporting the nationalist movement were emanating from inside Quebec and were directed at its own political institutions more than at the province's place in Canada. In later periods there would be more focus on the betrayal of the rest of the country and the substantive things that Quebec would be denied, which was more deeply offensive and could feed animosity.

The second reason abeyances were not the primary driver of sovereignty sentiment prior to 1960 was that the belief the constitution was in need of some kind of reform was one that was broadly shared among all Canadians. While by no means the top priority of the public, the absences of an amending formula, protections for civil liberties and reform of the Senate were commonly viewed as problems by everyone that had to be addressed eventually. Thus the possibility of

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[7] This is the colloquial expression for the agreement that the federal government came to with all of the provinces except Quebec in the Chateau Laurier Hotel in Ottawa for the patriation of the Canadian constitution.

some mutual compromises for constitutional change remained. Since the Victoria Charter was only the first try, the fact that it failed could be seen as regrettable but not egregious by the public. A genuine effort on the part of all the provinces made it look as though there was a legitimate will on the part of the rest of the country to resolve constitutional matters along mutually acceptable lines. As the first major public attempt at constitutional reform, its failure was regrettable but not terribly problematic. This failure would become more problematic with more attempts that ended in failure.

The final reason, based on the above two, was that the PQ was not as interested in basing its narrative on constitutional problems as it would do subsequently. Arguing more on the basis that the natural evolution of Quebec society led inevitably towards independence, the lack of enthusiasm the PQ showed through the 1960s and 1970s for constitutional reform reflected a sense that it was a distraction towards a larger goal. Furthermore, a narrative of betrayal or hostility by the rest of Canada was not something that René Lévesque was interested in pursuing. This kind of aggressive tone was not compatible with the PQ's attempt to appear broad-minded on the one hand, while still committed to exiting Canada with some kind of economic agreement on the other. Ironically, in the early period it was federalist leaders who saw the promise of constitutional change as the best way of assuring Canada's stability in Quebec.

While abeyances were increasingly emerging, one continues to see growth in the sovereignty movement. On the four characteristics identified in Chapter 2 of priority, intensity, commitment and organization, one sees strengthening on each dimension.

Increasing numbers of voters began to associate themselves with a nationalist project that saw exit from the Canadian federation as a *sine qua non* of Quebec's further advancement. While the national project remained behind other political and economic priorities it rose on the agenda in a way that it had not previously. Support for sovereignty was bolstered by the intensity of many of the core supporters, who found in the narrative a romantic vision for the province that galvanized support across a number of political groups - particularly students, artists and among the union movement. The intensity was partially driven by intellectual currents that were otherwise popular at the time, including for some on the left the desire to see a complete remodeling of the economic system along more socialist and anti-capitalist lines. The sovereigntist narrative also

dovetailed with contemporary views on decolonization and national liberation that were occurring around the world.

Organizationally this rise in sovereignty support manifested itself primarily in the creation and unification of the *Parti Québécois*. Unifying a number of highly disorganized and diffuse groups, over this time span, the PQ grew in coherence and organizational strength into a viable electoral vehicle. When it took power in 1976, it had successfully unified a number of fringe parties to present itself to the public as a unified force with a clear narrative and political direction. The PQ base was durable and displaced the UN as one of two mainstream parties in Quebec (although the bases of both parties' support were clearly not congruent). The tactical decision not to focus as heavily on the Canadian constitution meant that abeyances, while emerging as political issues, did not drive support for sovereignty as much as they would later.

3.2 Constitutional political strategies of Quebec political parties 1960-80

The most important factor in the inflation of the crisis was the restoration of the Liberals to power in Quebec City in 1960 after having been out of office since the Second World War. Their election gave voice to the changing aspirations of Quebec society, which had started to resemble its counterparts in the rest of North America beginning in the early 1950s. Focusing in particular on the "mega-abeyance" of duality, the 1960s saw a period in which all of the Quebec parties, for their own reasons, began to seriously examine what had previously been left in abeyance up until that point (Thomas 1997, 97–106). Prior to that point abeyances had been left obscured, as doing so suited the interests of both the federal and provincial governments. Picking up from Thomas, this section will show why the gradual replacement of the Union Nationale in the late 1960s and early 1970s marked a critical beginning of the crisis, given that the Lesage government was prepared to make constitutional demands that the previous UN regime was not. This situation was exacerbated by the replacement of the conservative UN with the separatist Parti Québécois, which had an incentive to confront the abeyances in the Canadian federation for electoral gain. The PQ did not do so until later, but it was sufficiently activist to scuttle efforts by the Liberals to address these problems by painting the Liberals as weak and selling out the province to the federal government. Therefore, by 1980, there were no longer any political parties in Quebec which were genuinely willing to show abeyance behaviour.

The following three subsections will demonstrate the evolution of the parties in turn.

3.2.1   The Union Nationale

The beginning of the crisis has to be seen with the end of the Union Nationale in the 1960s. It had been the party *par excellence* of defending many of the abeyances that had existed up to that point. It did so as much from electoral self-interest as from any connection it had to Canada. Throughout its two regimes, ranging from 1936-9 in its first term and 1944-60 in its second, the UN forged both a narrative and a base that was at the same time deeply hostile to the federation on the one hand and yet reluctant to press for reforms on the other. The contradiction is resolved in light of both the national narrative the UN depended on for its support and its genuine conservative ideological orientations. It found in the *Constitution Act, 1867* the powers to pursue its agenda and the material it needed to maintain that French Canada was threatened from all sides. While Ottawa and the UN never had an easy relationship, it did not serve the interests of the UN to damage the established constitutional order in Canada. On the contrary, the maintenance of these institutions was essential to maintaining the UN's support. As François Rocher has characterized it:

> On the political level, a great respect for traditional political institutions characterized conservative nationalism. In dealings between Quebec and Canada, Duplessis was an advocate of provincial autonomy. He believed in the virtues of federalism inasmuch as they clearly defined the limits of intervention at each level of government. The fact that this was the only means of protecting culture and maintaining the existing social order in the province explains the will to maintain Quebec's provincial autonomy. Duplessis' social and political conservatism, however, profoundly tainted his sense of autonomy. He opposed federal initiatives in the area of fiscal and social legislation on the grounds of preserving the rights of Quebec (Rocher 2002, 74).

Duplessis never sought the breakup of Canada, nor did he need the idea of secession to keep himself and his party in power. But he did need (and played on) a distrust of the federative pact, and as a result was very wary and voluble about any perceived transgressions of it (C. Black 1977, 447). Duplessis

> [W]anted the specific performance of the federative pact, not its rescission. In this way he
> could seem moderate enough in the eyes of the concerned, yet was unencumbered when
> pillorying his federal adversaries. He was, he said, merely asking that a contract be
> respected and lived up to (C. Black 1977, 411).

As a result he could be suspicious and antagonistic towards Canada in general and yet be conservative and anti-reformist on the other (see Laporte 1960, 117–24 for his notorious hostility to change).

The Second World War ensured that the elections of 1939 and 1944 had little or nothing to do with the Canadian constitution or Quebec's place in Canadian institutions. Rather, the issue of conscription in Quebec meant that both the government of Prime Minister Mackenzie King and Liberal Premier Adélard Godbout engaged in a tricky set of political maneuvers to keep national divisions at a minimum. Neither was willing to antagonize the other after what had occurred during the conscription crisis of World War I. Upon Godbout's defeat in 1944, the UN under Duplessis took a more conservative stance but showed little interest in outright constitutional reform either. Rather, and similar to Duplessis' approach to federalism during his first term between 1936-39, it was the defense of provincial autonomy, as well as the fight against communism, that dominated the elections of 1948, 1952, and 1956 (Quinn 1979, 129).

The Duplessis' "autonomist" program has been described as vague on what it was for but clear in what it was against: in particular, the fight against the growth of the central power in Ottawa (C. Black 1977, 447). To that extent, after World War II the major battles with Ottawa centered on taxation. Ottawa wanted to maintain the fiscal arrangements that had been agreed to during the war so that it would have the resources to both manage the economy and introduce a host of national social legislation. Centralization was needed, it argued, in the face of a challenging international environment; Ottawa needed all the resources it could muster to respond to the problems of reconstruction and the demands of a new nationalism in the citizenry (this was something that was apparent to contemporaries, see e.g. Brady 1959, 265–6). The UN argued that the province needed to reclaim what had been lost to Ottawa under the taxation agreements signed to ensure wartime defense; the latter cut off the province from revenues that were properly its own and hindered the province's ability to govern autonomously (Quinn 1979, 116). This point was not without justification. Contrived initially as a temporary measure, the

provinces had abandoned the personal and corporate taxes, as well as succession duties to Ottawa in return for a grant based on the gross national product (see C. Black 1977, 414 for a detailed treatment of how Duplessis addressed federal provincial taxation). By the mid-1950s the growth in conditional grants and the lack of taxation abilities provincially was indeed resulting in a restriction of provincial power (e.g. Angus 1955; Scott 1955; Brady 1959). More generally the province of Quebec attacked the social legislation that Ottawa was trying to introduce, such as the new family allowances, hospital insurance, and unemployment insurance as federal overreach (Quinn 1979, 115–6). The UN government was selective in the grants that it took – it took those for hospitals, for example, while very publically forcing the universities to reject any help from Ottawa – but it scored political points by painting national social legislation as intrusive and unnecessary for the province.

But while it was aggressive against Ottawa on the question of provincial autonomy in the abstract—a stance that had clear electoral advantages for all parties--the UN remained a conservative force on constitutional reform. The UN's arguments over the constitution were less about its essential characteristics or foundations, and more about whether it was being properly defended as it was *already written*. The narrative was always that of a hostile Ottawa against a besieged Quebec, with the latter only asking that the original Confederation compromise be respected. In published speeches leading up to 1956 for example, the UN premier presented himself as one of the few able to resist this tide. "Like all previous meetings, Duplessis has addressed the constitutional issue. He has asked that the people support his struggle for the recuperation of all the rights of the province. 'We lead the struggle against centralization, against those who wish to see only one government, against those who would like to see the provinces disappear. We want to see Quebec governed by Quebecers and not by outsiders. The fiscal problem is not solved, but we won't stop until it is'" (Union Nationale 1956, 361–2).[8]   This message squared well with a narrative of national victimhood, one that emphasized the realities of *la survivance*.[9] "Mr. Duplessies will never betray his province. He will never sacrifice its

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[8] Author's translation. Taken from a collection of speeches outlining the UN program for 1956. See https://www.poltext.org/sites/poltext.org/files/plateformes/qc1956un_plt_12072011_113637.pdf.

[9] In his celebrated and highly negative account of Duplessis in power, Pierre Laporte recounted some of the phrases that were used to couch his relationship with Ottawa, of which "cooperation always, assimilation never" was a favorite, as was "cooperation is not a one way street" (Laporte 1960, 120).

liberties for a few pieces of silver.[10] He will never stop the fight until he has recovered everything that belongs to Quebec" (Union Nationale 1956, 359). There was little aspiration for French Canada in the UN's outlook; the Quebec of the UN was surrounded by enemies – a federal government that wanted to send Quebecers and their money overseas, an atheistic communism that menaced the beloved Church so essential to French Canadian survival, and American foreign interests that dominated the Quebec economy (see Behiels 1985, 69 for a discussion of how the intellectualism of the 1950s contrasted with a French Canada that had lacked a philosophy of "positive action" based on secular and rationalist foundations). There was no space for national ambition in the UN vision of Quebec beyond that of a constant defence. Rather, with so many internal and external enemies, Quebecers were under such assault that they should take pride in having survived at all. Reform of the constitution did not serve the UN's interests well.

The maintenance of key abeyances worked for the UN in sustaining this narrative. The question of Canada's continuing relationship to Great Britain and the Empire, for example, and the unsettled questions of a domestic amending formula or whether or not the province had a veto over constitutional change, were all realities the UN relied on for its successful narrative of national weakness. While subscribing to a binational vision of the country, the UN insisted the binational vision was fearfully and decidedly lopsided in terms of political power. Quebec had been conquered: what it had reclaimed in Confederation was admirable, given the challenge, but essentially tenuous and reliant on perfidious and historically untrustworthy allies. The UN skillfully presented the Confederation pact as one that might be lost at any moment by an incompetent or weak provincial government under the Liberals. It was on the question of conscription that the UN had been able to effectively paint Adélard Godbout as complicit in sending Quebecers overseas in a war in which they had no stake. The British connection continued to give the UN material for propaganda in the post-War period as Canada had been asked to supply money overseas for reconstruction, something that Duplessis exploited with the message "The Liberals give to foreigners, Duplessis gives to his province" (Quinn 1979, 118). Privately Duplessis strongly resisted the abolition of appeals to the Judicial Committee of the

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[10] "Il ne sacrifiera rien de ses libertés contre un vil metal."

Privy Council, on the premise that there would be nothing stopping a set of judges appointed exclusively by Ottawa from trampling the rights of Quebec (C. Black 1977, 469). His fight with Prime Minister Louis St. Laurent over the question was done behind closed doors, however, and when it was eventually won, he sought to take credit for it (C. Black 1977, 469). Clarifying the relationship between Canada and Britain or agitating in a meaningful sense for the assumption of full Canadian sovereignty was not a priority for the UN and did not fit the narrative well. It ran against the basics of the political philosophy the UN exploited to gain political power.

Furthermore, there was little interest in the UN platform for reclaiming any additional powers from Ottawa under section 92 over and above what was already listed. The failure to do so meant the question of asymmetrical federalism rooted in cultural distinctiveness remained camouflaged. Ottawa might be intruding with its social legislation but to that extent it was doing so with all the provinces. Part of this reluctance stemmed from the fact that the UN was ideologically opposed to any significant state intervention in the economy anyway (Quinn 1979, 117). Viewing any such policies as inherently "paternalistic," the UN saw the provision of social services as something that was fundamentally the responsibility of the philanthropic system in the province (Quinn 1979, 84; Nish 1970, 105–6). Charity and private generosity, organized and administered through the religious authorities, could fill a gap that would otherwise fall to the state and from there to its limited tax revenues. If there is one indicator that so thoroughly captures the anti-statist attitude of the pre-Lesage era it is the near total lack of a civil service: in the 1950s there were fewer than 50 specialists employed in the social sciences in the provincial bureaucracy and almost a third of civil servants had less than 5 years of schooling (A.-G. Gagnon 1990, 41; D. Morin and Megas 2012, 94–5). But the acceptance of the division of powers as written was suggestive of a government that ultimately felt that it had the jurisdiction it required. What was needed was more respect of that jurisdiction by Ottawa.

One document of the era that challenged this view of the constitution was the Tremblay Report of 1956, or the Royal Commission of Inquiry into Constitutional Problems. The document was a departure from the UNs narrative and more in keeping with the philosophy that would underpin the Liberals after 1960. Nominally about intergovernmental finance, the report aggressively argued on the basis of a dualist view of Confederation that the unique religious and cultural background of the province meant that it could not consider itself to be in the same position as the other provinces and that a review of the Confederation agreement showed that it was not

supposed to be in such a position. In particular, the report submitted that Quebec did need more money, more autonomy, and that the Quebec state should use both to develop its culture. It saw in the development of the welfare state and the programs that Ottawa was introducing a violation of the basic ideas behind Confederation because they undermined Quebec's ability to propagate itself on its own terms in the social field. For example, in exploring the ways that the federal government had begun to get involved in pensions in the 1920s, the report noted that this intrusion represented a defeat of the purpose of section 92(13) on property and civil rights, because the scheme was both externally conceived and financed and Quebec had little choice but to go along:

> In 1867 it had been agreed that the whole social domain should lie exclusively within the competence of the provinces and that was done more particularly to enable the French-Canadian citizens of Quebec to preserve their own way of life and their own institutions. But now, under the influence of socialist ideas and groups, Ottawa was setting out to legislate in the social field, and this confronted the Province of Quebec with the alternative of either renouncing its ideals of social organization and accepting a plan of foreign inspiration, or remaining faithful to that ideal by paying a high price for it (Kwavnick 1973, 128).

The value of the federal scheme in the abstract was beside the point. In calling for the return of social security to the provinces in its recommendations the report did so because to do otherwise was simply a violation of the spirit of the constitution. "Having in view the higher aims of Canadian federalism, it is necessary that this should be so….To the Province of Quebec, bearing in mind its special role in the Canadian Confederation, the plenary exercise of its jurisdiction in social matters is of primary importance" (Kwavnick 1973, 216).

This was not the role that Duplessis saw for the state. Government action in social programs was not the way the UN felt Quebec's culture was to be developed. It was necessary for Ottawa to stay out of the field but in this he was often more in line with the other provinces anyway. Of course, the Report happened almost by accident. Duplessis called for the report because of his battle with Ottawa over taxes but also because he used such inquiries to keep hot issues under wraps. The impressive, 2000-page report went much beyond what was needed or wanted by Quebec City. There is evidence Duplessis sought, if not to supress the report, at least to keep it

"on ice" (Laporte 1957). Pierre Laporte, in *The True Face of Duplessis,* offered an extremely negative portrait of the premier, stating that the he had never asked for the report but that "public opinion forced his hand to some extent" (Laporte 1957). Furthermore, the press could not get copies on the pretext that it needed to be translated into English, a rouse that convinced no one. It was not in Duplessis' interests for the report to be taken seriously, but it nevertheless had a profound impact he had not foreseen.

Nor was there any interest of any kind in better fleshing out what the relationship was between citizens and the state in the form of Canadian civil liberties, in particular whether the individual had rights superior to those of a national collectivity. The country had a constitution "similar in principle to that of the United Kingdom" but the abeyance regarding the existence and extent of traditional British liberties in Canada's federal system was a matter that had never been squarely addressed (Dyck 2011, 465). The theoretical ability of either the federal or provincial power to legislate as it wished in its jurisdiction, and where traditional liberties sat with that idea, were by the 1930s being only tangentially addressed by the courts. At most the courts were prepared to allow for an "implied" bill of rights, dependent in particular on finding offending provincial actions *ultra vires* on account of intrusion of the criminal law (Dyck 2011, 465). But more aggressive protection of individual rights was something that had unclear consequences for a political community that perceived its fundamental characteristics as resting on a communal basis. Additional or even clearer civil liberties would also have hindered the UN in its persecution of communism, the Jehovah's Witnesses, and the trade union movement. The UN abridged civil rights for electoral ends: pursuing communists, for example, was essential to the portrayal of the UN as the saviour of the Church, which had been attacked overseas and was portrayed as needing strong domestic support   (Nish 1970, 74). Furthermore, on the division of powers, there was the additional argument that if communism were to take hold in Canada it would necessarily weaken Quebec, since it would be in the interests of a communist government to centralize the state (Quinn 1979, 128; C. Black 1977, 418–9). Although the powers of reservation and disallowance had begun to fall out of favour, that point did not need to be pressed. The vagueness of the federal powers of Ottawa over the province did not need to be discussed and it would in fact have been counterproductive for the UN in much the same way a clarification of the British connection would have been. Indeed, how would the UN, a government that saw one particular church as being responsible for most social services, have

been served by a clear recognition of freedom of religion? A clear enumeration and basis of civil rights in Canada would reduce the UN's political latitude while in government, and furthermore such individualism would undermine the collective basis that underpinned the nation as a whole. But it would not have done to deny the existence of civil liberties in Quebec either. As with all governments, the UN was reliant on a narrative of an effective judiciary and law enforcement and long standing institutions that defended the legitimate interests of citizens. After all, the fight against Ottawa was itself couched in the terminology of the "legitimate rights" of the province under the constitution. The precise question, therefore, of the existence and extent of civil liberties, and more generally the relationship that a citizen had to the state, was one that was best kept ambiguous and subject to multiple interpretations.

While the UN's moves against Ottawa were seen as consistent with French Canadian nationalism, it must also be observed that its actions were very much in keeping with some other provincial administrations at the time (Brady 1959, 265–6). As a result much of the dualist narrative of Quebec's place in Canada, especially in relation to Ottawa's intervention in the social field, was not as apparent until after 1960. In Ontario the UN found its clearest ally in the government of George Drew, who worked with Quebec to arrest Ottawa's growth following the Second World War (Gotlieb 1985, 27–9;42; C. Black 1977, 458). The creation of the "Drew-Duplessis axis," for example, was an important part of post-World War II reconstruction politics, and took aim at many of the plans and visions of the King government for centralized management of the economy (Gotlieb 1985, 42). In both Toronto and Quebec City the issue of creeping centralization was vitally important, and was seen as a menace to the structures that underpinned the constitution and the ability of either province to control its own development and culture (Gotlieb 1985, 47; C. Black 1977, 413–14). Ontario was so antagonistic to Ottawa's plans that Drew's cooperation with Duplessis brought the Dominion Provincial Commission on Reconstruction undertaken after the war to a halt (Gotlieb 1985, 44). Thus, in both temperament and outlook, the UN was reflective of the mainstream on the subject of constitutional politics in Canada.

However much the era of the UN is associated with the political conservatism of Maurice Duplessis, the social movements and political thought of his successors germinated and grew within the society that the UN governed. The nationalism and vision of Quebec that was espoused by Duplessis became increasingly outmoded during his tenure, given that Quebec

society was in the process of industrializing and urbanizing while he was in power. The extent to which the Quiet Revolution represented a genuine break or a reflection of trends already in play has been the subject of extensive scholarship that continues to this day (see Behiels and Hayday 2011b for an overview of the scholarship; Behiels 1985 is among the most important works in this field). But absent an electoral mandate, there was nothing that intellectual leaders such as Pierre Trudeau, André Laurendeau, René Lévesque, Gérard Pelletier or others could do before they came to power in the 1960s. This situation changed with the death of Duplessis and the restoration of the Liberals to power for the first time since 1944. From that point on, the constitutional crisis inflated.[11]

The UN's commitment to Canada was less clear under Daniel Johnson between 1966 and 1968, but a full break was never proposed under his watch and his death precluded that possibility. Johnson's successor, Jean-Jacques Bertrand, presided over the decline and death of the UN and made no major initiatives on the national unity-separatism front. But he "and his followers were federalists who believed that Quebec's goal of increased legislative and taxation powers could be achieved within the framework of the Canadian constitutional system by pursuing a policy of patient negotiations with Ottawa" (Quinn 1979, 250). Taken together:

> [A] study of the Union Nationale's 1976 program, as well as its programs of 1973 and 1966, leads to the following conclusion: the Union Nationale stands for a constitutional solution mid-way between sovereignty-association and traditional federalism… [Quebec Premier Pierre-Marc] Johnson's proposals were consonant with the text of the British North America Act of 1867. They were not 'separatist'" (Bernard 1978, 139).

Bernard notes in the same breath though that the rest of the country sometimes had problems with this distinction, and the UN was seen as being "crypto-separatist" and supporting a "two-nation" thesis of the country (Bernard 1978, 139). But the UN never abandoned federalism in the way the PQ did, and considered independence at best a "possible last resort" (L. Dion 1974, 140).

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[11] The literature on this is contentious, especially that associated with Jean-Louis Roy (Behiels and Hayday 2011a, 12)

Fundamentally, it was not in the interest of the UN, from an electoral standpoint, to seek conceptual clarity on the basic concepts of the BNA Act or the nature of the Canadian constitution outside of how it could feed into a narrative of national threat from without. The lack of clarity on civil liberties, the essentially unquestioned dominant position of the British traditions in the country, the uncertainty as to Quebec's actual powers in Canada — all were in the interest of the UN to keep conceptually vague and politically fluid. Doing so ensured a winning electoral narrative and tacit support of the major economic and religious powers. These abeyances accorded well with a federal government that had little to gain by pushing for greater clarification on these points in the rest of the country and was more than happy to leave them alone.

3.2.2   The Quebec Liberal Party

If the UN had shown little interest in the results of the Tremblay Report, the ideas it contained were more fully expressed at the political level, with the arrival of the government of Jean Lesage in 1960. Representing a different constituency and working in a very different era, the Liberals did see an advantage in taking a completely different orientation to the state and using it to advance the interests of the Quebec people. This necessarily meant a different approach, one that involved Ottawa indirectly at first but that had clear constitutional implications for which order of government was going to do what and how it was going to finance itself. The constitutional crisis in Canada began to rapidly escalate following a series of initiatives that Lesage's government undertook and that showed a more pro-active and aspirational nationalism as compared to the UN. Roger Tassé, a lawyer and former Federal Deputy Minister of Justice said in an interview he wanted to stress how different Lesage was from the leaders who had come before him, and what a real surprise he was to the federal government:

> Those who say that Lesage had a very great role to play - that's true, that's true. In fact there was a lot of disappointment in Ottawa when they realized that Lesage, who had been a federal minister in Ottawa, was taking such a nationalistic position in Quebec. There were some people who were really really [surprised] and had not realized that he could change that much (Interview with Tassé 2014).

In particular, the new Quebec nationalism of the 1960s sought more control over provincial affairs that linked social intervention with cultural progress and therefore brought on a more

complex conversation with Ottawa. As Lesage began to move into territory that exposed the question of cultural duality that had previously been in abeyance, the result was an escalating crisis with Ottawa. This process began with Quebec's assertion of existing powers but in new ways, with implications for Ottawa's constitutional ability to legislate in important areas and raising the question of why Ottawa was acting there at all. Thus, as François Rocher has noted, while the *demands* of Quebec were not really new, the new approach and ends to which Quebec used its powers were threatening to Ottawa:

> The emergence of Quebec neo-nationalism affected the provincial government's relations with the central government. The constitutional debate that permeated Quebec political life for three decades reflected the political will of successive governments to revise the division of powers by way of transferring to Quebec the powers claimed under the constitution of 1867, or those exercised by the federal government under the spending power…The attitude of the Lesage government concerning the constitutional dossier was marked by a profound change in perception and strategy. Provincial autonomy was presented not as a means of limiting the pernicious influence of Ottawa, but rather as a means of political, economic, and social restoration of the French-Canadian "people." The autonomist discourse thus took on a new orientation: the need to preserve the traditional character of French Canada giving precedence to the need for national affirmation that required the defence of power conferred upon the provinces, powers judged as indispensable to the task of modernisation towards which Quebec was striving (Rocher 2002, 79).

Ottawa was initially receptive to the Lesage narrative, if not to some of its implications. It also perceived the problems raised by the Quiet Revolution as a national problem based on linguistic and cultural inequality rather than a crisis in federalism. The redefinition of the province as the homeland for a more activist Quebec people necessarily required a re-evaluation of the French language in Canada, a problem that initially confronted the government of John Diefenbaker but became a priority under Lester Pearson. Ottawa's understanding of Quebec nationalism during the 1960s and 1970s was very much informed by its central and overriding fear that it might turn into a force that could break up the country, along with the recognition that the state had now taken a central role in the Quebec politics in a way that it had not previously. The narrative coalesced around the idea that Canada, and Canadian federalism in general, had been unfair to

French Canadians and the French language and that what was needed was reform of the Canadian state to better reflect the country's linguistic duality. Initially, the issue of French Canadian alienation was confronted using an utterly conventional instrument choice – a Royal Commission. The relatively early appearance of the Royal Commission on Bilingualism and Biculturalism in 1963 and its proposals designed to reduce the inequality of the languages in the country were a testament to the fact that the government of Lester Pearson had at least understood a part of the problem and had moved to discover what the new politics would look like and what was needed to ensure that the country's institutions were reflective of the demographic and linguistic realities.

The report of the "B and B" Commission is notable in that it lacks a detailed account of the basis or objectives of the new Quebec nationalism. Its Preliminary Report famously warned that Canada was going through the worst crisis in its history but the tone of the report is national in scope and addresses Quebec separatism only obliquely. The crisis that is emanating from Quebec, in the eyes of the report, was something that had to be addressed on a national level through legislation. Federalism only enters into the matter insofar as it might assist the national objectives of preserving two distinct cultures within a common state. A more substantive solution, in the sense of a possible redistribution of powers between Ottawa and Quebec City, is completely absent. Rather, the commission looked at other provincial jurisdictions only in how they might assist in bringing about linguistic equality (Canada 1967).

In no sense was this going to be sufficient, and the government of Lester Pearson soon found that while the first part of the problem – linguistic inequalities – might be addressed through a commission, the new centrality of the Quebec state in French Canadian life and its new demands could not be addressed in this way.[12] A more fundamental review of the constitutional basis of the country was going to play out in social policy that would challenge the pan-Canadian vision many had of the emerging welfare state with that of the muscular provincial role Quebec City envisioned. The assertion of Quebec's authority in health, education, and business began in

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[12] Several years after the report was published, Cameron, 1974 criticized the federal governments of both Pearson and Trudeau for focusing excessively on the national condition of French while missing the point that "bilingual and bicultural improvements in the federal civil service and outside the province (however meritorious in themselves) are not in any way the central issues for French Canada…." (130).

earnest in the early 1960s with a clear demand by the Quebec Liberal party that Ottawa retreat from those fields, which the Pearson government eventually proved willing to do with caveats that preserved a national role. The first genuine step in this direction was in 1964, with the discussions over the Quebec and Canada pension plans. The story here is well known: Quebec arrived at the conference with a plan that was far superior to that which had been offered by the federal government and did not want to give it up. It was not entirely foreordained that Quebec would be allowed to implement its own plan. Graham Fraser, in his book *René Lévesque and the Parti québécois in Power,* writes that the unveiling of the Quebec pension plan was seen at the time as a genuine menace to Confederation (Fraser 2001, 33–4) The resolution was seen as something as a triumph for Quebec but also for Ottawa's efforts to cooperate with the provinces (Fraser 2001, 34). But it was not the last time that the provinces would get the upper hand. Pearson's first administration has been described as being one of the quickest periods of decentralization in Canadian history (Behiels 1999, 78; English 1992; G. Stevenson 2004, 85). This decentralization made sense to some extent, in that part of what Pearson was trying to do was "staunch the Quiet Revolution" through non-constitutional means (Robertson 1999, 179).

Pearson did, to some extent, manage the national question, but only insofar as it meant on the whole agreeing with Quebec's interpretation on the abeyance of duality and attempting to keep the most contentious issues off the table. Pearson was directly confronted with a certain vision of the federation and decided not to fight it, ultimately subscribing as much as possible to a dualist vision of the country that was not sellable elsewhere (see McRoberts 1997 for the best known defence of this strategy). His response was reactive, a matter of finding ground that would satisfy Quebec. It managed to keep both the Quebec Liberals and the UN from breaking with the country at a time when that was a possibility. For their part the Quebec Liberals had flirted with the idea of separatism but had definitively come down as federalists by the late 1960s. By then the Liberal Party was committed to remaining inside the country. The Liberal Party's commitment to federalism became very clear after its loss in 1966 to the UN and the period of soul searching that followed that event (Quinn 1979, 233, 245). This period of course saw the departure of Lévesque from the PLQ to establish his own party. The return to power of the Liberals in 1970 under Robert Bourassa saw active participation on a variety of issues, including coming quite close to solving the constitutional issue with the Victoria Charter.

Thus, while the Quebec Liberals were not interested in pursuing an overtly separatist agenda, the party still did not accept the constitution as it was then written. For the UN during the 1960s and 1970s, questions surrounding the reform of the constitution, the possible veto of the province, and the individual's relation to the state were useful ambiguities that were to be maintained and exploited when needed. By contrast, the Quebec Liberals sought clarity and change on these topics. Their desire to intervene in the economy more aggressively and elevate French Canadians to a position of equality with their Anglophone counterparts required both an active discussion of these subjects and a clear idea of how they should be resolved (Rocher 2002, 79).

The Liberal Party of Quebec had a different vision than the UN of both Quebec's place in Canada and the responsibilities of the state. While the UN was dependent on a narrative of national weakness and sought a very small state, the Liberals believed in a narrative of national empowerment. To that end, the constitution of 1867 was in many ways outmoded. Separation was not necessary, but the status quo could not be accepted either. The Tremblay Report had been among the first pieces of evidence of the emerging shift and contained a vision on which the party built their basis of electoral support.

The inability of the provincial Liberals to reconcile their positions with those of the federal government under Pierre Trudeau was evident during the early 1970s, and will be discussed in the subsequent section on Trudeau's arrival. Much of the disagreement was rooted in the fact that with the arrival of the Part Québécois on its left, it became difficult for the Quebec Liberal party to come to agreements with the central government and not be painted as weak. Electoral considerations of this nature were obvious with the collapse of the Victoria Charter in 1971. Quebec Premier Robert Bourassa wanted to sign the Victoria agreement but was prevented by a cabinet that feared it would be seen as "selling out" and lose ground to the PQ (Stein 1989, 53; Russell 2004, 90–1). Those negotiations went silent and would not be resumed until after the Bourassa Liberals left power in 1976. However, it was becoming apparent at this time how little agreement there was on the subjects that needed to be addressed and how much difference there was on the fundamentals of the constitution. Neither the government of Robert Bourassa nor subsequent provincial Liberal leader Claude Ryan could accept the singular vision of the federal Liberals of Pierre Trudeau in any event. Ryan had consistently argued that there was too much power at the federal level, a position that he had subscribed to ever since he became the editor of *Le Devoir.* While remaining committed federalists, neither of these two Liberal leaders found

themselves in agreement with Ottawa on the nature and foundation of the Canadian constitution after 1968.

3.2.3   The Parti Québécois

The growing crisis at the heart of Canadian federalism was considerably exacerbated by the arrival of the Parti Québécois. As the first overtly separatist party to take power, the PQ was a game changer in that it had an active interest in bringing to the fore these points of contention in the constitution and exploiting a constitutional crisis for an electoral gain that would ultimately result in Canada's collapse. Abeyances for the PQ became over time less matters of academic debate or examples of unbridgeable differences between Quebec and Ottawa, and, instead, strategic opportunities to generate and expose grievances against the rest of the country. This motivation distinguished the PQ from the other parties which had each capitalized on constitutional deficiencies to some extent but still had no interest in seeing the country itself disintegrate.

Abeyances were not as useful to the PQ in galvanizing its base in the 1960s and 1970s as they would become afterward, however. At the time of the party's creation and throughout the 1970s the rhetoric on independence was more focussed on the desirability of independence in light of past history and the changes the PQ argued were needed within Quebec society. The defects in the Canadian constitution were obvious to everyone anyway and the debate surrounding the division of powers or the role of the two orders of government had been ongoing for nearly 80 years. Linguistic tensions had been a fact of Canadian life since 1759. Rather, the PQ emerged from groups who found nothing in federalism itself worth saving and saw no reason why it should be fixed. The PQ had founded itself on this position and never wavered from it. Thus with the arrival of the PQ, it became much more difficult for any political actor to exhibit abeyance behaviour. None of the major parties in Quebec was willing to practice it anyway.

The PQ's lack of interest in renewing federalism is critical for understanding how far the leadership of the PQ could go when talking to the rest of the country about abeyances or how they could be resolved. At the time of its founding the PQ had emerged from a number of groups which had already left the federalist tent (Quinn 1979, 239–241). The best early treatment of the genesis of the sovereignty movement can perhaps be found in a 1968 article in *Queen's Quarterly* written by James William Hagy, but there are a long list of authors who detail the slow

rise of the PQ as a political party leading up to its electoral triumph in 1976 (Hagy 1968; see also Fullerton 1978; L. Dion 1998; Quinn 1979; Saywell 1971; Saywell 1977; Fraser 2001; Savage 2008; Güntzel 2011).[13] Emerging out of a genuinely diverse group of organizations in the late 1960s that had been inspired by the movements towards decolonization and national liberation, the party gained particular traction following its successful alliance with the labour movement. The unions tended to represent lower class workers where the distinction with the much better off Anglophone community was clearer and the resentments could run a little deeper (Savage 2008, 865). The mining unions were particularly influential, but there were other sectors as well in which the PQ platform held a lot of appeal (Güntzel 2011, 282–3). The left turn made the arguments about national decolonization and liberation far more palatable to the labour movement and its leadership and had currency in the political sphere at this time (Güntzel 2011, 281–2). The link between nation and class was continually reinforced in a variety of ways around 1970, including a series of large strikes over the use of French in the workplace that resulted in the arrests of some union leaders. The experiences of the attacks committed by the *Front de Libération du Québec* during the October Crisis, in which a disproportionate number of union leaders were arrested, were to further alienate them from Ottawa and Trudeau's vision of federalism (Savage 2008, 865–66;884, n. 2).

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[13] The initial groups, such as the *Alliance Laurentienne* and *Action Socialist pour l'independence politique* were small affairs, doctrinaire and insular, and with little in common with one another. Growing out of the 1950s, many tended to share the values espoused by the UN – they were religious, conservative, and corporatist. Others, like the *Action socialist pour l'independence du Quebec* (ASIQ), were drawn more to the radical left, in particular the socialism of the 1960s, and tried bringing those ideas into the mainstream. Along with them would eventually appear the *Front de libération du Québec* (FLQ), which took its inspiration from the left and from other national liberation movements, in particular those in Algeria and the rest of Africa. Overall though the FLQ were not taken too seriously (until they became violent) and were consigned to the margins of Quebec society. The first of the truly meaningful organizations that signaled the beginning of coalescence was the *Rassemblement pour l'independence national* or RIN, which had been kicking around since 1960. The early calls of the RIN were not particularly influential and it served more as a pressure group than a political party, although it began to receive a wide audience by the mid-1960s. It became more formally organized during the election of 1966, actually fielding several unsuccessful candidates. The subsequent internecine squabbling led to the disintegration of the organization, although it soon re-emerged in the form of the more mainstream but short-lived *Movement souveraineté-association* (MSA) that would be run by Lévesque himself. Along with the (MSA) and another group, the *Ralliement national,* the three entities rapidly began to converge around their common commitment to independence and managed to set aside their differences to form a united coalition. In October of 1968, the groups disbanded and collectively joined the newly formed Parti Québécois, which soon became closely affiliated with organized labour, which overcame initial resistance to a nationalist program based on ideological and economic fears to become among its most ardent supporters. The history will be only briefly treated here, for more consult the cited authors.

The union movement also provided an enormous amount of institutional support to the PQ when it began to seriously contest elections in the early 1970s. Furthermore the bond remained strong for reasons that were almost entirely outside the constitution or any of the discussions surrounding it. In the lead up to the election of 1976 many in the leadership of these organizations no longer saw the PQ as a vehicle solely for the liberation of Quebec but more importantly as a vehicle for the achievement of socialism (Güntzel 2011, 287). This view followed a radicalization of these groups that resulted in them losing interest in "social-democratic" reformism" in favour of achieving actual socialism (Güntzel 2011, 287):

> As a result of the radicalization process, by 1972-1973, the leadership of both centrals became dominated by socialists. Most of these socialists opted for sovereignty. They did so because they saw it as an essential component of national liberation and because they believed pan-Canadian sovereignty did not constitute a viable option to achieve socialism (Güntzel 2011, 287).

The interests of the unions in the rest of the country could not be reconciled with those in Quebec either, because they were rooted in the dominant culture that did not have the same interests as Quebecers (Güntzel 2011, 287). Many of the ideas that they had latched onto were those of the 1960s in such publications as the *Parti Pris* and *Révolution Québécois* that were common in that era (Güntzel 2011, 287).

The union movement was perhaps the best organized supporter of the PQ but it was by no means alone. Strong support derived from the artistic community as well (Dufour and Traisnel 2009, 44). This cultural, literary and artistic expression was a fundamental break with the previous Catholic hegemony (Dufour and Traisnel 2009, 44). Singers were strongly allied with the movement at the time, with popular singers including Félix LeClerc and Gilles Vigneault, (one study found that 142 of 147 singers voted for the PQ in the election of 1976) (Piroth 2008, 148, 161 n. 21; Roy 1991). The other large movements closely associated with the sovereignty movement have traditionally been the student and the feminist movement, both of which remain closely committed to it (Dufour and Traisnel 2009, 57). The students had been courted in the 1960s and formed an important part of the coalition but they remained one of many left wing groups that were allied with the PQ (Fraser 2001, 35–6; Quinn 1979, 249).

The fundamental point is that despite all of this heterogeneity, the PQ was formed out of groups whose leadership had completely given up on the federal system by the time of the party's creation in 1968. This fact is obvious in the early platforms of the party when it moved to contest the election of 1970. A side by side comparison of what each party was offering, provided by the *Gazette* in the lead up to that election, makes it clear that the PQ was the only party that was seeking independence, despite the rhetoric from some of the competing parties. There is nothing in the PQ platform that suggests a renovation of the federal system would be accepted or even desirable. "The Parti Quebecois wants Quebec to become a sovereign state – a country that will be independent from Canada though linked to it economically" (Saywell 1971, 17). The UN, Créditistes and Liberals all offered proposals on the federal system, but of a kind that were not particularly new and seemed more designed to play on the fear of over-centralization and foreign ownership than to actually break from the country.

This position did not change during the 1970s, even after the shock victory of 1976. Throughout, the party position on constitutional renewal was one of detached disengagement, and the PQ showed little interest in this process. Instead it adhered to a pattern that has characterized its time in power: while it is fundamentally hostile to the federal system, it does very little to actually interfere with or disrupt its operations, with the exception of often not going along with the same playbook as the rest of the country on national platforms.[14] Rather, the PQ pressed ahead with the plan to hold a referendum and was uninterested in the proposals that were being offered. Evidence for this is manifest. Gordon Robertson found that for Levesque separation was the only answer and there was nothing really that could have been done (Robertson 1999, 180). Gagnon also notes that the PQ was more reactive than proactive during this time with regards to the constitutional issue (A.-G. Gagnon 1990, 159). Russell, after ably canvassing the proposals that were generated by the different levels of government, nevertheless concludes that "The Government of Quebec had nothing to contribute by way of proposals to restructure the Canadian federation" (Russell 2004, 102). Indeed, in looking at the documents that were

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[14] This pattern was confirmed for example in 1994 following the election of the PQ following the collapse of the government of Daniel Johnson. When asked during one of the first news conference whether or not he intended to oppose the system Parizeau told them that "I don't want to *oppose* the system. I want to get out of it" (CBC News 1994). This mentality was that of the Levesque government nearly twenty years earlier.

generated as far back as 1968, Levesque had already given up on an accommodation with the rest of the country in that did not include political sovereignty for Quebec.

The only thing that the PQ did contribute to the constitutional discussions during this whole period was *Quebec-Canada: A New Deal*. This document came out in 1979 and was really more of a precursor to the upcoming referendum than a genuine effort to engage the constitutional discussions. The document is usually referenced as being the first genuine statement of "sovereignty-association" that the PQ issued and would go on to fight the referendums on (Russell 2004, 102). But what is occasionally neglected is a chapter that canvasses not the proposals for federalism, but the reason why it had failed as a *fait accompli*. In a very clear way, the document makes it obvious that the system was viewed as beyond redemption. A forthright section entitled "The Impossibility of Renewal" makes this view especially clear and derides as unimportant the work of the politicians who at the time were seeking some kind of renewal (Quebec 1979).

Sovereignty was not about the *Constitution Act, 1867*; rather it was about the historic destiny of Quebec, as it has been with many other nations. In a 1977 speech in New York, Lévesque described the efforts at holding Canada together as akin to those of King Canute trying to stop the tides – a fruitless effort so that the sooner that Quebec's destiny is recognized the better (CBC News 1977). The linguistic anger is directed, as it was in particular during the strikes of the 1970s, against the Anglophone presence in Quebec and its disproportionate power, rather than aimed at reforms that might be undertaken nationally to better accommodate Quebec in Canada.

Taken together, it becomes clear that there was very little actual negotiating going on. Stein does an excellent job in canvassing the changes that happened, and the ongoing frustrations that were experienced during this time.

> It seems clear from our case study of Canadian constitutional bargaining that for most of the 13 years of the intermittent but intensive efforts at negotiating comprehensive constitutional renewal, the prerequisites of a genuinely integrative process of bargaining…were absent. The negotiating parties seemed unwilling or unable to search for a solution or package arrangement that would have provided greater joint benefits to them then a purely distributive (compromise) solution or absence of any agreement.

> There was little evidence of "give and take" attitude on their part, particularly on bargaining means and short term objectives. They seemed reluctant to make linkages and accept bargaining trade-offs on matters of secondary importance. They did not make extensive use of intermediaries to find areas of common interest, nor show much interest to, or readiness to experiment with, a wide range of "problem-solving" methods and mediating techniques such as single negotiating texts, contract embellishers, personelle [*sic*] exchanges or diplomacy, which might have facilitated the effort at reaching consensus. They were slow to acquire "political learning," and seemed to lack political commitment or will (Stein 1989, 33).

The arrival of the PQ thus represents a shift to a political party with an incentive to exploit abeyances for political gain. That the PQ did not do so initially was a choice of tactics, and not a deviation from its fundamental goal. The fading of the UN now meant that there was no party in Quebec particularly willing to hold tricky issues in abeyance.

3.3 Federal Liberal strategy of Pierre Trudeau

Trueau's arrival in 1968 as Prime Minister brought a shift in focus to the government that exacerbated the national unity crisis. Trudeau's rejection of the dualist conception of Canada represented a very direct attack on the broader philosophy of linguistic politics that had been simmering for most of the previous decade. The rejection of asymmetrical federalism implicitly meant that the dualist conception would not be accepted by Ottawa, and had the effect of adding fuel to the fire. In this Trudeau differed from his predecessor Lester Pearson, but also in many respects from the Progressive Conservatives under Robert Stanfield (Clippingdale 2008, 18–23). Furthermore, his commitment to the individual as the primary rights holder, and his belief that collective rights, such as those to language, were predicated on individual choice, effectively appeared to strip Quebec City of legitimacy to speak for a "people" at all. This view was in direct refutation of the duelist narrative.

Trudeau's policy commitments and active agenda marked an important shift in which contentious, unsettled constitutional issues were no longer allowed to rest in abeyance. His decision to open the constitution was done with a specific vision that, when introduced, collapsed any space that might be offered to keep apart   concepts that had previously been held in suspension. The fact that the Liberals dominated the federal scene between 1968 and 1984 meant

that the attitude of the Liberal Party to matters held in abeyance was of primary importance. The PCs remained more circumspect on constitutional reform, and would have little to say on it until the election of Brian Mulroney.[15]

However much this vision was informed by Trudeau as a person the decision to proceed at all was not entirely his and in reality not even that of the federal government. Reacting to the threat that it saw emerging in Quebec the first modern moves to open the constitution and drag it into the IGR process was not initiated by Ottawa or Quebec City but rather by Ontario and its Premier John Robarts. Because the Quebec Liberals had begun to recast the constitutional discussion in terms of social policy and had attacked Ottawa along those lines, any changes that Quebec got with Ottawa to those agreements would necessarily have implications for the other governments. For its part Ontario could not stand by uninvolved as Quebec moved to ever greater success in building its institutions and getting funding from Ottawa without at least being part of the discussion. The province had been completely thrown by the level of sophistication that Quebec had brought to the question of pensions in 1964 and did not want a repeat of that experience (Bryden 2013, 131). The progress of other provinces *vis-à-vis* Ottawa was becoming conspicuous in Toronto, and Quebec's success was menacing what it saw as its natural role as an articulator of the national interest. This clearly had political implications for Robarts and the province over the long term and Ontario needed to recast itself to address the deeper problems that lay at the heart of the Confederation deal:

> It no longer seemed feasible – and it fact it probably never had been – for Ontario to function as the voice of Canada. A Quebec in the midst of its Quiet Revolution had little time for the national interest, whether articulated by Ottawa or Toronto. Instead, the divide between the national and the provincial interest seemed to be widening, and by the mid-1960s finding a compromise position between the two looked increasingly necessary. Ontario was well positioned to facilitate that compromise. Therefore, in addition to dealing with the nuts and bolts of health insurance, and welfare policy, and tax rental agreements, Ontario bureaucrats under the able guidance of Premier Robarts began to shift their interest towards foundational, fundamental issues and away from the

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[15] See chapter 4 for a discussion of the Progressive Conservative evolution on these questions

minutiae. That approach meant that constitutional reform moved to the top of Ontario's agenda, but it also meant a subtle shift away from promoting one version of the national interest towards facilitating dialogue between the component parts of the Canadian national state (Bryden 2013, 130)

To that end Robarts called the "Confederation of Tomorrow Conference" in 1967, over the objections of Ottawa, to discuss the constitution. It had the effect of painting Ottawa in a corner and forcing it to have a discussion it would have otherwise liked to have avoided. For the first time, this marked the end of abeyance preserving behaviour in an actor other than Quebec City or Ottawa and the entry of the provinces into the fray. Ontario was now willing to put basic, unresolved questions – in particular those driving sovereignty in Quebec – on the table for resolution. Importantly how it did so defined how Ontario engaged with the national question and the ensuing constitutional negotiations over the coming decades: that is, first, as its own advocate; and second, as a mediator. But Ontario's strategy meant that the Ottawa-Quebec axis was still the dominant consideration. The provinces had a lot to say on their own behalf, but they never replaced Ottawa as the true "voice of Canada" for anyone in the country.

 Still, the Ontario move left Ottawa with no choice but to engage. The conference was hailed as a great success for breaking the Ottawa-Quebec City dynamic that had characterized Canada's approach to the national question, even if it achieved very little. The UN premier, Daniel Johnson, presented a set of constitutional proposals in his book *Égalité et Indépendance* that would have completely changed the country and reformed the relationship of Quebec with other countries (Quinn 1979, 233). Nevertheless three years later, a commentator in the *Globe and Mail* applauded the conference for getting the provinces involved. "Until the Confederation of Tomorrow Conference the role of an uneasy Quebec within Canada was largely the subject of a restricted dialogue between Ottawa and Quebec City. The rest of the country looked on and asked 'what does Quebec want?'" (Munro 1970). And at the time it was clear that these kinds of conferences represented a good tool for tackling rising soveignist sentiment in the country. The leader of the Ontario New Democrats was quoted in the *Globe and Mail* confirming that of all the issues that might be discussed, "Separatism – this is the dominant issue. This is the real threat" (Wills 1967).

Pearson declined to go to the conference, however, and it was suggested in newspaper accounts that he had tried unsuccessfully to dissuade Ontario Premier John Robarts from holding it. "Mr. Pearson believes his attendance at a federal-provincial conference called by a province would be a dangerous precedent. Any province might feel it could call such a conference and expect the Prime Minister to attend. 'Such a situation might itself be a threat to Confederation,' one source said" (Brydon 1967).But this approach was unsustainable over the long term, and the federal government knew that it would have to lead some kind of discussion on the constitution whether it wished to or not. Pearson's last act was to call a constitutional conference in February 1968. The document setting out the agenda for the conference was called *Federalism for the Future: A Statement of Policy by the Government of Canada* (Telford 2005, 3). But the tone was clear: after giving the provinces significant powers in the social policy field, the country could go no further. Pearson would soon leave the work on the constitution to others, but the conference flowed logically into the chain of events up to that point in his role as the Prime Minister. While it might not have been ideal, Pearson (and the federal government in general) was finding that it could no longer wait. The new Prime Minister would have to act.

Pierre Trudeau was initially opposed to federal intervention on the constitution, but there was little choice in the matter (Robertson 1999, 180; Russell 2004, 77). If there was no federal action, then there would be no answer to the nationalist challenge in Quebec and other actors, namely John Robarts, had shown they were perfectly prepared to begin the discussions (Russell 2004, 77). That is not to derogate from an individual who clearly also arrived with deep personal commitments to constitutional change and found in the political context an opening for his own vision. Winning the Liberal leadership campaign in 1968, Pierre Trudeau was now in a position to bring to the constitutional conferences that began that year and culminated in the failed Victoria Charter, his own unique vision of the country. It prioritized individual rights, egalitarianism, bilingualism, symmetrical federalism, and a pan-Canadian vision. Nevertheless, Ontario and Quebec would have each been given a constitutional veto, there would have been enhanced parliamentary language rights in each province east of Saskatchewan, and there would have been an entrenched recognition for the Supreme Court. While the country may not have been "clamoring" for constitutional change, the federal government had legitimately been pushed into a corner by Ontario premier Robarts and Quebec City.

The failure of their constitutional reform vision at Victoria was probably the first time that policy leaders should have begun to appreciate the inadequacy of Summit IGR to contend with the "new Quebec." They should have realized Summit IGR would not work on this issue, at least not as effectively as it had been working in the area of interprovincial finance and social program development. They should also have become aware, that on the nationalism issue the Quebec Liberals could not speak on behalf of the people of Quebec alone. Bourassa came extremely close to passing the deal, but eventually realized that he could not in the face of growing support for the PQ. He did not "turn down the deal;" it was only *after* he returned to his province that he realized that an otherwise sympathetic cabinet was finding the electoral calculations to be too much to handle (Stein 1989, 53; Russell 2004, 90–1). Perhaps more importantly, the Victoria Charter began to reveal the dangers of issue linkage. The Quebec Liberals were unhappy with how little power the Charter would have given the province. The attempt to reach a package deal in Victoria, where a number of issues would have to be discussed or none would be, revealed the challenges of Summit IGR (Olling and Westmacott 1980, 41–2).

A period of calm followed the failure of the Victoria agreement. Trudeau appeared to walk away from the issue, finding that there was little to gain electorally in pursuing it in the run-up to the federal elections of 1972. The Quebec election of 1973 returned the Liberals to office and played down the need for reform. Nationally, the Progressive Conservatives under Robert Stanfield remained fundamentally opposed to much of what the Liberals were proposing, seeing constitutional reform as divisive. In responding to the Throne Speech of 1973, Stanfield argued:

> Can anyone honestly claim, Mr. Speaker, that in their last four and one-half years in power the present government has helped unite Canadians in the pursuit of a common goal? Can anyone honestly claim in this House that Quebec and the Atlantic provinces are happier now? Can anyone really claim that a last minute effort to make the western provinces believe that their needs will at last be met was enough to mislead them? And does anyone really believe that Ontario and the other provinces will be pleased with the way in which their money was spent on inefficient programs, total failures, intended to reduce regional disparities? (As quoted in Clippingdale 2008, 18–9).

Neither the federal nor provincial Liberals had an interest in reopening the discussions the other provinces had begun.

Had the PQ not been elected in 1976 it is possible that the crisis would not have continued to inflate. But once it did, Trudeau was forced into confrontation and he continued to bring his own forceful vision of what Canada is and what it should become. He pursued a very activist position in the four years leading to the 1980 referendum. The federal government's normative framework, expectations, and view that the conflict with Quebec could be solved though a government-to-government process is apparent in a variety of reports that came through after 1976 to respond to the PQ win and ensured that Summit IGR would become an essential part of the process. In terms of the content of the proposals that people were willing to put on the table there was a lot of diversity, and a willingness to entertain the ideas that could not have been considered up to that point (Russell 2004, 99; Smiley 1980, 81). And Summit IGR was not the only mechanism that was engaged. Much as with the Royal Commission on Bilingualism and Biculturalism in 1963, the first response that Ottawa had to the PQ victory was to call the Task Force on Canadian Unity (Pépin-Robarts Commission) to try to get proposals that were acceptable on the table. But the underlying norms that were expressed – that this was a federal issue, one of executive federalism, that the government in Quebec City was the only one capable of resolving the crisis on behalf of the Quebec people – were nearly universal. This attitude was apparent in the ongoing Summit IGR that characterized the period and the attempts by the federal government to gain express provincial consent from all governments at this time and well into the 1980s.

Even Trudeau, who had also claimed his right to speak for Quebec on the strength of his MPs, was forced to acknowledge that he had to work in a multilateral context with the provinces to affect constitutional renewal. The federal approach to the crisis became clear with the issuance of *A Time for Action,* a government publication on constitutional renewal in which Trudeau reaffirmed the idea that there would be a new constitution and that he would talk to the other provinces in order to get it (Stein 1989, 19; Russell 2004, 100). The document makes it explicit that the government was now interested in the process of reconciliation and coordination on a host of topics and that governments would remain central to this process (Canada 1978, 16). This evident federal commitment to a process of reconciliation was also mirrored by an explosion of reports at the provincial level regarding their grievances.

Nevertheless, the federal Liberals made it clear that they were prepared to engage unilaterally where they believed they could do so under section 91.1 of the *Constitution Act, 1867*. Trudeau's

Constitution Amendment Bill (C-60) was introduced in 1978 and sought to codify the position of the Governor General, make alterations to the Supreme Court, introduce a charter of rights applying to federal legislation with provisions for provincial opting in, and most controversially, presented a plan for Senate reform in which the appointment process would be changed so that half of new Senators would be appointed by the provinces and the other half by the House of Commons (Russell et al. 2008, 483; Dupras 1992). The plan was deeply controversial and was referred to the Supreme Court, which ultimately rejected most of it (Reference re: Authority of Parliament in relation to the Upper House 1980). Nevertheless, the federal Liberal vision, based on provincial equality and civil liberties, remained.

3.4 Growth of the IGR framework and Summit IGR

The growing use of Summit IGR, particularly after 1967, shifted two key dynamics of the practice of Canadian federalism. First, it enhanced the need for government consent over policies that were subject to the process – it was one thing to lose in court, another to lose at a conference or to be left out of an agreement. Losing in a Summit context involves a much higher political cost. It represents the failure to get a deal, and the failure of the strategy that was applied, and broadcasts distance from counterparties who are supposed to be in some sense your political partners. Secondly, it changed the structure of federal relationships, which had been largely dyadic to a system better described as characterized by an increased element of multipolarity. Dominion-provincial, or federal-provincial relations was now "Intergovernmental Relations." Provinces could coordinate not just with the federal government but more effectively with each other, in ways that they had not done up to that point, and develop their own separate agendas.

The political calculations of the parties were forced to accommodate the new dynamic. Because provincial actors do not otherwise have access to national institutions and are only able to influence the national political agenda in a limited way, the temptations for issue linkage, visibility, and demonstrations of advocacy to "make the most" of the experience are relatively high for provincial actors. The need not to fail or appear "cut out" is also high. Similarly the federal government also has a strong incentive to demonstrate its value to citizens and its effectiveness as well, and initially IGR appeared a good place to do it. Initially, there was no reason to think that such conferences could not be "win-win." This attitude was reflected in bureaucratic innovations of the time. Trudeau's arrival marked an important shift in not just the

intellectual debate that surrounded federalism, but also the rapid institutionalization of the politics of IGR (Smiley 1980, 97–8). Don Smiley has seen this development as a reflection of both Trudeau's preoccupation with matters of federalism and his desire to rationalize the government (Smiley 1980, 97). During the 1970s the level of sophistication and importance of intergovernmental institutions exploded, amounting to a veritable "second cabinet" for the federal government (Smiley 1980, 97). Pierre Trudeau had no interest at all in special status for Quebec and did not perceive any asymmetric accommodations for Quebec to be in the national interest. For him it was language equality that was required and he had little time for the provincial administrations (e.g. see Laurendeau 1991, 9). But there was very little Trudeau could do to stop the growth of the IGR processes in Canada, even had he wished to do so. The provinces had also begun to invest heavily in their own institutions and were prepared to use them, as made clear by Ontario Premier Robarts' decision to call the "Confederation of Tomorrow" conference. Indeed, the continuation of the trend was something that was noted, as late as 1978, by Marc Lalonde, a noted Canadian politician connected in particular with the government of Pierre Trudeau:

> A century ago Sir John A. simply announced what his policy was going to be…By contrast, any policies and processes we decide upon in this area today will emerge as a result of the process of federal and provincial consultation (Cited in Institute of Public Administration of Canada 1979, 14).

Even so, Trudeau did not want to slow down the intergovernmental process. This institutional environment was one that he was comfortable with and he would use the roundtable format in order to pursue his constitutional objectives. Some political risks inherent in the environment had been revealed previously, in particular at Victoria, where a Summit meeting to patriate the constitution had broken up in failure and which had not been tried since. But there was little agreement that there were better options. This growth also fundamentally reflected the optimism of the period about the possibilities of the emerging IGR framework for solving the major social, economic, and political problems of the day. Until this point the intergovernmental process seemed to have been succeeding. There were admittedly enormous problems with the acrimony of the process, but there was good reason to believe that intergovernmental relations had worked to address the problems of nationalism in Quebec and had the potential to settle the outstanding abeyances in the constitution. Looking back in 1972, Richard Simeon reflected on what he called

the "ethnic question" and found that, on the balance, the new process had more to recommend than condemn it. This positive evaluation of IGR applied to dealing with both interprovincial conflict and French-English relations:

> It nevertheless seems clear that the negotiating process has played a role in mitigating ethnic conflict. The pension outcome in particular demonstrated that on some kinds of issues at least it is possible to devise solutions which go a long way to meeting both Quebec's demands for a special role and English Canadian goals of national leadership. It is unlikely that such a creative solution could have emerged without the process of negotiation (Simeon 2006, 289).

Simeon reached a similar conclusion on IGR's impact on federal and provincial conflicts; while IGR could be acrimonious, it could hide arguments as much as reveal them. His optimism about the process was at the time backed up by investment by governments in the process. Institutions mushroomed and were embraced by the provinces, and the first genuine moves to multipolarity in the system were reflected in the decision by John Robarts to call a conference in 1967 on his own accord.

The introduction of a more formalized IGR framework was important not just because it began to raise the visibility of the national unity issues but also because it led to the increasing "linkage" of issues (see Cameron and Krikorian 2008). This linkage became most apparent in the abeyance context during the negotiation of the Victoria Charter and afterwards, when the federal government consistently found that the provinces were unwilling to talk about any one particular constitutional issue unless all issues were on the table (Olling and Westmacott 1980, 41–2). Prior to the 1960s, the lack of coordination in most areas meant that different governments pursued their goals in an environment that was much more dyadic than it is today. The provinces had little to say in relation to each other, and most national issues with a federalism component were between, and resolved along, an Ottawa-provincial axis. Uniformity, when needed, was achieved by active coordination at the federal level or through policy boards that were independently set up for this purpose (Mundell and Delaute 1945). Stemming partially from the absence of pressure for national standards that would come later, Ottawa was in a position to speak with the provinces individually on different matters to ensure that there was similarity across jurisdictions. Negotiating in this way came with obvious challenges, especially when the

enabling legislation in the provinces was of dubious constitutionality (e.g. Corry 1939, 14 on agricultural standards). This more bilateral process makes more sense in the earlier periods when there were far fewer programs than there are today. When there was a genuine need for a national meeting, a conference could be held (Canadian Intergovernmental Conference Secretariat 2004).

Major crises that split the country along linguistic lines were prevented from becoming federal crises because they were each defined narrowly, according to the underlying policy portfolio on which the issue was based, and handled by the responsible jurisdiction. It was, in many ways, the same dynamic that prevails when an issue such as an abeyance is relegated to the courts. The practice of compartmentalization is not unfamiliar to political science. Michael Burgess, for example, with reference to the British constitution (Burgess 1995, 3–4), claims that issues that are clearly constitutional are hived off to be treated discretely, and prevented from becoming constitutional crises. The government selects an appropriate political solution for the issue--to the extent it is under its control-- and success is judged according to electoral outcomes. The best example of the abeyance of duality being managed in this way is the Conscription Crisis of the Second World War. The mishandling of the 1917 conscription crisis during the First World War provided lessons that were never lost on Mackenzie King. He played down conscription as a problem, avoided talking about it as much as possible, and delayed action until it was no longer a serious issue.[16]

The modern IGR framework is a product of the 1960s, and it was initially set up primarily to solve social policy funding problems and questions of proper jurisdiction. In particular, it was designed to address problems arising out of interdependency and the challenges that it created for program development (Inwood 2011, 7). The nub of the problem stemmed from the well-known discrepancy between federal government's revenue raising ability on the one hand and resulting provincial financial incapacity to legislate in areas that were in the greatest demand for political action on the other (Pollard 1986, 16–21). The IGR process did not displace early mechanisms for federal management; rather IGR was layered on top of pre-existing structures and was

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[16] As suggested by his famous quote "Conscription if necessary, not necessarily conscription" when asked if the policy would be introduced.

something of an extension of the first pillar of parliamentary government (see Johns, O'Reilly, and Inwood 2007 for the different formal and informal dimensions of intergovernmental relations in Canada). There were antecedents to these structures but under bureaucratic federalism the process was passive aggressive and *ad hoc.* Others have recounted the development of Canadian federalism and the rise of the provinces prior to World War Two , and so it will not be repeated here (e.g. Vipond 1991; Cairns 1971; Cairns 1977b) but it is worth observing that the first intergovernmental conference to take place was in 1887, held under the auspices of Oliver Mowat (Scott 1958, 68). These conferences would figure regularly over the course of the twentieth century, but they were not part of the same regularized system that we know today. The lack of serious policy interdependence across the two orders of government in the first 60 years of Confederation, meant, however, that further development of intergovernmental relations was unnecessary. It was also undesirable because its absence allowed both federal and provincial governments the maximum amount of action needed *vis-à-vis* other actors in the federation.

However, this situation had begun to change by the 1930s. The lack of capacity of the different governments to coordinate became a bigger concern, beginning with the Rowell-Sirois Commission and continuing well past the Second World War. Writing for that report, J.A. Corry found the machinery that existed in the late 1930s to be "hand to mouth," and really only covered a couple of public policy fields of which agriculture, fisheries and insurance were the most conspicuous (Corry 1939, 7). After World War Two, a more comprehensive review by the Royal Commission on Reconstruction found that the whole of the machinery could be covered in less than 30 pages (Mundell and Delaute 1945). While both the Commission and the Conference did a good job to suggest that more machinery was needed, the point was also being made effectively at the provincial level, where Quebec responded to these commissions in kind. The most famous was Quebec's 1957 Royal Commission on Constitutional Problems (Tremblay Commission) which agitated for the formalization of the relationships between the different provinces and the federal government (Kwavnick 1973, 221). While usually cited for the statements it made on the sociological basis of Canadian federalism and its resulting call for a more classical, "watertight" version of it, the Tremblay Report also made important recommendations on how federal institutions should be reformed to collaborate better. Recognizing the complexity of the interdependence in the field on which they wrote – namely

tax and social policy – the authors of the Tremblay Report found that resolving the problems of interdependence would require better institutions:

> *IV Coordination of policies*
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> In our era of integrated economic and social functions and of constant expansion of the state's role, co-ordination of policies within a federative state is a necessity which would become even more imperative if, as we propose, the Canadian provinces assumed full responsibility for their jurisdictions in economic and social matters. Now, this coordination cannot be obtained without a special effort being made towards that end. It requires suitable organization (Kwavnick 1973, 221).

The report then goes on to propose a "secretariat of federal provincial conferences," that would ensure "continuity in the work started by the conferences themselves; it would bring together documentation; establish permanent contact between experts of the federal administration and those of the provincial governments; and it would prepare and facilitate the usual exchange of views between the two orders of government. Constitution of such a secretariat would be highly desirable" (Kwavnick 1973, 221). It warned that such a structure could have the capacity to almost displace Parliament, a development which it found undesirable. But the suggestion shows the scope of the reforms that were being considered at the time was quite large.

These expert opinions suggest that there existed a system of IGR up to the 1960s that can be said to have reflected a "policy paradigm" as that term is usually understood, in that it represents a "coherent interpretive framework that consist of beliefs about how the world works and should work in a policy domain" (Skogstad and Schmidt 2011, 6, see also pp. 6-10 for a good overview of the current scholarship; Hall 1993; Thelen 1999). Paradigms need not be terribly well defined, but insofar as one existed for the management of Canadian federalism it consisted of ensuring that national and provincial objectives were pursued as harmoniously as possible and working to keep linguistic and regional tensions at a minimum. The tools were simple but found to be increasingly inadequate, however, and change was needed. Reform was brought about through a process of social learning, namely about the deficiencies in the process and the adoption of new ideas about what might be done to improve management of interprovincial conflict (Doerr 1982, 570). During such learning, as Peter Hall has noted, "the key experts pushing forward the learning process are the experts in a given field of policy, either working for the state or advising

it from a privileged position or the interface between the bureaucracy and the intellectual enclaves in society" (Hall 1993, 277). While Hall's study of economic paradigm shifts in Britain involved officials in the Treasury, in Canada's case reform leading to more formal intergovernmental relations institutions emanated from bureaucratic demands, and overt learning through formal commissions which recommended ways to improve the governance of the country. The role of experts in this process was central – this was not the case of a process deriving out of a state-society interface so much as those versed in the art of governing beginning to appreciate that more needed to be done in order to run the country effectively. Importantly this is only what might be termed "second order change," in the sense that the overall paradigm had not really been altered. The goals of national unity and effective federal intergovernmental maintenance were the same, but the instruments and to some extent the settings were proving to be insufficient to the tasks that they were being given.

All federal actors appeared to agree with this sentiment and what resulted was process innovation, initially at the federal level, then in Quebec, and then diffusing to the rest of the country. The very first effort in this area was in the Department of Finance in Ottawa in the 1954 (Johns, O'Reilly, and Inwood 2007, 22; Behiels and Talbot 2011, 18) but very soon the establishment of dedicated intergovernmental offices had spread across the country and, tellingly, all were connected to the finance departments if they were not under the control of the premier's office itself (Interview with Eldridge 2014; Pollard 1986, 11; Behiels and Talbot 2011, 18–9). This institutional growth was apparent by the early 1960s and represented a bureaucratic commitment to develop capacity in this area to better address the issues of the provinces. It was welcomed at the federal level during the government of Lester Pearson, who was trying to establish national programs in the pension, health, and disability fields.

With the development of the welfare state, it became possible to talk of the "machinery" of intergovernmental relations that was organizing the affairs of a growing state (Gallant 1965). This serious investment in intergovernmental capacity began to give shape to the modern form of "intergovernmental relations" in Canada, a concept that has been defined as the "ongoing process through which two or more orders or levels of government interact to pursue their respective policy goals." In 1982 Timothy Woolstencroft became the first person to document the emergence of intergovernmental relations units in Canadian governments. A more comprehensive account is given by Bruce Pollard in his excellent *Managing the Interface:*

Intergovernmental Affairs Agencies in Canada (1986). Table 2.1 demonstrates that by the late 1970s the system of intergovernmental bureaucracy was both maturing and diffusing throughout the country. The form units dedicated to intergovernmental relations took differed, from full ministries in the case of Quebec to what amounted to little more than committees designed to advise the premier elsewhere. Moreover, the structure of these institutions could change rapidly according to the political need. There was also the growth of a wide assortment of joint committees that mushroomed throughout the country between governments on different policy files. Nevertheless, the development of freestanding intergovernmental relations institutions among the different provinces and the federal government gives a good sense of the changes under way, and Table 3.1 gives a sense of the rapid growth in this area between 1960 and 1980:

Table 2.1. Creation of Intergovernmental Relations Institutions, 1960-1980

Province	Year	Notes/Reorganization
Quebec	1961	Initially a full ministry known as the Department of Federal-Provincial Relations, later renamed Department of Intergovernmental Affairs in 1967.
Ontario	1967	Initially the Federal-Provincial and Interprovincial Affairs Secretariat, in 1972 it moved into the Ministry of the Treasury, Economics and Intergovernmental Affairs. In 1978 became the Department of Intergovernmental Affairs and took on responsibility for municipalities as well.
Canada[17]	1968	Initially the Federal-Provincial Affairs Division of the Privy Council Office, later established as the Federal-Provincial Relations Office in 1975.
Manitoba	1969	Specialized cabinet committee in the year that Ed Schreyer became Premier, reorganized as a policy advisory group in the Premier's Office when Sterling Lyon was elected in 1977.
Alberta	1972	Department of Federal and Intergovernmental Affairs.
Nlfd. & Lab.	1974	Intergovernmental Affairs Secretariat.
British Columbia	1976	Office of Intergovernmental Affairs in the Premier's Office, made a ministry in 1979.

[17] Listed here is the more formal structure rather than the 1954 Department of Finance antecedent.

Saskatchewan	1978	Department of Intergovernmental Affairs.
Nova Scotia	1979	Creation of two new central agencies, Intergovernmental Affairs and a Policy Board.
Yukon	1980	Various organizations, including a separate secretariat.

(Compiled from Woolstencroft 1982, 2–4; Smiley 1980, 94–8; Pollard 1986, 111–74)[18]

The work of the intergovernmental organizations soon became a genuinely sprawling edifice. In 1965, when Edgar Gallant began to seriously categorize what IGR meant, he came up with no fewer than seven different dimensions of the phenomenon which he placed under an unhelpful heading of simply "The Broad Structure" (Gallant 1965, 519–23). By then there were some 125 committees and conferences on federal-provincial matters alone (Gallant 1965, 519). The period between the 1950s and 1960s has come to be known as "cooperative federalism:" a term intended to capture the deepening of the relationships brought about such well known programs as equalization and the precursors to the Canada Health Transfer and the Canada Social Transfer (Meekison, Telford, and Lazar 2004, 4). While initially focused on economic issues, the topics broadened, the meetings became increasingly formal, and became an established method of "doing business" in Canada. Provincially, Quebec was the first out the gate in this regard, setting up its operation in 1961 as the Department of Federal-Provincial Relations (Smiley 1980, 97). This department proved to be a successful innovation and as the IGR field grew in complexity the office grew with it, becoming the Department of Intergovernmental Affairs in 1967. Ontario followed suit rapidly after seeing the success in the neighbouring province (Smiley 1980, 97). It was the beginning of a trend that would expand, although federally this would not be introduced until the 1970s with the Federal-Provincial Relations Office (Brooks 2012, 252).

As the intergovernmental relations system became more formal, it began to attract considerable academic and bureaucratic interest in its own right. It was not unusual for comparisons to be made to mechanisms in the international system. (Gallant 1965, 515). In addition to the arrival of ministers in several provincial cabinets charged with an intergovernmental portfolio, academic

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[18] Given the loose organizational nature of some of these institutions, there is some ambiguity about exactly when many of these institutions can be said to have been "officially" created. Not all sources are in precise agreement.

work was soon supplemented with the founding of the Institute of Intergovernmental Relations at Queen's University in 1965, which began to generate extensive studies and expertise on this new process. A number of prominent legal and political scholars found enough activity in this area to build their careers, including Ron Watts, Peter Leslie, and J. Stefan Dupré. Don Smiley soon added the term "executive federalism" to the lexicon of Canadian political science and specified its flaws (e.g. Smiley 1979; Meekison, Telford, and Lazar 2004, 6). Richard Simeon was also a major contributor in this field, clarifying exactly what this new process entailed and from where it arose. For Simeon, the causes of "federal provincial-diplomacy" were inherently institutional, resulting from the fact that there was no effective way to represent provincial interests inside the central institutions of the national government (Simeon 2006, 25–31). While he was acutely aware of the social bases of Canadian federalism, for Simeon the language question was somewhat separate from the problems inherent in the institutions – for example, but for an effective Senate, Canadian federalism would have looked very different, perhaps much more American (Simeon 2006, 23–4).

And it was not just academics of course. Intergovernmental relations provided an important outlet for premiers to build their careers as well, especially given the publicity it offered and the issues involved. Roger Gibbins noted in an interview that Summit IGR was attractive because many ambitious politicians would never have been able to have a national impact otherwise:

> I think during the 60s and 70s the national movement in Quebec provided a stage, an opportunity, an opening if you want for provincial governments to play a much larger role and created a constitutional stage, and created roles and opportunities for people like Peter Lougheed to step on to that stage…. Lougheed in the late '70s was often cited for the [leadership of] the federal Conservatives, Progressive Conservative Party, at that point. But it became clear that his lack of ability in French shut him out of that national role; it was no longer possible. And so interprovincial relations was a pretty good substitute for that. So for people like Lougheed and Blakeney and others this had really allowed them to achieve the status of national politicians, national leaders that would not have been possible without that constitutional stage and the intergovernmental stage (Interview with Gibbins 2014).

What were the aims behind the expansion of IGR/executive federalism? At least initially, they were largely twofold. One was an obvious need to coordinate with other levels of government on areas of common interest. The second was a need to understand what the other governments were doing, especially if different agendas were going to be at odds (Pollard 1986, 17–8). There was the further desire by the provinces to defend their jurisdiction from encroachment by the federal government, something identified by the Tremblay Report (Pollard 1986, 19). The problems were real, especially since the provincial economies had grown to a sufficient size that provincial actions could legitimately hinder the growth and the development of the Canadian economy. Constitutional issues were also a big part of the discussion, not necessarily because of a need for reform of the constitution (although there was that dynamic too) but because constitutional issues touched nearly every issue that IGR was supposed to address anyway (Pollard 1986, 20).

Intergovernmental institutions became quite prestigious and powerful places for bureaucrats, and very useful to the political leadership of the different provinces (Interview with Cappe 2014). Nearly all of them were close to the premier or prime minister and were used for politics at the highest level. They became associated with constitutional issues, which increased their cache (Pollard 1986, 20). One interviewee spoke of these types of organizations as places that were much sought after by people who were seeking to make a career in the public service, second perhaps only to the Department of Finance in the 1970s (Interview with Cappe 2014). The fact that they were also deeply connected to matters of the public purse also meant that they had the capacity to "make an impact" on the day to day lives of ordinary Canadians. They also arrived at a time often thought to be associated with the growing power of first ministers in relation to their cabinets (e.g. see Savoie 1999 for the leading thinker in this vein; White 2010 for a competing view that nevertheless recognizes the dominant position of first ministers, especially at the provincial level).

It is not hard to understand the appeal of IGR units and why the processes that they organized became so stable. There were both tangible reasons for their existence and they served many needs of the elites who staffed them. There were a lot of reasons why the framework continued to persist over time and problems were addressed at this level. One was that it gave power to the elites, who were not interested in giving it up. Another was that it also offered strong political rewards for those who were practicing it – for no other reason than the visibility that it offered to

the different publics. It put them in control of the policy agenda with the other governments, in particular the federal government, which was, during the time in question, the one that had all of the money. The social and political rewards of the machinery to political office holders allowed the machinery to become embedded.

3.5   Conclusion

This chapter has argued that the breakdown in the traditional approaches to abeyances in Confederation emerged following three developments, namely the shift in approach by the Quebec parties from being willing to preserve the unsettled status of abeyances to being constitutional activists, including by entering terrain that had previously been kept off the political agenda; the arrival of Pierre Trudeau, a constitutional activist, and the rise of bureaucratic and Summit IGR and the related challenges of linkage. These shifts reflected the changing ideological and electoral incentives of the time. Reacting to the new social context of the 1960s and the evolving Canadian and Quebec identities presented electoral opportunities to engage questions that had not been considered important or relevant up to this point. Doing so, and in particular in partnership with other governments, had the effect of revealing how far apart different visions of federalism could be. This gap had significant negative consequences for Canada's stability.

These actions began to set the stage for the constitutional fights that would intensify in the 1980s. It marked the period when pressing constitutional issues were being identified, positions at the provincial and federal level towards them developed, and the first proposals for reform were being made. It was early in the process and so there was still a sense that some kind of an arrangement could be made – that at the end of the day the problems were fixable. The intractability of the problems was not as clear as it was to become.

Still, between 1960 and 1980 however, the abeyances in Canada are playing a secondary role in the rise of the Quebec separatist movement; little of the movement's growing strength can be attributed to constitutional abeyances as directly as might be possible later. The movement reflected the modernization of Quebec's state and society, and a deep dissatisfaction with the way that the province had been governed and how it had fallen behind the rest of North America on many social indicators. While questions surrounding the amending formula, the composition of the Senate and similar constitutional questions are becoming political issues, they are not the

opportunities they would become later for the PQ or the other parties and leaders to suggest that Canada was hopelessly broken. There was not yet the clarity of the issues or the recognition of distance between positions that could be translated into public anger. There was very little strategic benefit for the PQ in focusing on the Canadian constitution because the PQ core had already abandoned Canadian federalism so there was no vision they were prepared to suggest to the public as the "true" one. Furthermore the constitution was acknowledged by most Canadians to be in need of at least some reform and appeared to be at least partially fixable – engaging with the debate did not seem to be in the PQ's interest. Rather, the PQ focussed on a narrative of the inevitability, naturalness and desirability of independence, informed by the post-colonial context of the 1960s and 1970s, the left wing ideology of its base, and the youth and aspirational outlook of its members.

As the conservative nationalism of the UN fell into disfavour to be replaced by an affirming and aggressive nationalism of the 1960s, the constitutional settlement of 1867 was now on the table. This new agenda challenged assumptions and practices that had been buried until then. While the UN was satisfied to fight Ottawa on perceived encroachments on Quebec's power, the Liberals under Lesage, more interested in Francophone empowerment, necessarily challenged the conventional wisdom about French in Canada, French in Quebec, and the role of the province. The UN was dying, but its replacement by the PQ merely increased the speed of this transition. Both parties were products of the social change of the 1960s and had similar problems with the federation, even though they both drew different conclusions about what the solution would be. While the Liberals sought to reform the federation, the PQ reflected a segment of society that saw it as irretrievably flawed. The result was an electoral formation that had an actual advantage in picking apart old understandings and pushing inconsistencies to the limit in search of electoral advantage in Quebec politics. The collapse of the Victoria Charter was reflective of the growing power of the separatist narrative, with Bourassa finding that to sign onto a new constitutional agreement would be politically impossible at home. The federal response of seeking resolution through clarification and negotiation in public forums simply threw disagreements into stark and public relief, with what might turned out to be very negative effects for national unity.

Chapter 4
Abeyances Exposed: The Constitutional Crisis1980-1993

4   Constitutional reform as political opportunity

The objective of this chapter is to examine the period during which the federal crisis in Canada was at its peak. The first referendum that Quebec held on the possibility of sovereignty-association with the rest of Canada in 1980 had the effect of forcing all participants to the constitutional table to address irreconcilable positions in a public forum. It was a particularly good time for the PQ, which was forced to the constitutional table following the failed referendum and found it to be a fruitful location for the generation of grievances against the rest of the country. The ultimately successful patriation of the constitution effort resolved many issues for English Canadians, but in turn made Quebec's refusal to sign the constitutional document the dominant issue from 1982 onward. [19] The willingness of both the Mulroney and Bourassa governments to tackle the problem of securing Quebec's consent continued to clarify the underlying disagreements, further inflating the atmosphere of crisis. The negotiation and failure of both the Meech Lake and Charlottetown Accords represented the total collapse of abeyance preservation behaviour and set the stage for the second referendum in 1995. This outcome, exacerbated by linkage across issues on which there were competing philosophies, created an enormously destabilizing period in Canada, as it brought the question of duality to the forefront and the derivative abeyances that flowed from it. While many matters, such as the amending formula and the possibility of a veto for Quebec has been "solved," to some extent in a legal sense, the political question was very much open as to whether or not the 1982 settlement got it "right." Throughout this period, the PQ did what it could to exploit the situation for its own gain. Both the federal and provincial Liberal parties used the referendum experience to commit

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[19] As is well known to Canadian legal scholars, the physical document that was literally signed to patriate the constitution – the *Proclamation of the Constitution Act, 1982* – was only signed by a handful of people on April 17, 1982: Queen Elizabeth II, Prime Minister Pierre Trudeau, Justice Minister Jean Chrétien, and the Registrar General of Canada, André Ouellette. None of the provinces signed it in the literal sense. Nevertheless Quebec was the only province to refuse to give its political consent to the patriation process and therefore robbed the constitution of some political legitimacy, even if it remains the law of the land. This has come to be known as Quebec's refusal to "sign" the constitution. This phrase is used in the dissertation to signal that loss of political legitimacy.

themselves publically to constitutional renewal. Although efforts had failed in the past and the likelihood of success was uncertain, federalist leaders in both Quebec City and Ottawa adopted the attitude that the *status quo* was unacceptable and could be changed.

This period also sees the growing importance of the courts as an actor. The Trudeau government's references on patriation are important for setting the context of the negotiations that would lead up to 1982, but the Supreme Court of Canada's decisions are especially important after the introduction of the Charter for the generous view it adopts on linguistic rights and for the flexible law it develops on the division of powers.

The chapter will proceed in roughly three parts. The beginning will trace the evolution of the most relevant political parties who need to address abeyances, namely the federal and provincial Liberals, the Parti Québécois, and then the important shifts the opposition Conservatives are undergoing towards Quebec at the federal level. The second part then takes the parties and reviews their conduct during the major intergovernmental efforts at addressing abeyances, namely the Meech Lake and Charlottetown Accords. The final section will examine what the Supreme Court is doing during this phase, which coincides with the beginning of the "Charter Revolution" and the rise of stronger rights jurisprudence in Canada. The Supreme Court plays a secondary role in this period on the question of abeyances, overshadowed as it was by the politicians who were striving for constitutional reform or, in the case of the PQ, simply getting Quebec out of the country. But it is important to take stock of its activities at it arguably grows in importance in managing abeyances after 1995 and the second referendum.

4.1   Abeyances and sovereignty support

It was during this point that we see the absolute peak in both the coherence and support for the sovereignty movement. Abeyances start playing a much larger role in driving public opinion on the question of sovereignty than they had before.

Unlike in the period covered in the last chapter, constitutional abeyances played a larger role in driving the sovereignist movement on account of the increased clarity and attention they got from political leaders which raised their salience. This clarity was the result of the commitment by all political parties, including federalist parties who disagreed about the content of constitutional reform, to push into the abeyances. Their emergence reflected the changing

condition in Canada and in Quebec, and that the 19th century constitution was no longer completely appropriate for the mid-20th century. But while some of the abeyances were becoming clearer the question of how to solve some of the thornier abeyances that had been created in 1867 had not. In the interim the modern IGR system had developed, and the optimism surrounding that process appeared to give politicians the forum they needed to supply answers to the abeyances. The Quebec Liberal party and those who had been part of its intellectual formation in the 1950s and 1960 had been among the first to reject the quiet agreements upon which much of the Canadian constitution had rested. While Lester Pearson had been obliging to an extent, he hesitated in getting too involved until he was forced to do so after he found that Quebec's ambitions were chiming with other leaders, notably Ontario's John Robarts. For both personal and political reasons Pierre Trudeau began to see the constitution as an opportunity and brought it more centrally onto the political agenda after he took over the federal government in 1968. Shelving his agenda after the damp squib of the Victoria Charter the election of the PQ in 1976 brought new, national urgency to his pet project, and he was more than happy to bring the constitution back to the political fore.

The chapter starts in 1980. At this point, the abeyances were highly politicized, and the implications of where one fell on the mega-abeyance of duality was much more clearly defined for national institutions like the Senate, the amending formula or the composition of the Supreme Court. They would continue to be until the end of this period, largely after the end of the Charlottetown Accord in 1992 but most clearly after 1995 and the second Quebec referendum. The gaps between positions became clearer over successive rounds of negotiation and deals became larger, more complex, and easier to pick apart. Competing visions of the constitution were very much in collision, creating opportunities and traps for political leaders. The public was repeatedly confronted with the differences the Quebec government had with the rest of the country through successive, public failures to get an agreement on specific issues. In a very public way it became clear how far apart Canadians were on how to supply answers to constitutional abeyances.

Secondly, over the period there was a growing realization that it might not be possible to "square the circle" for everyone after all. Elsewhere in Canada other regions began to feel neglected, underappreciated, and disaffected with leaders who failed to push harder for their interests in any negotiated settlement. The constitution appeared unfixable and the different visions of the

country unbridgeable. Quebec appeared as though it might be trapped in a constitution over which it had no veto, which was a significant symbolic blow and suggested that it might be time for the province to abandon Canada altogether.

Finally, while the federalist leaders were unsuccessfully trying to reconcile themselves with each other, the PQ leaned more heavily on a narrative of betrayal and futility for its own supporters. This strategy was driven by successive failures to appease Quebec's political leaders. Following the 1980 defeat the PQ had little choice but to enter into discussions. However, the constitutional discussions proved fruitful for the generation of grievances. They gave ammunition to the party. Being outside of Canada was far better than being inside it because Quebec would have more control over its affairs. The PQ under Parizeau took a much harder line than under Lévesque, and suggested that a deal with the rest of the country following a "Yes" vote would not be something the rest of Canada could refuse. As each round failed, the PQ capitalized fully and with great success.

There was considerable volatility in this period in support for the sovereignist option, suggestive of the priority of the negotiations held on the political agenda and the intensity it could engender in the public. The period begins with the first referendum in which the federalist won by nearly 60%, but the percentage of Quebecers who would have voted "Yes" in the aftermath of Meech Lake was also in the vicinity of 60%, reaching an all-time high of 64% of the Francophone community in November of 1990 (Behiels 2007, 276). Evidence of the organization and commitment of the sovereignist forces in this period is also not hard to find, especially from the time Jacques Parizeau took office in 1988 through to his resignation in October of 1995. Successfully sidelining rivals who were more conciliatory towards the rest of the country, Parizeau was able to discipline his forces and focus their attention on the constitutional struggles that were at hand. Buying into Meech Lake on the premise that any new powers for Quebec were a good thing, and that the deal would better position the province in its march towards independence, Parizeau proved enormously effective in "spinning" the defeat of Meech Lake to his own advantage (Behiels 2007, 274). Throughout the Charlottetown debacle, he outmanoeuvered Bourassa on the political front and managed to play a purity test game with the Liberals in his insistence that any constitutional proposal that came from Ottawa was going to be too little too late. At the federal level, the desertion of several Quebec MPs to the Bloc Québécois, and the Bloc's subsequent election to the status of the country's official opposition,

demonstrated that the country was more divided than it ever had been. The catastrophic collapse of the Progressive Conservatives in the 1993 election demonstrated to many that the policies Mulroney had taken to resolve the question were doomed to fail.

The electoral battle also galvanized parts of civil society behind the PQ, in particular the unions. Their work in opposing the accords carried over into the electoral realm which gave the BQ and PQ a strong electoral boost in the 1993 election and beyond. Parts of the PQ electorate have always been ambivalent towards the party on the sovereignty front and this has sometimes served as a drag on their vote (Pinard 2005, 294–7). The PQ was much more able to fight this reality at this time. The *Fédération des Travailleurs et Travaillesuses du Québec* (FTQ, representing Quebec labour) actively supported the Bloc Québécois and other unions, while precluded from actually supporting one of the parties, were free to endorse individual BQ candidates and did (Güntzel 2011, 298). Even more critically, the unions offered the vital support that was needed to get the PQ elected in 1994. During this period, they were often prevented from being completely explicit about what they were doing but there was little doubt which side they supported (Güntzel 2011, 298). The unions were in a position to (and did) launch a "major propaganda effort" to support the "Yes" side when the referendum was finally called (Güntzel 2011, 298). Having sharpened their skills and organizational abilities on this issue in the electoral campaigns of 1992 and 1994, the unions were prepared in 1995 for a full fight based on many of the grievances, bringing the organization, strength, and knowledge to the campaign that the parties alone would not have been able to muster.

There was also a widespread association of many in the intellectual, student, and artistic community with the cause of national separation. The many voices included the director Denis Arcand, whose film "Comfort and Indifference" would be a noted commentary on the first referendum. There were also widespread suspicions that Radio-Canada had gone over to the separatist side, a source of perennial complaints in the rest of the country, even if it enjoys only incomplete empirical support. It did not help of course that Lévesque himself had worked for Radio-Canada and many of the justifications seemed well founded. There were many who argued that the election of the PQ in 1976 had a lot to do with Radio-Canada's subsequent approach to coverage (Lazar et al. 1999, 294). Overall though there has been little evidence of overt bias, especially when one compares the English and French language media given that they are really pitching to very different communities (Lazar et al. 1999, 291). Nevertheless the bulk

of scholarly opinion was that the media was at the very least far better used by the enemies than the supporters of both Meech Lake and Charlottetown to prevent those agreements from being ratified and for tearing down what little support they had (Taras 1991; Meisel 1991; Lazar et al. 1999; Monahan 1991).

More importantly, the Liberal commitment to federalism in Quebec began to waver. This shift began after Meech Lake. Jean-François Lisée, in his highly critical book on Robert Bourassa, recounts how the collapse of Meech essentially forced the federalist Liberals into the position where they would have to promise a referendum, or at least could not rule one out (Lisée 1994, 12). Polling data suggested that nearly two thirds of Liberal supporters wanted the constitutional question to be resolved by a referendum, a reality that Bourassa could not ignore if he wanted to stay on top of the situation (Lisée 1994, 14). The collapse of the accord also changed the nature of the engagement of the federalist parties's relationship with Ottawa. With Quebec no longer willing to be considered a province like the others, by the time that Bourassa was negotiating on Charlottetown it was expressly on the terms of Quebec and the "rest of Canada." Highly symbolic and effective as a statement of the abeyance of dualism of the country, this language had the effect of ensuring that the province distinguished itself from the rest of the country. This shift by the Liberals to a neo-nationalism largely along the European model had heretofore been shunned (Behiels 2007, 274). When Bourassa received a handshake from Jacques Parizeau following the former's announcement in the National Assembly of the shift, it was clear that the most federalist party in Quebec had begun to drift away.

Additional embraces of the sovereignist cause came in the convening of several commissions by the Bourassa Liberals, including the Belanger-Campeau Commission.[20] Split between

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[20] As a brief overview, in the wake of Meech's collapse a number of committees were called in Quebec and at the federal level. In Quebec, the Commission on the Political and Constitutional Future of Quebec (Bélanger-Campeau) was called by the government of Robert Bourassa in 1990 after the end of the Meech Lake Accord. Its chairmen were Michel Bélanger and Jean Campeau, both highly placed leaders in business and finance. The constitution committee of the Quebec Liberal Party also wrote policy report, discussed below, named after its chairman Jean Allaire, calling for significant repatriation of power from Ottawa.

Federal committees were also called in Parliament about what to do next. The Beaudoin-Edwards committee was a federal House of Commons – Senate Joint Committee called by the government of Brian Mulroney to examine the process of constitutional amendment and the amending formula itself in January of 1991. It was chaired by Senator Gerald Beaudoin and Member of Parliament Jim Edwards. The Beaudoin-Dobbie Committee (the latter being MP

sovereignists and federalists but nevertheless including the highly popular Lucien Bouchard, most lately of the BQ, the Belanger-Campeau Commission was designed to develop a cross party sense of unity (Behiels 2007, 275–6). The commission became something of a fiasco for Bourassa, however, soon serving to concentrate the province's anti-federalist feelings in a highly public forum. The commission had the effect of pushing the support level for sovereignty to an all-time high (Behiels 2007, 276). Similar results emerging from the Beaudoin-Dobbie commission, whose proposals Bourassa referred to as domineering, continued to demonstrate a posture of disengagement on the part of the Quebec Liberals that contributed to the province listing away from the federal structure (Behiels 2007, 278). The latter culminated with the adoption by the Liberals of the highly decentralist *A Quebec Free to Choose.* Known as the Allaire Report, it left only five areas of jurisdiction to the federal government and pledged the provincial Liberal government to hold a referendum by 1992, if not on the contents of the document then on sovereignty association itself (Behiels 2007, 276). The resulting proposals after the Allaire Report from Ottawa met with little warmth from provincial allies. *Shaping Canada's Future Together,* the document issued by the Trudeau government as setting a basis for those discussions, was scorned by both the Quebec Liberals and PQ alike (Behiels 2007, 278).

Furthermore, the Liberals' enthusiastic support of the federalist dialogue in Quebec under these circumstances precipitated a series of events that added up to the active disintegration of the provincial Liberal Party itself. The decision by the Liberal Party to endorse the Charlottetown Consensus Report, which would be presented to voters in the referendum in 1992, led to the departure of Jean Allaire and Liberal activist Mario Dumont and the creation of the ADQ. The latter, in turn, joined other secessionist forces later both to defeat the Charlottetown Accord and to fight for the "Yes" side in the 1995 referendum (Behiels 2007, 283). Bourassa was replaced by Daniel Johnson Jr., who would prove to be a hapless leader unable to stop the PQ from forming the next government in 1994, and not particularly effective either in the subsequent referendum campaign against the vastly more capable Lucien Bouchard. After the 1995 referendum, Johnson

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Dorothy Dobbie) was another federal House of Commons – Senate Joint Committee called later in 1991 to examine constitutional proposals and was the result of the Beaudoin-Edwards Committee urging its creation.

was quickly sidelined and replaced by the more effective federal Progressive Conservative leader Jean Charest.

The following sections will track these developments in more detail.

4.1.1   Federal and provincial Liberal commitment to "renewed federalism"

The 1980 referendum outcome did not stop the process of constitutional renewal that had been ongoing since the late 1960s but rather bound Ottawa more closely to it. In Quebec, the decision to vote "No" was for many people predicated on a new constitutional deal being offered down the road, and many statements made by the leaders of the "No" campaign gave credibility to this interpretation. The generally unsatisfactory condition of the constitutional situation in Canada was admitted by Pierre Trudeau on several occasions, along with promises that something would be done. One example can be found in a speech that Trudeau gave on the 16th of May, 1980, recounted in Sheppard and Valpy's book *The National Deal:*

> I know that I can make a most solemn commitment that following a "No" vote we will immediately take action to renew the constitution and we will not stop until we have done that. And I make a solemn declaration to all Canadians in the other provinces: we, the Quebec MPs, are laying ourselves on the line, because we are telling Quebecers to vote "No" and telling you in the other provinces that we will not agree to your interpreting a "No" vote as an indication that everything is fine and can remain as it was before. We want change and we are willing to lay our seats in the House on the line to have change (Sheppard 1982, 33).

As Sheppard and Valpy put it, "There! That is it. That is the promise to Quebec in its entirety" (Sheppard 1982, 33).

This promise would prove to be critical in winning the referendum. The "No" side was also helped along by a federal government that was generally more popular than its provincial counterpart; the latter had been in power for nearly a full term and had begun to lose support. Furthermore, fought in an era before the constitution had been patriated, the federal government was able to play on the possibility that reform was around the corner and that all of the needs of the Quebec people could be met inside the federation:

Although not at the peak of his national popularity at the beginning of his final term as Prime Minister, Trudeau was nevertheless still well regarded by Quebec voters at the time of the 1980 referendum. His thermometer rating in 1980 was a full ten points higher than that of Lévesque and more than twenty points higher than that of Ryan. Trudeau was equally well liked by both Francophone and Anglophone respondents in the 1980 survey, an achievement recorded by very few politicians in Quebec. The message of "renewed federalism" that ultimately swung the 1980 referendum result to the NO side was thus delivered to a relatively receptive electorate by a highly credible and popular federal Prime Minister who more than counterbalanced the provincial popularity enjoyed by Premier Lévesque (Pammett and LeDuc 2001).

There were no specific promises made over the course of the campaign, but the commitment to further discussions meant that the federal government had bound itself to finding a solution (McWhinney 1984, 243). Doing so would necessarily entail addressing the most basic disagreements that lay at the heart of Confederation, something that the federal government appeared willing to do. For many in Quebec this was further interpreted as a commitment to a settlement that was much more sympathetic to Quebec than the one that actually emerged. "Hundreds of declarations over the months and weeks leading up to the referendum leave no doubt as to the general understanding of renewed federalism: greater autonomy for Quebec to ensure its linguistic and cultural development, a concept that had been part of the list of demands of every Quebec premier since 1960" (P. Fournier 1991, 4).[21] The interpretation could bear weight in light of the seeming agreement of other Canadian leaders with the visions of the federalist Quebec Liberal Party, which had called for an overhaul of Canadian institutions. Among the more important of these documents was the "Beige Paper" published by the Quebec Liberal leader, Claude Ryan on the 9th of January 1980 in the run up to the plebiscite (Parti Libéral du Québec 1980). It was very decentralist in tone, aimed at enhancing Quebec's cultural sovereignty, the creation of a dualist federal council, granting the provinces more control over broadcasting and otherwise limiting the powers of the federal government (P. Fournier 1991, 5). None of the other major federalist leaders, including Pierre Trudeau, his chief lieutenant Jean

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[21] Indeed, given the subsequent events Fournier has referred to this as "the lie of renewed federalism" (P. Fournier 1991, 4).

Chrétien, or the other premiers, did anything to actively repudiate it, preferring to remain circumspect about its ideas. The silence, especially from those such as Ontario Premier Bill Davis, seemed to stem from a fear that the PQ would gain ammunition from any critical commentary (Fraser, 1980).

Ryan's proposals were also in keeping with other proposals that added to the sense that Ottawa was serious about change. While Ottawa never adopted the final Report published by the Task Force on Canadian Unity[22], its proposals were in line with those of the Quebec Liberals. The Task Force went a lot further than the federal government wanted it to do but Ottawa opted to quietly "sidestep" the report rather than actively repudiate it (Thomas 1997, 161). Some of the smaller aims it suggested were perhaps attainable, such as the removal of the essentially defunct disallowance and declaratory powers in the constitution (C. Bélanger 2001). Much more controversial, however, would have been its recommendations for Senate reform, the adoption of a proportional electoral system, and the handing over of the residual powers in the constitution to the provinces along with a large number of policy fields. Furthermore, in its "most daring" aspect, it endorsed the idea of asymmetric federalism to the extent that it would allow the provinces to defend their cultural uniqueness by giving them the authority over a broad number of fields, many of which were already under their jurisdiction (C. Bélanger 2001). Thomas has noted that the entire tenor of the report was antithetical to the maintenance of abeyances in Canada; indeed, the authors sought to squarely address them (Thomas 1997, 160). The result of a number of these proposals and the ambiguity that they were met with was a genuine expectation by people who voted "No" that there would be some kind of closure on the constitutional file in which Quebec would get a better deal. Public attitudes at the time also showed that it was renewed federalism, more than anything else, that the people of Quebec were after, and, in particular, further decentralization (P. Fournier 1991, 4).

The result was a very high level of expectation that the "No" vote was a safe bet to getting a better deal from the country in the form of constitutional renewal. Furthermore, it was an issue that the Opposition Quebec Liberal Party was willing to campaign on for electoral gain. Its

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[22] This group was called in 1977 by the government of Pierre Trudeau in response to the election of the PQ in Quebec. It was chaired by John Robarts, a previous Premier of Ontario, and Jean-Luc Pépin, a former federal Liberal minister.

leader, Claude Ryan, made his plans clear on the night the referendum was won by the federalists:

> I think we have just undergone the first phase of a process which must now lead us into a general election. The government will achieve four years in office in the fall of this year. I do hope that they will give the people of Quebec a second opportunity to pronounce themselves so as to complete in the next general election the verdict which they began rendering today. After having decided about sovereignty-association the people must have the chance to decide about which party will be better qualified to negotiate on their behalf the renewal of our federal system of government (Claude Ryan as recorded by P. Murray 2012).

Constitutional reform appeared as one of the "six pillars" in the Quebec Liberal Party's election platform that was issued in January of the following year, suggesting that the party would be consistent with what had been laid out in the earlier Beige Paper (Parti Libéral du Québec 1981, 2). At the federal level, the Liberal policy document for the election of 1979 in the run up to the referendum was equally activist. Couching the problem in economic terms, it warned that "The threat of Quebec's separation from Canada poses a clear and present danger to the realization of our future economic potential as Canadians" (Liberal Party of Canada 1979, CU–1). Its proposals recommitted to *A Time for Action* and vowed to patriate the constitution by 1981. However, two of its conditions – that Canada remain a genuine federation without asymmetries and that the proposed charter necessarily apply to both orders of government – flew in the face of the abeyance on duality and the status of the collective linguistic rights that had been adopted in Quebec (Liberal Party of Canada 1979, CU–7–8).

An enormous amount of material has been written in both English and French about the process that lead to patriation and its effects. There are many insider accounts, studies, and histories that have been written and it is not the intention here to go into it in too much detail. For our purposes, throughout the 1980-82 constitutional patriation process, the federal government remained committed to a vision that was clearly at odds with that of Quebec City and the Quebec Liberals (Thomas 1997, 91). The direct denial of Quebec's demands for veto power, the insistence of the charter as binding both levels of government, the move to judicial supremacy, and the denial of any form of asymmetric arrangements or special status starkly demonstrated

that the federal government was unwilling to act in a way that would leave any ambiguity on these matters.

The reaction was predictable. Many in Quebec saw the actions of the federal government and the other provinces, and Quebec's being outside the final negotiations as not just a betrayal, but a move to settle these issues in a way that was fundamentally at odds with the province's understanding of the country. In the lead up to the referendum, Richard Simeon observed that the federal government was always talking about issues different from those raised by Quebec: "Ottawa and the provinces had always brought different priorities to the table – the former stressed linguistic and individual rights, reform of the central institutions, amendment and patriation, while for most of the latter the issue was always the division of powers" (Institute of Public Administration of Canada 1979, 13).The PQ was more than happy to point to the differences, and did so for much of the next decade.

The rest of the country was not entirely sure what to make of the deal either. Keith Banting and Richard Simeon captured the feeling in their well-received collection about the patriation process *And No One Cheered* (Banting and Simeon 1983a). Dedicating the book to their children who "will live with the consequences," in the introduction the two note that among the Anglophone contributors "the reaction [to patriation] is one of regret and disappointment: we could have done better; we left too much unresolved; the settlement does not reflect who we are as perception of the strengths of the country" (Banting and Simeon 1983c, 348). But they also touch on what was becoming the nub of the problem – the early optimism about the possibilities of solving the constitutional question was giving way to the possibility that there may not actually be a solution forthcoming. In a prescient passage about what was to come, the two editors diagnose the problem as one of the unsettled that could have solved

> The demand for constitutional change itself reflects lack of consensus about some important aspect of the political system. But the norms governing constitutional reform normally require a high degree of consensus on the changes to be enacted and therefor make it difficult to mobilize sufficient agreement to succeed. Lack of consensus makes constitutional change necessary. The same lack of consensus makes constitutional change particularly difficult. Canadian experience certainly conforms to this pattern. Broader constitutional agreement could only have followed from a prior consensus. However,

> once the constitutionals genie was out of the bottle – once its legitimacy had been called into question – then it could not be put back. Because the constitution lacked consensus, it had to be debated. But the same lack of consensus made it impossible to agree on a new one (Banting and Simeon 1983b, 25).

We see true appreciation here of what is at stage by attempting to project a single view on the content of abeyances without first getting the consent needed for constitutional change or perhaps adequately appreciating the risks of proceeding without it.

4.1.2   PQ shift into constitutional discussions

Although the 1980 referendum represented a significant loss for the PQ in the short term, it also generated conditions that were far more fruitful for it to pursue its agenda than those that existed in the late 1970s. The defeat compelled the party to join constitutional discussions which its members had little interest in seeing succeed, and which the PQ successfully exploited by painting Canada as unfair to Quebec and fundamentally at odds with the collective aspirations of the Quebec people (Behiels 2007, 274). The stark differences in vision between Quebec and the rest of the country became apparent during the negotiating process, which relied heavily on high risk Summit IGR that was well covered in the media. This institutional setting was ill suited to manage the disagreements and was one that the PQ found it could exploit to suggest that the country was unworkable.

There were two clear political consequences of the loss of the 1980 referendum. The first was that the PQ would have to continue within the federal system whether the party liked it or not. The second was that it could not be seen to be rejecting the will of the population. Thus, the discourse changed in a significant way. Trudeau was well aware of the powers that he possessed in the aftermath of his referendum victory in 1980 and moved quickly to forcefully entrench his vision (McRoberts 1997, 169–70). Although the PQ had defeated Claude Ryan in the 1981 election, it was politically compelled to participate in the constitutional discussions called by the federal government. The party could no longer operate on a separate track, standing aloof from the constitutional debate, and engaging with it only to suggest that Canada was irredeemable. Thus there was a shift from offering proposals on separatism to taking positions on the constitution, the latter being something the PQ would rather have avoided. Writing at the time, David Milne, a constitutional advisor for Prince Edward Island, caught the new reality very well.

The PQ now found itself as a genuine "lame duck" in the negotiations between Ottawa's position and that of the more regionally minded provinces (Milne 1982, 48):

> In between these two colliding views sat a reluctant player. The PQ government, its sovereignty-association proposal rejected, was in the awkward position of complying with the federalist option against which it had so recently campaigned. Not only was Lévesque's government expected to negotiate *within* the Canadian federation, but to do so gracefully. Under no circumstances, therefore, would Quebec permit itself to be isolated on any item during the negotiation process. Since the regional conception of a federal state suited it far better than Trudeau's idea of Canada, it was easy enough for Quebec to align itself with the blocs of provinces without taking a strong leadership role and then await the outcome. If the talks failed, it would be vital to show Quebec's ongoing cooperation in the negotiations and to demonstrate that the process necessarily betrayed Quebec's interests. If the federalists were not to play into the hands of the separatists an accommodation would be required (Milne 1982, 49).

The failure of the patriation effort may have been inevitable. There were certainly some who doubted whether or not Quebec was serious about the negotiations (Tassé 2013, 325). Even at the time some sensed that Quebec was moving the goal posts. An internal report provided by former Ontario negotiating team member Don Stevenson revealed that there was considerable anger among Ontarians, when, after so much having already been agreed, Quebec abruptly decided to push for an expansion of section 133's bilingualism provisions in the *Constitution Act 1867* to include Ontario ("Report From Allan Stillar in Quebec City" 1981).[23] As news emerged that there would be an all-party resolution in Quebec City to condemn federal actions, Allan Stillar, an official in the Ontario Federal-Provincial Relations office, wrote:

> Find it fascinating that during last week's discussion [*sic*] Premier Levesque did not even raise the subject of section 133 and Ontario; moreover, he is on the record in the days before the conference as saying that while it would be nice if Ontario would voluntarily accept the obligations of section 133, even if we did so, it would not make an ounce of

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[23] There are a number of firsthand accounts of these events. For a particularly excellent recent recounting see Roger Tassé *A Life in the Law – The Constitution and Much More* (Tassé 2013).

difference to Quebec's views on the constitution; having discovered his extreme reaction to last week's agreement struck a false chord with the people of Quebec suddenly he has decided to make this an issue; Mr. Levesque, if this is really so basic an issue to Quebec, why didn't you raise it last week? ("Report From Allan Stillar in Quebec City" 1981).

In an interview Hugh Segal, who at the time was an advisor to Bill Davis, doubted that the PQ could have signed on in any event:

And in the end of course in those negotiations the Group of Eight[24] couldn't really hang tough, because in the end seven of them were federalists and one wasn't. Seven of them could find common ground if they had their rights protected as they were respected as through the […] notwithstanding clause. But it was impossible for René Lévesque to be part of any federalist sort out which in some way validated the country. It just went completely contrary to his legitimate political interests. So he conjured up the "night of the long knives" and all that stuff, which is far less than meets the eye (Interview with Segal 2015).

Segal further recounts:

The notion that they came to the meeting the next morning and were totally surprised is a complete fiction. But if you think about their problem for a moment where else could they be? Could they say "we saw this in the middle of the night and decided not to engage?" They couldn't say that. They had to say this was done behind our backs. They had no choice. It's just not true (Interview with Segal 2015).

More bluntly, Roger Tassé, who served as the federal Deputy Minister of Justice during the 1970s and 1980s and was heavily engaged in the patriation exercise, has written in his account of the experience that "Quebec had absolutely no interest in coming to an agreement" (Tassé 2013, 325). In an interview he pulled back slightly, arguing that Lévesque probably was after the best deal possible and might have signed it if it were up to him alone, but it is doubtful he would have been able to bring the party along (Interview with Tassé 2014). Overall, however, the failure of

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[24] Segal is referring here to the group of provinces that sided with Quebec against Ottawa on the question of constitutional patriation, which included all of them except Ontario and Prince Edward Island.

Quebec to sign the constitution allowed the province to show how far it was from the rest of the country on the constitution. It did so in a number of ways, including by adopting an all-party resolution in the National Assembly decrying federal action, and by asserting that Quebec represented a distinct society, that it had a constitutional veto, that the rights to be enshrined the Charter were for Quebec to adhere to voluntarily, and that more needed to be done on natural resources and equalization (Tassé 2013, 318–19). The Quebec National Assembly also invoked the notwithstanding clause on all legislation soon after the Charter was passed.

Following 1982, Levesque appeared to soften and shift his attention to finding a solution to the impasse, rather than simply pursuing sovereignty. However, the PQ retained an activist position on the constitution and was unwilling to accept the constitutional status quo. Even if sovereignty had been put on the back burner, the PQ argued that at the very least a better position could be had. This posture still made resolving the competing visions of the country an important public policy priority.

Lévesque called his decision to try to find a place for Quebec in Canada the "*beau risque*" of the PQ. This term refers to a specific policy shift, one taken with an eye to federal politics, by Lévesque not so much in the aftermath of the 1980 defeat but in the lead up to the 1984 federal election (Vacante 2011, 7). The so-called policy shift coincided with a period in which the PQ began to decline, leading eventually to the resignation of Lévesque and defeat of his successor, Pierre-Marc Johnson. Like most governments in the West, Quebec was being forced to make some of the same hard choices surrounding the role of the state that would come to dominate the politics of Canada, the United States, and Great Britain during the 1980s. The PQ, traditionally the party of the left, was particularly ill-suited to handle the economic problems of the period. The major cutbacks to the state the PQ was forced to make strained a number of elements in the party's coalition, and most particularly the unions. In a sense, if the "tide" of state intervention had come in in the 1960s, with the promise of guaranteeing the economic and social progress of Quebecers as a people, it had to go out by the 1980s (Fitzmaurice 1986, 186–87). Fiscal and state retrenchment was not a role that the PQ was good at playing.

Things had begun to fall apart for Lévesque and his party by the early 1980s, and with his cabinet increasingly angry at the perceived softening of his stance, the breaks were impossible to

ignore.[25] Jacques Parizeau and Camille Laurin were the most aggressive of these cabinet members and neither found he could stay in the party (A.-G. Gagnon 1990, 163; Vacante 2011, 13). Both had left by 1985, along with what would ultimately would be a quarter of Levesque's cabinet (Fraser 2001, xii; 344–45). What followed of course was the resignation of Lévesque himself, which was emblematic of the fact that any softening of the commitment to a truly independent Quebec was not really possible in the PQ, however much electoral sense it would have made. Even at the time, there were many people who did not think that this shift was genuine. Mel Cappe has called the shift

> No, separation was always there. So even if you reluctantly came to the table you know that you need the big sledgehammer behind your back and it has to be a credible threat and I never thought there wasn't a credible threat. And, after 1995, the same thing. It was always a matter of time, never a question of whether but a question of when (Interview with Cappe 2014).

In an interview, André McArdle, responsible for organizing many of the conferences at the time for the federal government, stated that he did not see the *beau risque* as representing a genuine opening for federalists (Interview with McArdle 2014). The party was simply too strong for Lévesque's initiatives, if genuine, to bear fruit. Further evidence of both his and the PQ's softening on sovereignty is usually provided by looking at the leadership race of 1985, in particular the election of Pierre-Marc Johnson to the premiership. Johnson was not a hardliner and was more than willing to "go slow" when it came to independence. Instead of pursuing

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[25] Indeed, the historiography surrounding Lévesque at this point is interesting. Jeffery Vacante, writing in the *Journal of Canadian Studies,* has recounted how Levesque is ironically perceived much better now in English Canada than his home province. In Quebec his legacy is complicated by the fact that he failed to attain his dream, and there has been considerable speculation that he was never fundamentally committed to the idea of independence. Some historians have described him as being little more than a federalist (Vacante 2011, 14). That failure meant that he remains much more positively viewed in English Canada, if only because he had the ability to make the country so much more exciting that it had been in the past.
The thesis that Levesque was anything other than a separatist does not have a great deal of support, rather it stems from the reflection of the fact that he was not among the most hardline in his party. In speeches, appearances before the constitutional committees, while there may not be any hatred or malice for English Canadians nor is there is there any love for Canada or a perception that Quebec has a role in it. What one might say is that he lacked the constancy and commitment of Trudeau, but that is to confuse the issue. The relationship he sought with Canada was one that had contemporary analogues – for him, it was not a commitment to Canada, it was arranging a union for Quebec along lines seen elsewhere, such as in Europe. This would all come at a high cost to Lévesque.

"sovereignty" or "sovereignty-association" he sought to gain concessions from Ottawa, based on what he styled "national affirmation" (A.-G. Gagnon 1990, 164; see also Fitzmaurice 1986). This strategy did not last; Johnson lost the election fairly quickly to Robert Bourassa, and, soon after, the leadership of the party to Jacques Parizeau. The softening was probably doomed in any event; all of the other contenders were sovereignty hardliners – Guy Bertrand, Pauline Marois, and Jacques Parizeau in particular. Soft or not, there were no candidates who were willing to accept the status quo; the party would remain active and aggressive on constitutional issues regardless of who was in charge. In its rejection of the status quo, it found itself in good company with the Liberals of Robert Bourassa.

4.1.3   Evolution of Progressive Conservative positions

For most of the period prior to 1980 the PCs had been far less activist than the Liberals and were much more willing to work to preserve the abeyances throughout the late 1960s and 1970s for their own electoral reasons. Federal Progressive Conservative leader Robert Stanfield was never aggressive on the constitution and generally subscribed to the Lester Pearson vision of Canada on questions of language and culture (Interview with L. Murray 2015; Interview with Segal 2015).[26] He defended the *Official Languages Act* in the 1960s as a reasonable initiative against the opposition of John Diefenbaker – at great political cost. After the election of the PQ in 1976, Stanfield took the position that the best way to deal with the national crisis was for the federal government to get out of provincial jurisdiction (Clippingdale 2008, 22). Trudeau's approach struck him as uncompromising and inflexible where a more diplomatic tone might have worked better (Clippingdale 2008, 20–1). By 1977, after he had stepped down from politics, Stanfield had taken to criticizing the federal Liberals on the divisiveness of their position. The most common view is that Stanfield would have been unwilling to patriate the constitution without securing considerably more provincial consent (e.g. see Simpson 1977; Canadian Press 1977).

Part of the reason for the Progressive Conservative leader's position was an ongoing sense that the party had neglected Quebec to the detriment of both itself and to the country. There was recognition that the Progressive Conservative Party was not seen as able to defend the interests

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[26] He maintained that position throughout his political career. His defense of the Meech Lake Accord and rejection of the Trudeau criticism of it took up much of the last years of his life.

of the province and there was a need to appear more conciliatory, which fed a reluctance to adopt hard-edged or inflexible policies that would go over poorly in the Quebec. Former Progressive Conservative Senator Lowell Murray argued that until Mulroney there was a genuine reluctance among the leadership to do anything that would antagonize Quebec:

> [PC leader Joe Clark] was continuing in the Stanfield approach. We had a lot, the Progressive Conservative party had a lot of time to make up, you know. I won't go back to Riel but it was almost that bad. You know apart from a few elections where for various reasons we won some seats in Quebec we really were not established there at all and had not been established there, basically since the days of John A. Macdonald. And we had a lot of ground to make up. And so we struggled. And we had few enough supports there, few enough caucus members there it was extremely difficult. And our leaders had to try to, as Stanfield did in preparation for the 1968 election and as Clark did when he took over, to try to make contact with Quebec intellectuals and Quebec journalists and a few Quebec business leaders or others and recruit some candidates […] but it was very, very, very hard sledding. And we had to prove ourselves constantly as Stanfield did on the *Official Languages Act* and other issues that came up, I can't remember what they were at the moment. Clark certainly did. But it awaited the arrival of Mulroney in 1983 until we could sink our roots deeply into Quebec (Interview with L. Murray 2015).

But this desire to engage with Quebec had to be balanced with other views in an organization that was often unwilling to make serious concessions to Quebec and which did not see its future in the province.

> There was always a canvass in the party that said "look stop wasting your time on Quebec." And people would say in the caucus, and elsewhere, that, you know, [when] a proposed positon is going to cost you votes in Quebec, "so what? We are not going to get votes there anyway." It would be that kind of quite defeatist attitude almost until the day that Mulroney came along (Interview with L. Murray 2015).

The result led to a party that for electoral reasons was not willing to disturb the abeyances but was instead perfectly happy to protect them. As it had been generally in the 1970s, the Conservative position on the duality issue in the 1979 election was more modest than the Liberal platform. The election of the PQ necessitated that the PCs take a more visible position, and the

argument that Trudeau had bungled the national unity issue was one the PCs could not ignore. In the run up to the election of 1979 Clark admitted that constitutional change would be needed, although the details of what that would involve were kept vague (York 1977). The problems of IGR were largely addressed in the party's "Kingston Declaration" of 1977, which came out of a meeting Joe Clark had with the Conservative premiers of Ontario, New Brunswick, Newfoundland and Alberta, and which argued that the solutions to the unity crisis lay in better economic management (Progressive Conservative Party of Canada 1977). The PC's 1979 document, "Let's Get Canada Working Again," said little about the constitution, arguing rather that "we need a genuine consultations with the provinces and a spirit of cooperation rather than confrontation" (Progressive Conservative Party of Canada 1979).

Clark largely adhered to this position during his seven months in office. Nevertheless the PCs remained committed to a much lower profile in Quebec politics than did the Liberals, which is understandable given their limited representation in the province. Although the outgoing Liberal federal government had initiated a variety of reforms which it believed, incorrectly, that it could do without provincial consent, the new PC government declined to continue with Trudeau's Constitutional Amendment Bill (Russell et al. 2008, 484). Furthermore, behind the scenes the Clark government tried to cut back on some of the policy capacity that the Trudeau government had created for handling the constitutional file and the PQ. In an interview George R.M. Anderson, who worked in intergovernmental affairs in Ottawa during this time, spoke of the decision by Clark to dismantle the "Tellier Group," an inter-ministerial committee formed under Undersecretary to Cabinet Paul Tellier which had been put together to consider constitutional proposals in light of the PQ win. Anderson felt this was overly cautious on his part, but also reflective of a view that the federal government should be less confrontational on constitutional and federalism issues:

> Clark viewed the Tellier Group as aggressive and [believed it was] improper for the federal government to have a group that was sort of plotting strategy against the PQ [….]. My view was that it showed the naiveté of Clark. I mean, the PQ was extremely organized, and for the federal government to say it shouldn't have a group that helps us think about it… anyway he shut it down (Interview with Anderson 2014).

Similarly, Clark refused to get involved in the upcoming referendum, out of recognition that both he and his party had little appeal there. His refusal to get involved in the upcoming referendum was harshly criticized. After his government fell the Liberals ran partially on his lack of presence in their 1980 election campaign literature:

> With every provincial faction busy looking out for itself, the national interest has been forgotten. Joe Clark as Prime Minister of our country has the ultimate responsibility for keeping it all together – yet has refused to get involved in the Quebec referendum debate – preferring to remain on the sidelines while others carry on the fight to hold our nation together (Liberal Party of Canada 1980).

While he had few roots in Quebec and the decision to remain on the sidelines was probably defendable, it was the last time that the Progressive Conservatives would find themselves able to skirt the issue until their near total annihilation in 1993.

The key shift for the PCs emerged following the arrival of Brian Mulroney, when both of the two major federal parties became overtly activist on abeyances. Politically, the refusal of Quebec to sign the accord meant that the PCs essentially could not leave the situation unfinished, especially given the attitude of the Quebec Liberals who soon retook power and the promises of the PCs (Monahan 1991, 17–22). The arrival of Mulroney brought a shift in the way that the federal government had been handling it, as well as an important shift in the direction of the Progressive Conservative Party. On the latter point, it meant that the PCs would no longer be playing a largely reactionary role. Instead, they would be the ones to develop the agenda and be responsible for coming up with some kind of a solution. This engagement of the PCs now meant that all political parties in Canada were willing to have active discussions on the constitutional file, rather than take a more passive approach to the question.

The new Progressive Conservative approach reflected a change away from a federal government that was characterized by its penchant for conflict into one interested in appearing more cooperative. The shift reflected a commitment to resolve the problem in a way that the government of Quebec could agree with (Gibbins 1990, 256). Obviously this shift was a major contrast with Trudeau, who did not believe that he needed to bargain with the provinces and who was perfectly prepared to fight to have his vision accepted (Jeffrey 2006, 120). In many ways, the arrival of Mulroney changed the discussions from one of *substance* to one of *process* – if

there was a sufficiently strong process that was just, then its results would themselves be just.[27]

Executive federalism was pursued "almost to the exclusion of Parliament and public opinion" (Jeffrey 2006, 120). Mulroney's approach was oddly similar to that of Lester Pearson – and reflected the belief that the provinces could be trusted, and that decentralization could promote national interests and provincial interests at the same time. There was a considerable amount of hope that could have been invested in this strategy as well, given the well-known federalist positions of Robert Bourassa after he returned to power in 1985. Bourassa was not only an unquestioned federalist, but also someone almost outside the mainstream of his own party. The positions that Bourassa took in relation to the rest of the country were the absolute minimum that could have been expected of someone in his position as the leader of the Quebec Liberal Party. They betrayed a clear vision of the country, and Quebec's role in it, establishing additional powers for his province. It was reasonable as a result for the PCs to think that they could have bargained with the government and come to some kind of an agreement. The pragmatic view of the country that Mulroney took meant that he genuinely wanted to get an agreement, the details of which were less important than the symbol of having one at all.

Nevertheless there were complicating factors. Mulroney's attempt to reduce the welfare state at the same time as he was trying to build consensus on the national unity file raised conflicts from the start (Jeffrey 2006, 120). His personal style of trying to govern by building personal relationships with the premiers helped him only so much, and he tended to play one part of the country against another (Jeffrey 2006, 120). This tactic would haunt Mulroney as the constitutional file progressed.

4.2   The problems of engagement – Meech Lake

The Meech Lake Accord negotiations represented the beginning of the peak of Summit IGR and the search for constitutional clarity on abeyances (Jeffrey 2006, 120). They reflected the desire of both Bourassa and Mulroney to find an agreement in a non-conflictual way, and to demonstrate symbolically the effectiveness of Canada in meeting the aspirations of all its people. They also represented the ongoing collapse of abeyance-maintaining behaviour, in that all provincial

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[27] I am in debt to Prof. Rod Haddow for helping me to develop this idea.

parties in Quebec, all provincial premiers, and both the major federal parties were in some degree active in seeking constitutional clarity on the nature of the federation.

Could the question of Quebec's place in Canada have been dropped after the constitution had been patriated in 1982? The warning of "incalculable consequences" from Lévesque had not materialized, and with the PQ clearly headed for a defeat, it is tempting to think that ignoring the question was possible. It appears the dominant belief is that the PCs had very little choice but to return to the constitutional table after 1984. Senator Murray suggested that it was something close to an imperative:

> Oh come on. I mean, I've heard that of course, "Aren't you sorry you reopened the constitution?" We felt - I think we would never have been forgiven [if we had not]. We would have been attacked, vigorously and legitimately, if after the election of a majority Conservative government in Ottawa under a Quebecer, with strong representation from every region, at the same time a majority government, federalist government under Bourassa in Quebec who had put forward five conditions, all of which had been offered by previous governments, and as my sometimes friend [former Liberal politician Jack] Pickersgill, said the most reasonable conditions that had been forwarded in living memory. No we could not ignore that and we did our best to bring it along, push it forward. So that's not really sensible, we would never have been forgiven if we hadn't (Interview with L. Murray 2015).

Hugh Segal argued that a lot of the pressure actually came from the rest of the country rather than Quebec, namely some of the other premiers and some Liberal senators who saw an opportunity in Bourassa and they wanted Mulroney to take advantage of it. This additional pressure the situation given what Mulroney had promised in order to get elected:

> For Mulroney coming in with a strong Quebec base, and a national mandate and the largest majority known to the time, and a commitment that had been made to Quebecers, the notion of not trying after the Anglophone premiers had said "you really should," would have been unconscionable. It would have been a complete violation of his sense of mission and the government's commitment to bring Quebec into the family (Interview with Segal 2015)

Whether it was a good idea or not to reopen the discussion on abeyances, this was the strategy that the opposition Conservatives adopted in the run up to the federal election of 1984. Mulroney exploited the still volatile situation, having brought Lucien Bouchard on board as a speechwriter to reach out to nationalists, and made bold, vague commitments to the people of Quebec that he would do what he could to "convince the National Assembly of Quebec to give its consent to the new constitution with honour and dignity" (Behiels 2007, 257–8). The PCs' subsequent strong win in Quebec limited Mulroney's ability to back down. In Quebec, Bourassa also campaigned on the issue, promising that his government would restore the province's veto, develop Quebec's hydroelectricity, and bring peace to the language front (Behiels 2007, 261). Among Bourassa's supporters, Mulroney's efforts held significant appeal; in the 1984 election half of the membership of the provincial Liberals and some twenty percent of the provincial Liberal riding associations were either supporting or even working for the PCs (Behiels 2007, 257). The result was a very strong Mulroney-Bourassa axis that was fundamentally committed to bringing Quebec back into the constitution, notwithstanding the absence of consensus on what that would look like.

The Meech Lake Accord represented the first of two efforts the Progressive Conservatives undertook (the other, the Charlottetown Agreement) in which the actors in the federal system attempted to fully define and resolve the points of disagreement that underlay the abeyances in the constitution. These actors shared a common commitment to finding a "magic-bullet solution" that would reconcile different visions of the country sufficiently to overcome the failure of 1982. Their strategy was to link all of the problems together into a single accord consented to by all actors. Their inability to agree on the fundamental questions at stake ended with the Meech Lake Accord becoming the most spectacular failure of the mega-constitutional era and the one with the most wide ranging repercussions.

Throughout the Meech Lake Accord negotiations, while some provinces were enthusiastic one of the biggest challenges for Ottawa and Quebec was convincing many of the remaining provinces that constitutional reform was an important step to take and that all parties needed to return to the bargaining table. For these other actors, the constitution had been more or less closed by the end of the patriation round and it took an active effort by federal officials for them to reengage (Behiels 2007, 263). By 1982, Trudeau had managed to answer most, if not all, of the problems that emerged from Canada's exit from the Empire to the status of full independence in a legal

sense. There remained serious constitutional issues in the country, in particular the unelected Senate, but the basic objectives had now been achieved. The country finally had an amending formula, obtained through a combination of political maneuvering on the one hand and litigation on the other. The monarch, the last symbolic connection to Britain, was now in an office that was technically no longer connected to the United Kingdom. Bringing the other premiers back to discuss the remaining issues demonstrated a commitment not to "leave well enough alone." Their willingness to engage with the issue kept the abeyances front and centre.

The accord itself is an admirable attempt to square the circle of the various visions.[28] Whether it was a good idea is not as relevant as the fact that it was being tried at all. It is not necessary to offer a blow by blow account of how it collapsed, except that it did so though an ever escalating series of attempts to bring constitutional clarity to questions on which there was no fundamental agreement. On the Quebec side, the PQ opened the discussion in 1985 with *Draft Agreement on the Constitution: Proposals by the Government of Quebec* (Quebec 1985). There was little doubt that the *Draft* was something of a wish list, given that Lévesque was having difficulty holding his party together and it was correctly assumed that he would be out of office soon (Behiels 2007, 259). Nevertheless, in many ways the *Draft* resembled the ideas that would be advanced by Robert Bourassa in 1986. It proposed: 1) the constitutional recognition of Quebec as a distinct society 2) the right to opt out with compensation of future programs in provincial jurisdiction 3) an expanded provincial veto 4) a provincial role for future Supreme Court appointments and 5) constitutional entrenchment of Quebec's role in immigration (Gibbins 1990, 257). The final accord managed to more or less recognize Quebec's insistence on the duality of the country supposedly without giving it any powers that the other provinces would not have or without taking away from the powers that they already had. It recognized Quebec's three seats on the Supreme Court while giving an expanded say to other provinces on the appointment of judges (The 1987 Constitutional Accord s. 6, cited in Monahan 1991, 301–2). It recognized Quebec as a distinct society while at the same time insisting that recognition had no impact on the "powers, rights, or privileges" of either the federal or provincial governments (The Constitutional Accord, 1987, s. 1, cited in Monahan 1991, 299). Without mentioning Quebec, the accord expanded

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[28] The text of the accord is not hard to find. See Monahan 1991 for an extensive set of materials, and also Gibbins, 1990, Appendix E for a more basic copy of the Accord.

Quebec's veto powers by making more areas subject to the rule of unanimity (The 1987
Constitutional Accord, s. 9-12, cited in Monahan 1991, 303–4).

In opposition, the federal Liberals and New Democrats began by being generally on side with the
deal, suggesting that their parties would "play ball." Nevertheless, constitutional reform would
ultimately split the Liberals quite badly and the NDP to a lesser extent (Behiels 2007, 266).
Former Liberal Prime Minister John Turner argued initially, although somewhat hastily as it
would turn out, that Meech Lake appeared to be a good deal (Cohen 1990, 143–5). It was a
position that he stuck to even as many of his colleagues began to pull away from supporting the
accord, in particular following the intervention of Pierre Trudeau and his obvious dissatisfaction
with the deal (see e.g. Trudeau 1987). Eventually major divisions would emerge, but it served
neither party's interest to seriously damage the deal. The Liberals had always relied on Quebec
for significant electoral support and had little interest in antagonizing that base and the NDP had
always maintained a positive position on questions such as distinct status for Quebec (Monahan
1991, 81, 101). The accord was ultimately neither party's responsibility and their attitude to the
accord was overshadowed by other issues that they felt were more important, such as the free
trade deal with the United States. The fact however that such deep divisions could exist in both
parties is suggestive of the problems that tackling abeyances entailed.[29]   Nevertheless, despite
the insistence of Conservative Senator Lowell Murray that the agreement was a "seamless web,"
the accord began to disintegrate and it became clear that the agreement could not stand alone and
it would require at least another round of bargaining (Behiels 2007, 269). Subsequent proposals,
meant to address in particular the concerns of women, Aboriginals, as well as Newfoundland and
New Brunswick contributed to an air of crisis. The latter province, under Frank McKenna, was
the first to suggest the idea of a parallel accord (Behiels 2007, 271–2). The subsequent Charest
Report led by PC MP Jean Charest to salvage the accord and its insistence on a future
"Companion Accord" testified to the inability of Meech to do the job it was supposed to do
(Behiels 2007, 271–2).

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[29] Cohen notes that for the Liberals the split was along linguistic lines and at one point as much as a third of the
federal caucus had signaled that it could not support the deal. See (Cohen 1990, 146–7).

In his influential book on the Accord Patrick Monahan has argued that it was the effort at clarity itself that doomed the accord. "Constitutions do not generally resemble the Income Tax Act. The point of a constitution is to set down basic, fundamental principles that are to govern the making of laws in a society" (Monahan 1991, 255). But in reality, Monahan argues that the competing symbols that lay at the heart of the agreement, and in particular the distinct society clause, turned English Canadians, Aboriginals, and others off the agreement, out of their fear of losing constitutional status. Alan Cairns' work on the dialogue of the constitution observes that the effort to accommodate the need of Quebec for special status could not be reconciled with the perception that distinct status for Quebec was robbing others of status at the same time (Cairns 1989; Monahan 1991, 256–7; see also Telford 1998 for the argument that accommodating Quebec's communitarian demands was simply too far for many Canadians in the more individualistic Charter era). In the eyes of many observers, it was too hard to recognize one part of the country as distinct while denying that it had any meaning. The Meech Lake Accord gave powers to Quebec in immigration while also denying that the recognition had any meaning. It had the effect of including some but not others, even if it just meant not being at the table at all:

> The bitterness and passion that inform the presentations of the numerous groups objecting to the Accord are not based on a narrow instrumental calculation of its effects on the future flow of material benefits. Their anger is not driven by the fear of tangible gains foregone, but by a more complex battery of emotions. The representatives of women's groups, of aboriginals, of visible minorities, of supporters of multiculturalism, along with the northerners and basic defenders of the Charter employ the vocabulary of personal and group identity, of being included or excluded, of being accepted or being treated as an outsider, of being treated with respect as a another participant or being cast into the audience as a spectator as one's fate is being decided by others. They employ the language of status – they are insulted, wounded, hurt, offended, bypassed, not invited, ignored, left out, and shunted aside. They evaluate their treatment through the lens of pride, dignity, honour, propriety, legitimacy, and recognition – or their reverse. Their discourse is a minority, outsider discourse. They clearly distrust established governing elites. They are in, but not of, the constitution (Cairns 1988, 139–40; quoted in Gibbins 1990, 262).

David Taras has argued that the level of media attention essentially meant that the actors were bargaining in two different venues, with each other on the one hand and in front of the country on the other, making the process of negotiating much more difficult than it had to be (Taras 1991, 169, 178). The atmosphere certainly constrained the parties in front of their publics, and they were fearful of appearing weak at the table (Meisel 1991, 150). Complicating matters, the high stakes nature of the negotiations fed into what John Meisel has called an environment of "high exposure/low comprehension" on the part of the Canadian public, in which people were unsure of what the deal meant or what to think of it (Meisel 1991, 148). A 1990 poll for the CBC/*Globe and Mail* showed that some 71% said they knew little or nothing about the Accord, against 28% who knew "a fair amount or more" (Meisel 1991, 148). Nevertheless the public was highly engaged, especially during the climatic meetings of first ministers. One estimate put the number of Canadians watching at least some part of the coverage on the final Saturday of the June conference at around 4 million (Meisel 1991, 148). It was in this highly charged context that Trudeau intervened with his devastating and highly effective written critique of the Accord in the *Toronto Star* and *La presse* of Montreal, which helped to rally opposition to the agreement (Russell 2004, 139).

In so far as the process used to negotiate the accord did not ease intergovernmental tensions either, the concept of Summit IGR received increasing scrutiny for being part of the problem. The accord itself took steps, broadly in keeping with its decentralizing tenor, to increase institutions of executive federalism. It committed the first ministers to holding annual meetings on the economy and constitution (The 1987 Constitutional Accord, ss. 8, 9, cited in Monahan 1991, 303–5). Although executive federalism would remain the format for the second round of constitutional negotiations, and demonstrated a commitment by elites to this type of negotiating process, critics increasingly saw the IGR process itself as an obstacle.[30] Alan Cairns felt that the Charter, which had politicized groups in the constitutional context in ways that had not previously been the case, was at least partly to blame for the political backlash to the Meech Lake Accord (Cairns 1988). Russell argued Canadians were rejecting having the country's sovereignty exercised solely by elites (Russell 2004). Before the accord had even collapsed

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[30] Earlier iterations have been discussed previously (see e.g. Simeon 2006; Institute of Public Administration of Canada 1979; Smiley 1979; Smiley 1980; Dupré 1988; D. Stevenson 1979).

Roger Gibbins noted that while some conflict and coordination is fine in a federal system, the system of Summit IGR can run into problems when it goes beyond the technical details to channel more fundamental disagreements:

> Intergovernmental conflict becomes a more serious matter when it serves as an outlet for major cleavages within the Canadian society. Conflict between Ottawa and the government of Quebec, for example, may go well beyond the intrinsic problems of governmental coordination to a fundamental debate over the place of Quebec within the Canadian political community. At issue is which government best speaks for Quebec when the two governments pursue quite different political visions (Gibbins 1990, 264).

Nevertheless, the commitment of the different actors to these provisions in the accord suggested that Summit IGR was now a primary vehicle for resolving ambiguities in the constitution.

All told, however, the collapse of the Meech Lake Accord had the effect of significantly increasing the media attention on the debate and on grievances that different parts of the country had with each other (Monahan 1991, 174–5, 213). The defeat of Meech Lake played into a narrative in Quebec of national victimhood that had been a part of the political culture for decades. That narrative was now further accentuated with the language of betrayal, rooted in the inability of the rest of the country to overturn the injustice that had been committed during 1982 (P. Fournier 1991; Behiels 1992, 136) Michel Behiels has argued that this narrative was never actually challenged by the federalists and was in fact embraced by them, considerably complicating the situation heading into Charlottetown (Behiels 2007, 274).

4.3   The problems of engagement – Charlottetown

The ultimate apex of abeyance-collapsing behaviour was the Charlottetown Accord, another major failure in the country's search for constitutional resolution. Really a continuation of the Meech process, the Charlottetown Accord's ongoing commitment to constitutional negotiation and search for clarity on abeyances by all parties exacerbated the crisis. Similar dynamics were present to that of Meech: Summit IGR, expanding commitments and agendas, and significant publicity on points of disagreement.

The decision to continue was not foreordained but given the political pressure to do something it would have been hard to avoid. Lowell Murray recounted that he was not sure if it was a great idea to try again but that there was considerable commitment on the part of Mulroney to proceed:

> I have often wondered about that, about whether it was wise to have pursued the issue once Meech had failed…. You know Prime Minister Mulroney and I were close anyway, and you know I felt very badly for him and the party and the government and the country. Still, I thought the speech that we had, that he gave that we had helped draft the morning after Meech had failed, pretty well, I thought we were closing the door. You know that we were closing the book in the same way that Trudeau closed the book after Victoria. He took a different view (Interview with L. Murray 2015).

There was a clear shift in focus however to make this more of a national affair once it became clear that there would be another attempt:

> But anyway, he was determined to try again and this time it was not going to be a "Quebec round" it was going to be a "Canada round" and everything was going to be in it and you know we talked about it during the summer. I talked to him about it fair bit. Obviously this was not something he could take on after Meech and he managed to persuade Joe Clark to become the Minster of Intergovernmental Affairs, [or] Constitutional Affairs, and away we went. I have often wondered whether it might not have been better to have, to have simply closed the book after Meech as Trudeau had done after Victoria (Interview with L. Murray 2015).

The accord, responding to criticisms of Meech Lake as being elitist and excessively focussed on Quebec, began by considerably broadening the topics under discussion. Mulroney's first attempt to restart negotiation, *Shaping Canada's Future Together*, constituted some 28 different reforms and statements about the constitution, its substantive powers, and what it meant to be a citizen or member of a variety of different groups (Behiels 2007, 278). This list would eventually be whittled down to 25 provisions. Many of these provisions were reflections of the agreements that had been unsuccessfully "tacked on" to the end of the Meech Lake Accord when elites were desperately trying to salvage the agreement in June of 1990. The deal was huge: nearly a third of the constitution would have been affected, and it would have seriously put in question the

authority of the Charter in Quebec, while also fundamentally changing the way that many of the country's political institutions worked (Jeffrey 2010, 216).

The gathering of suggestions also meant a much broader engagement and dialogue with the public about abeyances. This engagement took the form of a series of high profile, esoteric and opaque commissions that were designed to solicit public sentiment by both the federal and Quebec governments. The Quebec Bélanger-Campeau committee, set up by the government of Robert Bourassa to attempt a unified front for Quebec, ended up being severely hijacked by sovereignist forces who used it as a lens to focus public anger on the federation. Such efforts at public input at the federal level were also not particularly successful. The Spicer Commission, or more formally the Citizen's Forum on Canada's Future, sought the input of thousands of Canadians between November 1 1990 and June 27 1991:

> As observers predicted, the forum's function was largely that of a reverberating sounding board for thousands of Canadians to vent their political spleen against Mulroney for his determination to accommodate Bourassa's constitutional demands while ignoring the economy and social issues and imposing the hated Goods and Services Tax (GST). The forum's report of 27 June 1991 confirmed that ever widening old and new cleavages and the constant wrangling over constitutional structures, jurisdictions, and status were destroying Canadian unity and the shared values of citizenship inherent in the Charter of Rights and Freedoms (Behiels 2007, 277).

The Beaudoin-Dobbie committee, which was set up to examine the Charlottetown proposals and published its work in *A Renewed Canada*, was beset by internal struggles, apathy, and generally gave the impression of incompetence (Canada 1992; Behiels 2007, 278). The committee and its report were rejected by Bourassa essentially out of hand, raising the pressure on the federal government. Similar hearings were held by Joe Clark and received more, but not unqualified, success in raising the profile of the developing accord. Nevertheless the outcome of these processes did not on the whole contribute to resolving the crisis or bring about a consensus on how to resolve abeyances, seriously raising the amount of public participation, or otherwise bring the heat down on the issue.

The expanding agenda, actors, commitments and principles testified to the inability of the parties to get a deal but also their willingness to put everything on the table: to explore every ambiguity,

every proposal, every aspect of a troublesome constitution. This expansion of the agenda had been seen at the end of Meech Lake, but it got ever more out of hand as increasing numbers of groups sought to get into the Charlottetown Accord. This "linkage" reflected the snowballing that the process created:

> One of the chief grounds for resisting further constitutional discussion – even for those who believed, in principle, in the need for some constitutional change – was the phenomenon of linkage. Practically and politically, it proved impossible to propose a single amendment to the Constitution to address Quebec's concerns without, at the same time, addressing an unmanageable range of demands from the country's constitutional actors. One cannot offer to address Quebec's concerns without also confirming the equality of the provinces, tackling the reform of the Senate, responding to the constitutional aspirations of Canada's Aboriginal peoples, seeking to strengthen the Canadian economic union, and so on. Support for one constitutional priority is contingent on the acceptance of another, and so a large, unwieldy package of constitutional changes is rapidly constructed (Cameron and Krikorian 2008, 394).

The final accord was a massive statement on abeyances that attempted to offer nearly every active group in the country some form or recognition and to boil down the meaning of "Canadian" in a precise way that would pass muster in a national referendum. Here the PQ could capitalize on this effort and demand ever more powers for Quebec, although by this point Parizeau had admitted that there was no possibility that he would have supported anything except the total independence of Quebec. The PQ was skillful in suggesting that the province was acting very weak at the bargaining table. For example one of the most destructive things that could have happened to the Agreement in Quebec was the release of the transcripts of a telephone call, the "Wilhelmy Affair." Made by a member of the intergovernmental affairs section of the Quebec government, the transcripts suggested that the government had "caved" to the rest of the country (Russell 2004, 225). Thus the PQ effectively played a "purity game" in Charlottetown and was better able to take control of the agenda.

In the end the agreement failed to pass by a national vote of 55% to 45%, passing narrowly in Ontario but being defeated in Quebec 56.7% to 43.3% (McRoberts 1997, 216). Ultimately, the reason that the agreement failed was that the people in Quebec did not think that they were

getting enough and the rest of the country thought that Quebec was were getting too much (Russell 2004, 226). While the accord enjoyed some initial popularity, it was fairly clear by the time the referendum on the Charlottetown Agreement was approaching that there was little chance that it would succeed, and it went down to defeat in early 1992 by nearly ten percentage points. Again, by this point, the question was simply whether it would count as enough in the eyes of the government of Quebec, which began to make increasingly difficult demands on the rest of the country. At this point, the opposition to the accord was much more in control and able to exploit the structure of IGR. While the PQ had originally seen in Meech Lake a way to bring the country down quietly, there was no such restraint with the Charlottetown Agreement.

The Quebec Liberals arguably did not have much of a chance of getting it passed. The result was an ugly "No." Charlottetown was a round of negotiations that nobody really wanted and the country outside of Quebec did not seriously need. Alan Noël has argued that the rejection of the accord, often seen as a more general rejection of the type of executive style politics that was common up to this point, was actually an oddly thoughtful rejection of a set of constitutional proposals that the population simply did not want (Noël 1994, 66).

The collapse of Charlottetown marked the moment when the governments began to back off Summit IGR in a significant way.

> It was under the latter part of Mulroney when we started hearing "I don't want to have a federal-provincial meeting unless we're going to have a successful, a guaranteed successful outcome for the federal government. We don't want open ended meetings anymore, where we just sort of blue sky, and brainstorm and talk long term. Rather, we want guaranteed successful outcomes. And it's become more and more that way, but now I don't know how many times premiers have asked for the FMM and it's just dismissed. (Interview with Eldridge 2014).

The accord was also the final stage, as far as English Canada was concerned, with how far reform could go. To the extent one could say that there was "constitutional fatigue" in Canada, this was a key moment. "The referendum defeat brought the reform movement to a shuddering halt," wrote Roger Gibbins. "Intergovernmental negotiations stopped, and public consultation was avoided like the plague. If countries can 'burn out,' then Canada had" (Gibbins 1999, 273).

4.3.1   The aftermath of the 1992 referendum

 The aftermath of the referendum on the Charlottetown Accord is well known. Mulroney resigned his position in 1993 and the Progressive Conservative party was obliterated soon afterwards in the 1993 federal election. The government's defeat stemmed largely from the unpopularity of the Goods and Services Tax, the financial condition of the country, and Mulroney's handling of the constitution. Jean Charest finally took control of the party, being only one of two MPs re-elected in that election. The official opposition was headed by Lucien Bouchard, who was intent on leading Quebec out of the country and who took 54 of the province's 73 seats. Bouchard has recounted that he saw his role at that time as laying the groundwork for an eventual referendum on the sovereignty question. He has subsequently described the BQ as a "one shot" party, and that he had planned to retire from politics and take up the practice of law again once the referendum was finished (CBC News/Canadian Press 2014).

However, George Anderson argued in an interview that there was a clear difference politically between the rage felt in Quebec at the end of Meech and the consequences of the Charlottetown Agreement being defeated by a vote:

> The difference with Charlottetown is that Quebecers defeated Charlottetown, they voted against it. So the emotion of the defeat was totally different from what had happened with Meech. And the fact that the Quebecers and so many other Canadians voted "No," most of the rest of the country voted "No" – Ontario marginally voted "Yes" – that sort of marked the point when people said *enough* of all this constitutional stuff…..We have torn ourselves apart we have had these two elaborate exercises and it got us nowhere (Interview with Anderson 2014).

There was a clear indication during the election of 1993 that the federal Liberals wanted to bury this issue. The mantra was "jobs jobs, jobs," unsurprising given the level of unemployment that existed in the country at that time.[31] With no interest in the constitutional issue, which had badly split the party, there were now indications federally of the first moves to turn the questions that

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[31] This will be addressed more fully in the next chapter.

had been raised by the two accords into taboos that should not be raised again. If there was fatigue developing it would not be enough to stop the constitutional reform train quite yet however, as developments in Quebec forced the hands of the federal Liberals. Robert Bourassa, weak and unpopular, retired from government in 1994, yielding the floor to Daniel Johnson Jr. Johnson lost the election that year to the able and organized Jacques Parizeau, and the PQ came to office with the purpose of holding a referendum as soon as possible. In short order, the Quebec PQ government managed to organize a common front of parties, with the BQ at the federal level and the ADQ at the provincial level forming a sovereignist triumvirate.

There followed a process in which the people of Quebec were prepared for another referendum that took place in late October of 1995. The Parizeau government took a series of steps to lay the groundwork, including proposing a draft constitution for the province. After passing a measure designed to frame the conversation with the rest of the country following a successful referendum, Parizeau called a vote to be held on October 30th 1995. Although struggling initially to gain traction, the campaign for the "Yes" side began an inexorable rise following the entry of Bouchard into the campaign. Endorsing a form of sovereignty-association along European lines, with a common currency, market, and even some common institutions, Bouchard was much softer on the question than was Parizeau (Hülsemeyer and Lecours 2006, 3). This position was also shared by future leader Bernard Landry, and was similar to the approach taken in 1980. It would remain the basic PQ approach until well past the turn of the millennium (Hülsemeyer and Lecours 2006, 3). Bouchard's suggesting that he would play the role of chief negotiator with Canada is credited with beginning the swing towards the "Yes" side (e.g. Conley 1997, 87; However, this interpretation is by no means uncontroversial, for example see the work of J. Fox, Andersen, and Dubonnet 1999). Bolstered as well by disorganization, significant missteps, and underestimation by the federal government, Daniel Johnson was pushed aside late in the campaign by Jean Chrétien who begrudgingly admitted that he might be open to some new reforms if the province decided to stay in the country. Ultimately, the "Yes" option was rejected by roughly 50,000 votes, but not before significant interventions by the French and American Presidents and some turmoil in the markets for the Canadian dollar and bonds.

4.4   The Court

Perhaps the most important contribution that Court made in the period between 1980 and 1993 was in the way that it set up the conditions for Summit IGR so that it could not be avoided as a forum for addressing abeyances. It did so in the face the federal government's assertions that it alone could initiate and bring to completion major constitutional change according to its own vision. The Court refused to allow that from occurring. Three cases are particularly important: the *Reference re: Parliament's ability to Amend the Upper House* (the 1978 *Senate Reference*), *Reference re: Resolution to Amend the Constitution* (the *Patriation reference),* the *Quebec re: Amendment to the Canadian Constitution* (*Quebec Veto Reference*).

In the 1978 *Senate Reference*, the Trudeau government asked the Supreme Court if it could unilaterally alter the composition and amendment process for the upper house, with a view to turning it into a kind of "House of the Federation (Sarro 2013, 130)." Contained in Bill C-60, the Liberal plan was to have half of the members elected by the provincial legislatures and half by the House of Commons. It would have a suspensive veto, allowing it to block the Commons for 120 days (Sarro 2013, 130). This was an answer to those who found the Senate hopelessly out of date and a way to incorporate provincial input into the federal government in order to make it more inclusive. Indeed, one of the fundamental insights of Richard Simeon's federal provincial diplomacy had been that the combination of Westminster style parliamentary democracy, with the need for strict party discipline, combined with federalism had had the effect of pushing this kind of input out to the provincial legislatures (Simeon 2006, 25–6). The federal government argued that it had the sole right to enact that kind of change.

However, the Court disagreed. Reading the meaning of "Constitution of Canada" narrowly in this case, it did find that the federal government could make small amendments to the chamber that were limited to the interests of the federal government (Sarro 2013, 131). But the plan as proposed went too far. Changes to the "fundamental character" of the chamber would need the consent of the provinces. These included the basic premises of the agreement – that the chamber had an absolute veto over the Commons, that the appointment principle of regional equality be respected, and that the members be appointed (Sarro 2013, 131). Provincial consent would be required to change these aspects, necessitating some form of Summit IGR.

The Senate reference only touched one part of the Canadian Constitution, albeit a very large part. Of arguably even more importance was the *Patriation reference*. Trudeau had argued that he could bring the constitution home, with the three pillars an entrenched bill of rights, a domestic amending formula, and provisions for equalization (Russell 2004, 111–2). He argued that this could be done by Ottawa alone; there was no requirement to ask the provinces first or get their consent. This brought about intense animosity from the provinces – only Ontario and New Brunswick accepted Ottawa's position. Three provinces in particular, Quebec, Manitoba, and Newfoundland, brought reference questions to their provincial Courts of Appeal asking whether or not what Ottawa was doing was constitutional and could be done without them. The reference was itself the consolidation of these three cases.

As is well known, it brought federal unilateralism to a screeching halt. While the Court found, the federal government was in the right legally, it was nevertheless violating the unenforceable constitutional conventions that were a critical part of the constitution. Those conventions required that there be "substantial degree" of provincial consent in order for the federal government to proceed with the package of reforms as planned (Russell 2004, 118–9). The legal victory was a political disaster for federal unilateralism and had the effect of forcing the Trudeau government back into a multilateral context. The Trudeauvian answer to the content of abeyances could not be imposed – there would have to be some negotiation with the provinces. This meant that the PQ, which was in power at the time in Quebec, would have to be allowed to participate in some way, notwithstanding the fact that they had only just held a referendum on getting out the system entirely. And it would mean that there was no way for Ottawa to go over the heads of its rivals, their view of the meaning of abeyances had in effect been legitimated by the Court who gave them a seat at the table.

Finally, and perhaps of the least import, was the *Quebec Veto Reference*. It came later and was in many ways an echo of what had been already decided in the Patriation reference. Brought to the Court of Appeal after the constitutional amendment package had been signed and heard by the Supreme Court after it had been proclaimed into force, the Court found that there was no convention that Quebec had a constitutional veto. While the results were not terribly surprising it had the effect of doing for Quebec City what the Patriation Reference did for Ottawa in terms of Summit IGR – if there were going to be answers supplied to the meaning of the abeyances at the heart of the Canadian constitution, they would have to be worked out by agreement. Quebec

could not simply reject any proposal that came before it. As a result it too was forced into the process of Summit IGR along with the other provinces and the federal government.

The following subsections will look at these and other cases in more detail, in particular along the lines of how the Court has perceived the division of powers, visions of the federation, and linguistic rights.

4.4.1   Division of powers and visions of the federation

The Court's decisions between roughly 1980 and 1995 allowed for the essential characteristics of Canadian federalism to be interpreted in a variety of ways at critical junctures and on critical issues. Both the federal and Quebec governments could find material in the Court's decisions to support their positions. Furthermore, as the number of cases on the national question began to rise, the Court began to deviate from the centralizing track that had characterized the first decades after 1949, and to reveal an "uncanny balance" between federal and provincial victories (Russell 1985, 162.; Saywell 2002, 270–73, and chapter 11 generally).

Of the Court's decisions, the three most important for the national question were the *Senate Reference, Patriation Reference,* and *Quebec Veto Reference.* all discussed above. In all of them the Court acted in such a way as to protect both centralist and decentralist visions of the country.[32] The *Patriation Reference* was particularly careful in this regard, but it refused to explicitly adopt or rule out one or other of the interpretations. It was "[t]he epitome of balance – half a loaf to each side" (Russell 1985, 164). The case had important political ramifications because it hindered the bargaining power of both the federal and provincial governments, something that the Supreme Court appeared willing to do:

> The *Patriation Reference* is a textbook example. The federal government was not willing
> to use the resources that it gained in this case – namely the legal power to proceed
> unilaterally with its constitutional package – because it was apprehensive of the resource
> its provincial opponents had acquired in the same case – namely the Supreme Court's
> endorsation [*sic*] of the proposition that unilateralism violates a convention of the

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[32] Russell noted in his 1985 piece that the effect of this attitude was likely to encourage constitutional litigation, given that either side could see that it might win (Russell 1985, 164; Russell, Knopff, and Morton 1989, 9).

Canadian constitution. The provinces, on the other hand, realized that if they remained inflexible in opposition to Mr. Trudeau's package, legally he could and probably would 'go it alone.' As a consequence both sides went back to the bargaining table and with reasonably equal constitutional resources and a compromise resulted (Russell 1985, 166).[33]

Somewhat similarly, in the *Quebec Veto Reference,* the Court was asked to rule on whether Quebec could veto the deal that the other provinces and the federal government had made (Reference re: Objection by Quebec to a Resolution to amend the Constitution, 1982). The case dealt with many of the concepts that had been at issue in the *Patriation Reference.* However, in this second case, Quebec also expressly argued that it was not a province that was the same as the rest; rather, the country was fundamentally premised on the principle of duality. This duality entitled Quebec to a veto. However,

> The Court, through an anonymous and unanimous decision, managed to reject this second argument without addressing the principle on which it rests. It did so by concentrating on one of Sir Ivor Jennings's three tests for the existence of a constitutional convention – recognition of the convention by the political actors involved in the precedents. The Court took the view that such recognition must be explicit and rejected Quebec's argument because it had not been presented with any evidence that politicians outside Quebec had explicitly acknowledged such a convention. This may not have been an entirely convincing performance, but it was perhaps the best the Court could do under the circumstances (Russell et al. 2008, 532).

Marc Gold has taken issue with this reasoning, arguing that the Court sought a way to reject Quebec's arguments without appearing overly political by refusing to engage with either the historical record or much of the *Constitution Act, 1867* itself (Gold 1985). Refusing to engage with the principle of duality, for which there is significant support in the *Constitution Act, 1867,* allowed the judges to sidestep the issue. The SCC's unwillingness in this case to engage with

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[33] In his memoirs, Roger Tassé, the Deputy Minister of Justice at the time, writes that the decision generated considerable problems in the federal camp and that he, unlike then Justice Minister Jean Chrétien, felt that they could not proceed unilaterally without additional provincial consent. "In truth," he writes of the reference, "none of the parties emerged as winners from the exercise" (Tassé 2013, 289).

history contrasts somewhat with its earlier *Senate Reference*, in which it struck down the federal government's plans for reform after the Court expressly examined the historical basis for the chamber. In refusing to allow the federal government to unilaterally alter the "essential character" of the Senate, it found that to do otherwise would defeat the institution's responsibility to protect the sectional interests which were foundational to its creation (Reference re: Authority of Parliament in relation to the Upper House 1980; Russell et al. 2008, 483). The fact that it was only a convention that was under discussion, something that is not legally enforceable anyway, added to the oddity of the case but also provided additional cover. The collective effect of these decisions was to refuse to judicially sanction any one particular vision of Canadian federalism while providing all sides with sufficient cover to credibly maintain their positions. These cases were critical for setting the stage for the politics for the 1980s, where there was a blossoming in cases on federalism in front of the Court. From 1980 to 1995 there were 91 federalism decisions handed down, 15 of which were references.[34]

4.4.2   Language rights

As the decade wore on, the Court maintained a similar level of ambiguity around the Charter when it came to the interpretation of important language rights. The situation arose most squarely in the context of the language legislation that had been adopted in Quebec in the 1970s and which sat uneasily with the new primacy for individual rights that the Charter expressed. The Court had a way out in that its objections had been foreseen by the Charter's drafters in the form of section 33; the "notwithstanding clause" either insulated important laws from scrutiny or provided a pressure valve for governments to protect politically vital laws that supported their constitutional visions. Nevertheless, the Court did a considerable amount to assist Quebec to retain its language regime by essentially meeting it halfway on a number of issues. The most important of these cases was *Ford vs. Quebec (Attorney General)* in which the Court expounded a legal framework whereby the laws could be rewritten to ensure that French remained predominant on commercial signs, while nevertheless recognizing that English was an essential part of Quebec society and could not be extinguished entirely *(Ford v. Quebec (Attorney*

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[34] The Court's studious refusal to offer a definitive view of the country has been the subject of considerable scholarship that has already been discussed in Chapter 1 (e.g. Schertzer 2008; Schertzer 2012; Radmilovic 2010; Sunstein 1995; Interview with Schertzer 2014).

General)). The decision was ground-breaking for its legal theory but also perceived by many as overtly political. It was harshly criticized by some in English Canada as amounting to a betrayal of the Court's responsibility to defend the freedom of expression of a minority by caving in to the nationalist movement:

> Certainly it is understandable why the Court gave into temptation and strayed from the path of liberal interpretation that tradition and the rule of law demanded; an issue no less important than Canadian unity had to be taken into consideration. The Court realized that the sign language case would be historic in its implications and that the fate of Canadian Confederation could well be reflected in its outcome. Could the aspirations of the Québécois to preserve and promote their distinct position in the North American sea of English be realized in the Canadian context? Could these aspirations be reconciled with the concept of individual rights? This was no small task confronting the Court (Kondaks 1990, 9).

But there were limits to what the Court could do to remain outside the events of the day; despite the fact that many of the rulings were largely ambiguous, they could inevitably overflow significantly into the political process. The finding that much of Quebec's language law contained in Bill 101 was unconstitutional, for example, and the subsequent decision of Quebec to invoke the notwithstanding clause as a result, was a critical moment that caused Premier Gary Filmon of Manitoba to withdraw his support for the Meech Lake Accord (Gibbins 1990, 257). The Court was in some sense justified when in 1993 the government of Quebec passed Bill 86 to bring its laws into compliance with the Court's ruling in *Ford*, in particular by removing the requirement that French be the exclusive language on commercial signs and instead only mandating that it be the predominate language. This ensured that the province would not need the shield of section 33. The situation has largely remained stable since then, and by "walking-back" some of the language legislation as suggested by the Supreme Court in a way that was broadly accepted politically, the government of Quebec showed that Canadian institutions could offer some space needed to meet linguistic needs of French Canadians.

Additional support for both a dualist and contractual vision of the country could be found in the case of *Re Manitoba Language Rights*. In that instance the Court found that Manitoba was required to translate all of its legislation into French; the requirement stemmed from the

circumstances under which the province was created (Reference re: Manitoba Language Rights 1985). Similar cases included *Quebec (AG) vs. Blaikie (1)* and *Quebec (AG) vs. Blaike (No2)* where the Court was expansive on the requirements of institutional bilingualism in Canada (*Att. Gen. of Quebec v. Blaikie et al. (No. 1)*; *Att. Gen. of Quebec v. Blaikie et al. (No. 2)*). But the dualist vision had limits. Section 133 could not, for example, be used to ground an expansive reading of language rights. Justice Beetz found in *MacDonald v. City of Montreal* that the provision was limited in scope and must only be seen as the compromise that it was between two founding people (*MacDonald v. City of Montreal* at pg. 496; D. G. Réaume and Green 1990, 565).

Education rights were another front on which the Court's rulings offered space for competing visions of the country and on key constitutional abeyances, in particular on the question of duality. Among the oldest forms of national accommodation, the right of linguistic minorities to be educated in their mother tongue was indirectly recognized in the confessional schools of both Quebec and Ontario in the *Constitution Act, 1867* and then expressly so in the Charter era in section 23. Vaguely guaranteeing that official language minorities are entitled to an education "where numbers warrant" the Court had several opportunities to make a decision on how that would apply. Initially, the Court's work was criticized for reading the rights narrowly, and for failing to come to a clear consensus on the principles on which they were based (D. G. Réaume and Green 1990, 565–6; Sharpe 2013, 398; D. Réaume and Green 1989, 779–80). The Court's first efforts won little applause, when Justice Beetz explicitly drew a distinction between rights rooted in political compromise and legal rights based in principle (D. G. Réaume and Green 1990, 565–6). Finding that language rights fell into the former category, the Court ruled in *Société des Acadiens du Nouveau- Brunswick v. Minority Language School Board No. 50*:

> Unlike language rights which are based on political compromise, legal rights tend to be seminal in nature because they are rooted in principle. Some of them, such as the one expressed in section 7, are so broad as to call for frequent judicial determination.

> Language rights, on the other hand, although some of them have been enlarged and incorporated into the *Charter*, remain nonetheless founded on political compromise.

> The essential difference between the two types of rights dictates a distinct judicial approach with respect to each. More particularly, the courts should pause before they

decide to act as instruments of change with respect to language rights. This is not to say that language rights are cast in stone and should remain immune altogether from judicial interpretation. But, in my opinion, the court should approach them with more restraint than they would in construing legal rights (*Société des Acadiens v. Association of Parents*, at pg. 578; D. G. Réaume and Green 1990, 566. The case was a companion to *MacDonald vs. City of Montreal*).

This approach was abandoned during the latter half of the 1980s. The Court would soon settle on a view of such rights as encompassing an individual, collective, and remedial basis, leading to several complex decisions that gave section 23 much more power (Sharpe 2013, 398). An early indication of this expansion of section 23 came with the Court's rejection of Quebec's efforts to limit English language education in Montreal (*Quebec (Attorney General) v. Quebec Protestant School Boards*). The most important modern case arose in Alberta in *Mahe v. Alberta*, in which the Court had to examine the extent to which a linguistic minority could demand control and management of the education system (Sharpe 2013, 394). The Court took a robust approach, finding that the value of the educational provision lay in its ability to preserve and promote a minority culture as well as in the fact that educational institutions are important places to preserve that minority culture. Overall the Court used the case to demonstrate that the provision is essential for preventing the assimilation of the country's linguistic minorities, and section 23 represented "the linchpin in this nation's commitment to the values of bilingualism and biculturalism" (*Mahe v. Alberta*, para. 350; Sharpe 2013, 394). Emphasis was placed on the remedial nature of the right, something that was also essential in several other cases where the Court made it clear that a critical part of the section was to ensure that linguistic minorities have the supports required to ensure that they survive.[35]

Collectively, one finds during this period between 1980 and 1995 the Court navigating a new context in which it must slide the Charter into a constitutional context which is both in flux and contingent on several antecedent understandings of the nature of the political community. The Court's actions here were overshadowed by the politics of the period, which at many points saw

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[35] This has remained a running and increasingly important theme of the jurisprudence (*Arsenault-Cameron v. Prince Edward Island*; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*; *Gosselin v. Québec (Attorney General)*; Sharpe 2013, 394–6). More will be said about these cases in later chapters.

the Court ruling on a constitution that was at the point of imminent change. Nevertheless, the Court managed to stay out of the way most of the time, and when it became essential to pronounce in sensitive areas, such as on the division of powers, the matter of a provincial veto for Quebec, the language regimes in that province, or minority language education rights throughout Canada, it avoided pronouncing too heavily on any particular vision. This jurisprudence ensured that all parties were left with something to fight with in the next round.

4.5 Conclusion

The period leading up to constitutional patriation starting in 1980 through to the second Quebec referendum on sovereignty in 1995 describes a time when the political leaders in Canada completely abandoned any type of behaviour that could be considered abeyance preserving in relation to the major abeyances in the Canadian constitution. The patriation round saw the constitution reformed along a very distinct and particular vision that attacked many of the basic conceptions of the country that were widely held in Quebec, and a vision that was very much not in keeping with what many "no" supporters had in mind when they had voted against sovereignty-association. Emerging from the patriation round, the political situation in Quebec made for fertile ground for those who wished to exploit it. Ultimately the federal Progressive Conservatives adopted this tactic, abandoning a more circumspect position on the constitution in favour of one that was activist and engaged. Both politically expedient and likely the result of a genuine belief in the possibility of success on behalf of Brian Mulroney, the parties arrived in Ottawa in 1984 optimistically promising open ended discussions to find a suitable middle ground. They soon found a willing partner in the Quebec Liberals under Robert Bourassa, and working together this axis brought the other provinces back to the table to resolve the competing visions that the country had of itself. Unfortunately, the gaps proved unbridgeable, and as the failed efforts became increasingly obvious, the federation became more and more unstable, culminating in the near miss of 1995.

A cause of considerable instability was that an openly separatist government was politically forced to the negotiating table. Once it was in the game, the PQ began to use the system very well to its advantage. It was effective in claiming the high ground as the true representatives of the interests of Quebecers and showing the differences that existed between Quebec and the rest of the country. The shift was not one that the PQ took willingly. It was one that was only

possible after the loss of a referendum that the PQ honestly thought that it could win. When that belief proved to be hollow, the PQ entered into the ongoing constitutional discussions – discussions that had been continuing, on and off, since before it was created and which really addressed a number of concerns other than simply Quebec's place in Confederation. Following the end of Meech Lake, the PQ could use both that event and the patriation experience to stir up grievances against the country for political gain.

Arguably, the escalation of the crisis is consistent with what might be expected from the abeyance literature. Once different conceptions were exposed, those who held them were propelled into escalating tension and a struggle over who would ultimately "win out." Near the end of their term, the Bourassa Liberals were escalating the situation almost as much as the PQ to ensure that their vision on the constitution would be accepted. While the Quebec Liberals and the PQ were implacable enemies on many questions, they shared a common outlook on Canada that was fundamentally dualist in conception, antagonistic to the individual rights that menaced collective rights to language, and affirmed Quebec's veto power. Once these issues were put in play, *both* parties began to head for the exits. Bourassa took immediate steps in the aftermath of Meech Lake to reassert a conception of the country that had apparently been rejected. He refused to negotiate on any terms other than "nation-to-nation," adopted a sovereignist dialogue with the rest of the country, demanded increasing decentralization, and insisted on holding a referendum on Quebec's place in the country if Quebec's vision was not recognized.

Outside Quebec, and in particular in the West, this conception was rejected almost as strongly as it was promoted in Quebec. The federal PCs were abandoned in favour of an expressly provincially oriented, "contractualist" and egalitarian vision of the federation represented by Preston Manning and the Reform Party. The Reform Party's willingness to challenge official bilingualism, a provincial veto for Quebec, asymmetric federalism, and an unequal Senate laid bare the differences that other parts of the country had with Quebec. The fact that the Meech Lake Accord could be rejected so comfortably by all sides, especially given the obvious risks and escalation of the federal crisis rejection would entail, indicates neither side was willing to compromise or "back down" on these issues.

There is a very strong strain of thought in Canadian politics that holds that but for the collapse of Meech Lake, not only would there never have been another accord but there never would have

been a second referendum (Mulroney 2007, 539). That possibility is plausible, if ultimately unknowable. It is important to remember, however, that the PQ remained active on the sidelines throughout this period and earlier attempts by Lévesque to soften the stance proved impossible. To be sure it would never have been in the interest of the PQ for the province to sign the constitution, and it did what it could to stop it. But even if it had succeeded, Meech represented an opportunity that dovetailed perfectly well with the PQ strategy of *étapisme*, espoused by Claude Morin, of achieving independence step by step. Etapisme was something the PQ felt was more possible given the level of control that the province would be able to exert over the reformed Supreme Court and a more provincially focussed Senate (Behiels 1992, 156). Thus it is not at all certain that Meech Lake would have been sufficient to arrest sovereignty or that the machinations of the PQ would have been halted by the agreement. Nevertheless its collapse radically improved their fortunes. The sense of betrayal that was palpable following the accord's demise could be seen everywhere. The collapse of the accord led directly into the furious assault that followed, with accusations that were as vicious as they were predictable, that Canada did not care and that the country was simply not sustainable for French Canadians. The knock-on effects of this were profound, leading immediately to Charlottetown and otherwise seriously embarrassing the government of Quebec, forcing even the federalist Robert Bourassa to commit himself to a referendum if another solution could not be found.

Despite all this, the courts must be seen as representing a *generally* stabilizing force. They offered judgements that were hesitant to come down too firmly on one side or another on sensitive political questions. As Russell, Hogg and others observed at the time, the Court moderated its stance somewhat in the years after it became the highest court of appeal, rendering judgements that were more balanced on questions such as the division of powers. At times it could not remain fully apart, and some cases, in particular on the constitutional validity of the language legislation in Quebec, the fallout ricocheted into the political sphere and had a decisive impact on events. However, on the whole, the judiciary was secondary to that of the political actors who were driving the agenda. The rulings of the Supreme Court were tinged with an ambiguity that is common in common law judging found throughout the world. While the Court played a comparatively more important role in the subsequent (post 1995) period, between 1980 and 1995 it was less of a driver of events and was somewhat overshadowed by the events unfolding in the political realm.

Chapter 5
The Restoration of Abeyances 1993-2006

5   Constitutional reform as political liability

The 1992 referendum on the Charlottetown Agreement had three impacts that fundamentally changed the conversation on constitutional abeyances. First, it became apparent in Ottawa that although federalist leaders in Ottawa and Quebec City would have preferred to leave constitutional issues such as distinct society, Senate reform, or provincial representation in central institutions alone, the extent to which they had been caught flatfooted by the PQ demonstrated that was not an option and something had to be done to address the nationalist threat. Secondly, the leadership of the Quebec Liberal Party was altered by the arrival of Jean Charest, whose charismatic and effective performance in the referendum forced him politically into provincial politics. The PQ was also "federalized" somewhat, given that Lucien Bouchard had also left Ottawa by this time for Quebec City. And third and finally, the arguments that Ottawa and Quebec City had with one another were essentially "judicialized," ending a style of Summit IGR that had been in vogue since the 1970s.

The chapter will canvas the shifts that happened in the aftermath of the Charlottetown referendum, as elites, starting with the federal Liberals, realized the problems that they were encountering were beyond solving, and will situate them in the theoretical context of the abeyance literature of having now inflated a crisis by trying to reconcile two inherently antagonistic visions of the mega-abeyance of Canadian duality. Most importantly, it became clear over this period that the electoral benefits of continuing the conversation were no longer what they once were. Unlike in the early 1980s, when constitutional talks looked like winning bets electorally for both the federal government and the provincial government in Quebec (and even politically necessary), the appeal for them began to wane following Charlottetown. Successively, and over several years, all political parties came to the same conclusion that any discussion about abeyances would be fruitless and counterproductive.

This chapter starts with an overview of the sovereignty movement through this period and the apparent decline in enthusiasm for separation in the face of political shifts at the top. It then looks at the political calculations behind the different actors to shift away from discussing

abeyances. The first section concentrates on how the federal Liberals moved away from multilateral discussions to become far more incremental in their approaches and to recast themselves as good economic stewards. It examines in particular the federal Liberals' attempts to get control of the conversation after their efforts at disengagement in 1993 were disrupted by the referendum, in particular through unilateralism against the PQ with its so called "Plan A" and "Plan B" strategy. The non-negotiable, fairly popular, package of reforms that was introduced had the effect of allowing Ottawa to say that talks *à la* Meech Lake and Charlottetown were a thing of the past and federalist leaders would concentrate on demonstrating the functionality of the Canadian federalism more or less as it existed. It then examines the similar evolution based on political calculations in other federal parties and the impact of the change in government in Quebec City in 2003. In particular it looks at the change in posture that Jean Charest brought to the Quebec Liberal Party. Like their federal counterparts, the Quebec Liberals also refocused on the economy and tried to show the functionality of Canada as constructed. Unlike Ottawa, there was a continued effort at multilateralism with the creation of the Council of the Federation in 2003. However, Ottawa's refusal to engage with the Council robbed the body of much of its potential to highlight abeyances, a situation that was greatly aided by evolution of the provinces away from constitutional issues as well.

Finally the chapter examines the crucial role of the Supreme Court of Canada in this period. The increasing absence of Summit IGR left thorny abeyances increasingly to the courts to sort out when they necessarily became an issue. This proved a less dramatic forum for their resolution and was less inflammatory for the public. Major cases were decided on the division of powers which stressed the need for overlap in many policy fields and the empowerment of the different jurisdictions. Major cases were also decided on language rights, which were increasingly viewed as of fundamental national importance, suggestive of a dualist vision of the country and marking a break from earlier jurisprudence when language rights had been read more narrowly. Perhaps most importantly in this period was the Court's *Reference Re: The Secession of Quebec*, a balanced judgement lauded for recognizing both the lack of any provision for a unilateral declaration of independence in the constitution along with the need for the rest of the country to respect democratic outcomes of any future Quebec referendum.

5.1   Abeyances and sovereignty support

There is strong evidence that support for the sovereignty movement fell in the years after the 1995 referendum following a period of reengagement by the Liberals against the resurgent PQ. A series of initiatives introduced right after the referendum, known as plans "A" and "B," had an immediate impact in stabilizing the situation. This strategy had two effects for the public: it reduced the saliency of abeyances as a political issue, and it obfuscated the clarity of the different visions of constitutional abeyances. In Quebec, support fell so precipitously that even the leaders of the PQ were forced to acknowledge the decline by the turn of the decade (e.g. Lisée 2000; C. Morin 2001). By 1998 an Ekos Poll showed that support for sovereignty had fallen to 31%, after a long slide (Jeffrey 2010, 312). More concretely a scholarly literature began to track this trend (Gill 1996; Salée 2001; Gagné 2002; Mendelsohn 2002; Pinard 2003; Tanguay 2003) Not only did the overall support for the "Yes" side decline, some data suggested the beginnings of a reengagement of Quebecers with Canada. Mendelsohn found the "gap" between those who identified as being "very attached to Quebec" and those who identified as being "very attached to Canada" fell soon after the end of the Meech Lake Accord, going from a high of a 35% in 1991 to only 8% ten years later in 2001 (Mendelsohn 2002, 82). Furthermore, some of the old drivers of support for sovereignty seemed to be less relevant. Tanguay pointed out that there was a drop in the percentage of people who thought that the French language was threatened in Quebec (Tanguay 2003, 13) There was also evidence that the softening of the provincial economy overtook this question as the subject most Quebecers wanted their leadership to address (Gill 1996). "Quebecers no longer believe the sovereignist-federalist question is crucial," wrote Kevin Grace in 2003 for the Citizen's Centre (Grace 2003). By 2002 Grace noted that increasing numbers of people would no longer pick sides in the debate. As the profile of public opinion changed the support for the "Yes" side fell. Gilles Gagné's book *Les Raisons Fort* found that the fall in support for the "Yes" side, in particular after 1999, was driven by the loss of Francophones aged 18-54, students, and those who make more than $20,000 (Gagné 2002, 62). Those groups were and are the backbone of the "Yes" vote, but the level was simply not as high as it had been before. Other work showed that although the support for sovereignty consistently remained in the 40% range, the number of people who believed that Quebec would become an independent country had fallen to around 20% by 2002, and those agreeing "Quebec sovereignty is an idea whose time has passed" slowly rose, to well over 50% by the same time

(Grace 2003). Thus while there had been a measurable spike in sovereignty support in the aftermath of 1995, it faded fairly quickly and did not seriously recover at any time, with the possible exception being at the height of the sponsorship scandal.

Whether it was the new approaches of the government of Canada under Plans A and B that were having this dampening effect on sovereignty is hard to say, but many in the sovereignist leadership certainly thought it to be the case.[36] Lucien Bouchard had thought that the *Clarity Act* would pose as an important jumping off place for the movement, but this did not come to pass. Having stated that another referendum would not be held in the absence of the so-called "winning conditions," Bouchard rapidly began to find those conditions increasingly elusive. A conference to promote federalism held by the recently created *Forum of Federations* in 1999 in Mont Tremblant turned into a disaster after U.S. President Bill Clinton destroyed Bouchard's efforts to paint Canadian federalism as a failure (Jeffrey 2010, 318). Near the end of Bouchard's mandate, there even opened some small cracks in what had been, up until then, an iron clad commitment to sovereignty. The first was the willingness to pursue a bilateral change on the constitution regarding education, which, as discussed below, provided the federal government with some ammunition to suggest that federalism worked (Cameron and Krikorian 2008, 411; Jeffrey 2010, 311). But if there was a moment when it became clear that the government of Quebec was no longer going to do everything that it could to fight the federal system, it probably came in 1998, when Bouchard decided that he would talk to the other premiers about Canada's social union (Cameron and Simeon 2002, 57; The Montreal Gazette 1998). Quebec had been attempting to withdraw as much as possible from the intergovernmental relations after the referendum but was finding it difficult to justify that position to the electorate. The small window was significant. Finally, by 2000, watching the growing struggles of the Bloc Québécois may have been too much for Bouchard, and he left politics in 2001 (Jeffrey 2010, 351).

The common front of the sovereignist parties that had been clear in 1995 also began to come apart, and they each began to lose support or otherwise back away from the sovereignty question. The ADQ, sensing electoral risk and not wishing to alienate the voters in the province, began to

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[36] There is considerable empirical evidence to suggest that it did have a strong, positive effect for the federalists (see for example Gagné 2002, 63–4).

moderate its stance so as to attract more voters. Mario Dumont was no longer willing to label himself as anything more than a nationalist (rather than a sovereigntist of separatist) in the run-up to the 2003 campaign, in which he had high hopes that his party would be able to win (Grace 2003; Tanguay 2003, 2). From the time Bernard Landry took over in 2001 until his government was defeated in 2003, he tried to retake the sovereignty agenda, in particular through attacking Ottawa on constitutional issues. However, Landry had a fraught tenure, and a party that increasingly did not like him. He insisted that he would remain in office after the party's defeat in 2003, but he received a humiliatingly low vote of support in a June 2004 leadership review and stepped down soon afterwards.

Furthermore, many of the organizations of civil society that had previously backed the sovereignist parties and provided them with much of their organization and support found themselves less interested in the movement than previously. The labour movement in particular, and social progressives more generally, were disenchanted with a party that had seemingly become bound to the international markets in a way that made it almost indistinguishable from the other parties (Tanguay 2003, 16–8). The government of Quebec had not been immune to the turn to neoliberalism and globalization that had affected the broader economy (see for example Changfoot and Cullen 2011). The PQ had not embraced the reform spirit quite as vigorously as had Ontario, with the government of Lucien Bouchard maintaining considerably more civil peace with the decision in 1996 to pursue the so-called "Quebec Model." Nevertheless, many Quebec interests were affected by the forces of greater economic integration and continentalism, and the progressive forces that had been there for the movement in the 1970s and 1980s were no longer as engaged with helping these parties maintain power.

On the major dimensions of sovereignty, therefore, this period saw a return to quiescence. Sovereignty was no longer a priority of the people of Quebec, nor did it receive much support. The intensity of those voting "Yes" had drained away somewhat. Furthermore, the major political parties began to run into trouble on the sovereignty question too. The BQ began to lose its grip on Quebec seats in 2000, foreshadowing a long slide. The PQ found itself unable to drum up much interest in the project, and after nearly a decade in power was forced from office in 2003. The other parties in both Ottawa and Quebec City no longer saw any value in creating the kinds of conditions that would raise support for the sovereignty project. It no longer had the relevance that it had had in the past.

The following sections trace the evolution of the relevant actors in this process and shift in approach to abeyances and their relationship to the decline in support for sovereignty in greater detail.

5.2   Initial Liberal efforts to drop the subject

Even after the collapse of the Charlottetown Accord, there were still those in the camp around Brian Mulroney who wanted to have yet another round of constitutional discussions. Hugh Segal, who was chief of staff at the time, has spoken of a draft Throne Speech that was prepared (but never used) for Mulroney's successor with suggestions about what the reforms would look like (Interview with Segal 2015). There was little appetite in Kim Campbell's circles for that kind of initiative, however, and it was never used. Segal also recounts how Charlottetown was not seen by some as the end of constitutional discussions, instead it made it necessary to keep going:

> We saw the failure of Charlottetown as the failure of Charlottetown. We didn't see it as the failure of the idea of Ottawa and the provinces continuing to work together to improve our democracy, to improve our constitutional framework. We saw that as a kind of ongoing duty, a kind of maintenance if you wish, for the constitution, for the country (Interview with Segal 2015).

The Liberal Party under Jean Chrétien was the first party in decades that clearly exhibited abeyance preserving behaviour. It was willing to drop contentious abeyances without seeking their resolution. The Liberal Party's 1993 electoral platform, known as the "Red Book," said almost nothing about constitutional change, focussing on "bread and butter" economic issues (Liberal Party of Canada 1993). Its silence laid the foundation for turning constitutional change into a taboo among federalist parties: one whose "unsettlement" was acknowledged but otherwise left alone.

The decision to back out of the constitutional debate without seeking a resolution of it made a lot of sense and appealed to many Canadians, but it had its risks. Canadians were aware of the danger that the country remained in and needed assurances that the Liberals would be able to handle the situation. Thus, while the economy was by far the most important issue in the 1993 campaign, national unity was an important second:

The Chrétien Liberals were successful in obtaining one of the largest majorities in Canadian history because they addressed both these issues. First, they managed to convince voters that they could do so while preserving most of the social safety net and creating jobs. Second, they offered constitutional peace after nearly a decade of upheaval under the Conservatives. The promise of no new constitutional initiatives appealed to a broadly based constituency for whom a repeat of Brian Mulroney's "brink of disaster" scenarios was to be avoided at all costs. While the importance of the first point was unassailable, it should be underlined that the Liberals, of all parties, needed to demonstrate their ability to handle the national unity file if they were to be successful. Just as voters had lost faith in the Liberals' ability to manage the country's finances [in 1984], so the events of the previous nine years had gone a considerable distance towards destroying the Liberals' reputation as the party of national unity. Although the promise of doing nothing in terms of constitutional reform might have seemed only marginally noteworthy, it was in fact of huge importance in reassuring Canadians on this second front (Jeffrey 2010, 237).

Between 1993 and 1997 the Liberals were really the only significant party at the federal level to have demobilized on the constitution. The choice of the federal Liberals to drop constitutional topics as essentially irresolvable and irrelevant was premature, and unrealistic given the powerful forces that the failures of the 1980s had unleashed. This position flew squarely in the face of all of their parliamentary opponents, save perhaps the NDP, who were each elected with thumping mandates to continue discussions on constitutional reform. Under the slogan of "The West Wants In," the Reform Party platform placed constitutional issues near the top of its "Blue Sheet" election platform. Indeed, the document is primarily a statement about constitutional reform. Under the leadership of Preston Manning, the party called for a "Triple E Senate" as its first principle, rejected national bilingualism or cultural dualism (although respecting French and English where each predominated,) and foreshadowed a future round of constitutional negotiations that would be more participatory and democratic (Reform Party of Canada 1993). The document was tame in comparison with that of the Bloc Québécois, which relied on its 1991 statement of principles to argue broadly that the march towards sovereignty would be both rapid and inevitable, and that the Bloc was necessary in Ottawa to help Quebec take this final step to independence (Bloc Québécois 1993). Furthermore, the provincial Liberals, dejected and angry,

were swept away by the organized PQ of Jacques Parizeau in 1994. If there was constitutional fatigue in Canada, it was not apparent among the federal parties in the wake of the 1993 election.

Nevertheless, the Liberals did their best to maintain their avoidance of constitutional reform once they were elected, even after the election of the PQ in 1994. Convinced that maintaining a studied distance from constitutional issues was proving effective in keeping the pressure off the subject, the Liberal government refused to engage in constitutional speculation even as the country moved towards a referendum campaign. The federal government's refusal continued well into the second (1995) referendum campaign itself, and became engaged only when evidence mounted that the "Yes" side was having success in convincing many Quebecers that separation would be essentially painless and that Canada had little to offer. Moreover, there was also a continuation of the taboo that has been discussed earlier that refused to contemplate or discuss openly what would happen in the event of a "Yes" vote (Cameron 1974, 8).

That is not to say that the federal government was insensitive to the issue; there was a level of awareness brought into the civil service, of course. André Juneau, who at the time was an Assistant Deputy Minister at Health Canada for Policy and Communications, recounts the government issued instructions on how to address topics that could prove controversial by appointing a designated person to screen the issues:

> During the '95 referendum, we did have such a directive. I'll give you an example. It was one of the things that we did and - it's not a state secret, I don't think that it was publicized but it's not a state secret - all departments were told to designate an official who would be the point of contact for different parts for the department and who would be giving guidance or advice about whether something that was contemplated could cause problems in light of the upcoming referendum. I was the designated official, and I remember (I was the obvious guy). So if we were thinking of putting out a draft regulation that could be controversial in Quebec, [they would say to me] 'we are not so sure what do you think?' And I was given quite a bit of authority by the Deputy Minister so I could tell people to not do it if I didn't think they should. If they didn't believe me they could appeal to the Deputy but that wouldn't be a good idea. So we had some of that. I wasn't super active on that front but in the course of the referendum campaign or

just pre-referendum campaign or during the campaign, I must have had to interfere - I don't know - half a dozen times? (Interview with Juneau 2014)

Notwithstanding this caution, Ottawa was clearly caught off guard politically anyway. In their recent work on the subject, Chantal Hébert and Jean Lapierre have recounted that on both the federalist and separatist sides of the campaign, there was nearly total chaos and very little sense of what would happen in the event the sovereignists won (Wells 2014; Hébert and Lapierre 2014).

The government of Canada was overwhelmed in the aftermath of the referendum in 1995 (Interview with Mendelsohn 2014). In the last days of the campaign, Chrétien finally relented and agreed that he would, in fact, recognize that Quebec was a distinct society and ensure that it had a veto over constitutional change (Mahler 1996). He also committed himself to devolving manpower training programs to Quebec City (Jeffrey 2010, 281–2). Not all of these promises were implemented to great acclaim, but the reforms reflected the recognition that however much the government of Canada wanted to drop the subject of constitutional change, it was not going to be possible right away with a PQ government in Quebec City. What followed was a running firefight between Quebec City and Ottawa over the next five years, and one that differed in a number of respects from the tenor of previous discussions.

To begin, the taboo of not discussing post breakup scenarios was broken and became front and centre in the new strategy. Initiatives that were aimed at spelling out the consequences were generally placed under the heading of "Plan B," or the "get tough" approach. These strategies included, first, the highly visible and successful letter writing campaign launched by Stéphane Dion, a university professor brought into government as Intergovernmental Affairs Minister by Chrétien who took notice of his strong defence of federalism during the referendum; second, the *Secession Reference*; and, third, the ensuing *Clarity Act.* There also emerged rapidly a series of reforms that were aimed at fulfilling many of the promises that had been made over the course of the campaign. Known as "Plan A," these reforms were designed to demonstrate that federalism was flexible and workable, and that remaining in Canada was in the best interest of Quebecers. Collectively, the two approaches have been described as the "ten point plan" that was adopted by Chrétien in the aftermath of the referendum and incrementally put into place between 1995-2000 (Jeffrey 2010, 283). The reforms that were undertaken will be addressed in the next two sections.

What binds both the Plan A and Plan B approaches is that they gave the federal government an intellectual position to defend federalism that, unlike the Meech Lake or Charlottetown agreements, did not rely on obtaining the approval of the government of Quebec or the other provinces. The latter's consent was, of course, desirable when it was possible but the federal government was more interested in ensuring that the past mistakes that had allowed the "Yes" side to come as close as it did were not repeated. Plan A and Plan B either addressed some long standing Quebec issue or made clear what the cost of separation would be. The reforms in Plan A also made some small concessions to the possibility of asymmetrical federalism, something Chrétien had been largely opposed to until that point (e.g. Jeffrey 2010, 204).

In either case, there was very little possibility of getting an agreement with the government of Quebec on anything. Stéphane Dion, in conversation with the author, insisted that it would have been better to have had a referendum agreement pre-1995 akin to what was worked out between Edinburgh and London in the run-up to the Scottish referendum in 2014, and that while he wanted to negotiate more clarity with Quebec, he never found the PQ willing to come to an agreement with him. As a result he had to act unilaterally once he came to Ottawa as the Intergovernmental Affairs Minister responsible for the file. Distinguishing between the role of an ordinary minister of Intergovernmental Relations and that of a "unity minister," he found constitutional change and Summit IGR as a "unity minister" very different. He did not try a new national dialogue with the provinces on resolving Canada's abeyances:

> In normal times the Minister of intergovernmental Affairs is only trying to help his colleagues, or her colleagues, to deal with provinces, in order to help the federal agenda to go through because there are very little things you can do without at least speaking to provinces, if not agreeing with them, in our very decentralized federation from Ottawa. If you say "I am doing it my own way, and too bad for provinces" you will fail most of the time [….] But when you have a unity crisis, then you have another hat, as Unity Minister. I didn't have to negotiate a lot of constitutional changes – [there were] some, with Quebec and Newfoundland, but not national ones (Interview with S. Dion 2014b).

Overall, the Chrétien government maintained that the dominant problems were non-constitutional issues (Jeffrey 2010, 283) and that constitutional questions were of no interest to the people of Canada and should not be used to displace attention from other more important

issues. But the constitution nonetheless remained a critical lens through which most government policies had to be assessed (Jeffrey 2010, 284).

Furthermore, there was an emphasis on bilateralism and pragmatism in all federal-provincial matters. Multilaterialism was no longer the order of the day, or Summit IGR. Alfred LeBlanc, the Assistant Secretary to Cabinet for Federal-Provincial-Territorial Relations in Ottawa, pointed out, it came out of learning:

> Anyone looking at this history, again without taking sides, I think there has been some learning going on, and you can side with Mulroney you can side with Trudeau [and] can be forgiven for thinking "that was a near death experience." We underestimated the risks of trying to do multilateral constitutional change in Canada. And we also were saddled with an amending formula plus legislation piled on top that made it virtually impossible to change the constitution, [or] certainly very, very difficult. So I think what we saw with the Chrétien era was "a new realization of how risky this is for the country, how difficult constitutional change is." Chrétien, I would say, opened up a new era of federal-provincial relations which I think Harper has, to some extent, continued, which is to stay away from constitutional change, to be very pragmatic, to limit constitutional change to very manageable, bilateral constitutional amendments which would not risk blowing up in a multilateral environment (Interview with LeBlanc 2014).

The result was a series of unilateral and bilateral actions to gain control of the situation.

5.2.1   "Plan A"

Plan A involved a series of initiatives that were designed to show both that Canadians cared about Quebec and that the federal system was sufficiently flexible to accommodate the needs of Quebecers.[37] The initiatives comprised a mix of legislation, constitutional amendments on education, and national unity programs designed to showcase what Canada was about. Arguably less effective or meaningful than the steps that were taken under Plan B, Plan A reflected panic

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[37] The concepts of "Plan A" and "Plan B" are widely used but ill-defined monikers for the raft of initiatives that Ottawa took after 1995. The sorting done here is based on that of Jeffery (2010) although it would not strike most observers as controversial.

in some cases and some of its components, such as the sponsorship program, were clearly more deleterious in the long run than beneficial. Still, following the close call that they had experienced, there was likely no other choice for the Government of Canada than to try a variety of initiatives along these lines.

5.2.1.1　Regional Constitutional Formulae

In the last days of the 1995 referendum campaign, the federal government promised to ensure that Quebec had a constitutional veto. Knowing that a full constitutional veto entrenchment was unlikely, the Liberal government introduced the 1996 *Act Respecting Constitutional Amendments* (P. C. O. Canada 2007). The act is remarkably short, less than a page, but it binds the Government of Canada to get the consent of a variety of regions before proceeding with any constitutional amendment. The idea was that Quebec could be given a veto by "lending out" the federal government's rights in this area, forcing the government of Canada to get consent from a number of regions before proceeding.

The act will almost always be remembered more for anger that it set off in British Columbia than for what it symbolized in Quebec (Jeffrey 2010, 284–5). In BC, the act generated outrage because it lumped the province in with the other Western Canadian provinces, rather than conforming to British Columbians' identity as being a separate region (Russell 2004, 238). More generally, however, the act on constitutional amendments has been described as hastily implemented, and a reflection more of panic than a carefully thought out proposal. Indeed Russell has gone so far as to call the proposal "bizarre" (Russell 2004, 238). In an interview with the author, Matthew Mendelsohn, who was working in the Privy Council Office at the time, referred to the policy as a "mistake" that was more a result of panic than anything else (Interview with Mendelsohn 2014). He further noted that given that the constitutional amending formula is only required by statutory law, and not by constitutional law, it is likely thought of as not "really real" (Interview with Mendelsohn 2014).

However, the content of the bill, and the legal repercussions of it, are beside the point. The bill represented a partial concession to the abeyance of cultural dualism in Canada and was suggestive of Meech Lake. Furthermore, what counted for the federal government was that the question of Quebec's veto powers in Canada had been resolved. The issue of Quebec's veto

would not be raised again by any federal government. Furthermore, the amending formula represented a slight asymmetry that would not have been accepted but for the referendum.

5.2.1.2   Distinct Society

The abeyance of dualism was also nodded to, albeit outside of the constitution, with a parliamentary resolution recognizing Quebec as a distinct society. The distinct society clause had more or less sunk the Meech Lake and Charlottetown agreements in most of the rest of the country. However, the lack of recognition of Quebec's distinctiveness was a genuine problem in Quebec and a promise had been made in the referendum to do something about it.[38]

The Liberal government fulfilled its promise to recognize Quebec's distinctiveness with a parliamentary resolution (Watts 1996, 363). The resolution directed the House to take note of, and be guided by, the reality that Quebec is a distinct society within Canada; what constituted being "guided" by the resolution was left vague (O'Neal 1995, 21). The parliamentary resolution fell far short of what anyone in Quebec would have called appropriate—a resolution can be altered by a future parliament – but the government defended the resolution as sufficient. The parliamentary resolution would later be supplemented by a resolution by the provinces (discussed below) that recognized the "unique characteristics" of Quebec society, and there would be ongoing recognition in a variety of forms under the Harper government.

5.2.1.3   Manpower training and the end of decentralization

While not really touching a clear abeyance *per se* the federal government made a significant gesture towards empowering the province with the devolution in labour market training, usually referred to as "manpower" training. Polls have consistently shown that, aside from recognition, what the people of Quebec have sought from Ottawa is the devolution of power from the centre to the provinces (Burgess 1996, 46–7). Obtaining additional decentralization formed the basis of the Government of Quebec's strategy during the 1980s, becoming a theme that was repeated over and over. Indeed, the whole point of the Allaire Report, the Liberal Party of Quebec's 1991

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[38] Michael Burgess has argued that one of the reasons that the concept of "sovereignty-association" is so powerful is that along with the suggestion of economic benefit it also grants this recognition to Quebec in a different way. Polling has suggested that formal recognition along this line consistently eats into sovereignty support (Burgess 1996, 46–7).

report by its Committee on the Constitution undertaken after Meech Lake, was to demand more power from the central authorities. Ultimately amounting to 22 areas in total, the demanded decentralization would have left the federal government little more than an empty shell. Furthermore the idea that Quebec's cultural distinctiveness was best protected and expressed in the social field had antecedents going back to the Tremblay Report.

Manpower training had been hanging over the federal government's head for some time, especially as the Quebec attitude towards it was different and in many ways distinct from the rest of the country (for example, there has always been a greater willingness to involve the private sector in labour negotiations in the province, and the process tends to be more deliberative. For an overview see Haddow 1998). Recognizing Quebec's desire to gain control of manpower training has been characterized as part of the accommodative style of federalism that contrasted with the "bad cop," Plan B approach of getting tough (Russell 2004, 240). Accommodating Quebec's goals with respect to labour market training was achieved in 1997 through the decentralization of both funding and people to Quebec. Decentralization was a major breakthrough for many people in Ottawa. André Juneau, who was working in senior positions for the federal government in IGR, suggested in an interview with the author that people have always failed to appreciate how significant it was (Interview with Juneau 2014). But manpower training also marked the end of decentralization in Canada on a meaningful scale, and the results were forgotten quickly.[39] There have been some efforts to accommodate Quebec asymmetrically in the field of immigration, but immigration was already an area of concurrent jurisdiction, and decentralization here was far more incremental and involved all the provinces (Paquet 2014). After the labour training agreements, decentralization, so often fought for in federal systems, was no longer seriously on the table.

5.2.1.4   Public Visibility Programs

Along with the above noted programs, the government of Canada made a concerted effort to increase both the visibility of Canada and public support for it as a political community. A national unity committee headed by Marcel Massé, who served as the Minister of

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[39] Juneau feels that this might have had something to do with the fact that an agreement did not come with Ontario at the same time (Interview with Juneau 2014).

Intergovernmental Relations and later President of the Treasury Board, recommended two major programs to raise Canada's visibility. The first was the "free flag campaign," run through the Department of Canadian Heritage, which handed out flags to Canadians to raise their national spirit. Most Canadians will remember the program as something of a gimmick - one that went well over budget and eventually became mired in accusations of corruption (Depalma 1996; CBC News 2004).[40] Nevertheless Sheila Copps, the Minister of Canadian Heritage at the time, still considers the program a success and notes that it was wildly popular with the public (Jeffrey 2010, 288–9).

Of considerably more importance overall was the sponsorship program that Ottawa embarked on in 1996 under the Department of Public Works (Jeffrey 2010, 287). The program was eventually shut down, following allegations of corruption and kickbacks, and several people involved in it were charged and one imprisoned (Hubbard and Paquet 2007, 28–9). The program did some limited damage to Canadian federalism and contributed to the defeat of the Martin government after Paul Martin commissioned the Gomery Inquiry to investigate. Still, both the free flag and sponsorship programs were emblematic of the government's desire to raise the profile of the country in Quebec.

5.2.1.5   Bilateral Constitutional Amendments

Although not part of the unity plan *per se,* an agreement at the end of 1998 between Ottawa and Quebec City bilaterally changed the constitution so that the basis of education in the province would move from a confessional system to one based on language (Jeffrey 2010, 311). The change was done under section 43 of the *Constitution Act, 1982*, which allows the federal government and one or several provinces to effect constitutional change when it involves only a those provinces' boundaries or any provision relating to the use of either English or French in the territory of the relevant provinces (Canada 2012b, sec. 43; Cameron and Krikorian 2008, 405–6, 411; Jeffrey 2010, 311). This amending formula had been used in other contexts, but it was particularly important in the instance of confessional schools in showcasing that the constitution

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[40] An unexpected number of Canadians asked for large rather than small flags, with the consequence that the costs of the program rose. One estimate put the ultimate cost at over $23 million, well over the $6-7 million initial estimate (CBC News 2004).

can be flexible on official language minorities (Russell 2006, 26–7; Cameron and Krikorian 2008, 411–20; Jeffrey 2010, 311).

5.2.2   "Plan B"

Of considerably more importance were several initiatives that have been clumped under the heading of "Plan B," the underlying premise of which was that negotiations were futile and that a tougher line was needed. These initiatives were aimed at demonstrating that any possible breakup of the country would be more difficult than the PQ was letting on and there was no guarantee that many of the things they found attractive in Canada would be available or reproducible if Quebec seceded. Using a number of policy instruments, the federal government attempted to control the narrative in Canada about the conditions of any potential national break-up and any following scenarios. Along with Dion, Pierre Pettigrew, a consultant and provincial political advisor to the Quebec Liberals, was brought into the cabinet to help devise this strategy and raise the profile of the Quebec caucus. Dion, in particular, played a definitive role in its implementation. Beginning with a letter and media campaign in Quebec Dion made it clear that, among other things, Ottawa did not feel that Quebec could separate unilaterally, that it would not accept either an unclear majority or unclear question, and that the territorial integrity of Quebec post-separation could not be taken as a given (Jeffrey 2010, 286; see generally Henderson 1997). These principles were then further developed in a reference to the Supreme Court and later in legislation.

5.2.2.1   International Relations

One of the lesser known initiatives undertaken by Ottawa was to get better control of the narrative in the international community on the question of Quebec's possible secession and to try to head off possible recognition by other countries for an independent Quebec after a successful "Yes" vote or unilateral declaration of independence. In particular Jean Pelletier, Chrétien's close friend and Chief of Staff was sent to Paris to better connect with and lobby the French government to ensure that there would not be a repeat of the embarrassing quasi-endorsement of the "Yes" campaign by President Jacques Chirac. Although there was never an opportunity to see how effective a plan to render void international opinion might have been, the perceived need for an international strategy reflected an awareness that international opinion would make up a critical part of any post-breakup scenario. There was also an effort to foil the

PQ here as well, especially after Lucien Bouchard called a convention of the Conference of Parliamentarians of the Americas and used this forum to attack the federal system. (His attack was countered in a major address delivered by Jean Chrétien [Jeffrey 2010, 287–8]). This strategy made sense in retrospect. In an interview for *The Morning After*, Chantal Hébert and Jean Lapierre quote Parizeau as stating that Bouchard did not think that the negotiations with Canada would be a success and that he, Bouchard, would turn to the international arena for support: "Right from the beginning I thought negotiations with Canada would almost certainly fail. That is why I expended so much energy in courting the international community. For us, France was a major priority (Hébert and Lapierre 2014, 45)."

5.2.2.2   The Supreme Court of Canada and *Reference Re: Secession of Quebec*

The post-1995 period also saw the Supreme Court of Canada begin to take a comparatively more important role on national unity questions than it had during the early 1990s reflecting more than anything else the retreat of politicians for questions that touched on abeyances. The lack of face to face negotiations and the absence of constitutional reform proposals gave the Court's decisions considerable impact in shaping the federation and how the different actors' responses were perceived by the public. Much as it had been doing all along, the Supreme Court's jurisprudence showed a willingness to offer multiple interpretations on critical constitutional disagreements, ensuring that no side could claim to be a complete victor.

The most important case that the Court took up in this period was unquestionably the *Reference Re: Secession of Quebec* (Reference re: Secession of Quebec 1998)*. It is one of the most well regarded and important cases on the rights of minorities to secede from their countries that has ever been written. Perhaps second only to the *Clarity Act*, the decision to undertake the reference case was emblematic of Ottawa's new approach to intergovernmental relations and management of the national question. The driving forces behind it were Justice Minister Irwin Cotler and Intergovernmental Affairs Minister Stéphane Dion, although it had the full support of the prime minister. Although there were interventions from four provinces and two territories, Quebec refused to participate, instead having its case argued by an *amicus curiae* from Quebec.

The case was a critical win for the federal government. It denied the legality of a unilateral declaration of independence (UDI) and therefore negated the claim of the PQ that it alone could

set "Yes" vote conditions on the rest of the country. The case also denied that anything other than a clear majority to a clear question would be sufficient to break up the country. In this ruling, it laid the intellectual basis for what would happen later in the *Clarity Act.* But the ruling was not as unequivocal as Ottawa would have liked and instead went much further, articulating a principled basis for Canadian federalism that also left considerable room to maneuver for Quebec sovereignists. Finding that Canada was founded on four distinct principles – democracy, constitutionalism and the rule of law, federalism, and respect for minorities – the Court recognized that in the event of a clear expression of the Quebec people to leave Canada, there would be an obligation to negotiate in good faith. The decision almost amounted to a constitutional amendment: it established what would be legally required in the opinion of the Supreme Court for how a province could leave Confederation. The constitutional scholar Peter Hogg has written:

> Even without the court's ruling, the political reality is that the federal government would have to negotiate with Quebec after a majority of Quebec voters had clearly voted in favour of secession. It is safe to say that there would be little political support for a policy of attempted resistance to the wish of the Quebec voters. The Court's decision simply converts a political reality into a legal rule (Hogg, cited in Tierney 2003, 181).

This recognition of the widely held political reality is probably why it was so uncontroversial among the Quebec public, notwithstanding the many critics of the decision in separatist circles. This newly "constitutionalized right of exit" was unique at the time that it was created and is arguably unique in the world (A.-G. Gagnon, Rocher, and Berdún 2003, 7).

The writing on *Reference Re: Secession of Quebec* in the academic community is vast. Sylvia Leroy has argued that the effect of the decision was to collapse the abeyance of provincial separation that had lain at the heart of the constitution since Confederation and to generate new understandings regarding the conditions under which provinces could separate (LeRoy 2004, 5–6; see also Bateman 2000, 206 for a similar argument in the context of the Charter). Others have argued that it was so balanced that the federal government could have simply left the situation as it was – something that was considered at the time (Jeffrey 2010, 319–20). If the federal government had done so it would have been more in keeping with abeyance preserving behaviour, leaving the final say to the Court. The fact that the federal government decided to

pass additional legislation was unfair to some, especially the Quebec Liberals, because the federal government made itself "a player" (Schertzer 2014). "The genius of the *Secession Reference* was that it got people to support the process" of having a referendum fought on a clear question and majority, Rob Schertzer observed. "There was a sense that the *Clarity Act* was going a bit too far because they were actually in the game" (Schertzer 2014).

In an interview with the author, Stéphane Dion completely disagreed with the interpretation that the Court offered a "political decision" or one that might fit the abeyance concept. Rather, his position is that it simply laid down the law in favour of Canada's vision, unambiguously (Interview with S. Dion 2014b). Dion argues that the Court basically adopted the same position on the need for clarity on the question of secession that he had advocated all along:

> [The Court said] if you want to secede from our democracy you need to be within the legal framework, no unilateral right exists. And you need to create an obligation in the Canadian political culture to negotiate such a thing, you need to deliver very clear evidence that your population wants to stop, wants to secede. And it, really it's almost the same of what we are saying. In fact I might ask a copyright on this ruling. […] No I would completely disagree that it was a political gesture what the Court did. We asked the Court a non-political question, on how it may be done. It was not "should" it be done (Interview with S. Dion 2014b; see also S. Dion 2014a).

George R.M. Anderson, who was an advisor to Dion at the time in his capacity as the Deputy Minister of Intergovernmental Affairs in the Privy Council Office, did see the Court ruling as political even though he does back up Dion's claim that it adopted most of the material on clarity from Dion's own writings. Interestingly, Anderson felt that that the Court came to its decision as much from what it had heard in the media as by what was before the Court:

> When we pleaded we just pleaded what we call "black letter law." Meanwhile, while the court hearings were going on, and the Court was contemplating its judgement, [Quebec Premier Lucien] Bouchard made some casual comment on the right to secede, which led Dion to write the first of his letters to Bouchard. And we had that exchange of letters [on procedures relating to secession]. We had a team in our office that had done a lot of research on experiences in other countries so we had all these facts at out fingertips. So we put together this material but Dion was the principal author of the letters himself. And

if you look at the Court judgement, all the stuff in the Court's judgement about the clarity of the question, the clarity for the result, reflects what was in these letters. None of that was actually before the Court. They got it from reading the newspapers. Anyway having come up with the judgement that they did, the judgement they came up with was obviously, it's a very political judgement, a very wise judgement anyway, when you peel it away, when you get down to the hard core of it (Interview with Anderson 2014).

Ultimately, the genius of the decision from an abeyance preserving perspective was not that it ruled one way or another on the question of duality or otherwise definitively ruled out a constitutional vison that was at the heart of an abeyance. Instead, the abeyance preserving characteristic of the decision rested in the dodging of abeyances to instead focus on the mechanics of separation, namely recognizing something akin to a right of exit based on four principles common to all visions of the constitution. Assuring the population of Quebec that, while there was no right to leave unilaterally, there would have to be some negotiating in the face of a clear "Yes," seemed to guarantee that Quebec would never find itself trapped in a country it could not accept. The refusal to get into the substantively different visions of the country and to rely on common universals meant the constitutional game was still "afoot," as it were, in 1998. Nothing had been resolved on the other substantive matters that had been at issue during the mega-constitutional era. All that the Court did was to say that should the game end badly for Quebec it always had the option to leave.

This proved a winning decision in the province of Quebec but it also squared with English Canadian assumptions. Having already been through two referendums by 1995, it would have been hard for anyone in Canada to accept the notion that no province could leave after a strong "Yes." To start, there was no way to stop a referendum in any event. Anderson pointed out that it was recognized, from the federal government's perspective since the late 1970s, that there was never any question that Quebec had the right to call a referendum – how could the provincial government be stopped from consulting its own people? (Interview with Anderson 2014) Ottawa had considered a bill in the 1970s that might give it a tool to deal with confusing situations after a "Yes" vote but it was never introduced (Interview with Anderson 2014). Thus, this decision simply affirmed for the rest of the country what had already been long assumed: a strong "Yes" vote would trigger at minimum a process through which Quebec might secede.

5.2.2.3   *Clarity Act*

The federal government moved to introduce the *Clarity Act* soon after the decision in the *Secession Reference* came down. It was the final and most visible example of Plan B. The *Clarity Act*, or *An Act to give Effect to the Requirement for Clarity as set out in the Opinion of the Supreme Court of Canada in the Quebec Secession Reference* (Canada 2000), is a much larger and more complex piece of legislation than the statute on the regional veto. Its very extensive preamble goes to great lengths to establish that the Government of Canada, as well as citizens and the other governments, are political actors that have a stake in the breakup of the country in the event of a "Yes" vote. In particular, section 3(1) makes it clear that secession of Quebec would require "at least" the consultation of all ten provinces, more than the simple "7/50" amending formula (Canada 2000, s. 3). The maximum amount of negotiating room is allowed for the Canadian government. The ruling does not give any guidance on what a "clear" majority would entail, but instead phrases it very vaguely, insisting only that the government look not just at the margin of the victory but also at the percentage of the population that actually voted. A residual section allows the government to consider "any other matters or circumstances it considers to be relevant" (Canada 2000, s. 2).

The *Clarity Act* also appears to engage the maximum number of veto players possible. In addition to requiring that consideration be given to the views of the other provincial legislatures, the input of the other parties in the unnamed provincial legislature that voted "Yes" must also be taken into account. The views or resolutions of the Senate are also to be considered. Perhaps the most important section is that requiring the input of the Aboriginal peoples, especially those in the affected province. This requirement is an obvious nod to the Cree in Quebec, who had voted in their own referendum to stay in the country. This section, which embraces all these actors, is repeated to cover whether or not the referendum question is clear and also to weigh in on any result (Canada 2000, ss. 1(5); 2(3)). If there were any doubt about the clarity of the question or result, then the government of Canada is expressly forbidden from entering into any negotiations with the province at all. Speaking about the *Clarity Act*, François Rocher and Natalie Verrelli state that "The unfortunate reality, however, is that the bill focuses not on how to reconcile unity through diversity but on how to 'deal' with Quebec by rendering its constitutional aspirations nearly impossible" (Rocher and Verrelli 2003, 232). Although much of Rocher's and Verelli's argument can come across as overly fussy when it comes to the details, the thrust of some of the

argument is correct. The *Clarity Act* certainly did not make separation impossible, but it did finally clarify that Ottawa was no longer afraid of contemplating a worst case scenario and that should it occur, Quebec City could not count on a receptive audience to its demands. Given Ottawa's "take it or leave it" approach to Summit IGR and abeyances at this point, it basically left Quebec with the choice between an unreformed Canada and independence.

There is a line of thought in Canadian politics that holds that the *Clarity Act* was overkill. In particular, the fear was that the act was unnecessary – because the issue had been settled, at least somewhat, by the Supreme Court. One anonymous interviewee suggested that one problem was that it was coming from the federal government – which made the question of what might be accepted in the event of a "Yes" more fraught than the ruling from a neutral arbiter like the Supreme Court. And the possibility that the act was not needed was considered by the Government of Canada before it introduced the bill, because there was some evidence that the situation had stabilized (Jeffrey 2010, 319–20).[41] There had even been a high level informal committee convened, somewhat unorthodoxly made up of both ministers and senior officials, under the Clerk of the Privy Council Jocelyn Bourgon (Interview with Anderson 2014). The Quebec Liberals were also strongly against the act, and were of the position that it was an unwanted intrusion in a delicate situation (Jeffrey 2010, 287). Ultimately, the fears of some in Ottawa did not pan out. Polls at the time suggested that the public welcomed the idea, both inside Quebec and in the rest of Canada. This public support had the effect of unifying the Liberals, most importantly by including Paul Martin, around the strategy. Although he had been hesitant and circumspect up to this point, the polls cemented the commitment of Martin and his supporters to the *Clarity Act* (Jeffrey 2010, 323). Additional polling in 2000 suggested that the federalists led the sovereignist option in February of that year by some 15 points (Jeffrey 2010, 322). Chrétien eventually cited the *Clarity Act* as one of his three greatest achievements as prime minister (Jeffrey 2010, 323).

There was an immediate reply to the *Clarity Act* from the Government of Quebec. The *Act Respecting the Exercise of Fundamental Rights and Prerogatives of the Quebec People and the Quebec State* attempted to establish that it was only a simple majority that would be needed for

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[41] Indeed, Chrétien even told the caucus that "my preferred choice is to do nothing." See (Jeffrey 2010, 319).

secession, that the territorial integrity of Quebec was inviolate, and that the rights of the minorities, including the Aboriginals and the Anglophones, would be respected in a sovereign Quebec (Quebec 2000; J. Smith 2011, 77). The constitutionality of both the federal and Quebec laws is questionable, and they are clearly in conflict with one another. However the two pieces of legislation had the effect of concluding the active part of the debate in something of a stalemate. Soon after, the PQ left office. The *Clarity Act* was the last major initiative of a federal or provincial government on the national unity file.

Plan B made clear that the Government of Canada would no longer allow the Government of Quebec to shape the narrative surrounding post "Yes" breakup scenarios in the way it had been able to do in the referendum campaign of 1995. From this stage on, Quebec had effectively received a blueprint and a constitutional right to leave the country under reasonably well understood conditions, however vague some of them might be. Whatever Ottawa did, and no matter how unpopular it might be in Quebec, there was always a clear alternative against which the federal governments could be judged.

5.3   Unilateralism as a political strategy: The Federal Government withdraws from Summit IGR

The end of high profile Summit IGR began almost as soon as the Liberals took office in 1993 (Cameron and Simeon 2002, 53; Brock 1995). Indeed, Brooke Jeffery has referred to the "collapse" of executive federalism in this context (Jeffrey 2006, 119). With executive federalism widely discredited, Jean Chrétien saw IGR as offering little benefit for the federal government; rather, it only allowed the provinces to air their grievances against Ottawa. Package deals emblematic of Summit IGR did not appeal to him. Chrétien was more comfortable looking at such issues in a more relaxed atmosphere, one issue at a time (Brown 2003, 7). There was still high level consultation among the first ministers, although consultation began moving away from dedicated fora. Eddie Goldenberg, in response to an interview question about the decline of IGR during the Chrétien years, observed that the famed "Team Canada" missions overseas served as an excellent place where all the actors could meet (Interview with Goldenberg 2015). On the constitutional front, there was a return to "constitutional normalcy" (Russell 2006, 23). Arguing that Canada had returned to constitutional change "à la Burke," Peter Russell echoed the works of David Thomas that the ordinary, slow pace of constitutional change in the country had finally

begun to return (Russell 2006, 23). This normality did not mean constitutional stagnation, but "non-constitutional" renewal became the order of the day (Lazar 1998).

Matthew Mendelsohn, a former senior advisor in the Chrétien government's PCO and a political scientist, made an unprompted reference to the abeyance concept specifically in an interview with the author when he talked about the shift that he saw after the referendum:

> I think a general conventional wisdom or consensus emerged within a lot of senior bureaucrats in Ottawa and some politicians that one of the things that was fueling Quebec nationalism and the sovereignty movement was the constant talking about Quebec nationalism and the sovereignty movement. And so the ongoing discussion about "what does Quebec want?", what would satisfy Quebec's demands, how can we meet these demands, what concessions can we make - this negotiation, the constant negotiating approach over the country, over its existential future, was actually not helping […] So one tool that sort of emerged at that point was to just to kind of "down tools." We're not engaging with this anymore, we're not talking about it anymore, and these [controversial] things will arise occasionally – so [the] millennium scholarships opt out, or the Canada Job Grant, do you opt out? But these are from my perspective part of the way the country works and as long as you don't have to put it in the constitution or recognize it, [then] the *National Post* may have an editorial "*How Come Quebec Gets a Special Deal?*" but no one cares at the end of the day. And in Quebec people say it actually works a little bit, to the extent anyone engages with it, so the "down tooling" was a way to keep the abeyances present, to avoid the manifestation of potential crises or touchstones that are problematic.

The Summit IGR approach was also an issue because there was a sense that it was almost impossible to come up with a package that would satisfy everyone. The "risk–reward" calculation was deeply unfavourable:

> The risk of not succeeding was high; the reward for succeeding was minimal. I would say there was a wide consensus that one could not come up with a package, that it was unlikely that one could come up with a package that was sufficiently ambitious to satisfy Quebec nationalism that also had a strong likelihood of success (Interview with Mendelsohn 2014).

There was a strategy component, according to Mendelsohn as well, given that the federal government was faced with the PQ in office and there was little to be gained by attempting to engage with the provincial government at that time. Contrasting what he saw happening at the time with the "Charter of Quebec Values" introduced in 2013 by the Marois government[42] with the behaviour of the PQ in the 1990s, Mendelsohn spoke about why the shift away from Summit IGR happened and the perception the federal government had about the PQ and constitutional change:

> To me, Pauline [Marois's] approach is about creating conflict and tension and division, like the Charter of Values. I don't know whether she believes it or doesn't believe it. She knows it pisses off the rest of the country and creates opportunities for anti-Quebec backlash outside of Quebec, so it's a classic strategy in terms of creating division and destroying social capital across the country, a sense of shared citizenship. So to the extent that you choose not to engage with it as much as possible, I think that was the strategy post, probably not '95, post '96 though. By about '96 we had had a year's discussion, we had done the Calgary Declaration, we were into the Supreme Court reference by '97, I guess, and this consensus emerged over those two years I would say (Interview with Mendelsohn 2014).

Throughout the Chrétien tenure, relations with the provinces were conducted in a similarly hands off way. While Chretien would meet with the premiers, he did it as far away from the media as possible:

> Chrétien was deeply allergic to the kind of televised spectacle that we had had at the conference centre where you had all the premiers and the prime minister on television day after day. But the country was transfixed by it at different points. And Mulroney with a view to deal with Meech, with a view to getting maximum pressure to get an agreement, made it sound as though the country was going to fall apart if he didn't get what he was after. So he raised the political temperature to the absolute peak. Chrétien

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[42] The Charter of Quebec Values, which will be discussed in more detail in later chapters, was an initiative of Pauline Marois' Parti Québécois government to "secularize" the public service in Quebec. Its most controversial feature would have barred civil servants from wearing ostentatious religious symbols when dealing with the public.

was so averse to all of that he would never use the conference centre. He never wanted to put foot in the conference centre. His approach to dealing with First Ministers Meetings was to have as few as he could […] Basically he would only come when there was a deal that had already been cooked. He would bring them in, give them dinner, meet them in the morning, sign off on the deal, give them lunch and send them home. All done in the small board room at the top of the foreign affairs building, away from the cameras (Interview with Anderson 2014).

The creation of SUFA, the Calgary Declaration, the Agreement on Internal Trade (AIT), and even the Kyoto Accord, among other initiatives, generated a lot of excitement about the future of federalism in Canada.[43] These agreements were optimistically described as "collaborative federalism" in 2002 and interpreted as a willingness by all orders of government to work out the most appropriate balance of responsibilities among them and to effect incremental constitutional change (Cameron and Simeon 2002; Minaeva 2012). Despite some limited successes, however, nearly all the institutions that were associated with collaborative federalism had either failed or were in trouble within a few years. Lacking a binding enforcement mechanism, the AIT was recognized as ineffective within a few years of its creation. SUFA did not live up to expectations, and there was little appetite in many provincial capitals for some federal initiatives in the social policy field. Perhaps only in immigration has there been genuine success in transforming the institutions of Canada's federal system (e.g. Paquet 2014).

Ultimately, much of the collaboration was illusory. Instead, Ottawa increasingly disengaged from the provinces and began to move towards unilateralism, which was mimicked provincially (Jeffrey 2006, 133–44; Maioni 2008, 169). The result of this disengagement, as Tom Courchene observed, was that after 1995 Ottawa and the provinces moved in different directions with regard to the national question, the management of the social union, and the conduct of

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[43] The Social Union Framework Agreement (AIT) was a federal-provincial-territorial agreement signed in 1999 (minus Quebec) that set out national standards for shared cost programs and rules for the introduction of new shared cost social programs partially funding with the federal government's spending power. The Agreement on Internal Trade was a similar agreement signed in 1995 by all provinces and territories (including Quebec) that sought to liberalize rules for trade and labour mobility across the domestic market. The Kyoto Protocol was an international environmental agreement signed in 1992 that bound signatories to reduce their greenhouse gas emissions by a certain percentage below 1990 levels. It would have required provincial involvement to satisfy in Canada, however the country withdrew from the protocol in 2012 despite ratifying it in 2002.

intergovernmental relations (Courchene 2009; see also Cameron and Simeon 2002, 61 where the beginnings of federal disengagement are identified). Quebec's aloofness under the PQ meant that it was always only a semi-participant, which left leadership on the national question to Ottawa (Cameron and Simeon 2002, 63). To a large extent, the unique bilateral relationship that Ottawa had with the province gave it a distinct place in Canada (Noël 2000, 14–16). The federal coolness was not well received in several provincial capitals, which sought ways to keep Ottawa more involved.

The Council of the Federation was the most notable of these initiatives and came into play with the election of Jean Charest as Premier of Quebec in 2003. It responded to a call by the premiers of both Alberta and New Brunswick for a better relationship with Ottawa, and with Newfoundland's frustration with the neglect Ottawa was showing towards IGR (Brown 2003, 6). Newfoundland's Royal Commission on Renewing and Strengthening Our Place in Confederation, in its report in 2002, argued that there needed to be far more cooperation with Ottawa on intergovernmental matters (Brown 2003, 6). "In surveying recent trends in intergovernmental relations in Canada," wrote Douglas Brown, "the [Commission] concluded that the current federal government no longer seems interested in cooperative approaches, in regular intergovernmental exchange and in reaching national (i.e. federal and provincial) consensus" (Brown 2003, 6). The Canada West Foundation came to a similar conclusion. In a document entitled *The West in Canada: An Action Plan to Address Regional Discontent* (Brown 2003, 6), it supported the idea of the Council of the Federation and called for the federal government to "engage with it" (Brown 2003, 6).

The timing of many of these reports was not an accident. Their publication coincided with the upcoming departure of Jean Chrétien and reflected the hope that his successor, Paul Martin, would be more open to talking to the provinces than his predecessor had been (Brown 2003, 6). But the end result was that the provinces ultimately moved closer to one another and without the federal government. Ottawa decided to back away from the Annual Premiers' Conferences (APCs) and other collaborative mechanisms and try something new (see in particular Johns, O'Reilly, and Inwood 2007 for a description of this process). Courchene has noted this two track strategy and called the federal government's activities "combative" federalism: a style of federalism that stands in opposition to the "pan-Canadian provincial" approach that was adopted

by the provinces (Courchene 2009, 5; 11). The less collaborative approach of the federal government had the effect of bringing the provinces together to better coordinate against Ottawa:

> The Chrétien governments, in reaction to fatigue in constitutional politics after 1992, and faced in any case with the withdrawal of Quebec from many intergovernmental forums, put less emphasis on formal First Minister's Meetings. The Prime Minister has preferred more informal gatherings such as the team Canada missions abroad, or short meetings on specific issues such as health care. Ironically, the Chrétien approach to avoid formal first ministers' conferences contributed to the strengthening of the Annual Premiers Conference (Brown 2003, 7).

The extent to which these changes might have had an effect on the political climate in Quebec has been discussed by Eric Montpetit (Montpetit 2012). In his provocatively entitled piece "Are Interprovincial Relations More Important than Federal Ones?" Montpetit argues that too much time is spent examining the relationships that the provinces have with Ottawa to the neglect of the relations provinces have with each other. Tracking the growing level of interdependence and network density in inter-provincial relationships, Montpetit makes the argument that these relationships have become much deeper, as has recently been the case, when the objectives of the provinces are the same. This growth in interprovincial relationships, in his view, has assisted in the governing in the social policy field even though the federal government has disengaged. These networks have thus allowed Quebec to remain involved in the Canadian policy sphere while avoiding the high stakes identity games that are played when the federal government when it gets involved (Montpetit 2012, 2). Montpetit perceives these relationships to be deeply functional and effective in addressing different policy goals and problems.

The disengagement of Ottawa also became particularly apparent after the departure of Lucien Bouchard from Quebec politics in 2001. Ottawa faced a much harder line, if perhaps a less formidable opponent, in the form of Bernard Landry, who was ideologically closer to Jacques Parizeau on the question of sovereignty than to Bouchard. Landry aggressively attacked Canadian federalism as deleterious to the province, injurious to its people, and in desperate need of escaping. The shift in narrative under Landry was profound, with a much more explicit attempt to link federal policies to alleged damage being done to Quebec (Dufour and Traisnel 2009, 61). However, Ottawa was cool to Landry's entreaties throughout his term of office,

refusing to respond or to even engage with some of his more aggressive tactics, including calling the Canadian flag a "rag" (Radio-Canada 2001). Landry's efforts to put sovereignty back on the political agenda failed and the PQ's slide continued.

Perhaps the longest lasting impact of the Landry government on constitutional issues was the introduction of the concept of the "fiscal imbalance" into the national dialogue. The concept holds that an "imbalance" arises when an expenditure and the capacity to raise revenue for it should happen by one order of government but another level has the taxing authority and ends up with excess money (This is a large and controversial topic, and is lightly summarized here. See Rabeau 2011, 13 for some definitions, criticism, and the literature from which this definition is derived). The Landry government raised the fiscal imbalance issue by creating the Commission on Fiscal Imbalance. Headed by the former finance minister, Yves Séguin, the commission found that Quebec was disproportionally hurt by Ottawa and the way that it transfers money. The heavy fiscal burden that the provinces faced, Ottawa's more privileged position on revenue sharing, the inadequacy of the CHST and equalization, and an insufficiently limited spending power gave rise to an unfair imbalance (Y. Séguin 2002; Rabeau 2011, 20). The deeply controversial concept nevertheless became politically popular, shaped relations between Quebec City and Ottawa, and figured prominently in the development of the "open federalism" espoused by Stephen Harper (discussed in Chapter 5).

The last two years of this period of non-constitutional renewal coincided with the government of Paul Martin and the return of asymmetrical federalism. Following the 1995 referendum, Chrétien's "plan A" model made some advances toward asymmetrical federalism. It recognized Quebec's distinctiveness, attempted to give it a veto, and offered some limited decentralization. Nevertheless, Ottawa remained captive more or less to Trudeau's hostility to national asymmetries. The Martin government, although it was only in power until 2006, showed more openness to this approach (see e.g. Noël 2011). In the health care field, Ottawa came to a special agreement with Quebec on funding (noted above). Quebec City was given a ten year, $41 billion dollar deal without any conditions for funding its health care system (Seidle 2005, 2; Jeffrey

2010, 541).[44] Martin maintained, however, that this was not necessarily a "special deal" for Quebec; any province wanting a similar deal would be entitled to it. Martin's behaviour caused considerable consternation within his party, many seeing it as selling out the traditional ideals of Canadian federalism and with essentially no guarantees from the provinces.[45] In a revealing show of how deep the divisions over questions of asymmetry can be, Canadian Senator Serge Joyal argued at the time that the Health Accord was signed that it was a threat to the social fabric of Canada (A.-G. Gagnon 2009, 260–1). Nevertheless, the Martin government essentially dismissed these concerns, both out of a genuine ideological willingness to embrace an asymmetrical arrangement and also as a political tactic to raise the federal Liberals' political chances in the province (Noël 2011, 5) Overall the Health Care Accord gave a "win" to the government of Quebec. A similar asymmetric approach was evident with the national Child Care Benefit that was agreed to two months later. It was by no means a national program and varied considerably across the country.[46]

Martin's conduct of IGR was slightly more public than that practised by Jean Chrétien, although Martin remained unwilling to have particularly sensitive files negotiated in public. His tendency to negotiate only behind closed doors has been blamed for the lack of stature of the agreements Martin ended up negotiating with the provinces (for example on health) and for a general sense of confusion (Jeffrey 2010, 565–6). The lack of visibility of the work that was being done in IGR disappointed many who saw in such institutions as the Council of the Federation a real opportunity to change the way that the country did business. The council has not had this effect; rather "it simply institutionalizes existing practices among the provinces" (A.-G. Gagnon and Iacovino 2008, 349) Nevertheless this more conservative approach to IGR continued a shift into working out deals behind closed doors and not always insisting that all provinces be treated the same.

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[44] Notably, this agreement was reached while the hardline Landry was in power. Michel Venne has noted that the posture that the PQ takes towards Canadian federalism can vary depending on what is on the table (Venne 2011, 103).

[45] For example, in the health care accord, the provinces were only committed to "comparable" rather than common indicators, and to search for "benchmarks" within three years (Jeffrey 2010, 541).

[46] The coverage was quite patchy – for example Manitoba, Saskatchewan, Ontario and Nova Scotia all reached deals, but Quebec, New Brunswick, British Columbia and Alberta did not (Jeffrey 2010, 565–6).

The Martin interlude was brief, and limited in its impact, given its minority government status between 2004 and 2006. But it must be acknowledged Martin's conduct was not suggestive of a leader cognizant of abeyances or seeking to avoid them. In fact, Martin's approach to federalism has been described as resembling that of Brian Mulroney, which is unsurprising given Martin's support of Meech Lake (Jeffrey 2010, 540–2). Following the signing of his Health Accord, Martin suggested his willingness to reopen the question of Quebec's proper place in the constitution, announcing that it was "an important building block…in getting Quebec to sign on to the 1982 Constitutional amendment" (Martin quoted in Jeffrey 2010, 542). His dramatic announcement in the final weeks of the campaign in 2006 to forswear the notwithstanding clause would qualify as another counter-example of abeyance avoiding behaviour. It remains unclear, had he more time in office, how Martin would have handled constitutional questions, or if he would have been willing to undertake Summit IGR to find a solution to Quebec's place in Canada.[47] But by 2006, mired in the sponsorship scandal and reeling from wounds that were in many cases largely self-inflicted, Martin lost the election to the Conservatives under Stephen Harper, and left politics.

5.4   Other federal party shifts

The end result of both Plan A and Plan B was to give the federal government a defensible position to drop the subject of the national question entirely, a position it effected in particular by disengaging with the question and with the provinces more generally. The Liberals after 2000 finally could claim that Canadians no longer had any interest in constitutional reform and were more interested in the economy, social programs, and other "bread and butter" issues. When pressed by the sovereignist parties on these subjects, Ottawa could point to the *Secession Reference* and *Clarity Act* to argue, correctly, that the conditions that would have to be met for them to accept Quebec's declaration of independence had been laid out, and that there was nothing more to say. In the interim, Ottawa could do its best to demonstrate the workability of Canadian federalism.

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[47] His chief of Staff Tim Murphy has argued that Martin had no interest in the constitution, rather wishing to focus on the economy (Jeffrey 2010, 546).

The other federal parties rapidly followed suit for their own electoral reasons. These initiatives had received wide support in Canada and a considerable amount of support in Quebec, and helped the other federalist parties to move on to other subjects (see Jeffrey 2010, 322 for the public reception of these initiatives). By this point the Canadian Alliance, the successor party to the Reform Party, was desperately trying to move out of its Western stronghold and sensed that the anti-Quebec dialogue with which the Reform Party had been strongly identified was more of a hindrance than a help. In a campaign platform foreshadowing the "Open Federalism" of Stephen Harper, the Canadian Alliance's only mention of the Quebec issue for the 2000 election is the need to maintain the division of powers. After making an obligatory reference to the incompetence of the Liberals on this subject, the document goes on say that "[W]e will ensure that Quebecers want to remain a part of a strong and vibrant Canadian confederation by respecting Quebec's constitutional jurisdictions, thus making a third referendum irrelevant" (Canadian Alliance Party 2000, 20).

A similar story unfurled with the NDP. With the party little known or cared about in the province of Quebec at the time, the NDP platform concentrated on the economy and supporting social programs, attacking the Liberal record of gutting of federal transfers over the previous seven years and concentrating on the need to maintain stable funding for social programs. The NDP relegated the national question to the final page of its platform document where it states that the NDP would recognize Quebecers as a people (The New Democratic Party 2000, 19).

Collectively, and for their own interests, all the federal parties had now put the issue of Quebec's place in Canada on the back burner and moved on. The strategy appeared to work well electorally in 2000 for the Liberals. Whereas the 1997 election had seen little movement in the province, in 2000 Quebec returned to the Liberal fold, with the party gaining 11 seats in the province (Jeffrey 2010, 350). The election represented a disaster for the BQ, which found itself unable to provide a compelling reason for its existence in Ottawa and unable, as well, to capitalize on the PQ's logistical support. The poor BQ showing was credited with leading to the resignation of Lucien Bouchard a few months later since Bouchard could not foresee his "winning conditions" appearing in the near future (Jeffrey 2010, 351).

5.5   Jean Charest and the Quebec Liberal Party

As important as events were at the federal scene, by far the most important event for explaining the conversion of constitutional reform into a taboo among federalists was the arrival of Jean Charest as the new head of the Quebec Liberal Party. Temperamentally a conservative who had harboured dreams of being Prime Minister, Charest, who had not wished to go to Quebec City, realized following the resignation of Daniel Johnson that he would not succeed in Ottawa as long as the PQ remained strong.

Charest's leadership of the Quebec Liberal Party had the effect of making Quebec City much less interested in constitutional questions. It is worth quoting Charest himself, in conversation with the author, to capture the shift of perspective:

> The post-referendum period of '80 is one in which commitments had been made and there was a follow through. So we continued within that logic of trying to fix the constitution, until '81-'82 happens and then the '84 campaign and the period of Mr. Mulroney and the Meech Lake period. … we were going to fix what had been broken and aggravated by the unilateral patriation without the express consent of the National Assembly in Quebec. And then the episode of Charlottetown and '95 so by the time we arrive in '95, and then '98, we are through this: you know, this rollercoaster of constitutional discussions. And by the time I reach government in 2003, we're at a new point where the question is how do we manage the relationship? And by that time we know that we do not want to try to fix things through constitutional amendments. We have played in that movie. We know what it's about. It has been unsuccessful and has cost us a great deal of energy and time. And there has to be another way…(Interview with Charest 2014)

Charest studiously avoided raising the issues that he knew would cause particular problems for his party. Instead, questions turned directly to social policy, how programs were funded, and the role of the federal government's spending power. This new focus would most tangibly result in the Social Union Framework Agreement (SUFA) of 1999, which was designed to ensure that there would be more predictability and flexibility in the way that social programs were funded and delivered (Courchene 2009). SUFA's impact was mitigated when Ottawa's financial position

dramatically improved in the late 1990s-early 2000s, and the federal government reengaged with the social policy field.

The shift of Quebec's focus to social policy and its funding resumed a dialogue that was more reminiscent of Maurice Duplessis than of Jean Lesage.[48] The constitutional shift began while the Liberals were still in opposition, and even in the run up to the referendum in 1995 (Interview with Charest 2014). A document published in 2001 by a special committee of the Liberal Party under the direction of its eventual Intergovernmental Affairs minister, Benoît Pelletier, was particularly important in signalling the new direction, even if its actual impact is debatable. The very extensive report, entitled *Un Project pour Le Quebec: affirmation, autonomie, et leadership*, made clear that the political question of Quebec's place in Canada would no longer be front and centre (Parti Libéral du Québec, Comité spécial sur l'avenir politique et constitutionnel de la société québécoise, and Pelletier 2001). While thoroughly asserting the dualist vision of the country, *Un Project pour Le Quebec* nevertheless recommended a more flexible, asymmetrical federalism that, it argued, would benefit everyone (B. Pelletier 2001). It recognized that constitutional reform was unlikely in the immediate future, but that other gains could be brought in the short term through better dialogue and engagement with other partners in the federation. *Un Project pour Le Quebec* supported and adopted many of the elements advanced under the "Plan A" branch of constitutional reforms and legislated by Jean Chrétien, for example the regional veto provisions, and which had, effectively, constitutionalized the status quo (B. Pelletier 2001). *Un Project pour Le Quebec* also plays down "asymmetrical federalism" (Cousineau Morin 2009, 104). To the extent that it discusses asymmetrical federalism, *Un Project pour Le Quebec* perceives asymmetries as being achievable through administrative arrangements that are not necessarily restricted to Quebec (Cousineau Morin 2009, 104; see also B. Pelletier 2009 for an a good summarizing speech given in 2004 to Université du Québec à Montréal). It casts asymmetrical federalism as an idea that extends far beyond the constitution, and which is as much a process as anything else:

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[48] There has been some interesting work done on the rather haphazard constitutional vision of the Quebec Liberal Party in the last years of the 20th century (Cousineau Morin 2009).

> The federal formula does not rule out asymmetry in relations between the partners in the federation. Federalism can be a flexible system if the partners are themselves capable of flexibility. In the context of intergovernmental relations, asymmetry is a way of managing federal-provincial relations harmoniously by taking into account the specificities of each component in our federation as well as the need for coherence within Canada (quoted in B. Pelletier 2009, 476).

But the central focus of *Un Project pour Le Quebec* remained on finding a more fruitful and productive relationship with the rest of the country, even ultimately laying the intellectual groundwork for what would eventually become the Council of the Federation (B. Pelletier 2001).

Once in power, the Quebec Liberals governed very much in the vein of the ideas outlined in *Un Project pour Le Quebec*. Charest did not take issue with the division of powers in the federation. Rather he devoted his energies to a robust defence of the constitution as it was written. In essentially accepting the *Constitution Act,* Charest in effect recognized that Quebec had the powers, if perhaps not the resources, to develop itself fully. In returning to questions of taxation, now couched in terminology of the "vertical" and "horizontal fiscal imbalance," Charest emphasized the need for the strict adherence to the original constitution, rather than its reform.

Charest also scored a number of notable successes, in particular the Health Accord and National Child Care benefit agreement that he struck with the Martin Government (discussed below) (Seidle 2005, 2; Jeffrey 2010, 265–6). In the Health Accord, Charest was able to obtain from Ottawa $41 billion in funding on health care without any federal conditions at all (Jeffrey 2010, 541; Maioni 2008, 171). The Agreement was something of a masterstroke, in that Charest showed that he had signed a national deal without having any conditions attached to it: a demonstration of federalism's flexibility and value. He built on this success in the labour market and income support fields, where significant devolution had already been undertaken under Jean Chrétien. Under Prime Minister Martin, Charest could claim the 2005 Canada-Quebec Final Agreement on the Quebec Parental Insurance Plan, and under Harper, the 2007-10 adjustments to the Working Income Tax Benefit and the Labour Market Agreement of 2009 (Noël 2011, 2). While side agreements were possible with most of the other provinces, Quebec's increasingly bilateral relationship with Ottawa meant that some agreements, like that for parental insurance, remained unique (Noël 2011, 5).

Charest took a high profile leadership role in recasting Summit IGR as a more interprovincial affair through his proposal, accepted by the other premiers, of a "Council of the Federation" (Courchene 2009, 6). The Council of the Federation initiative was much more dramatic than the Calgary Declaration by Canada's premiers on constitutional renewal. This initiative came from Quebec and engendered high expectations in the province. It was seen as a way to increase the importance of interprovincial mechanisms within the federation. The idea found support in the Quebec nationalist community, possibly because the federal government would not be an overarching power within an interprovincial forum (Courchene 2009, 7). The Council of the Federation was also born out of a frustration in many parts of the country with the way that intergovernmental relations were working, and the sense that a better mechanism needed to be developed. This frustration was due in no small part to the fact that after 1995 the federal government had pulled away from Summit IGR, and made it harder for the provinces to get things done on the issues that mattered to them (Brown 2003, 6). The Bourassa ideal of negotiating only with Ottawa on a "nation-to-nation" basis, if not being abandoned, was being downplayed somewhat.[49] Charest's choices, and the posture he adopted throughout his time as premier, essentially put the Quebec Liberal Party in a constitutionally passive position for the first time since at least 1960. The provincial Liberal Party began playing the role of the conservative nationalists in an earlier era.

5.6   The Supreme Court of Canada

With the federal government and its electoral competitors losing interest in resolving abeyances they were more often addressed in the courts if they appeared at all. To that extent, abeyances were increasingly framed as legal rather than political issues, whether or not that distinction is possible or desirable. As discussed above, the most important judicial decision in terms of its implications for the treatment of constitutional abeyances during this period was unquestionably the *Reference Re: Secession of Quebec.* It was accompanied by other decisions of the Court whose effect was ensuring that the federation remains politically pliable depending on the circumstances.

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[49] This discussion continues below.

5.6.1   The division of powers

The fact that there are many understandings of the Canadian federal system, none of which are congruent, is not terribly surprising as a political fact. But this political reality began to get some legal recognition after 1995 in the Supreme Court of Canada, building on some cases that had been decided during the 1980s. This shift was important for the study of abeyances because it allowed for different conceptions of the country to coexist at once through providing decisions that appeared to support some visions without ruling others out (Schertzer 2008). Occasionally a decision might be quite "pan-Canadian," while at others the bi-national characteristic of the country was played up as fundamental. This could offer supporters of different visions of Canada the evidence they needed for their positons.

Along with this, the Court also appeared to place a premium on reducing intergovernmental conflict. As Russell noted, during the middle of the 1980s the Supreme Court of Canada began to take a more balanced approach to the question of the division of powers in Canada, moving from its centralizing position after 1949 and its more evenly split decisions during the 1970s and 1980s (Russell 1985, 162). By the latter half of the 1980s, the Court had begun to nuance this balanced approach further, by stressing that, where possible, decisions should not be constrained by an "either/or" logic on which order of government should be legislating in an area but should instead seek to show that the different orders of government can complement one another wherever possible.

This approach, which has come to be known as the "dominant tide" of Canadian federalism, was developed in the context of legal doctrines that historically had given more space to the federal rather than provincial governments in the event of legal conflicts. Using a cluster of legal principles involved in the interpretation of the division of powers – in particular Crown and interjurisdictional immunity, as well as the paramountcy, double aspect and pith and substance doctrines – the Court gradually began to stress that there was considerable room for overlapping legislation. Beginning in particular with the doctrine of paramountcy, the Court took a limited approach in *Multiple Access v. McCutcheon,* the leading case on the concept in Canada. In his oft quoted adoption of the work of W.R. Lederman, Chief Justice Laskin wrote that the doctrine of paramountcy would really only come into play if two laws were genuinely in operational

conflict, where between two equally valid legal schemes "compliance with one is defiance of the other" (*Multiple Access Ltd. v. McCutcheon*, at pg. 191):

> Because "[t]he language of [ss. 91 and 92] and of the various heads which they contain obviously cannot be construed as having been intended to embody the exact disjunctions of a perfect logical scheme" (*John Deere Plow Co. v. Wharton, supra,* at p. 338 *per* Viscount Haldane), a statute may fall under several heads of either s. 91 or s. 92. For example, a provincial statute will often fall under both s. 92(13), property and civil rights and s. 92(16), a purely local matter, given the broad generality of the language. There is, of course, no constitutional difficulty in this. The constitutional difficulty arises, however, when a statute may be characterized, as often happens, as coming within a federal as well as a provincial head of power. "To put the same point in another way, our community life — social, economic, political, and cultural — is very complex and will not fit neatly into any scheme of categories or classes without considerable overlap and ambiguity occurring. There are inevitable difficulties arising from this that we must live with so long as we have a federal constitution (*Multiple Access Ltd. v. McCutcheon* at pg. 180–1)."

The groundwork for a "cooperative federalism" view of the division of powers continued in the context of "interjurisdictional immunity" (see also Hogg 2014, sec. 5.8). The subject received considerable treatment during the 1980s and 1990s.[50] One of the first and most important of interjurisdictional immunity decisions was the 1987 finding in *Ontario (Attorney General) v. OPSEU*. Chief Justice Dickson wrote in his concurring opinion that the doctrine of interjurisdictional immunity was not helpful for a set of appellants seeking to strike down part of Ontario's *Public Service Act* as *ultra vires* the province of Ontario. The doctrine holds that laws that are enacted in one jurisdiction cannot "interfere with, or have an impact on, subject matters under the jurisdiction of the other order of government" (*Ontario (Attorney General) v. OPSEU*, para. 21):

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[50] The legal treatment of the doctrine of interjurisdictional immunity is one that has received considerable academic attention because of the Court's hesitant and rather incoherent approach to it over the past two decades. This section concentrates more on the permissive attitude that the Court has taken to questions of division of powers rather than the specific treatment and cases of the different doctrinal developments. Interested readers are invited to consult the works of Peter Hogg and John Furey (Hogg 2014, sec. 15.8; Furey 2008; see also Wright 2014).

I favour both of these arguments of caution about the scope of the interjurisdictional immunity doctrine. The history of Canadian constitutional law has been to allow for a fair amount of interplay and indeed overlap between federal and provincial powers. It is true that doctrines like interjurisdictional and Crown immunity and concepts like "watertight compartments" qualify the extent of that interplay. But it must be recognized that these doctrines and concepts have not been the dominant tide of constitutional doctrines; rather they have been an undertow against the strong pull of pith and substance, the aspect doctrine and, in recent years, a very restrained approach to concurrency and paramountcy issues (*Ontario (Attorney General) v. OPSEU 1987*, para. 27).

Significant work developing the "dominant tide" approach to Canadian federalism and the Court's willingness to allow for jurisdictional overlap was done in the bankruptcy context. Technically a federal jurisdiction under section 91(21) of the *Constitution Act, 1867,* bankruptcy is often in conflict or otherwise connected to other valid provincial acts. Returning to the doctrine of paramountcy, a quartet of cases decided over the 1980s made clear that there was to be a flexible reading of the federal relationship to ensure as much as possible that the different jurisdictions could continue to operate, but that the provinces could not alter the priorities under the *Bankruptcy Act* so as to create different lists of priorities in bankruptcy in different provinces. The Court summarized its position well in the 1995 case of *Husky Oil Operations Ltd. v. Minister of National Revenue*, in which Chief Justice Dickson signalled the Court's growing discomfort with reading the heads of powers excessively narrowly in the context of bankruptcy litigation:

> If the operational conflict is in a field of exclusive federal jurisdiction, the provincial legislation will be inapplicable as being *ultra vires* to that extent. If the conflict is in an area of concurrent or overlapping jurisdictions, the provincial legislation will remain *intra vires* but be inoperative. To the extent that there is operational conflict, there is no room for an incidental or ancillary effect of provincial legislation. If, on the other hand, there is no operational conflict, then both laws continue to operate and both continue to have effect to the extent that operational conflict does not arise. Short of operational conflict, provincial law may validly have an effect on bankruptcy, as I have indeed acknowledged in observing that there is no bankruptcy "bottom line" without provincial law (*Husky Oil Operations Ltd. v. Minister of National Revenue 1995*, para. 87).

In dissent, Justice Iacobucci wrote:

> I am uncomfortable with the "water-tight" approach to federal bankruptcy legislation
> propounded by the respondents. To interpret the quartet [of relevant precedent cases] as
> requiring the invalidation of provincial laws which have any effect on the bankruptcy
> process is to undermine the theory of co-operative federalism upon which (particularly
> post-war) Canada has been built. In *Deloitte Haskins*, *supra*, at pp. 807-8, Wilson J.
> recognized it to be appropriate to adopt as narrow a definition of operational conflict as
> possible in order to allow each level of government as much area of activity as possible
> within its respective sphere of authority *(Husky Oil Operations Ltd. v. Minister of*
> *National Revenue 1995*, para. 162).

This idea of the inappropriateness of a narrow definition of operational conflict was developed in
subsequent cases and broadened into a flexible view of jurisdiction for all levels of government.

The need, in the Court's view, for a federalism that is cooperative and one that relies on
intergovernmental agreement, was again stressed in the case of *Fédération des producteurs de*
voillailles du Québec v. Peland, which involved the constitutionality of a provincial chicken
marketing scheme. Under the federal-provincial agricultural agreement, the federal authority
could set global quotas but left it to the provincial authorities to allocate the quota and to market
it in other provinces. A chicken producer who exceeded his quota and was subsequently
punished by the provincial authority argued that the provincial law was unconstitutional as it
related to interprovincial trade. The Supreme Court rejected this argument, finding that its
connection to interprovincial trade was incidental and pursuant to a legitimate cooperative
federal provincial-agreement where the core jurisdictions were respected. Justice Rosalie Abella,
in referencing a similar finding in the case of egg marketing, found that the scheme "both reflects
and reifies Canadian federalism's constitutional creativity and cooperative flexibility"
(*Fédération des producteurs de volailles du Québec v. Pelland 2005*, para. 15). The need for
intergovernmental cooperation was seen as an essential component of maintaining a healthy
federal system.

5.6.2   Language rights

The Court continued to allow for a large and liberal interpretation of language rights in several cases. The decisions were much more supportive of French Canadian interpretations on the abeyance of cultural duality. The Court made a number of comments suggesting that when the judiciary was approaching language rights judges must take into account the historical and social context in which the rights were developed and examine each case in light of that background. It seemed as though the Court was more willing to nod to political rather than strictly legal factors when coming to a decision.

By 1999, the Court had completely abandoned the earlier and narrow interpretation that it had adopted to language rights in *Société des Acadiens.* In *R v. Beaulac*, the Court repudiated *Société des Acadiens* arguing that all language rights must be interpreted "purposely," and in a manner "consistent with the preservation and development of official language communities in Canada" (*R. v. Beaulac*, para. 25; Sharpe 2013, 392–3).

In the educational realm the Court maintained its robust approach to defending minority language rights. In *Arsenault-Cameron v. Prince Edward Island* the Court found that such rights have to be interpreted in a contextual approach, and merely formulaic comparisons with the majority were to be rejected in favour of an approach that took into consideration the local history of the minority language group (*Arsenault-Cameron v. Prince Edward Island 2000*, para. 30). The remedial nature of the right was most clearly expressed in the case of *Doucet-Boudreau v. Nova Scotia*, which revolved around that province's obligation to build a French language school. The Court found that the province could maintain jurisdiction over the construction of the school, in order to ensure that it was being done with the necessary haste. The Court felt that to do anything less than that would be to offer a way out for governments which were seeking to avoid or shirk their responsibility, and that time was a critical factor given the right is contingent on numbers "warranting" the construction of the school (*Doucet-Boudreau v. Nova Scotia (Minister of Education)*, para. 29; Sharpe 2013, 395–6).

The Court has recognized that section 23 of the Charter necessarily influences how different populations in Canada perceive the federation. These rights are important for that reason alone, and they must be looked at against the social background of each case and the conditions and controversies in which the cases arise. In *Solski (Tutor of) v. Quebec (Attorney General),* the

Court found that such rights have both an individual and a collective element, and these rights are deeply implicated in how the country works and what the different visions of it are:

> First, the members of the minority communities and their families, in every province and territory, must be given the opportunity to achieve their personal aspirations. Second, on the collective level, these language issues are related to the development and existence of the English-speaking minority in Quebec and the French-speaking minorities elsewhere in Canada. They also inevitably have an impact on how Quebec's French-speaking community perceives its future in Canada, since that community, which is in the majority in Quebec, is in the minority in Canada, and even more so in North America as a whole. To this picture must be added the serious difficulties resulting from the rate of assimilation of French-speaking minority groups outside Quebec, whose current language rights were acquired only recently, at considerable expense and with great difficulty. Thus, in interpreting these rights, the courts have a responsibility to reconcile sometimes divergent interests and priorities, and to be sensitive to the future of each language community. Our country's social context, demographics and history will therefore necessarily comprise the backdrop for the analysis of language rights. Language rights cannot be analysed in the abstract, without regard for the historical context of the recognition thereof or for the concerns that the manner in which they are currently applied is meant to address (*Solski (Tutor of) v. Quebec (Attorney General) 2005*, para. 5; Sharpe 2013, 384–5).

The case was particularly interesting because it involved the eligibility of an English language student who sought education in English but who had been denied it because the student failed the requirement to have already completed a mathematical majority of his or her education in English. The Court accepted the constitutionality of Quebec's law to the extent that it required that such eligibility was dependent on the "major part" of a student having received instruction in English, but stated the law had to be interpreted in a more flexible manner than it had been in this case.

This line of cases continued the interpretation that won out in the late 1980s that saw language rights as being fundamental not just to the Canadian state but to Canadians as individuals. While the early 1980s had seen some decisions suggesting that language rights were almost derivative

of other rights and of the social context, we see in these decisions a more nuanced appreciation of the role that they play in Canadian history and society.

5.7 Conclusions

This chapter examined the ways that the traditional abeyances at the heart of the Canadian constitution were either restored or converted into political taboos. Starting after 1992, but in particular after 1995, the political behaviour of the governments of Canada and eventually Quebec towards constitutional questions such as Quebec's veto, the amending formula, the composition of the central institutions resembled the period prior to 1960 far more than it has since that time in that it was no longer a priority. The most important influence was the conversion of the Quebec Liberal Party from one of constitutional activism to passivism, in which it sought to drop constitutional change from the political agenda. The PQ was increasingly sidelined by the other parties and the ambiguous decisions of the Supreme Court of Canada that appeared to safeguard Quebecers' fundamental rights by not adhering to a strict vision of the federation that is unpopular in the province. The battle was eventually brought to an unclear stalemate. Furthermore, the approach taken by the federal government to the IGR system in the aftermath of 1995 ensured that the issue lost visibility and the problem of linkage was avoided on sensitive questions. Mendelsohn, in reflecting on the process, considers the new approach to have been quite effective from that which had come before:

> [Post-1995] we start to look at other tools. The first tool was the Supreme Court reference, which was to many Quebec nationalists a provocative act. But both the questions and the approach and the Supreme Court decision were very reasonable and moderate… some people got outraged… [But] I thought that was an effective tool. I thought the *Clarity Bill* was an effective tool. I thought generally the campaign by the federal government led by Dion to talk more directly about what this looks like, you know a referendum, a "Yes" vote, and what happens and what that process looks like. And always did it, [in the sense of] "this is possible, we can do this, as Canadians, as Quebecers, but we should have a more fact based, realistic conversation about how this unfolds.' And you know he was vilified, unfairly I think, and mischaracterized in many ways. I think over time, I do believe that that the approach known as Plan B was effective, strategically, in terms of recalibrating some of the conventional wisdom in the

political class in Quebec and informed opinion leaders in Quebec about what a "Yes"

vote means and how that all unfolds (Interview with Mendelsohn 2014)

 Nevertheless the largely bilateral relationship that Ottawa had with Quebec was more or less preserved to ensure orderly and effective governance; this permitted for some growing asymmetries. At the same time the provinces went in the opposite direction, attempting to form a stronger and more united front. These changes still supplemented the federal government's approach by allowing for additional space for more asymmetry in Canada without the need for constitutional change.

Chapter 6
Abeyances Restored: Federalism 2006- 2015

6 The Politics of Stephen Harper

This chapter will examine how the national question has been managed since the election of the first minority government of Stephen Harper through to the departure of his government, which coincided with the completion of this project. At the time of writing it is too early to say what the impact will be, if any, of the election of Justin Trudeau. Rather, it will focus on the Stephen Harper years. It will present evidence that the federal government and the Government of Quebec under the Liberals of both Jean Charest and Phillippe Couillard continually demonstrated abeyance restoring behaviour surrounding constitutional questions. It argues that this behaviour, important for understanding ongoing federal stability, consists of the federal government maintaining a strategy similar to that of "discrete incrementalism," up to and including constitutional questions (e.g. Montpetit 2008). This strategy endured and survived the brief interlude of Parti Québécois government from 2012 to 2014. It appears to be continuing, although to a lesser extent, since the Liberals returned to power in Quebec in 2014 under Phillippe Couillard. The rapid drop-off of support for the sovereignty movement has also continued in this period, even though the federal government was extraordinarily unpopular in the province. Low key and responsive to grievances, the approach that Ottawa, the other provinces, and Quebec City have taken appears to have effectively kept sovereignty off the political agenda.

Much as with the *Secession Reference*, the Supreme Court of Canada has played a major role in depoliticizing the significant constitutional questions that have come before the country. This role can be seen in the *Senate Reference*, the *Reference Re: The Supreme Court Act ss. 5 and 6* (*"Nadon Reference"*), as well as several cases that involve the binational interpretation of the country's history and official languages.

6.1 Abeyances and sovereignty support

In this period, we see a broad continuation by the federal Conservatives under Stephen Harper of the Liberal strategy of Jean Chrétien to gloss over differences with the Liberals in Quebec and shrink away from conflict with the PQ, which is portrayed as unimportant. The refusal to engage

is part of a strategy to play down the visibility and salience of constitutional abeyances as really being a problem in Canada and to obfuscate differences over them so that they become less apparent to the voting public. We also see during this period the continued erosion of support for the sovereigntist option, with some historic lows in support for it. This is happening coincidentally with other contributing forces, of course, and the role of these other forces must be acknowledged. Flare ups by political elites have been avoided however.

Given Stephen Harper has always been fairly unpopular in Quebec, it is something of a puzzle to explain why there has been very little movement on the sovereignty front. The obvious explanation is that, from 2006 to 2012, Harper was assisted by a federalist premier in Quebec who shared an interest in keeping the national question at bay. Not only was Jean Charest one of the best proponents of Canadian federalism, he is largely credited, with some merit, as being the politician who saved the country in 1995. While there is no strategic cooperation, the congruence of interest between the two has avoided damaging clashes.

But even though the PQ has been in opposition, it is easy to find signs of clear degradation in the sovereignty movement, beyond what might be expected given the party is not in power. The national question no longer appears to be a strong priority of the Quebec people. A series of polls in the run-up to the Quebec election in 2012 confirmed that sovereignty support remains very low, at one point hitting just 28% during the campaign (Ibbitson 2012). A 2013 poll that appeared in *Le Devoir* also revealed that only 26% of Quebecers thought that it was important that the province sign the constitution, with 46% saying that it is unimportant and 28% undecided (Bourgault-Côté 2013). These polling numbers are suggestive of a public willing to leave abeyances alone and of weaker intensity surrounding the debate. To be fair the 2013 figures include supporters of the PQ, who do not care about the constitution because they are not interested in remaining in Canada, and do not recognize the sovereignty movement's solid, secure base of committed supporters. But the overall picture is one of a province disinclined to see the question of sovereignty reopened (but see Richez and Bodet 2012).

Organizationally, the movement appears to be in disarray, as demonstrated by weak electoral results for the PQ and BQ, the emergence of competing parties such as Option Nationale and Québec Solidaire, and the considerable internal dissent among prominent leaders on the direction of the movement.

In the election of 2007 the PQ under André Boisclaire found itself relegated to third party status behind the ADQ, which was something of a shock. It did manage to rebound somewhat in the subsequent election of 2008, but it was not enough to win power. While the PQ managed to regain power in 2012, it was only on a minority basis and it was short–lived (19 months). It subsequently went on to lose power in 2014 with a disastrous election campaign that saw its lowest take of the popular vote in almost 40 years, in part due to questions surrounding the party's commitment to holding another referendum (Hopper 2014). A very large part of the decline was attributable to the sudden appearance of Quebec publishing legend, Pierre Karl Peladeau, who burst onto the scene as a candidate with a commitment to make Quebec a country. While it was unexpected of the PQ to unveil such a high profile candidate polls suggested that his emphasis on the sovereignty issue backfired and turned many voters away from the PQ (R. Séguin and Perreaux 2014; D. LeBlanc 2014a). Furthermore, during this period the ADQ/CAQ managed to establish itself as a legitimate force in the electoral landscape, briefly winning the status of the official opposition in 2007 before losing it a year later. The CAQ has promised that if elected the sovereignty issue would not be a priority. The incidents were telling about how little appetite there was to reengage with constitutional issues, and an extent to which this had become a liability to those seeking to announce their intention to do so without couching it in softer terms such as "winning conditions" or the like.

At the federal level, the 2011 "Orange Crush" saw the Bloc almost disappear from parliament by a surprise sweep by the NDP, and then subsequently continue to disintegrate (Payton 2011). The Bloc itself has fallen into complete chaos. Following a succession of ineffective leaders, the election of Mario Beaulieu to lead the BQ brought a strong, negative reaction from the former leader Gilles Duceppe, who expressed outrage following the latter's proclamation of "*nous vaincrons*" (we shall overcome) after this election (Hopper 2014; McParland 2014). The BQ has progressively lost federal MPs under embarrassing circumstances. In particular the only visible minority MP, Maria Mourani, resigned during the debate over the secular charter and later converted to federalism (Cooper 2014). MPs Jean-François Fortin and André Bellevance also quit in short order over problems with Beaulieu (A. Woods 2014). Finally, Claude Patry, an NDP MP who defected to the Bloc over the sovereignty question also announced that he would not be running in the next election (D. LeBlanc 2014b). While part of the reason is internal disagreements, several commentators have noted the internal dissension in the BQ has occurred

in a context where the government of Canada is not providing very much ammunition for the leadership of the sovereignty movement to get its base upset (Montpetit 2008; A. Woods 2014).

The disintegration of these separatist parties is among the most interesting challenges confronting the contemporary sovereignty movement. While the overall level for support can consistently run at 40%, there is little evidence of a strong basis for independence (Dufour and Traisnel 2009, 62). The number is very volatile and it is unclear what the number means in light of unknowns such as whether it depends on a possible relationship with the rest of Canada. The emergence of a stronger left-right axis may be masking the divisions on sovereignty (Dufour and Traisnel 2009, 61–2). The evolution of the ADQ of Mario Dumont through its re-emergence as the CAQ is suggestive of the decline in public appetite for sovereignty. Although Dumont had signed on in 1995 to the coalition of "Yes" forces, he found that he could not sustain this position without attenuating it somewhat if he wanted to get elected. This reluctance to discuss Quebec's possible future outside of Canada or the current constitutional arrangement was later echoed in the minds of the CAQ, which made every effort to show that it was different. After François Legault took over and returned the focus to the economy, the party took on a decidedly less separatist tone. Furthermore, the frustration among some core supporters with the lack of progress on independence has led to the emergence of several smaller more dedicated parties, which have yet to make significant breakthroughs but have been popular enough to raise some consternation among mainstream sovereignists. In particular, the creation of the socialist Quebec Solidaire (QS) in 2006 has drained some strength from the PQ and has been seen by many as a source of concern for the PQ (Hamilton 2011). While QS is a separatist organization, it is primarily a socialist one, and takes its cue on the question of Quebec's place in Canada from socialist thinking on the rights of nations to be independent. The rise of the CAQ under the previously sovereignist Legault, as well as the defection of the prominent sovereignist Jean-Martin Aussant and the creation of the Option National political party (not a genuine threat to the PQ at the moment but a worrisome sign for it), is evidence of considerable restlessness with the traditional sovereignist leadership and parties.

As discussed above in the literature review, this was also the era when the scholarship began to appear about the movement's passing, reflecting a consensus among intellectuals, political leaders, and journalists that the issue is buried for the foreseeable future (e.g. Bock-Côté 2007; Bock-Côté 2012; Pratte 2008; Dubuc 2008; Changfoot and Cullen 2011; Hamilton 2012; Fortier

2014; Parenteau 2014). While the artistic community tends to remain overwhelmingly separatist in outlook, its organizational commitment has not been as strong as it once was. There has been high profile squabbling between it and a number of prominent artists and activists and those in the PQ. Pierre Curzi, for example, the head of the Union des Artistes, left the PQ in 2011 and has remained estranged from it (Authier 2011). Similar controversies have erupted in the modern union movement, which for reasons discussed earlier has consistently found itself unable to bridge the gap with the PQ on a number of issues in the same way as it had done previously. Ongoing problems concerning the more neoliberal turn in the Quebec economy has meant that the union movement is no longer as close or able to agree on a collective agenda on how to proceed (Changfoot and Cullen 2011; Tanguay 2003, 16–8). The strength and commitment is not as strong there was it was before.

As public enthusiasm seems to have waned for sovereignty, it appears so has that of several of its former leaders. Along with Legault, Aussant, Dumont and Curzi, Lucien Bouchard, one of the leading *lucides,* called the PQ "too radical" as it moved towards adopting the policies that would ultimately be presented by the Marois government (CBC News 2010). He has continued in this vein by reminding the PQ that anytime the party talked about sovereignty in the context of an election, support for the project dropped (Hamilton 2012). Recently Bouchard has admitted that he sees little future for the BQ that he founded, saying that it was a "one shot" deal that was not really supposed to survive the referendum (CBC News/Canadian Press 2014; Ravary 2014).

6.2   The election of Stephen Harper

The election of the federal Conservative Party in 2006 occurred at a moment when the national unity crisis had clearly abated. The only major constitutional question that was on the table at the time of their election was same-sex marriage, the federal definition of which had been challenged and found discriminatory against homosexuals in the courts as a violation of section 15 of the *Charter* and had been the subject of an ongoing jurisdictional debate with Alberta surrounding the right of Ottawa to impose marriage equality. The right to same-sex marriage had already been introduced by judicial fiat in most provinces and implemented by federal legislation by the Liberals everywhere else the previous year. There was some fear that the Conservatives might try to undo that change, but they decided to leave the marriage issue alone. There was some fear that the Conservatives might try to undo that change, but in the event they decided to

leave the marriage issue alone. There was a period of extended quiescence in Quebec, with the Charest government firmly in charge and the PQ suffering under the ineffective leadership of André Boisclair.[51] While the Charest government was facing some challenges, it did not appear as though the unity debate was near the top of the agenda. Nevertheless, the management of Quebec issues had never been the strong suit of either the Reform Party or the Canadian Alliance, the precursors to the modern Conservative Party, and the previously dominant Progressive Conservative Party of Canada no longer had the same strength or appeal in Quebec to anchor a campaign there. As a result, the Conservative Party, unified under Harper, realized that it would have to make inroads in Quebec if it was to win national power. The result was the adoption of a position towards Quebec and federalism in general that was deeply passive towards nearly all constitutional issues such as bilingualism, special status for Quebec, and provincial representation in central institutions. It came to be known as "open federalism."

The next section will outline the development of this position, specifying what it entails and what the commitments were. This will then be followed by a series of examples that show how open federalism was implemented and how the Conservatives have addressed the Quebec question. The Conservative Party's approach that mixes ideological commitments on the one hand and pragmatic compromise on the other has left the Harper government more or less able to manage the question despite its deep unpopularity in Quebec.

6.3 "Open Federalism"

Fairly early in his leadership of the Conservative Party, Harper developed an approach to the management of the federation that he called "open federalism" and which he has maintained throughout his tenure as prime minister. The concept of open federalism, and in particular whether it amounts to anything more than political marketing, is very controversial. Practitioners in the civil service generally see it as more of a branding exercise than as a seriously compellingly different approach to how they conduct intergovernmental relations (Interview with Mendelsohn 2014; Interview with Hjartarson 2014). Others see in it more substance, perhaps less

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[51] For an examination of some of the challenges faced by the government in Quebec and their popularity in their first term see *Le parti libéral: enquête sure les réalisations du gouvernement Charest* (É. Bélanger, Imbeau, and Pétry 2006; in particular Crête 2006; Maltais and Lachapelle 2006).

of a doctrine than an "approach," for which exceptions can be made for political expediency. Viewed in the latter way, open federalism falls between Trudeau and Chrétien's deep philosophical antipathy to anything resembling asymmetrical federalism on the one hand. and the more freewheeling federalism of Paul Martin on the other (see Montpetit 2008, 25 for a discussion of the disjointed nature of "Open Federalism"). Others have described it as an approach that might have had some substance in the early years of the Harper governments but less so now (Interview with Noël 2014). While the boundaries of what is meant by "open federalism" may be loose, the more basic commitment to divided jurisdiction, animosity to Summit IGR, and refusal to engage with the provinces even when they want it has been useful for keeping abeyances off of the political agenda. His reluctance to re-evaluate the constitution has also had an ameliorative effect in this regard.

The intellectual roots of open federalism arose out of the pre-existing animosity Harper held to federal intrusions in the provincial sphere and, more importantly, the political lessons he learned from his 2004 federal election loss to Paul Martin (Interview with Burney 2014; Behiels and Talbot 2011, 40–1). Intellectually, open federalism represented a clear evolution for the Conservatives from a combination of provincial rights rhetoric associated with Reform, while in practice it also provided some space for compromise more associated with the old PCs who had been willing to embrace asymmetrical federalism under Brian Mulroney. In any case it fits well with what we know of Stephen Harper's attitude towards federalism. Geoff Norquay, a former director of communications for Harper, wrote in *Policy Options* in 2012 that this approach is a reflection of Harper's genuine commitment to federalism, of someone who sees the division of powers in sections 91 and 92 as being almost sacred (Norquay 2012, 47). That commitment gave rise to the positions that he styled the "Harper Doctrine" to intergovernmental relations and, more generally, those surrounding the federal relationship with Quebec. In an interview with *Policy Options* Harper spelled out the basic rationale for open federalism – that the federal government has allowed itself to get involved in files where it had no business and it has ignored the areas where it has more legitimate responsibilities:

> It has always been my preference to see Ottawa do what the federal government is supposed to do…Ottawa has gotten into everything in recent years, not just provincial jurisdiction but now municipal jurisdiction. And yet if you look at Ottawa's major responsibilities, national defense for example, the economic union, foreign affairs,

beginning obviously with the most important relationship, the United States, Ottawa hasn't done a very good job of these things (quoted in Norquay 2012, 47).

It is no secret that Harper has always felt that the federal government was as much a hindrance as a help when it came to matters of shared jurisdiction (Behiels and Talbot 2011, 27). His attitude to federalism has been deeply informed by what he saw during the Trudeau era, in particular regarding the National Energy Program, and then later during the mega-constitutional struggles of the 1980s. He and others built the Reform Party on the premise that there should be more provincial involvement in national politics, in particular in the form of a reformed Senate, with a stress on provincial rights in social policy, and a reduction of Ottawa's meddling in local matters. Harper helped to develop these positions while he was a Reform MP and both refined and defended them while out of politics in the early 2000s as head of the National Citizens Coalition. In that capacity his most famous action was to co-sign, along with a number of conservative luminaries including Tom Flanagan, Ted Morton, Rainer Knopff, and others, the "firewall letter" in the *National Post* on the subject of Alberta's autonomy (Harper et al. 2001). The letter outlined an "Alberta Agenda," a sweeping set of proposals designed to reduce Ottawa's footprint in the province, including setting up an agency to collect the province's taxes, create its own provincial pension scheme, establish a provincial police force similar to the Ontario Provincial Police and the Sûreté du Québec, gain more control over the health care field from Ottawa, and force the issue of Senate reform back onto the table (Harper et al. 2001).

However, even more important than the antecedent beliefs of both Harper and his fellow Reform MPs as the catalyst for "open federalism" were the results of the 2004 federal election. In that election, it became apparent to the Conservative Party that it would have to do more to grow beyond the populist social conservatism that had otherwise brought it considerable success in the West. If it were to win, would need to pick up at least some seats in Quebec (Behiels and Talbot 2011, 40–1). To that extent the party needed to shift from some of its more controversial platforms to those that would be better received by Quebec voters and others east of the Manitoba border. Such a shift meant watering down much of the rhetoric of the "Alberta Agenda" to include some softer and more conciliatory positions. The absolutism of watertight compartments and provincial rights had to also include some space for a constructive federal government, loosely defined. The need to demonstrate support for a federal presence was particularly acute in the area of social program development, where it had been prone to

accusations of wanting to dismantle the national health care system. The resulting shifts began while efforts were underway to "unite the right," but 2004 made it clear that more was needed to appeal to Quebec voters in particular. In an interview, Derek Burney, who ran the transition team for the Harper Conservatives in 2006, argued that open federalism was the reflection of obvious strategic thinking on Harper's part. While the intense pro-Western Canada message might have been fine in opposition it was not a recipe for government and this reality drove the shift to appear more moderate. "You have to remember that far more than any previous government Stephen Harper believes in the division of powers. But the decision to soften that message was strategic" (Interview with Burney 2014).

The first tangible appearance of "open federalism" can be traced to a speech that Harper gave as Leader of the Opposition in Quebec City on December 19, 2005, in which he set out the principles that he saw as important in federal-provincial politics (G. Fox 2007). There was very little mention of the speech in the English Canadian media, but it had a strong impact in Quebec. The basics of open federalism were further clarified and enumerated during the 2006 election campaign in a section called "Open Federalism – Strengthening National Unity" in a party document entitled *Stand Up For Canada* (Behiels and Talbot 2011, 40–1; Conservative Party of Canada 2006, 41–6). Its main thrust was aimed at getting the federal government out of a number of provincial jurisdictions, but more than anything else it sought to address the "fiscal imbalance," a subject that had been hot in Quebec for some time on account of the agitation of Jean Charest.

> He was determined to try to establish a base in Quebec whether it was in and around Quebec City which is kind of normal Conservative territory. You know there is no doubt that he realized…He thought then that it would be very difficult to get a majority government with no support from Quebec. I mean, that's kind of an axiom of Canadian politics so, you know he is a good political tactician he recognized he had to do something there […] that's why I think he was more flexible on his normal economic thinking about things like the fiscal imbalance, which as you know is a myth. He decided to play along with it because if that was the price of political success in Quebec he was prepared to take that risk (Interview with Burney 2014)

The result of this shift towards Quebec was a strong and unexpected jump in popularity for the Conservatives in the province, which had grown weary of the scandal plagued Liberals under Martin. The Conservatives won far more seats there than they had anticipated in Quebec and contributed to them winning their first minority government (Hebert 2011; see also A.-G. Gagnon 2009, 268).

In most areas "open federalism" adhered to a symmetrical view of the federation, while allowing for some asymmetries in key areas particularly important to Quebec. In particular, the document promised a "Charter of Open Federalism," that would entrench better mechanisms for intergovernmental cooperation and work with the extant Council of the Federation to ease national unity tensions. It offered vague assurances that it would tackle the fiscal imbalance, while refusing to launch new shared cost programs unless it had "the consent of a majority of provinces to proceed, and that provinces should be given the right to opt out of the federal program with compensation, so long as the province offers a similar program with similar accountability structures" (Conservative Party of Canada 2006, 42).   The Conservatives would work with the provinces in areas like the environment, trade and culture while respecting the constitution, and recognized Quebec should have a role in UNESCO (Conservative Party of Canada 2006, 42). Importantly it said nothing about a "Triple-E" Senate, rather promising more provincial involvement in how Senators are appointed. Any hint of opposition to the *Official Languages Act* was dropped; rather the linguistic duality of Canada was described as a "unique social and economic advantage that benefits all Canadians" (Conservative Party of Canada 2006, 42). In addition, the document made a bald commitment to maintain the equality of French and English in the government and Parliament of Canada. As a result there were concessions to the abeyance of duality that had been missing in earlier iterations of Reform and Canadian Alliance thought.

Still later, by the middle of 2007, it had become possible to define what this approach meant outside of federal fiscal arrangements in Canada, including how the federal government was going to approach the national question. The full "doctrine," to the extent that there was one and to the extent that it was implemented, included: the formal recognition of Quebec at UNESCO; a commitment for Ottawa to back out of provincial jurisdictions and instead concentrate on federal responsibilities; limiting the use of the federal spending power in areas of provincial jurisdiction and providing opt out rights if comparable programs are created; getting out the labour market

training field by recognizing that the provinces and the territories are best suited to manage these areas; reviewing and strengthening the equalization formula and territorial financing arrangements; using a variety of programs to transfer billions of dollars to correct the then highly salient "fiscal imbalance;" and finally make the realistic recognition that health care and infrastructure were exceptions to a strict respect for the division of constitutional responsibilities under sections 91 and 92 of the Constitution Act (Norquay 2012, 47).[52]

Along with the change in approach and the maintenance of a discrete distance, the elimination, or at least the addressing of, the fiscal imbalance is probably the most tangible arrangement that one can find of open federalism. While the fiscal imbalance was always a contentious idea, there were concrete actions that Ottawa took to offer Charest something to show that work on this front was being done. This attitude reflected a willingness on the part of the federal government to acknowledge that flexibility was needed with different provinces – neither the governments of Jean Chrétien nor Paul Martin had even acknowledged that there was a fiscal imbalance (G. Fox 2007, 42). The major ideas coalesced in a 2006 budget document that provided a framework governing any further federal involvement (Canada, Department of Finance 2006). The return to taxation issues complemented nicely the approach of Charest, who had also taken major constitutional abeyances off the table and was more interested in demonstrating the functioning efficacy of his government and of the federation in general. In particular, Charest identified the primary fiscal issues that Quebec had with the federal government as being: accountability through clarity of roles and responsibilities; fiscal responsibility and transparency in budgeting; predictable, long term funding arrangements; a competitive and efficient economic union; and finally, effective collaborative management of the federation (G. Fox 2007). Apart from the supportive outlook Stephen Harper brought to the discussion, the ideas also found resonance in what was the major irritant across the federal system at the time, Ottawa's fiscal planning. The federal proposals were supposed to guide the use of the spending power, and they lay on top of other reforms which had had similar objectives, such as the Social Union Framework Agreement, that had come before. The need to reduce the interprovincial squabbling in these

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[52] That said there has been some commentary to the effect that the federal government is not successfully coordinating with the provinces in the health care field, partially as a result of its own internal structures (Fierlbeck 2010).

issues was something that government nevertheless aimed to do. The 2007 budget documents from the Department of Finance made express mention of reducing tension in intergovernmental relations as an objective (D. of F. Canada 2007).

The elimination of the fiscal imbalance was done primarily through the use of equalization but also through a number of other transfers which led to a drastic increase in the amount of money that Quebec received (Rabeau 2011, 25). Combining the Canada Health Transfer, Canada Social Transfer, and equalization, Quebec received transfers from Ottawa that rose from $12 billion to $19.6 billion in 2014-2015, a $7.6 billion increase (See Table 5.1. D. of F. Canada 2013; Curry and Morrow 2013).[53] As a result, the fiscal imbalance faded from the political radar in the later years of the Charest mandate (see Rabeau 2011, 4 for this argument, although the work is clearly that of a federalist partisan). Indeed, by the final election the fiscal imbalance had been dropped from the campaign literature of the provincial Liberals entirely.

Table 5.1: Federal Support to Quebec (in billions of dollars)

Source: Department of Finance. Additional notes excluded. Available online:
http://www.fin.gc.ca/fedprov/mtp-eng.asp

	2005 –2006	2006 –2007	2007 –2008	2008 –2009	2009 –2010	2010 –2011	2011 –2012	2012 –2013	2013 –2014	2014 –2015
	(millions of dollars)									
Major Transfers										
Canada Health Transfer[1]	*5,049*	5,036	5,246	5,471	5,799	6,124	6,439	6,805	7,184	7,427
Canada Social Transfer	*2,146*	2,185	2,215	2,452	2,520	2,590	2,664	2,759	2,834	2,911
Equalization	*4,798*	5,539	7,160	8,028	8,355	8,552	7,815	7,391	7,833	9,286
Total Transfer Protection[2]							369	362		

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[53] It is worth noting that the Government of Canada also introduced the temporary measure of "Total Transfer Protection" between 2011 and 2013 for Quebec, which was a guarantee that the province would not receive less than it had in previous transfers. This applied to all provinces but the program was dropped following the passing of the economic crisis, an interesting political choice that was made just as the government of Ontario was about to qualify for equalization. That act left it with $640 million less than it would have otherwise received (D. of F. Canada 2013; Curry and Morrow 2013).

Total - Federal Support	*11,993*	**12,760**	**14,622**	**15,952**	**16,673**	**17,267**	**17,287**	**17,317**	**17,851**	**19,623**
Change from 2005–06		**767**	**2,629**	**3,959**	**4,680**	**5,274**	**5,294**	**5,324**	**5,858**	**7,630**
Per Capita Allocation (dollars)	*1,583*	*1,673*	*1,902*	*2,057*	*2,128*	*2,180*	*2,161*	*2,145*	*2,191*	*2,387*

[1] CHT includes transition protection payments for 2007–08.

[2] Total Transfer Protection (TTP) was provided in 2011–12 and in 2012–13 to ensure that Quebec's total major transfers in one of these years are no lower than in the prior year. For the purpose of calculating TTP, total major transfers comprise Equalization, CHT, CST and prior year TTP.

It is in Harper's interests to provide Quebec City with evidence that the federation can work, and since the fiscal imbalance had been put in the spotlight it made sense to show Quebecers that Ottawa could be accommodating. Evidence for his patience can be found in his refusal to criticize Quebec when the Charest government decided to cut taxes upon getting the money, rather than confronting the province's very real fiscal problems more broadly. The decision to cut taxes went over poorly in the many quarters that had never accepted that the fiscal imbalance was an issue to begin with. For his part Charest thinks that it was hypocritical for other Canadians to criticize his move, stating in an interview that:

> [The] fiscal imbalance was quite interesting because you remember one of the most important outcomes was the 2007 election campaign. During that election campaign the federal government delivered a budget and then they announced major new transfers to the provinces and new money for us and I announced during the election campaign that the money would be used to reduce taxes. It created a negative reaction in the rest of the country, "oh this is terrible." [The criticism was] oblivious to the fact that this very same year, nine out of ten provinces in Canada were reducing taxes, nine out of ten. But in our case it just wasn't acceptable, but in everyone else's case it was (Interview with Charest 2014).

While echoing previous governments in the opinion that the fiscal imbalance is a "myth," Derek Burney has suggested that Harper's decision to play along was a tactical decision to keep the focus on solvable issues. Once the actions were taken on the fiscal imbalance it provided cover for the federal government to say that actions have been taken, although it remains an issue. (Interview with Burney 2014). A return to material focused on abeyances would not have suited the Conservative Prime Minister, nor his Liberal counterpart.

6.4   Political Allowances and Conflict Management

After the Conservatives had established themselves in power and the groundwork for open federalism had been established, the federal government displayed a certain amount of flexibility on the national question. In doing so it showed a willingness to allow incremental reforms and asymmetries to develop between Quebec and the rest of Canada at key political junctures, often at significant political cost to the Conservatives themselves. Often *ad hoc,* these incremental actions have succeeded in keeping what might have been larger crises under control and represent some of the more notable actions of Harper's government.

At the same time, there has been a continued practice of disengagement from the structures of Summit IGR and a much heavier use of the judicial system when Ottawa wants something that it fears is not in its jurisdiction. The retreat has left constitutional disagreement to be resolved in the courts. This "judicialization" of the politics of IGR has effectively hived off many contentious issues and kept them from becoming overly political. It arguably has not worked particular well for the Conservatives in terms of the achievement of substantive aims, but it nevertheless reflects a deeper disdain the government has shown towards structures such as the Council of the Federation or other mechanisms of Summit IGR.

6.4.1   Quebec at UNESCO

One of the first and most important signs of the Conservative shift towards asymmetry came in the decision to allow the government of Quebec to take a seat at UNESCO. This decision was a major part of the Conservatives' original vision of open federalism, and the government of Quebec took every opportunity to play up its importance. It was not hard to see how this connected to the mega-abeyance of whether Canada is fundamentally a union of two founding nations based on English and French. But it was specifically relevant as well to the derivative

abeyance of provincial equality – was Canadian federalism asymmetrical? Was each province like the others in the powers that they had and how they could be expressed? Allowing a province a form of international personality would suggest that they are not.

There was an obvious precedent here in Quebec's and New Brunswick's representation at the Francophonie, the worldwide association of Francophone nations. But the document bringing Quebec into UNESCO was notable for the commentary that it offered on the domestic characteristics of Canadian federalism and the relationship of Quebec to both Canada and the other provinces (Canada and Quebec 2006; Quebec 2006). Beyond giving Quebec a voice at the United Nations, something no other province has, its preamble recognized "the specificity of Quebec" and, moreover that:

> DESIRING to set out provisions to establish the role of Québec in the context of UNESCO, in the spirit of federalism of openness, which is asymmetric in its application, and which recognizes differences among provinces and territories, and notably the unique personality of Quebec; AGREE TO THE FOLLOWING PROVISIONS….(Canada and Quebec 2006 Preamble).

The overt endorsement of asymmetric federalism from the federal Conservatives was important in its own right. In terms of the country's operation at UNESCO, the participation of Quebec's Permanent Representative is still contingent on being a part of the Canadian delegation, and the entire delegation is still loosely under the direction of its Canadian head. But the relationship is supposed to be based on reaching consensus positions in order to speak with one voice, essentially giving the mission a dyadic character. The agreement specifies that the Quebec representative be consulted before major decisions are taken and the province is free to speak its mind as it wishes (Canada and Quebec 2006 s. 2). Notably, in the event of a split opinion, it is the responsibility of Canada to justify its position to Quebec: thus, Ottawa has the burden of finding consensus if there is a disagreement (Canada and Quebec 2006 s. 3.1). If an agreement cannot be reached, then Quebec is free to refuse to implement anything in a UNESCO agreement that comes under its jurisdiction. This latter provision was an important symbolic recognition of the pre-existing power of all the provinces to not implement foreign treaties within their sphere of jurisdiction.

The overt recognition of asymmetry was something that Charest had sought in other forums, including the founding documents of the Council of the Federation (COF) of which he was particularly proud. But this recognition goes much further than even that. The COF founding document recognizes that Quebec had not signed the *Constitution Act, 1982* and "accept[s] that there are differences among the provinces and territories and that governments may have different policy priorities and preferences" but does not actually refer to the asymmetric characteristics of Canadian federalism ("Council of the Federation Founding Agreement" 2003, 1; Charest 2014). Nor was the federal government a signatory to the document. The language here goes much further and must be considered a significant win for the former Liberal leader.

The limited recognition of the province in these international fora did not resolve the constitutionally open abeyance of cultural duality as a basis for Canadian federalism. Officially, the federal government did not address the question squarely and not beyond the expanded role for the province within the delegation. Still, while not settling the abeyance, the symbolic power of the gesture was important to the people in Quebec, who appreciated this "Nixon going to China" moment, even if it was clearly not going to settle the issue once and for all.

6.4.2   Quebec "nation" motion

Outside of the province's inclusion in UNESCO, by far the most important federal accommodation of Quebec has been the formal recognition of Quebec as a nation inside of a "united Canada." Unlike the inclusion of Quebec at UNESCO, this motion arose unexpectedly and is evidence of the Conservative's willingness to manage the national question in Quebec in a flexible way and as changing conditions demand. Like the question of Quebec at UNESCO this represented a gesture to the abeyance of Canadian duality, suggestive that Canada is fundamentally a compact between two linguistic nations.

The decision to pass the resolution recognizing Quebec as a nation, traditionally anathema to Conservative supporters, was rooted in some tough political manoeuvering that began soon after the federal Conservatives took office. The situation arose in the context of the Liberal leadership campaign following the defeat and resignation of Paul Martin in January of 2006. During the Fête National celebrations in Quebec of that year, Liberal leader candidate Michael Ignatieff, in contrast to the prime minister, suggested that the Québécois formed a nation within Canada (Choudhry 2007, 2). Among other things this position allowed Ignatieff to distinguish himself

from his rivals for the Liberal leadership, Bob Rae and Stéphane Dion. Neither Rae nor Dion supported the idea of Parliament endorsing such a move and subsequently wrote articles attacking the plan on the basis that it risked reopening old debates that were better left untouched (Choudhry 2007, 2). Ignatieff's position was nevertheless expanded in his campaign materials later that year, calling for the constitutional recognition of the "national status of Quebec" (cited in Choudhry 2007, 2). The move was seen as both provocative and controversial, in part because it seemed to go beyond even past proposals for special recognition for the province. Writing in the *Globe and Mail,* Lysiane Gagnon fretted that Ignatieff was playing with fire:

> To make things worse, Mr. Ignatieff now uses the controversial concept of "nation," which is much more explosive than the relatively innocuous concept of "distinct society" contained in the Meech Lake accord. In French, the word "nation" is often used sociologically. But in English, it usually is a synonym for "country." Throwing this concept into the political arena would undoubtedly provoke a huge anti-Quebec backlash and a flurry of vicious anti-Quebec rhetoric – something that would provide fresh ammunition for the sovereignists [*sic*] (L. Gagnon 2006).

She ended the article by arguing that "Only someone who doesn't know much about Canada's contemporary political history could entertain the idea of walking into such a swamp" (L. Gagnon 2006).[54]

The situation was considerably exacerbated for the federal Liberal Party after its Quebec wing endorsed a motion that Quebec constituted a "nation" and required the party to consider the motion as part of the party program (CBC News 2006). The federal Liberals were put in an awkward position and badly divided (Choudhry 2007, 3). The motion was seized upon by the Bloc Québécois almost immediately, which saw considerable opportunity in the unfolding Liberal debacle. The BQ announced they would be asking Parliament to recognize that the Québécois formed a nation, forcing the opposition to either deny that statement at their own

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[54] The move garnered a vast amount of attention in the English Canadian media, most of it negative. For a selection of stories, see Choudhry (2007 notes 16 and 18).

political risk or recognize it and, implicitly, its underlying suggestion that Quebec should be independent.

However, recognizing the trap and forced into confronting the abeyance head on, the Conservatives moved to neuter the threat by rephrasing it in a way that would be less politically charged. The day prior to Bloc Leader Gilles Duceppe introducing his motion, Harper countered with a motion that would recognize Quebec as a nation "within a united Canada." The proviso was seen as a political masterstroke that overshadowed its political implications. Caught flatfooted, the BQ was forced into agreeing to the motion along with the other parties or risk denying that Quebec represented any kind of nation at all. The Liberal caucus was divided but more or less on board with the compromise, and the subject was dropped from their upcoming convention. It represented a complete reversal for the Bloc, however, which found itself completely outmanoeuvered.

But it was not without cost for the Conservative Party, either. To take such a step represented a big leap, given its political base and its history opposing any form of special status for Quebec. It's unlikely this motion would have been possible under either the Canadian Alliance or Reform parties. The divisions exploded into the public view with the resignation of Harper's Minister of Intergovernmental Relations, Michael Chong, who announced the day of the motion that he would be resigning from the cabinet because he could not support the cabinet's decision and had not been consulted either (CanWest News Service 2006). In his view, it espoused an ethnic nationalistic view of Canada that he simply could not accept.

Polling data show the motion was controversial in Canada, and that the public was deeply split along regional and linguistic lines. The motion was not particularly popular among Anglophones (Choudhry 2007, 34 note 17). But it was wildly popular in Quebec, and it was a serious reaffirmation of the Harper approach of allowing, along the edges, certain asymmetries in Canadian federalism when the questions were important enough to allow for some additional political space. The motion lacked constitutional status, and no additional powers came with it. But it was in keeping with what had been the thrust of reforms in Canada since 1995 – after all, distinct society had been recognized in the wake of the referendum by the government of Jean Chrétien. Furthermore, the Conservatives had already gone some way to permit a form of special status when the decision was made to give the Quebec government a voice at the UNESCO table

(something for which the Martin government had been earlier seriously criticized for suggesting) (Ryan n.d.). The benefit of this approach, at least from the perspective of the Conservatives, is that it suggested that there really was room for Quebec to maneuver within the confines of Canadian federalism.

6.4.3 Bilingualism for Parliamentary Officers and Supreme Court appointments

Another telling example of the federal approach arose over the controversy surrounding the appointment of bilingual Officers of Parliament such as the Auditor General, as well as Supreme Court judges. Arising from the question of duality, the derivative abeyance in this instance was representation in central institutions, specifically linguistic representation. Despite the minority status of Francophones in Canada, how equal are the languages in relation to one another in the national government? Assuming that the country is a contract of equals, then the languages should get equal treatment. Section 133 of the *Constitution Act, 1867* extended the use of English and French to the Parliament of Canada and Quebec, as well as to the courts of Quebec or any court established by the federal government (Canada 2012a, sec. 133; Official Languages and Bilingualism Institute, University of Ottawa n.d.). In general, this provision has been interpreted to mean that the laws and regulations promulgated from the federal Parliament and the debates have to be translated, and that the proceedings in the courts have to be bilingual if there is a need (Official Languages and Bilingualism Institute, University of Ottawa n.d.). But there was no constitutional requirement for the members of the Court or the officers themselves to speak both languages personally, although bilingualism had been one of the "practical considerations" taken into account when filling Supreme Court vacancies (as well as many parliamentary jobs) (Shoemaker 2012, 31).

The controversy arose following the appointment of the unilingual federal Auditor-General, Michael Ferguson, in November of 2011 (Fekete 2011). The appointment was instantly decried as one of insensitivity to French Canada and was pounced upon by the BQ as being a scandalous example of Anglo-Canadian deafness to the needs of Quebec. Ferguson's lack of language proficiency was all the more peculiar given that he had held similar positons of considerable responsibility in his home province of New Brunswick, the country's only constitutionally bilingual province. The incident dilated with the appointment of Michael Moldaver to the Supreme Court, who also could not speak French (CBC News 2011). In the latter case the

situation was complicated by the fact that there was already a unilingual judge on the Court from Manitoba, Marshall Rotstein, who at the time of his appointment had promised to try to learn French but had failed to do so (Cleroux 2011). In 2008 the NDP MP for Acadie-Bathurst, Yves Godin, had introduced a private member's bill (Bill C-559) that would have made bilingualism necessary for Supreme Court appointments, but it had been defeated (Shoemaker 2012, 30–1). The fact that there would now be two unilingual Anglophones on the Court brought about the angry intervention by the Barreau du Quebec which wrote an open letter opposing the move (La Presse Canadienne 2011).

Eventually, the government partially relented. Reportedly telling his caucus that the appointment of Ferguson was a "mistake," the government decided to heed internal pressures and adopt a private member's bill proposed by NDP MP Alexandrine Latendress that would mandate bilingualism for parliamentary officers (De Souza 2012; D. LeBlanc 2012b). The government drew the line at the Supreme Court, however, insisting that merit would be the only criteria that would be considered (D. LeBlanc 2012b; L. Gagnon 2011). While not completely ending the controversy the allowances that were made went some way to redressing the situation and arguably extended the spirit of section 133 to include the officers that serve in the federal Parliament, even if it was not done through either judicial interpretation or constitutional amendment.

6.4.4   Monarchial succession

The recent change Canada enacted over the order of monarchial succession has also been instructive for how federalist political actors have cooperated to keep the abeyance of Quebec's veto off the table.

There had for some time been a debate in the Commonwealth about reforming the order of succession to the throne to reflect the fact that, in contemporary society, an institution that privileges the first male heir over that of a female is sexist and outmoded. The prohibition on the marriage of the monarch to a Roman Catholic was similarly seen as problematic. As a result in 2011 an agreement was reached in Perth, Australia among Commonwealth countries that the order of succession should be changed to reflect contemporary norms so that the first born of either gender would be first in line to the throne. While supportive of the idea, Ottawa initially displayed no interest in introducing reforms in the near term. "I don't think Canadians want to

open a debate on the monarchy," Harper said at the time, "that's our position, and I just don't see that as a priority for Canadians right now" (Boswell and Mayeda 2011).

The issue took on some urgency following the announcement in London that the Duchess of Cambridge, Kate Middleton, had become pregnant. The announcement spurred the UK to take action to bring gender equality to the order of succession, which immediately became problematic for Canada on account of the "divided monarchy" the country shares with the UK and other members of the Commonwealth. The institutions are technically separate and have been since the *Statute of Westminster, 1931.* Unless Canada took similar action and changed its laws there was a chance that, in the event that the Duchess had a girl, Britain and Canada would have two different heirs to the throne. However, since reforms to the monarchy are subject to the unanimous amending formula in section 41, it would appear that this would require wide consultation and consent of each provincial legislature.

Of course, despite wide support for the initiative and the clear constitutional process to bring it about, no such process occurred. In keeping with the tendency of the federal government to ignore the provinces it decided to act unilaterally to make the changes in the order of succession as well as end the prohibition of the sovereign marrying a Roman Catholic. To do so it quietly passed the *Succession to the Throne Act, 2013* which came into effect in March of 2015 (Canada 2015). The act is incredibly brief, running less than a page. The longest part is the preamble, where it takes note of the 2011 Commonwealth Conference, submits that Canada must make the change independent of Britain under the *Statute of Westminster, 1931,* and observes the change has been made in London. Its only substantial provision can be found in section 2 (out of a total of three), where it merely reads:

> The alteration in the law touching the Succession to the Throne set out in the bill laid before the Parliament of the United Kingdom and entitled *A Bill to Make succession to the Crown not depend on gender; to make provision about Royal Marriages; and for connected purposes* is assented to (Canada 2015, sec. 2).

Ottawa took a number of interesting and controversial positions to support its authority to pass the bill without provincial consent. The first was that the act was in keeping with the convention provided for in the preamble of the *Statute of Westminster, 1931,* requiring all the Dominions' consent for changing the royal titles and order of royal succession. Furthermore, it argued there

is a "principle of symmetry" between Canada and Great Britain regarding who sits on the throne arising from the *Constitution Act, 1867*'s proviso that the country is federally united under the monarch of the United Kingdom. Two other arguments were made as well, namely that the rules of succession were in fact not part of Canadian law at all, but were British law alone. Therefore it is up to the British to decide who sits on the throne, not Canada, which had really no other choice but to simply "assent" (Lagasse and Bowden 2014, 20). This argument is dubious, as it assumes that British law still prevails in this case despite the constitutional reforms of 1982.

The decision to proceed unilaterally was in keeping with the desire of Ottawa to avoid anything resembling multilateral constitutional politics which could damage it politically. Furthermore, it was clear that there was little interest in the rest of the country for having a serious discussion about it either. Notably the Leader of the Opposition, the NDP's Thomas Mulcair, was almost silent on the issue. Patrick Lagassé, a law professor, noted that none of the federal parties saw "this as fight worth having" (McGregor 2013). The provincial response was also muted. In a response to a query from CBC News, a spokesman for the Ontario premier acknowledged that there had been no consultation at all from Ottawa, but that this was not really a problem. "We have not been contacted to date and Ontario has not considered the question of the appropriate process to change succession laws in Canada. That said we are not aware of any reason why we would oppose changes to succession laws that are necessary to keep Canada in line with changes adopted by the British parliament" (McGregor 2013). Some provinces even shared Ottawa's view; there were reports that Saskatchewan and at least another Atlantic province supported Ottawa's position that they need not be consulted (McGregor 2013).

Quebec, however, was not one of them, and superficially one would expect that this would be a much bigger deal in Quebec City than it has been. The position of the Quebec government is that this *is* a matter that requires their consent. But there has been little controversy. The Quebec Liberals under Phillippe Couillard have tried to avoid putting the matter on the political agenda and instead appear to have been dragged into what little involvement they have had. In the face of Quebec City's unwillingness to challenge the act, law professors Patrick Taillon and Genevieve Motard independently brought a court case to challenge the constitutionality of the law on the basis that it required universal provincial consent, at which point the Quebec Attorney

General decided to intervene (Marin 2015). [55] There has been little attention paid to it by the government, however, and currently it is simply a matter before the courts. The provincial silence is also perplexing. While some have been suggestive of support, most are not on the record at all. Lagassé noted that the provinces should consider the implications of allowing the federal government to act unilaterally in this way, because they might cite it as a precedent in the future (McGregor 2013).

More interesting has been the conduct of the PQ. The act was passed during the tenure of the PQ under Pauline Marois, and it should be expected that a unilateral change to the constitution without the consent of the province should be a much bigger issue. And yet the party demurred – indeed the PQ did not make its position clear for a while after it emerged. There were those within the party who thought that this was an issue that had strategic value and should be exploited for it. Henri Brun, a noted sovereignist academic, suggested at the time that this might be fertile terrain to challenge Ottawa for acting unconstitutionally and without regard for Quebec or any of the other provinces (Maioni 2013). The PQ failed to do so, even as it was provoking Ottawa on a number of other constitutional questions such as the division of powers and the spending power.

Superficially it is a puzzle, but one that is fairly easily resolved in light of the PQ's own electoral calculations about this *particular* topic. Usually a fight about the monarchy would suit the PQ ideally but part of the answer here undoubtedly lies in the substantive nature of the change. The reform has been framed as one that is at root more about gender equality than it is about the proper use of the amending formula and the need to get Quebec's consent to constitutional change. In assessing the electoral gains to be had by challenging Ottawa, a balancing must be had between soliciting outrage on the one hand against appearing misogynistic and out of touch on the other. The problem was clearly compounded by the fact that the PQ was headed at the

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[55] Another court case was brought in Ontario challenging the law on the basis that it would still prohibit Catholics from ascending the throne entirely, even if the ban on the Crown's marriage to one was being removed: see *Teskey v. Canada (Attorney General)* (2014). The appellant, a Roman Catholic, argued this violated his equality rights under the *Charter*. However, the Court upheld a lower ruling and found that the man had no standing to bring the case and that the matter was not justiciable because it tried to use one part of the constitution to strike down another (see also Jones 2014)

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time by Quebec's first female premier. To oppose the change would have put the party in a very awkward position. Thus what's usually advantageous ground for the PQ was actually quite limiting for them simply because of the substance of the issue.

6.4.5   The decline of Summit IGR

Finally, there is abundant empirical evidence to show that the decline in Summit IGR has not just continued under the Conservatives but intensified. Table 5.1 shows that since hitting a peak in the early 1990s there has been a precipitous decline in the number of First Ministers Meetings (FMMs). There has not been a formal FMM since at least 2009 and there appears little interest in reviving the process as it once was (Interview with McArdle 2014). Nor has the federal government shown any interest in the Council of the Federation, and has tried to distance itself from it. (The Martin government was to some extent an outlier in this regard). Ottawa is thus moving against the demand of the provinces in the aftermath of 1995, for closer consultations and better management of national issues.

Figure 5.1: First Minister's Meetings over time, 1906-2015

(Modified from Brooks 2012, 220; see Canadian Intergovernmental Conference Secretariat 2004 for original source material).
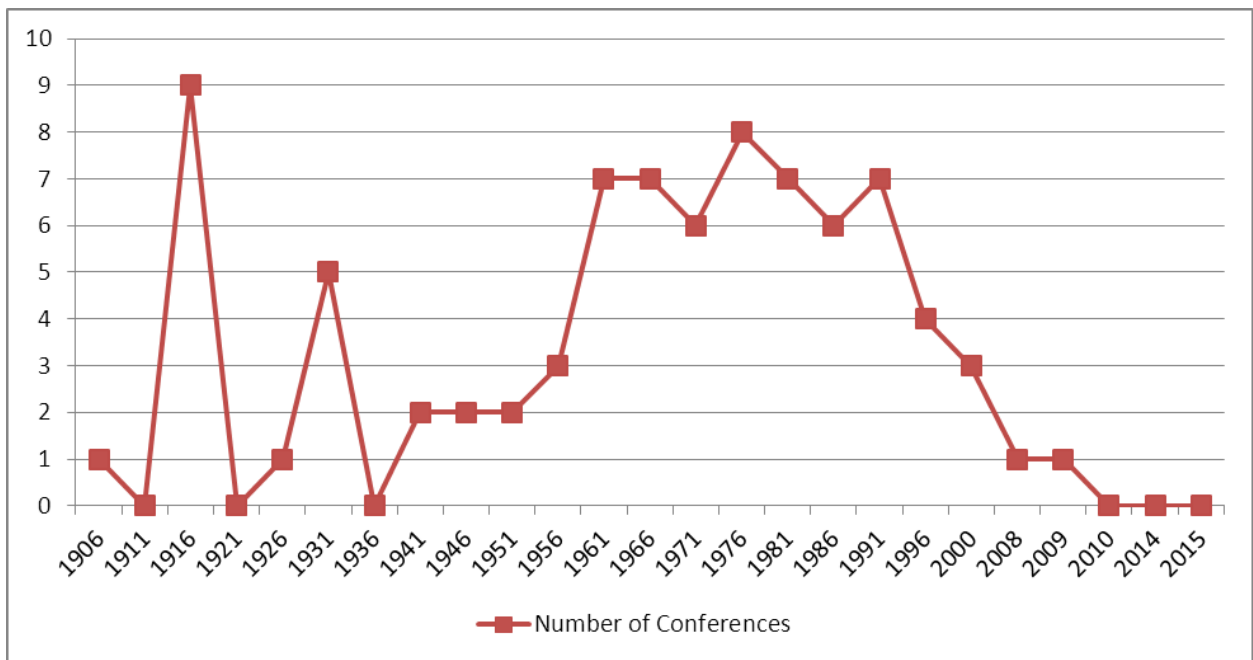
Ottawa's disengagement was widely panned in many of the interviews that were done for this project. At the same time, nearly everyone interviewed understood the reasons behind Ottawa's decision not to engage in Summit IGR: that is, the opportunity it allows for the provinces to "gang up" on Ottawa, the perennial demands for more money, the tendency of the meetings to highlight intergovernmental conflict. Still, in one interview Jim Eldridge, a long-time advisor to the Manitoba government, captured the frustration among the provinces brought on by Ottawa's refusal to meet with them:

> The biggest difference I see, now, is that there is virtually no dialogue, multilateral dialogue, between the federal government and the provinces at the highest levels. There's bilateral dialogue, and occasionally as happened in the recent Canada Job Grant negotiations or discussions, the provinces allied themselves and forced the federal government to sort of deal with them collectively through emissaries. But there hasn't been a first ministers meeting since 2009 and the general view is that that is no way to run a federation…[P]ost '95 the federal government pretty much started winding down the formalized first ministers meetings and so on, and there hasn't been, believe it or not, there hasn't been a formal meeting of IG deputies with the federal deputy since 1997 (Interview with Eldridge 2014).

This analysis exaggerates the situation somewhat, as Eldridge qualifies it in noting that the deputies have been in the same room and attended the same events, and there is coordination at lower levels. But that the formal structures that had existed are in decline. The erosion of the IGR institutions has been noted by several people interviewed for this project (Interview with Cappe 2014; Interview with A. LeBlanc 2014). Former Harper Chief of Staff Ian Brodie recounted in an interview that IGR machinery was never seen as a priority for the Harper government. "Remember, we never even appointed a very senior Cabinet level minister or anyone to run the government's position [on IGR]," recalled Brodie. "There was that minister, Chong, first, and then Peter Van Loan, but really there was no high level federal direction" (Interview with Brodie 2014). Instead, to the extent that the federal government wants to meet with the provinces, it only happens bilaterally, and largely out of sight. Additionally, even at the provincial level many of the IGR deputies have been given other responsibilities that overshadow their responsibilities in this area (Interview with Eldridge 2014).

Perhaps tellingly, the decline of importance of these meetings may have coincided with their greater democratization since Charlottetown when the process was widely derided as elitist and anti-democratic. In 2005 Julie Simmons wrote a dissertation in which she argued that interest groups played an important role in the Charlottetown process after the debacle of Meech Lake and continued to be critical players in the IGR framework as late as 2005, albeit in a number of different forms (e.g. Simmons 2005, 29–38). Since the responsibility for the processes of executive federalism have increasingly moved to the political staff and in particular the various cabinet secretaries, Gregory Inwood et al. have argued that open federalism does not extend to better engagement with the public (Inwood 2011, 74). While there have been some efforts at raising the level of accountability in the process in the sense of increasing the transparency of which government is doing what, open federalism has generally been more about maintaining the level of "government-to-government interface" at the highest level rather than seeking more public input. The relevant links are more closed, more political, and more fluid than in the past. As one example of this, Jim Eldridge described how the federal Cabinet Secretary has begun to play an important role in maintaining the relationships among governments at the expense of the traditional IGR machinery:

> The federal Cabinet Secretary and Clerk of the Privy Council… has maintained something that has existed now for more than ten years which are regular meetings of clerks. So there is a regular set of meetings of the federal, provincial and territorial cabinet secretaries. They meet at least twice a year and do occasional video conferencing and teleconferencing and they have become a very important instrument for multilateral, intergovernmental discussion. It's kind of formal and informal, and in some ways has replaced the intergovernmental deputy, F-P-T network. The federal clerk for these discussions is the "fed-prov" deputy and they deal with very high level stuff like governance best practices, and security issues, and stuff like that. But it is working, it is very positive, it is well regarded by the cabinet secretaries at all levels of government and so it is a new approach and the beauty of that is that these are the people in the provincial and federal governments who have the closest access to the first ministers (Interview with Eldridge 2014)

Most interviews suggest that the *need* for intergovernmental coordination has not declined, but rather there has been a rejection of the traditional *process*, the very public and open Summit IGR

that characterized earlier eras. Instead there has been an increasing use of the "back channels" where needed and less involvement by the prime minister in visible conferences with other premiers:

> You can imagine that there are huge national security issues that require good regular communications and the ability for government A to talk to government B on an urgent basis if necessary, and this network encourages that but it also encourages good discussion on governance improvements and everybody trying to provide better public services at reduced cost and it's doing some quite good stuff (Interview with Eldridge 2014).

Alfred LeBlanc, the Assistant Secretary to Cabinet for Federal-Provincial-Territorial Relations in Ottawa, acknowledged that the decline in Summit IGR clearly had some benefits for Ottawa, but felt that work could still proceed effectively without the political visibility.

> There is a lot of engagement over all kinds of files at many different levels, some of it at the officials' level, and also it tends to take place at what makes sense in terms of sectoral focus. So they [i.e. officials] may meet on infrastructure, they may meet on labour market agreements and labour market training, they would meet federally provincially, at first at the officials' levels, making sure you know what could possibly work and [to understand] the concerns of provinces. And then eventually you would meet at the lead-ministerial level. And that tends not to produce the same kind of 13-against-one broad demands. So it might produce a gang up – "we don't like the Canada Job Grant the way you have designed it, we want it done differently" – but it is not the same dynamic as a first minister's meeting where the Prime Minster is really much more exposed (Interview with LeBlanc 2014).

He also took slightly different take on the question of capacity reduction, suggesting that it was also just a reflection of the fact that there was less to do in intergovernmental relations than in the past. As well, the centralization of power in the PMO was also connected to the government's overall deficit reduction strategy:

There's a logic to what's been done. It is partly a reduction of capacity but also a reorganization of how these issues are managed within the Prime Minister's department. And in a longer term perspective this place and this function has gone through big cycles. So you know this was a big place in 1993, 1994 and in all the constitutional era. It has not always been this big, in fact at some points it didn't exist. So, yeah there has been a reduction in capacity but to some extent you could say well, I think most people's assessment of federal-provincial relations is that relative to the 60s, relative to the 70s, relative to the 80s, relative to half of the 90s, [they] have been in a reasonably harmonious state with low risk, low engagement – maybe too low for some people's interests – but it's not a boom time for federal provincial relations (Interview with LeBlanc 2014).

Taken together, we see a smaller shop in IGR, with more political management of controversial issues at the top to ensure less visibility and fewer meetings with the premiers that could get out of hand.

6.5   Quebec Governments

6.5.1   The Harper-Charest axis

As was canvassed in the previous section, the policy of the Harper government towards Quebec was obviously helped by the presence of the federalist Jean Charest until his defeat in the provincial election of 2012. In Charest, Harper had not only a federalist but someone who was willing to put aside constitutional abeyances in favour of other policy priorities. Part of his willingness to do so may be attributable to the fact that Charest had himself been a leader of the old Progressive Conservative party in Ottawa and agreed with Harper on a number of social and economic issues. One of the signal achievements of the Harper government, the Comprehensive Economic Trade Agreement (CETA) that was signed in August of 2014, was strongly supported by Jean Charest and has been more broadly supported by nearly all of Quebec's political parties (Dougherty 2013).

The Harper government had the good fortune to come to power after Jean Charest had already been elected. The shifts Charest had undertaken in recasting the federation in asymmetrical terms and as economically valuable had already borne fruit in both the COF and Quebec's relationship

with Paul Martin. With their promise to allow Quebec a seat at UNESCO, the Conservatives could fit in well with where the Liberals already were under Charest's leadership. Charest found in the Harper government's commitment to respect the division of powers the space that was needed to show a flexible federalism. At the same time, in the four Quebec elections that were fought between 2006 and 2014, the Liberals stayed away from the national question except to paint the PQ as dangerous for wanting to reopen it. They offered almost no proposals or promises on abeyances or for changing the constitutional status of the province in Canada beyond a traditional commitment to cultural dualism. In the party's 2007 working document, constitutional reform was treated lightly. There was a cursory mention of the importance that the party attaches to belonging to Canada, for example (Parti Libéral du Québec 2007, 4, 10). Canadian federalism was discussed under Commitment 29, in which the party promised in a general sense to defend the autonomy of Quebec and work to strengthen it in Canada. Among the specific commitments that it made, tax policy came first, with a promise to rectify the fiscal imbalance (Parti Libéral du Québec 2007, 70). Beyond the pledge on the fiscal imbalance it also promised to contribute to the functioning of the Council of the Federation, promote Francophone culture and identity in Western Canada and in non-Quebec Francophone communities, and to seek an administrative agreement on culture and communications with the federal government (Parti Libéral du Québec 2007, 701).The one area where the document does suggest meaningful constitutional renewal is when it comes to the appointment of the Supreme Court judges, where it promises that it will work to ensure that the province has more say. Notably however, it does not couch this promise in expressly constitutional terms, thus adhering to a vision that is in keeping with the 2001 Pelletier Report's emphasis on administrative and workable federalism (Parti Libéral du Québec 2007, 71).[56] Nor was this idea aggressively pursued once in power.

There does not appear to have been anything resembling a common or formal approach, however, in the sense of the federal Conservatives or the provincial Liberals discussing constitutional issues like Supreme Court appointments. Rather they each avoided subjects like

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[56] This was the 2001 document prepared by Pelletier before the Liberals had been elected and he became the intergovernmental affairs minister entitled *Quebec's Choice: Affirmation, Autonomy and Leadership*. The PQ had little to say in this election, beyond promising the adoption of a constitution for the province and to claim additional legislative powers (Parti Québécois 2007, 8). This fact is not all that unexpected as it is unlikely that any decentralization of powers would be considered acceptable. Rather the PQ promised to essentially begin governing as a party in the lead up to what it felt would be a successful "Yes" vote.

the composition of the Supreme Court for their own reasons. In an interview, Ian Brodie recounted that there was more of a mutual willingness to avoid constitutional questions of all sorts and that:

> There was never any agreement or any "grand strategy" on these questions or anything like that. It was fine if you wanted to meet in some hotel room somewhere, but he [Charest] didn't want to be seen working with the federal government in any real capacity. He didn't really want to be seen working with us (Interview with Brodie 2014).

Brodie's impression is understandable given many of the differences that the two governments have had on policy, in particular on climate change and the environment, something that Charest himself acknowledged (Interview with Charest 2014). Nevertheless, Charest was supportive of other initiatives that otherwise played to his federalist base, and in an interview spoke of his private support to Harper for the parliamentary motion recognizing Quebec as a nation (Interview with Charest 2014).

After winning only a minority government in the 2008 election, the Liberal Party returned to economic themes. In two documents the Liberals played on the emerging financial crisis to insist that they were the ones who were most trustworthy on the file (Parti Libéral du Québec 2008b; Parti Libéral du Québec 2008a). Constitutionalism and federalism were essentially dropped from both of these documents, with little or no suggestions on this front. The relative absence of both topics comparted to previous elections, continued into 2012, with both campaign documents focussing on economic issues and "full employment" playing a larger role (Parti Libéral du Québec 2012a; Parti Libéral du Québec 2012b). The election in 2012 was also focused heavily on the development of the resources of the provincial hinterland, the "Plan Nord" was designed to reassure a population that was seriously worried about its economic future. The document also made essentially no mention of the federal government or of Canada in general.

Charest stayed away from constitutional abeyances for the remainder of his premiership. The additional money from Ottawa was enough for the provincial Liberals to claim that they had "solved" the problem of the fiscal imbalance, which was central to Charest's early relationship with Ottawa. The later Charest government agenda was dominated by domestic issues that did not touch the national question and his agenda became increasingly overshadowed by accusations of government corruption that culminated in the calling of the Charbonneau

commission. There were also large scale protests by student groups on the cost of education that culminated in the *carré rouge* movement. In 2011, although Charest had endorsed the idea of having Quebec recognized as a nation in the Canadian constitution, he admitted that he did not see reopening the constitution as being "on the radar" (The Canadian Press 2011).

6.5.2   The PQ government 2012-2014

Things changed with the election of Pauline Marois and the Parti Québécois government in 2012 (CBC News 2012). That election removed one of the bedrock actors who had been contributing to the stability of the country since 1995. With it, the uneasy alliance the Government of Canada had with the Government of Quebec necessarily collapsed.

6.5.2.1   Election

During the 2012 election campaign the PQ made it clear that the party wanted to put tricky constitutional questions squarely on the agenda, and linked doing so with the success of the national project. "The strategy of the Party Québécois, if it wins the upcoming Quebec election, is to stage a series of constitutional and financial battles with Ottawa – and to use any defeat to help build its case for sovereignty," a *Globe and Mail* reporter noted dryly in the run-up to the election (D. LeBlanc 2012a). Bernard Drainville, who at the time was the constitutional affairs critic for the PQ, suggested that there might be a referendum, not on sovereignty *per se*, but rather on the constitutional demands for more power from Ottawa. "I don't see how we can lose…If Quebec wins, it becomes stronger. If Quebec is rebuffed, the demonstration is made that there is a limit to our ability to progress in this country" (Bernard Drainville quoted in D. LeBlanc 2012a). In particular, unemployment insurance was cited as a power to be repatriated, but additional powers over culture and communication and regional development were sought (Parti Québécois 2012, 23; D. LeBlanc 2012a). The party also wanted the provincial language regime to apply to federally regulated industries, enlarge the range of businesses to which it applied, as well as limit English in the school system (Parti Québécois 2012, 9; D. LeBlanc 2012a). Until such time that a referendum could be held, the PQ suggested that the party would try to govern as an independent state, through a vaguely defined form of "sovereignist governance" – the idea that the PQ would govern simply as though the province was already independent and would take on Ottawa whenever it got in its way. This strategy was couched in

terms of defending Quebec from federal intrusion but was really aimed at relighting the spark in the movement.

More important was the emerging shift to an ethnic nationalism that was far narrower in outlook than previous iterations of the PQ government. The idea of the "*nous*" was obviously not new in Quebec politics, but the overt appeal to the idea as a basis for identity legislation marked a break from the essentially civic nationalism that had characterized the PQ up to that point. There was some concern about the change during the campaign, especially surrounding the emphasis on a proposed new secularism charter, but it all appeared rather vague at this point (Parti Québécois 2012, 9). Ultimately the PQ got elected with only a minority position, and nearly tied the vote of the Liberals (CBC News 2012).[57] The close result, coming as it did after such an extended Liberal mandate and considerable social unrest in the province in the run-up to the election, was seen as a reflection of the population's wariness about the PQ and what it might do regarding Quebec's future in Canada.

6.5.2.2   Harper, Marois, and "les vieilles chicanes"

The election of Pauline Marois in 2012 provided an opportunity to examine what effect the positions of the PQ would have on the federal parties and other actors in the system. The government was not long lived, lasting only 19 months, but there were a number of instructive lessons that could be found in how the federal government managed the relationship and responded to what the Marois government was doing. Marois was always constrained in what she could do, given both the minority context of the government as well as polls that suggested that reopening the sovereignty debate was not terribly popular. Nevertheless, the PQ made a number of attempts to reopen the subject and there was a range of things Ottawa could have done to respond. The choices made in order to reopen the sovereignty issue were revealing. While the PQ was in power, there were two particular developments that directly raised the question of Quebec's constitutional status in the country, beyond mere rhetoric, that demanded a response

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[57] The distribution of the 125 seats was 54 for the PQ, 50 for the Liberals and the Coalition Avenir Québec with 19 seats. The final two were for the upstart Québec Solidaire (CBC News 2012). In terms of voting percentages, they were 31.95% (PQ); 31.20% (PLQ); 21.05% (CAQ).

from Ottawa. The first was the request for the transfer of jurisdiction to the province of unemployment insurance, and the second was the "Charter of Quebec Values."

Coming to power on the heels of the social unrest that had followed Jean Charest's efforts to increase tuition fees, the PQ was headed by a number of clear hardliners. Pauline Marois had been in provincial politics for 30 years, dating back to the Lévesque government. Among her most trusted advisors were the well-known former academic and activist Jean Francois Lisée as the Minister of International Cooperation and Bernard Drainville who was appointed the Minister of Democratic Institutions and Active Citizenship. The PQ was very much a government in a "hurry" to get independence. The government began by proclaiming that it would follow through with "sovereignist governance," a vague philosophy that essentially meant acting as though the government was independent until it ran up against the institutions of Canadian federalism." Unsurprisingly, it was seen by many in the media as being something of a stunt (Marissall 2013).

In a practical sense, the PQ strategy against Ottawa began with an attack on the division of powers. The PQ called a commission into unemployment insurance, with the aim of having it repatriated to Quebec. The jurisdiction for unemployment insurance had been transferred to the federal government in 1940, but Quebec City took the position that it should be returned. The government asked former BQ leader Gilles Duceppe and economist and former PQ MNA Rita Dionne-Marsolais to preside over a commission to recommend whether it should be repatriated to Québec City (La Presse Canadienne 2013). Alfred LeBlanc observed that the federal government was sensitive to what it thought were some clear provocations by the PQ during the time it was in office:

> [T]he PQ did seem to be trying to provoke the federal government in the lead up to the election. Part of the focus seemed to be around legal or constitutional issues. So we needed to be particularly careful in how we managed those provocations and we didn't want to play into their strategies. They also used their Charter [of Values] partly […] as a wedge issue in Quebec but also as a provocation to Ottawa, and it would have been great for the PQ if Ottawa had taken a particularly bullish stance (Interview with LeBlanc 2014).

The federal government never took the bait. LeBlanc offered a sense of why doing so was never in the cards:

> You know you raise the recognition question, and you fail to deliver, that creates a sentiment of rejection which is very supportive of support for sovereignty in Quebec. So I think governments have learned, particularly with Chrétien and continuing with Prime Minster Harper that it is important to avoid giving the PQ a high profile rejection (Interview with LeBlanc 2014).

Instead Ottawa responded along two lines. The first was to take the strict position that it did not have a mandate, or the will to dismantle the federation. Ottawa found that it did not have to continue along a devolutionary path, that it actually did have the political capital to reject the demands. But the rhetorical shift was also interesting. Following the path that had been pursued to this point, Harper refused to be pulled into the "old games," or *la vieille chicane*, of previous eras. It was a phrase that Harper had been using for several years, including in the run-up to the previous federal election (Lavallée 2011). And the people of Quebec did not put him under any pressure to do so either.

But the action that will forever define the Marois government will be its secularism charter as proposed by Bill 60 (*Charte de la laicité*). Among other things, the bill sought to establish that Quebec was officially secular and neutral towards religion and reemphasized the equality between men and women (National Assembly of Quebec 2013, preamble, 5). The bill proposed reforming the Quebec Charter of Rights and Freedoms in furtherance of a plan to limit the types of clothing and symbols that could be worn by state employees, and specifying that the latter must maintain a position of religious "neutrality and reserve" when delivering state services (National Assembly of Quebec 2013, sec. 3, 4). The bill's prohibition on ostentatious religious garments would have similarly applied to the public when they sought services from the state (National Assembly of Quebec 2013, 2, explanatory notes). The most dramatic image of Bill 60's unveiling were several panels of people in religious dress, clarifying that the hijabs, kippas, burqas, turbans and large crosses would not be tolerated in state institutions but less ostentatious symbols – a small cross or Star of David ring – would be fine. The bill also left vaguely defined legal space for the preservation of the heritage of the province, which was obviously Catholic. In particular, section one specified that:

> In the pursuit of its mission, a public body must remain neutral in religious matters and reflect the secular nature of the State, [*sic*] while making allowance, if applicable, for the emblematic and toponymic elements of Québec's cultural heritage that testify to its history (National Assembly of Quebec 2013, sec. 1).

Among the more prominent exceptions that were to be allowed was the crucifix in the National Assembly. While the PQ was accused of a double standard, the party nevertheless insisted that it was necessary to preserve the unique heritage of the province.

The Charter was immediately attacked from many quarters. Most of the criticism was levelled at the perception that the proposed law was little more than a racist and ethnocentric exercise that used the guise of secularism to marginalize and isolate minority religious communities. The provincial law society, *La Barreau du Québec*, condemned the plan as being clearly unconstitutional, as did a number of prominent legal scholars and the province's Human Rights Commissioner (La Barreau du Québec 2013; Fine 2013; Banerjee 2013). Nevertheless the Charter remained quite popular with the public, with polls consistently giving it more than 50% support, especially among Francophones (CTV News 2014).

The Charter was not as obviously an attack on the Canadian federal system as was the call for repatriation of unemployment insurance, but it had clear constitutional implications nevertheless. It appeared at odds with several provisions in the Canadian Charter of Rights and Freedoms, in particular sections 2, 7 and 15, on religious expression, fundamental justice and equality respectively. Since the Quebec Charter of Rights and Freedoms was to be reformed under Bill 60 to reflect the Charter's vision of secularism, a collision with the federal instrument would have been inevitable. More generally the Charter was not in keeping with the constitutional philosophy of multiculturalism in Canada surrounding the accommodation of religious minorities. Canada has never enforced state neutrality in the same way as was proposed by Bill 60; while it has had a strong multicultural tradition since the 1970s it has never had an American style anti-establishment clause or a clearly defined position on the state's attitude towards secularism. In directly stating that the state was religiously neutral, and placing corresponding obligations on both state employees and citizens to uphold that principle in their dress and actions in the public sphere, the PQ took inspiration from France and other continental countries which have addressed this question very differently from its Anglo-American counterparts.

The Charter clearly implicated a number of constitutional abeyances in Canada, including the rights of French Canadians to define their society without interference from the rest of the country, the use to which certain key federal powers could be put, the question of judicial supremacy, the contradictions between parliamentary sovereignty and federalism, the status of Quebec, and the protection of rights (Thomas 1997, 19). At first, the PQ equivocated on whether it would use the notwithstanding clause if Bill 60 were struck down in court. The PQ claimed that the legislation was constitutional. Some evidence was reported in *La presse* that the PQ was hoping that the project would be struck down by the courts, and thus set up a battle with Ottawa (Marissall 2014). This judicial possibility served as a deterrent to using section 33, in addition to avoiding any suggestion that it was in any way illegal.[58] Eventually, however, the government clarified and said that it *would* invoke section 33 in the event the Charter was struck down (Postmedia News 2014). Marois defended her right to use section 33 as well as the clause itself, arguing that it was there "to permit its societies to adopt laws and conduct politics that respect who they are and that completely respect the majority for example…It is in this sense that we must not be afraid of this clause or demonize it" (Chouinard 2014).

The Charter of Values did finally appear to be a bridge too far for Ottawa and the Charter began to lure the government of Canada into a debate with the PQ on the fundamentals of the bill and its approach. But the reaction was calculated, circumspect, and slow in coming. Harper eventually criticized the Charter, suggesting that it was "not going anywhere" (The Canadian Press 2013). More substantively, and after the debate was well under way, the federal Department of Justice made it clear that the project, if passed, would be challenged in the courts (A. Woods and MacCharles 2013). This decision by the Department of Justice showed that there were limits to what the federal government would accept. Even so, for the most part the federal government decided that it was best to remain on the sidelines and insist that the controversy surrounding the Quebec bill was essentially a local political debate. It was left as much as possible to Quebecers to sort the debate out without the interference of the federal government. Furthermore, relegating any possible challenges to the project to the judicial sphere was in

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[58] The PQ denied this while the Liberals insisted that the approach was almost "Machiavellian" (Postmedia News 2014).

keeping with the approach that the Harper government had always taken towards tricky constitutional questions – refuse to get into a public argument and let the lawyers sort it out.

Whether this approach would have been ultimately successful will never be clear, of course, because the PQ was defeated in the subsequent election before the bill could be passed.

6.5.2.3   Defeat

The PQ was defeated soundly in the general election of 2014. There had been some polling in the run-up to the calling of the election that the PQ was rebounding in popularity (Salvant 2014). However, that evaporated over the course of the campaign, and not even the intervention of media mogul Pierre Karl Peladeau could arrest the slide for the PQ, for which he may have been partially responsible in the campaign. The party ended up pulling only 30 seats to the Liberal's 70, with a stronger voting difference as well (41.52% to 25.38%, respectively). The CAQ did reasonably well, gaining 27.05% of the vote but which only translated into a disappointing 22 seats. Québec Solidaire gained a seat to end up with three with a little over 7% of the vote share (Ballingall 2014).

The defeat of the PQ was widely attributed to the focus that the party brought to sovereignty issues. A Léger poll conducted during the campaign was suggestive of the lack of enthusiasm that the population had for sovereignty. A full 69 percent of the respondents said that they wanted less talk about sovereignty during the campaign (D. LeBlanc 2014a). Conversely, when asked about the issues that mattered to them, respondents played much more emphasis on jobs (85%), health care (84%) and public finances (77%). Moreover there was a clear 54-29 percent split in favour of the "No" side in the event of a referendum (D. LeBlanc 2014a). A similar poll done by CROP for the CBC in March during the campaign found that 61% would oppose secession, while 39% would vote "Yes" (CBC News 2014; see also CROP 2014).

6.5.3   The Couillard arrival

In contrast to the PQ, the Quebec Liberals campaigned on the restoration of stability. Running under the slogan "*Ensemble, on s'occupe des vraies affaires*" (Together, we will take care of the real business) Liberal leader Phillipe Couillard essentially argued that the national question and that of identity should be shelved in favour of jobs, economic growth, and getting control of public spending. The Liberal Party program made no mention of the constitution at all except for

its opposition to Ottawa's proposed national securities commission (which it felt was in its sole jurisdiction and which would be affirmed later by the Supreme Court), and otherwise suggested that cooperation with the federal government was desirable (Parti Libéral du Québec 2014, n.p.).

This was met with considerable relief in Ottawa, although as Alfred LeBlanc pointed out a Liberal victory in Quebec comes with its own challenges. There is a trade-off working with either party:

> Much of what [the PQ] do - and I don't think many of them would disagree with this – but a good number of things they do is designed to show that Canada does not work. And so at one level it's kind of easier for Ottawa to deal with a PQ government because they can say "No", just "No, we're not going to do that because your ultimate purpose is just to demonstrate that Canada doesn't work" (Interview with LeBlanc 2014).

There does appear to be the possibility of tricky constitutional abeyances returning to the top of the political agenda at the moment, however. Couillard's government may not be as committed to keeping the constitutional issue closed as much as was that of Jean Charest. Couillard has stated on several occasions that he thinks that Quebec should sign the constitution, ideally before the country's 150th birthday (The Canadian Press 2014). It was a suggestion that he made during the leadership race to replace Charest, but it received immediate and negative reactions from the press and from the opposition PQ (Bourgault-Côté 2013; The Canadian Press 2014). Couillard suggested it again at an event to commemorate the 1864 Charlottetown conference, which was also attended by the prime minister. However, the suggestion was shot down immediately by Ottawa, and a spokesman for Harper stated bluntly that the government has "no intention of re-opening the constitution" (The Canadian Press 2014). For his part, Couillard has backed off.[59]

Furthermore, as part of the celebrations commemorating the 1864 conference Jean-Marc Fournier, the Intergovernmental Affairs Minister for Quebec, set out the government's position on constitutional reform in a speech that illustrated the priorities of the government. First, he suggested that constitutional topics were no longer taboo, and that they could be discussed. But

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[59] The Quebec Liberals have also decided to put forward another, watered down version of the values charter. While the details are unclear, it remains to be seen how much of it will resemble that of the PQ's charter (CTV Montreal 2014).

he followed immediately with the proviso that new proposals would not be coming from Quebec City, rather the province would wait for offers from the rest of Canada. More substantively, in the third part of the speech he suggested that the fiscal imbalance was returning as an issue, and that this would be more of a problem for Quebec in the coming years (J.-M. Fournier 2014).

This message remains in the same vein as what the PLQ has been saying for some time. If this is the direction that the government would like to take, it keeps the focus squarely on fiscal and administrative issues while doing little to disturb the status quo. In an interview, Alain Noël suggested that the Couillard government's position was just fresh enough for the party to be accepted without seriously changing direction:

> It's an interesting position because it frees them from the "fruit is not ripe" metaphor [for changing the constitution] by saying that we think that it should be discussed but that we are not going to discuss it. We are going to wait for proposals knowing full well that they will not come. And then it leaves the fiscal imbalance as the more substantial question that has to be addressed, because that is going to be a concern for all provinces in the coming years. Probably I think that he laid out the position of his party for the coming years. It is rather consistent with the past with a little twist (Interview with Noël 2014)

Overall, however, at the moment the Quebec Liberals appear to be nothing less than enthusiastic federalists. Couillard seems more than willing to put an end to "federalism with a footnote" (Noël 2000). While it is still early, he has appeared much more willing to engage with his provincial counterparts (Pratte 2014b). He signed on to an intergovernmental agreement for the bulk purchasing of medicine, which previous Quebec governments had refused to do (Pratte 2014b). Recently, he and Ontario Premier Kathleen Wynne agreed to work jointly in an (somewhat ill-defined) central Canadian alliance, covering everything from energy policy to the environment (Taber 2014). Couillard claimed it meant that the two provinces are "back to being a very important block of influence in this country" (Taber 2014). It is too early to suggest that the historic isolation of Quebec in the country is coming to an end, but if so it has been brought about without significant constitutional change.

6.6 The Court

To the extent that Stephen Harper and his government addressed the abeyances at the heart of the constitution, nearly all of them have taken the form of court cases. In this sense abeyances have been somewhat depoliticized by the Court as they are abandoned by political actors. This strategy has avoided the problem of "linkage" that is so common in past constitutional discussions (Cameron and Krikorian 2008).

In this period the Supreme Court continued to play an important role in maintaining space for the different visions of the federation along several fronts. In particular, it has offered flexible interpretations of the division of powers, the defence of language rights across the country, and in reconciling different political conceptions of Confederation. It also increasingly emphasized what it saw as the critical role of intergovernmental cooperation in Canadian federalism.

6.6.1 Division of powers

The Court's overall approach to questions on the division of powers has continued to stress the "dominant tide" in the federalism jurisprudence, a view that seeks to encourage the different orders of government to cooperate as much as possible. It has moved away from the watertight compartments that were so familiar to K.C. Wheare and the Judicial Committee of the Privy Council. As far back as 1995, the Court had accepted and begun to develop the concepts behind "flexible federalism," the idea that whenever the two orders of government's pronouncements can be reconciled, they should be.

The most important case in this period has been *Canadian Western Bank v. Alberta* (*Canadian Western Bank v. Alberta*; *British Columbia (Attorney General) v. Lafarge Canada Inc.* was also released as a companion case; Newman 2011, 1). In this case, the Court built on a line of jurisprudence that has stressed the importance of getting away from the notion of watertight compartments and instead embraced what the Court called "cooperative federalism." The case involved the selling of insurance products by banks. Insurance is a provincial jurisdiction while banking falls under the federal head. Once again, the question came up in the context of the doctrine of interjurisdictional immunity - could the provinces regulate what the banks were doing, or were the banks protected because they fell under the federal head of power?

The Court took the opportunity to synthesize what it meant by the "dominant tide" of Canadian federalism. Looking back over the jurisprudence (which was discussed in Chapter 4) it noted that:

> The 'dominant tide' finds its principled underpinning in the concern that a court should favour, where possible, the ordinary operation of statutes enacted by *both* levels of government. In the absence of conflicting enactments of the other level of government, the Court should avoid blocking the application of measures which are taken to be enacted in furtherance of the public interest (*Canadian Western Bank v. Alberta 2007*, para. 37).

Moreover, the Court conceded that the different "activities" of both levels of government overlap and that taking an overly defensive position would be counterproductive:

> As the final arbiters of the division of powers, the courts have developed certain constitutional doctrines, which, like the interpretations of the powers to which they apply, are based on the guiding principles of our constitutional order. The constitutional doctrines permit an appropriate balance to be struck in the recognition and management of the inevitable overlaps in rules made at the two levels of legislative power, while recognizing the need to preserve sufficient predictability in the operation of the division of powers. The doctrines must also be designed to reconcile the legitimate diversity of regional experimentation with the need for national unity. Finally, they must include a recognition that the task of maintaining the balance of powers in practice falls primarily to governments, and constitutional doctrine must facilitate, not undermine what this Court has called "co-operative federalism" … We will now turn to the issue of how, in our view, the main constitutional doctrines and the interplay between them should be construed so as to facilitate the achievement of the objectives of Canada's federal structure (*Canadian Western Bank v. Alberta 2007*, para. 24).

The Court then went on to look at both the doctrines of pith and substance and interjurisdictional immunity. In looking at interjurisdictional immunity in particular, the Court was unconvinced that it should be applied in the case that it was deciding:

A broad application also appears inconsistent, as stated, with the flexible federalism that the constitutional doctrines of pith and substance, double aspect and federal paramountcy are designed to promote…It is these doctrines that have proved to be most consistent with contemporary views of Canadian federalism, which recognize that overlapping powers are unavoidable. Canadian federalism is not simply a matter of legalisms. The Constitution, though a legal document, serves as a framework for life and for political action within a federal state, in which the courts have rightly observed the importance of co-operation among government actors to ensure that federalism operates flexibly (*Canadian Western Bank v. Alberta 2007*, para. 42).[60]

The Court went even further to stress a flexible view of federalism in its 2011 decision in *Reference Re: Securities Act* (Reference re: Securities Act 2011). The case arose out of a desire by the federal Conservatives to create a national securities regulator in place of the various provincial schemes. Naturally this had strong constitutional overtones and was tricky territory for the federal Conservatives, and was strongly opposed by Quebec, Alberta, and most of the rest of the provinces. The Court took the opportunity to both review the history of the "dominant tide" and affirm its central place in the interpretation of cases arising out of the division of powers. "The Supreme Court of Canada, as final arbiter of constitutional disputes since 1949, moved toward a more flexible view of federalism that accommodates overlapping jurisdiction and encourages intergovernmental cooperation — an approach that can be described as the "dominant tide" of modern federalism" (Reference re: Securities Act 2011, vol. 3, para. 57). After quoting from *Canadian Western Bank,* and other cases, the Court made it clear that it was interested in preserving a pliable view of the federal system. Nevertheless, the Court continued to recognize that although it might prefer a flexible interpretation, there would also be times when flexibility was not possible, and this was one of them. The Court decided that the legislative instrument proposed by Ottawa was in this case clearly *ultra vires* in light of the legal and constitutional history of this issue in Canada. The decision did not mean they did not appreciate that there might be a better way to regulate securities than the current system, and the Court

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[60] As noted above, this case was decided in the context of interjurisdictional immunity (IJI), which has its own idiosyncratic legal development that will not be discussed here. Nevertheless, the case was interesting for recognizing the IJI doctrine can apply in the provincial sphere, opening up the possibility of stronger provincial powers in relation to the federal government. For more see Newman, 2011.

made it clear that the different governments could come to another agreement or arrangement if they wished; it just meant that the federal government could not legislate unilaterally in this field:

> In summary, notwithstanding the Court's promotion of cooperative and flexible federalism, the constitutional boundaries that underlie the division of powers must be respected. The 'dominant tide' of flexible federalism, however strong its pull may be, cannot sweep designated powers out to sea, nor erode the constitutional balance inherent in the Canadian federal state (Reference re: Securities Act 2011, vol. 3, para. 62).

In making this statement the Court it echoed an earlier sentiment finding in *Reference re: Employment Insurance Act,* where the Court upheld the federal government's jurisdiction to legislate in relation to maternity and benefits in its *Employment Insurance Act.* The case arose after Quebec introduced a competing plan and sought to have the federal government reduce its contribution requirements in its legislation. Following the collapse of negotiations, the Quebec government referred the matter to the courts arguing the matter was its exclusive jurisdiction. Although the Supreme Court ultimately found in the federal government's favour, it nevertheless felt it necessary to point out that:

> A progressive interpretation cannot, however, be used to justify Parliament encroaching on a field of provincial jurisdiction. To derive the evolution of constitutional powers from the structure of Canada is delicate, as what that structure is will often depend on a given court's view of what federalism is. What are regarded as the characteristic features of federalism may vary from one judge to another, and will be based on political rather than legal notions (Reference re: Employment Insurance Act (Can.) 2005, vol. 2, para. 10).

6.6.2   Visions of federalism

There were a number of critical decisions in this period that had political ramifications; they involved how the Court articulated its vision of the federation and the institutions that were part of it. These decisions left the true nature of Canadian federalism ambiguous and contingent on the different issues being litigated. As in previous eras, the Court could stress the binational characteristics of the country in some cases, while suggesting that the provinces were equal in others.

One of the most important of these decisions was the *Reference Re: Supreme Court Act, ss. 5 and 6,* or the *Nadon Reference* (Reference re: Supreme Court Act, ss. 5 and 6 2014). At issue was the appointment of Justice Marc Nadon of the Federal Court of Appeal to one of the three seats traditionally reserved for Quebec on the Supreme Court of Canada. Under the *Supreme Court Act*, to qualify, Justice Nadon needed to be from either the bench or bar of Quebec at the time he was appointed. Technically the Federal Court of Appeal did not qualify in that regard. The court is not a Quebec court, and judges do not count as members of the provincial bar societies, from which they must maintain a clear distance. Arguably, Nadon could have resolved any lingering questions about his eligibility if he had stepped down, even for a single day, to technically return to being a member of the Quebec bar - a position that many thought was absurd (Canada 1985). The government of Canada decided to appoint him anyway, and the Toronto lawyer Rocco Galati challenged the appointment almost immediately.

The Court found that Justice Nadon was not permitted to sit on the Court because the Federal Court of Appeal did not qualify as an eligible institution from which its members might be promoted. Nevertheless, it also took the time to write expansively on the history of the Court, its role in Canadian federalism, and the importance of protecting the vital interests of Quebec.

It found the purpose of s. 6 of the act, which requires that three judges come from Quebec, is to ensure not only civil law training and experience on the Court, but also that Quebec's distinct legal traditions and social values are represented. This representation is critical to engender the confidence of the people of Quebec in the Supreme Court as the final arbiter of their rights. Put differently, s. 6 protects both the functioning and the legitimacy of the Supreme Court as a general court of appeal for Canada. This broader purpose was succinctly described by Professor Russell in terms that are well supported by the historical record:

> . . . the antipathy to having the Civil Code of Lower Canada interpreted by judges from an alien legal tradition was not based merely on a concern for legal purity or accuracy. It stemmed more often from the more fundamental premise that Quebec's civil-law system was an essential ingredient of its distinctive culture and therefore it required, as a matter of *right*, judicial custodians imbued with the methods of jurisprudence and social values integral to that culture. [Emphasis in original.] (Peter H. Russell, *The Supreme Court of*

Canada as a Bilingual and Bicultural Institution (1969), at p. 8) (quoted in Reference re Supreme Court Act 2014, para. 49).

In addition, the Court found that section 6 could not be unilaterally changed by the Government of Canada without passing through the constitutional amending procedures that were settled on in 1981. Again, this requirement was seen as being part of the critical safeguards that Quebec needed to keep confidence in the country:

> The fact that the composition of the Supreme Court of Canada was singled out for special protection in s. 41(*d*) is unsurprising, since the Court's composition has been long recognized as crucial to its ability to function effectively and with sufficient institutional legitimacy as the final court of appeal for Canada. As explained above, the central bargain that led to the creation of the Supreme Court in the first place was the guarantee that a significant proportion of the judges would be drawn from institutions linked to Quebec civil law and culture. The objective of ensuring representation from Quebec's distinct juridical tradition remains no less compelling today, and implicates the competence, legitimacy, and integrity of the Court. Requiring unanimity for changes to the composition of the Court gave Quebec constitutional assurance that changes to its representation on the Court would not be effected without its consent. Protecting the composition of the Court under s. 41(*d*) was necessary because leaving its protection to s. 42(1)(*d*) would have left open the possibility that Quebec's seats on the Court could have been reduced or altogether removed without Quebec's agreement (Reference re: Supreme Court Act, ss. 5 and 6 2014, vol. 1, para. 93).

In this case, the Court arguably went beyond what it had to do, and in a sense exceeded the caution that it normally shows by not restraining itself to the immediate questions at hand to promulgate a binational view of Confederation. The decision was sharply criticized by some in the media as being simply bad law (Hurscroft 2014). More cynically, Frédérick Bastien of the Université de Montréal argued that the Court was protecting its own interests, that Quebec's victory was not really justified, and that the Court is just as likely to change course against the province when it feels it needs to for its own sake (Bastien 2014). In the federalist press there was far more support for what the Court had done, with André Pratte referring to the judgement as an "historic gain" for the province (Pratte 2014a). It was universally seen as a blow to the

government of Stephen Harper to lose such an important appointment, especially because the mistake appeared to have been so avoidable given that the Court itself gave some advance notice regarding Nadon's ineligibility (e.g. Robitaille 2014b).

At other times the Court has sided with a vision of the country more in keeping with a provincial-equality view. In the *Reference re: Senate Reform*, the Court had the opportunity to rule on the role and function of another institution critical in Canadian federalism. At issue was whether the Canadian government could introduce major Senate reform as well as what level of provincial consent would be needed for abolition. While the issues in this reference would seem to be old hat – there had, of course, been a similar reference in the 1980s under the Trudeau government – the case turned more directly on term limits and selection criteria for senators, as well as whether abolishing the chamber would have the effect of altering the amending formula.[61]

Traditionally, this was the type of issue that was addressed first or at least in part through negotiations with the provinces, but Harper made it clear that he wanted to bypass the provinces and go directly to court. The conflict was judicialized from the start and there was little commentary from Ottawa or the provinces. "With the Senate reference," notes Brodie, "it was made clear that anything that had to do with an interprovincial meeting or anything like that was just not on the agenda. Anything interprovincial or needing [provincial] consent was just a no-go" (Interview with Brodie 2014).

In the result, the Court was more receptive to an equal partnership view of the country as being based on equal provinces rather than a binational vision at least insofar as it came to the amending formula:

> The April Accord [of 1982], and ultimately Part V, reflects the political consensus that
> the provinces must have a say in constitutional changes that engage their interests. The

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[61] There were four questions posed in this case. One asked how much consent from the provinces was needed to abolish the chamber. The other three concerned the qualifications and selection process for senators, namely whether Ottawa could get rid of the requirement that appointees hold $4000 in property, whether it could introduce fixed terms or if the government could change the selection process to one based on a consultative election. The amending formula was implicated because changing the Senate would change Parliament, whose consent is required for any formal constitutional changes.

"underlying purpose" of these documents is "to constrain unilateral federal powers to effect constitutional change": P. J. Monahan and B. Shaw, *Constitutional Law* (4th ed. 2013), at p. 204; *Supreme Court Act Reference*, at paras. 98-100. They also consecrate the principle of "the constitutional equality of provinces as equal partners in Confederation": *Constitutional Accord: Canadian Patriation Plan*, General Comment in Part A, at p. 1. In principle, no province stands above the others with respect to constitutional amendments, and all provinces are given the same rights in the process of amendment. The result is an amending formula designed to foster dialogue between the federal government and the provinces on matters of constitutional change, and to protect Canada's constitutional *status quo* until such time as reforms are agreed upon (Reference re: Senate Reform 2014, vol. 1, para. 31).

The Court also made it clear that the government could not unilaterally alter the Senate as it would violate the expectations of the different provinces, such as introducing elections. In the aftermath, Emmett Macfarlane, writing in *Maclean's*, essentially argued that this was the end of Senate reform for the foreseeable future, because Ottawa had lost any interest in intergovernmental negotiations on the constitution (Macfarlane 2014). Furthermore, there was little in the case to suggest a dualist nature of the federation either. While that subject was not particularly addressed, on several key moments it appeared as though provincial equality was the operative vision:

> In one sense, the Court's decision is a triumph for federalism and for the principle that provinces are co-equal partners in Confederation: any constitutional changes that have implications for them require the consent of at least two-thirds of their legislatures, representing at least 50 per cent of the Canadian population, and in some cases unanimity (Macfarlane 2014).

Therefore, both binational and provincial equality visions remain at play for the Supreme Court, depending on the issue and context, something that has been identified by a number of authors (e.g. Schertzer 2012).

6.6.3   Language rights

The Court continued to build on *Beaulac's* innovative and expansive view of language rights that broke with previous jurisprudence during this period to repudiate any suggestion that language rights are to be read more narrowly than other rights. In the context of the right to an interpreter in court proceedings, the Supreme Court made it clear that language rights are "meant to achieve substantive equality between linguistic groups, rather than formal equality" (Sharpe 2013, 393). In the 2009 Supreme Court Case of *DesRochers v. Canada (Industry),* the Court noted that language rights are not in any sense "accommodative," but substantive rights to which all Canadians are entitled:

> Before considering the provisions at issue in the case at bar, it will be helpful to review the principles that govern the interpretation of language rights provisions. Courts are required to give language rights a liberal and purposive interpretation. This means that the relevant provisions must be construed in a manner that is consistent with the preservation and development of official language communities in Canada (*R v. Beaulac*, 1999 CanLII 684 (SCC), [1999] 1 S.C.R. 768, at para. 25). Indeed, on several occasions this Court has reaffirmed that the concept of equality in language rights matters must be given true meaning (see, for example, *Beaulac*, at paras. 22, 24 and 25; *Arsenault-Cameron v. Prince Edward Island*, 2000 SCC 1 (CanLII), 2000 SCC 1, [2000] 1 S.C.R. 3, at para. 31). Substantive equality, as opposed to formal equality, is to be the norm, and the exercise of language rights is not to be considered a request for accommodation (*DesRochers v. Canada (Industry)*, para. 31).

Moreover, the justices also noted that when the rights are guaranteed by the Charter, the provision of translation service must be of equal quality as well (Sharpe 2013, 393).

In *Société des Acadiens et Acadiennes du Nouveau-Brunswick v. Canada,* the Court found that the RCMP, when working in New Brunswick as a provincial police force, are subject to section 20(2) of the Charter that makes that province bilingual (*Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v. Canada,* para. 14). Just because the RCMP was operating pursuant to a contract did not allow it to evade the province's constitutional responsibilities on language. Furthermore, combined with the findings in *DesRochers,* the RCMP also had to ensure that it was operating in both official languages at an equivalent level (Sharpe 2013, 393).

In the minority language education context, the Court continued to show sympathy for the English language minority in Quebec and for its ability to make use of the liberal interpretation of language rights that French had received in the rest of Canada. An important case in this period was *Nguyen v. Quebec (Education, Recreation, and Sports).* At issue were privately funded English-language bridging schools in Quebec whose graduates were not entitled to continue education in English because the schools did not qualify under provincial legislation for the purposes of having "received primary or secondary instruction in English in…Canada" under the Charter of the French Language. There had been some concerns raised because these private schools were becoming increasingly common in the province and they seemed like a way to sidestep the law. The question was whether the law was unconstitutional under section 23(2) of the Charter of Rights and Freedoms and if it was, did it count as a reasonable limit (Sharpe 2013, 397–8; *Nguyen v. Quebec (Education, Recreation and Sports)*). The Court decided that prohibiting graduates of the private schools from continuing their education in English was a violation of section 23 that could not be justified. It did not matter whether or not the school in question was a public or a private institution, rather, a more global inquiry must take place (Sharpe 2013, 398).

> As the Court observed in *Solski*, the specific purpose of s. 23(2) of the *Canadian Charter* is to provide continuity of minority language education rights, to ensure family unity and to accommodate mobility within Canada (para. 30). Although the purpose of s. 23 is to protect and promote both the English-speaking and French-speaking minority language communities, the rights provided for in s. 23(2) apply regardless of whether the parents or the eligible children are members of one of these minority communities or speak one of these languages in the home, or even have a working knowledge of the protected minority language. As this Court stated in *Solski*, "[t]he conditions for qualification under s. 23 reflect the fact that new Canadians in particular will decide to adopt one or the other official languages, or both, as participants in the Canadian language regime" (para. 31). Change of residence from one province to another is not among the conditions for exercising the guaranteed rights either. Finally, in the very words of s. 23(2) — which refers to instruction that the child has received or is receiving for the purpose of determining whether the child has a right to receive instruction in the minority language — no distinction is made between instruction that is public and

instruction that is private, whether subsidized or unsubsidized (*Nguyen v. Quebec (Education, Recreation and Sports)*, para. 27).

As a result, these sorts of schools received the necessary support from the Supreme Court as connected to the underlying educational language rights which are guaranteed to all Canadians in the Charter. Overall, these cases represent continuity with a shift noted in the previous chapter, of reading language rights large and liberally and connecting those rights to the importance that they represent to the individual. There is no sense that these rights are fixed, narrow or otherwise inflexible, they are to be read in a purposive and contextually sensitive manner.

6.7 Conclusions

This chapter has argued that the federal government under Stephen Harper acted to keep critical constitutional abeyances off of the political agenda in Quebec, preferring more flexible, administrative, and incremental arrangements to this problem, in particular under the guise of "open federalism." This strategy is a continuation of the policies of the previous Liberal governments. Harper was aided for much of his term by the presence of Jean Charest and the provincial Liberals, who have given voice to a similar strategy in the Pelletier Report and colluded to keep constitutional issues off the table.

The only genuinely disruptive actor to hold power during this period was the PQ, which was elected in 2012 and governed until 2014. During the PQ's time in office, the federal government studiously avoided anything to do with constitution such as getting into an argument over the division of powers. What efforts the Conservatives did make were done through the courts, such as on the question of a national regulator for securities or Senate reform. Instead, the Conservatives dismissed the PQ as out of date and managed to avoid inflaming public opinion in the province, notwithstanding their deep unpopularity in Quebec. The return of the Liberals under Phillipe Couillard in 2014 marked the arrival of a strongly federalist government, making life considerably easier for the Conservatives. Although the new premier has occasionally mused about reopening the constitutional questions, both Harper and the provincial Liberals have shown no interest and Couillard has usually demonstrated restraint. Couillard's approach is broadly continuous with the attitude of the former Quebec Liberal regime. To that extent, the spirit of the Pelletier Report approach to federalism and the Conservative ideals of open federalism remain very much alive.

When the federal government has felt the need to address tricky constitutional topics, it has tended to resort to judicial mechanisms. The Supreme Court has not been compliant or particularly supportive of the federal government, and many decisions have gone against Ottawa. Still, in focussing on the development of the "dominant tide" of overlapping Canadian federalism, and in stressing intergovernmental cooperation, the Court has offered support for the competing views of the nature of the federation. This plurality of meanings of the federation has allowed the political leaders in Canada to avoid addressing questions they have no interest in talking about and to continue with their abeyance sustaining behaviour.

Chapter 7
Conclusion

7   Concluding remarks

7.1   Institutional evolution

The institutions in a federal state are necessarily the result of conflict and political contestation, and it is important to study how they change. Using a "rounded" historical institutionalism (HI) this dissertation has demonstrated how intentional, incremental changes by politically situated actors has resulted in important shifts in the institutions of federal management in order to reduce the political salience of divisive abeyances and help to avoid a unity crisis.

While the story has clearly defined moments of punctuated equilibrium, as that term is understood in the literature, the most important changes since the last referendum over the last 15 years have been far more evolutionary. This type of incremental, agency-generated change is of growing interest to scholars of HI, who have traditionally focused on sudden changes with longer periods of stability. However, this dissertation recognizes that, as James Mahoney and Kathleen Thelen have observed "there is nothing self-perpetuating about institutions (Mahoney and Thelen 2010, 8; Mahoney et al. 2015, 14, 22–4). While it can be easy to slip into the language of mindless path dependency and of finding oneself trapped on a particular branch of a particular tree, the fluid nature of politics and the different interests of political leaders have meant that there has never been a clear and discrete path to the federal stability we see now. Actors acting within and constrained by the institutions have to do their best to mold the results as best they can.

7.2   Putting skeletons back into closets

An abeyance is an unsettled, constitutive matter at the heart of the constitution: one that relates to what the political community is and how different institutions and actors relate to one another within it. Abeyances are not ordinary ambiguities; they relate to the fundamentals of the state. If actors who hold competing interpretations share an overriding interest in constitutional stability, then these competing interpretations may lurk unresolved for years at the heart of the constitutional system. If, however, a political actor spots an opportunity for advancement in trying to resolve an abeyance, that abeyance can become politicized and lead to a constitutional

crisis. In a democracy, electoral considerations are normally the dominant consideration for an actor when deciding to politicize an abeyance, but there are exceptions. This dissertation has examined the changing relationship Quebec has had with the rest of Canada through this lens, arguing that the approaches that political leaders took to abeyances can help explain both the escalation and de-escalation of the crisis in Canadian federalism over the last 50 years.

In looking back over the change in approach that the Liberal government adopted to the question of Quebec nationalism in the mid-1990s, Mathew Mendelsohn cited the literature on abeyances specifically as being relevant to his thinking:

> I mean my own interpretation is that we have quite different conceptions of the country across the country, and I think that the argument around constitutional abeyances is a valid one. That this country works when we don't particularly talk loudly about our conception of the country because then it becomes clear that there are different conceptions of the country. But…those different conceptions are not a problem on a day to day basis, for most issues (Interview with Mendelsohn 2014).

For many people interviewed for this dissertation, even those not familiar with the abeyance literature, the basic idea that Canada only works because leaders have learned to leave "well enough alone" on the constitution deeply informed their view of Canada and Canadian federalism. These people tended to see this willingness to ignore the basic constitutional problems in Canada as a net positive, a key ingredient in the country's success, even something that makes Canada a little bit special. Others were much less convinced that the abeyance idea had traction. For example, when confronted about how abeyances might apply in the context of this project, Professor Alain Noël felt that it was too generous to examine contemporary constitutional politics in Canada through the abeyance lens:

> The stability that you observe is the result of a stalemate, really. So I don't see it as abeyance as a sort of… in the abeyance concept there is the idea of the wisdom of the founders that leaves certain things unaddressed, [it's] empowering. I think that is less wisdom than just power politics. There is a majority in Canada and a national minority and aboriginal people, and the majority though a series of periods of conflicts found out that it could shape Canada the way it preferred without regard for the views of the minority, and they realized the minority will put up with it and will not go. And so the

constitution we have has stability because the majority wins. That's power politics
(Interview with Noël 2014)

This dissertation finds that argument unconvincing. A more appropriate view would be to acknowledge that while sovereigntist Quebec nationalism is more dormant today than two decades ago, it is hardly dead, and could easily be inflamed in the event of political mismanagement at the top. The aggressive imposition of constitutional visions spawned political crises rather than ended them. The 1982 constitution may be the law but it has never been politically accepted in Quebec as representing the "true" basis of Confederation and Quebec's place in it. It was the political illegitimacy of the constitution, not its technical legal standing, which has been at the root of the Canada's constitutional problems since then. For all the work that went into coming up with the amending formula for Canada's constitution nearly 35 years ago, this political reality has rendered it almost unusable. There has only been one instance when the 7/50 formula was actually applied: in 1983 in the direct aftermath of patriation in relation to Aboriginal people. The unanimous amending formula has never been used. All that can be mustered are discrete, bilateral constitutional changes between Ottawa and a particular province when each finds amendment in its interest or when one provincial legislature alone can effect a change. A national dialogue among Canadians on constitutional change is simply not in the cards. As a result, the political rejection in Quebec of the constitution and the inability of the rest of the country to find common ground continues to deeply inform constitutional politics today, essentially precluding serious national action on issues such as Senate reform, the persistence of the Monarchy, the judicial appointment process for the Supreme Court, the possible future admission of territories as provinces, and many others. While a federalist may appreciate abeyances insofar as they are suggestive of a tolerant and accommodating political culture, their presence can come at a cost. Despite good reasons for attempting it, constitutional reform remains largely off the agenda out of a deep fear of triggering a broader unity crisis.

It is important to keep in mind that the choice to keep this question off the agenda is deliberate, and was taken after a process of learning. Not all federalist parties came to the same conclusions about constitutional abeyances – that they are best left alone where possible – at the same time, but all of them eventually adopted that posture to a degree. Between 1995 and 2006, there was a need to address the fallout of the 1995 referendum, but the flurry of Ottawa's activity in Plans A and B only masked the fact that it was aimed at setting up conditions where constitutional

abeyances could be taken off the table. Broadly successful, the latter period of 2006-2015 has been about maintaining that stability as much as possible, and maintaining the mega-abeyance at the heart of the Canadian constitution. Along with other social, political, and demographic factors that are working in Quebec to tamp down support for the secessionist option, federalist leaders have contributed to the decline through their ability to steer clear of constitutional abeyances that will open conversations that could be very damaging to the cause of national unity. This deliberate restoration of abeyances suggests that once they are in the open, they do not have to lead to a crisis.

Instead, to govern effectively, Canadian federalist actors need to remain wary of pronouncing upon their particular visions in relation to abeyances, and, if not overtly work together to keep them camouflaged, at least demonstrate a willingness to manage conflicts so that they do not devolve into zero-sum thinking and do not come to the surface of the political agenda in an explosive way. Despite the abeyance literature suggesting this avoidance strategy is not possible once an abeyance has come to the surface, the Canadian case, as documented in this dissertation, indicates the opposite. In essence, it *is* possible to put a skeleton back in the closet. But doing so requires political actors to agree to a shift in political priorities. Without coming to an agreement, it is possible to conceal abeyances if there are enough actors in the constitutional system who are willing to put aside differences to move on to other issues.

This is more than just a silent commitment; there must also be a mechanisms and tools available that allow such actors to resolve their problems in less confrontational ways when they have too. E.E. Schattschneider noted as far back as 1960 that the choice of forum a for resolving political issues is critical for understanding political conflict (Schattschneider 1964; see also Pierson 2015, 26). The judicial system in Canada has proved ideal for resolving disputes that can otherwise degenerate into political crises. The nature of common law judging, which is famously limited to specific facts, circumspect about implications, and hesitant to proclaim too broadly on deeper fundamentals leave parties with enough legal ammunition to continue to press their causes later and in different contexts. Judges remain wary of the deeper implications of the cases that appear before them, offering largely limited rulings on specifics, along with fluid reasoning on generalities. Thus the harder edges of debates are rounded out or put off to another day. Superficially a party may appear to "lose" a case but the losses are more of the nature of losing a particular battle than that of the more general war. The limited nature of the loss ensures that

debates can burn under the surface but true explosions become less likely – the parties know there will be another day.

Furthermore, the ability to turn a political issue into a legal dispute alters the nature of the conversation among elected elites. Politicians who have little interest in risking political capital or otherwise engaging in an unwanted debate are often happy to let the courts take a "stab" at it first. The long timelines of judicial action and the uncertain moment of pronouncement of a result give the political leadership the maneuverability they want to not be pinned down on a fraught abeyance and point to evolving action elsewhere as being the place for the public to focus.

Ultimately, from this we can see that three behaviours must be adopted by politicians who disagree on how to resolve an abeyance in order to keep it from becoming politicized:

1. **Issue avoidance:** Where possible, political leaders have tried to avoid talking about subjects over which there are major, irreconcilable disagreements. There is less of the populist rhetoric that characterized earlier eras among many provincial politicians, for example, about the proper place of a province or region in Canada. When confronted directly with a touchy subject with clearly contentious, unsettled constitutional connotations, it is usually sufficient for leaders to demur as much as possible. Excuses along the lines of bad timing, lack of public interest, or that the issues are "old hat" tend to appear, if the issue cannot be ignored entirely.

2. **Partial accommodation of competing interpretations**: In situations where it is not possible to avoid a controversial constitutional issue touching on unsettled fundamentals, or there are other considerations that force it onto the agenda, actors will offer partial accommodations to those holding competing visions who are otherwise interested in preserving the constitutional order intact. This accommodation will not amount to a full concession, but it may take the form of actions on specific files that have deeper constitutional connotations that hint at or support a competing vison of the political community. While these actions are rarely taken with the belief that a competing party will accept them as a "full" solution, it will be enough to keep fellow constitutionalists on side in preserving the illusion of unity. The best example in recent years in Canada

was the decision by the federal Conservatives to recognize the Québécois as a "nation," but nevertheless within a "united Canada." It was controversial enough to cost the government one of its ministers but sufficiently flexible to disarm opponents seeking to expose the federal government as insensitive and intolerant.

3. **Conflict isolation and de-politicization of sensitive issues:** If a sensitive constitutional matter is to be pursued, either because it becomes unavoidable not to do so or out of a genuine desire to tackle it, actors will try to address it in a manner that is low key and de-politicized. This often takes the form of "punting" the matter into the judicial system where all parties have confidence in a fair hearing and an ability to have their side of the story heard. This strategy has the added benefit of both isolating the issue – precluding the possibility that it will be "linked" to other matters as is common in IGR – and taking advantage of the partial and limited nature of many constitutional decisions. Referring a matter to the courts does run the risk, however, of a court decision not going the "right" way. Thus the federal government's most recent effort at Senate reform took the form of a reference to the Supreme Court, in which other parties could intervene but would not directly engage with one another outside of the legal context. Political actors demurred when asked about the case by merely stating that it is a question that is before the courts. When a decision came down, the responsibility could be said to be that of the Supreme Court and blame for failing to reform the institution was less acute. Both the victors and vanquished could avoid pinning responsibility fully on the failure of the other to negotiate or come to an understanding because the logic of a court case meant that kind of language was never in play in the first place. Federalist actors were prepared to talk about Senate reform only in the context of this isolated proceeding. Notably, once the Court ruled that it would take substantial agreement among federal actors to reform the chamber, all the parties in the case dropped the subject.

This pattern of behaviour is characterized by a general disinterest in constitutional issues, with the exceptions taken up unilaterally, passive aggressively, or through mild mutual accommodation. It is the informality and low publicity that is the most striking contrast to earlier eras. For the most part the Quebec Liberals, all federal parties outside of the Bloc, and all parties and leaders outside of Quebec adhere to this pattern. This marks a shift in thinking about how to

address knotty tensions in the incomplete and largely unwritten Canadian constitution. Critically constitutional change *does* happen in Canada, but when it happens it is less visible, involves the fewest actors possible, and is often resolved via judicial mechanisms. It is no longer given the "spotlight" that it once had and it is often dressed up as being "non-constitutional" in nature.

7.3   Further research

There are a number of lines along which the abeyance concept can be developed, especially in the study of secessionism. Most of the current work on abeyances looks at how the idea applies to constitutional actors thrashing out their own views of their offices and institutions *vis-á-vis* one another, rather than as a driver of a political movement. Furthermore, the study of abeyances has primarily involved identifying individual constitutional abeyances and examining them discreetly, rather than as part of an overall whole (Foley 2013; DiGiacomo 2010). Because the stakes are so high in multinational countries with contested constitutions, the application of the abeyance concept to secessionist movements is perhaps where the idea is the most relevant to political, as opposed to legal, scholars. Furthermore, the most obvious next step would be taking a more comparative approach. This study was of a single case and as a result it cannot be generalized beyond Canada. Future research in other contexts may be able to add additional heft to the concept. Not every secessionist movement needs to arise from collapsed constitutional abeyances and it will be worth examining how well the idea can travel into different countries.

The two obvious places for comparison would be Scotland and Catalonia. Both are Western, liberal democratic countries that are experiencing significant constitutional turmoil. Both have traditionally been seen as excellent comparators for Quebec. Both also appear to resemble what was the Canadian reality in the late 1980s and mid-1990s. Nevertheless, their secessionist movements are different in both their political origins and sources of popular energy. Of the two, it appears to be in Spain where the abeyance idea has more resonance. As in Canada, many Spanish constitutional abeyances were needed by the drafters of the constitution in order to effect a successful transition to democracy (see Colino 2009; Colino 2013). Democracy now achieved, nationalist parties have begun to explore the nuances of their founding document in ways that they had not done previously. Tensions have come to the surface, perhaps inevitably, as differing visions about the autonomy of subnational states, cultural considerations, and other issues quite

similar to those found in the Quebec-Canada debate have been placed on the table for discussion (see also Guibernau 2014a; Guibernau 2014b).

In Scotland, the debate over secession has always turned less on whether the constitution is being respected according to the "right" interpretation, and more on whether Scotland, with access to oil in the North Sea, its more liberal and European orientation, and its greater appetite for intervention in the economy, is better outside the constitution that everyone in the UK understands. However, there do appear to be some abeyances in the British constitution which might come to play a greater role in the future as the UK grapples with the place of Scotland and the other three nations in the kingdom. The matter of the "West Lothian Question," (the validity of non-English MPs voting on English laws despite the fact that English MPs cannot vote on similar legislation that goes through the Scottish Parliament applying to Scots), has never been resolved and is of rising importance in light of the referendum of 2014. The matter has lurked in the political discourse but there has never been an appetite to tackle it directly, given the sensitivity of the subject, a situation which well may change (For more information see Bogdanor 2010; Hazell 2006; Carrell 2012).

7.4   Continuing applicability to Canada

The abeyance concept still has wide applicability in the Canadian context. For now, Quebec secessionism is on the "back foot" and the rest of the country is happy to ignore, for the most part, constitutional politics. There is nothing to suggest that this must hold true forever, though, and the study of abeyances can help understand the functioning and stability of Canada in the future. The long historical record canvassed here shows how the Canadian constitution, unlike its American counterpart, reflects a political community very unsure of what it is or wants to be. The constitution's somewhat opaque origins, built on ill-defined compromises and its slow evolution with a Canadian society that has lost much of its original British connections, has left the public with little sense of what Canada is or where it is going.

It was Canada's obscure beginnings that set the federation up for much of the trouble that it would experience later on. The beginning of mega-constitutional politics in the middle of the twentieth century was a product of a country emerging organically from the embrace of an Empire and with a constitution that had been silent on many important points, either on account of political expediency or because it was assumed the answer lay with an intervention from

London. Hence there was no initial need for a domestic supreme court or the related debate on its regional composition in 1867, given the presence of the JCPC. Similarly, any discussion about potential linguistic rights, at the root of a two nation theory of Canada, in what would become Canada's west was politically remote enough at Confederation to leave unanswered. An amending formula was not needed, given that Canada was not really an independent country and modern federalism had not developed. Ottawa could ask Westminster for changes to the BNA Act if it wanted them. It would then be unlikely, but still within the right of the British government, to say no. Canadians at the time thought that was how it should be. But all of the issues were lurking on the horizon even if they went unaddressed.

Of course, as the country moved to full independence the lack of domestic political institutions would no longer do and the constitutional situation became more complicated. Filling the constitutional gaps that had been left off the table in 1867 proved to be more difficult than imagined and revealed just how differently people saw the foundations of the country. For a while, political leaders had little interest in pushing constitutional matters too far, however, and actually profited from the ambiguity. Throughout the 1930s, 40s, and 50s, the conservative nationalist Maurice Duplessis and his provincial counterparts often gained politically from painting Ottawa and one another in a bad light by claiming that only they really understood the constitution, and that a perfidious federal government was misconstruing the true basis of Canadian federalism for its own reasons. Doing so served many political interests, but there was little to be gained by pushing matters too far.

The Quiet Revolution of the 1960s changed all that. For the first time, there were electoral reasons to argue about the constitution and how it should be changed. For once the government of Quebec had an interest in having serious constitutional discussions on topics that had previously not been on the radar. Bolstered enormously by the arrival of Pierre Trudeau, who had a unique and muscular vision of a pan-Canadian constitution, and the emergence of genuinely separatist parties, elites approached this question with a view to "solve" once and for all. This attitude of Trudeau's necessitated the adoption of a confrontational, politically charged and highly visible negotiating style, rooted in the confidence of the times that the problems were resolvable to the satisfaction of all. This confidence disintegrated in light of the escalating challenges of the 1970s and 1980s. The startling arrival of the PQ in 1976, the adoption of what became the new constitution over Quebec's objection, a divisive referendum, the failure of two

further rounds of negotiations, and then the near miss of 1995 changed thinking on the subject drastically among all federalist actors who shared a desire to preserve constitutional unity even in the face of deep disagreements on many subjects.

Although successive Quebec governments have acknowledged the legal reality of the 1982 constitutional settlement taken over the objection of Quebec City, they have never accepted the legitimacy of the deal or that it is an accurate reflection of Quebec's historical entitlement. The resulting constitutional negotiations and the enduring symbolic lack of Quebec's signature to the constitution is an important political (rather than legal) statement about what the province believes is the true basis of Canadian federalism. This vision has been at odds with other interpretations, coming from the federal government in particular, but also from other regions which refuse to accept Quebec's visions of the country or its place in it. Nevertheless, Ottawa and other parts of Canada have been prepared to allow this situation to endure, partially out of a fear of what might happen if there is an attempt to "solve" the question once again. But failure to address the perceived illegitimacy in Quebec of the 1982 Constitution Act is also a recognition that it is very doubtful that political leaders could agree to a vision of Canada that squares with the historic demands of Quebec City on questions such as a provincial veto, special status, or drastically more asymmetry in the provincial representation of federal institutions. There is indeed little guarantee that Quebec could find a solution with the other provinces and territories as well. The result has been a quiet stalemate.

The successive conversion of each of the federal parties and the Quebec Liberals into constitutionally passive organizations reflects this new consensus among federalists on both the intractability of the mega-abeyance problem and an overriding common interest in preserving the status quo. It does not reflect consensus on substance. The Canadian constitution is not totally ossified; there have been some changes. While the past 20 years have been relatively quiet on the constitutional front, it has not been a vacuum, and a succession of issues have been tentatively addressed to various degrees of satisfaction. But there is nothing to suggest that this cautious and partial approach might not change into a much more robust discussion on the basics. Evolving social forces, ambitious political leaders and external crises could always revive interest in the Canadian constitutional "unsettlement." Perhaps the biggest check on that happening right now is simply the sheer number of "survivors" from the period who despite their differences have no interest in taking up the topic again. At the moment there also seems to be very little interest

among the young to do so either. But times change. Should an electoral advantage on a particular issue seem compelling enough, the country could once again find itself asking whether the collective project called Canada is worth it.

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Appendix 1 – List of Interviewees

No.	Name	Title	Date of interview
1.	Mel Cappe	Professor School of Public Policy and Governance/Former Clerk of the Privy Council, Government of Canada	February 25, 2014
2.	Jim Eldridge	Special Advisor the Government of Manitoba / Former Manitoba Cabinet Secretary	April 2, 2014
3.	Robert Schertzer	Former Senior Policy Advisor with the Government of Canada	March 5, 2014
4.	Don Stevenson	Former Deputy Minister, Intergovernmental Affairs for Ontario	June 29, 2014
5.	Mathew Mendelsohn	Head of the Mowat Centre/Former Deputy Minister Of Intergovernmental Relations, Democratic Renewal Secretariat, and Office of International Relations and Protocol for the province of	March 14, 2014

		Ontario/Former Senior Policy Advisor in the Privy Council Office, Government of Canada 1996-98	
6.	Josh Hjartarson	Vice President, Policy and Government Relations, Ontario Economic Council/Former Policy Advisor, Ministry of Intergovernmental Relations, Government of Ontario	April 4, 2014
7.	James McAllister	Former Manager, Federal Provincial Relations, Ministry of Finance, Government of Ontario	March 13, 2014
8.	Anonymous	Government of Ontario	March 21, 2014
9.	Anonymous	Government of Ontario	April 4, 2014
10.	Anonymous	Requested withheld	-----
11.	Anonymous	Requested withheld	-----
12.	Peter Russell	University Professor Emeritus, Faculty of Law and Department of Political Science, University of Toronto	March 24, 2014

13.	Ian Clark	Currently Professor, School of Public Policy and Governance, University of Toronto/Former Secretary of the Treasury Board, Government of Canada/Former Deputy Secretary, Privy Council Office, Government of Canada	March 24, 2014
14.	Rodney Haddow	Professor, Political Science, University of Toronto	August 15, 2014
15.	Roger Gibbins	Former Chair, Canada West Foundation	March 17, 2014
16.	François Rocher	Professor of Political Science, University of Ottawa	September 3, 2014
17.	André Juneau	Chair of Institute of Public Administration of Canada, Former Deputy Minister, Intergovernmental Relation, Ottawa	October 14, 2014
18.	Philip Resnick	Professor, Department of Political Science, University of British	October 24, 2014

		Columbia	
19.	Carolina de Miguel Moyer	Assistant Professor, Department of Political Science, University of Toronto	October 24, 2014
20.	Alfred LeBlanc	Assistant Deputy Minister, Intergovernmental Relations, Government of Canada	October 27, 2014
21.	André McArdle	Chair, Canadian Intergovernmental Conference Secretariat	October 29, 2014
22.	Alain Nöel	Professor, University of Montréal	October 29, 2014
23.	Roger Tassé	Former Deputy Minister of Justice and Attorney General	November 4, 2014
24.	Luc Turgeon	Professor of Political Science, University of Ottawa.	November 6, 2014
25.	George R.M. Anderson	Former Federal Deputy Minister of Intergovernmental Relations/Chairman of the Forum of Federation	November 11, 2014
26.	Ian Brodie	Former Chief of Staff to	November 12, 2014

		Prime Minister Stephen Harper	
27.	Jean Charest	Former Premier of Quebec	November 17, 2014
28.	Anonymous	Professor	November 21, 2014
29.	Michael Burgess	Professor, University of Kent	November 21, 2014
30.	Jackeline Kirkorian	Professor, York University	November 24, 2014
31.	Gordon DiGiocomo	PhD, instructor Carleton University	November 27, 2014
32.	Stéphane Dion	Former Liberal Leader of Canada and Minister of Intergovernmental Affairs	November 27, 2014
33.	Ron Watts	Professor Emeritus of Political Science, Queen's University, Former Director of the Institute of Intergovernmental Relations (IIGR)	November 29, 2014
34.	Derek Burney	Chief of Staff to Brian Mulroney/Head of Conservative Party Transition Team, 2006	December 22, 2014
35.	Lowell Murray	Former Chief of Staff to	January 12, 2015

		Robert Stanfield/Progressive Conservative Senator/Minister of State for Federal-Provincial Relations under Brian Mulroney	
36.	Hugh Segal	Former Senator, Chief of Staff to Brian Mulroney and Ontario Premier Bill Davis.	January 14, 2015
37.	Julien Gagnon	Former President of the Youth Wing of the Quebec Liberal Party	February 6, 2015
38.	Eddie Goldenberg	Former Chief of Staff to Jean Chrétien	February 6, 2015

Appendix 2 – Sample of Questions

The interviewees selected came from a wide variety of professional backgrounds and were operative during a number of different periods. The interviews themselves were semi-structured, and questions could vary and the conversation could go in several different directions. Nevertheless, the following topics and questions were used in many of the interviews to some extent.

1. I wonder if you could start by just telling me a little about your background on this issue and how you were involved in it at different times and in different capacities.

2. How would you compare the reactions of federal policymakers after 1980 and 1995? What would you say were the key differences in terms of "what to do next?"

3. A central argument of my thesis is that political management in Ottawa has been critical in bringing about the decline of the sovereignty movement. Would you agree with that statement?

4. How committed was the federal government to the style of interprovincial bargaining in Canadian federalism when you arrived in Ottawa?

5. How important do you find "management at the top" to be regarding this question, in terms of its management and stabilization? Do policymakers make a difference?

6. How dependent is Quebec nationalism on constitutional questions in your view? Did it become more so, or less, over time?

7. To what extent has that changed over the years, specifically in relation to the management of questions of national unity?

8. To what extent do you think that the style of interprovincial bargaining was itself a hindrance or a benefit to resolving questions of national unity during the 1980s?

9. How committed did you find the PQ leadership to the so-called *beau risque?*

10. In speaking with the rank and file of the PQ and its leadership, how similar did you feel their views were during the constitutional negotiations? What, if any were the major differences?

11. Did the IGR framework help policymakers manage this question, or was it more of a hindrance?

12. What kind of work is done on this file now? What could we do in the future? Has it been effective?

13. In many ways the PQ has had difficulty bringing the national unity question back to the top of the political agenda. What are the factors that you would identify as being the most important?

14. What were the lessons that people took away from Meech Lake?

15. There have been a variety of competing explanations that have been offered – including economic and globalization factors (i.e. greater engagement in the world leads to a decline is support); the identity issue (the population no longer identifies itself along this axis); simple institutional security (there is no longer a need for the movement) and finally just fatigue. What do you make of these?

16. In looking to other countries that are confronting similar experiences today, what would be your advice to someone occupying a position similar to the one you held?

17. Can you suggest people to talk to who would be good for further information?