Introduction to a Form of Government ensuring Responsible Federalism originating in the Province of Canada in the Mid-Nineteenth Century

Vincent Pouliot
President, Institute of Responsible Government

Corresponding author
Vincent Pouliot. E-mail: v.pouliot@iorg.ca

In the Reference re: the secession of Quebec, the Supreme Court of Canada defined federalism as the political structure and the political mechanism permitting the conciliation of unity and diversity. The Court reiterates that the provinces should be represented in this federal political structure and that the central government should be entrusted with jurisdiction only in affairs in which they have a common interest.

The Court also ruled that, to be legal, this conciliation must be accomplished within the institutions created by the Constitution Act "to allow for the participation of and the accountability to the people."

As to how this process was to occur, they stated that the representative and democratic character of our democratic institutions was simply assumed. They let it be understood, however, that the federal scheme of Canada's Constitution Act, 1867 was an adaptation of a system of government existing at the time of Confederation.

The study of the constitutional evolution of Canada brought to light a model of Responsible Government guaranteeing the conciliation of the interests of Upper and Lower Canada in the government of the Province of Canada in accordance with the "well-understood wishes and interests of the people". It was characterized by a coalition government formed and directed by two first ministers who were the political leaders of Upper and Lower Canada sitting in the Governor's Council as his chief advisers.

Further, it brought to light the injustice resulting from the operation of this federalism within the one legislature and one government provided by the Union Act (1840). The solution proposed by Confederation, to create financially responsible local governments while renewing this responsible federalism by providing a constitutionally balanced bicameral parliament wherein the Senate would represent the provinces of the Canadian federation, was never implemented.

The purpose of this paper is to highlight how this form of government guarantees responsible federalism to enable us to properly consider the constitutional structure and the constitutional

practices required to ensure responsible federalism within the more perfect constitutionally balanced bicameral Parliament proposed by Confederation and, at the same time, remedy the instability caused by its application within a federal state governed through an essentially unicameral legislature.

In 1867, Canada was on the verge of developing a political system that could have been a model for the world. The efficient and harmonious means it institutes to resolve conflicts within a federal community and provide for its good government calls for further study. Refining this model and adapting it to today's circumstances represent a rich and potentially transformative research agenda.

The Decision in the Reference re Secession of Quebec

In 1997, the Governor in Council asked the Supreme Court of Canada to render an opinion as to whether Quebec had the right to secede unilaterally from Canada. Essentially, the Supreme Court responded that if the secession of a province is to be accomplished, it must be achieved legally: through the political process within the legal framework underlying Canada's constitution.

The justices assert that this legal framework is provided by certain underlying rules and principles, which inform, sustain and are the vital unstated assumptions that "breathe life" into the text of the Constitution Act, 1867 (Reference re Secession, 1998, par. 32, 49, 50). These principles and rules, they state, emerge from an understanding of the constitutional text itself, the historical context and previous judicial interpretations of constitutional meaning. They explain the relevance of four fundamental organizing principles that assist in the interpretation of the text, the delineation of spheres of jurisdiction, the scope of rights and obligations and the role of our political institutions: federalism, democracy, constitutionalism and the rule of law, and respect for minorities (Reference re Secession, 1998, par. 52).

Through its decision, the Court sets out an entirely new and comprehensive set of guidelines to interpret the constitution of Canada, organized here under the four headings below.

The role of our political institutions in the context of a federal union

The Court reiterates that the provinces were meant to be represented in the central government, and this central government was meant to be entrusted only with the affairs in which the provinces had a common interest. It defines federalism as the political structure (in French) and the political mechanism (in English) permitting the conciliation of unity with diversity, which would determine the common interests the central government would govern:

> Federalism was a legal response to the underlying political and cultural realities that existed at Confederation and continue to exist today. At Confederation, political leaders

> told their respective communities that the Canadian union would be able to reconcile diversity with unity. (Reference re Secession, 1998, par. 43)
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> The Constitution Act, 1867 … was the first step … to a unified and independent political state in which different peoples could resolve their disagreements and work together toward common goals and a common interest. Federalism was the political mechanism1 by which diversity could be reconciled with unity. (Reference re Secession, 1998, par. 43)
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> The scheme of the Constitution Act, 1867, it was said in Re the Initiative and Referendum Act, [1919] A.C. 935 (P.C.), at p. 942, was "not to weld the Provinces into one, nor to subordinate Provincial Governments to a central authority, but to establish a central government in which these Provinces should be represented, entrusted with exclusive authority only in affairs in which they had a common interest." (Reference re Secession, 1998, par. 58)
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> The principle of democracy has always informed the design of our constitutional structure.… The principle was not explicitly identified in the text of the Constitution Act, 1867 itself.… This merely demonstrates the importance of underlying constitutional principles that are nowhere explicitly described in our constitutional texts. The representative and democratic nature of our political institutions were simply assumed. (Reference re Secession, 1998, par. 62)

The Fathers of Confederation and the Constitution Act, 1867, took it for granted that constitutional principles would be applied to breathe life into the text of the act. As a result, the representative and democratic nature of our public institutions was simply assumed in the text.

The legal framework of the constitution of Canada

The Supreme Court rules that the Constitution Act, 1867 meant to create a political structure in which the provinces should be represented and a political mechanism to conciliate diversity with the unity of Canada through the democratic institutions created by the act, that, to operate legally, these institutions must "allow for the participation of, and accountability to, the people" (Reference re Secession, 1998, par. 67), and that the people's political leaders, through the process of negotiation within these institutions, have the lawful duty to conciliate their interests so as to give effect in law to the sovereign will of the people:

> The task of the Court has been to clarify the legal framework within which political decisions are to be taken "under the Constitution." (Reference re Secession, 1998, par. 153)
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> The consent of the governed is a value that is basic to our understanding of a free and democratic society. Yet democracy in any real sense of the word cannot exist without the

> rule of law. It is the law that creates the framework within which the "sovereign will" is to be ascertained and implemented. To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. That is, they must allow for the participation of, and accountability to, the people, through public institutions created under the Constitution. (Reference re Secession, 1998, par. 67)
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> To the extent that the questions are political in nature, it is not the role of the judiciary to interpose its own views on the different negotiating positions of the parties, even were it invited to do so. Rather, it is the obligation of the elected representatives to give concrete form to the discharge of their constitutional obligations which only they and their electors can ultimately assess. The reconciliation of the various legitimate constitutional interests outlined above is necessarily committed to the political rather than the judicial realm precisely because that reconciliation can only be achieved through the give and take of the negotiation process. Having established the legal framework, it would be for the democratically elected leadership of the various participants to resolve their differences. (Reference re Secession, 1998, par. 101)

Thus, federalism is a legislative process that must be exercised through Parliament to legally determine the federal character of Canada. The justices conclude that, once this legal framework is established, it would not belong to the judiciary to interpose its views in the political negotiation conciliating the will of the people into law. This was a stunning conclusion. The Court ruled that it is not the role of the judiciary to determine the division of powers in the Canadian federation.

The legislative intent of the Constitution Act, 1867: The significance of Confederation

The Court rules that the intent of Confederation is embodied in the Quebec Resolutions (1864), that these resolutions express the desire of the provinces to be federally united, and that this scheme was loyally enacted by the Constitution Act, 1867:

> The delegates [at the Quebec Conference] approved 72 resolutions, addressing almost all of what subsequently made its way into the final text of the Constitution Act, 1867. (Reference re Secession, 1998, par. 38)
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> Resolution 70 provided that "The sanction of the Imperial and Local Parliaments shall be sought for the Union of the Provinces, on the principles adopted by the Conference." (Reference re Secession, 1998, par. 39)
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> Confirmation of the Quebec Resolutions was achieved more smoothly in central Canada than in the Maritimes. (Reference re Secession, 1998, par. 40)

> Sixteen delegates (five from New Brunswick, five from Nova Scotia and six from the Province of Canada) met in London in December 1866 to finalize the plan for Confederation. To this end, they agreed to some slight modifications and additions to the Quebec Resolutions. Minor changes were made.… (Reference re Secession, 1998, par. 41)
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> The British North America Bill was drafted after the London Conference with the assistance of the Colonial Office … passed third reading in the House of Commons on March 8, received royal assent on March 29, and was proclaimed on July 1, 1867. (Reference re Secession, 1998, par. 41)

The *Constitution Act, 1867*, was an evolutionary step in the constitution of Canada

The Court lets it be understood that the political structure and the democratic mechanism conceived to lawfully conciliate the unity with the diversity of Canada through the democratic institutions created by the Constitution Act, 1867, were not revolutionary but an evolutionary step, an adaptation of a system that existed at the time of Confederation:

> Our constitutional history demonstrates that our governing institutions have adapted and changed … by methods that have ensured continuity, stability and legal order. (Reference re Secession, 1998, par. 33)
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> The experience of both Canada East and Canada West under the Union Act, 1840, had not been satisfactory. (Reference re Secession, 1998, par. 59)
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> The Canadian tradition, the majority of this Court held in Reference re Provincial Electoral Boundaries (Sask.) [1991] … is one of evolutionary democracy moving in uneven steps toward the goal of universal suffrage and more effective representation. (Reference re Secession, 1998, par. 63)

How the existing system was meant to be adapted can be found in the scheme of Confederation adopted by the Quebec Conference (1864) and the text of the Constitution Act, 1867, which is meant to be understood in light of its constitutional implications in establishing the federal union desired by the provinces.

For a proper understanding of the constitutional language used in the 72 Quebec resolutions and the Constitution Act, 1867, providing the adaptation of this form of government for the Dominion of Canada, it is necessary to review Canada's political and constitutional history to discover the principles and practices underlying the representative and democratic character of its political institutions at the time of Confederation.

Evolution of the Uniquely Canadian Model of Responsible Government

Lord Durham's Report on the Affairs of British North America

Lord Durham was dispatched to British North America following the insurrections in Lower and Upper Canada in 1837–1838 with a mandate to recommend adjustments "respecting the form and future Government of the said provinces" (Durham, 1912, p. 7). He reported that the system of government in all the provinces of British North America shared the same constitutional defect. In essence, the governor's Executive Council, not being chosen from among members of Parliament, had become self-perpetuating. The Executive Council itself chose who could join their select group. Durham wrote:

> A Governor, arriving in a colony … is compelled to throw himself almost entirely upon those whom he finds placed in the position of his official advisers. (Durham, 1912, p. 77–78)

> Thus, every successive year consolidated and enlarged the strength of the ruling party. Fortified by family connexion, and the common interest felt by all who held, and all who desired, subordinate offices, that party was thus erected into a solid and permanent power, controlled by no responsibility, subject to no serious change, exercising over the whole government of the Province an authority utterly independent of the people and its representatives. (Durham, 1912, p. 78)

> Upper Canada has long been entirely governed by a party commonly designated throughout the Province as the "family compact." … This body of men … possessed almost all the highest public offices, by means of which, and of this influence in the Executive Council, it wielded all the powers of government; it maintained influence in the legislature by means of its predominance in the Legislative Council. (Durham, 1912, p. 149)

In Lower Canada the same constitutional defect had the same effect, except that the governing class was the "British Party" and the conflict of powers degenerated into a "war of races."

The constitutional defect initiated a power struggle between the House of Assembly and the executive government, resulting in the denial of the people's constitutional liberty, the corruption of their moral and material values, the inability of government to provide necessary and obvious reforms and the complete disorganization of the state.

While the reformers in Lower Canada demanded an elected Legislative Council (upper house), the Upper Canadian reformers realized that the upper house was the creature of the Executive Council. Their constant demand was for the executive to be responsible for their conduct (Durham, 1912, p. 111). Lord Durham recommended:

> It needs no change in the principles of government … to supply the remedy, which would, in my opinion, completely remove the existing political disorders. It needs but to follow out consistently the principles of the British Constitution, and introduce into Government those wise provisions, by which alone the working of the representative system can in any country be rendered harmonious and efficient. (Durham, 1912, p. 277)
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> Every purpose of popular control might be combined with every advantage of vesting the immediate choice of advisers in the Crown, were the Colonial Governor to be instructed to secure the cooperation of the Assembly in his policy, by entrusting its administration to such men as could command a majority. (Durham, 1912, p. 279)
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> This would induce responsibility for every act of Government. (Durham, 1912, p. 279)
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> The responsibility to the United Legislature of all officers of the Government, except the Governor and his Secretary, should be secured by every means known to the British Constitution. The Governor, as the representative of the Crown, should be instructed that he must carry on his government by heads of departments, in whom the United Legislature shall repose confidence; and that he must look for no support from home in any contest with the legislature, except on points involving strictly imperial interests. (Durham, 1912, p. 327)

By the Union Act, 1840 (United Kingdom, Parliament, 1840), the imperial authorities united Upper and Lower Canada under one legislature and one government to form the Province of Canada. Contrary to the recommendation of Lord Durham, Upper and Lower Canada were given an equal number of representatives in their united legislature. The imperial authorities expected the representatives of Lower Canada's English minority to vote with Upper Canada to temporarily outnumber the French. The consequence, however, was to establish the federal nature of the newly formed Province of Canada.

The principles underlying responsible government

Following the insurrections against a government that was neither responsible nor replaceable, the people of both Upper and Lower Canada were intent on establishing a responsible government for the Province of Canada. Robert Baldwin proposed four resolutions in the first session of the House of Assembly setting out the principles to be followed in the construction of the government. These resolutions, as amended by the imperial authority, were approved by a great majority of the House of Assembly on September 3, 1841 (Leacock, 1907, p. 109). They read as follows:

> 1. That the most important, as well as the most undoubted, of political rights of the people of this province is that of having a provincial parliament for the protection of their

liberties, for the exercise of a constitutional influence over the executive departments of their government and for legislation upon all matters of internal government.

2. That the head of the Executive Government of the province being, within the limits of his government, the representative of the sovereign, is responsible to the imperial authority alone but that, nevertheless, the management of our local affairs can only be conducted by him, by and with the assistance, counsel and information of subordinate officers of the province.

3. That in order to preserve between the different branches of the provincial parliament that harmony which is essential to the peace, welfare and good government of the province, the chief advisers of the representative of the sovereign, constituting a provincial administration under him, ought to be men possessed of the confidence of the representatives of the people, thus affording a guarantee that the well-understood wishes and interests of the people, which our gracious sovereign has declared shall be the rule of the provincial government, will, on all occasions, be faithfully represented and advocated.

4. That the people of this province have, moreover, a right to expect from such provincial administration the exertion of their best endeavour that the Imperial authority, within its constitutional limits, shall be exercised in the manner most consistent with their wishes and interests."

The second resolution acknowledges that the governor general is responsible to the imperial authority alone but asserts that he can only administer his government with the assistance, counsel and information of subordinate officers of the province.

The third resolution entitles the people to the rule of government in accordance with their well-understood wishes and interests. And to guarantee this rule of government, the chief advisers of the representative of the sovereign, constituting the provincial administration under him, must possess the confidence of the representatives of the people.

The evolution of Canadian federalism

The political structure, the democratic mechanism and the constitutional balance of powers that evolved to guarantee the responsible government of Canada were the consequence of the full and honest application of these principles to the Union Act, 1840. Section 12 of the Union Act granted the people of both Upper and Lower Canada the right to the same number of representatives in their united House of Assembly, in effect creating the constitutional balance of Upper and Lower Canada in their central government.

Given the cultural diversity of the people of the two united territories, founded on a customary law, a language, a religion and public institutions unique to each, the House of Assembly naturally divided into two equal sections. Each section of the province argued that it had the right to be constitutionally represented by a chief adviser in the governor general's Executive Council to guarantee the rule of government according to their own well-understood wishes and interests (Hincks, 1884, pp. 150–55).

Lord Elgin became governor general with the commission to establish a responsible government in Canada. Following the general election of 1847, he chose Louis-Hippolyte LaFontaine to form the government, as one who could command a majority of the united assembly. LaFontaine accepted on condition that Robert Baldwin hold an equivalent position. In this way, the people of Upper and Lower Canada would each have a political leader in the Executive Council in whom they could confide the authority and responsibility to advocate the exercise of the powers of the state according to their own wishes and interests.

Lord Elgin accepted this proposition and asked his two chief advisers to determine together the representative character of their cabinet and agree on a political program that their coalition government would implement upon its approval by the majority of the united House of Assembly (Leacock, 1907, pp. 284–86). The political leaders of the British in Upper Canada and the French in Lower Canada had to agree to the composition of this cabinet and to a program that would satisfy the wishes and interests of their own constituents. This democratic mechanism effectively excluded those concerns, unique to either Upper or Lower Canada, that could not, in justice, be reconciled within a common political program. It determined the interests Upper and Lower Canada wanted governed in common and made the ministry responsible to both Canadas for implementing the political program approved by Parliament.

The consequence of this democratic mechanism was to establish the federal nature of the rule of law in Canada. Local concerns specific to either Upper or Lower Canada were to be governed by law having effect only in that section of the province. It followed that the government, by law, of these local concerns required only the approval of those members of the Assembly elected to represent the people of the section affected by the law.

During the debates on Confederation, John A. Macdonald confirmed this. He said:

> Although we have nominally a Legislative Union in Canada — although we sit in one Parliament, supposed constitutionally to represent the people without regard to sections or localities, yet we know, as a matter of fact, that since the union in 1841, we have had a Federal Union; that in matters affecting Upper Canada solely, members from that section claimed and generally exercised the right of exclusive legislation, while members from Lower Canada legislated in matters affecting only their own section. (Province of Canada, Parliament, 1865, p. 30)

This uniquely Canadian form of responsible government, characterized by a coalition government formed and directed by two first ministers who were the political leaders of Upper and Lower Canada sitting in the governor's Council as his chief advisers, endured until the time of Confederation.

The operation of the Governor in Council under responsible government

Governors general are legally vested with all the powers of the state. However, they must exercise these powers to ensure the rule of government according to the well-understood wishes and interests of the people, which they know through the counsel of their chief advisers, possessed of the authority, by Parliament, to speak and act on its behalf.

Governors general cannot act if the will of Parliament is divided. They cannot sanction the exercise of the powers of the state unless both first ministers proffer the same advice as to how the people wish to govern themselves. To exercise power, the leaders must negotiate common ground. They would naturally call upon the governor general to help them in their constitutional difficulties. Given human nature, each of these political actors would tend to defend their legitimate jurisdictions. Given the governor general's position and role in Council, the political actors would be obliged to support their ambitions by referring to the legitimate constitutional interests of the people represented in Parliament.

The recourse to ensure respect for their legitimate jurisdictions is to resign. Canada won the struggle for responsible government when LaFontaine and Baldwin and their cabinet resigned in 1843, explaining why they could not hold themselves responsible for the government of the province under the rule of Governor General Charles Metcalfe. It took Metcalfe almost a full year to form a new coalition willing to serve under his administration (Province of Canada, Parliament, 1865, pp. 199–247).

A general election was held. LaFontaine and Baldwin called upon the people to uphold their authority. Metcalfe used every official resource and then some to support his party. Metcalfe's party won a greater majority in Upper Canada than LaFontaine won in Lower Canada, but putting the question to the people to decide who is true and who is abusing power proved to be a turning point. It forced the imperial government to recognize that it could not rule "in opposition to the opinion of the inhabitants" (Careless, 1967, p. 116).

The same recourse is available to the first ministers to ensure respect for the legitimate constitutional interests of their constituents. During the debates on Confederation, George-Étienne Cartier, the political leader of Lower Canada, explained, "At present, if I find unreasonable opposition to my views, my remedy would be to break up the Government by retiring and the same thing will happen in the Federal Government" (Province of Canada, Parliament, 1865, p. 571). If the Lower Canadian half of the Cabinet resigned crying abuse of power, the people would be called upon to decide who is telling true. Since this never actually

occurred during the existence of the Province of Canada, the threat of such recourse seems to have been sufficient to temper ambitions.

Evolution of the Intent of Confederation

The course of responsible government

With the support of the people, the responsible government of Canada was dynamic, decisive and powerful. Within a very short time, an efficient administration and social harmony were restored. The moral and material prosperity of Canada progressed rapidly. The unique form and operation of the government of Canada gained the respect of the entire Western world.

Nevertheless, the Province of Canada had its problems. Responsible government was structured within the constraints imposed by the Union Act, 1840, which established only one government to administer the law, in effect, three different systems of law governing two recognized communities and the whole of Canada.

Through LaFontaine and Baldwin, these two communities agreed to work together to further their moral and material progress. However, the prosperity that the French-Catholic community pursued was maybe more of a moral or spiritual nature, while the prosperity that the English-Protestant community pursued was more of a material nature.

As a result, Upper Canadians were contributing fully 75 per cent of the budget of the unified administration. Though the population of Upper Canada was fast outnumbering that of Lower Canada, the equal representation of the two Canadas in the legislature required their government to spend public revenue equally in each. The Upper Canadians quickly complained of the injustice of this arrangement. Also, whenever a public investment was deemed necessary to the general benefit of either Upper or Lower Canada, an offsetting amount had to be spent in the other section regardless of the value of the investment (Province of Canada, Parliament, 1865, p. 92).

George Brown, leader of the Upper Canadian reformers, demanded justice through constitutional reform. Beginning in 1856, the principles of this proposed reform were explored with increasing intensity. Brown effectively paralyzed the government by rallying a majority of the united Assembly to counter any increase in the public debt (Gray, 1872, pp. 33–34). To repair the injustice, he demanded representation by population: that each citizen be equally represented in the Assembly to distribute their influence more fairly according to the financial burden they must bear.

This reform, however, would eliminate the equal right of each of the Canadas to a chief representative in the governor's Council and the mechanism of coalition government that

guaranteed respect for their legitimate constitutional interests in the government of their union.

Rather than being established by agreement through a democratic mechanism determining the rule of government in accordance with their well-understood wishes and interests, it was feared that the law would become a tool whereby the English would rule the French by vote of a simple majority of the Assembly.

During the Confederation Debates, George-Étienne Cartier said,

> The consequence of representation by population would have been that one territory would have governed the other, and this fact would have presented itself session after session in the House, and day after day in the public prints. The moment this principle had been conceded as the governing element, it would have initiated between the two provinces a warfare which would have been unremitting. (Province of Canada, Parliament, 1865, p. 49)

The solution of Confederation

George Brown explained,

> Our Lower Canada friends have agreed to give us representation by population in the Lower House, on the express condition that they shall have equality in the Upper House. On no other condition could we have advanced a step; … and it was quite natural that the protection for those interests, by equality in the Upper Chamber, should be demanded by the less numerous provinces.
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> But, under this plan, by our just influence in the Lower Chamber, we shall hold the purse strings. If, from this concession of equality in the Upper Chamber, we are restrained from forcing through measures which our friends of Lower Canada may consider injurious to their interests, we shall, at any rate, have power, which we never had before, to prevent them from forcing through whatever we may deem unjust to us. (Province of Canada, Parliament, 1865, p. 88)
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> All local matters are to be banished from the general legislature; local governments are to have control over local affairs, and if our friends in Lower Canada choose to be extravagant, they will have to bear the burden of it themselves. (Province of Canada, Parliament, 1865, p. 92)

The intent of Confederation was set out in 72 resolutions adopted by the conference of 32 delegates representing almost all the political parties of the provinces involved in Confederation (Province of Canada, Parliament, 1865, pp. 1027–32).

The second resolution sets out the intent to unite the provinces in accordance with the federal principle wherein a general government would be charged with matters of common interest and local governments would be charged with local matters.

The third resolution expresses the desire to follow the model of the British Constitution as far as circumstances permit.

The fourth resolution stipulates that the government shall be "administered according to well-understood principles of the British constitution" (Province of Canada, Parliament, 1865, p. 1027).

The 14th resolution sets out the principle for appointing the initial members of the upper house of Parliament:

> The first [senators] shall be appointed by the Crown at the recommendation of the General Executive Government, upon the nomination of the respective Local Governments, and in such nomination due regard shall be had to the claims of … the Opposition in each Province, so that all political parties may as nearly as possible be fairly represented. (Province of Canada, Parliament, 1865, p. 1028)

This resolution thus provides for the proportional representation of all provincial political parties in the Senate. This representative character permits the Senate to conciliate the people's local interests in the government of Canada in harmony with those represented and protected in their provincial legislatures. By this, the local political capacity of the people to govern themselves as they wish is fully and truly represented in the Senate.

It only provided for the appointment of the first senators because the Fathers of Confederation could not agree on more (Pope, 1895, pp. 61–66). Some of them argued that each province should choose how it wished to be represented in the Senate. They all agreed, however, that the union of the provinces could not proceed unless this matter was settled. The delegates therefore agreed to this compromise.

They naturally assumed that the representative principle underlying the first selection of senators would continue to apply until a province decided otherwise. They certainly did not foresee that the federal government would be structured to prevent the provinces from advising the governor general of their choice of representative.

The Renewal of Responsible Federalism by the Constitution Act, 1867

Equality of the Senate and the House of Commons

During the Debates on Confederation, John A. Macdonald said, “In the Constitution we propose to continue the system of Responsible Government, which has existed in this province since 1841” (Province of Canada, Parliament, 1865, p. 33). The constitutional balance, the dual political structure. and the democratic mechanism to conciliate the unity with the diversity of the Province of Canada through Parliament was adapted by the Constitution Act, 1867 “to ensure efficiency, harmony and permanency in the working of the union” (Province of Canada, Parliament, 1865, p. 1028).

The equal privilege and power of the Senate and the House of Commons to influence the course of the government of Canada is established by section 18 of the Constitution Act, 1867, which states that the source of the privileges, immunities and powers of both the Senate and the House of Commons of Canada is the Commons House of Parliament of Great Britain and Ireland. Upon the first occasion, this was confirmed to mean that both houses have the same privileges, immunities and powers as the British Commons House of Parliament by An Act to define the privileges, immunities and powers of the Senate and House of Commons, assented to May 22, 1868 (Dominion of Canada, Parliament, 1868). It reads:

> Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:
>
> 1. The Senate and the House of Commons respectively, and the Members thereof respectively, shall hold, enjoy and exercise such and the like privileges, immunities and powers as, at the time of the passing of the British North America Act 1867, were held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland, and by the members thereof, so far as the same are consistent with and not repugnant to the said Act.

Both houses are thus recognized as representative institutions and equally empowered to represent the will of the people: the House of Commons to represent and protect their wishes and interests regarding their common government throughout Canada, the Senate to represent and protect the most cherished local interests of the inhabitants of the provinces.

The most important privilege of the House of Commons gained by the Glorious Revolution of 1688, which transformed the absolute monarchy into the British constitutional model of government, is to choose and mandate their own to advise the King in the exercise of the people’s prerogative. Section 18 entitles the Senate to the same privilege.

Given that section 18 renews the constitutional balance provided by the Union Act, section 12 renews the powers, authorities and functions that the governor general exercised in the

Province of Canada to facilitate conciliation of the unity with the diversity of Canada. Section 91 explicitly renews the dual political structure and the democratic mechanism permitting this conciliation by stating, “It shall be lawful for the Queen, by and with the advice … of the Senate and the House of Commons, to make laws.…” Fulfilment of this right requires that both houses be involved in initiating the law. This implies a common political program approved by both houses, excluding the purely local interests the people want governed locally.

Our constitutional system of government rests on the extension of this legislative form to the exercise of the discretionary powers of the state exercised by the Governor in Council (Hearn, 1887, p. 120). Further, section 12 of the Constitution Act, 1867, requires that the advice be proffered “as the case requires,” by an adviser in whom parliament has confided the authority to speak on the matter. “There is not a moment in the king’s life,” wrote Alpheus Todd (1880, p. 17), “during which there is not some one responsible to Parliament for his public conduct.”

The representative nature of the Senate

To enable the provinces to defend their interests, the true functionality of the British parliamentary model of government was adopted by restoring the original purpose of the House of Lords — to represent the political interests of the feudal territories in Parliament with the King (Pocock, 1957, p. 183) — and adapting provincial representation in the Senate to the democratic principle evolved under the British constitution.

In 1864, the Canadian delegates intervened in the Charlottetown Conference, which was called to discuss the union of the Maritime provinces, to propose a greater union. The Canadians found that the Maritime provinces were as committed to protecting their individuality as Lower Canada (Province of Canada, Parliament, 1865, p. 29). They offered the Maritime provinces the same number of provincial representatives in the Senate, so they could defend their local and regional interests as well as Upper and Lower Canada. Section 22 honours this commitment.

The representative nature of the Senate was conceived at a time when appointed representatives honoured the authority vested in them by resigning if the author of their appointment, for whatever reason, chose to confide the office in another. Lords, however, may under no circumstances abdicate their duties (Hearn, 1887, pp. 459–63). Section 30 of the Constitution Act, 1867, thus breaks with the British model to explicitly provide the right of senators to resign. The uniquely Canadian model of responsible government provides for the representative nature of the Senate by ensuring the accountability of the provincial representatives to the authority underlying their office.

Since it was intended that the provincial political parties be represented in the Senate, it belongs to them to choose and authorize their representatives to act on their behalf in the Senate. Though the honour system has lapsed, the political parties can still ensure respect for

the authority they confide in a proposed nominee by requiring them to sign an undated resignation.

It would be in the interest of the provincial parties to delegate the best candidates possible to the Senate. Voters would certainly be greatly influenced by their performance and would sanction any party that would suffer fools to protect their provincial interests. Furthermore, to gain influence in the federal executive, it would be in their interest to delegate persons with the abilities required to strengthen the government's administration.

The appointment for life of senators (later amended to the age of 75) was not conceived to make them unaccountable to those they represent but rather to ensure their freedom of expression by preventing the governor general from dismissing troublesome senators.

Implementation of the Constitution Act, 1867

Lord Monck's letter to Macdonald

Why is it that today the provinces are not represented in the Senate? Why are we ruled by a simple majority of the House of Commons?

It is because the first governor general of Canada, Lord Monck, in a letter dated May 24, 1867 (Macdonald Papers), called upon John A. Macdonald to form the first government on condition that he agree to put an end to the uniquely Canadian model of responsible government. He wrote,

> In authorizing you to undertake this duty of forming an administration for the Dominion of Canada, I desire to express my strong opinion that in future it shall be distinctly understood that the position of First Minister shall be held by one person who shall be responsible to the Gov. Gen. for the appointment of the other Ministers, and that the system of dual First Ministers which has hitherto prevailed shall be put an end to.

It is not hard to imagine the arrangement that would have induced Macdonald to agree to Lord Monck's directive: The Governor in Council would sanction all the power the prime minister sought in Canada's domestic matters if he upheld Her Majesty's interests in Canada's international affairs.

To consolidate his power following the first federal election, Macdonald simulated the continuation of the model of responsible government by forming a coalition government — not with the Senate but with the leader of the opposition in the House of Commons (Macdonald, 1867a, 1867b). Contrary to section 18, he applied the rules of the House of Lords to the Senate by insisting that its role was to apply a sober second thought to federal legislation. When he began appointing the provinces' representatives in the Senate, he thwarted the first attempt to

reform the Senate by moving it for discussion in a parliamentary commission that he controlled until the dissolution of Parliament. When New Brunswick challenged the legitimacy of his disallowance of provincial laws, he succeeded in silencing the controversy without anyone addressing how it is that the prime minister exercises the people's prerogative as he pleases.

Proof the dual political structure was meant to be renewed

Since civil law is the exclusive responsibility of the provinces under section 92(13) of the Constitution Act, 1867, the protection of the civil rights of minorities in Canada necessarily implies a democratic structure that can legitimately void an abusive law approved by a provincial legislative majority.

The democratic mechanism conceived by the Constitution Act to prevent this abuse was instituted by section 90 providing the governor general with the power to disallow provincial legislation. Alpheus Todd reports, in depth, on the constitutional crisis created by New Brunswick's 1871 Common Schools Act, which taxed the French Catholic Acadian minority to pay for an English Protestant public education (1880: 331–74).

Though the House of Commons voted a resolution directing Governor General Lord Dufferin to disallow the law, he refused. The debate raged in the highest instances in London and Ottawa, in the legislatures and in the courts. In the end, it was generally agreed to set aside the power of disallowance because its use "would be tantamount to a repeal of that portion of the British North America Act that confers an exclusive right to legislate upon certain matters on the provincial legislatures" (Todd, 1880, p. 337). Setting aside the exercise of the power to disallow provincial legislation in civil matters necessarily set it aside in matters impeding federal jurisdictions, even if both the Senate and the House of Commons agree that it should be exercised.

With a chief adviser of the Senate in the governor general's council, however, the dynamic of the disallowance mechanism is genius. The Equality party, established in Quebec in 1989 to protest language laws limiting the use of English, obtained 3.7 per cent of the vote in a general election later that year and won four seats in the legislature. Had Senate representation been at stake, it might have obtained much more. Under a system of proportional representation in the Senate, the Equality party probably would have obtained a seat in the Senate. It might well have rallied a majority of the Senate to advise the governor general to disallow the provincial language legislation.

The effect of this mechanism is to transform a majority of the provincial legislature into a minority in the Upper House for the purpose of protecting the legitimate constitutional interests of all minority parties throughout Canada. The provinces, taking it upon themselves to disallow provincial legislation, could not then argue that this disallowance denied the federal principle.

A Senate within which the provinces can lawfully negotiate their interests on an ongoing basis and a framework tending toward conciliation in the interest of all Canadians as the Fathers of Confederation intended could well be the missing element that would make it possible to resolve interprovincial disputes quickly and amicably. The 2018 constitutional crisis involving a dispute between British Columbia and Alberta over the expansion of the Trans Mountain oil pipeline is the most dramatic recent illustration of the inability of our current mechanisms to prevent such controversies from getting out of hand.

The Canadian model of responsible government is based on balancing a variety of interests and centres of power. Its pivot is the legitimate constitutional interest of the people, and it allows the various political actors to achieve their aims only with the support of the people — not by attempting to grab more power but through cooperation and conciliation within Parliament.

Suggestions for Future Research

We know some of the basic elements that such a system would contain, such as a provincially appointed Senate, dual heads of government, a cabinet responsible to both houses, and a governor general who could act as an impartial mediator. But this model of government was designed to operate within a single house. The intent to apply it to a constitutionally balanced bicameral parliament was never fully conceptualized. Many questions remain, and the research program now is to explore these questions.

For example, in the Province of Canada, the approval of the representative character of the coalition cabinet and the common political program it would pursue was given by the majority of the united Assembly. Applying this democratic mechanism to a constitutionally balanced bicameral parliament would seem necessarily to require a double majority. This principle was considered in 1856–1857 during the struggle to repair the injustice resulting from the Union Act. It was rejected as making a coalition cabinet unworkable. Can a political process be found to make this democratic mechanism work?

In the Canadian model of responsible government, the governor general plays a significant and extremely delicate role, in contrast to her largely ceremonial role today. The governor general must possess no semblance of authority to exercise the powers of the state as she wishes. She can’t even speak and defend herself other than through an acknowledged political leader. Yet she must ensure the rule of government in accordance with the well-understood wishes and interests of the people. Since the Statute of Westminster of 1931, the governor general is no longer an officer of the Queen. It therefore no longer belongs to the Queen to appoint the governor general. What system of appointment would ensure that the governor general can play this role effectively?

In 1867, Canada was on the verge of developing a political system that could have been a model for the world. A century and a half later, that model still has relevance both for Canada

and for other countries. Refining this model and adapting it to today's circumstances represents a rich and potentially transformative research agenda.

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Endnote

[1] The French text of the decision refers to federalism as a political "structure" rather than a "mechanism": "Le fédéralisme était la structure politique qui permettait de concilier unité et diversité."

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