

‘Oh, Canada’ by Bernard Cadogan

Preamble

The purpose of this lecture is to consider Canada as post-British polity like New Zealand, yet one that works with several sets of minority nationalism as a federal system; and to consider just how has it managed centrifugal tendencies, and majoritarian popularism, and to what extent formal constitutionalism or politics have “framed” the status quo; and what this may mean for New Zealand policy debates?

What is the most successful and impressive on-going constitutional rethink in the modern world?

Is it the Russian constitution of 1993 which has at least brought Russia from the Communist era into representative multi-party government? To quote its own author Sergey Shakray:-

“Every constitution has a service life”.¹

Is it the bloodless Czech and Slovak “Velvet Divorce” of 1992-1993? The Nepalese republic of 2008? The UK devolutions of 1998? But what about their West Lothian over-hang? MPs from the devolved territories may vote on the same services for England that English MPs may no longer vote on for in the regions. What about Scottish secession?

Albie Sachs’s South African constitution of 1996 is hailed as “the most progressive” in the world. That is rather scary. It is hard to know what that means, is it meant to be an example to us, is it an admonition to us because despite the challenges there, they have been able to do this? The past 200 years of South African history have been about Afrikaners, coloured people and blacks severally forming polities of their own in reaction to the nomocracy that emerged from Cape Town, while British settlers desired a liberal regime uncontaminated by the demands of *imperium*. Yet a representative *etat de droit* or *Rechtstaat* under full civic liberties is about the only solution one can imagine for South Africa to empower multi-racial politics and human rights, given the pronounced cultural and economic disparities in that country.

What about the EU? EU enlargement and integration has the advantage of operating on the grandest scale possible, sovereign nation states, and what’s more, it has had a major financial project to set up, the Euro. Surely that dual project would put it on a par with John Locke’s Whig constitutional project and the Bank of England he dedicated himself to founding and to Alexander Hamilton’s “Federalist Papers” and first Bank of the United States? For every constitution is a fiscal constitution. It would be charitable to say that the jury is still out.

¹ Samigullina, Aliya *GZT.RU* 18.11.2008; interview with Sergey Shakray.

Oh, what about Canada? With a population of 34 ½ million, 10 co-sovereign provinces and three territories with their own government, and 9.8 million km², Canadians have been labouring away for 45 years now at several issues that can be characterized as “constitutional”:-

- Quebec sovereignty
- the general French Canadian question
- the indigenous rights and self-determination of three First Nations:-
 - Inuit
 - Metis
 - 500 + Indian nations
- NAFTA
- *The Charter of Rights and Freedoms* of 1982

But if you appeared on a Canadian equivalent of “Mastermind” with “The Canadian Constitution” as your specialist topic, everyone would switch channels or turn it off. For that reason then CTV broadcasts right now a series called “*Masterminds*” which is about criminal, not political, masterminds.

Arguably Canada is the world’s most successful BOREAL civilization. It must be tough living in all that cold. Bigger and richer than Scandinavia, it lacks the grandiose misery of Russia and has made no historical wrong-turns. There have however frequently been times when Canada seemed to be about to fall apart, such as the October Crisis of 1970, the Quebec independence referendums. The French enumerate their two empires and five republics with Roman numerals. Quebec could designate itself the same way with its referendums.

Canadian history from the American War of Independence is punctuated by “rebellions”, by both settlers and First Nations. Despite the British “Tory” settler tradition, the history of white anglophone revolt involves not just Irish but also the Scots and English. The Upper Canada revolt under William Lyon Mackenzie in 1837-38 makes Australia’s “Eureka Stockade” just look like a protest march. *British* North Americans revolted in Canada, not just the Irish, the French, or Indians and Metis. *Everyone* then native to Canada has “rebel” ancestors. New Zealand does not have this. These Canadian revolts though were sporadic, we have no spectacle of a nation up in arms like the Americans in their War of Independence or Civil War.

Canada has long been the following things:-

- **Very old.** Permanent French settlement began in 1605 on what is now Nova Scotia, two years before Virginian settlement successfully began, and permanent English settlement on Newfoundland in 1610. But French and Breton and Basque and English fishermen were fishing Newfoundland waters from John Cabot’s landfall in 1497, St John’s Newfoundland appears on maps from 1519, becoming a shore station town for the fishing fleet

throughout the 16th century, occupied during the summers. Canada is as old as Columbus. Yet its West Coast was charted by Cook, coeval with ourselves in the British time we inherit, and for indigenous first encounters.

- **Multinational and multilingual.** Two settler nations and three first nations make up the official and historical mix. Not only is French “native” to districts outside of Quebec such as Newfoundland, New Brunswick and Ontario, but some Gaelic is still spoken on Nova Scotia. Once people in Manitoba even spoke a Scots Gaelic –Metis language known as “Bungee”. There was even a Basque pidgin once in the Gulf of St Lawrence. Two Inuit languages are official languages of the territory of Nunavik. Eleven languages are official languages for the Northwest Territory. 25 indigenous languages are spoken in Canada regularly including mixed languages such as the Metis “Michif”. They range from Ojibwa spoken by 99,000 to Tlingit spoken by 175.
- **Multi-jurisdictional.** Not only are there separate provincial legal systems but the *Code Civil du Quebec* or *Civil Code of Quebec* (1994) is the Law of that province. Indigenous Law now adds to Canada’s legal tapestry.
- **Geo-politically sensitive** . What is now Canada was part of *The Great Game* between hegemonic powers in North America anytime between 1605 and the 1860s, Britain, France, the United States, Spain, and Russia. What became Canada has long been on geopolitical fault-lines. These warring vying authorities sought alliances with Indian nations such as the Iroquois or Five Nations. Not long after New France was conquered, the Indian alliances were used to fight the United States, in the Revolution and War of 1812. Not even the Mexican War of 1846, the American Civil War, the sale of Alaska in 1867 and the *British North America Act 1867* shut the “Great Game” down as the British ran out of possible allies to play at balance of power in North America. The Americans bought Alaska from the Tzar to get at British Colombia. In the 21st century tensions with Putin’s Russia over the Arctic Ocean may revive Canada’s ancient “frontline” geopolitical status. There’s a big difference between the Americans and Soviets wanting to fire missiles over you and Putin actually eyeing chunks of your continental shelf. Back in the Cold War however it was a Tory Prime Minister, John Diefenbaker (1958-63) not a Langesque figure from among the Liberals or New Democrats who came to grief trying to distance Canada from American strategic requirements at the time of the Cuba Missile Crisis.
- **A co-sovereign federation** that originally defined itself as “con-federal.” As geopolitical power has been manifold and competitive in Canada, the political unification of that vast territory has been manifold dispersed and collegial as well. Canada is a state system, a small solar system of its own. The state that the British North America Act set up in 1867 was a confederation, like the “Confederate States of America” . Canada was the first exercise in deliberate British federalism.

That’s Canada then. **What’s it got to do with us?** In the first Treasury lecture I gave, I argued that hermeneutics were the way and that the usual result in reality for countries like ours isn’t a written

inclusive constitutional exercise but **rather abeyances and deferrals as the political capital eludes the negotiators.**

Grand Constitutionalists and small “c” constitutionalists

I would argue they have held together and maintained good government out of the frequently tense and even disruptive interactions of two classes of political agents, the GRAND Constitutionalists and the constitutionalists with a small “c”, who arise from provincial communitarian and populist politics. The eminent Pierre Elliott Trudeau is a good example of a grand constitutionalist. What he achieved is both extraordinary and yet controversial as he held the system together between 1968 and 1984. He reminds me of toys I played with as a boy:-

“Captain Scarlet is indestructible. You are not - do not try to imitate him”.

Weird Pierre was a genius. ²He understood that Canada’s esoteric on-going emergency had to be balanced with constitutional trade-offs to the people. The federal government not Quebec guaranteed language rights for francophones outside of Quebec, while the *Charter of Rights and Freedoms* of 1982 gave rise to a “Charter” season of popular politics.

Other significant figures were the Progressive Conservative or “PC” prime ministers and PC leaders, Brian Mulroney (1984-93) and Joe Clark (1979-80). Mulroney and Clark were responsible for the **Meech Lake Accord** of 1990, the result of gruelling talks from 1987, and the **Charlottetown Accord** of 1992 which sought to define the place of Quebec in Canada and amend the constitution and secure ratification for this process. Meech Lake was a failed exercise in provincial ratification, Charlottetown a failed exercise at a referendum process. Clark was Mulroney’s Minister of Constitutional Affairs. Not only did Mulroney and Clark’s popularities crash, but these processes wounded the PCs before their electoral catastrophe of 1993. What hadn’t been factored in was that many Canadians, populists included, had taken Trudeau’s *Charter of Rights and Freedoms* of 1982 seriously. A few men in suits engaged in protracted talks closeted away from the general population defining how one should do politics angered and alienated Canadians. As a reaction against grand constitutionalism, Canada is now a working stand-off, an abeyance of the kind that Michael Foley the British constitutionalist defined, as I discussed in my previous lecture. The Charter though alienated both Quebec and First Nations. ³

The First Nations response was critical. The Cree politician Elijah Harper stood up in the Manitoba legislature in 1990 and held up a white feather to signify refusal to ratify the Meech Lake Accord, when unanimity was required for the province’s ratification. Manitoba not ratifying, Newfoundland followed suit.

² Trudeau, Pierre Elliott *Memoirs* McClelland and Stewart, Toronto 1993.

Graham, Rod (ed) *The Essential Trudeau* McClelland & Stewart Toronto 1998.

³ Phillips, Anne *The Politics of Presence* Clarendon Press Oxford 1995 p. 128. Quebec language-protection laws were struck down as unconstitutional while First Nations lacked explicit recognition.

Which bring us to the present day. **Canada held a General Election on May 2nd**. Canadians delivered a shock outcome in what was the most dramatic result since 1993, back when the governing Progressive Conservatives or PCs collapsed from 151 ridings to 2; such support as the Centre Right retained was taken up by the new Canadian Alliance party, out in the West, with the Bloc Quebecois becoming the official Opposition.

What happened on 2 May 2011 is that the minority CPOC government of Stephen Harper finally became a majority government after being over 5 years in office. CPOC, the Conservative Party of Canada aka the Tories are the fusion of the remnants of the old PCs with the Canadian Alliance. If that wasn't extraordinary enough something like global warming attacked the ice cap of the Opposition parties. The hard ice of the Liberal Party vote and of the Bloc Quebecois suddenly thawed and melted and turned into the snow-melt lake of the New Democrats.

In all 24 seats went over to CPOC. The Liberals collapsed from 77 seats to 34. The Bloc Quebecois crashed from 41 seats to 4. The New Democrats rose from 36 seats to 102. CPOC then since 1993 had seen off the PCs and virtually got rid of the Bloc Quebecois and reduced the Liberals. Yet they only had one riding in 1989. New Democrat leader Jack Layton after a superb campaign brought in on his coat tails Quebec MPs who barely speak French and 19 year old undergraduates.

Isn't FPP wonderful. For the Canadians achieve these massive melt-downs by virtue of an FPP electorate. A dire or wrong-headed leader can really sink their party. As can a constitutional project handled too "constitutionally".

The basic reason why this result happened is that Quebecois wanted to vote for the Left, full-stop. It was in Quebec that the ice cap broke. They were hell-bent on it. CPOC had accused the Bloc Quebecois of being "leftist" so the BQs bent over backwards to demonstrate that they weren't. Quebecois deserted them for the New Democrats. As for the Liberals, their late leader Michael Ignatieff betrayed all the flaws of the overt intellectual in politics. He failed to connect with supermarket prices and interest rates and public services and utilities, getting caught up with constitutional and metanarrative issues as if he were John Ralston Saul. The electorate resented an election that was called after Ignatieff proposed a vote of no-confidence that was carried. The Speaker had found that both a CPOC Minister and the Cabinet might both be in "Contempt of Parliament" for failing to provide details of bills and costings to a committee. To Joe and Jane Public it sounded like petit-maitreship. They didn't like Ignatieff playing at Victorian statesman. There is a problem with post-modern Parliaments:- Britons didn't like it when Parliament hadn't policed MPs' expenses. The Canadian House of Commons was "policing", from the Opposition's perspective, yet it got clobbered.

So how do Canada's challenges of minority nationalism pan out in their political system?

How do people cope with living with an ongoing "constitutional" project for Quebec, for francophones, and for three First Nations, the Metis, the Indians and over 500 Indian nations. For out of Canada's population of 34 ½ million, 26 % are might be deemed "*special*" to use Mark

Sainsbury's word. ⁴And finally how did a new kid on the block, like CPOC or the Canadian Alliance as it was, cope with inheriting a sophisticated and fraught constitutional project, dating back to the 1760s and 1770s, and redefined back between the 1960s and 1980s by a great Liberal leader like Pierre Trudeau and nurtured by a sound careful man like Joe Clark for the old PCs? For the Canadian Alliance went into action in the 1990s promising its anglophone western provinces and Bible belt constituency that it would sort out the French and that it would fix Quebec and that it would end "special" treatment to indigenous minorities and to civil rights minorities.

The answer comes first, and then I shall demonstrate it. People like clarity and honesty and being confided in even when an issue is admittedly difficult. Canadians rewarded clarity in the 2 May General Election. Quebecois rewarded the New Democrats for being clear. In the rest of Canada, CPOC was rewarded for clarity.

Now clarity isn't the same as "saying it as it is" or some fundamentalist construction of a text. What's simplistic gives the impression of total understanding when in fact it has bunged the square peg of the truth into a round hole. Clarity exemplifies "mere complexities" so as to allow everyone understanding according to their means. Conversely the intellectual in politics or public policy can give the impression of being lost in a *Cloud of Unknowing* and that demoralizes an electorate that suspects a grand constitutional agenda. For what won constitutionally on 2 May was communitarian constitutionalism with a small "c".

Broadly speaking Canadians have three positions about their country. They are:-

- *"O Canada ! How wonderful how inclusive how exemplary it is for multiculturalism and toleration of lifestyle and cultural and national minorities and how this has always been the Canadian way. "*

This is very much the message of Michael Ignatieff the late Liberal Party leader and Leader of the federal Opposition and of John Ralston Saul. The trouble with this attitude is that it treats everyone like 1st year undergraduates and it reminds everyone that they are poised all the time over a volatile constitution, when all they really want to know about is what's into it for them.

- *"Oh Canada is alright but damn the Canadian Government, I wish it would get out of our lives, and stop pandering to all the minority groups and to Quebec and the French and Indians and to alternate lifestyle people and I wish John Ralston Saul and Michael Ignatieff would stop patronising us and I wish our provincial government would take over what the Federal Govt messes up in Health and Education. "*

⁴ According to the Canadian census of 2006, 3.8% of the population identified as indigenous, and 22.3% declared themselves francophone, that is, constitutionally recognized minorities amounted to 26.1% of the population. In New Zealand Maori are 14.6% of the population. That proportion varies a bit from the small proportions of ethnic minorities of Australia and the United States and Canada. Aborigines are 2.3% of the Australian population while American Indians and Inuit are 0.9 % of the population of the United States. That is not to say that in these great federations there aren't states where indigenous minorities amount to levels like those of Maori in New Zealand. 16% of Alaskans are indigenous. 17% of Manitobans are in Canada. 1-2 % of a population is rarity, like an Albanian or a Tibetan in New Zealand or Canada. 15-17% interspersed is a constant fact.

The trouble with this attitude is that it would see Canada straining at the seams, the Americans groaning, Putin and Medvedev gloating, many minority groups preparing for civil resistance and self-determination.

- " *Oh, Canada ! Canada sucks, Canada oppressed my ancestors and has imposed institutional racism on our people, Canada is an imperial colonizing monistic power state* ", and this is said in every language from French (7million speakers) to Ojibwa (99,000) down to Tlingit (175) and oh yes, Gaelic (3000) and on it goes.

Yet the politics of restitution and satisfaction and protection for minorities that have suffered a profound loss, that were once predestined to extinction , are only too necessary. Though if the minority has too negative an attitude, the general electorate can give up on the ghost on the issue. The anthropologist Marshal Sahlins (2004) talks about **schizmogogenesis**:- a schizmogogenetic polity would be one in which communities have instituted ideologically opposition to each other. ⁵A commonwealth without perceived commonalities is neither common nor well.

The modern Canadian Government is only a successor state of the British Empire in North America and its imperial hubris; - its citizens aren't the same Victorians who built a "*prison house of nations*", nor are current living Canadians the same as the supporters of Prime Minister William Lyon Mackenzie King (1921-25, 1926-30, 1935-48), who used to make public policy and wartime decisions on what his mother's spirit told him during seances or else that of his little dog Pat. It was he who introduced the infamous "residential schools" for indigenous Canadian youth with the concomitant abuse.

But the rhetoric all sounds familiar doesn't it? The rhetoric that is, if not the government by séance.

Unsurprisingly that part of the electorate that may resent minority nationalities insists that majoritarian democracy is the highest political value, (when it doesn't have minority governments , which is not infrequent) ⁶ and holds that that settlers and settler descendants built exemplary and innovative and self-correcting parliamentary democracies into which minorities were peacefully and freely included. The "shame" side of the equation is evident. But the demand for satisfaction and justice appears in neither New Zealand or Canada to be against the descendants of people whose ancestors warred against indigenous peoples and committed crimes against them or occasioned grievances among them. It is directed at the governments of the states and successor states of those colonies. The debate is no longer about one disadvantaged commune blaming and accusing another dominant one. Only when majoritarian popularism gets in the way between a minority and the bad past, does the argument become an inter-communal issue. And is not majoritarian popularism in fact not majoritarian minoritism?

So just as 21st century white electorates shouldn't feel they are being individually summoned to appear in the Nuremberg dock for the 1860s, for the Waikato War and the closure of the Great Plains in Canada between the 1860s-80s, or the Fall of Quebec in 1759, so shouldn't they have to cover for their grandparents and great-grandparents for the failed 1940s-60s assimilation. It only

⁵ Sahlins, Marshall *Apologies to Thucydides: Understanding History as Culture and Vice Versa* Chicago 2004.

⁶ 9 times since I was born in 1961.

becomes our argument when we try and over-ride the Law by attempting revolutionary denials and repudiations and when we get in the way of a plaintiff seeking redress. The quarrel is with the Government in its historic dimension, not with the majoritarian democracy.

Yet what the so-called majoritarians do want answers to, is the apparent one-sided renegotiation of political rights for one other group, the partial renegotiation of a common constitution that seems to shut the wider public out. Otherwise popularist majoritarians, if the Canadian experience is anything to go by, are responding to the same economic and political forces, as the national minority, maybe both sides share the same perceived threat and maybe the anglophone settler descent community wants some of the things the minority nationality has been able to get. And despairing of that, they demand equality, when in fact they might mean, we want the same. We want to raise all the boats not drain the lake. They just might not be *negalitarian*.

Why then are New Zealand and Canada so particularly comparable?

If Canada feels that it is a minnow beside the whale of the United States, then New Zealand is a sea louse compared with even this massive minnow. New Zealand is small, New Zealand is unitary, New Zealand suppressed its de facto federalism in 1876, New Zealand is one of the latest British settler colonies, older only than British Columbia (1849), and older only than the former Southern Rhodesia (1890) and Kenya (1895). We have never been a geopolitical hot-spot, nor witnessed flag-lowerings and transfers of power.

In the first place both Maori and French Canadians have long practised political rights *OF THEIR OWN* in the general polity and been afforded access to political participation unlike indigenous peoples in Canada, Australia and the United States. Maori are both an indigenous First Nation and a nation that settled. Human time began with them in New Zealand; - they also historically remember their emigration to New Zealand right down to lineages of persons, livestock, gods, ships' names.

French Canadians have voted three times not to secede from Canada. Maori are not for their part "separatist" but it is necessary while deploying that inflammatory word of Muldoonesque origin to note that what most Maori had in mind was a space like what Quebec or Nunavik are in Canada, not some break-away revolutionary state that would divide the North Island to ally with the late USSR or Hugo Chavez.

Ethnic Nationalism comes in two forms as a European construct. You can take it neat and German, or you can take it Scottish. The German variety is derived from Herder and Fichte 200 years ago, and it is self-determining blood soil and language nationalism that rises against some imperial *ancien regime*. France, Austria, Russia, the Ottoman Empire, for instance, and Great Britain if you were Irish.

If you took it Scottish you took up a pronounced "identity" politics that nonetheless fitted in as a minority nationalism with the ecumenical citizenship of a wider liberal polity, the UK and the Empire. Instead of Herder and Fichte, Walter Scott confected like Walt Disney a Mad King Ludwig fantasy-land of clans and Gothic castles and blood-thirsty dynasties, desperate resistance and an active folk-culture. Although Scotland was no white dominion, the autonomous dominions were able to plot their nationalist courses in the British convoy of nations in what seemed to be "loyal"

varieties of “deferred nationalism” of the Scottish kind. Though you would not guess this now from Alex Salmond’s rhetoric.

Many of the white dominions 100 years ago had to explain themselves thus to cope with another nation they shared the polity with and to explain that “Other” to themselves. “British North America” contained the descendents of New France. In South Africa’s case, it was the Afrikaners with whom the polity was shared. The Union of South Africa was a binary affair right down to two capitals. In New Zealand’s case it was Maori, even if the citizenship was distinctly second class or even cattle-car quality. Politics was possible precisely because there had been historic strife and sustained war and a raft of settlements as distinct from “murders in the bush”. Australia has never had even the American history of determinative alliances and diplomacies let alone provided until recently the kind of contestable *political* space that shapes a settler polity in turn. Australia has historically refused to be defined by indigenous issues.

What is this nightmare of history that we want to awaken from? ⁷Why are Canada and New Zealand shaped by working with minority nationalism, so that New Zealand is less like Australia, and Canada less like the United States, its neighbour, and more like one another?

What we have in common is the assimilation policy of Lord Durham introduced as it was among indigenous peoples by our own George Grey from Mauritius in 1840 and by the Canadian Bagot Commission Report of 1844.

As I explained in the last lecture, the Buxton Report, the Report of the Select Committee on Aboriginal Affairs of 1837 proposed a protectionist model of segregation, in a reaffirmation of the Appalachian Protectorate policy of 1763. That was immediately contradicted by the young George Grey, whose Port Louis paper of June 1840 set him up in an assimilationist career as a colonial governor.

Grey had been preceded by the *Report* of Lord Durham the Governor General of Canada in 1839, in which the causes of the 1837 rebellion were analysed, and solutions of representative government proposed. One specific remedy that Durham insisted on was the union of Upper and Lower Canada, that is, of modern southern Ontario and of Quebec along the St Lawrence and Labrador, so as to swamp the French and force them to assimilate. Some one prominent in New Zealand affairs was on Lord Durham’s staff: - Edward Gibbon Wakefield. The Report was the joint effort of Lord Durham, Charles Buller the British MP who served as Durham’s secretary, and Wakefield. ⁸

Grey’s memorandum then was the Durham Report for indigenous peoples. Of the southern hemisphere that is, of the South Australia, New Zealand and South Africa he was to govern.

Canada had no need for Grey though in its policy tradition. The assimilationist model had already been localised. With the Durham Report establishing an integrationist paradigm, the united Canada of the *Canada Act 1840* got to work. The Bagot Commission got to work in 1842, reporting by 1844

⁷ cf. Joyce, James *Ulysses* ch 2.

⁸ Ajzenstat, Janet, *The Political Thought of Lord Durham* McGill-Queen’s University Press Kingston and Montreal 1988 p. 3-12, pp. 73- 90.

that Indians should be induced to assimilate. They too were to be swamped and assimilated like the French. The 1857 *Act for the Gradual Civilization of the Indian Tribes of Canada* granted 20 acres to every literate debt-free Indian of good character who wished to give up his Indian status. Granting those 20 acres requiring breaking into Indian territory to survey and provide that land, while the costs of doing so required that more land be sold to settlers and for the remaining Indians be swamped, just as the Durham report recommended that a “static” people such as the French Canadians had to be swamped.

The British gave up their assimilationist designs on the French Canadians when the latter got Quebec back as a majoritarian province for themselves under the *British North America Act 1867*, which also con-federated the country. This was the same year that the *Maori Representation Act* was passed in New Zealand.

The distinguished Canadian political philosopher Will Kymlicka describes at length in “*Multicultural Citizenship*” (1995) how the most inclusive society for minority rights before the modern age was the Ottoman Empire, whose **millet system** he describes as a “federation of theocracies”. Nonetheless it was fairly illiberal, you had no individual rights and you had to belong to the faith of your fathers if you wanted to stay in your home millet.⁹ France copied it for French Protestant rights with the Edict of Nantes in 1589 that was suppressed in 1689.

But reconsidering Canada, the conquest of the French population in 1759, the three First Nations, the numerous revolts right down to the October Crisis of 1970, it is clear that the “monarchical constitution of the empire” aka “the Crown” in its illiberal prerogative-based people-catching capacity was an extraordinary engine for bagging and sweeping up whole nations and parking them in “millets” or something like that. In New Zealand the scale and the nature of the act is perhaps not so clear from one people with a single language, Maori. In Canada it was a multitude, just as it was in the United States and South Africa. Under Crown Colony Government such as the Quebec Act 1774, despite the distinctions between civilized and “barbaric” peoples, EVERYONE was basically under a millet and divided from others by proclaimed rights. The same was the case with the Thirteen American colonies, what else were they than millets under royal charter? Massachusetts was for the Calvinists, Virginia for the Anglicans and royalists, Maryland for Catholic gentry, Rhode Island for slavers and traders who could believe in anything and nothing.

The curious thing seems to be that the “prison house of nations” that was the British Empire has left a constitutional myth in the royal prerogative that now appears to be a space for liberation. Yet the myth was powerless to explain how different sets of subjects became citizens endowed with political rights in a common country. The subjects-to-citizens process was contradictory one, carried out on a millet by millet, class by class, nation by nation, unevenly, at different time intervals, stadially so that the constitution itself was stadialized not just the interpretation of human society. This applied everywhere where there was British parliamentary government. “Class” and “commune” are the headaches of the modern UK. Minority nationalism is the legacy in former colonies or else communalism.

⁹ Kymlicka, Will, *Multicultural Citizenship: A Liberal Theory of Minority Rights* Oxford University Press 1996, p. 156.

*Crucially it was the **Illiberal** extension of liberalism that has made British politics so “lumpy” and historicized.*

What else could they have done you might ask?

Well the American and French Revolutions turned into citizenship revolutions based on democratic ideologies of universal rights. The French made all males citizens but with restricted levels of participation that improved as the century advanced. The Americans had by the presidency of Andrew Jackson at least largely obtained a paradigm of free male suffrage, though the extent of that suffrage depended on the state even for federal elections.

History's handicaps aside, my conclusion as to why Canada is the most world's successful current constitutional project, despite its lack of formal resolution, can be argued this way:-

Canadian federalism underwent tremendous demands from the 1960s at every governance level, from Quebec,¹⁰ from the other provinces, and from First Nations living under the prerogative-based government of the *Indian Act 1876*.¹¹ The row reached white heat in Lester Pearson's time as Prime Minister (1963-68) much as Maori reacted against the assimilationist policies of the Hunn Report and of Ralph Hanan.

The federal government responded under Pierre Trudeau (1968-79, 1980-84) with a policy of “executive federalism”.¹² It was a use of executive power that its detractors, French Canadians, First Nations and the provinces characterized as univocal, uniform, top-down anti-popularist, in fact the complaints all round sounded similar regardless of the group alleging disadvantage. Trudeau for his part considered himself an exemplary democrat. He tried to cut the general public some deals, producing the Charter of Rights and Freedoms.

The Quebec “revolt” against executive federalism was the oldest and most salient dating back to the 1960s.¹³ The rows between Lester Pearson and Quebec weren't helped by France in the form of President de Gaulle attacking an ally. On his state visit to Quebec in 1967 de Gaulle got up at a rally to declare “*Vive le Quebec libre*” in what was something like a French nuclear test on foreign soil. New Zealand and Canada have both been attacked by modern France then.¹⁴

¹⁰ Sarra-Bournet, Michel *Les nationalismes au Quebec du xixe au xxie siècle* Les Presses de l'Universite Laval, Quebec 2001.

¹¹ Elliott, David W., *Law and Aboriginal Peoples in Canada* Canadian Legal Studies Series Captus Press Concord, Ontario 2005 p. 6.

¹² Gagnon, Alain-G., “Executive federalism and the exercise of democracy in Canada” in *Federal Democracies* Michael Burgess and Alain-G. Gagnon (eds) Routledge Abingdon 2010 p. 232.

¹³ Morin, Claude *Le Pouvoir Quebecois en negotiation* Les Editions du Boreal Express Quebec 1972.

¹⁴ Orban, Edmond *La Modernisation Politique du Quebec* Les Editions du Boreal Express Sillery Quebec, 1976.

The Quebec issue reached determination with the Supreme Court decision *Reference re Secession of Quebec* [1998] 2 S.C.R. 217. In this case the Governor General in Council referred the following questions to the Supreme Court :- could Quebec legally secede unilaterally, did international law give it that right, and which would take precedence if there were a conflict of laws between domestic and international law?

The court ruled that Quebec had no right to secede but that if the people of Quebec voted to do so, Canada “*would have no basis to deny the right of the government of Quebec to pursue secession*” and that both sides would be obliged to negotiate a separation. On the remaining questions the Court found that international law gave no specific right to secede. It declined to answer the conflict of laws question.

Both sides considered honour satisfied. Quebec had not taken part though an amicus curiae spoke for them. The Quebec premier Lucien Bouchard declared that his referendum policy was vindicated. The result of the Quebec referendum of 1995 on the Canadian constitution had been a slight “no” to secession, 50.58%. It was because of Bouchard’s proposal to hold another that Jean Chretien the Canadian Prime Minister resorted to the Governor General in Council’s questions to the Supreme Court.¹⁵

This goes to show that written constitutional projects may not only **not** relieve pressure but increase it on nationalist minorities, as Nico Krisch has observed.¹⁶ Formally, that is the end of the line at the moment on the Canadian Constitution, at a buffer amidst the *quelques arpents de neige*¹⁷ which Voltaire said was fought over in the Seven Years War.

The western provinces have long had a tradition of their own politics. Jealous of their rights, they too had gripes towards Ottawa. Long left alone to do their own thing under a system of “administrative federalism”, the redistributionalist policies of the mid 20th century exposed them to the same “executive federalism” coming out of Ottawa as the Quebecois encountered. The Social Credit party formed long-term governments for example in Alberta and British Columbia any time between 1935 and 1992. Saskatchewan has a long tradition of government-forming parties peculiar to that province. It originated the New Democrat party, which is now the federal opposition, back in 1961, when Tommy Douglas the Saskatchewan premier was elected the first leader. The only Canadian Prime Minister from the West before Stephen Harper (actually an Ontario-born émigré), John Diefenbaker (1958-1963) the Tory counterpart of David Lange, had come from Saskatchewan. The West then was used to independent, even maverick, politics.

¹⁵ The Supreme Court further noted that the Constitution is more than the written text, and that enumerated primary texts in s 52 (2) of the *Constitution Act 1982* were not exhaustive. The four fundamental interpretative principles the Court defined for the purposes of considering the legality of secession were a) federalism b) democracy c) constitutionalism d) the rule of law.

¹⁶ Krisch, Nico, “The Case for Pluralism in Postnational Law” *LSE Law, Society and Economy Working Papers* 12/2009 p. 12.

¹⁷ “several acres of snow

The Meech Lake Accord of 1990 and the Charlottetown Accord of 1992 were Brian Mulroney's attempts to define the place of Quebec as a specific society within a resolved constitutional system after Trudeau's Repatriation of the Constitution from the British Parliament in 1983. The *British North America Act 1867* still left its amending mechanisms at the Imperial Parliament. Trudeau closed that off. Earlier on William Lyon Mackenzie King had asked the British at the time of the Statute of Westminster in 1931 to retain the 1867 Act because back then he and the provincial governments could not reach agreement. They still can't but at least crucial bits of Canada aren't left lying around the British Parliament. New Zealand updated and naturalized our constitutional statute with Sir Geoffrey Palmer's *New Zealand Constitution Act* of 1986. As it was, neither Meech Lake and Charlottetown were able to obtain Quebec's consent. The rest of Tory Canada went into revolt mode over Charlottetown. The 1993 election with its destruction of the federal PCs can be characterized as an attempt of *majoritarian* nationalism to wrest the controls off the constitutionalists and power-broking elites.

Preston Manning, a successful business consultant and Baptist, the son of the Social Credit premier of Alberta Ernest Manning founded the Canadian Reform party in 1988. The Baptist Church had been strongly supportive of Social Credit under its Radio Reverend "Bible Bill" Aberhart who led Social Credit to victory in 1935 and mentored Ernest Manning. Preston Manning used the same base and the same culture to found a post-modern conservative party, perhaps the world's first. It supported the MRI and strongly was into economic individualism. But it wasn't libertarian. It has had a homophobic tinge. It was communitarian in the sense of Francis Fukuyama's book "Trust" though long before he published that. It was a party about wholesome neighbourhoods and families and sports and wealth-creation. Manning though did purge hate-speakers as he surfed the crests of majoritarian nationalist resentment. It was never quite a Tea Party. The Tea Party is an oil spill of BP proportions. It is vectored onto what sounds like a third American Civil War, if the Civil Rights movement can be regarded as a second. CPOC is an oil rig extracting political crude. The same western Bible culture on the other side of the border from the Tea Party has produced a movement capable of sustaining federalism in minority nationalist conditions. Nonetheless a good many negative-minded people tried to make it their vehicle in the 90s. That perception of intolerance prevented the party's growth after the 1993 election result.

The Canadian Reform won one riding in 1989, then won 52 in 1993, and built itself up into the Canadian Alliance party in 2000 and then merged with the Progressive Conservatives in 2003 to form The Conservative Party of Canada. The initial rebranding was a disaster because "Canadian Conservative Reform Alliance" with "party" added, spelt CRAP or C-Crap before it was hastily changed into the Canadian Reform Conservative Alliance. These 2000- 2003 mergers were crucial because the Canadian Reform /Alliance had been unable to win more than two seats in Ontario. It was impossible for it to become a federal government unless it had a viable federal policy towards minorities and win in Ontario. The formation of CPOC in 2003 had the effect of driving out the kookier die-hards and the hate-speakers and conspiracy theorists who have since been unable to create political vehicles of their own. Stephen Harper was elected leader in 2003 and became Prime Minister in 2006. The effect of the mergers has been to provide the previous Canadian Reform with the balance it badly needed and to endow the old PCs with the energy and vigour and access to the West it lost in 1993. AS the Montreal Gazette declared on 4 May:-

*Harper has built a big blue tent and has obviated the creation of new political entities on the right.*¹⁸

Manning declared in his book "The New Canada" of 1992 :-

"The leaders of Canada's traditional federal parties continue to think of our country as "an equal partnership between two founding races, the English and the French" – a federation of founding peoples and ethnic groups distinguished by official bilingualism, government-sponsored multi-culturalism, and government enterprise. The approach to national unity is to grant special status to those Canadians who feel constitutionally disadvantaged. This is Old Canada- and it has become a "house divided against itself".

"Reformers seek a New Canada – a Canada which may be defined as "a balanced democratic federation of provinces, distinguished by the sustainability of its environment, the viability of its economy, the acceptance of its social responsibilities and the recognition of the equality and uniqueness of all its citizens and provinces. New Canada must include a new deal for aboriginal peoples and a new Senate to address the problem of regional alienation. New Canada must be workable without Quebec but it must be open and attractive enough to include a New Quebec.

"19

As we can tell this is neither Tea Party portmanteau- word rhetoric nor is it NZ unitary majoritarian popularism of the Paul Henry kind. No one is "*refudiating*". Note that Manning could fall back upon a diverse constitutional system as a positive alternative to the binary option. New Zealand has only the unitary model to fall back on.

The trend is broader than CPOC however. Both the Liberal and CPOC governments have devolved to First Nations while removing them from the royal prerogative constitution of the Indian Act 1876, for it is fair to mention that as the *other* Victorian constitution of Canada, along with the British North America Act 1867.²⁰ The territory of Nunavik and the tribal governments to which devolutions are being made,²¹ mark a shift from the indigenous equivalent of "executive federalism" to which Quebec also objected.²²

¹⁸ Plamondon, Bob, *Montreal Gazette* 4 May 2011.

¹⁹ Manning, Preston *The New Canada* Macmillan Canada, Toronto 1992 p. viii.

²⁰ *Agreement between Her Majesty the Queen in Right of Canada and Westbank First Nation* 2003 at <http://www.ainc-inac.gc.ca/al/ldc/ccl/fagr/wfn/wfn-eng.asp>

²¹ Morse, Bradford W., "Regaining Recognition of the Inherent Right of Aboriginal Governance" in, *Aboriginal Self-Government in Canada: Current Trends and Issues* Yale D. Belanger, (ed) Purich Publishing Saskatoon, 2008.

²² Browne, Murray "The Promise of Delgamuukw and the Reality of Treaty Negotiations in British Columbia" in *Aboriginal Law since Delgamuukw* Maria Morellato Q.C. (ed) Canada Law Book Aurora Ontario 2009 pp. 465-505.

What Canadian Reform rejected was a binary Canada. To refer to Marshall Sahlins again, the Bloc Quebecois and Canadian Reform parties engaged in schizmo-genetic behaviour towards one another. They got electoral advantages from making each other to be the bogey; this behaviour however excluded Manning's party from office. As a post-modern conservative party the Canadian Reform/CPOC were not professedly adverse to a *plural* Canada constitutionally. What CPOC considers it governs a few weeks on from attaining its first majority government is a community of governments not a binary star system. Manning himself identified the common aspirations of his own constituents and of Quebecois for decentralization from Ottawa, by praising the Quebec electorate for being open to popularist parties like his own, such as the Bloc Quebecois or the Parti Quebecois. In complementing the PQs he was complementing the nationalist social democrat Rene Levesque the outstanding figure among Quebec nationalists, premier between 1976 and 1985. Levesque remains the only Quebec politician who supported Pierre Trudeau's repatriation of the Canadian Constitution in 1983.²³ Yet in CPOC lore, Levesque was Trudeau's foe therefore Ottawa's critic. If you want to make out that Ottawa is a city occupied by the forces of decentralizing popularism, you might well be gracious to the memory of a social democrat to send the signal that you would work with a Left-leaning Quebec.

So how has Canada succeeded in holding itself together despite the centrifugal forces that assail it?

- It has, just as the general public suspected a **deep constitutional project** of elites:- of senior politicians and judges and intellectuals and officials.
- This project has its **multiple versions**, Liberal, Tory and Quebecois and now CPOC. It isn't one thing, and no one course of written constitutional determination has ever succeeded since 1867.
- **Popularism**, whether of indigenous minorities, whether Quebecois or western province has ultimately not been destructive, though it could have been. Popularism has reinforced, not down-graded, the constitutional system, as delivered by small "c" constitutionalists. It turned out to be a shrewd hegemony project not "shock-jock" demagogic anarchy.
- Since Charlottetown in 1992 Canada has sustained profound **abeyances and deferrals** as British constitutionalist Michael Foley identifies.²⁴ There have also been some resolutions, such as the creation of tribal governments for First Nations and the closure of the prerogative sphere under the Indian Act 1876. But there is a general recognition that the "metaphysics" and theory of constitutionalism don't deliver and that it's actual governance that redefines the constitutional sphere.

²³ Stefanescu, Alexandre, *Rene Levesque : Mythes et Realites* VLB editeur Montreal 2008.

²⁴ Foley, Michael, *The Silence of Constitutions: Gaps, "abeyances" and political temperament on the maintenance of government* Routledge, London 1989 pp. 85-130.

- **Symmetrical political interests amongst competing minorities.** This fact arguably off-set the schizmogogenesis. The irony of the situation is that the economic restructuring of North America and the pressures on Canada to turn into a post-modern and post-industrial economy and society produced much the same fears, aspirations and politics among Quebecois as it did white Albertans and Manitobans and British Columbians and indigenous Canadians despite a great breach of language and rhetoric opening up between anglophones and francophones.
- A mixed bag of leaders, **grand plan constitutionalists** like Trudeau and Mulroney and Clark and **"small c" communitarian and popularist constitutionalists** like Manning and Harper and Levesque piloted whole blocks of Canadians towards the present situation. As Nico Krisch has argued for the EU, there is a polarity between "constitutionalism" as a formal elite nomothetic project and plural alternatives.

People-based Politics has resulted in a pluralism that defies the language, and definition, that political and nomocratic elites sought. *Norm* has prevailed over *Nomos*.

The house is divided, but it stands.

My final observation is to say that Canada has developed and sustained in the course of rough politics since the mid 1960s a constitutional process that can be described as hermeneutical, as discussed in my last lecture. Political hermeneutics isn't done in the pages of an academic journal. It is carried out in the aggression and competition of real political markets. People hate it when this process is exclusively pre-empted by intellectual and political elites. Clarity is rewarded so long as it is honest and not simplistic. The wisest constitutionalists among politicians are not those who play at statesmen and stateswomen to do formal constitutionalism, but who know how to read and endow constitutional meaning in the regular business of politics and make themselves intelligible on that basis.

Having reviewed "O, Canada" today, I ask for my third lecture, "O, New Zealand" just what is the future for us:- that is pluralistic, but not a translation of the old British millets, that produces unity and strength, though not at the cost of monism, that is the result of rule *of* Law not rule *by* Law, that enhances our democracy, instead of compromising it? In the third and final lecture I shall be drawing on the latest thinking from the EU to demonstrate how this might be possible.