Jeremy Webber*

Canada's Agonistic Constitution

Themes, Variations, Tensions, and Their On-Going Reconciliation

It was a great pleasure to return to Budapest, in the summer of 2017, for an International Symposium on the topic, 'What Can Central and Eastern Europe Learn from the Development of Canada's Constitutional System?' at Eötvös Loránd University. I first came to Budapest in 1995 for a seminar sponsored jointly by the Hungarian Academy of Sciences and the Royal Society of Canada.[1] That earlier meeting was organized within a few years of the collapse of communist regimes throughout Central and Eastern Europe. Its principal organizer was Professor Denis Szabó, a renowned criminologist who is a member of both the Hungarian Academy of Sciences and the Royal Society of Canada. He had left Hungary following World War II, obtained his doctorate from Université Catholique de Louvain, and emigrated to Canada in 1958 where, in 1960, he founded the influential École de criminologie at the Université de Montréal. I will never forget swimming alongside Szabó in the Hotel Gellért pool as he recounted the story of his departure from Hungary and, above all, the courage and vision of those who rose up against Soviet domination in 1956. Those struggles were acutely relevant to what was occurring in Hungary at the time of the 1995 symposium, as democratic constitutionalists worked to establish the rule of law in a society that had had a distinguished tradition of democratic thought but where that tradition had been eroded by the ideological conflicts and authoritarian regimes of the interwar period, followed by long years of communist rule. That experience was yet another lesson that constitutions are perennially works in progress, and that constitutionalism always depends upon the dedication, courage and insight of scholars and citizens. It was a great privilege, then, for me to return to Budapest for the symposium at which this paper was presented – a symposium of constitutional scholars from throughout the region who share those qualities of dedication, courage and insight.

This second symposium was prompted by the 150th anniversary of Canadian Confederation – 150 years of a country, founded on 1 July 1867 and destined, ultimately, to include all the territory of North America north of the United States. That history has made me. I am Canadian, deeply anchored in Canada, engaged by its debates, proud of my ancestry. But like all sources of national pride, my attachment to Canada needs to be tempered by an equal

* Jeremy Webber is professor at the Faculty of Law, University of Victoria, Canada.

1 That symposium was on 'National Minority and Multicultural Policy'. Its papers were published in Kálmán Kulcsár, Denis Szabó (eds), *Dual Images: Multiculturalism on Two Sides of the Atlantic* (Royal Society of Canada and Hungarian Academy of Sciences 1996, Budapest).

commitment to critical reflection, by which the national experience is tested for what is most important, most true, so that we draw upon what is valuable and correct what needs correcting. Let me suggest three sources of critical reflection for me upon this 150th anniversary.

– First, if one thinks of my ancestry as composed of four stems, each associated with one of my grandparents, three of those stems only took root in Canada immediately prior to WWI. What then does Canada's history, prior to 1911, have to do with me?

– Second, much of my scholarly work has to do with the constitutional position of Indigenous peoples. For them, Canada's 150th anniversary is not a subject of celebration. Rather, it marks a history of displacement, dispossession, imposition, and impoverishment. How can I have pride in my country in the face of that story?

– Third, I am not simply Canadian. I spent several years in Australia, married an Australian, and became an Australian citizen. That country too has a hold on me. Does that second significant allegiance somehow impair my first?

Now, I am not going to answer fully all the questions posed by those complexities. They may not even sound very constitutional – although in Canada, constitutional scholars have long grappled with texts and Canadians' complicated allegiances, with constitutional interpretation and constitutional debate, with legalism and statecraft. In part this is a product of Canadians' periodic, protracted engagement in constitutional reform. But the two enterprises – constitutional analysis and constitutional aspiration – have not been entirely separate even in the judicial interpretation of the constitution, for courts too have sought to give meaning to the constitution in a manner that would foster the continued development of the Canadian polity. And in that broad conception of the domain of constitutionalism, questions such as those posed above are acutely relevant. They shape our experiences of nationhood in ways that condition citizenship in Canada; they inform the relationship between our political institutions and our various societies.

Continued reflection on the nature of Canada – reflection on our positioning within Canada's history, which both informs our understanding of Canada and structures the institutions through which we define ourselves politically – is relevant to all Canadians. As individuals, none of us – without exception – lives our countries' entire constitutional histories. Each of us is in a sense a latecomer, stepping into an ongoing national conversation as we come to political awareness. That history has some good things, but it also has some bad things, some unresolved elements. How do we position ourselves in relation to that history?[2] Moreover, we all possess complex allegiances, complex commitments. We may have a different religion from our fellow citizens – or no religion. We may speak different languages. We may combine different national stories, as indeed Denis Szabó did, working for the future of his first country, Hungary, and becoming one of Canada's leading criminologists and Fellow

[2] For an excellent reflection on this question from a scholar who has been intensely committed to constitutionalism in both Australia and Poland, see Martin Krygier, *Beyond Fear and Hope: Hybrid Thoughts on Public Values* (ABC Books 1997, Sydney) 64–98.

of the Royal Society of Canada. Even if we share whatever orthodoxy we understand characterizes our country, we generally argue, sometimes fiercely, over what that orthodoxy should mean. How do we understand the foundation of our institutions, and our relations as citizens, in the face of that shared inheritance, complex history, and continued disagreements?

Canada has developed a set of resources for sustaining a country in the face of such complexities of belonging and citizenship. Not perfectly. Canada came within a hair's breadth of failing as a country, not least at about the time of my last visit to Budapest. In a referendum held in that year (1995), Quebecers rejected the secessionist option by a margin of less than 1.2 percent: 49.42 percent 'Yes' to 50.58 percent 'No'. Moreover, there are deep-seated challenges, deep-seated injustices, that we have yet to repair, as Indigenous peoples' lack of celebration of the 150th anniversary makes clear.

Nevertheless, through hard experience, Canadians have been forced to adopt particular methods of constitutional practice. If we learn the lessons of that experience, we can see striking approaches – productive approaches – for thinking about constitutions and constitutionalism. That is what I want to urge on you today. I will address three pervasive presumptions that are common in how constitutional scholars and governmental leaders talk about and practice constitutionalism. I will show how those presumptions do not fit Canadian constitutional history at all well. I will suggest how and why we should reconsider them and the implications of that reconsideration for constitutional interpretation, the demands of citizenship, and the health of our nations.

I Presumption 1: Constitutions are the Product of Constitutional Moments

The first of those presumptions is that we speak of constitutions as though they took shape in a moment in time. We think of them as documents, with those documents being discussed, deliberated upon, and drafted as concerted acts of political will. Thus, we celebrated at the conference a country – Canada – that we say is 150 years old, created on 1 July 1867, through the coming into force of Canada's original constitution: the *British North America Act* (now renamed the *Constitution Act, 1867*). Anniversaries certainly serve useful functions. They allow us to pause, take stock, and celebrate. But when it comes to understanding the role of constitutions in defining the foundational structure of a political and legal community, how helpful is it to think of them as being formed in a 'constitutional moment'?

That phrase was used by the American scholar Bruce Ackerman as part of an influential justification for judicial review. He argued that there are, from time to time, dramatic moments in which a people as a whole are engaged in political decision-making. The decisions they make at such times are, because of the depth and intensity of popular participation, worthy of special respect. Those decisions set the constitutional order; they can be enforced by the courts to constrain later decisions made by the people's representatives in the course of ordinary politics, which lack the same popular engagement and therefore the same

legitimacy. Ackerman recognizes three principal constitutional moments in the history of the United States of America – that country's Founding, Reconstruction, and New Deal – although he acknowledges there were also other lesser moments.[3]

Ackerman's argument is unconvincing as a justification for judicial review. It depends entirely on there being a profound difference in popular participation between 'constitutional moments' and political life generally, a contrast that both understates the extent of popular attention paid to political decision-making in ordinary times (at least in countries with a vibrant democratic culture) and overstates citizens' engagement in periods of constitutional change.[4] My concern here, however, is not with Ackerman's theory of constitutional review. Rather, it is the underlying assumption – very broadly shared – that constitutions are best understood as formal documents crafted by an act of will at salient moments in a country's history. It is true that constitutional documents play an important role in legal and political decision-making. It is also true that constitutional history has been punctuated, in many societies (including Canada), by important periods of self-conscious statecraft. But it is crucial that we keep those episodes in proportion, realizing both that they intervene in ongoing histories that have their own dynamism and impact, and that, no sooner do they occur, than they are shaped and reshaped by the day-to-day evolution of constitutional orders. Constitutions are continually being made and remade through the actions of their citizens and their citizens' representatives. We all participate, either through our action or inaction, in making our countries' constitutions. We all share responsibility for their health (or lack thereof).

One sees that dynamic character of constitutions if we ask: In what sense was the Canadian constitutional order created in 1867?[5] If we project ourselves back to 1867, Canada looked very different. It consisted of four provinces, not ten, and the two largest of those provinces, Ontario and Quebec, were very much smaller than they are now. Local allegiances to the provinces were stronger. Two potential provinces, Prince Edward Island and Newfoundland, which were involved in the negotiations leading up to confederation, initially held themselves outside the federation, Newfoundland for more than 75 years until 1949. Even in the original four provinces, local allegiances were in the early years very strong; those units had, after all, been independent colonies within the British Empire prior to 1867 (although the two central units, the core of what were to become Quebec and Ontario, had been joined to form a new 'Province of Canada' in 1841). Moreover, the land to the north and west of what was then Canada – the lands to which three-quarters of my ancestors came – were not yet annexed to

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[3] Bruce A. Ackerman, *We the People: Foundations* Volume I (Belknap Press of Harvard University Press 1991, Cambridge MA) especially at 262.

[4] See Jeremy Webber, 'Democratic Decision Making as the First Principle of Contemporary Constitutionalism' in Richard W. Bauman, Tsvi Kahana (eds), *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge University Press 2006, New York) 411 at 416 n11.

[5] For discussions of Canada's long constitutional history – a history which, while fundamental to this paper, can only be touched upon – see Peter H Russell, *Canada's Odyssey: A Country Based on Incomplete Conquests* (University of Toronto Press 2017, Toronto); Jeremy Webber, *Reimagining Canada: Language, Culture, Community and the Canadian Constitution* (McGill-Queen's University Press 1994, Montreal).

Canada. They were inhabited and controlled by Indigenous peoples, with the European population limited to small numbers of, predominantly, fur traders. There was an intention to expand Canada north and west, and that process began soon after confederation, but the Canadian constitution was in no real sense accomplished. It was an on-going project.

Confederation therefore constituted a step in a much longer history of constitutional practice. It drew upon the lessons of previous political experiments – the co-existence of French and English, Catholic and Protestant – and it also responded to the challenge of pursuing effective policy at the level of the previously independent colonies, especially in the face of a vigorous, economically-dynamic, populous, and militarized neighbour (the United States) to the South. It consolidated a liberal structure of government, especially the principle that the executive had to be accountable to the majority within the legislature – the principle, that is, of responsible government, which had been achieved in the colonies less than twenty years before. The new federation was to build a transcontinental market; construct canals and railways; and extend the modernization of the law in Canada, which had been changed dramatically in at least two important respects in the 15 years prior to confederation: the abolition of seigneurial tenures in Quebec (1854) and the adoption of the *Civil Code of Lower Canada* (1865). The new division of powers between the federal and provincial governments was shaped by all these aims.

There also were challenges that lay in the future, unanticipated, that were to mark Canada's constitutional history in dramatic ways. These included:

– the coming of waves of immigration, especially from sources other than Great Britain & Ireland;

– the development of a Canadian national identity that caused the country to drift away from its imperial allegiance to Great Britain, ultimately severing it;

– the fact that national identity came to be felt differently in different parts of the country: French-speaking Quebecers were especially devoted to their own language, religion, and laws, which they saw as under threat in an anglophone North America; they therefore retained a strong commitment to Quebec's autonomy as other Canadians gravitated, in most cases, to a predominantly Canadian allegiance;

– the advance of industrialization and urbanization and, in their train, the changing role of the state;

– the longstanding question of Canada's relationship with Indigenous peoples, which did not fade away but which remains a central challenge today; and

– the rights revolution, as part of which Canadians ultimately adopted the *Canadian Charter of Rights and Freedoms,* which formed the centrepiece of Canada's second major constitutional document, the *Constitution Act, 1982.*

The *British North America Act* of 1867 consolidated and refocused developments that had begun prior to confederation and it also – importantly – set Canada on the path to becoming a transcontinental power. But Canada's constitutional structure was far from complete, far from crystallized in a constitutional moment. It remains a work in progress, one whose details are shaped by the actions of its citizens, their governments, and their courts.

II Presumption 2: Constitutions are Comprehensive, Internally-Consistent, Rationalized Structures of Government

That brings us to the second ingrained assumption about constitutions. Constitutional lawyers tend to treat them as though they create comprehensive, internally consistent, highly rationalized structures of government. Or at least, even if we know they are not actually like that in their historical origins, we interpret them with that objective in mind. We do so for good reason: constitutional interpretation is about defining the relationship between the various institutions of government, and it makes sense to interpret constitutions in a manner that clarifies institutional roles, minimizes conflicts, respects fundamental rights, and resolves interpretive disagreements. But we should not be so enamored of coherence that we *a)* misunderstand our practice, or *b)* neglect other possibilities.

The complex and incompletely consolidated nature of the Canadian constitution is manifest in its textual foundation. Two constitutional documents tower above all the others: the *Constitution Act, 1867* and *Constitution Act, 1982*. But there are, in fact, more than 30 constitutional documents: 30 are listed in the schedule to the *Constitution Act, 1982,* and to that list must be added the *Constitution Act, 1982* itself. Moreover, no pre-confederation documents are listed. At least one – the first British constitution to apply to most of what became Canada, the Royal Proclamation of 1763, remains an important foundation for the recognition of Indigenous rights. It is expressly protected by section 25 of the *Canadian Charter of Rights and Freedoms*. Moreover, there are many additional documents that are protected by constitutional provisions so that they cannot be infringed by ordinary legislation, at least not without meeting special conditions. Canada's treaties with Indigenous peoples fall into that category. And we have thus far referred only to written instruments having constitutional status, not to the whole panoply of practices, statutes, constitutional principles, and constitutional conventions that remain important elements of the Canadian constitution. To take one important example, the central institutions of democratic governance – legislative, executive, courts – have only the most skeletal treatment in the constitutionally entrenched texts. The constitutions of provincial governments are virtually absent. Both these elements – the institutions of democratic governance, and the constitutions of the provinces – represent the most obvious legacy of Britain's unwritten constitutionalism within the contemporary Canadian order.

This large number of sources reflects the fact that the Canadian constitution has evolved incrementally over time. It is also a product of the fact that Canadian constitutionalism has addressed itself to at least six themes, each of which has had its own distinctive dynamic, its own champions, and often its own privileged sources:[6]

[6] See Jeremy Webber, *The Constitution of Canada: A Contextual Analysis* (Hart Publishing 2015, Oxford), which introduces these themes in its first chapter, sketches Canadian constitutional history in its second chapter, and then, in successive chapters, provides an overview over Canadian constitutional law.

1) the territorial organization of Canada – a theme that was most obvious in the period of territorial expansion, but that is still active in, for example, the creation of the new Inuit-majority territory of Nunavut in 1999, the current delimitation of the territorial jurisdiction of Indigenous governments, and of course the question of Quebec's potential secession.
2) The structure and operation of democratic government, including the historical struggle for responsible government, but also the perennial contemporary questions of reform of the Canadian Senate, electoral reform, and expanding the scope for autonomous action by members of parliament.
3) Canada's federal structure, which is continually being interpreted in new ways and adjusted through political negotiation. One thinks especially of the significance of the federal government's spending power in post-World War II Canada, including its recent limitation.[7]
4) Human rights – a theme that was present from the very earliest days of Canadian administration, but that is now dominated by – but by no means limited to – the application of the *Canadian Charter of Rights and Freedoms*.
5) The encounter between Indigenous peoples and non-Indigenous institutions – perhaps the oldest of the themes, but one which is attracting very substantial attention right now in government policy, litigation before the courts, the negotiation of treaties and other agreements, the development of the Indigenous-majority territories of Nunavut and the Northwest Territories, and, above all, the autonomous action of Indigenous peoples, as they reclaim their laws, reassert their jurisdictions, develop their governance structures, negotiate with the federal and provincial governments, and build their own conceptions of citizenship and participation.[8]
6) Finally, Canada's association with political institutions beyond the Canadian state, including the actual and potential limitations on Canadian governmental authority posed by trade and investment treaties.

These themes do interact, but in unpredictable ways. I have used elsewhere the analogy of minimalist music – the music, for example, of Philip Glass or Steve Reich – to suggest their relationship.[9] Each theme has its own starting point and its own meter, and as they are pursued they shift in and out of phase, producing varying, displaced, sometimes dissonant, sometimes harmonic interactions. The courts and constitutional commentators frequently reflect upon how those themes should be ordered relative to each other, but those relationships are hardly settled or predefined. Indeed, they are, in many cases, the subject of perennial debate.

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[7] For recent developments in the federal spending power, see Jeremy Webber, 'The Delayed (and Qualified) Victory of the Meech Lake Accord: The Role of Constitutional Reform in Undermining and Restoring Intercommunal Trust', in Dimitrios Karmis, François Rocher (eds), *Trust, Distrust, and Mistrust in Multinational Democracies: Comparative Perspectives* (McGill-Queen's University Press 2018, Montreal).

[8] See especially John Borrows, *Canada's Indigenous Constitution* (University of Toronto Press 2010, Toronto), his many other works, and the works of Val Napoleon and the Indigenous Law Research Unit, available here: <https://www.uvic.ca/law/about/indigenous/indigenouslawresearchunit/index.php> accessed 31 August 2018.

[9] Webber (n 6) 1–2.

III Presumption 3: Constitutions Must Be Based on Agreed Principles, from Which Determinate Rules of Governance Must Be Derived

Thus we come to the final underlying assumption about constitutionalism: that constitutions must be based on a set of foundational principles, settled and agreed in advance, upon which the structure of government is based and from which constitutional rules are derived. This assumption has not been true of important dimensions of the Canadian constitution – and, as will become clear, I wonder whether it is true of any country's constitution, at least in the strong sense it is often asserted. Certainly in the Canadian case, there are intractable disagreements on some very fundamental matters.

These contentions have been central to Canadian constitutionalism since the very beginning. One thinks, for example, of the long debate between adherents of the compact theory and statute theory of the constitution.[10] The compact theory asserted that the Canadian constitution was fundamentally a pact among the original colonies, so that the institutional heirs of the colonies (presumed to be the provinces) – or Quebec and the rest of Canada, or the French and English linguistic communities, for there were different descriptions of the parties to the compact – were the primary units and the federal government was derived from their act of federation. The theory was used to justify a decentralized view of confederation in which the provinces were the foundation of Canadian political legitimacy. The statute theory was a rejoinder to the compact theory. It asserted that all elements of Canada's federal structure were created by the British Parliament simultaneously when it adopted the *British North America Act,* and therefore neither level of government had precedence. This debate was never resolved, although it was eventually superseded by other terms which proved equally controversial: especially whether Quebec should be granted 'special status'; Quebec's character as a 'distinct society'; or Quebec's status as a nation within Canada.

Often, these differences of principle have been associated with the collectivities that make up Canada, especially but by no means exclusively Quebec's relationship to the rest of Canada. They are remarkably persistent, expressing in constitutional imagery the varying patterns of allegiance that persist within the Canadian federation. Nor are they simply a matter of constitutional politics, irrelevant to a constitutional lawyer. On the contrary, they have shaped some of the most important decisions in Canadian constitutional law.

This is clear when one considers the most remarkable decision by the Supreme Court of Canada in recent memory: *Reference re Secession of Quebec* (hereafter: *Secession Reference*).[11]

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[10] See Roderick A. Macdonald, '…Meech Lake to the Contrary Notwithstanding (Part I)' (1991) 29 Osgoode Hall LJ 253 at 284–288; and, for the classic exploration of the historical foundations of the compact theory, Ramsay Cook, *Provincial Autonomy, Minority Rights and the Compact Theory, 1867–1921* (Queen's Printer 1969, Ottawa).

[11] [1998] 2 SCR 217.

That case was decided in the aftermath of the 1995 referendum on Quebec's independence, a referendum that (as noted above) the secessionist side narrowly lost. The Supreme Court's decision addressed whether, in the case of a future referendum, a unilateral declaration of independence by Quebec would be legal under Canadian law. The straightforward way of approaching these issues would have been to determine whether secession constituted an amendment to the Canadian constitution and, if so, which branch of the constitution's amending formula would apply to the situation. The Court did indeed decide that secession would require an amendment to the Canadian constitution but, remarkably, it declined to determine which branch of the amending formula would apply. Instead, it held that, if a clear majority of Quebecers voted 'Yes' in a referendum held on a sufficiently clear question, an obligation on all governments to negotiate would arise. There was no textual foundation for this obligation; the Court itself fashioned the duty after reflecting upon four general principles underlying the Canadian constitution: federalism; democracy; constitutionalism and the rule of law; and respect for minorities. Nor did the Court specify what the negotiations' outcome should be; the government of Canada was not required to concede, for example, that Quebec was entitled to secede, even after a clear referendum victory for the secessionist side. Moreover, the Court stated that it would not supervise the conduct of the negotiations. Why did the Court adopt such an unusual (and inconclusive) result?

The answer lies in the interaction of two elements: 1) a particular conception of how the principal elements of the Canadian constitution should be approached – not through the establishment of a fully-determined theory to govern their interrelationship but as a continual work in progress, the elements being held in tension, perennially unresolved, open to further reflection and evolution; and 2) the Court's realization that such an open and unresolved constitutionalism might be essential to the continuation of the Canadian political community, given the different definitions of political community that Canadians bring to their country, together with the complex balancing Canadians conduct among these definitions. The second of these two elements is primary; it has, over time, driven the development of the first, so that practice has preceded theory. But let's start with the theory.

In the lead-up to the 1995 Referendum, the essential argument of *indépendantiste* governments in Quebec had been that, if a majority of Quebecers voted in favour of secession, the democratic legitimacy of that decision was sufficient to support a declaration of independence; no further requirement should be imposed.[12] But in the *Secession Reference*, the Court took the position that democracy, albeit very important, was merely one of the four principles underlying the constitution. Each of those principles, including democracy, had to be tempered by the other three. Indeed, the very definition of which parties needed to participate

[12] The Government of Quebec did not itself make this argument before the Supreme Court of Canada. Quebec was led at the time by the *indépendantiste* Parti Québécois, which declined to participate in the proceeding. The Court appointed a lawyer to make, as *amicus curiae*, the arguments that the Quebec government would otherwise have made.

in a democratic decision was shaped by the other principles. The Court was not willing to say which principle should take precedence in any particular situation. 'These defining principles function in symbiosis,' it said. 'No single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other.'[13] It found, in other words, that each of the principles was important, and the Court was not going to recognize any pre-established hierarchy among them that might have the effect of exalting one principle over another, diminishing their mutual interaction. The principles existed in unresolved tension. The Court declined to foreclose that tension and thereby diminish the force of some of the principles. Instead, the relationship among the principles should be a matter of continual consideration, with specific outcomes determined by negotiations.

That vision of constitutional principles was grounded in the Court's intense engagement with the contrasting conceptions of political community held by Canadians in practice. The tension among those conceptions was clear from the very question posed to the Court, which addressed whether a secessionist government in Quebec could rely solely upon a referendum victory to declare independence, without the participation of the government of Canada, citizens outside Quebec, or any other entities in the decision. Moreover, the volatility of those questions – their potential to trigger severe conflict – was evident from developments outside the courtroom. At the same time as Quebec's 1995 referendum, three Indigenous peoples – the Cree, Inuit, and Innu (Montagnais) – held their own referenda on Quebec's secession. In each case the vote was more than 95 percent against secession. These referenda directly challenged the notion that Quebec was the only appropriate unit for the exercise of the right of self-determination. In these proceedings, the Cree, Inuit, and Innu asserted their own contrasting claims to political status. The potential implications of those claims were significant. Even though Indigenous peoples constituted a small minority within Quebec as a whole, their traditional territories were extensive: the Cree and Inuit alone were the majority population in more than half the land mass of Quebec.[14]

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[13] *Secession Reference* (n 11) para 49. The Court declined to hold that specific principles trump other principles at paras 91, 92 and 93. The Court's reasoning has clear affinities with the notion of 'value pluralism': that we are, at times, committed to several values that bear upon a particular decision, without us possessing any convincing formula for how they ought to be traded off against each other. See, for example, Isaiah Berlin, *The Crooked Timber of Humanity: Chapters in the History of Ideas* (2nd ed., Princeton University Press 2013, Princeton) 12–20. One difference between the case of the Canadian constitution and most discussions of value pluralism is that in Canada the relevant values are also differentially associated with different constituent sections of the Canadian community (see below), so that a choice among the values can be tantamount to a choice among the groups (although note that Berlin too contemplates this possibility in the reference above).

[14] For the Cree, Inuit, and Innu referenda, see A. Derfel, 'The Message is Clear. We Won't Go' The [Montreal] Gazette (26 October 1995) A15; A. Derfel, 'Quebec Inuit strongly reject sovereignty in own vote' The [Montreal] Gazette (27 October 1995) A10; A. Derfel, 'Montagnais reject Quebec independence' The [Montreal] Gazette (28 October 1995) A9; Grand Council of the Crees (of Quebec), *Sovereign Injustice: Forcible Inclusion of the James Bay Crees and Cree Territory into a Sovereign Quebec* (Grand Council of the Crees 1995, Nemaska, Que.). Prior to the 1990s, the Innu were generally referred to as 'Montagnais'; they now make clear that they prefer 'Innu.'

This potential for conflict informed the Supreme Court's decision in the *Secession Reference*. To decide that one party's claim should take precedence over another's would be tantamount to deciding that one of those communities – in the example above, either the province of Quebec as a whole or the Indigenous peoples resident within Quebec – should be entirely subjected to others' will. The Court realized that it might one day be forced to make such a decision, but it was not going to make the decision before it had to. The decision itself would likely provoke deep alienation on the losing side. It would communicate to the loser that it was a subordinate party, held in what might appear to be an essentially colonial relationship – in Quebec's case to the rest of Canada, in Indigenous peoples' case both to Canada and Quebec.[15] Such an outcome would foreclose the development of more nuanced responses by the parties, responses that did not amount to a simple choosing of one over the other and that therefore might address the fundamental concerns of all. Hence the call for negotiations. More nuanced responses had been found in the past. They had arguably permitted the very persistence of Canada. The Court sought to foster such outcomes, not foreclose them.

Remarkably, the Court's decision was greeted with widespread approval. Quebecers were pleased that the Court had emphasized that a majority vote in favour of secession must be treated seriously, so that all parties had to negotiate the consequences. Canadians outside Quebec and Indigenous peoples throughout Canada were satisfied that the Court insisted that their concerns too should be considered – that secession could not simply occur by unilateral action. The Court's refusal to determine a simple winner and loser, its emphasis on mutual respect and the continued search for a working consensus, appeared to satisfy an essential orientation in Canadian constitutionalism.

[15] Long after the decision, in private conversation, one judge who had participated in the *Secession Reference* expressed this reasoning in pointed terms. Had the Supreme Court proceeded to decide which branch of the amending formula applied, it is very likely that the answer would have been 'unanimity': the branch that requires the approval of each and every provincial legislature plus the two houses of the Parliament of Canada: Jeremy Webber, 'The Legality of a Unilateral Declaration of Independence under Canadian Law' (1997) 42 McGill Law Journal 281 at 287–291. This meant that in theory (but likely not in practice), the majority in a single provincial legislature, even that of Prince Edward Island (which, according to the census of 1996, had a population of 135,000 (0.5 percent of the population of Canada as a whole) in comparison to Quebec's 7,139,000 [25 percent of Canada as a whole]) could have entirely blocked Quebec's secession. The judge said (this is a paraphrase, but one as close as I can remember to the original): 'We weren't going to have anything to do with unanimity. We weren't about to say that the democratic will of Quebecers was subject to that of every other province.' This was an astute reading of the politics of such a decision, but for the reasons developed in the text, there are also good reasons of constitutional principle for the Court's reticence.

IV Canada's Agonistic Constitution

But does such an approach really represent an approach to constitutional government worthy of being called 'constitutionalism'? Isn't it just political compromise – a protracted instance of muddling through?

FR Scott – distinguished constitutional scholar, eminent poet, and dean of McGill's Faculty of Law in the early 1960s – wrote a bitingly satirical poem upon the death of William Lyon Mackenzie King, prime minister of Canada for many years through the 1920s, 1930s, and 1940s. The poem reads in part:

> He blunted us.
>
> We had no shape
> Because he never took sides,
> And no sides
> Because he never allowed them to take shape.
>
> He skilfully avoided what was wrong
> Without saying what was right,
> And never let his on the one hand
> Know what his on the other hand was doing.
>
> The height of his ambition
> Was to pile a Parliamentary Committee on a Royal Commission.
> To have "conscription if necessary
> But not necessarily conscription",
> To let Parliament decide –
> Later.
>
> Postpone, postpone, abstain.[16]

Is such a picture of normless evasion the essence of the Canadian constitutional tradition sketched in this paper? My answer, of course, is an emphatic 'No'. The constitutionalism explored here is founded on a vision of political life that is normatively grounded – one especially appropriate to a country such as Canada which embodies such deep diversity.[17] It is, moreover, by no means limited to such a country.

It is a mistake to think that the identity and cohesion of countries require that their citizens express agreement to a set of foundational principles. Even if one considers the United

[16] FR Scott, 'W.L.M.K.' in FR Scott and AJM Smith (eds), *The Blasted Pine: An Anthology of Satire, Invective and Disrespectful Verse Chiefly by Canadian Writers* (Macmillan 1967, Toronto) 36.

[17] The phrase is that of the eminent Canadian philosopher Charles Taylor, 'Shared and Divergent Values' in Guy Laforest (ed), *Reconciling the Solitudes: Essays on Canadian Federalism and Nationalism* (McGill-Queen's University Press 1993, Montreal) 155 especially at 183.

States – which is the epitome of a country founded on a canonical set of principles, agreed to in a 'constitutional moment' – one quickly realizes that the extent of agreement is much less than one might think. On the contrary, its history has been marked by profound disagreement over its most fundamental principles. Think, for example, of its long struggles, right up to the present day, over the definition of liberty and equality – conflicts over which the country fought a civil war and that still bedevil American politics. Political debate in the United States certainly does have a distinctively American character, but it is not based on ideological agreement. It resides in the distinctive terms of American political debate: Americans' preoccupation with distinctive sets of questions; their attention to past answers to those questions; their privileging of rival versions of concepts such as liberty and equality, often in forms that have a distinctively American cast; the structuring impact of their political and legal institutions; their reliance on a common set of references in making their arguments (their constitution, the declaration of independence, the words and actions of their most revered leaders, and, above all, the history of their country since its founding) – all these, however, subjected to different interpretations. The nature of the terms matters, but Americans' identification as Americans is, in a very real sense, independent of the particular meaning they give those terms. One might say that Americans' political identity is characterized as much by the structure of their *disagreements* as by their agreements.[18]

I argue elsewhere that the character of political communities, and the grounds of citizens' allegiance to those communities, are best understood through the analogy of language, where citizens share the distinctive terms of a debate but are nevertheless fully capable of disagreeing strongly, all within the terms provided by the language.[19] The terms matter: they constitute the medium through which ideas are expressed, they convey the historical experience of that society, and they do condition what can be said, or at least the ease with which things can be said. They also are the object of strong attachment on the part of those raised within the society: they furnish the terms in which participants have formulated their understanding of public life, their understanding of themselves, their wants, and their aspirations. And those distinctive terms often are the only terms over which participants possess anything like mastery, certainly the terms in which they have the most experience. The linguistic analogy captures the balance between continuity and change that exists in any political culture. The

[18] Interestingly, Ulysses S Grant, commander-in-chief of the victorious Union forces in the United States' Civil War and president during reconstruction, in his reasons for rejecting a right of the southern states to secede, did not emphasize their original agreement to enter the Union. On the contrary, he accepted that, in the years immediately following the formation of the United States, the southern states should have been able to secede. Rather, it was the events that occurred in the many years following Union – the common undertakings, the common investments, the formation of new states – that, in his view, had knit the sections so thoroughly together as to remove the right. He used proprietary language – the fact that new territories had been 'purchased with both blood and treasure', for example – to emphasize how the interests of all sections had become entangled. The point can be generalized. Our national identities are forged overwhelmingly by what happens after the founding moment, not by the terms expressed in that moment. See Ulysses S Grant, *Personal Memoirs of US Grant* (Barnes & Noble 2003, New York) at 125–127.

[19] See Webber (n 6) 183–228.

terms of that debate are continually being adapted to say new things, they are affected by encounters with other political cultures, and in the process the terms themselves evolve.

Constitutions are an integral part of those terms. They shape public life, but they do so as sites of debate and disagreement. The concepts they express, the principles they articulate, are continually subjected to reflection, argument, deliberation, and attempts at specification. They constitute traditions of inquiry rather than documents whose meaning is fixed in a founding moment.[20] Their implications do need to be explored as the constitutional system develops. Courts are important actors in that exploration, alongside governments and their citizens. But it is a serious mistake to assume that that process has, as its natural endpoint, a single right theory of the society, that the law 'works itself pure'.[21] That expectation takes insufficient account of the fact that constitutions are not merely philosophical enterprises, that they exist by and for their peoples, that they draw upon the complexity and the dynamic character of their peoples' understandings and interactions, and that that fact gives to the constitutions' principles a perennially unresolved and evolving character.[22] And, as the *Secession Reference* makes clear, there may be times when the path of wisdom requires that the constitutional actors refrain from settling a question – when the issue is not ripe for decision, and when the principles are so resistant to definition[23] and so fundamental to the country, that the dialogue ought to be allowed to continue, not be foreclosed by decision.

This, then, is 'agonistic constitutionalism'.[24] The term derives from the Greek *agōn,* which refers to the athletic contests that occurred in ancient Greece as part of public ceremonies.

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[20] The traditional character of law has also been a major theme in the work of Martin Krygier. See Krygier, 'Law as Tradition' (1986) 5 Law and Philosophy 237; Krygier, 'The Traditionality of Statutes' (1988) 1 Ratio Juris 20; and Krygier, 'Thinking Like a Lawyer' in Wojciech Sadurski (ed), *Ethical Dimensions of Legal Theory* (Rodopi 1991, Amsterdam) 67. See also Jeremy Webber, 'The Grammar of Customary Law' (2009) 54 McGill LJ 579.

[21] The phrase was adopted and popularized by Ronald Dworkin, who assimilated it to his notion of law as integrity: Ronald Dworkin, *Law's Empire* (Belknap Press of Harvard University Press 1986, Cambridge MA) 400ff.

[22] For conceptions of constitutionalism, grounded in the Canadian constitutional tradition, that are very similar to that presented here, see James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press 1995, Cambridge); Jean Leclair, 'Le fédéralisme comme refus des monismes nationalistes' in Dimitrios Karmis and François Rocher (eds), *La dynamique confiance/méfiance dans les démocraties multinationales: Le Canada sous l'angle comparatif* (Presses de l'Université Laval 2012, Québec) 209.

[23] See also Rod Macdonald's fruitful analogy between the compact and statute theories of the Canadian constitution on the one hand, and the wave and the particle theories of light on the other: *supra* note 10 at 291–292. He argues that our theories are frequently inadequate to the phenomena we are trying to express, and that there are times when the articulation of two competing theories, apparently unreconciled, provides a better understanding of the phenomenon than does either theory alone. I am about as certain as I can be that the decision in the *Secession Reference* was not the product of reflection on the great Hindu epic, the *Mahābhārata,* but I am tempted to invoke David Shulman's observation on the limits of language in expressing profound truths (if the reader will forgive such a cosmic reference): 'The Yakṣa's Questions' in David Shulman, *The Wisdom of Poets: Studies in Tamil, Telugu, and Sanskrit* (Oxford University Press 2001, New Delhi) 40 at 59–62. My thanks to Jyotirmaya Sharma.

[24] See also Webber (n 6) at 8 and 259–265; Jeremy Webber, 'Contending Sovereignties' in Peter Oliver, Patrick Macklem, Nathalie Des Rosiers (eds), *The Oxford Handbook of the Canadian Constitution* (Oxford University Press 2017, New York) 281 at 290–291.

It has been adapted by a school of political theory to denote a conception of politics in which conflict is foregrounded – in which disagreement, contention, and argument are seen as the very essence of political life, ineradicable, and where an emphasis on maintaining consensus can silence the voices of dissenters, especially the powerless.[25] The emphasis on conflict might suggest a negative vision of political life, a connotation evident in *agōn's* most familiar derivative in the English language: agony. But it can be seen in a more positive light, emphasizing the full participation of all members of society, the stimulus derived from encounters among a diverse citizenry, and the insight gained from those encounters with diversity. I have, in other work, spoken of a society's political culture as being a 'conversation' through time,[26] and there is much to recommend that more peaceable metaphor. But there are also reasons to prefer the tougher language of agonism with its acceptance that we do often disagree on fundamentals and that our relations can therefore be conflictual. Agonism warns us away from trying to insist, too quickly, on agreement. It alerts us to the fact that our societies' dynamism is often the product of challenge and a reconsideration forced by encounter with the unexpected. It urges us to value the contentious dimension of deliberation and to build our political life in a way that enables rather than suppresses it.

This does not exclude the use of agreement as an ideal towards which political argument ought to aim (although it does reject a requirement that every citizen needs to consent to laws for those laws to be legitimate). Persuasion is, of course, an important objective in political discourse. Agonistic theory's emphasis on inclusion in political life implies that one should build a society responsive to all its members. But, agonists would argue, a goal of universal assent is impossible. Moreover, citizens do not conduct themselves as though that were the standard of legitimacy. Their attachment to their political institutions, their implicit authorization of those institutions, their version of Renan's *'plébiscite de tous les jours,'*[27]

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[25] For foundational works in this school, see William Connolly, *Identity/Difference: Democratic Negotiations of Political Paradox* (Cornell University Press 1991, Ithaca); Chantal Mouffe (ed), *Dimensions of Radical Democracy: Pluralism, Citizenship, Community* (Verso 1992, London); Bonnie Honig, *Political Theory and the Displacement of Politics* (Cornell University Press 1993, Ithaca); Chantal Mouffe, *The Democratic Paradox* (Verso 2000, London). Unsurprisingly, agonistic democrats have important differences among themselves. I would not, then, want my arguments to be identified with everything in the agonistic literature. I especially resist the romanticization of conflict or the antagonism towards all forms of authority, especially the state, that are found in some agonistic work. Some theorists of agonism are radically skeptical of the role of reason in politics, a position that I also reject; in my view we should be humble in our reasoning, always attentive to our own fallibility. We should welcome our exchanges with others for the opportunity they provide for us to access a wider range of experience and to test and correct our understandings, but reasoning continues to play a cardinal role in those exchanges. Thus, I do not see agonism as being in any way contrary to a deliberative conception of democracy, as long as that deliberation is genuinely dialogical and resists the temptation to place preconditions beyond the reach of dialogue. On this I find Tully's position entirely convincing: James Tully, *Public Philosophy in a New Key Vol 1: Democracy and Civic Freedom* (Cambridge University Press 2008, Cambridge) at 71–132. There is one essential point that agonistic democrats and I do share: the realization that disagreement is an ineradicable and productive dimension of public life.

[26] Webber (n 5) at 190–193 and 309–319.

[27] Ernest Renan, *Qu'est-ce qu'une nation?* (Pocket 1992 [1882], Paris) at 55.

is tolerant of profound disagreement. It does make sense, within agonism, to see *consent-building* – the progressive deepening of citizens' attachment to their polities – as a worthwhile aim, but that must be seen as a continual process, one never entirely realized. What is more, the form of consent is likely to be quite different from full subjective agreement, by each citizen, with every enactment. The outcome in the *Secession Reference* is a model of the kind of result one might envisage.[28]

Agonistic constitutionalism is, then, a fundamentally democratic ethos, in which the outcome of collective self-determination lies in the hands of the citizenry as a whole acting through their institutions, citizens' participation and freedom of expression are valued, and the diversity of a society's citizenry is considered to be enriching rather than regrettable. It is also epistemologically humble, recognizing that any theory of politics is partial and that the requirements of justice, even the fundamental premises of justice, must be open to democratic debate. The primary role of constitutional provisions, then, is not to settle all questions of principle – the agonistic vision accepts that disagreement over questions of principle will continue – but to provide a robust framework through which those issues can be debated, considered, elaborated, and decisions made. Its first objective is to sustain and support the capacity for democratic decision-making.[29]

This concern with process, this acceptance of conflict, does not mean that agonistic constitutionalism is unconcerned with issues of principle. It is just that questions of principle are pursued through political action, not set outside politics. And the form of political action agonism envisages is founded on its own commitments to breadth and equality of participation, freedom of expression, and an ideal of an active, vibrant sphere of public decision-making. Moreover, the parties bring their substantive commitments to that process, seeking to achieve those concrete objectives in their political lives. Indeed, they are often driven to participate precisely because of their substantive commitments, as they pursue their visions of a decent and just society.

In many agonistic theories, diversity is not merely an empirical fact but something valuable in its own right. These theorists – William Connolly is a good example[30] – see real merit in there being a wide array of modes of life and normative commitments precisely in order to expand the range of standpoints from which debate is joined. I see the attractions in such a view, but I find it too abstract to be fully satisfying. This paper has argued that our attachment to political communities is to a set of conversations through time – a specific set of conversations, which have shaped our lives, and through which we have come to pursue

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28 See the exploration of consent in Jeremy Webber and Colin Macleod (eds), *Between Consenting Peoples: Political Community and the Meaning of Consent* (UBC Press 2010, Vancouver), especially chapter 1 in that volume (Webber, 'The Meanings of Consent'), which canvasses alternative meanings that have been attributed to consent, and chapter 9 (James Tully, 'Consent, Hegemony, and Dissent in Treaty Negotiations'), which makes the case for a dynamic conception of consent-building.

29 Webber (n 4).

30 See, for example, William Connolly, *The Ethos of Pluralization* (University of Minnesota Press 1995, Minneapolis), xiii ff, although I do share Connolly's commitment to a dynamic and relational conception of identity.

our own aspirations. Our commitment is to those conversations – the conversations that have made our society what it is – and the diversities with which we are most directly concerned are those that are already present within our society.

The task of engaging more fully and effectually with our own society, and of fostering greater inclusion and participation among its members, is itself demanding. Canada's constitutional struggles from the 1960s until now have, in large measure, been about expanding the scope of political participation to include all its members, moreover doing so on terms that would allow for the flourishing of French-speaking and Indigenous political cultures long into the future. That has required – still requires – careful attention to, for example, the long-neglected articulation of law and governance within Indigenous peoples, and that is just one of an plethora of challenging (though enriching) projects. The diversities in question have been, above all, those of the Canadian community. Canada has long been open to immigration and, more recently, to the acceptance of other visions of how to live that are not primarily cultural, such as greater varieties of sexual orientation (although I would not want to exaggerate the extent to which Canadians have accepted a vision of continually expanding diversity; that, like so much else, remains contested). In those respects, Canada might appear to be gravitating towards Connolly's ideal. But I am not so sure. I suspect that those extensions have, like the others, depended upon a concrete perception of community: on perceiving more clearly and embracing more fully the nature of the existing people of Canada and, internationally, recognizing a sense of community and responsibility on the international plane. Canadians are, if nothing else, well practiced in federal conceptions of identity.

V Final Comments

The vision of agonistic constitutionalism described here is one that is especially appropriate to the Canadian constitutional order, which has, since its earliest days (well prior to Confederation) had to grapple with the co-existence of different languages, different legal traditions, indeed different modes of life. Canadians have not always understood their constitutions in this way, but they ought to have done so, and at their best they have found ways to do so. The *Secession Reference* is only one of many examples.[31]

These examples have implications for our understanding of constitutionalism generally. We constitutionalists often exaggerate the extent to which our societies are founded on agreement. We often fail to see that *every* society is marked by substantial disagreement, even over fundamentals (or, if we do see it, we put it quickly out of our minds). Think, for example, of the endless arguments we have had, in the British constitutional tradition, over the precise

[31] I discuss another striking example, the *Haida Gwaii Reconciliation Act,* SBC 2010, c 17, in *The Constitution of Canada: A Contextual Analysis* and 'Contending Sovereignties' (n 6).

location of sovereignty. We would do well to be less extravagant in our claims for principle and, in doing so, be better democrats and more appreciative citizens.

I began this paper with reasons for critical reflection upon Canada's 150th anniversary. By now, I hope it is clear why critical reflection is the necessary counterpart to pride in our societies – why both, welded together, constitute the very substance of citizenship, not its betrayal. I hope I have helped explain how we come to be engaged by our countries' whole histories, even if we are latecomers, and how we can participate in and owe allegiance to more than one nation's tradition. And I look forward to the variety of ways in which we Canadians will, through reckoning with our legacy of encounters among Canada's peoples, continue to enrich our lives as citizens.