

The London School of Economics and Political Science

***Judging the Nation: The Supreme Court of Canada,
federalism and managing diversity***

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Declaration

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Abstract

This thesis examines the management of diversity through federation and the role of the federal arbiter. It does this by focusing on the plurinational federation of Canada and its federal arbiter, the Supreme Court of Canada (SCC). Its aim is to advance federal theory and policy (both for Canada and beyond) by looking at the important role the SCC has played in the management of conflict over the very nature of the federation.

Through a comprehensive review of the SCC's federal jurisprudence since 1980, the thesis demonstrates that the Court tends to impose particular understandings of the federation through its decisions. I argue such an approach by a federal arbiter is detrimental to the legitimacy of the federation and its ability to manage diversity. However, in a number of decisions, the Court recognizes federation as the process and outcome of negotiation between the subscribers of legitimate perspectives on the nature of the order. I argue this approach, which seeks to facilitate negotiation, can generate legitimacy for the federation and the way it manages conflict. These two lines of analysis support the point that federal arbiters are particularly important in managing conflict in diverse federations.

The thesis consists of two broad sections. The first looks at the main approaches to managing diversity via federation and the associated roles for the federal arbiter, both in the Canadian context and more broadly. The second section looks at the SCC's work as the federal arbiter to determine the extent to which it adheres to the facilitative approach. The thesis concludes by reflecting on the potential issues with this approach to managing diversity via federation and role for the federal arbiter, including its applicability beyond Canada.

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Introduction

The Topic

This thesis examines the management of diversity and conflict through federation, focusing on the institution of the federal arbiter. It is primarily a study of an important case within the field of federal theory, Canada – investigating the work of its federal arbiter, the Supreme Court of Canada (SCC).

While the thesis is a case study, it engages broader theory and policy issues. As such, Canada is treated as a particular type of case: a plurinational federation.¹ The intention of making this linkage is to employ general theory to better understand Canada and the work of its federal arbiter, but also to facilitate analysis and reflection that can inform aspects of theory and policy applicable to other similar cases (i.e. other plurinational federations).

The scope of the study is to investigate how diversity and conflict are managed in Canada through federation and its federal arbiter. The aim is to draw on this analysis to advance theory and policy in this area for Canada, and for other similar states. This thesis is thus both a theoretical and empirical study. It reflects on the theory of federation as a means to manage diversity and conflict. This theoretical analysis provides the lens to interpret and assess the work of the SCC as federal arbiter. This empirical analysis, in turn, provides the base to reflect back on the wider theory and policy issues related to the use of federation to manage diversity and conflict.

While there have been many studies of how diversity and conflict are managed (both looking at Canada and beyond), this remains an important area of research. The 20th century was marked by a significant rise of intra-state warfare and ethno-national conflict.² This phenomenon

¹ The concept of plurinationality is an important element of the thesis. As I explain in detail below, a plurinational state is one where the national composition of the state is contested among different groups (i.e. one group arguing a state is *uninational* with another group arguing it is *multinational*). The concept distinguishes between the moniker of ‘multinational’ (which implies the citizens of a state overwhelmingly accept that it is comprised of multiple, sealed national groups) and ‘plurinational’ (which implies the national composition of a state is contested by various groups); on plurinationality, see Keating (2001).

² Ethno-national conflicts involve at least one party linking their objectives and motivations to ethno-national identity, they are conflict where ‘the primary fault line of confrontation is one of ethno-national distinctions;’

can be linked to the implementation of the doctrine of national self-determination in a system of states that are internally diverse.³ In other words, a strong argument can be made that ethno-national diversity within a state increases instability and the probability of violent conflict.⁴ And, even in diverse states where conflict does not manifest as violence, struggles for national self-determination inside and outside the political system can have significantly destabilizing effects on the association.

For many, federalism is one of the solutions to the problem of diversity and conflict. This is because federation tends to be seen as maintaining the territorial integrity of the state while either placating or accommodating ethno-national groups.⁵ Among the promoters of federation are those that see its use as a nation-building tool, as something that can be employed to divide ethno-national groups to create a sense of national unity.⁶ As part of the post-1989 movement towards minority rights regimes in international society, federation has also been promoted as a means to explicitly grant ethno-national groups territorial autonomy.⁷ What these two approaches share is the view that federation can *solve* ethno-national conflict by removing the *problem* of diversity through an institutional mechanism (that either assimilates diversity into a single national community or segregates national groups within a single state).

see Wolff (2011: 162). As Stefan Wolff notes, this is ‘among the most intractable, violent and destructive forms of conflict.’

³ In other words, one of the drivers of this conflict is the “problem of fit:” more than 600 language groups and 5000 ethnic groups are housed in less than 200 states; see Gurr (1993).

⁴ For support of this view, see Montalvo and Renal-Querol (2005); Gurr et al. (2008: 9); Toft (2003); Kaufmann (2011). On the other side, there are those that argue ethnic heterogeneity is not a predictor of civil war; see Fearon and Laitin (2003) and Laitin (2007).

⁵ In the thesis I distinguish between the terms ‘federalism’ (which refers to the ideology and principle of promoting federal systems of government) and ‘federation’ (which refers to the policy of shared and self-rule through institutional mechanisms); on this distinction, see King (1982). I also discuss later how the institutional arrangement of federation can be understood as a normative framework.

⁶ The objective of this approach is to design the sub-state jurisdictions so that they cut across ethno-national boundaries to break-down these allegiances and to create a centripetal force that generates loyalty to the state; see Horowitz (2000: 597-600).

⁷ This approach uses federation to accommodate a territorially concentrated group’s nationalist ambitions via self-government. For example, prominent scholars promote multinational federation as a solution to conflict in Spain (Requejo 2005), Iraq (O’Leary 2003) and India (Tillin 2007) to name only a few cases, while Will Kymlicka has been promoting multinational federation as a near-panacea to the problem of national minorities for some time (Kymlicka 2000), seeking to apply this aspect of his work to Eastern Europe (Kymlicka 2002; 2005), Africa (Kymlicka 2006) and Asia (Kymlicka 2007). For a review of the use of multinational federation in conflict management, see Schertzer and Woods (2011).

This shared characteristic of federal theory and policy is problematic. It assumes that ethno-national conflict can be resolved through fixed institutional mechanisms. Underlying this assumption is the view that conflict takes place within the federal structure, not over the way federation recognizes identity and distributes power and resources. In reality, conflict over the way the state recognizes national identities (or not) and accordingly distributes resources and power via federation (or not) continues over time. In other words, the main approaches to managing diversity and conflict through federation fail to fully recognize that federation is, at its base, a normative framework that is contested by those subject to the order.⁸

This issue is linked to another problem with contemporary federal theory: the under-examined role the federal arbiter plays in managing conflict over the distribution of power and resources via federation. More often than not, federal theorists ignore the institution of the federal arbiter.⁹ Where it is considered, it is assumed that the arbiter acts in an independent and objective manner. Generally, in theory and practice, this role falls to the judiciary (and ultimately an apex court), which is supposed to act as a neutral umpire within the federation, enforcing the rules of the game when parties conflict. The problem with this assumption is that neutrality and independence are difficult for a federal arbiter to achieve. This is because a federal arbiter cannot retreat to neutral ground in exercising its duties – it is part of the very system being challenged. In other words, federal theorists generally fail to recognize that conflict over the distribution of power tends to manifest as

⁸ As I explain in greater detail below, the complexity of recognizing identities and distributing resources and power via federation means it is, at any given time, contested by one or another group subject to the order.

⁹ An example of the under-examined and under-theorised role of the federal arbiter can be found in Will Kymlicka's *Finding Our Way*, which provides prescriptions and recommendations to accommodate diversity through multiculturalism and multinational federation in Canada. In this 220 page book, Kymlicka dedicates two paragraphs to the topic of the SCC, saying that Canada's federal arbiter guarantees representation for Québec as three of its nine justices must be from that province; see Kymlicka (1998: 114). There is no additional substantive reflection on the Court's role in the development of the federation or on the role it should play in managing diversity and conflict. Similarly, in an article that provides a comprehensive account of ethno-national conflict management theory, Stefan Wolff does note the role promoted for the judiciary among the main approaches; see Wolff (2011: 172). However, among these main approaches, the promoted role for the judiciary is simply 'independent,' with the only alteration (for the liberal consociationalist approach) being that it should also be 'representative.' Important for my point is that Wolff has to turn to personal correspondence with a liberal consociationalist (John McGarry) to make this distinction given the lack of work on the subject.

conflict over the rules themselves (not the application of a rule).¹⁰ The tendency to overlook this point is one of the reasons for the continued lack of reflection on the role of the federal arbiter.

This study seeks to address some of these gaps in the theory and policy of federation. As I have already said, it does this by looking at how conflict manifests over the distribution of resources and power within a plurinational federation (Canada) and how its federal arbiter (the SCC) has managed this conflict. Building on this analysis, the thesis presents a model of federation that accounts for this conflict, with a particular focus on the role of the federal arbiter. I am thus trying to advance theory and policy applicable to Canada and other similar cases.

I focus on Canada for three main reasons. First, as a plurinational federation, it represents a particular type of case. Examining this plurinational federation, where there has been long-running (political) conflict over national identity and the way identity is recognized and power and resources distributed via federation, facilitates analysis of these conflict dynamics and the way they are managed.¹¹ This allows for future comparative analysis, and can inform theory and policy applicable to other similar cases.¹²

Second, Canada is a key case within the field of federal theory (and ethno-national conflict management). This status is not just because Canada is one of the oldest federations or because it is generally perceived as one of the first states to accommodate national diversity through territorial self-government. Its status as a key case stems from the fact that analysis of Canada plays an important role in the development of general theory and policy. Even a cursory glance at

¹⁰ Conflict over the federal order is akin to conflict over the way any normative framework recognizes identities and accordingly distributes power and resources. Such conflicts are not struggles *for* recognition, but rather, are struggles *over* the way norms recognize identities and distribute power, see Schertzer (2008: 108-107); Tully (2004: 87-88).

¹¹ As this sentence implies, the focus of thesis tends to be on non-violent ethno-national conflict.

¹² There are 26 states that have adopted (or are in the process of adopting) federal systems of government. These 26 states house over 40% of the world's population. However, not all of these states are plurinational (i.e. not all have widespread competing conceptions of the nature of the state's national composition). I discuss the applicability of my analysis and argument to beyond Canada in the Conclusion.

comparative federalism texts,¹³ or the work of those promoting territorial self-government in diverse states,¹⁴ supports this point.

Third, Canada tends to be misunderstood. As I argue throughout the thesis, those analyzing the case, and particularly those seeking to export a “Canadian model” of federation, generally fail to account for the contested nature of national identity and federation present in the state. A more comprehensive analysis of Canada can inform our understanding of this key case and thus advance the theory and policy that has been developed in relation to that case.

More generally, focusing on Canada and its federal arbiter helps to contextualize discussion, rather than remain aloft in theoretical reflection. It also provides an empirical basis to examine the occurrence of conflict over national identity and federation and its management. While violent conflict has generally been absent in Canada,¹⁵ the state has been marked by sustained political conflict over the way national identities are recognized and the way power and resources are accordingly distributed via federation. Over the last 30 years this conflict over federation has tended to take place through, and been managed by, the judiciary (the state’s federal arbiter). Canada thus provides an opportunity to look at how conflict manifests over nationality and federation through well formulated arguments presented by key social actors in the legal forum, while also looking at how the SCC manages this conflict through the historical record of court decisions.

The Argument

This study seeks to answer the question of how the SCC has managed conflict over national identity and federation in Canada. Through a comprehensive examination of the Court’s work as federal arbiter over the past 30 years, the thesis argues the SCC has managed this conflict in both

¹³ For example, see Hueglin and Fenna (2006), Burgess (2006), Erk (2008), Baier (2006).

¹⁴ For a discussion of the important role Canada plays in the promotion of multinational federation, see Schertzer and Woods (2011).

¹⁵ The most notable exception being the series of bombings perpetrated by the nationalist group, Front de libération du Québec (FLQ), throughout the 1960’s and the related “October Crises” in 1970, when the FLQ kidnapped two high-ranking government officials (killing one) and the Government of Canada responded by implementing the *War Measures Act*, which suspended civil liberties and resulted in the arrest and detention of almost 500 individuals. Also noteworthy is the three-month armed standoff in 1990 at Oka, between a Mohawk (aboriginal) first nation group and the Canadian army (the conflict relating to a blockade of land the aboriginal group claimed as their territory).

problematic and beneficial ways. The key distinction between the former and the latter is the approach adopted by the Court. The problematic approach is where the SCC imposes a particular understanding of the federation through its decisions. The beneficial approach is where the Court recognizes that federation is a process and outcome of negotiation between the subscribers of legitimate competing perspectives. I argue the second of these, where the Court tends to adopt a role of facilitator of this negotiation, is preferable because it can generate and maintain legitimacy for the federation and the way it manages conflict.

My analysis of the Court's work also makes the case that the SCC is particularly important in the development of the federation and in maintaining its legitimacy. In other words, I argue that the institution of the federal arbiter matters. This is something that should be accounted for in federal theory and policy applicable to Canada and more broadly.

This argument has a number of layers. It recognizes that conflict over the nature of national identity and federation is an inherent part of politics in Canada. It also accounts for the fact that this conflict tends to be played out in the courts, and so the judiciary has an important role in managing this conflict. And, the assessment of the Court's work as problematic or beneficial for the legitimacy of the federation rests on an argument that draws from general theory about the way federation and its arbiter should manage diversity and conflict. Elaborating on each of these related points helps to further explain them and the main argument of the thesis.

In Canada, conflict over nationality and federation are part of life. Canada is a plurinational federation; accordingly, there are conflicting views about the state's national composition (i.e. key groups argue Canada is *uninational*, while others argue Canada is *multinational*).¹⁶ At the same time, federation's status as a normative framework means the way it distributes power and resources is always contested by one or another group subject to the order. The result in Canada, and other

¹⁶ Vastly oversimplified, anglophones outside Québec tend to argue Canada is uninational, while some francophones inside Québec and aboriginals tend to argue Canada is multinational. However, importantly, there are also actors within Québec and aboriginal groups that argue Canada is uninational. Nevertheless, the point is that there are substantial, organized (and institutionalized) groups that conflict over the nature of nationality in Canada. For a discussion of Canada's plurinational character, see Keating (2001, especially at 89-98).

plurinational federations, is that competing views of national identity mix with associated views of the appropriate distribution of power and resources to create considerable conflict over federation.

This conflict is propelled by three competing perspectives on the actual and ideal nature of the federal order: the pan-Canadian, provincial equality and multinational visions.¹⁷ These three ‘federal visions’ represent divergent perspectives on the national composition of the country, with associated views about the way the federation should be organized to accordingly distribute powers and resources. As I explain below, the pan-Canadian, provincial equality and multinational models are linked to the broader approaches within federal theory of trimming, trading or segregating away national diversity. However, these models are not just abstract theories. They are comprehensive accounts of what the federation is and ought to be, which inform political mobilization. As a result of this mobilization, federation in Canada has developed in such a way that the subscribers of each model can point to elements of the legal and institutional structure of the state to support their perspective. Each of these models thus stands as a legitimate perspective on the actual and ideal nature of the order.

The conflict driven by these competing perspectives plays out in many forums, from the political process, to the legal arena, to the social realm and even outside politics as violence. For example, we can see this in acrimonious intergovernmental relations, in court disputes, in the media and in instances of politically motivated violence and clashes on the streets (the latter being rare in Canada). By far the most common manifestation of this conflict in Canada is through intergovernmental relations and particularly disputes in the courts. Accordingly, the development of the Canadian federation has been marked by important (apex) court decisions on how the division of powers between the levels of government is to be implemented.¹⁸ In these cases, the SCC is

¹⁷ See Rocher and Smith (2003).

¹⁸ By referring to the “levels” of government I do not mean to imply a hierarchical relationship between the central and provincial governments; this language is adopted merely for purpose of style.

generally forced to deliver its decision in the face of competing arguments about the very nature of the federation made by subscribers to the various federal models.¹⁹

This leads to the point that the SCC plays a critical role in maintaining the legitimacy of the federation. The critical nature of this role stems from the important role legitimacy plays in a diverse federation, as well recognizing the unique nature of the Court's work as the federal arbiter.

Legitimacy is important in a diverse state because it is the expression of loyalty those within an association feel towards the association that ultimately maintains its unity.²⁰ A lack of loyalty to the way a state distributes power through institutions like federation thus threatens the very survival of the system.²¹ In other words, loyalty towards the federation helps to maintain order. The key characteristic of conflict over the federation (whether it is violent or political) is that it challenges the very legitimacy of the federation. Conflict over the federal order is about the definition of the political community and how the state ought to accordingly be governed and resources and power distributed. In diverse federations, then, the legitimacy of the order takes on a particularly pressing concern: loyalty to the system is important to offset the centrifugal demographic and institutional forces that abound.

In Canada, the SCC's role in maintaining this legitimacy stems from the unique work it undertakes as federal arbiter. This aspect of the Court's work is not simply about applying rules, or deciding if one party is right and the other wrong. In its federal jurisprudence, the Court is acting as the arbiter between parties holding, and arguing for, competing conceptions of what federation is and ought to be.²² When the Court makes a decision in such cases it is acting as part of the federal

¹⁹ The dynamic of conflict in such court cases tends to be between levels of government, with the central government arguing for the pan-Canadian model, Québec and aboriginal groups arguing for the multinational model and other provinces (particularly the western provinces) arguing for the provincial equality model. However, as discussed in subsequent chapters, the dynamic of conflict can also be between a private citizen or organization (arguing from the position of a particular federal model) and a level of government (arguing from the position of a competing federal model).

²⁰ In other words, as I explain in Chapter One, legitimacy is important because it is the very basis of sovereignty. Sovereignty is essentially the expression of political power, which is generated from the loyalty of the governed to their state and government; on this, see Loughlin (2003: Ch. 5)

²¹ Loughlin (2003: 78-82).

²² These competing conceptions are generally informed by the three federal models discussed above.

system: it is one of the key mechanisms by which the federation manages conflict over the order and evolves in response to this conflict. In exercising these duties, the Court can generate (or erode) loyalty among the subscribers of the various perspectives to the way the system manages conflict and the resulting order. This is because what the SCC says in a decision can either afford or deny legitimacy to a particular party's perspective on the nature of the federation, thus directly and indirectly affecting the way federation develops and also contributing to a group's political and material standing within the order.

This leads to the empirical question of how the SCC actually exercises this role and manages conflict. Looking at the Court's work as federal arbiter over the past 30 years reveals two distinct streams: one that has the potential to generate loyalty to the federation among the subscribers of the various federal models (by recognizing their perspective) and one that arguably erodes loyalty to the federation (by imposing a competing perspective).

This argument raises issue about how I can prove the Court's actual effect on the legitimacy of the federation and the loyalty groups feel towards the association. Proving that SCC decisions affect the legitimacy of the order (in the way they recognize or do not recognize perspectives) requires considerable empirical research. Such research is beyond the scope of this study. This is not because it is impossible: one could examine the Court's effect by investigating how attitudes towards the federation shift in response to particular decisions by looking at instances of nationalist mobilization, the tone of public debate (in the media and in legislatures) and polling data, for example. This line of analysis is beyond the scope of this study for the simple reason that it requires the analysis here before it can be properly conducted. Studying the effect decisions have on the federation necessarily follows an assessment of what decisions to investigate, and what to look for (i.e. to have a sense of whether a particular decision is potentially problematic or not). The empirical aspect of this study addresses these questions.

This study of the Court's federal jurisprudence works from a set of assumptions – which are outlined and defended throughout the thesis – about how the federal arbiter can generate

legitimacy in the way it manages conflict. In doing this, the thesis makes the case for why one stream of the SCC's federal jurisprudence can be seen as problematic and another stream can be seen as beneficial. But, it does not prove this point empirically. At the same time, the thesis provides a framework that facilitates later analysis of the SCC's actual effect on the association.

Returning to my argument, as subsequent chapters show, in a significant proportion (57%) of the Court's federal jurisprudence it problematically imposes one federal model over others when making a decision. The Court does this by working from, and reinforcing, only one of several legitimate federal models when making a decision. In such instances, the Court legitimizes a single federal model over the others by saying that it properly describes the federal order, while also aligning the federation with the privileged model through the decision outcome. For example, a decision that imposes the pan-Canadian model presents the federation as a centralized order that represents a pan-state nation, while asserting that this "fact" allows the central government to undertake a certain activity. This line of reasoning and the resulting outcome would be seen as an imposition to the subscribers of the multinational model, who view federation as a decentralized and asymmetrical order that accommodates minority nations like the Québécois and Aboriginals.

In these imposing decisions, the Court fails to recognize and account for the competing conceptions of nationality and federation in Canada. This is problematic because it has the potential to negatively affect the legitimacy of the federation by eroding the loyalty parties feel to the conflict management process and its results. This happens because those being imposed upon in a decision perceive the process as unfair – they see the Court as favouring a competing view of what the federation is and ought to be. Such imposing decisions reinforce the sense that some groups are political outsiders, alienating them from the conflict management process and from the resulting federal order. Moreover, the approach adopted in these decisions arguably leads to non-optimal outcomes. They are based on partial understandings of the institutional and legal structure of federation, and so reach outcomes based on incorrect assumptions that fail to account for the proper understanding of federation as incorporating elements of each federal model.

At the same time, in some circumstances, we can see the Court exercising its duties as federal arbiter in a way that can generate legitimacy for the conflict management process and the resulting order. The Court does this by making decisions that draw from, and reinforce the legitimacy of, multiple federal models – or, by explicitly recognizing that federation is the process and outcome of negotiation between the subscribers of legitimate models. In such decisions, the Court rejects the overall approach of solving a conflict by enforcing a fixed set of rules that align with a particular understanding of the federation; rather, in these decisions, the Court embraces an inclusive understanding of federation that incorporates elements of multiple federal models, while promoting the management of conflict through negotiation between the conflicting parties. The archetypal example of a decision following this approach reaches an outcome that is positive to all the parties of a conflict (or has positive elements for all parties), this outcome being based on a view that the federal order incorporates elements from all of the federal models.²³ In such decisions, the Court may even go so far as to explicitly say that federation is a normative order, which is the process and outcome of negotiation between the subscribers of legitimate and competing views about its nature.

This approach of recognizing and accounting for all parties' perspectives in resolving a conflict engenders loyalty to the process and outcome of conflict management, while also demonstrating that the federation is an inclusive order where all parties are stakeholders. Moreover, the Court's rejection of zero-sum outcomes allows subscribers of each federal model to find an aspect of the decision that supports their particular view of what the federation is and ought to be. Consequently, the subscribers of the various models are not alienated from the resulting federal order (they do not see the system as inherently biased against their position); rather, they see the decision as reaffirming that elements of the federal order reflect their view. All of this helps to show that the Court is subject to, and is affected by, the prevailing dynamics of the federal order, which helps to show how it is part of a fair and representative federal system. In other words, loyalty

²³ As an example, such a view of the federation can highlight that the order has both centralist and decentralist elements, while also allowing asymmetry between provinces, given the fact that Canada is at once a pan-state political community and one that incorporates multiple sub-state political communities, some of which identify as nations.

among those within the association is generated to the association and the way it manages conflict by the Court *recognizing and accounting* for the conflicting views of nationality and federation. Arguably, this also leads to optimal outcomes that consider and reflect the various elements of the institutional and legal structures that have developed in response to this conflict.

It is the comprehensive account of the SCC's federal jurisprudence over the past 30 years undertaken in subsequent chapters that brings into relief the divergent approaches of imposing particular federal models and that of recognizing the legitimacy of multiple models. This account also illuminates a number of important and related trends in the jurisprudence, which will be demonstrated later. For example, my analysis shows an early tendency for the Court to impose the pan-Canadian model. It also shows an initial lack of support for the multinational model, which softens from the 1990's forward. Most importantly, the review demonstrates that the Court makes a revolutionary turn in its approach to conflict management with the *Secession Reference* in 1998.²⁴ With this opinion the SCC provides the exemplar of a decision that recognizes the legitimacy of multiple federal models, while also promoting federation as the process and outcome of negotiation. The analysis also shows that this welcome change of course is increasingly followed after the opinion: from 1998 forward, 75% of the SCC's federal decisions adhere to the approach set forth in the *Secession Reference* of recognizing the legitimacy of multiple federal models.²⁵

Federal theorists and policymakers should account for the SCC's tendency to impose particular federal models. Despite the fact that it seems to be giving way to a more welcome approach, the Court still adopted this problematic approach in a quarter of cases since 1998. There is value in mitigating the possibility of a return to such an approach in future decisions. The SCC is currently undergoing a period of transition, with four new justices being appointed since 2006 and a new Chief Justice soon to be appointed. In addition, considerable intergovernmental issues remain on the horizon, particularly in the areas of securities regulation and labour mobility (topics that have

²⁴ *Reference re Secession of Quebec* [1998] 2 S.C.R. 217.

²⁵ Compare this to the fact that prior to the reference, some 64% of decisions imposed a federal model.

gained increasing importance in light of the recent economic crisis).²⁶ Looking beyond Canada, and considering federation's popularity as a means to manage diversity and conflict, broader federal theory should also take account of this stream of the SCC's work. This tendency to impose a federal model demonstrates how a federal arbiter can exercise its duties in a way that can negatively affect the legitimacy of the system. In this way, the subsequent analysis can inform theory and policy related to the federal arbiter's role in managing diversity and conflict in other similar cases to Canada (i.e. other plurinational federations).

Subsequent chapters also demonstrate that a federal arbiter can fulfill its role in a way that generates legitimacy for the association. This analysis provides the elements of an approach and role for the federal arbiter that should be promoted for Canada (and, in certain respects, more generally). At the centre of this approach is a role for the arbiter as a *facilitator* of negotiation between conflicting parties. We see this role exemplified in the *Secession Reference* and increasingly adopted in the decisions that follow this opinion. It is a role that recognizes there are multiple legitimate, if competing, conceptions of the national and federal character of the country. It accepts the objective of a federal arbiter is to manage conflict between those holding competing perspectives on the nature of the nation and the federation, not to solve it. And, it appreciates that the Court does not sit above the conflict, but rather, is part of the field of struggle and the system being challenged. Where this facilitative role is not possible (which is not uncommon, given the inherently adversarial nature of conflict) an inclusive understanding of the federation, along with a commitment to reject a zero-sum approach to reaching outcomes, should inform the decision-making process of the Court to ensure it acts as a *fair arbiter*.

Situating the Argument

The main argument of the thesis, and the layers of analysis underpinning it, draw from elements of constitutional theory, nationalism studies, federalism studies and conflict management theory.

²⁶ It should be noted that the Court delivered an opinion on securities regulation in December, 2011. Given the date, this reference falls outside the scope of the study.

From constitutional theory, I bring the above-noted appreciation of the critical role legitimacy plays in a political association. This perspective is based in particular on the work of Martin Loughlin and the argument that sovereignty is the expression of a political relationship.²⁷ Seeing sovereignty in this light illuminates the importance of maintaining the loyalty of those within an association to the way it is governed. My arguments also rest on a related view that constitutions are dynamic normative frameworks (rather than static legal documents).²⁸ This leads me to turn away from the more positivist approach of constitutional theory and law, as well as those that view constitutions as primarily mechanisms to enshrine liberal rights regimes; instead, I draw on republican-inspired arguments, which stress that constitutions represent a nexus of politics and law, and that constitutionalism should be about protecting civic freedom within political associations and the promotion of political mechanisms to manage conflict.²⁹

I also draw on three important developments within nationalism studies. First, I appreciate that nationalism is a dominant discourse of modern politics.³⁰ Nationalism plays a vital role legitimizing political power – it provides the necessary identity for the “people” that wield sovereign power.³¹ The point being that legitimacy in a political association is inherently bound up with questions of national identity in the modern period.

Second, I follow the “ethno-symbolic” approach to understanding the phenomena of nations and nationalism, particularly the variant developed by John Hutchinson.³² This approach seeks out the middle-ground between those that argue nations are discursive, elite constructions and those

²⁷ See Loughlin (2003: Chs. 1, 3).

²⁸ See Tully (1995, 2000b; 2004).

²⁹ See Tully (1995; 2004); Bellamy (1999; 2007); Petite (1997).

³⁰ For an overview of the emergent importance of the principle of nationality from the 19th century, see Breuilly (2011); Mayall (1990).

³¹ Yack (2001).

³² See Hutchinson (2005) and Smith (2009). For a comprehensive review of the different streams within the field of nationalism studies – the modernist, primordialist, perennialist and ethno-symbolist camps – which tend to diverge on the question of when nations emerged and the causal link between nations and nationalism, see Smith (1998).

that argue they are natural, real and enduring groups.³³ Accordingly, I understand nations as imagined, and recognize that conflict between actors with competing views about the nature of the nation shape their identity. At the same time, nations do exist, as defined by some combination of shared myths, symbols, language, practices, institutions and political culture. The importance of these characteristics is the limit they impose on actors and elites to shape national identity.³⁴ I argue that this definition allows an understanding of the enduring and loyalty-generating nature of nations,³⁵ while also accounting for their contested and discursive nature.

This last point leads me to highlight the value of recognizing certain states as “plurinational.” The classification of plurinational builds on Michael Keating’s distinction between the categories of “uninational” (which implies there is one nation within a state), “multinational” (which implies multiple, sealed national groups within a state) and “plurinational” (where the very concept of nationality is contested and plural).³⁶ Plurinational states are marked by conflict between actors over the very nature of the state’s national identity. This is clearly what takes place in states like Canada, the UK and Spain (where pan-state nationalists and minority nationalists conflict over the very nature of the state as uninational or multinational). The value of this perspective is that it allows for an understanding of the drivers and manifestation of conflict over nationality in states like Canada (conflict that also mixes with, and manifests as, conflict over federation).³⁷

Related to this view of nationality, I follow the emerging line of scholarship within federal theory that identifies federation as a type of normative order.³⁸ I argue federation is best understood as a system of order that arises out of conflict over the way identities are recognized and

³³ These are the positions of the so-called modernist and primordialist camps. For an example of the former see Hobsbawm (1990); Anderson (1991); Breuille (1993); Brubaker (1996; 2004), and for the latter see Geertz (1973); van den Berghe (1978; 1995); Grosby (1994).

³⁴ However, it is important to note the interplay between the debate over national identity and the more tangible aspects of national identity: as the limits on national identity frame the debate, so the debate over these characteristics shapes the understanding and nature of the nation. The definition of the nation put forth in the last three sentences mirrors that in Schertzer and Woods (2011).

³⁵ In particular, the strong emotive force nations produce for those that identify with them (even pushing some to die in the name of their nation).

³⁶ Keating (2001: 27; 2002: 361).

³⁷ On the manifestations of conflict in such states, see Schertzer and Woods (2011: 197-203).

³⁸ See Tully (2004); Schertzer (2008); Marchildon (2009).

power is accordingly distributed via the governing norms, what James Tully terms an ‘intersubjective normative framework.’³⁹ Federation is distinguished from other systems of rule in the way it constitutes multiple levels of government within a state to which it distributes power and resources. In this way, federation stands as one of the clearest examples of an intersubjective normative framework, as it *explicitly* distributes power and resources in line with the way the identities of constituent units are recognized.⁴⁰ Within federal studies, I also follow the practice of distinguishing between federalism (as an ideology) and federation (as a policy).⁴¹

Finally, my work seeks to build on the stream of conflict management theory that argues a nuanced understanding of nations and nationalism is of the utmost importance. The key point being that one’s view of nationality affects one’s view of the preferred management approach.⁴² For example, those that view national identity as a malleable elite construct tend to promote centripetal mechanisms that seek to resolve conflict by eliminating the offending ethno-national diversity (i.e. through assimilation),⁴³ while those that view nationality as real and enduring tend to seek rigid institutional structures that accommodate this fact.⁴⁴ In contrast, this study applies an understanding of nationality that stakes out the middle-ground between these two perspectives, along with a view of federation that recognizes its contested nature. Accordingly, the thesis seeks to advance conflict management theory and policy by bringing insights from the above three fields to bear on the use of federation in the management of ethno-national conflict.

As my analysis in subsequent chapters will demonstrate, the combination of insights from these four fields allows me to avoid some of the pitfalls of other studies that are based within one field, or that work from under-examined, and ultimately problematic, assumptions. For example, the

³⁹ See Tully (2004; 2001; 2000b).

⁴⁰ On the link between recognition and distribution, see Tully (2000b: 469-471).

⁴¹ See King (1982).

⁴² Woods, Schertzer and Kaufmann (2011); Wolff (2011).

⁴³ A position well represented in the work of Donald Horowitz and his followers; see Horowitz (2000); Reilly (2001).

⁴⁴ Exemplified by the above noted Canada School of multinational federalists and the related liberal consociationalists that follow the work of Brendan O’Leary and John McGarry, see McGarry and O’Leary (1993; 2007; 2009).

above allows me to avoid drawing an overly bright line between law and politics when reflecting on the role of the judiciary as federal arbiter. As just discussed, it also allows me to see nations as more than mere elite constructs or real and fixed facts, while also rejecting the use of contested terms associated with particular positions in the debate over the nature of nationality in Canada to describe the state.⁴⁵ The above also allows me to discuss and promote federation as a means to manage conflict without seeing it as a panacea to solve conflict through the implementation of fixed institutional structures. Finally, drawing from the fields of constitutional law, nationalism and federalism studies allows me to approach the theory and practice of conflict management in a way that moves past the application of “cookie-cutter” solutions from the centripetalist or consociationalist handbooks.⁴⁶

The Structure of the Argument

I answer the central question of the thesis through a series of chapters spanning both theoretical and empirical subjects over two broad sections.

The focus of the first section is the theory and policy of federation. In particular, it looks at the main approaches to managing diversity via federation and the associated roles for the federal arbiter (both in the Canadian context and more broadly). I also discuss the positive and negative elements of these approaches, while developing in contrast (what I argue is) a preferable federal model. This section establishes the analytical foundation for the main argument of the thesis by making many of the points discussed above. It also allows me to construct a theoretical framework for the various approaches to managing diversity via federation and the associated roles that are promoted for federal arbiters, which, among other things, informs my empirical investigation of how the SCC actually manages conflict.

⁴⁵ This is one of the central reasons why it is so important to shift our descriptive terminology from that of “multinational” to “plurinational.” As Brubaker argues, nations are a useful analytic category, but we need to avoid reifying them in our analysis of the phenomenon, see Brubaker (2004).

⁴⁶ The view that successful conflict management requires a nuanced understanding of the theory of nations and nationalism, and a proper account of the context within a state, are part of Stefan Wolff’s contribution to the field, including his argument that this approach tends to promote a mix of conflict management techniques, so-called ‘complex power-sharing,’ see Wolff (2011; 2009).

In line with these objectives, the first chapter looks at the use of federation to “solve” the “problem” of ethno-national diversity. It starts by discussing the challenge ethno-national diversity presents to the legitimacy of a state. It goes on to look at the broad attempts to solve this problem by trimming, trading or segregating away diversity through federation (while also discussing how these approaches are expressed in Canada as the pan-Canadian, provincial equality and multinational federal models). This discussion shows that these federal models inform and drive conflict over nationality and federation in Canada, and that each is a legitimate view of what the federation is and ought to be. The chapter explains the main approaches to managing diversity through federation and how these approaches inform conflict over nationality and federation in Canada. This, in turn, lays the groundwork to properly understand the contested nature of federation in Canada and the important role the arbiter plays in managing this conflict.

Building on this understanding of federation, the second chapter argues that the federal arbiter is important in the development and maintenance of legitimacy for the order. It starts by elaborating on the contested nature of federation as a normative framework, while also making the point that conflict over the order is only exacerbated in plurinational states like Canada. I then look at the various forums through which this contestation unfolds, focusing on the federal arbiter (which in Canada is the judiciary and ultimately its apex court, the SCC). In doing so, I discuss the key role the courts play in the development of the federation and in the maintenance of legitimacy for the order. The chapter then looks at how federal theory has generally presented the ideal role for the judiciary as federal arbiter, arguing that the three roles most widely promoted for the courts (as umpire, a branch of government or guardian) are problematically linked to the broader approaches of trimming, trading or segregating diversity. Following this, I present an alternative federal model, one that accounts for the contested nature of federation and promotes a role for the federal arbiter that will help to generate and maintain legitimacy for the order.

This raises important questions about the extent to which federal arbiters can, and do, live up to this ideal. I thus transition to an empirical investigation of these issues in the remainder of the

study. The second half of the thesis provides a comprehensive review of the federal jurisprudence of the SCC over the past 30 years, looking at the extent to which the Court's decisions draw from, and reinforce, the key federal models. This allows me to identify and discuss two streams of federal jurisprudence: decisions that recognize and account for conflict over nationality and federation, and those that do not. In doing this, the problems associated with the latter stream are discussed, notably the negative effects such decisions can have on the legitimacy of the order. At the same time, this review illuminates the key tenets and benefits of a federal arbiter exercising its role in a way that recognizes and accounts for the contested nature of nationality and federation, particularly the potential for this to generate legitimacy for the order.

Chapter Three discusses the main methodological issues of the study and the research design. The chapter explains how I conduct my review of SCC decisions and defends the underlying premises of my analysis. It starts by addressing some of the central issues related to the scope of the study (namely, why focus on the SCC and why do so from 1980 to 2010). It then discusses the nuances of my investigation of SCC jurisprudence. In particular, it reviews the ways in which a Court either does, or does not, recognize and account for the contested nature of nationality and federation in a decision. It does this by providing a comprehensive framework that builds on the analysis from the first two chapters. In discussing this framework, I explain how it is applied to determine if a decision works from, and reinforces, one or multiple federal models in the way the federation is depicted, in the outcome reached and in the Court's self-selected role within the federation.

Chapter Four argues that the *Secession Reference* represents the exemplar of a decision that recognizes and accounts for the conflicting views over nationality and federation. It does this by applying the framework introduced in Chapter Three to discuss how the depiction of the federation, the decision outcome and the self-selected role for the Court in the decision draw from, and reinforce, a view of federation as the process and outcome of negotiation between the subscribers of legitimate federal models. It also introduces some of the potential benefits of this approach by

discussing the context and reasons why the Court made this revolutionary turn in the face of a legitimacy crisis for the federation. This chapter thus does two important things for the overall argument of the thesis and the analysis in subsequent chapters: 1) it provides a detailed example of how I undertake my review of SCC federal jurisprudence, which is particularly important given the high number of decisions covered in subsequent chapters; and 2) it provides an example of a decision that accounts for the contested nature of nationality and federation. This informs the analysis in the next two chapters, which look at those decisions that fail to live up to this ideal, and those that substantially follow the lead of the *Secession Reference*.

Chapter Five turns to look at those SCC decisions that negatively affect the federation, explaining how they do this and elaborating on why they are problematic. It does this by explaining how 57% of the Court's federal jurisprudence over a 30 year period fails to account for the contestation over nationality and federation by imposing particular perspectives of what the federation is and ought to be. An important aspect of this chapter is discussing how the Court, acting in this way, can negatively affect the loyalty parties feel towards the federation and the way it manages conflict. This in turn reaffirms the need to account for this activity and approach by a federal arbiter in federal theory.

The sixth chapter turns to investigate those SCC decisions that account for the contestation over nationality and federation. It does this by looking at the stream of federal jurisprudence that follows the lead of the *Secession Reference*, particularly by recognizing and reinforcing federation as the process and outcome of negotiation between the subscribers of legitimate federal models. The chapter demonstrates that the Court can actually undertake its role as federal arbiter in a way that generates loyalty to the federation and the way it manages conflict. This discussion accentuates the positive implications of this approach, as well as how to promote this activity.

I conclude the thesis by summarizing my argument and reflecting on some of the key points made. In particular, I address some of the potential issues of applying my argument, while also discussing the extent to which my analysis can inform broader theory and policy development.

Chapter One

The “Problem” of National Minorities and the “Solution” of Federalism

Introduction

This chapter provides the context for the thesis. It explains why national diversity is seen as a problem and how federalism is presented as a solution. It represents the necessary starting point for a study looking at the way states manage national diversity through federation.

The chapter begins by looking at the how the rise of nationalism and its role legitimizing political authority problematizes national diversity. I then look at the oft-proposed solution of federation and the three main approaches federalists tend to promote to deal with national diversity. Turning to Canada, I illustrate how these broad approaches inform the three key perspectives on the nature and ideal direction for the Canadian federation – perspectives that both reflect and drive conflict over nationality and federation in that state.

This line of discussion – tracing the problematization of national diversity, the way federation is proposed as a response and how this plays out in Canada – lays the necessary theoretical and empirical groundwork to inform later analysis. It allows me to start with an appreciation of the way national diversity is understood and approached within federal theory. In so doing, it brings out the normative underpinning of the various perspectives on federation in Canada.

All of this informs both my preferred approach to managing national diversity, as well as analysis of the important role the judiciary does and ought to play in plurinational federations like Canada. I cannot discuss how the judiciary manages conflict over nationality and federation in Canada without first discussing the nature of that conflict. Nor can I make an argument about the preferable way to manage national diversity and the role the judiciary should play in the process, without first discussing the nature of the problem and current approaches. This chapter thus makes a number of points related to my specific argument and helps to place my research within the wider

context of federal theory, while also showing how it can inform theory generation and be applied as policy elsewhere.

The “Problem” of National Minorities⁴⁷

The problematization of national diversity is about legitimacy. No form of diversity challenges the legitimacy of a state more than national minorities.⁴⁸ This is because they represent a particular type of diversity that challenges the very basis of legitimate political power.⁴⁹ To understand why this is the case, it is necessary to briefly explain the nature of sovereign power and to grasp the important role national self-determination plays in legitimizing the popular variant of sovereignty.

The legal aspect of sovereignty is well developed and has been prominent in the literature since the time of Thomas Hobbes and the first international lawyers of Hugo Grotius and Emerich de Vattel. The notion of the King as the sovereign authority within a state, translated into the supremacy of singular governmental authority acting under the rule of law is a recognizable equation. Few draw attention to the legal aspect of sovereignty more explicitly than international relations scholars, with most arguing it represents the constitutive norm of international society and that a state’s right to territorial integrity and non-intervention are based on its legal sovereignty.⁵⁰

It is vital, however, to pull out the political core of sovereignty. As Martin Loughlin argues, ‘the authority invested in the institutional framework of government is founded on a political

⁴⁷ The “problem” of national minorities has been identified by many, for example see Macartney (1934); Claude (1955); Laponce (1960); Jackson-Preece (1998; 2005).

⁴⁸ I understand national minorities as *a named human population occupying an historic territory and sharing common myths and memories, a public culture, and perhaps common laws and customs for all members, but stands in an inferior relationship (numerically and/or substantively) to the rest of the population of a state and show, if only implicitly, a sense of solidarity directed towards preserving or attaining autonomy to protect their national identity.* This definition draws from the well known ‘Capotori’ concept as well as from Smith (2003: 24-25) and Jackson-Preece (1998: 26-25). National minorities are akin to Laponce’s ‘minorities by will’ (groups seeking autonomy), being distinguished from ‘minorities by force’ (those seeking integration); see Laponce (1960: 6).

⁴⁹ On the particular problem presented by national minorities in modernity (as opposed to religious minorities, for example), see Jackson-Preece (2005, particularly at 8-13).

⁵⁰ This cornerstone of international law is evidenced with clauses stressing the territorial integrity of the state going back to the Peace of Augsburg in 1555, the Peace of Westphalia in 1648, and today with Article 2 of the *Charter of the United Nations*; see Jackson (2003: Chs. 7, 12).

relationship.⁵¹ In this light, sovereignty is 'concerned not so much with [legal or administrative] competence but with capacity, not with [legal] authority but with power.'⁵² This proper understanding of sovereignty takes account of: 1) the power to constitute, abolish and alter government;⁵³ 2) the group that wields this power – "the people" as constituent power;⁵⁴ and, 3) the way that power is generated. The generation of *public power*, as separate from material power or coercion,⁵⁵ is a central component of this understanding of sovereignty. When one realizes that public power is the institutionalization of political power,⁵⁶ which is generated from loyalty, allegiance and the act of a group of people living together 'for the purposes of action,'⁵⁷ it can be seen that sovereign authority in its legal institutional variant ultimately 'rests on the allegiance of the people.'⁵⁸ The link between the legal and the political aspect of sovereignty is thus illuminated: the legal authority of government is an expression of the political core of sovereignty, which in turn is an expression of public power and the constituent power of the people – all of this resting on the loyalty of the people to the order itself.⁵⁹

The political nature of sovereignty points to the important role national self-determination plays in legitimizing a state. While the emergence of the state system through the 16th and 17th centuries was marked by the territorialisation of political authority wrestled from the papacy, this power was still seen as generated from on high through the dynastic embodied in the king.⁶⁰ It is the subsequent rise of national self-determination and nationalism in the 18th and 19th centuries that fundamentally altered perceptions of legitimate authority. National self-determination 'shattered the homogenised world of shared values and assumptions,' splitting international society into little

⁵¹ Loughlin (2003: 82).

⁵² Loughlin (2003: 85).

⁵³ See Loughlin (2003: 85, 66-68); Lawson (1992: 47) (cited in Loughlin 2003).

⁵⁴ See Loughlin (2003: 85, 61-64, 99-113); Sieyes (1963: 124-128).

⁵⁵ Loughlin (2003: 76-79).

⁵⁶ Loughlin (2003: 78).

⁵⁷ Arendt (1973: 175). See also Arendt (1958: 200); Loughlin (2003: 77-82).

⁵⁸ Loughlin (2003: 82).

⁵⁹ See Loughlin (2003: 85).

⁶⁰ Jackson (2005: 82-83); Osainder (1994: 27-28). The oft-cited signposts in this process are the Peace of Augsburg in 1555 and the Peace of Westphalia in 1648 and the role they played in solidifying the maxim *cuius regio, ejus religio* (whose realm, his religion). On this process also see Brown (2002: 23); Mann (1986; 1993); Teschke (1998); Wight (1977: 151-152); on the earlier stages of this variant of power, see Loughlin (2003: 74).

more than the sum of its distinct (national) parts.⁶¹ A state-system based on the principle of *national* sovereignty did not come about overnight, and the fight against dynastic rule was arduous as the American and French Revolutions attest; yet, on a theoretical level, from the introduction of the concept of national self-determination, it became increasingly difficult to rule a people without proper reference to their role.

The doctrine of national self-determination has three components: 1) there are nations as empirical fact;⁶² 2) the nation is the ultimate locus of political authority;⁶³ and 3) a subsequent normative argument that there must be congruence between the nation and the state.⁶⁴

This doctrine traces its roots back to the early contractarian thinking of Hobbes, John Locke⁶⁵ and J.J. Rousseau,⁶⁶ to the work of Abbé Sieyès and, particularly, John Stuart Mill's influential concept that 'the question of government ought to be decided by the governed.'⁶⁷ This line of thought combined with the emerging discourse on the "fact" of nations provides the formula that free institutions demand 'the boundaries of governments...coincide with those of nationalities.'⁶⁸ This simple equation of "one nation, one state" has been solidified as part of the basic syntax of modern politics.⁶⁹ As Ernest Gellner points out, nationalism, the overarching ideology of modern politics, 'is a theory of political legitimacy, which requires that ethnic boundaries should not cut across political ones, and in particular, that ethnic boundaries within a given state – a contingency *already formally excluded by the principle* in its general formulation – should not separate the power-holders from the rest.'⁷⁰

⁶¹ Mayall (1990: 25).

⁶² See Breuilly (2011).

⁶³ See Loughlin (2003: 85, 61-64, 99-113); Sieyès (1963: 124-128).

⁶⁴ See Mill (1991: Ch. 16); Tilly (1994: 133-134). It is often the later of these three components that is taken as the definition of national self-determination.

⁶⁵ See Locke (1982: Ch. 7, in particular at s. 89).

⁶⁶ Particularly, his notion that authority emanates from the collective of the people who together form a society; see Leerssen (2006: 82); Rousseau (1993: Book 1, particularly at Chs. 6-7); Benner (Forthcoming 2012).

⁶⁷ Mill (1991: Ch. 16).

⁶⁸ Mill (1991: Ch. 16); see Breuilly (2011) on the emerging discourse of the "fact" of nations in the 19th century.

⁶⁹ On this combining with the notion that each state is sovereign, see Jackson (2005: 73; 2007: 310).

⁷⁰ Gellner (1983: 1) (emphasis added).

This line of thought illuminates both the important role nationalism and national self-determination play in legitimizing political power and in the problematization of national diversity. As Bernard Yack argues, popular sovereignty provides powerful grounds for legitimatizing authority, but, contains a fundamental flaw with its inability to define “the people” that wield power.⁷¹ The nation provides what is lacking in popular sovereignty: a sense of the pre-political basis of the community and the necessary separate identity from the one that is derived from the establishment of political authority.⁷² This separate identity is necessary because the people must be able to survive the abolition of political authority to truly wield power, which is where ethno-national criteria are utilized to generate a sense of stable unity. It is this “sleight of hand” of nationalism – its ability to merge the people and the nation⁷³ – that is central to understanding the tension created by ethno-national diversity in the modern state.

If legitimate political authority is understood as tied to congruence between the people, the nation and the state, any group that brings this congruence into question is clearly seen as problematic. Thus, if congruence is the goal of both those in control of a state (trying to legitimate their authority) and those seeking their own state (to legitimate their actions and eventual rule) it is easy to see how the stress on congruence drives the problematization of national diversity and minorities. By drawing attention to the fact that congruence is a myth, or something not yet achieved, national minorities challenge the very fabric of legitimate political authority in their own state and beyond at a systemic level.⁷⁴

The actualization of the problem of national minorities begins with the transition from the concept of national self-determination to a doctrine dictating the activity of politics. One of the key ways this happens is through the ‘nationalization’ of politics in the 19th century, as the national

⁷¹ Yack (2001: 525). See also Jennings (1956: 56).

⁷² Yack (2001: 524-525).

⁷³ Breuilly (1993: 390).

⁷⁴ This is what Jackson-Preece terms the ‘national self-determination fudge;’ it is because national minorities draw attention to this that they are so problematic, see Jackson-Preece (1998: 29).

principle – that nations exist, deserve and require autonomy – shifts from the periphery to become the core of politics.⁷⁵ For example, we see

after 1800, the frequency with which subject populations revolted in the name of their distinct nationalities – and especially the frequency with which previously acquiescent minorities demanded full independence – greatly increased. The proportion of all revolutionary situations [in Europe] that included a clear national component rose correspondingly, from a typical 30 percent before 1800 to a typical 50 percent thereafter.⁷⁶

The emergent primacy of the doctrine of national self-determination is evidenced not only by its application in revolutionary movements (for example, the “Spring of Nations” in 1848), but, also by the adoption of the discourse by those that had the most to lose with its implementation: European dynastic empires of the time. For example, in the late 19th century we see the Tsarist government taking up policies of Russianization for non-Russian Slavs and the Habsburgs explicitly recognizing national distinctions.⁷⁷ This turn towards an essentialist view of the nature of the state (as necessarily being a nation-state) is crucial in understanding the problematization of national minorities.

The point at which national self-determination becomes the primary way sovereign authority is legitimized in practice was President Woodrow Wilson’s Fourteen Points at the end of WWI.⁷⁸ This process – the solidification of the nation-state as the basic ideal of political organization and key to legitimate sovereign authority – reaches its peak as a global-level phenomenon with decolonization in the mid 20th century.

Despite this process of nationalizing political authority, there remains a significant gap between the discourse of national self-determination and its practical implementation.⁷⁹ In reality,

⁷⁵ See Breuilly (2011).

⁷⁶ Tilly (1994: 137).

⁷⁷ Breuilly (2011).

⁷⁸ The shift being ushered in with the explicit recourse to the notion of *national* self-determination as the ‘primary consideration in the formation of new states in Central and Eastern Europe in the areas of the defeated or disintegrated Habsburg, Hohenzollern, Romanov, and Ottoman Empires;’ see Jackson (2005: 87).

⁷⁹ The argument that national self-determination has been revised with its implementation in international law is evident in most studies looking at the concept; see for example Mayall (1990); Cassese (2005); Crawford (2007); Emerson (1971); Jackson-Preece (2005: 168-170); Archibugi (2003); Weller (2005).

despite being a pillar of post-1945 international law,⁸⁰ national self-determination as a right to form a state in international law has been applied narrowly and does not take ethnic, cultural or linguistic divisions into consideration.⁸¹ This is exemplified by the accepted principle that the doctrine does not grant national minorities the right to form their own state.⁸² Over the 20th century a compromise has thus emerged: national self-determination is held up as the legitimating principle for sovereign authority, but, it is a revised understanding of the doctrine, with the key being a juridical (as opposed to sociological) basis for state borders.⁸³ This revised doctrine represents the interests of maintaining order and the territorial integrity of states in the face of the perceived chaos caused by an explosion of new members to the international community and related ethnic conflict that would stem from the application of the “pure” theory of national self-determination.

The rise of the doctrine of national self-determination, its revised implementation and the tendency of states to jealously guard territorial integrity has resulted in the oft-cited “problem of fit:” approximately 600 language groups and 5000 ethnic groups are housed in less than 200 states.⁸⁴ This paradox leads national minorities to struggle for national self-determination, while also motivating states to seek solutions to the problem of national minorities.

Given this problem of fit, the struggles by national minorities for self-determination, and the resulting instability they cause, are perhaps not so surprising. While difficult to quantify, we can

⁸⁰ For instance, the ‘right’ is enshrined in a number of standard bearers of international law: *Charter of the United Nations* (Article 1 and 55); *United Nations Covenant on Civil and Political Rights* (Article 1); *United Nations Covenant on Economic, Social and Cultural Rights* (Article 1); *United Nations General Assembly Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States* (1970); and the *Helsinki Final Act* (1975) (Article 8).

⁸¹ The right generally is understood to have two dimensions: internal (democratic participation in the state) and external (the right to form a state). It is the latter that international law restricts to a few limited circumstance. On the right in international law, generally, see Cassese (2005: 61-63); Crawford (2007: 415); Emerson (1971); Higgins (1994: Ch. 7).

⁸² A norm that is evidenced well by the Badinter Commission’s use of *uti possidetis juris* to understand the legitimacy of new states following the “dissolution” of the Former Yugoslavia. On this and related qualifications to the right, see Wheeler (2005: 12-13); Emerson (1971: 464); Higgins (1994: 119-121); Chambers (2004).

⁸³ Jackson (2003: 321-325). Again, the classic example of this compromise and the juridical nature for state borders is adherence to the principle of *uti possidetis juris* by emerging states in the decolonization processes in South America, Asia and Africa (particularly, the fervent support for the principle by the Organization of African Unity and the use of the principle in the dissolution of Yugoslavia).

⁸⁴ See Gurr (1993).

identify approximately 174 current struggles for national self-determination.⁸⁵ Only some of these struggles are violent, with a large number involving the use of “conventional” political means and also many where conflict management practices have been implemented to bring groups back into the political realm.⁸⁶ In those struggles that turn violent, the implications for peace and security are clear. From the 1950’s, intrastate warfare has made up the vast majority of conflict and has risen significantly.⁸⁷ National self-determination struggles fuel many of these conflicts (with some 87 such conflicts emerging since the 1950’s).⁸⁸ As noted earlier, while the point is still contested, a lack of congruence between state and ethno-national groups, especially when groups are territorialized or cut across multiple state borders, significantly increases the probability of conflict breaking out.⁸⁹

It is not only through violent struggles that national minorities pose a problem for states. Peaceful struggles also challenge the legitimacy of the current political order. Through these struggles, national minorities put forth arguments for autonomy and stress the need for congruence between the nation and the state – something that resonates as a key tenet in modern political discourse. Consequently, their existence and actions present a paradox: they seek congruence in a world where its value is elevated in political discourse and theories of legitimacy, but is rarely, if ever, found. Thus, on a fundamental level, national minorities and their struggles for autonomy destabilize the compromise whereby national self-determination and sovereignty have been merged by showing that it does not work for all.

These struggles are mirrored by state action seeking to deal with national diversity and the resulting instability. Following Jennifer Jackson-Preece and others, I see three broad ways that states have sought to solve the problem of national minorities.⁹⁰ First, states seek to eliminate national minorities through extermination or making borders match the “facts” by redrafting them or

⁸⁵ See: Quinn (2008: 36-37).

⁸⁶ With some 28 struggles in the first category, 100 in the second and 46 in the third, see Quinn (2008: 36-37). These figures and three categories were adapted from his ten.

⁸⁷ Hewitt (2008).

⁸⁸ See Quinn (2008: 34).

⁸⁹ See Montalvo and Renal-Querol (2005); Gurr et al. (2008: 9); Toft (2003); Kaufmann (2011).

⁹⁰ See Jackson-Preece (1998); McGarry and O’Leary (1993), from which the following three points are drawn.

transferring populations. There are many pertinent example of this approach, including: the numerous genocides perpetrated in the 20th century such as the Holocaust,⁹¹ East Timor and the Ibo in Nigeria; the mass population transfers involving Greece and Turkey following the Treaty of Lausanne in 1923 or Milosevic's ethnic cleansing practices in Former Yugoslavia; and, while less common, border revisions in the case of Bangladesh or the split of Czechoslovakia. Second, states seek to facilitate or actively assimilate national minorities into a larger nation.⁹² Opening up space for the "melting pot" culture in America and the attempted assimilation of Aboriginals in Canada through the residential school system are good examples of the two broad ways states undertake these types of assimilation. Finally, states can accommodate national minorities by granting rights or through institutional design. Minority rights provisions promoted by the League of Nations and the European Union, the establishment of a federal state in Canada (following the unpopularity of Lord Durham's proposed course of assimilating Québécois) and the devolution of power in the United Kingdom reflect elements of this broad approach.

The "Solution" of Federalism

Throughout the 20th century federation has gained prominence among policy makers and academics as a favourable mechanism to manage national diversity. Today federation is increasingly promoted as a means to accommodate national minorities while maintaining the territorial integrity of the state; however, the policy is also promoted and implemented to achieve assimilation. Accordingly, one can see discernable waves of federal policy as a response to national diversity in the 20th century, with federation being employed in the nation-building enterprises of the mid-20th century and becoming a popular option in the more accommodation-focused enterprises of the post-1990 period.⁹³

⁹¹ The fact that it was referred to as the 'Final Solution' is telling about how minorities are viewed as a problem to be solved.

⁹² See Jackson-Preece (2008: 611) on the difference between facilitating assimilation (i.e. social pressure to assimilate) and proactive state policies designed to assimilate minorities.

⁹³ See Watts (1994: 3-4, 10). On the general shift in international society from an assimilation-based to accommodation-based approach to national minorities, see Jackson-Preece (1998; 2008); Fink (2000).

In thinking about federation, I follow the now established practice of distinguishing between the policy of federation and the ideology of federalism.⁹⁴ In line with this, federalism should be seen as a normative position directed at mobilising political action, with the specific purpose of promoting a combination of shared and self-rule between two or more levels of government.⁹⁵ The ideology of federalism is best understood as a “second-tier” perspective, having already accepted the presumptions inherent in the overarching ideology of nationalism. As Benedict Anderson and others have pointed out, the overarching character of nationalism places it in a class of ideologies separate from those like liberalism or socialism.⁹⁶ As subsequent analysis will show, federalism and federal theory tend to accept the value of congruence between nation, people and state that lies at the heart of national self-determination (and nationalism), both as a means to legitimize political authority and to suppress conflict.

The particular practice federalism promotes is federation.⁹⁷ While federations do differ, they share a set of key characteristics that distinguish them from other systems of government, including: having at least two levels of government with a formal distribution of powers; a superior constitution (usually written); a formal dispute resolution mechanism (i.e. a federal arbiter, usually the judiciary); and, intergovernmental cooperation mechanisms.⁹⁸ Accordingly, federation is properly understood as a deliberate policy choice – as the implementation of a specific set of institutional mechanisms in a particular context in line with the principles of federalism.⁹⁹

The study and promotion of this form of government has lead to a corpus of federal theory. Within this field my focus tends to be on those that promote federation as a means to manage

⁹⁴ See Watts (1994: 7-8; 1998; 2007: 225-228); King (1982); McGarry and O’Leary (2007: 180).

⁹⁵ See King (1982: particularly at 1-3); Watts (1994: 8); Watts (1998: 120); Watts (2007: 226); McGarry and O’Leary (2007: 180). Daniel Elazar uses the term ‘federalism’ more as a description for systems of government based on federal principles. For him, federalism is a ‘theoretical and operational concept;’ see Elazar (1987: Ch. 2, particularly at 38). A recent example following this more descriptive use of federalism is Hueglin and Fenna (2006: Ch. 2).

⁹⁶ See Anderson (1991: 5); Norman (2006: 6-9).

⁹⁷ Along with other types of federal systems, like unions, consociations, confederations, leagues. I focus here on federation proper. For a review of the other systems, see Elazar (1987: 38-64); Watts (1998).

⁹⁸ Watts (1994: 8-9). Federations tend to differ in the extent they are centralist or decentralist, territorially or ethnically-based and democratic or not.

⁹⁹ See Hueglin and Fenna (2006: 28).

national diversity.¹⁰⁰ Among these scholars, there is a general split between those that see federation as a legal-institutional phenomenon and those that see federation as a sociological phenomenon. The former focuses on institutional structures, which are seen to influence socio-political activity, while the latter camp looks at the socio-cultural underpinnings in ‘federal societies,’ which are seen as driving institutional structures.¹⁰¹

Despite this split, the enterprise of both camps is similar: promoting institutional mechanisms that bring about congruence between nation and state. Both are about institutional design to the extent that it is the core focus of the legal-institutional camp and it is also the end goal for policy prescription from the socio-cultural camp, the latter seeking to properly understand the link (or gap) between institutions and society to better facilitate institutions reflecting their socio-cultural foundations.¹⁰² They both promote congruence to the extent that they are based on a presumption that federal institutions and social diversity must coincide for stability. Legal-institutionalists argue this can be achieved via institutional design changing society, while socio-culturalists say it is the opposite that is the case. In this way, the important difference between the camps is that the legal-institutionalists assume congruence, while socio-culturalists notice this is not always the case and seek to make it so in the name of stability.

This stress on congruence comes from the fact that federal theory (particularly its prescriptive bend) operates from within the confines of the ideology of federalism. As such, the broad perspective on how to deal with diversity has been to seek congruence between nation, people and state (or between society and institutions, in federal theory parlance). This base premise

¹⁰⁰ For examples of this type of work see Kymlicka (1998); McGarry and O’Leary (2007); O’Leary (2001); Gagnon (2007); Lijphart (2008). There are many divergent approaches and focuses within the field of federal theory, including those that focus on the various aspects of federations that intersect with economic, social policy, or democratic issues.

¹⁰¹ The classic examples for the legal-institutionalist and sociological perspectives being the work of KC Where and William Livingston, respectively; see Wheare (1963); Livingston (1952); for a review, see Erk (2008: 3-6).

¹⁰² The argument from the sociological camp is where federal societies do not have matching federal institutions the situation ought to be rectified via institutional design. One of the best examples of this line of argument today is Will Kymlicka’s multinational federalism, see Kymlicka (1995; 1998; 2001).

is seen as key to a functioning federation because it is held up as the way to ensure stability and counteract the centrifugal forces of federation.¹⁰³

Within prescriptive federal theory, I see three key approaches towards the management of national minorities (see Table 1.1). Following the work of Richard Bellamy on liberal approaches to pluralism, I see these three approaches promoting federation as a means to either trim, trade or segregate away national diversity.¹⁰⁴

Table 1.1: Three Main Approaches to Managing National Diversity via Federation

| Approach to Managing Diversity | Federal and Constitutional Order As | Key Aspects of Federal Institutions | Goal in Dealing with National Diversity | Key Theorists |
|---------------------------------------|--|--|---|---------------------------|
| Trimming | Neutral framework based on an overlapping consensus | Symmetrical Territorial Centralized | Building a single pan-state (civic) nation | Rawls Trudeau |
| Trading | Background, neutral framework facilitating market-based politics | Symmetrical Territorial Decentralized | Facilitating a single pan-state (civic) nation | Hayek Dahl Horowitz |
| Segregating | Framework separating autonomous nations / political communities | Asymmetrical / Symmetrical Ethnic / Territorial Decentralized | Accommodating multiple nations within one state | Walzer Kymlicka |

Trimming

The first approach, trimming diversity, aims to fix the constitution as a framework above politics. It is about demarcating the constitution from politics by establishing a set of principles that 'provide the preconditions for politics.'¹⁰⁵ Accordingly, the constitution is seen as a neutral framework that avoids any referent to a particular good life.¹⁰⁶ This is an objective clearly rooted in a

¹⁰³ See Erk (2008: 8-9); Almond and Verba (1963); Eckstein (1966); Eckstein and Gurr (1975).

¹⁰⁴ Bellamy (1999; 2000); see also McGarry and O'Leary (2007); Gagnon (2007); Horowitz (2000; 2003).

¹⁰⁵ Bellamy (2000: 200).

¹⁰⁶ Bellamy (2000: 200).

Rawlsian attempt to 'fix, once and for all,' a basic structure based on an overlapping consensus.¹⁰⁷ It is an attempt to by-pass the fact of pluralism by keeping the framework of politics neutral.¹⁰⁸

Among federal theorists this approach leads to the promotion of federation as an overlapping consensus that avoids any referent to sub-state national identities. Pierre Trudeau clearly promotes a model in this vein. For him, a federal division of powers represents a lasting, rational consensus found on reason, not ethno-national values or particularistic views.¹⁰⁹ This focus on neutrality and equality leads those following this approach to promote sub-state jurisdictions be merely territorial units (not ethno-national units), and for them to be equal in power and as symmetrical as possible.

With regard to national diversity, the trimming approach thus seeks to use federation as a nation-building enterprise.¹¹⁰ A key part of this enterprise is promoting a strong central government, which reinforces a pan-state political identity. Accordingly, territorial autonomy for national minorities *as national minorities* is firmly rejected. Similarly, the trimming federal approach often promotes mechanisms that reinforce an overarching citizenship, such as a bill of rights that bases 'the sovereignty of the...people on a set of values common to all, and in particular on the notion of equality among all....'¹¹¹

In line with the stated goal of promoting federation as the antidote to particularistic, archaic and ethno-cultural values,¹¹² the objectives of the trimming approach are clearly to: 1) build a single pan-state civic nation; and 2) fix the core tenants of this civic national identity as the overlapping consensus in the constitutional federal structure. At its core, then, the approach maintains that the federation needs to reflect national values and a consensus among one nation. Turning back to Trudeau, his vision of "un-hyphenated citizenship," of a singular pan-Canadian civic nation as the source of political legitimacy, is an example of how, despite the plurality of political communities in a

¹⁰⁷ Rawls (1993: Ch. 4, particularly at 161); Bellamy (1999: Ch. 2).

¹⁰⁸ Rawls (1993: 161, Chs. 4,7); Bellamy (2000: 201; 1999: 43-46).

¹⁰⁹ Trudeau (1998: 97, 103, 117-18).

¹¹⁰ See, for example, Trudeau (1998: 120).

¹¹¹ Trudeau (1998: 79).

¹¹² McGarry and O'Leary (2007: 188).

federation, the nation and state are still seen to *necessarily* coincide. In addition, Trudeau's political project of finalizing a constitutional amending formula for Canada and enshrining the *Charter of Rights and Freedoms* exemplify the desire to fix the basic structure of federation outside the realm of politics. This desire being driven by a view that having 'determined what justice requires, there can be no interesting argument for allowing it to vary from place to place' or to substantively change over time.¹¹³

Trading

The second approach of trading diversity is about distributing power among a plurality of agents so that none can monopolize authority – it is about creating an effective bargaining environment and positions.¹¹⁴ Key to facilitating this trading mentality is the creation of cross-cutting cleavages (multiple conflicting allegiances across many lines) to ensure that no stable majority can be established (only shifting coalitions of groups depending on the issue).¹¹⁵ The point of this is to ensure that diversity and the ensuing conflict are mitigated and resolved via mutually beneficial trade-offs.¹¹⁶ This notion of a counterbalancing 'polyarchy' is clearly drawn from the work of Robert Dahl and F.A. Hayek.¹¹⁷ The core of the approach builds on Hayek's view that trading values through a free market is the best route to respecting pluralism.¹¹⁸ In this view, the constitution ideally avoids regulating politics in line with a particular end – it should simply be a minimalist framework that facilitates a plurality of agents pursuing various purposes and bringing about a spontaneous order.¹¹⁹

In federal theory, this approach leads to the promotion of structural and distributive mechanisms that facilitate the trading and counterbalancing of difference. Drawing from elements of the wider school of 'centripetalism',¹²⁰ the goal is to use federation to disperse power through a decentralized federation. This decentralization is seen to: 1) facilitate correspondence between the

¹¹³ Levy (2007: 463).

¹¹⁴ Bellamy (2000: 202; 1999: Chap. 1).

¹¹⁵ Bellamy (2000: 202-03).

¹¹⁶ Bellamy (2000: 202).

¹¹⁷ See Dahl (1956, 1989).

¹¹⁸ See Hayek (1973, 1960).

¹¹⁹ Hayek (1973: Chap. 2, 55-59).

¹²⁰ See Horowitz (2000); Reilly (2001).

heterogeneity of preferences and values of individuals and the policy agendas of the multiple sub-state governments;¹²¹ and, 2) provide a counterbalance to the concentration of power in the central government, thereby protecting the freedom of individuals from tyrannies of majorities or minorities.¹²² The approach also promotes the design of symmetrical, and merely territorial, sub-state units to facilitate shifting allegiances and respect for plurality in the form of an overarching political identity.¹²³

This emphasis on symmetry and territoriality for sub-state units is about stripping national identity from the public and institutional realm. In so doing, the promoters of this approach are trying to use federation to build a civic nation¹²⁴ and create an environment that allows for the trading of difference to take place. The logic of this nation-building enterprise is that it provides stability and allows plurality to be respected. This betrays how the model works from the logic of national self-determination and how this informs the promotion of particular structural and distributive mechanism to bring about the ideal federation. These structures are about separating ethno-national identity from sub-state jurisdictions and elevating a singular national identity. The trading approach thus maintains that a single nation within a state is instrumentally and normatively preferable, as this is seen to promote stability and provide political legitimacy by creating and facilitating the environment to allow the trading of difference to take place at the political level.

Segregating

The third approach of segregating diversity is different in the way it recognizes and institutionalizes sub-state national identity. At the heart of this approach is adherence to the principle that groups should control areas vital to their form of life and so it promotes autonomy or power sharing for distinguishable sub-state groups.¹²⁵ The theoretical basis of the approach seeks to

¹²¹ Tiebout (1956: 419, 423-424).

¹²² Weinstock (2001: 76-78); Hueglin and Fenna (2006: 99-100); Levy (2007: 468-69).

¹²³ McGarry and O'Leary (2007: 186); Levy (2007: 461). Some even promote the intentional creation of heterogeneous sub-state units to disperse national identities to facilitate cross-cutting cleavages, see Horowitz (2000: 601-28); Wolff (2011:169).

¹²⁴ McGarry and O'Leary (2007: 187).

¹²⁵ Bellamy (2000: 204-05).

protect individual rights by protecting an individual's culture, which is what makes the protection of a group's values and identity via self-government instrumentally and normatively justifiable.¹²⁶ In this vein, the work of scholars like Michael Walzer underpin the approach, especially his linkage between the social construction of goods and identity and the justifiable protection of the autonomy of spheres within which this construction takes place,¹²⁷ as well as his argument that homogenous political communities are a means to lessen conflict.¹²⁸ Also central is the idea that local government can be better controlled than a distant central authority, and that it is valid to demarcate local government along ethno-national lines.¹²⁹

Within federal theory, this segregating approach is applied to achieve two complementary objectives: 1) protecting national minority identity; and, 2) dispersing power as a counterbalance of central authority to protect freedom. Will Kymlicka's promotion of ethno-national sub-state units, or multinational federation, is among the most prominent contemporary theories in this spirit.¹³⁰ Unlike the above approaches, this theory accepts that a measure of asymmetry among sub-state units is likely and acceptable, given that national minority identities may only line up nicely in certain regions (and thus some jurisdictions may be territorially-based and some nationally-based).¹³¹ Decentralization is also a key part of this approach. It is promoted to ensure that nationally-based sub-units have adequate powers to meaningfully exercise self-government,¹³² while also protecting groups from the potential tyranny of the majority through a central authority.¹³³

Multinational federation is properly understood as a structural response to the "reality" of nationalism, taking minority nationalist claims for self-determination seriously and trying to

¹²⁶ McGarry and O'Leary (2007: 189); see, for example, Kymlicka (1995).

¹²⁷ Walzer (1983: 7-10); Bellamy (1999: 68-70).

¹²⁸ Bellamy (1999: 75).

¹²⁹ Levy (2007: 462).

¹³⁰ See Kymlicka (1998: Ch. 10, 2001: Ch. 5). For a review of this and other related works following the multinational federal model, see Schertzer and Woods (2011).

¹³¹ See Kymlicka (1998: 139). The defence of asymmetry follows the logic that since nationally-based sub-state units can legitimately pursue particular purposes in line with their distinct culture, they need to have the policy levers to achieve these ends, which may exceed or differ from the policy levers other territorial jurisdictions need to manage themselves.

¹³² Kymlicka (1998: 139).

¹³³ Levy (2007: 466-67); Acton (1985).

accommodate them in a federal framework.¹³⁴ While this leads to a (welcome) attempt to accommodate national diversity, this commitment to take nationalism seriously betrays the approach's adherence to the doctrine of national self-determination. Clearly, the segregating approach drops the idea that each nation deserves and requires its own *state*, and in this way it properly rejects the overt assimilationist output of this equation being applied in the above two approaches.¹³⁵ At the same time, the equation that nation and state be necessarily congruent is only slightly adjusted, with the view that political authority be based on national values being moved down a level to apply to sub-state jurisdictions. This adjustment assumes national minority groups are well established, politically organized and already institutionalized to an extent.¹³⁶ In this way, the approach tends to recognize and work from an 'essentialist' understanding of national minority identity, selecting certain groups and particular views within those groups as the basis for institutional design.¹³⁷ Moreover, the accommodation of national minority self-government within this federal approach is generally only allowed to the extent that the powers and actions of self-government are consistent with liberal principles of individual freedom and equality.¹³⁸

The above exemplifies the shared flaw with all three federal approaches: they try to solve the problem of national diversity by containing conflict through fixed federal structures above politics. Each approach seeks to justify federation as fixed and static on the basis that politics legitimately happens *within* nations and the federal structure is the representation of the way groups are recognized as nations (or not); accordingly, debate and conflict *over* the federal structure is removed from the political agenda. The trimming federal model does this by placing the federal structure above politics as representative of an overlapping consensus of the pan-state civic nation. The trading federal model does this by removing the federation from the field of contestation as the minimalist framework that is the expression of, and the key factor in establishing, a pan-state civic

¹³⁴ Schertzer and Woods (2011: 204-206). See, for example, Kymlicka (1998: 130-32, 134, 139).

¹³⁵ McGarry and O'Leary (2007: 190-91).

¹³⁶ Bellamy (2000: 208).

¹³⁷ Wimmer (2008); Schertzer and Woods (2011).

¹³⁸ See, for example, Kymlicka (1995, 1998, 2001).

nation; consequently, politics and conflict takes place within this framework, not over it. The segregation model does this by maintaining that legitimate politics takes place within nations, and the federation is the framework that segregates these nations from each other and thus the framework is not an object of politics.

Before elaborating further on why this is problematic, I want to contextualize my discussion by turning to Canada. By looking at how these three broad federal approaches are applied in Canada, I can better draw out the issues with an approach that seeks to trim, trade or segregate away national diversity within a plurinational state, while also bringing into relief the need for an alternative understanding of, and approach towards, federation in that country.

The Contested Federation

The Canadian federation is complex. This complexity is related to the plurinational character of the state, as well as the inherently contested nature of federation. As a result, there is no widely agreed upon description of the nature of the federal order. For some it grants the central government considerable power and represents a pan-state national community, for others it grants the provinces considerable power and even gives Québec special powers to accommodate a minority nation. The considerable distance between these competing understandings of the national composition of the country and the federal order drive ongoing political conflict, which manifests most explicitly as conflict over the federal division of powers, the constitutional amending formula, the impact of civil liberties protections on provincial autonomy, and so on.

This section of the chapter looks at these competing perspectives of what the federation is and ought to be. It discusses the three main federal models, which represent competing positions about the actual and ideal institutional makeup of the federation driven by underlying views about the state's national character. In taxonomizing these federal models, I also demonstrate how they are informed by the three key approaches to managing national diversity within federal theory just discussed.

Many scholars have contributed to, and employed, a taxonomy of federal models within Canada.¹³⁹ Of these, Rocher and Smith's recent work, which can be understood as a refinement of Edwin Black's taxonomy, stands apart for its in-depth treatment of the federal models as emanating from underlying perspectives on political identity and associated perspectives on the preferred institutional makeup of the state.¹⁴⁰

Rocher and Smith argue that actors and citizens in Canada subscribe to one of four 'federal visions,' which represent 'diametrically opposed concepts, norms and values' with regard to federation.¹⁴¹ The differing perspectives on political identity at the heart of these visions lead to quite specific prescriptions for federal institutional design.¹⁴² These are not just abstract concepts or theories: they inform political mobilization and activity by social actors in Canada (which serve to reinforce and shape the visions).¹⁴³ This reciprocal relationship, whereby the visions mobilize action based on a perceived reality with the mobilization in turn helping to bring about that reality, points to one of the key attributes of these federal models: they are both purported descriptions of what the federation *is* and ideal models of what it *ought* to be.¹⁴⁴

Drawing heavily from Rocher and Smith, but also from Black and the others cited above, I identify three key federal models: pan-Canadian, provincial equality and multinational (see Table 1.2).¹⁴⁵

¹³⁹ Notably, see Black (1975); Mallory (1977); Swinton and Rogerson (1988); Carins (1994); Noel (1994); Cooper (1994); Tully (1994); Rocher and Smith (2003); McRoberts (2003); Russell (2004).

¹⁴⁰ See Rocher and Smith (2003) and Black (1975), respectively.

¹⁴¹ Rocher and Smith (2003: 22).

¹⁴² Rocher and Smith (2003: 22).

¹⁴³ Rocher and Smith (2003: 37).

¹⁴⁴ Black (1975: 2-3, 7).

¹⁴⁵ Rocher and Smith's four visions have been collapsed into three as the pan-Canadian, provincial equality and multinational visions incorporate significant components of their fourth vision (rights-based constitutionalism), see Rocher and Smith (2003: 22, 38-40). For example, the core of the rights-based movement in Canada helps to solidify the pan-Canadian vision by projecting a shared citizenship for all Canadians; at the same time, the rights-based movement can act to protect and solidify minority national identity, thus supporting the multinational vision (i.e. when group rights are recognized through ethno-cultural identifiers). In addition, I find support for my three categories from Black, where he is actually identifying three *models* (central, compact and dualist) and two additional *ways of undertaking* federation or processes of intergovernmental relations (administrative, coordinate), see Black (1975: Chap. 1, 15-20, 225-226). The overlapping consensus between these two taxonomies of Canadian federal theory, then, is that there are three key models: pan-Canadian, provincial equality and multinational.

Table 1.2: Three Canadian Federal Models

| Federal Model | Approach to Managing National Diversity | Nature of Federal Order | Ideal Federal Structure | Key Expressions of Model |
|----------------------------|---|--|---|---|
| Pan-Canadian | <u>Trimming</u> diversity to create one bilingual, multicultural nation across Canada | Compact among one nation | - Symmetrical - Territorial - Centralized - Central institutions as national | - Substance of <i>Constitution Act, 1867</i> - Expansion of social programs in 20 th century - Substance of <i>Constitution Act, 1982</i> - Defeat of Meech and Charlottetown Accords |
| Provincial Equality | <u>Trading</u> diversity to facilitate a civic nation built on the equal diversity of provinces | Compact between equal <i>provinces</i> | - Symmetrical - Territorial - Decentralized - Central institutions representing provincial diversity | - Process of enacting <i>Constitution Act, 1867</i> - Provincial rights movement in 19 th century - Defeat of Meech and Charlottetown Accords - Fed-Prov Internal Trade Agreement (1994) - Calgary Declaration (1999) |
| Multinational | <u>Segregating</u> diversity to accommodate multiple nations (Québécois, Aboriginals & English Canada) within the state | Compact between already established <i>nations</i> | - Asymmetrical - Ethnic and territorial - Decentralized - Central institutions include special representation for minority nations | - <i>Royal Proclamation</i> (1763) & <i>Quebec Act</i> (1774) - Process and substance of <i>Constitution Act, 1867</i> - 'Quebec Veto' over constitutional amendments - Aboriginal nationalism - Federal Government recognition of Quebec distinct society & nation (1999 & 2006) |

Pan-Canadian

The pan-Canadian model has gone through a number of iterations since the 19th century, most recently being expressed by Prime Minister Trudeau from the 1970s.¹⁴⁶

It clearly draws from the trimming approach in how it both views and deals with national diversity. At the heart of this model, is a view of Canada as a bilingual, multicultural pan-state nation;

¹⁴⁶ Rocher and Smith (2003: 34).

accordingly subscribers of this model seek to promote a single, comprehensive civic political identity for every citizen within the territory of the state.¹⁴⁷

This understanding of the nation, in combination with a view that federation is and ought to be an overlapping consensus between the members of a singular nation fixed above politics, informs the key policy prescriptions of the federal model. Placing the central government as the locus of pan-Canadian political identity, the model promotes a centralized system of federation where national standards are the benchmark against which provincial autonomy to act is measured.¹⁴⁸ Additionally, since the plurality of the singular nation is seen as represented in central institutions, the provinces are understood as subordinate territorial/administrative units, symmetrical in their status.

To support their position, subscribers of this model point to the extensive powers granted to the central government in the *Constitution Act, 1867* (particularly unlimited tax and spend powers and the reserve and disallowance powers). They also point to the process of patriating, and the substance of, the *Constitution Act, 1982* and the defeat of the Meech Lake and Charlottetown Accords as demonstrating the continued relevance of the pan-Canadian model.¹⁴⁹

Provincial Equality

The provincial equality model similarly has roots in the 19th century, stressing that Canada is the result of a 'compact' among four autonomous political entities in 1867.¹⁵⁰

The theoretical foundation of the provincial equality model shares much with the trading approach in its view and approach to nationality. The subscribers of this model try to facilitate allegiances that cut across ethno-national lines, enabling mutually beneficial trade-offs between (and among) the provinces and central government. While the provincial equality model stresses that the provinces represent the primary political community of belonging, subscribers see the sum

¹⁴⁷ Rocher and Smith (2003: 34); Webber (1994: 143); McRoberts (2001: 703-707).

¹⁴⁸ Rocher and Smith (2003: 34-35).

¹⁴⁹ Rocher and Smith (2003: 34-37).

¹⁵⁰ Rocher and Smith (2003: 23); Russell (2004: 48-52); Romney (1999).

of these communities as a singular Canadian nation – a nation that is the result of respecting the *equal diversity* of its constitutive elements.¹⁵¹

This understanding of Canada leads to a position that federation is the background neutral framework that facilitates the desired market-based politics between jurisdictions. As the provincial equality model presents the central government as the sum of its provincial parts, its supporters promote a decentralized federation; it is a decentralism based on equality, though, as the original compact is seen to be between equal partners.¹⁵² Accordingly, not only are central institutions supposed to equally represent the regional diversity of the country, each province is seen as a symmetrical territorial unit, none being any more distinct than the rest.

To stress the historical lineage of this model, its supporters highlight the political process of adopting the *Constitution Act, 1867* (i.e. representing this as a compact between four equal partners), and the subsequent provincial rights movement following confederation.¹⁵³ The promoters of the provincial equality model also point to the more recent unanimity clauses in the constitutional amending formula, the Federal-Provincial Internal Trade Agreement (1994), the Social Union Framework (1999) and the Calgary Declaration (1999) as a basis of the model's continuing importance.¹⁵⁴

Multinational

Originally stressing a bi-national character for Canada as the driving force for federation, the multinational model has moved beyond an exclusive Anglo-Franco dynamic to incorporate Aboriginals.¹⁵⁵

The multinational model draws on the segregation approach to accommodate national diversity. It starts with a base understanding of Canada as comprised of multiple sociological nations:

¹⁵¹ Rocher and Smith (2003: 24-26).

¹⁵² Rocher and Smith (2003: 23-26).

¹⁵³ Russell (2004: Chp. 4).

¹⁵⁴ Rocher and Smith (2003: 25-27).

¹⁵⁵ Rocher and Smith (2003: 28-33); McRoberts (2003: 89-91, 102-104).

the Québécois, Aboriginals and English Canada.¹⁵⁶ Accordingly, the model holds that some mixture of autonomy and power sharing for the Québécois and various Aboriginals is justified. This is a federal model that is about protecting values and culture seen as intrinsic to the identity of Québécois and Aboriginal groups through forms of self-government.

Given the adoption of the multinational character of Canada as fact, the supporters of this model understand and try to reinforce federation as the framework that separates these nations into autonomous political communities. Thus, from its beginnings as a compact between founding nations,¹⁵⁷ federation in Canada is seen as the means by which various nations within Canada are segregated from each other and enjoy the required autonomy to develop as nations. From this basis, those subscribing to the multinational model hold that sub-state jurisdictions can either be understood as ethno-national (Québec, Nunavut and Aboriginal communities) or territorial units (the remaining Provinces).¹⁵⁸ Moreover, as national minority identities in Canada only line up nicely in certain units (and thus the majority of Provinces are territorially-based) asymmetry between these jurisdictions is accepted and promoted.¹⁵⁹ Finally, the objective of protecting minority national identity from coercion by the majority leads to the promotion of both special representation for national minorities in the institutions of central government and decentralization of powers to the sub-state jurisdictions.

The promoters of this model point first and foremost to the political circumstances driving confederation to support its validity (for example, the Great Coalition in the Province of Canada and the implementation of federation to accommodate the francophone nation).¹⁶⁰ In addition, to support their understanding of federation in Canada, they point to the practice of a Québec “veto” over the rounds of constitutional negotiation from ‘Fulton-Favreau’ to ‘Victoria’ in the 1960s and

¹⁵⁶ See Resnick (1994); Schertzer and Woods (2011: 203).

¹⁵⁷ On the competing ‘compact’ theories see, for example, Sabetti (1982: 17-23).

¹⁵⁸ Kymlicka (1998: Ch. 10, 2001: Ch. 5).

¹⁵⁹ Kymlicka (1998: 139); McRoberts (2001: 711).

¹⁶⁰ On the relevant process of confederation, see Russell (2004: 18-33).

1970s.¹⁶¹ Multinationalists also draw attention to a number of more recent developments to argue that their model ought be the governing paradigm for federal design going forward in Canada; notably, they highlight the rise of Aboriginal nationalism and the Assembly of First Nations in the mid-20th century in response to assimilationist policies and the central government's move towards recognition of national diversity and asymmetry from the 1990s (for example, the Meech Lake and Charlottetown Accords, the 2004 First Ministers' meeting on the Future of Health Care, and the recognition of Québec as a distinct society through motions in the federal Parliament in 1999 and nation in 2006).

This review should highlight the points of contention between these federal models. Each model presents a different view of the national character of the country, a different way of dealing with this, and thus a different view of what federation represents and the role it ought to play. The space between these perspectives, and the fact that different groups tend to adhere to different models,¹⁶² leads to conflict in the political arena – something that has been reflected in the development of the federation.

What it should also point to, however, is that each model represents a legitimate perspective on the nature of the federation. Federation has developed in response to the conflict between these subscribers in a way that reflects elements of each federal model. Over and above the points just noted, even a cursory glance at Canada's constitutional documents supports this view.

Canada has had at least six main Constitutions since 1769 that have reflected and impacted the evolution of federation in the state (see Table 1.3 and 1.4). At first glance, it seems that each Constitution implements an overarching vision for the political community and federation. Each document could be seen as representing a perceived reality and ideal model for the state and the relations between political identity, institutions and authority. However, as Table 1.3 and 1.4

¹⁶¹ On the rounds of constitutional negotiation, see Russell (2004: Ch. 6).

¹⁶² Vastly oversimplified, the pan-Canadian vision generally finds its support within central Canada, the provincial equality view in the western provinces, and the multinational vision is favoured by Aboriginals and Québécois.

indicate, each document can be interpreted as an imperfect agreement between key social actors who held competing perspectives on the nature of the political community and thus competing ideal constitutional and federal models.

Table 1.3: Key Constitutions for Canada, 1763 to 1840¹⁶³

| Constitution | Key Aspects | Relation to Federation in Canada | Approach to Managing National Diversity |
|----------------------------------|--|---|---|
| Royal Proclamation (1763) | Established territory of Quebec under administration of a British Governor and council; established a large section of land 'reserved' for 'Indians' that could only be ceded by treaty with the Crown | Sought to establish a singular, unified colonial territory for British settlers Established the key territorial and legal entity foregrounding the Government of Canada | Assimilation of Catholic francophone settlers by excluding them from political administration and by implementing Protestant schools and churches Purported to treat Aboriginals as sovereign legal entities with right to negotiate cessation of lands with Crown as equals |
| Quebec Act (1774) | Expanded territory of Quebec; maintained administration under a British Governor and council; permitted free practice of Catholicism | Sought to maintain and solidify a unified colonial territory of anglophones and francophones under British rule Foundational example of accommodating francophone diversity | Accommodate Catholic francophones in Quebec by allowing free practice of Catholicism, practice of French civil law and granting them access to public office Significantly expanded territory of Quebec into lands reserved for Aboriginals via treaties (legitimacy of treaties is contested) |
| Constitutional Act (1791) | Segmented territory of Quebec into Upper Canada (Ontario) and Lower Canada (Quebec); established elected legislative assemblies for both colonies | Provided a measure of autonomy for the anglophones and francophones (through separate territories and representative institutions) Key early use of territorial autonomy to accommodate national diversity | Accommodate Catholic francophones by establishing separate territory and representative institutions from those of the anglophone United Empire Loyalists settling in Upper Canada Newly created territories (especially Upper Canada) expanded into lands reserved for Aboriginals through treaties (legitimacy of treaties is contested) |
| Act of Union (1840) | Reunited Upper Canada and Lower Canada into single territory with one legislature; provided guaranteed equal representation in legislature | Following Durham Report, sought to reverse autonomy for francophones and maintain stability of territory through centralized representative government | Retreated from accommodation through autonomy, seeking assimilation of francophones. Nevertheless, guarantee of equal representation in the legislature, maintenance of the provinces of Canada East and West and implementation of |

¹⁶³ Information and analysis draws from listed constitutional documents, as well as Russell (2004).

Table 1.4: Key Constitutions for Canada, 1867 to 1982¹⁶⁴

| Constitution | Key Aspects | Relation to Federation in Canada | Approach to Managing National Diversity |
|--------------------------------|---|--|--|
| Constitution Act (1867) | <p>Established a federal state with power divided between two orders of government, having four provinces (Ontario, Quebec, Nova Scotia and New Brunswick) and a bicameral central Parliament (that retained powers of reserve and disallowance)</p> <p>Authority to amend the Constitution and arbitration of intergovernmental disputes remained with the Imperial Parliament</p> | <p>Established the foundational division of powers and responsibilities between the two orders of government, which is still in force</p> <p>The three main federal models find support in the process of establishing, and in the substance of, the Act. For example, it: 1) creates and provides significant powers to a central government; 2) forms this government out of an agreement between the three original provinces; and 3) represents a compact between francophones and anglophones (through the 'Great Coalition' within the Province of Canada)</p> | <p>Reversed the course of assimilation set in the Act of Union by establishing a federal state where both anglophones and francophones had a measure of political autonomy. Minority rights provisions were also included for francophone and anglophone minority language communities and denominational schools</p> <p>Responsibility for Aboriginals (including the negotiation of treaties and the establishment of lands reserved for them) was granted to the central government</p> |
| Constitution Act (1982) | <p>Following federal-provincial negotiation (but without approval from Quebec) enshrined: a domestic amending formula with various permutation; a pan-state bill of rights; and, Aboriginal treaty rights</p> | <p>Solidified pan-Canadian model through the <i>Charter of Rights and Freedoms</i> and exacerbated tensions with Quebec (through the content and process of enshrining the Act)</p> <p>The two other federal models are also expressed in the Act; for example: the provincial equality model through the bi-lateral and unanimity clauses in the amending formula; and, the multinational model through the aboriginal rights provisions and Sec. 1 and</p> | <p>Through the <i>Charter</i> seeks to build a pan-state identity, but, also accommodates Quebec's autonomy (Sec. 1 and 33)</p> <p>Aboriginal treaty rights are affirmed, with the goal of negotiating land claims and treaties in good faith on a nation-to-nation basis (a symbolic reverse of the policy approach adopted throughout the 20th century of assimilation)</p> |

¹⁶⁴ Information and analysis draws from listed constitutional documents, as well as Russell (2004).

In this way, while socio-economic and political context may have dictated which social actors were able to position their federal model as the dominant one, the process and outcome of constitutional negotiation led to inevitable compromise and at least marginal inclusion of the competing perspectives. These Constitutions thus stand as representations of the then-achievable agreement between the key social actors who held competing perspectives on the nature and ideal form of Canada. Accordingly, the Constitutions of Canada reflect an increasing complexity in their presentation of the political community. This complexity is not just associated with the technological thrust of modernity. It reflects the fact that the Constitutions represent the outcome of negotiations over the very nature of the federation between increasingly wider sets of social actors and movements that held increasingly solidified views on the link between authority and ethno-cultural diversity (spurred on by the doctrine of national self-determination) – views that necessitated a level of accountability in the processes and final document for the association to remain legitimate.

This perspective allows us to see the dialectic that takes place between key social actors representing movements that subscribe to the various federal models and the federal structure of Canada. It provides an appreciation of the relationship between, on the one hand, things like the 1837 rebellions for representative government, opposition to the Act of Union and the political stalemate of the 1860s and the rise of Aboriginal nationalism and Québécois nationalism in the mid-20th century, and on the other hand, key constitutional and federal developments in response. In other words, understanding the development of federation in this way helps us to grasp the ability of the order to endure over time in the face of considerable political conflict and centrifugal forces (driven by things such as ethno-national diversity, geography and geo-political factors).

What this brief review of Canadian constitutional history shows is that there is no single triumphant perspective on the nature of the federation; rather, actors can and do draw on a number of persistent competing perspectives that have roots deep into the past. The point is that the substance of the Canadian Constitutions, and the process by which they were struck, exemplify the

competition and conflict between various actors over the nature of, and the ideal model for, federation in Canada.

Conclusion

The above discussion of the way national minorities challenge political authority, how policy makers and academics try to solve this problem through federation and the way this plays out in the Canadian case makes some important points for the remainder of the thesis.

The first relates to the nature of the issue. Understanding how national diversity (and particularly national minorities) challenge political legitimacy provides significant insight into the proposed solutions. Appreciating that national minorities are problematized because they draw attention to the lack of congruence between nation and state brings into relief that most solutions are about rectifying this situation. It shows that most policy responses are about generating legitimacy for a state or government through social or institutional manipulation with the goal of making the boundaries of nation and state one and the same.

Reflecting on this point also provides a sense of the importance legitimacy plays in politics. Instability and violence are often (rightly) the focus of policy makers and academics. These situations, though, are generally manifestations of a loss of legitimacy for governments and states. As noted above, in a large number of instances, this loss of legitimacy and violence is the result of ethno-national diversity and groups struggling for national self-determination. The maintenance of peace and order is thus, in no small way, linked to the maintenance of political legitimacy. In federations with national diversity this is even more the case – as geographic, institutional and demographic factors often combine to create centrifugal forces that threaten state unity. This is the context that informs my own study of Canada, and one of the key motivations for looking at the critical role the federal arbiter plays in managing conflict over the federation and in maintaining the legitimacy of the order both there and in other federations. In other words, the above analysis supports the view that order and unity in a federation is about generating and maintaining political legitimacy.

The above also shows how the popular policy of federation is generally promoted as a solution to the problem of national diversity by engineering congruence between nation and state. The three approaches described in this chapter all seek to generate legitimacy by implementing a generally fixed institutional structure informed by the logic of national self-determination. Each approach is about containing politics within nations and using federation as the means to either build or separate these nations. Accordingly, federalists tend to see the federation as a neutral framework that is not contested – as something that is implemented and then sits above politics.

Demonstrating the links between the broad approaches and main federal models tells us something important about the models while also bringing this premise into question. Showing how the three federal models are informed by the broader approaches allows us to see that each model represents a normative position on the best way to deal with national diversity.¹⁶⁵ The three federal models do not stand as comprehensive, accurate depictions of the Canadian federation. Rather, they are partial perspectives that merge a view of what federation is and what they think it ought to be – going on to promote a fixed institutional structure that reinforces and brings about their own ideal.

The discussion of federal models in Canada also challenges the premise that federation can be a neutral framework that sits above politics. Conflict over the very nature of what the federation is and ought to be has taken place since before the state was founded. This conflict, and the models that drive it, accordingly seem to be indeterminate. The view that implementing one approach will resolve this conflict simply fails to account for this fact.

The review also shows that each of the federal models is legitimate. Even though each model on its own represents a partial perspective on the true nature of federation, the order has developed over time to reflect elements of them all. The federation is at once the locus of a pan-state nation with centralist aspects, the means by which provincial diversity is equally recognized

¹⁶⁵ It should be noted that in some respects, given Canada's importance as a key case in federal theory, the particular models have also informed broader theory, particularly in the case of the Canada School of multinational federalists (led by Will Kymlicka), see Schertzer and Woods (2011: 204).

through decentralized powers and the mechanism by which national minorities are protected and wield asymmetrical powers.

What the above makes clear, then, is that federation is contested and dynamic. Conflict over the nature of the order between different groups has been the norm, and will continue to be so. The main medium through which this contestation over nationality and federation takes place in the state are the models noted above. Importantly, this political conflict has had an effect on the federal order. We can see how the order has adapted over time, changing to reflect the various positions through an evolving institutional structure.

This is what informs my argument that federal theory needs to take account of the inherent conflict over nationality and federation found in plurinational federations like Canada. A defensible federal theory cannot only work from the premises of, and work towards the ideal of, one federal approach and model. Simply seeking to solve the problem of national diversity by suppressing conflict through rigid institutional structures that try to build one civic nation or separate nations fails to adequately account for this dynamic of conflict. The inevitable result of such an approach is to push conflict over federation and the way it recognizes nationality outside the political process and into the realm of violence.¹⁶⁶ The alternative approach, which I outline and argue is preferable in the next chapter, is to account for the inherent conflict that takes place in a plurinational federation and try to generate and maintain legitimacy for the order in the way it manages this conflict.

This chapter is about laying the groundwork for this point, and the argument that the federal arbiter plays an important role in managing the conflict that takes place within and over federation in Canada. Establishing that such conflict over federation is a fact of life in the country points to the important role the mediators of this conflict play. As I will show in subsequent chapters, the federal arbiter is among the most important mechanisms for managing this conflict in Canada. The above also lays the foundation to argue that the SCC must undertake its role as federal arbiter in a way that recognizes the legitimacy of each of the competing perspectives on the nature of federation. Simply

¹⁶⁶ Schertzer and Woods (2011: 214).

imposing one perspective of what federation is and ought to be fails to generate and maintain the necessary legitimacy for the process of conflict resolution and the federation itself. In reviewing the main federal models in Canada, and how they draw on broader approaches to the problem of national diversity, I am taking the necessary steps to undertake an informed analysis of the work of the federal arbiter in Canada and to reflect on how it ought to ideally manage conflict.

Chapter Two

The Role of the Federal Arbiter in a Diverse Federation

Introduction

This chapter picks up on the last by reflecting on the conflict that takes place over national identity and federation in Canada. It discusses a number of implications that stem from this observation for that state and for broader federal theory and policy.

The central objective of the chapter is to show that the conflict over federation (particularly in a plurinational state) means the federal arbiter is important in the development and maintenance of legitimacy for the order. This is something that mainstream federal theory has generally failed to grasp; however, where the federal arbiter is considered, the tendency has been to promote a role that has the potential to delegitimize the conflict management process and federation more generally. Seeking to address these issues, I argue federation should be about institutional and political mechanisms that reinforce the order as the process and outcome of free and fair negotiation. A central component of this view is a role for the federal arbiter as first and foremost the facilitator of negotiation between conflicting parties, and where this is not possible, to act as a fair arbiter when negotiation breaks down.

The chapter begins with a brief discussion of the implications stemming from the analysis in the last chapter. The focus of this discussion being the nature of federation as a contested normative framework, while making the point that conflict over the order is only enhanced in plurinational states like Canada. Reflecting on the various forums where this conflict plays out and the mechanisms that are used to manage it, I look in-depth at the vital role of the federal arbiter (which in Canada is the judiciary, and ultimately the Supreme Court of Canada). In doing this, I highlight why the judiciary is an important mechanism to manage conflict (namely, because its decisions affect the development of the federation and the legitimacy of the order). I then lay out how federal theory has generally presented the ideal role for the judiciary as federal arbiter, arguing that the three main

roles for the court (as umpire, a branch of government or guardian) are problematically linked to the broader approaches of trimming, trading or segregating diversity. Following this, I present what I argue is a preferable federal model, one that accounts for the contested nature of federation and promotes an ideal role for the federal arbiter that will help to generate and maintain legitimacy for the order.

This line of analysis introduces one of the central arguments of the thesis: the Supreme Court of Canada (SCC) plays a critical role in managing conflict within and over federation in Canada, and it should exercise its duties as federal arbiter in a way that generates legitimacy for the conflict management process and the order more generally. The discussion below also completes the theoretical framework that informs later analysis of the SCC's federal jurisprudence. It provides the markers that allow me to identify when the Court is recognizing the contested nature of federation and adopting a role in line with this understanding, or when it understands federation from within one of the partial perspectives and goes on to impose that model through its decision. Finally, the chapter also helps to justify my decision to look at the role of the judiciary in a plurinational federation (by showing why the courts are important and laying the groundwork for my perspective on how they should act).

Conflict over Federation and the Forums of Management

The last chapter demonstrates that federation in Canada is contested by groups subscribing to competing federal models – models that represent different perspectives on the nature of the order and its ideal direction. This seemingly indeterminate conflict is driven by two related factors: the nature of federation as a normative framework and the plurinational character of the state.

The introduction presented the idea that federation is properly understood as system of order governed by a set of norms (in both their regulating and regularizing aspect).¹⁶⁷ Federation is actually one of the most explicit examples of a normative framework. It is an order that arises out of contestation over the way identities are recognized and power and resources are accordingly

¹⁶⁷ On normative orders, see Tully (2004: 88); Butler (1997: 1-105).

distributed via the governing norms (what James Tully terms an ‘intersubjective normative framework’).¹⁶⁸ In this way, federation is only one type of intersubjective normative order within the gambit of political associations (which are all governed by intersubjective normative orders); going back to the last chapter, federation is distinguished from other systems of rule, though, in the way it explicitly constitutes multiple levels of government within a state and distributes power and resources accordingly.

One of the central elements of intersubjective normative orders is that conflict is an inherent part of the association. The multiplicity of perspectives among those subject to the order on its true and ideal nature means that consensus on how to organize the association – even on its basic rules – is virtually impossible. As Tully has argued, these orders and the struggles over them are ‘too complex, unpredictable and mutable to admit of definitive solutions.’¹⁶⁹

This inherent conflict over federation is also driven by the fact that Canada is a plurinational state,¹⁷⁰ which means there is considerable conflict within and among groups with regard to nationality. The idea of plurinationality is enhanced by linking it to the work of John Hutchinson, which illuminates that nations are best understood as ‘zones of conflict’ where multiple movements and understandings compete over time to define the nature and direction of the group.¹⁷¹ This link allows us to see that nationality itself is contested, and that it is through this contestation that the nation emerges and re-emerges;¹⁷² it draws attention to the ways that social actors compete over time to define, and thus set the future agenda for, their national projects.

The contested nature of nationality is clearly observable in the case of Canada. For example, within Québec there are both Québécois nationalists and pan-state nationalists. Also, inside the

¹⁶⁸ See Tully (2004; 2001); on the link between recognition and distribution, see Tully (2000b: 469-471).

¹⁶⁹ Tully (2001: 5).

¹⁷⁰ As discussed earlier, the idea of ‘plurinationality’ is best explained by noting the difference between the category of ‘multinational’ (implying multiple sealed national groups within a state) and ‘plurinational’ (where the very concept of nationality is contested and plural), see Keating (2001: 27; 2002: 361).

¹⁷¹ See Hutchinson (2005).

¹⁷² The point is to recognize that nations, as an imagined community, have a rather fluid nature and that contestation over the idea of the nation takes place among various sets of actors with competing visions, see Anderson (1991); Brubaker (1996; 2004); Hutchinson (2005).

Québécois nationalist project there are sets of actors competing over what it means to be Québécois (e.g. those espousing an “ethnic” or “civic” core for the group).¹⁷³ At the same time, there are English Canadians outside Québec who are both English Canadian nationalists and pan-state nationalists, while there are also those who are sympathetic to Québécois and Aboriginal nationalism, displaying what might be thought of as a type of “multinational nationalism.”¹⁷⁴ In other words, there is conflict within groups that identify as nations and between these groups over the way the state recognizes their identities or not.¹⁷⁵

The benefit of noting Canada’s plurinational character, along with federation’s nature as a normative order, is that this illuminates much about the conflict that takes place within and over federation in the state. Most importantly, it shows us that the contestation between subscribers of the federal models is driven, in no small way, by a struggle over the way identities are recognized by the federation (or not). The struggles within and over federation are thus exacerbated by the plurinational character of the country. The usual conflict related to resource competition mixes with identity politics, while debates over the character of Canada as *uninational* or *multinational* play out as debates over federation. The result is continual conflict between levels of government, as well as between private actors and governments, over the distribution of resources and power via federation. Appreciating the dynamics of conflict over nationality and federation in Canada recasts these struggles as more than simple competition over resources. It allows us to see that these struggles are not struggles *for* recognition of a particular federal power or right; rather, they are struggles *over* the very way the recognition of nationality takes place and powers and responsibilities are accordingly distributed.¹⁷⁶

Struggles of this general type (i.e. struggles over recognition) play out in various forums and are managed through a number of mechanisms. Identifying these forums and management

¹⁷³ Something readily observable during the hearings of the ‘Consultation Commission on Accommodation Practices Related to Cultural Differences’ within Quebec. The Final report is available at <http://www.accommodements.qc.ca/index-en.html>.

¹⁷⁴ For example, see Kymlicka (1998); for a discussion of this, see Schertzer and Woods (2011).

¹⁷⁵ See Schertzer and Woods (2011).

¹⁷⁶ See Tully (2004: 87-88); Schertzer (2008:106-107).

mechanisms involves three related steps of analysis: 1) looking at the specific type of struggle that is taking place; 2) considering the mediums through which the struggle manifests; and, 3) determining where the struggles are explicitly and implicitly managed.¹⁷⁷

The type of struggle focused on here, as noted above, is conflict over nationality and federation. In particular, I am examining struggles over the way federation either recognizes or imposes particular national identities in the way it distributes power and resources. This type of struggle tends to focus on two related areas: the substantive provisions of the federation (i.e. the constitutional division of powers) and the political practices that underpin the federal structure.¹⁷⁸ Moreover, Stephen Tierney has pulled out four specific areas disaffected groups within a plurinational state direct their struggles (recognition of nationality, representation in central decision-making, control over constitutional amendment process, and group autonomy).¹⁷⁹

The mediums through which these struggles manifest are diverse. There are numerous ways in which actors go about struggling against a constitutional and federal order they see as an imposition (or act in defence of an order they see as recognizing their position). Such action is clearly observable in the legal and political realm, both in the every day practices of political actors and at more extraordinary junctures (so called, mega-constitutional politics).¹⁸⁰ This conflict also takes place, though, in the cultural realm (for example, through artistic activity supporting or criticising the distribution of power via federation), in the media, in the economic sector (for example, with private actors pursuing economic activity and policies that reinforce or challenge the distribution of resources via federation) and even outside politics as violence.

The forums where conflicts between actors over nationality and federation manifest and are explicitly managed are more limited. I can identify five main forums: 1) central government institutions (i.e. Parliament, the executive and the bureaucracy); 2) intergovernmental relations mechanisms (i.e. regular inter-governmental cooperation and coordination, official bi-lateral and

¹⁷⁷ Schertzer (2008: 107); Tully (2004 88-90).

¹⁷⁸ See Tierney (2009: 93).

¹⁷⁹ See Tierney (2009: 92; 2003).

¹⁸⁰ On 'mega-constitutional politics,' see Russell (2004: 75-76).

multilateral meetings and committees and more extra-ordinary central-provincial conferences); 3) public discourse (i.e. through the media and public debates, as well as through public inquiries and commissions); 4) arbitration mechanisms (i.e. the judiciary, constitutional courts and referenda); and, 5) international forums (i.e. multilateral institutions and international tribunals).

What should be taken away from this is that in states like Canada there is continual conflict within and over the federation, and this conflict happens in many places and is managed in many different ways. In general, this draws our attention to the fact that federation is not implemented and its job is done. Politics does not just take place within the framework of federation, it happens over that framework as well. There is thus a need to think about the role played by the forums of conflict management in developing and maintaining the legitimacy of the order.

The Judiciary as Federal Arbiter

Among the mechanisms that manage conflict over nationality and federation, the federal arbiter occupies a special status. This is because it is generally the ultimate way difficult conflicts over the federation are settled in the domestic political sphere, a role that has important implications for the development and legitimacy of the order.

When thinking about federal arbiters it is important to remember that they take a number of forms: from apex court models (Canada, the United States and India), to special constitutional court or committee models (Austria, Germany and Spain), to the use of referenda (Switzerland).¹⁸¹ This variation, however, only strengthens the argument that conflict is inherent in federations, as is the need for arbitration. Some form of arbiter can be identified in every federation. I focus here on the judiciary (i.e. the apex court model) for two main reasons: 1) it is arguably the most prominent form of federal arbitration (especially since there is a propensity to understand federation from a legal lens and, in the absence of other suitable alternatives, the federal arbiter has tended to be the judiciary);¹⁸² and 2) it is the model in Canada – the state representing a foundational case within

¹⁸¹ For an overview, see Hueglin and Fenna (2006:277-278).

¹⁸² Hueglin and Fenna (2006: 275).

federal theory, while also providing a rich history of actors subscribing to differing federal models conflicting in court battles.¹⁸³

Understanding federation's contested nature points to the important role the judiciary plays as federal arbiter. At the same time, this understanding does shine a light on the benefits and need for negotiation between actors to manage their differences. Central institutions, intergovernmental relations and public discourse play a vital role in maintaining peace within, and legitimacy for, federation (and so are natural focuses of study). At the same time, the inherently adversarial nature of conflict, especially that which combines identity politics and resource competition, means that negotiation and cooperation often break down. Moreover, structural and material inequalities mean forums of negotiation can be irreparably unfair, with parties that feel wronged often seeking outside actors to help arbitrate and resolve disputes. In Canada, and in many other federations, the judiciary represents the last line of defence for such parties, helping to keep the management of conflict over federation within the domestic political process.

This position means the judiciary significantly affects the development of federation over time. In Canada, conflicts over federation and nationality have a tendency to manifest as conflicts between the levels of government (and between private actors and levels of government) over the constitutional distribution of powers. These conflicts over which level of government has authority over a particular issue places the courts in the position of having to decide the validity of one level of government's action or legislation by engaging in a 'process of classification to determine whether [it] comes within a federal or provincial class of powers.'¹⁸⁴ In the process of settling such disputes and interpreting the Constitution, the courts' federal jurisprudence sets the meaning of the constitutional and federal order. The judiciary is thus one of the main ways that the constitutional

¹⁸³ I have already discussed Canada's role as a key case in the field; just glancing at recent comparative federalism texts demonstrates the important role Canada plays in thinking about federation, see in particular Hueglin and Fenna (2006), Burgess (2006), Erk (2008), Baier (2006).

¹⁸⁴ Swinton (1990: 26).

and federal order develops over time.¹⁸⁵ It represents one of the central mechanisms through which the federation adapts in response to challenges and thus remains a dynamic order.

The judiciary's position as federal arbiter also means it has a vital role in maintaining the legitimacy of the association. It mediates some of the most important and heated conflicts within and over the federation.¹⁸⁶ Over the past 30 years, the SCC has been a major player in many constitutional events, as well as dealing with hundreds of comparatively lower level intergovernmental and private actor conflicts over federation. The Court's decisions in these cases – which represent selections between competing arguments put forth by parties about the actual and ideal nature of the order – have significant effects on the legitimacy of the conflict management process and the order more generally.

There are two general aspects of a court's decision that can affect the legitimacy of federation: the decision-making process and the outcome.

How federation is depicted in rationalizing a decision can help to reinforce federation's nature in line with a party's particular perspective, or not. This aspect of the decision-making process can have implications for a party's loyalty to the federation, allowing them to see it as either recognizing their perspective or imposing a competing perspective, while ultimately also affecting their status within the order. In a related way, the decision process can either be seen as biased against a party's perspective on the nature of federation, or it can be seen as recognizing their perspective and as protecting this view. The implication here is that the decision process can affect loyalty to the conflict management process and raise questions about the ability to control the development of the association.

With regard to the decision outcome, it can either be seen as taking account of, or ignoring, perceived facts about the nature of federation. The potential issue here is that ignoring a party's perspective on the nature of the order can raise questions about the validity of the conflict

¹⁸⁵ Baier (2003: 111-112); Tremblay (1991: 164).

¹⁸⁶ These situations represent some of the most intractable and acrimonious conflicts. Taking a party to court is a significant decision. It involves considerable financial implications and risk (including the consideration that it damages future relations with a party).

management process. More importantly, the outcome can either alienate a group from the order that stems from a court's decision, or it can work to create linkages between a group's ideal picture of federation and the evolving order. In this same vein, a decision outcome can have real effects on the distribution of powers, responsibilities and resources for groups. Consequently, a decision can affect a group's status and power within the federation and ultimately the connection they feel towards the order (i.e. affecting their self-perceived, and actual, status as political insiders or outsiders).

If this is the important role the judiciary plays as federal arbiter, how does federal theory account for this and the activity of judicial review? Well, generally, the judiciary *as a federal arbiter* receives little reflection.

This lack of reflection stems from the way one's view of the constitutional and federal order drives one's view of the courts' role within that order. In other words, perspectives on the courts' role and theories of judicial review within a federation represent part of a wider understanding of what the federal order is and ought to be. For example, the very concept of judicial review presupposes the constitution as supreme law and the judiciary as the enforcer of that law.¹⁸⁷ From this perspective, judicial review as the action of invalidating legislation that is deemed to contravene the constitution seems logical. In a federal sense, judicial review is thus generally seen as legitimate in two situations: 1) where one level of government's legislation or action offends the established division of powers and responsibilities; and, 2) where one level of government's legislation or action, while within its federal jurisdiction, violates some other constitutional provision (i.e. individual rights).¹⁸⁸

As I discussed in the introduction to the thesis, the result of this has been a relatively minimal treatment of the role of the judiciary within federal theory beyond the basic idea that an arbiter is needed and that it ideally should be an independent and neutral body. This is attributable, at least in part, to the fact that federal theorists have followed the line of argument in *Marbury v.*

¹⁸⁷ Hueglin and Fenna (2006: 276-277).

¹⁸⁸ Hueglin and Fenna (2006: 276-279).

Madison in 1803,¹⁸⁹ which laid out a mandate for the Supreme Court of the United States to act as the umpire of the federation and the protector of a rigid constitution understood as supreme law.¹⁹⁰ For example, we see this understanding of the federal order and the judiciary's role in the work of influential constitutionalist A.V. Dicey and federal theorist K.C. Wheare.¹⁹¹

At the same time, there are many that discuss judicial review more generally, particularly in the American context;¹⁹² debate continues between those that see it as anti-democratic and carried out by judges lacking expertise and policy competence, and those that see judicial review protecting democracy by upholding the conditions which give rise to it (i.e. constitutional rights and responsibilities).¹⁹³ Among federal theorists, though, coherent, comprehensive accounts of the links between the activity of judicial review, the role of the judiciary and the policy of federation are few and far between.¹⁹⁴ Where the topic is broached, the role of the judiciary as the enforcer of the constitutional order is generally accepted.¹⁹⁵ And, even where this role is critiqued, the tendency is to simply focus on the way the court deviates from this ideal of independence.¹⁹⁶

Within this general consensus on the ideal role of the judiciary as federal arbiter there is a measure of variation. This variation comes from federal theorists adopting a particular understanding of the constitutional and federal order, which leads them down a path towards an

¹⁸⁹ *Marbury v. Madison* [1803] 5 U.S. 137.

¹⁹⁰ See Hueglin and Fenna (2006: 287-289); Tierney (2009: 97-100).

¹⁹¹ See Dicey (1982) and Wheare (1963).

¹⁹² The debate about the role of the judiciary in America is voluminous; for an overview see Bobbitt (1981, 1991). However, as I argue below, most in these debates focus on the judiciary and present theories and understandings of judicial review divorced from comprehensive understandings of the context of the competing understandings and theories of federation, as well as failing to look at how these competing understandings of the federal and constitutional order shape both the analysts' perspective and the work of the courts.

¹⁹³ For a review of this debate, see Swinton (1990: 34-55, 325-331).

¹⁹⁴ A few notable exceptions being Baier (2006); Monahan (1984; 1987); Weiler (1974); Tierney (2009), as well as those looking at the issue from a more legal perspective, Kelly and Murphy (2005); Swinton (1992); Leclair (2003); MacKay (2001).

¹⁹⁵ As I discuss below, there are those within federal theory that argue the political nature of federation and the role of the court as federal arbiter means judicial review of federal grounds is generally illegitimate, see Weiler (1974) and Monahan (1984).

¹⁹⁶ The debate over apex courts as "centralizers" is a good example of this, see Bzdera (1993). The focus of such work tends to be a call for courts to be better umpires, rather than moving on a step and accounting for the nature of arbitration in the federal structure and revising federal theory accordingly.

associated notion of the courts' ideal role.¹⁹⁷ Here, I discuss three of the key ideal roles for the judiciary as federal arbiter, which are linked to the three approaches and models noted in the last chapter.¹⁹⁸ These three roles are the judiciary as umpire, branch of government or guardian of the federation (with links to the trimming, trading and segregating approaches and the pan-Canadian, provincial equality and multinational federal models, respectively) (see Table 2.1).¹⁹⁹ Despite this variation, these three roles still work from a shared understanding of federation as a fixed order above politics. In line with this, the judiciary's role is ultimately to uphold and enforce the federal order. Accordingly, these roles do not take account of the inherently contested and political nature of federation, nor the integral way the federal arbiter helps to maintain the legitimacy of the order.

Table 2.1: Three Roles for the Judiciary as Federal Arbiter

| Role | Related Approach / Model | Key Aspects of Role | Court's Objective as Federal Arbiter |
|-----------------------------|---------------------------------|--|--|
| Umpire | Trimming Pan-Canadian | Neutral and independent arbiter | Implement the constitutional consensus and stay above the fray of politics |
| Branch of Government | Trading Provincial Equality | Equal to other institutions (e.g. central and provincial parliaments) and providing checks and balances to their power | Facilitate market-based politics by upholding the minimalist framework that creates cross-cutting cleavages |
| Guardian | Segregating Multinational | Superior to other institutions as the protector of the constitution | Protect the federal arrangement and uphold the means by which the nations and political communities are segregated |

¹⁹⁷ A good example of how this sequence of thought takes place – how a theorist's view of the federation leads to a particular view of the judiciary's role – can be seen in the work of Strayer (1988).

¹⁹⁸ The conceptual links between the broader federal approaches discussed in the last chapter and the roles for the federal arbiter are not quite as clear as they are presented in the follow paragraphs. With such categorization and analysis nuance is often lost. For example, all three roles promote a measure of independence for the judiciary, while the umpire and guardian roles share an aim of ensuring the courts enforce the rules of the association. Nevertheless, the following paragraphs argue that each federal approach *at its core* has links to one of the three ideal roles for the judiciary. The intention of this section is thus to pull out these links and to facilitate reflection on the promotion of these roles and the use of federation to manage diversity and conflict.

¹⁹⁹ For a review of these three prominent views of the judiciary in Canada, see Greschner (2000; Swinton (1992). These ideal roles can also be seen in wider federal theory.

The judiciary as an umpire

The judiciary as the umpire of federation is a logical role for those promoting the trimming approach and pan-Canadian federal model.²⁰⁰ From this view, the courts must act in a neutral fashion, adjudicating disputes fairly in accordance with pre-established rules. The judiciary presented as an umpire places it as a restrained arbiter, occupying a truly important position in the development of the federation, but not the pre-eminent one.²⁰¹ It is a body that must, above all else, display appropriate balance and independence to be above the fray of politics.²⁰²

This last line, placing the courts above politics, regulating it in line with the pre-established rules, draws attention to how this ideal role for the courts is linked to the trimming federal approach and pan-Canadian model. As Donna Greschner puts it: the umpire view of the courts assumes that the “game” has “rules”... and that the umpire’s job is to apply them.²⁰³ From this view, these rules – the constitutional order, the federal structure – are constitutive of the political game that the levels of government find themselves within.

So, we can see how the federal structure, as presented by the trimming approach and pan-Canadian model, dictates the courts’ role as an umpire; in this approach and model the federal structure: 1) is above politics; 2) is a neutral framework; and, 3) is legitimate as it represents an overlapping consensus of a single nation. Accordingly, the arbiter of disputes over the federal structure, as an umpire: 1) must act to regulate politics, not be part of it; 2) must apply the neutral framework fairly and in a balanced way, so as to let the neutrality of the framework mediate disputes; and, 3) must act in accordance with the rules, interpreting them, not changing them, so as to maintain their legitimacy as an overlapping consensus.

²⁰⁰ See, for example, Rawls (1993); Wheare (1963); Trudeau (1998).

²⁰¹ See Russell (1969: 123); Lederman (1975: 615); Greschner (2000: 56-57, 61).

²⁰² See Lederman (1975: 619); Greschner (2000: 57).

²⁰³ Greschner (2000: 65).

The judiciary as a branch of government

The judiciary viewed primarily as a branch of government is about presenting it as an equal institution to the legislative and executive branches of the levels of government.²⁰⁴ This view thus promotes the Canadian federation as one where courts and parliament(s) are participants in a conversation about the compatibility of laws and actions within the supra-legal constitutional order.²⁰⁵ Seeing the courts as a branch of government is a position that stresses the separation of powers, and to pick up on the above metaphorical language, not as an “umpire” of the “game” of politics, but, in a way, as one of the “players.”²⁰⁶ Thus, the perceived need for an arbiter that upholds the supra-constitutional law manifests here in line with the perspective on the constitution as distributing power among the various branches of government to ensure checks and balances; accordingly, no branch, the courts included, can be the sole actor in the development of the federation.

Clearly, stressing the need for the courts to act as an equal branch of government is linked to the trading federal approach and provincial equality model. As noted earlier, the trading federal model presents the federal structure: 1) as dispersing power among multiple centres, within the central government and between orders of government; and, 2) as facilitating the resolution of issues through trading and politics, but, still acting as a minimalist fixed framework to regulate this activity. Accordingly, the judiciary, understood as a branch of government in line with this approach and model: 1) provides an additional locus of power in the federal system, checking the monopolization of power in either order of government; and 2) upholds the background framework of constitutional law; but, as power is distributed between multiple centres, does not itself monopolize power and is seen as only one of the many actors involved in the development and implementation of the federal structure.

²⁰⁴ See Greschner (2000: 55).

²⁰⁵ Greschner (2000: 49). Though Greschner labels this view of the courts as promoting ‘dialogue,’ I prefer to highlight that the courts’ role is seen as an equal branch of government. On this role for the courts in Canada, see Hogg and Bushell (1997).

²⁰⁶ Greschner (2000: 70).

The judiciary as a guardian

The notion of the judiciary as the guardian of federation promotes a more activist role for the courts than the umpire role (which stresses balance and a measure of deference) and the view of the courts as a branch of government (which stresses that the courts should not supplant the role of parliaments in establishing the federal structure, but rather work with them). In this view, the judiciary is understood as the protector of the constitutional and federal order (rather than just its enforcer);²⁰⁷ this, in turn, means that intervention by the judiciary to uphold the supreme law against contravening legislation or action is a requirement. This perspective thus promotes a hierarchical relationship between judiciary and parliaments²⁰⁸ – the courts having the higher authority to interpret and protect the order that gives rise to the levels of government.²⁰⁹

This idea of the courts as the protector of the structure that gives rise to politics draws attention to its linkages with the segregation approach and multinational model. In this approach and model, the federal structure is viewed: 1) as elevated above politics; 2) as fixing an agreement between groups for autonomy; and, 3) protecting identifiable groups, such as national minorities, by protecting their political autonomy from encroachment by the majority or central power. Accordingly, the judiciary as guardian of the federal structure: 1) must act above politics and protect the federal agreement from political interference; 2) regulate politics in line with the pre-determined agreement; and, 3) act as the key enforcer and protector of the agreement that in turn protects the autonomy of those groups thought to be vulnerable to coercion or abuse at the hands of either majority or minority interests. We can see these principles in the work of those like Lijphart, for example, who says the courts need to be a ‘forceful protector of the constitution.’²¹⁰ Along these lines, theorists promoting the need to protect sub-state autonomy will often present the courts’ role as upholding the compact between levels of government to respect mutually exclusive

²⁰⁷ Greschner (2000: 54).

²⁰⁸ Greschner (2000: 54).

²⁰⁹ This is not like the umpire applying clear rules of a game, but rather, the commissioner of the league, who settles disputes and oversees the relationships between the clubs.

²¹⁰ See Lijphart (2008: 85).

jurisdictions and evaluate the courts in line with this view as a guardian of sub-state autonomy, generally portraying it as a failure in this regard and noting its tendency to centralize the federation.²¹¹ In addition, this line of thinking leads theorists promoting the segregation model to prescribe that identifiable minority groups (i.e. national minorities) be given special representation within the judiciary (i.e. a selection of judges on the apex court representing the minority), so as to ensure it acts accordingly in its role as a guardian of the federal structure.²¹²

This brief review demonstrates the links between each ideal role for the judiciary and a federal approach and model. The value of this is that it shows how each role is based on a particular understanding of federation, and that it works towards an ideal order. The shared characteristic of these roles, then, is that each seeks to enforce a particular constitutional and federal order that stands beyond political contestation. This brings into relief the shared problem: the failure to take into account the fact that federation is inherently contested. This failure leads theorists to ignore the potential for the judiciary to impose particular perspectives on the nature of the federation and the effect this will have on the legitimacy of the federation. Promoting a role for the court as neutral arbiter (be it as umpire, branch of government or guardian) allows the judiciary to impose particular federal models under the veil of neutrality, invites it to do this, or raises expectations of neutrality that simply cannot be met.²¹³ Each of these situations can negatively affect the legitimacy of federation, as they call into question the validity of the conflict management process and the status of the federal order as free and fair.

As implied above, this failure with the main ideal roles for the judiciary as federal arbiter stems from not linking theories of judicial review to theories of federation. Drawing a bright line between these two leads to problems for both. It allows theories of federation to simply assume that the judiciary will act as a neutral arbiter and enforce a particular model, while also underestimating the importance of the courts in the development of the federation and in

²¹¹ See Elazar (1987: 182-183, 214-17); Bzdera (1993); Tierney (2009).

²¹² See Kymlicka (1998: 114).

²¹³ As I discuss below, the Court cannot meet the standard of neutrality because it is not independent of the struggles over which it presides. Courts are part of the federal system that is being challenged in such conflicts.

maintaining the legitimacy of the order. At the same time, a theory of judicial review promoting a role for the court as either umpire, branch of government or guardian can fail to appreciate this role is linked to a particular and partial understanding of federation, and thus the roles fail to account for, and adequately manage, the contested nature of federation. In contrast, understanding federation as inherently contested and appreciating the role the federal arbiter plays in managing this conflict, allows us to see that what should drive our ideal of the courts' role is the management of conflict within and over federation in a way that generates legitimacy for the order (while rejecting the imposition of any particular federal model as the law).

There are those that do link an understanding of federation as contested to their reflections on the courts' role as federal arbiter. The general trend among those that have done this, though, is to still strive for neutrality. Katherine Swinton's earlier arguments exemplify this approach. While noting that there are competing models of the Canadian federation and that this has implications for the way courts select and impose particular perspectives on the federation, she argues for a balanced approach to judicial review where the courts act in an unbiased role as an umpire.²¹⁴ Similarly, Dona Greschner has noted that federation in Canada is contested by actors holding multiple understandings of the nature of the arrangement, going on to suggest that by promoting a role for the courts as umpire this diversity may be best managed.²¹⁵ Daniel Elazar has also identified that federation can be understood as more than a final, fixed structure, arguing it is also a dynamic process;²¹⁶ nevertheless, he goes on to imply that the role of the courts in a federation is to uphold the 'perpetual compact' and its activity should be evaluated against this role.²¹⁷

At the same time, a small number of people working on federation have linked an understanding of federation to a role for the judiciary that goes beyond promoting it as a neutral

²¹⁴ See Swinton (1990: 5, 21-55, 195-200). Swinton does seem shift towards a model more in line with the one proposed below, which promotes a role for the court as primarily the facilitator of conflict between levels of government; see Swinton (1992: 138), where she says the court 'has a role to play in managing conflict and change in the federalism system, but its role is secondary and, ideally, facilitative.'

²¹⁵ See Greschner (2000, particularly at 71-76).

²¹⁶ Elazar (1987: 67-68).

²¹⁷ See Elazar (1987: 157, 182-183, 214-217).

arbiter. For example, Patrick Monahan has argued that the influence theories of federation can have on the ultimately political work of courts, raise questions about their validity to act as federal arbiter.²¹⁸ Similarly, Paul Weiler has argued that the political nature of the courts' work managing conflict over federation means the apex court model of federal arbitration should be virtually abandoned.²¹⁹ Also, in Swinton's later work she seems to move towards the view that the contested nature of federation means the courts should operate as a facilitator of negotiation between political actors.²²⁰ Similarly, work by James Kelly and Michael Murphy highlights the SCC's recent turn to embrace a facilitator role.²²¹ Ultimately, though, this stream of analysis does not account for the importance and need of a federal arbiter (the issue with Monahan's and Weiler's arguments), nor do they represent comprehensive accounts of what federation is and ought to be with an appreciation of the judiciary's actual work and an ideal model of the role it ought to play in federation (the issue with Swinton and Kelly's pieces). In the next section, I begin to address these issues by sketching a theory of federation that accounts for its contested nature and the important role the courts play in the order.

A Theory of Dynamic Federation and the Judiciary as Facilitator and Fair Arbiter

What the above leaves us with is that there is a need for a theory that accounts for: 1) the contested nature of federation, and 2) the important role the courts play in managing this conflict and maintaining the legitimacy of the order. The case has already been made for why this is necessary. I now turn to sketch how this can best be done by promoting federation as the process and outcome of free and fair negotiation, with the federal arbiter's role being to facilitate this negotiation and to act as a fair arbiter where this is not possible.

A model promoting federation as the process and outcome of negotiation has a different theoretical basis than those discussed in the last chapter. It is an approach that seeks to *manage* conflict over the nature of federation, not to trim, trade or segregate away diversity and conflict

²¹⁸ See Monahan (1984; 1987).

²¹⁹ See Weiler (1974).

²²⁰ See Swinton (1992: 138).

²²¹ Kelly and Murphy (2005).

from the political agenda. This perspective, which builds on the work of those like Tully,²²² starts by recognize the nature of the above-discussed struggles *over* the nature of federation and the necessity of institutional mechanisms that manage and beneficially harness this conflict.

This fundamental difference, seeking management of conflict over elimination, is best achieved through the promotion of federation as an order of non-domination in line with broader republican principles.²²³ In this vein, the goal of federation should be to respect and protect the free agency of actors to define, control and actively participate in the intersubjective normative orders to which they are subject.²²⁴ Doing so ensures that federation remains legitimate, as the order can generate and maintain loyalty to the way it recognizes and manages conflict over the way identities are accounted for (or not) in the distribution of power and resources.

Tully and others have provided a set of principles and conventions that can inform the design of institutional mechanisms to account for the conflict over federation.²²⁵ The key goal of these principles is to generate legitimacy for associations like federations in the way they manage conflict between actors over the normative order.

The first principle is *quod omnes tangit ab omnibus approbetur* (what touches all, must be approved by all).²²⁶ This principle promotes the active participation of key actors in establishing the process by which normative arrangements are negotiated, approved and contested over time – as well as being incorporated in the act of negotiation, approval and contestation of the normative

²²² See Tully (1995; 2000b; 2001; 2004); It also builds on the work of Ludwig Wittgenstein, which informs much of the relevant aspects of Tully's work, see Wittgenstein (1967).

²²³ In addition to Tully (1995), see also Petite (1997) and Bellamy (2007).

²²⁴ Tully (2004: 91-95).

²²⁵ I recognize that the following "principles" are drawn from practices and conventions in particular historical contexts. In this regard, their applicability as universal principles to guide federal institutional design to manage diversity and conflict is limited. I discuss some of the limitations of their applicability in the conclusion.

²²⁶ Tully (2004: 92). This principle immediately raises a key issue: in what ways and to what extent can *everyone* subject to a norm like federation be incorporated into the active process of approval; on this see Luhmann (1996: 884-887). For my purposes it suffices to say that the actors contesting federation include all the citizens of a state, either through their representatives in the democratic system of government or as individual actors, if they so choose (through mechanisms like the courts).

arrangement.²²⁷ *Quod omnes tangit*, then, shares a similar logic to that of Jurgen Habermas' principle D: 'only those norms can claim to be valid that meet (or could meet) with the approval of all affected in their capacity as participants in a practical discourse.'²²⁸

The second key principle is *audi alteram partem* (always listen to the other side).²²⁹ The core of this principle is that the actors negotiating, approving and contesting a normative order listen to other actors' reasons and justifications for their positions *vis-à-vis* the normative order (including those actors speaking in defence of the current norms); moreover, the principle places an active responsibility on actors to respond in kind in an act of dialogue (including those actors speaking in defence of the current norms).²³⁰ *Audi alteram partem* is particularly important to institutionalize, as it facilitates the actualization of *quod omnes tangit*; necessitating the duty to listen to the other side and to reply pushes those in a dominant position to engage in a process where actors actively participate in the negotiation, approval and contestation of a governing normative order.

These principles clearly need to be brought down from the realm of abstraction to effectively guide institutional design. Tully's earlier work on constitutionalism shows how this can be done by following three conventions that can usefully guide the design of a federal model that accounts for conflict over the order and garners legitimacy in the way it does this.²³¹ The first such convention is that institutions must *recognize* actors self-selected identities. This seeks to ensure that the way actors see themselves as actors in the activity of negotiating, approving and contesting norms is as free from domination by others as possible. The second convention is that institutions must account for the *heterogeneity and indeterminacy of identity*. This seeks to account for the fact that prior to, through and after the negotiation, approval and contestation of normative orders the identities of participating actors remain, but also, can and do change in complex ways. The third

²²⁷ In addition to Tully (2004), on the establishment of governing norms in line with the *quod omnes tangit* principle (as part of the re-conception of liberalism and democracy as mutually constitutive) see Habermas (2001, particularly at 776-778).

²²⁸ Habermas (1995: 66); Tully (2004: 92).

²²⁹ Tully (2004: 94-95).

²³⁰ Tully (2004: 99).

²³¹ See Tully (1995), from which the subsequent three conventions are drawn.

convention is that the institutions based on the negotiation, approval and contestation of normative orders must receive the *active consent* of those subject to their authority. Active consent seeks to ensure that the ongoing struggles over the normative order are accounted for – that given the indeterminate contestation over federation itself noted in the last chapter, federation is not removed from the political agenda.

This last line indicates the fundamental purpose behind a model promoting federation as a process and outcome of negotiation: to enable the management of the inherent struggles over the norms that govern political associations in a way that garners loyalty to the association (and thus legitimacy). And, this should, in turn, illuminate some of the key differences between the promotion of federation as a process of negotiation and the trimming, trading and segregating approaches.

First and foremost, there is a fundamental difference in the way the constitutional and federal order are understood and promoted. As the previous chapter explains, the three main approaches and federal models all work from an understanding of the constitution and federation as something that is fixed above contestation and as giving rise to politics. This ‘modern constitutionalism’ is something that is shared by each of the three perspectives.²³² I have laid out above a contrasting basis for a federal model, one that understands constitutions are, and can be, based on political conventions and processes.²³³ The point here being that constitutions are not immune from the conflict that takes place over them, nor should they be; there is a dialectic that does, and ought to, take place between the actors subject to an order and the order itself (as my discussion of the evolution of Canadian constitutional and federal order demonstrated in the last chapter). Accordingly, a constitution should be promoted as the tool to manage conflict over its nature, while also being the representation of agreements stemming from such conflict. In this way,

²³² On modern constitutionalism – with its key tenets that a constitution exists as a tangible fact and gives rise to the state and government – see Tully (1995); McIlwain 1947. Tomas Paine’s work exemplifies the foundations of modern constitutionalism.

²³³ On the links between this view of the constitution and a more ‘ancient constitutionalism,’ which highlights the way conventions dictate political action and set the norms of an association, see Tully (1995). On ancient constitutionalism see McIlwain (1947). The key tenets of this approach are exemplified by Edmund Burke’s work.

the very basis of federation – the legal and institutional structure upon which identities are recognized and power and resources are distributed – can be seen as the *process* and *outcome* of imperfect agreements between actors holding competing perspectives, not a fixed framework that sits above this contestation in an attempt to trim, trade or segregate away the offending diversity.

The above principles, conventions, emphasis on conflict *management* and rejection of modern constitutionalism, inform a federal model that stands in contrast to the pan-Canadian, provincial equality and multinational models.

The core objective of this federal model is to manage the conflict among key social actors holding competing perspectives on the nature and direction of the federation (i.e. between the subscribers of the pan-Canadian, provincial equality and multinational models). This approach rejects that a *particular* model can solve conflict within and over the Canadian federation. The idea is not to promote an ideal balance of power. The goal is not centralization or decentralization. Similarly the model does not seek to distribute power symmetrically or asymmetrically. Rather, the balance of powers in the federation is understood as dynamic, as legitimately shifting in response to debates over the ideal way power and resources should be distributed in the association based on the political, social and economic context. The key, then, is to promote the mechanisms through which this negotiation takes place (i.e. ad-hoc and structured intergovernmental relations, citizen-government forums, as well as effective and fair arbitration mechanism).

The point is that the objective of centralized or asymmetrical federation, along with the other oft-focused on ways of manipulating the federal structure like the nature of central institutions or the relationship between levels of government, should not be the primary focus of a federal model. Instead, the focus should be to implement a set of institutional processes that incorporate the key conventions noted above – to facilitate key social actors reaching agreements that take into account the conflicting and various views over the nature of the federation. For Canada, there is thus no ideal federal model; rather, federation should be promoted as a process

through which the actors subscribing to the pan-Canadian, provincial equality and multinational visions work to reach agreement.

Now, with negotiation there is conflict, and conflict is rarely fully settled. This is one of the key reasons why a fixed federal model is problematic. It fails to implement a real consensus, because no real consensus is possible. This leads to the realization that federation should be understood and promoted as an indeterminate process. The competing visions of federation in Canada have endured in some form or another for nearly two centuries, and they are not likely to go away any time soon. Consequently, a core component of any federal model for Canada should be to ensure the federal structure remains open to continual contestation through arbitration and amendment.

To say this may imply support for never-ending discussion and debate (i.e. celebration of debate, for debate's sake). This is not my intention. The macro-political nature of constitutions – the idea that they need to be removed from everyday partisan politics if they are to be effective at all – is important.²³⁴ The point, then, is that the more mundane processes of contesting and adapting the federal structure should be facilitated and accessible (i.e. intergovernmental relations mechanisms and arbitration), while the more extra-ordinary measures like constitutional amendment should be just that, extra-ordinary, but still possible. Amending the constitution should not be easy, but the process and formula to do so should also not make it impossible. The point is that the principle means by which a federation adapts over time – intergovernmental relations, arbitration and amendment – should be designed to ensure the federation is not a 'straitjacket.'²³⁵

As with the other approaches and models, how nationality is understood drives aspects of this federal model.²³⁶

The previous chapter makes the point that one of the main issues with the three Canadian federal models is that they work from, and seek to reinforce, particular perspectives on the national

²³⁴ See Loughlin (2003: 44); but also, on the problematic positivist logic that can stem from this point, see Loughlin (2003: 44-52).

²³⁵ See Tully (2000a: 21-31).

²³⁶ On the link between one's view of nationality and how it affects one's approach to conflict management strategies, see Woods, Schertzer and Kaufmann (2011).

composition of the state. They see Canada as either uninational or multinational, and seek congruence between this understanding of the state's sociological nature and its political institutions. The trimming and trading approach are underpinned by a constructivist approach to nationality that seeks to build a pan-state community by overcoming sub-state national diversity (which is understood as elite-driven, discursive identity).²³⁷ The multinational model is underpinned by a more primordialist-inspired understanding of Canada's sociological nature and tries to accommodate this fact through rigid institutional structures.²³⁸

Working from a more nuanced understanding of nationality can help avoid the issues associated with these approaches. As discussed in the introduction, there is much to gain from staking out a middle ground between the constructivist and primordialist perspectives. Following the ethno-symbolic approach, the nation is best understood as an imagined and discursive community, but one that does exist and is defined by combination of shared myths, symbols, and cultural markers.²³⁹ In other words, there are competing narratives about the nature of the nation, but these are structured by and work from the same set of resources.²⁴⁰ This view of nationality allows us to see that it cannot simply be ignored: nationality drives political mobilization both due to its emotive force and also because it is a central aspect of politics and the way authority is legitimized. At the same time, this perspective shows us that we should not take the claims of some nationalists too seriously, as they are likely only representing a particular narrative within the wider national community.

These points show the problem with the constructivist and primordialist underpinnings of the three federal models. Denying that the Québécois or Aboriginal groups are nations, or selecting aspects of these identities and trying to invalidate pan-state identity, are equally problematic positions to start from when designing institutions to manage national diversity. In other words,

²³⁷ On the constructivist approach to nationality and its effect on conflict management approaches, see Wolff (2011: 171-175).

²³⁸ Schertzer and Woods (2011: 203-206); Wolff (2011: 171-175).

²³⁹ See Hutchinson (2005); Smith (2009).

²⁴⁰ See Zimmer (2003); Kaufmann (2009; 2008).

failing to account for the plurinational character of the state by promoting only one of these positions is problematic. Implementing a model based on one perspective risks delegitimizing the federation for those that do not subscribe to the underlying view of the national composition of the state.

Taking all of this into account, what a federal model seeking to manage national diversity in Canada should promote are processes and institutional mechanisms that allow actors from the various national groups to negotiate how federation ought to recognize their group in the distribution of resources and power via federation. Focusing on the conflict and negotiation that takes place between the various established political units in Canada (i.e. between provinces, the central government and to an extent aboriginal band councils), the key is to promote a model of federation that both seeks to take national identities seriously, while not reifying and institutionalizing certain identities to the detriment of others. Accordingly, the goal should be to accept, but not promote, ethno-national-based political units within the federation. Similarly, the asymmetry that often accompanies the recognition of ethno-national units should be accepted, but not promoted. In other words, federation should open up the space for the order to accommodate difference based on nationality (i.e. it does not need to openly reject asymmetry for Québec or Nunavut based on a status as political units overwhelmingly representing national groups). At the same time, federation needs to actively promote institutions and mechanisms that represent the pan-state community to reinforce this important element of state unity. These institutions, however, must be designed in a way that represents the plurality of views on the national character of the state (i.e. through so-called intra-state federal mechanisms, like representation in the executive for members of the different groups).²⁴¹ Essentially, in trying to manage national diversity through federation, a governing principle should be to avoid dogmatic support to either distributive or

²⁴¹ On intra-state federal measures, see Smiley and Watts (1985); Kymlicka (1998: 114-120); Baier and Bakvis (2007: 89).

structural mechanisms in line with constructivist or primordialist perspectives; the key is to rely on many different mechanisms and allow federation to develop through processes of negotiation.²⁴²

The benefit of such an approach to federation is that it can walk the line between recognizing the importance of nationality without reifying it as the only way to legitimize authority. It can recognize and account for the emotive power of nationality and its ability to mobilize political action. At the same time it seeks to manage national diversity from outside a paradigm that sees political legitimacy as emanating from some ideal congruence between nation and state. In this way it does not fall into the trap of some post-modernist work that downplays the importance of nationality in modern politics, reducing it to only one of the multiplicity of identities that humans hold.²⁴³ Similarly, it does not work to legitimize the federal order as the embodiment of some overlapping consensus on how to recognize national identity through federation. Instead, it seeks to recognize and accommodate those that see Canada as both uninational and multinational through processes and institutions that grant these perspectives validity, while treating the actors holding these views with equality in status. The means by which legitimacy of the order is generated is thus shifted to how federation recognizes the various competing perspectives on the nature of the state's national composition and the federation, and in the way the order manages the conflict between the actors subscribing to these views.

One of the key differences between this approach and the main federal models is the starting point: this approach begins with a comprehensive and accurate account of the nature of nationality and federation, rather than a partial picture. It avoids the problem of collapsing the categories of is and ought at the heart of each of the three models discussed in the last chapter. By appreciating the contested nature of nationality and federation, it illuminates that each federal model represents a partial (and proper) description of the nature of the Canadian federation. At its base, then, this model recognizes what Canada is, and ought to be: a dynamic federation.

²⁴² On the need to avoid working from within either constructivist or primordialist perspectives and the attendant promotion of only distributive or structural conflict management mechanisms (as well as the related turn towards 'complex power sharing') see Wolff (2011; 2009).

²⁴³ As is the case with Tully (1995).

Recognizing and promoting federation as a dynamic order draws our attention back to the role of the federal arbiter. As noted above, starting with an appreciation of the inherently conflicted nature of nationality and federation points to the importance of political and institutional mechanisms that facilitate negotiation, but it also points to the vital role the judiciary plays in the development of the order and in maintaining its legitimacy when negotiations stall or break down. The lack of consideration for this role noted above, and the problems with those ideals that start from and reinforce partial perspectives on the nature of the federal order can be avoided within a model that understands and promotes federation as a process and outcome of negotiation between the subscribers of legitimate perspectives.

First, the understanding of federation as a dynamic entity allows for an appreciation of not only the courts' role in federation, it also allows a better understanding of the judiciary itself. Seeing federation as a normative order opens up that the judiciary is part of this order, given its function managing conflict over the federation. In other words, the judiciary does not, and cannot, sit above conflict as a neutral umpire, an independent branch of government or a guardian of the system, because it is part of the system. The fact that the courts reduce 'inherently political questions to matters of legal judgement' does obscure this point.²⁴⁴ But, in conflicts over federation, the courts are part of the field of struggle.²⁴⁵ As Ran Hirschl argues, 'constitutional courts and their jurisprudence are integral elements of a larger political setting and cannot be understood as isolated from it.'²⁴⁶

The implications of this insight are important. As part of the system, facing struggles that directly challenge that system, the legitimacy of the judiciary is also being challenged. Striving for neutrality is thus a false hope. In such conflicts there is simply no neutral ground to which the courts can retreat.²⁴⁷ This opens up the idea that the process of decision-making can be influenced by base

²⁴⁴ Hueglin and Fenna (2006: 312).

²⁴⁵ Tully (2004); Schertzer (2008).

²⁴⁶ Hirschl (2008: 97). On this, and Hirschl's wider argument about the 'judicialization' of politics and his concept of 'juristocracy,' also see Hirschl (2004).

²⁴⁷ Schertzer (2008: 120); Bellamy (2000: 201).

presumptions, understandings and perspectives on the nature of the federation held by judges themselves.²⁴⁸ What is needed, then, is not to hope for neutrality and independence, or to mandate courts protect a particular perspective; rather, what is needed, is a judiciary that accounts for its potential to impose particular understandings of the federation and to ask courts to actively recognize the various perspectives on the nature and ideal direction for the order.

This need to promote an ideal role for the courts that differs from the umpire, branch or guardian roles stems from: 1) the contested nature of nationality and federation; 2) the realization that the courts plays a key role in the development and maintenance of legitimacy in the order; and, 3) the fact that it cannot undertake this role in a neutral fashion. It is these three factors, combined with the principles underpinning the promotion of federation as the process and outcome of negotiation between the subscribers of legitimate perspectives on the nature of the order, which also illuminate the path towards doing this.

Working from the principles and conventions underpinning the promotion of federation as the process and outcome of negotiation, and devising a theory of judicial review as part of a broader conflict management approach within a theory of federation, the judiciary should ideally act, first and foremost as the facilitator of negotiation between conflicting parties, and where this is not possible it should seek to be a fair federal arbiter that works to maintain the legitimacy of the federation.

In its primary role as facilitator, the judiciary should seek to manage conflict within and over federation by actively promoting negotiation and cooperation between conflicting parties through political processes. This role is inherently linked to the understanding of federation as contested and as the process and outcome of negotiation. It seeks to embrace this nature of federation, rather than suppress it by enforcing a partial, fixed idea of the order. In line with this, one of the guiding principles for the judiciary's decision making process should be to ensure that it reinforces the legitimacy of the various perspectives on the nature of federation (rather than imposing one

²⁴⁸ See Swinton (1990: 26-31, particularly at 29). See also my discussion of this in the next chapter.

perspective and working to delegitimize competing ones). Similarly, the courts' federal jurisprudence should be conducted with a view towards legitimizing the political and institutional processes that allow negotiation and cooperation between the subscribers of the various federal models. A key part of this is pushing conflicting parties to use these mechanisms to manage their conflict, while also being deferential to the outcomes of these negotiations (i.e. not imposing its own interpretation of the ideal federal order in the place of negotiated settlements on how the federation is to be operationalized between the levels of government).

It should be evident how this ideal of the judiciary as a facilitator stems from the principles and approach of promoting federation as a dynamic entity. Legitimizing the perspective of conflicting parties and the mechanisms of negotiation and cooperation is about ensuring that those within the federation participate in its development and that the system recognizes their status, while listening and responding to their perspective. Of course, negotiation and cooperation between the subscribers of the various federal models and between levels of government is not always possible, especially in conflicts that get as far as the legal realm. Court disputes are inherently adversarial, often resulting in acrimonious relations in high-stake situations. A comprehensive account of the judiciary's ideal role as federal arbiter needs to keep this reality in mind. When negotiation and cooperation is not possible to manage a conflict over federation and the courts have to arbitrate conflict and make binding decisions, this should be done in a way that ensures one particular perspective on the nature of the order is not imposed.

This principle is what can allow the judiciary to act as a fair arbiter, when required. Similar to the facilitator function, the fair arbiter approach should be guided by the underlying principles of the dynamic federal model: recognition, participation and listening to all sides in a conflict. These principles translate into a broad approach that is about actively trying to recognize the legitimacy of the various perspectives on the nature of the federation, while not imposing one perspective in the decision making approach and outcome. Central to being a fair federal arbiter, then, is still recognizing and reaffirming the legitimacy of the competing perspectives on the nature of

federation. As part of this, decisions in federal jurisprudence should reject a zero-sum approach, or mitigate negative outcomes for losing parties, where possible.

This ideal role for the judiciary, that of first facilitator and second fair arbiter, is inherently linked to an understanding of federation as dynamic and the promotion of it as the process and outcome of negotiation. It is not only a theory of judiciary review, but also an account of the court's role in a broader approach seeking to manage diversity through federation. It is about accounting for the important role the courts play in the development and maintenance of legitimacy for the federation in a plurinational state.

There are a number of potential benefits to this approach of federal judicial review and conflict management. First, this position does not create an ideal of neutrality and independence for the courts that simply cannot be achieved (removing the negative repercussions of falling short of this ideal). Instead, this approach invites the courts to seek ways of encouraging parties to manage their own conflicts, and when acting as arbiter it calls on the courts to recognize their own partial perspectives and seeks to have decisions recognize the various other positions on the nature of the federation. In this way, and others, the role of facilitator and fair arbiter should lead to decisions that generate legitimacy for both the conflict management process and the resulting order. Part of this is that court decisions will not be held over the heads of parties in any future negotiations; instead, they will work to grant status and legitimacy to the main federal models, leading to freer and fairer negotiations. Ultimately, a federal jurisprudence in this light should be one that properly accounts for the legal and institutional landscape (rather than focusing on particular aspects of the constitutional law that reinforce partial perspectives on the nature of the federation). Similarly, recognizing and incorporating the plurality of perspectives on the federal order should lead to more optimal outcomes in federal jurisprudence (by representing the plurality of perspectives on the law).

Conclusion

This chapter has started to make the case for why the judiciary is important in a plurinational federation. This important role stems from its position as the arbiter of conflict within

and over the order. This is something that federal theory has generally failed to adequately consider – the main ideal roles stressing independence and neutrality are flawed. They fail to account for the conflict that takes place over federation and the fact that the federal arbiter is part of the field of struggle. The important role the judiciary plays in the development and maintenance of legitimacy in the federation points to the need to address these issues. I argue this can be done by the federal arbiter acting as a facilitator and fair arbiter within a broader approach that promotes federation as the process and outcome of negotiation between the subscribers of legitimacy perspectives on the order.

If this is what the courts should do, it begs the question: what have they been doing? Can they live up to this ideal in practice? I turn to investigate these questions in the remainder of the thesis.

Chapter Three

Investigating the SCC's Federal Jurisprudence

Introduction

This second section of the thesis answers a number of questions stemming from the first section, most importantly: how has the judiciary in Canada managed conflict over national identity and federation? In addressing this question, the remainder of the thesis explains and reflects on the findings of a comprehensive review of the Supreme Court of Canada's (SCC) federal jurisprudence over the past 30 years. This analysis focuses on the extent to which the Court's decisions draw from and reinforce the key federal models previously discussed and the self-selected role the Court takes in resolving disputes.

The key aspect of this analysis is the identification and discussion of two streams of federal jurisprudence: decisions that recognize and account for conflict over nationality and federation, and those that do not. Analyzing these two streams illuminates the problem with the latter, notably the negative effect such decisions can have on the legitimacy of the federation. At the same time, this review brings to the fore the possible benefits of a federal arbiter recognizing and accounting for the contested nature of nationality and federation (i.e. the potential for this to generate legitimacy for the order).

This chapter acts as the introduction to the second (more empirical) section of the thesis. It explains how I conduct my review and defends some of the key premises informing my analysis. The overall goal here is to explain why and how I analyze the SCC and its federal jurisprudence, and importantly how I determine that a decision adheres to and imposes one particular federal model or recognizes federation as the process and outcome of negotiation between the subscribers of legitimate models.

The chapter begins by discussing the key issues related to the scope of the study. It explains why I focus on the SCC from 1980 forward (mainly because of the important role it plays in the

development of the federation, particularly from 1980 on) as well as justifying my case-selection criteria. I then lay out my research design in more detail, providing the framework that informs my analysis of SCC decisions and covering some of the finer points of Canadian constitutional law to contextualize subsequent analysis.

The Scope of the Study

When planning a study of the way federal arbiters manage conflict within and over federation a number of questions immediately arise with regard to the scope. For my own study, the central questions are: why focus on the SCC, why start in 1980 and what cases should be considered? In this section I answer the first two questions together, then turning to discuss the case selection criteria.

The reason I focus on the SCC from 1980 forward is because it plays an important role as the ultimate federal arbiter in Canada – a position that was crucial in mediating the heated conflicts over the nature of the federation that took place in the early 1980s and have dictated the tone of federal politics ever since. In other words, the SCC matters. It has played a vital role in the development of the federation and in maintaining legitimacy for the association. How it makes decisions also matters: imposing particular federal models or recognizing the legitimacy of multiple models can affect the development and legitimacy of the order.

The central role of Canada's apex court in the development of the federation is an oft-made point.²⁴⁹ The SCC was established in 1875, but only became the state's apex court at the top of its judicial system in 1949.²⁵⁰ Prior to this, the Judicial Committee of the Privy Council (JCPC) acted as the final court of appeal for Canada. As a result, many of the early decisions shaping federation were handed down from the JCPC in the UK, not from the SCC.²⁵¹ In the period following confederation (from 1867 to the 1930s) the JCPC was an integral element in the rise of the

²⁴⁹ See Mahler (1987: Ch 2); Baier (2003: 111-112); Russell (2004: 40-46, Chs. 7-8).

²⁵⁰ For a historical overview of the SCC from 1875 to 2000, see Lamer (2000). On the Canadian court system, see Morton (2002: Ch 3); Fitzgerald and Wright (2000: 95-103); Iacobucci (2002).

²⁵¹ For an overview of the JCPC, see Cairns (1971); Vaughan (1986); Saywell (2002).

'provincial rights' movement.²⁵² There is consensus that the JCPC consistently sided with those promoting a decentralized view of federation in battles over the order, interpreting the Constitution in a way that expanded provincial jurisdiction while limiting central powers.²⁵³

In the post-World War Two period and with the rise of the welfare state there was a notable shift towards centralization in the federation, with an increasingly important central government and the need for levels of government to cooperate to deliver social services.²⁵⁴ This trend is demonstrated well by looking at the increase in central spending going to provinces: in 1949 cash transfers to the provinces made up 5.9% of central government expenditures, by 1971 this rose to 23%.²⁵⁵ At the outset of this period we can see the JCPC halting the tide of decentralizing decisions, a signal that was ultimately taken up by the SCC when it replaced the JCPC as the state's court of last resort.²⁵⁶

From the 1960s and into the 1970s, intergovernmental relations were hostile in Canada, being marked by a number of failed attempts to negotiate a domestic constitutional amending formula and the rise of Québécois nationalism.²⁵⁷ At the outset of this period the SCC was of lesser importance in the development of the federation (the mechanisms of executive federalism instead taking centre stage);²⁵⁸ however, by the latter part of the 1970's the Court was increasingly being called upon to mediate disputes over the division of powers.²⁵⁹

²⁵² Russell (2004: Ch. 4).

²⁵³ Baier (2003: 117-120); see also Mahler (1987: 35-43). The result is that the initial reading of the *Constitution Act 1867*, which provides the impression the order is significantly centralized is not how the federation developed in practice, see Wheare (1963: 20); Smith (2003: 52-56).

²⁵⁴ Particularly since the increasingly important issue areas of the time (healthcare, social services and education) are provincial matters of competence, while the central government has the resources and ability to establish national-level programs. On this era of 'cooperative federalism,' see Smiley (1980); Cameron and Simeon (2002).

²⁵⁵ Monahan (1987: 145); Dowd and Sayeed (1985) (cited in Monahan 1987).

²⁵⁶ A key signal being *Edwards v. Attorney General for Canada* [1930] A.C. 124, which also marked the emergence of the progressive interpretive approach discussed below; on this see Mahler (1987: 43-44); Baier (2003: 119-120).

²⁵⁷ On this period of executive federalism, see Smiley (1980); Cameron and Simeon (2002); Russell (2004: Chs. 6-7).

²⁵⁸ Monahan (1987: 149-150); see also Smiley (1970; 1980).

²⁵⁹ The number of cases decided on federalism grounds between 1950 -59 was 30, between 1960-69 it was 36, and between 1970-1979 it was 54; see Monahan (1987: 150-151). Some of these cases, notably *Reference re*

With tensions increasing into the 1980's, a lineage of conflicts between the levels of government related to the "patriation" of the Constitution and the nature of the federation emerged, with the SCC playing a central role.²⁶⁰ A key moment in this line of conflict was the *Senate Reference* (1980).²⁶¹ The SCC's rejection in this case of Prime Minister Trudeau's plan to take unilateral action on areas thought to be within central control (Senate reform, SCC composition and a federal charter of rights) led to the subsequent patriation round of negotiations. The first round of these negotiations in September 1980 failed, with the Prime Minister declaring in October 1980 to 'go over the heads' of the provinces by unilaterally patriating a constitutional package from the UK. The legality of the intended unilateral action by the central government was quickly challenged in the courts by the provinces of Québec, Newfoundland and Manitoba. The resulting *Patriation Reference*²⁶² in 1981 broke the impasse in negotiations by legally allowing unilateral action by the central government, but, advising that constitutional convention mandates substantial provincial consent for the kind of constitutional amendments Trudeau sought. The result was an agreement producing the *Constitution Act, 1982*, which included an amendment formula and charter of rights with all provinces except Québec signing-on to the document.

The process and substance of the *Constitution Act, 1982* have informed constitutional politics ever since. Québec took to the courts to argue that a constitutional agreement without its assent was illegitimate; in the *Quebec Veto Reference*²⁶³ in 1982 the SCC disagreed, saying the Constitution was in force and that Québec had no veto over constitutional negotiations. In 1987 a new central government received unanimous consent among the provinces on a package of constitutional amendments designed to entice Québec back into the constitutional family (the Meech Lake Accord); however, in the face of concerns over the elite-driven process, perceived over-accommodation of Québec and failure to account for Aboriginal interests the Accord failed to be

Anti-Inflation Act, [1976] 2 S.C.R. 373, were important and heated disputes over the very nature of the federation.

²⁶⁰ See Russell (2004: Ch. 7, 107).

²⁶¹ *Reference re Authority of Parliament in relation to the Upper House*, [1980] 1 S.C.R. 54.

²⁶² *Reference re Resolution to amend the Constitution*, [1981] 1 S.C.R. 753.

²⁶³ *Reference re Objection by Quebec to a Resolution to Amend the Constitution*, [1982] 2 S.C.R. 793.

ratified by Manitoba and Newfoundland. In an attempt to address these concerns, a new round of negotiations was struck (the Canada Round), with the resulting package of amendments (the Charlottetown Accord) ultimately going forward to a state-wide referendum in 1992 (the package being rejected, both inside and outside Québec, with some 55% of Canadians opposed).

The subsequent period was one of even higher tensions, with nationalist Québec politicians pushing for secession. The culmination was a 1995 province-wide referendum on secession in Québec, with the federalist option winning with a mere 50.6% of the vote. As part of the central government's well known plan to combat the sovereignty movement, the legality of unilateral secession by a province was referred to the SCC. The Court responded in the *Secession Reference*²⁶⁴ that, technically, unilateral secession is illegal, but, constitutional principles dictate that a clear vote on a clear question places a duty on all levels of government to negotiate secession. Both the central government and Québec declared victory and conflict continued with the central government's enactment of the *Clarity Act* in 2000, which seeks to define a 'clear question' and a 'clear majority.'²⁶⁵

Following the battles around the *Clarity Act* there has been a noticeable easing of tension in federal and constitutional politics, and a turn towards more asymmetrical and coordinated relations (as evidenced by the Social Union Framework Agreement [1999], Accord on Health Care Renewal [2003], Parliament's recognition of the Québécois nation [2006] and attempts to address a fiscal imbalance through a renewed equalization formula [2007], among other things). This is the era some are calling 'collaborative federalism.'²⁶⁶ However, to say that conflict has ceased is erroneous. Conflicts still regularly take place in the intergovernmental arena and before the courts, some of the most notable issues being inter-provincial labour mobility and financial regulation. Between 2000 and 2010, the SCC has rendered decisions in 30 conflicts over the division of powers.

²⁶⁴ *Reference re Secession of Quebec* [1998] 2 S.C.R. 217.

²⁶⁵ SC, 2000, C 26.

²⁶⁶ Cameron and Simeon (2002).

This review shows that Canada's apex court has always played a central role in mediating disputes over the nature of the federal order. From the mid-20th century this duty has fallen to the SCC. While the Court hears all types of law,²⁶⁷ and the importance of civil rights cases from the 1980's has taken over a considerable part of its docket, its role as the state's ultimate federal arbiter remains one of its most important functions.

This is why I focus on *the SCC, in particular*: it occupies a special place in the system. It is *the* final arbiter of federal disputes within the domestic sphere. Because it is the apex court virtually all major disputes related to the federation that come before the judiciary are settled by the SCC. Moreover, given the high-stakes of even comparatively mundane disputes over the distribution of resources and power via federation, the SCC is often called upon to mediate such conflict. In settling these disputes the Court sets the tone for the entire judiciary and intergovernmental relations. Lower court decisions are clearly taken into account, but, when a conflict over federation needs to be settled, it is the apex court that is called upon.

The SCC thus represents an ideal focus for my study. It provides a picture of how the federal arbiter in Canada either imposes a particular model of federation or recognizes the order as the process and outcome of negotiation between the subscribers of legitimate models.²⁶⁸ The cases that reach the SCC, given the high resource investment and public scrutiny, tend to push actors to clearly and forcefully elaborate their positions. The nature of these conflicts force the Court to select between these competing perspectives on what the federation is and ought to be, with the outcomes shaping the federal order. So, by reviewing the SCC's federal jurisprudence I am able to reflect on the role the federal arbiter plays in managing national diversity through federation, and on the way its actions affect the legitimacy of the order.

²⁶⁷ As Canada's supreme appeal and constitutional court the SCC hears both private law (tort, contract, business, property and family law) and public law (constitutional, criminal, administrative, tax and labour law) cases; see Iacobucci (2002: 34).

²⁶⁸ Focusing on the SCC also serves a pragmatic purpose. Studying just SCC cases from 1980 to 2010 involves a consideration of 697 constitutional cases, 159 of which deal with federalism issues. Including lower-court cases or expanding the period would make the project unfeasible.

The above review should also indicate why I begin in 1980. From the process and substance of the *Constitution Act, 1982* a series of conflicts over the nature of the federation follow where the SCC played a particularly crucial role. These conflicts are all linked, and are all about competing conceptions of what the Canadian federation is and ought to be.²⁶⁹ From the wellspring of the 1980's, then, debates about the very nature of federation become more explicit and are hotly contested; the result is well formulated and elaborated positions, which have much to offer a study of the ways that nationality and federation are contested, how this competition is mediated via federation and the role the federal arbiter plays in this process. Starting analysis in 1980 does mean I am investigating a heightened moment of conflict over the federation where the Court was particularly important. This, though, should not imply that in other times the Court is unimportant. The above overview makes the point that the state's federal arbiter has always played a key role in the development of the federation. Conflicts over the nature of the order have been the norm since confederation. Moreover, the period of analysis actually covers recent years where the extent of intergovernmental conflict seems to have eased slightly, and yet, cases still regularly come before the Court.

Despite asserting its independence and taking a central place in the political system, interestingly, the SCC has strong administrative and structural links to the central government. The Court is actually a creature of central statute (i.e. it is not a constitutionally protected institution).²⁷⁰ The institution's funding also comes from the central government.²⁷¹ Moreover, the central government appoints the nine justices of the Court for a term of good behaviour until the age of 75. At the same time, judicial independence is often touted by the SCC as a central principle of the

²⁶⁹ See Choudhry and Gaudreault-DesBiens (2007: 166-167). Justice Iacobucci, a key actor in the events, even sees them as a causal string (see Choudhry and Gaudreault-DesBiens, 2007: 186). These were not new conflicts, but, in the run-up to patriation issues were 'brought to the surface' and 'antagonisms that, in the past, had been left unstated' became part of constitutional politics, see Choudhry and Gaudreault-DesBiens (2007: 172-173).

²⁷⁰ See *Supreme Court Act*, RSC, 1985, C S-26.

²⁷¹ For a review of the Court's funding mechanisms, see Bilodeau (2010: 427).

Canadian constitutional order.²⁷² And, there are conventions and rules that dictate justices represent regional diversity, that three justices be from Québec and that the Court operates as a bilingual institution.

This brings to light a number of important issues pertinent to the SCC's role as federal arbiter. On one hand, it appears to have many of the hallmarks of an independent arbitration body: it exercises its authority and plays a central role within the constitutional and political system;²⁷³ it has considerable discretion to set its agenda;²⁷⁴ and, it can strike out new avenues of law (relatively) free from precedent.²⁷⁵ On the other hand, it has significant links to the central government, and is often charged as a nationalizing and centralizing force.²⁷⁶ At the same time, the SCC operates as a bilingual institution and represents regional diversity on the bench, including special accommodations for Québec.²⁷⁷ In this way, the Court can be perceived as either an independent body, as a tool to impose a nationalist and centralizing agenda or as protecting and representing diversity and minority rights.

This historical, structural and administrative context informs my analysis of the SCC, but this is not a study of the SCC *per se*; rather, this is a study of the way the SCC *as federal arbiter* manages conflict over nationality and federation. What should be taken away from the above is that the institution of the Court is important in the development of the federation and has a number of institutional characteristics that can affect its perceived ability to fulfill this role successfully.

The idea of the SCC *as an institution* is important for my study. The subsequent chapters focus on the way the institution of the SCC either works to impose particular federal models or

²⁷² See, in particular, *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 [*Judges Salary Reference*].

²⁷³ For example, the Court is not shy about overturning lower court rulings, see Hogg (2009: 252, 264).

²⁷⁴ While the Court does tend to allow appeals involving federal disputes, it does set its agenda (rejecting four of every five leaves to appeal), see Morton (2002: 97).

²⁷⁵ The Court is not bound by precedent (even that set by its own or JCPC rulings), though it does not overturn its own precedent too often, see Hogg (2009: 252, 264).

²⁷⁶ See Bzdera (1993). There are those that argue against this position, notably Hogg (1979) and Baier (2003; 2006).

²⁷⁷ However, an aboriginal justice has never been appointed to the Court. On the guarantee of justices from Québec as an accommodation, see Lamer (2000: 12).

recognizes the order as the process and outcome of negotiation (while reflecting on the potential effect these approaches have on the legitimacy of the order).

At the same time, the Court is made up of individual justices. Accordingly, when looking at the way the SCC understands and reinforces ideas of what federation is and ought to be, I am really looking at how individual justices' ideas about federation influence their decisions. In this way the shifting conceptions of what federation is among SCC decisions noted in the next three chapters is no doubt related to the fact that the composition of the Court is continually in flux. Over the period of analysis (from 1980 to 2010) there have been four Chief Justices,²⁷⁸ and an addition 27 Puisne (i.e. ordinary) Judges. Much can be gained from looking at individual justices and their role in decision-making on the Court.²⁷⁹ Clearly, the tone set by Chief Justices, and the individual characteristics and perspectives that come with new justices, affect the dynamics of decision-making.²⁸⁰ Indeed, many argue an individual judge's understanding of federation can be discerned from the corpus of their judgments.²⁸¹

Such individual-level analysis, however, is not my objective here.²⁸² While interesting and perhaps shedding light on *why* the Court shifts its conception of federation over time, this approach can obscure an understanding of the important role the Court fulfills as an institution. Ultimately, the SCC's power does not come from individual justices, but rather from the normative force it wields as the apex court of the state's judicial system. What the Court says in (and the outcome of) its decisions clearly matter in terms of the development and maintenance of legitimacy for the constitutional, political and federal order; but, the name on the judgments matters far less than the fact that they come from the SCC.²⁸³ Despite an appreciation of the individual justices and their opinions (and their regional ties), the key actors of federation (and the general public) are likely to

²⁷⁸ The Chief Justices being: Rt. Hon. Bora Laskin (1973-1984), Rt. Hon. Brian Dickson (1984-1990), Rt. Hon. Antonio Lamer (1990-2000) and Rt. Hon. Beverley McLachlin (2000-).

²⁷⁹ See, in the Canadian context, McCormick (2000; 2004; 2008); Ostberg et al (2004).

²⁸⁰ See the revealing interview with Justice Binne by Makin (2011).

²⁸¹ See, for example, Sharpe (2000); Swinton (1990; 1991); Choudhry and Gaudreault-DesBiens (2007).

²⁸² On the attitudinal model of analysis, in the context of the SCC, see Ostberg and Wetstein (2007); Songer and Johnson (2007).

²⁸³ On the legitimacy of the Court in relation to its judgements, see Hausegger and Riddell (2004).

consider the overall impact of the Court *qua* institution on federation, rather than the impact of a particular justice or chief justice on federation.

This view of the SCC as an institution is something that the Court itself seems to be embracing. The SCC has sought consensus among justices in delivering judgments in recent years.²⁸⁴ We see this manifesting, for example, through an increasing tendency in federal jurisprudence to deliver unanimous judgments, rather than having individual justices author dissenting or concurring opinions. Prior to the *Secession Reference* (from 1980 to 1999) some 48% of the Court's federal decisions were completely unanimous; following the *Secession Reference* (from 1998 to 2010) this rose to 80%.²⁸⁵ This turn towards consensus is also observable in the more general shift over the last two decades towards a standardized format for decisions (which depersonalizes the judgments and presents them as emanating from an institution).²⁸⁶

This brings me to the third issue related to scope, the case selection criteria. As indicated previously, my focus is on the SCC's federal jurisprudence. Federal jurisprudence is constitutional law where the core of the case is a challenge to a level of government's jurisdiction to legislate or act under the constitutional division of powers.²⁸⁷ It is an area of law separate from other aspects of constitutional law, most notably civil rights cases involving the *Charter of Rights and Freedoms*. Federal jurisprudence is about *what* level of government has jurisdiction to legislate according to the

²⁸⁴ On unanimous judgements and the consensus approach, see Songer and Siripurapu (2009); Macfarlane (2010). For a look at disagreement on the Court see McCormick (2004). Tellingly, Justice Binnie identifies this aspect of the Court's approach during his tenure (1998-2011): 'You have an institutional responsibility to try to generate as much clarity and solidarity in the law as you can ... the whole point of the Supreme Court is you are not dealing with individual judges penning their own thoughts. You are expressing the ideas of nine judges synthesized into one judgment' and, speaking about the *Secession Reference*, he says: 'the objective from the outset was to have a decision "from the court" ... We wanted an anonymous judgment which carries the authority of the whole court and avoids personalizing some particular judge's perspective. I think it was just understood that this was too important for people to be flying off at angles from the main thrust of the judgment.' He goes on in the interview to note the concerted effort during his tenure within the institution of the SCC to ensure justices operated as a whole, rather than forming 'cabals,' see Makin (2011).

²⁸⁵ Interestingly, while 13% of the Court's unanimous federal decisions are delivered as 'The Court' (a practice that tends to be used in federal references), even where an individual justice is identified as the author of a unanimous decision the judgment always begins with the text 'The Judgment of the Court was delivered by....' By 'completely unanimous' I mean there was no dissenting or separate concurring opinion.

²⁸⁶ McCormick (2009).

²⁸⁷ The division of powers and responsibilities between the levels of government are laid out (generally) in s. 91-95 of the *Constitution Act, 1867*. Other sections, such as the judicature sections (96-101) and s. 35 of the *Constitution Act, 1982* dealing with Aboriginal rights, also play an important role in federal jurisprudence.

constitutional division of powers (not *if* government has authority to act at all, which is the question in *Charter* jurisprudence).²⁸⁸ The associated legal principle is that when a government enacts legislation outside its jurisdiction it is invalid, hence the dichotomy of rulings in federal cases of *intra vires* (valid, being within the legal power of a government) and *ultra vires* (invalid, being beyond the legal power of a government).²⁸⁹ Of course, in many areas of constitutional law, and particularly *Charter* jurisprudence, issues do arise about the way identities are recognized and power is distributed.²⁹⁰ The difference, though, and the reason I focus on federal jurisprudence, is that these cases deal *explicitly* with the recognition of identities and the distribution of power and resources *via federation*.

In cases where the issue is which level of government has jurisdiction, there are three main ways impugned legislation is attacked: 1) on the validity of the law (the question being if the law falls within or outside a level of government's jurisdiction); 2) the application of the law (the question being if the law, while validly enacted within a government's jurisdiction, has aspects that apply to another level's area of competence); and 3) the operability of the law (the question being if a validly enacted law is inoperative because it conflicts with another level of government's validly enacted law). In essence, then, the central issue in a federal case is if legislation is within a level of government's power or if it infringes on another level's jurisdiction.²⁹¹ These challenges have associated legal doctrines developed over time to deal with them, which are discussed below. The point to make here is that these attacks beg questions about the scope of a level of government's jurisdiction, about when a law's application infringes this jurisdiction and when one level of

²⁸⁸ This is a distinction the Court often makes itself, see *Reference re Assisted Human Reproduction Act* [2010] 3 S.C.R. 457 (at 44): 'Whether a federal law falls within Parliament's criminal law power under s. 91(27) of the *Constitution Act, 1867*, is a question of *which level* of government has jurisdiction to enact this law. This question relates to the powers of one level of government *vis-à-vis* the other, and it is resolved by determining the law's pith and substance. The degree to which the Act may impact on individual liberties is not relevant to this inquiry' (emphasis original).

²⁸⁹ Hogg (2009: 366).

²⁹⁰ See Kelly (2001); Clarke (2006).

²⁹¹ In the instances where there is a conflict between validly enacted laws the doctrine of paramountcy comes into play, see Hogg (2009: 392, Ch. 16).

government's law trumps the other. Consequently, answering these questions pushes the SCC into a process of selecting between competing perspectives on the very nature of the federation.

In these cases the dynamics of conflict between key actors arguing for competing perspectives on the nature of the federation can take a number of forms. The most clear-cut dynamic is between levels of government (i.e. provincial and central governments conflicting). In the decisions discussed later this takes place 20% of the time. In a number of cases private actors (citizens, civil society or corporations) challenge a level of government's legislative jurisdiction. In these cases, three dynamics can take place: 1) a private actor vs. a level of government (20% of cases reviewed in the thesis); 2) a private actor being supported in its case by an intervening level of government, turning the conflict into one between levels of government (29% of cases); or, 3) a private actor conflicting with a level of government that is being supported by another level of government (28% of cases).²⁹² Finally, the dynamic of conflict can take place between two private actors (which happens only 3% of the time in the decisions reviewed). Regardless of the dynamic of conflict, though, these cases are about actors putting forth competing perspectives on the nature of the federation with the Court interpreting the order in a way that either imposes a particular perspective or recognizes the legitimacy of multiple models.

Employing the criteria of identifying all decisions where the conflict is *explicitly* over the recognition of identity and the distribution of resources and power *via federation*, I identify 159 SCC decisions delivered between 1980 and 2010. These cases are drawn from a review of all constitutional law decisions delivered by the Court over this period (some 697 decisions),²⁹³ selecting for further analysis those cases where one of the key questions is which level of government has the

²⁹² When a constitutional question is raised challenging a level of government's jurisdiction all Attorneys General are invited to intervene in the case.

²⁹³ Including (4) motions and court orders.

constitutional jurisdiction to legislate or act in relation to a matter.²⁹⁴ The case review was conducted using the SCC's official, comprehensive online database of decisions.²⁹⁵

In line with the study objectives, 28 decisions have been excluded from the initial pool of 159. These 28 decisions have been excluded for one of two reasons: the judgement is too brief to accurately determine the rationale behind the Court's decision (so called "stump decisions" comprising one to two paragraphs, often delivered orally); or, 2) the division of powers issue raised in the case is not considered at all by the Court because the appeal is determined on another point of law. This leaves 131 SCC decisions that play an important role in the development of the federation *and* represent a useful population to research the extent to which the Court either imposes a particular federal model or recognizes the legitimacy of multiple models and the order as the process and outcome of negotiation.

Given my objective, it is quite clear why I do not consider cases dealing exclusively with criminal, administrative, tax or other areas of constitutional law; however, my case-selection criteria gets more complicated in relation to *Charter* cases and Aboriginal rights jurisprudence. As mentioned above, *Charter* cases often involve conflicts associated with identity recognition and the distribution of power and resources; however, in these cases this is (generally) not *explicitly* linked to the distribution of resources and power *via federation*. This is why I exclude from analysis cases that only deal with *Charter* challenges. Of course, some cases involve both *Charter* issues and explicit division of powers issues. In cases where the division of powers issue is considered by the Court it is included in the 131 decisions analyzed in subsequent chapters.

With regard to cases involving aboriginal issues, the approach is broadly similar. I analyze those decisions where the key issue is which level of government has jurisdiction to legislate. Accordingly, two types of cases are included in the above-noted 131 decisions: 1) those where the

²⁹⁴ This includes cases where the principle issue is the division of powers and also those cases where some form of division of powers issue is raised.

²⁹⁵ The database provides public access to all SCC decisions, see: <http://scc.lexum.org/en/index.html>. It includes the official text for all decisions from 1994 onward and is considered reliable for the period of study, see: <http://www.scc-csc.gc.ca/faq/faq/index-eng.asp#f26>.

question is which level of government (the centre or the provinces) have the jurisdiction to legislate with regard to aboriginal issues; and 2) those where a claim is made by an aboriginal group that the Constitution (via s. 35) grants them the right to *actively regulate themselves as a level of government* (i.e. a claim for self-government).²⁹⁶ While the former is quite common, the second type is rather rare (I have identified only two such cases in the period of study).²⁹⁷

In line with the focus of study I exclude the two other streams of aboriginal jurisprudence (i.e. classic aboriginal rights cases and aboriginal title cases).²⁹⁸ The former include cases where the central issue is if aboriginal rights under s. 35 of the *Constitution Act, 1982* protect an individual or group from any government regulation or action.²⁹⁹ The latter include cases where the issue is a proprietary claim to an area of land (including the standards to allow such a claim and what rights, like mineral, hunting or fishing rights, accompany the claim).³⁰⁰ These decisions are not considered for the same reason *Charter* cases are excluded: they deal with the question of *if* government can regulate an activity at all, not which level of government can regulate an activity. In other words, while these streams of jurisprudence involve conflicts over identity and the distribution of resource and power, they do not deal directly with the distribution of the resources and power via federation.

One central issue remains relating to the case selection criteria, as the population of 131 decisions includes both federal references and division of powers cases. This raises questions about the inclusion of both types of cases and their comparability.

References are advisory opinions (almost always on matters of constitutional law) given by the SCC in response to questions posed by the central or provincial governments.³⁰¹ It is often

²⁹⁶ S. 35 of the *Constitution Act (1982)* states that 'the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.'

²⁹⁷ *R. v. Pamajewon*, [1996] 2 S.C.R. 821 and *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010. The latter only cursorily dealt with the issue. While self-government claims have been discussed in other aboriginal rights cases (namely, *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911) it has only explicitly been dealt with in these two cases.

²⁹⁸ For an overview of the voluminous literature on aboriginal jurisprudence, see (Hogg 2009: Ch. 28).

²⁹⁹ On aboriginal rights, see (Hogg 2009: 634-648).

³⁰⁰ On aboriginal title, see (Hogg 2009: 643-647).

³⁰¹ Provincial governments cannot directly refer questions to the SCC. They have an appeal to the SCC as of right following a reference to a provincial court of appeal; they thus have a *de facto* right to submit references to the SCC where they so choose, see Hogg (2009: 258-259).

pointed out that, because they are technically opinions, references have no effect other than representing the views of the justices.³⁰² However, it should be remembered that references play a key role in determining whether proposed or recently enacted legislation is within the constitutional jurisdiction of a level of government.³⁰³ Division of powers cases, on the other hand, deal with *actual* conflicts of law or fact where the constitutional jurisdiction of a level of government's legislation is challenged. This is "traditional" federal judicial review with all its attendant enforcement mechanisms and doctrines (which makes up the brunt of federal jurisprudence).³⁰⁴

There are three related issues with comparing federal references and division of powers cases. First, is the position that sees references as overtly political, while division of powers jurisprudence is seen as a proper function of judicial review applying constitutional law to actual conflicts. This is an understandable perspective given the lineage of heated political conflicts that have led to references where unwritten principles and conventions are employed by the Court.³⁰⁵ Nevertheless, it is a flawed position.

In references the Court is undertaking the same function it does in other areas of judicial review: the Constitution is being interpreted and applied to a situation. Admittedly, this interpretation can take the form of elaborating fundamental principles and conventions of the Constitution; however, conventions are properly understood as the underlying assumptions and architecture of the Constitution.³⁰⁶ The result is that the legal framework worked out in the ("political") references is often applied in the ("legal") division of powers cases.³⁰⁷ At the same time, the legal doctrine and precedents stemming from division of powers cases are often applied in references. Thus, while references tend to take account of the Constitution as a broad normative framework and division of powers decisions tend to be more explicitly linked to precedent and the

³⁰² Hogg (2009: 257-263); Strayer (1988: Ch. 9).

³⁰³ Hogg (2009: 263).

³⁰⁴ For an overview, see Hogg (2009: 365-697).

³⁰⁵ See, for example, *Patriation Reference*, *Quebec Veto Reference*, *Judges Salary Reference*, *Secession Reference* and also *Re Manitoba Language Rights* [1985] 1 S.C.R [Manitoba Language Rights]. On the recourse to unwritten principles in the Court's work, see Hogg (2007: 90-93).

³⁰⁶ See *Secession Reference* [1998] at 32.

³⁰⁷ See *Leclair* (2002:396-397, 412-13, 439); *Russell* (1983: 228); Hogg (2009: 418-423).

text of the Constitution, the two are linked in that the Constitution can only be interpreted and applied with recourse to both streams. The unwritten principles and conventions identified in references provide the substantive provisions of the Constitution with meaning, and *vice-versa*.³⁰⁸

The second issue is the extraordinary element of most references. The context and issues raised by some references thrust the Court into overtly political battles and require it to make decisions about the very nature of the constitutional and federal order.³⁰⁹ Can these references be compared to cases where mundane and technical issues arise, for instance over the jurisdiction to regulate the telecommunications or financial sector?

As argued in previous chapters, it is incorrect to segment 'struggles over recognition' (as explicit struggles for modes of recognition based on identity) from 'struggles over distribution' (as explicit struggles over economic, social and political power).³¹⁰ This is because 'challenges to a prevailing norm of intersubjective recognition to which citizens are subject also challenges in some way the prevailing relations of political, economic, and social power that the norm of recognition legitimates, and *vice versa*.'³¹¹ If references are where the norms related to identity recognition are more directly challenged and division of powers cases are where conflicts arise as to the economic, social, and political distribution of power, the two must be seen as intimately linked. Also, not all references are particularly extraordinary (there are those dealing with taxation issues, firearms regulation and the regulation of human reproduction).³¹² Similarly, many division of powers cases deal with hotly contested issues where the disposition of rights and powers has far reaching effects on the nature of the federation.³¹³

³⁰⁸ See *Judges Salary Reference* [1997] at 95; *Secession Reference* [1998] at 52; Leclair (2002: 394); Russell (1983: 217). In the *Secession Reference* [1998] the Court noted (at 52) that the four unwritten principles identified 'assist in the interpretation of the [Constitutional] text,' and specifically that they inform the 'delineation of [the] spheres of jurisdiction' (i.e. division of powers jurisprudence).

³⁰⁹ See: Choudhry (2008: 214-15, 219-220, 228); Choudhry and Howse (2000); Tierney (2003: 170).

³¹⁰ Tully (2000b).

³¹¹ Tully (2000b: 471).

³¹² See *Re: Exported Natural Gas Tax* [1982] 1 S.C.R. 1004; *Reference re Firearms Act (Can.)* [2000] 1 S.C.R. 783; *Reference re Assisted Human Reproduction Act* [2010] 3 S.C.R. 457. The point is that not every reference is about the validity of the constitution or the ability of a province to secede.

³¹³ See *Multiple Access Ltd. v. McCutcheon* [1982] 2 S.C.R. 161; *R. v. Crown Zellerbach Canada Ltd.* [1988] 1 S.C.R. 401; *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)* [1988] 1 S.C.R. 749;

Thirdly, as references are by their nature hypothetical cases, valid questions arise about the different context and its effect on the decision approaches and outcome.³¹⁴ Nevertheless, the hypothetical nature of the case does not mean a conflict over the federation is not taking place (the core issue in each federal reference discussed is the nature of the federal order). It also needs to be realized that in no reference has the opinion of the SCC ever been ignored – the normative force of the “opinions” in references clearly result in a binding decision on parties.³¹⁵ In any event, the difference between an *opinion* of the Court and a *decision* is questionable: the law, as a normative order, is only binding to the extent it is followed. Finally, the procedures of the two streams are nearly indistinguishable, with both seeking to determine the jurisdiction to legislate based on an understanding of what the Constitution mandates – something the SCC itself noted in the *Secession Reference*.³¹⁶

The Research Design

The above provides a picture of the overall scope of the study. This section covers the finer points of the research design and review of SCC decisions.

The general design of the study is rather simple. The broad methodology is textual analysis. The scope is all federal decisions delivered by the SCC in the period 1980-2010 (131 cases).³¹⁷ The objective is to determine the extent to which these decisions demonstrate the Court is adhering to, and reinforcing, particular federal models in its federal jurisprudence (or alternatively, if it

General Motors of Canada Ltd. v. City National Leasing [1989] 1 S.C.R. 641; *Friends of the Oldman River Society v. Canada (Minister of Transport)* [1992] 1 S.C.R. 3; *Ontario Hydro v. Ontario (Labour Relations Board)* [1993] 3 S.C.R. 327; *R. v. Hydro-Québec* [1997] 3 S.C.R. 213; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)* [2002] 2 S.C.R. 146; *Canadian Western Bank v. Alberta* [2007] 2 S.C.R. 3.

³¹⁴ There ‘does appear to be some link between reference cases and [a higher percentage of] rulings of *ultra vires*’ when compared to division of powers cases; however, this is likely because governments refer particularly contentious legislation and also the very process of the reference may tip off courts that there are questions as to the constitutionality of the legislation, rather than some systemic difference in approach, see Monahan (1987: 154-55).

³¹⁵ See Hogg (2009: 260-261). It should also be noted that the Court struck down legislation and issued a binding decision in *Manitoba Language Rights*.

³¹⁶ See Hogg (2009: 261); *Secession Reference* [1998] at 25.

³¹⁷ My analysis excludes dissenting opinions within these decisions because they are generally of lesser importance and for reasons of efficiency. Also, in line with my focus on the Court *qua* institution, I tend to treat the SCC as a corporate entity. However, the first time a decision is substantively discussed I do identify via a footnote how the decision is reached (i.e. if it is a unanimous or majority judgement) and the primary author of the unanimous, majority and concurring opinions, where appropriate.

understands and reinforces the order as the process and outcome of negotiation between the subscribers of legitimate models). To facilitate this objective an analytical framework was developed and employed to review and assess the SCC decisions.

Analyzing the text of SCC decisions is the only viable means of determine what the Court thinks about the nature of the federation. Other seemingly applicable methods such as survey or elite-level interviews have considerable constraints: SCC justices generally do not discuss the particulars of judgements and the rationales behind them. Moreover, what the Court says in a decision, and how it says it, is important. Text is the only way the SCC can fulfill its role as federal arbiter and exert its power.³¹⁸

Despite the recent push to standardize judgements, it is correct to say that SCC decisions have always followed a general structure, having a factual background, discussing lower court actions, conducting analysis that gives reasons for a decision and ending with an explanation of the outcome.³¹⁹ At the same time they have changed over the years, notably becoming longer and departing from the practice of *seriatim* judgments in a move towards consensus orientated decisions that represent an institutional product.³²⁰ Importantly, though, decisions have almost always included an analytical component, where constitutional interpretation explicitly takes place and is applied to the legal or factual issue at hand. This is the section I tend to focus on in my review.

In federal jurisprudence, this analytical component has traditionally followed a two-step process.³²¹ The first step is to characterize the challenged law's pith and substance, or the true and dominant matter of the law, including a consideration of its purpose and effect.³²² The second step is to identify the appropriate "head of power" to which the law should be assigned (which involves an

³¹⁸ McCormick (2009: 36-37).

³¹⁹ McCormick (2009: 45). The 'standardization' in the last 20 years coming from adherence to a particular format for decisions with the use of the above-noted generic sub-headings.

³²⁰ McCormick (2009: 37, 38, 42, 51, 58); see, also: L'Heureux-Dube (1990). A *seriatim* decision having the form of each justice writing a full reason for decision as if it is the only judgment.

³²¹ For a discussion of how the Court undertakes judicial review, see Laskin (1955: 114); Lederman (1975); Finkelstein (1986: 242); Hogg (2009: 370-391).

³²² See: Hogg (2009: 370-391). This process has involved the development of a number of legal doctrines to assist the Court in the process of characterization, which are discussed below.

explicit or implicit consideration of the scope of the various areas of legislative competence assigned to the levels of government and the nature of the federal order).³²³ These two stages are recognized as inherently linked. Defining the matter of a law is done in relation to the areas of jurisdiction, and the areas of jurisdiction are given meaning through the classification of permissible and impermissible activities within them.³²⁴

Reflecting on these two steps in the decision-making process of federal judicial review draws attention to the way understandings of the nature of the federal order can influence the decision, as well as how these decisions reinforce particular perspectives as legal fact. Choosing the essential matter of a law is generally determinative of its validity (if the law is classified one way, it is a valid exercise within a level of government's jurisdiction, classified another way, it is not).³²⁵ The process of characterization thus comes down to a choice that is made knowing full well the result determines the validity of the statute and shapes the federal structure. And, in making this choice, the Court draws from a perspective on the nature of the national community and the ideal federal order, particularly where the relevant statute or precedent are unhelpful in determining a law's pith and substance.³²⁶ At the same time, determining the scope of a level of government's jurisdiction is a more overt act of taking an understanding of the federation and giving it form through legal reasoning.

By combining these two steps and rendering a decision the Court provides a legal rule that either sanctions or disallows a law as falling within or outside a government's jurisdiction. This action thus actualizes a particular perspective on the federation by defining the scope of these powers and the nature of the order. Moreover, as I discuss below, resolving the trickier situations (i.e. where a law is seen to validly fall within both level of government's jurisdiction or dealing with questions

³²³ A voluminous set of doctrines relating to each level of government's areas of legislative jurisdiction have developed to assist the Court's in this stage of analysis, for an overview see Hogg (2009: Chs. 17-33).

³²⁴ Laskin (1955); Hogg (2009: 370).

³²⁵ Hogg (2009: 385).

³²⁶ See Hogg (2009: 385-387); Lederman (1981: 241); Simeon (1984: 131).

about the extent to which a law may affect another level’s jurisdiction) draw from and reinforce a particular understanding of the nature of the federal order.

To investigate how SCC decisions draw from and reinforce particular understandings of the federation (and so impose or recognize a federal model) I analyze three related components of the 131 above-noted judgments. First, is how the federation is depicted, including the use of legal forms of argument to reinforce the validity of this depiction. Second, is the outcome of the case. Third, is the self-selected role adopted by the Court in the decision.

To facilitate this analysis a framework has been developed (see Tables 3.1 to 3.4). The framework builds on the last two chapters to provide indicators that help assess how a decision adheres to and reinforces a federal model. The framework was employed to analyze the depiction, outcome and self-selected role for the Court in each of the 131 decisions. The review of decisions and identification of text that corresponds to an indicator was conducted by coding sentences and paragraphs with the assistance of the computer program *Atlas.ti*. Populated frameworks for each decision (with citations indicating the relevant section of the decision and explanations of the coding, where appropriate) are provided in the Annex.³²⁷ These populated frameworks also provide a summary of the issue in the case as well as the reasoning behind its classification as an “imposing” or “recognizing” decision.

Reviewing this framework – and the indicators of adherence to a federal model for each aspect of a decision – helps to explain subsequent analysis.

Depiction of the Federation

The way the SCC depicts the federation matters. It illuminates how the Court understands the order, which drives the outcome of a case. How the federation is presented by the Court in a decision also has broader effects, influencing the public’s understanding of the order, the perceived legitimacy of the various federal models and the status of the subscribers of those models.

³²⁷ The Annex is included with the study in electronic format to facilitate ease of access.

Unpacking the depiction of the federation in a decision involves looking at a number of aspects that play into one’s understanding of the order and its ideal form. These aspects include the perceived nature of the constitution, purpose of federation, ideal balance and distribution of power, relationship between levels of government, the national character of the state, and so on. Building on the last two chapters, I have identified how each of the federal models depicts the federation in relation to these aspects (see Table 3.1). In reviewing the SCC’s decisions I looked for correspondence between these ideals and the Court’s depiction of the federation to indicate adherence to particular federal models.

Table 3.1: Indicators for Depicting the Federation in line with a Federal Model

| | | Federal Models | | | |
|--------------------------|--------------------------------|----------------------------------|--|--|---|
| | | Pan-Canadian | Provincial Equality | Multinational | Dynamic |
| Aspects of Federal Model | National Character | Uninational | Uninational | Multinational | Plurinational |
| | Nature of Constitution | Overlapping consensus | Background neutral framework | Separates and protects national communities | Contested normative order |
| | Nature of Federation | Compromise given diversity | Compact between equal provinces | Compact between founding <i>nations</i> | Process and outcome of negotiation |
| | Purpose of Federation | Trim away diversity and conflict | Trade away diversity and conflict | Segregate diversity to suppress conflict | Manage diversity and conflict |
| | Balance of Powers | Centralized | Decentralized | Decentralized | No ideal (fluid in response to conflict) |
| | Distribution of Powers | Symmetrical | Symmetrical | Asymmetrical | No ideal (fluid in response to conflict) |
| | Nature of Provinces | Territorial | Territorial | National <i>and</i> Territorial | National <i>and/or</i> Territorial |
| | Nature of Central Institutions | National | Equally representing provinces | Guaranteeing special representation for minority nations | Representing actors to facilitate dialogue and cooperation |
| | Relationship Between Levels | Centre superior to provinces | Provinces equal amongst selves and with centre | Québec, Nunavut and Aboriginals have special status | Equality in status to allow fair negotiation (order of non-dominance) |

Use of Legal Argument

An important element of my analysis is the way the Court goes about interpreting the constitution and formulating legal arguments. As Phillip Bobbitt points out, the presence of a constitution means that it has to be construed in some way and there are a number of *accepted*

ways this is done in legal analysis.³²⁸ For this study, it is particularly important to consider how these methods of constitutional interpretation are employed to buttress the depiction of the federation. This is because it is through accepted forms of legal argument that the imposition (or recognition) of a federal model is legitimized *as law* – how mere theories are given creditability and anchored in the constitutional law.

To investigate this aspect of the SCC’s federal jurisprudence, I apply a framework that looks at how the key methods of constitutional analysis are applied in the 131 decisions (focusing on the extent to which they are employed to reinforce an imposing or recognizing depiction of the federation) (see Table 3.2).

Table 3.2: Methods of Constitutional Interpretation

| | | Manifestation | Reinforces Depiction |
|--------------------------------|-------------|----------------------|-----------------------------|
| Interpretative Approach | Historical | yes/no | yes/no |
| | Textual | yes/no | yes/no |
| | Doctrinal | yes/no | yes/no |
| | Structural | yes/no | yes/no |
| | Prudential | yes/no | yes/no |
| | Ethical | yes/no | yes/no |
| | Progressive | yes/no | yes/no |

Some additional explanation of this framework and the use of legal argument is required to contextualize subsequent analysis. This framework builds on Bobbitt’s taxonomy of accepted ways of interpreting the constitution and formulating legal arguments about its nature.³²⁹ The ‘constitutional modalities’ listed above are the method through which legal propositions about the constitution are given a meaning as true – the formulation of a legal argument in their image is what generates legitimacy for the argument and for the constitution.³³⁰

³²⁸ Bobbitt (1991: 5, Ch. 3; 1981); see also Barber and Fleming (2007, particularly Chs. 1, 4). For an overview of the more Canadian-specific methods of interpretation see: Hogg (2007; 2009: Ch. 15).

³²⁹ See Bobbitt (1982; 1991). While Bobbitt’s focus is the use of these approaches in the United States, as subsequent analysis shows, they are (with the exception of the ethical modality) regularly employed by the SCC in its federal jurisprudence.

³³⁰ Bobbitt (1991: 9, 11-12).

The first modality, the historical approach, stresses the constitution should be interpreted and applied in line with the original intent of the framers.³³¹ Second, is the textual method, which involves looking to the meaning of the words of the document as they would be understood by the “man on the street.”³³² Third, is the doctrinal approach, which applies the rules and principles developed from precedent to understand and interpret the constitution.³³³ Fourth, is the structural mode of analysis, which infers constitutional rules from the institutional relationships established by the constitution.³³⁴ Fifth, is the prudential approach, which seeks to make wise rules that balance the costs and benefits of the rule.³³⁵ Sixth, is the ethical modality, which seeks to derive rules from the cultural ethos of the polity reflected in the constitution.³³⁶ The final modality, the progressive approach, is specific to the Canadian case. Often touted as the dominant approach in Canada, it stresses flexibility in interpreting the text of the constitution in line with the changing social, economic, technological and regulatory context.³³⁷ It recognizes the constitution is not frozen and should adapt over time (and is thus also known as the ‘living tree doctrine’).³³⁸ This alternative moniker illuminates that the progressive modality actually walks the line between an approach to constitutional interpretation and a legal doctrine relying on precedent to establish a constitutional principle.

³³¹ Bobbitt (1982: Ch. 2; 1991: 12). This mode of analysis is thus also referred to as ‘original intent’ or ‘originalism.’

³³² Bobbitt (1982: Ch. 3); Bobbitt (1991: 12).

³³³ Bobbitt (1982: Ch. 4); Bobbitt (1991: 13).

³³⁴ Bobbitt (1982: Ch 6; 1991: 12-13). To explain further, a structural constitutional argument would go as follows: 1) an uncontroversial statement is made about the constitutional order and institutional structure it sets up; 2) a relationship is inferred from this structure; 3) a factual assertion is made; and 4) a conclusion is drawn that provides the constitutional rule. So, as an example: 1) Canada distributes legislative power between the centre and the provinces; 2) this means that the two levels of government are equal in status; 3) the centre is trying to unilaterally alter the federal order in a way that would affect provincial powers; 4) since the two levels are equal, the central government cannot unilaterally alter the federal arrangement if it affects the provinces’ powers.

³³⁵ Bobbitt (1982: Ch. 5; 1991: 13).

³³⁶ Bobbitt (1982: Ch. 7; 1991: 13, 20). This rather abstract approach is rarely used by the SCC. Bobbitt argues that the ethos of the American constitution is limited government, which is discernable through the consequence that rights in the American system are defined as those choices beyond the power of the government to compel, see Bobbitt (1991: 20-21).

³³⁷ Hogg (2007: 87).

³³⁸ See Hogg (2007: 86). This view of the constitution was laid out in *Edwards v. Attorney General for Canada* [1930]. The view is set against the formalism at the heart of other modalities like the historical and textual approaches, see Hogg (2007: 87).

Reflecting on the use of these modalities in federal jurisprudence raises an important point: each can be employed to impose (or recognize) a particular federal model. This is the case even though the first three modalities do provide a measure of structure the interpreter has to contend with (i.e. the historical record, the text of the constitution or the case law). Even when using these approaches the Court has sufficient room to interpret the constitution in a way that reinforces a particular view of its nature and that of the federal order. This is because through any modality different aspects of the source of interpretation can be highlighted to support a particular view of federation. This is even more the case with the final four modes of interpretation, which are considerably more flexible. For example, there is a lot of leeway to determine what the structure of federation is, what is prudent and wise, what the ethical ethos of the constitution is and what socio-political changes the document should reflect. In other words, what is important is not the use of particular modalities, but *how* they are used by the Court to reinforce particular depictions of the federation.

A more in-depth explanation of how this takes place in relation to the prominent modality of doctrinal reasoning serves a few important functions. It demonstrates how a modality can be used to either impose or recognize a federal model. It addresses an important critique to my approach (that doctrine structures SCC decisions, not theories of federation). And, it provides necessary context for later analysis of SCC decisions (in relation to some of the finer points of Canadian federal jurisprudence). To do this, I review some of the key division of powers doctrines employed by the SCC in its federal jurisprudence, showing how each can be used to either impose a particular federal model or recognize the order as the process and outcome of negotiation between the subscribers of legitimate models.

The first doctrine – the pith and substance doctrine – is a key part of the process of characterizing a law discussed above. This doctrine establishes that a law is characterized in relation to a head of power by its central and dominant matter, even though it may have other aspect that

relate to other areas of jurisdiction.³³⁹ The doctrine thus allows a law passed by one level of government to have an ‘incidental effect’ on another level of government’s jurisdiction.³⁴⁰ It is this that demonstrates how the doctrine can be employed to impose a particular federal model: a generous interpretation of what is “incidental” to a law can justify a centralized federation in line with the pan-Canadian model, while a narrow interpretation of incidental effect can protect provincial autonomy in line with the provincial equality model. At the same time, a nuanced test, which recognizes each level of government has core areas of jurisdiction, but that these are not static water-tight compartments, can reinforce that the division of powers is dynamic and able to respond to conflicts over the order.

Also important to the process of classifying legislation is the double aspect doctrine. This doctrine explicitly recognizes that a law may have more than one *dominant* matter, falling within central jurisdiction in one respect and in provincial jurisdiction in another respect (and so, both levels of government can validly pass laws relating to this issue).³⁴¹ It is clear how this doctrine can be employed to reinforce a view of the federation and balance of powers as dynamic – as the process and outcome of negotiation that remains flexible in response to conflicts. However, the doctrine can also be employed to impose the pan-Canadian model, as the increasing tendency to note that almost any issue has a double aspect means the doctrine of central paramountcy can allow for the federation to be considerably centralized.

This principle of federal paramountcy, which represents a general understanding of how the division of powers is to be operationalized, is important. The paramountcy doctrine holds that where there are validly enacted, but inconsistent and conflicting, central and provincial laws the central law prevails.³⁴² The way this doctrine can be used to impose a particular model comes down to the test of what constitutes a conflict: a broad test (saying that parallel laws or minor inconsistencies between them constitutes a conflict) allows and promotes a centralized order, whereas a narrow

³³⁹ See Hogg (2009: 371-374).

³⁴⁰ See Hogg (2009: 373).

³⁴¹ See Hogg (2009: 375-377).

³⁴² See (Hogg 2009: Ch. 16).

test (saying that only where there is significant operational conflict between laws) protects provincial autonomy in line with the provincial equality view. At the same time, the test for paramountcy can be employed to recognize both the ultimate superiority of central legislation (in line with the pan-Canadian model) and the need to protect provincial autonomy (in line with the provincial equality view), while also recognizing the respective positions by only “reading down” the aspects of provincial laws that explicitly conflict with central laws (rather than striking down the conflicting law).³⁴³

Another key doctrine dealing with the general understanding of how to operationalize the division of powers is the interjurisdictional immunity doctrine. This doctrine holds that each level of government’s jurisdiction has a ‘basic, minimum and unassailable’ core that is immune from the application of another level of government’s legislation.³⁴⁴ Again, with this doctrine the key to understanding how it can work to impose a federal model is the test employed by the Court to determine the scope of a level of government’s immunity (a broad scope for central immunity in an area can lead to a centralized order, or a broad scope for immunity in a provincial area can reinforce a decentralized order). At the same time, restricting the applicability of this doctrine and reinforcing a narrow test of immunity can work to recognize the dynamic and inherently contested nature of the federal order as well as its ability to adapt as a process of negotiation.

Finally, there are numerous principles and doctrines that inform the Court’s interpretation of the various heads of power in s. 91 and 92 of the *Constitution Act, 1867*. For example, there is the precedent and doctrine around the scope and nature of the central government’s residual power to make laws for peace order and good government, or the provinces’ power over property and civil rights, to name only two.³⁴⁵ The important thing to note is that the doctrine related to the heads of

³⁴³ This general direction on paramountcy is evidenced in the Court’s thinking on the doctrine, which is summarized in *Canadian Western Bank v. Alberta* [2007]. On the reading down principle, see Hogg (2009: 390-391).

³⁴⁴ See *Bell Canada v. Quebec* [1988] at 839; *Canadian Western Bank v. Alberta* [2007] at 33; Hogg (2009: 392-404). It should be noted that the Court in *Canadian Western Bank v. Alberta* voiced its concern with this doctrine and indicated it has fallen out of favor.

³⁴⁵ For an overview, see Hogg (2009: Chs. 17-33).

power, even more so than the doctrines noted above, can be employed to impose particular federal models. Selecting aspects of the case law and emphasizing certain precedent can help to reinforce the scope of a head of power in line with a particular federal model. In fact, the question needs to be asked, what informs the initial development of doctrine around heads of power if not theories of what the federation is and ought to be?

This last line draws attention to the final point I want to make about doctrine and the use of legal argument before moving on: while doctrine is properly understood as a structuring factor in a decision, its influence should not be overstated. As Gerald Baier points out, the force of previous decisions and the principles contained in doctrine do shape the SCC's federal jurisprudence.³⁴⁶ However, what underlies the development and application of doctrine is pre-conceived understandings of the nature of the federation. The development of doctrine over time is simply the statement of legal principles that stem from, and operationalize, views of what the federation is and ought to be. This is a point that is borne out through the next three chapters, which clearly show how federal models inform the Court's understanding of the federation and drive decision outcomes that provide precedent and doctrine, which in turn lead to the application of this doctrine in future cases.

Outcomes

While the way the federation is depicted is an important element of how SCC decisions draw from and reinforce particular understandings of the federation, equally important is a consideration of the outcome of the case. The decision outcome has practical political and material effects, while working to align the constitutional and federal order with the way it is depicted in the decision and establishing precedent that influences future decisions. The outcome is thus a central element of a decision either imposing a particular model or recognizing the legitimacy of multiple models and the order as the process and outcome of negotiation (and accordingly has implications for the legitimacy of the conflict management process and the federal order).

³⁴⁶ See Baier (2006).

Looking at how an outcome plays into the judgment either imposing or recognizing federal models involves investigating two aspects of the decision (see Table 3.3). The first is the actual disposition of the appeal (i.e. who wins and how they win). The second aspect is the broader effect the outcome has on the federal order. The ideal-type of an imposing decision involves a zero-sum outcome (where one jurisdiction wins outright and the other loses), with the effect of aligning the federal order with a particular model (i.e. reinforcing through the decision that the federation *is* as a model says it *should be*). The opposite ideal-type is a decision that rejects the zero-sum approach to disposing of the appeal (seeking positives for all jurisdictions, or at least mitigating the loss for a party) while rendering a ruling that reinforces the legitimacy of multiple models and the order as the process and outcome of negotiation.

Table 3.3: Decision Outcome Indicating Adherence to a Federal Model

| | | Federal Models | | | |
|-------------------|--------|-------------------------------|--------------------------------------|---|----------------------------------|
| | | Pan-Canadian | Provincial Equality | Multinational | Dynamic |
| Outcome Indicator | Winner | Positive Central Government | Positive All Provinces | Positive Particular Jurisdictions (Québec, Aboriginals) | Positive All (or Mitigates Loss) |
| | Effect | Reinforces Pan-Canadian Model | Reinforces Provincial Equality Model | Reinforces Multinational Model | Reinforces Dynamic Model |

Self-Selected Role

The way the federation is depicted and the decision outcome combine with the Court's self-selected role to form a broader conflict management approach in any given case where the Court is acting as the federal arbiter. Accordingly, the Court's self-selected role is a central aspect of my analysis: how the SCC perceives its role within the federation plays an important part in both its decision-making approach and the outcome in a case. In other words, how the SCC perceives its function in the federation is part of how it understands the constitutional and federal order and also informs how it goes about disposing of the case. The role the Court projects for itself as federal

arbiter thus has important implications for the legitimacy of the conflict management process and the broader federal order.

Accounting for the Court’s self-selected role involves teasing out the links between its perceived position in the federation and the various federal models (see Table 3.4). As noted earlier, there are links between the federal models and the ideal role the Court should play as federal arbiter (i.e. between the pan-Canadian, provincial equality and multinational models and the umpire, branch of government and guardian roles, respectively). When assessing if a decision imposes a particular federal model, I look at how the Court adopts and promotes an ideal role for the judiciary in line with what a particular federal model expounds it should be, while also employing this role to justify an outcome that reinforces the legitimacy of a particular model. At the same time, I also investigate the extent to which the Court operates with an understanding of the federation as the process and outcome of negotiation and accordingly adopts and promotes its role as the facilitator of this negotiation and a fair arbiter when it breaks down.

Table 3.4: Self-selected Roles for the Judiciary

| | Self-Selected Role | | | |
|------------|--------------------|----------------------|----------|----------------------------|
| | Umpire | Branch of Government | Guardian | Facilitator / Fair Arbiter |
| Indication | yes/no | yes/no | yes/no | yes/no |

Situating the Study

This study focuses on the SCC and the way it either works to impose particular federal models through its decisions or recognizes the order as the process and outcome of negotiation (while reflecting on the potential affect these approaches have on the legitimacy of the order).

The idea that the Court’s adherence to particular federal models influences decisions has a pedigree in Canadian scholarship.³⁴⁷ The key point of this line of analysis is that given the nature of

³⁴⁷ For example, Monahan explores how federal jurisprudence is influenced by judges’ adherence to normative theories of federalism (rather than legal arguments or principles, per se), see Monahan (1984: 48-49, 70, 71, 84-87, 89-90, 92; 1987); see also Weiler (1974); Lederman (1983); Saywell (2002: xvii). Baier (2006) represents

constitutional interpretation in general, and since federal judicial review is in the main a political activity, the element of discretion the courts are afforded to interpret and apply the Constitution allows pre-conceived understandings of the federation to influence decisions.³⁴⁸ As Justice Binnie has said: ‘nobody arrives at the Supreme Court of Canada without baggage. We have all had experiences. We all have views as to how society operates.’³⁴⁹ Chief Justice Laskin has also admitted as much: ‘do we lean? Of course we do, in the direction in which the commands of the constitution take us *according to our individual understandings*.’³⁵⁰ The relevant point thus becomes *what those understandings are*, the extent these *particular understandings of the federation and the Constitution* play into the approach and outcome of federal jurisprudence and the affect they have on the development and legitimacy of the order.

This might suggest that my study replicates what has come before. However, there are three points that set this thesis apart from previous related studies.

First, I disagree with the general conclusion reached in most of the above-cited works that since the Court is undertaking a political practice in federal judicial review, the activity should be abandoned altogether.³⁵¹ Building on Stephen Tierney’s distinction between substantive and process orientated prescriptions for constitutions in plurinational states,³⁵² while thinking about macro-constitutional changes is important (particularly in states transitioning from violence to peace by establishing new constitutions), in places like Canada, the more pragmatic and logical starting point is adapting already existing constitutional structures (like the way the Court goes about its role as

a contrasting view that sees the Court’s decisions and effect on federation being structured by legal doctrine rather than theories of federation.

³⁴⁸ See Monahan (1984: 64-65, 68-69); Weiler (1974); Lederman (1964). Even Peter Hogg notes the discretionary aspect of constitutional interpretation, specifically with regard to federal jurisprudence, see Hogg (2009: 138, 140). However, the work of Hogg (and his followers such as Baier) can be contrasted to these scholars as they generally see the Court to be conducting legal reasoning separated from political decision-making, see Baier (2006).

³⁴⁹ Makin (2011).

³⁵⁰ Cited in Saywell (2002: xvii) (emphasis added).

³⁵¹ See Weiler (1974); Monahan (1984). I similarly reject that federal jurisprudence is wholly ‘legal’ in the traditional understanding; accordingly, striving for a neutral umpire approach, as noted in the previous chapter, is not sufficient.

³⁵² See Tierney (2009: 93). The former focusing on structural changes to the constitutional and federal order via amendment, the latter looking at more incremental changes like the way constitutions are interpreted by actors in the system.

federal arbiter). Similarly, from a pragmatic standpoint, it is logical to keep federal jurisprudence (which has developed in a legal environment) linked to the other streams of constitutional law.³⁵³ More importantly, though, abandoning the idea of a federal arbiter and leaving the resolution of conflict completely to the political process fails to account for the reality that certain actors have material and political power advantages. The federal arbiter can play an important role in keeping the federation a free and fair order (or rather, it should do so). In a related way, the judiciary can also be a useful mechanism to achieve a balance between the need to protect the constitutional and federal order from partisan political manipulation while remaining open and dynamic enough to respond to conflicts over the order.

Second, I take issue with the emphasis in studies that focus only on the outcomes of Court decisions. I argue the *approach* adopted by the SCC in its federal jurisprudence (i.e. the way decisions are rationalized, the constitution interpreted and the very act of recognizing, or not, the other models) is important, both in terms of its influence on decision outcomes and the effect the approach can have on the legitimacy of the federal system.

Finally, looking at the scope and dates of the above-cited pieces, it is clear that there is a need for a study that is up-to-date, takes into consideration all federal jurisprudence over a period of time (not just a few cases)³⁵⁴ and, finally, takes the step past description towards theory generation.³⁵⁵

Nevertheless, this study is only worthwhile if federal judicial review has an effect on the federal order. The opposite case – that federal jurisprudence has no discernable impact on the

³⁵³ See (Hogg 2009: 270). This approach recognizes that issues in all areas of constitution law often intertwine. Having one body deal with them allows for a coherent and up-to-date perspective from the federal arbiter.

³⁵⁴ This approach addresses selection-bias issues. While Saywell (2002) does look at a large selection of federal jurisprudence from confederation through to the *Secession Reference*, his study lacks a clear and consistent application of a framework of federal theory to inform his analysis (which is thus slightly ambiguous in its conclusions). Baier (2006), while covering a number of important cases does not conduct a comprehensive review of the Court's work.

³⁵⁵ These last two points set my work apart from a recent study by Nadia Verelli (2008), where the Court's adherence to the key federal models is investigated in four references. This study looks at *all federal jurisprudence* from 1980 to 2010, while also developing a normative federal theory that accounts for the role of the federal arbiter in the management of conflict over nationality and federation.

choices made by government – has been made by Patrick Monahan with something he calls the maxim of federalism: it is always possible to do indirectly what cannot be done directly.³⁵⁶ This argument rests on a distinction between internal and external perspectives on federal judicial review. The internal perspective is that of participants in the process itself for whom ‘consistency or rationality of constitutional decision-making are necessarily and inherently important;’ and, the external perspective stands outside the judicial enterprise where what matters is only if ‘they have significant impacts on other political institution or on citizens.’³⁵⁷ In other words, federal judicial review does not really matter because outsiders only care about the final policy outcome (and ultimately governments can work around negative decisions).

I disagree with this position on three fronts. First, on the internal/external perspective, who is really external to the process of judicial review when it deals with constitutional law? By its very definition, constitutional law encompasses the interests of the entire state; accordingly, the approach and outcome of federal judicial review matters for everyone, and particularly for those who see the entire system as set against their particular view of the order. Second, and related to this, I argue it is not just the outcomes that matter to parties, but also the process itself and the way the system seeks to deal with conflict over the nature of the federation. A process that generates loyalty to the way it does this, rather than derogating the position of participants, is vital to a legitimate federal order. Finally, the fact that actors actually continue their negotiations in other forums after a decision is an important observation, but, it supports the point that federal jurisprudence acts as a step in the process and outcome of federation (which does not mean it is unimportant and does not influence outcomes).³⁵⁸

Stepping back from the Canadian case, the worth of this thesis also rests on its ability to contribute to the wider field of federalism studies. I have already pointed out that Canada represents a key case within federal theory. Canada was one of the first federations, and has (and

³⁵⁶ Monahan (1987: iv, 8-11, 161-2, 224, 239).

³⁵⁷ Monahan (1987: 8-9).

³⁵⁸ For an interesting study of the strategic use of SCC judicial review and its role in intergovernmental relations, see Riddell and Morton (2004).

continues to) serve as a model for those seeking to accommodate national diversity via federation. Even a cursory glance at the field supports this view. One of the best examples is the prominence of Canada among those theorists (like Will Kymlicka) pushing multinational federation as a means to manage national diversity.³⁵⁹ Moreover, focusing on the SCC within Canada in a study looking at the role of federal arbiters in the management of diversity through federation makes sense given the propensity of federations to follow the apex court model.³⁶⁰

The generalizability of this study thus comes about by furthering our understanding of a key case that can inform theory generation in the broader field. Investigating the role of the apex court in the development and management of conflict over federation in Canada can help to advance general theory about the role of federal arbiters in diverse federations. Moreover, studying the way a plurinational state manages the dynamics of conflict via federation facilitates later comparison to other similar states.³⁶¹

There is a valid concern, however, that particulars of constitutional law in Canada limit comparison and the generation of general theory. In response to such a view, first and foremost, it is worth stating that the study of any jurisdiction's constitutional law is inherently comparable. There are key similarities in the very nature of public law as a practice endemic to the modern state system that lend themselves to general and comparative analysis. I thus align myself with the emerging practice of comparative constitutional law.³⁶² Finally, this study finds a pedigree in work that seeks to build on Canadian federal jurisprudence for both comparative analysis and general theory building.³⁶³ This is a case study, but, it is done with a view of investigating aspects of a key case that can advance general theory, while acting as the basis for future comparative analysis. I return to discuss the issue of the generalizability and applicability of my analysis beyond Canada in the conclusion of the thesis.

³⁵⁹ For an overview of this school of thought see Schertzer and Woods (2011).

³⁶⁰ Hueglin and Fenna (2006: 275).

³⁶¹ On the dynamics of conflict within plurinational states, see Schertzer and Woods (2011: 197-203).

³⁶² For an overview of the key issues in comparative constitutional law see Choudhry (2006).

³⁶³ See Baier (2003; 2006); Choudhry (2008); Walters (1999); McHugh (2000).

Conclusion

This chapter provides the necessary context for subsequent analysis while explaining and justifying some of the key choices in my research design. It explains why I focus on the SCC's federalism jurisprudence from the 1980's forward, namely because the Court plays a particular important role in the development and maintenance of legitimacy for the order (a function that became especially important in the face of heated conflicts from the 1980s). It also lays out my analytical framework and research method to determine if the Court is imposing a particular federal model in a decision (or if it is recognizing the order as the process and outcome of negotiation between the subscribers of legitimate models).

Over the next three chapters, I apply this framework and method to argue that a significant proportion of the Court's work as federal arbiter erodes the legitimacy of the federation by imposing particular federal models. At the same time there is a stream of the SCC's federal jurisprudence that shows how it can act as the facilitator of negotiation between the subscribers of legitimate federal models and in so doing manage conflict in a way that generates legitimacy for the federation.

The next chapter discusses the *Secession Reference*. The reference is seen as an exemplar in two ways. First, it substantially adheres to the-ideal type of a decision that recognizes federation as the process and outcome of negotiation between the subscribers of legitimate models, with the Court acting as the facilitator of this negotiation. Second, I conduct an in-depth review of the decision to provide an example for the reader of how I apply my analytical framework for the numerous cases that follow in Chapters Five and Six. Chapter Five then discusses those decisions that fall short of the benchmark set in the *Secession Reference* and adhere more to the ideal-type of a decision that imposes a particular federal model. Chapter Six looks at those decisions that follow the *Secession Reference* and recognize the legitimacy of multiple models and the order as the process and outcome of federation.

Chapter Four

The Exemplar of the *Secession Reference*

Introduction

This chapter discusses one decision, in-depth: the *Secession Reference*.³⁶⁴ It presents this important decision as an exemplar in two senses. First, this reference represents the decision that most closely adheres to the ideal-type of a decision that recognizes and reinforces federation as the process and outcome of negotiation between the subscribers of legitimate federal models (rather than imposing one federal model). Second, through a detailed discussion of the reference, the chapter demonstrates how the remaining 130 decisions are analyzed in the two subsequent chapters.

This chapter is thus integral to the overall argument of the thesis. It provides a detailed example of how I employ the analytical framework introduced in Chapter Three and how I conduct the review of SCC federal jurisprudence. This is important given the high number of decisions covered in subsequent chapters. The chapter also provides a concrete example of how the Court can account for the contested nature of nationality and federation and introduces the potential benefits of this approach for a federal arbiter in a plurinational federation. Setting this benchmark informs the analysis in the next two chapters, which look at those decisions that fail to live up to this ideal and those that substantially follow the lead of the *Secession Reference*.

The chapter begins by discussing the context surrounding the case, highlighting the seriousness of the situation and the fact that the reference dealt with issues that directly challenge the legitimacy of the federal order. I then discuss the way the federation is depicted in the reference, noting the inclusive nature of the Court's understanding of the order. The third section examines the use of legal argument to reinforce the legitimacy of this inclusive depiction. The fourth

³⁶⁴ *Reference re Secession of Quebec* [1998] 2 S.C.R. 217. The reference was a unanimous opinion (authored by 'The Court').

section discusses the outcomes of the case, particularly the Court's rejection of a zero-sum approach and the attempt to ensure each side can find a positive aspect in the opinion. The next section discusses the SCC's self-selected role within the federation and how this draws from and reinforces the broader conflict management approach in the decision.

Following this review, I reflect on why the Court recognized the legitimacy of multiple federal models, promoted the order as the process and outcome of negotiation and adopted a role as the facilitator of this negotiation. I argue the Court took this revolutionary approach because it was seen as the best way to reinforce the legitimacy of the federal order in the face of a severe legitimacy crisis and a direct challenge to the survival of the system with the potential unilateral secession of Québec.

Context

As discussed in the previous chapter, the *Secession Reference* represents the culmination of a tumultuous decade marked by considerable nationalist mobilization in Québec, heated intergovernmental conflict and continuous constitutional negotiation.

Following the patriation of the *Constitution Act, 1982* without the signature of Québec was the disastrous *Quebec Veto Reference*,³⁶⁵ where Québec was told by the SCC that the document was in force regardless of a perceived veto and special status for the province. After this a number of attempts were made to bring the province into the constitutional fold. This principally took the form of the Meech Lake Accord (which included a controversial clause recognizing Québec's distinct status) and the Charlottetown Accord (which included the "Canada Clause" recognizing Québec's distinct status along with aboriginal rights to self-government and the equality of the provinces). Both of these attempts to amend the Constitution ultimately failed, the latter being rejected by a pan-state referendum. Ironically, this process, which started as an attempt to accommodate Québec, actually exacerbated Québec-Canada relations and fuelled separatist sentiment, resulting in a 1995 provincial referendum initiated by the Québec government seeking a mandate to secede.

³⁶⁵ *Reference re Objection by Quebec to a Resolution to Amend the Constitution*, [1982] 2 S.C.R. 793.

With the federalist option winning the referendum by the slimmest of margins (securing only 50.6% of the vote), the central government mobilized to combat separatist forces. A two-pronged strategy was implemented (so-called Plan A and Plan B).³⁶⁶ Plan A was to actively promote a united Canada and stress the benefit to Quebeckers of staying in the federation. Among other things, this took the form of appeasing “soft-nationalists” by recognizing Québec’s distinct status through a motion in the central legislature, committing to recognize a Québec veto over constitutional amendment proposals, and sponsoring pro-Canada activities in the province.³⁶⁷

Plan B was to take a harder line that accentuated the costs associated with separation and making it difficult to achieve. The *Secession Reference* was a central component of Plan B.³⁶⁸ The reference was initiated by the central government and asked the Court three related questions: 1) can Québec legally, under Canadian constitutional law, unilaterally secede from Canada; 2) under international law and the concept of self-determination does Québec have the right to unilaterally secede from Canada; and, 3) in the event of a conflict between domestic and international law, which would take precedent?

The legitimacy of the entire court process was explicitly challenged by Québec. The province argued the move was an attempt to interfere in its domestic politics, constrain its democratic rights and maintained that the SCC was biased against their position.³⁶⁹ Québec even refused to participate in the reference and the SCC had to appoint an *Amicus Curiae* (a friend of the Court) to defend the legitimacy of unilateral secession.³⁷⁰ In addition, 13 parties intervened in the decision, including the provinces of Manitoba and Saskatchewan, the governments of the Yukon and Northwest Territories,

³⁶⁶ On Plan A and B, and the link to the *Secession Reference*, see Drache and Monahan (1999); Gibson (1999); Greschner (1999). On these approaches and their branding see the speech by then Minister of Intergovernmental Affairs for Canada, Stephen Dion, ‘Beyond Plan A and Plan B,’ December 3, 1997; available at <http://www.pco-bcp.gc.ca/aia/index.asp?lang=eng&Page=archive&Sub=speeches-discours&Doc=19971203-eng.htm>

³⁶⁷ On the first two points see the Prime Minister’s Office press release of November 27, 1995; available at <http://www.pearson-shoyama.ca/Archives/8.html>. On the latter, and the ill-fated \$100 million Sponsorship Program that was plagued by issues of corruption and accountability, see Hubbard and Paquet (2007).

³⁶⁸ As was the central government’s response to the decision, the *Clarity Act* passed in 2000.

³⁶⁹ See Schneidermann (1999: 4-5).

³⁷⁰ There is a general consensus that the *Amicus Curiae*, a self-proclaimed separatist, represented Québec’s position faithfully and forcefully (including challenging the legitimacy of the reference itself); see Schneidermann (1999: 6-7).

various aboriginal groups (for example, the Grand Council of the Crees and the Chiefs of Ontario) as well as other advocacy associations. The general thrust of the interventions was against the right of Québec to unilaterally secede. Nevertheless, the dynamic of conflict in the case was between the central government and the Québec government, represented through the *Amicus Curia*.³⁷¹

The reference was marked by a high level of public engagement. The hearing and decision received significant media coverage and in the first few hours of posting the decision online it was accessed over 20,000 times.³⁷² The justices took note of this aspect of the process, and provided an opinion aimed not only at the participants of the case, but also the general public.³⁷³ The text of the opinion is quite long (over 21,000 words) and comprises three key sections. The first deals with the Court's role and its ability to hear the case (paragraphs 3-31). The second focuses on the identification and definition of four unwritten principles that underpin the Constitution and are applicable to the issues in the case (these being federalism, democracy, constitutionalism and the rule of law, and minority rights) (paragraphs 32-82). The third section applies these principles to the issue, which gives rise to the key opinions of the case (paragraphs 83-147). Despite the extraordinary nature of the issue (and the recourse to unwritten principles) the reference has a general structure similar to other federal decisions: it interprets the Constitution and applies that interpretation to a question of law or fact to render its opinion.

The Court's opinion rejected the *legal* right of Québec to unilaterally secede, under either Canadian or international law. However, Québec was given solace in the ruling. If a clear majority of Quebecers voted for secession in a referendum with a clear question, a duty to negotiate in good faith with Québec would be placed upon all levels of government. Following the decision, both the

³⁷¹ The SCC indicating as much by reserving its questions mainly for the central government and the *Amicus Curia* in the oral hearing. see Schneidermann (1999: 7).

³⁷² Gaudreault-DesBiens (1999: 793).

³⁷³ See McHugh (2000, particularly at 446, 459); Des Rosier (2000: 182). See also Tully (2000a: 3) where the decision is presented as 'an exercise in public reason[ing].' As Justice Binnie says of the intense public interest and reception of the decision by the public: 'My feeling then and now is that, although the judges are aware of this environment outside the courtroom, the focus is very concentrated on the issue and sense of responsibility to get it right regardless of how it is to be perceived. Personally, I was very pleasantly surprised that it was so well received by all sides ... It seemed to me it was a hugely important function for the court to perform - to say that it's not our decision; it's the decision of the people of Canada,' Makin (2011).

central government and Québec claimed victory, the former stressing the legal aspect of the ruling and the need for clarity in any future referendums, the latter stressing the duty to negotiate following a referendum.³⁷⁴

Because of this Solomonic approach (seen by many as a deft political move) and the issues raised by the reference, it is often heralded as the most important decision the Court has ever made.³⁷⁵ What was at stake in the case was nothing less than the dissolution of the federation initiated by Québec. In this way, the case resonates with broader international issues: the unity of a state being challenged by a national minority group claiming a right to unilaterally secede, while the central government fights this endeavour. The reference thus forced the Court to grapple with issues that directly challenge the legitimacy of the constitutional and federal order (including the role of the Courts within the system).³⁷⁶ This extraordinary element no doubt led the Court to embrace a revolutionary turn in how it conceives of the federation and the constitution.³⁷⁷ Many have noted an important part of this turn, focusing on the rejection of positivism in the opinion and the Court's recourse to unwritten constitutional principles to deal with the extraordinary legitimacy crisis.³⁷⁸

While I discuss these elements below, my focus goes beyond the direct political implications or the novel legal reasoning of the decision. My analysis instead focuses on uncovering the theory of federation and judicial review that underpin the decision approach and outcome, while reflecting on the implications this can have for the legitimacy of the order. Doing this exemplifies how the Court can fulfill its role as federal arbiter in a way that recognizes federation as the process and outcome of negotiation between the subscribers of legitimate federal models and act as the facilitator of this negotiation.

³⁷⁴ For an interesting example of this see the August 25, 1999, open letter from Canada's then Minister of Intergovernmental Affairs, Stephen Dion, to Lucien Bouchard, then Premier of Québec, on why the central government won the case; available at: <http://www.pco-bcp.gc.ca/aia/index.asp?lang=eng&Page=archive&Sub=letters-lettres&Doc=19980825-eng.htm>.

³⁷⁵ On the Court mimicking King Solomon's judgement in the "Mothers' Case" (though, having a rather negative interpretation of this) see Mandel (1999).

³⁷⁶ See Tierney (2003: 170-173).

³⁷⁷ See (Tully 2000a: 3-7); Schertzer (2008: 119).

³⁷⁸ See Leclair (1999); Walters (1999: 384); Choudhry and Howse (2000: 150); Choudhry and Gaudreault-DesBiens (2007: 191-192); Choudhry (2008: 215-228).

Depiction of the Federation

The first step in my analysis is to look at how the Court depicts the federation in the *Secession Reference*. How federation is depicted is important. It signals the Court's understanding of the order that drives the outcome, while also playing an important role in legitimizing (or delegitimizing) the various federal models.

As previously discussed, the federation is depicted in relation to a number of characteristics, such as: the balance and distribution of power, the nature of the constitutional and federal order, the relationship between the levels of government, the nature of central institutions and the national composition of the state, among other things. These different characteristics represent "points of conflict" for the subscribers of the various federal models. Each model presents a different perspective on the actual and ideal nature of the federation through these points. Accordingly, how the federation is depicted by the Court in relation to these points, plays into the extent to which it either imposes a particular federal model or recognizes the legitimacy of multiple models and the order as the process and outcome of negotiation.

In the *Secession Reference*, we see the Court depict the federation in a way that recognizes the legitimacy of multiple models and the order as the process and outcome of negotiation in two related ways. First, it provides a *balanced depiction* of the order. Second, it *explicitly* highlights that federation is a dynamic process of negotiation.

With regard to the first approach, the Court's depiction of the federation is balanced to the extent it highlights how aspects of each of the three main federal models find support in the institutional and political structures of federation.³⁷⁹

For example, the pan-Canadian model finds support in the Court's presentation of the nature of the federation and the role of the central government: 'Canada as a whole is...a democratic community in which citizens construct and achieve goals on a national scale through a

³⁷⁹ Schertzer (2008: 114-15).

federal government.³⁸⁰ This point is accentuated by the Court's depiction of the Constitution as an overlapping consensus that 'was an act of nation-building.'³⁸¹ In line with this, Canada operates on the premise of 'constitutional supremacy'³⁸² and 'the *basic structure of our Constitution*...contemplates the existence of certain political institutions, including freely elected legislative bodies at the federal and provincial level.'³⁸³ This combination of statements places federation and the Constitution above politics – as a consensus that takes place among one nation, which gives rise to the different levels of government, an understanding of the constitutional and federal order that closely aligns with the trimming approach and pan-Canadian model.

At the same time, the Court's depiction of the federal and constitutional order recognizes the legitimacy of the provincial equality model. While reflecting on the principle of federalism, the SCC consistently discusses the provinces as a block and as one of two levels of government, implying equality among them and with the central government.³⁸⁴ Also, the idea of federation as a compact among equal provinces is a strong undercurrent of the decision. The Court argues that without federation 'neither the agreement of the delegates from Canada East nor that of the delegates from the maritime colonies could have been obtained.'³⁸⁵ The point of federation, in this view, is thus not to 'weld the Provinces into one, nor to subordinate Provincial Governments to a central authority, but to establish a central government in which these Provinces should be represented, entrusted with exclusive authority only in affairs in which they had a common interest. Subject to this each Province was to retain its independence and autonomy and to be directly under the Crown as its head.'³⁸⁶ This clearly represents an understanding of the federal and constitutional order that recognizes provinces have considerable autonomy as equal jurisdictions to pursue their own and

³⁸⁰ *Secession Reference* [1998] at 66.

³⁸¹ *Secession Reference* [1998] at 43.

³⁸² *Secession Reference* [1998] at 72.

³⁸³ *Secession Reference* [1998] at 62.

³⁸⁴ See *Secession Reference* [1998] at 55-60, for example (at 56) the Court says: 'In a federal system of government such as ours, political power is shared by two orders of government: the federal government on the one hand, and the provinces on the other. Each is assigned respective spheres of jurisdiction by the *Constitution Act, 1867*.'

³⁸⁵ *Secession Reference* [1998] at 37.

³⁸⁶ *Secession Reference* [1998] at 58, citing *Re the Initiative and Referendum Act*, [1919] A.C. 935 [P.C.] at 942.

collective self-interests (and thus draws from and reinforces that view that federation is about facilitating the trading of interests).

There is also considerable support for an understanding of the federation and Constitution in line with the multinational model. The Court clearly states that federation ‘facilitates the pursuit of collective goals by *cultural and linguistic minorities* which form the majority within a particular province. This is the case in Québec, where the majority of the population is French-speaking, and which possesses a *distinct culture*.³⁸⁷ Despite the above comments on the nature of federation as a compact among equal provinces, the SCC also says that: ‘the social and demographic reality of Québec explains the existence of the province of Québec as a political unit and indeed, was one of the essential reasons for establishing a federal structure for the Canadian union in 1867.’³⁸⁸ Federation, in this view, is ‘a legal response to the underlying political and cultural realities that existed at Confederation and continue to exist today.’³⁸⁹ The adoption of “constitutional supremacy” cited above,³⁹⁰ when combined with comments saying the Constitution is a tool to protect national minorities,³⁹¹ thus also sustains a view of the federal and constitutional order as a framework segregating various nations in line with the multinational model.

These seemingly irreconcilable positions are not simply incoherence on the part of the Court; rather, when the decision is read carefully it is clear that support for one model is qualified in turn by important aspects from a competing model. For example, when weight is given to the idea of Canada as a mere quasi-federation (in line with a centralist pan-Canadian view) it is qualified by noting the importance of provincial autonomy and federation as a compact among provinces; this is then further qualified by highlighting provincial autonomy is used to protect distinct cultural groups, their existence being the driving force behind confederation.³⁹² This balancing of perspectives is indicative of the respect the SCC affords to the complexity of the issues at hand and its task of

³⁸⁷ *Secession Reference* [1998] at 59 (emphasis added).

³⁸⁸ *Secession Reference* [1998] at 59.

³⁸⁹ *Secession Reference* [1998] at 43.

³⁹⁰ *Secession Reference* [1998] at 72.

³⁹¹ *Secession Reference* [1998] at 79-82.

³⁹² See *Secession Reference* [1998] at 55-60.

interpreting the Constitution in the face of competing perspectives on it and the federation.³⁹³ The apparent support for each model is thus easier to grasp: it is about rejecting a singular perspective and seeking to embrace the complexity of the way the Constitution and federation are understood by key actors.³⁹⁴

The Court's recognition of the complexity of the issues and the federal and constitutional order plays into the second way it depicts the federation as the process and outcome of negotiation.

We see the Court presenting such a view of the federation in the identification, definition and discussion of the relationship between the four unwritten principles at the heart of the decision (federalism, democracy, constitutionalism and the rule of law, and minority rights).³⁹⁵ The purpose of the four unwritten principles is made clear by the Court. They are a vital part of the 'global system of rules and principles which govern the exercise of constitutional authority' in Canada; they act as the architecture of the Constitution addressing gaps and abeyances in the text, thereby providing the base normative order as the 'fundamental and organizing principles of the Constitution.'³⁹⁶ The principles are seen to emerge from political conflict over the federation and Constitution, which produce patterns of adherence³⁹⁷ – conflict that has pushed the governing institutions (like federation) to adapt to changing social and political values.³⁹⁸ In other words, we can see the Court accepting that the normative order of federation is brought about through the custom and process of actors who hold competing understandings of Canada reaching agreements (and continuing to disagree). Accordingly, the principles carry a normative force: they *may* give rise to substantive legal obligations and bind the actions of individuals, governments and courts.³⁹⁹ They are also necessarily

³⁹³ *Secession Reference* [1998] at 1; Gaudreault-DesBiens (1999: 794-5); Des Rosiers (2000: 182-3).

³⁹⁴ See Gaudreault-DesBiens (1999: 794-5).

³⁹⁵ Much has been written about the use of unwritten principles in the *Secession Reference*, both favourable and critical; for an overview see Hogg (2009: 418-423); Leclair (2002); McLachlin (2006). My focus here attempts to go beyond narrower legal debate to engage with wider issues of constitutional and federal theory, as have a few notable pieces such as Tully (2000a); Choudhry and Howse (2000); Choudhry (2008); Tierney (2003; 2009).

³⁹⁶ *Secession Reference* [1998] at 32, 49-52.

³⁹⁷ *Secession Reference* [1998] at 48.

³⁹⁸ *Secession Reference* [1998] at 33.

³⁹⁹ *Secession Reference* [1998] at 54, 71-72; Walters (1999: 385)

enforced in the legal, political and social forums⁴⁰⁰ – something that helps to show how the Constitution and federation is conceived in this case as an intersubjective normative process.⁴⁰¹

The Court's view of federation as the process and outcome of negotiation rests largely on the link it provides between democracy and federation, with federation facilitating democracy and *vice versa*.⁴⁰² In presenting democracy as a continual process of discussion, compromise and negotiation among actors holding competing perspectives, so it presents federation in the same light.⁴⁰³ Federation in this view is not static – it is not a straitjacket – but rather, is a process and outcome of contestation and it is legitimate to the extent that it remains a democratic system of continual deliberation.⁴⁰⁴ It is in the relationship between democracy and federation, then, that the Court can coherently see federation to incorporate the competing models of federation (viewed as contingent perspectives, with federation representing the process and outcome of contestation between the subscribers of these contingent perspectives).⁴⁰⁵

To say these models are contingent does not mean they lack legitimacy. It is just that the interaction between federation, democracy and constitutionalism gives rise to the view of them as contingent, while showing that federation is the process and outcome of mediating the tension between these contingent views.⁴⁰⁶ This point, taken in conjunction with the Court's presentation of the genealogy and purpose of the principles, is further evidenced by the Court's opinion that the principles are inter-dependent and so no one can trump the others.⁴⁰⁷ This is an important aspect of the decision, because each principle is privileged by different constituencies in this case (and within

⁴⁰⁰ See *Secession Reference* [1998] at 54, 98-103; Walters (1999: 389-390)

⁴⁰¹ *Secession Reference* [1998] at 52, 58, 68, 88, 150; (Tully 2000a).

⁴⁰² *Secession Reference* [1998] at 58-59, 65, 66, 74-76; Schertzer (2008: 115).

⁴⁰³ See *Secession Reference* [1998] at 68.

⁴⁰⁴ See *Secession Reference* [1998] at 150, 68; Tully (2000a: 21-31); Schertzer (2008: 115-116).

⁴⁰⁵ On the Court seeing the competing federal models, or narratives, as contingent, see Gaudreault-DesBiens (1999: 836); *Secession Reference* [1998] at 66.

⁴⁰⁶ *Secession Reference* [1998] at 75-78 and particularly (at 66) where the Court says 'the relationship between democracy and federalism means, for example, that in Canada there may be different and equally legitimate majorities in different provinces and territories and at the federal level. No one majority is more or less "legitimate" than the others as an expression of democratic opinion.' It goes on to say (at 68) that 'at both the federal and provincial level, by its very nature, the need to build majorities necessitates compromise, negotiation, and deliberation. No one has a monopoly on truth....'

⁴⁰⁷ *Secession Reference* [1998] at 49.

the federal models). Accordingly, to ensure that the Constitution and federation remain legitimate, no particular principle can be seen to be privileged.⁴⁰⁸

This view of federation, and the reconciliation of competing perspectives on it, is also closely linked to the Court's understanding of the national character of Canada. In the reference, it is clear that the Court recognizes the plurinational character of the state. Just as the competing perspectives are all legitimate, so too is their basis in differing self-selected identities.⁴⁰⁹ In other words, each conception put forth by the competing federal models (i.e. Canada as unination or multinational) is legitimate, and in this way Canada is plurinational. As the SCC states: 'in Canada there may be different and equally legitimate majorities in different provinces and territories and at the federal level...the function of federalism is to enable citizens to participate concurrently in different collectivities and to pursue goals at both a provincial and a federal level.'⁴¹⁰ So, a picture of the state as comprising various sets of key political actors is painted, with each holding their own contingent perspectives on nationality and federation.⁴¹¹

Given the seemingly strong support in the decision for a depiction of Canada as a *multinational* (rather than plurinational) state,⁴¹² and the implications such a view would have for my reading of the *Secession Reference*, it is prudent to briefly address this interpretation of the decision. Interpreting the decision as supporting a multinational depiction of Canada rests on the Court's presentation of Québec as a distinct culture⁴¹³ and the possibility that the Québécois even form a people.⁴¹⁴ What matters, though, is not the presence of this support for the multinational model, but *how it is placed relative to competing conceptions of nationality* in line with the other

⁴⁰⁸ On the reference as a battle between democracy *qua* Québec and constitutionalism *qua* Canada, see Tierney (2003: 178); McRoberts (1999).

⁴⁰⁹ *Secession Reference* [1998] at 66, 68 75-78.

⁴¹⁰ *Secession Reference* [1998] at 66.

⁴¹¹ See: *Secession Reference* [1998] at 92, 98, 100, 101, 110, 153; Joffe (1999); Walters (1999: 379).

⁴¹² For examples of analysis along these lines, see Walters (1999: 381); Turp (1999); Joffe (1999); Tierney (2003).

⁴¹³ *Secession Reference* [1998] at 59.

⁴¹⁴ *Secession Reference* [1998] at 125.

federal models. Since Canada is plurinational, and the understanding of Canada as multinational is one of the key perspectives on nationality, the recognition of this view in the reference is legitimate.

The point, then, is that the Court does not only afford the multinational understanding of Canada legitimacy. It recognizes the plurinational character of Canada in the relationship it sees between the competing conceptions of nationality. As shown above, the Court balances each perspective and model off one another and shows how each is represented in the federal and constitutional order. Thus, despite the support for the multinational model, acceptance of plurinationality helps to explain the Court's avoidance of the controversial term "dualism" and reluctance to declare the Québécois "a people" under international law.⁴¹⁵ In other words, the Court does recognize a multinational Canada, but, it identifies this *as one of the many views on nationality* that legitimately exist in Canada. The result is that the *Secession Reference* forces both Québécois and the rest of Canada to question the validity of their particular national narratives as natural, universal and true.⁴¹⁶

Thinking about the overall depiction of the federation in the reference shows us how the Court draws from and reinforces elements of each of the three main federal models. This balanced depiction is coherent because the Court also explicitly presents the federation as the process and outcome of negotiation between the subscribers of these legitimate federal models. The *Secession Reference* thus rejects an imposing depiction of the federation, instead putting forth an understanding of the order as a dynamic and free association of non-domination.

Use of Legal Argument

This section looks at how accepted forms of legal argument are used in the reference to reinforce the legitimacy of the above depiction of the federation.⁴¹⁷ As explained in Chapter Three,

⁴¹⁵ See Ryan (2000) on the absence of the term.

⁴¹⁶ Gaudreault-DesBiens (1999: 837-838).

⁴¹⁷ As noted above, the Court's approach to constitutional interpretation in the *Secession Reference* has been the focus of significant analysis, with most noting the reliance on unwritten principles marking a departure from a broadly positivist approach towards a more progressive approach, see Choudhry and Howse (2000: 154-157); Choudhry (2008: 216-218); Tierney (2003: 182); Leclair (1999; 2003: 449); Walters (1999: 384); Gaudreault-DesBiens (1999: 825). Not everyone welcomes this turn, see Hogg (1999: 2-3; 2007: 73-74, 90-93).

one of the central ways the Court legitimizes its depiction of the federal order is to employ the various constitutional modalities to present its perspective as the law. In this way, when it imposes a particular model or recognizes the legitimacy of multiple models, the Court says that this understanding simply reflects the nature of federation as dictated by the framers' intent or the text of the constitution or legal doctrine, and so on.

In the *Secession Reference*, each of the seven modalities discussed in Chapter Three are employed to support the depiction of the federation.⁴¹⁸ Among these modes of interpretation, the structural, doctrinal and textual approaches are used most prominently. Moreover, the Court even explicitly says it uses the doctrinal, textual and historical approaches to interpret the (unwritten aspects of the) Constitution in the decision.⁴¹⁹ However, it is not so much the use of particular approaches (or their frequency) that is important for my purpose. As previously argued (and demonstrated below), any modality of interpretation can be shifted to support a particular depiction of the federation. What is really important, then, is *how* these modalities are employed to reinforce the nature of federation. Looking at this aspect of the decision is important because it helps us better understand the way imposing or recognizing depictions (and the related decision outcomes) are legitimized, and thus how decisions can affect the legitimacy of the federation.

In the *Secession Reference*, legal argument is used to reinforce the federal depiction in two related ways. First, constitutional modalities are employed to reinforce the legitimacy of each of the three federal models. Second, accepted forms of legal argument are used to reinforce the legitimacy

Despite the correct assessment that the decision was a remarkable example of anti-positivism (in particular, the understanding of the Constitution and federation as a contested normative order), there were aspects of positivism that should not be overlooked. For example, the Court relied on a positivist approach to buttress the primary legal opinion that secession (via unilateral amendment to the Constitution) by a province is illegal; it also employed a decidedly positivist approach in interpreting and applying international law in the decision, with international statutes having pride of place); see *Secession Reference* [1998] at 84, 109-139; Walters (1999: 376).

⁴¹⁸ These seven key modes of legal argument and constitutional interpretation are the historical, textual, doctrinal, structural, prudential, ethical and progressive modalities. For detailed information on how these approaches are employed to reinforce the depiction of the federation, please see the review framework for the *Secession Reference* in appendix one.

⁴¹⁹ *Secession Reference* [1998] at 32; see also (Tully 2000a: 11-12).

of the order as the process and outcome of negotiation between the subscribers of these legitimate federal models.

With regard to the first approach, we see the Court explicitly reinforcing the pan-Canadian model, for example, by saying the federation is a centralized order representing a pan-state nation *because* ‘the vision of those who brought about Confederation was to create a unified country, not a loose alliance of autonomous provinces.’⁴²⁰ In addition to this historical support for the pan-Canadian model, we also see the Court say that the text of the Constitution reinforces the validity of this model: ‘on paper, the federal government retained sweeping powers which threatened to undermine the autonomy of the provinces.’⁴²¹

At the same time, we see the Court qualifying this support for the pan-Canadian model by saying, in the same paragraph, that the constitutional structure of Canada as a federation protects provincial autonomy and has led to the centre’s sweeping powers (like the ability to disallow provincial legislation) falling into disuse.⁴²² This support for the provincial equality model through the structural modality is also employed to present federation as decentralized order.⁴²³ And, citing relevant precedent to support its view, the Court says it is an order that came about through a compact between equal provinces.⁴²⁴

⁴²⁰ *Secession Reference* [1998] at 96.

⁴²¹ *Secession Reference* [1998] at 55.

⁴²² See *Secession Reference* [1998] at 55: ‘Our political and constitutional practice has adhered to an underlying principle of federalism, and has interpreted the written provisions of the Constitution in this light. For example, although the federal power of disallowance was included in the *Constitution Act, 1867*, the underlying principle of federalism triumphed early. Many constitutional scholars contend that the federal power of disallowance has been abandoned.’

⁴²³ See *Secession Reference* [1998] at 58: ‘The principle of federalism recognizes the diversity of the component parts of Confederation, and the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction. The federal structure of our country also facilitates democratic participation by distributing power to the government thought to be most suited to achieving the particular societal objective having regard to this diversity.’

⁴²⁴ See *Secession Reference* [1998] at 58: ‘The scheme of the *Constitution Act, 1867*, it was said in *Re the Initiative and Referendum Act*, [1919] A.C. 935 (P.C.), at p. 942, was not to weld the Provinces into one, nor to subordinate Provincial Governments to a central authority, but to establish a central government in which these Provinces should be represented, entrusted with exclusive authority only in affairs in which they had a common interest. Subject to this each Province was to retain its independence and autonomy and to be directly under the Crown as its head.’ The Court goes on to cite two additional cases in this paragraph to support this view.

Yet, we also see the Court resorting to the intentions of the drafters to paint the federation as something more than an association between equal territorial units. Following a lengthy citation of one of the key framers (George-Etienne Cartier), the Court summarizes his intentions as supporting the view that ‘the federal-provincial division of powers was a legal recognition of the diversity that existed among the initial members of Confederation, and manifested a concern to accommodate that diversity within a single nation by granting significant powers to provincial governments.’⁴²⁵ This clear support for the multinational model’s understanding of federation as a compact between founding nations is further buttressed by the Court highlighting that the very structure of federation supports a view of Québec as a nationally-based province.⁴²⁶ Moreover, the multinational model’s support for asymmetry between provinces is reinforced by saying that the structure of federation allows provinces ‘to develop their societies’ and that doctrine supports the view that ‘differences between provinces "are a rational part of the political reality in the federal process.”’⁴²⁷

This demonstrates one of the ways the Court can coherently balance the competing federal models in its depiction of the federal order. Through the various interpretive approaches, the Court finds support for each model in the constitutional law. This illuminates something about the federal models and the interpretive approaches themselves. With regard to the federal models, it shows how each one is legitimate in the Court’s eyes. Using the various modes of analysis brings out that each federal model finds expression in Canada’s constitutional order. With regard to the forms of legal analysis, the above demonstrates how a modality can be shifted to support any model. We see

⁴²⁵ *Secession Reference* [1998] at 43. The Court also (at 82) resorts to the historical approach (in conjunction with the doctrinal modality) to say that it was the intent of the framers of the *Constitution Act (1982)* to protect the rights of aboriginal peoples with s. 35 (a view that reinforces the purpose of federation in line with the multinational model).

⁴²⁶ See *Secession Reference* [1998] at 59: ‘The principle of federalism facilitates the pursuit of collective goals by cultural and linguistic minorities which form the majority within a particular province. This is the case in Québec, where the majority of the population is French-speaking, and which possesses a distinct culture. This is not merely the result of chance. The social and demographic reality of Québec explains the existence of the province of Québec as a political unit and indeed, was one of the essential reasons for establishing a federal structure for the Canadian union in 1867.’

⁴²⁷ *Secession Reference* [1998] at 58.

above that the historical approach was used to present the framers' intent as creating a centralized, unified federation *and* one that devolves considerable autonomy to minority nations to protect their diversity. We see how the structure of the federation supports both an understanding of federation as a compact between equal, territorial provinces *and* a compact between founding nations where provinces can represent national groups and exercise their authority in an asymmetrical manner. This raises the point that we need to closely scrutinize decisions where the Court imposes a particular federal model by saying the constitutional law (interpreted through a particular modality like doctrine) dictates a particular understanding of the federation and an associated outcome.

With regard to the second way legal argument is used to explicitly reinforce the dynamic depiction of the federation, we see this happening with the Court highlighting that the 'federal principle, inherent in the structure of [Canada's] constitutional arrangements' translates into the view that 'federalism is a political and legal response to underlying social and political realities.'⁴²⁸ In other words, the very structure of federation reinforces a view of the order as the outcome of negotiation and conflict about how 'social and political realities' are represented. Even more explicitly, the Court links the structure of the constitutional order as a democracy and a federation to relevant doctrine to say the order 'necessitates compromise, negotiation, and deliberation.'⁴²⁹ The Court goes on to anchor this view of the federation in the text of the Constitution: 'The *Constitution Act, 1982* gives expression to this principle, by conferring a right to initiate constitutional change on each participant in Confederation.'⁴³⁰

This last line also indicates how the Court employs modalities to reinforce and justify a decision outcome. The Court's ruling that there is a duty to negotiate with a party that initiates a constitutional amendment proposal, which as I discuss in a moment reinforces the dynamic model,

⁴²⁸ *Secession Reference* [1998] at 56-57.

⁴²⁹ *Secession Reference* [1998] at 68.

⁴³⁰ *Secession Reference* [1998] at 69. The Court is referring here to s. 46(1) of the *Constitution Act (1982)*, which allows both the central and provincial governments to initiate negotiations over a constitutional amendment.

is reached in part by noting this is mandated by the text of the Constitution.⁴³¹ At the same time, this finding of a duty to negotiate is clearly justified by the Court through prudential reasoning:

For both theoretical *and practical reasons* ... we hold that Quebec could not purport to invoke a right of self-determination such as to dictate the terms of a proposed secession to the other parties: that would not be a negotiation at all. As well, it would be naive to expect that the substantive goal of secession could readily be distinguished from the practical details of secession. The devil would be in the details ... No negotiations could be effective if their ultimate outcome, secession, is cast as an absolute legal entitlement based upon an obligation to give effect to that act of secession in the Constitution. Such a foregone conclusion would actually undermine the obligation to negotiate and render it hollow.⁴³²

This is clearly a decision outcome reached through a consideration of what is wise policy.⁴³³

We can thus also see how the various constitutional modalities are employed to reinforce the dynamic federal model. These examples show how the Court can move past the confines of the three federal models and towards a more inclusive understanding of the order. In other words, the above shows how an understanding of federation as the process and outcome of negotiation can find expression in the constitutional law. And, this in turn, reinforces the legitimacy of that understanding of what federation is and ought to be.

Outcome

I turn now to focus on the outcome of the case, which is an important aspect of the decision recognizing and reinforcing the legitimacy of federation as the process and outcome of negotiation between the subscribers of legitimate federal models. The outcome of any federal case is important because it has practical, material and political effects. The Court's judgement influences the distribution of power and resources, a party's standing in federation and the development of the order more generally. Of course, the depiction of the federation and the outcome are linked: how

⁴³¹ See *Secession Reference* [1998] at 69: 'The *Constitution Act, 1982* gives expression to this principle, by conferring a right to initiate constitutional change on each participant in Confederation. In our view, the existence of this right 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.'

⁴³² *Secession Reference* [1998] at 91 (emphasis added).

⁴³³ At the same time, there is a need to divorce this aspect of reaching the decision (its prudential element) from a view that sees the *entire* judgment as an act of prudential reasoning. While prudential considerations clearly inform the Court's overall approach (a line of analysis that is clearly identifiable in the literature, see Schertzer 2008: 118-119; Choudhry and Howse 2000: 164-168; Hogg 2007: 96-100; Rocher and Verrelli 2003: 211; Tierney 2003: 174-175, 196), this does not mean the Court does not make its decision (in the main) through other forms of constitutional interpretation.

the constitutional and federal order is understood drives the way the Court goes about disposing of the appeal. Moreover, it is the combination of the two components of a decision that allow us to understand the overall extent to which it imposes a particular federal model, or not.

As explained previously, I analyze two elements of a decision outcome: who wins the case and how they win; and, its effect on the federation more generally and the extent it reinforces any particular federal model. In the *Secession Reference*, these two elements display remarkable adherence to the ideal-type of a decision that seeks to generate legitimacy for the conflict management process and the federation more generally by reinforcing it as the process and outcome of negotiation between the subscribers of legitimate perspectives.

As the above implies, the *Secession Reference* is a complex case that deals with many issues. Accordingly, there are a number of outcomes that stem from the decision. I have already indicated what the main ones are above, but it is worth summarizing the four key ones again for clarity.⁴³⁴ First, is the opinion that it is technically illegal for Québec to unilaterally secede.⁴³⁵ Second, is the constitutional duty placed on all levels of government to negotiate in good faith with a government that wants to amend the Constitution (i.e. secede).⁴³⁶ Third, is the declaration that any reference initiating negotiations related to secession needs to have a clear question, with a clear result.⁴³⁷ Fourth, is the opinion that international law does not sanction Québec's unilateral secession.⁴³⁸ When speaking about the reference, it is thus proper to talk of its outcome as the sum of these four points. Focusing on only one of them fails to comprehend the approach the Court took to resolving the dispute.

Looking at these four points in tandem allows us to see that the Court handed each jurisdiction a positive outcome, while mitigating negative outcomes. For example, deciding a province cannot legally secede from Canada unilaterally (under either Canadian or international law)

⁴³⁴ In addition to these four outcomes there is also the ruling that the Court has jurisdiction to hear the case and that the questions are justiciable, which is discussed in the next section.

⁴³⁵ See *Secession Reference* [1998] at 104, 106-107, 149.

⁴³⁶ See *Secession Reference* [1998] at 84, 88, 90-92, 96, 150.

⁴³⁷ See *Secession Reference* [1998] at 87, 100, 148.

⁴³⁸ See *Secession Reference* [1998] at 111, 130, 137, 154.

is clearly a positive outcome for the central government (as is the ruling that only a clear reference question with a clear majority can trigger secession negotiations). These outcomes meet the objectives of the centre going into the case: to erect roadblocks for the secessionist movement.⁴³⁹ At the same time, the ruling that there is a constitutional duty to negotiate *in good faith* with a province seeking to secede also hands Québec a significantly positive outcome. This aspect of the opinion lends the secessionist movement legitimacy, pushing the other parties in the federation to recognize the validity of Québec's position in the face of a positive vote to secede (rather than simply being intransigent). The legitimacy the Court affords Québec's position in this regard also helps to mitigate the negative outcome for it in the form of the illegality of unilateral secession and the clarity mandate (i.e. while Québec cannot unilaterally secede, if its people declare they want to leave the federation the other members of the order have to work to make that a reality in good faith). Moreover, the Court mitigates the negative aspects of the ruling for Québec by saying that, while *not granting legality* to the process, ultimately, the determinative element of any secession is if it is effective on a practical and political level.⁴⁴⁰ In addition, aboriginal groups are handed a positive in the ruling for a duty to negotiate, with the Court clearly saying that their interests need to be represented and accounted for in any negotiations that affect their lands and rights.⁴⁴¹ Similarly, all other provinces also receive a positive element in the decision with the ruling that one of them alone could not legally alter or destroy the federal order and with the implication that any negotiations over secession would have all provinces represented at the table.⁴⁴²

⁴³⁹ On how the central government employed the roadblock of the clarity mandate via the *Clarity Act*, see Rocher and Verelli (2003).

⁴⁴⁰ See *Secession Reference* [1998] at 106: 'Although under the Constitution there is no right to pursue secession unilaterally, that is secession without principled negotiation, this does not rule out the possibility of an unconstitutional declaration of secession leading to a *de facto* secession. The ultimate success of such a secession would be dependent on effective control of a territory and recognition by the international community.'

⁴⁴¹ See *Secession Reference* [1998] at 139: 'a clear democratic expression of support for secession would lead under the Constitution to negotiations in which aboriginal interests would be taken into account.' On this aspect of the decision, see Joffe (1999); Tierney (2003: 181-2, 188-89).

⁴⁴² The Court seems to take for granted that the provinces would participate in the negotiations, though it does remain somewhat ambiguous on the point; see *Secession Reference* [1998] at 88: 'The clear repudiation by the people of Quebec of the existing constitutional order would confer legitimacy on demands for secession, and place an obligation on the other provinces and the federal government to acknowledge and

These outcomes also clearly have broader effects that reinforce the legitimacy of each of the main federal models. The ruling that under international law a sub-state unit cannot secede (and that Québec is not technically “a people” under international law) reinforces the superiority of the central government and a view of the provinces as subordinate territorial units in line with the pan-Canadian model. At the same time, giving all provinces a seat at the table in any negotiations over secession reinforces their status as equals in line with the provincial equality model. Finally, ruling that there is a duty to negotiate with Québec, and the inclusion of aboriginal interests in the process, reinforces a view of the federation as comprising and protecting national minorities.

What we see in the sum of the reference’s outcomes, then, is a concerted effort by the Court to balance positives and negatives off one another for each jurisdiction and for the supporters of the various federal models. In other words, the Court rejects a zero-sum approach to resolving the dispute. Each jurisdiction can point to a positive outcome, while the negative outcomes are also generally mitigated in some way. At the same time, the sum of the outcomes reinforce that federation has developed, and will continue to develop, in a way that reflects elements of each federal model. The decision thus generates legitimacy for each model, while highlighting that there is a place for its subscribers in the federation by showing that the order has and will continue to develop in line with their perspective.

Now, equally important is how the outcomes also explicitly reinforce the legitimacy of federation as the process and outcome of negotiation. I focus here on the duty to negotiate element of the decision, discussing the other elements in the next section (as they tell us a great deal about the Court’s adopted role in the reference). The opinion that there is a duty upon all parties to negotiate in good faith if Québec expresses a clear desire to secede reinforces three key elements of the dynamic federal model.

respect that expression of democratic will *by entering into negotiations.*’ See also at 90: ‘One of those propositions is that there would be a *legal obligation on the other provinces and federal government to accede to the secession of a province, subject only to negotiation of the logistical details of secession,*’ and (at 92) ‘Negotiations would be necessary to address the interests of the federal government, of Quebec *and the other provinces,* and other participants, as well as the rights of all Canadians both within and outside Quebec’ (emphasis added).

First, it reinforces that federation is – and its legitimacy rests upon – a process of negotiation. In other words, it reinforces that the Constitution is not, and cannot be, a ‘straitjacket.’⁴⁴³ The decision solidifies the idea that the principles underpinning the constitutional order mandate federation be a process that responds to conflicts over the order through dialogue and negotiation between those in conflict.⁴⁴⁴ The perceived necessity of negotiation rests on the recognition that there are a number of key social actors that hold competing perspectives on what Canada is and ought to be.⁴⁴⁵ Highlighting this contested nature to federation forces both Québécois and the rest of Canada to question the validity of their particular national narratives as natural, universal and true.⁴⁴⁶

Related to this, the outcome reinforces an equality of status between the subscribers of the various federal models. Mandating that the duty to negotiate falls upon all within the federation (that each jurisdiction and their interests must be involved in the process of negotiation and that the position of Québec with regard to its place in the order and its right to leave it is valid) reinforces both the self-perceived status of each group and the validity of their perspective. Moreover, holding that negotiations must be conducted in good faith – that they must be free and fair – buttresses the point that no one perspective can trump the others (i.e. that each model and perspective is legitimate).

Finally, by highlighting that negotiations will be difficult and disagreement is a reasonable part of the process,⁴⁴⁷ the Court reinforces federation as a continual process. This aspect of the outcome strengthens the view that federation cannot solve conflict, but rather must work to

⁴⁴³ *Secession Reference* [1998] at 150.

⁴⁴⁴ See *Secession Reference* [1998] at 88: ‘The federalism principle, in conjunction with the democratic principle, dictates that the clear repudiation of the existing constitutional order and the clear expression of the desire to pursue secession by the population of a province would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire.’

⁴⁴⁵ See *Secession Reference* [1998] at 66, and the analysis of this component of the decision above.

⁴⁴⁶ Gaudreault-DesBiens (1999: 837-838).

⁴⁴⁷ See *Secession Reference* [1998] at 96-97, for example: ‘No one can predict the course that such negotiations might take. The possibility that they might not lead to an agreement amongst the parties must be recognized.’

manage it over time. It helps to establish that conflict over the order and the process of dealing with it is indeterminate.

Role of the Court

The Court's self-selected role in the *Secession Reference* is an integral part of the decision recognizing and reinforcing federation as the process and outcome of negotiation between the subscribers of legitimate federal models. As argued earlier, there is a link between a Court's understanding of the constitutional and federal order and the role it adopts. Accordingly, there are links between the umpire, branch and guardian roles and the pan-Canadian, provincial equality and multinational models, respectively. In the *Secession Reference*, we see the Court generally eschew these roles and adopt one of facilitator and fair arbiter. In this way, the Court both draws from and reinforces an understanding of federation as the process and outcome of negotiation through its adopted role of facilitator of this negotiation.⁴⁴⁸ This is particularly evident in two areas of the reference, the determination of the referred questions as justiciable and the rulings related to clarity and a duty to negotiate.

With regard to the determination of the referred questions as justiciable, the Court explicitly links its ruling to its self-perceived 'proper role' as facilitator.⁴⁴⁹ The SCC was clear that its proper role is only to identify and consider the legal aspects of the global system of rules and principles that comprise the Constitution.⁴⁵⁰ Accordingly, the Court established itself as a facilitator of the democratic process by clarifying the legal framework within which democratic will manifests.⁴⁵¹ This role is quite different than the other roles the Court could have adopted as federal arbiter: it did not

⁴⁴⁸ The facilitator role of the SCC in the *Secession Reference* has been noted by others, see Des Roseiers (2000: 173, 182); Choudhry and Howse (2000: 157-164).

⁴⁴⁹ See *Secession Reference* [1998] at 24-31 and particularly (at 27) where the Court says: 'As to the "proper role" of the Court, it is important to underline, contrary to the submission of the *amicus curiae*, that the questions posed in this Reference do not ask the Court to usurp any democratic decision that the people of Quebec may be called upon to make. The questions posed by the Governor in Council, as we interpret them, are strictly limited to aspects of the legal framework in which that democratic decision is to be taken.'

⁴⁵⁰ See *Secession Reference* [1998] where the Court says (at 27 and 32) that the constitution 'includes the global system of rules and principles which govern the exercise of constitutional authority,' going on to say (at 100) that 'the role of the Court in this Reference is limited to the identification of the relevant aspects of the Constitution in their broadest sense. We have interpreted the questions as relating to the constitutional framework within which political decisions may ultimately be made.'

⁴⁵¹ See *Secession Reference* [1998] at 27, 100.

seek to uphold and implement the framework as a neutral umpire; nor did it act as an equal branch of government and simply dictate the rules of the game to the other branches; nor did it only seek to protect the framework from adaptation by the political actors. Instead, the Court, in line with its view of the Constitution as a normative framework, sought to facilitate discussion and negotiation over the framework itself (while also managing the conflict).⁴⁵²

The adopted role of facilitator is also apparent in the way the Court approached the issue of defining clarity. The SCC didn't simply dictate what clarity meant (i.e. that a referendum question on secession had to say 'x' and that 'x' number of people were required to support that question).⁴⁵³ It was careful to not impose its own will on the process: 'it will be for the political actors to determine what constitutes a clear majority on a clear question.'⁴⁵⁴ In this way, the need for clarity is presented as an outgrowth of democracy (the lack of ambiguity allowing a clear expression of democratic will) and as something that supports democracy by instigating a reciprocal duty among all parties within Canada to negotiate constitutional change.⁴⁵⁵ This approach places the SCC as the facilitator of a legitimate and free process of contestation over federation and the Constitution, rather than as an imposer of a particular perspective.⁴⁵⁶ The ambiguity and deference allowing political actors to define clarity has unquestionably caused issues;⁴⁵⁷ but, arguably, the SCC imposing a particular definition of clarity, or leaving the entire issue of what instigates the duty to negotiate untouched, would have caused greater controversy.⁴⁵⁸

⁴⁵² It is from this view of the Constitution, and its role within it, that the Court laid out a three-tier approach to justiciability: the first is (written) law enforced by the courts; the second is (unwritten) legal principle, which *is* enforced in the political and social realm and *may* also be enforced in the legal realm; and, the third is constitutional convention, which is *only* enforced in the political and social realms, see *Secession Reference* [1998] at 54, 98, 102; Walters (1999: 389).

⁴⁵³ See *Secession Reference* [1998] at 87-88.

⁴⁵⁴ *Secession Reference* [1998] at 153, 100.

⁴⁵⁵ See *Secession Reference* [1998] at 87-88, 153.

⁴⁵⁶ Des Roseiers (2000: 173, 182).

⁴⁵⁷ See Rocher and Verrelli (2003).

⁴⁵⁸ Surely more contention would have resulted by allowing Québec to claim the decision was illegitimate if too harsh a level of clarity was defined by the Court, or by allowing the federal government to reject the decision as illegitimate if the issue was not broached or too lenient a standard was identified as instigating the duty to negotiate secession.

The function of facilitator, and the way it draws from and reinforces a view of federation as the process and outcome of negotiation, is even more evident in the Court's identification of a reciprocal duty to negotiate in the event of a positive referendum on secession. The constitutional obligation on the members of the federation to enter into good faith negotiations over secession emanates from all four of the unwritten principles.⁴⁵⁹ The Court clearly says that its role is limited to identifying the duty to negotiate in good faith stemming from these principles.⁴⁶⁰ The conduct of parties in negotiations, the ability to reconcile their positions to reach an outcome and the enforcement of perceived breaches of conduct in negotiations is a matter for the political actors.⁴⁶¹ At the same time, the Court does not eschew its important role as a fair arbiter within the federation if negotiations were to break down. It still maintained the constitutional framework gives rise to *legal* obligations, with *legal* repercussions enforceable through the judiciary, if necessary.⁴⁶² The facilitator role similarly runs through the SCC's treatment of the parties to the negotiation, being sufficiently vague on who is constitutionally guaranteed a spot at the table,⁴⁶³ and also in restraining itself from prescribing what amending formula would apply to implement a change to the Constitution stemming from secession negotiations.⁴⁶⁴

⁴⁵⁹ See *Secession Reference* [1998] at 90: 'The conduct of the parties in such negotiations would be governed by the same constitutional principles which give rise to the duty to negotiate: federalism, democracy, constitutionalism and the rule of law, and the protection of minorities.'

⁴⁶⁰ In addition to the above, see *Secession Reference* [1998] at 100: 'We have interpreted the questions as relating to the constitutional framework within which political decisions may ultimately be made. Within that framework, the workings of the political process are complex and can only be resolved by means of political judgments and evaluations.'

⁴⁶¹ See *Secession Reference* [1998] at 100: 'The Court has no supervisory role over the political aspects of constitutional negotiations,' and (at 101) where it says 'to the extent that the questions are political in nature, it is not the role of the judiciary to interpose its own views on the different negotiating positions of the parties, even were it invited to do so. Rather, it is the obligation of the elected representatives to give concrete form to the discharge of their constitutional obligations which only they and their electors can ultimately assess ... Having established the legal framework, it would be for the democratically elected leadership of the various participants to resolve their differences.'

⁴⁶² See *Secession Reference* [1998] at 102: 'The non-justiciability of political issues that lack a legal component does not deprive the surrounding constitutional framework of its binding status, nor does this mean that constitutional obligations could be breached without incurring serious legal repercussions. Where there are legal rights there are remedies...' see also at (105).

⁴⁶³ See *Secession Reference* [1998] at 88, 92-93, 103, 139, 151-152; Choudhry (2008: 217).

⁴⁶⁴ By not explicitly elaborating a required amending formula the SCC avoids imposing the related particular federal model, while also avoiding issues associated with trying to legitimize that model in a case that is all about the divergence and competition between various understandings of the federation. On the vagueness, see *Secession Reference* [1998] at 84; Choudhry (2008: 227); Gaudreault-DesBiens (1999: 825); Hogg (1999).

The above indicates more than just the Court's self-selected role in this reference (important as this is in its own right). Pulling out the links between the Court's adopted role, its understanding of the constitutional and federal order and the way it disposes of the appeal shows how the SCC draws from and reinforces a view of the federation as the process of negotiation with it being a key facilitator of this negotiation. In other words, the above signals how the facilitator role is indicative of a broader conflict management approach adopted in the decision. The Court's clear goal in the reference is to push the management of the conflict back into the political realm (while facilitating the conditions for free and fair negotiations). It does not impose a particular vision of the federation or a final solution to the problem; rather, it sees the process of contestation in the political sphere as indeterminate (and ultimately remains open to the possibility that it will have to step in again as a fair arbiter). It is this broad approach that reinforces the idea of federation as a contested normative framework, particularly because the Court did not simply assert this was its role: it explicitly linked this 'proper role' to the very nature and structure of the constitutional and federal order.⁴⁶⁵

I turn now to briefly reflect on this broader conflict management approach (and understanding of the federal order) both in terms of the possible reason the Court adopted it in this case and its potential implications.

A Revolutionary (and Welcome) Approach

The above provides a comprehensive picture of the *Secession Reference* as an exemplar of a decision that recognizes and accounts for the contestation over nationality and federation in Canada. It depicts the federation in an inclusive manner, with the Court employing accepted forms of legal analysis that demonstrate how federation reflects aspects of each federal model and as the process and outcome of negotiation. Building on this understanding, the decision reaches an outcome that rejects a zero-sum approach, while reinforcing the legitimacy of the inclusive depiction. And, running through the overall approach in the decision is the Court's self-selected role as the facilitator of negotiation between conflicting parties, rather than the imposer of a particular

⁴⁶⁵ See *Secession Reference* [1998] at 98-101.

solution. In this way, the reference both draws from, and reinforces, federation as the process and outcome of negotiation between the subscribers of legitimate models. And, in doing this, the decision provides an a benchmark for how the Court can generate legitimacy for the conflict management process and the order more generally in the way it manages conflict over federation.

As I have already indicated (and will demonstrate in subsequent chapters) the approach adopted in the *Secession Reference* is revolutionary.⁴⁶⁶ It stands in contrast to the significant proportion of the SCC's federal decisions that impose a federal model (i.e. those decisions that draw from and reinforce a single model in the depiction of the federation and the outcome). The revolutionary character of this reference is most evident in the fact that some 64% of the Court's decisions prior to the reference impose a particular federal model, while only 25% of those following it do so. The *Secession Reference* thus marks a noticeable shift in the Court's general approach in its federal jurisprudence. Moreover, even among those cases that follow the general approach of the *Secession Reference*, as discussed in Chapter Six, this reference stands apart in the extent to which it adheres to the ideal-type.

This raises an important question. Why did the Court adopt such a revolutionary approach in this particular case? As mentioned above, the likeliest answer is that the Court was forced to find a way to save the federation in the face of a direct challenge to the legitimacy of the constitutional and federal order. While all federal jurisprudence involves conflict over the nature of the federation (i.e. over the way identities are recognized and power and resources are distributed), the uniqueness of the *Secession Reference* is the direct and serious nature of the conflict. The case was about a party to federation challenging the survival of the order. The *Secession Reference* was one of the rare occasions when the system as a whole was in flux and in danger of dissolution. In the face of this, the requirement on the Court to find an innovative way to rescue the legitimacy of the entire political and legal system was particularly pressing.⁴⁶⁷

⁴⁶⁶ For a similar argument about the revolutionary nature of the reference, see: Tully (2000a).

⁴⁶⁷ This is an argument made by many (though the focus tends to be on the political astuteness of the decision); see Schertzer (2008:117-119, from which the next two paragraphs are drawn); Choudhry and Howse

In such situations, it is important to recognize that the ‘tendency of judges may be to struggle to save the system from collapse.’⁴⁶⁸ In a case like this, the judges are forced to deal with the fact that a direct challenge to the legitimacy of the constitutional order challenges their legitimacy and place within the system. In other words, struggles like that in the *Secession Reference* highlight how courts are themselves part of the field of struggle.⁴⁶⁹ Accordingly, the SCC fought in the reference to ‘find a way to ensure that legal continuity, stability and above all legitimacy would be maintained.’⁴⁷⁰ In this way, the reference is best understood as an explicit attempt to generate and maintain legitimacy for the constitutional and federal order.

The revolutionary turn, then, comes in *how* the Court sought to maintain order and generate this legitimacy. Rather than imposing a particular order (informed by a trimming, trading or segregating logic), the Court turned to recognize, account and manage the conflict that takes place over the federation. Seeing itself as part of the system of government as its federal arbiter, the Court used what it had at hand to save the system: the law. The goal for any government in such a situation is to maintain order and legitimacy. The Court simply recognized in this case it could not achieve this goal by imposing a particular perspective on those in the association. It saw the benefits of recognizing the legitimacy of the various federal models and federation as the process and outcome of negotiation.

This indicates the potential benefits of the broader approach to federal jurisprudence exemplified in the *Secession Reference*, namely its ability to generate legitimacy for the conflict management process and the federation more generally. The inclusive way the federation is depicted in the reference (rather than imposing one party’s perspective) demonstrates to the parties that the federal arbiter takes their perspectives into account (thereby addressing any questions of bias). This creates “buy-in” to the conflict management process and the federal order, reinforcing

(2000: 164-168); Hogg (2007: 96-100); Rocher and Verrelli (2003: 211); Tierney (2003: 170-175, 196; Walters 1999).

⁴⁶⁸ Walters (1999: 371); Hart (1961: 114).

⁴⁶⁹ Tully (2004: 86).

⁴⁷⁰ Schertzer (2008: 119).

that both reflect each party's perspective of what the federation is and ought to be. Similarly, rejecting a zero-sum outcome in the reference allows the subscribers of the federal models to find positive aspects in the decision (and to see that elements of the outcome reaffirm the legitimacy of their perspective and standing in the order). In other words, the approach to disposing of the issue in the *Secession Reference* generates legitimacy for the federation because it does not align the order with any one perspective; rather, it shows the subscribers of each federal model that the order will develop in a way that reflects aspects of their perspective. Finally, the facilitator role adopted by the Court in the reference helps to ensure the conflict management process is seen as unbiased, free and fair, while also legitimizing the institutional and political mechanisms of federation by pushing parties to use these processes to manage conflict.

These ideas are only introduced here, as I elaborate on these benefits (and the problems with decisions that impose a federal model) over the next two chapters. I turn to discuss the full breadth of the SCC's federal jurisprudence now for this and other reasons.

Confining my analysis to the *Secession Reference* – important as this case is – only tells part of the story. To leave things here would be to accept what may just be a temporary (or even rhetorical) turn by the Court in a rather extraordinary case without examining the broader jurisprudence.⁴⁷¹ By looking beyond this case (but, still keeping it in view) we are able to gain a more comprehensive account of the Court's work as federal arbiter. Importantly, this allows for a better evaluation of the extent to which the SCC can fulfill its role as federal arbiter in a way that generates legitimacy for the federation. To do this, I look next at those decisions where the SCC substantially fails to live up to the benchmark set in the *Secession Reference* and imposes a particular federal model. Following this I discuss those decisions where the Court tends to recognize the legitimacy of multiple models and federation as a process and outcome of negotiation in line with the approach adopted in this reference.

⁴⁷¹ Something others have done, see (Tully 2000a) in particular.

Chapter Five

The SCC's Imposing Federal Jurisprudence

Introduction

In this chapter I turn from the *Secession Reference*⁴⁷² to look at the SCC's problematic decisions that impose a particular federal model. The chapter analyzes how these decisions legitimize specific views of what the federation is and ought to be over others. As argued earlier, such decisions are problematic because they fail to recognize the inherent conflict that takes place over nationality and federation in Canada. The goal of this chapter, in the overall context of the thesis, is to demonstrate how the SCC can negatively affect the legitimacy of the federation, and also why there is a need to account for its role in federal theory and policy.

This chapter and the next are closely linked. This chapter looks at decisions that can negatively affect the federation, explains how they do this and elaborates on why they are problematic. The next chapter looks at the inverse: decisions that can positively affect the legitimacy of the federation by recognizing the legitimacy of multiple models and federation as the process and outcome of negotiation between the subscribers of these models. It is by comparing these two types of decisions that the negative and positive aspects of the Court's federal jurisprudence are accentuated, while also demonstrating the need to account for the judiciary's role within the federation (and importantly, how to do this).

In line with these objectives, the specific argument of this chapter is that a substantial proportion of the SCC's federal jurisprudence imposes a particular federal model: in 61 (55%) of division of powers cases and 13 (65%) of federal references, the Court reinforces the legitimacy of one federal model over the others. As already argued, the federal arbiter should recognize the legitimacy of multiple models and federation as the process and outcome of negotiation *in every decision*. The ideal is a federal jurisprudence with no imposing decisions. Accordingly, this tendency

⁴⁷² *Reference re Secession of Quebec* [1998] 2 S.C.R. 217.

to impose particular models needs to be addressed if the federal arbiter and the federation itself are to remain legitimate. This is especially so given the fact that the Court tends to impose the pan-Canadian model, while displaying virtually no support for the multinational model, something that does not sit well with the reality of Canada as a plurinational state.⁴⁷³

As explained previously, the ideal-type of a decision that imposes a particular federal model has three key characteristics. First, is how the federation is depicted. A decision that imposes a federal model presents the federation in a way that corresponds with, and legitimizes, only one federal model (while also potentially delegitimizing other models). Furthermore, this particular perspective of what the federation is and ought to be is presented as a fact through the use of accepted forms of legal argument and modes of constitutional interpretation. The second characteristic is that the outcome of the case follows and reinforces the depiction of the federation. Accordingly, in imposing decisions, the outcome favours a specific jurisdiction, and does so in a way that aligns the federal order with the ideal of the imposed federal model. The third characteristic is that the Court's adopted role reinforces the legitimacy of the federal depiction and further justifies the outcome.

It is when all of these factors combine that a decision substantially adheres to the ideal-type of an imposition. For example, a decision that imposes the pan-Canadian model would depict the federation as centralized with a central government that is superior to the provinces, a situation that is presented as a legal fact supported by the text of the Constitution, which the Court as umpire is bound to enforce. And, because of all this the central government can, for example, unilaterally amend funding agreements it has reached with the provinces (as was the case in *Canada Assistance Plan*).⁴⁷⁴ In other words, a decision imposes a federal model when the depiction and outcome, supported by the way the Constitution is interpreted and the Courts' role, all work *to reinforce the*

⁴⁷³ As explained earlier, a plurinational state is one where there is conflict over the national character of the state (as either *uninational* or *multinational*). This is distinguishable from a 'multinational state,' where it is generally accepted that there are multiple national groups within one state housed in defined territorial zones.

⁴⁷⁴ *Reference Re Canada Assistance Plan (B.C.)* [1991] 2 S.C.R. 525. The issue in this case is whether the central government can unilaterally amend funding agreements with the provinces. It was a unanimous decision (authored by Sopinka JJ).

*legitimacy of the same model. Ontario Hydro*⁴⁷⁵ also exemplifies this well; in this decision, the federation is presented as centralized with a superior central government through its broad power to declare something for the advantage of Canada and to thus assume complete jurisdiction for the matter.⁴⁷⁶ This view of the federation is supported with recourse to the text of the Constitution and related doctrine, which give rise to legal rules the Court says it must enforce as an umpire.⁴⁷⁷ And, by enforcing these rules the centre is granted exclusive jurisdiction to regulate labour relations at provincially owned atomic energy facilities (despite labour relations generally falling within provincial jurisdiction). Not all decisions so clearly draw from, and reinforce, a particular model in the decision approach and outcome. As my analysis shows, there are varying degrees of adherence to the ideal-type. However, the basic characteristics of an imposing decision are evident in each of the 74 cases discussed below.

This basic architecture of an imposing decision informs the structure of the chapter. The first section discusses how the federation is depicted in line with one model, looking at the extent this

⁴⁷⁵ *Ontario Hydro v. Ontario (Labour Relations Board)* [1993] 3 S.C.R. 327. The issue in this case is whether provincial or central labour relations legislation applies to workers at provincially owned atomic energy generation stations. The core of the issues is the scope of the centre's power to declare something for the 'general advantage of Canada' under s. 92(10)(c) of the Constitution, which allows it to assume legislative jurisdiction for the matter. It was a majority decision (authored by La Forest JJ, with Lamer CJ concurring).

⁴⁷⁶ See *Ontario Hydro* [1993] at 370-372: 'The power conferred on Parliament to declare that works wholly situate within the province are for the general advantage of Canada or for the advantage of two or more of the provinces, is obviously a far-reaching power. Parliament is the sole judge of the advisability of making this declaration ... it vests in Parliament exclusive legislative authority over the local work which it removes from the provincial to the federal field of jurisdiction. There is no authority supporting the view that the declaratory power should be narrowly construed. Quite the contrary ... the courts, including this Court, have never shown any disposition to so limit its operation, and a wide variety of works -- railways, bridges, telephone facilities, grain elevators, feed mills, atomic energy and munition factories -- have been held to have been validly declared to be for the general advantage of Canada ... The declaratory power is not the only draconian power vested in the federal authorities. The powers of disallowance and reservation accorded the federal government by ss. 55-57 and 90 of the *Constitution Act, 1867* give it unrestricted authority to veto any provincial legislation ... The declaratory and veto powers were frequently used in tandem in the early years following union to accomplish the original constitutional mandate by establishing the authority of the central government and its policies, and in particular to ensure the construction of the intercontinental railway. Later, the declaratory power was effectively used as a tool to regulate the national grain market in the pursuit of the constitutional vision of integrating the western region of Canada into the country.'

⁴⁷⁷ In *Ontario Hydro* [1993] the Court counters the argument that it ought to narrowly construe the declaratory power of the central government to protect the federal principle by saying (at 371) that such an 'argument evinces a misunderstanding of the respective roles of law and politics in the specifically Canadian form of federalism established by the Constitution' and (at 372) that the rules of the Constitution are to be enforced by the Courts, while 'protection against abuse of these draconian powers is left to the inchoate but very real and effective political forces that undergird federalism.'

takes place in all of the 74 cases and going on to exemplify how this is done in specific decisions. I do the same in subsequent sections, looking at the way the Court reinforces the legitimacy of particular models through legal argument, the outcomes of decisions and the Court's adopted role. Following this structure (rather than reviewing cases in their entirety) best accomplishes my goal of demonstrating how the Court imposes particular federal models in these 74 decisions. It allows for in-depth analysis of the way these cases exemplify the various characteristics of an ideal-type imposition. This structure also facilitates clear comparison with those decisions that tend to adhere to the opposite ideal-type of recognizing the legitimacy of multiple models.

I conclude the chapter by reflecting on my analysis, discussing some key points related to the wider arguments of the thesis. I start by comparing the division of powers decisions and references, arguing that despite some differences they are essentially similar in their imposition of specific federal models over others. This shared tendency highlights the difference between these 74 decisions and the *Secession Reference*, demonstrating the latter's revolutionary status and facilitating comparison with decisions that adhere to this exemplar. I then elaborate on why these imposing decisions are problematic, focusing on the way they hinder the ability of the federation to generate and maintain loyalty in the plurinational state of Canada. As part of this, I highlight four specific trends in these 74 decisions that negatively affect the legitimacy of the Court as the federal arbiter and the federation more generally: 1) the tendency to impose the pan-Canadian model more than others; 2) the lack of support afforded the multinational model; 3) the creation of stark winners and losers in the outcomes of the cases; and, 4) the propensity of the Court to adopt a role for itself that reinforces the legitimacy of particular federal models.

Context

The analysis in this chapter stems from a comprehensive review of every decision dealing with federalism issues delivered by the SCC between 1980 and 2010. As discussed in the methodology chapter, this period has been marked by intergovernmental conflict and nationalist mobilization, with the result being considerable litigation in the courts. The clear initiator of this

heightened era of conflict (and particularly the recourse to the courts to arbitrate the conflict) was the process of establishing a domestic constitutional amending formula (and enshrined bill of rights) in the early 1980s. From this process stemmed a trilogy of references to the SCC (the *Senate*,⁴⁷⁸ *Patriation*⁴⁷⁹ and *Quebec Veto*⁴⁸⁰ references) that decisively set the tone of constitutional politics and intergovernmental relations in the following decades. Even outside the realm of this so-called “mega-constitutional politics,” a climate of hostility informed the more traditional conflicts over the nature of the federal order taking place between governments and between private actors and governments. While this has been discussed in previous chapters, what has not been explained are the specific issues that have actually been brought before the SCC over this period.

As Table 5.1 and 5.2 indicate, the issues that arise in these imposing cases span a range of matters. Within the division of powers cases there are many that deal with the scope of the centre’s criminal law power (20), with the extent of the centre’s power over its works and undertakings (8),⁴⁸¹ with the role and scope of the judiciary’s power in the federation (6), and matters such as trade (4), maritime law (4), taxation (4) and aboriginals (3) among others. Similarly, in addition to the two high-profile references related to constitutional amendment, there are those that deal with the role and scope of the judiciary’s power in the federation (4), natural resources (3), as well as those that mirror division of powers cases where the jurisdiction of a government to pass economic or social legislation is challenged (4 cases). This range of issues is not surprising given the inherent conflict that is expected in any federation – and particularly in a plurinational federation like Canada, where

⁴⁷⁸ *Re: Authority of Parliament in relation to the Upper House* [1980] 1 S.C.R. 54. The opinion in this reference was unanimous (authored by ‘The Court’).

⁴⁷⁹ *Re: Resolution to amend the Constitution* [1981] 1 S.C.R. 753. The opinion in this reference was split between two majorities (one on the legal issue and one on the convention issue). For an overview, see the framework in the Annex.

⁴⁸⁰ *Re: Objection by Quebec to a Resolution to amend the Constitution* [1982] 2 S.C.R. 793. The opinion in this reference was unanimous (authored by ‘The Court’).

⁴⁸¹ The center’s ‘works and undertakings’ are those matters that fall under exclusive central control as a result of s. 92(10) of the *Constitution Act 1867*. This generally includes enterprises such as inter-provincial transportation (like railways, steamships and aviation) and telecommunications, as well as things declared by the centre to be for the general advantage of Canada, like atomic energy.

conflict over the distribution of power and resources mixes with nationalist mobilization and identity politics.

Table 5.1: Issues in Imposing Federal References, 1980 to 2010

| Reference | Primary (and related) Area of Jurisdiction | Issue |
|-------------------------------------|--|---|
| Senate [1980] | Constitutional Amendment | Central law changing composition of Senate |
| Residential Tenancies Act [1981] | Courts (s. 96) | Provincially established tribunal |
| BC Family Relations Act [1982] | Courts (s. 96) | Provincially established tribunal |
| Exported Natural Gas Tax [1982] | Natural Resources (s. 125) | Central tax on export of natural gas |
| Quebec Veto [1982] | Constitutional Amendment | If Quebec has veto over constitutional amendment proposals |
| McEvoy [1983] | Courts (s. 96) | Centrally established tribunal |
| Upper Churchill [1984] | Natural Resources (Extra-territorial Effect) | Newfoundland expropriating power station partly owned by Quebec |
| Strait of Georgia [1984] | Natural Resources | Ownership of Strait of Georgia seabed |
| Goods and Services Tax [1992] | Tax (Property and Civil Rights) | Central value-added tax (if infringes provincial jurisdiction) |
| Canada Assistance Plan [1991] | Central Spending Power | Centre unilaterally altering funding agreement with provinces |
| Quebec Sales Tax [1994] | Tax | If provincial tax direct and within province |
| NS Residential Tenancies Act [1996] | Courts (s. 96) | Provincially established tribunal |
| Firearms [2000] | Criminal Law (Property and Civil Rights) | Central regulation of firearms (if infringes provincial jurisdiction) |

Table 5.2: Issues in Imposing Division of Powers Cases, 1980 to 2010

| Case | Primary (and related) Area of Jurisdiction | Issue |
|---|--|--|
| Labatt Breweries v. Canada [1980] | Trade (Criminal Law, POGG) | Central law regulating production and labelling of beer |
| Four B Manufacturing [1980] | Aboriginals (s. 91.24, Labour) | If provincial labour regulations apply to aboriginal business |
| Ritcey v. The Queen [1980] | Admin of Justice (Courts) | Provincial law relating to administration of courts |
| Fowler v. The Queen [1980] | Fisheries (Environment) | Central fisheries legislation |
| Northwest Falling Contractors [1980] | Fisheries (Environment) | Central fisheries legislation |
| The Queen v. Sutherland [1980] | Aboriginals (s. 91.24) | Provincial law regulating aboriginal hunting |
| Boggs v. R [1980] | Criminal Law | Central criminal sanction for provincial offence |
| Crevier v. Que [1981] | Courts (s. 96) | Provincially established tribunal |
| Alb v. Putnam [1981] | Criminal Law (Admin of Justice) | Jurisdiction to investigate and sanction central police |
| Massey-Ferguson v. Sask [1981] | Tax | If provincial tax direct |
| Moore v. Johnson [1982] | Fisheries (Property and Civil Rights) | Regulation of seal hunt |
| NB v. Simpsons-Sears [1982] | Tax | If provincial tax direct and within the province |
| Municipality of Peel v. Mackenzie [1982] | Criminal Law (Municipalities) | Centrally imposed fee on municipalities via young offenders act |
| Canada v. Law Society of B.C [1982] | Courts (Property and Civil Rights) | Centre shielding law from provincial court review, Application of central law to regulate provincial law society |
| Capital Regional District [1982] | Courts (s. 96) | Provincially established tribunal related to pollution control |
| Westendorp v. The Queen [1983] | Criminal Law (Municipalities) | Municipal legislation relating to prostitution |
| Canada Labour Relations Board [1983] | Federal Undertaking (Labour, Courts) | Central regulation of labour, Centre shielding law from provincial court review |
| Zavarovalna Skupnost [1983] | Maritime Law | Central law regulating marine insurance |
| Northern Telecom [1983] | Federal Undertaking (Labour, Courts) | Central regulation of labour |
| Bisaillon v. Keable [1983] | Criminal Law (Admin of Justice) | Provincial commission mandate (if infringes on criminal law) |
| Canadian National Transportation [1983] | Criminal Law (Admin of Justice) | Centre's prosecutorial power (re: anti-competition law) |
| R. v. Wetmore [1983] | Criminal Law (Admin of Justice) | Centre's prosecutorial power (re: food and drug law) |
| Quebec v. Grondin [1983] | Courts (s. 96) | Provincially established tribunal relating to landlord-lessee affairs |
| Skoke-Graham v. The Queen [1985] | Criminal Law | Criminal code provision (re: disturbing religious service) |
| R. v. Big M Drug Mart [1985] | Criminal Law | Criminal code provision (re: Sunday shopping) |
| Scowby v. Glendinning [1986] | Criminal Law (s. 96) | Provincial commission mandate (if infringes on criminal law) |
| R. v. Crown Zellerbach [1988] | POGG (Environment) | Central law regulating dumping at sea |
| Clark v. Canadian National Railway [1988] | Federal Undertaking (Property and Civil Rights) | Central law regulating civil actions related to railways |
| Devine v. Quebec [1988] | Criminal Law (Trade) | Provincial law regulating language use for commerce |
| Sobeys v. NS [1989] | Courts (s. 96) | Provincially established tribunal related to labour relations |
| City National Leasing [1989] | Trade (Property and Civil Rights) | Centre's anti-competition law |
| Quebec Ready Mix [1989] | Trade (Property and Civil Rights) | Centre's anti-competition law |
| Irwin Toy v. Quebec [1989] | Federal Undertaking (Criminal Law) | Provincial law regulating advertising to children |
| YMHA v. Brown [1989] | Labour (Employment Insurance) | Application of central labour laws to centrally funded enterprise |
| Mackeigan v. Hickman [1989] | Criminal Law (Courts) | Provincial commission mandate (if infringes on criminal law) |
| Bank of Montreal v. Hall [1990] | Banking (Property and Civil Rights, Paramourncy) | Jurisdiction to regulate seizure of property in security of a bank loan |
| Knox Contracting v. Canada [1990] | Criminal Law (Tax, Admin of Justice) | Provision of centre's income tax act (if valid as criminal law) |
| National Battlefields Commission [1990] | Federal Undertaking | Provincial transport regulations (if apply to federal undertaking) |
| Central Western Railway [1990] | Federal Undertaking (Labour) | Jurisdiction over labour relations for particular railway line |
| Whitbread v. Walley [1990] | Maritime Law (Property and Civil Rights) | Central law regulating civil action relating to maritime matters |
| Monk v. Island Fertilizers [1991] | Maritime Law | Central law regulating civil action relating to maritime matters |
| R. v. Swain [1991] | Criminal Law (Health) | Criminal code provision (re: detention of mentally ill) |
| Ontario Hydro [1993] | Federal Undertaking (POGG) | Jurisdiction to regulate labour at provincial atomic power stations |
| R. v. Morgentaler [1993] | Criminal Law (Health) | Provincial abortion laws (if infringe on criminal law) |
| Hunt v. T&N [1993] | Courts | Province prohibiting removal of corporate documents from province |
| Allard Contractors v. Coquitlam [1993] | Tax (Licensing) | Provincial levy charging variable fees |
| BC v. Canada [1994] | Transportation | If centre must continue rail service on Vancouver Island |
| RJR-MacDonald v. Canada [1995] | Criminal Law (POGG) | Central law regulating advertising of tobacco products |
| Husky Oil v. Canada [1995] | Bankruptcy (Paramourncy) | Provincial law relating to bankruptcy |
| R. v. Hydro-Québec [1997] | Criminal Law (Municipalities) | Central law regulating toxic substances |
| Delgamuukw v. BC [1997] | Aboriginals (Self-Govt, s. 91.24) | Aboriginal right to self-government, If provinces can extinguish aboriginal rights |
| Westcoast Energy v. Canada [1998] | Federal Undertaking | If particular natural gas operation is a federal undertaking |
| Consortium Developments [1998] | Criminal Law (Municipalities) | Provincial commission mandate (if infringes on criminal law) |
| Ordon Estate v. Grail [1998] | Maritime Law (Property and Civil Rights) | Central law regulating civil action relating to maritime matters |
| M & D Farm [1999] | Paramourncy | Jurisdiction relating to seizure of property |
| Unifund Assurance [2003] | Extraterritorial Effect | Extraterritorial effect of provincial law |
| R. v. Malmo-Levine [2003] | Criminal Law | Criminalization of marihuana possession (if valid as criminal law) |
| R. v. Demers [2004] | Criminal Law | Criminal code provision (re: detention of person unfit to stand trial) |
| BC v. Imperial Tobacco [2005] | Extraterritorial Effect | Extraterritorial effect of provincial law |
| Kirkbi AG v. Ritvik Holdings [2005] | Trade | Central law regulating unregistered trademarks |
| Dunne v. Quebec [2007] | Tax | If provincial tax direct and within the province |

The 74 imposing decisions are classified as such by applying the framework introduced in the methodology chapter (which facilitates analysis of the extent to which decisions draw from and reinforce the pan-Canadian, provincial equality, multinational or dynamic federal models in their approach and outcome).⁴⁸² I have identified these imposing decisions by reviewing all of the Court's constitutional law work reported between 1980 and 2010 (almost 700 decisions), selecting 159 cases where a key issue is raised with regard to the jurisdiction of a level of government to act. From these 159 decisions, 28 have been excluded from my analysis because they do not provide sufficient information on the relevant federalism issue to determine if they impose a particular model or recognize multiple models.⁴⁸³ This leaves 131 decisions, 74 of which (57%) are classified as impositions. Of these 74 imposing decisions, 61 are division of powers cases and 13 are references.

As discussed previously, while division of powers cases and references can be considered two separate streams of federalism jurisprudence, they share the fundamental similarity of dealing with conflicts over the nature of the federal order. Both types of cases are about determining the scope of a government's jurisdiction to enact legislation based on the powers allocated to it by the Constitution. The difference is that division of powers cases involve *actual conflicts* of law or fact where the legislative jurisdiction of a level of government is challenged by an actor (be it an individual or government), whereas federal references stem from *governments referring a question to the SCC* to determine if proposed or recently enacted legislation is within the constitutional jurisdiction of a government.⁴⁸⁴

The importance of looking at these two streams of federalism jurisprudence together should be evident: these decisions share the characteristic of imposing a specific view of what the federation is, in cases where the SCC is asked to settle a conflict over the very nature of what the

⁴⁸² Supplementary data from the review is available in the Annex (which provides the populated frameworks for each case, including summaries of the issues, decision-making approach and outcomes).

⁴⁸³ The lack of information in these 28 decisions stems from: 1) the reasons for decision simply being too brief to determine the rationale behind the Court's decision, so called 'stump decisions' (i.e. one to two paragraph reasons, often delivered orally); or, 2) the division of powers issues not being considered at all by the Court given the appeal is disposed of on another point of law.

⁴⁸⁴ See Hogg (2009: 257-263, 365-371) on the characteristics of these two related streams of federalism jurisprudence.

federation is. This is particularly so in the references, where the conflict tends to be between levels of government over key aspects of the federal order (i.e. the process of constitutional amendment).⁴⁸⁵ Similarly, in many division of powers cases the nature of the conflict is between levels of government, either directly or because a level of government has intervened to support a private actor challenging an opposing level of government.⁴⁸⁶ Even in those cases where the conflict is between a private actor and a government, the case represents a clash between competing perspectives on the nature of the federation. And, while some division of powers cases are more technical and mundane than references, the fact they involve the actual disposition of rights means they take on a measure of finality, which raises the stakes.

The point, then, is that these two streams involve decisions where a particular view of what the federation is and ought to be is imposed by the Court in important cases where key social and political actors are in conflict about what the federation is and ought to be. Moreover, the range of issues noted above illuminates the importance these imposing decisions have played in the development of the federation. The outcomes of these cases on a wide range of matters both individually and cumulatively realign the nature of what the federation is in line with specific federal models.⁴⁸⁷

In the sections that follow, I try to bring this to light by discussing how the Court's division of powers and reference work impose particular models. Within each section I discuss the shared characteristic between the division of powers and reference decisions that lead them to impose a federal model, going on to discuss how the two streams of decisions do this separately. I reflect on

⁴⁸⁵ In 16 of the 21 references discussed in the thesis (76%), the conflict dynamic is between levels of government.

⁴⁸⁶ While only 9% of division of powers cases (10 of 110) involve direct government to government conflict, an additional 35% (38 of 110) involve a level of government intervening in support of a private actor to turn the conflict into one between levels of government.

⁴⁸⁷ As explained below, a single decision can significantly affect the federal order (i.e. *R v. Crown Zellerbach Canada Ltd.* [1988] 1 SCR 401, which centralizes the order by legitimizing the centre's ability to take exclusive jurisdiction over matters of 'national concern' like environmental protection); at the same time, the cumulative effect of imposing decisions can be noteworthy (i.e. the centralizing effect of the line of decisions that reinforce a broad scope to the centre's criminal law power).

some of the key similarities and difference between these two streams in the concluding section of the chapter and later in the thesis.

Imposing Depictions

The Court's depiction of the federation rests on how it perceives the order in relation to a number of "points of conflict." The key points of conflict being the balance of powers (as centralized or decentralized), the distribution of powers (as symmetrical or asymmetrical) and the nature of provinces (as equal territorial units or as housing national minorities), among others.⁴⁸⁸ It is from a particular understanding of the federation *vis-a-vis* these points of conflict that the Court goes on to depict the federal order. And, the way the federation is presented by the Court – the way it explains what the federation *is* – is a central component to a decision imposing a specific model. This is because the Court's understanding of what the federation is drives the outcome of a case, and through the decision the Court can either align the federation with a particular model or reinforce the order as the process and outcome of negotiation between the holders of legitimate competing models.

It is important to note at the outset that in these 74 decisions the federation is depicted in a way that primarily reinforces the legitimacy of either the pan-Canadian model (44 decisions) or the provincial equality model (29 decisions) (see Table 5.3).⁴⁸⁹ However, while this is important to note, the mere fact that the federation is being presented in line with one specific model is equally (if not more) significant. That is, the key point to highlight is how these decisions depict the federation by drawing from, and reinforcing, a particular perspective of what the federation is and ought to be in line with one federal model (regardless of which model is adhered to).

⁴⁸⁸ As outlined in Chapter Three, the focal points of conflict over what the federation is generally include: the way the constitution is represented; the nature of the federation; the purpose of federation; the distribution of powers; the balance of powers; the nature of the provinces; the nature of central institutions; the relationship between the levels of government; and, the national composition of the country. Additional information on the way the federation is depicted in relation to these points of conflict is available in the Annex.

⁴⁸⁹ The order being depicted primarily in line with the multinational model in one decision: *Attorney General of Quebec v. Grondin* [1983] 2 S.C.R. 364 (*Quebec v. Grondin*). The decision was unanimous (authored by Chouinard JJ).

Table 5.3 Summary of Imposing SCC Decisions, 1980 to 2010

| Rank | Case | Depiction | | | | Outcome | | Court's Role |
|--|---|----------------|-------------------|------------------------------|-------------------------|-----------------|------------------|----------------------|
| | | Model Imposed | Secondary Support | Approach | Primary Modality | Winner | Model Reinforced | |
| High | Senate [1980] | Provs | | One | Text, Historical | Provs | Provs | Branch (Facilitator) |
| | Canada v. Law Society of B.C [1982] | Provs | | One | Doctrine | Provs | Provs | Branch |
| | Quebec Veto [1982] | Pan-Can | | One | Doctrine, Prudent | Cen | Pan-Can | Ump |
| | Canadian National Transportation [1983] | Pan-Can | Provs | Primary | Text | Cen | Pan-Can | Ump |
| | R. v. Wetmore [1983] | Pan-Can | | Minimal | Doctrine | Cen | Pan-Can | ----- |
| | Scowby v. Glendinning [1986] | Pan-Can | Provs | Primary | Text | Cen | Pan-Can | Ump |
| | R. v. Crown Zellerbach [1988] | Pan-Can | Provs | Primary | Doctrine | Cen | Pan-Can | ----- |
| | Bank of Montreal v. Hall [1990] | Pan-Can | Provs | Primary | Prudent, Doctrine | Cen | Pan-Can | (Branch) |
| | Whitbread v. Walley [1990] | Pan-Can | | One | Doctrine | Cen | Pan-Can | ----- |
| | Canada Assistance Plan [1991] | Pan-Can | | One | Text | Cen | Pan-Can | Ump |
| | Hunt v. T&N [1993] | Pan-Can | | One | Doctrine, Structure | Cen | Pan-Can | Branch |
| | Ontario Hydro [1993] | Pan-Can | Provs | Primary | Text, Doctrine | Cen | Pan-Can | Ump |
| | RJR-MacDonald v. Canada [1995] | Pan-Can | | One | Doctrine, Prudent | Cen | Pan-Can | (Branch) |
| | Husky Oil v. Canada [1995] | Pan-Can | Provs | Primary | Doctrine | Cen | Pan-Can | (Branch) |
| | NS Residential Tenancies Act [1996] | Provs | | One | Doctrine, Progress | Provs | Provs | Branch |
| | Ordon Estate v. Grail [1998] | Pan-Can | | One | Doctrine, Prudent | Cen | Pan-Can | Branch |
| Firearms [2000] | Pan-Can | Provs | Primary | Doctrine | Cen | Pan-Can | Umpire | |
| Unifund Assurance [2003] | Provs | | One | Doctrine, Structure, Prudent | Provs | Provs | Ump, Branch | |
| Medium | Four B Manufacturing [1980] | Provs | | One | Doctrine | Provs | Provs | ----- |
| | Ritcey v. The Queen [1980] | Provs | | One | Text, Doctrine | Provs | Provs | ----- |
| | Boggs v. R [1980] | Provs | Pan-Can | Primary | Doctrine, Text | Provs | Provs | ----- |
| | Residential Tenancies Act [1981] | Pan-Can | | One | Doctrine, History | Cen | Pan-Can | Ump |
| | Municipality of Peel v. Mackenzie [1982] | Provs | Pan-Can | Primary | Doctrine | Provs | Provs | Branch |
| | Westendorp v. The Queen [1983] | Pan-Can | | One | Text | Cen | Pan-Can | ----- |
| | Devine v. Quebec [1988] | Provs | | One | Doctrine, History, Text | Provs | Provs | ----- |
| | Sobeys v. NS [1989] | Provs | Pan-Can | Primary | Doctrine | Provs (Cen) | Provs | Branch |
| | Irwin Toy v. Quebec [1989] | Provs | | One | Doctrine | Provs | Provs | ----- |
| | Mackeigan v. Hickman [1989] | Provs | | One | Text, Doctrine | Provs | Provs | Branch |
| | Knox Contracting v. Canada [1990] | Pan-Can | Provs | Primary | Doctrine, Text | Cen | Pan-Can | ----- |
| | Monk v. Island Fertilizers [1991] | Pan-Can | | One | Doctrine, Progress | Cen | Pan-Can | ----- |
| | Goods and Services Tax [1991] | Pan-Can | Provs | Primary | Doctrine | Cen | Pan-Can | ----- |
| | R. v. Morgentaler [1993] | Pan-Can | Provs | Primary | Doctrine, Text | Cen | Pan-Can | Ump |
| | BC v. Canada [1994] | Pan-Can | | Minimal | Text | Cen | Pan-Can | ----- |
| | R. v. Hydro-Québec [1997] | Pan-Can | Provs, Dyn | Primary | Doctrine, Prudent | Cen | Pan-Can | (Branch) |
| M & D Farm [1999] | Pan-Can | | Minimal | Doctrine | Cen | Pan-Can | Ump | |
| R. v. Malmo-Levine [2003] | Pan-Can | | One | Doctrine | Cen | Pan-Can | Ump | |
| BC v. Imperial Tobacco [2005] | Provs | | One | Doctrine | Provs | Provs | ----- | |
| Kirkbi AG v. Ritvik Holdings [2005] | Pan-Can | Provs | Primary | Doctrine | Cen | Pan-Can | ----- | |
| Low | Labatt Breweries v. Canada [1980] | Provs | Pan-Can | Primary | Doctrine | Provs | Provs | ----- |
| | Fowler v. The Queen [1980] | Provs | Pan-Can | Primary | Doctrine | Provs | Provs | ----- |
| | Northwest Falling Contractors [1980] | Pan-Can, Provs | | Balance | Doctrine | Cen | Pan-Can | ----- |
| | The Queen v. Sutherland [1980] | Pan-Can | Provs, Mul | Primary | Doctrine, Text | Cen | Pan-Can | ----- |
| | Crevier v. Que [1981] | Pan-Can | | Minimal | Doctrine | Cen | Pan-Can | Ump |
| | Alb v. Putnam [1981] | Pan-Can | Provs, Dyn | Minimal | Doctrine | Cen | Pan-Can | ----- |
| | Massey-Ferguson v. Sask [1981] | Provs | | Minimal | Doctrine | Provs | Provs | ----- |
| | BC Family Relations Act [1982] | Pan-Can | Provs | Balance | Doctrine, Progress | Cen (Provs) | Pan-Can | Ump |
| | Moore v. Johnson [1982] | Pan-Can | Provs, Mul | Primary | Text | Cen | Pan-Can | ----- |
| | NB v. Simpsons-Sears [1982] | Provs | | Minimal | Doctrine | Provs | Provs | ----- |
| | Exported Natural Gas Tax [1982] | Pan-Can | Provs | Primary | Text | Cen (Provs) | Pan-Can | Ump (Facilitator) |
| | Capital Regional District [1982] | Provs | | One | Doctrine, Text | Provs | Provs | Branch |
| | Canada Labour Relations Board [1983] | Provs | Pan-Can | Primary | Doctrine | Provs | Provs | Branch |
| | Zavarovalna Skupnost [1983] | Pan-Can | Provs | Primary | Doctrine | Cen | Pan-Can | ----- |
| | McEvoy [1983] | Provs | | One | Doctrine | Provs | Provs | Branch |
| | Northern Telecom [1983] | Pan-Can | Provs | Primary | Doctrine | Cen | Pan-Can | Ump (Branch) |
| | Bisaillon v. Keable [1983] | Pan-Can | Provs | Primary | Doctrine | Cen | Pan-Can | ----- |
| | Quebec v. Groudin [1983] | Mul | Provs, Dyn | Primary | Doctrine | Mul | Mul | Facilitator |
| | Upper Churchill [1984] | Provs | | Minimal | Doctrine | Provs | Provs | Ump |
| | Strait of Georgia [1984] | Provs | | One | Doctrine, Text | Provs | Provs | ----- |
| | Skoke-Graham v. The Queen [1985] | Pan-Can | | Minimal | Doctrine | Cen | Pan-Can | ----- |
| | R. v. Big M Drug Mart [1985] | Pan-Can | Provs, Dyn | Primary | Doctrine | Cen | Pan-Can | Facilitator |
| | Clark v. Canadian National Railway [1988] | Provs | Pan-Can, Dyn | Primary | Doctrine | Provs | Provs | Branch |
| | YMHA v. Brown [1989] | Provs | Pan-Can | Primary | Doctrine, Text | Provs | Provs | Facilitator |
| | City National Leasing [1989] | Pan-Can | Provs, Dyn | Primary | Doctrine | Cen | Pan-Can | Facilitator |
| | Quebec Ready Mix [1989] | Pan-Can | Provs, Dyn | Primary | Doctrine | Cen | Pan-Can | Facilitator |
| | National Battlefields Commission [1990] | Pan-Can, Provs | | Balance | Doctrine | Cen | Pan-Can | ----- |
| | Central Western Railway [1990] | Provs | Pan-Can | Primary | Doctrine | Provs | Provs | ----- |
| R. v. Swain [1991] | Pan-Can | Provs | Primary | Doctrine | Cen | Pan-Can | ----- | |
| Allard Contractors v. Coquitlam [1993] | Provs | | Minimal | Doctrine | Provs | Provs | ----- | |
| Quebec Sales Tax [1994] | Provs | | Minimal | Doctrine | Provs (Cen, Mul) | Provs | ----- | |
| Delgamuukw v. BC [1997] | Pan-Can | Provs | Primary | Doctrine | (Cen) (Provs) | Pan-Can (Provs) | Facilitator | |
| Westcoast Energy v. Canada [1998] | Pan-Can, Provs | | Minimal | Doctrine | Cen | Pan-Can | ----- | |
| Consortium Developments [1998] | Provs | | One | Doctrine | Provs | Provs | ----- | |
| R. v. Demers [2004] | Pan-Can | Dyn | Primary | Doctrine | Cen | Pan-Can | Facilitator | |
| Dunne v. Quebec [2007] | Provs | | Minimal | Doctrine, Text | Provs | Provs | ----- | |

In the 61 imposing division of powers decisions, the primary way the Court tends to depict the federation is in relation to the balance of powers and the relationship between the levels of government. In virtually all of these decisions the federation is depicted in line with either the pan-Canadian or provincial equality model by: presenting the federation as granting broad powers to the centre, with the added ability to infringe on the legislative jurisdiction of the provinces; or, saying the order grants the provinces broad powers and an autonomous legislative jurisdiction that is to be free of infringement from the centre.⁴⁹⁰ *Scowby v. Glendinning*⁴⁹¹ is indicative of the former, with the centre's criminal law power presented in the 'widest sense of the term' and as having a 'destructive force' on those provincial laws that encroach on the centre's broad and superior jurisdiction (even if the provincial law is passed in relation to its own power over civil rights).⁴⁹² Similarly, in *Kirkbi AG v. Ritvik Holdings*,⁴⁹³ despite recognizing a measure of provincial autonomy in areas like the regulation of local trade,⁴⁹⁴ the federation is ultimately presented as centralized via a broad and superior trade and commerce power that allows the central government to infringe on the provinces' jurisdiction over property and civil rights.⁴⁹⁵ Whereas in *MacKeigan v. Hickman*⁴⁹⁶ the provinces are seen to have a broad scope of power over the administration of justice, including autonomy over aspects relating to *criminal* justice, despite s. 91(27) of the Constitution granting the centre jurisdiction over criminal

⁴⁹⁰ In *Quebec v. Grondin* [1983] the federation is depicted in line with the multinational model by presenting the distribution of powers as asymmetrical (at 382-383) and the Constitution as protecting this historical compromise for asymmetrical powers (at 377).

⁴⁹¹ *Scowby v. Glendinning* [1986] 2 S.C.R. 226. The issue in this case is whether a provincial human rights board can investigate the conduct of central police officers relating to the arrest and detention of individuals. It was a majority decision (authored by Estey JJ).

⁴⁹² *Scowby v. Glendinning* [1986] at 238; see also at 233-238, 240-241.

⁴⁹³ *Kirkbi AG v. Ritvik Holdings Inc.* [2005] 3 S.C.R. 302. The issue in this case is the validity of a central law regulating unregistered trademarks (i.e. if the law is within the centre's trade and commerce power). It was a unanimous judgment (authored by LeBel JJ).

⁴⁹⁴ See *Kirkbi AG v. Ritvik Holdings* [2005] at 15-16, 23.

⁴⁹⁵ In *Kirkbi AG v. Ritvik Holdings* [2005] the Court clearly establishes a broad scope to the centre's trade and commerce power (at 17-19), arguing this centralization of power is necessary to ensure consistency in the law across the country (at 28-29, 32-33) and saying that the centre can validly infringe on the jurisdiction of the provinces when acting under its trade and commerce power (at 20-21, 23-27, 32-33).

⁴⁹⁶ *MacKeigan v. Hickman* [1989] 2 S.C.R. 796. The division of powers issue in this case is whether a provincial commission mandate is *ultra vires* because it relates to matters of criminal law and procedure (an area of exclusive central jurisdiction under s. 91(27) of the *Constitution Act, 1867*). It was a majority judgment (authored by McLachlin JJ, with La Forest JJ and Lamer CJ concurring).

law and procedure.⁴⁹⁷ And in *YMHA v. Brown*⁴⁹⁸ the Court reinforces a broad and autonomous scope to the provinces' jurisdiction over labour relations, while questioning the scope of the centre's power to bring matters under its regulatory authority by simply using its power to distribute funds.⁴⁹⁹

In a number of cases (27), the view of the federation as centralized or decentralized is augmented by depicting the federal order in line with other key aspects of the pan-Canadian or provincial equality models. For example, in *Sobeys v. Nova Scotia*,⁵⁰⁰ the federation is presented as a compact between provinces,⁵⁰¹ which results in a symmetrical distribution of powers between equal territorial units⁵⁰² (a view that reinforces the provincial equality model to the determinant of key aspects of the multinational depiction of the federation). Similarly, in *Unifund Assurance*⁵⁰³ the Court

⁴⁹⁷ See *MacKeigan v. Hickman* [1989] (at 834) where the Court notes that the provinces power over the "administration of justice" should be interpreted broadly as including criminal justice ... [and] given a fair, large and liberal construction' (see also at 809-810). In addition, the Court (at 834-835) implies that the centre and provinces have autonomy over their respective spheres relating to criminal law, procedure and justice (with the first two being areas of central jurisdiction and the latter a legitimate area of provincial competence).

⁴⁹⁸ *YMHA Jewish Community Centre of Winnipeg Inc. v. Brown* [1989] 1 S.C.R. 1532. The issue is whether provincial labour relations standards apply to work undertaken as part of a centrally funded job creation program. It was a unanimous judgment (authored by L'Heureux-Dube JJ).

⁴⁹⁹ See *YMHA v. Brown* [1989] (at 1540) where the Court explicitly follows the 'fundamental principle that legislative competence over labour relations is provincial ... [and thus works from] the assumption that there is provincial competence over labour relations in the present case.' The Court goes on (at 1548) to note that the 'scope and extent of [the federal spending power] has been subject to some speculation,' implying a shaky basis for the centre's ability to distribute resources to areas that may fall outside its jurisdiction, while further narrowing this power by saying (at 1550) 'it [is] difficult to believe that simply by providing federal money to promote employment in a region or sector, the federal government can obtain jurisdiction over the workers employed by virtue of the grant.'

⁵⁰⁰ *Sobeys Stores Ltd. v. Yeomans and Labour Standards Tribunal (N.S.)* [1989] 1 S.C.R. 238. The issue in this case is whether a provincially established tribunal dealing with labour relations infringes on the authority of Superior Courts protected by s. 96 of the Constitution. The judgment was unanimous (authored by Wilson JJ, with Beetz, La Forest and L'Heureux-Dube JJ concurring).

⁵⁰¹ See *Sobeys v. Nova Scotia* [1989] (at 263-264) where the Court refers to the process of union in 1867 as the 'original bargain' or the 'Confederation bargain.'

⁵⁰² See *Sobeys v. Nova Scotia* [1989] (at 264-266) where the Court says the validity of a provincially established tribunal must be determined by investigating the conditions in *all four of the original confederation provinces* (treating them as equals at the time of union and as having the same jurisdiction to establish tribunals after union). In addition, (at 265-266) the SCC laments the asymmetry in powers that results from a misapplication of this aspect of the test to determine the validity of provincially established tribunals. The key point is that the Court rejects the view that asymmetrical judicial arrangements in pre-confederation jurisdictions like Québec (i.e. special inferior courts in Québec in 1867) allow *only* Québec to establish similar tribunals in the contemporary period, and this reinforces the view that all the provinces were, and are, equal in status with symmetrical powers. Compare this depiction with that of *Quebec v. Grondin* [1983].

⁵⁰³ *Unifund Assurance Co. v. Insurance Corp. of British Columbia* [2003] 2 S.C.R. 63. The core issue in this case is the validity of a province's law that affects an insurance company in another province. It was a majority decision (authored by Binnie JJ).

presents the order as one where the provinces are equal in status, with broad and symmetrical powers and autonomy to act free of influence from outside jurisdictions.⁵⁰⁴ Whereas in *Hunt v. T&N*⁵⁰⁵ a depiction of the federation as centralized⁵⁰⁶ is reinforced by presenting Canada as a pan-state (legal and economic) community, where “thick” intra-state boundaries are inefficient and unjust,⁵⁰⁷ and where the courts act as a unifying national institution.⁵⁰⁸ Or in *Whitbread v. Walley*⁵⁰⁹ the Court depicts the federation in line with the pan-Canadian model, saying the centre necessarily holds broad and superior powers to enact a national body of maritime law to deal with pan-state

⁵⁰⁴ See *Unifund Assurance* [2005] at 50-51: ‘it is well established that a province has no legislative competence to legislate extraterritorially ... this territorial restriction is fundamental to our system of federalism in which each province is obliged to respect the sovereignty of the other provinces within their respective legislative spheres, and expects the same respect in return. It flows from the opening words of s. 92 of the *Constitution Act, 1867*, which limit the territorial reach of provincial legislation: “In each Province the Legislature may exclusively make Laws in relation to” the enumerated heads of power...’ (emphasis original). This depiction of equality with broad and autonomous powers is made elsewhere in the decision (at 23-24, 56, 73-75) and further buttressed by equating provincial boundaries with those of sovereign states that have a monopoly on domestic law (at 28, 30, 60-62, 68-71, 73-75). A similar depiction can be seen in *British Columbia v. Imperial Tobacco Canada Ltd.* [2005] 2 S.C.R. 473 (*BC v. Imperial Tobacco*).

⁵⁰⁵ *Hunt v. T&N plc* [1993] 4 S.C.R. 289. The issue in this case is whether a provincial statute prohibiting the removal of documents from a business in that province, by order of a court in another province, is valid. The decision was unanimous (authored by La Forest JJ).

⁵⁰⁶ See *Hunt v. T&N* [1993] (at 322-323) where the Court notes the broad scope of powers afforded the central government, contrasted against a narrow interpretation of provincial powers (at 319-320).

⁵⁰⁷ At the outset of *Hunt v. T&N* [1993] (at 295-296) the Court states: ‘Legal systems and rules are a reflection and expression of the fundamental values of a society, so to respect diversity of societies [sic] it is important to respect differences in legal systems. But if this is to work in our era where numerous transactions and interactions spill over the borders defining legal communities in our decentralized world legal order, there must also be a workable method of coordinating this diversity. Otherwise, the anarchic system’s worst attributes emerge ... Developing such coordination in the face of diversity is ... one of the major objectives of the division of powers among federal and provincial governments in a federation.’ Following this foregrounding, the Court goes on (at 321-322) to equate strong provincial autonomy with an ‘outmoded conception of the world that emphasized sovereignty and independence, often at the cost of unfairness,’ while also (at 322) depicting the federal order as having ‘the obvious intention...to create a single country’ with ‘common citizenship,’ ‘interprovincial mobility of citizens,’ and a ‘common market.’

⁵⁰⁸ See *Hunt v. T&N* [1993] (at 312) where the SCC (citing a previous case) says that (provincial) Superior Courts “are not mere local courts for the administration of the local laws” (p. 19) but “are the Queen’s Courts, bound to take cognizance of and execute all laws, whether enacted by the Dominion Parliament or the Local Legislatures” (p. 20) (emphasis added). A view the Court goes on to apply to itself, where it says (at 318) that the SCC ‘can thus play a “unifying jurisdiction” over the provincial courts ... This is consistent with the mandate given it under the *Supreme Court Act* which establishes it as “a General Court of Appeal for Canada.”’

⁵⁰⁹ *Whitbread v. Walley* [1990] 3 S.C.R. 1273. The issue in this case is the applicability of central maritime law in relation to civil actions that stem from incidents on provincial waters. The decision was unanimous (authored by La Forest JJ).

issues, and these powers allow it to infringe upon provincial areas of responsibility (i.e. the regulation of torts under the provinces' jurisdiction over civil rights).⁵¹⁰

Even in the 12 cases among these imposing decisions where the Court undertakes a relatively minimal depiction of the federation, it is still evident that the way the federation is understood and presented reinforces a specific federal model. This tends to take the form of the Court working from presumptions about the nature of the federal order and simply stating contested points as legal fact. *R v. Wetmore*⁵¹¹ exemplifies this approach, where a broad scope to the centre's criminal law and trade power was simply assumed,⁵¹² as was the superiority of the centre to determine how criminal prosecutions take place in the country.⁵¹³ *M&D Farm*⁵¹⁴ and *Allard Contractors v. Coquitlam*⁵¹⁵ are also indicative of this same pattern of presuming contested aspects

⁵¹⁰ *Whitbread v. Walley* [1990] at 1294-1295: 'the very nature of the activities of navigation and shipping, at least as they are practised in this country, makes a uniform maritime law which encompasses navigable inland waterways a practical necessity ... The Fathers of Confederation thought it necessary to assign the broad and general power over navigation and shipping to the central rather than the provincial governments, and ... the courts quickly accepted that this power extended to the regulation of navigation on inland waterways....' Similar depictions of the centre's power over maritime matters as necessarily broad and superior to provincial jurisdiction (through a uniform body of national maritime law) are made throughout the decision, see at 1286, 1288-1289, 1292-1293, 1298-1299.

⁵¹¹ *R. v. Wetmore* [1983] 2 S.C.R. 284. The issue in this case is the ability of the centre to prosecute offences under its food and drug legislation. The prosecution of criminal offences is traditionally the purview of provincial Attorneys General (as mandated by the centre's *Criminal Code* and, the provinces argue, as part of their power over the administration of justice). It was a majority judgment (authored by Laskin CJ, with Beetz and Lamer JJ concurring).

⁵¹² See *R. v. Wetmore* [1983] (at 288-289) where the Court, in brief reasons, simply states that the challenged legislation has three purposes (protecting physical health and safety, protecting the moral health of the public and regulating marketing and controlled drugs), the first two 'properly assigned to the criminal law' and the last falling under its trade and commerce power.

⁵¹³ See *R. v. Wetmore* [1983] (at 287) where the Court flatly states that criminal prosecutions by the provinces have always 'depended and continues to depend on federal enactment' passed under the centre's broad criminal law power (implying both that the provinces' power over the administration of justice does not encompass this jurisdiction and that the provinces exercise the power only at the behest of the central government).

⁵¹⁴ *M&D Farm Ltd. v. Manitoba Agricultural Credit Corp.* [1999] 2 S.C.R. 961. The issue in this case is a conflict between a provincial and central law relating to the seizure of farms. The unanimous decision (authored by Binnie JJ) in favour of the centre was premised on the principle that central laws are paramount (at 17, 40) in conjunction with broad scope afforded central competence (thereby limiting the available scope for conflicting provincial legislation) (at 25-26).

⁵¹⁵ *Allard Contractors Ltd. v. Coquitlam (District)* [1993] 4 S.C.R. 371. The issue in this case is if municipal by-laws authorizing variable fees are valid (since they impose what is, in effect, an indirect tax contrary to the Constitution only granting provinces and municipalities the ability to enact direct taxes). The Court, via a unanimous judgment (authored by Iacobucci JJ), legitimizes the power to impose indirect fees on the premise that they are within the provinces' broad jurisdiction to raise revenue in relation to its licensing and permit power (at 398-399, 402).

of the federal order as settled and going on to rationalize a decision based in large part on the presumption.

The basic pattern of depicting the federation as either centralized with a superior central government, or decentralized with provinces being equal in status to the centre, is also evident in federal references. For example, in *Upper Churchill*⁵¹⁶ the provinces are presented as equal, autonomous units that are protected from outside influence at the hands of another jurisdiction in their areas of competence.⁵¹⁷ While in *Goods and Services Tax*⁵¹⁸ the SCC highlights that the central government can legitimately infringe on areas of provincial jurisdiction through its broad taxing power (thus, presenting the centre as superior to the provinces and also the federation as considerably centralized).⁵¹⁹ There is a measure of legitimacy afforded the provincial equality model in this reference; however, it simply takes the form of an assurance that the provinces do enjoy autonomy in some areas and that the test to determine if the central government can infringe this autonomy 'is clearly a strict one.'⁵²⁰ A similar depiction of the federation as permitting the central

⁵¹⁶ *Reference re Upper Churchill Water Rights Reversion Act* [1984] 1 S.C.R. 297. The issue in this case is the effect of one province expropriating a power station partly owned by another province. The opinion was unanimous (authored by McIntyre JJ).

⁵¹⁷ See *Upper Churchill* [1984] (at 321, 326, 332, and particularly 328) where the Court says 'the territorial limitation on provincial legislative competence is contained in the *Constitution Act, 1867*. The opening words of s. 92 are: "In each Province...". Subsection (13) of s. 92 gives the Provinces exclusive legislative authority over "Property and Civil Rights in the Province", and subs. (16), similarly, is confined to matters of a purely local or private nature in the Province' (original emphasis). In addition, the Court highlights the extensive powers of the provinces, noting (at 324-325) that in accordance with the provinces' power over property and civil rights they may subject even federal incorporated companies to 'all laws of general application in the province ... Provincial legislation may license and regulate the activities of federal companies within the field of provincial competence and may impose sanctions for the enforcement of its regulations...' so long as this regulation does not destroy the essential status or capacities of the company.

⁵¹⁸ *Reference re Goods and Services Tax* [1992] 2 S.C.R. 445. The issue was if a central value-added tax is valid (or if it infringes on provincial jurisdiction). The opinions was unanimous (authored by Lamer CJ, with La Forest and L'Heureux-Dube JJ concurring).

⁵¹⁹ *Goods and Services Tax* [1992] at 470-471, 483-485, and particularly 468 where the Court says: 'the GST Act has no purpose other than to raise revenue for the federal government...The GST Act has significant effects upon matters within provincial jurisdiction, but it is impossible to say that the purpose of the Act is to produce these effects. The purpose of the Act is to raise revenue for the federal government, and the effects produced by the scheme on matters within provincial jurisdiction are incidental to this purpose.'

⁵²⁰ *Goods and Services Tax* [1992] at 469; see also (at 478, 481-482 and 494) where the SCC notes the Constitution limits the ability of the central government to tax the lands, property, resources and consolidated revenue funds of the provinces.

government to infringe on the autonomy of the provinces via its broadly defined powers is also evident in *Firearms*.⁵²¹

Just as with the above division of powers decisions, there are those federal references that augment the basic depiction of the federation as centralized or decentralized by highlighting how the order aligns with other aspects of a specific federal model. For example, in *Residential Tenancies Act*⁵²² the Court presents federation *as a compromise* that protects *national unity* through a judiciary that acts as a *national institution*, while also affording the central government a *superior position* to establish and appoint the justices of s. 96 Superior Courts.⁵²³ Such adherence to a particular model in the depiction of the federation can also take the form of delegitimizing competing models, as was generally the case in *Quebec Veto*. Here the Court said that the federal order does not include a convention recognizing a requirement for unanimous provincial consent to amend the Constitution,⁵²⁴ nor a special veto for Québec in such situations⁵²⁵ (thus legitimizing the pan-Canadian model by delegitimizing the provincial equality and multinational view of the status of the provinces).

⁵²¹ *Reference re Firearms Act (Can.)* [2000] 1 S.C.R. 783. The issue in this case is whether central legislation requiring firearms be licensed infringes provincial jurisdiction over property and civil rights. In the unanimous opinion (issued by 'The Court'), the SCC (at 26, 29, 31 and particularly 28) states: 'criminal law, as this Court has stated in numerous cases, constitutes a broad area of federal jurisdiction... [and it] ...often overlaps with provincial jurisdiction over property and civil rights...' Additionally, in line with the pan-Canadian model, the Court (at 2-3) implies that the constitutional and federal order is neutral and fixed above the political controversy at hand.

⁵²² *Re: Residential Tenancies Act, 1979* [1981] 1 S.C.R. 714. The issue in this case is whether a provincially established tribunal infringes on the jurisdiction of Superior Courts protected by s. 96 of the Constitution. The opinion was unanimous (authored by Dickson JJ).

⁵²³ See *Residential Tenancies Act* [1981] at 728: 'section 92(14) and ss. 96 to 100 represent one of the important compromises of the Fathers of Confederation. It is plain that what was sought to be achieved through this compromise...a strong constitutional base for national unity, through a unitary judicial system...Section 96 has thus come to be regarded as limiting provincial competence to make appointments to a tribunal exercising s. 96 judicial powers and therefore as implicitly limiting provincial competence to endow a provincial tribunal with such powers.'

⁵²⁴ See *Quebec Veto* [1982] at 807-808: '...one essential requirement for establishing a conventional rule of unanimity was missing. This requirement was acceptance by all the actors in the precedents. Accordingly, there existed no such convention;' going further and explicitly saying (at 812) that 'the opinion expressed in the *First Reference* that there existed no conventional rule of unanimity should be re-affirmed.'

⁵²⁵ See *Quebec Veto* [1982] at 814-815: '...neither in his factum nor in oral argument did counsel for the appellant quote a single statement made by any representative of the federal authorities recognizing either explicitly or by necessary implication that Quebec had a conventional power of veto over certain types of constitutional amendments...Furthermore, a convention such as the one now asserted by Quebec would have to be recognized by other provinces. We have not been referred to and we are not aware of any statement by the actors in any of the other provinces acknowledging such a convention.'

The point of these examples is to demonstrate how the Court can, and does, depict the federation in line with one particular federal model in its federalism jurisprudence. This discussion shows that in a significant percentage of its federal jurisprudence the Court understands and presents the federation in line with particular federal models. This is the case in all 74 decisions, even in those few instances where a measure of legitimacy is afforded competing models. In other words, in both its division of powers and reference work the Court draws from theories of federalism to understand what the federation is, while reinforcing these theories as fact by describing the federation in line with them in its reasons-for-decision.

Use of Legal Argument

The depiction of the federation is only one part of an imposing decision. The way a depiction is reinforced and legitimized by employing legal argument is also a key part of understanding how these 74 decisions impose specific federal models. This is because the Court can and does present what is ultimately a contested aspect of the federal order as a legal fact by using accepted forms of legal argument and constitutional interpretation.⁵²⁶ It is evident when reviewing these 74 cases that this happens in each decision: the Court employs accepted forms of legal reasoning to reinforce the legitimacy of a particular depiction of the federation in line with a federal model.

As Table 5.3 indicates, in these imposing decisions the Court primarily employs the doctrinal modality to reinforce the depiction of the federation in line with a particular model (either by citing supportive case law or adapting and applying the host of “division of powers doctrines” discussed in Chapter Three).⁵²⁷ At the same time, the textual modality plays an important role as both a primary and secondary way of reinforcing the various depictions of the federation (as do the prudential and

⁵²⁶ As explained in Chapter Three, the generally accepted forms of legal argument and methods of constitutional interpretation are the doctrinal, textual, prudential, structural, ethical and progressive modalities. Additional information on how these modalities are employed is available in the Annex.

⁵²⁷ This modality is employed in all 74 cases, and is the primary way the Constitution is interpreted and the depiction support in 66 of the 74 cases. The doctrinal modality is employed to support both the pan-Canadian model (in 37 cases), the provincial equality model (in 28 cases) and the multinational model (in one case) by selecting case law that supports the particular model imposed, or by highlighting aspects of the applicable “division of powers doctrines” (i.e. the paramountcy doctrine, the interjurisdictional immunity doctrine, the pith and substance and incidental effect doctrine, ect.) to reinforce key elements of the particular model imposed.

structural forms of reasoning).⁵²⁸ As already discussed, however, the frequency of the various modes of constitutional interpretation is not what really matters to a decision imposing a model, as the Court can employ a range of modalities and adapt them to reinforce a particular depiction of the federation.⁵²⁹ To better understand how the Court imposes a federal model in these decisions the focus must be squarely on *how the Court employs* these modes of legal argument to reinforce a specific depiction of the federation.

There are numerous examples in the 61 division of powers cases of how the Court employs doctrine to reinforce the legitimacy of a particular depiction of the federation. For example, *Fowler v. The Queen*⁵³⁰ is indicative of the way the Court can emphasize selective aspects of the case law to support a view of the central government's power over fisheries as relatively narrow in scope, when compared to the broad provincial power over property and civil rights⁵³¹ (thereby legitimizing a

⁵²⁸ Textual analysis is employed as the primary modality to support a depiction in 20 decisions, and as a secondary mode of interpretation in an additional 22 cases. Prudential analysis is employed in support of a depiction as a primary form of legal argument in 7 decisions and as a secondary form of argument in 11 decisions. Structural analysis is employed as a primary form of argument in only 2 cases, but, as a secondary form of argument it is used in 16 cases to support a specific depiction of the federation.

⁵²⁹ As argued previously, the various modes of legal argument can be shifted to support any model – both those more “constraining modalities” (the textual, historical and doctrinal modes) and those more “flexible modalities” (the structural, progressive, prudential and ethical modes). In this way, correspondence between specific modalities and specific depictions offers limited analytical value. Simply pointing out that doctrine is employed in support of the pan-Canadian model in 37 decisions and in support of the provincial equality model in 28 decisions does not add much to our understanding of how the Court imposes particular models and the problematic element of this (because this modality, and all the others, can easily be used to reinforce other models). What is important to point out, then, is *how* the modalities are used to reinforce specific models.

⁵³⁰ *Fowler v. The Queen* [1980] 2 S.C.R. 213. The issue in this case is whether the centre's fisheries act (which prohibits the putting of debris into water frequented by fish) is within its legislative competence (or if it infringes provincial jurisdiction over property and civil rights). The judgment was unanimous (authored by Martland JJ).

⁵³¹ See *Fowler v. The Queen* [1980] (at 221-223) where the Court highlights the following from the applicable case law on the scope of the central fisheries power: ‘the legislation in regard to “Inland and Sea Fisheries” contemplated by the *British North America Act* was not in reference to “property and civil rights” – that is to say, not as to the ownership of the beds of the rivers, or of the fisheries, or the rights of individuals therein, but to subjects affecting the fisheries generally ... To all general laws passed by the Dominion of Canada regulating “sea coast and inland fisheries” all must submit, but such laws must not conflict or compete with the legislative power of the local legislatures over property and civil rights ... Their Lordships are of opinion that the 91st section of the *British North America Act* did not convey to the Dominion of Canada any proprietary rights in relation to fisheries ... There is everywhere a power of regulation in the Dominion Parliament, but this must be exercised so as not to deprive the Crown in right of the Province or private persons of proprietary rights where they possess them ... Federal power in relation to fisheries does not reach the protection of provincial or private property rights in fisheries through actions for damages or ancillary relief for injury to those rights.’

depiction of the federation in line with the provincial equality model). While, in *R v. Crown Zellerbach*⁵³² the Court pulls from the case law a set of principles that legitimize a view of the federation where the centre can usurp legislative jurisdiction for a matter from the provinces under the ‘national concern’ branch of its reserve power⁵³³ (legitimizing a view of the order as centralized with a superior central government). Similarly, in *Ordon Estate v. Grail*⁵³⁴ the Court employs what it perceives to be an established legal principle to support a depiction of the federation as centralized with a superior central government. Employing the ‘interjurisdictional immunity doctrine,’ the Court says ‘that each head of federal legislative power under the *Constitution Act, 1867*, possesses a basic, minimum, and unassailable content, which the provinces are not permitted to regulate indirectly through valid laws of general application,’ and accordingly, the centre’s broadly construed jurisdiction over maritime matters creates ‘a body of law, uniform across the country, within which there is no room for the application of provincial statutes.’⁵³⁵

These three examples demonstrate the range of ways doctrine is used to support a particular depiction of the federation in these imposing decisions: from citing case law to legitimize a broad or narrow scope to a government’s powers; to developing a perspective on the scope of a government’s powers into a legal principle; to the application of an established legal principle that reinforces a specific depiction.

⁵³² *R v. Crown Zellerbach Canada Ltd.* [1988] 1 SCR 401. The issue in this case is whether a central law prohibiting the dumping of substances at sea (in waters that are within the boundaries of the province of BC) are valid (the key issue being if the laws fall under the national concern branch of the centre’s reserve power to pass laws for the peace, order and good government of Canada). It was a majority judgment (authored by Le Dain JJ).

⁵³³ *R v. Crown Zellerbach* [1988] (at 423-424) reinforces the legal principle that the centre can legitimately legislate on an issue that has become a national concern (i.e. an issue that has moved beyond the scope of a merely local or provincial issue) under its reserve power. Drawing from the applicable case law the Court (at 432-434) ascribes a broad scope to what constitutes an issue of national concern, arguing that such issues do not need to be national emergencies (at 427-428, 431-432) and encompass a wide range of issues, such as aeronautics (at 425). Ultimately, the Court establishes that the federal order includes a legal principle that allows the centre to usurp provincial jurisdiction in relation to a matter that was previously considered local and is now determined (by the centre and the Court) to be of national concern.

⁵³⁴ *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437. The issue in this case is whether the centre’s maritime law applies to regulate a set of private tort actions stemming from claims of negligence in boating accidents (or if provincial law regulating tort actions through its jurisdiction over property and civil rights applies). The decision was unanimous (authored by Iacobucci and Major JJ).

⁵³⁵ *Ordon Estate v. Grail* [1998] at 486, 497, also see at 489-491 and 496-499.

In the division of powers decisions where modalities other than doctrinal reasoning are employed, the approach is broadly similar: the Court uses an accepted form of legal argument to reinforce the legitimacy of a depiction of the federation. So, for example, in *Canadian National Transportation*⁵³⁶ the Court presents the text of the Constitution as the supreme law of the country (fixed above influence from political practice),⁵³⁷ one that mandates a centralized federation⁵³⁸ with a superior central government.⁵³⁹ In *RJR-MacDonald v. Canada*⁵⁴⁰ the Court clearly uses prudential reasoning to buttress the legitimacy of its depiction of the centre's criminal law power as broad.⁵⁴¹ This broad criminal law power is rationalized as allowing the criminal prosecution of tobacco advertisers, which is presented as an innovative solution to a public evil that is necessary given the

⁵³⁶ *A.G. (Can.) v. Can. Nat. Transportation, Ltd.* [1983] 2 S.C.R. 206. The issue in this case is whether the central government can prosecute an offence under its anti-competition law (or if criminal offences must be prosecuted by provincial Attorneys General, given past political practice and the provinces' jurisdiction over the administration of justice). The case is essentially about the scope of the centre's criminal law power in relation to the provinces' power over the administration of justice. The decision was unanimous (authored by Laskin CJ, with Dickson, Beetz and Lamer JJ concurring).

⁵³⁷ See *Canadian National Transportation* [1983] at 235: 'the issue must be decided on the basis of the language of ss. 91 and 92 [of the Constitution] and the principles of federal exclusiveness and paramountcy embodied therein. It would be one thing to assert that practical considerations would best be served by recognizing provincial prosecutorial authority in the general run of criminal law offences, but this is a matter to be considered by the legislature that has constitutional authority to enact the relevant provisions. It cannot of itself determine where that constitutional authority lies.'

⁵³⁸ See *Canadian National Transportation* [1983] at 223: 'Language and logic inform constitutional interpretation, and they are applicable in considering the alleged reach of s. 92(14) and the allegedly correlative limitation of criminal procedure in s. 91(27). I find it difficult, indeed impossible, to read s. 92(14) as not only embracing prosecutorial authority respecting the enforcement of federal criminal law but diminishing the *ex facie* impact of s. 91(27) which includes procedure in criminal matters. As a matter of language, there is nothing in s. 92(14) which embraces prosecutorial authority in respect of federal criminal matters. Section 92(14) grants jurisdiction over the administration of justice, including procedure in civil matters and including also the constitution, maintenance and organization of civil and criminal provincial courts. The section thus narrows the scope of the criminal law power under s. 91, but only with respect to what is embraced within "the Constitution, Maintenance, and Organization of Provincial Courts ... of Criminal Jurisdiction". By no stretch of language can these words be construed to include jurisdiction over the conduct of criminal prosecutions. Moreover, as a matter of conjunctive assessment of the two constitutional provisions, the express inclusion of procedure in civil matters in provincial Courts points to an express provincial exclusion of procedure in criminal matters specified in s. 91(27);' see also at 216-217, 220-221, 240-241.

⁵³⁹ Note that in the previously cited paragraph from *Canadian National Transportation* [1983] (at 235) the Court presents the Constitution as mandating a superior role for the centre in the federation ('...the language of ss. 91 and 92 and *the principles of federal exclusiveness and paramountcy embodied therein...*'); see also at 212, 219, 221.

⁵⁴⁰ *RJR-MacDonald Inc. v. Canada (Attorney General)* [1995] 3 S.C.R. 199. The issue in this case is a central law regulating tobacco advertising. It was a majority judgement (authored by Iacobucci, with McLachlin concurring).

⁵⁴¹ On the decision presenting the centre's criminal law power as broad, see *RJR-MacDonald v. Canada* [1995] at 240-242.

difficulties of banning tobacco advertising wholesale.⁵⁴² This form of prudential argument is generally used in conjunction with other modalities to further legitimize a depiction of the federation (as was the case in *RJR-MacDonald v. Canada*).

This practice of layering legal arguments to rationalize a particular depiction is evident in most of the 74 imposing decisions, as *Bank of Montreal v. Hall*⁵⁴³ exemplifies. In this decision the Court broadens the definition of what constitutes a conflict of laws under the paramountcy doctrine⁵⁴⁴ (thereby reinforcing that the rules of federation promote a centralized order with a superior central government). This general depiction in line with the pan-Canadian model is further buttressed by the Court noting the policy reasons that support a centralized power over banking given ‘the pressing need to provide, on a nationwide basis, for a uniform securities mechanism.’⁵⁴⁵ While in *Senate*, the provincial equality model is reinforced by highlighting that the text of the Constitution mandates that Parliament includes a body that represents the interests of the province,⁵⁴⁶ while also noting that the fathers of confederation intended this to be the role of the Senate and that they viewed federation as a compact among equal provinces.⁵⁴⁷

⁵⁴² See *RJR-MacDonald v. Canada* [1995] at 252-253: ‘Parliament has been innovative in seeking to find alternatives to a prohibition on the sale or use of tobacco. In light of the practical difficulties entailed in prohibiting the sale or consumption of tobacco, and the resulting need for innovative legislative solutions, Parliament’s decision to criminalize tobacco advertisement and promotion is, in my view, a valid exercise of the criminal law power.’ See, also (at 241-245 and 247-249) where the Court explicitly justifies the use of the criminal law because it says (at 247) that ‘a prohibition upon the sale or consumption of tobacco is not a practical policy option at this time.’ Generally, this type of prudential reasoning is employed to justify a centralization of authority; however, there are also decisions that employ prudential reasoning to reinforce the legitimacy of other models. For example, in *Unifund Assurance* [2003] (at 28, 68-71) the Court emphasizes the importance of provincial boundaries and autonomy as ensuring order and justice in the federal order.

⁵⁴³ *Bank of Montreal v. Hall* [1990] 1 S.C.R. 121. The key issue in this case is whether a central law that lays out the procedure and conditions for a bank to seize property as security of a loan is subject to provincial laws that regulate the procedures for the seizure of property put up as security for a loan. The decision was unanimous (authored by La Forest JJ).

⁵⁴⁴ As explained in Chapter Three, the paramountcy doctrine holds that when there is a conflict between a valid central and provincial law the former is seen as superior and applicable. In *Bank of Montreal v. Hall* [1990] (at 152-154) the Court broadens the definition of conflict under the paramountcy doctrine by adding the notion that a mere frustration of the legislative intent of the central government engages the doctrine. This is a considerably broader test than that established in *Multiple Access Ltd. v. McCutcheon* [1982] 2 S.C.R. 161 (discussed in the next chapter) which states that an operational conflict is needed for the paramountcy doctrine to be applicable.

⁵⁴⁵ *Bank of Montreal v. Hall* [1990] at 146, also see at 134-135, 137-140.

⁵⁴⁶ See *Senate* [1980] (at 71, 73-75 and particularly 68) where the Court says ‘the place of the Senate in the exercise of federal legislative powers is determined by ss. 17 and 91 of the [Constitution] Act [1867]... The power to enact federal legislation was given to the Queen by and with the advice and consent of the Senate

The use of doctrinal and other forms of legal argument to reinforce particular depictions of the federation is also evident in the Court's 13 imposing references. For example, in *Exported Natural Gas Tax*⁵⁴⁸ the Court presents the text of the Constitution as establishing a centralized federation with a generally superior central order,⁵⁴⁹ a view that is further justified by the relevant doctrine that allows the centre to infringe upon provincial jurisdiction.⁵⁵⁰

What these examples are meant to demonstrate is how various forms of legal argument and modes of constitutional interpretation (on their own and in combination) are used to reinforce the legitimacy of particular views of the federation. They show what happens in each of these 74 decisions: the presentation of a particular and contested perspective of what the federation is as a legal fact.

and the House of Commons. Thus, the body which had been created as a means of protecting sectional and provincial interests was made a participant in this legislative process.' On the use of the textual modality in this reference, see Monahan (1987: 175-179, particularly at 178).

⁵⁴⁷ See *Senate* [1980] (at 77 and particularly 66-67) where the Court cites debates among the fathers of federation to note their intention that 'in order to protect local interests and to prevent sectional jealousies, it was found requisite that the three great divisions into which British North America is separated, should be represented in the Upper House on the principle of equality...' and that '..the very essence of our compact is that the union shall be federal and not legislative,' statements immediately followed with the view that 'a primary purpose of the creation of the Senate, as a part of the federal legislative process, was, therefore, to afford protection to the various sectional interests in Canada in relation to the enactment of federal legislation.' On the use of the historical modality and the (lack) of historical accuracy in this decision, see Monahan (1987: 179-186).

⁵⁴⁸ *Re: Exported Natural Gas Tax* [1982] 1 S.C.R. 1004. The issue in this reference is the validity of a proposed central tax on the export of natural gas. It was a majority opinion (authored by Martland, Ritchie, Dickson, Beetz, Estey and Chouinard JJ).

⁵⁴⁹ See *Exported Natural Gas Tax* [1982]; while the majority find s. 125 of the Constitution protects provinces from the taxation of their property by the central order, importantly this protection is presented as an *exception* (at 1067); the general superiority of the central order through its taxation power and other heads of power is reaffirmed. And so, in a decision structured by reviewing relevant constitutional and legislative text the Court argues (at 1053-54) that 'the federal government has the undoubted power in the exercise of its regulatory authority under s. 91(2), "The Regulation of Trade and Commerce", to affect directly and seriously the provincial proprietary interest notwithstanding that that effect might come through regulatory taxation and notwithstanding the presence of s. 125.' A position that was taken yet further by the dissenting opinion (at 1031), and which also indicated that the centre's residual power to legislate for the peace, order and good government of Canada contained in s. 91 of the Constitution may apply in this instance (at 1041-42).

⁵⁵⁰ See *Exported Natural Gas Tax* [1982] (at 1068): 'While s. 125 restricts the federal taxing power, it does not limit the exercise of the other heads of power found in s. 91. Provincial Crown lands are not immune from the operation of Dominion laws made in exercise of competent authority affecting the use of such property. This proposition flows from the doctrine that laws "in relation to" a federal head of power may "affect" provincial jurisdiction or property.'

Imposing Outcomes

The extent to which a decision imposes a federal model not only rests on how the federation is understood, presented and legitimized via legal argument, but also on the outcome of the case.

As argued previously, imposing decisions reinforce the legitimacy of a particular federal model by bringing the federal order in line with the way that model says the federation ought to be. In such decisions, the jurisdiction that wins, and the way it wins, reinforces only one model (i.e. the outcome reinforces that the federation *is* as a model says it *should be*).

There is a close link between the way the federation is depicted and the outcome: the depiction of the federation establishes the nature of the order that drives the decision, and the outcome of the decision in turn reinforces the legitimacy of a particular depiction of the federation as legal fact. It is thus the correspondence between a specific depiction of the federation in line with a federal model and an outcome that reinforces the legitimacy of that model that is the hallmark of an imposing decision. Each of these attributes are evident in almost all of these 74 cases: in virtually each decision the outcome reinforces only one model (through the jurisdiction that wins and the way it wins); and, in each decision there is a correspondence between the way the federation is depicted in line with a model and the way the outcome reinforces the legitimacy of that federal model.⁵⁵¹

We can see these two attributes when looking at the 37 division of powers decisions that depict the federation in line with the pan-Canadian model. In these decisions the central government is the primary winner and the outcomes actually work to better align the federal order with the ideal model in each instance. This is exemplified in *Ontario Hydro*, where the Court (following a depiction of the federation as centralized with a superior central government) finds that central laws apply to regulate labour relations at provincially owned atomic power stations. This outcome works to centralize the federation and solidify the superiority of the central government

⁵⁵¹ The exceptions being *Re: B.C. Family Relations Act* [1982] 1 S.C.R. 62 and *Reference re Quebec Sales Tax* [1994] 2 S.C.R. 715, with the outcomes in both cases being positive to multiple jurisdictions (however, still tending to reinforce the legitimacy of one model).

because it reinforces the ability of the centre to usurp legislative jurisdiction from the provinces via a broad interpretation of its declaratory power⁵⁵² and what constitutes a matter of national concern.⁵⁵³ Similarly, in *R v. Hydro-Quebec*⁵⁵⁴ it is clear that the Court's decision to allow the centre to legislate with regard to the environment (i.e. to classify material as toxic and regulates its use) follows a broad depiction of the centre's criminal law power⁵⁵⁵ (which, in turn, works to reinforce the nature of the federation as a centralized order).

In the seven federal references that impose the pan-Canadian model the central government is also the primary winner and the outcomes also align the federal order with the ideal model. For example, in *Firearms* the "long-gun" registry is found to be a legitimate exercise of the central government's criminal law power despite provincial objections⁵⁵⁶ – a ruling that centralizes the federation and reinforces the superiority of the central government by legitimizing its ability to

⁵⁵² The declaratory power stems from s. 92(10)(c) of the Constitution, which is seen to allow the centre to unilaterally bring a local work (which would otherwise be within the legislative remit of the provinces) within its exclusive jurisdiction by declaring that it is "for the general advantage of Canada." This power has been used over 470 times, though generally prior to 1970. On the power and its use see Hogg (2009: 132, 577-580). In *Ontario Hydro* [1993] (at 362-363) the Court granted a broad scope to this power: 'when such a declaration is made, any work subject to the declaration falls ... within the legislative jurisdiction of Parliament ... [and thus] provincial jurisdiction over the work is ousted,' (original emphasis). Summing up the basis of its decision on this point the Court (at 367) affirms that 'the legislative jurisdiction conferred over a declared work refers to the work as a going concern or functioning unit, which involves control over its operation and management ... Labour relations are integral and vital parts of the operation of a work ... [accordingly] legislation governing labour relations on such works is legislation in relation to that work and falls outside provincial legislative competence.'

⁵⁵³ *Ontario Hydro* [1993] (at 379) adds to the expanding definition of what constitutes a national concern and so falls within the exclusive legislative jurisdiction of the centre via its reserve power (in a similar manner to that taken in *R v. Crown Zellerbach* discussed above). While the outcome in this decision is based on the centre's declaratory power and jurisdiction over matters of a national concern, similarities in the way the outcome reinforces a broad and superior scope to the centre's power over federal works (including labour relations) can be seen in *Northern Telecom v. Communication Workers* [1983] 1 S.C.R. 733 (*Northern Telecom*).

⁵⁵⁴ *R. v. Hydro-Québec* [1997] 3 S.C.R. 213. The issue in this case is whether environmental protection legislation (clarifying what constitutes a toxic substance) is within the centre's jurisdiction (particularly under its criminal law power). It was a majority decision (authored by La Forest JJ).

⁵⁵⁵ See *R. v. Hydro-Québec* [1997] (at 118-119) where the centre's criminal law power is presented as 'plenary in nature' and is explicitly interpreted in its 'widest sense,' and following this interpretation the Court (at 123-124, 127, 146, 152) goes on to hold environmental pollution to be a public evil that allows for regulation through the broad criminal law power.

⁵⁵⁶ See *Firearms* [2000] at 31, 39, 40 and particularly 24: 'the effects of the law suggest that its essence is the promotion of public safety through the reduction of the misuse of firearms, and negate the proposition that Parliament was in fact attempting to achieve a different goal such as the total regulation of firearms production, trade, and ownership...' and, after applying a test that builds on relevant doctrine the Court (at 35) goes on to state that the 'gun control law possesses all three criteria required for a criminal law.'

affect provincial jurisdiction over the regulation of property and civil rights.⁵⁵⁷ In *Canada Assistance Plan*, the Court holds the central government can unilaterally alter funding agreements previously reached with the provinces,⁵⁵⁸ which reinforces the pan-Canadian model adhered to in the depiction and approach by clearly establishing the centre as superior and the federation as a centralized order.⁵⁵⁹

The same pattern of an outcome following, and reinforcing, a particular depiction of the federation is evident in the six federal references that impose the provincial equality model. For example, in *Strait of Georgia*⁵⁶⁰ the territory claimed by both the central and provincial governments was determined to be the property of the colony of British Columbia prior to joining Canada (and so, it was seen to be the territory of the province of British Columbia today);⁵⁶¹ this ruling reinforces the provincial equality model adhered to in the depiction as it reinforces the very nature of federation as a compact between equal, already established, autonomous communities that retain this autonomy into and throughout federation.⁵⁶² We see a similar link between approach and outcome in

⁵⁵⁷ See *Firearms* [2000] at 26, 28, 29, 50 and particularly 4: ‘the gun control law comes within Parliament’s jurisdiction over criminal law. The law in “pith and substance” is directed to enhancing public safety by controlling access to firearms through prohibitions and penalties. This brings it under the federal criminal law power. While the law has regulatory aspects, they are secondary to its primary criminal law purpose. The intrusion of the law into the provincial jurisdiction over property and civil rights is not so excessive as to upset the balance of federalism.’

⁵⁵⁸ See *Canada Assistance Plan* [1991] (at 548) where the Court rules that the central order has ‘the power of repealing or amending [any Act, such as that giving rise to the agreement between the provinces and the central order] and of revoking, restricting or modifying any power...’ that stems from such acts – a ruling that is reinforced (at 557-558) by the Court holding that provincial expectations that the agreement would not be altered do not give rise to substantive legal rights.

⁵⁵⁹ See *Canada Assistance Plan* [1991] at 548-549, 563-564 and at 560 where the Court says: ‘a restraint on the Executive in the introduction of legislation is a fetter on the sovereignty of Parliament itself;’ and also (at 567) where the Court goes on to argue ‘it was said that, in order to protect the autonomy of the provinces, the Court should supervise the federal government’s exercise of its spending power. But supervision of the spending power is not a separate head of judicial review. If a statute is neither *ultra vires* nor contrary to the *Canadian Charter of Rights and Freedoms*, the courts have no jurisdiction to supervise the exercise of legislative power.’ As Baier (2006: 147) also argues, the outcome of this reference clearly affirms ‘the superiority of the federal government in setting governmental priorities through its spending power.’

⁵⁶⁰ *Reference re: Ownership of the Bed of the Strait of Georgia and Related Areas* [1984] 1 S.C.R. 388. The issue in this case is whether the central or provincial government owns the seabed (and the resources contained therein) of the Strait of Georgia. It was a majority opinion (authored by Dickson JJ).

⁵⁶¹ See *Strait of Georgia* [1984] at 410, 418, 421, 425.

⁵⁶² See *Strait of Georgia* [1984] at 401: ‘if British Columbia can demonstrate [that the territory belonged to the colony prior to joining federation] ... it would *necessarily follow* that the lands in question were within British Columbia when it entered Confederation and consequently British Columbia has retained proprietorship’ (emphasis added). It is the implication that the colony necessarily retains its status and autonomy into

McEvoy,⁵⁶³ where the prohibition against establishing tribunals that infringe on s. 96 Superior Court functions is extended to the central government,⁵⁶⁴ and, in this negative outcome for the centre we see the provincial equality model reinforced as both levels of government are presented as equal in their subordination to the independence of the judiciary.⁵⁶⁵

These two attributes, all provinces being the primary winners of the case and the outcome aligning the federation with what the provincial equality model says it is and ought to be, are also evident in the 23 division of powers decisions that impose the provincial equality model. For example, in *Irwin Toy*⁵⁶⁶ a provincial law prohibiting advertising to children was found valid, despite the fact it affects television broadcasting (an area of exclusive central jurisdiction). This outcome reinforces a broad scope for provincial powers as well as a measure of equality with the centre (by allowing provinces to affect central jurisdiction and the rejection of a broad application of central paramountcy in the case).⁵⁶⁷ In *Devine v. Quebec*⁵⁶⁸ the outcome also follows and reinforces a depiction of the provinces as having broad and symmetrical powers (while simultaneously

federation (an order that thus is the result of the pooling of this sovereignty with other autonomous jurisdictions) that works to reinforce the nature of the federation as a compact in line with the provincial equality model.

⁵⁶³ *McEvoy v. Attorney General for New Brunswick et al.* [1983] 1 S.C.R. 704. The issue in this reference is if the central government can establish a tribunal that infringes on the jurisdiction of Superior Courts protected by s. 96 of the Constitution. The unanimous opinion was issued by 'The Court.'

⁵⁶⁴ See *McEvoy* [1983] at 719-722: 'the judicature sections of the *Constitution Act, 1867* guarantee the independence of the Superior Courts; they apply to Parliament as well as to the Provincial Legislatures.'

⁵⁶⁵ See *McEvoy* [1983] at 719-722, and particularly 720: 'The traditional independence of English Superior Court judges has been raised to the level of a fundamental principle of our federal system by the *Constitution Act, 1867* ... Under the Canadian constitution the Superior Courts are independent of both levels of government. The provinces constitute, maintain and organize the Superior Courts; the federal authority appoints the judges. The judicature sections of the *Constitution Act, 1867* guarantee the independence of the Superior Courts; they apply to Parliament as well as to the Provincial Legislatures.' A point which makes clear that the two levels are equals under the Constitution, something the Court reiterates (at 722): the two levels are equal as there are elements of the Constitution that 'are beyond conjoint provincial and federal action.'

⁵⁶⁶ *Irwin Toy Ltd. v. Quebec (Attorney General)* [1989] 1 S.C.R. 927. The issue in the case is whether provincial legislation prohibiting advertising to children is *ultra vires* because it infringes on federal jurisdiction over television broadcasters. It was a majority judgment (authored by Dickson, Lamer and Wilson JJ).

⁵⁶⁷ See *Irwin Toy* [1989] (at 950-951 and 957-958) where the Court works from a depiction of the order that allows provinces to legitimately pass legislation that affects areas of central jurisdiction, while (at 963-964) additionally applying the paramountcy doctrine in a way that protects provincial autonomy (i.e. employing the more stringent test that requires an operational conflict between laws for provincial legislation to be displaced by central legislation).

⁵⁶⁸ *Devine v. Quebec (Attorney General)* [1988] 2 SCR 790. The division of power issue in this case is whether Québec legislation that mandates the use of French for business is invalid because it infringes on the central government's power over the criminal law and trade and commerce. The case also involves *Charter* issues, which were determinative in the appeal. The unanimous judgment was issued by 'The Court.'

delegitimizing the view that Québec can wield asymmetrical powers as a jurisdiction housing a national minority).⁵⁶⁹ The Court's decision does this by finding that the ability of all provinces (not just Québec) to validly regulate language use in relation to commerce results from their shared authority over the regulation of commerce within the provinces.⁵⁷⁰

Finally, despite *Devine v. Quebec* challenging the legitimacy of the multinational model, in *Quebec v. Grondin*⁵⁷¹ (the only case that imposes the multinational model) the outcome clearly follows and reinforces the view that the federation allows Québec to wield asymmetrical powers as a result of its distinct historical and cultural situation. The outcome of *Quebec v. Grondin* reinforces this view of federation by allowing Québec a unique and distinct power to establish an inferior court/tribunal that handles landlord-lessee affairs based on the fact that inferior courts within Québec dealt with such matters prior to confederation.⁵⁷² In other words, Québec (alone) is allowed to establish such a tribunal, based on the unique legal and historical circumstances of the jurisdiction – a ruling that legitimizes an asymmetrical arrangement based on the pre-confederation situation in Québec (i.e. recognizing a unique and enduring quality of Québec both as a colony prior to confederation and province after the union).⁵⁷³

What these examples demonstrate is that regardless of which model is imposed, the outcome and depiction in these 74 decisions work in tandem to reinforce the legitimacy of one particular federal model. They exemplify how a partial understanding of what the federation is and

⁵⁶⁹ On this depiction and its link to the outcome see *Devine v. Quebec* [1988] (at 807-809) where the Court rejects that a plenary authority over 'language' is given to either level of government, instead deciding that provincial legislation regulating language must do so in relation to a head of power that all provinces share through s. 92 of the Constitution (i.e. the power must be one exercised within the symmetrical jurisdiction afforded provinces as a level of government).

⁵⁷⁰ As just stated, it is the rationalization that focus on the shared jurisdiction of all provinces that reinforces the view of provinces as equal in status while delegitimizing the view that Québec holds asymmetrical powers to regulate language in the province.

⁵⁷¹ The issue in this case is whether a tribunal dealing with landlord-lessee relations established by Québec violates Superior Court jurisdiction protected under s. 96 of the Constitution (and the role of the central government in appointing and establishing such courts).

⁵⁷² See *Quebec v. Grondin* [1983] (at 377 and 382-383) where the Court says that because inferior courts in Lower Canada (Quebec) exercised this power prior to confederation, the province can establish a tribunal with such powers in the contemporary period.

⁵⁷³ Contrast the way this case reinforces the multinational view of the federation and distribution of powers (in the application of the *Residential Tenancies Act* test) with the way the provincial equality model is reinforced to the detriment of the multinational model in *Sobeys v. Nova Scotia* [1989] discussed above.

ought to be informs the outcomes of a case, and how these outcomes reinforce the legitimacy of that partial view in turn. They show how these decisions actually align the federation with what a model says it should be - how they merge the normative with the factual.

An Imposing Role

The SCC's adopted role within the federation can be an integral part of a decision imposing a particular model. As noted earlier, one's ideal role for the judiciary as the federal arbiter is linked to a particular understanding of what the federation is and ought to be.⁵⁷⁴ Generally, there are three ideal roles for the judiciary that stem from an understanding of the constitution and federation as a fixed set of rules that are to be enforced and protected (the umpire, branch of government and guardian roles).⁵⁷⁵ Moreover, there are links between these three ideal roles and the three key federal models: the court as an umpire draws from and reinforces elements of the pan-Canadian model; the branch of government model draws from and reinforces elements of the provincial equality model; and, the guardian role draws from and reinforces elements of the multinational model. What we see in a number of SCC decisions is the Court adopting and promoting one of these three roles in a way that works from, and also reinforces, particular understandings of the actual and ideal federal order.

As Table 5.3 indicates, in the 74 imposing decisions I was able to determine the Court's self-selected role in 38 cases.⁵⁷⁶ In these 38 decisions the Court adopts a role for the judiciary as an umpire in 16 cases and as a branch of government in 18 cases, while also displaying a measure of support for the judiciary as a facilitator of negotiation to manage conflict over the federal order in 9

⁵⁷⁴ As argued in Chapter Two, despite the lack of coherence within federal theory with regard to theories of federation and theories of judicial review (i.e. the role of the Court within the order), there is an inherent link between these two things as the Court's role within the federation stems from how the actual and ideal constitutional and federal order are understood.

⁵⁷⁵ These three roles can be contrasted with the facilitator role, which starts from an understanding of the federation as a contested normative order and seeks to manage conflict over this order by fostering negotiation.

⁵⁷⁶ The lack of information in a number of cases stems from the SCC tending to avoid theoretical discussions on points such as the role of the judiciary in the federation (unless the issue is raised by a party).

cases.⁵⁷⁷ Interestingly, there is also a high degree of correspondence between the identified role of umpire and the imposition of a pan-Canadian model (13 of 14 cases).

In any event, it is not the frequency of particular roles (or even the correspondence between particular roles and particular models) that is of primary concern; what really matters is how the SCC employs a particular role to reinforce the legitimacy of a particular federal model. In imposing decisions we see this happening in two key ways.

The first is when the Court actively employs its adopted role to reinforce a specific depiction of the federation in line with a federal model. A number of division of powers decisions exemplify this approach. In *Canada v. Law Society of BC*⁵⁷⁸ a depiction of the federation as decentralized, with provinces being equal amongst each other and with the central government,⁵⁷⁹ is buttressed by presenting the judiciary as a branch of government independent from both the centre and the provinces and as the arbiter between these two equal levels of government.⁵⁸⁰ In contrast, *Hunt v. T&N* presents the judiciary as a branch of government that is essentially unitary in nature, acting as a national institution (with provincial Superior Courts being more than ‘mere local courts’ and the SCC as a having a ‘unifying jurisdiction’ as an apex court).⁵⁸¹ This adopted role for the judiciary as a branch of government thus helps to reinforce the legitimacy of the depiction in the decision, which presents the federation as centralized and stresses the pan-state nature of the political

⁵⁷⁷ It is important to note that the Court can and does display support for multiple roles within a single decision. In all 9 of the decisions where the facilitator role is adopted there is a measure of legitimacy afforded multiple models in the depiction of the federation; because of this and the support for the facilitator role, these cases tended to fall on the lower end of the scale of imposing decisions.

⁵⁷⁸ *A.G. Can. v. Law Society of B.C.* [1982] 2 S.C.R. 307. The issue in this case is whether central anti-competition legislation is applicable to provincial law societies. The decision was unanimous (authored by Estey JJ).

⁵⁷⁹ See *Canada v. Law Society of BC* [1982] at 318, 334-336, 347, 349.

⁵⁸⁰ See *Canada v. Law Society of BC* [1982] (at 327) where the SCC notes the equality of both levels of government in relation to an independent judiciary: the provincial Superior Courts have always ‘occupied a position of prime importance in the constitutional pattern of this country ... They cross the dividing line, as it were, in the federal-provincial scheme of division of jurisdiction, being organized by the provinces under s. 92(14) of the *Constitution Act* and are presided over by judges appointed and paid by the federal government (sections 96 and 100 of the *Constitution Act*),’ and that these provincially organized superior courts ‘are surely bound to execute all laws in force in the Dominion, whether they are enacted by the Parliament of the Dominion or by the Local Legislatures,’ see also at 326-328 and 330.

⁵⁸¹ See *Hunt v. T&N* [1993] on the courts as unitary in nature (at 314), on the courts as more than mere local institutions (at 311-312), and on the SCC as a unifying apex court (at 318-319).

community.⁵⁸² While in *Scowby v. Glendinning* the Court says that the constitutional law mandates a centralized federation with a superior central government, and that the Court's role is to enforce this law as an umpire, not to comment on its wisdom⁵⁸³ (thereby reinforcing a depiction of the federation in line with the pan-Canadian model as simply reflecting the rules of the constitutional order).

The SCC also employs an adopted role for the judiciary to reinforce the way it depicts the federation in its imposing references. For example, in *McEvoy* the SCC presents the judiciary as an independent branch of government, saying this role has been 'raised to the level of a fundamental principle of our federal system' – a role that reinforces the provincial equality model imposed in this reference because it means the courts are 'independent of both levels of government' (reinforcing an equality between the two orders).⁵⁸⁴

The second way the Court's self-selected role can work to impose a federal model is by employing the adopted role to justify an outcome that reinforces the legitimacy of a particular model. The archetypal example of this is when the Court says that its role as umpire of the federation mandates it to enforce the rules of the constitution, regardless of their effect. This is nicely exemplified in the division of powers case *Northern Telecom*.⁵⁸⁵ Here, the finding that the central government can carve out the regulation of labour relations from provincial jurisdiction when it is related to federal undertakings is reinforced *as a legal rule* through the Court's self-selected role. The Court says its proper role is to enforce the constitutional division of powers that allows such action, and to police conflict that may arise as a result of those rules, not to act as a

⁵⁸² See the discussion of this depiction above.

⁵⁸³ See *Scowby v. Glendinning* [1986] at 238: 'The terms of s. 91(27) of the Constitution must be read as assigning to Parliament exclusive jurisdiction over criminal law in the widest sense of the term. Provincial legislation which in pith and substance falls inside the perimeter of that term broadly defined is *ultra vires*. Parliament's legislative jurisdiction properly founded on s. 91(27) may have a destructive force on encroaching legislation from provincial legislatures, *but such is the nature of the allocation procedure in ss. 91 and 92 of the Constitution. Here we are not concerned with the result in law of the exercise by Parliament of one of its exclusive heads of jurisdiction*' (emphasis added).

⁵⁸⁴ *McEvoy* [1983] at 720, see also at 719-721 generally.

⁵⁸⁵ The issue in this case is whether labour relations associated with a federal undertaking fall under central or provincial competence. The majority decision was authored by Estey JJ, with Dickson JJ concurring.

branch of government to adapt those rules or to facilitate negotiation over the rules.⁵⁸⁶ Similar examples of the Court using the umpire role to further justify an outcome that favours the pan-Canadian model can clearly be seen in *R v. Malmo-Levine*⁵⁸⁷ and *R v. Morgentaler*.⁵⁸⁸

Despite these cases, in a number of decisions the Court embraces the branch of government role to allow it to consider the policy rationale of a particular law or action; importantly, in these decisions the Court often goes on to employ these policy considerations to help justify a law as legitimately within the scope of a government's jurisdiction. For example, in *RJR-MacDonald v. Canada* the Court justifies the outcome (which reinforces a broad scope to the centre's criminal law power and allows it to regulate tobacco advertising) by implying its role permits it to consider this action as a practical necessity and an innovative policy solution.⁵⁸⁹ Similarly, in *Bank of Montreal v. Hall* the Court justifies the outcome that reinforces a broad scope to the centre's power over banking by noting 'the pressing need to provide, on a nationwide basis, for a uniform security mechanisms' (implying such policy concerns are within its proper role to consider).⁵⁹⁰

This approach of employing a particular role to rationalize and justify an outcome that reinforces a specific model is also evident in the SCC's federal references. In *Canada Assistance Plan* the Court explicitly rejects a role of guarding the federal principle or acting as an equal branch of government. Instead, it opts to explicitly enforce the rules of the Constitution as an umpire, regardless of the effect this has on the balance of the federation or intergovernmental relations (even if, as in this reference, these rules are interpreted to legitimize the central government infringing on what is generally thought to be provincial jurisdiction).⁵⁹¹

⁵⁸⁶ See *Northern Telecom* [1983] at 742: 'It is inherent in a federal system such as that established under the *Constitution Act*, that the courts will be the authority in the community to control the limits of the respective sovereignties of the two plenary governments, as well as to police agencies within each of these spheres to ensure their operations remain within their statutory boundaries. Both duties of course fall upon the courts when acting within their own proper jurisdiction.' See also (at 745 and particularly 768-769) where the Court rejects the view that its role is to facilitate continued negotiation over the constitutional rules.

⁵⁸⁷ See *R. v. Malmo-Levine*; *R. v. Caine* [2003] 3 S.C.R. 571 at at 275.

⁵⁸⁸ See *R. v. Morgentaler* [1993] 3 S.C.R. 463 at at 263, 299, 516.

⁵⁸⁹ See *RJR-MacDonald v. Canada* [1995] at 39.

⁵⁹⁰ *Bank of Montreal v. Hall* [1990] at 146.

⁵⁹¹ See *Canada Assistance Plan* [1991] (at 558-559 and particularly 567) where the Court responds to the argument 'that the "overriding principle of federalism" requires that Parliament be unable to interfere in areas

The point is that in both streams we can see examples of the SCC adopting and promoting an ideal role for the judiciary in line with what a particular federal model expounds it should be, while also employing this role in a way that reinforces key aspects of a federal model's depiction of the federation. In addition, there are a number of examples that demonstrate how the Court employs a selected role to justify an outcome that favours a jurisdiction and reinforces a federal model.

The Problem with this Imposing Jurisprudence

The above review establishes the difference between these 74 imposing decisions and the exemplar of the *Secession Reference*. Imposing decisions overwhelmingly depict the federation in line with only one model, while the *Secession Reference* recognizes the legitimacy of multiple models and federation as the process and outcome of negotiation between the subscribers of these models. It is also evident how legal argument and constitutional interpretation are employed in the imposing cases to frame one perspective on what the federation is in the legitimacy of the law. This approach is generally rejected in the *Secession Reference*, where legal argument and methods of constitutional interpretation are used to lend legitimacy to multiple federal models. Similarly, the outcomes of these 74 imposing decisions diverge significantly from the *Secession Reference*; the former create stark winners and losers and reinforce specific federal models to the detriment of others; the latter rejects a zero-sum approach and seeks an outcome that benefits all parties to the conflict, while also working to reinforce the legitimacy of multiple federal models. Finally, the Court's adopted role in the *Secession Reference* facilitates negotiation and dialogue to resolve the conflict between the actors subscribing to legitimate federal models. The tendency of the SCC in the imposing cases is to adopt a role in line with what a particular federal model mandates it should be, while also employing this role in a way that reinforces key aspects of a specific federal model's depiction of the federation and to justify outcomes that reinforce that model.

of provincial jurisdiction. It was said that, in order to protect the autonomy of the provinces, the Court should supervise the federal government's exercise of its spending power. But supervision of the spending power is not a separate head of judicial review. If a statute is neither *ultra vires* nor contrary to the *Canadian Charter of Rights and Freedoms*, the courts have no jurisdiction to supervise the exercise of legislative power.' Gerald Baier (2006: 149) has also noted this aspect of the decision: 'the court claimed that it could not supervise the exercise of the federal spending power even if the stability of intergovernmental compromise was at stake.'

As the above analysis demonstrates, there is little difference between the SCC's imposing division of power decisions and its references. In both streams the models imposed, and the way they are imposed, are substantially similar. For example, the pan-Canadian model is imposed a majority of the time in both streams (61% in division of powers decisions and 55% in references). Similarly, there is virtually no support for the multinational model across both streams. Moreover, the pattern of an imposing decision is generally followed, with all 74 decisions depicting the federation in line with a particular model and reaching outcomes that draw from and reinforce this depiction.

At the same time, and as already discussed in the methods chapter, there are some general differences between the two streams of federalism jurisprudence that should be noted. As the 13 imposing federal references demonstrate, these cases tend to place levels of government in direct opposition,⁵⁹² while a majority of the 61 imposing division of powers decisions (50) *begin* as conflicts between private actors and a government. Moreover, as discussed above, references are technically advisory opinions, whereas division of powers cases lead to an actual disposition of rights. However, these differences are offset by the fact that in a large number of the division of powers cases (25) governments intervene on behalf of the private actor to turn the conflict into one between levels of government,⁵⁹³ as well as the reality that references are almost always followed as binding decisions.⁵⁹⁴

We can also see in these imposing decisions a slight difference in the apparent willingness of the Court to find a law unconstitutional (with rulings of *ultra vires* in approximately 45% of imposing references, compared to about 34% of imposing division of powers decisions). This discrepancy seems to support the view, already discussed, that the different context of the references leads to

⁵⁹² In 10 of the 13 imposing references the dynamic of conflict was between governments.

⁵⁹³ The result of these interventions is that in a majority of imposing decisions, some 58%, the levels of government are in direct conflict. Moreover, the levels of government are cooperating in these cases a mere 16% of the time (contrast this with higher percentage of cooperation evident in those cases where the Court recognizes the legitimacy of multiple models, discussed in the next chapter).

⁵⁹⁴ See Hogg (2009: 260-261).

slightly different outcomes; however, this difference is slight and understandable since the nature of a reference is to deal with especially contentious legislation.⁵⁹⁵

Ultimately, my concern is not only with which level of government wins a case, or the rate at which the Court overturns laws. I argue *how* these decisions are reached, and the extent to which they reinforce specific understandings of the federation to the detriment of others, deserves equal attention. And, on this front, the slight differences between these two streams of federal jurisprudence are offset by their shared tendency to follow the pattern of an imposing decision. All of the 74 decisions discussed in this chapter, to some degree: depict the federation in line with one model; legitimize that depiction as a fact through accepted forms of legal argument; reach an outcome that draws from and reinforces the depiction of the federation in line with a particular federal model; while also adopting a role for the judiciary that reinforces the depiction and further justifies the outcome.

It is the shared nature of these decisions that supports the core argument of the chapter. The above analysis shows that the SCC can impose a particular federal model in its decisions, and that it does this in a significant proportion (57%) of its federal jurisprudence between 1980 and 2010. Moreover, the comparison between these decisions and the *Secession Reference* illuminates the revolutionary character of the latter in the way it departs from the majority of the Court's problematic federalism jurisprudence.

As argued earlier in the thesis, the problematic aspect of the SCC's imposing jurisprudence is that these decisions fail to account for the inherent conflict over nationality and federation in Canada. Canada is a plurinational state. Accordingly, various groups hold conflicting views about the national character of the country (i.e. seeing Canada as uninational or multinational). Canada is also a federation. The nature of federation as a normative framework leads to inherent disagreement about the ideal distribution of resources and power. Canada's dual nature as a *plurinational federation* thus leads to views on the national character of the state mixing with associated beliefs of

⁵⁹⁵ See the discussion on this point in Chapter Three.

how resources and power ought to be distributed via federation. The result is a significant amount of conflict within and over the federal order. For the federation to remain legitimate in the eyes of those that are subject to the order, the way this conflict is handled must generate a sense of loyalty to the system. This is why the Court's role as arbiter of conflict within and over the federal order is so important and also why its decisions that fail to recognize and account for the base sources of this conflict are problematic.

When the SCC fails to recognize and account for the drivers of conflict over nationality and federation in Canada, and rather picks a particular federal model to inform its decisions, it delegitimizes its role as federal arbiter and the federation more generally. Such decisions are seen by members within the association as imposing, because they reinforce a particular perspective of what the federation is that they do not subscribe to. In such decisions, the "losing" parties have to absorb a negative outcome while also being told the way they understand the federation, at a base level, is an illegitimate perspective. When this happens, the Court is seen as a tool of oppression and falling well short of the popular ideal of neutrality. Moreover, the outcomes in imposing decisions align the distribution of powers and resources closer to the ideal of the imposed federal model. This alienates those imposed upon, because the federation no longer lines up with what they believe it is and should be (while also leading them to perceive the federation as "stacking the deck" against them in future conflicts). The overall effect of all of this is that loyalty to the federation and the way it manages conflict suffers. Those groups that are imposed upon see the process of conflict management as unfair because their perspective on the nature of the federation is delegitimized in the process, and they are further alienated from the federal order that results from an imposed decision as it reflects a distribution of powers and resources that weakens the basis of their perspective into the future.

We can see how this all happens in these 74 decisions by looking at a few specific trends. There are four in particular I want to highlight at this point.

The first is the tendency of the Court in these decisions to impose the pan-Canadian model to a greater extent than the other models and to favour the central government in the outcomes.⁵⁹⁶ The figures support this point: in 44 of the 74 decisions (59%) the Court imposes the pan-Canadian model and reaches an outcome generally favourable to the central government. Also, the Court tends to find central laws valid at a considerably higher rate compared to provincial laws: 70% of the time central laws are challenged they are upheld, compared to 55% where the impugned legislation is provincial.

Looking at raw figures of court decisions, though, does not always tell the whole story. One decision can fundamentally alter the federal order while another string of decisions can deal with technical or relatively minor issues. However, considering the context surrounding these imposing decisions and the extent to which they actually affect the federation only strengthens the assertion that the SCC, at times, acts as a strongly centralizing force in Canada.

Compare, for example, some of the key outcomes of the federal references above. The net effect of the decisions in favour of the central government is to: legitimize a Constitution passed without the consent of Québec; allow the central government to unilaterally amend funding levels of key social programs established by agreements with the provinces; uphold the centre's ability to raise taxes by any mode or system regardless of the effect on provincial jurisdiction; and, allow the central government to regulate and establish a registration system for "long-guns" under its criminal law power regardless of the effect on the provinces' jurisdiction.⁵⁹⁷ While the decisions in the provinces' favour: prohibit the central government from abolishing or fundamentally altering the

⁵⁹⁶ The debate over the SCC as a centralizing force in the federation is a perennial topic of Canadian political studies. There are those that argue the Court is biased in favour of the central government (Bzdera 1993; Leclair 2003; MacKay 2001; Greschner 2000) and those that see it as generally 'balanced' federal arbiter (Hogg, 1979; Baier, 2003; 2006). My own analysis recognizes the centralizing tendency in the Court's imposing decisions, but also notes that this is not always the case (particularly in the Court's decisions that afford a measure of legitimacy to multiple models, as I will argue in the next chapter). More importantly, though, my point is that focusing only on the outcomes of the SCC's decisions (and the extent to which they favour the centre or the provinces) misses significant aspects of the Court's work as federal arbiter. Equally important is the way these decisions are reached.

⁵⁹⁷ See, respectively, *Quebec Veto* [1982], *Canada Assistance Plan* [1991], *Goods and Service Tax* [1992], *Firearms* [2000].

Senate; grant ownership of the seabed between Vancouver Island and the west coast of British Columbia to that province; prohibit one province from expropriating the property of another province (as they are all barred from affecting extraterritorial rights); and, allow provinces to establish tribunals that resolve landlord-tenant disputes.⁵⁹⁸

This same pattern is evident in the imposing division of powers decisions: the Court tends to expand the centre's scope of power in important areas and with far-reaching implications. This is best exemplified by the host of important decisions that significantly expand the scope of the centre's criminal law power.⁵⁹⁹ Similarly, there are the lines of decision that revitalize the centre's trade and commerce power,⁶⁰⁰ establish a broad and exclusive jurisdiction for the centre over maritime matters⁶⁰¹ and expand the centre's power over banking and bankruptcy (while reinforcing the paramountcy of central laws when they conflict with provincial laws).⁶⁰² There are also the decisions that broadly define the core of a federal undertaking that is immune from provincial legislation⁶⁰³ and reinforce the ability of the centre to usurp provincial jurisdiction over any work or undertaking through its declaratory power.⁶⁰⁴ Finally, there are the cases that generously interpret the centre's ability to take legislative control over matters of 'national concern,'⁶⁰⁵ including the use

⁵⁹⁸ See, respectively, *Senate* [1980], *Strait of Georgia* [1984], *Upper Churchill* [1984], and *Reference re Amendments to the Residential Tenancies Act (N.S.)* [1996] 1 S.C.R. 186.

⁵⁹⁹ See, in particular, *Canadian National Transportation* [1983] and *R. v. Hydro-Québec* [1997]; see also: *Attorney General of Alberta et al. v. Putnam et al.* [1981] 2 S.C.R. 267; *Westendorp v. the Queen* [1983] 1 S.C.R. 43; *Bisaillon v. Keable* [1983] 2 S.C.R. 60; *R. v. Wetmore* [1983]; *Skoke-Graham v. The Queen* [1985] 1 S.C.R. 106; *R. v. Big M Drug Mart Ltd.* [1985] 1 S.C.R. 295; *Scowby v. Glendinning* [1986]; *Knox contracting ltd. v. Canada* [1990] 2 S.C.R. 338; *R. v. Swain* [1991] 1 S.C.R. 933; *R. v. Morgentaler* [1993] 3 S.C.R. 463; *RJR-MacDonald v. Canada* [1995]; *R. v. Malmo-Levine* [2003]; *R. v. Demers* [2004] 2 S.C.R. 489.

⁶⁰⁰ See *Canadian National Transportation* [1983]; *General Motors of Canada Ltd. v. City National Leasing* [1989] 1 S.C.R. 641; *Québec Ready Mix inc. v. Rocois Construction Inc.* [1989] 1 S.C.R. 695; *Kirkbi AG v. Ritvik Holdings* [2005].

⁶⁰¹ See *Zavarovalna Skupnost, (Insurance Community Triglav Ltd.) v. Terrasses Jewellers Inc.* [1983] 1 S.C.R. 283; *Whitbread v. Walley* [1990]; *Monk Corp. v. Island Fertilizers Ltd.* [1991] 1 S.C.R. 779; *Ordon Estate v. Grail* [1998].

⁶⁰² See *Bank of Montreal v. Hall* [1990]; *Husky Oil Operations Ltd. v. Minister of National Revenue* [1995] 3 S.C.R. 453; *M & D Farm* [1999].

⁶⁰³ See *Northern Telecom* [1983]; *National Battlefields Commission* [1990]; *Ontario Hydro* [1993]; *Westcoast Energy Inc. v. Canada (National Energy Board)* [1998] 1 S.C.R. 322.

⁶⁰⁴ See *Ontario Hydro* [1993].

⁶⁰⁵ See *R. v. Crown Zellerbach* [1988]; *Ontario Hydro* [1993].

of this and other broadly defined powers to regulate the environment.⁶⁰⁶ The corollary of this expansion of central power has been, in most cases, to narrow areas of provincial jurisdiction or to allow the centre to affect matters within provincial competence.

At the same time, there are division of powers decisions that impose the provincial equality model and favour the provinces. The few areas where provincial jurisdiction has been expanded include the ability to establish administrative tribunals⁶⁰⁷ and the ability of provinces to levy variable and indirect fees.⁶⁰⁸ There are also the select cases that effectively narrow the centre's criminal law power (i.e. in relation to the administration of justice within the province and the provinces' powers over property and civil rights).⁶⁰⁹ The tendency, though, is for decisions to maintain (not expand) provincial powers, for example, in relation to property and civil rights⁶¹⁰ or labour relations.⁶¹¹ This is also exemplified by the decisions that allow provincial laws of general application to apply to federal undertakings and persons (but only to the extent provincial laws do not affect the core of federal jurisdiction over these matters).⁶¹²

The point is that in these 74 decisions we can see the Court centralizing power in key areas. The relative importance of the decisions that favour the centre, in their effect on the overall federal order, is markedly different than those in favour of the provinces. When the centre wins, the decision tends to fundamentally reinforce a generally centralized order with a superior central

⁶⁰⁶ See *Northwest Falling Contractors Ltd. v. The Queen* [1980] 2 S.C.R. 292; *R. v. Crown Zellerbach* [1988]; *R. v. Hydro-Québec* [1997].

⁶⁰⁷ See *Capital Regional District v. Concerned Citizens of British Columbia et al.* [1982] 2 S.C.R. 842; *Sobeys v. Nova Scotia* [1989].

⁶⁰⁸ Either through an expansive reading of the provinces' power to exclusively enact direct taxes within the province or a liberal interpretation of their power to raise levies in relation to a licensing scheme; see *Massey-Ferguson Industries Ltd. et al. v. Government of Saskatchewan et al.* [1981] 2 S.C.R. 413; *Minister of Finance of New Brunswick et al. v. Simpsons-Sears Ltd.* [1982] 1 S.C.R. 144; *Allard Contractors v. Coquitlam* [1993]; *Dunne v. Quebec (Deputy Minister of Revenue)* [2007] 1 S.C.R. 853.

⁶⁰⁹ With regard to the administration of justice, see *Mackeigan v. Hickman* [1989]; *Consortium Developments (Clearwater) Ltd. v. Sarnia (City)* [1998] 3 S.C.R. 3; with regard to property and civil rights, see *Labatt Breweries of Canada Ltd. v. Attorney General of Canada* [1980] 1 S.C.R. 914. However, these cases need to be placed in the context of a line of federal jurisprudence that has significantly expanded the center's criminal law power over the past 30 years.

⁶¹⁰ See *Fowler v. The Queen* [1980]; *Clark v. Canadian National Railway Co.* [1988] 2 S.C.R. 680.

⁶¹¹ See *Four B Manufacturing v. United Garment Workers* [1980] 1 S.C.R. 1031 (*Four B Manufacturing*); *YMHA v. Brown* [1989]; *Canada Labour Relations Board et al. v. Paul L'Anglais Inc. et al.* [1983] 1 S.C.R. 147.

⁶¹² With regard to federal undertakings, see *Irwin Toy v. Quebec* [1989]; with regard to 'federal persons' (i.e. aboriginals) see *Four B Manufacturing* [1980].

government. When the provinces win, the decisions tends to reinforce the legitimacy of select areas of provincial competence and to resolve rather technical issues (like the validity of a local levy). The impression of the Court's imposing decisions over the last three decades is thus one of an expanding central power in relation to stagnant, and even declining, provincial jurisdiction. As John Leclair has argued, this trend in the SCC's work is clear: the centre's powers have been liberally interpreted, while the provinces' powers have generally been held at bay or reduced.⁶¹³

This centralist tendency, in and of itself, is problematic. Consistently siding with the central government delegitimizes the Court as arbiter of the federation for the subscribers of the provincial equality and multinational models. For these groups, this centralist tendency raises questions about the neutrality of the Court and alienates these subscribers from the federal order that stems from these decisions (as it does not reflect their view of what the federation is and ought to be). However, as I have said, decision outcomes are not my main concern; equally important is the decision process.

The issue with this trend in the SCC's work, then, is not just the tendency to side with the central government, but also *the way this happens* (i.e. that fact that these decisions *impose* the pan-Canadian model). The imposing nature heightens the extent to which these decisions reinforce the perception that the SCC is biased among subscribers of the provincial equality and multinational models, while also further alienating these subscribers from the resulting federal order. This happens because the way the central government wins legitimizes the pan-Canadian model, while delegitimizing the other models. Accordingly, those imposed upon have to deal with the negative outcome of a case while being told the way they understand the federation is wrong and illegitimate. Furthermore, they have to come to terms with the fact that the result of the decision and the reasons it is based on further align the order with the pan-Canadian model. The net effect of this tendency for the SCC to impose the pan-Canadian model is to erode the loyalty of those being imposed upon to the process of settling disputes and to the federation itself.

⁶¹³ See Leclair (2003).

Of course, in over 40% of the above cases the provinces win and the provincial equality model is imposed, which could be seen as close to striking a balance between these two models. In other words, the flip side of nearly 60% of these decisions imposing the pan-Canadian model is that over 40% impose the provincial equality model. The argument could be made that in the absence of “balance” *within* a decision, at least there is a measure of “balance” *between* decisions. Setting aside the 10% difference, this view still does not sit well with the analysis that the imposing pan-Canadian decisions tend to be more important and have further-reaching effects for the nature of the order. More importantly, though, and as argued earlier in the thesis, the ideal that the SCC be “balanced” in its federal jurisprudence by seeking a rough equilibrium where the centre wins half the time and the provinces win the other half is deeply flawed. Such an ideal, and studies that employ this ideal, miss the point that the outcomes of federal jurisprudence are only half the story – the way these decisions are made is equally important. The ideal of balance in federalism jurisprudence is properly understood as the extent to which the Court’s decisions (in both their approach and outcome) recognize and account for the legitimate views of what the federation is and ought to be. On this score, it is hard to see how there is any balance in these 74 decisions. Balanced federal jurisprudence would have no imposing decisions.

The fact that the provincial equality model is imposed in 40% of cases where the centre loses also presents a fundamental issue: a lack of support for the multinational model. This is the second problematic trend I want to highlight in these imposing decisions. The lack of support for the multinational model in these decisions is clear. The model is imposed in only one case⁶¹⁴ and receives a measure of legitimacy through the Court’s depiction of the federation in only two others.⁶¹⁵ In addition, the multinational model is *actively* delegitimized in 10 decisions.⁶¹⁶ Thus, even

⁶¹⁴ *Quebec v. Grondin* [1983].

⁶¹⁵ See *The Queen v. Sutherland et al.* [1980] 2 S.C.R. 451; *Moore v. Johnson et al.* [1982] 1 S.C.R. 115.

⁶¹⁶ See *Quebec Veto* [1982]; *Devine v. Quebec* [1988]; *Sobeys v. Nova Scotia* [1989]; *National Battlefields Commission* [1990]; *Whitbread v. Walley* [1990]; *Ontario Hydro* [1993]; *Hunt v. T&N* [1993]; *BC v. Canada* [1994]; *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010 (*Delgamuukw v. BC*); *BC v. Imperial Tobacco* [2005]. Something that happens only once for the provincial equality model, and does not happen for the pan-Canadian model.

when the provinces are the “winners,” this happens at the hands of imposing the provincial equality model, which generally delegitimizes key aspects of the multinational model (i.e. by reinforcing a view of provinces as having symmetrical powers given their status as equal territorial units).

This tendency in the SCC’s imposing decisions is problematic given the reality that the multinational model is a legitimate view of what the federation is and ought to be. The fact is that a significant proportion of Canadians view the state as housing multiple nations, and that federation does and ought to accommodate these groups. One can *argue* that Canada is a single nation, but, one can hardly deny that a great many people *believe* that the Québécois and Aboriginals are nations within Canada. The multinational model is not an abstract theory. It reflects historical processes and institutional arrangements in Canada, and it continues to inform political mobilization.

The Court’s failure in these decisions to recognize the legitimacy of this model decreases the loyalty towards the process of resolving conflict within the federation, and the order itself, among subscribers of the multinational model. How else can someone who sees Canada as multinational, and federation as the means to accommodate this fact, react to the Court telling them they are fundamentally wrong? The effect of these decisions is a perceived promotion of Canada as a single nation with a strong central government, or that all of the provinces are equal in their status as territorial units. This does not sit well with the views of many in the state. It also fails to account for the facts on the ground (i.e. that Canada is a plurinational federation with political and institutional arrangements that seek to accommodate groups that self-identify as nations). Ultimately, the lack of legitimacy afforded the multinational model in these decisions negatively affects the ability of the Court and the order in general to manage the inherent conflict that takes place over nationality and the distribution of resources and power in the state. Moreover, failing to recognize and account for the legal and political facts that support the multinational model arguably is plain “bad law” and leads to non-optimal outcomes in federal arbitration.

The third key trend I want to highlight is the way these imposing decisions create stark winners and losers. A shared characteristic of virtually all of the imposing decisions is that they

overwhelmingly resort to zero-sum outcomes. In these decisions one jurisdiction generally achieves absolute victory, and importantly this happens in a way that aligns the federation with a particular federal model. Of the 74 imposing decisions there are only five cases where one jurisdiction does not win outright.⁶¹⁷ I recognize that the adversarial nature of most legal conflicts creates a need declare a winner and to dispose of rights accordingly. However, this can be done in a way that rejects stark, zero-sum outcomes. Such an approach was embraced in the *Secession Reference*, and, as the next chapter demonstrates, in many of the decisions that follow its lead.

The dispute resolution approach in these imposing decisions causes a number of issues. First, similar to the first two trends in these cases, it erodes the legitimacy of the Court as arbiter and the federation more generally. Creating stark winners and losers generates resentment towards the process of conflict resolution, and the resulting order that stems from the decision. Moreover, SCC decisions have a certain finality, with no further appeal and the permanency of law. When they are delivered in a way that reinforces this finality, as is in the cases discussed above, the effect is to suppress the continued conflict over the federal order that is inherent in any association. As argued earlier, the suppression of conflict over the nature of the federal order does little to manage it (and can actually work to exacerbate it in the long-run). Also, the nature of these decisions as definitive and clearly siding with one jurisdiction and reinforcing one model creates precedents in the case law that structure and influence future decisions. Such precedents based on imposing decisions and rationalizations work to tilt the scales in favour of one particular model in future cases involving similar issues, which can negatively affect the perceived fairness of the process of solving disputes as well as leading to non-optimal outcomes.

The underlying issue with the Court's dispute resolution approach in these imposing cases is that it is seeking to solve a problem by imposing a fixed constitutional and federal order. This

⁶¹⁷ In these 5 cases the outcome is positive for more than one jurisdiction (*BC Family Relations Act* [1982]; *Exported Natural Gas Tax* [1982]; *Quebec Sales Tax* [1994]; *Sobeys v. Nova Scotia* [1989]) or is ambivalent among the parties to the conflict (*Delgamuukw v. BC* [1997]). However, in all of these cases one jurisdiction tends to come out ahead and the outcomes still reinforce the legitimacy of primarily one federal model. It should also be noted that there are ten additional cases where I could identify the negative outcome for a particular jurisdiction being mitigated, to a small extent.

tendency for the Court to eschew its proper role as facilitator of negotiation to manage conflict within and over the federal order is the final point I want to touch on here. While there are a few examples of the Court embracing this role in some way, as discussed above, the general tendency is for the Court to embrace a role that reinforces a particular model. In these instances the Court is cloaking itself in a false veil of impartiality (for example, by saying it is the umpire of the federation). Such a position negatively affects the legitimacy of the institution in decisions that are anything but neutral – decisions that draw from and reinforce particular federal models. The issue is that adopting this role sets a benchmark of neutrality the Court simply cannot live up to in the eyes of the participants to the conflict. As already argued, the Court is not, and cannot be, a neutral arbiter: it is part of the field of struggle and is inherently a political institution. Accordingly, to maintain loyalty to the process of dispute resolution within and over the federation the Court needs to embrace and account for this fact. This is best achieved by first and foremost seeking to manage conflict by facilitating negotiation between conflicting parties.

These four trends all exemplify the problem with these imposing decisions. They all show how an imposing federal jurisprudence can negatively affect the legitimacy of the federal arbiter and the federation more generally. They also point to some additional issues (i.e. how they can lead to bad law, non-optimal outcomes and imposing precedents). I elaborate further on these points in the final chapter of the thesis; but, for now, it is important to look more closely at how these decisions differ from the ideal of the *Secession Reference*. This allows for a better understanding of why imposing decisions are problematic, and also shows how a different approach to federal jurisprudence is possible and beneficial. In other words, comparing the imposing decisions to the ideal of the *Secession Reference* accentuates the problems with the former and the benefits of the latter. I turn now to do this, discussing in the next chapter the SCC's federal jurisprudence that adheres to the ideal of recognizing the legitimacy of multiple models and federation as the process and outcome of negotiation between the subscribers of these models.

Chapter Six

A Federal Jurisprudence of Recognition

Introduction

This chapter provides a comprehensive account of the SCC's federal jurisprudence by looking at the decisions that follow the ideal of the *Secession Reference*.⁶¹⁸ These decisions are markedly different from the group of cases discussed in the last chapter. They recognize the legitimacy of multiple federal models and federation as the process and outcome of negotiation between the subscribers of these models, rather than imposing particular views of what the federation is and ought to be. Accentuating this difference is the core objective of this chapter. Doing so highlights the benefits of a jurisprudence that follows the lead of the *Secession Reference*, as well as illuminating the path to achieving this ideal.

This other side of the Court's work deserves attention. Approximately 43% of the SCC's federal decisions recognize and reinforce the legitimacy of multiple federal models and federation as the process and outcome of negotiation. While this falls well short of the ideal of every decision adhering to the exemplar of the *Secession Reference*, this is a welcome trend. This is a welcome approach because these decisions seek to manage (not solve) conflict over the federal order, while generating loyalty to the process of conflict management and the federation itself. This chapter is thus important to my overall argument because it shows the SCC is increasingly following this approach. It shows the Court can positively affect the legitimacy of the federation by acting in line with its proper role as the facilitator of negotiation and a fair arbiter when negotiation breaks down. Such an approach is particularly important in Canada and other plurinational federations. In these states the federal arbiter can significantly affect the legitimacy of the association, given the important role it plays in managing the inherent conflict that takes place as views about the national

⁶¹⁸ *Reference re Secession of Quebec* [1998] 2 S.C.R. 217.

character of the state mix with views about the ideal distribution of powers and resources via federation.

A decision that follows the exemplar of the *Secession Reference* is the opposite of the imposing cases discussed in the previous chapter. Like its counterpoint, however, the ideal-type has three key characteristics. First, is a depiction of the federation that recognizes the order is a process and outcome of negotiation between the subscribers of legitimate federal models. This depiction is legitimized through accepted forms of legal argument that anchor it in the constitutional law. The second characteristic is a rejection of a zero-sum approach to dispute resolution, with the outcome of a case seeking benefits for all parties and reinforcing the legitimacy of multiple federal models. Finally, the Court adopts a role that seeks to manage the conflict by, first and foremost, facilitating negotiation between the conflicting parties.

It is when these three characteristics combine that a decision substantially adheres to the ideal-type. We can see this happening, for example, in a decision like *Fédération des producteurs de volailles du Québec*.⁶¹⁹ Here, the SCC presents the federation as the process and outcome of negotiation between the subscribers of the legitimate federal models,⁶²⁰ pointing out that such a view is supported by the case law and legal doctrine.⁶²¹ Working from this understanding of the

⁶¹⁹ *Fédération des producteurs de volailles du Québec v. Pelland* [2005] 1 S.C.R. 292. The issue in this case is whether an agreement between the centre and provinces that delegates control over the production of poultry to provinces (and which affects the inter-provincial and international trade of poultry, areas of central competence) results in the provinces acting outside their legislative jurisdiction. The decision was unanimous (authored by Abella).

⁶²⁰ See *Fédération des producteurs de volailles du Québec* [2005] (at 15) where the Court notes that central-provincial agreements on how to implement the division of powers 'reflect and reify Canadian Federalism's constitutional creativity and cooperative flexibility,' also see at 2-3, 28, 38 and 53.

⁶²¹ From the outset of *Fédération des producteurs de volailles du Québec* [2005] (at 2-3, 15) the Court says the validity of central-provincial cooperative schemes that regulate agricultural production and marketing is established by a landmark 1978 SCC decision. The Court goes on to summarize the applicability of that case to the one at bar (at 22-23): 'In the *Egg Reference* ... the Court reached the following relevant conclusions: although constitutional jurisdiction over marketing is divided, agricultural production is *prima facie* a local matter under provincial jurisdiction; the provincial scheme was not aimed at controlling extraprovincial trade, but was deemed to be coordinated and integrated with the regulations established under federal authority; and, most pertinently, producers could not claim exemption from provincial control over production by electing to devote their entire output to extraprovincial trade. Any effect of the provincial egg marketing and production scheme on [central competence over] extraprovincial trade was found to be incidental to the constitutionally permissible purpose of controlling agricultural production within the context of a cooperative federal-provincial agreement' (emphasis added).

federal order, the Court decides that an agreement between the centre and the provinces is grounds to allow the provinces to regulate the production of poultry (despite the significant effect this has on the centre's exclusive jurisdiction over inter-provincial and international trade). The decision thus also provides an example of the Court adopting a role of facilitating, and deferring to, such negotiated schemes that seek flexible solutions to implement the division of powers in the federation.⁶²²

The basic architecture of this type of decision informs the structure of analysis below. In the first section I discuss how the federation is depicted in these 56 decisions to account for, and reinforce, the legitimacy of multiple federal models. The second section looks at the use of legal argument to reinforce the legitimacy of how the federation is depicted. The third section investigates the Court's rejection of a zero-sum approach in reaching outcomes in these cases. I then turn to analyze the tendency of the Court in these decisions to embrace a role as the facilitator of negotiation within a broader conflict management approach.

In each of these sections I look at the extent to which all 56 decisions discussed here adhere to the ideal-type, while also exemplifying how they do this by looking at specific examples. Also, as in the last chapter, I analyze both division of powers cases and federal references in each section.⁶²³

Following this analysis, I conclude by picking up on some of the points made at the end of the last chapter and which relate to the wider arguments of the thesis. I start by highlighting the fundamental differences between the 56 decisions discussed in this chapter and the 74 imposing decisions. Doing this lays the foundation to discuss the benefits of the former and the problems with the latter, while also demonstrating the revolutionary nature of the *Secession Reference*. As argued earlier, the *Secession Reference* is revolutionary not only in the stark difference between its approach and that of the imposing decisions, but also because it marks a significant shift in the

⁶²² See *Fédération des producteurs de volailles du Québec* [2005] in addition to the above (at 38): 'With respect, I see no principled basis for disentangling what has proven to be a successful federal-provincial merger.'

⁶²³ As discussed in Chapters Three and Five, while I recognize the differences between these two streams of federal jurisprudence, they share fundamental similarities that justify considering them together.

Court's approach to federal jurisprudence: prior to the *Secession Reference* some 64% of decisions impose a federal model, following the reference some 75% of decisions recognize the legitimacy of multiple models and the order as the process and outcome of negotiation. As part of my analysis I reflect on why these decisions that follow the lead of the *Secession Reference* are preferable to those that impose a particular federal model. To contextualize this analysis I discuss four positive trends in these 56 decisions: 1) the inclusive nature of the Court's understanding and presentation of the federation; 2) the (increasing) tendency to recognize the legitimacy of the multinational model; 3) the rejection of zero-sum outcomes; and, 4) the Court's (increasing) willingness to adopt a role of facilitator of negotiation and to promote political processes to manage conflict. I argue the fundamental benefit of a federal jurisprudence that exhibits these qualities is that it generates legitimacy for the federal arbiter and the federation more generally. By looking at these trends within the SCC's work, and by discussing their benefits, I am making the case that a federal jurisprudence in this image should be promoted within Canada and beyond.

Context

As explained in previous chapters, my analysis stems from a review of all SCC constitutional law decisions delivered between 1980 and 2010. I focus on the 131 of these cases where the fundamental dispute is over the distribution of powers and resources via federation (i.e. where the key question is which level of government has the constitutional jurisdiction to legislate or act in relation to a matter).⁶²⁴ Having already discussed the *Secession Reference* and the 74 imposing decisions, I turn to the remaining 56 cases below. This includes a consideration of 49 division of powers decisions and 7 federal references in this period. As in the last two chapters, these 56 decisions are classified as recognizing the legitimacy of multiple models by applying the framework introduced in the methodology chapter (which facilitates analysis of the extent to which decisions

⁶²⁴ As explained previously, there are an additional 28 decisions where there is insufficient information to determine if the Court is imposing a particular model or recognizing the legitimacy of multiple models. The lack of information is generally because the reasons for decision are simply too brief or because the division of powers issue is not dealt with and the appeal is disposed of on other grounds.

draw from and reinforce the pan-Canadian, provincial equality, multinational and/or dynamic federal models in their approach and outcome).⁶²⁵

As Table 6.1 and 6.2 indicate, the issues that arise in these 56 decisions span a range of matters. Among the division of power decisions, there are a number of cases where the primary issue is the criminal law (10), Aboriginals (8), the centre’s works and undertakings (7),⁶²⁶ conflicting central and provincial laws (4), the role and scope of the judiciary’s power in the federation (3), taxation (3), the provinces’ power over property and civil rights (2), trade (2) and labour (2) among other issues. A number of federal references mirror division of powers cases, in that the jurisdiction of a government to pass economic or social legislation is challenged (4); but, there is also the important *Patriation Reference*⁶²⁷ (which deals with constitutional amendment), as well as a reference relating to natural resources and one on the role and scope of the judiciary’s power in the federation.

Table 6.1: Issues in “Recognizing” Federal References, 1980 to 2010

| Reference | Primary (and related) Area of Jurisdiction | Issue |
|--|--|---|
| Patriation [1981] | Constitutional Amendment | Ability of centre to unilaterally seek amendment of Constitution |
| Newfoundland Continental Shelf [1984] | Natural Resources | Ownership of resources offshore of Newfoundland |
| Education Act [1987] | Education | Funding for denominational schools |
| Young Offenders Act [1991] | Courts (s. 96) | Validity of youth criminal courts |
| Same-Sex Marriage [2004] | Marriage | Central ability to change definition and administration of marriage |
| Employment Insurance Act [2005] | Employment Insurance (Property and Civil Rights) | Maternity benefits under central employment insurance scheme |
| Assisted Human Reproduction Act [2010] | Criminal Law (Health) | Central law regulating assisted human reproduction |

⁶²⁵ Supplementary data from the review is available in the Annex (which provides the populated frameworks for each case, including summaries of the issues, decision-making approach and outcomes).

⁶²⁶ As explained earlier, the center’s ‘works and undertakings’ are those matters that fall under exclusive central control as a result of s. 92(10) of the *Constitution Act 1867*. This generally includes enterprises such as inter-provincial transportation (like railways, steamships and aviation) and telecommunications, as well as things declared by the centre to be for the general advantage of Canada, like atomic energy.

⁶²⁷ *Re: Resolution to amend the Constitution* [1981] 1 S.C.R. 753. The issue in this reference, as discussed in detail in previous chapters, is the constitutionality of the centre to unilaterally seek approval for a domestic constitutional amending formula from the UK. The case raises issue of both constitutional legality and constitutional conventions.

Table 6.2: Issues in “Recognizing” Division of Powers Cases, 1980 to 2010

| Case | Primary (and related) Area of Jurisdiction | Issue |
|--|---|---|
| Canadian Pioneer Management [1980] | Banking (Labour) | Labour relations for a trust company |
| Dominion Stores v. R [1980] | Trade (Agriculture) | Central law regulating quality of produce |
| BC v. Canada Trust [1980] | Tax | If provincial tax direct and within the province |
| Covert v. NS [1980] | Tax | If provincial tax direct and within the province |
| Fulton v. ERCB [1981] | Federal Undertaking | If undertaking federal or local |
| Schneider v. The Queen [1982] | Health (Criminal Law) | Provincial law relating to heroin treatment |
| Multiple Access v. McCutcheon [1982] | Paramountcy (Trade, Property and Civil Rights) | Conflicting insider trading laws |
| Deloitte v. WCB [1985] | Paramountcy (Bankruptcy) | Provincial law relating to bankruptcy |
| Dick v. La Reine [1985] | Aboriginals (91.24) | Application of provincial hunting law to aboriginals |
| Derrickson v. Derrickson [1986] | Aboriginals (91.24) | Application of provincial divorce law to aboriginals |
| R. v. Edwards Books [1986] | Property and Civil Rights | Sunday shopping prohibition |
| Ontario v. OPSEU [1987] | Labour | Regulation of provincial officials in federal elections |
| Rio Hotel v. NB [1987] | Criminal Law (Property and Civil Rights) | Regulation of adult entertainment |
| O'Hara v. BC [1987] | Criminal Law (Admin of Justice) | Provincial investigation of police and prison officials |
| Bell Canada v. Quebec [1988] | Federal Undertaking (Labour) | Application of provincial health and safety law |
| Canadian National Railway [1988] | Federal Undertaking (Labour) | Application of provincial health and safety law |
| Alltrans Express v. BC [1988] | Federal Undertaking (Labour) | Application of provincial health and safety law |
| R. v. Francis [1988] | Aboriginals (91.24, Paramountcy) | Application of provincial traffic law to aboriginals |
| Ontario v. Pembina [1989] | Maritime Law (Courts) | Province granting inferior court maritime jurisdiction |
| Alberta Government Telephones [1989] | Federal Undertaking (Telecoms) | If provincial crown corp is federal undertaking |
| IBEW v. Alberta Government Telephones [1989] | Federal Undertaking (Labour) | If provincial crown corp is federal undertaking |
| Starr v. Houlden [1990] | Criminal Law | Provincial investigation of criminal activity |
| R. v. S. (S.) [1990] | Criminal Law | Delegation of youth sentencing to provinces |
| R. v. F.(J.T.) [1991] | Courts (s. 96) | Validity of youth criminal courts |
| R. v. W.(D.A.) [1991] | Courts (s. 96) | Validity of youth criminal courts |
| R. v. Furtney [1991] | Criminal Law | Delegation of lottery regulation to provinces |
| R. v. Jones [1991] | Criminal Law | Delegation of lottery regulation to provinces |
| Friends of the Oldman River Society [1992] | Environment | Application of central environmental regulations |
| R. v. Colarusso [1994] | Criminal Law | Provincial power to conduct criminal investigation |
| MacMillan Bloedel v. Simpson [1995] | Courts (s. 96) | Powers conferred on youth courts by centre |
| R. v. Pamajewon [1996] | Aboriginals (Self-Government) | If aboriginal band has right to self-regulate gambling |
| Ontario Home Builders' Association [1996] | Tax (Licensing) | If provincial tax direct |
| Westbank First Nation v. BC Hydro [1999] | Aboriginals (91.24) | If aboriginal band can tax provincial corp |
| Global Securities v. BC [2000] | Property and Civil Rights | Extraterritorial effect of provincial securities law |
| Lovelace v. Ontario [2000] | Aboriginals (91.24) | Provincial law allowing aboriginal gambling |
| Public School Boards of Alberta [2000] | Education | Provincial law relating to denominational schools |
| Law Society of BC v. Mangat [2001] | Paramountcy (Immigration, Property and Civil Rights) | Conflicting laws relating to immigration tribunals |
| Ward v. Canada [2002] | Fisheries (Property and Civil Rights, Criminal Law) | Central law prohibiting sale of young seals |
| Kitkatla v. BC [2002] | Aboriginals (91.24, Property and Civil Rights) | Provincial law relating to cultural heritage |
| Krieger v. Law Society of Alberta [2002] | Criminal Law (Admin of Justice) | Regulation and discipline of crown prosecutors |
| Siemens v. Manitoba [2003] | Criminal Law (Property and Civil Rights) | Provincial law allowing local prohibition of gambling |
| Paul v. BC [2003] | Aboriginals (91.24, Courts) | Powers conferred on tribunal by province |
| Rothmans v. Sask [2005] | Paramountcy | Conflicting tobacco advertising laws |
| Fédération des producteurs de volailles du Québec [2005] | Trade (Agriculture) | Delegation to regulate poultry production to provinces |
| Isen v. Simms [2006] | Maritime Law (Property and Civil Rights) | Regulation of civil actions relating to maritime events |
| Canadian Western Bank [2007] | Banking (Property and Civil Rights, Paramountcy) | Regulation of insurance sold by banks |
| BC v. Lafarge Canada [2007] | Federal Undertaking (Paramountcy) | Application of provincial laws to building of ship yard |
| Confédération des syndicats nationaux [2008] | Labour (Employment Insurance) | Central employment insurance scheme |
| Chatterjee v. Ontario [2009] | Criminal Law (Property and Civil Rights, Paramountcy) | Provincial law relating to the proceeds of crime |

There is little difference between the issues covered in these 56 cases and the imposing decisions discussed in the last chapter. Both deal with highly contentious matters like constitutional amendment procedures, the scope of the criminal law or ownership of strategic natural resources. Similar conflicts also take place over the scope of the various areas of jurisdiction laid out in s. 91 and s. 92 of the Constitution (for example, the power to regulate trade). In other words, both the

imposing cases covered in the last chapter, and the 56 decisions discussed here, deal with important matters in the development of the federation. The outcomes of these cases, which cover a wide range of issues, establish the very nature of the federation.

The fact that both types of cases deal with similar issues raises an interesting preliminary point. It appears that the issue of a case does not drive the Court to either impose a particular federal model or recognize the legitimacy of multiple models. The structuring variables associated with a specific issue area (like case law, doctrine, the framers' intent and constitutional text) do not seem to lead the Court to necessarily impose a particular federal model. What we see, rather, is the Court interpreting these structuring variables in a way that either imposes a particular model, or supports the legitimacy of multiple models, in line with a preconceived understanding of what the federation is and ought to be. This point should become clearer through the below discussion of how legal argument is employed in these decisions.

There is one "structural" difference between the imposing decisions and those discussed here that should be mentioned at the outset: the dynamic of conflict between the levels of government. I noted in the last chapter that in many imposing decisions (58%) the levels of government are in conflict.⁶²⁸ In contrast, there is a higher tendency for the levels of government to cooperate in the cases discussed in this chapter. In 45% of the cases discussed below a level of government intervenes to support another level of government, turning the conflict into one between a private actor, on one side, and cooperating levels of government, on the other. This only happens 16% of the time in cases where the decision imposes a particular federal model. At the same time, in the cases discussed in this chapter the levels of government still conflict in some 38% of cases. More importantly, though, the different dynamics of intergovernmental conflict do not change the fact that the cases discussed below represent conflicts between competing conceptions of the federal order. Private actors subscribe to the federal models and can argue just as forcefully as governments for a particular perspective on the nature of the federal order. Nevertheless, in

⁶²⁸ This includes cases where levels of government are in direct conflict and where one level of government supports a private actor in their case against an opposing level of government.

cases where the levels of government are cooperating, the Court seems more likely to recognize the legitimacy of multiple models. This is both an interesting and welcome trend (as I argue below when discussing the role of the Court in these 56 decisions).

Inclusive Depictions

As explained earlier, conflict over the federation generally focuses on a number of key aspects (i.e. the balance and distribution of powers, the relationship between the levels of government, the nature of the provinces, etc.).⁶²⁹ The way the Court depicts the federation in relation to these “points of conflict” is central to a decision either recognizing the legitimacy of multiple federal models or imposing a particular model. This is because the way the federation is understood and presented – the way the Court explains what the federation *is* – drives the outcome of the decision, while also working to either legitimize multiple models or a single model.

As Table 6.3 indicates, in all of the 56 decisions discussed here, the federation is depicted in a way that reinforces the legitimacy of multiple federal models (or the dynamic model explicitly). This happens in two key ways: the decision *balances models off one another* when depicting the federation; and/or the decision *explicitly recognizes federation as a process and outcome of negotiation between the subscribers of competing federal models*.⁶³⁰

⁶²⁹ As outlined in previous chapters, the focal points of conflict over what the federation is, generally include: the way the constitution is represented; the nature of the federation; the purpose of federation; the distribution of powers; the balance of powers; the nature of the provinces; the nature of central institutions; the relationship between the levels of government; and, the national composition of the country. Additional information on the way the federation is depicted in relation to these points of conflict is available in the Annex.

⁶³⁰ Note that multiple approaches can be adopted within one decision (i.e. while a depiction balances models off one another, it can also explicitly recognize federation as the process and outcome of negotiation between the subscribers of these models). Also, Table 6.3 notes when a decision only has a minimal depiction of the federation. In these cases the Court still adopts a counterbalancing method of depicting the federation, as discussed below.

Table 6.3: Summary of “Recognizing” SCC Decisions, 1980 to 2010

| Rank | Case | Depiction | | | Outcome | | Court’s Role |
|--|--|--------------------------------------|------------------------------|------------------------------------|-----------------------------|--------------------------------------|---------------------------------|
| | | Primary (secondary) Model Recognized | Approach | Primary Modality | Primary (secondary) Winners | Primary (secondary) Model Reinforced | |
| High | Patriation [1981] | Pan-Can, Provs (Mul, Dyn) | Balance | Text, Progress, Structure | Cen, Provs, Particular | Pan-Can, Provs, Mul, Dyn | Facilitator (Ump, Branch) |
| | Multiple Access [1982] | Pan-Can, Provs, Dyn | Balance | Doctrine | Provs, Cen | Provs, Pan-Can, Dyn | ----- |
| | R. v. S. (S.) [1990] | Pan-Can, Mul, Provs, Dyn | Balance | Doctrine | Cen (Provs, Particular) | Pan-Can, Mul, Provs | ----- |
| | R. v. Furtney [1991] | Dyn, Pan-Can, Provs | Balance | Doctrine, Text | Cen, Provs | Dyn, Pan-Can, Provs | Facilitator |
| | R. v. Jones [1991] | Dyn, Pan-Can, Provs | Balance | Doctrine, Text | Cen, Provs | Dyn, Pan-Can, Provs | Facilitator |
| | Lovelace v. Ontario [2000] | Pan-Can, Mul | Balance | Doctrine | Provs, Cen, Particular | Pan-Can, Provs, Mul | ----- |
| | Siemens v. Manitoba [2003] | Provs, Pan-Can, Dyn | Balance | Doctrine | Provs, Cen | Provs, Pan-Can, Dyn | Facilitator |
| | Fédération des producteurs de volailles du Québec [2005] | Dyn (Pan-Can, Provs) | Explicit | Doctrine | Cen, Provs | Dyn | Facilitator |
| | Canadian Western Bank [2007] | Dyn, Provs, Pan-Can, Mul | Balance | Doctrine | Provs (Cen) | Dyn, Provs, Mul (Pan-Can) | Facilitator |
| | BC v. Lafarge Canada [2007] | Dyn, Pan-Can, Provs | Balance | Doctrine | Cen (Provs) | Pan-Can, Dyn (Provs) | Facilitator |
| | Confédération des syndicats nationaux [2008] | Dyn, Pan-Can, Provs | Balance | Doctrine | Cen (Provs) | Pan-Can, Dyn (Provs) | ----- |
| | Chatterjee v. Ontario [2009] | Dyn, Pan-Can, Provs | Explicit | Doctrine | Provs (Cen) | Provs, Dyn (Pan-Can) | Facilitator |
| Assisted Human Reproduction Act [2010] | Provs, Pan-Can (Dyn) | Balance | Doctrine | Prov, Cen | Provs, Pan-Can | Facilitator, Ump (Guard) | |
| Medium | Canadian Pioneer Management [1980] | Provs, Pan-Can | Balance | Doctrine | Provs (Cen) | Provs, Pan-Can | Facilitator |
| | BC v. Canada Trust [1980] | Pan-Can, Provs, Dyn | Balance | Doctrine, Progress | Provs (Cen) | Pan-Can, Provs, Dyn | Facilitator |
| | Covert v. NS [1980] | | Minimal | Doctrine | Provs (Cen) | Pan-Can, Provs, Dyn | ----- |
| | Fulton v. ERCB [1981] | Pan-Can, Provs (Dyn) | Balance | Doctrine, Text | Cen, Provs | Pan-Can, Provs, Dyn | Facilitator |
| | Schneider v. The Queen [1982] | Pan-Can, Provs (Dyn) | Balance | Doctrine | Provs, Cen | Provs, Pan-Can, Dyn | Facilitator |
| | Deloitte v. WCB [1985] | Pan-Can, Provs | Balance | Doctrine | Cen, Provs | Pan-Can, Provs | ----- |
| | Dick v. La Reine [1985] | Pan-Can, Provs, Mul | Balance | Doctrine | Provs, Cen (Particular) | Provs, Pan-Can, Mul | ----- |
| | R. v. Edwards Books [1986] | Provs (Pan-Can, Dyn) | Balance | Doctrine | Provs (Cen) | Provs (Pan-Can) | Facilitator |
| | Education Act [1987] | Mul, Provs | Balance | Text, Doctrine | Particular, Provs | Mul, Provs, Dyn | Guard (Facilitator) |
| | Ontario v. OPSEU [1987] | Provs, Pan-Can, Dyn | Balance | Doctrine, Structure | Provs, Cen | Provs, Pan-Can, Dyn | Ump, Branch, Guard, Facilitator |
| | Ontario v. Pembina [1989] | Provs, Pan-Can | Balance | Structure, Text, Doctrine | Provs, Cen | Provs, Pan-Can | Branch |
| | R. v. Colarusso [1994] | Pan-Can, Provs | Minimal | Doctrine, Prudent | Provs, Cen | Pan-Can, Provs | Facilitator |
| | R. v. Pamajewon [1996] | Mul (Provs, Pan-Can) | Balance | Doctrine | (Cen, Provs, Particular) | Mul (Pan-Can, Provs) | ----- |
| | Ontario Home Builders [1996] | Provs (Pan-Can, Mul, Dyn) | Balance | Doctrine, History, Structure | Provs (Cen) | Provs (Pan-Can, Mul) | (Branch) |
| | Law Society of BC v. Mangat [2001] | Pan-Can, Provs, Dyn | Balance | Doctrine | Cen (Provs, Particular) | Pan-Can, Provs, Dyn | ----- |
| | Ward v. Canada [2002] | Dyn, Pan-Can, Provs | Balance | Doctrine | Cen | Pan-Can, Provs | Ump, Guard |
| | Paul v. BC [2003] | Provs, Pan-Can, Mul | Balance | Doctrine | Provs (Cen, Particular) | Provs, Pan-Can, Mul | Branch (Ump, Facilitator) |
| | Same-Sex Marriage [2004] | Pan-Can, Provs (Dyn) | Balance | Doctrine | Cen, Provs | Pan-Can, Provs, Dyn | Facilitator (Ump, Guard) |
| | Rothmans v. Sask [2005] | Provs, Pan-Can (Dyn) | Balance | Doctrine | Provs, Cen | Provs, Pan-Can | Facilitator |
| | Employment Insurance Act [2005] | Dynamic | Explicit | Doctrine, Progress | Cen | Pan-Can, Dyn | Facilitator |
| Isen v. Simms [2006] | Provs, Pan-Can | Balance | Doctrine, Structure, Prudent | Provs | Provs (Pan-Can) | ----- | |
| Low | Dominion Stores v. R [1980] | Provs, Dyn | Balance | Doctrine | Provs (Cen) | Provs, Dyn (Pan-Can) | Facilitator, Ump |
| | Newfoundland Continental Shelf [1984] | Pan-Can (Provs, Mul) | Balance | Doctrine | Cen | Pan-Can, Dyn | Facilitator |
| | Derrickson v. Derrickson [1986] | Pan-Can, Provs | Balance | Doctrine | Cen, Provs | Pan-Can, Provs | Branch (Ump) |
| | Rio Hotel v. NB [1987] | Provs, Pan-Can, Dyn | Balance | Doctrine | Provs, Cen | Provs, Pan-Can | ----- |
| | O’Hara v. BC [1987] | Provs, Pan-Can, Dyn | Balance | Doctrine | Provs, Cen | Provs, Pan-Can | ----- |
| | Bell Canada v. Quebec [1988] | Pan-Can, Provs, Dyn | Balance | Text, Doctrine | Cen, Provs | Pan-Can, Provs | Ump, Guard |
| | Canadian National Railway [1988] | Pan-Can, Provs, Dyn | Balance | Text, Doctrine | Cen, Provs | Pan-Can, Provs | Ump, Guard |
| | Alltrans Express v. BC [1988] | Pan-Can, Provs, Dyn | Balance | Text, Doctrine | Cen, Provs | Pan-Can, Provs | Ump, Guard |
| | R. v. Francis [1988] | Provs, Pan-Can | Balance | Doctrine | Provs (Cen) | Provs, Pan-Can | ----- |
| | Alberta Government Telephones [1989] | Provs, Pan-Can | Minimal | Doctrine | Cen, Provs | Ambivalent | ----- |
| | Ibew v. Alberta Government Telephones [1989] | Provs, Pan-Can | Minimal | Doctrine | Cen, Provs | Ambivalent | ----- |
| | Starr v. Houlden [1990] | Pan-Can, Provs | Balance | Doctrine | Cen | Pan-Can, Provs | ----- |
| | Young Offenders Act [1991] | Pan-Can, Provs (Mul, Dyn) | Minimal | Doctrine | Cen, Provs, Particular | Provs | Branch (Guard) |
| | R. v. F.(J.T.) [1991] | Pan-Can, Provs (Mul, Dyn) | Minimal | Doctrine | Cen, Provs, Particular | Provs | Branch (Guard) |
| | R. v. W.(D.A.) [1991] | Pan-Can, Provs (Mul, Dyn) | Minimal | Doctrine | Cen, Provs, Particular | Provs | Branch (Guard) |
| | Friends of the Oldman River Society [1992] | Pan-Can, Dyn, Provs | Balance | Doctrine, Text, Prudent, Structure | Cen, Provs | Pan-Can, Provs, Dyn | Ump |
| | MacMillan Bloedel v. Simpson [1995] | (Pan-Can, Provs) | Minimal | Doctrine, Prudent | Ambivalent | Pan-Can, Provs | Branch |
| | Westbank First Nations v. BC Hydro [1999] | Provs, Pan-Can, Dyn | Balance | Doctrine | Provs | Provs, Pan-Can, Mul | ----- |
| | Global Securities v. BC [2000] | Provs, Pan-Can | Balance | Doctrine, Prudent | Provs (Cen) | Provs (Pan-Can) | (Branch) |
| | Public School Boards of Alberta [2000] | Provs (Mul) | Balance | Doctrine | Provs | Provs (Mul) | ----- |
| Kitkatla Band v. BC [2002] | Provs, Pan-Can (Mul, Dyn) | Balance | Doctrine, Prudent | Provs, Cen | Provs, Pan-Can | Facilitator | |
| Krieger v. Law Society of Alberta [2002] | Provs, Pan-Can (Dyn) | Minimal | Doctrine | Ambivalent | Provs, Pan-Can | No Info | |

Depicting the federation in a way that balances the competing models off one another is the most prominent approach in these 56 decisions. We see this happening in 39 of the 49 division of powers cases and in 4 of the 7 federal references. Generally, the Court does this by presenting the federation as granting both levels of government broad powers. For example, in *Ward v. Canada*⁶³¹ the centre's jurisdiction is presented as broad and validly affecting areas of provincial competence, while at the same time the Court elaborates on the broad scope of provincial powers and the need to respect provincial autonomy.⁶³² A similar depiction that supports elements of both the pan-Canadian and provincial equality models is evident in *O'Hara v. BC*.⁶³³ Here, the Court offsets a liberal view of the provinces' power to administer justice in the province with a broad central power over criminal law and procedure.⁶³⁴

⁶³¹ *Ward v. Canada (Attorney General)* [2002] 1 S.C.R. 569. The issue in this case is whether a central prohibition on the sale of young hooded and harp seals falls under its fisheries and criminal law power (or if it infringes on provincial jurisdiction over property and civil rights). The unanimous decision was authored by Wilson CJ.

⁶³² See *Ward v. Canada* [2002] at 42-43: 'Although broad, the [central] fisheries power is not unlimited. The same cases that establish its broad parameters also hold that the fisheries power must be construed to respect the provinces' power over property and civil rights under s. 92(13) of the *Constitution Act, 1867*. This too is a broad, multi-faceted power ... Thus we have before us two broad powers, one federal, one provincial. In such cases, bright jurisdictional lines are elusive.' Similarly, the Court goes on to note (at 52) that 'although the criminal law power is broad, it is not unlimited' There are further examples of this method of depicting the federation that balances elements of the pan-Canadian model with elements of the provincial equality model, see in particular at 30 and also 47-48. A similar depiction that balances broad central powers (over maritime matters) with broad provincial powers (over property and civil rights and local matters) is found in *Isen v. Simms* [2006] 2 S.C.R. 349 at 20, 24-26.

⁶³³ *O'Hara v. British Columbia* [1987] 2 S.C.R. 591. The issue in this case is whether the mandate of a provincially established commission to investigate actions of a provincial police force is invalid (because it infringes on the centre's powers over the criminal law and procedure). The majority decision was authored by Dickson CJ.

⁶³⁴ See *O'Hara v. BC* [1987] at 605: 'it is well established that pursuant to s. 92(14) a province may create a commission or inquiry and, in certain circumstances at least, arm such a body with coercive investigatory powers.' The Court goes on to add (at 606) that 'the boundaries of the "administration of justice" do not include the discipline, organization and management of the R.C.M.P. ... however, ... the "administration of justice" does include the organization and management of police forces created by provincial legislation' (emphasis original). Moreover, (at 607) the Court says that 'the authority to establish such an inquiry is not without limits. A province must respect federal jurisdiction over criminal law and criminal procedure,' and (at 610) that 'a certain degree of overlapping is implicit in the grant to the provinces of legislative authority in respect of the administration of justice and in the grant to Parliament of legislative authority in respect of criminal law and criminal procedure.' In sum, (at 611-612) the Court's understanding of the division of powers in relation to the administration of justice and the criminal law seeks to convey the view that, despite considerable provincial powers, 'there are limits to a province's jurisdiction to establish an inquiry and equip it with coercive investigatory authority ... [and] this limitation on provincial jurisdiction is an acknowledgement of the federal nature of our system of self-government.'

This balancing approach is also employed by highlighting how various aspects of each model are reflected in the federal order. For example, in *Dick v. La Reine*⁶³⁵ the three main models are afforded legitimacy in the way the federation is depicted: the multinational model by presenting the state as housing multiple national groups (with aboriginals seen as legitimately distinct cultural groups with attendant rights);⁶³⁶ the provincial equality model with the autonomy and broad jurisdiction afforded the provinces to pass laws of general application;⁶³⁷ and, the pan-Canadian model by saying the centre has exclusive and paramount control over its areas of jurisdiction (like aboriginals).⁶³⁸ Similarly, in *Westbank First Nation v. BC Hydro*⁶³⁹ an understanding of the federation in line with aspects of the multinational model (where aboriginal bands represent a *de facto* level of

⁶³⁵ *Dick v. La Reine* [1985] 2 S.C.R. 309. The issue in this case is whether a provincial law restricting hunting of deer to certain times applies to an aboriginal person (or if the law infringes on the centre's jurisdiction to exclusively legislate with regard to aboriginals under s. 91.24). The unanimous judgment was authored by Beetz JJ.

⁶³⁶ See *Dick v. La Reine* [1985] (at 320) where the Court accepts that distinct social, cultural and institutional practices form a basis for aboriginal identity, giving rise to a core 'Indianness,' which provincial laws cannot fundamentally affect.

⁶³⁷ See *Dick v. La Reine* [1985] (at 322) where the Court notes that even though provincial laws cannot interfere with the fundamental core of a central area of jurisdiction, that 'it has never been suggested, so far as I know, that, by the same token, those provincial ... laws cease to be laws of general application,' see also at 325-326.

⁶³⁸ See *Dick v. La Reine* [1985] (at 324) where the Court notes that aboriginals are the exclusive legislative jurisdiction of the centre, and (here and at 322 and 325-326) notes that such exclusive jurisdiction is to be free of interference from provincial laws that affect the core of this jurisdiction.

⁶³⁹ *Westbank First Nation v. British Columbia Hydro and Power Authority* [1999] 3 S.C.R. 134. The issue in this case is if an aboriginal band can tax a provincial utility through a delegated power from the central government. The case thus involves issues of immunity from taxation under s. 125 of the *Constitution Act 1867*, which prohibits one level of government from taxing the other's revenues. The unanimous judgement was authored by Gonthier JJ.

government)⁶⁴⁰ is offset by reaffirming the centre's power over aboriginals⁶⁴¹ and equality between the centre and provinces as the two official levels of government in the federation.⁶⁴²

This same pattern of balancing models off one another when depicting the federation takes place in the *Education Act* reference.⁶⁴³ Here, the SCC presents the nature of federation, the distribution of powers and the balance of powers in a way that legitimizes the multinational⁶⁴⁴ and provincial equality models.⁶⁴⁵ We can also see the Court highlighting aspects of the federal order that lend legitimacy to different models in *Patriation*, where the balance of powers, the relation between orders and even the nature of the federal and constitutional order is presented in line with

⁶⁴⁰ See *Westbank First Nation v. BC Hydro* [1999] (at 20) where the Court implies this: 'These principles [of immunity from taxation other governments], and the guiding structure of the Constitution, are as applicable to Indian Band Councils exercising the right of taxation authorized by s. 83 of the *Indian Act* as they are to the federal and provincial levels of government. *The exercise of governmental powers in Canada, by any level of government, must be done in accordance with the constitutional framework of the country*' (emphasis added).

⁶⁴¹ See *Westbank First Nation v. BC Hydro* at 37: 'the purposes of these [impugned] taxes are "to promote the interests of Aboriginal peoples and to further the aims of self-government". Thus, as the Chief Justice pointed out (at para. 43), the taxes here are "more ambitious" than simple taxation. However, the existence of this secondary purpose does not remove these taxes from the head of power under which s. 83 is founded — s. 91(3) [the central power over Aboriginals]. Indeed, while the intention of Parliament in enacting s. 83 may have been to advance self-government, that does not mean that this is the specific purpose of the taxes themselves' (emphasis original).

⁶⁴² See *Westbank First Nation v. BC Hydro* (at 16-17) where the Court highlights how the Constitutional immunity each level of government enjoys from taxation by another government is afforded to the centre and the provinces: 'the final text of s. 125 read: "No Lands or Property belonging to *Canada or any Province* shall be liable to Taxation." The section is one of the tools found in the Constitution that ensures the proper functioning of Canada's federal system. It grants *to each level of government* sufficient operational space to govern without interference' (emphasis added).

⁶⁴³ *Reference re Bill 30, An Act to Amend the Education Act (Ont.)* [1987] 1 S.C.R. 1148. The issue in this case is whether Ontario can fully fund Catholic secondary schools (i.e. if this action is within the province's power over education and consistent with denominational school rights laid out in s. 93 of the Constitution). The unanimous opinion was authored by Wilson JJ (with Beetz, Estey and Lamer JJ concurring).

⁶⁴⁴ See *Education Act* [1987] (at 9, 27-28, 63, and particularly 27-28) where the Court says 'the protection of minority religious [qua national minority] rights was a major preoccupation during the negotiations leading to Confederation because of the perceived danger of leaving the religious minorities in both Canada East and Canada West at the mercy of overwhelming majorities ... [the resulting protections in] s. 93 was part of a solemn pact resulting from the bargaining which made Confederation possible ... [it is part of the] the basic compact of Confederation...' Additionally, in line with the multinational model, the Court (at 21, 23, 24, 26, 28-29, 61-63) notes that the federal and constitutional order allows for a decentralized and asymmetrical distribution of powers with regard to education via the ability of provinces (particularly Ontario and Québec) to establish denominational school systems and to augment these systems as they see fit.

⁶⁴⁵ See *Education Act* [1987] (at 78) where the Court presents the compact of federation as taking place between the provinces, not nations, a process that was about '...the sharing of sovereign power between the two plenary authorities created at Confederation.' This shift in focus to depict the federation in line with the provincial equality model is buttressed in the by the Court (at 62, 69, 71, 79) referring to the provinces *en mass*, as a level of government, with all provinces sharing this power equally (i.e. despite the fact that policy asymmetry may occur in response to local conditions, the power is available to all provinces to establish denominational school systems under their common head of power over education).

both the pan-Canadian⁶⁴⁶ and provincial equality models,⁶⁴⁷ while at the same time there is some implied support for the multinational model.⁶⁴⁸

This approach of balancing models off on another in the depiction of the federation is also evident in the 8 division of powers decisions and one federal reference where the Court only dedicates a minimal amount of effort and space explaining the nature of the federal order. For example, in *Krieger v. Law Society of Alberta*⁶⁴⁹ the single paragraph dedicated to explaining the nature of the federal order counterbalances provincial powers to regulate professions (including the legal profession, under their property and civil rights power) with the central powers over criminal law and procedure.⁶⁵⁰ Similarly, in *Young Offenders Act*,⁶⁵¹ the Court dedicates very little space to

⁶⁴⁶ See *Patriation* [1981] (at 801-802, and particularly 806) where the Court states that ‘federal paramountcy is ... the general rule in the actual exercise of [legislative] powers...’ while also noting the many ‘unitary features’ of the federal order. And, this unitary federal order mandated by the text of the constitution cannot be affected by any political conventions that may support competing federal models (see 774-775, 778-779, 784, 788); the Court (at 803) goes as far as to say that competing models to the pan-Canadian model, such as the ‘compact theory,’ are just that, theories, and ‘do not engage the law,’ which mandates a centralized federation with a superior central order.

⁶⁴⁷ See *Patriation* [1981] (at 904-906, 909,) where the Court (at 905) says ‘the object of the [*Constitution Act 1867*] was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy.’ And, this view of federation – supported as it is by convention – is seen to be an integral part of the constitution, as conventions ‘ensure that the legal framework of the constitution will be operated in accordance with the prevailing constitutional values or principles’ which leads to ‘conventional rules of the constitution’ (at 880) – rules that often support a provincial equality model by limiting the superior position of the central order (at 879-880, 893).

⁶⁴⁸ See *Patriation* [1981] (at 893-894) where the Court, despite depicting the federation as a compact among equal provinces, does imply a special status for Québec in the order by pointing to the ability of Québec *alone* to halt amendment negotiations and thereby implying a veto in line with its distinct status as a nation. For a similar interpretation on this aspect of the decision see Russell (1983: 225-226).

⁶⁴⁹ *Krieger v. Law Society of Alberta* [2002] 3 S.C.R. 372. The issue in this case is whether a province can regulate and sanction the actions of a provincial crown prosecutor through their civil rights jurisdiction (or if, since the prosecutor oversees criminal proceedings, this infringes the criminal law and procedure jurisdiction of the centre). The unanimous decision was authored by Major JJ.

⁶⁵⁰ See *Krieger v. Law Society of Alberta* [2002] at 33: ‘Section 91(27) of the *Constitution Act, 1867* grants jurisdiction over criminal law and criminal procedure to the Federal Government. Federal jurisdiction over criminal law and criminal procedure includes the authority to determine the procedures that govern criminal trials. Sections 92(13) and (14) grant jurisdiction over property and civil rights and the administration of justice, both criminal and civil, to the Provinces. Provincial jurisdiction over property and civil rights and the administration of justice includes licensing and regulation of lawyers, including reviews of alleged breaches of ethics ... It would thus appear that there is a strong possibility of overlap between the provincial and federal spheres.’ The result is that the Court accepts this overlapping area of jurisdiction and goes on to determine if the rules and regulations are valid by looking at the extent to which they target the prosecutor as professional discipline or as criminal law and procedure (at 34, 38).

⁶⁵¹ *Reference re Young Offenders Act (P.E.I.)* [1991] 1 S.C.R. 252. The issue in this case is whether s. 96 of the *Constitution Act 1867* allows Youth Courts (as established under the *Young Offenders Act*) to be presided over

reflecting on the federal order, spending one paragraph describing the order in such a way that could support any of the three key models.⁶⁵²

The counterbalancing approach is often coupled with a more explicit recognition of federation as a process and outcome of negotiation. This happens in some 30 division of powers decisions and 5 of the 7 federal references. For example, in *BC v. Lafarge Canada*⁶⁵³ the Court depicts the federation in a way that draws from elements of the pan-Canadian and provincial equality models,⁶⁵⁴ while also recognizing that the order is a process and outcome of negotiation between the subscribers of these legitimate views.⁶⁵⁵ Similarly in *R v. Furtney*⁶⁵⁶ the Court says that the federation is flexible enough to accommodate the oft-required central-provincial agreements to implement programs and policies in areas of overlapping jurisdiction;⁶⁵⁷ in other words, that the federal order is the outcome of negotiation over how it can be implemented.

by judges appointed by the provinces rather than the central government. Essentially, the case deals with the scope of Superior Court jurisdiction as protected via the judicature sections of the Constitution and the ability of governments to establish inferior courts. The unanimous decision (authored by Lamer CJ, with Wilson, McLachlin, La Forest and L'Heureux-Dube JJ concurring) was delivered in tandem with *R. v. F.(J.T.)* [1991] 1 S.C.R. 285 and *R. v. W.(D.A.)* [1991] 1 S.C.R. 291.

⁶⁵² See *Young Offenders Act* [1991] where over and above one line (at 277) that implies support for the provincial equality model by referring to the 'four original confederating provinces,' the only paragraph that depicts the federation (at 296) highlights the central level's broad criminal law powers, the autonomy both orders equally share in the administration of justice, while implying that the system allows for asymmetry in the administration of justice in response to particular circumstances.

⁶⁵³ *British Columbia (Attorney General) v. Lafarge Canada Inc.* [2007] 2 S.C.R. 86. The issue in this case is whether provincial laws apply to the construction of a ship offloading facility (or if this undertaking falls under the exclusive jurisdiction of the central government under its navigation and shipping jurisdiction). Essentially, the case deals with the scope and applicability of the interjurisdictional immunity doctrine. The unanimous decision was authored by Binnie and LaBel JJ (with Bastarache JJ concurring).

⁶⁵⁴ See *BC v. Lafarge Canada* [2007] (at 36) where the Court notes the centre's broad powers over its own public property and shipping and navigation, while also (at 37) recognizing that such lands and port's have a double aspect and fall under the provinces' control under their broad jurisdiction over property and civil rights.

⁶⁵⁵ See *BC v. Lafarge Canada* [2007] (at 37-38) where the Court says that the fluid and dynamic nature of the division of powers, which creates areas of overlapping jurisdiction, necessitates cooperation because the 'potential for conflict' in these areas is 'considerable' and accordingly 'federal-provincial-municipal cooperation in such matters is not unconstitutional. It is essential.' The Court goes on to reject a view of the division of powers as fixed and creating enclaves of jurisdiction (at 42-43), reinforcing the need for dialogue and negotiation between levels to both implement the order and to manage conflict.

⁶⁵⁶ *R. v. Furtney* [1991] 3 S.C.R. 89. The issue in this case is the validity of a criminal code provision that delegates regulatory authority for lotteries from the central government to a provincial body. The unanimous decision was authored by Stevenson JJ.

⁶⁵⁷ See *R v Futney* [1991] at 102: 'in the exercise of its powers generally, and the criminal law specifically, Parliament is free to define the area in which it chooses to act and, in so doing, may leave other areas open to valid provincial legislation.' Here, instead of focusing on the constitutional prohibition on delegating legislative powers between levels of government, the Court views the order as flexible enough to allow the levels of

In two division of powers cases this explicit support for a more dynamic understanding of the federation is particularly evident, as it is the primary way the federation is depicted. In addition to *Fédération des producteurs de volailles du Québec*, discussed above, we see this happening in *Chatterjee v. Ontario*.⁶⁵⁸ Here, a view of the federal and constitutional order as a fixed set of jurisdictional enclaves is rejected, with the nature of federation being presented as flexible and having overlapping jurisdictions that require negotiation and cooperation.⁶⁵⁹

This second approach to depicting the federation is also evident in the SCC's federal references. In *Assisted Human Reproduction Act*,⁶⁶⁰ a view of the federation that supports both the pan-Canadian⁶⁶¹ and the provincial equality⁶⁶² models is augmented by highlighting that the federation is a normative order, which creates areas of shared jurisdiction that require cooperation and compromise to implement.⁶⁶³ In *Employment Insurance Act*⁶⁶⁴ the Court explicitly recognizes the

government to by-pass the rigidity of the division of powers to negotiate and cooperate to delegate the administration and regulation of issue areas (here lotteries) through agreement.

⁶⁵⁸ *Chatterjee v. Ontario (Attorney General)* [2009] 1 S.C.R. 624. The issue in this case is whether a provincial law relating to the seizure of proceeds of crime infringes on the centre's criminal law power. The unanimous decision was authored by Binnie JJ.

⁶⁵⁹ See *Chatterjee v. Ontario* [2009] at 2: 'resort to a federalist concept of proliferating jurisdictional enclaves (or "interjurisdictional immunities") was discouraged by this Court's decisions in *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, and *British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23, [2007] 2 S.C.R. 86, and should not now be given a new lease on life. As stated in *Canadian Western Bank*, "a court should favour, where possible, the ordinary operation of statutes enacted by both levels of government" (para. 37 (emphasis in original)).' The Court goes on (at 32) to say 'co-operative federalism recognizes that overlaps between provincial and federal laws are inevitable: "Matters, however, which in one aspect and for one purpose fall within the jurisdiction of a province over the subjects designated by one or more of the heads of s. 92, may in another aspect and for another purpose, be proper subjects of legislation under s. 91, and in particular under head 27,"' see also at 24, 29-30, 33-35, 40.

⁶⁶⁰ Reference re *Assisted Human Reproduction Act* [2010] 3 S.C.R. 457. The issue in this reference is whether a central law prohibiting and controlling certain acts related to assisted human reproduction fall within the centre's criminal law power (or infringes on provincial jurisdiction relating to healthcare and the regulation of medical practices). The unanimous opinion was authored by McLauchlin CJ (with LeBel, Deschamps, Abella and Rothstein and Cromwell JJ concurring).

⁶⁶¹ Through a broad and exclusive scope afforded the centre's criminal law power, see *Assisted Human Reproduction Act* [2010] at 77 and 30, 48-51, 53, 56.

⁶⁶² Through broad and autonomous powers afforded the provinces over healthcare and local matters and a view of the federation as generally decentralized, see *Assisted Human Reproduction Act* [2010] at 182-183, 262-264, 287.

⁶⁶³ See *Assisted Human Reproduction Act* [2010] (at 268) where the Court says that the 'double aspect' of many matters of jurisdiction is a reflection of the 'different normative perspectives that make it possible to understand certain corresponding facts' as falling under either central or provincial jurisdiction, 'regardless of their legal characterization.' In other words, the competing understandings of the federation are all implicitly legitimate, given the flexibility of the federal structure and the competing ways it is understood. And, this

contested nature of federation: ‘to derive the evolution of constitutional powers from the structure of Canada is delicate, as what that structure is will often depend on a given court’s view of what federalism is. What are regarded as the characteristic features of federalism may vary from one judge to another...’⁶⁶⁵ In line with this view, the Court depicts the scope and balance of powers in the federation as legitimately shifting in response to negotiations between actors over the order.⁶⁶⁶ Elements of this understanding of the constitutional and federal order as a contested normative framework are also observable in both *Same-Sex Marriage*⁶⁶⁷ and *Patriation*.⁶⁶⁸

What all of these examples highlight is the tendency of the Court in these 56 decisions to present federation in an inclusive manner. In these decisions the Court presents federation in a way that reinforces the legitimacy of multiple models, including the dynamic model. It does this by recognizing aspects of Canada’s political and institutional structures that support the various understandings of what the federation is, lending legitimacy to the views of those that subscribe to different federal models. At the same time, a number of these decisions explicitly recognize federation as a dynamic normative order – as the process and outcome of negotiation between the subscribers of legitimate perspectives on what the federation is and ought to be. It is these two

dynamic nature of the order both allows and necessitates cooperation between the levels to govern (see at 184 and 139).

⁶⁶⁴ *Reference re Employment Insurance Act (Can.), ss. 22 and 23* [2005] 2 S.C.R. 669. The issue in this reference is whether the centre can grant parental benefits to individuals who take time off work to care for a child under its unemployment insurance jurisdiction (or if this infringes on provincial competence over property and civil rights and matters of a local or private nature). The unanimous opinion was authored by Deschamps JJ.

⁶⁶⁵ *Employment Insurance Act* [2005] at 10.

⁶⁶⁶ When read in tandem, aspects of *Employment Insurance Act* [2005] (at 8-10, 37, 39, 45) demonstrate this view, with the Court presenting federation as the outcome of negotiations between the actors over which level has the right to legislate with regard to employment insurance and what the scope of that right is (the Court holding the scope changes over time in response to conflict and negotiation over the right); the SCC nicely summarizes this aspect of the ruling (at 45): ‘On the one hand, no constitutional head of power is static. On the other hand, the evolution of society cannot justify changing the nature of a power assigned by the Constitution to either level of government...’ and so the Court turns to the negotiations between the parties over the applicable heads of power to inform its opinion on its scope, while facilitating continued negotiation over time.

⁶⁶⁷ See *Reference re Same-Sex Marriage* [2004] 3 S.C.R. 698 (at 21-30), the subtitle of the section (‘The Meaning of Marriage Is Not Constitutionally Fixed’) sums up the point that the constitutional and federal order should be understood as shifting in response to conflict over the order so as to ‘ensure the continued relevance and, indeed, legitimacy of Canada’s constituting document.’

⁶⁶⁸ See *Patriation* [1981] (at 874) where the Court depicts the constitution as ‘the global system of rules and principles which govern the exercise of constitutional authority in the whole and in every part of the Canadian state,’ a view of the constitution as a normative framework where conventions play a key role (providing, as noted at 831, ‘constitutional constraints’ that are followed by the actors in the association).

elements (a balanced recognition of the key federal models and explicit support for the dynamic model) that demonstrate how these decisions follow the approach to understanding and presenting the federation displayed in the *Secession Reference*.

Use of Legal Argument

This leads to the Court's use of legal argument in these 56 decisions, and how it buttresses a depiction as more than a mere theory – how it lends it credibility by anchoring it in the constitutional law. There is thus a similarity between these decisions and the imposing cases in the way accepted forms of legal argument and methods of constitutional interpretation are used to support a depiction of the federation. The important difference is that in these decisions the Court is properly accounting for the various federal models and affording legitimacy to each (rather than legitimizing one over others).

Table 6.3 indicates another similarity between these 56 decisions and the 74 imposing decisions: the particular forms of legal argument relied upon.⁶⁶⁹ In each of the 49 division of powers decisions, and in almost all of the 7 references, the Court employs doctrinal analysis as a primary means of supporting its depiction of the federation. Moreover, just as in the impositions, the textual modality plays an important role as both a primary and secondary way of anchoring the depictions of the federation in the constitutional law (as do the prudential and structural forms of reasoning).⁶⁷⁰ While interesting, as already argued, these figures are of secondary importance to *how* the Court employs these modes of legal argument to reinforce its depiction.⁶⁷¹ It is on this front where the clear difference between an imposing decision and one that recognizes the legitimacy of multiple models is found. In these 56 decisions we see in each case the Court employing accepted forms of

⁶⁶⁹ The various forms of legal argument are defined and explained in Chapter Three.

⁶⁷⁰ Textual analysis is employed as the primary modality to support a depiction in 10 decisions, and as a secondary mode of interpretation in an additional 17 cases. Prudential and structural analysis are both employed in support of a depiction as a primary form of legal argument in 6 decisions and as a secondary form of argument in 9 decisions.

⁶⁷¹ This is because the Court employs a range of modalities, adapting them to reinforce particular depictions of the federation. As explained in Chapter Three, the various modes of legal argument can be shifted to support any model.

legal argument to reinforce the legitimacy of multiple models and federation as the process and outcome of negotiation.

There are numerous examples of this in the 49 division of powers decisions where the Court employs doctrinal reasoning. For example, *Schneider v. The Queen*⁶⁷² is indicative of the way support for multiple models can be pulled from the case law, with the Court saying precedent supports both a decentralized and centralized federal order.⁶⁷³ While in *Multiple Access*⁶⁷⁴ an essentially novel element of the division of powers doctrine of paramountcy is established and applied along with a crystallizing double aspect doctrine.⁶⁷⁵ In this case, the Court raises the threshold at which central legislation supplants conflicting provincial laws, saying the Constitution dictates this only happens when there is ‘actual conflict’ not simply parallel legislative schemes. The Court goes on to praise such parallel schemes as a reflection of the dynamic nature of the division of powers, which creates overlapping jurisdictions and a necessity for cooperation.⁶⁷⁶ The use of doctrine in the decision thus reaffirms the legitimacy of three competing perspectives: 1) that central jurisdiction is broad and ultimately paramount; 2) that there is a need to protect provincial autonomy; and, 3) that the federal division of powers results from, and necessitates, cooperation and negotiation. In *Canadian*

⁶⁷² *Schneider v. The Queen* [1982] 2 S.C.R. 112. The issue in this case is whether a provincial law relating to the treatment and detention of heroin addicts infringes on central jurisdiction over the criminal law. The unanimous decision was authored by Dickson JJ (with Laskin CJ and Estey JJ concurring).

⁶⁷³ See *Schneider v. The Queen* [1982] (at 130-133) where the Court draws on precedent to support a wide scope and autonomy for the provincial powers over healthcare issues (and issues of a local nature), and (at 126, 130-132) where the Court also draws from the case law support for the centre being ultimately superior and having broad powers via its criminal law jurisdiction.

⁶⁷⁴ *Multiple Access Ltd. v. McCutcheon* [1982] 2 S.C.R. 161. The issue in this case is the validity of provincial and central insider trading legislation. The case is essentially about the doctrine of central paramountcy: the key issue being if there is a conflict between provincial and central laws, and if so, do central laws take precedent. The unanimous decision was authored by Dickson JJ (with Beetz, Estey and Chouinard JJ concurring).

⁶⁷⁵ The double aspect doctrine holds that some laws can fall under both central and provincial jurisdiction and are therefore within the competency of both governments, see Hogg (2009: 375-377).

⁶⁷⁶ See *Multiple Access* [1982] at 181-183, 186-191. The sum of this reasoning is expressed (at 190) where the Court applies the essence of the narrowed paramountcy doctrine with the essence of the double aspect doctrine to say that the constitutional law of Canada holds that ‘duplication is ... “the ultimate in harmony”. The resulting “untidiness” or “diseconomy” of duplication is the price we pay for a federal system in which economy “often has to be subordinated to [...] provincial autonomy.” Mere duplication without actual conflict or contradiction is not sufficient to invoke the doctrine of paramountcy and render otherwise valid provincial legislation inoperative.’ Compare this to the stricter test of paramountcy employed by a lower Court in this case (laid out at 171), which is rejected by the SCC: ‘the constitutional doctrine of paramountcy operates so as to invalidate provincial legislation where it duplicates valid federal legislation in such a way that the two provisions cannot live together and operate concurrently.’

*Western Bank*⁶⁷⁷ the Court applies the paramountcy and double aspect doctrine, while significantly limiting the interjurisdictional immunity doctrine.⁶⁷⁸ In doing this, the Court reinforces that the constitutional law supports a view of the division of powers as inherently dynamic and as creating overlapping jurisdictions that require negotiation to implement,⁶⁷⁹ while rejecting a view that the Constitution fixes a centralized order with the centre's jurisdiction over matters being completely protected from provincial laws.⁶⁸⁰ In cases since *Canadian Western Bank*, the Court has applied these legal principles to reinforce that the law recognizes the dynamic nature of the division of powers and the necessity of central-provincial cooperation.⁶⁸¹

The above demonstrates how the Court uses doctrinal reasoning by drawing from the case law, developing legal principles and applying established doctrine. The key point is that this doctrinal approach is used to reinforce that the constitutional law supports a view of the various federal models as legitimate and the federation itself as the process and outcome of negotiation.

⁶⁷⁷ *Canadian Western Bank v. Alberta* [2007] 2 S.C.R. 3. The issue in this case is the extent to which banks, as federally regulated institutions, must comply with provincial laws regulating the promotion and sale of insurance. The unanimous decision was authored by Binnie and LeBel JJ (with Bastarache JJ concurring).

⁶⁷⁸ The interjurisdictional immunity doctrine holds that there are core areas of central jurisdiction to which provincial laws shall not apply (even laws validly enacted within areas of provincial competence), see Hogg (2009: 392-405).

⁶⁷⁹ See *Canadian Western Bank* [2007] (at 30) where the Court links this view to the double aspect doctrine, going on at (at 69-75) to employ this view with the narrowed paramountcy doctrine established in *Multiple Access* [1982] to present the law as balancing the overlapping nature of the division of powers with a recognition of the center's ultimately paramount jurisdiction and the need to protect provincial autonomy.

⁶⁸⁰ See *Canadian Western Bank* [2007] at (35) where the Court recognizes 'the application of interjurisdictional immunity has given rise to concerns by reason of its potential impact on Canadian constitutional arrangements. In theory, the doctrine is reciprocal ... However, it would appear that the jurisprudential application of the doctrine has produced somewhat "asymmetrical" results.' Going on (at 36) the Court endorses 'a view of federalism that puts greater emphasis on the legitimate interplay between federal and provincial powers.' And, (at 40) highlighting that where this doctrine has been applied it is 'to protect "essential" parts of federal "undertakings."' The crux of the Court's reflection on the doctrine (at 45) is that 'a broad use of the doctrine of interjurisdictional immunity runs the risk of creating an unintentional centralizing tendency in constitutional interpretation. As stated, this doctrine has in the past most often protected federal heads of power from incidental intrusion by provincial legislatures. The "asymmetrical" application of interjurisdictional immunity is incompatible with the flexibility and co-ordination required by contemporary Canadian federalism.' Accordingly, the Court says (at 47) it 'does not favour an intensive reliance on the doctrine.'

⁶⁸¹ See *BC v. Lafarge Canada* [2007], for example, at 4, 41-42, 77; *Confédération des syndicats nationaux v. Canada (Attorney General)* [2008] 3 S.C.R. 511, for example, at 32; *Chatterjee v. Ontario (Attorney General)* [2009] 1 S.C.R. 624, for example, at 2, 42; *Assisted Human Reproduction Act* [2010], for example, at 139, 183, 188.

Of course, the Court often combines doctrinal analysis with other forms of legal argument to legitimize its depiction of the federation as law. This layering of various modalities is exemplified well in the division of power case *Bell Canada v. Quebec*.⁶⁸² Here, a doctrine that seeks to balance the ultimate superiority of the centre's jurisdiction over its works and undertakings with the provinces' broad and autonomous jurisdiction over matters that touch on these works and undertakings is crystallized.⁶⁸³ In developing the doctrine (that the centre does have immunity from provincial laws, but only for a narrow set of activities deemed to be essential to the work or undertaking) the Court draws on the related case law, but also, on the text of the Constitution to justify the rule as valid constitutional law.⁶⁸⁴ Similarly, in *Ontario v. OPSEU*⁶⁸⁵ we see the structural modality employed (in conjunction with doctrinal and textual analysis) to reinforce the legality of a depiction of the federation where broad central and provincial powers are counter-balanced – the Court saying this balance is the essence of the 'federal principle' and is part of 'the basic structure of [the] Constitution.'⁶⁸⁶ While in *Kitkatla v. BC*⁶⁸⁷ a depiction of the federation that grants a measure of

⁶⁸² *Bell Canada v. Quebec (CSST)* [1988] 1 S.C.R. 749. The issue in this case is whether provincial health and safety legislation is constitutionally applicable to a federal undertaking. The unanimous decision (authored by Beetz JJ) is part of a trilogy of cases delivered together, the other two being *Canadian National Railway Co. v. Courtois* [1988] 1 S.C.R. 868 and *Alltrans Express Ltd. v. British Columbia (Workers' Compensation Board)* [1988] 1 S.C.R. 897.

⁶⁸³ See *Bell Canada v. Quebec* [1988] (at 761-762) where the general doctrine is summarized: '...Parliament is vested with exclusive legislative jurisdiction over labour relations and working conditions when that jurisdiction is an integral part of its primary and exclusive jurisdiction over another class of subjects, as is the case with labour relations and working conditions in the federal undertakings... [but] ...works, such as federal railways, things, such as land reserved for Indians, and persons, such as Indians, who are within the special and exclusive jurisdiction of Parliament, are still subject to provincial statutes that are general in their application, whether municipal legislation, legislation on adoption, hunting or the distribution of family property, provided however that the application of these provincial laws does not bear upon those subjects in what makes them specifically of federal jurisdiction....'

⁶⁸⁴ On the use of case law, in addition to *Bell Canada v. Quebec* [1988] (at 761-763) see also (at 815-845). Throughout the decision, though, textual analysis is continually employed to anchor the "balanced" depiction of the federation in the constitutional law (see, for example, at 815-816, 819, 828-830 and 839-840).

⁶⁸⁵ *Ontario (Attorney General) v. OPSEU* [1987] 2 S.C.R. 2. The main issue is the validity of a provincial law limiting the participation of provincial civil servants in central elections. The unanimous decision was authored by Beetz JJ (with Dickson CJ and Lamer JJ concurring).

⁶⁸⁶ See *Ontario v. OPSEU* [1987] at 45-47, 57.

⁶⁸⁷ *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)* [2002] 2 S.C.R. 146. The issue in this case is whether a provincial act relating to the protection, alteration and destruction of cultural heritage objects is outside the province's jurisdiction over property and civil rights to the extent it applies to aboriginals and Culturally Modified Trees. The unanimous decision was authored by LeBel JJ.

legitimacy to the multinational, pan-Canadian and provincial equality models⁶⁸⁸ is reinforced as legitimate by considering the way it balances the interests of aboriginal groups with others in the province.⁶⁸⁹ The point is that the Court reverts to prudential reasoning in this decision to augment the doctrinal support afforded its depiction of the federation, while also employing prudential reasoning in a way that reinforces the legitimacy of multiple models (i.e. by balancing the interests of aboriginals as a group with those of other provincial inhabitants and the broad powers of the two levels of government *vis-a-vis* aboriginals).

The use of legal argument to reinforce the legitimacy of depictions as law is also observable in all seven of the federal references noted in Table 6.3. For example, in *Education Act* we can see how multiple modalities of constitutional interpretation are used to support the various federal models. Doctrine is employed to lend credence to a view of a province as a national-based unit in line with the multinational model,⁶⁹⁰ while the text is relied upon to present provinces as equal juridical units in line with the provincial equality model.⁶⁹¹ While in *Newfoundland Continental*

⁶⁸⁸ See *Kitkatla v. BC* [2002] at 31, 43-46, 65-69, 70-75.

⁶⁸⁹ See *Kitkatla v. BC* [2002] at 62: 'No heritage conservation scheme can provide absolute protection to all objects or sites that possess some historical, archaeological or cultural value to a society. To grant such an absolute protection would be to freeze a society at a particular moment in time. It would make impossible the need to remove, for example, buildings or artifacts of heritage value which, nevertheless, create a public health hazard or otherwise endanger lives. In other cases, the value of preserving an object may be greatly outweighed by the benefit that could accrue from allowing it to be removed or destroyed in order to accomplish a goal deemed by society to be of greater value. It cannot be denied that ... [the impugned provincial legislation] ... could sometimes affect aboriginal interests. As will be seen below, these provisions form part of a carefully balanced scheme. As recommended by the Court in *Delgamuukw*, it is highly sensitive to native cultural interests. At the same time, it appears to strike an appropriate balance between native and non-native interests. Native interests must be carefully taken into account at every stage of a procedure under the Act. The Act clearly considers them as an essential part of the interests to be preserved and of the cultural heritage of British Columbia as well as of all First Nations.' The Court goes on (at 64) to cite that the percentage of cultural artifacts to be destroyed has the effect of 'striking of a balance between the need and desire to preserve aboriginal heritage with the need and desire to promote the exploitation of British Columbia's natural resources.'

⁶⁹⁰ See *Education Act* [1987] (at 23-26, 47 and particularly 28) where the Court cites a number of decisions that support its depiction, with the Court saying 'the compromise or, as Duff C.J. in the *Reference Re Adoption Act*, [1938] S.C.R. 398 at p. 402, termed it, "the basic compact of Confederation", was that rights and privileges already acquired by law at the time of Confederation would be preserved and provincial legislatures could bestow additional new rights and privileges in response to changing conditions.'

⁶⁹¹ See *Education Act* [1987] (at 71, 75-76, 78, 79 and particularly 69) where the Court relies on the text of the Constitution to demonstrate the equality of all provinces in the powers granted to them as a level of government: 'the opening words of s. 93 are a clear grant of legislative power to the province, providing the province with the authority to make laws in relation to education. As such, the opening words of s. 93 are similar to

Shelf,⁶⁹² the textual modality is used to reinforce the legitimacy of the pan-Canadian, provincial equality and multinational models.⁶⁹³

This section accentuates the difference between these 56 decisions and the 74 imposing decision in way legal argument is used to legitimize a depiction of the federation. These examples demonstrate how the Court employs the various forms of legal argument and constitutional interpretation to reinforce the legitimacy of federation as the process and outcome of negotiation between the subscribers of legitimate models. This is quite different than what happens in the imposing decisions, where legal argument is employed to legitimize a partial perspective of what the federation is *as the law*. Whereas above, the Court is using different forms of legal analysis to show how each federal model finds support in the law. In this way, the examples discussed here illustrate how the constitutional law can develop and be applied to support an understanding of the federation in line with each of the three key federal models and the dynamic model.

Rejecting Zero-Sum Outcomes

The way the Court understands the federation and uses legal analysis to anchor this understanding in the law is not the only important aspect of federal jurisprudence. The outcome of a case is also important. It should be clear why this is so: the outcomes have practical political effects and align the constitutional and federal order with the way it is depicted in the decision, while also establishing precedent that influences future decisions.

the various grants of provincial power found in s. 92 of the *Constitution Act, 1867* and might well have been included in s. 92....'

⁶⁹² *Reference re Newfoundland Continental Shelf* [1984] 1 S.C.R. 86. The issue in this case is which government (Canada or Newfoundland) has jurisdiction to exploit the natural resources of the continental shelf off the coast of the province and to legislate with regard to the exploitation of these resources. The unanimous opinion was issued by 'The Court.'

⁶⁹³ See *Newfoundland Continental Shelf* [1984] (at 127-128) where the Court says the text of the Constitution mandates a general superiority for the central level: 'There is nothing in s. 92 of the *Constitution Act, 1867* which could confer legislative jurisdiction upon Newfoundland in respect of such rights held by Canada. Legislative jurisdiction falls to Canada under the peace, order, and good government power in its residual capacity. Newfoundland's legislative competence, like that of all the other provinces, is confined to legislation operating within the provinces' (see also 108, 111, 115). In the same decision, the SCC (at 104-105) lends credence to the provincial equality and multinational models by citing the text of key constitutional documents that could be taken to support a view of federation as a compact between either provinces or nations (i.e. the Court notes the status of Newfoundland prior to joining the state as an autonomous political community equal to that of Canada in the Balfour Declaration).

As argued in the last chapter there is a close link between the way the federation is presented and the outcome of a case. The depiction of the federation establishes what the order is, while the outcome draws from that understanding and reinforces the legitimacy of that depiction as legal fact. Decisions that follow the example of the *Secession Reference* reach outcomes that mitigate the creation of stark winners and losers while also reinforcing the legitimacy of multiple federal models (and/or the dynamic model explicitly). The hallmark of a decision that rejects an imposing approach is thus: 1) a depiction that recognizes the legitimacy of multiple federal models and the order as the process and outcome of negotiation; and 2) an outcome that is positive to multiple jurisdictions and reinforces the legitimacy of multiple models (and/or the dynamic model explicitly). We see these two elements in a significant percentage of the 56 decisions discussed in this chapter.

With regard to selecting winners and losers in these cases, we see a clear trend of rejecting zero-sum outcomes. There are only 7 decisions where one jurisdiction wins and the others lose outright. In many decisions (34) the outcome is positive to more than one jurisdiction (i.e. both the centre and the provinces receive a beneficial outcome).⁶⁹⁴ In the remaining 15 decisions the Court still rejects a zero-sum approach to resolving the dispute, as the negative outcome for the “losing” jurisdiction is significantly mitigated.⁶⁹⁵

In a high proportion of these 56 decisions the outcomes also reinforce the legitimacy of multiple models, and/or the dynamic model explicitly. In 53 decisions the outcome draws from, and works to reinforce the legitimacy of, more than one federal model. This includes 21 cases where the outcome explicitly reinforces the legitimacy of the dynamic model.

Disposing of the appeal in such a way that multiple jurisdictions “win” and multiple models are reinforced is exemplified well in a number of division of powers decisions. For example, in

⁶⁹⁴ Included in these 34 decisions are 5 division of powers decisions where the outcome was equally ambivalent between the centre and all provinces.

⁶⁹⁵ This represents a significantly higher percentage of decisions that mitigate the negative outcome for a losing party than in the imposing decisions: 68% of these decisions that have a negative outcome for a party seek to mitigate this in some way, compared to only 15% of imposing decisions.

*Lovelace v. Ontario*⁶⁹⁶ a provincial law allowing aboriginal groups in the province to establish casinos on their reserves and which mandates the proceeds go to registered bands is found valid. In upholding the law, provincial autonomy to pass laws of general application within an area of competence is reinforced.⁶⁹⁷ However, this provincial power is subject to a substantial caveat: provincial laws are valid only if they do not touch on the 'Indianness' of an aboriginal group or infringe aboriginal rights (neither of which applies in this case).⁶⁹⁸ The ruling thus also reinforces both exclusive powers for the centre over aboriginals *qua* aboriginals, *and* the distinctiveness of aboriginals as a community that bear rights to things such as self-government (and the ability to raise revenue to fund self-government). In a similar fashion, in *Siemens v. Manitoba*⁶⁹⁹ a provincial law allowing local communities to prohibit gambling via video lottery terminals is found valid (and as not infringing upon the centre's criminal law jurisdiction). This outcome is positive to both the provinces (and provincial equality model) and the central government (and the pan-Canadian model). It clearly reinforces a broad scope to the provinces' powers over property and civil rights and local commerce (allowing the prohibition of an activity with sanctions).⁷⁰⁰ However, the central government argued in favour of this outcome, and the decision reinforces broad and ultimately

⁶⁹⁶ *Lovelace v. Ontario* [2000] 1 S.C.R. 950. The division of powers issue in this case is the validity of a provincial law that allows aboriginal communities to establish casinos on their reserves and mandates that all proceeds go to registered band councils (thereby excluding non-status aboriginals and bands from accessing the proceeds). The case is thus about if this law infringes on the centre's jurisdiction over aboriginals. The unanimous decision was authored by Iacobucci JJ.

⁶⁹⁷ See *Lovelace v. Ontario* [2000] particularly at 111.

⁶⁹⁸ See *Lovelace v. Ontario* [2000] particularly at 110-111.

⁶⁹⁹ *Siemens v. Manitoba (Attorney General)* [2003] 1 S.C.R. 6. The issue in this case is whether provincial legislation that enables local communities to hold binding referendums on whether to allow video lottery terminals in local establishments is within the provinces' power or if it infringes on the centre's jurisdiction over criminal law. The unanimous decision was authored by Major JJ.

⁷⁰⁰ See *Siemens v. Manitoba* [2003] (at 22-23, 30) where the Court says: 'the regulation of gaming activities has a clear provincial aspect under s. 92 of the *Constitution Act, 1867* subject to Parliamentary paramountcy in the case of a clash between federal and provincial legislation ... Altogether apart from features of gaming which attract criminal prohibition, lottery activities are subject to the legislative authority of the province under various heads of s. 92, including, I suggest, property and civil rights (13), licensing (9), and maintenance of charitable institutions (7).' Adding that 'the *VLT Act* is not, as the appellants have submitted, a colourable attempt to legislate criminal law ... The respondents conceded that the *VLT Act* contains a prohibition, namely, s. 3(1) prohibits the operation of VLTs in municipalities that have banned them as the result of a binding plebiscite. Nevertheless, this alone is insufficient to establish that the *VLT Act* is, in pith and substance, criminal law. The Act does not create penal consequences, and was not enacted for a criminal law purpose ... the presence of moral considerations does not *per se* render a law *ultra vires* the provincial legislature. In giving Parliament exclusive jurisdiction over criminal law, the *Constitution Act, 1867* did not intend to remove all morality from provincial legislation.'

superior criminal law powers for the centre (because the Court explicitly says it can pass legislation under its criminal law power that would take precedent and supplant provincial laws in this area if it so chooses).⁷⁰¹

Siemens v. Manitoba also exemplifies how a decision can reinforce the legitimacy of the dynamic model explicitly. In the decision, the Court states that the outcome reached is informed by the fact that the centre and provinces struck an agreement on how to operationalize the division of powers in relation to lotteries and gambling.⁷⁰² We see a similar outcome that reinforces the legitimacy of federation as a process and outcome of negotiation over how to implement the order is evident in *R v. Furtney*. Here, the Court finds a scheme negotiated between the centre and provinces to regulate lotteries valid (importantly, saying the provincial regulation of the matter is not seen to be an unconstitutional delegation of power from the central government).⁷⁰³ This case, and others like it,⁷⁰⁴ show how the Court can reach decisions that actually reinforce a dynamic nature to federation (i.e. that federation is a normative order and the process and outcome of negotiation and cooperation between key political actors over the way the order is to be implemented).

⁷⁰¹ See *Siemens v. Manitoba* [2003] (at 22), note the important caveat added to the ruling the law is within the provinces' ability to regulate gambling: 'In my view, the regulation of gaming activities has a clear provincial aspect under s. 92 of the *Constitution Act, 1867 subject to Parliamentary paramountcy in the case of a clash between federal and provincial legislation*' (emphasis added).

⁷⁰² See *Siemens v. Manitoba* [2003] at 34: 'The Attorney General of Canada's intervention in support of the provincial government creates a situation of attempted federal-provincial cooperation. The governments, in the absence of jurisdiction, cannot by simple agreement lend legitimacy to a claim that the *VLT Act* is *intra vires*. However, given that both federal and provincial governments guard their legislative powers carefully, when they do agree to shared jurisdiction, that fact should be given careful consideration by the courts.'

⁷⁰³ See *R v. Furtney* [1991] (at 105) where the Court, speaking about the criminal code provisions that allow the provinces to regulate lotteries, says they do not 'impose any right or duty on a provincial legislature ... regardless of the nature of the delegation, it is not a prohibited inter-delegation' going on to say they these provisions 'may be read as incorporating by reference provincial legislation authorizing the Lieutenant Governor in Council to issue licences containing relevant terms and conditions or as excluding from the reach of the criminal law prohibition, lotteries licensed under provincial law so long as that licensing is by or under the authority of the Lieutenant Governor in Council. Dreidger, in the article to which I have referred, notes that the *Criminal Code* exemption for lotteries conducted in accordance with a provincial statute is not a delegation. I agree.' The Court adds (at 107): 'much was made of the fact that the provinces and the federal government reached an agreement in 1985 under which the federal government agreed that it would not conduct lotteries, but rather leave the conduct of lotteries to the provinces. I am unable to discern any grounds upon which this agreement can be said to be unconstitutional let alone have any unconstitutional effects on the provisions of the *Code*. Parliament, in the exercise of the criminal law power, may define those agencies or instrumentalities exempt from the prohibition.'

⁷⁰⁴ See, in particular, *Fédération des producteurs de volailles du Québec* [2005], *Canadian Western Bank* [2007] and *Confédération des syndicats nationaux* [2008].

There are also those decisions that reject the zero-sum approach to disposing of an appeal by denying either party absolute victory, and/or mitigating the loss for a jurisdiction. *Alberta Government Telephones v. Canada*⁷⁰⁵ exemplifies this approach. The decision in this case simultaneously finds that a provincially owned telecommunications company comes under the legislative jurisdiction of the central government (as a federal work and undertaking), but, because of provincial crown immunity the company falls outside the reach of central telecommunications legislation (as it stood at the time).⁷⁰⁶ The resulting regulatory vacuum denies either side a clear win (and, forces more explicit legislation, as well as negotiation and coordination between levels, to regulate the company in question).⁷⁰⁷ While in *Law Society of BC v. Mangat*⁷⁰⁸ we can see how a decision that is mainly positive for the central government mitigates the loss for the provinces. In this case a central law allowing non-lawyers to represent clients at immigration tribunals is deemed valid and applicable, despite provincial laws prohibiting non-lawyers from representing anyone at judicial proceedings. However, this provincial loss is mitigated on a number of fronts. First, the Court reinforces broad provincial powers to regulate professional activities (like the practice of lawyers), even establishing that they can regulate the activity of lawyers at immigration tribunals (up to the point of conflict with central legislation).⁷⁰⁹ Second, the Court applies a narrow paramountcy

⁷⁰⁵ *Alberta Government Telephones v. Canada (Canadian Radio-television and Telecommunications Commission)* [1989] 2 S.C.R. 225. The issue in this case is whether the business of a provincial crown company brings it under the legislative jurisdiction of the central government as a federal work and undertaking pursuant to 92.10.A of the Constitution. The majority decision was authored by Dickson CJ.

⁷⁰⁶ See *Alberta Government Telephones v. Canada* [1989] at 257: 'The case law clearly establishes that if a work or undertaking falls within s. 92(10)(a) it is removed from the jurisdiction of the provinces and exclusive jurisdiction lies with the federal Parliament.' The Court goes on (at 268) to find that 'AGT is an interprovincial undertaking within the meaning of s. 92(10)(a) of the *Constitution Act, 1867*.' However, later in the decision (at 301) the Court finds 'that, on the basis of the legislation as presently drafted, AGT is immune from [central] jurisdiction exercised under s. 320 of the *Railway Act*.'

⁷⁰⁷ See *Alberta Government Telephones v. Canada* [1989] (at 283) where the Court explicitly states that 'the fact that granting immunity will produce a regulatory vacuum with respect to AGT is insufficient and does not amount to a frustration of the *Railway Act* as a whole. While granting immunity unless and until Parliament chooses to amend the legislation will produce a gap in potential coverage of the *Railway Act*, the Act can continue to function just as it did prior to this Court's finding that AGT is a federal undertaking.'

⁷⁰⁸ *Law Society of British Columbia v. Mangat* [2001] 3 S.C.R. 113. The issue in this case is whether a provincial law prohibiting non-lawyers from representing clients at any judicial proceeding in the province is in conflict with a central law that allows non-lawyers to represent clients at immigration tribunal hearings. The unanimous decision was authored by Gonthier JJ.

⁷⁰⁹ See *Law Society of BC v. Mangat* [2002] at 38-47.

doctrine, which protects a measure of provincial autonomy; accordingly, it does not strike down the provincial law in question, but rather, simply “reads down” the relevant provisions so that they do not apply to prohibit representation by non-lawyers at immigration tribunals.⁷¹⁰

This same tendency of rejecting zero-sum outcomes is evident in the federal references noted in Table 6.3. For example, in *Patriation* the opinion that it is technically legal for the central government to unilaterally seek an amendment to the Constitution that affects provincial autonomy, but, conventionally, must secure a measure of consent from the provinces for such an amendment, is beneficial to: the central government (as it grants the then-central government’s plan legitimacy); all provinces (as it mandates, according to constitutional convention, that a substantial measure of provincial consent be achieved before amending the Constitution when their autonomy is affected); and, a particular province (as the ambiguity on the required amount of provincial consent required leaves the door open to a Québec veto over the negotiations).⁷¹¹ While in *Same-Sex Marriage*,⁷¹² the central government’s legislation that changes the definition of marriage is determined to be within its power (despite impacting areas of provincial jurisdiction);⁷¹³ nevertheless, provincial autonomy is protected in the finding that an operational clause guiding how provinces administer marriage is invalid because it infringes upon exclusive provincial jurisdiction.

⁷¹⁰ See *Law Society of BC v. Mangat* [2002] at 72-74. The point being the provincial law still applies to all other judicial proceedings that are not immigration tribunal hearings, and that it also still applies generally to immigration tribunal proceedings, with the exception of the inapplicable provisions. On the approach of reading down legislation so that it does not apply to a matter within another level’s jurisdiction, see Hogg (2009: 390-392).

⁷¹¹ As noted in previous chapters, this outcome led to negotiations that resulted (without the consent of Québec) in the *Constitution Act 1982*. The legality of adopting this constitution without Québec’s signature and the issue of what constituted a substantial measure of provincial consent – and if this included a veto for Québec – was taken up in *Quebec Veto* [1982] (which is discussed in the previous chapter, and where the legality of the constitution was affirmed and a veto for Québec rejected).

⁷¹² *Reference re Same-Sex Marriage* [2004] 3 S.C.R. 698. The issue in this reference is the ability of the centre to unilaterally change the definition of marriage to allow for same-sex marriage and exempt religious officials from necessarily performing same-sex unions. The central division of powers issue is if this legislation falls within the central head of power over “Marriage and Divorce” or if this infringes on the provincial head of power relating to the “Solemnization of Marriage.” The unanimous opinion was issued by ‘The Court.’

⁷¹³ See *Same-Sex Marriage* [2004] at 19, 31-32.

Finally, *Employment Insurance Act* exemplifies both how a negative outcome can be mitigated and how the dynamic model can be explicitly reinforced.⁷¹⁴

What these examples demonstrate is how the Court can, and does, resolve disputes in a way that rejects a zero-sum approach. There are those decisions that reach a positive outcome for multiple jurisdictions and reinforce the legitimacy of multiple models. There are those decisions that explicitly reinforce the validity of the dynamic model. And, there are those decisions that deny either side absolute victory or mitigate the negative outcome for a party in some substantial way. Each of these approaches reinforces the legitimacy of multiple federal models and the order as the process and outcome of negotiation, rather than aligning the federation with one particular perspective. I discuss the benefits of this in a moment; for now, it is also important to look at the role the Court adopts in these 56 decisions.

A Positive Role Model

The Court's adopted role can be an integral part of a decision recognizing the legitimacy of multiple models and federation as a process and outcome of negotiation. This is because, as argued earlier, there is a link between one's ideal role for the federal arbiter and how one understands the constitutional and federal order. And, in those decisions that follow the exemplar of the *Secession Reference*, ideally an understanding of the federation as the process and outcome of negotiation between the subscribers of legitimate federal model is paired with a role for the Court as the facilitator of this negotiation.

⁷¹⁴ The decision supports the pan-Canadian model as it reinforces the legitimacy of the centre's ability to affect areas of provincial jurisdiction through an expanding power over employment insurance, see *Employment Insurance Act* [2005] at 36-38, 67-68. However, allowing the central government to expand employment insurance to provide maternity benefits also reinforces the dynamic model, because it recognizes that the constitutional division of powers adapts in response to conflicts and negotiations over the order (see at 8-10, 39-40, 45, 67). Moreover, the loss for Québec in this case is mitigated by the Court highlighting how previously negotiated agreements between the levels of government remain open to challenge in the courts. The case itself exemplifies this point, as Québec is challenging the scope of the central government's authority to legislate with regard to employment insurance (a power divested to it via a constitutional amendment in 1940 where the provinces carved this right out of their own s. 92 powers over property and civil rights). A similar tempering of support for the pan-Canadian model by reinforcing the dynamic model can be seen in *Newfoundland Continental Shelf* [1984].

This facilitator role is marked by an attempt to manage conflict by promoting negotiation and cooperation between conflicting parties through political processes. It is a role where the Court ideally seeks to reinforce the legitimacy of the various parties' perspectives, affirm the legitimacy of the political and institutional processes that allow negotiation and cooperation, and push the parties to use these processes. In instances where negotiation and cooperation are unlikely (which is not uncommon, given the inherently adversarial nature of conflict) the Court can and does adopt a role as fair arbiter. Here the ideal is to not impose a particular perspective of one party on the other, to reaffirm the legitimacy of the losing party's perspective and to mitigate the loss for a party to the extent possible, while also seeking to highlight that continued disagreement is reasonable.

As Table 6.3 indicates, I was able to determine the Court's self-selected role in 37 of these 56 decisions.⁷¹⁵ The ideal role of facilitator was adopted in some 24 of these decisions. In the remaining 13 cases one or more of the three traditional roles were adopted (i.e. the umpire, branch and guardian roles).⁷¹⁶ Interestingly in a high percentage (79%) of cases where the facilitator role is employed, it is paired with a depiction of the federation in line with the dynamic model; a fact that seems to indicate there is a strong link between the Court endorsing an understanding of federation as the process and outcome of negotiation and selecting a role as facilitator of that negotiation.

The ideal role of facilitator is exemplified in *Canadian Western Bank*. In this decision the Court shows deference to, and reinforces the legitimacy of, a central-provincial scheme to regulate insurance provided by banks;⁷¹⁷ the Court, in reaffirming the validity of the scheme and the political

⁷¹⁵ While this is a higher percentage of cases where I was able to determine the Court's role than in the imposing decisions, the same reason applies for the lack of information in some decisions: the SCC's tendency to avoid theoretical discussions on points such as the role of the judiciary in the federation (unless the issue is raised by a party).

⁷¹⁶ While this falls short of the ideal that in every case the Court recognizes its role as the facilitator of negotiation between conflicting parties as laid out in the *Secession Reference*, these 13 cases tend to follow the example of the *Secession Reference* in other ways (i.e. in the depiction of the federation and the outcomes). Accordingly, they are still considered to meet the threshold of a decision that recognizes federation as the process and outcome of negotiation between the subscribers of legitimate models; although, as a result, these cases do tend to fall on the lower end of the spectrum of adherence to this ideal-type. In addition, it is interesting to note that in many of these decision the traditional roles are employed in a way that still reinforces the legitimacy of multiple federal models (for example, by employing one or more models to justify and reinforce aspects of a depiction that counterbalances competing models).

⁷¹⁷ See *Canadian Western Bank* [2007] at 20.

process that establishes it, explicitly recognizes that its role in the federation is to ‘facilitate, not undermine, ...co-operative federalism.’⁷¹⁸ In this decision the Court even explicitly links this ideal role to a dynamic understanding of the constitutional and federal order: ‘the Constitution, though a legal document, serves as a framework for life and for political action within a federal state, in which the courts have rightly observed the importance of co-operation among government actors to ensure that federalism operates flexibly.’⁷¹⁹ The explicit promotion of, and deference to, the political processes that manage conflict through negotiation and cooperation is clearly evident in a number of other decisions.⁷²⁰ The important point is that this tendency grants legitimacy to these processes and pushes governments to use them.

This role of facilitator of negotiation and cooperation is also embraced in *BC v. Lafarge*;⁷²¹ however, here, the secondary role of fair arbiter is also explicitly embraced. In this decision, the Court says that where parties ‘are in disagreement, of course, the courts will have to resolve the difference.’⁷²² This statement needs to be understood in the context of what the Court says about the nature of the federation in this decision (i.e. that the order is a process and outcome of negotiation between the subscribers of legitimate models). From all of this, it can safely be implied that here the Court is promoting an arbiter role that reaches decisions which properly account for the competing ways the federation is understood.⁷²³

⁷¹⁸ See *Canadian Western Bank* [2007] at 24: ‘As the final arbiters of the division of powers, the courts have developed certain constitutional doctrines, which, like the interpretations of the powers to which they apply, are based on the guiding principles of our constitutional order. The constitutional doctrines permit an appropriate balance to be struck in the recognition and management of the inevitable overlaps in rules made at the two levels of legislative power, while recognizing the need to preserve sufficient predictability in the operation of the division of powers. The doctrines must also be designed to reconcile the legitimate diversity of regional experimentation with the need for national unity. *Finally, they must include a recognition that the task of maintaining the balance of powers in practice falls primarily to governments, and constitutional doctrine must facilitate, not undermine what this Court has called “co-operative federalism”*’ (emphasis added).

⁷¹⁹ *Canadian Western Bank* [2007] at 42.

⁷²⁰ See, for example, *Chatterjee v. Ontario* [2009] at 2, 29-30; *Siemens v. Manitoba* [2003] at 33-34; *Ontario v. OPSEU* [1987] at 19-20.

⁷²¹ See *BC v. Lafarge* [2007] at 3, 38-39.

⁷²² See *BC v. Lafarge* [2007] at 90.

⁷²³ See the comments above on the way the federation is depicted in *BC v. Lafarge* [2007].

The same tendency to adopt a role of facilitator and fair arbiter is also evident in the federal references that follow the lead of the *Secession Reference*. For example, in *Employment Insurance Act* the SCC explicitly recognizes a connection between federation as a normative order and its ideal role being to facilitate negotiation and cooperation through political processes, saying: ‘what are regarded as the characteristic features of federalism may vary from one judge to another, and will be based on political rather than legal notions ... [and so] ... the task of maintaining the balance between federal and provincial powers falls primarily to governments.’⁷²⁴ Similarly, in *Assisted Human Reproduction Act* the Court says that ‘flexible, cooperative’ federalism ‘should be encouraged’ by the Courts.⁷²⁵ While in *Newfoundland Continental Shelf* the facilitator and fair arbiter role is implicitly merged and applied. In this decision, which grants the central government rights over natural resources sought by the province,⁷²⁶ a seemingly one-sided outcome plays a crucial role in resolving a decades-long dispute between the levels of government through a political process. The key point here is that the Court’s ruling is delivered in the context of a heated political negotiation, and the ruling in favour of the centre offsets an earlier ruling by the Newfoundland Court of Appeal strengthening the provinces position *vis-a-vis* ownership of the resources. The Court thus plays a crucial role in the resulting intergovernmental agreement on offshore resource management between Canada and Newfoundland, ensuring that both parties’ perspectives are granted a measure of legitimacy and facilitating fruitful and fair negotiations.⁷²⁷

What these examples demonstrate is how the Court, at times, embraces a role as a facilitator and fair arbiter within a comprehensive conflict management approach that follows that

⁷²⁴ *Employment Insurance Act* [2005] at 10; in other words, the Court ought not simply be an umpire of the federation and impose the rules on the actors, nor act as a branch of government and have a role in shaping them, nor act as a guardian to protect the federal order – it is the role of the Court to facilitate the resolution of issues by government themselves. Related to this, and in line with the role of facilitator first and fair arbiter second, the Court says (at 8) that given the propensity of governments to conflict over the division of powers, and ‘because a decision regarding the scope of the powers assigned by the *Constitution Act, 1867* has undeniable social and political consequences...’ when negotiation cannot resolve the issue it falls to the Court to step in as a fair arbiter – to ‘...approach the task assigned to it by the law with considerable circumspection.’

⁷²⁵ See *Assisted Human Reproduction Act* [2010] at 139: ‘The Court’s endorsement of a flexible, cooperative approach to federalism suggests that this kind of pragmatic lawmaking should be encouraged.’

⁷²⁶ For a summary of the decision see *Newfoundland Continental Shelf* [1984] at 128-129.

⁷²⁷ For a similar view, see Swinton (1992: 139) and Monahan (1987: 9).

laid out in the *Secession Reference*. This is a role and approach that works from, and reinforces, an understanding of federation as the process and outcome of negotiation between the subscribers of legitimate federal models. These examples illuminate the links the Court makes between this understanding and a role for itself as the facilitator of negotiation over the federation. They show how the Court can understand federation as a contested normative order, with the federal arbiter's role being one of managing the conflict over federation by promoting cooperation through political processes. This role is thus informed by an understanding that the judiciary – in its role as federal arbiter – is an inherently political position. These decisions reflect an acceptance by the Court that it is part of the field of struggle over the nature and ideal direction of the federation. The importance of the SCC embracing such a view of federation and its role within the order, as I am about to elaborate on, is that it allows the Court to implement a conflict management approach that generates loyalty to the process of resolving disputes and the resulting federal order.

A Welcome Turn in Federal Jurisprudence

The above analysis demonstrates the fundamental difference between the 56 decisions discussed here and the 74 imposing decisions covered in the last chapter. In the decisions discussed above the approach of presenting the federation in line with only one model is rejected. Instead, the federation is depicted in a way that draws from, and reinforces the legitimacy of, multiple federal models, including the dynamic model. And, this comprehensive depiction is anchored in the constitutional law through the use of legal argument, while in the imposing cases legal argument is used selectively to highlight aspects of the law that reinforce the legitimacy of a particular depiction. Similarly, the approach of declaring stark winners and losers, and reaching outcomes that align the federal order with a particular model is rejected. What we see in the decisions above is an attempt to find benefits for all parties to the conflict (or at least mitigate the loss for a party), while also reinforcing that federation is dynamic and incorporates elements of many federal models. In line with this approach, we also see in these decisions a tendency for the Court to adopt a role as the facilitator of negotiation and cooperation between the levels of government to manage conflict over

the order. This approach and role is in contrast to the tendency in the imposing decisions for the Court to employ a role (as umpire, branch of government or guardian) that reinforces key aspects of a specific federal model's depiction of the federation and which justifies outcomes that reinforce that model.

This chapter thus provides the final element in a comprehensive picture of how the SCC accounts for (and fails to account for) the inherent contestation over nationality and federation in its role as federal arbiter. It brings into relief the positive aspect of the SCC's federal work: those decisions that follow the lead of the *Secession Reference* and recognize federation as the process and outcome of negotiation between the subscribers of legitimate federal models.

Completing this picture makes an important point: the *Secession Reference* is not an aberration. This decision marks a revolutionary turn in how the Court understands the federation, how it manages conflict over the order and how it views its own role within the process. As the above shows, it does build on elements from decisions that precede it; also, and importantly, the above shows how the Court has generally followed the ideal of the *Secession Reference* in its subsequent federalism jurisprudence. 75% of post-*Secession Reference* decisions follow its lead – with many substantially adhering to the ideal-type.⁷²⁸

As I argued in Chapter Four,⁷²⁹ this revolutionary tack can be seen as an attempt by the Court to maintain the legitimacy of the federal arbiter and the entire system in the face of considerable challenges. The issues presented by the case (the legality of a unilaterally secession by Québec) and the political context surrounding the case (being so close to a nearly successful secession referendum) directly challenged the very existence of the federation. Given this context, I argue that to understand the revolutionary break of the *Secession Reference* we need to accept the idea that when a legal system is facing its disintegration or destruction the 'tendency of judges may

⁷²⁸ Note how the majority of cases that fall on the higher end of the spectrum of decisions that adhere to the ideal-type come after the *Secession Reference*.

⁷²⁹ And elsewhere, see Schertzer (2008: 117-119), from which the following two paragraphs are largely drawn.

be to struggle to save the system from collapse.⁷³⁰ In this case, then, the Court was forced to demonstrate how the federal order was able to deal with the challenge to its legitimacy and come out the stronger for it. This argument is built on the base idea that in conflict over the federal order the courts are indeed part of the field of struggle.⁷³¹ Accordingly, challenges to the existing constitutional and federal order also challenge the Court's legitimacy and place within it. Given one of its self-perceived roles as guardian of the Constitution the SCC fought to find a way to ensure that legal continuity, stability and above all legitimacy would be maintained. The revolutionary turn, then, comes in shifting from an imposing and assimilative approach to maintaining stability to one that recognizes the inherently dynamic nature of the system.

In line with this, the Court used the tools it had at hand to secure this goal of generating and maintain legitimacy: the law. So, the *Secession Reference* does not represent a mere rhetorical turn, or *just* a self-centred attempt to 'define its place' within the political system as legitimate;⁷³² rather, it can be seen as a revolutionary shift in how to legitimize the federal arbiter and the federation.

Highlighting this positive turn in the Court's work, though, should not overshadow the problematic elements noted in the preceding chapter. The fact remains that a significant proportion of the SCC's federalism jurisprudence over the past three decades imposes a particular federal model in both its approach and outcome. The 57% of cases between 1980 and 2010, and even the 25% following the *Secession Reference*, that impose a federal model fall well short of the ideal of zero. I have already discussed the problematic nature of these decisions – the fact that they can negatively affect the legitimacy of the federal arbiter and the federation more generally. In so doing, I have also made the case for why this situation needs to be addressed (both in Canada and as part of broader federal theory).

If anything, what this chapter does is bring into relief the problematic nature of the SCC's imposing decisions. It shows that an alternative approach to managing conflict is possible. It shows

⁷³⁰ Walters (1999: 371); see also, Hart (1961: 114).

⁷³¹ See, Tully (2004: 86).

⁷³² See McHugh (2000: 461).

that the Court can and does embrace an inclusive understanding of the federation, while reaching decisions that reject zero-sum outcomes and facilitating negotiation and cooperation among conflicting parties. Reflecting on these points clarifies why an approach to solving conflict that imposes fixed rules in line with a particular federal model can negatively affect the legitimacy of the arbiter and the federation. And it is the contrast between the problematic decisions in the last chapter and the positive ones in this chapter that illuminates the path to a welcome new approach in federal jurisprudence.

It should be evident at this point why I see the decisions that follow the lead of the *Secession References* as a positive turn in federal jurisprudence: they properly account for the contestation that takes place over nationality and federation in Canada. The Court does this by recognizing, and reinforcing the legitimacy of, federation as a process and outcome of negotiation between the subscribers of legitimate perspectives on what the order is and ought to be. This approach to managing the inherent conflict over the order in plurinational federations is central to the federal arbiter, and the federation itself, remaining legitimate. As argued earlier, this is because the SCC plays a particularly important role as federal arbiter in the plurinational federation of Canada, where conflict over the federation regularly manifests with competing views about the national character of the state mixing with associated views about the proper distribution of power and resources.

Elaborating on this positive element of the SCC's federal jurisprudence – explaining further what the benefits are – is best achieved by referring back to some of the key trends that emerge from the above analysis. Doing this also helps to better illuminate the specific aspects of the SCC's federal work over the past 30 years that should be encouraged in Canada and incorporated into broader federal theory. There are four trends in particular that I want to highlight here.

First, I want to draw attention to the fact that in virtually every one of the above decisions the Court understands and presents the federation as an inclusive order. In the last chapter, I made the point that a significant percentage of the SCC's federal decisions impose the pan-Canadian model and centralize the federation. I argue that this raises questions about the Court's neutrality

among the subscribers of other federal models, and ultimately works to alienate these groups. What we see in the above decisions is the opposite: the Court understanding and presenting the federation as one where the subscribers of each federal model can find recognition. In other words, the Court consistently depicts the federation in a way that reflects elements of what each model says the order is.

This inclusive view of the federation, which simultaneously affords legitimacy to an understanding of the order as centralized *and* decentralized, as granting symmetrical *and* asymmetrical powers to the provinces, may seem incoherent.⁷³³ However, as I argued when discussing the *Secession Reference* this is simply not the case. All the Court is doing in these decisions is properly recognizing there are competing understandings of the federation, while accounting for the reality that the constitutional order has evolved in a way that reflects this competition. What the above decisions do is recognize that federation in Canada is the process and outcome of negotiation between the subscribers of legitimate views of what the order is and ought to be. This stands in contrast to the approach discussed in the last chapter, where the federation is depicted to reflect only one perspective.

The difference between these two ways of presenting the federation is important: one creates problems for the federation, while the other has significant benefits. Most notably, presenting the federation in an inclusive manner can actually generate legitimacy for the federation and the way it handles conflict. By demonstrating that the views of all parties on the nature of the federation are taken seriously and accounted for in resolving disputes, the Court can generate loyalty to the conflict management process. Simply telling the subscriber of a federal model they are wrong, or imposing a view of what the federation is on these groups, is not a sound conflict management approach. It can actually destabilize the association, and lead to more, and increasingly intense, conflict in the future. The flip side is that recognizing, and accounting for all parties' perspectives in resolving a conflict works to create buy-in to the process and the outcome.

⁷³³ Or, as argued in Chapter Four (and addressed there and above), as opportunistic and even a superficial attempt to placate those groups that destabilize the federal system.

Accordingly, reinforcing that the constitutional law supports and reflects the various perspectives on what the federation is and ought to be also generates and maintains loyalty to the federation itself.

The SCC is an important institution. How it presents the federation matters. When it affords legitimacy to the subscribers of the various models – and employs legal argument to anchor these perspectives in the constitutional law – it is demonstrating to actors that the federation is an inclusive order. In rejecting the approach of simply ignoring a particular perspective – or saying that one is right and the others are wrong – the Court is helping to reinforce that the federation is, in fact, a dynamic and contested normative order to which the subscribers of each model can be loyal. This approach thus provides rhetorical tools, which carry the legitimacy of SCC decisions, for each party to wield in future political and legal conflicts.⁷³⁴ While at the same time inclusive depictions of the federation reflect that the Court is subject to, and affected by, the prevailing dynamics of the federal order, which helps to show how it is part of a fair and representative federal system.

Closely linked to this is the second important trend stemming from the above analysis: the increasing tendency of the Court to recognize the legitimacy of the multinational model in its decisions. In the last chapter, I discussed how this model is granted a measure of legitimacy in only 3 of the 74 imposing decisions. In contrast, as Table 6.3 indicates, in these 56 cases the multinational model is drawn from and reinforced in the approach and outcome of some 16 decisions. Moreover, 12 of these decisions were delivered after 1990, indicating an increasing willingness for the Court to embrace the legitimacy of this model in recent years.

This is a positive aspect of the SCC's federalism jurisprudence given the fact that there is a significant population within Canada that believe it is a multinational state. As already argued, Canada is a plurinational federation, with groups holding conflicting views on the national character of the state. One of these fundamental views is that Canada contains multiple nations, including the Québécois and Aboriginals. Moreover, this view finds support in a number of institutional and political processes that accommodate groups as nations via federation. To deny these things – to

⁷³⁴ The point is all sides are given such tools, rather than just one side; this mitigates the ability for one party to use an SCC decision in a coercive way in future negotiations or Court cases.

pretend that the federations is only a centralized order representing a pan-state nation or an association of provinces that are equal territorial units – fails to account for these fundamental aspects of the Canadian political landscape.

This is why granting the multinational model its due as a legitimate perspective is so welcome. In doing so, the Court avoids serious legitimacy issues. Ignoring, or actively delegitimizing, this model alienates a significant population of Canadians. As argued in the last chapter, the paucity of support afforded this model in imposing decisions is one of their central failures. In contrast, the tendency for the Court to afford the multinational model legitimacy in the decisions discussed above provides two distinct benefits.

First, it generates loyalty among the subscribers of the multinational model to the conflict management process and to the federation itself. Recognizing the legitimacy of the multinational model when resolving disputes eases the fears of subscribers that the system is biased against their perspective. It also reduces the ability of nationalist entrepreneurs to use this claim as evidence of disenfranchisement. By accounting for their perspective in this process the Court ensures that the federation is understood and implemented in a way that reflects elements of the multinational model, which helps to generate loyalty among subscribers to the federal order itself. This is particularly important given the subscribers of the multinational model tend to be national minorities (i.e. Québécois and Aboriginals). Generating loyalty among these groups to the conflict management process and the federal order – establishing that the federation reflects their perspectives on what it is and ought to be – is an important step in alleviating destabilizing political mobilization and managing conflict within and over the federation in Canada.

Second, recognizing the legitimacy of the multinational model can actually lead to better federal jurisprudence. Accounting for this perspective on the nature of the federation allows for a comprehensive view of the institutional and political structures that ought to inform the development and application of constitutional law. As I argued in Chapter One and Two, each model is reflected in the institutional and legal structures of federation. Ignoring these elements of the

constitutional order in resolving pertinent questions about the nature of that order invites criticism of the Court's federal jurisprudence. In contrast, a comprehensive account of the institutional and political landscape should lead to better decisions, which take into consideration the full breadth of institutional and legal structures that support the various parties' perspectives. Additionally, building on the strength of a plurality of perspectives should generate loyalty to outcomes, rather than alienating a particular party by imposing an opposing view of what the federal order is and ought to be.

An important point to make here is that the support afforded the multinational model in the above decisions does not come at the expense of the other models. I am not saying that *imposing* the multinational model would bring about these benefits and be a welcome trend. That would simply lead to the subscribers of the other models feeling alienated from the conflict resolution process and the resulting federal order. There is a real need to ensure that other groups, particularly pan-Canadianists inside and outside Québec, do not feel slighted by a perceived over-recognition of the multinational character of the state (or a perceived over-accommodation of national minorities by the Court). Such sentiments about the conflict management process and the federation are detrimental to its legitimacy and ultimately threaten unity and order. The point, then, is that the support for the multinational model comes in the context of an approach to managing conflict over the federation that sees the order as the process and outcome of negotiation between the subscribers of *multiple legitimate* models. In these decisions the Court is rejecting the approach that legitimizes one view of the federation over others, seeking instead to generate legitimacy for an inclusive federation and to the way the order manages conflict.

This brings us to the third trend I want to highlight: the rejection of a zero-sum approach to resolving disputes. As I highlighted above, in these decisions there is a tendency for the Court to either seek positive outcomes for all parties, to deny any party an absolute victory or to substantially mitigate the loss for a party. This is in contrast with the way appeals are disposed of in the 74 imposing decisions. In those cases, the outcomes generally create stark winners and losers. As I

argue in the last chapter, such an approach is problematic in federal jurisprudence, because it can negatively affect the loyalty of losing parties towards the conflict management process and the resulting federal order. The flip side is that the approach to managing conflict adopted by the Court in these 56 decisions can actually benefit the federal order.

By rejecting a zero-sum approach, as is done in the above decisions, the Court can protect the legitimacy of the conflict management process and the federal order. In decisions that follow this approach, subscribers to the various federal models are able to find an aspect of the outcome that supports their particular view of what the federation is and ought to be. In this way, even when parties “lose” a case this is mitigated, as their perspective is legitimized in the way the federation is presented and/or because the negative outcome is offset by some positive element. Accordingly, the subscribers of the various models are not alienated from the resulting federal order (they do not see the system as inherently biased against their position); rather, they see the decision as reaffirming that elements of the federal order reflect their view. The conflicting parties see the conflict management process as fair, because their perspective on what the federation is and ought to be is afforded legitimacy in the outcome of a decision. They also see the result as acceptable, because it does not align the federal order with any one perspective over their own (allowing all parties a leg to stand on in future conflicts).

In other words, this revised approach creates legitimacy by: 1) affording the subscribers of each model recognition through decision outcomes; 2) where this is not possible, by mitigating and offsetting the negatives of a decision for the losing parties; and 3) demonstrating through outcomes how the constitutional law incorporates elements of each federal model. Moreover, these three factors combine to show parties can affect the way the Court makes decisions, even if they do not win. This efficacy means that Court-decided outcomes can be seen as more than merely in-built and imposed; rather, each party can see how they directly and indirectly shape the federal order that stems from the judicial process, which means the subscribers of each model see elements of the

federal system as “theirs.” The overall effect of all of this is that loyalty to the way the federation manages conflict, and to the federation itself, is generated and maintained.

I recognize that not every case can be resolved in a way that affords all parties a positive outcome. The nature of some cases require a winner and loser to be declared and for the disposition of rights and privileges to be ordered. The adversarial nature of law makes this a reality. Promoting an ideal where everyone wins all the time, though, is not the point. The point is to adopt a conflict management approach that avoids creating resentment to the process of dispute resolution and the resulting federal order. What the above analysis demonstrates is that this *can* happen, that federal jurisprudence can be undertaken in a way that rejects a complete zero-sum approach to resolving disputes. There are many cases where the outcome can be positive to multiple parties, and almost always a negative outcome can be mitigated. Even in those cases where this cannot happen through the outcome of a case, presenting the federation in a way that supports a conflicting party’s perspective can help to generate loyalty to the process and the order.

Arguing that one of the key goals of the SCC’s federal jurisprudence should be generating loyalty to the system stems from an appreciation that the Court occupies a unique role when it acts as the federal arbiter. As already argued, federal jurisprudence is a rather exceptional stream of constitutional law. It is not simply about determining which side is right. It involves struggles over the very nature of the constitutional order, how it recognizes identities and accordingly how power and resources are distributed. The inherently political nature of these cases, where the Court and its role within the federation is part of the field of struggle, means there is no neutral ground to which it can retreat. In such cases, simply choosing winners and losers (especially when this is accompanied by imposing a federal model) jeopardizes the legitimacy of the federation. What we see in the above decisions is how the Court can avoid this problem by adopting a conflict management approach that works from, and reinforces, an understanding of federation as the process and outcome of negotiation between the subscribers of legitimate models.

This brings me to the final trend I want to highlight here: the tendency of the Court to adopt the role of facilitator of negotiation to manage conflict. This role, which pushes parties to use the political process to manage their conflict via negotiation and cooperation, both reflects and is part of the broader conflict management approach adopted by the Court in these decisions. Importantly, one of the things the above demonstrates is that this is increasingly becoming the favoured approach and role of the SCC: in 8 of the last 11 division of powers decisions the Court has adopted this role. Accordingly, we may be seeing a transition, where the vestiges of an outmoded role that seeks to impose fixed rules to solve problems is giving way to a role that seeks to facilitate negotiation and cooperation to manage conflict.⁷³⁵

The problematic nature of these outmoded roles was discussed in the previous chapter. What we see in the imposing decisions is the Court acting under a false veil of neutrality to impose a fixed set of rules that favour particular understandings of the federation. This is a misrepresentation of what the Court is actually doing in imposing cases: making decisions and acting in line with a particular understanding of the federation. The effect being inappropriate expectations of neutrality that cannot be met and decisions rendered that are at odds with the political and institutional landscape, which create resentment towards the arbiter and generate feelings that the federation is biased.

The facilitator role is the preferable approach because it can avoid these issues, while actually generating legitimacy for the Court and the federation. It does this by rejecting the view that it sits above the order and hands down final judgements; rather, working from a view that the federation is a contested normative order and that the arbiter is part of this system, the Court seeks to act in a way that reinforces the legitimacy of this system and its place within it. It strives for transparency in how it reaches its decisions, while also working to have the parties negotiate and cooperate to resolve the dispute (by granting each of these parties a measure of equality at the negotiating table). In this way, those within the association see the Court as part of the system, but

⁷³⁵ Of course, the outmoded roles, anchored as they are in the constitutional law and given their pedigree in federal jurisprudence, will likely continue to be employed.

they see the system as fair and unbiased towards their perspective. They see how they can work within the federation to raise their concerns over the order and work to negotiate mutually agreeable outcomes. This clearly has benefits for the legitimacy of the federal arbiter, but this role also helps to generate legitimacy for the federation more generally.

The inherent aspect of the facilitator role that pushes parties to use political processes to manage conflict works to legitimize those processes, which are the heart of federation. At the core of the facilitator role is the recognition that federation is the process and outcome of negotiation. By showing deference to the outcome of negotiations over the way to implement the federal order, and pushing parties to use these processes to resolve disputes, the Court reinforces their validity and usefulness. It generates loyalty not only to the way conflict is managed through the courts, but also how it is dealt with through other forums (like intergovernmental relations). The Court thus demonstrates that federation is a fair process, which leads to collaborative outcomes that incorporate participants' perspectives.

The increasing adoption of the facilitator role, and the other three trends, exemplify the potential benefits of a federal jurisprudence that follows the lead of the *Secession Reference*. They show, among other things, how the SCC can generate and maintain legitimacy for itself and the federation more generally. At the same time, these positive elements of the SCC's federal work should not blind us to the potential issues associated with its more problematic decisions. In fact, they bring into relief the problematic nature of the majority of the SCC's work, while also sketching the case for why a different type of federal jurisprudence is needed (and how it can be achieved).

Conclusion

This thesis has two related lines of analysis. The first looks at the management of diversity and conflict through federation and the role of the federal arbiter (focusing both on Canada and broader theory and policy). The second looks at the work of Canada's federal arbiter, the Supreme Court of Canada, arguing it exercises its duties in a way that can either negatively or positively affect the legitimacy of the federation. In this conclusion, I discuss how these two lines of analysis support the overall argument of the thesis, while also reflecting on some of the potential issues with the argument in its application to Canada and beyond.

The Argument, Revisited

Federal arbiters matter in the management of diversity and conflict via federation. This is particularly so in plurinational federations like Canada, where the recognition of national identities and the distribution of resources and power via federation is continually contested by those subject to the order. In such states, the federal arbiter is important because it plays a key role in the development of the association and in maintaining the legitimacy (and thus unity) of the order. As the review of SCC federal jurisprudence demonstrates, the arbiter can exercise this role in potentially problematic or beneficial ways. The key difference between the former and the latter is the extent to which the Court imposes a particular understanding of the federation or recognizes the order as the process and outcome of negotiation between the subscribers of legitimate competing perspectives. I argue the second approach, where the Court adopts a role of facilitator of this negotiation, is preferable because it can generate and maintain legitimacy for the federation and the way it manages conflict.

As I said in the introduction, this argument has a number of layers. It rests on an examination of the Canadian case and general theory. In addition, the argument builds on both theoretical and empirical analysis. Revisiting the layers here helps to explain some of the nuance of

the argument, which is prudent before turning to discuss its potential issues and limits. I do this by tracing the key points within the thesis' two lines of analysis.

The first and second chapters focused on the first line of analysis: the use of federation to manage diversity and conflict and the role of the federal arbiter. Both chapters engage general theory and the case of Canada. In this way, they treat Canada as a particular type of case within the broader category of federal, plurinational states. The chapters make the point that looking at this case can inform and advance theory and policy on the use of federation to manage diversity in Canada and other similar cases.

The first chapter examined the context and theory related to the management of diversity through federation. It started by discussing why national diversity – and particularly national minorities – are generally viewed as a “problem” to be “solved.” The reason is because national diversity challenges the legitimacy (and thus unity) of the state in the modern period by bringing into question the way sovereign power is legitimized via the doctrine of national self-determination.

I then looked at federation, a popular response to this problem given its perceived ability to protect the territorial integrity of a state while providing sub-state groups with autonomy. The chapter discussed the three main approaches of using federation to manage diversity and conflict: trimming, trading or segregating away the offending diversity via institutional structures. I argue each of these approaches is about containing conflict within nations by eliminating the offending diversity and creating homogenous political communities (the first two through assimilation and the later through segregation).

Turning to Canada, I demonstrated how the trimming, trading and segregating approaches are expressed in that case as the pan-Canadian, provincial equality and multinational federal models, respectively. Highlighting this link illuminates that the federal models represent both particular perspectives of what the Canadian federation *is* and what it *ought* to be. At the same time, these are not just abstract theories. The federal models have driven (and continue to drive) political mobilization. Their subscribers have informed the development of federation in Canada and can

point to aspects of its political and institutional structures to support their view (as my review of Canada's Constitutions shows). This is why each federal model is legitimate.

Examining the use of federation to manage diversity and conflict in Canada, and in broader theory and policy, was the necessary starting point for the thesis. It established the foundation to discuss the problems with the broader approaches, which facilitated a reinterpretation of this key case from outside the paradigms of the pan-Canadian, provincial equality and multinational models. This, in turn, allowed me to build a contrasting federal model for Canada in the second chapter.

Reinterpreting the key case of Canada also contributes to general theory.⁷³⁶ Understanding the case from outside the paradigms of these approaches illuminates the potential shortfalls of exporting a particular understanding of Canada as *the* Canadian model. It shows there are different understandings of what the federation is and ought to be (and that in reality each is correct, to an extent). Theory and policy that works from only one of these understandings can miss important ways federation in Canada actually operates to help maintain stability in the face of considerable diversity.

This understanding also facilitates comparative analysis. While the pan-Canadian, provincial equality and multinational federal models are Canadian-specific views of federation, their theoretical underpinnings have links to wider approaches to managing diversity via federation that are applied to other states.⁷³⁷ As I point out below, looking at the conflict between the subscribers of competing federal models, and particularly how this is managed by the federal arbiter in Canada, acts as a good base for subsequent comparative research.⁷³⁸

⁷³⁶ As argued in the introduction (and elsewhere in the thesis), Canada is a key case within the field of federal theory and policy. Models building on analysis of Canada have informed theories and policy for other states, especially over the last 20 years in the area of managing diversity and conflict via territorial self-government. Accordingly, analysis that illuminates shortfalls in how the case tends to be understood, and drawing links to how these understandings drive aspects of broader theory and policy, can help to inform that broader theory and policy.

⁷³⁷ As I point out below, further comparative work is required to uncover how these approaches are applied and manifest in other federations.

⁷³⁸ As part of this discussion, I reflect on the importance of context when seeking to generalize my analysis.

The second chapter picked up on this point, making the related argument that the federal arbiter is important in the management of diversity and conflict, especially in plurinational federations like Canada. This argument stems from an appreciation of the dynamics of conflict in Canada over both nationality and federation. The second chapter elaborates on this point by arguing that Canada, in reality, *is* a plurinational state – not uninational or multinational, as the subscribers of the competing federal models attest. The chapter also points out that federation’s status as a normative framework means it is continually contested by some group subject to the order. It is the combination of these two characteristics – the fact that Canada is a *plurinational federation* – that drives the indeterminate conflict over the federation (as potent views related to the recognition of national identities explicitly combine with views about the proper distribution of resources and power via federation).

The chapter goes on to discuss the various forums through which this type of conflict is expressed and managed in federations. I focus on the federal arbiter as a particularly important forum, mainly because of its role in the development of a federation and the maintenance of legitimacy (and thus unity) for the order. It is also a key position since it represents the final domestic institutional mechanism to manage conflict over the nature of federation within the political process. As explained in the chapter, I focus on the apex court model of federal arbitration because it is the most prominent approach across federations, and because it is the model in Canada.

A key aspect of my reflection on the importance of the federal arbiter in the management of diversity and conflict via federation is my examination of the how theorists and policy makers think the judiciary (as federal arbiter) should exercise its role. As part of this discussion, I noted the general lack of attention afforded this critical role.⁷³⁹ Nevertheless, as demonstrated in the second chapter, there are three main roles promoted for the judiciary as federal arbiter: an umpire of the

⁷³⁹ As I noted in the second chapter, while there are many studies of courts, and even courts in federations (particularly on the Supreme Court in the United States), there is a lack of research looking at the role of the judiciary *as a federal arbiter*, and going on to reflect on the implications of the judiciary and its work as federal arbiter for federal theory and policy.

federation, an independent branch of government or a guardian of the federal order. Each of these roles has conceptual links to the main approaches of managing diversity through federation: the umpire role being linked to the trimming approach, the branch of government role to the trading approach and the guardian role to the segregating approach. Highlighting these links illuminates a fundamental issue with the promotion of these three roles to manage conflict over the nature of the federation. Since each role draws from, and reinforces, a particular approach on how to manage diversity via federation, each fails to account for the contestation that takes place in plurinational federations over the nature of nationality and federation.

The second chapter concluded by sketching a federal model that seeks to address the identified issues with the three main federal approaches and their related roles for the federal arbiter. Building on my analysis of the Canadian case, this contrasting federal model seeks to account for the dynamics of conflict over nationality and federation in plurinational federations. One of the key ways it does this is by recognizing the importance of the federal arbiter in the development and maintenance of legitimacy for the federal order. Accordingly, the model promotes federation as the process and outcome of negotiation over the way identities are recognized and power and resources are distributed via the institutional structures of federation. In other words, the federal model seeks to *manage* diversity and conflict by institutionalizing processes of free and fair negotiation and dialogue, rather than *solving* the *problem* through institutional structures above politics (that seek to trim, trade or segregate away diversity).

As I argued in the chapter, a central component of this model is a role for the federal arbiter as a facilitator of negotiation between those that conflict because they hold competing perspectives on the nature of the federation. As I previously explained, the key aspect of this role is to push parties to use political processes to manage the conflict through negotiation, and where this is not possible, to help resolve conflicts fairly by recognizing and accounting for the different legitimate perspectives on the nature of the federation.

The second chapter made the initial case for why federal arbiters matter and how they ought to fulfill their role in the management of diversity and conflict via federation. In presenting a federal model in contrast to the trimming, trading and segregating approaches (and their Canadian-specific models) it also completes the picture of the main approaches to the management of diversity via federation and the role of federal arbiter, which facilitated subsequent analysis of the SCC's work in this capacity. In this regard, the chapter provided the framework to investigate the SCC's work as federal arbiter (and the normative lens to assess this work as problematic or beneficial).

The chapter seeks to make a contribution to the theory and policy of federation in two related areas. First, working from the proper understanding of the dynamics of conflict over national identity and federation in Canada, it constructs and promotes a federal model for that country that can account for (and manage) these dynamics. Second, again building on this understanding of the key case of Canada, it seeks to inform broader federal theory and policy for states with similar dynamics of conflict. It does this by making the initial case that there is a need to account for the contestation that takes place in plurinational federations over both national identity and federation. This is something the main approaches fail to do, which is particularly evident with their under-conceptualized and problematic roles for the federal arbiter. In making this argument, the chapter also helps to make the point that a federal arbiter can play an important role in the management of this contestation, and thus in the development of a federation and the maintenance of legitimacy for an order.

Chapters One and Two are thus about more than stage-setting, or contextualizing my argument to facilitate later analysis of the SCC's work; together, the two chapters make linkages between general theory and the case of Canada to advance federal theory and policy designed to manage diversity and conflict in that state and beyond. They do this by analyzing and using general theory to inform an understanding of the Canadian case as a state with conflict between the subscribers of competing, partial perspectives on the nature of national identity and federation. This

understanding allows for reflection back on the general theory and policy of federation as a means to manage diversity in states with similar dynamics of conflict, particularly the need to account for the contested nature of nationality and federation and the important role the federal arbiter plays in managing this conflict.

This line of analysis raises a number of questions. First and foremost, is the question of how these dynamics of conflict play out in the plurinational federation of Canada and how the SCC has exercised its role as federal arbiter to manage them. This in turn brings up the question of the effect the Court has when exercising its duties as federal arbiter (i.e. on the legitimacy of the federation). There is also the question of whether the SCC can live up to the role set out in Chapter Two of a facilitator of negotiation and fair arbiter. In other words, empirical questions were raised about the role of the federal arbiter and the extent to which it can exercise its duties in a way that generates and maintains legitimacy for the federation.

The second section of the thesis sought to answer some of these questions. To do this, the chapters investigated the SCC's work arbitrating conflict within and over the nature of federation between the subscribers of competing federal models. Together the chapters demonstrate that *how* the Court does this matters. The section made the argument that the SCC can either negatively affect the legitimacy of the order by imposing a particular understanding of the federation, or it can maintain the legitimacy of the order by recognizing and accounting for the legitimate competing perspectives on the order (while facilitating negotiation between the subscribers of these perspectives). This line of analysis is therefore about highlighting what should be avoided, and promoted, in the arbitration of conflict over the federal order by the SCC (and, to an extent, other federal arbiters).

The third chapter acted as the introduction to this second line of analysis. It explained why I look at *the SCC, in particular*, and why I focus on the last 30 years of its work. As I pointed out, the SCC has always played an important part in the development of the federation and managing conflict over its nature (and increasingly so, since 1980). The chapter also justified my case selection

criteria, explaining that the 131 cases were chosen because they represent all disputes coming before the SCC that explicitly involve conflict over the nature of the federation between actors subscribing to competing perspectives on its nature.

The chapter also explained how I analyzed the SCC's work as federal arbiter. It did this by presenting the framework used to assess the SCC's decisions, which builds on the analysis of the federal models from the first section of the thesis. In discussing the framework, I explained how it is applied to the Court's decisions to look at the extent to which they draw from and reinforce a federal model (or models). This analysis involves looking at the way the federation is depicted (i.e. the way the federation is understood by the Court), the outcome (and how this draws from and reinforces the depiction) and the self-selected role for the Court as federal arbiter in each of the 131 decisions. The point of this analysis is to assess the extent to which the Court either imposes a particular federal model or recognizes the legitimacy of multiple models and the order as the process and outcome of negotiation, while also looking at the self-selected role to see if it is that of umpire, branch of government, guardian or facilitator.

The fourth chapter examined the revolutionary *Secession Reference*.⁷⁴⁰ There are two reasons I began my empirical research by looking in-depth at this case: it helps the reader understand how I conducted my analysis of a decision (which is important given the number of cases dealt with in the thesis); and, the decision is an exemplar of the way a federal arbiter can work from an understanding of federation as the process and outcome of negotiation and recognize the legitimacy of competing perspectives on the nature of the federation, while also acting as the facilitator of this negotiation. In this way, the *Secession Reference* is a useful benchmark against which other decisions can be compared.

The decision is "revolutionary" in two ways. First, it is (by some measure) the decision that most closely adheres to the ideal-type of a decision that works from, and reinforces, an understanding of federation as the process and outcome of negotiation between legitimate

⁷⁴⁰ *Reference re Secession of Quebec* [1998] 2 S.C.R. 217.

competing perspectives on the order, with the role of Court being to facilitate this negotiation. I demonstrated this in the chapter by discussing the way the SCC depicts the federation in the reference to highlight that the order reflects aspects of each model, while also being a process and outcome of negotiation and dialogue. I also showed how the decision rejects a zero-sum approach, granting positives to all sides of the conflict and reinforcing the legitimacy of each federal model in the outcome. Finally, I made the point that the Court explicitly adopts the role of facilitator between the parties conflicting over the nature of the federation in the reference, pushing parties to use political mechanisms to manage their conflict and negotiate a resolution.

The second aspect to the *Secession Reference's* revolutionary character is that it marks a fundamental shift in the SCC's approach to its role as federal arbiter. Prior to the decision, 68% of the SCC's decisions impose one federal model; after the decision, 75% of the Court's decisions recognize the legitimacy of multiple federal models and federation as the process and outcome of negotiation, with the SCC's role being to facilitate such negotiation. As discussed in the chapter, this turn comes in response to the direct challenge to the legitimacy of the system posed by the unilateral secession of a province. Accordingly, the reference can be seen as an example of how a federal arbiter can react to conflict over the nature of the federation and seek to generate legitimacy for the order in the way it presents the system and manages the conflict.

In Chapter Five, I turned to look at those decisions that do not adhere to the benchmark of the *Secession Reference* – decisions that impose a particular federal model. The chapter thus discussed the decisions that have the potential to negatively affect the legitimacy of the federation and the conflict management process.

In the chapter, I identified 74 decisions that impose a particular federal model in their approach and outcome (which represents 57% of federal decisions analyzed between 1980 and 2010). As explained, these decisions impose a federal model by depicting the federation in a way that draws from, and reinforces, the legitimacy of only one federal model. This depiction is then relied upon to reach an outcome that is overwhelming favourable to a single jurisdiction and works

to reinforce only the particular model relied upon in the depiction. At the same time, in these decision, there is a tendency for the SCC to self-select a role (be it umpire, branch of government or guardian) that works from, and reinforces, the particular model being imposed in the decision.

I argued this stream of federal jurisprudence is problematic because it can negatively affect the legitimacy of the federation and the Court's standing as federal arbiter. This argument rests on four related points made in the chapter. First, is the fact that the 74 decisions tend to impose the pan-Canadian model, with outcomes that favour the central government to the detriment of the other jurisdictions. This is problematic because the tendency to side with one jurisdiction can instigate mobilization among subscribers of competing models in the other jurisdictions, while also calling into question the fairness of the conflict management process. Second, is the lack of legitimacy afforded the multinational model in the 74 imposing decisions. This is something that does not sit well with the reality of Canada as a plurinational federation where a significant percentage of the population views Canada as containing multiple nations (and so, again, is something that can lead to mobilization in defence of the multinational perspective and perceptions that the Court is biased). Third, is the tendency of the Court to create stark winners and loser in its imposing decisions. This approach is problematic because it can foster resentment towards the conflict management process and the order that stems from that process. Finally, there is the tendency for the SCC to reject a facilitative role in these decisions, adopting instead the role of umpire, branch of government or guardian. As explained in the chapter, this approach can create expectations of neutrality that cannot be met, while also reinforcing a sense that the system is not operating fairly for all participants.

The fifth chapter thus does two important things for the thesis. It demonstrates that the Court has imposed particular federal models in a significant proportion of its work as federal arbiter. Second, it makes the case for why this is problematic. The chapter advances the argument that the activity (and potential) of a federal arbiter imposing a particular perspective on the nature of the

federation should be accounted for and addressed in federal theory and policy applicable to Canada (and to other plurinational federations).

The sixth chapter discussed the decisions that follow the lead of the *Secession Reference* and recognize that federation is the process and outcome of negotiation between the subscribers of legitimate perspectives on the order, with the role of the Court being to facilitate this negotiation. This chapter thus dealt with those decisions I argue can have a positive effect on the legitimacy of the federation and the conflict management process.

The chapter identifies 56 such decisions (which represent 43% of federal decisions analyzed between 1980 and 2010). These decisions follow a contrasting approach to those that impose one federal model: they tend to depict the federation in a way that grants legitimacy to multiple federal models or explicitly recognize it as the process and outcome of negotiation between the subscribers of competing models; they tend to reject zero-sum outcomes, while also establishing that there are elements of the federal order that reflect aspects of each model; and, they tend to involve the Court explicitly adopting the role of facilitator of negotiation over the nature of the federal order (or at least acting as a fair arbiter, which recognizes and accounts for the various perspectives on the nature of the order in reaching a decision).

The chapter makes the argument that these decisions are a welcome turn in the Court's approach as federal arbiter. They are welcome because their underlying approach has the potential to positively affect the legitimacy of the federation through its conflict management process. As in Chapter Five, this argument relies on four related points. First, is the fact that virtually all of the 56 decisions discussed in Chapter Six depict the federation in an inclusive manner. This is beneficial to the (legitimacy and unity) of the federation because it can generate loyalty to the order among the subscribers of each federal model (by showing them the federation recognizes their views). Second, is the SCC's increasing tendency to recognize the legitimacy of the multinational model in these decisions. This is something that can mitigate the potential mobilization among national minorities

(i.e. Québécois and aboriginals) against the association.⁷⁴¹ Third, is the consistent rejection of a zero-sum approach to resolving disputes. This is welcome because it can help parties see that the conflict management process is fair and balanced, while also generating loyalty to the resulting federal order as one that recognizes and accounts for their perspective. Finally, in these decisions, the SCC tends to explicitly adopt the role of facilitator between the subscribers of the conflicting perspectives, rather than relying on the outmoded roles of umpire, branch of government or guardian. The benefit of the Court embracing this approach is that it can generate loyalty to the federation *in the way it goes about fairly managing conflict* (by pushing parties to use the political process, acting with transparency and accepting that it is part of the field of struggle).

The sixth chapter thus rounds out the argument of the thesis by making two related points. The first is that the Court can exercise its duties in a way that accounts for, and manages, the dynamics of conflict over national identity and federation in Canada. This, in turn, points us to the approach that should be promoted for the federal arbiter in Canada and the potential benefits of this (which comes into relief in contrast to the problematic approach of imposing federal models). And, as I argue below, aspects of this approach can also inform theory and policy for other plurinational federations.

The second section as a whole demonstrates how Canada's federal arbiter manages conflict over national identity and federation, and how it can do this in potentially problematic or beneficial ways. This line of analysis lays out what activities I argue should be avoided (and followed) by the federal arbiter (both in Canada, and, to an extent, in other plurinational federations). The second section of the thesis, much the same as the first, therefore seeks to reflect on the particular case of Canada (and how the federation manages diversity and conflict, with a particular focus on the federal arbiter) to both understand that case and to help advance general theory. However, just as the first section of the thesis raises a number of questions that were taken up in the second section,

⁷⁴¹ As discussed in the chapter (and also below), recognition of the multinational model comes in tandem with recognition of the legitimacy of the pan-Canadian and provincial equality views. In these decisions the Court does not impose the multinational model. This is an important distinction, because imposing the multinational model could push the dominant majority of pan-Canadianists to mobilize in defence of their perspective.

this line of analysis brings to the fore a number of additional questions, particularly related to the defensibility and applicability of my arguments within and beyond Canada.

Considering the Argument in the Canadian Context

Reflecting on the above points in the Canadian context brings to light a number of potential issues. Discussing these here both buttresses my argument and helps to explain it further.

First and foremost is the question of whether my approach and argument falls prey to one of the main criticisms I levy at the promoters of the three federal models in Canada: whether I work from a *partial* understanding of Canada to derive a normative federal model. Put another way, does my preferred method of managing diversity via federation and the SCC's role collapse the categories of "is" and "ought" (which is what the three Canadian federal models do)?

From the outset, the thesis makes the point that each of the three federal models work from a misunderstanding of the Canadian case. The subscribers of the pan-Canadian, provincial equality and multinational models *assume* that Canada is either uninational or multinational, while seeking to promote and reinforce this understanding through federation. In other words, they think Canada *is* uninational or multinational and say that federation *ought* to reflect and protect this "reality." I have made the case that, in reality, Canada *is* plurinational (that the concept of nationality in Canada is contested between the subscribers of these competing understandings).

In this way, one of my central aims is to avoid collapsing the categories of is and ought when thinking about federation in Canada. I work from an understanding that accounts for the sociological reality of the state. Seeing it as a plurinational case – outside the paradigms of the competing nationalist narratives – helps to show how federation can account for the dynamic of conflict taking place between the subscribers of these competing understandings of the state. Admittedly, I work from an understanding of Canada; however, it is one that is more comprehensive than the promoters of the main federal models in Canada.⁷⁴²

⁷⁴² This understanding focuses on the *main* competing perspectives on the national character of Canada – there are more narratives than the three discussed in the thesis. I focused on the pan-Canadian, provincial equality and multinational perspectives, however, as they are the key ones competing to define and influence

I have also tried to avoid the problems associated with promoting a federal model based on a partial understanding of Canada by recognizing and accounting for the continual conflict that takes place over the nature of federation itself. The failure to adequately account for this dynamic of conflict is one of the central issues with the main Canadian models, each seeking to fix a particular institutional structure above political contestation.

I recognize that such a claim is open to criticism that I have made “straw men” out of the models: each model is not entirely fixed and each does allow for adaption of the federal structure (i.e. through amendment).⁷⁴³ At the same time, one of the points the thesis makes is that these models, at their core, are about institutionalizing a particular federal approach to managing diversity based on (and seeking to bring about) a particular understanding of the state. My analysis in the thesis works from a distillation of these models to facilitate comparison between them (and with my own approach) to advance theory and policy. As with any such categorization and comparison nuance is lost. At the same time, focusing on the core of an approach allows for useful reflection on its utility and applicability. An approach’s assumptions and starting point matters. In this regard, one of the arguments of the thesis is that the three main federal models in Canada are flawed because they start from flawed understandings of the state and go on to promote fixed institutional structures based on that partial understanding.⁷⁴⁴

Turning from this aspect of my argument to the role of the federal arbiter, there are a number of issues that arise in relation to my analysis of the SCC. In particular, questions arise about

federation in Canada and to inform broader federal theory and policy. As I discuss in the next paragraph, for reasons of simplicity, I also sought to distil these positions to their core; however, within the groups subscribing to these perspectives there are also competing narratives.

⁷⁴³ Each model also promotes mechanisms that seek to recognize and account for elements of competing perspectives. For example, the pan-Canadian model is a centripetalist-inspired *federal* model (i.e. it still promotes shared and self-rule through a federal institutional structure). Similarly, the promotion of the multinational model is generally accompanied by the promotion of so-called “intra-state” federal measures (like representation in the central legislature and executive) designed to offset centrifugal forces created by the granting of territorial autonomy.

⁷⁴⁴ It is prudent for me to say that I tend to focus on the model promoted by the multinational federalists of the Canada School, which I understand as primordialist-inspired consociationalists rather than liberal-consociationalists. The latter tend to recognize the fluidity of identity and the ability of groups to define their own identity more than the former; on this distinction, see Wolff (2011: 166-168); on the Canada School of multinational federalists as more primordialist-inspired, see Schertzer and Woods (2011).

the argument that the Court either negatively affects the legitimacy of the federation by imposing a particular model or positively affects the legitimacy of the order by recognizing the legitimacy of multiple models.

One of the central issues with this argument is whether the Court actually “chooses” to impose (or recognize) a particular model in any given case. There are legitimate questions to ask about the agency of the SCC to either impose or recognize federal models in its decisions. These questions stem from the perspective that doctrine (or other structural factors like the text of the Constitution) lead the Court to rule in a particular manner,⁷⁴⁵ or that the fact situation of a case requires the Court to impose a federal model and side with a jurisdiction.

I have already addressed the perspective that doctrine and other factors like the text structure the SCC’s federal jurisprudence. As argued in the third chapter, and demonstrated in the second section of the thesis, the Court shifts the interpretation of doctrine (and the Constitution through various other modes of legal analysis and interpretation) to support a particular depiction of the order. While it must contend with the presence of the case law and the text, the SCC tends to use these to anchor a particular understanding of the federation in the constitutional law.

Making this point also helps address the issue of whether the fact situation of a case leads to a particular outcome. Demonstrating that the SCC can support particular depictions of the federation by shifting its interpretation of the case law and Constitution through the various modes of legal analysis shows the Court has the agency to either impose or recognize particular federal models in any given case. In other words, my analysis shows that the SCC is able to use the various modes of legal analysis to anchor any of the competing understandings of the federation in the constitutional law. This agency makes shows that even where the particular fact situation of a case pushes the Court to impose a particular federal model, this can be overcome by highlighting how the Constitution can support an inclusive depiction of the federation and an outcome that reinforces the legitimacy of the various models.

⁷⁴⁵ For an argument in this vein, see Baier (2006).

This argument does not deny that particular fact situations may favour an outcome for a particular jurisdiction. In some cases it is quite clear who is going to win given the facts. What matters, though, is how the Court reaches its decision and the extent to which it accounts for, and recognizes, the competing federal models in its depiction of the federation and in reaching the outcome. My argument is that this is where the Court has agency, and it can make its decision in a way that either imposes a particular federal model or recognizes the legitimacy of competing models.

A brief look at how the SCC *could* have rendered a decision in one of its (more significant) impositions helps to make this point. As I explained in Chapter Five, in *Canada Assistance Plan*,⁷⁴⁶ the Court imposes the pan-Canadian model by depicting the federation as centralized with a central government that is superior to the provinces, a situation that is presented as a legal fact supported by the text of the Constitution, which the Court says it is bound to enforce as an umpire. And, because of all this, the central government's unilateral amendment to funding agreements that help the provinces deliver services in their areas of competence is seen as legitimate and legal.

In contrast to this imposing approach and outcome, the Court *could* have embraced a more inclusive understanding of the federation and a role of facilitator to resolve the dispute in this case. It could have noted that the centre has autonomy to control its spending (as per s. 91 of the Constitution). At the same time, it should have recognized that federation grants the provinces considerable autonomy in their areas of competence. Moreover, it should have accounted for the fact that the division of powers contemplates coordinate action and negotiation between the levels (especially where one's actions touch on the others' areas of jurisdiction). In this way, while the text of the Constitution does not limit the centre's ability to control its spending, political actions and conventions show that where this power concerns spending in areas of provincial competence it should be exercised in consultation and cooperation with the provinces.

⁷⁴⁶ *Reference Re Canada Assistance Plan (B.C.)* [1991] 2 S.C.R. 525. The issue in this case is whether the central government can unilaterally amend funding agreements with the provinces. It was a unanimous decision (authored by Sopinka JJ).

From this understanding of the federation (which balances central superiority with provincial autonomy and also recognizes that federation necessitates negotiation and coordination) the Court could have reached an alternative outcome that did not *impose* the pan-Canadian model. Following this depiction of the federation the Court could have said that while technically, under the letter of the law, the centre has the ability to control its resources and spending, when it enters into an agreement to fund services in provincial areas of competence it is under a duty to negotiate changes to that agreement (in line with the principle of federalism that necessitates such negotiation when actions are coordinated).⁷⁴⁷ While the centre would “win” the case, this would be offset by the fact that the Court provided a normative check on its ability to unilaterally alter such agreements (thereby rejecting a zero-sum approach). Moreover, in such a decision the Court would be abandoning the umpire role (which simply enforces the rules of the constitution), as it would be pushing parties to negotiate an agreement that deals with the conflict (similar to the way it did in *Patriation and Secession Reference*).

The point of this exercise is to highlight that while the centre would still win the case, the way it wins could be significantly altered. The facts did not preclude the above from happening; the approach and outcome reflect the agency of the SCC to choose the path it took. And, as I argue, this choice has repercussions, as the approach adopted by the Court imposed a particular federal model that has the potential to negatively affect the legitimacy of the federation and the conflict management process.

This leads to a related set of questions about the perceived effect of imposing decisions. First, is whether decisions that impose a federal model actually have a negative effect on the legitimacy of the order (and conversely whether those that recognize multiple models and facilitate negotiation between the subscribers of these models positively affect legitimacy). As I said at the outset of the thesis, an empirical proof of this point is beyond the scope of the project. To prove

⁷⁴⁷ Such an opinion would thus mimic the logic in *Reference re Resolution to amend the Constitution* [1981] 1 S.C.R. 753 [*Patriation*] and *Secession Reference*. On this aspect of the principle of federalism, as explained in that opinion, see *Secession Reference* [1998] at 55-60.

such an argument (i.e. by looking at nationalist sentiment and mobilization following either imposing or recognizing decisions) requires the analysis conducted here first. Before quantifying the effect, it is necessary to identify what constitutes an imposing or recognizing decision. This analysis is clearly the next stage of research stemming from this project. At the same time, I have made a case for why such decisions may affect legitimacy and the importance of accounting for this activity.

Second, is whether imposing a particular federal model, at a particular time, may actually help to manage the conflict over nationality and federation in Canada. An argument could be made that the Court is actually managing conflict undercover by handing a particular jurisdiction or model a victory in a case (and in so doing, even generating legitimacy for the federation by acting in line with broader socio-political sentiments).

The problem with this view is that it fails to account for the argument that impositions are problematic not just because one side wins, but mainly in *how* a party wins. While, at first blush, granting one party in the federation a victory might seem to help keep the association together (for example, by strengthening pan-state identities and institutions), doing this by *delegitimizing* the other parties' perspectives is not a sound conflict management strategy. Such an approach fosters resentment towards the arbitration process and the resulting order among those being imposed upon, thereby fuelling mobilization. As I argued in Chapters Five and Six, recognizing the legitimacy of multiple models and facilitating negotiation to manage conflict is a preferable approach to arbitration because it can generate legitimacy for the system by generating loyalty among multiple groups. In other words, in a plurinational federation like Canada, failing to recognize and account for the competing perspectives on the nature of national identity and the federation only pushes the subscribers of these views to mobilize outside the political process.

This raises another related point: whether recognizing the legitimacy of competing perspectives jeopardizes order and unity in Canada by eroding the status and importance of pan-state identity. In other words, will following the dynamic model and facilitative approach to federal arbitration exacerbate conflict by either eroding pan-state identity (thus allowing centrifugal forces

to pull the federation apart) or threatening pan-state nationalists (thereby pushing them to assert dominance). This line of argument rests on a view that strong pan-state identity is necessary for unity in states like Canada.⁷⁴⁸ This is an important observation and position – pan-state identities are *one* of the important mechanisms that help to maintain unity in diverse states and federations. This is the case in Canada, particularly given the fact that there are pan-state nationalists within Québec and aboriginal groups.

At the same time, this position fails to fully grasp the need and benefit of recognizing the various competing perspectives on the nature of nationality in the plurinational state of Canada. A central component of my argument is that institutions that recognize and account for the dynamics of conflict over nationality and federation are better equipped to manage diversity and conflict than those that work from only one of the competing perspectives. In other words, in a plurinational federation like Canada, seeking unity and order via pan-state identity and institutions *alone* will likely exacerbate conflict, because it will lead those that subscribe to other perspectives on the nature of the state's institutions and national character to mobilize in defence of their perspective. Accordingly, the above critique would be valid if I were arguing that the Court recognize and impose *only* a multinational understanding of the federation. However, as pointed out in Chapter Six, my argument is that the Court should recognize and account for the legitimacy of the pan-Canadian, provincial equality *and* multinational perspectives (not to impose one over the others). This is one of the reasons I focus on the SCC in the thesis, as I argue it can play an important role in generating and maintaining unity in the plurinational federation of Canada *outside the paradigm of pan-state nationalism*.⁷⁴⁹ My argument is that this does not have to come at the expense of pan-state identity

⁷⁴⁸ As Brendan O'Leary has argued, stability in diverse federations can be linked to the presence of a large, dominant *Staatsvolk* (i.e. a group that adheres to a pan-state identity and identifies with pan-state institutions); see O'Leary (2001).

⁷⁴⁹ In other words, it is one of the institutional mechanisms that can help to keep Canada together by generating unity to the way the state manages conflict over the recognition of identity and distribution of power and resources. This is part of a wider argument that part of the "glue" that holds Canada together is political and institutional mechanisms that manage conflict between groups over how the state recognizes identity and distributes power and resources.

and institutions, rather it is about granting these identities and institutions legitimacy in *conjunction with competing identities and (ways of understanding) institutions*.

This leads to the related question about the importance of the Court as federal arbiter. Chapter Three already raised and addressed this point. It is not necessary to discuss it again here. It suffices to say that there is an argument that the SCC is ultimately not that important in the federation, mainly because actors can work around negative decisions if they so choose (and so its actual effect on the development of the federation is questionable). However, this point of view fails to fully account for the fact that it is not just the outcome of a case that matters, but also how that outcome is reached. What the SCC says in a decision about a group and its perspective has ramifications for that group's political (and material) standing in the system. Moreover, the potential for actors and governments to "work around" decisions does not mean they are unimportant (it simply means the decision is part of the process of resolving certain conflicts, and the fact that the route of federal arbitration is taken speaks to its perceived importance by the actors participating).

Finally, my analysis of the Court's imposing decisions raises questions related to the frequency with which this happens and the need to address this activity. In other words, the fact that the Court imposes a model in a bare majority of cases (57%), and it seems to be doing this less since 1998, calls into question the need to promote an alternative approach.

In response, as I argued previously, the 74 impositions since 1980 is a significant number. The goal is zero impositions, not 50%. In other words, my analysis shows that in more than half of the cases over the last 30 years the Court has exercised its duties in a way that can damage the legitimacy of the federation. On the tendency of the Court over the last 15 years to do this less often, as I have already said, this is a welcome trend. However, this also means that in 25% of cases the SCC is still acting in a possibly detrimental fashion. Moreover, accounting for this potential and seeking to mitigate the chances of a return to such activity by the SCC in future conflicts is important (particularly as the composition of the Court changes over time). Finally, bringing this tendency and

potential to light can inform theory and policy further afield to help address the potential of such activity by federal arbiters in other plurinational federations.

Considering the Argument Beyond Canada

This last point raises a broader set of questions related to the argument. These questions stem from one of my stated aims, which is to inform general theory related to the management of diversity and conflict via federation.

The most pertinent of these questions is the extent to which I can generalize my argument about (or export my preferred approach for) federation and the role of the federal arbiter in the management of diversity and conflict. This is a problem common to all case studies. Each state is unique, having its own mix of characteristics (from institutional, to geopolitical, to economic, to demographic, to historical, to political factors). These factors limit the generation and application of general theories. Building a theory from one unique case runs into problems when you try to apply that theory to other cases that are unique in their own right.

Within the field of ethno-national conflict management – that is, among those that seek to manage conflict framed in ethno-national terms through institutional and policy mechanisms like federation – this is a particularly important issue. When thinking about the applicability or potential success of any theory or policy related to the management of conflict in a diverse state, there are a myriad of factors to consider, including: the particular nature of the conflict; the commitment of the participants to resolve the conflict; the preferences of the actors for a pre-determined set of solutions or institutions; the current institutional makeup of the state; the territorial patterns of ethnic demography; the relative significance (in material, strategic or symbolic terms) of contested or important territories to the groups in conflict; the distribution of resources within and across groups; the geopolitical significance of the state; the presence of external states or groups with an interest in the conflict (be it material or symbolic), among others.⁷⁵⁰ These factors – the context of a

⁷⁵⁰ On these factors, and their relative importance in the application of theories and approaches to managing ethno-national conflict and diversity, see Wolff (2011: 176-184). Also, on the importance of the distribution of resources within and between groups (particularly the unequal distribution of capital), see Green (2011).

case – clearly matter to the applicability of any proposed approach;⁷⁵¹ they are vital considerations when thinking about how institutions can manage diversity and conflict. In other words, “cookie-cutter” solutions from the various (consociationalist or centripetalist) handbooks are unlikely to succeed in managing diversity and conflict without adaptations that take into account the context of a particular case.

At the same time, the importance of context does not preclude the generation of (or mitigate the value of) general theory. It simply means that we need to think carefully about how to *apply* general theories as specific policies. The observation that context matters in how particular institutional approaches are applied (and the analysis of how they are applied, and should be applied) necessarily follows the development of those approaches themselves. And, the generation of such theory is often (and properly) done by analyzing and reflecting on particular cases and how diversity and conflict is managed in that case.

As explained earlier, one of the aims of the thesis is to inform broader theory and policy through such analysis. In particular, the thesis seeks to advance thinking about one of the key factors just mentioned that relate to the applicability and success of ethno-national conflict management theory and policy in any given case: *the nature of conflict*. It does this by illuminating the particular dynamics of conflict over national identity and federation in a plurinational federation, while examining how these dynamics have been managed (both successfully and problematically). An important part of this objective is the reinterpretation of the key case of Canada put forth in the thesis (and, as part of this, highlighting how others have misinterpreted it). It is from this analysis that a number of points can be derived to inform aspects of theory and policy for that state and others, specifically in relation to the management of conflict over nationality and federation through the federal arbiter.

This focus on conflict dynamics and the mechanisms to manage them demonstrates a recognition that the context of a given case matters when thinking about the application of my

⁷⁵¹ See the analytic framework developed by Wolff (2011: 180), which shows how the content of institutional design can account for the context of a case.

analysis beyond Canada. My aim is thus not to argue for a particular model of federation to manage diversity and conflict *in general* (it is, in fact, quite the opposite); nor is it to say that the federal arbiter *must* act as a facilitator of negotiation *in all cases and all contexts*. Rather, outside the Canadian context, my aim is to highlight a number of points that can inform theory and policy when thinking about how to manage particular dynamics of conflict.

The first of these points is that federal arbiters matter. They matter because they are important in the development of a federal order over time and in maintaining its legitimacy. In dealing with conflicts between parties over the nature of the federation they shape the process and outcome of federation. And, among the forums through which conflicts over identity and federation play out and are managed, federal arbiters represent one of the last lines of defence to keep disputes over the nature of federation within the domestic political process (i.e. to stop them from spilling over into violence). Accordingly, federal theorists and policy makers should account for this important role when analyzing federations and when designing institutions in diverse states.

The second point is that in plurinational federations the federal arbiter is particularly important. I demonstrated this by showing how the SCC managed conflict over national identity and federation in the plurinational federation of Canada. I argued the federal arbiter was particularly important to the legitimacy and unity of the state because of the presence of these two dynamics.

This point is applicable beyond the case of Canada – plurinational federations, by definition, have some measure of these two dynamics. We see this, for example, in the Russian Federation. This is evident with the distinction between the two competing concepts of Russian: “rossiyki” (referring to pan-state Russian identity) and “ruskiy” (referring to the dominant, ethnic nation of Russians, which comprise over 80% of the population of the state).⁷⁵² In addition, there are numerous groups within the remaining 20% that self-identify as ethnic groups or nations (and which mobilize in defence of this identity), notably the Chechens. The tension between and within these groups (i.e. the pan-state nationalists, the dominant ethno-national Russians and minority ethno-national

⁷⁵² On this distinction, see Simonsen (1996).

groups) over the nature of national identity and the related distribution of power and resources has been a central component of contemporary politics and conflict in Russia. Similarly, in the (quasi-federal) states of Spain and the United Kingdom similar dynamics are evident.⁷⁵³ In the UK there are those that stress both a pan-British identity and those that see the state as comprised of multiple nations (i.e. the English, Scots and Welsh). Competing conceptions of the state and its national composition within and between these groups motivates ongoing political conflict in the UK over the distribution of resources and power through devolution. In Spain, similar conflict (both political and violent) takes place between those stressing a pan-state identity to maintain unity and those that mobilize in support of increased autonomy for self-identified nations (notably, the Basques, Catalans and Galicians).

Of course, further research is required to explore the conflict dynamics in these and other plurinational federations. This marks a future direction of study stemming from the thesis (particularly focusing on the role of the federal arbiter in managing such conflict). The important point, though, is that the presence of these dynamics (and the fact that they are linked to political and violent conflict as competing conceptions of identity mix with competing conceptions of the way power and resources should be distributed) points to the importance of the mechanisms by which they are managed – and, among these mechanisms, the federal arbiter can play a particularly important role.

My argument with regard to the importance of the federal arbiter does go beyond the subset of states that are plurinational and have federal systems of government; aspects of my argument apply to all federal states. Contestation over federation is something that is a common feature to all federal states, by virtue of the fact that they are federal states. As I argued earlier, federation is a normative framework. It is therefore always contested by one or another group in the way the order recognizes identities and distributes power and resources. Accordingly, in such states the federation, and related institutions (like the federal arbiter), should be designed to manage this conflict. Many

⁷⁵³ For an overview of the dynamics in these (and other states), see Keating (2001: Ch. 3).

of my earlier points on the value of federation being open to adaption over time in response to such conflict, and the benefits of the federal arbiter acting as a facilitator of negotiation between those that have competing perspectives on the nature of the order, apply in this vein.

There are also aspects of my argument that may be applicable to inform theory and policy related to (non-federal) plurinational states. Specifically, the point that accounting for the conflict over the nature of nationality in designing institutions can have positive benefits for loyalty to the state (and thus order) may be applicable in other plurinational states. For example, this line of analysis could apply to Turkey, where there is (political and violent) conflict within and between pan-state nationalists, the dominant ethno-national group of Turks and the minority ethno-national group of Kurds. In this case, looking at methods of institutional design that can recognize and account for the competing conceptions of identity and competing arguments for how power and resources should be distributed may help to manage the long-running conflict through political processes. The point is that in plurinational states, institutions should be designed to mitigate the imposition of particular views on nationality to avoid a loss of loyalty and legitimacy to the way the state recognizes the views of its citizens. However, such specific analysis and prescription is well beyond the scope of this thesis (though it represents a future line of research that could build on the work here).

Turning back to plurinational federal states, my argument about the potentially negative or positive effects stemming from the way the federal arbiter exercises its duties may also have applicability beyond Canada. Again, the broader implications of my analysis in this regard relate to how the arbiter manages the dynamics of conflict over nationality and federation present in a plurinational federation. My analysis can draw attention to the potential benefits that can arise from a federal arbiter recognizing and accounting for the various legitimate perspectives on the nature of the association in a plurinational federation. It also draws attention to the potential legitimacy costs of a federal arbiter favouring a particular view of the nation and federation when exercising its role in such states. In this way, this analysis highlights the potential problems

associated with promoting an ideal of simple neutrality and independence for the federal arbiter, given the potential for this to create expectations that cannot be reached or because it can allow the arbiter to impose a particular perspective on the nature of a federation under the veil of neutrality (both situations increasing the likelihood of mobilization in response to such action by disaffected groups).

Related to this, while the more specific arguments with regard to the way the SCC can generate legitimacy in exercising its duties made at the end of Chapters Five and Six may seem context-specific, underlying them are a set of points that could inform theory and policy applicable to federal arbiters in other plurinational federations. That is, while it is context-specific to say the SCC should not impose the pan-Canadian model, or it should recognize the legitimacy of the multinational model, underlying these arguments are more broadly applicable points. Looking back to the arguments made at the end of Chapters Five and Six, three points can inform how federal arbiters in plurinational federations should exercise their duties to avoid eroding legitimacy for the federation and its conflict management process (while helping to generate such legitimacy).

First, federal arbiters should recognize and account for the plurinational character of a country and how this drives conflict over federation. In other words, federal arbiters should not impose only one particular perspective on a state's national character and a related view of how federation should distribute power and resources.

Second, federal arbiters should avoid a zero-sum approach to resolving disputes over the nature of federation. Rather than creating stark winners and losers, they should work to find mutually agreeable outcomes for conflicting parties, or at least mitigate losses by reinforcing the legitimacy of a losing party's perspective.

Finally, building on these two points, arbiters should avoid the outmoded approach of umpire, branch of government or guardian and embrace a role as first and foremost the facilitator of negotiation between conflicting parties, and where this is not possible, act as a fair arbiter. The point here is to avoid the problematic approach of sitting above a conflict as an independent body; by

embracing a role as part of the system and field of struggle, federal arbiters can facilitate the management of conflict through negotiation and the political process, or at least render decisions that recognize and account for the legitimacy of the competing perspectives of the parties.

All of the above points on the applicability of my argument beyond Canada focus on the presence of the conflict dynamics present in Canada; however, there are other factors that also play into the exportability and generalizability of my analysis. As I noted above, these include geopolitical, economic and other broad factors that are part of any comparative analysis. Setting these general issues aside, there are two additional factors that are important to consider when thinking about how my analysis can inform broader theory and be applied as policy.

The first is another aspect related to the nature of the conflict taking place in any given state. In general, my analysis is most applicable to states with long-running (mainly) political conflict. In this way, the approach and arguments are generally of limited application when thinking about how to resolve “hot” conflicts (i.e. those instances where violence is widespread and conflict is taking place primarily outside the political process). In such situations, the focus is necessarily the cessation of violence, restoring order and bringing parties back into the political process to resolve and manage their differences. The argument of the thesis offers little that can be applied in such instances and processes.

Nevertheless, at the juncture where discussions turn towards institutional design to manage conflict and diversity within the political process, some of the above analysis can inform particular policy choices. That is, when thinking about institutional design in post-conflict states that have territorialized groups that identify as nations, some of the above points could be considered as informative (particularly the role of the federal arbiter if territorial self-government is a viable option).⁷⁵⁴

⁷⁵⁴ Again, while specific prescription beyond Canada is outside the scope of the thesis, mechanisms such as interpretative clauses in the constitution that direct the federal arbiter to recognize and account for the competing conceptions of the state’s national and federal character, along with mechanisms to adapt the constitutional order over time, are what I have in mind here.

Second, is the extent to which the participants of a conflict recognize the legitimacy of competing groups, *as groups*. The applicability of my argument rests on there being a measure of mutual recognition between the parties in conflict (which generally takes place where there is commitment to liberal values of autonomy and equality).⁷⁵⁵ The ability to manage conflict (successfully) through processes of negotiation and dialogue are necessarily reliant on such recognition among parties about the status of the other.⁷⁵⁶ This is clearly not always the case in states marked by ethno-national conflict. In such situations (where there is a lack of mutual recognition among groups) promoting bi-lateral negotiations to manage conflict can actually be counter-productive, as it can allow those with material or power advantages to dominate and oppress other groups free of legal or institutional checks that may take place under more structured conflict management mechanisms.

At the same time, as institutional and liberal rights protections take hold in post-conflict states, and a sense of mutual recognition develops, some of the above points could be helpful in thinking about specific institutional and policy choices. For example, a focus on keeping conflict over national identity and the associated distribution of resources and power via institutions within the political process can be an important element in mitigating the outbreak of violence (and, again, the domestic arbiter or judiciary can play a role in this process).

Reflecting on the above considerations, one of the overall contributions of the thesis to broader theory and policy related to federation and the management of diversity and conflict is to draw attention to one of the important factors in thinking about the applicability of such theory and policy (the nature or dynamics of conflict) and linking this to mechanisms that can manage this

⁷⁵⁵ Related to this point is the importance of adherence to the rule of law for the applicability of my argument. For example, the ability of the judiciary or federal arbiter to manage diversity and conflict within the political process is linked to broader adherence to the rule of law, which is not always the case in post-conflict states.

⁷⁵⁶ Such recognition does not mean there is agreement between the parties on their actual status as groups, something that the conflict over nationality in Canada demonstrates. For example, while pan-Canadianists and multinationalists disagree about the status of Québec as a nation, neither group denies the ability for the other to make its claims. In this way, while the groups conflict about the nature of the state's national character, the fact that each group recognizes the existence of the other and enters into debate and dialogue with them demonstrates a basic level of mutual recognition.

conflict (particularly focusing on the role of the federal arbiter). My overall argument with regard to the applicability of my analysis beyond Canada is that it can *inform aspects* of federal theory and policy in this area. Specifically, my analysis draws attention to particular dynamics of conflict that should be accounted for when thinking about how to employ federation to manage diversity and conflict. The most applicable point for broader theory and policy stemming from this is that federal arbiters matter, and that they have the potential to negatively or positively affect the legitimacy of an association in how they exercise their duties (i.e. in how they go about managing conflict over national identity and federation).

I have implied here that there are three types of states where aspects of my argument have varying applicability: plurinational federal states, federal states and non-federal plurinational states. Looking at the applicability of my argument for states that fall into these categories marks a future research direction. In particular, an examination of the dynamics of conflict over nationality and federation and how they are managed – and the role of the federal arbiter in this process, where applicable – is an important part of thinking about how to apply my arguments and approach. This analysis is beyond the scope of this thesis, but, does represent the next logical step of research.

The thesis as a whole thus offers insights applicable to Canada and other states. Its focus is admittedly centered on Canada – it is a case study of that state. However, from analysis of that case, it also makes a contribution to broader thinking about federation and the management of diversity and conflict, particularly related to the importance of the federal arbiter.

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