

Research Article

## The Constitutional Status of Yukon— A Normative Analysis

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**Abstract:** Because Yukon is established by an Act of Parliament, is it possible Ottawa could abolish it or alter the government's powers at will? The question of the legal position of Yukon in the federation is not straightforward. This article considers three pillars supporting the normative constitutional status of Yukon. The first is a review of functionality, which suggests that today Yukon operates essentially like a province. The second pillar is permanence. It is suggested that the structure of public government, the democratic rights of Yukoners, and the rights of Yukon First Nations, together operate to limit Parliament's power to unilaterally change the *Yukon Act* without the agreement of the people of Yukon. The final pillar is sovereignty. As a result of devolution and responsible government, it is suggested that the Yukon government's sphere of power is now protected from unilateral interference by Parliament. While there has been no constitutional amendment, these pillars support an interpretation that the "constitution-in-practice" has been altered. At the same time, the majority of Yukon First Nations have constitutionally protected rights and are now self-governing. This article concludes that the traditional binary view of the federation comprised of provinces and the federal government needs to be reimagined. The normative constitutional framework must embrace a broader vision that accommodates asymmetries in status and authority, acknowledges a permanent and sovereign place for Yukon and the other territories, and makes space for participation by Indigenous peoples in governance of the federation.

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## Part I. Introduction

K.C. Wheare defined the “federal principle” as the “method of dividing powers so that the general and regional governments are each, within a sphere, coordinate and independent.”<sup>1</sup> Canada’s Constitution<sup>2</sup> establishes a central federal government<sup>3</sup> and ten provinces<sup>4</sup> and sets out an exclusive division of powers between the two orders of government.<sup>5</sup> In practice, Canada is considered to have a federal government that meets Wheare’s definition.<sup>6</sup> However, Yukon<sup>7</sup> and the other two territories of Canada—the Northwest Territories and Nunavut—are separate subnational territorial sites of public<sup>8</sup> government but do not fit neatly into this constitutional structure.

The territories<sup>9</sup> are established by “ordinary” Acts of Parliament, which suggests that they could be abolished, or their powers altered at will by Ottawa. However, the question of the normative constitutional status and place of the territories in the federation is not as straightforward as that.

In the past, the territories were easily overlooked on the national stage because they are in the periphery and not part of the conventional federal system. This is changing, however, as mature public government in the North<sup>10</sup> evolves and as Indigenous<sup>11</sup> peoples of the North become self-governing and make legitimate claims for a role in governance of the federation.<sup>12</sup>

The North is also taking on new economic and geopolitical importance because of the melting polar ice.<sup>13</sup> The potential for an ice-free Northwest Passage<sup>14</sup> and intensifying interests in oil, gas, and mineral resources<sup>15</sup> create opportunities as well as complex ecological, governance, and sovereignty challenges.

Yukon, the most westerly of the territories, was established as a distinct polity in 1898 in response to the influx of people during the Klondike gold rush.<sup>16</sup> At that time, Indigenous peoples also lived on the land that would become Yukon, as they had for thousands of years.

Over its 122-year existence, Yukon has experienced a “profound political revolution.”<sup>17</sup> The relationship of public governance and Indigenous rights has been critical to this evolution. The Yukon government was initially operated as an extension of a federal government department. As a result of devolution over the years, however, it now has representative and responsible public government with essentially provincial-like powers. At the same time, as a result of negotiations over several decades, eleven of the fourteen Yukon First Nations have entered into modern treaties and have self-government powers.<sup>18</sup>

It is against this backdrop that the constitutional status of Yukon within the federation is examined. While aspects of this article apply to the Northwest Territories and Nunavut, the specific status of each of them would need to be considered separately taking into account their histories and governance structures.<sup>19</sup>

There are various possible models for subnational public governance structures, ranging from a “central outpost”<sup>20</sup> to those that have more impact on people’s lives than a national government.<sup>21</sup> In the Canadian context, a conventional approach would be to view these subunits “below” the central state on a continuum, with provincehood at one end as the “ultimate” goal, and a mere federal agent or delegate at the other.

In order to locate Yukon on the continuum, this article begins with a brief description of the creation of Canada and the evolution of Yukon to set the context.

A discussion of three pillars supporting the constitutional status of Yukon follows, starting with an empirical review of functionality compared to a province. Next is an evaluation of the permanence of Yukon based on the principle of democracy. Legislative sovereignty over devolved matters is considered as the third pillar. Based on this analysis, which combines both positive and normative elements, it is suggested that Yukon is as close to being a province as is possible without direct constitutional amendment. As a result, the Canadian “constitution-in-practice”<sup>22</sup> should now be characterized not only by formal federalism but also by “devolutionary federalism.”<sup>23</sup>

It is clear that Wheare’s definition is no longer a complete description of Canada. Rather, an expanded vision of the federation is required<sup>24</sup>—one that transcends both the traditional federal/provincial dichotomy and the linear conception of subnational units that assumes provincehood is the ultimate goal.

It is suggested that the Canadian constitutional universe may be theorized as a constellation where status is not the sole defining feature and members may have varying authorities, though all have a role in the governance of the federation. In this universe there is respect for the constitutional principles of federalism; democracy; the rule of law and constitutionalism; and protection of minorities. However, there is also an acknowledgement that there is a place for Yukon—and indeed the other territories as well as Indigenous governments—to participate in governance in the federation, despite asymmetries in status and authority.

This normative account of the Canadian political existence invites us to invoke our “constitutional imagination”<sup>25</sup> to reveal “new ways of conceiving the boundaries of practical political action”<sup>26</sup> to ensure an inclusive and democratic society for all Canadians.

## **Part II. Background**

Because public governance in Yukon and in the other two territories is “anomalous within the Canadian federal system”<sup>27</sup> a précis of the creation of the country and the evolution of Yukon will be of assistance to set the context for the discussion of the constitutional status of Yukon today.

## A. Creation of Canada

Under the *Constitution Act, 1867*,<sup>28</sup> the Provinces of Canada (Ontario and Quebec), New Brunswick, and Nova Scotia formed the Dominion of Canada.<sup>29</sup> That Act sets out a list of exclusive powers for the central Parliament and each of the provinces.<sup>30</sup>

In 1870, Rupert's Land was transferred to Canada along with the North-Western Territory,<sup>31</sup> part of which was then established as the province of Manitoba. The remaining part was constituted as the Northwest Territories.<sup>32</sup> Jurisdiction to create new provinces<sup>33</sup> and to "make provision for the administration, peace, order and good government"<sup>34</sup> of any territory not within a province was conferred on Parliament. Thus, Parliament's jurisdiction in the North is not limited by the division of powers.

The colony of British Columbia joined "Confederation" in 1871 and Prince Edward Island joined in 1873. In 1898, the Yukon Territory was carved out of neighbouring Northwest Territories and established as a separate territory. The Northwest Territories was also the "geographic quarry"<sup>35</sup> for Alberta and Saskatchewan, which were created as provinces in 1905. Newfoundland joined confederation in 1949 and in 1999, the Northwest Territories was divided to create a new territory of Nunavut. Thus Canada is now comprised of ten provinces and three territories.

This capsule account of Canada, however, only tells part of the story. When Europeans arrived in what would become Canada, Indigenous peoples were living in their own communities with distinct cultures and governing themselves according to their own laws and customs,<sup>36</sup> but there was no formal role for them in Confederation.<sup>37</sup> In the Constitution, Parliament was assigned responsibility for "Indians and lands reserved for the Indians."<sup>38</sup>

In 1982, the rights of Indigenous peoples gained explicit constitutional recognition and protection.<sup>39</sup> Negotiations of comprehensive land claim and self-government agreements are now viewed as the "best approach"<sup>40</sup> to pursue reconciliation. Indigenous governments are also involved with provinces, territories, and the federal government in various intergovernmental fora, though they do not necessarily always have the co-equal role they seek.<sup>41</sup>

## B. Evolution of Yukon

When Yukon was first established, a federally appointed commissioner governed it with advice from the responsible federal minister or the federal Governor in Council as well as an appointed six-member legislative council.<sup>42</sup> Yukon operated essentially under a "colonial regime."<sup>43</sup> In response to local demands for representation, the governance structure evolved to a hybrid model, and

then to a fully elected council by 1908.<sup>44</sup> Following the gold rush, the existence and composition of the council waxed and waned.<sup>45</sup> Even with a fully elected council, though, the commissioner still had full executive authority and a veto over legislation. This continued to foment resentment on the part of Yukoners who lobbied for change.<sup>46</sup>

Through the 1960s and 1970s, elected officials started to take on greater authority culminating in a letter issued in 1979 by the federal Minister of Indian Affairs and Northern Development Jake Epp, which formally instructed Commissioner Christensen to institute responsible government in Yukon. Christensen was to constitute an executive council (cabinet) composed of elected members chosen by the premier, remove herself from the day-to-day affairs of government, and act only on the advice of the executive council or legislative assembly.<sup>47</sup> With the “Epp letter” and the introduction of party politics, “most of the characteristics of provincial-style government had been instituted.”<sup>48</sup> In the 1980s and 1990s public government continued to evolve. Today, Yukon has a modern Westminster style of government<sup>49</sup> and the principles of responsible government are reflected in the modernized *Yukon Act*.<sup>50</sup>

As evolution of public government was occurring, Yukon First Nations presented their proposal in 1973<sup>51</sup> for negotiation of treaties. Today eleven of the fourteen Yukon First Nations<sup>52</sup> have comprehensive modern treaties<sup>53</sup> that are given force through legislation<sup>54</sup> and protected by the constitution.<sup>55</sup> The related self-government agreements are not treaties but do provide for extensive powers of self-government<sup>56</sup> and are given effect through legislation.<sup>57</sup>

Over the years, control over most provincial-like programs had been devolved to the Yukon government, however, devolution of natural resources only occurred in 2003<sup>58</sup> once a majority of Yukon First Nations had settled their claims. This was a crucial stage in devolution as it provided “effective control over the most important elements in the territorial economy.”<sup>59</sup>

Today, Yukon First Nation final and self-government agreements provide a foundation for innovative and evolving cooperative governance between public government and First Nations.

### **Part III. Comparative “Postfunctionalist”<sup>60</sup> Analysis**

With that background to set the context, we can now turn to an analysis of the status of Yukon, the first pillar of which is its governance function. A positive intra-country comparative analysis of the structure of governance with a province will assist in locating the relative position of Yukon on the constitutional continuum.

In theorizing subnational structures of governance, Hooghe et al. have employed what they term a “postfunctionalist” approach because of their assertion that governance is measured not only “by its functionality but by its emotional resonance.”<sup>61</sup> The design of governance structures has intrinsic significance for people as it is one key way in which identity is reflected.<sup>62</sup> In a composite polity, people are positioned in a relational way to both the central state and sub-state governments.<sup>63</sup> In Canada, people are “Canadians” and they are, for example, “Yukoners” or “British Columbians” as well.

Hooghe et al. use multiple dimensions to measure regional authority, taking into account domains of self-rule and shared-rule.<sup>64</sup> They have profiled and scored the territories and provinces of Canada as well as eighty other countries.<sup>65</sup>

These dimensions form the basic framework for this assessment though they have been materially adapted here to more fully explicate the similarities and differences between Yukon and a province.

## **A. Self-Rule<sup>66</sup>**

### **1. Representation<sup>67</sup>**

As described previously, Yukon now has a fully elected representative government.

### **2. Institutional Depth and Policy Scope<sup>68</sup>**

These two dimensions are concerned with independence from control of the central state and the scope of autonomous policy decision-making.<sup>69</sup> Legislative power, responsibility for programs and services, the court system, the application of the Charter of Rights and Freedoms (the Charter),<sup>70</sup> and the role of the head of state are considered below in assessing these dimensions.

The *Yukon Act* was replaced in its entirety in 2003 and now essentially replicates the provincial list of legislative powers for the Yukon Legislature.<sup>71</sup> Yukon’s legislative powers are not exclusive, however, and a federal law prevails in the event of a conflict with a Yukon law.<sup>72</sup> Notably though, validly enacted provincial and federal laws may on occasion be in conflict<sup>73</sup> even though their jurisdictions are exclusive, and federal paramountcy applies in that case as well.<sup>74</sup>

Federal powers to direct the commissioner to reserve assent to a bill and disallow a law made by the Yukon Legislature are included in the *Yukon Act*.<sup>75</sup> Constitutional experts contend that similar federal powers in respect of provincial legislation,<sup>76</sup> which have not been used since 1943, have been abandoned.<sup>77</sup> The last time these powers were used by the federal government in Yukon was 1982.<sup>78</sup> Judicial pronouncements,<sup>79</sup> the application of the Charter, availability of judicial review, and democratic responsibility<sup>80</sup> suggest that they would no longer be used in Yukon either.

Yukon also has responsibility for essentially the same programs as are under provincial jurisdiction with only a couple of anomalous and historic exceptions.<sup>81</sup> There is a legal point of departure from a province, however, with respect to ultimate “ownership” of the natural resources on public land,<sup>82</sup> as in Yukon they continue to “belong” to Her Majesty in right of Canada.<sup>83</sup> The Yukon government has the same powers a province has to regulate and sell public land and retain the proceeds. However, the *Yukon Act* provides that the federal government can unilaterally “take back” land or resources in Yukon in limited circumstances (e.g., national interest)<sup>84</sup> though that has never occurred.

With respect to the courts, while the judicature provisions of the constitution<sup>85</sup> do not apply to Yukon, the Yukon superior courts<sup>86</sup> and Yukon’s territorial court<sup>87</sup> are organized, and function, in the same way as their counterparts in a province. Because the Charter applies equally to the territories and provinces,<sup>88</sup> the relationship of the Yukon government with its citizens in relation to their rights and freedoms is also identical to that of a province with its citizens.

Finally, with respect to the head of state, the governor-general is the representative of the British and Canadian monarch at the federal level<sup>89</sup> and a lieutenant-governor fulfills this role at the provincial level.<sup>90</sup> The commissioner is the head of state for Yukon.<sup>91</sup> While the federal government appoints a lieutenant-governor,<sup>92</sup> it was decided early on in Canada’s history that a lieutenant-governor is the representative of the monarch for all purposes of the provincial government and is not an agent of the federal government.<sup>93</sup> The question of the status of the commissioner as an agent of the Crown or of the federal government, however, remains unsettled.

The preamble of the *Yukon Act* acknowledges that Yukon has a system of responsible government that is similar in principle to that of Canada.<sup>94</sup> The commissioner is also appointed by the federal government<sup>95</sup> and fulfills the same functions as a lieutenant-governor.<sup>96</sup> A previous provision that required the commissioner to act on instructions from the federal government has now been repealed.<sup>97</sup>

Whether there exists a “Crown in right of Yukon” is sometimes conflated with the question of provincial status,<sup>98</sup> but they are not necessarily the same question. For example, there exists a Crown in right of the Northern Territory of Australia even though self-government there is achieved through an Act of Parliament.<sup>99</sup> Federal ownership of public land is also not a deciding factor because this was the case in the prairie provinces until 1930.<sup>100</sup> Nor is the difference in the title determinative given that the constitution acknowledges that a chief executive may be called by other titles.<sup>101</sup> When the *North-West Territories Act* was first enacted in 1875, the chief executive of the territories was styled lieutenant governor.<sup>102</sup>

The paramountcy of federal laws over Yukon laws is akin to the relationship of the laws of the Imperial Parliament to laws of Parliament prior to the *Statute of Westminster*<sup>103</sup> so does not decide the issue of whether there exists a Crown in right of Yukon either.

Lastly, the lack of a reference to the Yukon commissioner in the constitution is not conclusive as the status of the lieutenant governor is not explicitly set out in the constitution either and had to be decided by the courts.<sup>104</sup>

The concept of a “Crown in right of” recognizes that the Crown acts through different governments in the exercise of its functions. This construction is necessary in a federation to accommodate the somewhat misleading concept of the indivisibility of the Crown.<sup>105</sup> Recognition of a Crown in right of Yukon would not have “some near mystical significance”<sup>106</sup> nor would it mean that Yukon is now a province. Rather, what it signifies is that Yukon is a government with legislative and executive powers.<sup>107</sup>

The Supreme Court of the Northwest Territories confirmed in 1999 that it had long been recognized that the territorial government and its institutions are not agents or delegates of the federal government when acting within their spheres of power.<sup>108</sup> Two years later, though, in what was arguably *obiter dicta* (opinion incidental to the decision), the Federal Court of Appeal stated in respect of the Northwest Territories that there is no “territorial” Crown.<sup>109</sup> However, the question does not appear to have been fully argued before that court. In any event, the status of the Yukon commissioner under the modernized *Yukon Act* has not been determinatively settled.

On one level this issue has only symbolic importance given that functionally the commissioner’s role is “almost indistinguishable from a lieutenant-governor.”<sup>110</sup> However, as Loughlin notes, “constitutions are required to serve both instrumental and symbolic purposes.”<sup>111</sup> If normatively Yukon is considered a permanent and sovereign member of the federation as this article suggests, recognition by the federal government of the concept of a Crown in right of Yukon should follow.<sup>112</sup>

### 3. Fiscal Autonomy and Borrowing Autonomy<sup>113</sup>

Yukon has full provincial-like taxation powers and powers to raise revenues.<sup>114</sup> With respect to actual revenues, however, Yukon is not subject to the equalization provisions of the Constitution<sup>115</sup> and most of the territorial budget flows from Ottawa.<sup>116</sup> The dependence on federal financing is a reflection of Yukon’s small population of 36,000,<sup>117</sup> lack of mature economy, and higher costs due to distances and climate.<sup>118</sup> As one consequence of this dependence, the federal government sets a borrowing limit for the Yukon government.<sup>119</sup>

## **B. Shared-Rule<sup>120</sup>**

### **1. Law Making<sup>121</sup>**

Under the second domain for the measurement of regional authority, the first dimension is concerned with the role of the regions in selecting representation at the centre.<sup>122</sup> Yukon has one elected member of Parliament,<sup>123</sup> however the federal government chooses and appoints all senators, including Yukon's one senator.<sup>124</sup>

### **2. Executive Control<sup>125</sup>**

While there is a division of powers under the Constitution, there is an interdependence among governments in Canada related to policy and "interprovincial" matters necessitating cooperative approaches.<sup>126</sup> The Constitution, however, does not make explicit provision for intergovernmental arrangements. As a result, "dense institutional arrangements have developed in an ad hoc, informal"<sup>127</sup> manner. The First Ministers' meeting is the apex of this "cooperative federalism,"<sup>128</sup> also referred to as "executive federalism."<sup>129</sup>

The role of the territories in cooperative federalism has evolved.<sup>130</sup> Since 1992, the territories have been full participants in First Ministers' meetings and in the Council of the Federation.<sup>131</sup>

### **3. Constitutional Reform<sup>132</sup>**

This final dimension of shared-rule is concerned with the ability to amend the Constitution. The *Yukon Act* is Yukon's constitution. Because it is a federal Act, Yukon cannot amend its own constitution in the same way a province can.<sup>133</sup> Significantly, though, as part of the modernization of the *Yukon Act*, there is now a statutory requirement for the federal government to consult with the executive council before any amendment to or repeal of the Act<sup>134</sup> and the legislative assembly may make recommendations to the federal minister with respect to amendment or repeal of the Act.<sup>135</sup>

Still, there is no formal role for any of the territories<sup>136</sup> in the amendment of the constitution.

## **C. Concluding Observations on Comparative Governance Functions**

Overall, Hooghe et al. score Yukon at fifteen on self-rule and the provinces at seventeen, the difference attributable only to the borrowing limit.<sup>137</sup> On shared-rule, provinces score six while Yukon scores four because of the lack of a formal role in constitutional reform.<sup>138</sup>

This empirical comparison demonstrates that functionally Yukon's institutional and legislative independence and governance structures are almost equivalent to those of a province. It is not suggested here that Yukon has

become an actual province through some form of “constitutional Darwinism.”<sup>139</sup> However, the difference today is mainly in status rather than in powers.<sup>140</sup> Viewed through the postfunctionalist lens, this difference has little impact on the lives of the people of Yukon who interact with, vote for, and are governed by their territorial government in the same way other Canadians relate to their provincial governments.

#### **Part IV. Permanence of Yukon**

Having established the near-equal functionality with a province, the second pillar of the constitutional status of Yukon relates to permanence. Could Ottawa simply repeal the *Yukon Act* and thereby abolish Yukon and its governmental institutions or amend the Act to materially alter the powers or institutions of government? The status of the *Yukon Act* as an “ordinary” Act of Parliament suggests that this could be the case, subject only to the requirement for consultation with the executive council.<sup>141</sup>

Some authors contend that Yukon’s “existence is accepted as permanent.”<sup>142</sup> While that may be true, the question of permanence is about more than just a “remote possibility . . . of abolition,”<sup>143</sup> or significant amendment, and the resulting complex web of details that would have to be addressed. Rather, it speaks to the place of Yukoners in Canada, and how they imagine their lasting political existence<sup>144</sup> in the federation.

In the following Part, it is suggested the *Yukon Act* now has quasi-constitutional status, and this together with the democratic rights of Yukoners and the rights of First Nations operate to limit Parliament’s power to unilaterally repeal or significantly amend the *Yukon Act* without agreement of the people of Yukon.

##### **A. *Yukon Act* as a Quasi-Constitutional Statute**

Within the Canadian constitutional framework, there are federal and provincial statutes that are not included in the definition of the constitution<sup>145</sup> but which are “constitutional in the sense that they establish or regulate some of the important institutions of the country.”<sup>146</sup>

The status of the *Yukon Act* has not been considered by the courts. We can, however, look to the United Kingdom (UK) for some guidance in relation to the status of statutes establishing devolved governments. There are significant differences in the circumstances of the UK due to the unitary nature of the state, the history of the constituent nations, and the lack of an entrenched written constitution. Nevertheless, there are some parallels that may be of assistance.

The *Scotland Act 1998*,<sup>147</sup> the *Northern Ireland Act 1998*,<sup>148</sup> and the *Government of Wales Act 2006*<sup>149</sup> have all been held to be constitutional statutes.<sup>150</sup>

Distilling the relevant principles from the case law, Ahmed and Perry suggest that “a constitutional statute is a statute that is about state institutions and which substantially influences, directly or indirectly, what those institutions can and may do.”<sup>151</sup>

Applying this definition, the *Yukon Act* “creates or regulates a state institution”<sup>152</sup> and is of “great direct importance”<sup>153</sup> as it establishes the Yukon legislature and executive government including the office of the commissioner. Indirectly it is also of importance as all of Yukon statutes and delegated legislation depend on the Act, as do the existence of municipal governments and their bylaws. The *Yukon Act* also has a significant indirect effect on the final and self-government agreements of Yukon First Nations. One of the central concepts underpinning the agreements is that each First Nation has a traditional territory within Yukon<sup>154</sup> and the territorial boundaries of Yukon are established in the *Yukon Act*.<sup>155</sup> There are instances as well where the substance of the final and self-government agreements are premised on the existence of Yukon institutions of public government.<sup>156</sup>

The final agreements also provide for various regulatory or advisory boards with guaranteed representation from the First Nations.<sup>157</sup> The agreements contemplate devolution of powers to the Yukon government and in respect of the majority of these boards, the Yukon government now fulfills the role assigned to “Government.”<sup>158</sup>

Because of the *Yukon Act*'s subject matter and its direct and indirect impacts, it is suggested that it is beyond dispute that it would be considered constitutional in nature. A key implication of this status is that the Act, like the Acts establishing devolved governments in the UK, would not be subject to the doctrine of implied repeal<sup>159</sup> or a presumption that it is “consistent with an earlier ordinary statute.”<sup>160</sup>

These doctrines are interpretive devices that have developed in response to the concept of parliamentary sovereignty, which suggests that Parliament has “the right to make or unmake any law whatever.”<sup>161</sup> Primacy clauses are sometimes included in legislation in order to defeat the application of the doctrines.<sup>162</sup> However, the Supreme Court of Canada has recognized a “hierarchy of statutes”<sup>163</sup> in finding that human rights legislation takes precedence over later inconsistent legislation, even in the absence of a primacy clause, because of the special quasi-constitutional nature of such legislation.<sup>164</sup>

The *Yukon Act* does not contain a primacy clause to address any potential conflict with another Act of Parliament. This is not surprising given that the Act is of a different order than most other legislation. However, one would reasonably expect that an Act establishing institutions of democratic government for one of the subnational jurisdictions in Canada would only be subject to repeal or amendment through explicit legislative action.

## B. Limits on Unilateral Repeal or Amendment by Parliament

### 1. The Democracy Principle

The general rule is that statutes that are not included in the definition of the constitution<sup>165</sup> can be repealed or amended by the ordinary legislative process. However, the Diceyan concept of the sovereignty of Parliament (that is, the concept that Parliament may make or unmake any law at all) must, in the Canadian context, be modified to account not only for constitutional constraints such as the division of powers and the application of the Charter, but also for constitutional conventions that “regulate the working of the constitution”<sup>166</sup> and operate to limit government action in practice, even if they may not be strictly enforceable by the law courts.

In the *Reference re Secession of Quebec* case (the *Secession Reference*), the Supreme Court of Canada reiterated that in addition to the written constitutional texts comprising the constitution, there are unwritten rules “which govern the exercise of the constitutional authority in the whole and in every part of the Canadian state.”<sup>167</sup> Four principles identified by the court are federalism; democracy; constitutionalism and the rule of law; and protection of minorities. These principles “assist in the interpretation of the text and delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of our political institutions.”<sup>168</sup> And while one cannot dispense with the written constitutional text, the court held that these conventions “may in certain circumstances give rise to substantive legal obligations ... which constitute substantive limitations on government action” as the conventions are “invested with a powerful normative force, and are binding upon both courts and governments.”<sup>169</sup>

In respect of the principle of democracy, the Court reminds us that democracy is not just concerned with the “process of government,” but is connected to “the promotion of self-government.”<sup>170</sup> Democracy is the expression of “the sovereign will of the people”<sup>171</sup> and “consent of the governed”<sup>172</sup> is essential in a democracy. While institutions of democracy must be based on a legal foundation, “a political system must also possess legitimacy” and reflect “the aspirations of the people.”<sup>173</sup> The Court here is reflecting the understanding that constitutionalism in the modern era is founded on the premise that the power of government flows from the people and can only be exercised through constituted bodies that draw their authority from the people.<sup>174</sup> The constituent power remains alive even after the establishment of the constitution,<sup>175</sup> and the constituent and the constituted exist in a symbiotic relationship.<sup>176</sup> This gives “constitutions their open, provisional, and dynamic qualities, keeping them responsive to social change.”<sup>177</sup> All of this is encapsulated in the court’s articulation of the democracy principle.

As noted, in a federal system, people are positioned in this relational way to both their national and subnational governments. This is the case for the people of Yukon as well as the people of the provinces. While governance structures have evolved over time, Yukon has been a “separate geographical and political entity within Canada since 1898.”<sup>178</sup> Yukon’s ethos has been shaped by many factors including the momentous impacts of the gold rush and construction of the Alaska Highway; both federal hegemony and federal neglect; its vast wilderness and remoteness; its rich mineral potential and the related “bust and boom” economy; and important steps taken toward reconciliation with Yukon First Nations, including through the final and self-government agreements. As a result of all of this, Yukon has come of age and today, many Yukoners, both “Aboriginal and non-Aboriginal—exhibit fierce loyalty and a distinctive pride in the territory, every bit as strong as the loyalties”<sup>179</sup> of provincial residents to their provinces.

The establishment and maturation of institutions of government, the process of devolution, and the enactment of a modernized *Yukon Act* reflect the long-sought control over their own affairs by Yukoners and a rejection of an anti-democratic “Ottawa-run colonial regime.”<sup>180</sup> This is consistent with the tradition in Canada of “evolutionary democracy moving in uneven steps toward the goal of universal suffrage and more effective representation.”<sup>181</sup>

A comparison with the political development of Canada itself at this juncture is instructive given that the evolution of Yukon within Canada parallels in many ways the evolution of Canada within the British Empire.<sup>182</sup> In British North America there was an evolution from the period when the Imperial Parliament asserted absolute sovereignty over the colonies (1760–1847), to grants of responsible government beginning in 1848, to autonomous government at the time of Confederation in 1867, to independence as a result of the *Statute of Westminster* in 1931, and finally to full “constitutional independence”<sup>183</sup> in 1982 with the “patriation” of the Constitution.<sup>184</sup> The principle of democracy, also fundamental to the British constitutional system, meant that the Imperial Parliament never unilaterally rescinded a grant of responsible government<sup>185</sup> and never amended the Canadian constitution without the “vital role”<sup>186</sup> of Canadian consent. This is exemplified by the 1982 amendments to the Constitution made by the UK Parliament. As the Supreme Court of Canada noted, “the legitimacy as distinguished from the formal legality of the amendments derived from political decisions taken within Canada.”<sup>187</sup>

It is also of assistance for comparison purposes to recall issues of permanence in Scotland. Devolution through the establishment of the Scottish parliament and government occurred in 1998 following a referendum on devolution in 1997.<sup>188</sup> The issue of permanence of Scottish government institutions was addressed by the UK Parliament in the aftermath of the 2014 Scottish independence referendum,

by adding a section to the *Scotland Act 1998* stating that the Scottish parliament and government are a permanent part of the constitutional arrangements of the UK and are not to be abolished except on the basis of a Scottish referendum.<sup>189</sup>

In considering this gesture, Walker asserts that while there may be some expressive value in a statutory form, more assurance “lies in the political force of established convention or common accord.”<sup>190</sup> Indeed, Brouillet and Mullen agree that “the autonomy of devolved government is strongly protected by the non-legal principles of the constitution and political reality.”<sup>191</sup>

Unlike the *Scotland Act 1998*, the *Yukon Act* does not contain a statutory commitment to permanence. A certain legal stability can be said to exist for Yukon, however, in the fact that the Charter specifies that it applies to Yukon and its legislative body, and includes recognition of the right of Yukon citizens to vote in elections for their legislative assembly and for the federal House of Commons.<sup>192</sup> This protects the democratic rights of Yukoners and provides some constitutional recognition of the Yukon legislature.<sup>193</sup> As noted previously, the constitution also explicitly provides for representation in the centre for Yukon.<sup>194</sup> If these constitutional rights were to be attenuated by Parliament through repeal of or significant amendment to the *Yukon Act*, a constitutional amendment would be required, which underscores the *gravitas* of any such measure.<sup>195</sup>

Aside from these provisions, the *Constitution Act* under which Yukon was established says nothing about the permanence or constitutional status of a territory.<sup>196</sup> Any new province established by Parliament under that same Act<sup>197</sup> was governed by existing constitutional architecture, which informed the status and powers of the province. There is no such frame for a territory other than to say it is not a province.

Given both the historical and normative context of the development of Yukon and its place as a discrete and important demos within the Canadian federation today, it is suggested that the binding force of the principle of democracy fills this gap in the constitutional text<sup>198</sup> and helps to build out a framework within which to consider the status of a territory. On the question of permanence, the effect is that Parliament’s normative ability to repeal or significantly amend the *Yukon Act* is now limited except perhaps in pathological circumstances.<sup>199</sup>

In the *Secession Reference*, the democratic principle demanded “that considerable weight be given to a clear expression by the people of Quebec of their will to secede.”<sup>200</sup> Here we are considering a situation that in some ways is the reverse—that is, the ability of Parliament to unilaterally abolish or materially diminish Yukon’s system of democratic government. Unlike in Scotland, there was no referendum on devolution in Yukon given that it was a process over many years and there was no single defining moment, or “constitutional novation,”<sup>201</sup> in respect of which to have a vote. Nevertheless, it is suggested that the democratic

principle would require that considerable weight be given to the clear expression by the people of Yukon in order to now abolish or diminish their government, with a corresponding obligation on the federal government to principled negotiations.<sup>202</sup> Arguably this is reflected in the requirement for the federal government to consult the executive council before any repeal or amendment of the Act, and the ability of the legislative assembly to make related recommendations.

This proposal rejects a formalistic interpretation of the Constitution in favour of a more nuanced approach, which recognizes that Parliament's jurisdiction is conditioned by the requirement for legitimacy. Legitimacy, in turn, depends on the democratic will of the people of Yukon. This is similar to the political constraints that limit the ability of the UK Parliament to overturn Scottish devolution. It also has some parallel in the situation of Westminster as a "bare legislative trustee"<sup>203</sup> in relation to Canada prior to 1982. This approach recognizes that a grant of responsible government is "a watershed moment"<sup>204</sup> and, once granted, cannot be unilaterally rescinded.<sup>205</sup>

There will no doubt be those who assert that while this approach may not be objectionable in principle, the reality of Yukon's small population and dependence on federal funding tilts the balance of power and would permit Parliament to legitimately repeal or amend the *Yukon Act* as it sees fit.

The first point in response is that it cannot be definitively predicted that the financial position of Yukon will for all time remain at its current level. The fortunes of the provinces have ebbed and flowed dramatically at times influenced by many factors including discovery of and prices for non-renewable resources, trade, population demographics, and globalization. As a result, the fiscal arrangements between the federal government and the provinces have undergone many changes in 153 years of Confederation.<sup>206</sup>

There is a "vertical imbalance"<sup>207</sup> in Canada as a result of the division of powers, with major taxing authority residing at the federal level, but responsibility for expensive health, welfare, and education programs residing with the subnational governments. This necessitates transfers from the federal government to all of the provinces. There are also "horizontal imbalances"<sup>208</sup> in the revenue-raising ability of the provinces and these are addressed through equalization payments. Similar principles also underpin financial transfers to Yukon.

The vertical and horizontal imbalances today are more pronounced in the North. However, the federal government and all Canadians have an interest in prosperity and security in the North in an era when global interest in the circumpolar regions of the world is on the rise. In addition, even if federal funding remains a significant aspect of Yukon's fiscal picture, this was the case when Parliament moved forward with establishing a democratic government in the territory. Financial dependence cannot legitimately be held as a trump card for all

time that can, at the will of a particular federal government, be used to abolish or diminish the democratic rights of Yukoners.

While levels of funding from the federal government may fluctuate as they do in the provinces, financial dependence should not affect the normative permanent status of Yukon's democratic structures of governance.

## 2. Rights of First Nations

In the *Secession Reference*, the court reiterated that protection of Aboriginal and treaty rights, “whether looked at in their own right or as part of the larger concern with minorities, reflects an important underlying constitutional value.”<sup>209</sup>

A repeal of the *Yukon Act* or material changes to the governance structures or powers of the Yukon government could have impacts on First Nations in Yukon. At a minimum, this would require consultation with the First Nation governments to ensure, among other things, the continued respect for Aboriginal and treaty rights, the integrity of “Government” commitments, and maintenance of the “political balances”<sup>210</sup> created through the final and self-government agreements. If such changes amounted to a de facto amendment to the agreements, the consent of First Nation governments would be required.

At the same time, giving effect to the democracy principle would not, and could not, derogate from the constitutionally protected Aboriginal or treaty rights or Crown obligations owed to Indigenous Peoples. These rights and obligations are addressed now in Yukon, as they are in provinces, through a series of bilateral and multilateral relationships among First Nation governments, the federal government, and the territorial or provincial government. A degree of entrenchment of the status of Yukon would not change this. Over time, the dynamics in the matrix of relationships in Yukon might come to resemble more closely those in a province. However, there is no template in this regard and the circumstances of the First Nations and the subnational government mandate the complex workings of these partnerships with the federal government.

## 3. Principles of Federalism, and Constitutionalism and the Rule of Law

Finally, the effect of the application of the democracy principle, as described above, on the remaining underlying constitutional principles must be considered because they all are required to function in symbiosis.<sup>211</sup>

While the interpretation suggested could be characterized as “post-colonial,” it presents no threat to constitutionalism and the rule of law that “lie at the root of our system of government.”<sup>212</sup> The jurisdiction of Parliament as the body that amends or repeals the *Yukon Act* is respected, though subject to the constraints imposed by the democracy principle and First Nation rights.

The authority of the provinces under the federalism principle would not be affected in any way either. It would not require constitutional amendment or changes to the machinery of executive federalism. An enhanced status may potentially lend more import to Yukon's voice on the national level, but that will continue to be influenced by factors such as population and economic clout, as is currently the case, even among the provinces.

## **Part V. Sovereignty at the Periphery**

Having considered functionality and permanence, the third and final pillar of Yukon's constitutional status involves an inquiry into Parliament's ability to legislate in respect of matters that have been devolved to the Yukon legislature.

### **A. Relational Sovereignty**

Sovereignty, as theorized by Loughlin, is a relational concept.<sup>213</sup> Political power, he writes, "does not reside in any specific locus"<sup>214</sup> but rather is generated from the relationship between government and its citizens.<sup>215</sup> Public power, in turn, exists when this political power is harnessed through the "institutionalization of authority."<sup>216</sup>

In a federal state the division of power is not a "division of sovereignty."<sup>217</sup> Rather, the constitutional framework provides an internal and coherent mechanism through which "the nation ... constitute[s] a system of government" and is thus an "elaboration of legal sovereignty."<sup>218</sup>

This legal sovereignty or jurisdictional competence, however, is only one aspect of sovereignty.<sup>219</sup> Harkening back to the discussion of the constituent power and constituted authority in relation to the democracy principle, sovereignty is an expression of the relationship between the people and the institutions of government.<sup>220</sup>

Sovereignty involves a "fluid ... interplay between law and politics"<sup>221</sup> that elevates our understanding beyond strict positivism and its tendency to "conceptualize extensive spheres of public life in legal terms."<sup>222</sup> Moving away from such "juridification" allows for an appreciation that the interpretation of legal rules "often depends on the social dimensions of normative authority."<sup>223</sup> This account of sovereignty can assist in understanding and explaining the relationship among Parliament, the Yukon government, and the people of Yukon.

Having devolved provincial-like powers to the Yukon government, the relational sovereignty has shifted and is now "locally sourced."<sup>224</sup> It is more than a mere delegation of powers from Parliament.<sup>225</sup> A territorial site of representative and responsible government has been established and Parliament has backed out of these areas of jurisdiction.

One of the benefits of the principle of federalism is that it recognizes diversity in the subnational jurisdictions and facilitates democracy by “distributing power to the government thought to be most suited to achieving”<sup>226</sup> societal objectives. Services provided by the central government tend to be uniform across the country and thus insensitive to local needs.<sup>227</sup> They are also more difficult to reform as they may require cross-country input.<sup>228</sup> Subnational governments in contrast can be more efficient as they are “better positioned to access and make use of local knowledge and context”<sup>229</sup> and because they can be more responsive.<sup>230</sup> This is reflective of the principle of “subsidiarity”<sup>231</sup> in the European Union context, which holds that “decisions affecting individuals should, as far as reasonably possible, be made by the level of government closest to the individual affected.”<sup>232</sup>

Federalism and democracy principles are thus mutually reinforcing. These principles are equally applicable to the citizens of Yukon who have democratic rights equivalent to those of their fellow Canadians. Indeed, as noted by the Supreme Court of Canada, the territories, as well as the provinces, vigorously pursue objectives related to protection of their cultures and autonomy in relation to local matters.<sup>233</sup>

At the time of devolution in 2003, representatives of the Yukon government, resource industries, and environmental watchdogs were united in their support for more local decision making<sup>234</sup> in contrast to the “remoteness of federal officials in Ottawa”<sup>235</sup> and their protracted decision-making processes.<sup>236</sup> Representatives of First Nations also saw the benefit in dealing with a closer public government that understood the “local needs and conditions.”<sup>237</sup>

It is suggested, then, that as in the case of the permanence of Yukon, the devolved sphere of power is now normatively protected from unilateral interference by Parliament. Quite apart from the fact that Ottawa is ill-equipped to manage the quotidian details of provincial-like programs, it no longer holds “political supremacy”<sup>238</sup> on these matters. While the spectre of its formal power to legislate in respect of the devolved matters may continue to be a “ghostly legal presence,”<sup>239</sup> the democratic principle requires that the legitimacy of any intrusion into Yukon’s capacity depends on the will of the people of Yukon expressed through their elected legislative assembly. This would not of course apply to Parliament’s authority to legislate in Yukon in the non-devolved areas, as it does in a province.

## B. An Emerging Constitutional Convention

Emerging as a supplement to the sovereignty claim, though perhaps in an inchoate state as yet, is a specific convention that also serves to limit Parliament's power to legislate in respect of devolved matters.

There is no explicit agreed-upon convention in Yukon similar to the Sewel convention<sup>240</sup> in Scotland, which provides that the UK Parliament will not normally legislate with respect to devolved matters without the consent of the Scottish Parliament.<sup>241</sup> However, a constitutional convention relating to the principles of responsible government<sup>242</sup> can develop over a period of time, eventually attracting "a sense of obligation or normative character."<sup>243</sup>

The first of the three requirements evidencing a convention is the existence of a precedent.<sup>244</sup> Parliament has not legislated directly in respect of a devolved matter in Yukon for many years and certainly not since 2003. In one instance Parliament made provision for the potential application of a Canada-wide endangered species law to matters under the control of Yukon; however, that law specifies that it applies only if an equivalent territorial law does not exist, and its application requires prior consultation with the Yukon government.<sup>245</sup> A similar arrangement applies in the provinces.<sup>246</sup> Thus, a precedent has arguably been set.

The absence of federal legislation, and the complex legislative mechanism employed in the endangered species legislation to avoid the indiscriminate application of a federal law to matters under Yukon's power, can reasonably be interpreted as some evidence that Parliament treats the convention as binding, which speaks to the second requirement.<sup>247</sup>

Lastly, the condition that there be a reason for the rule<sup>248</sup> is met by the democratic principle and the sovereignty that inheres between the Yukon government and the people of Yukon. Yukoners elect a Yukon government based on a platform for governance in respect of the devolved provincial-like matters. The people and the government are thus "bound together by the concept of representation."<sup>249</sup> Yukon has established over time the machinery of government to enact legislation, deliver programs and services, consult with stakeholders on proposed government action, and work with First Nations and other governments on matters of mutual importance. It would be democratically retrograde for Parliament to step back in and unilaterally legislate from afar on matters that have been devolved to Yukon and in respect of which Yukoners have a legitimate expectation will be dealt with by their elected territorial representatives. That Yukon has only one Member of Parliament in the 338 seat House of Commons brings into clear focus the democratic deficiencies that would be associated with federal legislation on matters of a local nature.

While the Sewel convention, as with any convention, is not strictly enforceable in the courts,<sup>250</sup> the UK Supreme Court recently acknowledged the importance of it in “facilitating harmonious relationships between the UK Parliament and the devolved legislatures.”<sup>251</sup> Even though Westminster still has the jurisdiction “to legislate in devolved fields, it has generally accepted the convention that it will not do so.”<sup>252</sup> A similar approach is suggested here. Both the principle of sovereignty and the evolving convention challenge a strict positivist assertion of the absolute legal authority of Parliament.<sup>253</sup> While Parliament retains the jurisdiction to legislate on any matter in Yukon, the legitimacy of any such action requires a balance between the political and the legal.

## **Part VI. The New Canadian Constitutional Universe**

Based on the three pillars of functionality, permanence, and sovereignty, Yukon is normatively as close to being a province on the constitutional continuum as possible without constitutional amendment. However, the question remains as to how the Canadian federation can appropriately account for this or indeed for the other territories. A further layer of complexity arises because the traditional view of the Canadian federation does not easily accommodate Indigenous governments either.

It is suggested in this Part that an expanded view of the Canadian constitutional universe is required, which is inclusive and democratic, and which can accommodate a constellation of members, despite differences in status and authorities.

### **A. The Constitution-in-Practice**

A constitution is a framework that serves as the platform to “constitute a political order and allow people engaged in politics to do things within that order.”<sup>254</sup> Constitutional interpretation is the means by which the constitutional order legitimately changes and adapts overtime<sup>255</sup> as reflected in the description of the Canadian Constitution as a “living tree.”<sup>256</sup>

Bell conceptualizes “vectors” along which constitutional change may occur.<sup>257</sup> The first is the “legal constitution,” which is revised when changed by means that it contemplates, such as amendment of the text or judicial interpretation.<sup>258</sup> There have been some revisions of the Canadian Constitution through amendment, the most significant in 1982.<sup>259</sup> Revision has also occurred as a result of judicial interpretation. The explicit terms of the *Constitution Act, 1867* that granted sweeping powers to the federal government appear to establish only a partially federal system.<sup>260</sup> But as the Supreme Court noted in the *Secession Reference*, “a review of the written provisions ... does not provide the entire picture.”<sup>261</sup> The

principle of federalism is a “response to underlying social and political realities”<sup>262</sup> and has played a key role in the interpretation of the written text of the Constitution by the courts.<sup>263</sup> The decisions of the Judicial Committee of the Privy Council had a deep impact as key members “believed strongly in provincial rights, and they elevated the provinces to coordinate status with the Dominion.”<sup>264</sup> These judicial interpretations revised the Constitution even though the text was not amended.

A further vector along which revision may occur is the “political constitution,”<sup>265</sup> which “sits alongside or even behind the legal constitution”<sup>266</sup> and reflects “the fundamental agreements on which the polity understands itself to be able to hold together.”<sup>267</sup> As Hogg notes, a federal nation could not survive and be successful without a means to adapt its constitution.<sup>268</sup> Most major change does not occur through the courts or through amendments.<sup>269</sup> As a country, Canada has changed tremendously since Confederation. Not only has the geographic area and population expanded, but dominant industries have also changed and grown. Technology has revolutionized transportation and communications. Government services have multiplied. Society today is more modern, pluralistic, and urban. Through all of this, the text of the Constitution has changed very little<sup>270</sup> and for the most part only incremental change has come from judicial interpretation.<sup>271</sup> Instead, in Canada, “cooperative federalism”<sup>272</sup> has been one means “to allow a continuous redistribution of powers and resources without recourse to the courts or the amending process.”<sup>273</sup>

Balkin employs the expression “constitution-in-practice”<sup>274</sup> to describe “how the constitution considered as an on-going institution operates at any point in time”<sup>275</sup> given the various adaptations made to meet the demands of the modern world. It is suggested that an interpretation today that accords a degree of permanence and sovereignty for Yukon based on its representative and responsible governance structures and democratic rights of Yukoners can be viewed as a revision of the political constitution of Canada. Framing it this way supplies a model for considering the place of Yukon in Canada in a way that acknowledges the “social and political realities”<sup>276</sup> that underpin the constitution-in-practice in the same way those realities shaped the interpretation of the principle of federalism in determining provincial authority.

Before proceeding any further with this analysis, however, there needs to be a word about Yukon’s provincial aspirations. Why “settle” for revision of the political constitution instead of pursuing constitutional amendment and full-fledged provincehood?

Since the “patriation” of the Constitution, establishment of a new province now requires approval of the House of Commons, the Senate, and two-thirds of the provincial legislatures representing at least half of the population of all of the provinces.<sup>277</sup> This is a high, perhaps unattainable, threshold and was not required

for the establishment of any of the six post-Confederation provinces<sup>278</sup> that were admitted by the federal government acting alone.<sup>279</sup> As Robertson describes it, these are now “black ball” rules as effective as any club could want.”<sup>280</sup>

The Yukon government unsuccessfully challenged the requirement for provincial agreement to territories becoming provinces in the context of the *Meech Lake Accord* in 1987<sup>281</sup> viewing it as “a substantial breach of faith and democratic principles with the people of the territorial North.”<sup>282</sup> Yukon was not seeking provincial status, but rather the right to gain it at the appropriate time, under terms comparable to those that applied to the other provinces.<sup>283</sup> The Court decided the issue was not justiciable though, with the result that “any path to provincehood for the territories”<sup>284</sup> has all but disappeared.

However, even if “joining the club” remained a viable legal option, it is not clear that attainment of provincehood, or at least provincehood as we understand it today, should be the goal. Robertson argues that “the financial regime of the provinces does not remotely fit the North”<sup>285</sup> and would require a change, or a special deal for the territories, which would be “a very large order indeed.”<sup>286</sup> Moreover, given the demographics and First Nation treaties and self-governments, political structures that best suit the circumstances of the territory may not conform to the provincial template.<sup>287</sup> So while conventional provincial status may be the norm for a subnational government, it does not have to be, and likely would not be the best option for Yukon.

Instead, devolution has been the means to accommodate the democratic aspirations of Yukoners. Often, devolution and federalism are theorized as alternative options in a unitary state such as the UK, with devolution sometimes viewed as the “poor cousin”<sup>288</sup> to federalism. However, while “devolution is, in principle, more hierarchical” than federalism, “the distinction is less clear in practice.”<sup>289</sup> Indeed in the UK context, Bogdanor suggests that “in practical political terms, the categories almost merge ... and yield a ‘quasi-federal’ system of government.”<sup>290</sup> Aroney refers to this as “devolutionary federalism.”<sup>291</sup> In Canada it can be said that both formal federalism and devolutionary federalism are at work and inform the constitution-in-practice.

## **B. Asymmetrical Federalism**

Devolutionary federalism and a new vision of the constitution-in-practice challenges the traditional dualistic federal/provincial view of Canada where the territories have been viewed as anomalous peripheral polities subject to the will of Parliament. It also leads one to consider how best to imagine a federation that can accommodate differences among the constituent members.

With respect to the issue of equality, there has long been a “profound ideological debate”<sup>292</sup> in Canada about “special status” for any of the provinces<sup>293</sup> and steadfast adherence to the mantra that a “province is a province is a province.”<sup>294</sup> However, Canada is a “complex multi-level”<sup>295</sup> state and the question of equality among the provinces is not straightforward.

There are immanent stresses and strains on equality as events of the recent past attest to, including attempts to accommodate Quebec’s national claim, the failed *Meech Lake Accord* discussions, and the rejection of the *Charlottetown Accord*.<sup>296</sup> There are also sharp horizontal asymmetries among the provinces in terms of influence, economic power, wealth, population, and geography.<sup>297</sup>

The constitutional situation of the provinces is not identical either.<sup>298</sup> Some sections of the Constitution apply “to only one or only some of the provinces”<sup>299</sup> and the terms of union for a province generally had unique terms enforceable only against that province.<sup>300</sup> However, as Hogg notes, “the differences are not so marked as to justify the description of “special status” for any province.”<sup>301</sup>

Despite these existing asymmetries, the narrative of equality dominates in relation to the subnational governments.<sup>302</sup> Often overlooked, however, is the asymmetry occasioned by the subordinate constitutional status of Yukon and the other territories. While not having the same rank as the provinces, the territories occupy an important part of the Canadian mosaic as reflected in the observation of the Supreme Court, that “since Confederation, the people of the provinces and territories have created close ties of interdependence (economically, socially, politically, and culturally) based on shared values.”<sup>303</sup>

The asymmetry is further enhanced because there are inter-territorial legal distinctions as well. While Yukon obtained control over its natural resources in 2003, the Northwest Territories had to wait until 2014 to assume these responsibilities. Nunavut has not yet done so and “is unlikely to do so in the near future.”<sup>304</sup> The texts of the Acts establishing each of the territories have some important variations.<sup>305</sup> Because Nunavut was established as the result of a federal commitment in the Inuit land claim agreement, this may mean there is “a level of protection from unilateral or arbitrary repeal by Parliament”<sup>306</sup> that is different than protections for Yukon or the Northwest Territories.

One must also consider that First Nation treaties and self-government agreements are examples of asymmetrical arrangements alongside the conventional structure of the federation. They provide for self-government and First Nation citizenship, and at the same time confirm that members of First Nations have rights as Canadian citizens and as residents of their province or territory.

So while the provinces may strive for formal equality among members of the provincial “club,”<sup>307</sup> asymmetry is already a fact of life in the Canadian constitutional milieu.

### **C. The Constitutional Constellation**

Rather than a linear constitutional continuum where “status” at the subnational level is the defining feature and provincehood the presumed goal, or a binary vision of the federation comprised only of provinces and the federal government, it is perhaps more helpful to conceive of the Canadian constitutional universe as a constellation comprised of the federal government, provinces, territories, and Indigenous governments. Members of the array do not necessarily all have equal authorities or roles, but all are important parts of the federal cluster.

While most of the provincial components of this universe may currently desire equality among themselves, the broader constitutional universe so imagined recognizes and can accommodate asymmetries that would not only recognize natural differences (such as size, population, history, etc.) among the units of a federation, but also formal differences in law among the units either with respect to jurisdictional powers and duties, the shape of central institutions, or the application of national laws and programs.<sup>308</sup>

Moreover, the place of the constituent members in the constellation is not necessarily fixed for all time<sup>309</sup> but can be subject to ongoing change driven by “political and pragmatic discussions about the appropriate locus of political decision making.”<sup>310</sup> The constitution-in-practice is fluid and evolving. This approach gives meaningful expression to the democracy principle and Yukon’s place in the federation. It can also accommodate differences among the territories. The principle of protection of minorities is also recognized by “making space”<sup>311</sup> for Indigenous governments “to participate in the governance of the federation.”<sup>312</sup> It respects the principle of federalism and the division of powers between the federal government and the provinces, but also recognizes that the Canadian constitution needs to adapt so that it is broadly and inclusively reflective of the principles that underpin it.

While the provincial blueprint informed the creation and functions of Yukon, in the reimagined constitutional universe we should now avoid the impulse to constantly compare it with a province and define Yukon by what it is not. Rather, Yukon should be viewed normatively as one of the members of the federal constellation with the power to forge its own future and the potential to be a leader in Canada in respect of advancing reconciliation with Indigenous peoples. At the same time, Yukon can participate fully with the other members, including Indigenous governments, in governing the federation in a mutually beneficial manner.

## Part VII. Conclusion

Yukon is now a distinct demos and important territorial site of democratic governance in Canada that normatively is accorded permanence and sovereignty. At the same time, the majority of Yukon First Nations have entered into modern treaties and self-government agreements, which create a solid and unique foundation for governance into the future. There are not many places in the world that have undergone “the intensity of peaceful ... change that has occurred in the Canadian North.”<sup>313</sup> The political and legal revisions occasioned by “devolutionary federalism”<sup>314</sup> and Indigenous self-government are “state-building constructions”<sup>315</sup> and have created new realities on the ground.

However, the traditional binary view of the federation as comprised only of a central government and ten provinces has not kept pace. Wheare’s federal principle is no longer in practice a comprehensive guide to the Canadian federation. The normative constitutional framework needs to embrace a broader vision of the nation to explain and accommodate the place of Yukon and the other territories, and make space for participation by Indigenous peoples in governance in the federation.

Invoking our “constitutional imagination”<sup>316</sup> to view the Canadian constitutional universe as a constellation, where status is not the lodestar and asymmetries in the array are permitted, offers an alternative perception of our lived experience<sup>317</sup> and helps to achieve a more complete confederation.

Innovation through interpretation resulting in changes to the constitution-in-practice is not a new phenomenon in Canada, and is essential to the continued success of the country. This approach does not undermine the Constitution or the principles that underpin it. Indeed it sustains democracy and the protection of minorities and is reflective of federalism through recognition of those same “underlying social and political realities”<sup>318</sup> that have shaped the Constitution to date. The position and authorities of the provinces and the federal government are respected though the universe in which they operate has expanded. A more inclusive approach to federalism is the basis for a continuing democratic and just society in Canada and a means to effectively address the challenges of the twenty-first century.

## Notes

1. KC Wheare, *Federal Government* (Oxford University Press, 1963) at 10.
2. The Canadian constitution is comprised of several documents referred to in the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11, Part VII – General, s 52 [*Constitution Act, 1982*]
3. The term “federal government” is used in a general sense in this article to denote either the central legislative body of Parliament or the federal executive government. The term “Ottawa” is also used to describe the federal government or Parliament given that this is the capital of Canada and seat of the federal government.
4. A reference to a province in this article means the legislative and executive political entity that governs a geographic area.
5. *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91, 92, 92A, 93 (originally enacted as the *British North America Act, 1867* (UK)) [*Constitution Act, 1867* (UK)]
6. Wheare, *supra* note 1 at 20; Peter W Hogg, *Constitutional Law of Canada* 5<sup>th</sup> ed (Toronto: Thomson Carswell, 2007) at 112.
7. The term “Yukon” is used in the current *Yukon Act*, SC 2002, c 7. In previous versions, the term “the Yukon Territory” was used. In this article, the term “Yukon” is used to mean either Yukon as a political entity or the geographical land mass. The context will make clear which meaning is intended.
8. The term “public” in relation to government is used in this article to denote structures of government applicable to all residents as distinguished from Indigenous self-government. See also Kirk Cameron and Graham White, *Northern Governments in Transition: Political and Constitutional Development in the Yukon, Nunavut and the Western Northwest Territories* (Montreal: The Institute for Research on Public Policy, 1995) at 4.
9. The term “territories” is used in this article to describe the political entities of Yukon, the Northwest Territories, and Nunavut unless the context otherwise indicates.
10. In this article, the expression “the North” means Yukon, the Northwest Territories, and Nunavut.
11. *Constitution Act, 1982*, Part II – Rights of the Aboriginal Peoples of Canada, s 35, defines “aboriginal peoples of Canada” to include Indian, Inuit, and Métis peoples of Canada. However, the term “First Nation” is often used to describe Aboriginal peoples who are “Indians” or their government. The term “Indigenous” is often used in place of “Aboriginal.”
12. Ian Peach, “Introduction: On Governing a Dynamic Federation” in Ian Peach, ed, *Constructing Tomorrow’s Federalism: New Perspectives on Canadian Governance* (Winnipeg: University of Manitoba Press, 2007) 3 at 6.
13. Frances Abele et al, “Introduction and Overview” in Frances Abele et al, eds, *Northern Exposure: Peoples, Powers and Prospects in Canada’s North* (Montreal: The Institute for Research on Public Policy, 2009) 3.
14. Franklin Griffiths, “Canadian Arctic Sovereignty: Time to Take Yes for an Answer on the Northwest Passage” in Abele et al, eds, *Northern Exposure*, *supra* note 13 at 107.

15. Frances Abele et al, “Introduction and Overview,” *supra* note 13 at 4.
16. *The Yukon Territory Act*, SC 1898 (v. I-II), c 6 (Yukon Territory Act). For a detailed description of the historical constitutional context and the creation of the territories, see Bernard W Funston, “Canada’s North and Tomorrow’s Federalism” in Ian Peach, ed, *Constructing Tomorrow’s Federalism*, *supra* note 12, 115 at 116–118.
17. Ken Coates & Greg Poelzer, “An Unfinished Nation: Completing the Devolution Revolution in Canada’s North” (MacDonald-Laurier Institute Publication, 2014) at 4.
18. Self-government powers of Yukon First Nations are set out in separate self-government agreements that are not part of the treaties. For more information see the discussion under section 2 entitled “Evolution of Yukon” in Part II–Background of this article.
19. Funston, *supra* note 16 at 115, 116.
20. Liesbet Hooghe et al, *Measuring Regional Authority: A Postfunctionalist Theory of Governance, Volume I* (London: Oxford University Press, 2016) at 3.
21. *Ibid.*
22. Jack M Balkin, “The Framework Model and Constitutional Interpretation” in David Dyzenhaus and Malcolm Thorburn, eds, *Philosophical Foundations of Constitutional Law* (London: Oxford University Press, 2016) 241 at 242.
23. Nicholas Aroney, “Devolutionary Federalism Within a Westminster-derived Context” in Aileen McHarg et al, eds, *The Scottish Independence Referendum: Constitutional and Political Implications* (London: Oxford University Press, 2016) 295.
24. Peach, *supra* note 12 at 3, 4.
25. Martin Loughlin, “The Constitutional Imagination” (2015) 78 *The Modern Law Review* 1 at 3, online: <<https://doi.org/10.1111/1468-2230.12104>>.
26. *Ibid.*
27. Funston, *supra* note 16 at 115.
28. *Constitution Act, 1867* (UK).
29. For a detailed description of Confederation see *Reference re Secession of Quebec* [1998] 2 SCR 217 at paras 33–48 [*Secession Reference*].
30. *Constitution Act, 1867* (UK), s 91, 92, 92A, 93. There are a very few areas of concurrent jurisdiction. See s 94, 94A, 95.
31. *Rupert’s Land and North-Western Territory Order*, online: <<http://caid.ca/RupLanNorWesTerOrder1870.pdf>>.
32. First titled the North-West Territories in the *North-West Territories Act*, SC 1875, c 49. See also Funston, *supra* note 16 at 116.
33. *Constitution Act, 1871* (UK), 34 & 35 Vict, c.28, s 2 [*Constitution Act, 1871* (UK)].
34. *Constitution Act, 1871* (UK), s 4.
35. Gordon Robertson, *Northern Provinces: A Mistaken Goal* (Montreal: The Institute for Research on Public Policy, 1985) 1.
36. *R v Van Der Peet* [1996] 2 SCR 507 at para 30.
37. Will Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship* (London: Oxford University Press, 2001) at 122.

38. *Constitution Act, 1867* (UK), s 91(24).
39. *Constitution Act, 1982*, Part II – Rights of the Aboriginal Peoples of Canada.
40. Government of Canada; Indigenous and Northern Affairs Canada; Communications Branch, “Comprehensive Claims” (3 November 2008), online: <[www.aadnc-aandc.gc.ca/eng/1100100030577/1100100030578](http://www.aadnc-aandc.gc.ca/eng/1100100030577/1100100030578)>.
41. See for example, Kristin Rushowy, “Indigenous leaders split on meeting with premiers” *The Star* (Toronto, 18 July 2018), online: <[www.thestar.com/news/canada/2018/07/18/premiers-meet-with-indigenous-leaders-in-new-brunswick-but-three-major-groups-decline-to-attend.html](http://www.thestar.com/news/canada/2018/07/18/premiers-meet-with-indigenous-leaders-in-new-brunswick-but-three-major-groups-decline-to-attend.html)>.
42. *Yukon Territory Act*.
43. Robertson, *supra* note 35 at 3.
44. Chris Pearson, “Yukon’s Responsible Government” (1980) 3:1 Canadian Parliamentary Review, online: <[www.revparl.ca/english/issue.asp?param=92&art=354](http://www.revparl.ca/english/issue.asp?param=92&art=354)>.
45. *Ibid.*
46. *Ibid.*
47. Letter from Minister Epp to Commissioner Christensen, 9 October 1979 (Yukon Archives, 2001/164, Box 510/18). See also Steven Smyth, “Constitutional Development in the Yukon Territory: Perspectives on the ‘Epp Letter’” (1999) Arctic 71; Pearson, *supra* note 44.
48. Cameron & White, *supra* note 8. For a detailed account of the history of the development of the Yukon from 1948 to 1979, see Janet Moodie Michael, “From Sissons to Meyer: The Administrative Development of the Yukon Government 1948–1979” (Whitehorse: Yukon Archives, 1987).
49. Jeremy Webber, *The Constitution of Canada: A Contextual Analysis* (Oxford: Hart Publishing, 2015) 69.
50. *Yukon Act*, SC 2002, c 7 [Yukon Act].
51. “Together Today for Our Children Tomorrow: A Statement of Grievances and an Approach to Settlement by the Yukon Indian People, January 1973” (Council of Yukon First Nations, 1977), online: <<https://www.cyfn.ca/agreements/together-today-for-our-children-tomorrow/>>
52. The remaining three First Nations are subject to the *Indian Act*, RSC 1985, c I-5.
53. See for example Selkirk First Nation Final Agreement (Ottawa: Minister of Indian Affairs and Northern Development, 1998), online: <[http://www.eco.gov.yk.ca/aboriginalrelations/pdf/selkirk\\_fa.pdf](http://www.eco.gov.yk.ca/aboriginalrelations/pdf/selkirk_fa.pdf)>.
54. *Yukon First Nations Land Claims Settlement Act*, SC 1994, c 34; *Yukon Land Claim Final Agreements (An Act Approving)*, RSY 2002, c 240.
55. *Constitution Act, 1982*, Part II – Rights of the Aboriginal Peoples of Canada, s 35.
56. See for example Selkirk First Nation Self-Government Agreement (Ottawa: Minister of Indian Affairs and Northern Development, 1998), online: <[www.eco.gov.yk.ca/aboriginalrelations/pdf/selkirk\\_sga.pdf](http://www.eco.gov.yk.ca/aboriginalrelations/pdf/selkirk_sga.pdf)>.
57. *Yukon First Nations Self-Government Act*, SC 1994, c 35, s 3; *First Nations (Yukon) Self-Government Act*, RSY 2002, c 90, s 5.

58. The exception to this was control of oil and gas resources, which had been devolved in 1998.
59. Coates & Poelzer, *supra* note 17 at 14.
60. Hooghe et al, *supra* note 20 at 1.
61. *Ibid.*
62. *Ibid* at 2.
63. *Ibid* at 17–18.
64. *Ibid* at 23.
65. *Ibid* at 114.
66. *Ibid* at 23.
67. *Ibid* at 25.
68. *Ibid* at 25, 114.
69. *Ibid* at 25, 115.
70. *Constitution Act, 1982*, Part I – Canadian Charter of Rights and Freedoms.
71. *Yukon Act*, s 18-19. The Act came into force on April 1, 2003.
72. *Yukon Act*, s 26.
73. Despite exclusive legislative authority, the doctrines of double aspect and pith and substance enable this—see Hogg, *supra* note 6 at 484.
74. Hogg, *supra* note 6 at 484.
75. *Yukon Act*, s 24(1), 25(2).
76. *Constitution Act, 1867* (UK), s 56 and 90.
77. Hogg, *supra* note 6 at 127.
78. The Bill in question was an *Executive Council Act*. The federal government was concerned that it enshrined in territorial legislation principles of responsible and Cabinet governance ahead of amendments to the *Yukon Act* by Parliament.
79. *Morin v Crawford* (1999) 29 CPC (4<sup>th</sup>) 362 (NWTSC) at para 52.
80. Hogg, *supra* note 6 at 127.
81. Prosecutions of criminal offences, which are delegated by the federal government under the *Criminal Code*, RSC 1985, c C-46 to the provinces, are still conducted by the federal government in Yukon. All industrial relations (other than for the Yukon public service) including those that would normally be regulated by a province, are still regulated federally under Part 1 of the *Canada Labour Code*, RSC 1985, c L-2, which predates the 2003 devolution. Neither of these programs has been a devolution priority for the Yukon government to date.
82. *Constitution Act, 1867* (UK), s 109, 117.
83. *Yukon Act*, s 2 (definition of “public real property”).
84. *Yukon Act*, s 49.
85. *Constitution Act, 1871* (UK), s 96–101.
86. *Yukon Act*, s 40–44; *Court of Appeal Act*, RSY 2002, c 47; *Supreme Court Act*, RSY 2002, c 24; *Judges Act*, RSC 1985, c. J-1; *Supreme Court Act*, RSC 1985, c S-26.
87. *Territorial Court Act*, RSY 2002, c 217.
88. *Constitution Act, 1982*, Part 1 – Canadian Charter of Rights and Freedoms, s 30.
89. *Constitution Act, 1867* (UK), s 10.

90. *Constitution Act, 1867* (UK), s 58.
91. *Yukon Act*, s 4; Minister of Indian Affairs and Northern Development, *Commissioners of the Territories* (Ottawa, 2000).
92. *Constitution Act, 1867* (UK), s 58.
93. *Liquidators of Maritime Bank v Receiver General of N.B.* [1892] AC 437, 443.
94. *Yukon Act*, preamble.
95. *Yukon Act*, s 4, though a slightly different wording formulation is used. See for example P.C. 2018-0296 made under the *Constitution Act, 1867* (UK), s 58 appointing a Lieutenant Governor of the Province of British Columbia and P.C. 2018-0240 made under the *Yukon Act*, s 4 appointing the Commissioner of Yukon.
96. *Roberts v The Commissioner of the Northwest Territories and the Speaker of the Legislative Assembly*, 2002 NWTSC 68 at para 41. See for example *Yukon Act*, s 8, 11, 17, 24.
97. *Yukon Act*, s 4(3) repealed by SC 2002, c 7, s 68 on April 1, 2013.
98. *Commissioner of the Northwest Territories v Canada* 2001 FCA 220 at para 39.
99. *Northern Territory (Self-Government) Act 1978* (Australia) (No. 58 of 1978).
100. The Natural Resources Agreements were given effect by the *Constitution Act, 1930* (UK), 20 & 21 George V, c 26, and are scheduled to the RSC 1985, Appendix II, No. 26.
101. *Constitution Act, 1867* (UK), s 10, 62.
102. *The North-West Territories Act*, SC 1875, c 49.
103. *Statute of Westminster, 1931* (UK), 22 & 23 George V, c 4.
104. *Liquidators*, *supra* note 93 at 443.
105. Hogg, *supra* note 6 at 302.
106. Anthony J Jordon, “The Constitution of the Northwest Territories” (A Thesis Submitted to the College of Graduate Studies in Partial Fulfilment of the Requirements for the Degree of Master of Laws in the College of Law, University of Saskatchewan, 1978) at 91.
107. *Ibid* at 92.
108. *Morin v Crawford* (1999) 29 CPC (4<sup>th</sup>) 362 (NWTSC) at para 53; *R v Chamberlist* (1970) 72 WWR 746 (YTCA), 749–750.
109. *Commissioner of the Northwest Territories v Canada* 2001 FCA 220 at para 43.
110. Robertson, *supra* note 35 at 24.
111. Martin Loughlin, “What Is Constitutionalisation?” in Petra Dobner and Martin Loughlin, eds, *Twilight of Constitutionalism?* (London: Oxford University Press, 2010) 47 at 52.
112. See for example Kirk Cameron who argues in favour of this position: “Notes from the Supreme Court: Affirming the Territorial ‘Crown’ Relationship” (March, 2017) *Northern Public Affairs*, online: <<http://www.northernpublicaffairs.ca/index/notes-from-the-supreme-court-affirming-the-territorial-crown-relationship/>>.
113. Hooghe et al, *supra* note 20 at 25, 121, 123.
114. *Constitution Act, 1867* (UK), s 92(2), 92A; *Yukon Act*, s 18(1)(f), 19(3).
115. *Constitution Act, 1982*, Part III – Equalization and Regional Disparities.

116. For example, 82% of the actual 2016/17 revenues for the Yukon government came from federal transfers—see Yukon Government Financial Information 2018/19, Revenues by Source, online: <<https://yukon.ca/sites/yukon.ca/files/fin/fin-budget2018-2018-19-financial-information.pdf>>; Department of Finance, Government of Canada, “Federal Support to Provinces and Territories” (15 December 2014), online: <[www.fin.gc.ca/fedprov/mtp-eng.asp#Yukon](http://www.fin.gc.ca/fedprov/mtp-eng.asp#Yukon)>.
117. Statistics Canada, Government of Canada, “Population and Dwelling Count Highlight Tables, 2016 Census” (8 February 2017), online: <[www12.statcan.gc.ca/census-recensement/2016/dp-pd/hlt-fst/pd-pl/Table.cfm?Lang=Eng&T=101&S=50&O=A](http://www12.statcan.gc.ca/census-recensement/2016/dp-pd/hlt-fst/pd-pl/Table.cfm?Lang=Eng&T=101&S=50&O=A)>.
118. Robertson, *supra* note 35 at 33.
119. *Yukon Act*, s 23(4). The other two territories also have borrowing limits.
120. Hooghe et al, *supra* note 20 at 23, 125.
121. *Ibid* at 26, 125.
122. *Ibid* at 125.
123. *Constitution Act, 1867* (UK), s 37.
124. *Constitution Act, 1867* (UK), s 24.
125. Hooghe et al, *supra* note 20 at 26, 126.
126. Hogg, *supra* note 6 at 154.
127. George Anderson & Jim Gallagher, “Intergovernmental Relations in Canada and the United Kingdom” in Michael Keating & Guy Laforest, eds, *Constitutional Politics and the Territorial Question in Canada and the United Kingdom* (Springer International Publishing, 2018) 20, online: <[http://link.springer.com/10.1007/978-3-319-58074-6\\_2](http://link.springer.com/10.1007/978-3-319-58074-6_2)>.
128. Hogg, *supra* note 6 at 154, quoting William Lederman, *Continuing Canadian Constitutional Dilemmas* (Toronto: Butterworths, 1980) ch 17.
129. Anderson & Gallagher, *supra* note 127 at 20.
130. The territories were not part of the *Meech Lake Accord* negotiations in 1987, but were fully involved in the 1992 *Charlottetown Accord* talks. See *Meech Lake Accord: Document* (*The Canadian Encyclopedia*), online: <[www.thecanadianencyclopedia.ca/en/article/meech-lake-accord-document/](http://www.thecanadianencyclopedia.ca/en/article/meech-lake-accord-document/)>, which ultimately failed to proceed; *Charlottetown Accord: Document* (*The Canadian Encyclopedia*), online: <[www.thecanadianencyclopedia.ca/en/article/charlottetown-accord-document/](http://www.thecanadianencyclopedia.ca/en/article/charlottetown-accord-document/)>. The Accord was defeated in a Canada-wide referendum. See also Ian Peach, “A Province in All But Name: The Political and Constitutional Evolution of Yukon Since 1979” (Paper presented at the Canadian Political Science Association Annual Conference, 2018) at 5, online: <[www.cpsa-acsp.ca/documents/conference/2018/1000.Peach.pdf](http://www.cpsa-acsp.ca/documents/conference/2018/1000.Peach.pdf)>; Cameron & White, *supra* note 8 at 124.
131. Anderson & Gallagher, *supra* note 127 at 23.
132. Hooghe et al, *supra* note 20 at 26, 128–129.

133. *Constitution Act, 1982*, Part V – Procedure for Amending Constitution of Canada, s 45.
134. *Yukon Act*, ss 56(1).
135. *Yukon Act*, ss 56(2).
136. *Constitution Act, 1982*, Part V – Procedure for Amending Constitution of Canada.
137. Hooghe et al, *supra* note 20, summary chart at 130–131.
138. *Ibid.*
139. *Government of Northwest Territories v Public Service Alliance of Canada* (1999), 180 FTR 20 at para 31.
140. Robertson, *supra* note 35; *Commissioner of the Northwest Territories v Canada* 2001 FCA 220 at para 39.
141. *Yukon Act*, s. 56.
142. Doug McArthur, “The Changing Architecture of Governance in Yukon and the Northwest Territories” in Frances Abele et al, eds, *Northern Exposure*, *supra* note 13 at 187, 229.
143. Cameron & White, *supra* note 8 at 119.
144. Loughlin, *supra* note 25 at 3.
145. *Constitution Act, 1867* (UK), s 52.
146. Hogg, *supra* note 6 at 12. Examples include the Bill of Rights of 1960 and the statute that created the Federal Court of Canada and provincial statutes that establish courts, require elections, and regulate legislative proceedings.
147. *Scotland Act, 1998* (UK), c 46; *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin) at para 62; *H v Lord Advocate*, [2012] UKSC 24 at para 30.
148. *Northern Ireland Act 1998* (UK), c 47; *Thoburn*, *supra* note 147 at para 62; *R (Robinson) v Secretary of State for Northern Ireland* [2002] UKHL 32 at para 11.
149. *Government of Wales Act 2006* (UK), c 32; *Thoburn*, *supra* note 147 at para 62; *R (Governors of Brynmawr Foundational School) v The Welsh Ministers* [2011] EWHC 519 at para 77.
150. Farrah Ahmed & Adam Perry, “Constitutional Statutes” (2017) 37 *Oxford Journal of Legal Studies* 461 at 465, online: <<https://doi.org/10.1093/ojls/gqw030>>.
151. *Ibid* at 471.
152. *Ibid.*
153. *Ibid.*
154. See for example Selkirk First Nation Final Agreement, *supra* note 53 at Chapter 1, definition of “Traditional Territory.”
155. *Yukon Act*, Schedule 1.
156. See for example Selkirk First Nation Final Agreement, *supra* note 53 at Schedule C to Chapter 10; Selkirk First Nation Self-Government Agreement, *supra* note 56 at Article 20.0.
157. See for example Selkirk First Nation Final Agreement, *supra* note 53 at Article 13.5.0 for the establishment and composition of the Yukon Heritage Resources Board and Article 14.4.1 for composition of the Water Board.

158. See for example Selkirk First Nation Final Agreement, *supra* note 53 at Chapter 11, Land Use Planning; Chapter 13, Heritage; Chapter 14, Water Management; Chapter 16, Fish and Wildlife (other than “federal species”).
159. Hogg, *supra* note 6 at 358.
160. Ahmed & Perry, *supra* note 150 at 464.
161. AV Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (MacMillan and Co, 1885) at 35.
162. See for example *Scowby v Glendinning* [1986] 2 SCR 226 at para 236; Hogg, *supra* note 6 at 358.
163. Hogg, *supra* note 6 at 359, n 67; PJ Monahan & AJ Petter, “Developments in Constitutional Law: The 1985-86 Term” (1987) 9 Supreme Court Law Review 69, 143–150.
164. *Winnipeg School Division No. 1 v Craton* [1985] 2 SCR 150, 156; Hogg, *supra* note 6 at 358.
165. *Constitution Act, 1982*.
166. Hogg, *supra* note 6 at 21.
167. *Secession Reference*, *supra* note 29 at para 32.
168. *Ibid* at para 52.
169. *Ibid* at para 54.
170. *Ibid* at para 64.
171. *Ibid* at para 66.
172. *Ibid* at para 67.
173. *Ibid* at para 67.
174. Martin Loughlin & Neil Walker, “Introduction” in Martin Loughlin & Neil Walker, eds, *The Paradox of Constitutionalism – Constituent Power and Constitutional Form* (Oxford University Press, 2007) 1.
175. Stephen Tierney, “Sovereignty and the Idea of Public Law” in Emiliós A Christodoulidis & Stephen Tierney, eds, *Public Law and Politics: The Scope and Limits of Constitutionalism* (Ashgate, 2008) 18.
176. *Ibid*.
177. Martin Loughlin, *The Idea of Public Law* (Oxford University Press, 2003) at 113.
178. Funston, *supra* note 16 at 115, 118.
179. Cameron & White, *supra* note 8 at 13.
180. *Ibid* at 22.
181. *Secession Reference*, *supra* note 29 at para 63.
182. Peach, *supra* note 130 at 3.
183. Peter C Oliver, *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand* (Oxford University Press, 2005) at 1.
184. Peach, *supra* note 130 at 3; Maurice Ollivier, *Problems of Canadian Sovereignty from the British North America Act, 1867, to the Statute of Westminster, 1931* (Canada Law Book Company, 1945) at 6.
185. Peach, *supra* note 130 at 3.

186. *Re Resolution to amend the Constitution (Patriation Reference)*, [1981] 1 SCR 753, 831.
187. *Secession Reference*, *supra* note 29 at para 47.
188. *Scotland Act 1998* (UK), c 46 [Scotland Act 1998 (UK)].
189. *Scotland Act 1998* (UK), s 63A added by *Scotland Act 2016* (UK), c 11, s 1.
190. Neil Walker, “The Territorial Constitution and the Future of Scotland” in Aileen McHarg et al, eds, *The Scottish Independence Referendum: Constitutional and Political Implications* (London: Oxford University Press, 2016) 247 at 256.
191. Eugénie Brouillet & Tom Mullen, “Constitutional Jurisprudence on Federalism and Devolution in UK and Canada” in Michael Keating & Guy Laforest, eds, *Constitutional Politics and the Territorial Question in Canada and the United Kingdom* (Springer International Publishing, 2018) 49, online: <[http://link.springer.com/10.1007/978-3-319-58074-6\\_3](http://link.springer.com/10.1007/978-3-319-58074-6_3)>.
192. *Constitution Act, 1982*, Part I – Canadian Charter of Rights and Freedoms, s 3, s 30.
193. *Morin v Crawford* (1999) 29 CPC (4<sup>th</sup>) 362 (NWTSC) at para 54.
194. *Constitution Act, 1867* (UK), s 22 (as amended), s 37 (as amended).
195. *Constitution Act, 1982*, Part V – Procedure for Amending Constitution of Canada. The precise amending procedure to be used would presumably depend on the nature and effect of the proposed amendment.
196. *Constitution Act, 1871* (UK), s 4.
197. *Constitution Act, 1871* (UK), s 2.
198. *Secession Reference*, *supra* note 29 at para 53.
199. Vernon Bogdanor, “Constitutional Reform in Britain: The Quiet Revolution” (2005) 8 Annual Review of Political Science 73, 84, online: <<https://doi.org/10.1146/annurev.polisci.8.082103.104930>>.
200. *Secession Reference*, *supra* note 29 at para 87.
201. Peter C Oliver, *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand* (London: Oxford University Press, 2005) at 6.
202. *Secession Reference*, *supra* note 29 at paras 88–105.
203. Ivan C. Rand, “Some Aspects of Canadian Constitutionalism” (1960) 38 Can Bar Review 135 at 145.
204. Peach, *supra* note 130 at 2.
205. *Ibid.*
206. Robertson, *supra* note 35 at 25–30; David McGrane, “Limiting Fiscal Capacity? The Relationship between Transfer Payments and Social Spending in Canadian Provinces from 1988 to 2002,” in Ian Peach, ed, *Constructing Tomorrow’s Federalism*, *supra* note 12, 51.
207. Hogg, *supra* note 6 at 158.
208. *Ibid.*

209. *Secession Reference*, *supra* note 29 at para 79.
210. Cameron & White, *supra* note 8 at 121.
211. *Secession Reference*, *supra* note 29 at para 49.
212. *Ibid* at para 70.
213. Loughlin, *supra* note 177 at 81.
214. *Ibid*.
215. *Ibid* at 78.
216. *Ibid*.
217. *Ibid* at 84.
218. *Ibid*.
219. *Ibid* at 85.
220. *Ibid*.
221. Tierney, *supra* note 175 at 16.
222. Loughlin, *supra* note 177 at 131.
223. *Ibid*.
224. Neil Walker, *supra* note 190 at 254.
225. *Re Gray* (1918) 57 SCR 150 at 170.
226. *Secession Reference*, *supra* note 29 at para 55.
227. Keith Banting & Nicola McEwen, “Inequality, Redistribution and Decentralization in Canada and the United Kingdom,” in Michael Keating & Guy Laforest, eds, *Constitutional Politics and the Territorial Question*, *supra* note 127, 107, online: <[https://link.springer.com/chapter/10.1007/978-3-319-58074-6\\_5](https://link.springer.com/chapter/10.1007/978-3-319-58074-6_5)>.
228. *Ibid*.
229. Christopher Alcantara et al, “Assessing Devolution in the Canadian North: A Case Study of the Yukon Territory” (2012) 65:3 Arctic 328 at 329, online: <<http://pubs.aina.ucalgary.ca/arctic/Arctic65-3-328.pdf>>.
230. *Ibid*.
231. Treaty on European Union (Maastricht Treaty) Art 5(3); Alcantara et al, *supra* note 229 at 329.
232. Hogg, *supra* note 6 at 120.
233. *Secession Reference*, *supra* note 29 at para 60.
234. Alcantara et al, “Assessing Devolution,” *supra* note 229 at 336; “It’s official: Yukon devolution in effect” (*CBC News*, 1 April 2003), online: <[www.cbc.ca/news/canada/north/it-s-official-yukon-devolution-in-effect-1.361649](http://www.cbc.ca/news/canada/north/it-s-official-yukon-devolution-in-effect-1.361649)>.
235. Alcantara et al, *supra* note 229 at 335.
236. *Ibid*.
237. *Ibid* at 332.
238. Bogdanor, *supra* note 199 at 85.
239. Peter C Oliver, *supra* note 201 at 3.
240. The “Sewel Convention”: Commons Library Briefing, UK Parliament, online: <<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN02084>>.
241. *Scotland Act 1998* (UK), s 28(8) added by *Scotland Act 2016* (UK), c 11, s 2.

242. *Ontario English Catholic Teachers' Association v Ontario*, [2001] 1 SCR 470 at para 65.
243. Hogg, *supra* note 6 at 27.
244. *Re Resolution to amend the Constitution (Patriation Reference)*, [1981] 1 SCR 753 at 888–909.
245. *Species at Risk Act*, SC 2002, c 29, s 35.
246. *Ibid*, s 34.
247. *Re Resolution to amend the Constitution (Patriation Reference)*, [1981] 1 SCR 753 at 888–909.
248. *Ibid*.
249. Tierney, *supra* note 175 at 17.
250. *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 at para 146.
251. *Ibid* at para 151.
252. Michael Keating & Guy Laforest, “Federalism and Devolution: The UK and Canada” in Michael Keating & Guy Laforest, eds, *Constitutional Politics and the Territorial Question*, *supra* note 127, 10, online: <[http://link.springer.com/10.1007/978-3-319-58074-6\\_1](http://link.springer.com/10.1007/978-3-319-58074-6_1)>.
253. Tierney, *supra* note 175 at 17.
254. Balkin, *supra* note 22 at 243.
255. *Ibid* at 241.
256. *Edwards v Attorney-General for Canada*, [1930] AC 124, 136; *Secession Reference*, *supra* note 29 at para 52.
257. Christine Bell, “Constitutional Transitions: The Peculiarities of the British Constitution and the Politics of Comparison” (2014) Public Law 446, 453.
258. *Ibid* at 453.
259. For example, see the *Constitution Act, 1982*.
260. *Secession Reference*, *supra* note 29 at para 55.
261. *Ibid*.
262. *Ibid* at para 57.
263. *Ibid* at para 56.
264. Hogg, *supra* note 6 at 125; *Hodge v The Queen* (1883) 9 App. Cas 117; *Liquidators*, *supra* note 93.
265. Bell, *supra* note 257 at 453.
266. *Ibid* at 450.
267. *Ibid*.
268. Hogg, *supra* note 6 at 153.
269. *Ibid*.
270. *Ibid* at 474.
271. *Ibid* at 153.
272. Hogg, *supra* note 6 at 154, quoting William Lederman, *Continuing Canadian Constitutional Dilemmas* (Butterworths, 1980) c 17.

273. Hogg, *supra* note 6 at 154.
274. Balkin, *supra* note 22 at 242.
275. *Ibid.*
276. *Secession Reference*, *supra* note 29 at para 57.
277. *Constitution Act, 1982*, Part V – Procedure for Amending Constitution of Canada, s 42. Funston & Meehan note that the *Constitution Act, 1871* includes provisions respecting the creation of new provinces and the extension of provincial boundaries into the territories. They raise as a question whether section 42 impliedly replaces the provisions of the *Constitution Act, 1871*, or whether section 42 simply dictates the formula to be used to amend the *Constitution Act, 1871*. See Bernard W Funston & Eugene Meehan, *Canada's Constitutional Law in a Nutshell* (4<sup>th</sup> edn, Carswell 2013) 231, fn 19.
278. Coates and Poelzer, *supra* note 17 at 13.
279. *Constitution Act, 1871* (UK), s 2.
280. Robertson, *supra* note 35 at 37.
281. *Canada (Prime Minister) v Penikett* (1987) 45 DLR (4<sup>th</sup>) 108 (YKCA).
282. Coates & Poelzer, *supra* note 17 at 13.
283. *Ibid.*
284. Adam Goldenberg & Tony Penikett, “A Reminder to Premiers: Confederation Is Still Not Complete” *Globe and Mail* (Opinion) (Toronto, 24 July 2013), online: <[www.theglobeandmail.com/opinion/a-reminder-to-premiers-confederation-is-still-not-complete/article13387855/](http://www.theglobeandmail.com/opinion/a-reminder-to-premiers-confederation-is-still-not-complete/article13387855/)>.
285. Robertson, *supra* note 35 at 35.
286. *Ibid* at 40.
287. *Ibid* at 21.
288. Stephen Tierney, “Federalism in a Unitary State: A Paradox Too Far?” (2009) 19 *Regional & Federal Studies* 237 at 243, online: <<https://doi.org/10.1080/13597560902753511>>.
289. Keating & Laforest, *supra* note 252 at 8.
290. Bogdanor, *supra* note 199 at 84.
291. Aroney, *supra* note 23.
292. Milne, “Equality or Asymmetry: Why Choose?” in Ronald L Watts & Douglas M Brown, eds, *Options for a New Canada* (University of Toronto Press, 1991) 285 at 286.
293. Gerald Baier & Herman Bakvis, “Federalism and the Reform of Central Institutions: Dealing with Asymmetry and the Democratic Deficit” in Ian Peach, ed, *Constructing Tomorrow's Federalism*, *supra* note 12, 89 at 91.
294. Robertson, *supra* note 35 at 36.
295. Keating & Laforest, *supra* note 252 at 3.
296. Ian Peach, *supra* note 12 at 3.
297. Milne, *supra* note 292 at 287–288.
298. Hogg, *supra* note 6 at 114.

299. *Ibid.* See for example *Constitution Act, 1867* (UK), s 93 (denominational schools) s 133 (language); *Constitution Act, 1982*, Part I – Canadian Charter of Rights and Freedoms, s 16(2), 17(2), 18(2), 19(2), 59 (language).
300. Hogg, *supra* note 6 at 114, n 20.
301. *Ibid* at 114.
302. Milne, *supra* note 292 at 292.
303. *Secession Reference*, *supra* note 29 at para 149.
304. Coates & Poelzer, *supra* note 17 at 14.
305. For example, the *Yukon Act*, SC 2002 c 7, has a preamble that refers to Yukon's system of responsible government. This is not included in the *Northwest Territories Act*, SC 2014 c 2 or the *Nunavut Act*, SC 1993, c 28. The ability of the federal government to provide instructions to the Commissioner is in place in Northwest Territories until 2024 (s 4(3), 4(4) and 80) while in Nunavut these provisions have no sunset clause (s 6(1), 6(2)). The introductory words to the legislative powers in the *Yukon Act*, s 18 and of *Nunavut Act*, s 23 more closely parallel wording in s 92 of the *Constitution Act, 1867*, than do the opening words in s 18 of the *Northwest Territories Act*.
306. Funston, *supra* note 16 at 126.
307. Robertson, *supra* note 35.
308. Milne, *supra* note 292 at 285.
309. Keating & Laforest, *supra* note 252 at 15.
310. Trevor C. Salmon, "The Dynamics of Decentralization: Canadian Federalism and British Devolution" in Trevor C. Salmon & Michael Keating, eds, *The Dynamics of Decentralization: Canadian Federalism and British Devolution* (McGill-Queen's University Press, 2001) 187 at 187.
311. Peach, *supra* note 12 at 7.
312. *Ibid* at 6.
313. Coates & Poelzer, *supra* note 17 at 4.
314. Aroney, *supra* note 23.
315. Balkin, *supra* note 22 at 255.
316. Loughlin, *supra* note 25 at 3.
317. *Ibid.*
318. *Secession Reference*, *supra* note 29 at para 57.

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**Pamela Muir** is employed by the Government of Yukon, however the views and opinions expressed in this article are those of the author and do not necessarily reflect the views and opinions of the Government of Yukon. This article is based on the author's LLM dissertation; the University of Edinburgh awarded the degree with distinction in November 2018.