

Seven Conceptions of Federalism Guiding Canada's Constitutional Change Process — How Do They Work, and Why So Many?

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Canada's constitutional amending formula is a complex one, with many different procedures for different circumstances. By looking into the whole Canadian constitutional change process, we can observe that federalism, under different conceptions, is the main guiding principle. It is these conceptions that we want to discuss here. Indeed, we want to demonstrate that the Canadian constitutional change process gives shape to at least seven conceptions of federalism, thus demonstrating its commitment to the federal principle in many of its features. These different conceptions that we will explore are (1) territorial federalism through the major role of provinces in the process, (2) executive federalism and constitutional conferences, (3) personal federalism and the intervention of Indigenous peoples, (4) confederalism and the quest for unanimity, (5) asymmetrical federalism and the openings for special arrangements, (6) treaty federalism and Indigenous legal orders, and (7) consociational federalism with the search for consensus. Finally, this will lead us to propose two main reasons to explain why there are so many conceptions of federalism expressed in the Canadian constitutional change process.

La procédure de révision constitutionnelle du Canada en est une complexe, avec plusieurs modalités différentes applicables dans différentes circonstances. En étudiant l'ensemble du processus de révision de l'ordre constitutionnel canadien, on remarque rapidement que le fédéralisme, sous différentes facettes, en est le premier principe directeur. Ce sont ces facettes que nous souhaitons discuter dans la présente contribution. En effet, nous souhaitons démontrer que le processus de révision de l'ordre constitutionnel canadien donne forme à au moins sept déclinaisons différentes du principe fédératif, démontrant ainsi son engagement envers le fédéralisme, et ce, sous plusieurs de ses déclinaisons. Ces différentes déclinaisons que nous aborderons sont (1) le fédéralisme territorial par le rôle majeur que jouent les provinces dans le processus de révision, (2) le fédéralisme exécutif et les conférences constitutionnelles, (3) le fédéralisme personnel et l'intervention des peuples autochtones, (4) le confédéralisme et la quête de l'unanimité, (5) le fédéralisme asymétrique et les ouvertures aux arrangements spéciaux, (6) le fédéralisme par traités et les ordres juridiques autochtones, et (7) le fédéralisme consociatif avec la recherche de consensus. Cette étude nous amènera in fine à proposer deux principales raisons pouvant expliquer pourquoi il est possible d'observer autant de déclinaisons du principe fédératif dans le processus de révision de l'ordre constitutionnel canadien.

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Introduction

Federalism is a concept that is both polysemic and polymorphic. Although the federal principle is based on a key feature — the division of legislative powers within a single state between coordinated and not subordinated entities¹ — , it can produce several variations, and structure the societal organisation of power in numerous ways. There are, in fact, “multiple forms of federal states and manifestations of the federal principle.”²

Federalism is thus one of those terms of legal and political vocabularies whose definition must be broad enough to include the plurality of meanings to which it can refer. This makes federalism a concept that is deepened by many theoretical teachings and practical experiences. After all, isn't it true that almost half of the world's population lives in federal states?³

Ever since its very first manifestations as a political entity, Canada has participated in and been enriched by the vividness of diverse practices of federalism. In fact, even before the 1867 Confederation, customs and conventions rooted in the spirit of federalism had spread over the Canadian territory. Among these, there was notably the consociational regime of 1848,⁴ as well as Indigenous confederative experiences.⁵

In different spheres, Canada's constitutional system still reflects the importance that federalism has in its political organisation. If Canadian federalism does not always evolve according to the aspirations, desires, and hopes of all (which seems particularly true for many Quebecers, for instance), the federal principle nonetheless influences the way relationships are being developed between the partners of the Canadian political association. Most

1 See KC Wheare, *Federal Government*, 4th ed (London, Oxford University Press, 1963) at 10, 55; Ronald L Watts, *Comparing Federal Systems in the 1990s* (Kingston, Institute of Intergovernmental Relations, 1996) at 93.

2 Eugénie Brouillet, *La négation de la nation : L'identité culturelle québécoise et le fédéralisme canadien* (Sillery, QC, Septentrion : 2005) at 79-80 [translated by author].

3 See Michael Burgess, “Federalism and Federation: Putting the Record Straight” (6 October 2017), online (blog): [50 Shades of Federalism <50shadesoffederalism.com/?s=federalism+and+federation>](http://50shadesoffederalism.com/?s=federalism+and+federation).

4 See James Kennedy, *Liberal Nationalisms: Empire, State, and Civil Society in Scotland and Quebec* (Montréal & Kingston: McGill-Queen's University Press, 2013) at 44, 150; Marc Chevrier, “La genèse de l'idée fédérale chez les pères fondateurs américains et canadiens” in Alain-G Gagnon, ed, *Le fédéralisme canadien contemporain : Fondements, traditions, institutions* (Montréal: Presses de l'Université de Montréal, 2006) 19 at 33.

5 See John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 129 [Borrows, *Canada's Indigenous Constitution*]; Christophe Parent, “Fédéralisme(s) et sécession : De la théorie à la pratique constitutionnelle” in Jorge Cagiao y Conde & Alain-G Gagnon, eds, *Fédéralisme et Sécession* (Brussels, Peter Lang: 2019) 15 at 24.

notably, its process of constitutional change seems to be particularly influenced by federalism.

Indeed, in this process, several conceptions of federalism can be observed, under different circumstances and at various stages. The key purpose of this paper is to expose these conceptions and discuss their meaning. It is not to extol the merits of Canadian federalism, to list its flaws, to criticize some of its tendencies, or to define the way in which it should evolve. Rather, this contribution aims to demonstrate that the Canadian constitutional amending formula⁶ gives shape to a large number of conceptions of the federal principle, thus demonstrating not only its commitment to federalism in many of its features, but also testifying to historical experiences and national compromises that occurred at different times and in different contexts.

The literature on constitutional change in Canada is rich and addresses, among other things, procedural aspects,⁷ specific issues,⁸ and critics of the process.⁹ Several authors also have studied the constitutional amending formula through the lens of federalism.¹⁰ Building on this literature, the first part of this

6 For the sake of my analysis, I do not limit the “amending formula” of the Canadian Constitution to the text of Part V of the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 1 [*Constitution Act, 1982*]. Instead, I include in it mechanisms and procedures that globally play a role in the process of changing the Canadian constitutional order.

7 Allan C Hutchinson, “Constitutional Change and Constitutional Amendment: A Canadian Conundrum” in Xenophon Contiades, ed, *Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA* (London: Routledge, 2013) 51; Peter W Hogg, “Formal Amendment of the Constitution of Canada” (1992) 55:1 L & Contemp Probs 253; Benoît Pelletier, *La modification constitutionnelle au Canada* (Scarborough: Carswell, 1996) [Pelletier, *La modification constitutionnelle*]; Richard Albert, “Temporal Limitations in Constitutional Amendment” (2016) 21:1 Rev Const Stud 37.

8 See Richard Albert, “Constitutional Amendment by Constitutional Desuetude” (2014) 62:3 Am J Comp L 641; Richard Albert, “Nonconstitutional Amendments” (2009) 22:1 Can JL & Jur 5; Jamie Cameron, “To Amend the Process of Amendment” in Gérald-A Beaudoin et al, eds, *Le fédéralisme de demain : réformes essentielles* (Montreal: Wilson & Lafleur, 1998) 315.

9 Patrick Taillon, “Une Constitution en désuétude : Les réformes paraconstitutionnelles et la ‘déhiérarchisation’ de la Constitution au Canada” in Louise Lalonde & Stéphane Bernatchez, eds, *La norme juridique “reformatée” : Perspectives québécoises des notions de force normative et de sources revisitées* (Sherbrooke: Revue de droit de l’Université de Sherbrooke, 2016) 297; Kate Glover, “Complexity and the Amending Formula” (2015) 24:2 Const Forum Const 9; Katherine Swinton, “Amending the Canadian Constitution: Lessons from Meech Lake” (1992) 42:2 UTLJ 139.

10 See Kate Glover, “Structural Cooperative Federalism” (2016) 76 SCLR (2nd) 45; Jean-François Gaudreault-DesBiens, “Cooperative Federalism in Search of a Normative Justification: Considering the Principle of Federal Loyalty” (2014) 23:4 Const Forum Const 1; Martin Papillon, “Adapting Federalism: Indigenous Multilevel Governance in Canada and the United States” (2012) 42:2 Publius: J Federalism 289; Rainer Knopff, “U2: Unanimity versus Unilateralism in Canada’s Politics of Constitutional Amendment” in Emmett Macfarlane, ed, *Constitutional Amendment in Canada* (Toronto: University of Toronto Press, 2016) 126; Martin

paper offers a general and complete overview of the different conceptions of federalism that are expressed in Canada's constitutional change process. The second part proposes two possible explanations of why federalism, in many dimensions, is the main principle guiding this process. In short, this paper seeks to define and explain, in a comprehensive way, the different conceptions of federalism underlying the amending formula.

Part I — The seven conceptions of federalism in Canada's constitutional change process

These different conceptions that will be explored are (1) territorial federalism through the major role of provinces in the amendment process, (2) executive federalism and constitutional conferences, (3) personal federalism and the intervention of Indigenous peoples, (4) confederalism and the quest for unanimity, (5) asymmetrical federalism and the openings for special arrangements, (6) treaty federalism and Indigenous legal orders, and (7) consociational federalism with the search for consensus.

1. Territorial federalism through the major role of provinces in the amendment process

Probably the most common conception of the federal principle, territorial federalism divides the components of a society according to a territoriality criterion. The federated entities, in such a context, are geographically identifiable and their boundaries delimit their area of action within their own spheres of competence. For individuals, the place where they live and settle on the territory of the state bases their membership to a given federated entity rather than to another.

Papillon & Richard Simeon, "The Weakest Link? First Ministers' Conferences in Canadian Intergovernmental Relations" in J Peter Meekison, Hamish Telford & Harvey Lazar, eds, *Canada: The State of the Federation 2002* (Montreal & Kingston: McGill-Queen's University Press, 2004) 113; José Woehrling, "Le recours à la procédure de modification de l'article 43 de la Loi constitutionnelle de 1982 pour satisfaire certaines revendications constitutionnelles du Québec" in Pierre Thibault, Benoît Pelletier & Louis Perret, eds, *Les mélanges Gérald-A Beaudoin : Les défis du constitutionnalisme* (Cowansville: Yvon Blais, 2002) 449 [Woehrling, "Le recours"]; Michael J Bryant, "The State of the Crown-Aboriginal Fiduciary Relationship: The Case for an Aboriginal Veto" in Patrick Macklem & Douglas Sanderson, eds, *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal & Treaty Rights* (Toronto: University of Toronto Press, 2016) 223; Charlotte Twilight, "Constitutional Renegotiation: Impediments to Consensual Revision" (1992) 3:1 *Constitutional Political Economy* 89; Daniel Proulx, "La modification constitutionnelle de 1997 relative aux structures scolaires au Québec : une mesure opportune et juridiquement solide" (1998) 58 R du B 41.

At its core, this type of federalism intends to treat all citizens identically,¹¹ whether or not they are part of some distinct group. It also puts all federated entities on an equal footing. Therefore, territorial federalism does not necessarily promote diversity among the federated entities and seems to assume that there are no significant differences within their populations.

In general, this territorial dimension predominates within Canadian federalism.¹² Indeed, legislative jurisdictions in Canada are shared between a federal state and provinces with well-defined and constitutionally protected territorial boundaries.¹³ In addition, the main partners of the federal government in the conduct of state affairs are the provinces, with which it can also develop some forms of cooperation.¹⁴

This preference for territorial federalism in Canada is all the more evident in its constitutional amending formula and in the primary role that the provinces play in it. Indeed, the provinces all have the ability to formally introduce a constitutional amendment through their legislature.¹⁵ In its *Reference Re Secession of Quebec*, the Supreme Court added that this initiative procedure, at least in some circumstances, is complemented by a constitutional duty to negotiate the proposed changes.¹⁶

11 Alain-G Gagnon, *The Case for Multinational Federalism: Beyond the All-Encompassing Nation* (London: Routledge, 2010) at 15 [Gagnon, *Multinational Federalism*].

12 One important exception can be found at section 91(24) of the *Constitution Act, 1867* with regard to the federal jurisdiction over “Indians, and Lands reserved for the Indians”: *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91(24), reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act, 1867*]. This is more in line with personal federalism.

13 *Constitution Act, 1982*, *supra* note 6, s 43.

14 See Noura Karazivan, “Le fédéralisme coopératif entre territorialité et fonctionnalité: le cas des valeurs mobilières” (2016) 46:2 RGD 419; *Reference Re Pan-Canadian Securities Regulation*, 2018 SCC 48.

15 This procedure is contained in section 46 (1) of the *Constitution Act, 1982*: “The procedures for amendment under sections 38, 41, 42 and 43 may be initiated either by the Senate or the House of Commons or by the legislative assembly of a province.”; See also Pelletier, *La modification constitutionnelle*, *supra* note 7 at 110-111: “both the provinces and the federal government can submit constitutional reform proposals to their federal partners” [translated by author].

16 There is a debate about whether the duty to negotiate constitutional changes applies to other cases than the secession of a province. The wording of the Supreme Court of Canada seems to include a wide range of cases regarding constitutional initiatives: *Reference Re Secession of Quebec*, [1998] 2 SCR 217 at para 69, 161 DLR (4th) 385 [*Secession Reference*]: “the existence of this right [of initiative] imposes a corresponding duty on the participants in Confederation to engage in constitutional discussions in order to acknowledge and address democratic expressions of a desire for change in other provinces. This duty is inherent in the democratic principle which is a fundamental predicate of our system of governance”. On the duty to negotiate, see also Henri Brun, Guy Tremblay & Eugénie Brouillet, *Droit constitutionnel*, 6th éd (Cowansville, QC: Yvon Blais, 2014) at 243-244: “the Reference inferred the duty to negotiate both from the underlying principles of the Constitution and the right of each participant of the federation to initiate the process of constitutional amendment” [translated

In addition to the ability to initiate amendments, provinces must ratify proposals that are of multilateral application. Two ways can thus be identified, namely that of the unanimity of the two houses of Parliament and the legislatures of the ten provinces, and that of the so-called “7/50” formula. The latter requires the approval, in addition to both houses of Parliament, of the legislatures of at least seven provinces that account, in the aggregate, for at least 50% of the Canadian population.¹⁷ Together, these two procedures reflect a “political consensus that the provinces must have a say in constitutional changes that engage their interests.”¹⁸ They also make provinces the main actors in the ratification process of new constitutional provisions in Canada.

2. Executive federalism and constitutional conferences

Executive federalism — a form of intergovernmental federalism — is the second conception of the federal principle at work within the constitutional change process of Canada. Indeed, this type of federalism emphasizes the major role that federal and provincial governments are called upon to play in the conduct of state affairs.¹⁹ This is, therefore, a conception of federalism in which the mechanisms of intergovernmental negotiation are controlled “predominantly by the representatives of the executive power within the various governments that make up the federal system.”²⁰

Executive federalism is also one of the most important conceptions of federalism in Canada. Its omnipresence is mainly explained by the convergence

by author]; David P Haljan, “A Constitutional Duty to Negotiate Amendments: Reference Re Secession of Quebec” (1999) 48:2 ICLQ 447; Jean-François Gaudreault-DesBiens, “The Quebec Secession Reference and the Judicial Arbitration of Conflicting Narratives About Law, Democracy, and Identity” (1999) 23:4 Vermont L Rev 793; Patrick Taillon & Alexis Deschênes, “Une voie inexplorée de renouvellement du fédéralisme canadien : l’obligation constitutionnelle de négocier des changements constitutionnels” (2012) 53:3 C de D 461; Commission sur l’avenir politique et constitutionnel du Québec, *Les aspects juridiques de la redéfinition du statut politique et constitutionnel du Québec*, by José Woehrling, vol 2, (Québec: Commission sur l’avenir politique et constitutionnel du Québec, 2002) at 27: “In other words, when a province or the federal government (which are the ‘participants of the Confederation’) takes the initiative to propose a constitutional amendment, the principles of federalism and democracy place a general obligation on the other participants to negotiate in good faith. Such an obligation applies even if the proposed amendment is the secession of a province” [translated by author].

17 In both cases, it is important to note that the Senate only enjoys a suspensive veto because its failure to vote favourably on a proposed amendment can be resolved, after a six months, by a second affirmative vote in the House of Commons: *Constitution Act, 1982*, *supra* note 6, s 47.

18 *Reference Re Senate Reform*, 2014 SCC 32 at para 31 [Senate Reference].

19 See e.g. François Laplante-Lévesque, *L’impact des mécanismes de fédéralisme exécutif sur le déficit fédératif canadien* (MA Thesis, Université du Québec à Montréal, Montréal, 2010) [unpublished].

20 Ronald L Watts, “Executive Federalism: A Comparative Analysis” (1989) Institute of Intergovernmental Relations Research Paper No 26 at vii.

of two essential characteristics of the Canadian state: federalism and British-style parliamentarism. Indeed, as François Laplante-Lévesque notes, “Canada was one of the first countries to combine federalism — a system involving two levels of government — and the Westminster parliamentary model — with a concentration of power in the hands of the executive. This combination has fostered the development of intergovernmental coordination mechanisms.”²¹

In addition, executive federalism finds in Canada an additional purpose: it fulfills a function that no other institution really is in position to fulfill. That is to represent the specific interests of the provinces at the federal level. Indeed, despite the existence of the Canadian Senate, Henri Brun, Guy Tremblay and Eugénie Brouillet write that “there is no effective ‘federal chamber’ in Canada” and neither “senators nor members of Parliament are mandated by the provinces.”²² As the Supreme Court stated in the *Reference Re Senate Reform*, “the Senate rapidly attracted criticism and reform proposals. Some felt that it failed to provide ... meaningful representation of the interests of the provinces.”²³ Therefore, executive federalism contributes to bridge this gap.

It is through executive federalism that constitutional conferences, the main forum for constitutional negotiations in Canada, take place. These conferences represent a practice that transcends the country’s history. During such events, the creation of Canada was negotiated between 1864 and 1867, an agreement on Patriation was reached in 1981, and attempts to amend the Constitution with the Meech and Charlottetown Accords took shape.²⁴ Constitutional

21 Laplante-Lévesque, *supra* note 19 at 35 [translated by author]; See also David Cameron & Richard Simeon, “Intergovernmental Relations in Canada: The Emergence of Collaborative Federalism” (2002) 32:2 *Publius: J Federalism* 49 at 49: “‘Executive federalism’ or ‘federal-provincial diplomacy’ has long been considered the defining characteristic of Canadian federalism, which combines federalism and Westminster-style cabinet government”; For Guy Laforest and Éric Montigny, “executive federalism is therefore the result of the evolution of these institutional arrangements, and this, in a context where the state (regardless of its level of government) has undertaken to occupy an important place in the daily life of citizens”: Guy Laforest & Éric Montigny, “Le fédéralisme exécutif : problèmes et actualités” in Réjean Pelletier & Manon Tremblay, eds, *Le parlementarisme canadien* (Québec: Presses de l’Université Laval, 2005) 345 at 348 [translated by author].

22 See Brun, Tremblay & Brouillet, *supra* note 16 at 432 [translated by author]. See also Marc-Antoine Adam, Josée Bergeron & Marianne Bonnard, “Intergovernmental Relations in Canada: Competing Visions and Diverse Dynamics” in Johanne Poirier, Cheryl Saunders & John Kincaid, eds, *Intergovernmental Relations in Federal Systems: Comparative Structures and Dynamics* (Don Mills, ON: Oxford University Press, 2015) 135 at 146.

23 *Senate Reference*, *supra* note 18 at para 17.

24 The Meech Lake Accord of 1987 is one of the culminating points of executive federalism in Canada, despite the fact that it failed to be ratified by the provinces. See Christopher Alcantara, “Ideas, Executive Federalism and Institutional Change: Explaining Territorial Inclusion in Canadian First Ministers’ Conferences” (2013) 46:1 *Can J Political Science* 27 at 27.

conferences are a constant in Canadian history and have been at the heart of the deepest debates concerning the constitutional future of the country.²⁵ These conferences “thus perpetuate the mechanism for discussion, negotiation and collaboration among the political elites of the various groups present in Canada.”²⁶

Traditionally, constitutional conferences brought together the federal prime minister and provincial premiers. Since the 1980s and 1990s, they have included Indigenous leaders and premiers of the three territories in these conferences, especially when the issues discussed relate to them.²⁷ The source of many criticisms,²⁸ constitutional conferences and executive federalism nevertheless allow Canadian political elites to negotiate with each other the content of proposed constitutional amendments affecting all Canadians.

3. Personal federalism and the intervention of Indigenous peoples

Personal federalism, in contrast with territorial federalism, proceeds instead with the distribution of legislative competences according to the linguistic, ethnic, or religious cleavages of a given society. In such a system, it is to the various groups that make up the State that the different jurisdictions are assigned. This attribution is therefore in accordance with the principle of personality, from which this form of federalism draws its spirit. According to such a perspective, the application of laws and norms is intrinsically linked to individuals and not to territories.²⁹ As Geneviève Motard puts it, “A system of personal autonomy or personal federalism means that the division of legislative

25 See Papillon & Simeon, *supra* note 10 at 113-114; Alcantara, *supra* note 24 at 27; Donald J Savoie, “Le pouvoir au sommet : la domination de l’exécutif” in Alain-G Gagnon & David Sanschagrin, eds, *La politique québécoise et canadienne : Acteurs, institutions, sociétés*, 2th ed (Québec: Presses de l’Université du Québec, 2017) at 179.

26 Dave Guénette, “L’apanage des élites : Étude de la nature élitaire des processus constitutants dans les sociétés fragmentées belge et canadienne” in Alex Tremblay Lamarche & Serge Jaumain, eds, *Les élites et le biculturalisme : Québec-Canada-Belgique XIX^e-XX^e siècles* (Québec: Septentrion, 2017) 196 at 213 [translated by author].

27 See Alcantara, *supra* note 24 at 27; José Woehrling, “Les aspects juridiques de la redéfinition du statut politique et constitutionnel du Québec ” (1991-1992) 7:1 RQDI 12 at 19 [Woehrling, “Les aspects juridiques”].

28 See Patrick Taillon, “Les obstacles juridiques à une réforme du fédéralisme” (2007) Institut de recherche sur le Québec Working Paper, online (pdf): <irq.quebec/wp-content/uploads/2015/03/Obstaclesjuridiques.pdf> [Taillon, “Les obstacles juridiques”].

29 See Geneviève Motard, *Le principe de la personnalité des lois comme voie d’émancipation des peuples autochtones? : Analyse critiques des ententes d’autonomie gouvernementale au Canada*, (LLD Thesis, Université Laval, 2013) at 8 [unpublished].

powers among government entities is made along identity lines, rather than geographical criteria.”³⁰

In Canada, it is in harmony with the principles of personal federalism that Indigenous peoples were integrated into the multilateral process of constitutional negotiations. Indeed, having been left out in this matter until the 1980s,³¹ Indigenous leaders have been able to find a place in this process of constitutional negotiations during the Patriation debates.³² From that moment on, “Aboriginal peoples sought a central role at the constitutional bargaining table so that the rights for which they argued would be respected.”³³

After Patriation, four constitutional conferences were held between 1983 and 1987, specifically to discuss the issues related to Indigenous peoples. Indigenous leaders participated in each of these.³⁴ From the first of those conferences, the *Constitution Amendment Proclamation, 1983*³⁵ emerged, which added section 35.1 to the *Constitution Act, 1982*.³⁶ It provides that before enacting any amendment to the Constitution with respect to the rights of Indigenous peoples, it is mandatory to hold a constitutional conference on the matter and to invite Indigenous leaders to participate in it. This is the foundation of a constitutional duty to consult.³⁷

After the success of the *Constitution Amendment Proclamation, 1983*, however, the 1984, 1985, and 1987 conferences all failed to produce results.³⁸ Indigenous peoples were subsequently excluded from the constitutional

30 *Ibid* [translated by author].

31 See Papillon, *supra* note 10 at 299: “indigenous peoples in Canada were not involved in the process leading to the creation of the federation and in its subsequent consolidation”; See also *Quebecers, Our Way of Being Canadian: Policy on Québec Affirmation and Canadian Relations* (Québec: Secrétariat aux affaires intergouvernementales canadiennes, 2017) at 15 [*Policy on Québec Affirmation*]: “During the constitutional negotiations that led to the *Constitution Act* in 1867, the Aboriginal peoples were not represented, and their participation was not even considered.”

32 John Borrows, *Freedom & Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016) at 115-127 [Borrows, *Freedom & Indigenous Constitutionalism*].

33 See Christa Scholtz, “Part II and Part V: Aboriginal Peoples and Constitutional Amendment” in Macfarlane, *supra* note 10, 85 at 86.

34 See Canada, Parliamentary Research Branch, *Aboriginal Self-Government*, by Jill Wherrett, Current Issue Review 96-2E (Ottawa: Library of Parliament, 1999), online: <publications.gc.ca/Collection-R/LoPBdP/CIR/962-e.htm>; Peter H Russell, *Canada’s Odyssey: A Country Based on Incomplete Conquests* (Toronto: University of Toronto Press, 2017) at 392.

35 *Constitution Amendment Proclamation, 1983*, 11 July 1984, SI/84-102, (1984) C Gaz II, 2984. This proclamation also amended sections 25 and 35 of the *Constitution Act, 1982*, *supra* note 6.

36 *Ibid*, s 35.1.

37 Patrick J Monahan, Byron Shaw & Padraic Ryan, *Constitutional Law*, 5th ed (Toronto, Irwin Law, 2017) at 514.

38 Wherrett, *supra* note 34.

debates that led to the Meech Lake Accord in 1987. The situation led to “strong Aboriginal protests that contributed to the Accord’s defeat in 1990.”³⁹ This was corrected two years later, in 1992, when federal, provincial, territorial, and Indigenous leaders all took part in the negotiation of the Charlottetown Agreement. Despite the failure of the Agreement, the precedent it created, with respect to the participation of Indigenous peoples and the three territories of Canada in the process of constitutional conferences, remains of great importance.

These events have had two main consequences. First, Indigenous peoples are increasingly perceived as constitutional partners in Canada. Indeed, as Martin Papillon says, “building on the precedent of the constitutional negotiation rounds of the 1980s, [I]ndigenous organizations have successfully established their status as ‘intergovernmental partners’ whenever federal-provincial negotiations directly concern their interests.”⁴⁰ James Ross Hurley, for his part, describes Indigenous peoples as “important political participants in the constitutional debate.”⁴¹

Another consequence of these precedents is that the role of Indigenous peoples in the constituent process seems to have been extended with the advent of constitutional conventions. Indeed, on the one hand, some have voiced the opinion that the constitutional duty to consult would today be of general scope and would come into play for any major constitutional reform proposal.⁴² On the other hand, it appears that there is a custom which gives Indigenous peoples a *de facto* veto in relation to all constitutional amendments that directly affect them.⁴³ As Benoit Pelletier suggests, “although theoretically the consent of Indigenous peoples is not required for Canada’s constitutional amendment, it now appears to be politically necessary.”⁴⁴

39 *Ibid.*

40 Papillon, *supra* note 10 at 302.

41 James Ross Hurley, *La modification de la Constitution du Canada. Historique, processus, problèmes et perspectives d'avenir* (Ottawa: Ministre des Approvisionnement et Services Canada, 1996) at 67 [translated by author]. See also Scholtz, *supra* note 33 at 85: “The mobilization of Aboriginal peoples during and since the Patriation process clearly indicates that they now have a political role. And, according to section 35.1 of the Constitution Act, 1982, there appears to be a legally enforceable obligation on the part of governments to consult with Aboriginal peoples prior to amending any constitutional provision that specifically applies to them.”

42 See Taillon, “Les obstacles juridiques”, *supra* note 28 at 28.

43 Scholtz, *supra* note 33 at 87-88; Taillon, “Les obstacles juridiques”, *supra* note 28 at 28-29; Pelletier, *La modification constitutionnelle*, *supra* note 7 at 112; Bryant, *supra* note 10 at 231-232.

44 Benoit Pelletier, “Les modalités de la modification de la Constitution du Canada”, in Gérald-A Beaudoin et al, eds, *Le fédéralisme de demain : réformes essentielles* (Montréal: Wilson & Lafleur, 1998) 271 at 286 [translated by author].

4. Confederalism and the quest for unanimity

Federalism and confederalism are two different theoretical models, expressing different degrees of integration. While a federation is an independent and sovereign entity within which there are different member states, a “confederation is an association of sovereign and independent states recognised as such on the international scene”⁴⁵ and in which “each member state retains its full legal personality.”⁴⁶ In this sense, a federation can participate in a confederal structure. Similarly, a confederation is often a step towards the creation of a federal state,⁴⁷ although the opposite can also be true.

One of the main differences between federalism and confederalism lies in the degree of consent required to change the founding act of the political association that created them. Indeed, as Hugues Dumont and Sébastien Van Drooghenbroeck write, it is the “principle of unanimity that defines the confederal model.”⁴⁸ Thus, while federal states are perfectly comfortable with both centralized and decentralized amending formulas and usually require consent from a *majority* of their member states to allow for amendments to pass,⁴⁹ confederations necessarily opt for processes that are decentralized and in which the *unanimous* consent of states is required.⁵⁰

In Canada, not only are there matters for which the Constitution provides that unanimous consent is required,⁵¹ but there is also a tendency to try to amend simultaneously several subjects; some of them covered by the unanimity procedure, others by less stringent procedures, while setting out to meet the most stringent formula (unanimity) for the whole package. Rather than the

45 See Antoine Baillex & Hugues Dumont, *Le pacte constitutionnel européen : Fondements du droit institutionnel de l'Union*, t 1 (Bruxelles: Bruylant, 2015) at 195 [translated by author].

46 See Philippe Ardant & Bertrand Mathieu, *Droit constitutionnel et institutions politiques*, 29^e éd (Paris: LGDJ, 2017) at 46 [translated by author]; See also Louis Favoreu et al, *Droit constitutionnel*, 17^e éd (Paris : Dalloz, 2015) at 455; Parent, *supra* note 5 at 22-23.

47 Favoreu et al, *supra* note 46 at 454.

48 Hugues Dumont & Sébastien Van Drooghenbroeck, “The Status of Brussels in the Hypothesis of Confederalism” [2007] *Brussels Studies* 1 at 1 [translated by Gail Ann Fagen]; Jean Gicquel & Jean-Éric Gicquel, *Droit constitutionnel et institutions politiques*, 30^e éd (Paris: LGDJ, 2016) at 91; Favoreu et al, *supra* note 46 at 455; Olivier Beaud, *Théorie de la fédération*, 2^e éd (Paris: Presses Universitaires de France, 2009) at 82.

49 Beaud, *supra* note 48 at 176.

50 Baillex & Dumont, *supra* note 45 at 195: “This treaty, unlike a Constitution — at least in principle — can only be amended by the unanimous consent of member States.” For instance, it is the unanimity rule that prevails to amend the European treaties. This procedure is the equivalent to granting a veto to all EU Member States, regardless of their size.

51 *Constitution Act, 1982*, *supra* note 6, s 41.

exceptional procedure it was designed to be,⁵² unanimity thus became the norm to follow in the case of any major amendment to the Constitution. That was certainly the case with the Meech and Charlottetown Accords, for instance.

In addition, there is also a tendency to involve or to take into account the opinion of more and more civil society actors in the amending process.⁵³ Indeed, we are witnessing a “globalization of the constitutional amendment procedure” by the “multiplication of participants”⁵⁴ seeking to take part or be heard in the process. As José Woehrling writes, “Any attempt at constitutional reform now provokes the almost automatic intervention of many social groups who oppose any modification of the provisions that they consider to be in their advantage, or who call for the adoption of new constitutional provisions that would be in their interest.”⁵⁵

For Patrick Taillon, the globalization of this process represents a major obstacle to any future reform of Canadian federalism.⁵⁶ In his view, “the involvement of pressure groups in the debate on constitutional amendments makes it even more difficult to develop a consensus that would bring together the necessary support required for a renewal of federalism.”⁵⁷ The quest for unanimity is therefore even wider.

5. Asymmetrical federalism and the openings to special arrangements

Asymmetrical federalism, in its conceptual foundations, is intended to be implemented in sociologically diverse political entities.⁵⁸ It represents a model of power sharing that seeks to promote a better cohabitation of groups holding important distinctions between them.⁵⁹

52 See *Senate Reference*, *supra* note 18 at para 41: “It is an exception to the general amending procedure. It creates an exacting amending procedure that is designed to apply to certain fundamental changes to the Constitution of Canada.”

53 Peter H Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?*, 3rd ed (Toronto: University of Toronto Press, 2004) at 157.

54 See Woehrling, “Les aspects juridiques”, *supra* note 27 at 19 [translated by author]; See also Alan C Cairns, *Charter versus Federalism: The Dilemmas of Constitutional Reform* (Montréal & Kingston: McGill-Queen’s University Press, 1992).

55 Woehrling, “Les aspects juridiques”, *supra* note 27 at 20 [translated by author].

56 Taillon, “Les obstacles juridiques”, *supra* note 28 at 22.

57 *Ibid* at 23 [translated by author].

58 See Gagnon, *Multinational Federalism*, *supra* note 11 at 31-51.

59 See Linda Cardinal, ed, *Le fédéralisme asymétrique et les minorités linguistiques et nationales* (Sudbury, Prise de parole, 2008).

By providing for special arrangements, asymmetrical federalism recognizes and values the particularism of minority groups.⁶⁰ Hence, it is a model that is likely to create areas of institutional autonomy shaped by the aspirations of different political communities sharing a common territory. The constitutional amending formula in Canada offers many openings to create those separate spaces of autonomy. Indeed, it is precisely by following some of these asymmetrical ways that we can find “an avenue easily practicable”⁶¹ in the process of amending the Constitution of Canada.

The first and most important of these avenues lies within the special arrangements procedure. Set out in section 43 of the *Constitution Act, 1982*, it provides that an “amendment to the Constitution in relation to any provision that applies to one or more, but not all, provinces” may enter into force when “authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province *to which the amendment applies*.”⁶² In other words, in the case of matters that are purely local, provincial, or regional, it is possible to amend the Constitution with the sole agreement of the two houses of Parliament⁶³ and that of the province or provinces concerned by the proposed amendment.⁶⁴

So far, this section of the *Constitution Act, 1982* has been referred to by many different names: bilateral procedure,⁶⁵ selective unanimity procedure,⁶⁶ or special arrangements procedure.⁶⁷ This variety of labels could be explained by the fact that this procedure attempts to achieve aims of both efficiency and protection. On the one hand, it allows for some kind of flexibility in the rigid constitutional amending formula of Canada and, on the other hand, it

60 See Gagnon, *Multinational Federalism*, *supra* note 11 at 31-51.

61 See Guy Tremblay, “La portée élargie de la procédure bilatérale de modification de la Constitution du Canada” (2011) 41:2 RGD 417 at 419 [translated by author]; See also Dwight Newman, “Understanding the Section 43 Bilateral Amending Formula” in Macfarlane, *supra* note 10, 147.

62 *Constitution Act, 1982*, *supra* note 6, s 43 [emphasis added].

63 It should be remembered that the Canadian Senate has only a suspensive veto. See *Constitution Act, 1982*, *supra* note 6, s 47.

64 See Benoit Pelletier, “La modification et la réforme de la Constitution canadienne” (2017) 47:2 RGD 459 at 479-480; Hurley, *supra* note 41 at 81-82; Brun, Tremblay & Brouillet, *supra* note 16 at 231; Tremblay, *supra* note 61; Woehrling, “Le recours”, *supra* note 10; Proulx, *supra* note 10; Woehrling, “Les aspects juridiques” *supra* note 27; David R Cameron & Jacqueline D Krikorian, “Recognizing Quebec in the Constitution of Canada: Using the Bilateral Constitutional Amendment Process” (2008) 58:4 UTLJ 389.

65 Tremblay, *supra* note 61; Cameron & Krikorian, *supra* note 64.

66 Taillon, “Les obstacles juridiques”, *supra* note 28 at 10; Jacques-Yvan Morin & José Woehrling, *Les constitutions du Canada et du Québec : du régime français à nos jours*, t 1 (Montréal: Thémis, 1994) at 515.

67 See *Senate Reference*, *supra* note 18 at paras 42-44.

necessitates obtaining the consent of a province that is the subject of a special arrangement before amending it.⁶⁸

Another asymmetrical opening offered by the Canadian constitutional amendment process is the provinces' right to dissent, which allows them to opt out of multilateral amendments. This mechanism is found in section 38(3) of the *Constitution Act, 1982*.⁶⁹ It provides that an amendment made under the "7/50" procedure "shall not have effect in a province the legislative assembly of which has expressed its dissent thereto by resolution supported by a majority of its members."⁷⁰ This is coherent with the normative proposal that any "Member State which disagrees with an amendment accepted by the others should be able to withdraw from the scope of this measure."⁷¹ It represents some sort of reversed asymmetrical federalism (reversed as accommodating for the majority, but without forcing the hand of the minority) or a constructive veto power (constructive since it does not block the process of amendment). It is also accompanied, in limited circumstances, by the right to "reasonable compensation."⁷²

6. Treaty federalism and Indigenous legal orders

A specific conception of the federal principle that is at the heart of relations between a state and its Indigenous peoples, treaty federalism also leads to a form of asymmetry for Indigenous nations in the Canadian constitutional order. More respectful of Indigenous traditions,⁷³ this type of federalism insists on the role political negotiation must play in the relation between partners.⁷⁴

From a theoretical point of view, treaty federalism is rooted in the *pactist* tradition.⁷⁵ In this sense, it is a form of federalism that categorically rejects unilateralism, preferring instead bilateralism or multilateralism.⁷⁶ Highlighting

68 *Ibid* at para 44; See also Newman, *supra* note 61 at 155.

69 *Constitution Act, 1982*, *supra* note 6, s 38(3).

70 *Ibid*.

71 See Louis Massicotte & Antoine Yoshinaka, "Les procédures de modification constitutionnelle dans les fédérations" (2000) 5:2 Rev Const Stud 138 at 144 [translated by author].

72 See *Constitution Act, 1982*, *supra* note 6, s 40; See also Brun, Tremblay & Brouillet, *supra* note 16 at 241; Hurley, *supra* note 41 at 79.

73 See Borrows, *Canada's Indigenous Constitution*, *supra* note 5 at 129; Alain-G Gagnon, *Minority Nations in the Age of Uncertainty: New Paths to National Emancipation and Empowerment* (Toronto, University of Toronto Press, 2014) at 82-93 [Gagnon, *Minority Nations*].

74 Gagnon, *Minority Nations*, *supra* note 73 at 82-93.

75 *Ibid*.

76 Papillon, *supra* note 10 at 302: "much coordination work is achieved through bilateral and trilateral negotiations at the local level, with specific First Nations under the Indian Act or a self-government agreement".

the respect between nations and community coexistence through discussion and reconciliation,⁷⁷ treaty federalism appears fundamental to address constitutional relations with Indigenous peoples⁷⁸. In Canada, treaties and agreements with Indigenous peoples are “an important structuring element of the relationship between First Nations and the Canadian state.”⁷⁹

According to Félix Mathieu, “the best way to understand treaty federalism in the Canadian context is to understand treaties signed with Indigenous peoples, throughout the history of Canada, as parts of the constitutional order.”⁸⁰ He continues: “Treaties with Indigenous nations therefore signify the recognition of their existence in the constitutional order as ‘equal’ partners of the Canadian political association.”⁸¹ In fact, in the words of the Supreme Court of Canada, “treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty.”⁸²

Treaty federalism and agreements with Indigenous peoples, although plagued with shortcomings,⁸³ represent a process that is more respectful of the traditions and claims of Indigenous nations than other approaches.⁸⁴ But the treaties with Indigenous peoples are also of symbolic value. Indeed, “Aboriginal peoples who have signed a treaty, old or new, generally consider the latter as the main constitutional document regulating their relationship with the Canadian federation.”⁸⁵ In addition, treaties are also used to provide for the establishment of constitutions *by* and *for* the Indigenous peoples.⁸⁶

77 Gagnon, *Minority Nations*, *supra* note 73 at 82-93.

78 See Gagnon, *Multinational Federalism*, *supra* note 11.

79 See Papillon, *supra* note 10 at 299.

80 Félix Mathieu, *Les défis du pluralisme à l'ère des sociétés complexes* (Québec: Presses de l'Université du Québec, 2017) at 195 [translated by author].

81 *Ibid* at 195 [translated by author]. See also Graham White, “Treaty Federalism in Northern Canada: Aboriginal-Government Land Claims Boards” (2002) 32:3 *Publius: J Federalism* 89.

82 *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511 at para 20, 245 DLR (4th) 33 [*Haida Nation*].

83 See John Borrows, “Canada’s Colonial Constitution” in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017) 17 at 21; Motard, *supra* note 29 at 47.

84 See Papillon, *supra* note 10 at 302; Motard, *supra* note 29 at 46.

85 See Papillon, *supra*, note 10 at 299; See also Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001); Kiera L Ladner, “Up the Creek: Fishing for a New Constitutional Order” (2005) 38:4 *Can J Political Science* 923; Geneviève Motard, “Le Gouvernement régional d'Eeyou Istchee Baie James : une forme novatrice de gouvernance consensuelle au Canada” in Loleen Berdahl, André Juneau & Carolyn Hughes Tuohy, eds, *Régions, ressources et résilience: état de la fédération 2012* (Montréal & Kingston: McGill-Queen’s University Press, 2015) 145.

86 *Nisga’a Final Agreement*, 27 April 1999, s 22.12, online (pdf): *Nisga’a Lisims Government* <www.nisgaanation.ca/sites/default/files/Nisga%27a%20Final%20Agreement%20-%20Effective%20

This leads us to the process of adopting and amending these treaties and agreements. Two elements appear fundamental. The first relates to the negotiation of these treaties, which must be conducted in accordance with the principle of honour of the Crown. This principle, which “infuses the processes of treaty making and treaty interpretation,” forces the Crown to “act with honour and integrity” when “making and applying treaties.”⁸⁷ The Crown is therefore obligated to negotiate in good faith.

The second fundamental element relates to the step that follows the negotiation of a treaty, *i.e.* its ratification. In this process, Indigenous peoples usually require the ratification of the treaty both by their institutions and by their population, through a referendum.⁸⁸ For their part, the federal, provincial and/or territorial levels of government that are signatories of a treaty must provide for its entering into force through the passing of a law by their parliaments.⁸⁹

7. Consociational federalism and the search for consensus

Consociational federalism is a form of federalism that rests on the four pillars of consociationalism.⁹⁰ Those pillars are (1) a grand governing coalition in which all segments of a plural society are represented,⁹¹ (2) the respect of

Date.PDF> [Nisga'a Final Agreement]; *Thichq Agreement*, 25 August 2003, s 7.1, online (pdf): *Thichq Ndek'awoo Government* <www.tlichq.ca/sites/default/files/documents/government/T%C5%82%C4%B1%CC%A8cho%CC%A8%20Agreement%20-%20English.pdf> [Thichq Agreement]; *Tsawwassen First Nation Final Agreement*, 6 December 2007, s 24.3, online (pdf): *Tsawwassen First Nation* <www.tsawwassenfirstnation.com/pdfs/TFN-About/Treaty/1_Tsawwassen_First_Nation_Final_Agreement.PDF> [Tsawwassen Final Agreement]; *Westbank Self-Government Agreement*, 24 May 2003, s 42, online (pdf): *Westbank First Nation* <www.wfn.ca/docs/self-government-agreement-english.pdf> [Westbank Self-Government Agreement].

87 See *Haida Nation*, *supra* note 82 at para 19; See also *R v Sparrow*, [1990] 1 SCR 1075 at 1105-1106, 70 DLR (4th) 385.

88 See *Thichq Agreement*, *supra* note 86, s 4.2; *Tsawwassen Final Agreement*, *supra* note 86, s 24.2; *Westbank Self-Government Agreement*, *supra* note 86, s 282; *Nisga'a Final Agreement*, *supra* note 86, s 22.2.

89 See *Thichq Agreement*, *supra* note 86, s 4.3; *Tsawwassen Final Agreement*, *supra* note 86, ss 24.11-24.14; *Westbank Self-Government Agreement*, *supra* note 86, s 285; *Nisga'a Final Agreement*, *supra* note 86, ss 22.10-22.11.

90 Indeed, Arend Lijphart, the main theorist of consociationalism, writes: “If we add a few characteristics to the concept of federalism, we arrive at the concept of consociationalism”: Arend Lijphart, “Non-Majoritarian Democracy: A Comparison of Federal and Consociational Theories” (1985) 15:2 *Publius: J Federalism* 3 at 3 [Lijphart, “Non-Majoritarian Democracy”]; See also Brenda M Seaver, “The Regional Sources of Power-Sharing Failure: The Case of Lebanon” (2000) 115: 2 *Political Science Q* 247; Ian S Spears, “Africa: The Limits of Power-Sharing” (2002) 13:3 *J Democracy* 123.

91 See Arend Lijphart, *Democracy in Plural Societies: A Comparative Exploration* (New Haven, Yale University Press, 1977) at 25-36 [Lijphart, *Democracy*]

proportionality,⁹² (3) a veto for minorities,⁹³ and (4) autonomy for segments in their own sphere of action.⁹⁴ Asymmetrical arrangements are another characteristic of consociational federalism.⁹⁵ Hence, in a society bounded by “segmental cleavages”⁹⁶ that can be of a “religious, ideological, linguistic, regional, cultural, racial, or ethnic nature,”⁹⁷ like Belgium or Switzerland for instance, consociational federalism is a way to think of and structure the various institutions and processes to allow for the groups to live and evolve without entering into conflicts.

An overview quickly reveals that all those characteristics and pillars are implemented in the Canadian constitutional amending formula. The first pillar, the grand governing coalition in which all the segments are represented, is exactly what the constitutional conferences are about. By having the Canadian prime minister, the premiers of all provinces and territories, and Indigenous leaders negotiating the content of future amendments, constitutional conferences embody this “primary characteristic of consociational democracy.”⁹⁸

The principle of proportionality, the second pillar, also has echoes in the amendment formula, most notably with the “7/50” formula in which provinces are represented according to the size of their population. As Andrew Heard and Tim Swartz put it, this “formula operates at two levels: the formal level makes no distinctions among the provinces; however, the informal level provides greater weight in practice for the more populous provinces.”⁹⁹

The third pillar of consociationalism, the veto power, has at least three different applications in the process of constitutional change in Canada. The first one is the unanimity procedure, in which all provinces have veto power.¹⁰⁰ The second is the bilateral procedure of section 43, because it gives provinces a

92 *Ibid* at 38-41.

93 *Ibid* at 36-38.

94 *Ibid* at 41-44.

95 See Arend Lijphart, “Consociation and Federation: Conceptual and Empirical Links” (1979) 12:3 *Can J Political Science* 499 at 510: “Therefore, a federation can be regarded as a consociation only if it belongs to the *asymmetrical* category [of federal systems]” [emphasis added].

96 Lijphart, “Non-Majoritarian Democracy”, *supra* note 90 at 3.

97 *Ibid* at 3-4.

98 Lijphart, *Democracy*, *supra* note 91 at 25.

99 Andrew Heard & Tim Swartz, “The Regional Veto Formula and Its Effects on Canada’s Constitutional Amendment Process” (1997) 30:2 *Can J Political Science* 339 at 340-341. They add at 341: “At the time that this measure was entrenched, Ontario and Quebec had an informal but still special status, since these two provinces contained more than 50 per cent of the nation’s population between them.”

100 Pelletier, *La modification constitutionnelle*, *supra* note 7 at 208.

veto when it comes to the special arrangements that concern them.¹⁰¹ The third one relates to the possibility for a province to opt out of an amendment passed under the “7/50” formula — what we call a constructive veto — and therefore having it not producing any effects on its territory.¹⁰²

Segmental autonomy, the fourth pillar, finds its most important feature in the capacity for provinces to amend unilaterally their own constitution. Contained in section 45 of the *Constitution Act, 1982*, it provides a large spectrum of autonomy for provinces and “establishes a unilateral power to amend provisions that affect province’s institutions and that are not subject to the other amendment procedures provided by the Constitution of Canada.”¹⁰³ It also allows provinces to adopt a written constitution if they so wish.¹⁰⁴

Finally, with regard to the asymmetrical arrangements that consociational federalism should allow, the bilateral procedure, the possibility for provinces to opt out of “7/50” amendments and treaty federalism all lead to some sort of asymmetry. Therefore, the consociational federalism that can be traced in Canada’s constitutional amending formula is a combination of many different elements of this process.

Part II — Two possible explanations for the many conceptions of federalism expressed by the process of constitutional change

Why are there so many conceptions of federalism in Canada’s constitutional amending formula? We think there are two prominent explanations for this phenomenon and that the first one has to be the country’s history. Indeed, some of these conceptions find their very origin and purpose in the Canadian past.

The practice of constitutional conferences through executive federalism is in direct harmony with this explanation. Constitutional conferences were the main approach the Fathers of Confederation took to concretize their plan to unite the colonies of British North America between 1864 and 1866.¹⁰⁵ This

101 See Taillon, “Les obstacles juridiques”, *supra* note 28 at 10; Morin & Woehrling, *supra* note 66 at 515.

102 See *Constitution Act, 1982*, *supra* note 6, s 38(3); See also Brun, Tremblay & Brouillet, *supra* note 16 at 241.

103 Taillon, “Les obstacles juridiques”, *supra* note 28 at 11-12 [translated by author].

104 Emmanuelle Richez, “The Possibilities and Limits of Provincial Constitution-Making Power: The Case of Quebec” in Macfarlane, *supra* note 10, 164 at 169.

105 Guénette, *supra* note 26 at 210.

custom then continued after Confederation and intensified in the 1960s,¹⁰⁶ especially with the different attempts to patriate the Constitution.¹⁰⁷ Even after Patriation, conferences were held to try to broadly amend the Constitution with the Meech and Charlottetown Accords.¹⁰⁸ The executive federalist conception in the constituent process of Canada therefore definitely has historical roots.

The important role that provinces play in the amending process can also be partly explained by the country's historical trajectory. Indeed, Canada is a federation that was shaped by an aggregation process. It was not only created by different colonies of British North America, but other territories were periodically added to it. In such circumstances, it is a common thread that member States will have a tendency to retain a strong hold on decision-making processes.¹⁰⁹ As Tocqueville once wrote, nations "all bear some marks of their origin; and the circumstances which accompanied their birth and contributed to their rise affect the whole term of their being."¹¹⁰ This appears to be the case with regard to the role that provinces kept in the amending process of the Canadian Constitution.

The same can be said about the capacity of provinces to amend their own constitutions. Even before Confederation, colonies of British North America already had some powers to amend their constitutions.¹¹¹ This capacity was then entrenched in the *Constitution Act, 1867* at section 92 (1), which was replaced by section 45 of the *Constitution Act, 1982*.¹¹² Nonetheless, the intention and purpose of that power stayed stable throughout history.¹¹³

Treaty federalism with Indigenous peoples also goes back to long before Confederation. Actually, it is certainly the form of federalism in the constituent process that finds its oldest roots in Canada. Starting in 1701, "the British Crown entered into treaties with Indigenous groups to support peaceful economic and military relations."¹¹⁴ Throughout Canada's history, this prac-

106 Adam, Bergeron & Bonnard, *supra* note 22 at 148.

107 Hurley, *supra* note 41 at 23-72.

108 *Ibid* at 115-139.

109 Beaud, *supra* note 48 at 32.

110 Alexis de Tocqueville, *Democracy in America*, translated by Henry Reeve (New York: Century Co, 1898) at 82.

111 See *Colonial Laws Validity Act 1865* (UK), 28 & 29 Vict, c 63, s 5; Brun, Tremblay & Brouillet, *supra* note 16 at 218.

112 *Constitution Act, 1867*, *supra* note 12, 92(1); *Constitution Act, 1982*, *supra* note 6, s 45.

113 Brun, Tremblay & Brouillet, *supra* note 16 at 218.

114 Government of Canada, "Treaties and Agreements" (last modified 11 September 2018), online: *Crown-Indigenous Relations and Northern Affairs Canada* <rcaanc-cirnac.gc.ca/eng/1100100028574/1529354437231>.

tice has been perpetuated and since the *Calder* case in 1973,¹¹⁵ its use has increased.¹¹⁶

The quest for unanimous consent with regard to multilateral amendments, although a little more ambiguous, still has deep roots in Canadian history. In fact, during all the years of debate on the Patriation of the Constitution, a consensus of all provinces was what leaders were intensely seeking.¹¹⁷ Even with the Supreme Court ruling that there was no constitutional convention with regard to such unanimous consent or to a Quebec veto in 1982,¹¹⁸ it still declared in 1981 that a “substantial degree of provincial consent” was required to patriate the Constitution.¹¹⁹ Finally, after Patriation against Quebec’s will, a strong search for unanimous consent became the norm again.¹²⁰

The Patriation debates also explain the asymmetrical conception of federalism in the Canadian constituent process. With the denial of the Quebec veto,¹²¹ other alternatives were exploited, including the possibility for dissenting provinces to opt out of multilateral amendments for which unanimous consent was not required.¹²² It is also with Patriation that the special arrangements procedure was entrenched in the amending formula, at section 43 of the *Constitution Act, 1982*.¹²³

It is thus easy to conclude that many modalities of constitutional amendment in Canada directly come from specific moments that shaped today’s federation. Canada’s historical trajectory and the many steps it took towards becoming a sovereign country all explain in part why there are so many conceptions of federalism in its constituent process.

The second major reason why there are so many conceptions of federalism in Canada’s constitutional amending formula is most probably that it

115 *Calder v British Columbia (AG)*, [1973] SCR 313, 34 DLR (3d) 145.

116 Papillon, *supra* note 10 at 303.

117 See Hurley, *supra* note 41 at 23-72; *Reference Re Resolution to Amend the Constitution*, [1981] 1 SCR 753 at 905, (*sub nom Reference Re Amendment of the Constitution of Canada (Nos 1, 2, and 3)*) 125 DLR (3d) 1 [*Patriation Reference*].

118 *Reference Re Objection by Quebec to a Resolution to Amend the Constitution*, [1982] 2 SCR 793 at 811-812, 814-815, 140 DLR (3d) 385.

119 *Patriation Reference*, *supra* note 117 at 905.

120 Woehrling, “Les aspects juridiques”, *supra* note 27; Taillon, “Les obstacles juridiques”, *supra* note 28.

121 See Canada, Parliamentary Research Branch, *Quebec’s Constitutional Veto: The Legal and Historical Context*, by Mollie Dunsmuir & Brian O’Neal, Background Paper BP-295E (Ottawa: Library of Parliament, 1992), online: <publications.gc.ca/collections/Collection-R/LoPBdP/BP/bp295-e.htm>.

122 Hurley, *supra* note 41 at 60.

123 *Constitution Act, 1982*, *supra* note 6, s 43.

is a complex society within which different groups of different natures evolve. Perhaps the most significant argument in favour of this explanation lies in the presence and importance of Indigenous peoples in Canada. Indeed, three conceptions of federalism in Canada's amending formula apply to Indigenous peoples and two explicitly aim to take their specificity into account.

Those two are treaty and personal federalism. While the first one allows for Indigenous nations to negotiate and benefit from the implementation of specific legal orders that apply to them,¹²⁴ the second one compels federal and provincial leaders to integrate Indigenous peoples in the multilateral process of constitutional negotiations.¹²⁵ The other conception of federalism that affects Indigenous nations is confederalism, and it does so because the quest for unanimity means that Indigenous peoples' positions and demands have to be taken into account in order to receive their support for important constitutional reforms.¹²⁶

But confederalism also has significant implications for the other groups that participate to the Canadian diversity. As mentioned earlier, some groups use the process of constitutional negotiations, whether to call for new provisions or to oppose any modification of those provisions that they consider to be in their best interests.¹²⁷ The wider search for unanimity and consensus can therefore benefit smaller segments or interest groups that do not directly play a role in the amending process, but that nonetheless seek to intervene in order to make their voices heard.

For their part, populations that are of greater historical and demographic importance, like Quebecers, linguistic minorities, different regions with specific characteristics or issues, and bilingual provinces might use modalities directly offered to provinces to promote their own diversity. As the Supreme Court stated in the *Reference Re Secession of Quebec*, "[t]he principle of federalism facilitates the pursuit of collective goals by cultural and linguistic minorities which form the majority within a particular province."¹²⁸ Therefore, territorial and asymmetrical federalism can both benefit segments of the Canadian diversity that are able to mobilise their provincial institutions.

124 See Ghislain Otis, ed, *Contributions à l'étude des systèmes juridiques autochtones et coutumiers* (Québec, Presses de l'Université Laval, 2018).

125 See Wherrett, *supra* note 34.

126 See Scholtz, *supra* note 33 at 87-88; Taillon, "Les obstacles juridiques", *supra* note 28 at 28-29; Pelletier, *La modification constitutionnelle*, *supra* note 7 at 112.

127 Woehrling, "Les aspects juridiques", *supra* note 27 at 20.

128 *Secession Reference*, *supra* note 16, at para 59.

Finally, it is precisely because Canada is a complex society within which coexist different groups that consociational federalism can be usefully implemented. This type of federalism is thus a way to make sure that the different segments of the Canadian society can play a role in the process of amending its Constitution, that they are able to evolve in asymmetrical areas and that they are protected against amendments they would oppose.

It is true that, if Canada was a less diverse society, it could still display different conceptions of federalism in its process of constitutional change. The United States and Germany,¹²⁹ for instance, are both federations in which there are multiple conceptions of federalism expressed in their constitutional amending formula. In the United States, territorial federalism is the main guiding principle of constitutional change, primarily because of the role states play in the process of ratifying amendments.¹³⁰ States additionally have their own constitutions, and therefore some autonomy.¹³¹ Confederalism also has historical roots in the United States, with unanimity being required at the time of the *Articles of Confederation* of 1777.¹³² In Germany, while territorial federalism is the predominant guiding principle of constitutional change, executive federalism also has some relevance, most notably through the *Bundesrat*, where Länder's governments are the main actors.¹³³

On the contrary, diverse federations rarely exhibit as many conceptions of federalism as Canada in their amending formula. Belgium and Switzerland are two examples of federations that, although quite diverse, do not express as many conceptions of federalism in their constitutional change process. In Belgium, territorial and personal federalism are both partially implemented, in particular by the role of Regions (territorial federalism) and Communities

129 Although the United States and Germany are far from being homogeneous societies, they are still leading cases of "mononational federal States", along with Australia: See Michel Seymour with the collaboration of Alain-G Gagnon, "Multinational Federalism: Questions and Queries" in Michel Seymour and Alain-G Gagnon, eds, *Multinational Federalism: Problems and Prospects* (Basingstoke, UK, Palgrave Macmillan, 2012) 1 at 2; Gagnon, *Multinational Federalism*, *supra* note 11 at 31-51.

130 See John R Vile, "Constitutional Revision in the United States of America" in Contiades, *supra* note 7, 389 at 396-400. Territorial federalism is also expressed by the fact that each state is represented in the Senate — an important actor of constitutional change — by an equal number of Senators, regardless of its population: *ibid* at 397.

131 See Tom Ginsburg & Eric A Posner, "Subconstitutionalism" (2010) 62:6 *Stan L Rev* 1583; Robert F Williams & G Alan Tarr, "Subnational Constitutional Space: A View from the States, Provinces, Regions, Länder, and Cantons" in G Alan Tarr, Robert F Williams & Josef Marko, eds, *Federalism, Subnational Constitutions, and Minority Rights* (Westport, Conn: Praeger, 2004) 3.

132 See Richard Albert, "Constitutional Disuse or Desuetude: The Case of Article V" (2014) 94:3 *BUL Rev* 1029 at 1034-1035.

133 See Philippe Lauvaux, "Quand la deuxième chambre s'oppose" (2004) 108 *Pouvoirs* 81, at 88.

(personal federalism) in selecting Senators,¹³⁴ by the existence of linguistic groups in both houses of the federal parliament (personal federalism),¹³⁵ and by the election of MPs in the House of Representatives in different electoral districts (territorial federalism).¹³⁶ Consociational federalism is additionally a distinct feature of the process of constitutional change in Belgium,¹³⁷ as it is in Switzerland. Territorial federalism is, nevertheless, the most important conception of federalism in the Swiss amending formula, where cantons all have the same voice.¹³⁸ Cantons in Switzerland also have their own constitutions, and the capacity to amend them.¹³⁹

The four examples above tend to show that more or less diverse federations can all express multiple conceptions of federalism in their processes of constitutional change, but that Canada does so in a unique and enhanced way. This appears to be the case precisely because of the variety of distinct groups that make up Canada. In other words, it is not only because of its diversity that Canada has a process of constitutional change with so many conceptions of federalism, but because its diversity also has many dimensions.¹⁴⁰ The presence of minority nations, Indigenous peoples, and ethnocultural groups in Canada make it a country with a particularly complex diversity.

When considered together, we think that Canada's complex diversity and its history of evolution within constitutional continuity are the main explanations of why there are so many conceptions of federalism expressed by its process of constitutional change. This is, at least, a hypothesis that future research could explore and substantiate.

Conclusion

Federalism is a useful yet complex set of ideas and processes, and its Canadian expression is no exception. As Tocqueville stated, "The federal system, therefore, rests upon a theory which is complicated, at best, and which demands

134 *Belgian Constitution*, art 67, online (pdf): *De Kamer* <www.dekamer.be/kvvcr/pdf_sections/publications/constitution/GrondwetUK.pdf>.

135 *Ibid*, art 43.

136 *Ibid*, art 63.

137 See Dave Sinardet, "Le fédéralisme consociatif belge : vecteur d'instabilité?" (2011) 136 *Pouvoirs* 21.

138 With the exception of the six historic half-cantons. See *Federal Constitution of the Swiss Federation*, art 142, online (pdf): *Federal Council* <www.admin.ch/opc/en/classified-compilation/19995395/201801010000/101.pdf>.

139 *Ibid*, art 51.

140 See James Tully, *A Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995); Mathieu, *supra* note 80.

the daily exercise of a considerable share of discretion on the part of those it governs.”¹⁴¹ Almost two hundred years after he wrote it, his claim is still as appropriate and relevant now as it was then.

The seven conceptions of the federal principle expressed in its amending formula offer an example of how federalism is implemented in a specific area of Canada's political and constitutional architecture. This architecture reflects some choices that were made along the way and some solutions that were applied to satisfy the greatest number of interested parties.

However, Canada's amending formula is rarely used, even when it comes to its different asymmetrical procedures and despite the openings they provide for the evolution of the federation. The many conceptions of federalism that can be observed in the constitutional change process of Canada are then left unexploited and constitutional debates are said to be for other times and situations.

Perhaps it could be appropriate to acknowledge that the time has come and recognise that some political actors and partners in Canada have asked for institutional changes.¹⁴² Perhaps it could be appropriate to reopen constitutional debates and start using some of the conceptions of federalism that are guiding Canada's constitutional amending formula.

141 de Tocqueville, *supra* note 110 at 210.

142 See e.g. Canada, Truth and Reconciliation Commission of Canada, *Honoring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Ottawa: Truth and Reconciliation Commission of Canada, 2015), as well as the recent *Policy on Québec Affirmation*, *supra* note 31.