



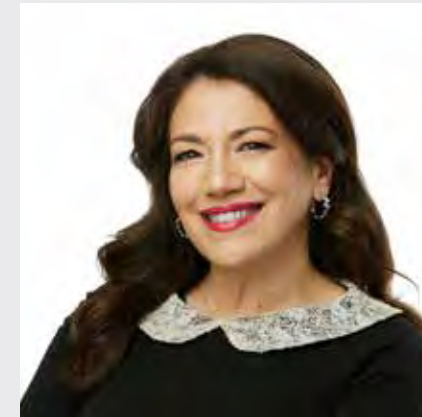
Language, Culture and Identity

Learning
and Integration
Collection



FONDATION
PIERRE ELLIOTT
TRUDEAU
FOUNDATION

President's Message



Pascale
Fournier

Ad. E., PhD
Harvard University
President and
Chief Executive Officer
2003 Scholar

“Language, culture and identity forge who we are, but foremost, they inspire, animate and make us alive.”

– Pascale Fournier

Language, culture and identity each have in common that they give life, substance, colour, and the ability to listen, speak and think to human beings.

They shape individuals, just as they more broadly structure collective identities. However, when we combine them, some consider the result to be simply a purely mathematical sum of distinct parts. On the contrary, although they form a complex equation, these elements, with which we all grow and evolve, are much more meaningful than a simplistic juxtaposition of parts. It is not enough to add up to understand the true essence of a result. When dealing with language, culture and identity, the integration of all these variables of the human dimension provokes rich, unsuspected, almost mysterious configurations.

The interdisciplinary, or even transdisciplinary study of language and languages allows us to understand how they shape our political and legal reality, while intersecting with social identity, group attachment and the intergenerational transmission of cultural beliefs.

Exploring languages from a multidisciplinary standpoint opens the door to many topical issues, including the impact of digital technologies on linguistic abilities, dispositions and practices, as well as challenges of protecting minority languages and promoting linguistic diversity in political communities and online. Leaders in Canada and around the world need to reflect on these issues to ensure social inclusion, respect for cultural diversity and human rights, while being innovative and visionary in addressing current language issues.

Language, culture and identity forge who we are, but foremost, they inspire, animate and make us alive. They enable us to better understand the ways used in our own environments and in the rest of the world to speak together, but also, to hear and listen to each other, to share, and to understand each other, and even to love each other. They engage us in a fascinating adventure of ever-growing knowledge, of discovery and – most of all – openness to oneself and to those we meet along our paths.

May this collection be a source of inspiration to you, but also a way to move forward to this destination where engaged leaders from here and elsewhere are eagerly awaited.

Language, Culture and Identity

Language and languages, and the many questions they raise about human beings and their relationships to others, have been a longtime interest of intellectuals and thinkers in various fields. A number of today's realities, such as the need to protect and preserve Indigenous languages, technological advances in artificial intelligence, and rethinking globalization, have rendered questions about language and languages even more timely and relevant. What are the implications of artificial intelligence technologies for language learning and use, and for the global configuration of languages? Do these technologies open up new horizons for understanding how language learning impacts cognitive predispositions or for empowering people with language difficulties? How do contemporary linguistic realities relate to notions of culture and identity?

Language and languages are at the heart of the Pierre Elliott Trudeau Foundation's 2021–2024 scientific cycle. We will pay particular attention in this cycle to the close links that can be made between language, culture and identity as we explore, in an interdisciplinary, and at times intersectional manner, issues and debates on this theme. As such, this theme challenges Scholars to address important questions at the intersection of language, culture and identity.

This includes profound questions about how modern society can better accommodate linguistic pluralism and identity politics associated with it. This subject also invites the question of whether other countries, which are also trying to recognize the importance of linguistic pluralism and its place in increasingly multicultural contexts, may learn from the language policy frameworks of countries such as Canada, South Africa or Spain.

The contemporary multidisciplinary issues related to language and languages are numerous. First, there is the need to preserve linguistic diversity. In Canada, we also encounter issues such as bilingualism, multilingualism and everything that is found in the spaces and interstices of what are called official languages.

The Pierre Elliott Trudeau Foundation sincerely hopes that this compendium of learning and integration of the Language, Culture & Identity scientific cycle, brilliantly informed by the individual but complementary views of Fellows and Mentors of the 2021 cohort, will allow you, dear Scholars, to deepen and broaden your reflection, and possibly your future research.

**Discover.
Inspire.
Change.**





Stéphanie Chouinard

PhD, Fellow 2021

Associate Professor,
Department of Political
Science, Royal Military
College (Kingston) and
Queen's University

Professor Stéphanie Chouinard's research focuses on language rights, minority and Indigenous rights, and law and politics. She teaches in Canadian politics, comparative politics, and political geography.

She was the recipient of SSHRC Joseph-Armand Bombardier (Masters) and Vanier (Doctoral) Scholarships, as well as a SSHRC Postdoctoral Fellowship and a fellowship from the Baxter & Alma Ricard Foundation. She is a graduate of the University of Ottawa (PhD, M.A.) and was a Postdoctoral Fellow at the Faculty of Law, Université de Montréal, as well as a Visiting Scholar at the Centre for Canadian Studies, University of Edinburgh.

Works

01

Stéphanie Chouinard and Martin Normand (2020)

Talk COVID to Me: Language Rights and Canadian Government Responses to the Pandemic

Canadian Journal of Political Science, vol. 53: 259-264

"I selected this article because it is an example of "engaged research": it had a major political impact when it was published, and its main points appeared subsequently in several newspapers. Government authorities were asked about the shortcomings identified in the paper in relation to services in both official languages. That media pressure led to correspondence with the Minister of Official Languages in which we made various recommendations to mitigate the impact of COVID-19 on access to services in both official languages. Our recommendations on the labelling of cleaning products were implemented. We were also called on to testify before a parliamentary committee on the subject. In my view, this work demonstrated (1) audacity (in engaging the federal government on its shortcomings even though the Office of the Commissioner of Official Languages had been very quiet on the topic); (2) communication and knowledge-sharing (the paper was published in open-access format and disseminated through social media, enabling journalists to familiarize themselves with its content and press the authorities on our conclusions); and (3) innovation by proposing an original reading of the health crisis so as to highlight public health issues that had so far gone unnoticed."

02

Stéphanie Chouinard (2018)

Section 23 of the Charter and Official-Language Minority Instruction in Canada: The Judiciary's Impact and Limits in Education Policymaking

Emmett Macfarlane (dir.), *Policy Change, Courts, and the Canadian Constitution*, Toronto : University of Toronto Press: 230-249

"This work is a companion piece to Gabriel Poliquin's article suggested below. It is shared with Scholars to give them an understanding of the scope of language requirements in Canadian education. It also sheds light on the limits on court action in the area of language rights in Canada. I hope that in reading this document, Scholars may learn about the audacity and resilience of the parent groups who, on many occasions since 1982, went all the way to the Supreme Court to ensure their children could obtain access to education in their mother tongue; and their service to the community, because by the time the Supreme Court heard their case, their own children had finished school. Indeed, they were fighting for future generations. The text is also an example of communication and knowledge-sharing, particularly in regard to intercultural diversity. Many English-speaking Canadians are unaware of the existence of French-language schools and school boards outside Quebec. They are even less familiar with the never-ending struggles that led to their creation and the problems that still persist today in obtaining access to the same quality of education as that provided by majority-language schools."

Influence and Inspiration

01

Michel Brault and Pierre Perrault (1971)

L'Acadie, l'Acadie?!?

National Film Board, available online:

www.onf.ca/film/acadie_acadie

"This documentary describes a student crisis at Université de Moncton, in New-Brunswick, in the late 1960s. Other elements alluded to include the tabling of the report of the Royal Commission on Bilingualism and Biculturalism (Laurendeau-Dunton Commission), General de Gaulle's hosting of an Acadian delegation at the Élysée Palace, the economic and religious subjugation of the Acadian population, and the sometimes difficult relationship with Quebec nationalism. This student struggle still resonates strongly with the province's French-speaking community today as it reflects the spirit of the Acadian "Quiet Revolution." It is a story of (1) audacity and resilience in the context of non-acceptance by a portion of the Canadian and New Brunswick population; and (2) the linguistic and cultural diversity of the region and country. For me, this film resonates deeply, having walked the same hallways as the former students who were there some 40 years before me, and having shared their passion for the same questions on minority-language rights and communities and the place of French in Canada, despite the evolution of the political and legal situation since 1969.. It is also a formidable introduction to the history of language issues in New Brunswick in preparation for our visit to this region."

02

Gabriel Poliquin (2013)

La protection d'une vitalité fragile : Les droits linguistiques autochtones en vertu de l'article 35

Revue de droit de McGill, vol. 58, no. 3: 573-605

"This article on the possibility of protecting Indigenous Languages in the Constitution Act, 1982, was a revelation for me in regard to the promises of the recognition of multinationalism in the Canadian constitutional framework. Written a few years before the adoption of the *Indigenous Languages Act*, the article not only elegantly demonstrates the relationship between language, culture and identity as it is understood in Canadian jurisprudence, it also makes a case for the existence of a right (so far unclaimed) to the protection of Indigenous languages in Canada. The parallel established between existing rights for English and French languages and those that could (or should) be recognized for Indigenous languages also seemed to be an important consideration in efforts to obtain justice and recognition for Indigenous peoples, as well as a much-needed critical questioning of Canada's linguistic framework. In my view, this article is an example of communication and knowledge-sharing, of course, but also recognition of Canada's linguistic and cultural diversity and innovation in the area of constitutional and language law."



François Larocque

PhD, Fellow 2021

Professor, Faculty of Law,
University of Ottawa

François Larocque is a Professor of Law at the University of Ottawa, and has published in the areas of philosophy of law, Canadian legal history, civil liability, human rights, and international law. Dr. François Larocque studied philosophy before graduating from the Common Law French program at the University of Ottawa in 2000. He clerked both at the Court of Appeal for Ontario (2000-2001) and at the Supreme Court of Canada (2001-2002), working successively for the Honourable Justices Charron, Borins, Goudge, Labrosse and Arbour.

A Commonwealth Scholar, SSHRC Doctoral Fellow, a Fondation Baxter & Alma Ricard Scholar, and Honorary Prince of Wales Scholar, François Larocque began his doctoral research in 2002 at the University of Cambridge (Trinity College) under the joint supervision of Professors James Crawford and Philip Allott. His thesis examined the jurisdiction of national courts in civil proceedings for serious violations of international law.

Dr. Larocque has published in the areas of philosophy of law, Canadian legal history, civil liability, human rights and international law. He is currently most active in two areas of research: (1) Language Rights in Canada and (2) Civil Liability for grave breaches of international human rights.

Works

01

François Larocque and Darius Bossé

L'obligation de faire adopter la version française des textes constitutionnels canadiens

Linda Cardinal and François Larocque (directors), *La constitution bilingue du Canada : un projet inachevé*, Québec, PUL, 2017, aux pp 87-126

“Although Canada is an officially bilingual country, most Canadians may be surprised to learn that Canada’s constitutional documents are not bilingual. The vast majority of the 30 texts that make up Canada’s written Constitution have binding force of law only in English. It was this incongruity that the drafters of the Constitutional Act, 1982 sought to rectify. Section 55 of this Act requires Canada to enact the French version of its Constitution «as soon as possible», but this has not yet been done. This paper, written in collaboration with my colleague Maître Darius Bossé, describes the fundamental problems that arise from the persistent failure to comply with section 55, in terms of constitutionalism, the Rule of law and the protection of minorities. This chapter reflects my commitment to collaboration, creativity, innovation and audacity. Indeed, it was written as a result of a symposium I organized on constitutional bilingualism with my colleague, Professor Linda Cardinal, and it paved the way for a court case I am currently undertaking with The Honorable Senator Serge Joyal to compel the Government of Canada and the provinces to comply with section 55 of the Constitution Act, 1982.”

02

François Larocque and Aimée Craft

Vers la décolonisation des langues officielles : le cas du michif

François Charbonneau, Stéphanie Chouinard and François Larocque (directors), *Droits, langues et communautés : mélange en l'honneur du professeur Pierre Foucher*, Presses de l'Université d'Ottawa, chapter 4.

“In this soon-to-be-published essay, my colleague Professor Aimée Craft and I propose a new and bold way to think about Canada’s official languages and the possibilities to extend their special status to Indigenous languages, such as Michif, the ancestral language of the Métis. The proposal builds on existing language rights principles and jurisprudence and the particular linguistic kinship that exists between French and Michif. By extending the rights, status and privilege that the French enjoy under the Constitution to the Michif, Canada would not only decolonize its concept of official languages, it would meaningfully empower Métis communities to reclaim, revitalize and develop their traditional language for the benefit of future generations. This essay reflects my scholarly commitment to the values of collaboration, diversity, creativity, audacity and community resilience.”

Influence and Inspiration

01

Leslie Green (1987)

Are Language Rights Fundamental?

25:4 Osgoode Hall Law Journal 639-669
<https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1831&context=ohlj&httpsredir=1&referer=>

“I consider this essay to be mandatory reading for anyone interested in reflecting about the nature of language rights, writ large, and about Canada’s particular constitutional norms on official languages. In short, Professor Green queries whether the constitutional centrality of Canadian language rights can be justified on moral grounds. While the essay is written by a legal theoretician, it remains accessible enough for non-legal experts in articulating its central claims and demonstrations. It introduces the reader to basic principles of language policy and planning, as well as some of the enduring dilemmas that arise in relation to the underlying public and private interest in language. As a classic text in the canon of language rights and policy, this is a leading essay on accessible communication and thoughtful knowledge sharing.”

02

Canadian Heritage (2021)

English and French: Towards a substantive equality of official languages in Canada

Ottawa, Her Majesty the Queen in Right of Canada
<https://www.canada.ca/fr/patrimoine-canadien/organisation/publications/publications-generales/egalite-langues-officielles.html>

“In this document, released in the winter of 2021, the Government of Canada outlines its vision for reforming Canada’s Official Languages Act (OLA), an act that has not been significantly amended since 1988. This policy guided the drafting of Bill C-32 (An Act for the Substantive Equality of French and English and the Strengthening of the Official Languages Act) introduced in June 2021. This proposed vision of official languages is generally supported by the major opposition parties, suggesting that the modernization of the OLA will eventually proceed in this direction. This paper provides an accessible description of the history of official languages in Canada, the legal principles that protect them – including the concept of substantive equality – and the challenges and opportunities in the 21st century for strengthening and harmonizing them consistently the imperative principles of reconciliation and revitalization of Indigenous Languages. It is a bold and innovative vision of official languages that opens the door to creative and innovative legal and policy solutions.”



Lorna Wanosts' A7 Williams

PhD, Fellow 2021

Professor Emerita of
Indigenous Education
and Linguistics,
University of Victoria
(B.C.)

Dr. Lorna Wanosts'a7 Williams is Professor Emerita of Indigenous Education, Curriculum and Instruction at the University of Victoria and Canada Research Chair in Education and Linguistics. She is the first director of the University of Victoria's Indigenous education program. She developed authoritative curricula in Indigenous language revitalization by using traditional teaching and learning practices. Her courses were also revolutionary for their inclusion of Indigenous pedagogy, spiritual leaders and knowledge keepers. She has indelibly strengthened language reclamation and revitalization in Canada.

At the University of Victoria, Dr. Williams initiated and led the development of Bachelor's and Master's degrees in Indigenous Language Revitalization, and a Master's in Counselling in Indigenous Communities. She also initiated, designed, and implemented a mandatory course in Indigenous Education for all teacher education students, leading to the requirement that all teacher education programs in British Columbia include an Indigenous Education course.

She received the Order of Canada in December 2020.

Works

01

Language Revitalization and the Líl'wat Language

UNESCO (Dec 6, 2019)

Technology and Indigenous Languages

Paris

<https://youtu.be/XTK8FJOCuOQ>

Ahkameyimok Podcast with Perry Bellegarde

Reviving and Revitalizing Indigenous Languages

Podcast link of Dr. Lorna Williams Wánosts'a7 as a guest on the Ahkameyimok Podcast with National Chief Perry Bellegarde.

<https://blubrry.com/ahkameyimok/72932105/reviving-and-revitalizing-indigenous-languages-w-dr-lor-na-williams/>

"My work in Indigenous languages began with the work with my language – Líl'wat, and the name of our work is Ucwalmicwts – language of the people. you can find examples of it at First Voices where there are two apps on two of the dialects of my language that are based on my early work in data collection. I include here links first to a keynote I gave for UNESCO in Paris 2019 on the considerations needed for inclusion of Indigenous languages in technology, and the second is a podcast with Perry Bellegard, the Assembly of First Nations leader who led the way to passing the Indigenous languages Act for Canada."

02

Culture and Identity

Lorna Williams (2019)

Ti wa7 szwatenem. What we know: Indigenous knowledge and learning

BC Studies

<https://ojs.library.ubc.ca/index.php/bcstudies/article/view/191456/188596>

"This set comprises an article that is published on Indigenous knowledge and teaching and learning. It is informed by a course that I offered at the University of Victoria to set a space for learners to experience learning and teaching in an Indigenous world. While this may be a little difficult to convey, in the Indigenous world, we learn by doing, therefore, the course was structured in that way."

The Mind of a Child

Documentary of the work of Reuven Feuerstein and Lorna Williams. The Mind of a Child documentary is now freely available online.

<https://vimeo.com/290546774>

"It is difficult to only speak about culture and identity, since both have been impacted by colonialism and imperialism throughout the world. This is a film produced/directed and coproduced by myself and a storyteller about the effects on learning when people are denied their language, identity, and teachings from their families and communities. This film is still used throughout the world and this summer a rebroadcast was organized in Jerusalem to celebrate Reuven Feuerstein's 100th birthday."

Works

03

Indigenous knowledge

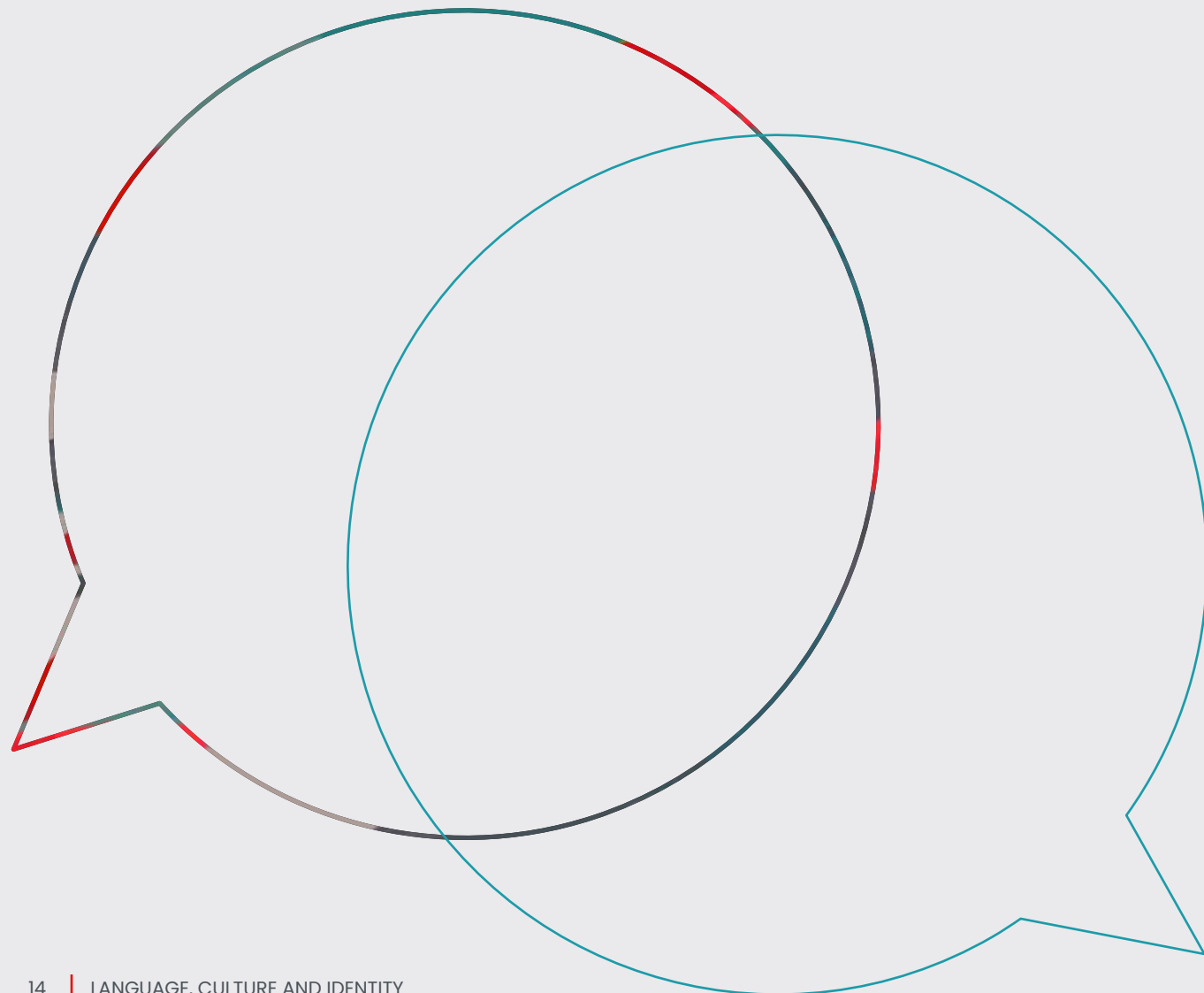
Gloria Snively and Lorna Wánosts'a7 Williams (2016)

Knowing Home: Braiding Indigenous Science with Western Science Book 1

Book 2018

<https://pressbooks.bccampus.ca/knowinghome/>

"A major part of my work has been to bring Indigenous knowledge to the academy. I did this by creating curriculum for schools in Indigenous history and by teaching courses at a University and publishing resource materials such as Knowing Home: Braiding Indigenous Science with Western Science, Book 1 - 2016, Book 2 - 2018, by Gloria Snively and Lorna Wanosts'a7 Williams. These books are the result of a move to bring Indigenous students and Indigenous knowledge into the academy and into Science."



Robert Blair

PhD, Pierre Elliott Trudeau Foundation Fellow and Joint Chair in Contemporary Public Policy 2021

Professor of Public Administration
University of Nebraska Omaha

Dr. Robert Blair is Professor Emeritus at the University of Nebraska. A prolific author, Dr. Blair has published extensively in the fields of city management, public policy and economic development. He also served as executive editor, and on the editorial board for *Community Development: Journal of the Community Development Society*. Dr. Blair works closely with Nebraska city managers and administrators, and the International City County Management Association on educational, applied research, and professional development issues, and has provided technical assistance to many communities and public agencies over the years. He was awarded a

visiting scholar fellowship in 2009 by the University of Agder to conduct his research in Norway and was a visiting instructor at Siauliai University in Lithuania in 2012 and 2019.

Robert Blair has competed in sprint triathlons and tennis tournaments and is pleased that the Chicago Cubs won the World Series.

Works

Two of my research articles provide insight into critical aspects of the policy process: the relationship among levels of government.

01

Robert Blair and Anthony Starke (2017)

The Emergence of Local Government Policy Leadership: A Roaring Torch or a Flickering Flame?

State and Local Government Review 49 (4): 275-284

“The first article addresses the role of local governments as policy leaders within an intergovernmental and federal system of government. While this is a study of the US system, like Canada it is a federal system where power is shared among units of government, and not shared equally.”

02

Robert Blair and Christian Janousek (2013)

Collaborative Mechanisms in Interlocal Cooperation: A Longitudinal Examination

State and Local Government Review. 45 (4): 268-282

“The second work of mine addresses another aspect of the development and implementation of public policy: the collaborative structures among units of local government that are needed to implement programs and policies. Like the first article, it addresses the issue of intergovernmental relations, a critical factor in the environment of the policy process.”

Influence and Inspiration

01

Christopher Weible (2008)

Expert-Based Information and Policy Subsystems: A Review and Synthesis

The Policy Studies Journal 36 (4): 615-635

“The first article is transformative because one of the goals of the workshop is to transform engaged leaders into policy entrepreneurs, to enable them to address issues relating to multiculturalism and multilingualism.”

02

Michael Mintrom and Phillipa Norman (2009)

Policy Entrepreneurialism and Policy Change

The Policy Studies Journal 37 (4): 649-667

“These two works are transformative in the sense that they provide a foundation for understanding the policy process, especially those concepts which constitute my specific approach to the study of public policy. Rather than take a traditional mechanical perspective (the making of public policy), my approach is organic (policy is developed or nurtured, not made like a washing machine). Public policy is rarely done, and almost always needs adjustments. It is important that the Scholars not only have knowledge of Language, Culture & Identity and its impact on issues that relate to multiculturalism and multilingualism, but also an understanding of the role of public policy.”



“It is difficult to only speak about culture and identity, both have been impacted by colonialism and imperialism throughout the world.”

– Lorna Wanosts' a7 Williams, Fellow 2021

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Mentors Men
ors Mentors
Mentors Me
Mentors Men
ors Mentors
Mentors Men



M^e Karine Asselin

Karine Asselin is a seasoned diplomat who has served in multiple capacities at Global Affairs Canada for more than two decades. She served at the Privy Council Office, in the Machinery of Government Secretariat, she was posted to Vienna at Canada's Delegation to the Organization for Security and Cooperation in Europe, and was Minister-Counsellor at the Canadian Embassy in Brasilia. M^e Asselin served as Canada's Ambassador to the Republic of Panama from 2015 to 2018. Recently, she has held senior management positions in the Multilateral Organizations Bureau and, currently, in the Consular Policy Bureau.

Mentor 2021

Director General, Consular
Policy Bureau, Global Affairs
Canada

Influence and Inspiration

01

Development of Human Rights: Audacity, Resilience and Cooperation

Beijing Declaration and Platform for Action
https://authoring.prod.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/CSW/BPA_F_Final_WEB.pdf

“The first document that I wish to share is a follow-up to the United Nations’ Fourth World Conference on Women: Action for Equality, Development and Peace, held in Beijing from September 4 to 15, 1995. I chose the text of the *Beijing Declaration and Platform for Action* because it is the product of a historic conference that left an indelible mark on the development of human rights. The Beijing event was the most influential world conference on the status of women. Moreover, as a young lawyer with the Department of External Affairs, I had the opportunity to participate in negotiating the Declaration and Platform for Action at the UN Headquarters in New York over in the preceding months and then to take part in the discussions surrounding its implementation with representatives of civil society.

The adoption of the *Beijing Declaration and Platform for Action*, a multilingual document that addresses a wide range of topics, was the result of long and arduous negotiations involving more than 180 UN member states whose positions were sometimes diametrically opposed; it is remarkable that a consensus could be achieved at the time. For these discussions, the negotiators had to show full respect for the diverse cultures represented while simultaneously defending and championing universal standards and principles of justice and human rights.

Consequently, the outcome of the negotiations illustrates certain fundamental concepts of the Pierre Elliott Trudeau Foundation's own engaged leadership curriculum that the delegates were required to uphold: collaboration and respectful dialogue, audacity and resilience in defending their position, and a duty of service in terms of promoting human rights.

In diplomacy as in negotiations, in order to convince another person to adopt a common position, there has to be something in it for everyone. The key to success is therefore a willingness to listen and engage in respectful dialogue with a view to identifying and agreeing on the most ambitious common denominator acceptable, all while adhering to and furthering the international normative framework.

Although many terms and concepts have evolved since the Beijing Conference, it remains a high point of international diplomacy because, as a result of these periodic discussions, it was possible to reach a consensus on a plan of action. That plan now serves as a basis for pursuing a shared vision of society.”

Influence and Inspiration

02

Serving Canada Internationally: Cooperation and the Promotion of Human Rights

<https://www.laestrella.com.pa/internacional/america/180707/deben-cuerpo-mujeres-derechos>

“The second document that I wish to share is an interview that I gave in Spanish to Panama’s national daily, *La Estrella*, published on July 7, 2018. Marking the end of my term as Ambassador (2015–2018), the interview looked back at Canada’s accomplishments over the preceding three years and sought to showcase and strengthen our close bilateral relationship.

Various subjects were discussed in the interview (relationships in the education sector, trade links, development projects, national security cooperation agreements, etc.). However, only my comments regarding the promotion of women’s rights, and particularly the right to make decisions concerning their own bodies, made the headlines. Since it was a controversial subject in the country, the article became known, but it was generally well received since Canada is recognized for its feminist policies and consistent action in support of the Rule of law, inclusion and diversity.

This article conveys my passion for strengthening human rights and democracy and advancing social policies and initiatives that support women and vulnerable populations in other countries, as in Canada, in the context of public service. Moreover, this interview, as my other public communications as a Canadian diplomat, was conducted in Spanish, illustrating my commitment to linguistic diversity. In my profession, this is a fundamental tool for truly immersing oneself in the local culture and understanding the identity of the people and country to which one is accredited. Most of all, it is a tangible sign of one’s respect for and interest in the host country, allowing for strong bilateral relationships.”

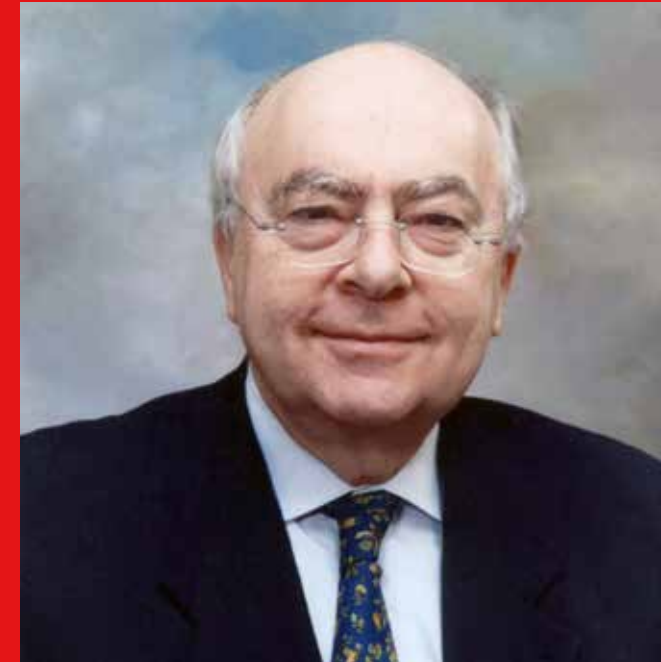
03

Déclaration contre la détention arbitraire dans les relations d’État à État

https://www.international.gc.ca/news-nouvelles/assets/pdfs/arbitrary_detention-detention_arbitraire-declaration-en.pdf

“Finally, I also wish to share a link to a global initiative put forward by Canada this year, and which was developed in part by the team that I lead. The Declaration Against Arbitrary Detention in State-to-State Relations is a multilateral initiative for which Canada’s leadership is being praised by numerous players in the international arena. The Declaration brought together a diverse coalition of countries and is a testament to their efforts to denounce the unacceptable but unfortunately growing practice of arbitrarily detaining foreign citizens to put pressure on another country. This practice is in direct violation of numerous international standards pertaining to human rights, consular law and diplomatic law because it is an impediment to peaceful relationships between nations.

After more than 25 years in diplomacy, the duty to promote human rights and social justice in order to improve the lives of our fellow citizens around the world has always been, and will continue to be, a constant in my professional life.”



Me Julius H. Grey

Julius H. Grey is a renowned lawyer with more than 40 years of experience and practice in several areas of law, notably in human rights and freedom and in language rights. He taught at McGill University, Université de Montréal, and the Canadian Human Rights School in Charlottetown. A president of the Canadian Human Rights Foundation from 1985 to 1988, he continues to publish on topics of law and general interest. In 2004, Me Grey received the Barreau du Québec Medal for his career accomplishments. Julius Grey has pleaded the second most cases in the Supreme Court of Canada. He has gone to the highest court in the country more than 50 times!

Mentor 2021

Senior Attorney,
Grey Casgrain, S.E.N.C.
Avocats and Professor

Works

01

Julius H. Grey, (1948–), interviewé

Julius H. Grey : entretiens avec Geneviève Nootens

Montréal (Québec) : Boréal, [2014]. – 22 cm. – (Trajectoires). pp 57–91

“I have chosen this text because it reflects the importance of freedom of expression in my life. Freedom of expression, even of things others consider wrong, is the key element in proposing and effecting change. It is also a crucial part of individual liberty and dignity. When there is a risk to speaking out, people tend to be conformist and express majority opinion. That is what is happening in our society in these times of political correctness and the power of lobbies. One of the significant but forgotten facts is that freedom of expression helps the weak, the marginalized, the unpopular while restrictions reinforce the positions of the powerful. It is therefore only in extreme cases when the harm can be proved, such as incitement to hate, that limiting freedom of expression can be justified.”

02

Julius H. Grey, (1948–)

Capitalism and the Alternatives

Montréal (Québec) : McGill-Queen's University Press, [2019]. 6 x 9, 296 p. pp 128–172

“In this extract, I propose a new system with a redistribution of goods and services and a relative economic equality. I deal with two difficulties. The first is the failure of bureaucratic socialism in the 20th century. I propose keeping a large private sector and redistributing through the tax system, although a significant public sector is always needed. The second is the threat to individual liberty posed by a very powerful state. The proposed « romantic individualism » is an attempt to keep freedom safe by freeing citizens from regulation except in the economic sphere. Not only is the power of government to be restrained but also the power of identity groups, of religious and cultural traditions. These must be free, to be sure but the freedom of the individual to dissent must be paramount. I believe that this position can be defended both as a matter of justice and as a matter of philosophy.”

Influence and Inspiration

01

Charles Dickens (1850)

David Copperfield

UK, Bradbury & Evans, 14 November 1850, bound (première édition), 624 p.

“*David Copperfield* is a book which transformed my life. I was an immigrant, with language difficulties who had lost his friends and his milieu. Dickens gave me the resilience and the hope that all would turn out well. *David Copperfield* is the quintessential novel of resilience, of a come-back from hardships far worse than mine at that time. It is also a critical portrayal of an unjust society in which those who lose get nothing. Dickens makes it clear that the humble and the weak are at least as worthy as the privileged but they do not often get the chance to show it. Finally it is a study of beauty, art and of creativity, since David becomes a writer and recounts his life in an unforgettable way. It is a commentary on creativity since David becomes a writer.”

02

Jean-Christophe Rufin (2014)

Globalia

France, Gallimard, 512 p. (Globalia was written in French; however an English version is available)

“Although it is a fairly recent novel, *Globalia* has established itself among the best «dystopian» novels about the future. What is particularly disturbing but also thought-provoking about it is the fact that it portrays a stalling society which nonetheless accepts many of our cherished notions- racial and ethnic equality and a guaranteed minimum for everyone. What is missing is liberty. Its absence is so painful that the hero and heroine choose to escape to dangerous lands rather than remain in the totally controlled *Globalia*. The lessons are many- that ideals can become platitudes without freedom, that free will is an essential aspect of morality, that material comfort is not a substitute for freedom. One other cautionary tale: *Globalia* has free elections but almost no one bothers voting and nothing can be changed that way.”



Emmanuel Kattan

A philosopher and novelist, Emmanuel Kattan is Director of the Alliance Program, an innovative academic joint venture of Columbia University and three major French Higher Education Institutions. He was previously Director of the British Council in New York, where he oversaw academic collaboration programs, and Senior Adviser at the United Nations Alliance of Civilizations. Dr. Kattan holds a Doctorate of Philosophy and Politics and a former Rhodes Scholar whose novels focus on the intersections of identities. Dr. Kattan has always worked to create and foster collaborations between academic communities and institutions.

PhD, mentor 2021

Director of the
Alliance Program,
Columbia University

Influence and Inspiration

01

Boris Cyrulnik (2013)

Resilience: How Your Inner Strength Can Set You Free from the Past

MJF Books, 320 p.

“Boris Cyrulnik is a French psychiatrist and neuro-physician who contributed to introduce the concept of “resilience” to explain how people can rebound and recover from trauma. Cyrulnik himself experienced significant trauma as a child: in 1944, when he was 6 years old, his parents were deported to Auschwitz. He was also arrested and managed to escape the Nazis. In *Resilience*, Cyrulnik draws on his experience working with children who have been abused, orphaned or fought in wars to show how the deepest traumas can be overcome. He tells the story of his encounter with Romanian orphans, who were isolated and deprived of any human contact for years. Despite the profound trauma and developmental challenges they faced, half of these children were able to embark on the road to recovery when verbal and emotional connections were restored. Cyrulnik describes processes of resilience in great detail, explaining, in particular, how storytelling enables individuals to externalize painful events of their past and create narratives that empower them to regain control over their own lives. Cyrulnik is a wonderful storyteller and his book illustrates how communication and collaboration (two key concepts of the Pierre Elliott Trudeau Foundation Leadership Curriculum) are instrumental in achieving resilience.”

02

Ta-Nehisi Coates (2015)

Between The World and Me (Une colère noire)

Spiegel & Grau, 152 p.

“Ta-Nehisi Coates’ book takes the form of a letter written to his 15-year-old son. Coates retraces the history of racial relations in the United States. Based on his knowledge of history and his personal experience, Coates paints an unforgiving picture of racial injustice. In particular, he analyzes the impact of insidious and overt prejudice on black bodies, as well as the fear and vulnerability it provokes. This book forced me to question my own knowledge of history, my assumptions about pervading policies that maintain inequalities institutionally. It made me realize that promoting diversity – a key value of the Pierre Elliott Trudeau Foundation – started with acknowledging past injustices and understanding how they continue to shape the present. I found Coates’ book inspiring because it is uncompromising and clear-sighted.

Coates’ goal is not to provide a prescription to overcome the deep-seated social and economic injustices that remain today. Rather, his message to his readers is: you have the power to denounce and address all forms of inequality. Despite its realist tone, *Between the World and Me* is both life affirming and empowering: it reminds us that we all share a responsibility to fight oppression and it gives us the tools to stand up and stand firm against injustice, wherever it occurs. In this, Coates sets out an inspiring example of audacity and leadership, two core concepts of the Pierre Elliott Trudeau Foundation Leadership Curriculum.”



The Honourable Aldéa Landry

C.M., P.C., C.Q.,
mentor 2021

Lawyer and
Businesswoman

The Honourable Aldéa Landry is a former politician, a business owner, a volunteer and an advocate for numerous causes. Her expertise and impressive network with respect to Acadian and Francophone communities are highly relevant to the scientific theme *Language, Culture, and Identity*. As one of Canada's Top 100 Most Powerful Women according to the Women's Executive Network (2009 and 2010), she has always been a strong proponent for the advancement of women in leadership roles. She is the former Chancellor of the Université Sainte-Anne (Nova Scotia).

Appointed Queen's Counsel in 1987 (Q.C.) and to the Privy Council of Canada in 2005 (P.C.), she was awarded the Order of Canada in 2006 (C.M.) and received The Queen Elizabeth II Diamond Jubilee Medal in 2012. She received the Order of Moncton in 2014. She holds an honorary doctorate from four universities.

Influence and Inspiration

01

Stéphanie Collin (2021)

Lumière sur la réforme du système de santé au Nouveau-Brunswick

Les Presses de l'Université d'Ottawa, 312 p.

"I chose the book *Lumière sur la réforme du système de santé au Nouveau-Brunswick* by Stéphanie Collins, PhD, published in May 2022 and of which I am one of the main characters.

In 2008, the eight existing health authorities of New Brunswick were abolished, and two new health authorities were created. It is in this context that the Minister of Health appointed me Chair of the Board of the Regional Health Authority A, which operated entirely in French.

For the four former French-language health authorities, the reform was likened to a "hostile takeover." Opposition to the reform was vigorous and relentless (and still ongoing today). During my term of office and that of the President and CEO, it became subject, varying degrees, to personal attacks in the media and the public space, power dynamics, competition between the regions, and a certain amount of misinformation and misogyny.

My goal in sharing my experience is to give Scholars of the Pierre Elliott Trudeau Foundation a unique perspective on the six key concepts of the leadership curriculum, and more specifically on audacity and resilience in the face of adversity as well as on the duty of service and public engagement."

02

Greater Moncton Immigration Strategy 2020-2024

https://www5.moncton.ca/docs/immigration/GMIGM_Strategie_immigration_2020-2024.pdf

"Co-creating this Strategy was transformational for me. It provided me with a unique lens on interculturalism, language and diversity. There is a demonstrable link between this work and these concepts: Diversity and Duty of service

The backbone of a very broad Immigration Strategy was created by observing, consulting, and sharing knowledge by means of very broad consultative process.

The consultations revealed attitudes and behaviours of many in our community towards immigrants: racism, unconscious and overt biases, prejudices ... While 'values and attitudes cannot be downloaded', this shows that we must endeavor to counter criticism through education, awareness raising and celebrating diversity.

I also realized the need to raise awareness among newcomers that learning both official languages is not only about getting a job, it is part of who we are as citizens of the only officially bilingual city of the only officially bilingual Province.

This work has heightened my resolve to promote the benefits of immigration and support newcomers through advocacy, coaching and awareness raising. I have encountered many newcomers and helped them settle in Greater Moncton, leading by example, and creating a human bond that goes beyond any cultural difference."



Azola Zuma Mayekiso

Azola Zuma Mayekiso is co-Chairman of the Lulalab Foundation and a deputy Chairman of the Human Resources Development Council of South Africa. She was previously CEO of Sanlam Investment Management, one of South Africa's most reputable investment management companies, and the executive Director and Head of Business Development for the Vunani Group. She holds an MBA in International Business and Management from the Hanze University in the Netherlands.

Mentor 2021

Co-Chairman of
the Lulalab Foundation
Deputy Chairman of
the Human Resources
Development Council
of South Africa

Influence and Inspiration

01

Esme Witbooi

Neuro-Linguistic Programming and why it has been a gamechanger in my leadership journey

www.esmelife coaching.com

"It is my unwavering belief that highly effective leaders are master communicators. Neuro Linguistic Programming (NLP) is a systematic approach to establishing a deep understanding of the people you seek to influence with your communication. It works in the context of the workplace (in leadership & sales), in the family setting and in your social setting.

I encountered NLP in 2012 and have been using it in my leadership journey ever since. At the time I was in senior management heading up business development for a small asset management business. I used NLP to build deep rapport with clients; really getting under their skin and understanding their motivations. This helped me unlock so much support for my organization in terms of closing deals at a pace not previously achieved by the business. The rapport I developed helped me position the business in a way that different clients could relate to and the sales effort was easy because I made it about them & less about my company.

From a leadership perspective, NLP is extremely useful if you have members in your team that require guidance or coaching. The manual I have attached (with permission) will serve as a useful guide to empower you as a leader to have a deep understanding of those you need to coach or lead and will help you do so in an effective manner. What I like about it is it provides deep insights about people's different representational systems and from that you can glean their preferred styles of communication and frame the communication with them accordingly. In leading my team as CEO of a large asset management business I took the time to figure out representational systems of each of my EXCO members and managed to effectively communicate with each of them using their preferred methods of receiving communication, using language that resonated with them. This way I could ensure co-operation and a sense of moving in a common direction far easier.

At a personal development level, there are different aspects to NLP training, viz. learning how to set goals effectively, learning how to think about anything constructively by using "chunking" (i.e. grouping) or helping those you lead to do same. Also diagnosing yourself regarding your own representational systems that make you relate more easily to others is good for enhancing self-awareness.

Framing is also a useful tool to achieve desired outcomes. Whether it is a change of mindset or perspective or whether it's used as a guide for achieving specific results in meetings, managing conflict and strengthening interpersonal relationships. NLP at the core of it is about mastering the practice of being an effective communicator. I have found it to be invaluable in understanding others at a deep level and, as a result, in being able to influence them at a deeper level too."

Influence and Inspiration

02

Thomas J. DeLong (2011)

Why Flying Without A Net has been transformational in my leadership journey and made me audacious & resilient

Boston: Harvard Business Review Press, 288 p

"This book is a high-need-for-achievement professionals' guide on how to thrive in their careers and operate from a position of confidence and resilience in dealing with change, uncertainty or personal feelings of inadequacy. It is useful for managing the self as well as others in instances where anxiety gets in the way. It forces you to reflect on where you are in your journey and helps to refocus your attention towards driving changes in your behaviour that will guide you to growth & fulfilment.

One of the toughest things I've had to deal with as a leader was leading disengaged professionals. Utilising the tools in the book around confirming the purpose of the business and how their work fitted in with respect to realizing that purpose, proved to be invaluable. It is full of dos and don'ts for professionals and organisations alike.

The book further taught me about the importance of having difficult conversations early on and how this builds trust and allows for effective feedback to be given to team members early so that they can improve their performance. It also forced me out of the trap that most leaders of organisations fall into, that of results myopia. Where the obsession is with productivity & profit measures only and where the people who produce those results are essentially ignored instead of being affirmed & reassured. The SKS process contained in it has been a revolutionary tool I have used to elicit feedback from colleagues & subordinates regarding my leadership impact and I strongly recommend it. It is a process where you ask others what you should stop doing, keep on doing or start doing as you work alongside them or lead them. This process should happen regularly such that as a leader you are steeped in the present day realities rather than being anchored in achievements of the past.

What I like most about this book is that it is written for workers and leaders alike and is thus relevant for professionals at whatever stage of their careers. It provides a model for learning, changing and growing if you take heed of its advice."



Gabrielle Scrimshaw Sagalov

Mentor 2021

Gleitsman Fellow,
Center for Public Leadership,
Harvard University;
Founder, The Scrimshaw
Group; Co-Founder,
Indigenous Professional
Association of Canada

Gabrielle Scrimshaw Sagalov is an Indigenous professional with a passion for creating social impact. She has an MBA from Stanford and is a Gleitsman Fellow at the Center for Public Leadership at Harvard University. Mrs. Scrimshaw Sagalov is the founder of The Scrimshaw Group, a consultancy with a focus on diversity, inclusion, and Indigenous economic development. A proud citizen of the Hatchet Lake Denesuline Nation, she is the co-founder of the Indigenous Professional Association of Canada.

Influence and Inspiration

01

Batista, Ed

The Art of Self Coaching

Stanford Graduate School of Business — Course

<https://www.edbatista.com/the-art-of-self-coaching-course.html>

“This class is one of the highest subscribed courses at the Stanford MBA program. Because of COVID, the professor, a professional leadership coach in the Bay Area – began offering the course online and posts the readings/recordings of the class online. The course is designed to support reflection for life and career growth for individuals. It also addresses how to build resiliency and develop through periods of transition.

The class has 9 modules, each of which you should take with a partner as it is designed to be collaborative. A good friend or a fellow Scholar would work well.”

02

Heifetz, Ronald A. (1998)

Leadership Without Easy Answers

Harvard University Press, 368 p

<https://www.hup.harvard.edu/catalog.php?isbn=9780674518582>

“I was lucky enough to take Ron Heifetz’s class at grad school where he teaches the practice of adaptive leadership. Many of the big problems Scholars (and all of us, for that matter) will face are adaptive in nature. There are problems at many layers and no clear answer. Heifetz writes about the difference between adaptive problems and technical ones, and how to take a step back and analyze situations fully before diving in. How to lead without authority. In 2016, President Juan Manuel Santos of Colombia highlighted Heifetz’s leadership advice in his Nobel Peace Prize Lecture. It is an old book so the examples are dated, however the learnings and reflections are solid.

Drawing on a dozen years of research among managers, officers, and politicians in the public realm and the private sector, among the nonprofits, and in teaching, Heifetz presents clear, concrete prescriptions for anyone who needs to take the lead in almost any situation, under almost any organizational conditions, no matter who is in charge. His strategy applies not only to people at the top but also to those who must lead without authority—activists as well as presidents, managers as well as workers on the front line.”

Scholars of the scientific cycle 2021–2024



Roxana
Akhmetova

Roxana is a doctoral student in Migration Studies at the University of Oxford. Her research is focused on what ethical artificial intelligence (AI) means in immigration and border control. More specifically, Roxana’s research will investigate how different actors (state, private tech companies, advocacy groups, and migrants) understand ‘ethical AI’ and the impacts AI is having on borderwork. Roxana has a B A and M A in Political Science from The University of Winnipeg and The University of Manitoba, respectively, and a M Sc in Migration Studies from the University of Oxford. She holds the positions of Equality and Diversity Officer at the Keble College Middle Common Room and she is part of the Diversity and Inclusion Team with the Oxford AI Society. Roxana currently works as a research assistant at the Oxford Department of International Development and has disseminated her research ideas in the forms of book and report chapters, television appearances, and blog posts on the use of AI in border governance as well as on the role of Canadian newcomers in reconciliation efforts with Indigenous peoples.



María
Juliana
Angarita

María Juliana is completing a PhD in museology, mediation and heritage at the Université du Québec à Montréal under the supervision of Professor Jennifer Carter. She holds a doctoral grant from the *Fonds de recherche du Québec – Société et Culture*.

María Juliana holds a Bachelor’s Degree in International Relations from the Universidad del Rosario (Colombia) and a Master’s Degree in Museology from the Université du Québec à Montréal. In 2019, María Juliana received the Prix Roland-Arpin, and in 2020 she received the Young Leadership Award from the Montreal Holocaust Museum. María Juliana is also a core member of the Beyond Museum Walls research team – a multilingual, interdisciplinary research and knowledge mobilization project designed to conceive new methodologies for public dialogue around difficult history and cultural conflict – based at the Curating and Public Scholarship Lab at Concordia University.

Drawing on the experiences of survivors of the Colombian armed conflict, María Juliana’s doctoral research explores how grassroots memorialization initiatives such as commemorations, performances and community museums give rise to heritagization, and how the memory practices of historically marginalized victims foster new approaches to, and uses of, heritage-building “from below” in peacebuilding contexts.



Monique
Auger

Monique Auger is Métis of Haudenosaunee, Nisga’a, and of French ancestry. She lives on the territory of the Ləkʷəŋən peoples and is a PhD student in the Social Dimensions of Health program at the University of Victoria. She is a passionate educator, teaching as a sessional instructor in Indigenous Health at both the University of Victoria and Camosun College.

Monique has maintained a strong relationship with the Métis Nation of British Columbia as a Métis researcher, a proud citizen, volunteer, and former elected youth leader. She holds a MSc from the Faculty of Health Sciences at Simon Fraser University and a BA in First Nations Studies from the University of Northern British Columbia.

Monique’s program of research has been responsive to the needs and strengths of her Métis community, looking at determinants of health and wellness with a focus on cultural continuity and community connections. Her doctoral research explores the ways in which Métis values, culture and traditions, and ways of knowing, may contribute to a prevention-focused Métis child welfare system. Building on her past work in investigations with the Representative for Children and Youth, her research aims to inform the future of Métis jurisdiction with respect to child welfare.



Prativa
Baral

Prativa is an epidemiologist, a social scientist, and a doctoral student at the Johns Hopkins Bloomberg School of Public Health. She operates at the intersection of epidemiology and policy and is passionate about making science accessible and digestible. Concurrently, she consults for the World Bank, monitoring disruption of essential services due to COVID-19. She is also a research fellow at the Global Strategy Lab, conducting mixed-methods research on transnational issues such as global health governance.

Most recently, Prativa supported the UN’s efforts in creating a research roadmap for COVID-19 recovery. Prior to this, she worked for the Bill and Melinda Gates Foundation, has served on the WHO’s Science Division expert advisory committee, and has advised the Government of Canada in drafting their first global health research strategic plan. She also acts as point of contact between Canadian government departments, community partners, and refugee families across Québec.

Prativa is a McGill University graduate, with a Master’s Degree from Columbia University as a Merit Scholar. She is also a recipient of the Canadian Institutes for Health Research’s Doctoral Foreign Study Award. Fluent in French, English and Nepali, Prativa is a former nationally ranked chess player. She regularly appears on CBC News providing Canadians with practical advice regarding COVID-19.



**Lydie
B. Belporo**

Lydie holds two master's degrees in law and international relations, and she is a PhD student at the School of Criminology of the Université de Montréal. Her research focuses on the governance of extremist violence in sub-Saharan Africa. She is specifically interested in the trajectories of former recruits of the terrorist group Boko Haram and their reintegration in Cameroon. Lydie is actively involved in her field of expertise and worked as coordinator of PREV-IMPACT project for the UNESCO Chair in the Prevention of Radicalization and Violent Extremism in Canada before becoming a research associate for a project led with the Organisation Internationale de la Francophonie. Previously, she served at the Court of Arbitration of Côte d'Ivoire, in the Training Section of the International Bureau for Children's Rights and as a researcher with the Peace Operations Research Network in Montreal.

Socially committed, Lydie is a representative on the Equity, Diversity and Inclusion Advisory Committee and sits on the Board of Directors of the Association des jeunes philanthropes de l'Université de Montréal. She particularly enjoys sharing experiences and co-founded the international network of women doctoral students (RIFDOC). Above all, she is very proud to combine her multiple involvements with her role as a mother.



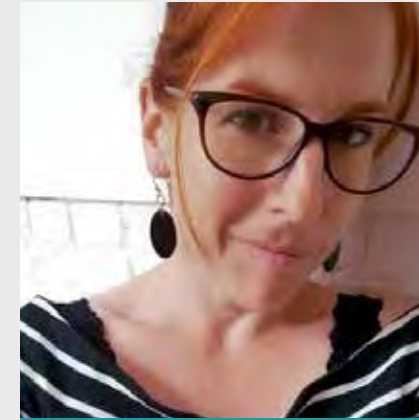
**Étienne
Cossette-
Lefebvre**

Étienne is currently pursuing a doctorate at the University of Toronto, where he obtained an LLM in 2020. His dissertation develops a novel trans-systemic account of the concept of self-ownership to explain a person's rights in her body, image, voice and personal information. He feels privileged to be a Junior Fellow at Massey College.

Étienne earned a BCL/LLB (Hons) in the Faculty of Law at McGill University in 2014. He won numerous awards of excellence and graduated on the Dean's Honour List. He was also awarded the First Prize in the undergraduate category of the essay competition of the Quebec Association of Comparative Law (2013-2014). Throughout his post-secondary education, Étienne has continued to pursue his study of music, training and performing as a classical pianist.

After successfully completing the Quebec Bar, earning the second-highest grade point average in the Quebec Bar School (2014-2015), Étienne worked as a law clerk at the Court of Appeal of Quebec. In 2018-2019, he clerked for Justice Russell Brown at the Supreme Court of Canada.

Étienne is a course lecturer at McGill. In September 2020, he was appointed Assistant Director of the Paul-André Crépeau Centre for Private and Comparative Law.



**Anick
Desrosiers**

Anick is a doctoral student at McGill University's School of Social Work. Building upon her intimate, professional, and academic experience of life on the streets, Anick has established and led a community of practice in mental health and homelessness, as well as a psychotherapeutic outreach program for people experiencing homelessness, in collaboration with Doctors of the World Canada. She currently accompanies unsheltered women at Montreal's La rue des Femmes.

With and for the homeless people, and in support of field workers, she commits, through an ethnographic approach, to furthering our collective understanding of the impacts of the traumatic life courses that precede and follow the experience of life on the street, that they may be better taken into account. Known for her determination and her ability to turn knowledge into collaborative action, she hopes to continue to mobilize people towards forming a society that is proud of the active care that it embodies, where each human being can find a roof and a sense of belonging in their community.



**Raphaël
Grenier-
Benoit**

Raphaël is a doctoral student at the University of Oxford Faculty of Law, where he conducts research under the supervision of Professor Richard Ekins. Fascinated by issues at the intersection of law, politics, and morality, his research focuses on constitutional interpretation and on the role of the judiciary in harmonizing law to social change. Before studying law, Raphaël worked for almost a decade in the media, notably as an actor in the Radio-Canada series *Les Parent*. He also co-developed and hosted a documentary series highlighting the community involvement of young francophones. Following these experiences, he obtained a bachelor's degree in civil law and common law at McGill University's Faculty of Law, and an MPhil in law (with Distinction) at the University of Oxford. While at McGill, he served as Executive Editor of the McGill Law Journal, worked as a law clerk for Judge Jean-Pierre Archambault of the Court of Quebec, and as a research assistant for Professor Mark D. Walters. In addition to his academic activities, Raphaël sits on the board of directors of the *Fête de la lecture et du livre jeunesse de Longueuil*, and is a member of the International Association of Young Lawyers.



Jasmine
Cassy Mah

Jasmine is a resident doctor who is passionate about caring for older adults. She holds an MD from the University of Ottawa and an MSc from the London School of Economics and the London School of Hygiene and Tropical Medicine. As part of the Clinician Investigator and Internal Medicine Programs at Dalhousie University, Jasmine's doctoral research uses epidemiology and statistics to better understand how social vulnerability and frailty influence health outcomes, use of healthcare resources, and long-term care placement.

As a nationally recognized advocate in geriatric medicine, Jasmine also focuses on building partnerships between patients, policymakers, and frontline healthcare workers to promote health systems innovation as part of the Geriatric Medicine Research Group. Jasmine's interests in healthcare and aging are inspired by family experiences with the long-term care system; her work strives to provide solutions for older adults to live, age and receive healthcare and social care with dignity in the home of their choice, even in circumstances that limit their autonomy. Just as caring for the elderly is a community effort, Jasmine would like to thank her family and mentors for their support.



Kowan
O'Keefe

Kowan was born and raised in Kamloops, B.C. He is currently a second-year PhD student in the School of Public Policy at the University of Maryland, College Park. Kowan studies climate change policy and is particularly interested in the social, political, and ethical challenges of using carbon dioxide removal strategies to achieve net-zero emissions goals. Kowan attended Minot State University in North Dakota on a golf scholarship and was a two-time NCAA Division II Academic All-American and a finalist for the NCAA Division II Male Scholar Athlete of the Year Award. He became the first person in his family to graduate from university, earning a Bachelor's Degree in chemistry and mathematics. He then earned a Master's Degree in chemistry from the University of Toronto. Kowan twice attended the United Nations Climate Change Conference representing the American Chemical Society and has written three chapters for a series of collaborative books on climate change literacy and education. In addition to his doctoral studies, Kowan is a member of an interdisciplinary team at the University of Maryland's Center for Global Sustainability that focuses on climate change and energy policy projects.



Bryon
Maxey

Bryon is a PhD student in Religion at the University of Toronto. He previously completed his BA and MA at the University of Michigan. Bryon's leadership approach builds on his years of experience as a facilitator and co-creator of open online learning and digital humanities projects with the University of Michigan's Center for Academic Innovation and its Digital Islamic Studies Curriculum.

As an educator and interdisciplinary researcher of Islam and premodern Africa, Bryon interprets and seeks to facilitate greater awareness of the centuries-old Black intellectual and cultural heritage bridging communities in Africa and the Americas. His research focuses on the dynamic and diverse history of interpreting the Qur'an in Africa as a foundation for understanding this rich and pluralistic heritage. Bryon is a new arrival to Toronto from the United States, but no stranger to Canada because of generations of close and transnational family ties between the U.S. and the historic Black communities of Southwestern Ontario. As an emerging scholar, Bryon also draws on his earlier experiences as a secondary educator in Detroit and Chicago, and as a direct-action organizer of multifaith communities to inform his approach to engaged scholarship.



Joshua
Okyere

Joshua is a PhD student in Peace and Conflict Studies at the University of Manitoba. His research interests spans across young people affected by violence, conflict and peacebuilding in Africa, conflict and gender, using emancipatory peacebuilding approaches to foster sustainable peace. For his thesis, he seeks to delve deeper into the entrenched social and institutionalized cultural practices that enable violence against children, especially in Africa, to be able to devise suitable interventions against such violence using peacebuilding frameworks of peacebuilding. He obtained his Master's Degree in International Studies from Ohio University and his undergraduate degree in Political Studies from the Kwame Nkrumah University of Science and Technology in Ghana. He is currently a volunteer at the Newcomer Ethnocultural Youth Council of Winnipeg and an associate member of the Pan-African Scientific Research Council.



**Chanelle
Robinson**

Chanelle is a doctoral student in Systematic Theology at Boston College. Her scholarship explores womanist theology and diasporic poetry, with a focus on the Canadian context. An educator and scholar, Chanelle completed a Master of Arts in Theological Studies and a Master of Teaching at the University of Toronto. She earned an Honors Bachelor of Arts from the University of Western Ontario. Chanelle is the recipient of Doctoral Fellowships through the Social Science and Humanities Research Council (SSHRC) and the Louisville Institute. Currently, she serves as the Student Representative for the Canadian Theological Society.



**Cristina
Wood**

Cristina is a PhD candidate in History at York University, committed to creative storytelling about the past. Her dissertation project, *Enchanting the Ottawa River: An Affective Environmental History of the Ottawa River*, will follow the waterway's transition from a transit and trade thoroughfare to a regulated, recreational place. Building on her work in public history and digital humanities, Cristina draws on archival and oral histories and material culture to bring alive environmental pasts and futures. Cristina's work has also been supported by a SSHRC Doctoral Fellowship. Her Master's research featured the history of one section of the Ottawa River through data sonification – a novel method for communicating information through sound. For this project, she received the 2019 University Medal for Outstanding Graduate Work at Carleton University. Cristina was the 2018-2019 Garth Wilson Fellow for Public History at Ingenium: Canada's Museums of Science and Innovation, and she later introduced tools for digital curation to museum staff. Born in France, Cristina grew up near the shore of the Kichi Sibi River in Ottawa. Her undergraduate studies at Queen's University helped her discover passions for history and environmental studies, along with public history and community engagement, especially through a commemorative project reaching schools across Canada.



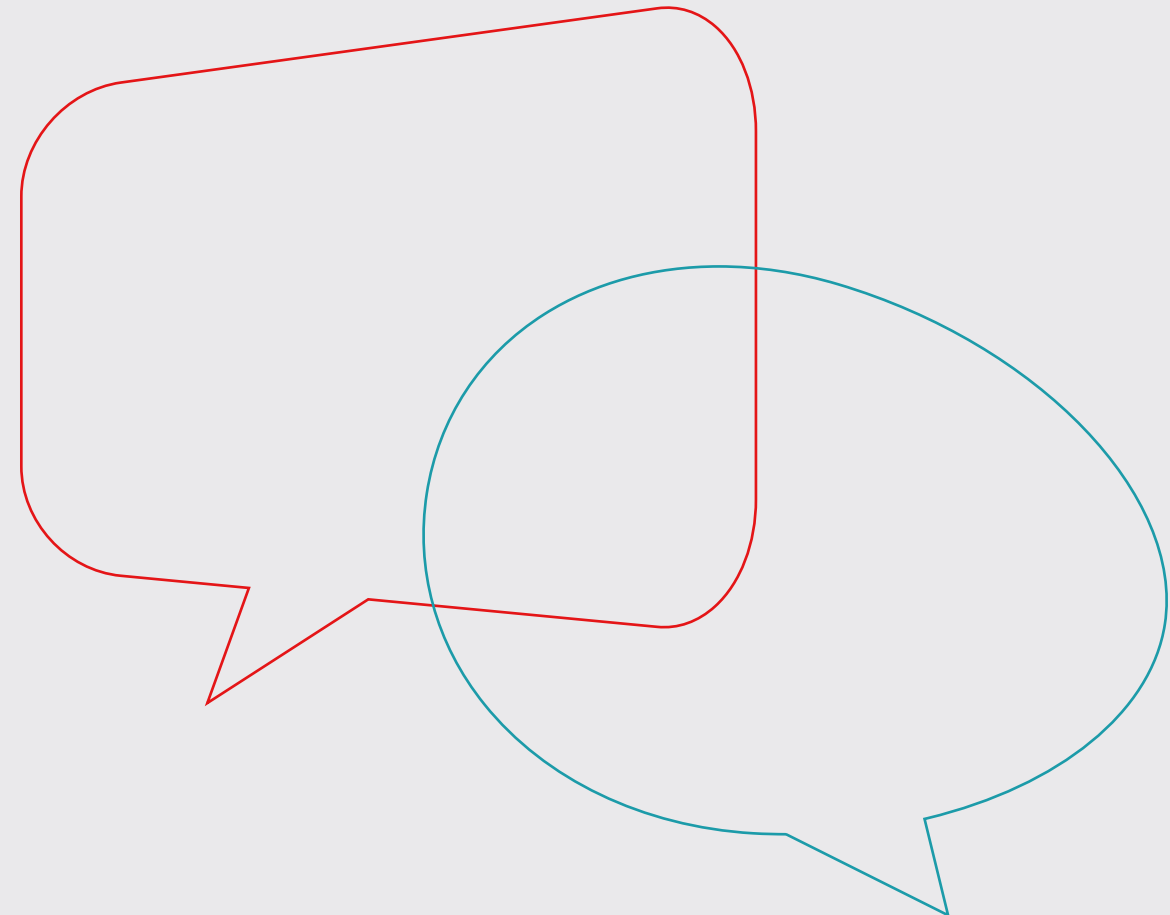
**Kylie
Heales**

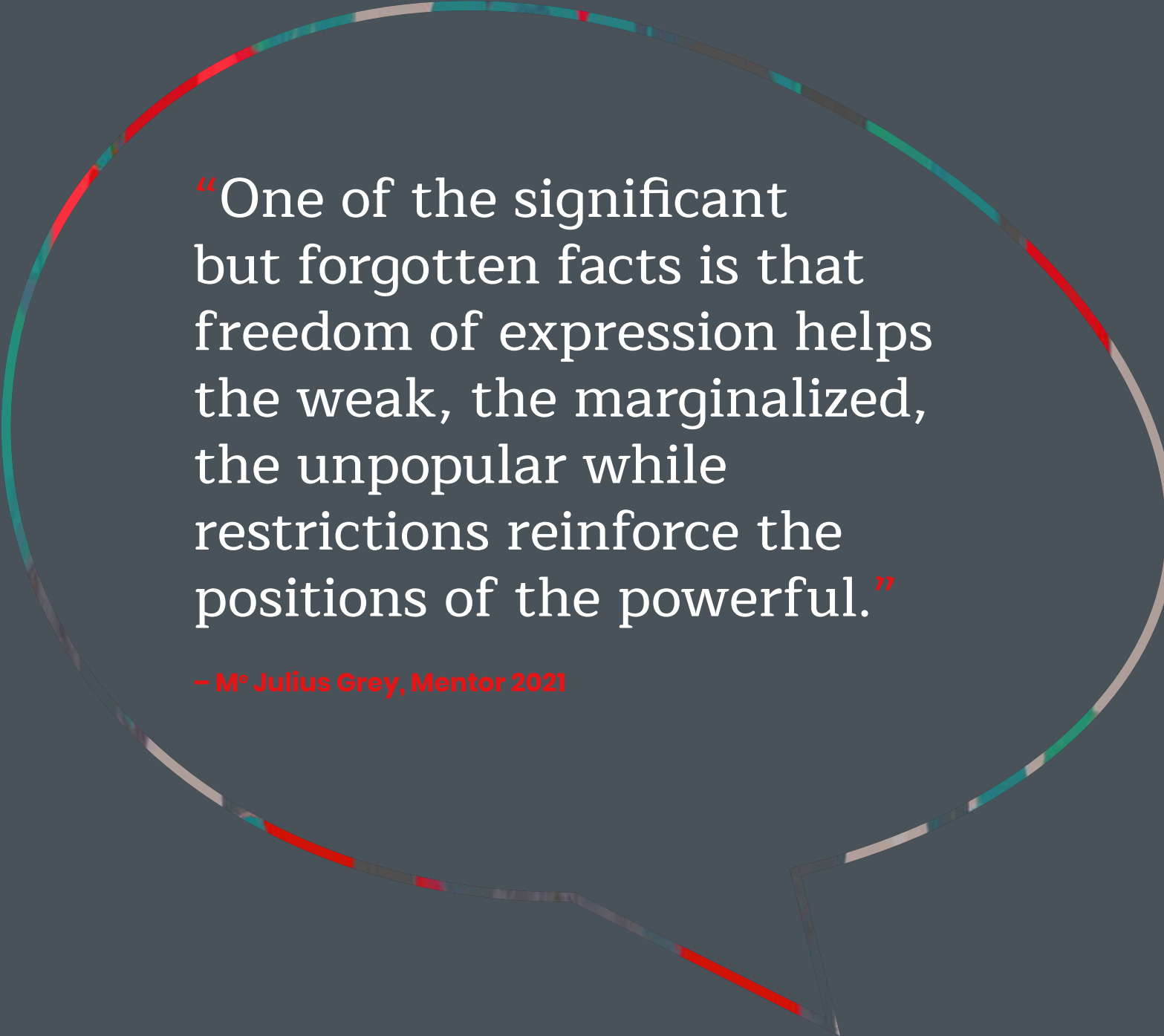
Kylie is a PhD student in the Alberta School of Business' Strategy, Entrepreneurship and Management Department at the University of Alberta. Prior to this, Kylie completed her MBA at The Fuqua School of Business at Duke University where she interned at the Bill & Melinda Gates Foundation. She also co-founded a fintech firm during this time.

Kylie's vision for contributing to a better future globally is to explain why entrepreneurs in contexts of poverty struggle to scale, and how these entrepreneurs can overcome this growth challenge to move themselves, and their communities, out of poverty. To support this vision, Kylie is currently exploring the role of social norms related to innovation and entrepreneurship in Haiti and Tunisia.

In addition to academia, Kylie has seven years of business experience helping non-profits, start-ups and Fortune 500 companies enhance operational performance. She has also worked directly with entrepreneurs in Kenya and Zambia to grow their ventures.

Originally from Australia, Kylie enjoys being outdoors with her dog, and has recently discovered the joy of snowshoeing across the Great Plains and through the Canadian Rockies. She is also a competitive ballroom dancer having competed in Australia, the United States, and China.





“One of the significant but forgotten facts is that freedom of expression helps the weak, the marginalized, the unpopular while restrictions reinforce the positions of the powerful.”

– M^o Julius Grey, Mentor 2021

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RESEARCH NOTE/NOTES DE RECHERCHE

Talk COVID to Me: Language Rights and Canadian Government Responses to the Pandemic

Stéphanie Chouinard^{1*} and Martin Normand²

¹Royal Military College (Kingston) and Queen's University, Department of Political Science and Economics, 13, General Crerar Crescent, Kingston (ON), K7K 4B9 and ²School of Political Studies, University of Ottawa, 75 Laurier Avenue East, Ottawa (ON), K1N 6N5

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Since the COVID-19 outbreak, a gradual loosening of linguistic obligations in public institutions and governments has been observed in various jurisdictions in Canada. This article argues that in addition to legal requirements to provide minority language services, it is not justifiable for governments to suspend or curtail such services in an emergency situation, for reasons pertaining to public safety and public health. After performing a survey and analysis of government actions against their constitutional, legislative, and policy language obligations to highlight best practices and deficiencies, we discuss the policy implications of these actions. In conclusion, the article considers how governments could better uphold their language obligations in times of emergency.

Government Responses to the COVID-19 Pandemic

Canada's language regime draws upon two traditions (Cardinal, 2015). The first is political compromise, which, in practice, has allowed for the recognition of both French and English as a fundamental characteristic of Canadian society. As official languages, they are each a vector for citizenship and political participation. The second is federalism, which, in the spirit of compromise, empowers the federated identities to develop their own sets of language laws, rules, and policies pertaining to the delivery of government services, communications with the public, and supports for Official Languages Minority Communities (OLMCs). In other words, as language is an ancillary jurisdiction in the Canadian federal regime, it has led to a very different status for French, English, and a number of Indigenous languages from one province/territory to the other. Services and communications in non-official languages are offered on the basis of accommodation; they do not stem from a constitutional or legislative obligation. They will therefore be discussed only briefly in this article. The following survey of government responses to the crisis highlights best practices and deficiencies with respect to official language obligations.

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the government response to COVID-19 have been felt more acutely. Despite the availability of simultaneous interpretation during briefings, Premier Blaine Higgs has not made use of the service, and has occasionally refused to answer questions fielded by Francophone reporters (Gravel, 2020). Commissioner of Official Languages Shirley MacLean noted that “the [New Brunswick] *Official Languages Act* applies to institutions, not to elected representatives” (Gravel, 2020; personal translation). However, New Brunswick's linguistic obligations may be unfulfilled by simultaneous interpretation, rather requiring a French-language interlocutor to provide equal services to both linguistic communities, in the spirit of section 16.1 of the *Canadian Charter of Rights and Freedoms* (Radio-Canada, 2020).

Québec

Québec shines by comparison in the domain of COVID-19 minority-language communications. Despite *la Charte de la langue française* providing no obligation to do so, daily briefings by Premier François Legault have consistently been held in French and English, without the use of interpreters. However, there have been some gaps in written information distributed to citizens. A “COVID guide” sent to all Québec households was originally available in French only (Chambers, 2020). It was translated into English and distributed in paper form several weeks later (Montreal Gazette, 2020). The *Secrétariat du Québec aux relations canadiennes* (SQRC) has published a special edition of its French-language “COVID guide” for Francophones outside of Québec (SQRC, 2020), filling the gap left by other provinces with respect to minority-language services and demonstrating a form of “kin-state” action on behalf of Québec.

Other Provinces

Good practices have been witnessed in other provinces. Prince Edward Island's Chief Public Health Officer answered questions in French during briefings, as did British Columbia's Minister of Health (and Minister Responsible for Francophone Affairs). Jason Kenney, premier of Alberta, has also answered questions in French during briefings and gave interviews in that language to various media outlets. Despite less robust language obligations than Ontario and New Brunswick, these provinces have offered information to their Francophone population during these briefings.

Why Should Language Rights Be Upheld during a Pandemic?

We have identified two main arguments to uphold language rights during the outbreak: public safety and public health.

Public Safety

Citizens need to have access to information, legislation and regulations coming from numerous stakeholders, like chief medical officers, premiers and ministers. As previously stated, some governments have relied on simultaneous interpretation or closed captioning of briefings relayed on electronic platforms. Yet these are not accessible to

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all citizens, notably in rural or remote areas. Some argue that since the rate of bilingualism is higher among Francophones in Canada (Statistics Canada, 2017), everyone should understand the guidelines circulated in English. However, French unilingualism is common, especially among the elderly, and English–French bilingualism is often self-evaluated. Francophones tend to overstate their capacity in English in surveys or during interactions with state institutions (Deveau et al., 2009; Tardif and Dallaire, 2010). Therefore, in order to ensure proper understanding of daily directives, access to information in French is paramount. There is anecdotal evidence that French speakers outside of Quebec watch the Quebec briefings to access information in French (Liberal Party of Ontario, 2020). This may prompt citizens to comply with Quebec’s guidelines, rather than those of their own province, which could have public safety (and legal) implications.

Public Health

Language obligations are also important for health reasons. Language barriers when receiving health services can have adverse effects on a patient (Bowen, 2015), such as errors in diagnosis and inadequate subsequent treatment. They can also lead to health promotion and education resources being underused. These risks are higher for vulnerable members of society, among whom are the elderly (OFLSC, 2016). As we know, COVID-19 disproportionately affects seniors, who make up a comparatively larger proportion of the Francophone population in minority communities compared to the majority and who have a low level of literacy, making it harder for them to navigate the health system (Bouchard and Desmeules, 2017). Also, second-language proficiency decreases with age, and stressful conditions and cognitive issues such as dementia are aggravating factors (OFLSC, 2018). It is thus imperative that this segment of the population receive information on COVID-19 in its mother tongue. Some of these observations are also valid for recent Francophone immigrants outside of Québec.

While the issue of non-official languages falls outside the scope of this analysis, we acknowledge that several of the above arguments also apply to government services, and especially communications, in other non-official languages. This would ensure that a larger proportion of citizens is properly informed, including Indigenous language speakers and allophone immigrants.

Conclusion

Since the beginning of the COVID-19 outbreak, most governments have enacted and communicated policies through daily briefings. Appropriate measures must be implemented to ensure speakers of a minority language are adequately informed. Beyond the state’s responsibility to uphold the rule of law and to maintain the public trust in its institutions, the policy basis of public safety and public health outlined above more than justify minority language services throughout an emergency. Canada is not alone in this situation; other minority language communities have observed a similar challenge (Collective, 2020). Governments have already shown they understand the impetus of being understood by all, including the most vulnerable, by engaging sign language interpreters for their briefings.

As Béland et al. (2020) have previously highlighted, COVID-19 has created a critical juncture in the federal state’s interactions with the population. Institutions generally resistant to the use of new technologies, for example in the administration of justice or in education, have been compelled to adjust to ensure the delivery of essential services. While institutions are innovating rapidly, language rights and obligations should be an integral part of this transformation, rather than an afterthought or a hindrance. Existing minority-language service delivery bodies should be mobilized by governments in this transition to help plan for consistent inclusion of language rights in government action, now and in the future.

Acknowledgments. The authors would like to thank the anonymous reviewers for their insightful comments and Sean Stephenson for the linguistic revision.

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Cite this article: Chouinard S, Normand M (2020). Talk COVID to Me: Language Rights and Canadian Government Responses to the Pandemic. *Canadian Journal of Political Science* 53, 259-264. <https://doi.org/10.1017/S0008423920000359>

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Policy change, courts, and the Canadian constitution

Author(s)	Macfarlane, Emmett
Imprint	University of Toronto Press, 2018
Extent	ix, 448 pages
ISBN	9781487519483, 9781487523152, 9781487504120, 1487523157, 1487504128
Permalink	https://books.scholarsportal.info/en/read?id=/ebooks/ebooks3/utpress/2018-11-28/1/9781487519483
Pages	243 to 262

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11 Section 23 of the Charter and Official-Language Minority Instruction in Canada: The Judiciary's Impact and Limits in Education Policymaking

STÉPHANIE CHOUINARD

This chapter takes an in-depth look at the evolution of official-language minority education – that is, full English-language instruction in Quebec and French-language instruction in the rest of Canada¹ – through the interpretation that the Supreme Court of Canada (SCC) has given to section 23 of the Canadian Charter of Rights and Freedoms (Charter). In the last thirty-five years, the SCC has paid a lot of attention to this question as it has been called upon many times to clarify the meaning and the extent of these rights. The evolution of Canada's language regime has, since then, been driven by the courts rather than the legislatures.² The SCC has had to interpret the provisions contained in section 23, while attempting to steer away from interference from provincial jurisdictions. The policy of the SCC towards official-minority language education has, therefore, had a substantial impact, but has contained enough flexibility to be adapted by the provinces.

In 1982, section 23 of the Charter entrenched in the constitution a new provision guaranteeing, for the children of parents whose first language was the minority official language in their province of residence, access to instruction in that language. This section entailed obvious new duties for provincial governments everywhere in the country, education being an area of provincial jurisdiction. It also demonstrated a blatant jurisdictional encroachment of the federal government on the provinces – and many provinces responded by openly admitting that they would disregard section 23 since it was not available to dismissal through the notwithstanding clause. The provincial backlash against this new provision was such that every province in the country has, since 1982, been found in disrespect of its section 23 obligations at least once by Canadian courts. The SCC has been particularly active in this

area, handing down ten decisions since 1982 that have gradually clarified the provinces' obligations and elaborated a liberal and generous interpretation of the extent of section 23.

Three and a half decades later, one could believe that these numerous cases of jurisprudence regarding the provincial governments' official-language education obligations would have led to a normalization of the conditions of access to minority official-language schools and to a standardization of the quality of instruction provided in those institutions throughout the federation – especially since provincial education policies, with the exception of Quebec, have significantly converged in the last decades.³ And yet, still today, many inconsistencies and inequalities persist among different provinces and sometimes within them. As this chapter was being written, nearly half the provinces and territories of Canada were facing a constitutional challenge brought forward by francophone minority communities, which were accusing the provincial and territorial instances of failing to fulfil their section 23 obligations. According to the newspaper *Le Devoir*, "Never in Canada's history have so many legal cases in the domain of official-language minority education concurrently ended up in the higher courts."⁴

It thus appears that court intervention in official-language minority instruction does not constitute a panacea for official-language minority communities. While the SCC has certainly done its part to enforce the respect of section 23 since 1982, it is clear that case law has a limited impact on provincial implementation of said obligations. This chapter will aim to demonstrate that these policy outcomes are the result of power relationships, both between the two parties involved in each case (the minority communities and the provincial governments) and between the SCC and the legislatures that are responsible for implementing the policy changes following a decision.

In the first case, the adversarial nature of litigation systematically disadvantages the non-state actors as they have limited means and can rarely present an adequate and complete record of evidence – an issue already highlighted in the works of Marc Galanter⁵ and demonstrated in other non-section 23 language rights cases by Power, Larocque, and Bossé.⁶ The burden of evidence being thrust on the shoulders of official-minority communities in these cases creates a clear advantage for the state actor, who has virtually unlimited resources and who is a "repeat player"⁷ in the judicial system, with a sophisticated knowledge of said system. In the second case, and as will also be highlighted in James B. Kelly's findings in the following chapter, the SCC relies on

the provincial legislative assemblies to enact language policy changes – changes that they might be reluctant to make⁸ for electoral and/or ideological reasons.

This chapter will begin with a brief overview of the historical and political reasons behind the entrenchment of section 23 rights in the 1982 constitution and the population to whom these rights apply. It will then present, chronologically, an analysis of the ten SCC section 23 decisions to highlight how the Court has read into this provision since 1982. It has notably clarified and extended the minority communities' right to manage their own educational institutions as well as highlighted the importance of these institutions being granted the resources necessary to ensure that they can provide an education of the same quality as the majority institutions. This second part will set out the "state of affairs" in the jurisprudence. Finally, the chapter will shed light on some of the SCC's limits regarding official-language minority education policymaking. The adversarial aspect of litigation, the federal division of powers, and the courts' jurisdictional limits on the implementation of positive rights are three issues that will be discussed.

Historical Context

The issue of minority education rights has been at the forefront of political debate in Canada since before Confederation. It is also an issue with which courts have had to grapple for almost as long. Originally, the debate regarding access to education in French or in English in Canada was closely intertwined with another important divide in Canadian society: the religious divide between Catholics and Protestants. As early as 1864, the legislature in Nova Scotia, a province where schooling in French and in Gaelic had been recognized for decades, voted to implement an English-only, non-confessional school system⁹ – legislation that was only partly repealed in 1902. In 1867, the Fathers of Confederation decided to grant provinces jurisdiction over education, but to constitutionalize a universal guarantee of access to "separate or dissentient schools" – a guarantee found in section 93 of the British North America Act (BNA Act). Back then, religious cleavages mostly followed linguistic ones, with the majority of the anglophone population being Protestant and the francophone population Catholic; these provisions were thus also assumed to protect access to schools in both those languages, where one or the other would be the language of the minority.

However, this belief was proved wrong a few short years following Confederation. The Irish Catholic clergy quickly proved reluctant to provide French-language education outside Quebec. Moreover, more provinces passed legislation to abolish the right to separate schools – legislation that, despite being unconstitutional, was never disavowed by the federal government. This situation led to a number of "school crises."¹⁰ Catholic schools were abolished in New Brunswick in 1871, leading to the 1875 Caraquet riot, after which the provincial government retracted its legislation. The Manitoba government abolished public funding of confessional schools as well as the bilingual status of the province in 1890 – just two decades after entering Confederation. The federal government refused to disavow these legislative moves, preferring to let the courts intervene. Franco-Manitobans went all the way to London to see these provisions abolished – at that time, the Judicial Committee of the Privy Council (JCPC) was the highest court in Canada – first, to no avail; then, three years later, they were granted a recognition of prejudice towards Catholics in the province. Following the 1896 "Greenway-Laurier compromise," Catholic instruction would be re-established for up to an hour a day, but French would continue to be forbidden as a language of instruction until 1947.¹¹

Finally, following the adoption of Regulation 17 by the Ontario Department of Education in 1912, French-language education was abolished and forbidden throughout that province past second grade.¹² Members of the Franco-Ontarian community, with the help of a newly founded community organization, the Association canadienne-française d'éducation en français de l'Ontario, went to the JCPC and argued that section 93 of the BNA Act also protected the language of education; they lost that legal battle.¹³ Regulation 17 was eventually repealed in 1927.

In short, following Confederation, and for many decades, most French Canadians outside Quebec had limited, if any, access to instruction in their mother tongue, and this instruction was often provided in English schools as an addendum to the regular curriculum. Meanwhile, the government of Quebec never threatened English-language education in that province, where English schools flourished, from first grade to university.¹⁴

In 1969, the final report of the Laurendeau-Dunton Commission (Royal Commission on Bilingualism and Biculturalism) rang an alarm bell: access to education in French outside Quebec was still dismal, and the quality of instruction provided in existing schools was unsatisfactory,

especially when compared to the quality of English schools. The commissioners recommended that parents whose first language was the minority official language have access to public schools in which the language of instruction would be theirs in areas where the demand was sufficient.¹⁵ In 1977, the Quebec government began to restrict access to English schools in the province through provisions found in the Charter of the French Language, commonly known as Bill 101. René Lévesque's government's plan was to limit the anglicization of newcomers, who almost systematically sent their children to the province's English schools,¹⁶ rather than to limit access to those schools for the children of Anglo-Quebecer parents.¹⁷ Nevertheless, this legislation was coldly received by his provincial counterparts. In August 1977, all premiers of Canada, with the exception of Lévesque, signed the St. Andrews Declaration, in which they vowed to "make their best efforts to provide instruction in English and French wherever numbers warranted."¹⁸ The Council of Ministers of Education, Canada was also to conduct a review of the state of minority-language education in each province.

The premiers reiterated and clarified their engagement the following year in the Montreal Accord, which stated that each "child of the French-speaking and English-speaking minority is entitled to an education in his or her language in the primary or the secondary schools in each province wherever numbers warrant. The implementation of this principle will be as defined by each province."¹⁹ Provincial governments were looking to regularize official-language minorities' situation in education; but despite these good intentions, there still existed, at the end of the 1970s, significant disparities among the provinces in the conditions of access to instruction in the minority language. Moreover, as was made explicit in the 1978 accord, provinces still retained full discretion over the implementation of these policies, and official-language minorities had no legal recourse should a provincial government refuse to respect its obligations.

A second series of school crises hit French Canada in the same period, notably in Ontario, where many English school boards refused to create French-language classes and schools, despite numbers widely warranting such measures. Confrontations took place in many localities: Ottawa, Elliot Lake, Cornwall, Sturgeon Falls, Burlington, Kirkland Lake, East York, Windsor-Essex, and, finally, Penetanguishene (Penetang).²⁰ The "Penetang crisis," in particular, gained momentum through political and media attention across the country as it unfolded during the Quebec referendum campaign – during which Premier Bill Davis campaigned for the No camp.²¹

The Adoption and Entrenchment of Section 23 and Its Subsequent Interpretation by the Supreme Court of Canada

This series of events, followed by the victory of the federalist camp during the 1980 Quebec referendum, set the scene for engagement by the federal government – an actor that, until then, had decided not to intervene – in the debate on official-language minority education. This engagement was reflected in section 23 of the Canadian Charter of Rights and Freedoms.

Minority Language Educational Rights

Language of instruction

23. (1) Citizens of Canada

(a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or

(b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,

have the right to have their children receive primary and secondary school instruction in that language in that province. (93)

Continuity of language instruction

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

Application where numbers warrant

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

(a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

(b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

Seeing a lack of strong commitment on the part of the provinces, Prime Minister Pierre Elliott Trudeau sought to enshrine these rights in the constitution.²² According to James Kelly, “Trudeau considered judicial activism necessary to ensure greater protection for language rights and ‘long realized that he would need to enlist the courts as allies.’”²³ Official-language education rights had, therefore, been deliberately removed from the political arena by the Charter masterminds and put in the hands of the judges. Jean Chrétien, minister of justice at the time, corroborated this strategy. As he explained himself,

The courts will decide and it would be out of the political arena, where the matter is sometimes dealt with by some people who do not comprehend or do not want to comprehend.

I think we are rendering a great service to Canadians by taking some of these problems away from the political debate and allowing the matters to be debated, argued, coolly before the courts with precedents and so on.

It will serve the population, in my judgement very well.²⁴

The point of this legislation was to guarantee the same level of access to schools for all official-language minorities in Canada. It is worthy of note that Charter language rights were also not available for derogation; provincial governments could, therefore, not make use of the notwithstanding clause to circumvent their section 23 duties. However, the text of section 23 actually fell quite short of what minority official-language communities, especially francophone minority communities, had been expecting from the new constitution. Indeed, they had been very vocal during the constitutional renewal process, requesting not only a right to schooling in their own language but also a right to the management and control of their own educational institutions.²⁵ The vagueness of the text of this section of the Charter meant that to reveal its true extent, it would need to be interpreted by the courts. The implementation of the Court Challenges Program, created in 1978 by the federal government to give Anglo-Quebecers and francophones outside Quebec the financial means to challenge their respective provincial governments’ linguistic laws and policies, would subsequently help minority communities make their way before the judges through hefty financial contributions.²⁶

As is also noted in James Kelly’s chapter in this volume, official-language minorities did not delay in making use of this new legal tool:

the SCC heard its first section 23 challenge in 1984. In *Attorney General of Quebec v. Quebec Protestant School Boards*,²⁷ the SCC deemed sections 72 and 73 of Bill 101, which set out the conditions of access to English-language minority schools, overly restrictive. The Quebec provisions created stricter conditions than those found in section 23 and were not justifiable under section 1 of the Charter, as proved by the *Oakes* test. They were therefore struck down. The SCC justices went so far as to argue that the language of section 23 was perhaps chosen by the legislators to object to Bill 101’s provisions.

This set of constitutional provisions was not enacted in a vacuum. When it was adopted, the framers knew, and clearly had in mind the regimes governing the Anglophone and Francophone linguistic minorities in various provinces in Canada so far as the language of instruction was concerned. They also had in mind the history of these regimes. ... Rightly or wrongly, – and it is not for the courts to decide, – the framers of the Constitution manifestly regarded as inadequate some – and perhaps all – of the regimes in force at the time the Charter was enacted, and their intention was to remedy the perceived defects of these regimes by uniform corrective measures.²⁸

The next case to make its way to the SCC, *Mahe v. Alberta*,²⁹ called on the judges to determine whether section 23 rights included a right to facilities that belonged to the minority community – and that would be managed and controlled by the minority community rather than, in the case at stake here, an English school board. This case was brought forward by a group of francophone parents from Edmonton, who wished to obtain their own school board to manage the existing French schools in the area. The SCC read section 23 in a generous and liberal manner, in line with what the justices believed was the remedial nature of those rights. In other words, section 23 had been entrenched to remedy historic wrongs suffered by official-language minority communities, notably regarding instruction in their own language. This generous interpretation was meant to guide the determination of the extent of the rights enshrined in section 23.

To settle the issue regarding the management and control of minority institutions, the justices first turned to the wording of subparagraph 23(3)(b), which states, in English, the right to “minority language educational facilities” and, in French, “des établissements d’enseignement de la minorité linguistique.” Confirming a prior decision from the Ontario

Court of Appeal, the SCC justices decided that while the English text of the law might seem ambiguous, the French text suggested that “the facilities belong to the minority and hence that a measure of management and control should go to the linguistic minority in respect of educational facilities.”³⁰ They then explained that this measure of management and control required a sliding-scale approach, which relied on the number of potential pupils in a given region: the greater the number of potential students, the more autonomy the minority community would be granted in the area of education. The justices focused on clarifying the upper echelons of this scale, determining that where the numbers warranted, section 23 might go as far as granting the minority its own school board to manage its own homogeneous, government-funded schools – the optimal situation for a given minority community.

The SCC did not specify how many students would be required to trigger this superior echelon of obligations. However, it did decide that, in the case at hand, in Edmonton the number of francophone pupils was not sufficient to mandate the creation of a school board. Nevertheless, those pupils’ parents should be granted some power of control over their schools in the English school board’s governance system, in the form of a number of seats on the board at least proportional to the percentage of their children in the school board’s population. It is worthy of note that the provincial government went ahead and created a homogeneous French-language school board in 1993, following further negotiations with the francophone community (and a pending threat of litigation before the United Nations’ Human Rights Committee), therefore going beyond its section 23 obligations as interpreted by the SCC.

The SCC had a chance to substantiate the position it had taken in *Mahe* with the *Manitoba Public Schools Reference*³¹ case in 1993. The justices determined that “minority language educational facilities” could mean facilities distinct from those of the majority or, at the very least, a demarcation in the physical spaces between minority and majority schools. Chief Justice Lamer added that it was of the utmost importance that minority language parents participate in assessing the educational needs of the children attending minority schools as well as in determining the structures and services necessary to respond to those needs. The reference case therefore clarified the Court’s position in *Mahe* regarding the right of minority communities, flowing from section 23, to educational facilities that they owned, managed, and controlled, adding that these should be in separate locations from the majority’s facilities – all

within the frame of the sliding-scale approach, relying on the size of the minority-language pupil population.

Next, the SCC’s *Arsenault-Cameron*³² decision in 2000 was the result of the legal mobilization of a group of parents from Summerside, Prince Edward Island, formed in 1982 to build a French school in their town. In this case, the SCC re-evaluated section 23 rights through the notions of *substantial equality* and *differential treatment*. According to the justices, implementing policies following a pattern of formal equality between majority and minority communities in education would entail a failure by governments to take into account the purposive, remedial nature of section 23. Policies should therefore follow a pattern of substantive equality, which meant that different measures might need to be taken for a minority community to achieve equality with the majority. For example, the pedagogical needs of a minority could not be the same as those of the majority, and the provincial government, while retaining the power to implement universal standards and to expect that they be met in all the province’s public schools, had an obligation to take these different needs into account. Moreover, the SCC’s decision recognized the role of minority community organizations (in this case, minority school boards) as legitimate spokespersons.

Where a minority language board has been established in furtherance of s. 23, it is up to the board, as it represents the minority official language community, to decide what is more appropriate from a cultural and linguistic perspective. The principal role of the Minister is to develop institutional structures and specific regulations and policies to deal with the unique blend of linguistic dynamics that has developed in the province.³³

The SCC therefore explicitly restricted the power of the provincial government in favour of the minority communities in the area of education.

The next decision, *Doucet-Boudreau*,³⁴ handed down in 2003, is probably the most fascinating of all SCC decisions from the standpoint of section 23. After the government of the province of Nova Scotia had failed for many years to begin the construction of homogeneous French high schools in five districts where the number of potential pupils warranted such facilities but none existed, a group of francophone parents from those districts appealed to the Supreme Court of Nova Scotia to direct the ministry of education to answer its constitutional obligations. Not only did Justice LeBlanc find that the parents were within their right to demand these new facilities and that the government had failed, but he

also found that the government “had not given sufficient attention to the serious rate of assimilation among Acadians and Francophones in Nova Scotia.”³⁵ He therefore decided to remain seized of the case after he rendered his decision, setting a number of deadlines by which those facilities and programs should be provided as well as a series of follow-up meetings with the applicants and respondents to make sure that reasonable advancement was made to respect these deadlines.

The government appealed the remedial part of this decision. The Nova Scotia Court of Appeal effectively struck it down on the basis that “the trial judge, having decided the issue between the parties, had no further jurisdiction to remain seized of the case.”³⁶ This decision was again appealed by the Association of Parents. The SCC agreed to hear the case despite the fact that the issue at stake had become a theoretical one, as the French-language schools and programs had by then been put in place. The Court confirmed Justice LeBlanc’s 2003 ruling and thus created an important precedent for future cases in which provincial governments have an obligation, by virtue of section 23, to fulfil their obligations in a timely manner.

The *Solski*³⁷ and *Nguyen*³⁸ cases, brought to the SCC in 2005 and 2009, respectively, called into question the admission criteria to English-language public schools in Quebec, set out in Bill 101, in the wake of the debate on “bridging schools” in that province. As is also discussed by James Kelly in the next chapter, this debate concerned the practice of expanding access to minority schools in Quebec to children of parents who were not rights-bearers, according to section 23, through their temporary registration in unsubsidized private schools. These parents

were enrolling their children in [unsubsidized private schools] for short periods so that they would be eligible – on a literal reading of s. 73 CFL and in light of the administrative practice of the Ministère de l’Éducation – to attend publicly funded English schools. In the government’s view, parents who did so were circumventing all the rules relating to the language of instruction.³⁹

The National Assembly of Quebec had amended sections 72 and 73 of Bill 101 in 2004 in an attempt to curb this phenomenon. As was the case in 1984, the SCC found the legislation to be overly restrictive; it struck down the two sections as unconstitutional and gave the Quebec government a year to revise its provisions. The National Assembly responded by adopting Bill 115 in 2010. This new bill created a

points-based system allowing non-rights-bearing children, under certain circumstances, to attend bridging schools – a system that did not respect either “the letter or the spirit of the judgment of the Supreme Court,”⁴⁰ according to lawyers involved in the *Nguyen* case. However, at the time this chapter was written, no further legal challenge to the provisions enacted by Bill 115 had been brought forward.

Meanwhile, the *Gosselin*⁴¹ case was brought to the SCC in 2005 by a number of Quebec-born francophone parents, who argued that section 23 of the Charter as well as sections 72 and 73 of Bill 101 were unconstitutional, according to equality rights found in section 15 of the Charter and sections 10 and 12 of the Quebec Charter of Human Rights and Freedoms. The SCC rejected their claim, stating that there was no hierarchy of Charter rights. The justices also reiterated that the purpose of section 23 was “the protection and promotion of the minority language community in each province,”⁴² a purpose that could not be respected if minority schools were accessible to members of the linguistic majority. Moreover, in Quebec, access to English schools for everyone would go against the legislature’s intent of protecting and favouring the French language: the language of the majority in that province, but that of the minority in the rest of the country.⁴³

Finally, in 2015, the SCC was seized with two section 23 cases: *Rose-des-Vents*⁴⁴ and *Yukon Francophone School Board*.⁴⁵ In *Rose-des-Vents*, a group of francophone parents in Vancouver claimed that the province was acting in an unconstitutional manner by denying their children access to a school equivalent in quality to that of the majority in the same part of the city, a practice that had been going on for a number of years. The French-language school had been operating over capacity for many years, and basic facilities were not available to their children. The SCC sided with the francophone parents, reminding the province that its section 23 obligations were time-sensitive, a point it had already made in *Doucet-Boudreau*. The justices also clarified that substantive equality in education should be applied to facilities, a finding that responded to the principle of “substantive equivalence.”⁴⁶ They explained this new principle as follows:

When assessing equivalence, a purposive approach requires a court to consider the educational choices available from the perspective of s. 23 rights holders. Would reasonable rights-holder parents be deterred from sending their children to a minority language school because it is meaningfully inferior to an available majority language school? If so, the purpose of this

remedial provision is threatened. If the educational experience, viewed globally, is sufficiently superior in the majority language schools, that fact could undermine the parents' desire to have their children educated in the minority language, and thus could lead to assimilation. The inquiry into equivalence should thus focus on comparisons that would adversely affect the realization of the rights under s. 23 of the *Charter*.⁴⁷

In the *Yukon Francophone School Board* decision, the SCC had to decide whether the minority community had the right to unilaterally extend the conditions of admission to its schools beyond section 23 obligations so that they could take in pupils who were not rights-bearers under the Charter. In this instance, the school board had admitted children whose parents did not speak French into its own schools and argued that decision making over admissions was one of the powers granted to it by section 23. The justices sided with the territorial government in the case, stating that it was up to the Department of Education to decide whether section 23 principles for admission could be extended to admit non-rights-bearers to francophone schools, not up to the school board. However, following further negotiations with its francophone community, the Yukon government accepted in August 2016 to delegate to the Francophone School Board control over its admissions through a territorial regulation.⁴⁸

It is clear from this review of the jurisprudence that the SCC has had a notable influence on policymaking regarding official-language minority instruction since 1982, gradually clarifying the provincial governments' obligations and restricting their discretionary powers, while empowering minority communities and imposing on provinces a duty to consult the community representatives in areas of cultural and linguistic relevance in education. It has expressed and enhanced a policy of substantive equality and substantive equivalence between the minority and majority school systems – where numbers warrant – and has reminded the provinces, on many occasions, to fulfil their duties in a timely manner to combat assimilation. However, it is also worth noting that the justices have attempted to preserve the separation of powers between the judiciary and legislatures so as not to impose remedies that would encroach on the provinces' prerogatives in their own areas of jurisdiction, leaving as much room for provincial policymaking as possible within the framework built around section 23 obligations. In many instances, the SCC did not have the last word in implementing provincial minority-language education.

Limits on the Impact of the SCC on Minority Official-Language Education Policymaking

Flowing from these SCC decisions, as well as the myriad lower court jurisprudence that could not be discussed here, one could believe that the provinces would now be keenly aware of their section 23 obligations and that minority official-language education policies would have been standardized across the country. However, such is not the case, as demonstrated by the overwhelming number of francophone minority communities that currently find themselves in litigation processes against their respective provincial governments. I would like to offer three hypotheses to explain why such standardization has not happened since 1982 and why legal mobilization is still so prevalent today.

First, to understand the challenges to the creation of a clear and standardized regime of minority official-language education, one needs to look to the vehicle through which it developed – that is, the repeated use of judicial recourse. Not only is this recourse symptomatic of continuous failures by provincial governments to adequately live up to their constitutional responsibilities, but it is also an adversarial system in which governments and communities repeatedly butt heads. One of “the inefficacies of the adversarial system in Canada from an evidentiary perspective [is] the near impossibility, for disadvantaged parties, to present an adequate and complete evidence record.”⁴⁹ From the cases described above, it is clear that the organization or community members pleading their case, who have to rely on fundraising and underfunded “legal aid and access-to-justice programs,”⁵⁰ such as the Court Challenges Program and Language Rights Support Program, are at a disadvantage when they face provincial attorneys general or departments with in-house counsels and potentially limitless resources. Provincial justice departments, unlike community organizations, have “advance intelligence”⁵¹ of the legal system, with expertise at the ready.

Moreover, some observers of francophone minority communities, such as Joseph Yvon Thériault and Linda Cardinal, are wary of the “perverse effects”⁵² of Supreme Court decisions on the political relationship of these minorities with their provincial majorities. As Thériault explains, “Law ... steers the involved parties away from any spirit of dialogue, of mediation, or in other words, of political compromise.”⁵³ He continues, arguing that legal mobilization “could turn the majority against the minority in other cases where law can't be mobilized”⁵⁴ to protect the latter. However, Pierre Foucher points out

that official-language minorities have time and time again used legal mobilization precisely because mediation and attempts at dialogue with their respective majorities have proved unsuccessful.⁵⁵

In sum, according to these authors, legal mobilization puts minority communities at a disadvantage when they bring forward constitutional litigation against their governments, but it is also, because of its adversarial nature, a political strategy like no other. Beyond those victories obtained through legal recourse, there can be deleterious effects on the relationship between minority and majority, which may be counterproductive in the long run. Courts' decisions could be subsequently used against minorities, or used as "ceilings" to the rights granted to minorities, even after their situation has changed.

Second, federalism places limits on the power of justices to outline a complete regime of minority-language education. Education is a provincial jurisdiction, and the SCC has been sensitive enough in its decisions to leave as much room as possible for the provinces to adapt to the duties bestowed upon them by section 23. Provinces have enacted official-language minority education schemes without much consultation with one another, which would have fostered an apt environment for policy learning and convergence. These differences are also exacerbated by the sliding-scale approach found in the SCC's interpretation of section 23, which entitles each province to adapt its duties on a case-by-case basis. It is, however, worthy of mention that one province, New Brunswick, has gone beyond the sliding-scale approach with regard to minority-language education, implementing a dualist structure in its Department of Education in 1981.

Finally, it is inherently difficult for a judge to force a government to fulfil its duty when that duty flows from positive rights – that is, rights that can be fulfilled only with governmental action (and spending of public funds). While most provinces will abide by court decisions in a timely manner, some provincial governments will delay their actions as long as possible, even after they have been ordered to act by a court, for either ideological or electoral reasons. As Hall underscores, courts constantly face "the counter-majoritarian difficulty"⁵⁶ – that is to say, judicial review can be unpopular with the majority of the people and appear undemocratic because it exercises control *against* the majority. When a ruling goes against public opinion or interest, as it often does in minority-language cases, legislative assemblies are less likely to enact a policy change prescribed by a court. Such a situation is presently unfolding in British Columbia. It has been three years since the SCC, in the

Rose-des-Vents case, found that the province had failed to fulfil its section 23 duties towards francophone students in West Vancouver by failing to provide teaching facilities of equivalent quality to those of the majority. The school was recently granted access to a trailer to alleviate the issue of overcrowding; no further proposal for an upgrade of existing facilities or for the construction of a new school has been put forward.⁵⁷

Remedies such as the one used by Justice LeBlanc in *Doucet-Boudreau* to ensure proper implementation of section 23 duties are exceptional, and it would be surprising if they became the norm. However, in the area of minority-language education, time is of the essence: assimilation is a threat in every minority community. In many of them, school is the only public space where the minority language is spoken. Moreover, school is the quintessential place for inter-generational cultural transfer and identity building. When governments unduly delay fulfilling their section 23 duties, effects on these communities may be dire.

As previously mentioned, positive rights also entail financial investment by governments. Money forms the sinews of war, it is often said, and "[t]he courts control neither the 'sword' nor the 'purse.'"⁵⁸ More and more section 23 litigation deals with the issue of insufficient funding of the minority official-language school system – and the unequal quality of education that flows from those budgetary restrictions. However, it is not the courts' place to decide on public spending, and justices are often quite wary of writing decisions that restrain legislators' public spending choices. This limits the extent to which they can push governments in any policy direction.

Conclusion

The aim of this chapter was to demonstrate the profound influence that the SCC has had in the evolution of the minority official-language education system in this country since the adoption of the Charter, but it also set out to shed light on some of the limits on this influence. Indeed, the SCC has elaborated a liberal and generous interpretation of section 23 constitutional guarantees since 1982. However, these legal advances have been undermined by a lack of adequate funds and, at times, blatant ill will by provincial legislators to fulfil their duties. The issue of education is, as explored above, one of the most important historical battles fought by official-language minorities, especially francophone minorities, throughout Canada, and one for which the federal government has granted them an important legal tool.

As a result, it appears certain that the courts will continue to be thoroughly involved in policymaking in this area, but that their influence will remain limited. Justices will likely continue to be called upon to remind legislators of their duties as well as to further clarify their extent – by recognizing both the processes of community decision making and the significance of the principles of *substantive equality* and *substantive equivalence* – in the policymaking and budgetary processes. These decisions will continue to act as a frame of reference for provincial policymaking; however, the provinces will not always subsequently enact adequate policy changes, as is also highlighted by James Kelly’s analysis in the following chapter. Consequently, we are likely to see further litigation in the area of official-language education rights, although the effect of this litigation on provincial policy change remains uncertain.

NOTES

- 1 This excludes immersion programs, which are part of the language majority’s school system in each province.
- 2 Linda Cardinal and Selma Sonntag, *State Traditions and Language Regimes* (Montreal and Kingston: McGill-Queen’s University Press, 2015), 35.
- 3 Jennifer Wallner, *Learning to School: Federalism and Public Schooling in Canada* (Toronto: University of Toronto Press, 2014), 28.
- 4 *Le Devoir*, “La francophonie à rude école,” author’s translation, accessed 18 September 2016, <http://www.ledevoir.com/societe/actualites-en-societe/431164/la-francophonie-a-rude-ecole>.
- 5 Marc Galanter, “Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change,” *Law and Society Review* 9, no. 1 (1974): 95–160.
- 6 Mark C. Power, François Larocque, and Darius Bossé, “Constitutional Litigation, the Adversarial System and Some of Its Adverse Effects,” *Review of Constitutional Studies* 17, no. 2 (2012): 1–40.
- 7 Galanter, “Why the ‘Haves’ Come Out Ahead,” 98.
- 8 Matthew E.K. Hall, *The Nature of Supreme Court Power* (Cambridge: Cambridge University Press, 2011).
- 9 Marcel Martel and Martin Pâquet, *Langue et politique au Canada et au Québec: Une synthèse historique* (Montreal: Boréal, 2010), 66.
- 10 Michel Bock and François Charbonneau, eds., *Le siècle du Règlement 17: Regards sur une crise scolaire et nationale* (Ottawa: Prise de parole, 2015).
- 11 *Ibid.*, 73.
- 12 *Ibid.*, 77–8.

- 13 *Trustees of the Roman Catholic Separate School for the City of Ottawa c. Mackell* (1916), [1917] A.C. 62, 32 D.L.R. 1 (P.C.).
- 14 McGill University (Montreal) was founded in 1821, Bishop’s University (Sherbrooke) in 1843.
- 15 Martel and Pâquet, *Langue et politique au Canada et au Québec*, 158.
- 16 *Ibid.*, 140.
- 17 For a broader discussion of the adoption of the Charter of the French Language, see Kelly, this volume.
- 18 St. Andrews Declaration, quoted in Matthew Hayday, *Bilingual Today, United Tomorrow: Official Languages in Education and Canadian Federalism* (Montreal and Kingston: McGill-Queen’s University Press, 2005), 104.
- 19 Montreal Declaration, quoted in *ibid.*, 105.
- 20 Martel and Pâquet, *Langue et politique au Canada et au Québec*, 206–7.
- 21 On this subject, see Michael D. Behiels, *Canada’s Francophone Minority Communities: Constitutional Renewal and the Winning of School Governance* (Montreal and Kingston: McGill-Queen’s University Press, 2004).
- 22 Here I respectfully disagree with Kelly (this volume) regarding Trudeau’s intent in drafting section 23. While the Charter of the French Language was certainly targeted by this new constitutional provision, the overturning of the Quebec legislation was not its sole objective: access to minority-language schooling was a country-wide issue and was more acute outside Quebec than in that province.
- 23 James B. Kelly, *Governing with the Charter: Legislative and Judicial Activism and Framers’ Intent* (Vancouver: UBC Press, 2005), 12.
- 24 Jean Chrétien, quoted in Kelly, *ibid.*, 94.
- 25 Martin Normand, “De l’arène politique à l’arène juridique: Les communautés francophones minoritaires au Canada et la Charte canadienne des droits et libertés,” in *Un nouvel ordre constitutionnel canadien: Du rapatriement de 1982 à nos jours*, ed. François Rocher and Benoît Pelletier (Quebec: Presses de l’Université du Québec, 2013), 179–203, 187–8.
- 26 Linda Cardinal, “Le pouvoir exécutif et la judiciarisation de la politique au Canada: Une étude du Programme de contestation judiciaire,” *Politique et sociétés* 19, no. 2–3 (2000): 43–64.
- 27 *Attorney General of Quebec v. Quebec Protestant School Boards*, [1984] 2 S.C.R. 66.
- 28 *Ibid.*, 79.
- 29 *Mahe v. Alberta*, [1990] 1 S.C.R. 342.
- 30 *Ibid.*
- 31 *Reference re Public Schools Act (Man.)*, s. 79(3), (4) and (7), [1993] 1 S.C.R. 839.
- 32 *Arsenault-Cameron v. Prince Edward Island*, [2000] 1 S.C.R. 3.

- 33 Ibid., 33.
- 34 *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3.
- 35 Ibid., at para. 6.
- 36 Ibid., at para. 9.
- 37 *Solski (Tutor of) v. Quebec (Attorney General)*, [2005] 1 S.C.R. 201, 2005 SCC 14.
- 38 *Nguyen v. Quebec (Education, Recreation and Sports)*, [2009] 3 S.C.R. 208, 2009 SCC 47.
- 39 Ibid., at para. 7.
- 40 Canadian Broadcasting Corporation, “Quebec Liberals Push Language Law Through,” 19 October 2010, accessed 30 November 2016, <http://www.cbc.ca/news/canada/montreal/quebec-liberals-push-language-law-through-1.969976>.
- 41 *Gosselin (Tutor of) v. Québec (Attorney General.)*, [2005] 1 S.C.R. 238.
- 42 Ibid., at para. 28.
- 43 Ibid., at para. 31.
- 44 *Association des parents de l'école Rose-des-Vents v. British Columbia (Education)*, [2015] 2 S.R.C. 21.
- 45 *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, [2015] 2 S.C.R. 282.
- 46 *Association des parents de l'école Rose-des-Vents v. British Columbia (Education)*, at para. 33.
- 47 Ibid., at para. 35.
- 48 Canadian Broadcasting Corporation, “Yukon’s Francophone School Board Gains Power over Admissions,” 31 August 2016, accessed 30 November 2016, <http://www.cbc.ca/news/canada/north/yukon-francophone-school-board-admissions-1.3743310>.
- 49 Power et al., “Constitutional Litigation, the Adversarial System and Some of Its Adverse Effects,” 1.
- 50 Ibid., 38.
- 51 Galanter, “Why the ‘Haves’ Come Out Ahead,” 98.
- 52 Linda Cardinal, “La judiciarisation de la politique, les droits des minorités et le nationalisme canadien,” author’s translation, *Forum constitutionnel* 13, no. 3 / 14, no. 1 (2005): 62.
- 53 Joseph Yvon Thériault, *Faire société: Société civile et espaces francophones*, author’s translation (Sudbury: Prise de parole, 2007), 293.
- 54 Ibid., author’s translation, 293–4.
- 55 Pierre Foucher, “Les gardiens de la paix: La Cour suprême du Canada et le contentieux des droits linguistiques; Montée en puissance des juges, pourquoi?,” author’s translation, in *La montée en puissance des juges: Ses*

- manifestations, sa contestation*, ed. Mary Jane Mossman and Ghislain Otis (Montreal: Éditions Thémis, 2000), 129–60.
- 56 Hall, *The Nature of Supreme Court Power*, 4.
- 57 Radio-Canada, “École surpeuplée: une annexe pour Rose-des-Vents,” 4 May 2017, accessed 26 February 2018, <http://ici.radio-canada.ca/nouvelle/1031847/ecoles-surpeuplees-vs-annexe-csf-rose-des-vents-megaproces-sylvain-allison-vancouver>.
- 58 Hall, *The Nature of Supreme Court Power*, 3.

LA PROTECTION D'UNE VITALITÉ FRAGILE :
LES DROITS LINGUISTIQUES AUTOCHTONES
EN VERTU DE L'ARTICLE 35

*Gabriel Poliquin**

L'auteur propose d'interpréter l'article 35 de la *Loi constitutionnelle de 1982* et la jurisprudence pertinente à cet article à la lumière de certains principes généraux issus de la jurisprudence de la Cour suprême du Canada portant sur l'article 23 de la *Charte canadienne des droits et libertés*, qui garantit des droits linguistiques aux communautés de langue officielle. La thèse suivante se dégage de cette interprétation : les droits autochtones garantis à l'article 35 comprennent des droits linguistiques, dont une obligation positive de l'État de favoriser la vitalité des langues autochtones. Cette obligation de favoriser la vitalité des langues autochtones se démarque de l'obligation de l'État en matière de langues officielles qui est d'assurer l'égalité des deux communautés de langue officielle. L'obligation positive de l'État à l'égard des communautés de langues autochtones est de mettre en place les structures nécessaires à la préservation des patrimoines linguistiques autochtones pour assurer leur transmission d'une génération à l'autre. Le contenu de cette obligation pourra varier d'une communauté linguistique autochtone à l'autre selon l'écologie linguistique propre à cette communauté. L'auteur propose en outre que cette interprétation de l'article 35 est conforme aux principes promulgués par les accords internationaux auxquels le Canada est partie en matière de droits autochtones.

The author proposes an interpretation of section 35 of the *Constitution Act, 1982*, and its related jurisprudence, in light of certain general principles emanating from Supreme Court judgments that discuss section 23 of the *Canadian Charter of Rights and Freedoms*. Section 23 provides guarantees of language rights to official-language communities. The following argument flows from this interpretation: aboriginal rights in section 35 create language rights and impose a positive obligation on the state to promote the vitality of aboriginal languages. This obligation is distinct from the state's obligation concerning official languages, which serves to ensure equality between the two official linguistic communities. The state's positive obligation toward aboriginal linguistic communities requires the development of structures necessary for the preservation of aboriginal linguistic heritage in order to ensure its transmission from one generation to the next. The content of this obligation may vary from one linguistic community to another, depending on the linguistic environment specific to a given community. The author proposes that this interpretation of section 35 also corresponds to the principles promulgated by the international treaties concerning aboriginal rights to which Canada is a signatory.

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Citation: (2013) 58:3 McGill LJ 573 ~ Référence : (2013) 58 : 3 RD McGill 573

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Introduction

Le présent article a pour objet de démontrer que, si l'article 35 de la *Loi constitutionnelle de 1982*¹ confère des droits linguistiques aux peuples autochtones du Canada, la Couronne a une obligation *positive* de protéger les langues autochtones. Cette étude reprend ainsi l'intuition d'auteurs comme Fontaine² ou Leitch³ qui s'entendent pour dire que les principes élaborés par la Cour suprême du Canada en matière de droits relatifs aux langues officielles, garantis à l'article 23 de la *Charte canadienne des droits et libertés*⁴ (*Charte*), devraient avoir une certaine application en matière de droits linguistiques autochtones qui, eux, seraient protégés par l'article 35 de la *Loi constitutionnelle de 1982*.

Il s'agit de la première analyse en profondeur de cette intuition. Fontaine propose une obligation positive qui serait fondée sur une obligation morale de pallier les effets dévastateurs qu'ont eu les pensionnats sur les cultures et les langues autochtones. Nous irons plus loin en proposant que l'obligation positive de l'État est une obligation proprement juridique : elle découle d'une interprétation de l'article 35 de la *Loi constitutionnelle de 1982* à la lumière des principes adoptés par la Cour suprême dans sa jurisprudence portant sur les droits relatifs aux langues officielles.

Leitch, pour sa part, propose l'existence d'un droit autochtone à l'éducation en langue autochtone. Bien que nous soyons d'accord avec cette thèse dans son ensemble, notre approche sera plus nuancée. Nous proposons l'existence d'un droit à la vitalité linguistique, c'est-à-dire un droit à ce qu'une langue soit préservée, employée et transmise de génération en génération. L'éducation en langue autochtone est bien entendu une composante fondamentale dans la réalisation de ce droit. Cependant, le droit à l'éducation, même s'il existe, n'est pas nécessairement applicable à bon nombre de communautés linguistiques autochtones.

Par exemple, un droit à l'éducation serait d'application difficile dans la communauté taguiche qui, aujourd'hui, compte moins d'une dizaine de lo-

¹ Constituant l'annexe B de la *Loi de 1982 sur le Canada* (R-U), 1982, c 11.

² Lorena Sekwan Fontaine, « Re-conceptualizing and Re-imagining Canada : Opening Doors for Aboriginal Language Rights » dans André Braën, Pierre Foucher et Yves Le Bouthillier, dir, *Languages, Constitutionalism and Minorities / Langues, constitutionnalisme et minorités*, Toronto, LexisNexis Butterworths, 2006, 309.

³ David Leitch, « Canada's Native Languages: The Right of First Nations to Educate their Children in their Own Languages » (2006) 15 : 3 Const Forum Const 107.

⁴ Partie I de la *Loi constitutionnelle de 1982*, constituant l'annexe B de la *Loi de 1982 sur le Canada* (R-U), 1982, c 11 [*Charte*].

uteurs⁵. L'application du droit à l'éducation suppose l'existence d'une communauté de locuteurs qui sont en mesure de fonder et d'entretenir des écoles ou autres institutions pédagogiques. Dans le cas du taguiche, l'application à la vitalité linguistique passerait d'abord par des efforts de revitalisation linguistique. Selon la thèse que nous proposons, l'État aurait une obligation de financer de tels efforts. Ainsi, l'obligation d'assurer la vitalité linguistique pourrait se manifester différemment d'une communauté à l'autre selon les besoins linguistiques de chacune d'elles. Nous établirons d'abord que les langues autochtones bénéficient d'une protection constitutionnelle pour ensuite cerner la nature et la portée de cette protection. Les auteurs qui ont réfléchi à la question s'accordent pour dire que la Couronne a une obligation positive à l'endroit des langues autochtones et de leurs locuteurs. Ce consensus se fonde largement sur des arguments d'ordre moral ou politique, plutôt que sur des considérations de nature juridique. En particulier, d'aucuns ont noté que les politiques assimilationnistes de l'État canadien ont largement contribué à l'agonie des langues autochtones. En effet, la politique des pensionnats a contribué sans aucun doute à l'extinction accélérée des langues autochtones. Nous laisserons aux auteurs autochtones le soin de raconter cette histoire, dramatique et rebutante⁶.

Pour nos fins, il est important de noter que, des 61 langues autochtones parlées au Canada, seules trois ont une chance de survie, soit le cri, l'ojibway et l'inuktitut⁷. Même si cet argument est susceptible d'influer le législateur, il en serait autrement en ce qui concerne les tribunaux. Bien que la Couronne soit en grande partie responsable du déclin des langues autochtones, il ne s'ensuit pas nécessairement qu'il existe une obligation *juridique* de réparer les dégâts, encore moins une obligation constitutionnelle. Cet article s'attardera à jeter les bases d'une justification juridique

⁵ Patrick Moore et Kate Hennessy, « New Technologies and Contested Ideologies: The Tagish First Voices Project » (2006) 30 : 1-2 *The American Indian Quarterly* 119; voir aussi Yukon Native Language Centre, *Tagish*, en ligne : <<http://www.ynlc.ca/languages/tg/tg.html>>.

⁶ Voir Fontaine, *supra* note 2; voir aussi Canada, The Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, vol 1, Ottawa, Canada Communications Group, 1996, partie II, ch 10.

⁷ Voir Canada, Groupe de travail sur les langues et les cultures autochtones, *Le début d'un temps nouveau : Premier rapport en vue d'une stratégie de revitalisation des langues et cultures des Premières nations, des Inuits et des Métis*, Ottawa, 2005 aux pp 33-36 [*Rapport du groupe de travail sur les langues autochtones*]; Canada, Statistique Canada, *Les langues autochtones au Canada*, Ottawa, 2011, en ligne : <http://www12.statcan.gc.ca/census-recensement/2011/as-sa/98-314-x/98-314-x2011003_3-fra.cfm> [*Recensement*]; Linda Tschanz, *Native Language and Government Policy: An Historical Examination*, London (Ont), Centre for Research and Teaching of Canadian Native Languages, University of Western Ontario, 1980 aux pp 2, 7, 14.

de l'obligation positive qui incombe à l'État de protéger la vitalité réelle des langues autochtones. Selon nous, et comme le proposent aussi Fontaine et Leitch, l'obligation positive de la Couronne à l'endroit des langues autochtones prend sa source d'abord dans l'article 35 de la *Loi constitutionnelle de 1982*, mais aussi dans la jurisprudence de la Cour suprême du Canada qui porte sur les droits des communautés de langue officielle garantis par la *Charte* à l'article 23. Bien entendu, il existe des différences fondamentales entre l'article 23 et l'article 35 de la *Loi constitutionnelle de 1982*. D'abord, l'article 23 ne confère de droits qu'aux communautés de langue officielle. Ensuite, l'article 23 fait partie intégrante de la *Charte* alors que l'article 35 lui est extrinsèque, limitant ainsi les réparations rendues par le paragraphe 24(1) qui ne s'applique qu'aux articles de la *Charte*. Cependant, nous sommes d'avis que certains principes établis dans la jurisprudence qui interprète l'article 23 sont pertinents à l'interprétation de l'article 35.

Ceci ne veut pas dire cependant que les langues autochtones se voient accorder le statut de langues officielles *de facto*. Nous prétendons que l'obligation positive de la Couronne découle de la *nature* des droits linguistiques eux-mêmes : dans plusieurs arrêts concernant les langues officielles, la Cour suprême du Canada énonce le principe suivant lequel la protection constitutionnelle d'une langue n'a aucun sens si la Couronne ne prend pas de mesures proactives pour la protéger⁸. Une protection de principe n'empêchera jamais une langue de mourir dans les faits⁹. Il faut donc changer la situation linguistique vécue, soit « l'écologie langagière »¹⁰, ce qui implique une intervention étatique.

Afin de replacer notre argumentation dans son contexte, nous commencerons par accomplir une synthèse de la doctrine portant sur les droits linguistiques des peuples autochtones reconnus par l'article 35. Nous définirons ensuite la portée de l'obligation positive qui incombe à

⁸ Voir entre autres *Mahé c Alberta*, [1990] 1 RCS 342, 68 DLR (4^e) 69 [*Mahé*]; *R c Beaulac*, [1999] 1 RCS 768, 173 DLR (4^e) 193 [*Beaulac*]; *Arsenault-Cameron c Île-du-Prince-Édouard*, 2000 CSC 1, [2000] 1 RCS 3 [*Arsenault-Cameron*]; *Doucet-Boudreau c Nouvelle-Écosse (Ministre de l'Éducation)*, 2003 CSC 62, [2003] 3 RCS 3; *Lalonde c Ontario (Commission de restructuration des services de santé)*, 56 RJO (3^e) 577, 208 DLR (4^e) 577 [*Montfort*]; *Desrochers c Canada (Industrie)*, 2009 CSC 8, [2009] 1 RCS 194. Pour un résumé complet de la jurisprudence jusqu'à cette date, voir aussi Commissaire aux langues officielles, *Rapport sur les droits linguistiques 2001-2002*, Ottawa, Ministère des Travaux publics et Services gouvernementaux Canada, 2003.

⁹ Voir William F Mackey, « La modification par la loi du comportement langagier » dans Paul Pupier et Jose Woehrling, dir, *Language and the Law: Proceedings of the First Conference of the International Institute of Comparative Linguistic Law*, Montreal, Wilson & Lafleur, 1989, 45.

¹⁰ *Ibid.*

l'État de protéger les langues autochtones à la lumière de la jurisprudence de la Cour suprême du Canada en matière de droits linguistiques et des normes internationales.

I. Les droits linguistiques autochtones en tant que droits ancestraux

Contrairement aux articles 16 à 23 de la *Charte*, qui garantissent des droits linguistiques aux communautés de langue officielle, le paragraphe 35(1) de la *Loi constitutionnelle de 1982* ne fait pas mention explicite de droits linguistiques autochtones :

35. (1) Les droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada sont reconnus et confirmés. **35. (1)** *The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.*

Seuls les « droits ancestraux » et « issus de traités » des peuples autochtones sont protégés en vertu du paragraphe 35(1). Nous nous pencherons plus particulièrement sur les droits ancestraux, à savoir si leur portée peut inclure des droits linguistiques. Dans l'affirmative, nous approfondirons plus avant la nature exacte de ces droits. Nous nous limiterons à l'examen de la vitalité linguistique comme droit ancestral en passant outre à l'analyse des divers traités qui devrait faire le sujet d'une étude ultérieure. Il s'agit là d'une omission intentionnelle : notre étude est d'une portée plus large alors que l'étude des traités nécessite un examen plus détaillé et approfondi du cadre juridique dans lequel évoluent des communautés précises.

Bien que la Cour suprême du Canada se soit penchée à plusieurs reprises sur la définition des termes « droits ancestraux » contenus à l'article 35¹¹, la question de savoir s'ils incluent des droits linguistiques n'a toujours pas été confirmée par la Cour. Ceci dit, à notre avis, il est possible d'inférer de la jurisprudence de la Cour suprême du Canada que les droits ancestraux incluent effectivement des droits linguistiques, bien qu'il soit difficile de définir, sur ce seul fondement, la portée et la nature précise de ces droits.

Dans l'arrêt *Van der Peet*, la Cour suprême du Canada énonce très clairement quels sont les critères définitoires d'un droit ancestral. Pour résumer très brièvement, afin de constituer un droit ancestral, une activi-

¹¹ Voir *R c Van der Peet*, [1996] 2 RCS 507, 137 DLR (4^e) 289 [*Van der Peet*]; *R c Sappier*, 2006 CSC 54, [2006] 2 RCS 686; *R c Gladstone*, [1996] 2 RCS 723, 137 DLR (4^e) 648.

té doit correspondre à une pratique, coutume ou tradition faisant « partie intégrante de la culture distinctive »¹² du peuple autochtone concerné. Ainsi, il ressort clairement de l'arrêt *Van der Peet* que les droits ancestraux comprennent des droits liés à la protection de pratiques culturelles et qu'ils ne se limitent pas à des revendications foncières¹³. Or, comme le souligne le *Rapport de la Commission royale sur le bilinguisme et le biculturalisme*, la protection de la culture passe irrémédiablement par la langue : « la langue est en outre la clef du progrès culturel. Certes langue et culture ne sont pas synonymes, mais le dynamisme de la première est indispensable à la préservation de la seconde »¹⁴. Il apparaît dès lors raisonnable de dire que le concept de « pratique culturelle », autochtone ou non, comprend l'usage d'une langue¹⁵. Les rapports étroits entre la culture et la langue ont d'ailleurs été reconnus par la Cour suprême du Canada dans l'arrêt *Mahé*¹⁶. Bien que cet arrêt ait été rendu dans le contexte des communautés de langue officielle, il n'y a pas lieu, à notre avis, de faire exception à ce principe en ce qui concerne les peuples autochtones :

[I]l est de fait que toute garantie générale de droits linguistiques, surtout dans le domaine de l'éducation, est indissociable d'une préoccupation à l'égard de la culture véhiculée par la langue en question. Une langue est plus qu'un simple moyen de communication; elle fait partie intégrante de l'identité et de la culture du peuple qui la parle.¹⁷

¹² *Van der Peet*, supra note 11 à la p 549.

¹³ Cette définition des droits ancestraux est d'ailleurs confirmée et appliquée par la Cour suprême du Canada dans l'arrêt *R c Côté*, [1996] 3 RCS 139 à la p 166, 138 DLR (4^e) 385, où il est dit, par ailleurs, qu'un droit ancestral sur une pratique peut être indépendant d'un titre aborigène sur un territoire. Autrement dit, une pratique culturelle peut être protégée qu'elle soit pratiquée ou non sur un territoire sur lequel existe un titre aborigène.

¹⁴ Canada, Commission royale d'enquête sur le bilinguisme et le biculturalisme, *Rapport de la Commission royale d'enquête sur le bilinguisme et le biculturalisme*, t 2(8), Ottawa, Imprimeur de la Reine, 1967 à la p 8.

¹⁵ À ce propos, voir notamment Jeffrey Richstone, « La protection juridique des langues autochtones au Canada » dans Paul Pupier et Jose Woehrling, dir, *Language and the Law: Proceedings of the First Conference of the International Institute of Comparative Linguistic Law*, Montreal, Wilson & Lafleur, 1989, 259 aux pp 266-67: « Certains arrêts récents de la CSC ont d'ailleurs reconnu le rôle important que jouent les droits linguistiques en tant que catégorie privilégiée des droits de la personne (voir par ex *R c Mercure*, [1988] 1 RCS 234, 48 DLR (4^e) 1). Il serait illogique de reconnaître les droits coutumiers autochtones mais de ne pas protéger en même temps la langue dans laquelle ces droits sont articulés et véhiculés ». Voir aussi Sébastien Grammond, *Aménager la coexistence : les peuples autochtones et le droit canadien*, Bruxelles, Bruylant, 2003 aux pp 196, 202.

¹⁶ *Supra* note 8.

¹⁷ *Ibid* à la p 362.

La Cour suprême du Canada réitère dans ce passage un principe déjà énoncé dans le *Renvoi relatif aux droits linguistiques au Manitoba*¹⁸, dans lequel il est dit que

[l']importance des droits en matière linguistique est fondée sur le rôle essentiel que joue la langue dans l'existence, le développement et la dignité de l'être humain. C'est par le langage que nous pouvons former des concepts, structurer et ordonner le monde autour de nous. Le langage constitue le pont entre l'isolement et la collectivité, qui permet aux êtres humains de délimiter les droits et obligations qu'ils ont les uns envers les autres, et ainsi, de vivre en société.¹⁹

Il devient dès lors possible de formuler un syllogisme. D'une part, selon *Van der Peet*, les pratiques culturelles autochtones sont protégées; d'autre part, tel que le reconnaît l'arrêt *Mahé*, langue et culture sont inextricablement liées. En conséquence, les langues autochtones sont protégées au même titre que les pratiques culturelles. Il nous faut toutefois apporter deux nuances importantes à cette affirmation.

D'abord, l'articulation d'un syllogisme ne suffira sans doute pas à convaincre un tribunal de l'existence d'un droit ancestral à la vitalité linguistique. La preuve du droit ancestral devra être faite au moyen d'éléments de preuve concrets. La nature de ceux-ci variera selon les cas et aura un impact sur la définition précise du droit linguistique reconnu. Étant donné ce caractère variable, nous n'aborderons pas la question de la preuve ancestrale, notre étude étant principalement centrée sur des questions de droit. Aux fins de cette étude, nous présumerons que la preuve concrète de ce droit ancestral aura été faite avec succès. Il convient simplement de noter que cette question demeure d'une importance fondamentale.

Ensuite, le lien que trace *Mahé* entre langue et culture est synchronique et vivant. Or, dans *Van der Peet*, une pratique culturelle relevant d'un droit ancestral ne sera protégée que si elle existait à l'époque précoloniale, soit avant le contact avec les Européens. Survient donc le danger que seules les pratiques culturelles archaïques et figées dans un passé lointain soient protégées. Cette exigence est difficilement conciliable avec la réalité linguistique : les langues, autochtones ou non, sont des phénomènes sociaux dont le renouveau perpétuel est un signe de vitalité. Protéger une langue revient à lui insuffler cette vitalité en finançant et en promouvant les institutions qui permettent la transmission et le développement de celle-ci²⁰.

¹⁸ [1985] 1 RCS 721 à la p 744, 19 DLR (4^e) 1 [*Renvoi Manitoba*].

¹⁹ *Ibid* à la p 744.

²⁰ Donna Patrick, « Language rights in Indigenous communities: The case of the Inuit of Arctic Québec » (2005) 9 : 3 *Journal of Sociolinguistics* 369 aux pp 373-77.

Enfin, il convient de noter que l'inclusion de droits linguistiques parmi les droits ancestraux autochtones est reconnue par la Cour suprême des États-Unis, dont les décisions en la matière ont fortement influencé la définition des droits ancestraux au Canada²¹. Cette approche est d'ailleurs conforme à celle adoptée par la Finlande, la Nouvelle-Zélande, la Colombie et le Nicaragua, qui, comme le Canada, doivent composer avec des minorités linguistiques autochtones²². Ainsi, il est raisonnable que l'article 35 protège les langues autochtones à titre de pratiques culturelles faisant partie intégrante de leur culture distinctive.

Cependant, le fait qu'elles soient protégées ne donne pas nécessairement lieu à une obligation positive de la Couronne de prendre des mesures pour assurer le développement de ces langues ou même pour garantir leur vitalité en créant des institutions semblables à celles qui jouent ce rôle pour les langues officielles. Quoi qu'il en soit, nous argumenterons dans la prochaine section que si une obligation positive existe, c'est sur l'article 35 qu'elle pourra être fondée. Même s'ils font miroiter la possibilité d'une obligation positive en matière de droits linguistiques autochtones, nous partageons l'avis de Richstone qu'une telle obligation positive ne peut s'ancre dans l'article 15, ni, à l'instar de McGilp et Dassios, dans l'article 27²³.

En ce qui concerne l'article 15, outre le fait que la langue n'est pas toujours un motif reconnu de discrimination²⁴, la Couronne ne pourrait être forcée d'agir que dans le cas d'une contravention à l'article 15, c'est-à-dire en présence d'une action discriminatoire à l'égard des locuteurs d'une langue autochtone²⁵. Ainsi, l'obligation positive de corriger les effets de la

²¹ Fernand de Varennes, « L'article 35 de la *Loi constitutionnelle de 1982* et la protection des droits linguistiques des peuples autochtones » (1994) 4 : 3 RNDC 265 à la p 285.

²² *Ibid* aux pp 281-82.

²³ Voir Richstone, *supra* note 15 aux pp 261-63; Ian McGilp et Christopher Dassios « Potential Constitutional Claims by Linguistic Groups Other than French and English » dans David Schneiderman, dir, *Langue et État : Droit, politique et identité*, Cowansville (Qc), Yvon Blais, 1991, 343 à la p 362.

²⁴ À notre connaissance, la langue n'a pas été proscrite comme motif analogue aux motifs de discrimination énumérés à l'article 15. Dans *Mahé*, *supra* note 8 à la p 369, le juge Dickson a jugé non-pertinente toute analyse de l'article 15 dans le contexte d'une réclamation en vertu de l'article 23. Voir aussi *Renvoi relatif à la Loi sur les écoles publiques (Man)*, [1993] 1 RCS 839 à la p 857, 100 DLR (4^e) 723 [*Renvoi écoles publiques*]. Voir toutefois *McDonnell c Fédération des Franco-Colombiens*, [1986] 31 DLR (4^e) 296 à la p 302, 69 BCLR (2^e) 390 (CA) où la Cour d'appel admet la possibilité que la langue soit un motif analogue de discrimination. Voir aussi *R c Rodrigue*, [1994] 91 CCC (3^e) 455, 24 WCB (2^e) 18 pour une discussion générale de cette jurisprudence.

²⁵ Selon le juge McIntyre, la discrimination peut se décrire comme une distinction, intentionnelle ou non, mais fondée sur des motifs relatifs à des caractéristiques personnelles

discrimination en question ne pourrait être qu'en rapport à une action étatique précise. Ceci, à notre sens, ne fait pas naître un droit linguistique analogue aux droits linguistiques dont profitent les communautés de langue officielle, c'est-à-dire le droit collectif d'être assuré de sa sécurité linguistique²⁶.

Selon la thèse de Tarnopolsky, une réclamation fondée sur l'article 27, conjuguée avec l'article 15, pourrait fonder l'ordonnance d'un tribunal enjoignant la Couronne à financer des programmes de soutien à une culture minoritaire. Une telle ordonnance serait justifiée selon cet auteur s'il y existait une inégalité de financement entre deux groupes culturels²⁷. Sans vouloir critiquer cette thèse de façon détaillée, nous nous limiterons à dire qu'elle serait d'application limitée dans le contexte linguistique. Les programmes assurant la protection des communautés de langue officielle sont très bien financés par le gouvernement canadien, surtout relativement aux programmes de soutien aux langues autochtones. Selon nous, il serait malgré tout difficile de prétendre que ce sous-financement constitue de la discrimination au sens de l'article 15, discrimination qui, en plus, irait à l'encontre du principe de multiculturalisme enchâssé à l'article 27 où il est établi que toute interprétation de la *Charte* doit concorder avec l'objectif de promouvoir le maintien et la valorisation du patrimoine multiculturel du Canada. Le constituant, en promulguant les articles 16 à 23, a créé un État bilingue, c'est-à-dire que deux langues ont été déclarées officielles à l'exclusion de toute autre langue. Il s'agit déjà là d'une discrimination, au sens très large, qui s'inscrit au cœur de l'identité canadienne telle que la conçoit le constituant. Il s'ensuit — pour le meilleur ou pour le pire — que les langues officielles seront privilégiées par rapport aux autres langues. Ainsi, alléguer l'existence d'une discrimination dans un tel contexte linguistique reviendrait à alléguer que la *Charte* est elle-

d'un individu ou d'un groupe d'individus, qui a pour effet d'imposer à cet individu ou à ce groupe des fardeaux, des obligations ou des désavantages non imposés à d'autres ou d'empêcher ou de restreindre l'accès aux possibilités, aux bénéfices et aux avantages offerts à d'autres membres de la société. Les distinctions fondées sur des caractéristiques personnelles attribuées à un seul individu en raison de son association avec un groupe sont presque toujours taxées de discriminatoires, alors que celles fondées sur les mérites et capacités d'un individu le sont rarement.

Andrews c Law Society of British Columbia, [1989] 1 RCS 143 aux pp 174-75, 34 BCLR (2^e) 273.

²⁶ Voir Michel Bastarache, « Introduction » dans Michel Bastarache, dir, *Language Rights in Canada*, Cowansville (Qc), 2^e éd, Yvon Blais, 2004, 1 aux pp 5-7 pour une description des droits linguistiques au Canada.

²⁷ Walter S Tarnopolsky, « The Equality Rights » dans Walter Tarnopolsky et Gérard-A Beaudoin, dir, *The Canadian Charter of Rights and Freedoms: Commentary*, Toronto, Carswell, 1982, 395 aux pp 441-42.

même discriminatoire, ce que ne peuvent admettre les principes d'interprétation.

Ceci n'empêche pas pour autant les peuples autochtones de réclamer un financement accru de ces programmes de soutien linguistique en se fondant sur l'article 35²⁸. Une telle réclamation ne revient toutefois pas à revendiquer l'égalité avec les langues officielles. C'est ici que réside la différence entre le traitement juridique des langues autochtones et des langues immigrantes, ces dernières ne profitant d'aucune protection constitutionnelle, si ce n'est des garanties incertaines de l'article 27.

II. La nature des droits linguistiques autochtones

Si l'article 35 de la *Loi constitutionnelle de 1982* garantit des droits linguistiques aux peuples autochtones, quelle est la nature de cette protection? Sur ce point, ni la jurisprudence ni la doctrine n'offrent de réponses définitives. Les éléments de réponse qu'offre la doctrine sont sommaires. De plus, les auteurs qui s'aventurent sur ce terrain ont aussi des opinions variables quant à l'ouverture potentielle des tribunaux.

Richstone, même s'il reconnaît que des droits linguistiques autochtones pourraient être protégés par l'article 35, se montre sceptique quant à la portée des obligations qui en découleraient pour le gouvernement :

Les tribunaux admettraient sans doute volontiers que la constitutionnalisation des droits linguistiques autochtones a pour effet de protéger les langues autochtones contre toute action gouvernementale qui tenterait d'en prohiber l'usage. Constituerait ainsi un acte enfreignant l'article 35 le déni du droit de chaque peuple autochtone d'utiliser sa langue à l'intérieur de ses institutions représentatives. Cependant, et ceci rejoint nos conclusions relativement à l'étendue de l'article 27 de la *Charte*, il est difficile de voir dans l'article 35 un « droit-créance » permettant aux peuples autochtones de réclamer des subventions publiques pour l'apprentissage et le développement de leurs langues.²⁹

Richstone n'est prêt à reconnaître qu'une obligation négative en vertu de l'article 35, bien qu'il reconnaisse qu'une obligation positive pourrait naître des obligations qui incombent au Canada en vertu du droit international. Les conventions internationales auxquelles réfère Richstone, soit

²⁸ Voir l'article 22 de la *Charte*, *supra* note 4 selon lequel « les articles 16 à 20 n'ont pas pour effet de porter atteinte aux droits et privilèges [...] des langues autres que le français ou l'anglais ». Voir aussi Brian Slattery, « Aboriginal Language Rights » dans Schneiderman, *supra* note 23 à la p 369 [Slattery, « Aboriginal Language Rights »], qui fait la même observation en rapport aux droits linguistiques autochtones.

²⁹ Richstone, *supra* note 15 à la p 268.

la *Déclaration des Nations Unies sur les droits des peuples autochtones*³⁰ (*Déclaration*) et la *Convention (n° 107) relative aux populations autochtones et tribales*³¹ de l'Organisation internationale du travail, étaient en cours de révision au moment où il écrivait³². Nous allons voir que ces conventions internationales n'ouvrent pas la porte à une obligation positive, mais que d'autres instruments de droit international appuient effectivement la thèse de Richstone³³.

En revanche, d'autres auteurs, qui s'appuient par analogie sur le régime américain des droits ancestraux, sont d'avis qu'il existe une obligation positive à la charge de l'État de protéger les langues autochtones :

This [American] analysis may be relevant to the protection of linguistic rights of cultures other than French and English in Canada. As indicated, the Supreme Court of Canada has held that freedom of expression includes the right to use the language of one's choice, and has stated that "language is not merely a means of interpersonal communication [or] carrier of content... Language is content [Ford]." Thus, governmental programs which fund one language group, but not another, in the schools or for public advocacy purposes, constitute a direct interference with the content of individual thought, belief and expression. As such, Canadian governments should not be permitted to "prefer" particular language groups in expending public funds because to do so is akin to a government "preference" for particular ideas or beliefs. Government must be neutral with respect to ideology, and, in our opinion, also with respect to culture and language.³⁴

Il faut souligner que l'affirmation de McGilp et Dassios s'applique aussi bien aux langues parlées par les communautés immigrantes qu'aux langues autochtones. Ces auteurs proposent donc que la Couronne assume une obligation positive à l'égard de l'ensemble de ces langues. Cependant, comme nous l'avons expliqué plus haut, si les langues autochtones n'ont pas de statut officiel, l'article 35 leur confère tout de même un statut de langues protégées, ce qui les distingue des langues immigrantes. L'article 35, interprété à la lumière de la jurisprudence portant sur les

³⁰ Rés AG 61/295, Doc off AG NU, 61^e sess, supp n° 53, Doc NU A/61/53 (2007). Le Canada a voté contre cette déclaration au moment de son adoption mais y donne officiellement son appui depuis novembre 2010.

³¹ Genève, 40^e session CIT, 2 juin 1959, en ligne : Organisation Internationale du Travail <<http://www.ilo.org>>.

³² Richstone, *supra* note 15 à la p 268

³³ Voir la section « L'obligation positive issue de l'ordre juridique international » ci-dessous.

³⁴ McGilp et Dassios, *supra* note 23 à la p 358.

droits linguistiques, ouvre la porte à une obligation positive *générale*, c'est-à-dire, dont l'existence n'est pas tributaire de chaque cas d'espèce.

À l'opposé, Slattery propose qu'un statut de langue officielle *de facto* soit reconnu aux langues autochtones en vertu de la protection dont elles bénéficient à l'article 35³⁵. Dans les sections qui suivent, nous offrirons une position plus nuancée, à savoir que les droits linguistiques autochtones, s'ils jouissent d'un statut constitutionnel singulier, se distinguent néanmoins des droits conférés aux communautés de langue officielle. Plus précisément, à notre avis, l'État assume une obligation positive à l'endroit des langues autochtones, ce qui les différencie des langues immigrantes. Cette obligation positive possède toutefois un contenu sensiblement différent de l'obligation positive de l'État à l'égard des communautés de langue officielle.

Le contenu de l'obligation de l'État à l'endroit des langues autochtones est défini par les besoins et les intérêts des peuples autochtones, alors que celle qui se rattache aux communautés de langue officielle est définie par la Constitution ou la législation. Reconnaître aux langues autochtones le statut de langues officielles *de facto* reviendrait à leur conférer des droits analogues à ceux que possèdent les communautés de langue officielle en vertu de la Constitution, par exemple, le droit des administrés de communiquer avec les autorités fédérales en langue autochtone. Selon nous, l'obligation de la Couronne envers les langues autochtones se limiterait à favoriser leur survie.

C'est d'ailleurs l'approche recommandée par le *Rapport du groupe de travail sur les langues autochtones*, dont les études démontrent que le statut de « langue officielle » n'a pas nécessairement d'impact sur la vitalité d'une langue. Les auteurs de ce rapport favorisent une approche communautaire, en vertu de laquelle le gouvernement fédéral garantirait aux peuples autochtones les moyens de prendre en main la vitalité de leurs langues³⁶. Les besoins de chaque communauté étant différents, les modalités de ces programmes de prise en main varieraient d'une communauté à l'autre.

Les origines distinctes des droits linguistiques autochtones et des droits relatifs aux langues officielles font ressortir une autre différence importante. Les droits linguistiques autochtones sont des droits implicites aux droits ancestraux garantis, alors que les droits relatifs aux langues officielles sont des droits constitutionnels exprès. La Couronne a donc une obligation positive en matière linguistique envers tous les peuples autoch-

³⁵ Slattery, « Aboriginal Language Rights », *supra* note 28 à la p 372.

³⁶ *Rapport du groupe de travail sur les langues autochtones*, *supra* note 7 à la p v.

tones dans la mesure où chacun de ceux-ci, au moment de leur contact avec la Couronne, parlait une langue autochtone. La situation est tout autre aujourd'hui, la majorité des langues autochtones étant en voie d'extinction, lorsqu'elles ne sont pas déjà éteintes. L'obligation positive de la Couronne s'étendrait donc aussi aux peuples autochtones dont la langue est aujourd'hui éteinte. Par conséquent, cette obligation positive aurait pour contenu de fournir aux communautés autochtones les moyens de revitaliser leurs langues dans la mesure du possible.

A. *L'obligation positive de l'État comme corollaire des droits linguistiques*

Nous proposons dans cette section que l'obligation positive due aux peuples autochtones en matière de langues découle de la nature même des droits linguistiques. Ainsi, l'obligation positive de l'État en matière de droits linguistiques n'a pas de lien nécessaire avec le pouvoir des tribunaux d'ordonner à l'État de légiférer dans un but réparateur, comme le permet le paragraphe 24(1) de la *Charte*. Même si l'article 35 est extrinsèque à la *Charte*, l'obligation positive de l'État en matière de droits linguistiques autochtones découle de la nature du droit linguistique lui-même, ce qui est d'ailleurs reconnu par les divers instruments de droit international en matière de protection des droits linguistiques que nous aborderons à la fin de cette étude. Afin d'étayer notre position, nous nous appuyerons d'abord sur la thèse de Green, selon laquelle les droits linguistiques, en raison de leur caractère singulier, supposent une obligation positive de l'État. Nous référerons ensuite, par analogie, aux obligations positives qui incombent à l'État en matière de langues officielles.

Comme le fait remarquer Bastarache, l'évolution récente des droits linguistiques a fait de ceux-ci des droits fondamentaux³⁷. Bastarache réfère à titre d'exemple à la *Déclaration sur les droits des personnes appartenant à des minorités nationales ou ethniques, religieuses et linguistiques*³⁸, qui comporte des dispositions en ce sens, ou encore les arrêts de la Cour suprême du Canada *Renvoi relatif aux droits linguistiques au Manitoba*³⁹ et *R. c. Mercure*⁴⁰. L'existence d'un droit fondamental n'entraîne pas nécessairement une obligation positive à la charge de l'État. Nous songerons par exemple à la liberté d'expression : un droit

³⁷ *Supra* note 26 aux pp 9-10.

³⁸ Rés AG 47/135, Doc off AG NU, 47^e sess, supp n° 49, Doc NU A/47/49 (1993).

³⁹ *Supra* note 18.

⁴⁰ *Supra* note 15.

fondamental selon la Cour suprême du Canada⁴¹, qui n'entraîne toutefois pas d'obligation positive de la part de l'État⁴².

Quoi qu'il en soit, Green considère les droits linguistiques comme étant des droits fondamentaux spéciaux dans la mesure où ils sont *collectifs*⁴³. Selon cet auteur, le caractère fondamental des droits linguistiques provient de ce qu'ils assurent la sécurité linguistique du particulier — la sécurité de pouvoir employer sa langue — qui ne peut être assurée sur le plan individuel sans assurer la sécurité linguistique collective du groupe⁴⁴. Ainsi, le caractère fondamental des droits linguistiques ne se rattache pas au « rôle essentiel que joue la langue dans l'existence, le développement et la dignité de l'être humain »⁴⁵; ce rôle essentiel ne justifierait que le droit de parler une langue quelconque, non pas celui de parler une langue spécifique⁴⁶.

Le caractère fondamental des droits linguistiques n'est pas non plus issu du fait que la perte d'une langue est une catastrophe culturelle et scientifique comme semble le proposer Fontaine par exemple⁴⁷. Selon Green, ce dernier argument justifierait l'importance des droits linguistiques, mais non pas une obligation positive de l'État de protéger une langue en voie de disparition. À son avis, cette considération fait néanmoins des langues, dans leur dimension collective, des objets plus importants que leurs locuteurs dans la mesure où les langues feraient l'objet d'une protection étatique alors que les droits individuels de leurs locuteurs ne bénéficient pas nécessairement d'une protection active de la part de l'État⁴⁸. En revanche, le concept de sécurité linguistique justifie non seulement le caractère fondamental des droits linguistiques, mais aussi l'obligation positive de l'État de la garantir. La sécurité linguistique ne peut exister sans investissements de la part de l'État⁴⁹.

Si on se fie à la thèse de Green, il n'existe aucune raison a priori de privilégier une langue plus qu'une autre. Si les droits linguistiques sont fondamentaux, ils le sont pour tous, auquel cas l'État aurait une obliga-

⁴¹ *R c Keegstra* (1990), [1991] 3 RCS 697, 2 WWR 1.

⁴² *Baier c Alberta*, 2006 CSC 38, [2007] 2 RCS 673.

⁴³ Leslie Green, « Are Language Rights Fundamental? » (1987) 25 : 4 Osgoode Hall LJ 639 à la p 661.

⁴⁴ *Ibid* aux pp 658-60.

⁴⁵ *Renvoi Manitoba*, *supra* note 18 à la p 744.

⁴⁶ Green, *supra* note 43 à la p 651.

⁴⁷ *Supra* note 2. Voir aussi Claude Hagège, *Halte à la mort des langues*, Paris, Odile Jacob, 2000.

⁴⁸ Green, *supra* note 43 à la p 656.

⁴⁹ *Ibid* à la p 663.

tion positive envers toutes les communautés linguistiques⁵⁰, incluant les langues autochtones. Pour Green donc, le régime de langues officielles qui existe au Canada est justifié entre autres par la « *realpolitik* » : le français et l'anglais sont langues officielles parce que les communautés linguistiques correspondantes détiennent le pouvoir démographique de faire éclater la fédération canadienne⁵¹. Greene soutient également que la taille des communautés de langues officielles justifie leur statut dans la mesure où chacune d'elles constitue une masse critique assurant une vitalité linguistique à long terme⁵².

Ainsi, la thèse de Green justifie l'existence de droits linguistiques autochtones dans la mesure où les peuples autochtones sont des communautés linguistiques, qui, comme toute communauté linguistique, devrait avoir droit à une sécurité linguistique.

Toutefois, on ne pourra justifier sur cette base que les langues autochtones soient mieux protégées que les langues immigrantes. Nous ne pourrions pas non plus justifier que soient protégés les droits linguistiques des peuples autochtones dont la langue a disparu.

La protection constitutionnelle des langues autochtones n'est donc pas justifiée par un argument moral de la tenure de celui de Green, mais par un argument historique : la Couronne entretient un rapport spécial de nature fiduciaire avec les peuples autochtones, dont elle protège les droits ancestraux⁵³, y compris les droits linguistiques. Selon Green, ce genre de favoritisme linguistique n'est justifié dans une société démocratique que s'il ne cause pas de tort aux communautés linguistiques qui n'ont pas de droits linguistiques garantis. Sans accomplir une étude approfondie, il est possible de spéculer qu'une protection accrue des langues autochtones ne ferait pas de tort direct aux communautés linguistiques immigrantes. En revanche, le bilinguisme officiel canadien aurait causé des torts aux langues autochtones, auquel cas leur protection, du moins d'un point de vue politique, est d'autant plus pressante⁵⁴.

⁵⁰ *Ibid* aux pp 662-63.

⁵¹ Comme le fait remarquer Green, *ibid* à la p 664, c'était d'ailleurs la justification que donnait Pierre Elliot Trudeau. Voir notamment P E Trudeau, *Federalism and the French Canadians*, Toronto, Macmillan, 1968.

⁵² Green, *supra* note 43 à la p 664.

⁵³ Voir *R c Sparrow*, [1990] 1 RCS 1075 à la p 1108, 70 DLR (4e) 385 [*Sparrow*].

⁵⁴ Voir Mark Fettes, « Life on the Edge: Canada's Aboriginal Languages Under Official Bilingualism » dans Thomas Ricento et Barbara Burnaby, dir, *Language and Politics in the United States and in Canada: Myths and Realities*, Mahwah (NJ), Lawrence Erlbaum Associates, 1995, 117. Ces dommages auraient mené les Territoires du Nord-Ouest et le Nunavut à adopter un régime de multilinguisme officiel.

Si la Cour suprême du Canada n'a pas adopté, à notre connaissance, la thèse de Green de façon explicite, sa jurisprudence récente en matière de droits linguistiques énonce très clairement que les droits relatifs aux langues officielles entraînent une obligation positive de l'État de faire en sorte qu'ils puissent être exercés. La Cour suprême du Canada justifie cette approche en se basant sur des principes généraux de droit linguistique ainsi que des principes généraux d'interprétation constitutionnelle. Or, ces principes s'appliquent aux droits linguistiques autochtones.

La Couronne a une obligation positive d'agir pour favoriser le maintien et l'épanouissement des langues officielles. Dans un domaine tel que l'éducation, l'existence d'une obligation positive est évidente, car elle est prévue explicitement dans la Constitution⁵⁵. Il en va de même pour l'obligation de légiférer dans les deux langues officielles, du moins, dans certains ressorts⁵⁶, ainsi que pour l'obligation de fournir des services dans les deux langues⁵⁷. En plus de la Constitution, certaines provinces se sont imposé des obligations d'agir par la voie législative. Mentionnons à cet effet la *Loi sur les services en français* de l'Ontario⁵⁸, ou la *Loi sur les langues officielles* du Nouveau-Brunswick⁵⁹.

Dans la même veine, il convient de citer l'article 530 du *Code criminel*⁶⁰, selon lequel un accusé peut subir son procès dans la langue officielle de son choix, peu importe où l'accusé subira son procès. Selon l'arrêt *Beaulac*⁶¹, il découle de cette disposition que les cours provinciales et les cours supérieures doivent être en mesure d'entendre des procès dans les langues minoritaires des provinces où elles se situent. Il ne s'agit pas simplement d'un droit procédural auquel un tribunal peut déroger, mais d'un droit fondamental⁶². Qui plus est, il s'agit d'un droit fondamental qui nécessite une intervention active de l'État, car, comme le dit le juge Bastarache, les droits linguistiques « ne peuvent être exercés que si les moyens en sont fournis »⁶³. Le droit de subir son procès en français en Co-

⁵⁵ *Charte*, supra note 4, art 23.

⁵⁶ Voir *Loi constitutionnelle de 1867* (R-U), 30 & 31 Vict, c 3, art 133, reproduit dans LRC 1985, ann II, n° 5; *Charte*, supra note 4, art 18; *Loi de 1870 sur le Manitoba*, 33 Vict, c 3, art 23.

⁵⁷ *Charte*, supra note 4, art 20.

⁵⁸ LRO 1990, c F 32.

⁵⁹ LN-B 2002, c O-05.

⁶⁰ LRC 1985, c C-46, art 530.

⁶¹ *Supra* note 8.

⁶² *Ibid* à la p 790.

⁶³ *Ibid* à la p 788.

lombie-Britannique serait en effet vide de sens si l'appareil judiciaire était incapable de le mettre en œuvre.

Une obligation positive incombe également à l'État en vertu de l'article 23 de la *Charte*, qui reconnaît le droit de faire instruire ses enfants dans l'une ou l'autre langue officielle, là où le nombre de locuteurs de ces langues le justifie. Le droit de faire instruire ses enfants dans une langue minoritaire entraîne l'obligation corollaire des provinces de créer des écoles dont l'enseignement est dispensé dans une langue officielle minoritaire. Les provinces doivent non seulement créer de telles écoles, mais leur gestion doit être assurée par la communauté minoritaire dont les enfants fréquentent ces écoles. Cette interprétation large, libérale et, surtout, téléologique de l'article 23, est adoptée par la Cour suprême du Canada dans les arrêts *Mahé* et *Arsenault-Cameron*, qui, comme l'arrêt *Beaulac*, rejettent l'interprétation restrictive des dispositions linguistiques de la *Charte* adoptée par la Cour dans les arrêts *Société des Acadiens c. Association of Parents*⁶⁴, *MacDonald c. Ville de Montréal*⁶⁵ et *Bilodeau c. Manitoba (P.G.)*⁶⁶.

L'interprétation libérale des droits linguistiques est motivée par le caractère réparateur des dispositions linguistiques de la *Charte*⁶⁷. Le caractère réparateur de l'article 530 du *Code criminel* justifie également son interprétation large et libérale⁶⁸. Dans chacun de ces cas, le constituant ou le législateur cherchait à réparer une inégalité. Dans le cas de l'article 23, le constituant cherchait « à remédier à l'échelle nationale, à l'érosion progressive des minorités parlant l'une ou l'autre langue officielle et à appliquer la notion de "partenaires égaux" des deux groupes linguistiques officiels dans le domaine de l'éducation »⁶⁹. Quant à l'article 530 du *Code criminel*, le législateur cherchait à remédier aux inégalités linguistiques inhérentes à l'appareil judiciaire⁷⁰.

Ainsi, les droits linguistiques, dans la mesure où ils poursuivent un objectif réparateur, entraînent une obligation positive de l'État de mettre en place des structures appropriées à des fins réparatrices. En ce qui concerne les langues officielles, l'objectif est de réparer une inégalité entre les

⁶⁴ [1986] 1 RCS 549, 27 DLR (4e) 406.

⁶⁵ [1986] 1 RCS 460, 27 DLR (4e) 321.

⁶⁶ [1986] 1 RCS 449, 27 DLR (4e) 39.

⁶⁷ *Mahé*, supra note 8 aux pp 363-64; *Arsenault-Cameron*, supra note 8 à la p 27; *Québec (PG) c. Quebec Association of Protestant School Boards*, [1984] 2 RCS 66 à la p 79, 10 DLR (4e) 321; *Renvoi écoles publiques*, supra note 24 à la p 850.

⁶⁸ *Beaulac*, supra note 8 à la p 790.

⁶⁹ *Mahé*, supra note 8 à la p 364.

⁷⁰ *Beaulac*, supra note 8 à la p 789.

deux communautés de langue officielle. Les obligations positives qu'entraîne cet objectif sont relativement claires : fonder des écoles, maintenir un appareil judiciaire bilingue, etc.

Il en est autrement pour les droits linguistiques autochtones. En effet, le texte de cet article ne laisse pas supposer qu'il existe une obligation positive de l'État à leur égard. Mais s'il est possible de démontrer que l'article 35 a lui aussi un objectif réparateur, il s'ensuivrait que les obligations de l'État face aux langues autochtones seraient elles aussi de nature positive.

L'article 35 a-t-il un objectif réparateur même s'il est extrinsèque à la *Charte*? Dans l'arrêt *Sparrow*⁷¹, la Cour suprême reconnaît, comme c'est le cas pour les articles 16 à 23 de la *Charte*, que « la nature même du par. 35(1) laisse supposer qu'il y a lieu de l'interpréter en fonction de l'objet qu'il vise »⁷². Qui plus est, la Cour suprême cite avec approbation le jugement de la Cour d'appel, qui rejette une interprétation restrictive du paragraphe 35(1) :

Une telle interprétation du par. 35(1) ferait abstraction à la fois de ses termes et du principe selon lequel la Constitution doit recevoir une interprétation libérale et réparatrice. Nous ne pouvons accepter que ce principe s'applique avec moins de force aux droits ancestraux qu'à ceux garantis par la Charte, compte tenu particulièrement de l'histoire et de la méthode d'interprétation des traités et des lois concernant les Indiens commandée par des arrêts comme *Nowegijick c. La Reine* [référence omise].⁷³

Ainsi, l'interprétation libérale et réparatrice du paragraphe 35(1) découlerait de la présence même de cette disposition dans la Constitution. Une telle interprétation du paragraphe 35(1) est d'autant plus justifiée qu'elle fait écho au principe élaboré dans *Nowegijick*⁷⁴, selon lequel les traités avec les peuples autochtones doivent bénéficier d'une interprétation libérale et réparatrice, l'honneur de la Couronne étant en jeu dans ses rapports avec eux.

Selon Slattery, le contexte dans lequel l'article 35 a été adopté lui confère son caractère réparateur :

When the Special Joint Committee on the Constitution agreed unanimously to insert the section [35], the occasion was treated by all parties as one of historic significance. The later deletion of the section, as the result of the federal-provincial accord of November 1981, caused

⁷¹ *Supra* note 53.

⁷² *Ibid* à la p 1106.

⁷³ *Ibid* à la p 1107, citant *R c Sparrow*, [1987] 36 DLR (4^e) 246, 2 WWR 577 (BCCA).

⁷⁴ *Nowegijick c La Reine*, [1983] 1 RCS 29 à la p 36, 144 DLR (3^e) 193.

*a sharp reaction among native Canadians. Intensive lobbying and public demonstrations led to its reinstatement, in a slightly amended form. These facts suggest that section 35 was intended to operate in a remedial fashion.*⁷⁵

Si l'article 35 protège des droits linguistiques autochtones, et que cette protection entraîne une obligation positive de l'État de pallier les problèmes que subissent les communautés de langues autochtones, quelle réparation s'impose? Dans le cas des langues officielles, l'État cherche à réparer l'inégalité entre le français et l'anglais⁷⁶. L'inégalité entre les langues autochtones et les deux langues officielles est indisputable. L'égalité linguistique est-elle pourtant l'objectif recherché? Nous ne nous attarderons que peu sur la question de la réparation, qui, comme nous l'avons souligné plus haut, devrait être taillée à la mesure des besoins de chaque communauté linguistique autochtone. Cependant, à ce sujet, les recommandations faites par le *Rapport du groupe de travail sur les langues autochtones*⁷⁷ ou le *Report of the National First Nations Elders Language Gathering*⁷⁸ constituent un point de départ intéressant.

Les modalités particulières des réparations convenables sont largement tributaires de faits que nous n'avons pas l'occasion ici d'apprécier comme, par exemple, la taille des communautés individuelles, le nombre de locuteurs d'une langue autochtone qu'on y trouve, le nombre d'enfants en bas âge, etc. Il convient malgré tout d'examiner la question préliminaire de savoir si une réparation est disponible. Rappelons que l'article 35 ne fait pas partie de la *Charte*. Une réclamation formulée en vertu de cette disposition ne peut se prévaloir du paragraphe 24(1), qui permet l'obtention de réparations pour toute violation de la *Charte*. Une violation de l'article 35 ne pourrait être sanctionnée que par le biais de l'article 52, qui permet l'annulation de toute loi incompatible avec la Constitution du Canada. L'obligation négative de la Couronne est donc tout au moins garantie.

Cette garantie n'exclut pas la possibilité d'une obligation positive, qui pourrait être reconnue par les tribunaux sur la base de leur compétence inhérente, mais aussi sur la base de la nature intrinsèque des droits linguistiques. C'est d'ailleurs le point de vue de Slattery, qui se montre opti-

⁷⁵ Brian Slattery, « The Constitutional Guarantee of Aboriginal Treaty Rights » (1982-1983) 8 : 1-2 *Queen's LJ* 232 à la p 248 [Slattery, « Constitutional Guarantee »].

⁷⁶ Voir Bastarache *supra* note 26 à la p 6.

⁷⁷ *Rapport du groupe de travail sur les langues autochtones*, *supra* note 7 aux pp ix-xi.

⁷⁸ Assembly of First Nations, Languages and Literacy Steering Committee and Language and Literacy Secretariat, *Wisdom and Vision: the Teaching of our Elders, Report of the National First Nations Elders Language Gathering*, Île Manitoulin (Ont), Ojibway Cultural Foundation Elders Advisory Council of Manitoulin Island, 1993.

miste quant à la possibilité d'obtenir des réparations convenables pour toutes réclamations faites en vertu de l'article 35⁷⁹. Nous verrons dans la section suivante que dans de nombreuses actions fondées sur l'article 35, la réparation accordée est analogue aux réparations disponibles en droit administratif. Ces réparations peuvent avoir un effet positif dans le contexte des droits linguistiques⁸⁰. Nous examinerons néanmoins s'il est possible d'obtenir des réparations plus concrètes et spécifiques.

B. L'obligation positive découlant de l'obligation fiduciaire

Nous verrons dans cette section que, contrairement à ce que propose de Varennes⁸¹, il n'est pas clair que l'obligation positive de la Couronne envers les communautés linguistiques autochtones puisse découler ou être générée par l'obligation fiduciaire qui la lie aux peuples autochtones. La Cour suprême du Canada a confirmé, dans l'arrêt *Guerin*⁸², l'obligation fiduciaire de la Couronne envers les peuples autochtones⁸³. La nature de cette obligation reste nébuleuse dans le contexte plus large du droit canadien des fiducies⁸⁴, sans parler de son application au droit autochtone⁸⁵. En vertu de cette obligation, la Couronne doit veiller aux intérêts des autochtones et se garder d'agir à leur encontre. Tel que l'expliquent Borrows et Rotman :

*Fiduciary law's primary purpose is to preserve the integrity of important, socially and/or economically valuable or necessary relationships that arise as a result of human interdependency. It also provides protection for beneficiaries who are involved in fiduciary relations from the potential for indecorous activities against their interests by unscrupulous fiduciaries.*⁸⁶

C'est sur la base de cette obligation fiduciaire que de Varennes fait reposer l'existence d'une obligation positive de la Couronne de protéger les

⁷⁹ Slattery, « Constitutional Guarantee », *supra* note 75.

⁸⁰ Voir par ex *Montfort*, *supra* note 8.

⁸¹ De Varennes, *supra* note 21.

⁸² *Guerin c La Reine*, [1984] 2 RCS 335, 13 DLR (4^e) 321 [*Guerin* avec renvois aux RCS].

⁸³ Voir Leonard I Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada*, Toronto, University of Toronto Press, 1996 aux pp 3-4. Pour un survol des origines de cette obligation, voir *ibid* aux pp 11-18.

⁸⁴ Pour une explication détaillée dans le contexte du droit des fiducies, voir Mark R Gillen et Faye Woodman, dir, *The Law of Trusts: A Contextual Approach*, 2^e éd, Toronto, Emond Montgomery, 2008 ch 15.

⁸⁵ Pour un survol dans le contexte du droit autochtone, voir *ibid*, ch 16 et John J Borrows et Leonard I Rotman, *Aboriginal Legal Issues: Cases, Materials & Commentary*, 3^e éd, Markham (Ont), LexisNexis Canada, 2007 ch 5 [Borrows et Rotman].

⁸⁶ *Ibid* à la p 447.

langues autochtones⁸⁷. De Varennes explique que ce devoir de protéger les langues autochtones implique l'obligation de fournir l'instruction publique et des services gouvernementaux en langues autochtones⁸⁸. C'est apparemment la voie suivie par les États-Unis et la Finlande en cette matière⁸⁹.

Il est raisonnable de croire qu'une obligation positive envers une communauté linguistique entraîne l'obligation de créer des infrastructures communautaires garantes de la survie de cette langue. C'est d'ailleurs la position élaborée par la Cour suprême en la matière⁹⁰. Cependant, s'il existe une obligation positive de la Couronne de protéger les langues autochtones, nous proposons que celle-ci ne repose pas nécessairement sur les obligations fiduciaires de la Couronne. Dans l'arrêt *Guerin*⁹¹ la Cour suprême du Canada reconnaît la justiciabilité du rapport fiduciaire qui existe entre la Couronne et les peuples autochtones⁹². La relation fiduciaire se caractérise par un « large pouvoir discrétionnaire »⁹³ entre les mains de la Couronne, qu'elle doit exercer dans le meilleur intérêt des peuples autochtones⁹⁴. Cette obligation ne se limite pas pour autant à des biens tangibles. Autrement dit, la Couronne peut avoir une obligation fiduciaire qui a pour objet des biens non tangibles, comme des droits de chasse et pêche⁹⁵. Comme l'écrit le juge Binnie dans l'arrêt *Wewaykum*, il est tentant d'imposer à la Couronne, en vertu de cette obligation, « une responsabilité totale à l'égard de tous les aspects des rapports entre la Couronne et les bandes indiennes », ce qui, selon lui, est « aller trop loin »⁹⁶.

La Couronne a-t-elle une obligation positive d'agir dans l'intérêt des peuples autochtones en ce qui concerne leurs langues en vertu de cette obligation fiduciaire? Pour répondre à cette question, il faudra d'abord dé-

⁸⁷ De Varennes, *supra* note 21 à la p 291.

⁸⁸ *Ibid* aux pp 294-95.

⁸⁹ De Varennes ne divulgue pas sur quelles sources il appuie cette affirmation.

⁹⁰ Voir par ex *Mahé*, *supra* note 8 aux pp 365, 371.

⁹¹ *Guerin*, *supra* note 82.

⁹² Comme le remarquent Borrows et Rotman, *supra* note 85 à la p 444, *Guerin* n'est pas le premier arrêt à traiter la relation qui unit la Couronne aux peuples autochtones comme une relation de nature fiduciaire, un concept issu du droit privé. Il s'agit toutefois du premier arrêt de la Cour suprême du Canada qui assimile ces deux relations explicitement.

⁹³ *Guerin*, *supra* note 82 à la p 385.

⁹⁴ Voir par ex *Nation Haïda c Colombie-Britannique (Ministre des Forêts)*, 2004 CSC 73, [2004] 3 RCS 511 à la p 523 [*Nation Haïda*].

⁹⁵ *Guerin*, *supra* note 82 à la p 468.

⁹⁶ *Bande indienne Wewaykum c Canada*, 2002 CSC 79 au para 81, [2002] 4 RCS 245.

terminer dans quel rapport fiduciaire s'ancrerait cette obligation positive. Comme le note Rotman, le rapport fiduciaire qui unit la Couronne aux peuples autochtones se manifeste de deux façons distinctes⁹⁷. D'abord, la Couronne a une obligation fiduciaire générale envers les peuples autochtones. Cette obligation générale, qui remonte aux premiers contacts entre les peuples autochtones et les Européens, a pour effet que, dans ses rapports avec les peuples autochtones, l'honneur de la Couronne est toujours en jeu. La Couronne se doit d'agir avec honneur et circonspection « lorsqu'[elle] traite avec eux »⁹⁸. Cette obligation générale n'oblige pas la Couronne à agir, mais, lorsqu'elle le fait, elle doit agir dans le meilleur intérêt des peuples autochtones. Comme le résume le juge Binnie pour la Cour dans l'arrêt *Lax Kw'alaams c. Canada*, « [l]'honneur de la Couronne est un principe général qui sous-tend tous les rapports de la Couronne avec les peuples autochtones, mais on ne peut y avoir recours pour créer des engagements qui n'ont jamais été pris »⁹⁹.

Par ailleurs, cette obligation fiduciaire donne lieu à un principe interprétatif, formulé comme suit par le juge en chef Lamer dans l'arrêt *Van der Peet* :

En raison de cette obligation fiduciaire, et de l'incidence de cette obligation sur l'honneur de l'État, les traités, le par. 35(1) et les autres dispositions législatives et constitutionnelles protégeant les droits des peuples autochtones doivent recevoir une interprétation généreuse et libérale : *R. c. George* [référence omise].¹⁰⁰

Ainsi, cette obligation fiduciaire générale constitue un cadre qui circonscrit les actions de la Couronne, sans toutefois les provoquer. Pour satisfaire à son obligation fiduciaire, la Couronne devra justifier toute action qui porte atteinte à un droit ancestral, en plus de donner voix aux intérêts des peuples autochtones¹⁰¹. Les réparations accordées en réponse à une violation reconnue de cette obligation sont analogues aux réparations accordées en droit administratif : une décision qui aura été prise sans tenir compte des intérêts autochtones sera annulée et renvoyée à l'instance décisionnelle¹⁰². Ce genre de réparation appelle une obligation positive de la

⁹⁷ Borrows et Rotman, *supra* note 85 à la p 444, reproduisant Rotman, *supra* note 83.

⁹⁸ *Van der Peet*, *supra* note 11 au para 24.

⁹⁹ *Bande indienne des Lax Kw'alaams c Canada (PG)*, 2011 CSC 56 au para 13, [2011] 3 RCS 535.

¹⁰⁰ *Van der Peet*, *supra* note 11 au para 24.

¹⁰¹ Voir *Delgamuukw c Colombie-Britannique*, [1997] 3 RCS 1010 à la p 1108, 153 DLR (4^e) 193.

¹⁰² Voir par ex *Nation Haïda*, *supra* note 94; *Première nation crie Mikisew c Canada (Ministre du Patrimoine canadien)*, 2005 CSC 69, [2005] 3 RCS 388; *Québec (PG) c Canada*

Couronne de se comporter ou d'agir d'une certaine façon. La Couronne devra, par exemple, consulter les peuples autochtones concernés, et prendre une décision qui tiendra compte du résultat de ces consultations. L'obligation est donc positive, mais n'a pas la même force que l'obligation positive reconnue dans *Mahé et Arsenault-Cameron*, dans lesquels la Couronne a été contrainte de s'attaquer à un problème donné. Pour ce qui est des langues officielles, la force de l'obligation positive reconnue est justifiée par le texte constitutionnel. Il en est autrement pour les langues autochtones, leur protection constitutionnelle découlant de l'interprétation des termes généraux de l'article 35. Cependant, on ne saurait exclure complètement la possibilité qu'il existe une obligation positive de l'État en vertu de l'obligation fiduciaire qui serait applicable en matière de droits linguistiques autochtones. Une telle obligation devrait découler d'une promesse à cet égard, qu'il incomberait à l'État de garder pour que l'honneur de la Couronne reste sauf. C'est d'ailleurs un des arguments avancés par Leitch, qui voit dans la *Proclamation royale de 1763* la promesse de protéger un droit autochtone à l'éducation en langue autochtone :

The Supreme Court [...] expanded the scope of the fiduciary duty in Sparrow by agreeing with a lower court that the federal government has the "responsibility... to protect the rights of Indians arising from the special trust relationship created by history, treaties and legislation."

*It can, therefore, be asserted that the federal government has, and has always had, a fiduciary duty to protect the Aboriginal right of First Nations to educate their children in their own languages. That right was clearly part and parcel of the Royal Proclamation right to undisturbed possession of unceded land [italiques dans l'original].*¹⁰³

Malheureusement, Leitch n'explique pas pourquoi le texte de la *Proclamation royale de 1763* devrait être interprété ainsi, à savoir que la possession paisible des terres non concédées implique nécessairement la protection d'un droit à l'éducation en langue autochtone, à supposer que ce droit est prouvé. Par conséquent, nous trouvons cette proposition peu convaincante. Il serait plus prometteur, à notre avis, de chercher ce genre de promesse dans les divers traités, ce qui sort du champ de notre étude, mais qui constitue une piste de recherche de valeur indubitable.

Ainsi, le contenu des droits linguistiques étant indéfini, il est difficile d'évaluer la force de l'obligation positive seulement à partir de l'obligation fiduciaire générale. La force de l'obligation positive en matière de droits

(Office national de l'énergie), [1994] 1 RCS 159, 112 DLR (4^e) 129; *Halfway River First Nation c British Columbia (Ministry of Forests)*, 1999 BCCA 470, 178 DLR (4^e) 666.

¹⁰³ Leitch, *supra* note 3 à la p 117.

linguistiques autochtones est plus évidente à la lumière de la nature même des droits linguistiques en général, illustrée dans la section précédente. Il est tout aussi difficile d'établir une obligation positive de cette nature sur la base du deuxième type d'obligation fiduciaire. Ce deuxième aspect de l'obligation fiduciaire est « spécifique », comme le décrit Rotman¹⁰⁴, en ce qu'il doit avoir pour objet un intérêt concret. Comme le remarque le juge Dickson dans l'arrêt *Guerin*, « l'obligation de fiduciaire qu'a sa Majesté envers des Indiens ne constitue [...] pas une fiducie »¹⁰⁵. L'obligation fiduciaire spécifique fait naître une obligation qui « tient [...] de la nature d'une obligation de droit privé »¹⁰⁶. Un manquement à l'obligation fiduciaire spécifique peut appeler une réparation en *equity*¹⁰⁷. Ainsi, on pourra imaginer qu'un tribunal oblige la Couronne à agir de façon ciblée pour réparer un manquement qui aurait mené à la dégénérescence d'une langue autochtone donnée. Cependant, la démonstration qu'il existerait une fiducie ayant pour objet un bien culturel abstrait comme une langue fait toute la difficulté de cet argument.

Tout de même, comme l'affirment plusieurs auteurs, les politiques assimilationnistes du gouvernement fédéral, dont le système des pensionnats indiens, ont grandement contribué à la diminution dramatique de locuteurs de langues autochtones¹⁰⁸. Pourrait-on voir là un manquement à l'obligation fiduciaire de la Couronne qui pourrait mener à une telle réparation? La perspective est intéressante, mais elle se heurte à des obstacles conceptuels importants. Dans l'arrêt *Guerin*, le juge Dickson impose un critère fondamental à la reconnaissance d'une obligation fiduciaire relative à un bien quelconque : le bien en question doit faire l'objet d'une cession à la Couronne¹⁰⁹. La Couronne exerce dès lors un pouvoir discrétionnaire à l'endroit de ce bien, de sorte que les bénéficiaires sont vulnérables par rapport à la Couronne. Sans vouloir être trop légaliste dans notre approche, ce qui pourrait mener à la conclusion que l'obligation fiduciaire n'est pertinente qu'aux biens concrets, il est difficile de concevoir comment un peuple autochtone aurait pu céder sa langue. Le fait de parler une

¹⁰⁴ *Supra* note 85.

¹⁰⁵ *Supra* note 82 à la p 386.

¹⁰⁶ *Ibid* à la p 385.

¹⁰⁷ Par exemple, des dommages-intérêts en *equity* dans *Guerin*, *supra* note 82 ou une fiducie par interprétation dans *Bande indienne de Semiahmoo c Canada*, [1998] 1 CF 3, 148 DLR (4^e) 523.

¹⁰⁸ Voir par ex le *Rapport du groupe de travail sur les langues autochtones*, *supra* note 7 et *Tschanz*, *supra* note 7. Voir aussi Heather Zamorano, *From Assimilation to Apathy: Government Responsibility and the Aboriginal Language Crisis in Canada*, 13 décembre 1991 [non publié, archivé à la Bibliothèque Fauteux de l'Université d'Ottawa].

¹⁰⁹ *Supra* note 82 à la p 376.

langue est une pratique culturelle, qui, comme le propose Richstone, devrait être assimilée aux droits ancestraux coutumiers¹¹⁰. En tant que pratique culturelle, une langue n'existe pas indépendamment de ses locuteurs¹¹¹. Il est donc difficile d'établir un manquement si on ne peut établir l'objet de la fiducie¹¹².

C. L'obligation positive issue de l'ordre juridique international

Comme nous l'avons signalé plus haut, Richstone se montre sceptique quant à l'existence d'une obligation positive de la Couronne de maintenir et de développer les langues autochtones¹¹³. Il entrevoit tout de même la possibilité qu'une telle obligation existe en vertu d'instruments de droit international. Richstone mentionne particulièrement la *Déclaration*¹¹⁴ et la *Convention (n° 107) relative aux populations autochtones et tribales*¹¹⁵ de l'Organisation internationale du travail à laquelle a succédé la *Convention (n° 169) relative aux peuples indigènes et tribaux*¹¹⁶. La possibilité qu'entrevoit Richstone était des plus théoriques, car le Canada n'avait ratifié aucun de ces instruments au moment où il écrivait. Seule la *Convention sur la diversité biologique*¹¹⁷, à laquelle le Canada a adhéré, faisait miroiter quelques espoirs, espoirs qu'identifiaient également les auteurs du *Report on the Task Force*, publié par le gouvernement des Territoires du Nord-Ouest¹¹⁸.

La *Convention sur la biodiversité* est plutôt ambiguë quant aux obligations exactes des pays signataires. En vertu du paragraphe 8(j), ces derniers s'engagent à « respecte[r], préserve[r] et maint[enir] les connaissances, innovations et pratiques des communautés autochtones et locales

¹¹⁰ *Supra* note 15 à la p 267.

¹¹¹ Noam Chomsky, *Knowledge of Language: Its Nature, Origin and Use*, Westport (CT), Praeger, 1986.

¹¹² Il y a toutefois lieu d'être inventif : les peuples autochtones n'ont jamais cédé leurs langues, mais ils ont cédé la gestion des institutions qui permettent la survie des langues (par ex les écoles, etc.). Les pensionnats autochtones étaient l'instrument principal des politiques assimilationnistes du gouvernement fédéral, auquel cas, il y aurait peut-être lieu de voir un manquement face aux institutions culturelles autochtones dont le gouvernement fédéral était fiduciaire.

¹¹³ *Supra* note 15.

¹¹⁴ *Supra* note 30.

¹¹⁵ *Supra* note 31.

¹¹⁶ Genève, 47^e session CIT, 5 septembre 1991, en ligne : Organisation Internationale du Travail <<http://www.ilo.org>>.

¹¹⁷ 5 juin 1992, 30619 RTNU 169.

¹¹⁸ Gouvernement des Territoires du Nord-Ouest, *The Report of the Task Force on Aboriginal Languages*, Yellowknife, 1986 à la p v.

qui incarnent des modes de vie traditionnels présentant un intérêt pour la conservation et l'utilisation durable de la diversité biologique ». Il n'est pas clair d'abord si la langue fait partie des connaissances pertinentes. Selon une interprétation large et généreuse, on pourrait imaginer que la langue est effectivement pertinente, car les langues autochtones thésaurisent des savoirs particuliers relatifs aux milieux où elles se sont développées. Ceci dit, le paragraphe 8(j) est très clair lorsqu'il dit que cette protection doit se faire sous réserve « des dispositions de [l]a législation nationale ». Or, la législation canadienne, si elle offre une protection aux langues autochtones, n'est pas claire quant à la nature de cette protection, d'où l'intérêt de la présente étude.

Quant à la *Déclaration*, le Canada y donne maintenant son appui, bien qu'il ait été un des quatre pays à avoir voté contre au moment de son adoption¹¹⁹. La *Déclaration* contient tant des dispositions expresses que progressives en matière de protection des langues autochtones. Il est difficile cependant d'identifier avec précision quelles seront les retombées concrètes de ce changement de cap. Dans le communiqué qui explique sa nouvelle position, le Canada « réaffirme sa détermination à promouvoir et à protéger les droits des peuples autochtones » tout en insistant sur le fait qu'une déclaration n'est qu'un « document d'aspiration » qui « n'est pas juridiquement [contraignant], ne constitue pas une expression du droit international coutumier et ne modifie pas les lois canadiennes »¹²⁰. Ce communiqué laisse penser que l'enthousiasme du gouvernement sur le plan international est assorti d'une tiédeur politique au plan interne.

Quoi qu'il en soit, l'appui du Canada à la *Déclaration* reste une bonne nouvelle pour les communautés de langue autochtone. Le premier alinéa de l'article 13 de la *Déclaration* reconnaît aux peuples autochtones « le droit de revivifier, d'utiliser, de développer et de transmettre aux générations futures leur histoire, leur langue, leurs traditions orales, leur philosophie, leur système d'écriture et leur littérature ». Le deuxième alinéa du même article stipule que :

¹¹⁹ Avec l'Australie, les États-Unis et la Nouvelle-Zélande. Voir le compte-rendu disponible sur le site internet du Haut-Commissariat des Nations Unies aux droits de l'homme, *Déclaration sur les droits des peuples autochtones*, en ligne : Haut-Commissariat des Nations Unies aux droits de l'homme <<http://www2.ohchr.org/french/issues/indigenous/declaration.htm>>. Voir aussi la déclaration des Affaires autochtones et Développement du Nord Canada, *Position du Canada : Projet de déclaration des Nations Unies sur les droits des peuples autochtones*, 29 juin 2006, en ligne : Affaires autochtones et Développement du Nord Canada <<http://www.ainc-inac.gc.ca/ap/ia/pubs/ddr/ddr-fra.asp>>.

¹²⁰ Affaires autochtones et Développement du Nord Canada, *Énoncé du Canada appuyant la Déclaration des Nations Unies sur les droits des peuples autochtones*, 12 novembre 2010, en ligne : Affaires autochtones et Développement du Nord Canada <<http://www.aadnc-aandc.gc.ca/fra/1309374239861/1309374546142>>.

Les États prennent des mesures efficaces pour protéger ce droit et faire en sorte que les peuples autochtones puissent comprendre et être compris dans les procédures politiques, juridiques et administratives, en fournissant, si nécessaire, des services d'interprétation ou d'autres moyens appropriés.

Le premier alinéa de l'article 14 reconnaît quant à lui le droit des peuples autochtones à la gouvernance de leurs institutions scolaires. Cependant, l'article 14 n'oblige pas les États à prendre des mesures pour aider les peuples autochtones à établir ces institutions, contrairement à ce que stipule l'article 23 de la *Charte* pour les communautés de langue officielle. Sur le plan scolaire, les États n'ont pris que des engagements limités : le deuxième alinéa reconnaît aux enfants autochtones le droit d'accéder à « tous les niveaux et à toutes les formes d'enseignement public, sans discrimination aucune » ce qui n'implique pas nécessairement que cet enseignement public soit dispensé en langue autochtone; les États ne s'engagent qu'à prendre des mesures efficaces pour que les enfants puissent accéder à un enseignement dans leur langue s'ils vivent à l'extérieur de leur communauté. Nous sommes d'avis que cet engagement plus circonscrit pourrait limiter l'aide financière du gouvernement à la mise sur pied ou à l'amélioration de programmes scolaires en langues autochtones, pourtant si essentiels à la transmission des langues.

Enfin, l'article 16 reconnaît aux peuples autochtones « le droit d'établir leurs propres médias dans leur propre langue ». L'alinéa 2 de cet article stipule que les États s'engagent par ailleurs de faire en sorte que « les médias publics reflètent dument la diversité culturelle autochtone », « sans préjudice à l'obligation d'assurer pleinement la liberté d'expression ». Une contribution financière et politique dans ce domaine de la part des États saurait donner une plus grande visibilité aux communautés de langues autochtones, visibilité qui attiserait leur vitalité en leur impartant un prestige qui leur fait souvent défaut.

Depuis la parution de l'article de Richstone, l'Assemblée générale des Nations Unies a aussi adopté la *Déclaration des droits des personnes appartenant à des minorités nationales ou ethniques, religieuses et linguistiques*¹²¹. Même si cette déclaration ne comporte aucune force juridique contraignante, l'obligation positive des États de « favoriser » ou de « promouvoir » les cultures, religions et langues minoritaires constitue l'un de ses principes sous-jacents. Il reste que les États membres pourront interpréter ces dispositions à leur guise. La déclaration impose aux États membres des obligations positives, surtout en matière d'éducation. Citons à cet effet le texte intégral de son article 4 :

¹²¹ *Supra* note 38 à la p 210.

Article 4

1. Les États prennent, le cas échéant, des mesures pour que les personnes appartenant à des minorités puissent exercer intégralement et effectivement tous les droits de l'homme et toutes les libertés fondamentales, sans aucune discrimination et dans des conditions de pleine égalité devant la loi.
2. Les États prennent des mesures pour créer des conditions propres à permettre aux personnes appartenant à des minorités d'exprimer leurs propres particularités et de développer leur culture, leur langue, leurs traditions et leurs coutumes, sauf dans le cas de pratiques spécifiques qui constituent une infraction à la législation nationale et sont contraires aux normes internationales.
3. Les États devraient prendre des mesures appropriées pour que, dans la mesure du possible, les personnes appartenant à des minorités aient la possibilité d'apprendre leur langue maternelle ou de recevoir une instruction dans leur langue maternelle.
4. Les États devraient, le cas échéant, prendre des mesures dans le domaine de l'éducation afin d'encourager la connaissance de l'histoire, des traditions, de la langue et de la culture des minorités qui vivent sur leurs territoires. Les personnes appartenant à des minorités devraient avoir la possibilité d'apprendre à connaître la société dans son ensemble.
5. Les États devraient envisager des mesures appropriées pour que les personnes appartenant à des minorités puissent participer pleinement au progrès et au développement économiques de leur pays.

Tout au moins, l'article 4 de cette déclaration appuie le principe reconnu par la Cour suprême du Canada que les droits collectifs en matière de langue ou de culture sont dénués de sens si l'État ne prend pas des mesures positives pour que ces droits soient pleinement exercés. Dans son commentaire général¹²² sur l'article 27 du *Pacte international relatif aux droits civils et politiques*¹²³ (auquel le Canada est partie), le Haut-commissariat aux droits de l'Homme des Nations Unies réitère ce principe. Même si, à première vue, les obligations qui incombent aux États en vertu de l'article 27 semblent être négatives, le Haut-commissariat aux droits de l'Homme est d'avis que des obligations positives y sont implicites :

¹²² *Observation générale n° 23 : article 27*, NU HCDH, 50^e sess, Doc NU HRI/GEN/1/Rev 1 (1994) 38 au para 6.2.

¹²³ 19 décembre 1966, 999 RTNU 171, art 27, RT Can 1976 n° 47, 6 ILM 368 (accession du Canada : 19 mai 1976).

Article 27

Dans les États où il existe des minorités ethniques, religieuses ou linguistiques, les personnes appartenant à ces minorités ne peuvent être privées du droit d'avoir, en commun avec les autres membres de leur groupe, leur propre vie culturelle, de professer et de pratiquer leur propre religion, ou d'employer leur propre langue.

Bastarache voit la même obligation positive implicite¹²⁴ dans l'article 29 de la *Convention relative aux droits de l'enfant*, ratifiée par le Canada, qui requiert que l'éducation des enfants mette en valeur « le respect [...] de son identité, de sa langue et de ses valeurs culturelles »¹²⁵. Selon nous, l'article 30 va encore plus loin dans ce sens :

Article 30

Dans les États où il existe des minorités ethniques, religieuses ou linguistiques ou des personnes d'origine autochtone, un enfant autochtone ou appartenant à une de ces minorités ne peut être privé du droit d'avoir sa propre vie culturelle, de professer et de pratiquer sa propre religion ou d'employer sa propre langue en commun avec les autres membres de son groupe.

L'article 30 est formulé de façon négative, mais nous sommes d'avis que l'obligation positive implicite peut être déduite aisément. Selon cet article, un enfant autochtone doit pouvoir « employer sa propre langue en commun avec les autres membres de son groupe », ce qui suppose non seulement un système d'éducation où il apprend à respecter sa langue, comme l'impose l'article 29, mais aussi où il apprend à l'employer. Qui plus est, pour que l'enfant emploie sa langue avec les membres de son groupe, y compris les adultes, on devra supposer qu'il existe d'autres institutions où l'enfant peut employer sa langue, comme la famille ou la bibliothèque. On suppose donc un devoir de l'État de soutenir et maintenir les institutions à la périphérie de l'école qui contribuent à la vitalité d'une langue. Si un État ne crée pas, ou ne soutient pas de telles institutions, l'enfant est effectivement privé d'employer sa langue, ce que l'article 30 interdit.

Enfin, nous tenons à noter que la ratification de la *Convention n° 169* de l'Organisation internationale du travail serait souhaitable, car ses dispositions semblent bien adaptées aux réalités des communautés autochtones. L'article 28 de la *Convention n° 169* impose l'obligation aux États ratificateurs d'établir un système d'éducation en langue autochtone lorsque « cela est réalisable » :

¹²⁴ *Supra* note 26 aux pp 7-8.

¹²⁵ 20 novembre 1989, 1577 RTNU 3, RT Can 1992 n°3 (ratification du Canada : 13 décembre 1991), art 28(1)(c).

Article 28

1. Lorsque cela est réalisable, un enseignement doit être donné aux enfants des peuples intéressés pour leur apprendre à lire et à écrire dans leur propre langue indigène ou dans la langue qui est le plus communément utilisée par le groupe auquel ils appartiennent. Lorsque cela n'est pas réalisable, les autorités compétentes doivent entreprendre des consultations avec ces peuples en vue de l'adoption de mesures permettant d'atteindre cet objectif.
2. Des mesures adéquates doivent être prises pour assurer que ces peuples aient la possibilité d'atteindre la maîtrise de la langue nationale ou de l'une des langues officielles du pays.
3. Des dispositions doivent être prises pour sauvegarder les langues indigènes des peuples intéressés et en promouvoir le développement et la pratique.

L'article 28 semble aussi tenir compte des divers degrés de vitalité des langues autochtones. Si une langue autochtone n'a pas la vitalité requise pour que soit développé un système d'éducation qui opère dans cette langue, l'État ratificateur devra tout de même prendre des dispositions pour sauvegarder la langue autochtone en question. Ceci pourrait signifier le développement de programmes communautaires dont l'objectif serait la transmission de la langue aux enfants de la communauté, ainsi que l'archivage des données linguistiques toujours existantes.

Conclusion

Les sources des droits linguistiques autochtones se résument donc à ceci : l'article 35 de la *Loi constitutionnelle de 1982* confirme et reconnaît les droits ancestraux existants des peuples autochtones; les droits ancestraux incluent des pratiques culturelles¹²⁶; or, langue et culture sont inséparables¹²⁷. Il est donc raisonnable de croire qu'une langue est une pratique culturelle qui correspond à un droit ancestral. La protection des langues autochtones à l'article 35 établit tout au moins une obligation négative de l'État canadien de ne pas causer de tort aux langues autochtones. Toute législation dans ce sens pourrait être rendue inopérante en vertu du paragraphe 52(1) de la *Loi constitutionnelle de 1982*.

Cependant, cet état du droit tient plus de la constatation que de la consociation pour les locuteurs de langues autochtones et leurs descendants. Même si les politiques assimilationnistes du passé ont connu un

¹²⁶ *Van der Peet*, *supra* note 11.

¹²⁷ *Mahé*, *supra* note 8.

succès funeste, cette approche n'a plus cours aujourd'hui, du moins, pas ouvertement. Les langues autochtones sont plutôt en proie à l'érosion des langues très minoritaires qui ont une histoire marquée par la colonisation et la répression systématique. Le nombre de leurs locuteurs diminue chaque année, faute d'avenir prometteur. Or, c'est justement cette érosion qu'il faut contrer si on souhaite que les langues autochtones soient promises à un lendemain.

Le français fait face à la même érosion là où il est minoritaire. Dans ce cas, les gouvernements fédéral et provinciaux sont intervenus avec des mesures proactives pour le protéger. Ces gouvernements sont d'accord que la survie du français nécessite une intervention positive de l'État, non pas parce qu'il s'agit d'une langue officielle, mais parce qu'il s'agit d'une langue comme une autre, qui, pour survivre, doit se cristalliser autour d'institutions fondamentales. Certains de ces gouvernements sont allés plus loin encore en constitutionnalisant l'égalité réelle des langues officielles pour réaliser l'égalité déjà théorique. Il en est de même pour les langues autochtones. Les institutions fonctionnant en langues autochtones favorisent non seulement la transmission de ces langues de génération en génération, mais aussi la perception par ses locuteurs qu'elles sont des langues utiles, car elles expriment une réalité à la fois immémoriale et contemporaine.

La Couronne a-t-elle une obligation positive envers les langues autochtones? Nous sommes d'avis que cette obligation existe en vertu de principes applicables aux droits linguistiques en général. D'abord, les droits linguistiques sont des droits fondamentaux collectifs, qui, pour qu'ils soient exercés, nécessitent la création d'institutions qui favorisent la survie et le développement des langues. Ensuite, cette obligation positive est justifiée par une interprétation « large, libérale et téléologique » des droits linguistiques autochtones, qui, comme les droits relatifs aux langues officielles, ont un objectif réparateur dans la mesure où l'article 35, tout comme l'article 23, a un objectif réparateur. L'existence d'une obligation positive de la Couronne en cette matière, si elle n'est pas explicite, est tout au moins sous-entendue par les instruments de droit international qui reconnaissent l'existence de droits linguistiques minoritaires.

Cet état de droit fait naître plus de questions que de réponses, nous en convenons. Même si cette obligation positive envers les communautés autochtones n'a pas été explicitement reconnue par le gouvernement canadien (fédéral ou provincial), se peut-il qu'il s'en acquitte tout de même volontairement au moyen de programmes spéciaux? Il existe en effet des programmes d'éducation élaborés pour certaines langues autochtones

comme le cri¹²⁸, l'inuktitut¹²⁹, ou même le huron¹³⁰. Le gouvernement canadien finance également des programmes-ressources, ou des programmes de revitalisation des langues autochtones¹³¹. Même s'il s'agit là de nobles efforts, les communautés autochtones, comme les statistiques¹³², s'accordent pour dire que les langues autochtones s'érodent encore et toujours, ce qui laisse penser que ces programmes sont soit sous-financés, soit mal ciblés¹³³. Une appréciation de leur impact pourra faire l'objet d'une étude future ou postérieure.

Enfin, que doit chercher à accomplir le gouvernement canadien au moyen de cette obligation positive? Pour les langues officielles, l'objectif est clair : l'égalité réelle. Nous sommes d'avis qu'il en est autrement pour les langues autochtones pour lesquelles l'objectif à réaliser est la vitalité réelle, c'est-à-dire la croissance du nombre de leurs locuteurs qui assureront ensuite leur perdurance. Cet objectif se fonde sur une analogie avec les droits ancestraux en général, qui assurent, eux aussi, la survie de pratiques ancestrales à l'avenir.

¹²⁸ Voir la Commission Scolaire Crie, en ligne : Commission Scolaire Crie <<http://www.cscree.qc.ca/>>.

¹²⁹ Inuit Tapiriit Kanatami, *Report on the Inuit Tapiriit Kanatami Education Initiative*, 2008, ITK Summit on Inuit Education and Background Research, en ligne : <<http://www.itk.ca/>>.

¹³⁰ Dans le cas du huron, il s'agit d'un programme de revitalisation. Voir le projet *Yawenda : revitalisation de la langue huronne-wendat*, en ligne : Centre interuniversitaire d'études et de recherche autochtones de l'Université Laval <<http://www.ciera.ulaval.ca/publications/yawenda.htm>>.

¹³¹ Voir par ex les programmes du ministère du Patrimoine canadien : *Initiative des langues autochtones : Programmes des autochtones*, en ligne : Patrimoine canadien <<http://www.pch.gc.ca/>>; *Groupe de travail sur les langues et les cultures autochtones*, en ligne : Patrimoine canadien <<http://www.pch.gc.ca>>.

¹³² Recensement, *supra* note 7; Mary Jane Norris, « Langues autochtones au Canada : nouvelles tendances et perspectives sur l'acquisition d'une langue seconde » (2007) 83 *Tendances sociales canadiennes* (Statistique Canada) 21.

¹³³ Voir aussi *Rapport du groupe de travail sur les langues autochtones*, *supra* note 7.

François Larocque et Darius Bossé, « L'obligation de faire adopter la version française des textes constitutionnels canadiens » dans Linda Cardinal et François Larocque (directeurs), *La constitution bilingue du Canada : un projet inachevé*, Québec, PUL, 2017, aux pp 87-126

Chapitre 5

L'obligation de faire adopter la version française des textes constitutionnels canadiens

François Larocque et Darius Bossé*

I. Introduction

Le 1^{er} juillet 2017, la population canadienne fêtera le 150^e anniversaire de la Confédération d'un océan à l'autre. Cet événement important constitue un moment privilégié pour souligner la richesse de l'histoire du pays et de revenir sur ses dimensions fondatrices, dont son caractère bilingue. L'engagement du Canada envers l'égalité du français et de l'anglais s'est exprimé, d'abord, en 1969 par l'adoption de la *Loi sur les langues officielles*¹ qui a fait du français et de l'anglais les langues officielles du pays. Ensuite, en 1982, l'égalité du français et de l'anglais a été enchâssée dans la Constitution

* Les auteurs désirent remercier le Programme d'appui aux droits linguistiques pour avoir financé l'étude d'impact qui a rendu la rédaction de ce chapitre possible et de nous avoir invités à en présenter les conclusions le 23 novembre 2015 à l'Université d'Ottawa dans le cadre de sa 6^e rencontre annuelle intitulée : *La progression vers l'égalité de statut et l'usage du français et de l'anglais au Canada*.

¹*Loi sur les langues officielles*, SRC 1970, c 0-2, art. 2.

du Canada au moment de l'adoption de l'article 16 de la *Loi constitutionnelle de 1982*² qui, bien entendue, est rédigée dans les deux langues officielles³.

Toutefois, il est étonnant d'apprendre que la majorité des textes constitutionnels du Canada ne sont pas officiellement bilingues, incluant notamment la *Loi constitutionnelle de 1867*⁴. Bien qu'une version française de ce document fondamental ait été rédigée à l'époque de la Confédération par Eugène-Philippe Dorion⁵, celle-ci n'a jamais été déposée

² *Loi constitutionnelle de 1982*, constituant l'annexe B de la *Loi de 1982 sur le Canada* (R-U), 1982, c 11 [*Loi constitutionnelle de 1982*].

³ La *Loi de 1982 sur le Canada* fut adoptée en anglais seulement, mais inclut à son annexe une version bilingue de la *Loi constitutionnelle de 1982* et prévoit à son article 3 que la version française « has the same authority in Canada as the English version ».

⁴ *Loi constitutionnelle de 1867* (R-U), 30 & 31 Vict, c 2, reproduite dans LRC 1985, annexe II, n° 5 [*Loi constitutionnelle de 1867*].

⁵ Eugène-Philippe Dorion est né à Saint-Ours le 6 août 1830. Il fut admis au barreau en 1853 et devint traducteur à la chambre d'Assemblée de la province du Canada en 1855. En 1859, il dirige le bureau des traducteurs français; il occupera ce poste par la suite auprès de la chambre des Communes à Ottawa. Il était reconnu pour ses connaissances des langues mortes, de l'anglais, du français et de quelques langues autochtones. Eugène-Philippe Dorion présida la Société Saint-Jean-Baptiste et l'Institut canadien-français. Il décède à Ottawa le 1^{er} juillet 1872. Voir Jean-Charles Bonenfant, « Dorion, Eugène-Philippe », dans *Dictionnaire biographique du Canada*, vol 10, Université Laval / University of Toronto, 2003-2016 [dernière révision de l'article : 1972], [En ligne], [www.biographi.ca/fr/bio/dorion_eugene_philippe_10F.html]; Dorion s'inspirait et bénéficiait d'au moins trois différentes traductions françaises de la *Loi constitutionnelle de 1867* faites et reproduites par des journaux francophones de l'époque comme *La Minerve*, *Le Pays*, *Le Canadien*, *Le Courier de St. Hyacinthe*, *L'Ordre*, *Le Courier du Canada* et *Le journal de Québec* : voir Hugo

au Parlement de Westminster⁶. Par conséquent, à ce jour, seule la version anglaise de la *Loi constitutionnelle de 1867* jouit du statut officiel. Il en est de même pour les autres textes constitutionnels fondamentaux adoptés à Westminster pour le compte du Canada, dont le *Décret en conseil sur la terre de Rupert et le Territoire du Nord-Ouest* (1870), les *Conditions d'adhésion de la Colombie-Britannique* (1871), les *Conditions de l'adhésion de l'Île-du-Prince-Édouard* (1973), le *Statut de Westminster* (1931) et la *Loi sur Terre-Neuve* (1949). Somme toute, parmi les vingt-cinq textes déclarés dans la *Loi constitutionnelle de 1982* comme faisant partie de la « Constitution du Canada »⁷, seulement sept ont été adoptés par le Parlement, dans les deux langues officielles comme le requiert l'article 133 de la *Loi constitutionnelle de 1867*. Ces textes sont : la *Loi de 1870 sur le Manitoba*, la *Loi sur l'Alberta* (1905), la *Loi sur la Saskatchewan* (1905), la *Loi constitutionnelle de 1965*, la

Choquette, « Translating the *Constitution Act, 1867*: A Critique » (2011) 36:2, *Queen's Law Journal* 503 [Choquette, *Critique*].

⁶ Nous ignorons pourquoi le législateur n'a pas recouru au même mécanisme, à l'époque, qui a permis l'adoption de la version bilingue de la *Loi constitutionnelle de 1982* (c'est-à-dire d'inclure les deux versions en annexe et de proclamer leur égale force de loi dans la loi adoptée par le parlement de Westminster). Il semblerait que la réponse à cette question soit tout simplement que le législateur n'y avait pas pensé, mais également parce que la pratique à l'époque semblait être celle de traduire la version anglaise officielle des lois vers le français après en avoir reçu une copie au Canada : voir Choquette, *Critique supra* note 5, p. 517.

⁷ *Loi constitutionnelle de 1982*, *supra* note 2, art. 52(2). Le paragraphe 52(2) de la *Loi constitutionnelle de 1982* stipule que la Constitution du Canada comprend la *Loi constitutionnelle de 1982* elle-même et les trente textes figurant à son annexe, mais dont six sont abrogés. Le paragraphe 52(2) est non exhaustif : *New Brunswick Broadcasting Co c. Nouvelle-Écosse (Président de l'Assemblée législative)*, [1993] 1 RCS 319, 118 NSR (2^e) 181.

Loi constitutionnelle de 1974, la Loi constitutionnelle n° 1 de 1975, ainsi que la Loi constitutionnelle n° 2 de 1975. Ces sept textes, additionnés à la Loi constitutionnelle de 1982 et aux quelques modifications apportées par celle-ci⁸, constituent l'ensemble de la Constitution écrite bilingue du Canada. Le reste n'est officiel qu'en anglais.

C'est pour corriger cette incongruité que les auteurs de la *Loi constitutionnelle de 1982* ont inclus les articles 55 et 56 en son sein, lesquels prévoient ce qui suit :

Version française de certains textes constitutionnels

55. Le ministre de la Justice du Canada est chargé de rédiger, dans les meilleurs délais, la version française des parties de la Constitution du Canada qui figurent à l'annexe; toute partie suffisamment importante est, dès qu'elle est prête, déposée pour adoption par proclamation du gouverneur général sous le grand sceau du Canada, conformément à la procédure applicable à l'époque à la modification des dispositions constitutionnelles qu'elle contient.

Versions française et anglaise de certains textes constitutionnels

French version of Constitution of Canada

55. A French version of the portions of the Constitution of Canada referred to in the schedule shall be prepared by the Minister of Justice of Canada as expeditiously as possible and, when any portion thereof sufficient to warrant action being taken has been so prepared, it shall be put forward for enactment by proclamation issued by the Governor General under the Great Seal of Canada pursuant to the procedure then applicable to an amendment of the same provisions of the Constitution of Canada.

English and French versions of certain constitutional texts

⁸ Ces modifications figurent à la colonne II de l'annexe de la *Loi constitutionnelle de 1982*.

56. Les versions française et anglaise des parties de la Constitution du Canada adoptées dans ces deux langues ont également force de loi. En outre, ont également force de loi, dès l'adoption, dans le cadre de l'article 55, d'une partie de la version française de la Constitution, cette partie et la version anglaise correspondante.

56. Where any portion of the Constitution of Canada has been or is enacted in English and French or where a French version of any portion of the Constitution is enacted pursuant to section 55, the English and French versions of that portion of the Constitution are equally authoritative.

En juillet 1984, dans l'exécution du mandat que lui confie l'article 55, le ministre de la Justice a établi le Comité de rédaction constitutionnelle française, lequel était constitué d'éminents juristes et jurilinguistes⁹. En décembre 1986, le ministre de la Justice de

⁹ Les personnes suivantes furent membres du comité : M^e Jules Brière, de l'étude Hickson, Martin et Blanchard (Québec), président du comité; L'honorable Gérald A. Beaudoin, sénateur, O.C., c. r., professeur à la Faculté de droit de l'Université d'Ottawa; M^e Robert C. Bergeron, c. r., avocat général, Section de la législation, ministère de la Justice; M^e Alain-François Bisson, professeur à la Faculté de droit de l'Université d'Ottawa; M. Alexandre Covacs, jurilinguiste, Section de la législation, ministère de la Justice; M^e François La Fontaine, avocat-conseil, Section de la législation, ministère de la Justice, secrétaire du comité; M^e Gérard Bertrand, c. r., à l'époque premier conseiller législatif du gouvernement, à titre de président du comité; M^e Robert Décary, c. r., à l'époque de l'étude Noël, Décary, Aubry et associés (Hull); M^e Christine Landry, conseillère législative, Section de la législation, ministère de la Justice, à titre de secrétaire du comité; le regretté Louis-Philippe Pigeon, ancien juge de la Cour suprême du Canada, à l'époque professeur à la Faculté de droit de l'Université d'Ottawa; M^e Gil Rémillard, à l'époque professeur à la Faculté de droit de l'Université Laval; M. le bâtonnier Michel Robert, c. r. (voir *Rapport définitif, infra* note 12).

l'époque, l'honorable Ray Hnatyshyn, déposait le premier rapport du Comité de rédaction constitutionnelle française à la Chambre des communes¹⁰. Ce premier rapport comprenait une nouvelle version française de la *Loi constitutionnelle de 1867* qui fut expédiée à toutes les provinces¹¹. En décembre 1990, six ans après sa création et après plus de cinquante réunions, le Comité de rédaction constitutionnelle française avait terminé son travail et produit une version française des textes constitutionnels du Canada; la ministre de la Justice de l'époque, la très honorable Kim Campbell, déposait à la Chambre des communes le *Rapport définitif du Comité de rédaction constitutionnelle française chargé d'établir, à l'intention du ministre de la Justice du Canada, un projet de version française officielle de certains textes constitutionnels*¹² et en expédiait une copie à tous les ministres de la justice provinciaux¹³. Malheureusement, depuis leur production, aucune mesure n'a été prise pour les faire adopter, comme l'exige pourtant l'article 55 de la *Loi constitutionnelle de 1982*.

¹⁰ Ministère de la Justice Canada, *Premier rapport du comité de rédaction constitutionnelle française chargé d'établir, à l'intention du ministre de la Justice, un projet de version française officielle de certaines lois constitutionnelles*, Ottawa, ministère de la Justice Canada, 1986; Chambre des communes, *Journaux*, 33^e lég., 2^e sess., n^o 50 (17 décembre 1986), p. 334-335 (document parlementaire N^o 332-4/9).

¹¹ *Bertrand*, *infra* note 34, par. 151.

¹² Ministère de la Justice Canada, *Rapport définitif du comité de rédaction constitutionnelle française chargé d'établir, à l'intention du ministre de la Justice du Canada, un projet de version française officielle de certains textes constitutionnels*, Ottawa, ministère de la Justice Canada, 1990 [*Rapport définitif*]; Chambre des communes, *Journaux*, 34^e lég., 2^e sess., n^o 269 (19 décembre 1990), p. 2507 (document parlementaire N^o 342-4/39).

¹³ *Bertrand*, *infra* note 34, par. 151.

Le chapitre porte, *a priori*, sur l'obligation fédérale (et provinciale, selon la procédure de modification constitutionnelle employée) aux termes de l'article 55 de la *Loi constitutionnelle de 1982*, de faire adopter « dès qu'elle est prête » la version française des textes constitutionnels du Canada en question. Cette obligation sera analysée à la lumière des paragraphes 16(1) et (3) de la *Charte canadienne des droits et libertés*¹⁴ et, également, de la Partie VII de la *Loi sur les langues officielles*¹⁵. Les principes constitutionnels de la protection des minorités, de la primauté du droit et celui du fédéralisme interviendront également pour étoffer un argumentaire dont l'objet avoué est de mettre fin à l'immobilisme dans ce dossier et d'envisager la mise en œuvre de l'article 55 de *Loi constitutionnelle de 1982*.

À l'aide d'exemples concrets tirés de la jurisprudence, notre chapitre mettra également en exergue l'impact, tant pratique que symbolique, de l'unilinguisme quasi total de la Constitution écrite actuelle. En plus de faire violence au principe de l'égalité de droit, statut et privilège du français et de l'anglais ainsi qu'au principe de progression vers l'égalité de statut ou d'usage des deux langues officielles, le maintien d'une Constitution largement anglaise représente un manquement à l'article 55 de la *Loi constitutionnelle de 1982* et à l'engagement fédéral à « favoriser l'épanouissement des minorités francophones [...] du Canada et à appuyer leur développement, ainsi qu'à promouvoir la pleine

¹⁴ *Charte canadienne des droits et libertés*, partie I de la *Loi constitutionnelle de 1982*, constituant l'annexe B de la *Loi de 1982 sur le Canada* (R-U), 1982, c 11 [*Charte*].

¹⁵ *Loi sur les langues officielles*, SRC 1985, c 31 (4^e suppl.) [*Loi sur les langues officielles*].

reconnaissance et l'usage du français et de l'anglais dans la société canadienne¹⁶ ». Hormis l'impact néfaste de ces manquements sur les communautés francophones minoritaires, nous avancerons qu'il n'existe sans doute aucun droit linguistique plus fondamental pour *tous* les Canadiens et les Canadiennes que de pouvoir lire le texte de la Constitution du Canada dans la langue officielle de leur choix. À l'heure actuelle, seuls les Canadiens d'expression anglaise jouissent de ce droit. Notre étude démontrera l'inadmissibilité juridique du *statu quo*.

Notre étude cherche à établir la portée de l'article 55 de la *Loi constitutionnelle de 1982* et son caractère exécutoire. Tout d'abord, nous reprendrons les principes d'interprétations applicables et fonderons notre étude sur une interprétation particulière de l'article 16 de la *Charte*. En deuxième lieu, nous présenterons l'état des écrits et du droit entourant l'article 55 de la *Loi constitutionnelle de 1982* en vue de proposer une interprétation qui tienne compte des principes d'interprétations qui lui sont applicables. Puisque nous soutenons que l'article 55 est exécutoire s'il est fondé dans un recours sous l'article 16 de la *Charte*, nous consacrerons une troisième section exclusivement à ce dernier afin de comprendre l'origine de son interprétation restrictive et d'expliquer pourquoi celle-ci ne tient plus. Finalement, la quatrième partie de notre étude passera en revue les problèmes, symboliques et pratiques, découlant de l'unilinguisme quasi total de la Constitution écrite.

¹⁶ *Ibid.*, art. 41(1).

II. L'article 55 de la *Loi constitutionnelle de 1982*

L'article 55 ne faisait pas partie du *Projet de loi C-60* sur la réforme constitutionnelle déposé à la Chambre des communes le 20 juin 1978 par le gouvernement Trudeau¹⁷. Il apparaît pour la première fois dans le *Projet de résolution portant adresse commune à Sa Majesté la Reine concernant la Constitution du Canada* publié le 6 octobre 1980. L'article est accompagné de la note explicative suivante :

Nouveau. Beaucoup de documents constitutionnels canadiens sont des lois du Royaume-Uni, adoptées uniquement en anglais. Bien qu'une version française non officielle en figure dans les Lois du Canada, elle n'a pas valeur juridique. Le présent article prévoit l'établissement d'une version française officielle¹⁸.

L'article 55 sera maintenu dans les propositions de réforme constitutionnelle subséquentes et entrera en vigueur au sein de la *Loi constitutionnelle de 1982*. En puisant, notamment, dans le peu de doctrine qui existe à son sujet et dans les quelques décisions judiciaires qui en traitent, quel est l'état du droit entourant l'article 55 de la *Loi constitutionnelle de 1982* et l'interprétation qu'on peut en faire?

¹⁷ Canada, PL C-60, *Loi modifiant la Constitution du Canada dans certains domaines ressortissant à la compétence législative du Parlement du Canada et prévoyant les mesures nécessaires à la modification de la Constitution dans certains autres domaines*, 3^e sess., 30^e lég., 1978 (première lecture le 20 juin 1978).

¹⁸ Chambre des communes, *Journaux*, 32^e Parl, 1^{re} sess., n^o 67 (6 octobre 1980), p. 528 (document parlementaire N^o 321-7/20).

II.I. Un état des lieux

Il est surprenant de constater le peu de discussion, au sein de la doctrine, au sujet de l'article 55, de son contenu et de sa portée juridique¹⁹. Le professeur Hogg, par exemple, mentionne que l'article 55 ordonne au ministre de la Justice de préparer une version française des textes unilingues de la Constitution, mais que la version proposée par le Comité de rédaction constitutionnelle française « has never been introduced into the amendment process²⁰ ». D'autres auteurs vont un peu plus loin et suggèrent qu'il « n'apparaît pas conforme au texte de l'article 55 que les autorités fédérales aient pu jusqu'à maintenant ne pas tenter de faire adopter la version française de la Constitution²¹ », mais sans élaborer davantage. On trouve également l'idée selon laquelle l'adoption de la version française des textes constitutionnels rédigée en application de l'article 55 doit se faire

¹⁹ C'est notamment afin de répondre à ce vide doctrinal que la Chaire de recherche sur la francophonie et les politiques publiques et la Faculté de droit de l'Université d'Ottawa organisaient, le vendredi 6 novembre 2015, une journée d'étude sur l'article 55 et la constitution bilingue canadienne intitulée « Une Constitution officiellement bilingue pour le Canada en 2017 ? ». Les allocutions présentées lors de cette journée feront l'objet d'une publication.

²⁰ Peter Hogg, *Constitutional Law of Canada*, 5^e éd., Toronto, Carswell, 2011 (feuilles mobiles), p. 56-5.

²¹ Henri Brun, Guy Tremblay et Eugénie Brouillet, *Droit constitutionnel*, 6^e éd, Cowansville (Qc), Yvon Blais, 2014, p. 889 [Brun, Tremblay, Brouillet, *Droit constitutionnel*]. Voir également Michel Doucet, « Le bilinguisme législatif » dans Michel Bastarache et Michel Doucet (dir.), *Les droits linguistiques au Canada*, 3^e éd, Cowansville (Qc), Yvon Blais, 2014, 179, p. 238-239.

conformément à la procédure applicable à la modification des dispositions qu'elle contient, ce qui signifie à toutes fins utiles l'approbation des deux Chambres fédérales et de l'assemblée législative de chaque provinces, selon la procédure prévue à l'article 41 de la *Loi constitutionnelle de 1982*²².

L'article 55 de la *Loi constitutionnelle de 1982* crée plusieurs obligations. Or, les chercheurs qui ont étudiés l'article 55 se sont concentrés sur une seule de ces obligations, soit celle exigeant de la part du ministre de la Justice de « rédiger » les versions françaises des textes constitutionnels. Ces chercheurs ont donc étudié les travaux du Comité de rédaction constitutionnelle française et les textes préparés par celui-ci. Entre autres, Hugo Choquette a critiqué la version française de la *Loi constitutionnelle de 1867* proposée par le Comité de rédaction constitutionnelle, ainsi que l'interprétation large faite par celui-ci de son propre mandat en rédigeant la version de textes qui n'étaient pas mentionnés à l'article 55²³. Il reproche également au Comité de vouloir substituer à la version française

²² José Woehrling et André Tremblay, « Les dispositions de la Charte relatives aux langues officielles (articles 16 à 22) » dans Gérald-A Beaudoin et Errol Mendes, dir., *Charte canadienne des droits et libertés*, 4^e éd, Markham (Ont.), LexisNexis, 2005, 1027, p. 1028-1030; voir également Guy Tremblay, « La version française des lois constitutionnelles du Canada » (2000) 41:1, *Cahiers de droit* 33, p. 37-38.

²³ Choquette, *Critique*, supra note 5, p. 510-515, 548-549. En effet, l'article 55 fait explicitement référence aux « parties de la Constitution du Canada qui figurent à l'annexe » et ne mentionne pas de textes supplémentaires. L'auteur argumente également que refaire les versions françaises des textes canadiens déjà officiellement bilingues rend la première partie de l'article 56 de la *Loi constitutionnelle de 1982* superflue, et que l'objectif du législateur n'était pas celui d'une « wholesale modernization of the French version of the

de la *Loi constitutionnelle de 1867* proposée par Eugène-Philippe Dorion et approuvée par Macdonald, Cartier, Brown, Langevin, Tilly et Howe, par une version qui jouit d'une certaine légitimité historique. Par surcroît, Choquette préférerait voir la version de Dorion adoptée au lieu de la version préparée par le Comité de rédaction constitutionnelle française²⁴. Le professeur Guy Tremblay, plus nuancé au sujet de la valeur de la version française proposée par le Comité, a exprimé des opinions similaires²⁵. Nous ne traiterons pas de cette question davantage dans le présent chapitre. En revanche, soulignons que le ministre de la Justice s'est acquitté du premier volet des obligations qui lui incombaient en vertu de l'article 55 de la *Loi constitutionnelle de 1982*. La version française des parties de la Constitution qui figurent à ses annexes – ce qui inclut la *Loi constitutionnelle de 1867* – a été rédigée dès les années 1990. Notre étude porte plutôt sur les autres obligations prévues par l'article 55, soit le dépôt et l'adoption de la version française des textes constitutionnels. Le gouvernement canadien tarde à s'acquitter de ces obligations.

Le quasi-silence de la doctrine au sujet de l'article 55 de la *Loi constitutionnelle de 1982* est peut-être un symptôme de l'état de la jurisprudence, qui est elle aussi relativement

Constitution » mais plutôt celui plus modeste de « officialize, on an itemized basis, the French version of those parts of the Constitution that were as yet unofficial, a sort of constitutional housekeeping » (*Ibid.*, p. 512). Choquette reprend ici les idées qu'il a avancées dans sa thèse de maîtrise en droit : Hugo Choquette, *Translating the Constitution Act, 1867: A Legal-Historical Perspective*, thèse de maîtrise en droit (LLM), Université Queen's, 2009 [non publiée].

²⁴ Choquette, *Critique*, supra note 5, p. 513-514. Voir aussi Hugo Choquette, c 3.

²⁵ Tremblay, supra note 22.

silencieuse à son sujet; on peut parler, à quelques exceptions près, d'un vide jurisprudentiel à son égard.

En 1986, dans *Société des Acadiens c. Association of Parents*²⁶, une majorité de la Cour suprême, sous la plume du juge Beetz, mentionne au passage que :

Sous réserve de variantes stylistiques mineures, les termes des art. 17, 18 et 19 de la *Charte* ont été empruntés clairement et délibérément à la version anglaise de l'art. 133 de la *Loi constitutionnelle de 1867*, dont une version française n'a pas encore été adoptée conformément à l'art. 55 de la *Loi constitutionnelle de 1982*.

La Cour suprême poursuit en citant la traduction non officielle couramment utilisée à l'époque, soit celle qui figure dans la refonte de 1985 des Lois du Canada²⁷. Toutefois, ce n'est pas ce que la Cour d'appel fédérale a fait dans *Fédération Franco-Ténoise c.*

*Canada*²⁸, un appel découlant de la tentative de la part de représentants de la communauté francophone des Territoires du Nord-Ouest d'obtenir une déclaration de droits linguistiques assortie d'une réclamation en dommages. Selon ces personnes, le gouvernement canadien violait les articles 16 et 20 de la *Charte*, la partie VII de la *Loi sur les langues officielles*

²⁶ *Société des Acadiens c. Association of Parents*, [1986] 1 RCS 549, p. 573, 69 NBR (2^e) 271 [*Société des Acadiens*]. La Cour suprême a rendu cette décision le 1^{er} mai 1986.

²⁷ *Lois du Canada*, LRC 1985, annexe II, n°5.

²⁸ *Fédération Franco-Ténoise c. Canada*, [2001] 1 RCF 241, 192 FTR 220.

ainsi que le principe constitutionnel de la protection des minorités lorsqu'il délègue une grande partie de sa compétence législative à un gouvernement territorial sans exiger le respect des droits linguistiques des citoyens qui y résident ou y veiller. Dans cette affaire, le juge Décary, au nom de la Cour unanime, rappelle que certaines « dispositions de textes constitutionnels antérieurs à la *Loi constitutionnelle de 1982* [...] n'ont toujours pas de version française officielle » et, du même souffle, choisit de se référer dans sa décision aux « textes qu'a proposé[s] en 1990 le Rapport du Comité de rédaction constitutionnelle française chargé d'établir, sous le régime de l'article 55 de la *Loi constitutionnelle de 1982*, un projet de version française de certains textes constitutionnels²⁹ ». Il est utile de rappeler que le juge Décary était l'un des membres du Comité de rédaction constitutionnelle française³⁰.

Il convient d'ouvrir ici une parenthèse afin de traiter d'une première série de questions. On peut se demander si le recours aux versions non officielles des textes constitutionnels par les tribunaux confère à celles-ci un caractère officiel. Or, bien qu'une

²⁹ *Ibid.*, par. 11.

³⁰ D'ailleurs, dans l'affaire *Simms c. Isen*, 2005 CAF 161, [2005] 4 RCF 563 le juge Décary, dissident cette fois, se réfère également aux textes du Comité de rédaction constitutionnelle française au paragraphe 66 de ses motifs : « Je relève que l'expression « navigation and shipping » a été rendue par « la navigation et les bâtiments ou navires (*shipping*) » dans la traduction actuelle (encore non officielle) de l'ancienne Loi de 1867 sur l'Amérique du Nord britannique, et par « la navigation et la marine marchande » dans le Rapport définitif du Comité de rédaction constitutionnelle française chargé d'établir, à l'intention du ministre de la Justice du Canada, un projet de version française officielle de certains textes constitutionnels, daté de décembre 1990. »

telle pratique puisse contribuer à faire connaître et à légitimer les textes en question, il nous semble assez évident que leur simple citation par les tribunaux n'a pas pour effet de les officialiser. D'abord, aux termes de l'article 55, ce sont le Parlement et les assemblées législatives qui sont habilités à adopter les versions officielles des textes constitutionnels en français et non les cours de justice. Ensuite, cela nous semble aller à l'encontre des récents propos de la Cour suprême du Canada qui confirme que « même si elle reconnaît l'importance des droits linguistiques, la *Charte* reconnaît par ailleurs l'importance du respect des pouvoirs constitutionnels des provinces³¹ ». En définitive, les références judiciaires à la version non officielle des textes constitutionnels en français doivent nécessairement s'effectuer sous réserve de sa compatibilité avec la version officielle anglaise. En l'absence d'une version officielle en français, « toute divergence entre les versions française et anglaise [des textes constitutionnels] doit être tranchée en se reportant à l'original établi en langue anglaise, le seul texte ayant à ce jour force de loi³² ».

C'est ce qu'a conclu la Cour du banc de la Reine de l'Alberta par exemple dans *R c. Caron*. Dans cette affaire relative à l'obligation de l'Alberta d'adopter, d'imprimer et de publier ses lois en français et en anglais, la cour devait interpréter, entre autres, l'Adresse

³¹ *Conseil scolaire francophone de la Colombie-Britannique c. Colombie-Britannique*, 2013 CSC 42, par. 56, [2013] 2 RCS 774; *Commission scolaire francophone du Yukon, district scolaire #23 c. Yukon (PG)*, 2015 CSC 25, par. 68, [2015] 2 RCS 282.

³² Doucet, *supra* note 21, p. 238. Voir également *Renvoi: Droits linguistiques au Manitoba*, [1985] 1 RCS 72 p. 777-780, 19 DLR (4^e) 1; Hogg, *supra* note 20, p. 56-5.

du Sénat et de la Chambre des communes à la Reine de 1867, qui figure en annexe du *Décret en conseil portant adhésion à la terre de Rupert et du Territoire du Nord-Ouest* de 1870. La juge Eidsvik estime

important de noter qu'en première instance les parties ont utilisé la version française de l'Adresse de 1867 et d'autres documents constitutionnels suivant la recommandation du Comité de rédaction constitutionnelle française chargé d'établir, à l'intention du ministre de la Justice du Canada, un projet de version officielle française de certains textes constitutionnels britanniques qui ont été adoptés en anglais seulement. Il faut noter que cette recommandation n'a pas encore été adoptée et qu'elle n'a donc pas force de loi³³.

Nous reviendrons plus loin sur les problèmes qui découlent de l'affaire *Caron* et de l'Adresse de 1867.

Dans *Bertrand c. Québec (PG)*, une des rares affaires où une cour de justice a eu l'occasion de considérer la portée de l'article 55 de la *Loi constitutionnelle de 1982*, on intentait une action en justice afin d'obtenir, notamment, une déclaration d'inconstitutionnalité à l'égard du projet de sécession unilatérale du gouvernement du Québec de l'époque. Celui-ci avait donc présenté une requête déclinatoire et en irrecevabilité en réponse, alléguant que l'action était irrecevable : i) car elle concernait des

³³ *R c. Caron*, 2009 ABQB 745, par. 56, 476 AR 198 [*Caron*].

questions théoriques et politiques non justiciables sur lesquelles les tribunaux n'ont pas compétence, et ii) en raison de l'absence de traduction de certains textes intégrés à la *Loi constitutionnelle de 1982*³⁴. Aux fins de la présente étude, il est pertinent de rappeler l'argument du gouvernement du Québec selon lequel : « La loi constitutionnelle de 1982 serait inopérante [car] l'article 55 obligeait la traduction et l'adoption en français de toutes ses annexes [et], bien que le texte de celles-là ait été traduit, la version française de plusieurs d'entre elles n'a pas encore été adoptée³⁵. » Le gouvernement du Québec argumentait que l'article 55 créait trois obligations constitutionnelles :

Premièrement, le ministre est chargé de rédiger, dans les meilleurs délais, la version française des parties de la Constitution qui figurent à ses annexes.

Deuxièmement, dès qu'une partie suffisamment importante est prête, il doit la déposer pour adoption. Cette obligation comporte deux étapes indissociables. D'abord, le ministre doit décider si une partie est suffisamment importante, puis si elle est prête pour adoption.

Troisièmement, la version française des textes est adoptée, conformément à la procédure applicable à la modification des dispositions constitutionnelles qu'elle contient³⁶.

³⁴ *Bertrand c. Québec (PG)*, [1996] RJQ 2393, par. 1-4, 138 DLR (4^e) 481 [*Bertrand*].

³⁵ *Ibid.*, par. 27.

³⁶ *Ibid.*, par. 144.

Selon le Gouvernement du Québec, le ministre de la Justice du Canada avait manqué aux trois obligations constitutionnelles : « Quant à la première, il n'a pas agi avec toute la diligence requise; en ce qui concerne la deuxième, il a fait défaut de déposer les parties suffisamment importantes des textes dès qu'elles étaient prêtes; enfin la troisième n'a tout simplement pas été exécutée³⁷. » Le gouvernement du Québec jugeait qu'un délai de 14 ans était « inacceptable³⁸ » et que dans la mesure où l'article 55 de la *Loi constitutionnelle de 1982* créait des obligations constitutionnelles impératives : « L'omission de respecter cette disposition a[v]ait pour conséquence juridique inévitable de rendre l'ensemble des textes constitutionnels inopérants³⁹. »

Le demandeur argumentait (1) que le gouvernement du Québec était en partie lui-même responsable de l'omission de respecter l'article 55 dans la mesure où il n'avait pas réclamé l'adoption de la version française des textes constitutionnels canadiens, malgré qu'il en avait possession depuis 1990; (2) que le gouvernement du Québec ne devrait pouvoir réclamer l'application de la *Loi constitutionnelle de 1982* et recourir aux dispositions de celle-ci afin d'argumenter qu'elle est inopérante; et (3) qu'il était préférable que cette question reçoive une réponse dans le cadre d'un recours distinct⁴⁰.

³⁷ *Ibid.*, par. 145.

³⁸ *Ibid.*, par. 27.

³⁹ *Ibid.*, par. 143.

⁴⁰ *Ibid.*, par. 36, 147.

L'article 55 a ceci de particulier qu'il « impose au maître d'œuvre, le ministère fédéral de la Justice, une collaboration obligatoire, qui fait dépendre le résultat final d'une volonté qu'il ne peut contrôler tout au long du processus⁴¹ ». En effet, alors que l'obligation prévue à l'article 55 de « rédiger, dans les meilleurs délais, la version française des parties de la Constitution du Canada qui figurent à l'annexe » de la *Loi constitutionnelle de 1982* incombe explicitement et uniquement au ministre de la Justice du Canada, ce qu'il a fait, l'obligation d'adopter ces textes, quant à elle, suppose implicitement la participation de tous les intervenants, tant fédéraux que provinciaux, dans la mesure où ces derniers doivent présenter et adopter des résolutions préalablement à toute « adoption par proclamation du gouverneur général sous le Grand Sceau du Canada, conformément à la procédure applicable à l'époque à la modification des dispositions constitutionnelles qu'elle contient⁴² ». Ainsi, l'article 55 lie également les provinces qui, en ratifiant la *Loi constitutionnelle de 1982*, se sont engagées à mener à terme le projet de l'article 55. Autrement dit, l'article 55 enjoint inexorablement les provinces à collaborer avec le fédéral en vue de faire adopter la version française des textes selon la procédure de modification constitutionnelle applicable. Il ne s'agit pas simplement d'une obligation de moyen, mais également d'une obligation de résultat fondée sur le texte de l'article 55 lu ensemble avec

⁴¹ *Québec (PG) c. Langlois* (5 décembre 1997), Québec 200-73-000514-979, décision sur requête (CQ) M. le juge Vallières, confirmé en appel par *Québec (PG) c. Langlois* (21 avril 1998), Québec 36-511-972 (CS Québec) M. le juge Tremblay [*Québec c. Langlois*]. Le pourvoi en appel à la Cour d'appel du Québec fut rejeté le 6 juillet 1998 : 200-10-000685-987.

⁴² *Loi constitutionnelle de 1982*, *supra* note 2, art. 55.

l'article 16 de la *Charte* et sur les principes constitutionnels de la primauté du droit et du constitutionnalisme, du respect des minorités, et du fédéralisme. Cette idée sera élaborée tout au long du présent chapitre.

La Cour supérieure de justice du Québec dans l'affaire *Bertrand* a toutefois choisi de ne pas se prononcer sur la portée de l'article 55 de la *Loi constitutionnelle de 1982*, jugeant qu'elle « ne saurait, au stade de l'irrecevabilité, déclarer que le ministre de la Justice du Canada a failli à ses obligations constitutionnelles sans lui permettre de faire la preuve complète des circonstances entourant les événements⁴³ » et que le cadre de la requête en irrecevabilité n'était pas adéquat pour décider d'une question de fond telle que la détermination des mesures de redressements appropriées dans l'éventualité où elle concluait au manquement du ministre de la Justice du Canada à ses obligations constitutionnelles prévues à l'article 55 de la *Loi constitutionnelle de 1982*⁴⁴. La Cour soulevait toutefois une série de questions qui méritent d'être présentées :

156 On peut certes s'étonner et spéculer sur les circonstances responsables de ce que 17 des 24 textes encore en vigueur des annexes de la *Loi constitutionnelle de 1982* n'aient pas encore été adoptés. Il n'en demeure pas moins que des questions de fait importantes devront être appréciées par un juge saisi de l'affaire au fond. À titre d'exemple : comment expliquer qu'il se soit écoulé plus de huit ans avant que la version définitive des textes ne soit prête ? Les légistes, constitutionnalistes et traducteurs chargés de

⁴³ *Bertrand*, *supra* note 34, par. 157.

⁴⁴ *Ibid.*, par. 158.

préparer la version française de ces textes ont-ils rencontré des difficultés hors de l'ordinaire ? Pourquoi les provinces, sur réception de la version finale des textes, n'ont-elles pas posé de gestes afin qu'elle soit adoptée ? Leur adoption devait-elle faire l'objet de consultations auprès des provinces, comme le prétend [Le Procureur général du Canada] ? Dans l'affirmative, pourquoi n'ont-elles pas été tenues⁴⁵ ?

II.II. Une proposition

Malgré l'absence de jugements interprétant la portée de l'article 55 de la *Loi constitutionnelle de 1982* et en dépit du silence relatif de la doctrine à cet égard, les observations suivantes s'imposent. D'abord, il semble qu'une violation de l'article 55 de la *Loi constitutionnelle de 1982* par le ministre de la Justice du Canada n'a pas pour effet de rendre celle-ci invalide et inopérante comme le prétendait le Procureur du Québec dans l'affaire *Bertrand*, ne serait-ce qu'en raison du principe selon lequel la Constitution ne peut pas être elle-même inconstitutionnelle⁴⁶. C'est sans doute pour cette raison que le Procureur général du Québec a subséquentement abandonné l'argument de l'invalidité de la *Loi*

⁴⁵ *Ibid.*, par. 156-160.

⁴⁶ *McAteer c. Canada (AG)*, 2014 ONCA 578, par. 58, 121 OR (3^e) 1, autorisation de pourvoi à la CSC refusée 36120 (25 février 2015); *Gosselin (Tuteur de) c Québec (PG)*, 2005 CSC 15, par. 2, [2005] 1 RCS 238. Voir également Guy Tremblay, *supra* note 22, p. 37-38.

constitutionnelle de 1982 fondée sur le non-respect de l'article 55⁴⁷. Nous sommes toutefois d'avis que le gouvernement du Québec avait bien caractérisé les obligations constitutionnelles découlant de l'article 55 dans l'affaire *Bertrand*⁴⁸.

Ensuite, un autre constat, plus évident celui-ci, est que l'article 55 n'est pas sujet à un quelconque pouvoir de dérogation semblable à celui qui est prévu à l'article 33 de la *Charte*, ni aux limites raisonnables aux termes de son article premier. L'article 55 demeure, à part entière, un article impératif de la Loi suprême du pays au sens de l'article 52. Comme il s'agit, en définitive, d'un droit linguistique – le droit à une version officielle des textes constitutionnels en français – l'article 55 doit s'interpréter selon les principes d'interprétation applicables à ce type de droit, notamment le fait que ceux-ci « doivent dans tous les cas être interprétés en fonction de leur objet, de façon compatible avec le maintien et l'épanouissement des collectivités de langue officielle au Canada⁴⁹ ».

De plus, nous savons que « les dispositions expresses de la Constitution doivent être considérées comme étant l'expression des principes structurels sous-jacents non écrits⁵⁰ ». Ainsi, les obligations prévues à l'article 55 doivent être considérées à la lumière des

⁴⁷ Choquette, *Critique*, supra note 5, p. 506; *Bertrand c. Québec (Premier ministre)*, [1998] RJQ 1203, JE 98-845.

⁴⁸ *Bertrand*, supra note 34, par. 144, reproduit plus haut au texte correspondant à la note 36.

⁴⁹ *R c. Beaulac*, [1999] 1 RCS 768, par. 25, 173 DLR (4^e) 193 [*Beaulac*]; *Arsenault-Cameron c. Île-du-Prince-Édouard*, 2000 CSC 1, [2000] 1 RCS 3, par. 27 [*Arsenault-Cameron*].

⁵⁰ *Renvoi relatif à la rémunération des juges de la Cour provinciale (Î.-P.-É.)*, [1997] 3 RCS 3, par. 107, 156 NFLD & PEIR 1 [*Renvoi relatif à la rémunération des juges*].

principes constitutionnels du fédéralisme⁵¹, de la primauté du droit et du constitutionnalisme⁵², ainsi que de la protection des minorités⁵³ dans la mesure où ces principes « guident l'interprétation du texte [de la Constitution] et la définition des sphères de compétence, la portée des droits et obligations ainsi que le rôle de nos institutions politiques » et que « le respect de ces principes est indispensable au processus permanent d'évolution et de développement de notre Constitution⁵⁴ ».

Quant au premier volet de ses obligations, nous avons mentionné précédemment que le ministre de la Justice a établi le Comité de rédaction constitutionnelle française en 1984 et que ce dernier a produit une version française des textes constitutionnels du Canada en 1990. Le Comité de rédaction constitutionnelle française, en interprétant l'article 55, a « jugé qu'il ne fallait pas l'interpréter de façon restrictive » et a « estimé que la version française de la Constitution du Canada devait autant que possible en donner une représentation complète, dans sa chronologie comme dans son état actuel⁵⁵ ». Dans la première partie de son rapport, le Comité a rédigé une version française des trente textes mentionnés à l'annexe de la *Loi constitutionnelle de 1982*, sans égard au fait que ceux-ci

⁵¹ *Renvoi relatif à la sécession du Québec*, [1998] 2 RCS 217, par. 55-60, 161 DLR (4^e) 385 [*Renvoi relatif à la sécession du Québec*].

⁵² *Ibid.*, par. 70-78.

⁵³ *Ibid.*, par. 79-82.

⁵⁴ *Ibid.*, par. 52.

⁵⁵ *Rapport définitif*, supra note 12, p. 12.

étaient abrogés ou non, britanniques ou canadiens⁵⁶. Ensuite, dans la deuxième partie de son rapport, le Comité a rédigé une version française de huit textes supplémentaires non mentionnés à l'annexe de la *Loi constitutionnelle de 1982*, mais dont il avait dû faire ou refaire la version française dans l'exercice de son mandat en vertu de l'article 55 afin d'assurer une cohérence entre les nouveaux textes et ceux-ci. Finalement, jugeant que « l'article 55 de la loi de 1982 pouvait s'interpréter comme ne faisant pas obstacle à la mise en cohérence formelle de textes constitutionnels contemporains avec les textes dont il avait établi la version française », le Comité a proposé la modification de forme d'autres passages de la Constitution du Canada, incluant la *Loi constitutionnelle de 1982* elle-même, dans une troisième partie de son rapport⁵⁷.

L'article 55 de la *Loi constitutionnelle de 1982* impose également l'obligation de faire adopter, « dès qu'elle est prête » la version française des textes constitutionnels canadiens. Cette obligation, à notre avis, doit être comprise par l'entremise de l'article 16 de la *Charte*. D'ailleurs, la Cour supérieure du Québec avait fait allusion à cela dans l'affaire *Bertrand* lorsqu'elle mentionnait que le défaut d'adoption de la version française de certains textes des annexes de la *Loi constitutionnelle de 1982* « soulève d'importantes questions liées à l'interprétation de plusieurs dispositions de la Constitution du Canada,

⁵⁶ Les textes canadiens étaient déjà officiels en français, mais le Comité a jugé qu'il était habilité à refaire les versions françaises afin d'en harmoniser la forme avec les traductions des textes britanniques qu'il allait proposer.

⁵⁷ *Rapport définitif*, supra note 12.

notamment les articles 16, 52, 55 et 56⁵⁸ ». Nous allons donc maintenant nous tourner vers l'article 16 de la *Charte*.

III. L'article 16 de la *Charte* : disposition déclaratoire ou exécutoire ?

Il faut remonter au moins à l'année 1963 pour bien comprendre l'article 16 de la *Charte*. À l'époque, l'existence d'une crise constitutionnelle et politique, notamment avec le Québec, vient mettre l'intégrité du pays en jeu. En réponse à cette crise, le gouvernement Pearson, crée la Commission royale d'enquête sur le bilinguisme et le biculturalisme, dont le mandat est :

[F]aire enquête et rapport sur l'état présent du bilinguisme et du biculturalisme au Canada et recommander les mesures à prendre pour que la Confédération canadienne se développe d'après le principe de l'égalité entre les deux peuples qui l'ont fondée, compte tenu de l'apport des autres groupes ethniques à l'enrichissement culturel du Canada, ainsi que les mesures à prendre pour sauvegarder cet apport⁵⁹.

La Commission prononçait déjà un diagnostic grave dans son rapport préliminaire de 1965 :

⁵⁸ *Bertrand*, supra note 34, par. 159.

⁵⁹ André Laurendeau et Arnold Davidson Dunton, *Rapport de la Commission royale d'enquête sur le bilinguisme et le biculturalisme*, Ottawa, Imprimeur de la Reine, 1967, p. 179.

[L]e Canada traverse actuellement, sans toujours en être conscient, la crise majeure de son histoire. Cette crise a sa source dans le Québec [...]. Elle a des foyers secondaires : les minorités françaises des autres provinces et les minorités ethniques – ce qui ne signifie aucunement qu’à nos yeux ces problèmes soient en eux-mêmes secondaires [...]. Si elle persiste et s’accroît, elle peut conduire à la destruction du Canada⁶⁰.

La Commission recommandait notamment que le français et l’anglais soient déclarés langues officielles au palier fédéral et dans les provinces de l’Ontario et du Nouveau-Brunswick. Le gouvernement fédéral (ainsi que le gouvernement du Nouveau-Brunswick⁶¹) a donné suite à certaines recommandations et, c’est ainsi que, depuis 1969, grâce à l’adoption de la *Loi sur les langues officielles*⁶², le français et l’anglais jouissent d’un statut, des droits et privilèges égaux quant à leur usage dans les institutions du Parlement et du gouvernement du Canada.

L’article 16 de la *Charte* apparaît également pour la première fois, dans sa forme actuelle, dans le *Projet de résolution portant adresse commune à Sa Majesté la Reine concernant la Constitution du Canada* du gouvernement Trudeau, publié le 6 octobre

⁶⁰ André Laurendeau et Arnold Davidson Dunton, *Rapport préliminaire de la Commission royale d’enquête sur le bilinguisme et le biculturalisme*, Ottawa, Imprimeur de la Reine, 1965.

⁶¹ *Loi sur les langues officielles du Nouveau-Brunswick*, LN-B 1969, c 14.

⁶² *Loi sur les langues officielles*, SRC 1970, c O-2.

1980⁶³ et il « élève au rang de norme constitutionnelle de première classe le texte de l’article deux de la *Loi sur les langues officielles*⁶⁴ » en 1982. L’article 2 de la *Loi sur les langues officielles* de 1969 était formulé ainsi :

Déclaration du statut des langues

2. L’anglais et le français sont les langues officielles du Canada pour tout ce qui relève du Parlement et du gouvernement du Canada ; elles ont un statut, des droits et des privilèges égaux quant à leur emploi dans toutes les institutions du Parlement et du gouvernement du Canada.

Declaration of Status of Languages

2. The English and French languages are the official languages of Canada for all purposes of the Parliament and Government of Canada, and possess and enjoy equality of status and equal rights and privileges as to their use in all the institutions of the Parliament and Government of Canada.

L’article 16 de la *Charte* quant à lui, prévoit ce qui suit :

Langues officielles du Canada

16. (1) Le français et l’anglais sont les langues officielles du Canada; ils ont un statut et des droits et privilèges égaux quant à leur usage dans les institutions du Parlement et du gouvernement du Canada.

Official languages of Canada

16. (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

Langues officielles du Nouveau-Brunswick

(2) Le français et l’anglais sont les langues officielles du Nouveau-Brunswick; ils ont un

Official languages of New Brunswick

(2) English and French are the official languages of New Brunswick and have equality

⁶³ Chambre des communes, *Journaux*, 32^e parl, 1^{re} sess., n° 67 (6 octobre 1980), p. 528.

⁶⁴ *Société des Acadiens*, supra note 26, p. 613 (juge Wilson).

statut et des droits et privilèges égaux quant à leur usage dans les institutions de la Législature et du gouvernement du Nouveau-Brunswick.

Progression vers l'égalité

(3) La présente charte ne limite pas le pouvoir du Parlement et des législatures de favoriser la progression vers l'égalité de statut ou d'usage du français et de l'anglais.

of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.

Advancement of status and use

(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

Le contenu et la portée de l'article 16 de la *Charte* sont incertains. Le professeur Hogg note que celui-ci fait de l'anglais et du français les « langues officielles » du Canada et du Nouveau-Brunswick, mais que « [i]t is not clear what, if any, practical consequences flow from official status⁶⁵ ». Il note également que les paragraphes 16(1) et 16(2) ne concernent probablement pas les communications entre le gouvernement et le public canadien étant donné que celles-ci sont explicitement abordées à l'article 20 de la *Charte*⁶⁶, mais ils

⁶⁵ Hogg, *supra* note 20, p. 56-22.

⁶⁶ En effet, il existe une théorie selon laquelle les articles 16 à 20 de la *Charte* « se rapportent à des domaines distincts et étanches des activités parlementaires, judiciaires et gouvernementales de l'État fédéral »; R c *Simard* (1995) 27 OR (3^e) 97, 105 CCC (3^e) 461, autorisation de pourvoi à la CSC rejeté dans [1996] 3 RCS xiii; voir toutefois Webber, *infra* note 94, p. 146; Jennifer Klinck et coll., « Le droit à la prestation des services publics dans les langues officielles » dans Michel Bastarache et Michel Doucet (dir.), *Les droits linguistiques au Canada*, 3^e éd, Cowansville (Qc), Yvon Blais, 2014, 451, p. 477-483.

protègent potentiellement le droit des fonctionnaires fédéraux et au Nouveau-Brunswick de travailler dans la langue officielle de leur choix⁶⁷. Selon les professeurs Brun, Tremblay et Brouillet :

[Bien que le paragraphe 16(1) de la *Charte*] émet[te] une déclaration de principe quant à l'égalité de statut et d'usage du français et de l'anglais dans les institutions fédérales [...] cette disposition est libellée en des termes fort semblables à ceux de l'article 2 de l'ancienne *Loi sur les langues officielles*, [...] article que les tribunaux ont jugé dépourvu d'efficacité réelle dans des affaires impliquant la langue du travail⁶⁸.

Il est donc utile, pour les fins du présent chapitre, de commencer l'étude de l'article 16 de la *Charte* par une revue de la jurisprudence interprétant l'article 2 de la *Loi sur les langues officielles* de 1969. Notamment, on avait argumenté le caractère exécutoire de cette disposition dans les affaires *Joyal c. Air Canada*⁶⁹ et *Association des gens de l'air du Québec c L'honorable Otto Lang*⁷⁰. Une analyse de cette jurisprudence nous permet de déceler l'existence de deux interprétations opposées de la déclaration de statut officiel du français et de l'anglais prévu à l'article 2 de la *Loi sur les langues officielles* de 1969, une

⁶⁷ Hogg, *supra* note 20, p. 56-22.

⁶⁸ Brun, Tremblay et Brouillet, *Droit constitutionnel*, *supra* note 21, p. 894.

⁶⁹ *Joyal et coll. c. Air Canada*, [1976] CS 1211 [*Joyal c. Air Canada*].

⁷⁰ *Association des gens de l'air du Québec Inc. et coll. c. L'honorable Otto Lang et coll.*, [1977] 2 CF 22, 76 DLR (3^e) 455 [*Association des gens de l'air*].

opposition qui, comme nous le verrons, sera revue par la Cour suprême dans le contexte de son interprétation de l'article 16 de la *Charte*.

A. Les deux interprétations opposées de l'article 2 de la *Loi sur les langues officielles* de 1969

Dans *Joyal c. Air Canada*, les demandeurs tentaient, notamment, d'obtenir l'annulation d'un règlement publié par Air Canada ainsi qu'une injonction contre celle-ci afin de la forcer « de préparer et rédiger ou de faire préparer ou rédiger, pour l'usage des pilotes à son emploi, une terminologie française du matériel de vol dont le poste de pilotage de ses aéronefs doit être pourvu⁷¹ », ce que la Cour supérieure du Québec a ordonné. Celle-ci a également ordonné à Air Canada de cesser d'empêcher ses pilotes d'utiliser le français comme langue de travail dans certaines circonstances⁷². Expliquant pourquoi Air Canada avait tort d'interpréter l'article 2 de la *Loi sur les langues officielles* de 1969 comme une disposition déclaratoire et non exécutoire, le juge Deschênes avance que :

Le Parlement ne pouvait s'arrêter à sa déclaration de principe concernant le statut officiel de l'anglais et du français au Canada; il lui fallait immédiatement en prévoir les résultats tangibles et ancrer ce statut dans la réalité canadienne. De là suit la conclusion concrète du principe : « elles (les deux langues officielles) ont un statut, des droits et des privilèges égaux quant à leur emploi dans toutes les institutions du Parlement et du gouvernement du Canada » [...]. L'article 2 [de la *Loi sur les langues*

⁷¹ *Joyal c. Air Canada*, supra note 69, p. 1234.

⁷² *Ibid.*

officielles] contient donc beaucoup plus que le seul principe éthéré auquel la défense voudrait le restreindre⁷³.

Il ajoute plus loin :

Il serait d'ailleurs pour le moins étonnant que, devant un Tribunal de juridiction supérieure au Canada, une loi fédérale valide, imposant certains critères linguistiques dans un domaine de compétence fédérale, reste lettre morte en cas de violation et doive être considérée comme une affirmation platonique d'une bonne intention dépourvue de sanction. Que les demandeurs, au contraire, y puisent un droit exécutoire devant les Tribunaux ressort de l'examen de la législation, peu importe qu'on entreprenne de la considérer du point de vue du droit civil ou de celui de la common law⁷⁴.

Après avoir survolé les fondements de son opinion en droit civil et en common law, le juge Deschênes conclut :

Quel que soit l'aspect sous lequel on l'envisage, la Cour est d'opinion que [la *Loi sur les langues officielles*] possède, en son article 2, un fondement tout à fait approprié pour asseoir un recours en droit commun de la nature de celui que les demandeurs exercent [il s'agissait d'une injonction en l'espèce].

⁷³ *Ibid.*, p. 1215-1216.

⁷⁴ *Ibid.*, p. 1217.

[...] D'autre part, [la *Loi sur les langues officielles*] demeure silencieu[se] sur le rôle des Tribunaux : [elle] ne leur en attribue expressément aucun – nous avons vu plus haut que cela n'était pas nécessaire, vu que le droit commun s'en charge – mais il ne leur enlève expressément aucune de leurs prérogatives non plus.

Pour faire droit à la prétention d'Air Canada, il faudrait donc lire dans [la *Loi sur les langues officielles*] une clause privative implicite. À la faveur de l'institution du poste de commissaire des langues officielles, il faudrait conclure à l'abrogation du pouvoir traditionnel de surveillance des cours supérieures et à l'abolition pure et simple de tous recours de droit commun auxquels pourrait donner ouverture une violation [de la *Loi sur les langues officielles*] et, plus particulièrement, de son article 2.

La Cour ne saurait se rendre à cette conclusion; elle ne saurait abdiquer ses responsabilités; elle ne saurait refuser de considérer à son mérite un recours qui relève de sa compétence, en l'absence d'une indication claire de la volonté du Parlement en ce sens⁷⁵.

Alors que le juge Barbès avait maintenu le jugement de première instance, le juge Monet au nom d'une majorité de la Cour d'appel du Québec était d'avis que le juge

⁷⁵ *Ibid.*, p. 1219-1220.

Deschênes s'était « mépris sur la portée de l'article 2 » et que cet article ne devait pas être isolé du reste de la *Loi sur les langues officielles*⁷⁶. Cela dit, le juge Monet « ne di[t] pas que le Parlement a exclu le pouvoir judiciaire de l'application de la [*Loi sur les langues officielles*] » et précise même que « [l]es dispositions de l'article 2, il est vrai, ne sont pas uniquement des vœux émis par le Parlement⁷⁷ ». Au lieu de cela, le juge Monet était en désaccord avec la conclusion du premier juge selon laquelle la Cour devait intervenir en raison de l'efficacité discutable et du caractère précaire du recours devant le commissaire des langues officielles.

Dans la cause *Association des gens de l'air*, les demandeurs contestaient, devant la Cour fédérale, la validité de l'*Ordonnance sur les normes et méthodes des communications aéronautiques*⁷⁸ du ministre des Transports du Canada, qui faisait de l'anglais la seule langue de l'aviation au Canada sauf dans quelques circonstances limitées. Traitant de la question de savoir si l'Ordonnance était nulle parce que contraire à la *Loi sur les langues officielles*, le juge Marceau était d'avis que l'article 2 constituait certainement la pierre angulaire de la loi, qu'il était clairement « plus que l'expression d'un vœu pieux ou d'une déclaration de principe platonique et sans conséquence » et que le Parlement y exprimait là « une volonté nette qui permet de souscrire à cette conclusion [qu'il] enracine déjà le principe des langues officielles dans le terroir de notre pays et lui donne sa consécration

⁷⁶ *Air Canada c. Joyal*, [1982] CA 39, 134 DLR (3^e) 410.

⁷⁷ *Ibid.*

⁷⁸ *Ordonnance sur les normes et méthodes des communications aéronautiques*, DORS/76-551.

dans les faits⁷⁹ ». Le juge Marceau était cependant d'avis que l'article 2 ne pouvait pas être isolé de l'ensemble de la *Loi sur les langues officielles* et que, « [s]ur le plan pratique des droits et obligations juridiques qui en découlent », il constituait plutôt « une « déclaration de statut », qu'on ne saurait formuler avec plus de vigueur mais qui demeure introductive⁸⁰ ». C'est aux articles qui suivaient l'article 2 qu'on devait trouver les effets juridiques de cette « déclaration de statut ».

En appel, le juge Le Dain au nom d'une majorité de la Cour d'appel fédérale s'exprimait autrement au sujet du caractère exécutoire de l'article 2 de la *Loi sur les langues officielles* de 1969 :

Suivant mon interprétation de l'article 2, celui-ci est plus qu'une simple déclaration de principe ou l'expression d'un but ou d'un idéal général. Il l'est par rapport à la *Loi sur les langues officielles dans son ensemble* – l'expression de l'esprit principal de la *Loi* auquel d'autres dispositions de la *Loi* se réfèrent – mais il est également l'affirmation du statut officiel des deux langues et du droit strict d'employer le français, tout comme l'anglais, dans les institutions du gouvernement fédéral. D'autres articles de la *Loi*, tels que les articles 9 et 10, réglementent les modalités d'application afin d'en faire un droit effectif et une réalité pratique [...]. À mon humble avis, l'article 2 est, à ce titre, plus qu'une simple disposition introductive, il est

⁷⁹ *Association des gens de l'air du Québec*, supra note 70, p. 34.

⁸⁰ *Ibid.*

plutôt le fondement juridique de l'emploi du français, comme de l'anglais, dans la fonction publique du Canada, que ce soit comme fonctionnaire ou comme membre du public traitant avec lui [...]⁸¹.

Ce survol jurisprudentiel permet d'observer que « [t]outes les cours qui ont eu à étudier l'art. 2 s'accordent pour dire qu'au minimum ce dernier exprime l'engagement fondamental du Canada envers le concept de la dualité linguistique⁸² ». Mais plus important encore, il permet d'observer l'existence de deux interprétations opposées de la déclaration de statut officiel du français et de l'anglais : une première interprétation qui soumet le principe d'égalité consacré à l'article 2 de la *Loi sur les langues officielles* de 1969 aux limites prévues par les autres articles de cette loi, et une deuxième interprétation qui donne à cet article une portée juridique véritable, indépendamment des autres articles de la loi. La Cour suprême du Canada n'a jamais entendu les affaires *Joyal c. Air Canada* et *Association des gens de l'air*, mais elle a néanmoins fait renaître l'opposition entre les deux interprétations qu'elles contiennent lorsqu'elle a dû interpréter une autre déclaration de statut officiel du français et de l'anglais, constitutionnel cette fois, prévu à l'article 16 de la *Charte*⁸³.

⁸¹ *Association des gens de l'air du Québec Inc. et coll. c. L'honorable Otto Lang et coll.*, [1978] 2 CF 371, p. 379-380, 89 DLR (3^e) 495.

⁸² Joseph Eliot Magnet, « The Charter's Official Languages Provisions: The Implications of Entrenched Bilingualism » (1982) 4 SCLR 163, p. 172.

⁸³ Klinck et coll., supra note 66, p. 519-522.

B. Les deux interprétations opposées de l'article 16 de la *Charte*

C'est en 1986, dans l'affaire *Société des Acadiens*, que la Cour suprême a interprété l'article 16 de la *Charte* pour la première fois. Le jugement qui ne portait pas sur le fond de l'article 16 lui-même, constitue néanmoins l'arrêt le plus détaillé à porter sur le contenu et la portée de l'article 16 de la *Charte*, à ce point que la décision a permis subséquemment dans l'affaire *Beaulac*, de guider les principes d'interprétation applicables aux droits linguistiques. Par surcroît, dans *Société des Acadiens*, la juge Wilson, dans ses propres motifs, cita les propos du professeur André Tremblay au sujet des deux conceptions possibles de la portée de l'article 16⁸⁴. D'abord, le paragraphe 16(1) peut être interprété comme une déclaration « purement platonique ou abstraite, de type préambulaire qui énoncerait un objectif ou une règle générale dont l'étendue serait fixée par les articles 17 à 22⁸⁵ ». Selon cette première interprétation : « La déclaration ne viserait pas à implanter un bilinguisme intégral ou absolu, mais uniquement le niveau ou les modalités de bilinguisme précisé[s] aux articles subséquents⁸⁶. » Une seconde interprétation voit « dans l'article 16(1) le principe fondamental et autonome de la politique linguistique au niveau fédéral, ou ce que l'on peut appeler la pierre d'angle ou la charnière de tout le dispositif linguistique au niveau fédéral⁸⁷ ». Cette seconde interprétation signifie ce qui suit :

⁸⁴ André Tremblay, « Les droits linguistiques » dans Gérald-A. Beaudoin et Walter S Tarnopolsky (dir.), *Charte canadienne des droits et libertés*, Montréal, Wilson & Lafleur/Sorej, 1982, p. 559.

⁸⁵ *Société des Acadiens*, supra note 26, p. 613.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*, p. 613-614.

[L]'article 16(1) aurait un effet contraignant sur les autorités fédérales qui auraient l'obligation constitutionnelle d'assurer l'égalité de statut et des droits et privilèges du français et de l'anglais. Il aurait aussi pour effet de conduire au contrôle judiciaire étendu de la constitutionnalité des lois et règlements fédéraux qui contreviendraient au principe d'égalité⁸⁸.

Interprété ainsi, l'article 16 de la *Charte* donnerait lieu à des déclarations d'invalidité en vertu de l'article 52 de la *Loi constitutionnelle de 1982* ainsi qu'à des redressements sous l'article 24 de la *Charte*⁸⁹.

Toujours dans *Société des Acadiens*, dans ses propre motifs, le juge en chef Dickson notait que « [b]ien que l'importance précise de l'art. 16 soit débattue dans la doctrine, il constitue à tout le moins un indice très révélateur de l'objet des garanties linguistiques de la *Charte* » et que « [p]eu importe qu'il soit visionnaire, qu'il soit déclaratoire ou qu'il participe d'une disposition de fond, l'art. 16 est un outil important dans l'interprétation des autres dispositions linguistiques de la *Charte*⁹⁰ ». Selon le juge Dickson, l'adoption des garanties linguistiques de la *Charte* par le gouvernement fédéral et le gouvernement du Nouveau-Brunswick témoignent, au minimum, de « leur engagement à réaliser le

⁸⁸ *Ibid.*, p. 614.

⁸⁹ *Ibid.*, p. 615.

⁹⁰ *Ibid.*, p. 565.

bilinguisme officiel dans leurs ressorts respectifs⁹¹ ». Enfin, sous la plume du juge Beetz⁹², la majorité dans cette affaire concluait plutôt que les droits linguistiques sont des droits fondés sur un compromis politique et que l'article 16 de la *Charte*, conséquemment, confirmait la règle voulant que les tribunaux fassent preuve de retenue dans leur interprétation des droits linguistiques⁹³.

Selon nous, il ne fait aucun doute que l'interprétation restrictive de l'article 16 de la *Charte* proposée par la majorité dans *Société des Acadiens* ne tient plus et que l'interprétation juste de l'article 16 de la *Charte* est celle qui en fait une disposition autonome, exécutoire et ayant un contenu qui lui est propre⁹⁴. Certains auteurs partageant une opinion semblable postulent que l'article 16, en plus de servir à interpréter les articles 17 à 23 de la *Charte*, « serves two residual functions: it can increase the *scope* of the constitutional consequences of official bilingualism and it can increase the *intensity* of specified obligations under official bilingualism⁹⁵ ». L'article 16 commande donc une interprétation plus étendue des articles 17-23 de la *Charte*, mais il possède également un

⁹¹ *Ibid.*

⁹² Le juge Beetz était accompagné des juges Estey, Chouinard, Lamer et Le Dain, ce dernier ayant été nommé à la Cour suprême du Canada en 1984, soit 6 ans après sa décision dans l'appel de *Joyal c. Air Canada*.

⁹³ *Société des Acadiens*, *supra* note 26, p. 578-580.

⁹⁴ Voir particulièrement l'excellente démonstration de Grégoire Charles N. Webber, « The Promise of Canada's Official Languages Declaration » dans Joseph Eliot Magnet, dir, *Official Languages of Canada : New Essays*, Markham (Ont), LexisNexis, 2008, p. 131.

⁹⁵ *Ibid.*, p. 143.

contenu résiduel qui peut créer des obligations précises, y compris, mais sans s'y limiter : le droit de travailler dans la langue officielle de son choix au sein des institutions du gouvernement fédéral⁹⁶, le bilinguisme obligatoire à la Cour suprême du Canada et le bilinguisme officiel de la ville d'Ottawa⁹⁷. Nous argumentons dans ce sens et élaborons maintenant les règles et principes qui, selon nous, font que l'article 16 de la *Charte* donne lieu à des déclarations d'invalidité en vertu de l'article 52 de la *Loi constitutionnelle de*

⁹⁶ *Ibid.*, p. 160-162; Klinck et coll., *supra* note 66, p. 519-524; voir également Hogg, *supra* note 20, p. 56-22.

⁹⁷ Webber *supra* note 94, p. 155-157; Pierre Foucher, « Les articles 16 à 22 de la Charte » (2013) 62 SCLR 377, p. 388-392; Pierre Foucher, « Les articles 16 à 22 de la Charte » dans Errol Mendes et Stéphane Beaulac, *Charte canadienne des droits et libertés*, 5^e éd, Markham (Ont), LexisNexis 2013, 1029, p. 1038-1042; voir également François Larocque et Maxime Bourgeois, « « Jusqu'à ce qu'il plaise à la Reine d'en ordonner autrement... » : l'obligation positive du gouvernement du Canada de favoriser et promouvoir l'égalité des langues officielles à la Ville d'Ottawa », étude d'impact réalisée pour le Programme d'appui aux droits linguistiques, 2016.

1982 et à des redressements sous l'article 24 de la *Charte*⁹⁸, incluant des redressements pour la violation de l'article 55 de la *Loi constitutionnelle de 1982*⁹⁹.

D'abord, la Cour suprême du Canada a rectifié dans l'affaire *Beaulac* que « [d]ans la mesure où l'arrêt *Société des Acadiens du Nouveau-Brunswick* [...] préconise une interprétation restrictive des droits linguistiques, il doit être écarté¹⁰⁰ ». Au contraire, le paragraphe 16(1) de la *Charte*

⁹⁸ D'ailleurs, au-delà des règles et principes, le sénateur Serge Joyal, qui a participé au projet de réforme constitutionnelle de 1982 en tant que député et président du Comité mixte du Sénat et de la Chambre des communes sur le Rapatriement de la Constitution canadienne, rapportait les propos suivant au sujet de son rôle dans Darius Bossé et coll., « Un entretien avec l'honorable sénateur Serge Joyal » (2012-2013) 44:3, *Revue de droit d'Ottawa* 595, p. 614 :

J'ai rencontré Monsieur Trudeau et je lui ai dit (avant 1980, avant que le comité ne soit créé) : « Monsieur Trudeau, s'il y a une chose que je trouve fondamentale dans votre réforme, c'est de reconnaître formellement l'égalité du français et de l'anglais de manière obligatoire et de donner la possibilité d'ester en justice devant les tribunaux pour revendiquer cette égalité. » Donc, si le citoyen a la conviction que son droit est violé par une décision ou par une loi, il pourrait avoir la possibilité d'aller directement devant les tribunaux. Cette justiciabilité est incarnée par l'article 24 de la *Charte*. J'ai dit à Monsieur Trudeau que c'était la seule chose que je voulais et que je lui garantissais ma fidélité jusqu'à la fin si ces deux éléments, l'égalité du français et de l'anglais et son caractère exécutoire, étaient dans la *Charte*. Il pouvait alors se fier à moi pour œuvrer du meilleur de mes capacités à son projet. C'est ce que j'ai fait et c'est pourquoi nous avons l'article 16 et l'article 24 [notes omises].

⁹⁹ Woehrling et Tremblay suggèrent toutefois que même l'interprétation correcte et plus large du paragraphe 16(1) qui crée des obligations positives pour l'État limite son application aux garanties spécifiques énoncées aux articles 17 à 22 de la *Charte* (Woehrling et Tremblay, *supra* note 22, p. 1066-1074). Nous ne partageons pas cet avis, mais précisons qu'une telle théorie de l'article 16 devrait au minimum étendre son application à l'article 55 de la *Loi constitutionnelle de 1982* dans la mesure où les deux dispositions sont si intimement reliées au projet bilingue de la réforme constitutionnelle de 1982.

¹⁰⁰ *Beaulac*, *supra* note 49, par. 25; voir également *Arsenault-Cameron*, *supra* note 49, par. 27.

confirme l'égalité réelle des droits linguistiques constitutionnels qui existent à un moment donné. L'article 2 de la *Loi sur les langues officielles* a le même effet quant aux droits reconnus en vertu de cette loi. Ce principe d'égalité réelle a une signification. Il signifie notamment que les droits linguistiques de nature institutionnelle exigent des mesures gouvernementales pour leur mise en œuvre et créent, en conséquence, des obligations pour l'État¹⁰¹.

Bien qu'il soit évident que l'article 16 devra recevoir une interprétation plus large par les tribunaux dans le futur, même en procédant à une analyse restrictive de l'article 16, la majorité dans *Société des Acadiens du Nouveau-Brunswick* reconnaissait « qu'il est exact d'affirmer que l'art. 16 de la *Charte* contient un principe d'avancement ou de progression vers l'égalité de statut ou d'usage des deux langues officielles¹⁰² ». Ainsi, en

¹⁰¹ *Beaulac*, *supra* note 49, par. 24; *Lavigne c. Canada (Commissariat aux langues officielles)*, 2002 CSC 53, par. 22, [2002] 2 RCS 773 [*Lavigne*].

¹⁰² *Société des Acadiens*, *supra* note 26, p. 579. Les propos de la juge Wilson au sujet du principe d'avancement ou de progression vers l'égalité de statut ou d'usage des deux langues officielles, p. 618-619, sont également intéressants :

[L]a difficulté qu'on éprouve à caractériser l'art. 16 de la *Charte* découle en grande partie des problèmes d'interprétation inhérents au par. 16(1). J'estime que la disposition introductive portant que « [le] français et l'anglais sont les langues officielles du Canada » est déclaratoire et que le reste du paragraphe énonce les conséquences principales de cette déclaration dans le contexte fédéral, savoir que les deux langues ont un statut égal et sont assorties des mêmes droits et privilèges quant à leur usage dans les institutions du Parlement et du gouvernement du Canada. Toutefois, il ressort clairement du par. 16(3) que ces conséquences représentent le but visé plutôt

plus de considérer ce principe important dans l'appréciation de la portée de l'article 55 de la *Loi constitutionnelle de 1982*, l'interprétation correcte des obligations contenues dans celui-ci requiert également de considérer la promesse véritable et beaucoup plus large de l'article 16 de la *Charte*¹⁰³.

Ensuite, étant donné que la Cour suprême s'en était inspiré, il faut nuancer la comparaison entre l'interprétation de l'article 2 de la *Loi sur les langues officielles* de 1969 et celle de l'article 16 de la *Charte*, comme le font les professeurs Brun, Tremblay et Brouillet, entre autres, parce que l'article 16 « jouit d'une autorité supralégislative et ne peut donc céder le pas à des lois ou à des règlements que les règles ordinaires d'interprétation tendraient à faire prévaloir », mais aussi parce que son application « n'est pas confié[e] à une institution particulière comme le commissaire aux langues officielles,

que la réalité actuelle; il s'agit de quelque chose dont le Parlement et les législatures doivent « favoriser la progression. [...] » J'abonde dans le sens de ceux qui voient dans l'art. 16 un principe de croissance ou de développement, une progression vers un objectif ultime. La question, selon moi, sera donc toujours de savoir où nous en sommes présentement dans notre cheminement vers le bilinguisme et si la conduite attaquée peut être considérée comme appropriée à ce stade de l'évolution. Dans l'affirmative, même si la conduite en question ne reflète pas la pleine égalité de statut et l'égalité quant aux droits à l'usage des langues officielles, elle ne sera pas contraire à l'esprit de l'art. 16.

¹⁰³ En effet, dans *Beaulac*, *supra* note 49, par. 22, la Cour suprême expliquait que « [l]e principe de la progression n'épuise toutefois pas l'article 16 qui reconnaît officiellement le principe de l'égalité des deux langues officielles du Canada [et qu'il] ne limite pas la portée de l'article 2 de la *Loi sur les langues officielles* ».

mais bien aux tribunaux judiciaires en vertu des paragraphes 24(1) et 52(1) de la [*Loi constitutionnelle de 1982*]¹⁰⁴ ». Selon ces auteurs :

[I]l est difficile d'admettre que le paragraphe 16(1) n'exprime qu'un principe introductif qu'il faut comprendre à la lumière des précisions apportées par les dispositions qui suivent ; en effet, le terrain couvert par ces articles suivants est trop limité pour justifier la généralité des termes du paragraphe 16(1)¹⁰⁵.

D'ailleurs, les principes d'interprétation applicables aux droits linguistiques et le caractère quasi constitutionnel de la *Loi sur les langues officielles*¹⁰⁶ n'avaient pas encore été établis à l'époque des affaires *Joyal c. Air Canada* et *Association des gens de l'air* et n'avaient donc pas été pris en compte dans l'interprétation de son article 2. En ce sens, même l'article 2 de la *Loi sur les langues officielles* de 1969 recevrait une interprétation plus large aujourd'hui.

L'interprétation de la portée de l'article 16 de la *Charte* doit être perfectionnée et appuyée par les principes d'interprétations applicables aux droits linguistiques, notamment le fait que ceux-ci « doivent dans tous les cas être interprétés en fonction de leur objet, de

¹⁰⁴ Brun, Tremblay et Brouillet, *Droit constitutionnel supra* note 21, p. 894.

¹⁰⁵ *Ibid.*; voir également Klinck et coll., *supra* note 66, p. 521.

¹⁰⁶ Citant *Canada (PG) c. Viola*, [1991] 1 CF 373, p. 386-387, 123 NR 83, la Cour suprême reconnaît le caractère quasi constitutionnel de la *Loi sur les langues officielles* dans l'affaire *Beaulac*, *supra* note 49, par. 21; voir également *Lavigne*, *supra* note 101, par. 23.

façon compatible avec le maintien et l'épanouissement des collectivités de langue officielle au Canada¹⁰⁷ ».

L'article 16 doit également être interprété à la lumière des valeurs de la *Charte*¹⁰⁸, « soit les valeurs qui sous-tendent chaque droit et qui leur donnent un sens¹⁰⁹ ». Il semble fort probable que « [f]ont partie de ces valeurs le statut du français en tant que langue officielle au Canada, la protection des droits des minorités de langue officielle et l'engagement constitutionnel à protéger et à promouvoir tant le français que l'anglais¹¹⁰ ».

¹⁰⁷ *Beaulac*, supra note 49, par. 25; *Arsenault-Cameron*, supra note 49, par. 27.

¹⁰⁸ *Dubois c La Reine*, [1985] 2 RCS 350, p. 365-366, 41 Alta LR (2^e) 97 : « Notre *Charte* constitutionnelle doit s'interpréter comme un système où « chaque élément contribue au sens de l'ensemble et l'ensemble au sens de chacun des éléments » [...]. Les tribunaux doivent interpréter chaque article de la *Charte* en fonction des autres articles. » Cette approche a été confirmée par la Cour suprême dans l'affaire *Health Services and Support – Facilities Subsector Bargaining Assn. c. Colombie-Britannique*, 2007 CSC 27, par. 80, [2007] 2 RCS 391 : « Il faut interpréter la *Charte* [...] d'une manière qui préserve ses valeurs sous-jacentes et sa cohérence interne », et plus récemment dans l'affaire *Ontario (PG) c. Fraser*, 2011 CSC 20, par. 96, [2011] 2 RCS 3 : « [I]nterpréter en fonction des valeurs de la *Charte* les garanties formulées dans celle-ci de manière générale est conforme à la jurisprudence constitutionnelle des 25 dernières années. » Voir également Mark C. Power et Darius Bossé, « Une tentative de clarification de la présomption de respect des valeurs de la *Charte* canadienne des droits et libertés » (2014) 55:3, *Cahiers de droit* 775, p. 781-782.

¹⁰⁹ *École secondaire Loyola c. Québec (PG)*, 2015 CSC 12, par. 36, [2015] 1 RCS 613.

¹¹⁰ *Conseil scolaire francophone de la Colombie-Britannique c. Colombie-Britannique*, 2013 CSC 42, par. 109, [2013] 2 RCS 774 (juge Karakatsanis). La majorité dans cette affaire n'entreprend pas de définir les valeurs de la *Charte* relatives aux droits linguistiques, mais ne contredit pas la minorité sur ce point non plus.

Par ailleurs, l'interprétation de l'article 16 doit s'inspirer des principes constitutionnels. Comme nous l'avons mentionné précédemment, « les dispositions expresses de la Constitution doivent être considérées comme étant l'expression des principes structurels sous-jacents non écrits¹¹¹ ». Ainsi, les obligations prévues à l'article 16 doivent également être considérées à la lumière des principes constitutionnels du fédéralisme¹¹², de la primauté du droit et du constitutionnalisme¹¹³, ainsi que de la protection des minorités¹¹⁴ dans la mesure où ces principes « guident l'interprétation du texte [de la Constitution] et la définition des sphères de compétence, la portée des droits et obligations ainsi que le rôle de nos institutions politiques » et où « le respect de ces principes est indispensable au processus permanent d'évolution et de développement de notre Constitution¹¹⁵ ».

La Constitution du Canada est la loi suprême du pays. Il est impératif que ses dispositions soient respectées, non seulement en raison de notre attachement collectif à la primauté du droit, mais également parce qu'elles expriment nos idéaux les plus chers. L'adoption d'une constitution intégralement bilingue, exigée par l'article 55 de la *Loi*

¹¹¹ *Renvoi relatif à la rémunération des juges*, supra note 50, par. 107.

¹¹² *Renvoi relatif à la sécession du Québec*, supra note 51, par. 55-60.

¹¹³ *Ibid.*, par. 70-78.

¹¹⁴ *Ibid.*, par. 79-82; voir également *Lalonde c. Ontario (Commission de restructuration des services de santé)* (2001), 56 OR (3^e) 505, 208 DLR (4^e) 577 [*Lalonde*].

¹¹⁵ *Ibid.*, par. 52.

constitutionnelle de 1982, s'inscrit en toute cohérence avec ces idéaux, incluant l'article 16 de la *Charte* et les valeurs qui le sous-tendent. Le respect de la primauté du droit et des communautés de langue officielle du Canada n'exige rien de moins. En plus de faire violence à l'article 55 de la *Loi constitutionnelle de 1982*, au paragraphe 16(1) de la *Charte* et à son principe de l'égalité de droit, statut et privilège du français et de l'anglais¹¹⁶ le maintien d'une Constitution largement anglaise constitue un manquement au principe de progression vers l'égalité de statut ou d'usage des deux langues officielles¹¹⁷. Un tel immobilisme dans ce dossier fait également violence à la *Loi sur les langues officielles*, loi quasi constitutionnelle qui a pour objet « d'assurer le respect du français et de l'anglais à titre de langues officielles du Canada, [ainsi que] leur égalité de statut¹¹⁸ » et « de favoriser, au sein de la société canadienne, la progression vers l'égalité de statut et d'usage du français et de l'anglais¹¹⁹ », mais qui confirme également l'engagement fédéral de « favoriser l'épanouissement des minorités francophones [...] du Canada et [d']appuyer leur développement, ainsi qu'à promouvoir la pleine reconnaissance et l'usage du français et de l'anglais dans la société canadienne¹²⁰ » prévu à sa Partie VII. Celle-ci « constitue le

¹¹⁶ *Charte*, supra note 14, art. 16(1); *Loi sur les langues officielles*, supra note 15, art. 2a); *Beaulac*, supra note 49, par. 22; *Thibodeau c. Air Canada*, 2014 CSC 67, par. 112, [2014] 3 RCS 340 [*Thibodeau*].

¹¹⁷ *Charte*, supra note 14, art. 16(3); *Loi sur les langues officielles*, supra note 15, art. 2b); *Société des Acadiens*, supra note 26, par. 68.

¹¹⁸ *Loi sur les langues officielles*, supra note 15, art. 2a).

¹¹⁹ *Ibid.*, art. 2b).

¹²⁰ *Loi sur les langues officielles*, supra note 15, art. 41(1). Notons toutefois que la Cour suprême du Canada ne s'est jamais prononcée sur la portée de la Partie VII de cette loi.

prolongement du paragraphe 16(1) de la *Charte* » et « donne effet au principe consistant à « favoriser la progression vers l'égalité de statut et d'usage du français et de l'anglais », principe qui exige du Parlement ou d'une législature la prise de mesure législatives et administratives¹²¹ ».

IV. Problèmes découlant de l'unilinguisme quasi total de la Constitution écrite

Jusqu'à maintenant, le présent chapitre a survolé l'état du droit concernant l'article 55 de la *Loi constitutionnelle de 1982* et l'article 16 de la *Charte*. Plus important encore, il a tenté de rectifier les erreurs du passé en proposant une interprétation plus juste ou correcte de ses articles, appuyée par les principes d'interprétations applicables. Nous proposons maintenant de conclure notre étude en mettant en exergue l'impact, tant pratique que symbolique, de l'unilinguisme quasi total de la Constitution écrite actuelle.

A. Problèmes symboliques

La première série de problèmes qui découlent du manquement de la part du ministre de la Justice à son obligation de faire adopter la version française des textes constitutionnels canadiens, tel que l'exige l'article 55 de la *Loi constitutionnelle de 1982*, est d'ordre symbolique. À cet effet, le professeur Foucher, souligne que :

[L]'aménagement linguistique reconnaît que l'un des moyens de revitaliser une langue est de lui conférer un statut officiel. La minorité linguistique constate alors que sa langue est reconnue et avalisée par l'État, et qu'elle est

¹²¹ Michel Bastarache, « Le principe d'égalité des langues officielles » dans Michel Bastarache et Michel Doucet (dir.), *Les droits linguistiques au Canada*, 3^e éd, Cowansville (Qc), Yvon Blais, 2014, 89, p. 138.

donc légitime. Une telle déclaration devrait renforcer le sentiment de légitimité de la minorité linguistique¹²².

On reconnaît d'ailleurs que « [l]'aspect symbolique le plus important de [la *Loi sur les langues officielles*] (et de la *Charte*) est qu'elle donne aux versions française et anglaise des lois canadiennes une égale force de loi » et que « [l]e français et l'anglais acquièrent ainsi une égalité de statut : aucune des deux langues officielles n'a (théoriquement) préséance sur l'autre, aucune ne profite d'un prestige symbolique que ne posséderait pas l'autre¹²³ ». Ainsi, pensons tout simplement au non-sens qui découle de l'unilinguisme quasi total de la Constitution écrite actuelle : le Canada est un pays dont le bilinguisme officiel est enchâssé dans sa Constitution, mais sans que celle-ci soit elle-même officiellement bilingue. L'entreprise constitutionnelle inachevée qui avait été envisagée par l'adoption de l'article 55 en 1982 n'est pas sans conséquence. D'abord, la légitimité du projet social bilingue canadien est remise en question; on envoie le message que le bilinguisme officiel du Canada n'est pas assez important pour s'appliquer à la Constitution elle-même et constitue plutôt une déclaration de principes. Ensuite, on crée l'impression chez les citoyens que malgré que le français soit reconnu comme langue officielle, il n'est pas réellement égal à l'anglais; seuls les citoyens canadiens anglophones bénéficient d'une constitution dans leur langue.

¹²² Foucher, *supra* note 97, p. 388.

¹²³ François Charbonneau, « L'avenir des minorités francophones du Canada après la reconnaissance » (2012) 45-46, *Revue internationale d'études canadiennes* 163, p. 168.

On ne doit pas négliger la valeur en soi que peut avoir la reconnaissance officielle et formelle du statut d'une langue; « [l]'absence de reconnaissance a le potentiel d'être vécue par les individus comme une violence avec des conséquences délétères¹²⁴ ». La Cour suprême du Canada a reconnu que l'importance de la langue dépasse son caractère instrumental :

Une langue est plus qu'un simple moyen de communication; elle fait partie intégrante de l'identité et de la culture du peuple qui la parle. C'est le moyen par lequel les individus se comprennent eux-mêmes et comprennent le milieu dans lequel ils vivent¹²⁵.

Et ailleurs :

Le langage n'est pas seulement un moyen ou un mode d'expression. Il colore le contenu et le sens de l'expression. Comme le dit le préambule de la *Charte de la langue française* elle-même, c'est aussi pour un peuple un moyen d'exprimer son identité culturelle. C'est aussi le moyen par lequel un individu exprime son identité personnelle et son individualité¹²⁶.

¹²⁴ *Ibid.*, p. 166; voir également Fabienne Brion, « Pour une éthique de l'action interculturelle : Blessures morales et attentes de reconnaissance », dans Jean-Marc Larouche, *Reconnaissance et citoyenneté : au carrefour de l'éthique et du politique*, Montréal, Presses de l'Université du Québec, 2003, p. 111.

¹²⁵ *Mahé c. Alberta*, [1990] 1 RCS 342, p. 362, 68 DLR (4^e) 69 [Mahé].

¹²⁶ *Ford c. Québec (PG)*, [1988] 2 RCS 712, p. 748-749, 54 DLR (4^e) 577.

La Cour suprême reconnaissait également l'importance de protéger la langue dans le *Renvoi : Droit linguistique au Manitoba*, une affaire qui, rappelons-le, portait justement sur la langue des lois et leurs valeurs juridiques :

L'importance des droits en matière linguistique est fondée sur le rôle essentiel que joue la langue dans l'existence, le développement et la dignité de l'être humain. C'est par le langage que nous pouvons former des concepts, structurer et ordonner le monde autour de nous. Le langage constitue le pont entre l'isolement et la collectivité, qui permet aux êtres humains de délimiter les droits et obligations qu'ils ont les uns envers les autres, et ainsi, de vivre en société¹²⁷.

Le symbolisme d'une reconnaissance officielle d'une communauté linguistique en situation minoritaire de la part de l'État joue également un rôle positif sur la vitalité linguistique de celle-ci. Le professeur Breton, par exemple, dans son interrogation « sur les conditions qui favorisent l'existence et la vitalité d'une communauté en situation minoritaire¹²⁸ » constate que pour contrer l'assimilation vers la culture majoritaire :

On cherche [...] à renforcer les frontières ethnoculturelles, de façon à empêcher ou, du moins, [à] endiguer cette perte. On essaie d'aviver la fierté

¹²⁷ *Renvoi: Droits linguistiques au Manitoba*, [1985] 1 RCS 721, p. 744, 35 Man R (2^e) 83; Voir également *R. c. Mercure*, [1988] 1 RCS 234, p. 269, 48 DLR (4^e) 1 [*Mercure*].

¹²⁸ Raymond Breton, « L'intégration des francophones hors Québec dans des communautés de langue française » (1985) 55:2, *Revue de l'Université d'Ottawa*, p. 77.

d'appartenance. On établit des organisations qui donnent aux membres une certaine expérience de leur héritage culturel. On tente de maintenir ou de développer un « capital humain » propre au groupe, c'est-à-dire un capital (langue, connaissance[s] culturelles et techniques) qui prend surtout sa valeur dans la collectivité ethnoculturelle. Enfin, on cherche à obtenir une reconnaissance officielle de la part des différentes institutions de la société et, en particulier, de l'État. L'un des objectifs d'une telle démarche vise à légitimer la participation (directe ou indirecte) des institutions de la société au maintien de la communauté et à sa vitalité organisationnelle. Le cadre constitutionnel et les politiques institutionnelles (gouvernementales ou autres) peuvent soutenir les institutions de la minorité (ou leur nuire) [...]. On veut que l'existence de la minorité soit considérée comme légitime, donc que ses institutions puissent réclamer un certain soutien de l'ensemble de la société¹²⁹.

Or, la Cour suprême également a reconnu l'importance de la langue et des droits linguistiques à cet égard et notait que par leur nature et leur objet, les droits linguistiques sont indissociables d'une préoccupation à l'égard de la culture exprimée par la langue officielle en question et visent à remédier à l'érosion progressive des communautés de langues officielles et à faire de ces groupes linguistiques des partenaires égaux dans le

¹²⁹ *Ibid.*, p. 78-79.

domaine en question¹³⁰. La Cour suprême reconnaît que ces droits sont « essentiels à la viabilité de la nation [canadienne]¹³¹ ». C'est d'ailleurs pourquoi ces droits « doivent dans tous les cas être interprétés en fonction de leur objet, de façon compatible avec le maintien et l'épanouissement des collectivités de langue officielle au Canada » et constituent « un outil essentiel au maintien et à la protection des collectivités de langue officielle¹³² ».

Les tribunaux canadiens ont accepté des témoignages et de la preuve d'experts en sciences sociales au sujet de l'importance symbolique d'une reconnaissance d'une communauté linguistique en situation minoritaire et des effets d'une telle reconnaissance sur la vitalité de ses communautés¹³³. Par exemple, dans l'affaire *Lalonde*, on demandait la révision judiciaire de la décision de la Commission de restructuration des services de santé de fermer l'Hôpital Montfort. En annulant la décision de la Commission, la Cour

¹³⁰ *Mahé*, supra note 125, p. 362-364; *Renvoi relatif à la Loi sur les écoles publiques (Man.)*, art. 79(3), (4) et (7), [1993] 1 RCS 839, p. 849, 83 Man R (2^e) 241; *Arsenault-Cameron*, supra note 49, par. 26; *Association des parents de l'école Rose-des-vents c. Colombie-Britannique (Éducation)*, 2015 CSC 21, par. 26-27, [2015] 2 RCS 139.

¹³¹ *Mercure*, supra note 127, p. 269; *Thibodeau*, supra note 116, par. 4.

¹³² *Beaulac*, supra note 49, par. 25; *Arsenault-Cameron*, supra note 49, par. 27.

¹³³ Stéphanie Chouinard, « The Rise of Non-Territorial Autonomy in Canada: Towards a Doctrine of Institutional Completeness in the Domain of Minority Language Rights » (2014) 13:2, *Ethnopolitics* 141; Stéphanie Chouinard, « Quand le droit linguistique parle de sciences sociales : l'intégration de la notion de complétude institutionnelle dans la jurisprudence canadienne » (2016) 3, *Revue de droit linguistique* 60.

divisionnaire de l'Ontario référerait, notamment, à la preuve sociologique au sujet du rôle des institutions dans le maintien de la viabilité des collectivités minoritaires :

14 Le D^r Raymond Breton et le D^r Roger Bernard, deux experts reconnus en sociologie – surtout sur les tendances sociales qui affectent l'existence et la viabilité des collectivités minoritaires – ont témoigné que les institutions sont essentielles à la survie des collectivités culturelles. Elles sont beaucoup plus que des fournisseurs de services. Elles sont des milieux linguistiques et culturels qui fournissent aux personnes les moyens d'affirmer et d'exprimer leur identité culturelle et qui, par extension, leur permettent de réaffirmer leur appartenance culturelle à une collectivité. Une personne et sa famille ne peuvent à eux seuls maintenir l'identité linguistique et culturelle d'une collectivité. Par conséquent, ces institutions doivent exister dans le plus grand éventail possible de sphères de l'activité sociale pour permettre à la collectivité minoritaire de développer et de maintenir sa vitalité.

15 Les institutions sont aussi des symboles importants de la collectivité franco-ontarienne. Elles expriment l'identité du groupe, la présence française en Ontario et au Canada, la réalité française dans la vie publique, et la force et la vitalité de la collectivité. Toute diminution de la sphère d'activité d'une institution aura un effet négatif sur la collectivité et augmentera les probabilités d'assimilation. Les D^{rs} Breton et Bernard ont reconnu que les hôpitaux ne sont peut-être pas parmi les institutions situées au plus haut niveau de l'échelle, mais ils maintiennent néanmoins que les hôpitaux

comme Montfort sont « toutes aussi importantes dans le réseau des institutions » d'une culture minoritaire¹³⁴.

La Cour d'appel de l'Ontario a confirmé les conclusions de la Cour divisionnaire, notamment selon lesquelles la décision de la Commission de restructuration des services de santé de fermer l'Hôpital Montfort aurait pour effet de « nuire au rôle plus large de Montfort en tant qu'importante institution sur les plans linguistique, culturel et éducatif, vitale pour la minorité francophone de l'Ontario¹³⁵ ».

Dans *Galganov c. Russell (Township)*, les demandeurs contestaient la constitutionnalité d'un règlement municipal exigeant que toutes les affiches commerciales extérieures soient en français et en anglais. La Cour supérieure de justice de l'Ontario a accepté la preuve d'expert du D^r Breton selon laquelle un tel règlement joue le rôle d'une reconnaissance symbolique de l'égalité entre la langue française et la langue anglaise et que l'importance de ce symbolisme découle du fait qu'il combat l'assimilation en encourageant les membres de la communauté francophone minoritaire à maintenir leur langue française et en inspirant en eux la fierté¹³⁶.

¹³⁴ *Lalonde c. Ontario (Commission de restructuration des services de santé)*, [1999] 48 OR (3^e) 50, par. 14-15, 181 DLR (4^e) 263.

¹³⁵ *Lalonde*, *supra* note 114, par. 188.

¹³⁶ *Galganov c. Russell (Township)*, 2010 ONSC 4566, par. 75-90, 325 DLR (4^e) 136. La Cour d'appel de l'Ontario a également fait référence à la preuve du D^r Breton et a conclu que la juge de première instance

En 2006, dans une affaire également intitulée *Fédération franco-ténoise c. Canada (PG)*, les demandeurs remettaient en cause, encore une fois, la nature et l'étendue des obligations linguistiques du gouvernement des Territoires du Nord-Ouest et du gouvernement fédéral dans ce territoire; ils posaient comme argument que « [l]a communication et la prestation de services en français ont un effet symbolique et réel sur la dignité, le bien-être et le sentiment d'appartenance de la communauté francophone des TNO » et que « [l]'absence de communication et de services gouvernementaux en français nuit à la viabilité de la langue française et de la communauté francoténoise¹³⁷ ». Dans cette affaire, la Cour suprême des Territoires du Nord-Ouest a accepté comme preuve le contenu de témoignages d'experts en sciences sociales « concernant l'importance du rôle que doit jouer le gouvernement dans le maintien de la vitalité ethnolinguistique¹³⁸ ». La Cour d'appel des Territoires du Nord-Ouest concluait que l'ordonnance de la juge dans cette affaire était justifiée par la preuve et le droit¹³⁹.

En somme, si la reconnaissance officielle du statut du français contient une valeur symbolique non négligeable, voire bénéfique, pour la communauté de langue minoritaire, il

avait correctement accepté cette preuve : *Galganov c. Russell (Township)*, 2012 ONCA 409, par. 34-35, 39, 49, 67-68, 75, 78, 293 OAC 340 autorisation de pourvoi à la CSC refusée 34965 (6 décembre 2012).

¹³⁷ *Fédération franco-ténoise c. Canada (PG)*, 2006 NWTSC 20, par. 592, 150 ACWS (3^e) 348.

¹³⁸ *Ibid.*, par. 625. Voir également *Ibid.*, par. 592-622.

¹³⁹ *Fédération Franco-Ténoise c. Canada (AG)*, 2008 NWTCA 6, par. 312, 176 CRR (2^e) 116.

semble d'autant plus évident qu'une telle reconnaissance dans le contexte de la Constitution du pays aurait une valeur symbolique non négligeable et s'impose.

B. Problèmes pratiques

L'impératif du projet de l'article 55 se fait sentir de manière concrète dans les litiges qui soulèvent des questions constitutionnelles. Il n'est pas rare en droit canadien que les cours fassent l'interprétation croisée ou comparée des deux versions linguistiques d'un texte législatif bilingue pour découvrir le sens véritable¹⁴⁰. Depuis 2002, à la suite d'une série de litiges où l'examen des deux versions linguistiques s'est avéré déterminant à l'issue du pourvoi, la Cour suprême du Canada a émis un avis à la communauté juridique l'exhortant à citer la version française et anglaise des extraits de textes législatifs dont la publication bilingue est exigée par la loi¹⁴¹. Cette directive a depuis été intégrée aux *Règles de la Cour suprême du Canada*¹⁴². L'accès aux textes dans les deux langues officielles également autoritaires permet aux cours judiciaires de découvrir l'intention réelle du constituant et du législateur en dégagant le sens commun aux deux versions¹⁴³. Cette

¹⁴⁰ *R c. Mac*, 2002 CSC 24, [2002] 1 RCS 856; *Schreiber c. Canada (PG)*, 2002 CSC 62, par. 54, 56, [2002] 3 RCS 269; *R c. Daoust*, 2004 CSC 6, par. 26-31, [2004] 1 RCS 217.

¹⁴¹ Cour suprême du Canada, *Avis à la communauté juridique : Avril 2002 – Lois bilingues*, [En ligne].
[www.scc-csc.ca/].

¹⁴² *Règles de la Cour suprême du Canada*, DORS/2002-156, art. 42(2)(g).

¹⁴³ Voir généralement l'honorable Michel Bastarache et coll., *Le droit de l'interprétation bilingue*, Montréal, LexisNexis, 2009.

recherche du sens commun aux deux versions linguistiques se solde, en amont, par un entendement plus riche et plus complet de la Constitution canadienne.

Inversement, l'absence de version française peut engendrer des conséquences regrettables sur le plan de l'interprétation constitutionnelle, comme le démontre par exemple le jugement de la Cour du banc de la reine de l'Alberta dans l'affaire *Caron*¹⁴⁴. Ce litige soulevait la question à savoir si l'Alberta était tenue d'adopter, d'imprimer et de publier ses lois en français et en anglais. La réponse à cette question dépendait, entre autres, de l'interprétation que l'on fait de l'Adresse du Sénat et de la Chambre des communes de 1867 (« l'Adresse de 1867 ») qui se trouve en annexe du *Décret en conseil portant adhésion à la terre de Rupert et du Territoire du Nord-Ouest* de 1870 (« Décret de 1870 »), ce dernier étant lui-même l'un des trente documents énumérés à l'annexe de la *Loi constitutionnelle de 1982* comme faisant partie de la Constitution du Canada. En tant que document émanant des « chambres du Parlement du Canada » au sens de l'article 133 de la *Loi constitutionnelle de 1867*, l'Adresse de 1867 a été produite en français et en anglais. Toutefois, comme l'a fait remarquer la juge Eidsvik :

[C]'est la reine qui a publié le Décret de 1870 en anglais, l'Adresse de 1867 qui a été annexée était uniquement la version anglaise [...]. Il est quelque peu ironique que la version française ne s'y trouve pas, considérant que c'est

¹⁴⁴ *Supra* note 33.

une loi du Parlement britannique qui exige que l'adresse soit adoptée par le Parlement canadien dans les deux langues¹⁴⁵.

Ainsi, même si la Cour avait à sa disposition une version française officielle de l'Adresse de 1867, celle-ci a été escamotée au profit de la version anglaise de ladite Adresse puisque c'est celle-là qui a été annexée au Décret de 1870¹⁴⁶.

L'affaire *Caron* soulève plusieurs grandes questions juridiques, dont celle de la portée du passage suivant de l'Adresse de 1867 :

Version anglaise annexée au Décret de 1870	Version française originale de 1867¹⁴⁷	Version du Comité de rédaction de 1990
That in the event of your Majesty's Government agreeing to transfer to Canada the jurisdiction and control over the said region, the Government and Parliament of Canada will be ready to provide that <u>the legal rights</u>	Le gouvernement et le Parlement du Canada sont également disposés, si le gouvernement de Votre Majesté accepte de transférer au Canada toute autorité sur la région en cause, à faire respecter <u>les droits acquis des</u>	Le gouvernement et le Parlement du Canada sont également disposés, si le gouvernement de Votre Majesté accepte de transférer au Canada toute autorité sur la région en cause, à faire respecter <u>les droits des</u>

¹⁴⁵ *Ibid.*, par. 220.

¹⁴⁶ *Ibid.*, par. 230 : « [J]e dois interpréter l'expression « *legal rights* » qui se trouve dans un document constitutionnel ».

¹⁴⁷ *Journaux du Sénat*, 1^{re} lég., 1^{re} sess., n° 1 (17 décembre 1867), p. 142.

<u>of any corporation, company or individual</u> within the same shall be respected, and placed under the protection of Courts of competent jurisdiction.	<u>personnes physiques ou morales</u> qui y sont installées et placer ces droits sous la protection des tribunaux compétents.	<u>personnes physiques ou morales</u> qui y sont installées et placer ces droits sous la protection des tribunaux compétents.
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Or, puisqu'elle avait conclu que seule la version anglaise de l'Adresse de 1867 avait force de droit constitutionnel, la juge Eidsvik a limité son analyse à la portée de l'expression « *legal rights* », sans tenir compte de la portée potentiellement plus généreuse du terme « droits acquis », ou du sens plus large encore du mot « droits », employé dans la version française originale et moderne, respectivement, de l'Adresse de 1867.

À notre avis, la décision de faire fi de la version française de l'Adresse de 1867 était une erreur de droit. Même si elle n'avait pas été enchâssée dans la Constitution en 1870 au moment de la prise du Décret portant adhésion à la terre de Rupert et du Territoire du Nord-Ouest, l'article 56 de la *Loi constitutionnelle de 1982* a eu pour effet de l'assimiler à la Loi suprême du pays. En effet, les versions anglaise et française de l'Adresse de 1867 sont, à notre avis, « des parties de la Constitution adoptée dans ces deux langues¹⁴⁸ ». Par conséquent, depuis 1982, l'autorité de la version française est égale à celle de la version anglaise. La Cour du banc de la reine aurait dû en tenir compte à notre avis. De plus, si la version française du Décret de 1870 produite par le Comité de rédaction constitutionnelle

¹⁴⁸ *Loi constitutionnelle de 1982*, *supra* note 2, art. 56.

française avait été adoptée en 1990 ou peu après, la Cour du banc de la Reine l'aurait vraisemblablement interprétée différemment.

La majorité de la Cour d'appel de l'Alberta n'a pas examiné la question de savoir si la juge Eidsvik avait erré en faisant fi de la version française de l'Adresse de 1867¹⁴⁹. Finalement, au sujet des différentes versions françaises de l'Adresse de 1867, la majorité de la Cour suprême expliquera simplement que « [q]uoi qu'il en soit, notre analyse n'est pas tributaire de l'une ou l'autre des versions françaises. Notre conclusion ne change pas, que le texte dise « droits acquis » ou « droits légaux¹⁵⁰ » ». Elle note également que « [l]e statut constitutionnel de la version française de l'Adresse de 1867 ne fait pas l'unanimité. Or, à notre avis, notre raisonnement ne change pas, que l'on examine la version anglaise ou la version française de ce texte¹⁵¹ ».

V. Conclusion

Ce chapitre a proposé une étude des fondements juridiques de l'obligation, fédérale et provinciale, de faire adopter la version française des textes constitutionnels canadiens. Pour ce faire, nous avons d'abord survolé l'état du droit lacunaire qui découle de l'article 55 de la *Loi constitutionnelle de 1982*. Nous avons posé que les principes d'interprétations applicables aux droits linguistiques, ainsi que les principes constitutionnels du fédéralisme,

¹⁴⁹ *R c. Caron*, 2014 ABCA 71, par. 53, 92 Alta LR (5^e) 306.

¹⁵⁰ *Caron c. Alberta*, 2015 CSC 56, par. 15, [2015] 3 RCS 511.

¹⁵¹ *Ibid.*, par. 15, n 1.

de la primauté du droit et du constitutionnalisme et de la protection des minorités, doivent guider l'interprétation des obligations prévues par l'article 55. Nous avons également exposé que l'article 55 de la *Loi constitutionnelle de 1982* doit être compris par l'entremise de l'article 16 de la *Charte*, mais que l'interprétation que la Cour suprême du Canada a faite de ce dernier dans l'affaire *Société des Acadiens* ne tient plus. L'article 16 n'est pas qu'une simple disposition déclaratoire. L'interprétation correcte de l'article 16 fait elle aussi appel aux principes d'interprétations applicables aux droits linguistiques et aux principes constitutionnels, mais également aux valeurs de la *Charte*. Interprété correctement, l'article 16 doit être compris comme une disposition exécutoire et sert de fondement à l'obligation de faire adopter la version française des textes constitutionnels canadiens. Finalement, nous avons précisé que le maintien d'une constitution quasi unilingue fait également violence à la *Loi sur les langues officielles*, le texte quasi constitutionnel qui constitue le prolongement de l'article 16 de la *Charte*. Dans la dernière partie, nous avons tenté d'illustrer quelques-unes des conséquences, tant symboliques que pratiques, de la violation, par le gouvernement, de son obligation de faire adopter la version française des textes constitutionnels canadiens.

Vers la décolonisation des langues officielles : le cas du michif

François Larocque et Aimée Craft

« *Le français et l'anglais sont les langues officielles du Canada...* »
Charte canadienne des droits et libertés, art 16

Introduction

Quelles sont les langues officielles du Canada? Pour le juriste, la réponse semble aussi simple que la question, d'autant plus qu'elle est codifiée à l'article 16 de la *Charte canadienne des droits et libertés* (ci-après la *Charte*). Le français et l'anglais sont les langues officielles du Canada. Mais pour le linguiste, cette réponse n'est pas simple du tout parce que le français et l'anglais sont des langues vivantes, aux couleurs et formes multiples. Il n'existe pas une seule langue anglaise ou une seule langue française, mais plutôt des dizaines de manifestations régionales de ces langues partout sur la planète. Comment douter que le français de Moncton ne soit pas distinct de celui de Montpellier ou de Marrakech? Comment douter que l'anglais qui se parle à Calgary ne soit pas distinct de celui de Cape Town ou de Cardiff? Les dialectes du français et de l'anglais présentent parfois d'importantes différences entre eux, tant à l'oral qu'à l'écrit, mais ils n'en demeurent pas moins des manifestations, respectivement, du français et de l'anglais. La diversité dialectique est le propre des langues vivantes, notamment de celles qui, comme le français et l'anglais, ont évolué en parallèle sur plusieurs continents durant l'époque coloniale.

Cette riche biodiversité naturelle des langues humaines en général, et du français et de l'anglais en particulier, soulève une question juridique fascinante eu égard à la *Charte*. Quelles sont les manifestations du français et de l'anglais qui sont protégées par l'article 16? Suivant l'interprétation large et libérale applicable à la *Charte* et aux droits linguistiques, nous avançons une réponse possible : l'article 16 embrasse non pas exclusivement les versions standardisées des langues colonisatrices canadiennes, mais potentiellement *toutes* les manifestations dialectiques du français et de l'anglais qui chantent, qui chuchotent, qui comptent, qui racontent, qui braillent, qui raillent, qui grasseyent, qui s'essaient, qui coulent, qui roulent, qui s'esclaffent et qui s'excusent – bref – toutes ces langues qui participent du français et de l'anglais qui vivent et qui vivent au Canada.

Malgré leurs différences, le français de Memramcook est tout aussi valable que celui de Montréal. Celui de La Broquerie est tout aussi légitime que celui de La Baie. Les français qui se parlent à Chéticamp et à Shédiac sont tout aussi beaux que celui de Sherbrooke. Prétendre le contraire serait également d'accepter que l'anglais des Cantons de l'Est serait moins digne ou important que celui de Calgary ou de Corner Brook. Honnis soient qui mal y pensent – les puristes prescriptivistes de la langue et les Denise Bombardier de

ce monde – tout ça selon nous relève de l'article 16. L'idéologie d'une langue standard et légitime est factice et surtout factieuse¹. Si la *Charte* et les droits linguistiques ont réellement une vocation réparatrice et unificatrice, comme le dit la Cour suprême, il convient par conséquent de lire les mots « français » et « anglais » de l'article 16 de manière généreuse et inclusive, et non pas de manière bornée ou chauvine.

À la lumière de ce qui précède, nous avançons la thèse qu'il convient de décoloniser l'entendement général qui prévaut des langues officielles du Canada et de reconnaître le michif comme langue protégée par l'article 16 de la *Charte*, en plus de sa protection sous l'égide la *Loi sur les langues autochtones*² (ci-après la *LLA*) et l'article 35 de la *Charte* qui reconnaît les droits ancestraux et issus de traités. Il s'agit d'une hypothèse juridique inédite qui se fonde néanmoins sur des prémisses bien établies portant sur les rapports historiques et linguistiques entre les Métis et la langue française. Il s'agit d'une hypothèse qui tend vers la décolonisation des langues officielles et qui explore leur contribution potentielle à la réalisation de l'objectif constitutionnel de la réconciliation avec les Métis, un peuple fondateur du Canada.

Ethnogenèse métisse

Les Métis sont un peuple autochtone distinct au sens de l'article 35 de la *Loi constitutionnelle de 1982*. L'ethnogenèse métisse est bien documentée³. Elle s'est déroulée sur plusieurs générations, à partir du milieu du 18^e siècle, autour des Grands Lacs, dans le Nord-Ouest des Amériques; une vaste région qui comprend des sections de l'Ontario, du Manitoba, de la Saskatchewan et de l'Alberta actuels, ainsi que du Dakota du Nord aux États-Unis⁴.

Les Métis formaient historiquement un peuple polyglotte en raison de leur descendance généalogique de pères européens et de mères autochtones. Grâce à leur maîtrise du cri, du saulteux, du déné, du français et de l'anglais, les Métis travaillaient comme traducteurs et intermédiaires fiables entre les commerçants de fourrures européens et les communautés autochtones. En plus de leur maîtrise de ces langues, les Métis ont développé leur propre langues orales – le michif, et ses dialectes – qui demeurent à ce jour un élément fondamental de l'identité et de la culture métisses modernes. Par ailleurs, la *Loi sur les langues autochtones* du Manitoba reconnaît le michif comme langues autochtone parlée

¹ Annette Boudreau, *À l'ombre de la langue légitime*, Paris, Classiques Garnier, 2016.

² *Loi sur les langues autochtones*, LC 2019, c 23.

³ Voir par exemple Auguste-Henri de Trémaudan, *Histoire de la nation métisse dans l'Ouest canadien*, Montréal, LUX Éditeur, 2010; Jean Teillet, *The North-West is Our Mother: The Story of Louis Riel's People, the Métis Nation*, Patric Creans Editions, 2019; Bruce D Sealey et Antoine S Lussier, *The Métis: Canada's Forgotten People*, Winnipeg, Manitoba Métis Federation, 1975.

⁴ Il existe une littérature émergente qui cherche à décantonner les Métis de l'ouest canadien et de situer l'autochtonie métisse au sein d'une diaspora formée de multiples communautés se trouvant sur l'intégralité des territoires régis par les empires de la fourrure du 18^e et 19^e siècles. Voir notamment Michel Bouchard, Sébastien Malette, Guillaume Marcotte, *Les Bois-Brûlés de l'Outaouais. Une étude ethnoculturelle des Métis de la Gatineau*, Québec, PUL, 2019. Dans cet essai, il sera uniquement question du peuple Métis de l'ouest canadien et de sa langue, le michif.

et utilisée au Manitoba.⁵ Malheureusement, en raison des politiques assimilatrices du gouvernement canadien et de l'effet dévastateur des pensionnats autochtones, de nombreuses langues autochtones comme le michif sont en danger critique d'extinction. Il y aurait un peu plus de 1100 locuteurs michif au Canada aujourd'hui, situés principalement au Manitoba et en Saskatchewan⁶.

Le michif : langue mixte issue du cri et du français

Les linguistes classifient le michif comme une langue mixte ou langue de contact unique au monde, composée à peu près à parts égales de français et de cri, avec certains apports de l'ojibwe ou du bungi, selon les dialectes. Comme le souligne Peter Bakker, le michif se distingue des autres langues mixtes en ce sens que

[TRADUCTION] pratiquement tous les verbes sont cris, alors que les noms sont presque toujours français. Il y a quelques verbes français et anglais avec des affixes cris. Les noms français sont accompagnés d'articles définis – distincts selon le genre et le nombre, exactement comme en français – mais les adjectifs démonstratifs français sont rarement, sinon jamais, utilisés. Au lieu, les démonstratifs cris s'accordent au genre avec le nom selon les systèmes cris, c'est-à-dire que la forme du démonstratif varie selon le genre animé ou inanimé des noms. Les noms en cri ou en ojibwe ont parfois des articles en français et parfois des affixes en cri attachés. Les chiffres sont en français. Habituellement, seul le chiffre cri « un » est employé. Les mots des questions viennent presque toujours du cri. Les mots de fonction (mots d'interrogation, particules de discours, etc.) sont principalement cris, à l'exception des articles français, des prépositions et d'un nombre appréciable d'adjectifs. La plupart des autres catégories (adjectifs, adverbes, négation et conjonctions) sont tirées des deux langues, avec quelques variations régionales.⁷

Il s'agit là d'une schématisation du michif « standard », qui est parfois parlé concurremment à d'autres langues métisses issues du cri et du français, en proportions variables, selon les régions. Par exemple, les Métis de l'Île-à-la-Crosse parlent un dialecte cri-français, lequel est constitué principalement du cri avec certains emprunts lexicaux du français⁸.

On ne saurait réduire les Métis à leur hybridité européenne-autochtone; ils sont un peuple *sui generis* et distinct en droit canadien et international⁹. En revanche, la langue michif pour sa part est indissociable de ses codes linguistiques constitutifs : le cri et le français.

⁵ Loi sur la reconnaissance des langues autochtones, CPLM c A1.5, art 1.

⁶ Statistiques Canada, Recensement en bref : *Les langues autochtones des Premières Nations, des Métis et des Inuits*, 2016.

⁷ Peter Bakker, *A Language of Our Own: The Genesis of Michif, the Mixed Cree-French Language of the Canadian Métis*, Oxford University Press, 1997 à la p 116 [Bakker].

⁸ Ibid, c 5; Jennifer Brown, « Michif » dans *l'Encyclopédie Canadienne*. Repéré à <https://www.thecanadianencyclopedia.ca/fr/article/michif> (8 juillet 2020).

⁹ Chris Andersen, « Métis »: *Race, Recognition and the Struggle for Indigenous Peoplehood*, Vancouver, UBC, 2015.

Sur le plan linguistique, le michif est issu d'un processus d'entrelacement (« *linguistic intertwining* ») qui « [TRADUCTION] est inusité, sinon unique à plusieurs égards parmi les langues du monde »¹⁰. En effet, il est exceptionnel qu'une langue combine deux systèmes grammaticaux et phonologiques, tout en préservant leurs règles internes respectives, comme le fait le michif. Selon le professeur Bakker, « [TRADUCTION] le cri et le français ont perdu très peu de leur complexité respective dans le michif ».¹¹ Par ailleurs, la complexité conceptuelle et cosmogonique autochtone est préservée dans le michif avec sa capacité maintenue d'attribuer un statut animé aux objets inanimé en français et d'attribuer un genre masculin ou féminin du français lorsque la langue cri ne fait pas référence au genre. Le michif est donc réellement à la fois une langue autochtone et un français canadien. À notre avis, cette réalité linguistique devrait être reflétée dans l'état du droit applicable aux langues officielles du Canada à l'ère de la réconciliation.

Plusieurs arguments constitutionnels particuliers s'appliquent à la reconnaissance du michif comme langue officielle du Canada. Premièrement, les caractéristiques grammaticales et phonologiques propres au michif lient inextricablement cette langue au français, langue officielle du Canada aux termes de l'article 16 de la *Charte*. En effet, les liens linguistiques entre le français et le michif sont si forts que, suivant une interprétation large et téléologique des principes applicables, les droits et obligations constitutionnels relatifs au français pourraient s'appliquer au michif.

De plus, sous l'optique de la réconciliation et l'obligation constitutionnelle de l'honneur de la Couronne, un mariage interprétatif des articles 16 et 35 de la Loi constitutionnelle de 1982 permettrait à la fois la reconnaissance de chacune des deux composantes du michif (français et cri/ojibwé), et chacune avec ses fondements constitutionnels complémentaires.

Autrement dit, il est possible que la relation historique et linguistique du michif avec le français soit suffisamment importante pour justifier la reconnaissance de droits et obligations linguistiques exécutoires en droit canadien au profit des Métis. Le fait que les droits linguistiques des Métis puissent découler de la relation unique du michif avec une langue officielle coloniale est, à notre connaissance, un argument inédit. Il repose néanmoins sur des faits historiques et des principes juridiques qui reconnaissent les rapports historiques des Métis à la langue française.

Les rapports historiques des Métis à la langue française

Les Métis ont longtemps revendiqué la reconnaissance des droits linguistiques, en particulier les droits linguistiques français, dans la Terre de Rupert et le Nord-Ouest. Par exemple, en 1849, à la suite de l'affaire Guillaume Sayer, les Métis, sous la direction de Louis Riel, père, demandent au Conseil d'Assiniboia de congédier l'irascible Adam Thom et d'embaucher des juges bilingues. Vingt ans plus tard, en 1869-1870, cette fois sous la direction de Louis Riel, fils, le gouvernement provisoire des Métis prépare plusieurs listes de droits codifiant les conditions à l'annexion de la Terre de Rupert et du

¹⁰ Bakker, *supra* note 5 aux pp 3-4.

¹¹ Ibid, à la p 9.

territoire du Nord-Ouest. Toutes les versions des listes de droits exigeaient l'établissement de droits linguistiques, à savoir la législation et des tribunaux bilingues. Les Métis avaient revendiqué et obtenu ces droits linguistiques de la Compagnie de la Baie d'Hudson et souhaitaient les conserver après l'annexion au Canada. En réponse, Sa Majesté la Reine a publié une proclamation royale, rassurant les Métis « que lors de l'union avec le Canada, tous vos droits et privilèges civils et religieux seront respectés, vos biens vous seront garantis et que votre pays sera gouverné, comme dans le passé, en vertu des lois britanniques et dans l'esprit de la justice britannique »¹². Sachant que ces assurances étaient destinées aux Métis, un public multilingue, la Couronne s'est assurée de publier la Proclamation royale de 1869 en français et en cri (les deux langues constitutives du michif), ainsi qu'en anglais.

La Proclamation royale de 1869 est un document ayant une résonance constitutionnelle pour les Métis¹³. Elle témoigne de la reconnaissance impériale des droits et privilèges préexistants des Métis, y compris les droits de propriété et les droits linguistiques. Plus important encore, la Proclamation royale de 1869 témoigne de l'engagement de la Couronne à garantir ces droits au Canada.

La Loi sur les langues autochtones

Le Parlement a récemment reconnu le fondement constitutionnel des droits linguistiques des Métis avec la sanction de la LLA. Le préambule de la LLA prévoit, entre autres, ce qui suit :

que les langues autochtones ont occupé une place importante dans les relations que les Européens et les peuples autochtones ont tissées entre eux;

que les peuples autochtones ont joué un rôle important dans le développement du Canada et que les langues autochtones contribuent à la diversité et à la richesse des patrimoines linguistiques et culturels du Canada;

...

que la situation de chaque langue autochtone, notamment son degré de vitalité, peut varier considérablement par rapport à celle d'autres langues autochtones et qu'il est urgent de soutenir les peuples autochtones dans leurs efforts visant à se réapproprier les langues autochtones et à les revitaliser, les maintenir et les renforcer;

que les langues autochtones sont fondamentales pour les peuples autochtones sur le plan identitaire et en rapport avec leurs cultures, leurs liens avec la terre, leur spiritualité, leurs visions du monde et leur autodétermination;

...

que les efforts visant à protéger la vitalité des langues autochtones peuvent non seulement contribuer à enrichir les connaissances autochtones mais également à

¹² Proclamation royale de 1869, (1870) 5 Documents de session, no 12, aux pp. 43-44

¹³ F Larocque, « La proclamation du 6 décembre 1869 » (2009) 33:2 *Manitoba Law Journal* 299

prévenir l'érosion de la diversité culturelle ou la perte de biodiversité ou de spiritualité;

qu'une approche flexible permettant de reconnaître la situation et les besoins propres aux groupes, collectivités et peuples autochtones est essentielle pour tenir compte de la mosaïque des identités et cultures autochtones et de l'histoire de chaque peuple autochtone.

La LLA préconise une approche flexible à la reconnaissance des droits linguistiques des peuples autochtones, une approche qui tient compte des circonstances, des histoires et des identités uniques des divers peuples autochtones et de leurs langues. Une approche flexible aux droits linguistiques des Métis se doit d'envisager la possibilité théorique que ceux-ci puissent découler des liens historiques et linguistiques entre le michif et le concept du « français » codifié à l'article 16 de la *Charte*. Une approche flexible à l'égard des droits linguistiques des Métis doit aussi tenir compte de l'histoire et l'ethnogenèse du peuple Métis et de son rôle déterminant dans la création du Canada.

Enfin, et c'est peut-être la disposition la plus importante, l'article 6 de la LLA exprime l'entendement du législateur que les droits reconnus à l'article 35 de la *Loi constitutionnelle de 1982* comportent des droits relatifs aux langues autochtones. Cette détermination révélatrice du Parlement est d'importance capitale puisqu'elle recèle en son sein le germe de la possible décolonisation de l'article 16 et des langues officielles du Canada. Sachant qu'il nous incombe de toujours interpréter de façon harmonieuse les dispositions de la Constitution, il s'ensuit que la reconnaissance du michif comme manifestation du « français » à l'article 16 de la *Charte* favoriserait concrètement la réalisation de « l'objectif constitutionnel global de réconciliation inscrit dans l'art. 35 de la Loi constitutionnelle de 1982 »¹⁴.

Décolonisation et solidarité

C'est grâce aux Métis et à leurs résistances contre l'expansionnisme colonial du Canada à la fin de 19^e siècle que la langue française jouit aujourd'hui d'un statut juridique privilégié au Manitoba et, par extension, aux Territoires du Nord-Ouest et au Nunavut. La francophonie non-autochtone de l'ouest Canadien leur doit une fière chandelle. Les Métis étaient francophones – certains le sont toujours – et leur langue ancestrale, le michif, est indissociable de la langue française¹⁵. Il sied de s'en rappeler et d'en prendre acte.

Malheureusement, dans le sillon bouleversant de la défaite à Batoche lors de la résistance Métis de 1885, de la pendaison de Louis Riel et des ravages des pensionnats autochtones, de nombreux Métis ont rompu leurs rapports avec la francophonie canadienne et, pire encore, avec le michif, choisissant pour survivre de se laisser assimiler à la masse linguistique de la majorité anglophone¹⁶. Le Canada de cette époque s'employait à rendre

¹⁴ *Manitoba Métis Federation Inc c Canada (Procureur général)*, 2013 CSC 14 au para 137.

¹⁵ Patrick C. Douaud, « Le michif : un aspect de la francophonie albertaine » (1989) 1(2) *Revue des études indigènes* 69 à la p 77.

¹⁶ *Ibid* à la p 78.

blanc et anglais tous ceux et ce qui ne l'étaient pas. Au début du 20^e siècle, certains Francophones blancs racistes et amers de leur nouveau statut minoritaire dans l'Ouest, ont exacerbé l'insécurité linguistique des Métis en taxant leur langue de mauvais français¹⁷.

Aujourd'hui, une autre voie est possible : celle de la revitalisation du michif par le truchement de la *Charte*. Il convient de favoriser le maintien, l'épanouissement et la solidarité des francophonies plurielles qui sont reflétées, en acte et en puissance, à l'article 16 de la *Charte* en donnant suite aux appels à l'action nos. 13-17 de la Commission de vérité et de réconciliation¹⁸. Une telle reconnaissance constitutionnelle du michif fondée dans la *Charte* comporterait de nombreux avantages pour les Métis sur le plan de l'accès plénier aux institutions les plus importantes du pays, incluant le droit de communiquer avec le gouvernement fédéral et d'en recevoir les services en michif (article 20), le droit d'employer le michif devant les tribunaux fédéraux (article 19) et le droit d'employer le michif dans les débats et les travaux du Parlement (article 17)¹⁹.

Mais de manière plus cruciale, une telle reconnaissance donnerait aux Métis la possibilité de faire éduquer leurs enfants dans leur langue ancestrale, là où les nombres le justifient, en vertu de l'article 23 de la *Charte*. Comme il le fait pour les autres francophones minoritaires du pays, l'article 23 contribuerait à freiner l'assimilation des Métis et à réparer les injustices du passé²⁰. Leurs écoles et programmes d'enseignement serviraient de centres communautaires Métis et favoriseraient la transmission intergénérationnelle de la langue michif. Ce fier peuple fondateur du Canada disposerait enfin des moyens juridiques d'assurer sa sécurité linguistique et culturelle, dans la dignité et dans le respect de ses valeurs.

f

¹⁷ Pamela Sing, « Intersections of Memory, Ancestral Language, and Imagination; or, the Textual Production of Michif Voices as Cultural Weaponry » (2006) 31 *Études en littérature canadienne* 95 à la p 99, note 10; *Pensionnats du Canada : rapport final de la Commission de vérité et réconciliation du Canada*, volume 3 : L'expérience métisse, 2015 ; à la p 65

¹⁸ Appels à l'action de la Commission de vérité et de réconciliation, nos. 13-17. En ligne : http://trc.ca/assets/pdf/Calls_to_Action_French.pdf. Essentiellement, ces appels à l'action portent sur des mesures favorisant la réappropriation et la revitalisation des langues et cultures autochtones, dont l'adoption d'une Loi sur les langues autochtones, de la création d'un commissariat et de la reconnaissance des droits linguistiques autochtones.

¹⁹ La procédure parlementaire permet l'emploi des langues autochtones au Parlement depuis 2018. Voir Canada, Chambre des communes, *L'utilisation des langues autochtones dans les délibérations de la Chambre et des comités*, Rapport du Comité permanent des procédures et des affaires de la Chambre, adopté par la Chambre des communes le 29 novembre 2018.

²⁰ *Conseil scolaire francophone de la Colombie-Britannique c Colombie-Britannique*, 2020 CSC 13 au para 15.

World Virtual Indigenous Circle on Open Science and the Decolonization of Knowledge: Webinar Report

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Executive Summary

Purpose of the webinar

The World Virtual Indigenous Circle on Open Science and the Decolonization of Knowledge took place November 12, 2020. It was organized by the UNESCO Chair in Community-Based Research and Social Responsibility in Higher Education and co-hosted by the Canadian Commission for UNESCO and the World Indigenous Nations Higher Education Consortium. Its format was designed by Lorna Wanósts'a7 Williams. The Circle featured nearly 20 Indigenous speakers and attracted some 300 registrants from around the world. Its purpose was to inform UNESCO's forthcoming recommendation on open science and, in turn, to ensure Indigenous Knowledge is incorporated respectfully and with integrity to help reshape how institutions recognize and use it. Ultimately, the aim was to take the next of many steps toward ensuring that Indigenous Knowledge is better recognized worldwide so it can guide individuals and institutions in education, in research and in protecting the Earth.

Indigenous Circle format and themes

Despite its virtual format, the webinar adhered to Indigenous protocols, opening and closing with prayers, songs and territorial welcomes from respected Elders and Knowledge Keepers. As one speaker reminded everyone, "Songs and prayers are a very important part of science."

The format emulated a Talking Circle that encouraged respect, information-sharing, attentiveness and interconnectedness. Speakers and attendees expressed their recognition that the webinar marked a time for Indigenous People to revisit who and where they are, who their ancestors are, and where their teachings come from to move forward in a positive way. They also expressed their appreciation for the use of the traditional Circle format and its ability to "bring out" Indigenous Knowledge.

Many participants used Indigenous languages, which are also integral to Indigenous or traditional knowledge and can indeed serve as a shortcut to knowledge. As one of the opening speakers put it, the "wellness of language is connected to the wellness of the Earth."

Dr. Lorna Williams aptly summed up the purpose of the Circle and its format in her opening remarks: "We have gathered today in a circle and we are here to shape what's in the middle: the bundle of knowledge that will guide the way in which Indigenous Peoples' knowledge is continued and created from all over the world."

Participants in order of appearance

Laurie Robinson, Mahingan Sagaigan Nation, Executive Director, Indigenous Advanced Education and Skills Council, Ontario, Canada

John Elliott, Tsartlip First Nation

Katsi Cook, Wolf Clan Mohawk Akwesasne

Lorna Wanósts'a7 Williams, Lil'wat First Nation, Professor Emerita, University of Victoria, Canada

Sébastien Goupil, Secretary-General, Canadian Commission for UNESCO

Keiki Kawai'ae'a & Kealani Makaiwi, World Indigenous Nations Higher Education Consortium

Carrie Bourassa, Canadian Institutes of Health Research

Dominique Bérubé & David Newhouse, Social Sciences and Humanities Research Council, Canada

Kevin Fitzgibbons, Natural Science and Engineering Research Council of Canada

Leroy Little Bear, Blackfoot First Nation, Professor Emeritus, University of Lethbridge, Canada

Gregory Cajete, Tewa, Santa Clara Pueblo, Professor, University of New Mexico, US

Wangoola Wangoola Nduwala, Nabyama, MPAMBO African Multiversity, Busoga, Uganda

Zanisah Man, Orang Asli Professor, Universiti Kebangsaan Malaysia

Sonajharia Minz, Vice-Chancellor Sido Kanhu Murmu University, Dumka, India

Jazmin Romero Epiayu, Wayuu activist, Colombia

Ed Connors, Psychologist, Kahnawake First Nation, Canada

Manulani Aluli Meyer, University of Hawaii, US

Jose Barreiro, Taino, Cuba; Emeritus Smithsonian Institute, USA

Kevin Lowe, Gubbi Gubbi, Scientia Indigenous Fellow, University of New South Wales, Australia

Key messages

Many speakers contrasted Indigenous and western views of science, describing Indigenous science as the foundation for understanding the nature of the universe and our relationship with it versus western science as something that is more fleeting and focused on the temporal. Culture, tradition, spirituality, relationships and time are all important components of Indigenous Knowledge (which is science). The lack or loss of these has resulted in devastation, both for Indigenous Peoples and the world in general. There is fear that this may continue, but revitalizing these understandings is a source of hope for the next generation.

Each webinar participant brought a unique perspective—from the importance of storytelling and cross-cultural dialogue to the connection between Indigenous Knowledge and political activism to the global class struggle, the intersection of Indigenous language and mental health care, and more. Some central themes emerged:

- The knowledge that Indigenous Peoples accumulated for thousands of years before the emergence of “civilization” is not only valuable, but necessary for the continued existence of humans on Earth. Indigenous Knowledge systems have been around since time immemorial and can benefit future generations.
- The Earth is facing a crisis. The broader scientific community can help to address it and restore equilibrium by supporting Indigenous scientific communities. A central goal of Indigenous Knowledge is sustainability, and it is built on relationships rather than on what can be measured.
- Indigenous science is about love of land. Its continuity is therefore linked to the continuity of life on Earth.
- Indigenous language and knowledge are intertwined, and both are at the heart of cultural survival and identity. A reinvigoration of Indigenous languages and cultures can help Indigenous populations reclaim space, dignity, equality, justice and liberty.
- Despite long traditions of Indigenous science that are now being appreciated and reimplemented, the practice of Western science has systemically excluded Indigenous thought, Indigenous ways of knowing and Indigenous Peoples. This needs to stop.

Central discussion points

- Indigenous Peoples in many parts of the world have experienced a 500-year attack on their territories, cultures, languages and knowledges. This systematic move to silence and devalue Indigenous perspectives can be seen as a form of intellectual colonization.
- We are engaged in the work of educating people about the fact that Indigenous Knowledge has value and that considering other knowledges does not jeopardize their own. This is an effort to appreciate that the Indigenous Knowledge people continue to hold is precious, and to recognize that it continues despite a centuries-long effort to silence it.
- Indigenous scholars and activists around the world have diverse languages, cultures and histories, but take strength from important commonalities in their epistemologies, and agree on the importance of decolonizing knowledge and establishing a shared infrastructure to support the re-emergence of and renewed respect for their languages and knowledges.
- The importance of this work is gaining recognition among pillars and funders of research. In Canada, these include the Canadian Institutes of Health Research, the Social Sciences and Humanities Research Council, and the Natural Sciences and Engineering Research Council.
- Language is an essential starting point for reasserting the value and application of Indigenous Knowledge, as they are indivisible. The richness of Indigenous Knowledge systems arises from an intimate tradition of knowing and relationship, with a focus on continuity. It is time to for these traditions to enter the mainstream and receive the same serious consideration as “western” knowledge.
- Value can be derived from bringing traditional knowledge into universities and having Indigenous institutions work alongside western institutions. These ideas are connected to the need to ensure access to quality education for Indigenous Peoples everywhere and to ensure Indigenous ways of knowing are incorporated into educational institutions so they can be considered universal rather than western.

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Mainstream agencies should reflect on the need to develop an ethical space from which to frame a relationship between themselves (and the state) and Indigenous Peoples.

- Colonization has had persistent effects in Indigenous communities in physical, linguistic, economic and cultural domains. Indigenous scholars face an ongoing challenge to hold space in their minds to engage in cultural survival and to continue to support cultural reclamation.
- Bringing Indigenous languages into the light is a global struggle, and the reclamation and use of language and the participation of people in Indigenous cultural work is in itself a political act.

Key recommendations

- Acknowledge Indigenous knowledge as science.
- Recognize Indigenous spiritual practices as vital to guiding and informing Indigenous Knowledge.
- Support the revitalization of Indigenous cultures and languages, recognizing that they are integral to Indigenous knowledge.
- Work toward an understanding of science that prioritizes relationality—that is, relationships with people, community, land and all creation.
- Recognize an Indigenous concept of time that ensures longevity of relationships and sustainability for future generations.

For more information

This report contains half-page summaries of each speaker’s key points. These are paraphrased and condensed from the webinar and seek to convey the essence of each speaker’s message. A complete transcript of the webinar is available as a separate document. The full [webinar](#) itself is available to view online.

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Report on the World Virtual Indigenous Circle on Open Science and the Decolonization of Knowledge

Purpose

The World Virtual Indigenous Circle on Open Science and the Decolonization of Knowledge took place on November 12, 2020. It was organized by the UNESCO Chair in Community-Based Research and Social Responsibility in Higher Education and co-hosted by the Canadian Commission for UNESCO and the World Indigenous Nations Higher Education Consortium. Its format was designed by Lorna Wanósts'a7 Williams. The Circle attracted some 300 registrants from around the world. Its purpose was to inform UNESCO's forthcoming recommendation on open science, ensuring that Indigenous Knowledge is incorporated respectfully and with integrity to help reshape how institutions recognize and use it. Ultimately, the aim was to take the next of many steps toward ensuring that Indigenous Knowledge is better recognized in the world so it can guide individuals and institutions in education, in research and in protecting the Earth.

Indigenous circle format and themes

Despite its virtual format, the webinar adhered to Indigenous protocols, opening and closing with prayers, songs and territorial welcomes from respected Elders and Knowledge Keepers. As one speaker reminded everyone, "Songs and prayers are a very important part of science."

The format emulated a talking circle that encourages respect, information-sharing, attentiveness and interconnectedness. Speakers and attendees expressed their recognition that the webinar marked a time for Indigenous People to revisit who and where they are, who their ancestors are, and where their teachings come from in order to move forward in a positive way. They also expressed their appreciation for the use of the traditional Circle format and its ability to "bring out" Indigenous Knowledge.

Many participants used Indigenous languages, which are also integral to Indigenous or traditional knowledge and can indeed serve as a shortcut to knowledge. As one of the opening speakers put it, the "wellness of language is connected to the wellness of the Earth."

Dr. Lorna Williams aptly summed up the purpose of the Circle and its format in her opening remarks on the reason for the gathering: "We have gathered today in a circle and we are here to shape what's in the middle: the bundle of knowledge that will guide the way in which Indigenous People's knowledge is continued and created from all over the world."

Key messages

Many speakers contrasted Indigenous and western views of science, describing Indigenous science as the foundation for understanding the nature of the universe and our relationship with it versus western science as something that is more fleeting and focused on the temporal. Culture, tradition, spirituality, relationships and time are all important components of Indigenous Knowledge (which is science). The lack or loss of these has resulted in devastation, both for Indigenous Peoples and the world in general. There is fear that this may continue, but revitalizing these understandings is a source of hope for the next generation.

Although each webinar participant brought a unique perspective—connecting Indigenous Knowledge to political activism, the importance of storytelling and cross-cultural dialogue, the global class struggle, the intersection of Indigenous language and mental health care, and more—some central themes emerged:

- The knowledge that Indigenous Peoples accumulated for thousands of years before the emergence of "civilization" is not only valuable, but necessary for the continued existence of humans on Earth. Science can no longer ignore the wisdom that comes from Indigenous Knowledge systems that have been around since time immemorial and can benefit future generations.

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- The Earth is facing a crisis. The broader scientific community can help to address this crisis and restore equilibrium by supporting Indigenous scientific communities. A central goal of Indigenous Knowledge is sustainability, and it is built on relationships rather than on what can be measured.
- Western science is linked to money. Indigenous science is about love of land. The continuity of Indigenous science is, therefore, linked to the continuity of life on Earth.
- Indigenous Peoples around the world will explain science in different ways and emphasize different aspects, but all operate from the same paradigm and share a way of understanding themselves in the world, including how they come to knowledge and self-understanding.
- Indigenous language and knowledge are intertwined, and both are at the heart of cultural survival and identity. A reinvigoration of Indigenous languages and cultures can help Indigenous populations reclaim space, dignity, equality, justice and liberty.
- Despite long traditions of Indigenous science that are now being appreciated and reimplemented, the practice of Western science has systemically excluded Indigenous thought, Indigenous ways of knowing and Indigenous Peoples. Western knowledge and its proponents continue to seek to privilege it over other forms and origins of knowledge, both in mainstream media and in formal education.
- Indigenous Knowledge can help communities to regain autonomy and self-governance by improving cross-cultural dialogue.
- The effects of colonization are alive and well in many of the world's Indigenous communities. The starting point for decolonizing knowledge is to colonize countries, nations, peoples and their languages.

Central discussion points

Indigenous Peoples in many parts of the world have experienced what one webinar participant termed "the long assault": a 500-year-long attack on their territories, cultures, languages and knowledges. This systematic move to silence and devalue Indigenous perspectives can be seen as a form of intellectual colonization.

Today, we are engaged in the work of educating people that Indigenous Knowledge has value and that considering other knowledges does not jeopardize their own. It is an effort to appreciate that the Indigenous Knowledge that people continue to hold is precious and to recognize that it continues despite a centuries-long effort to silence it.

Indigenous scholars and activists around the world have diverse languages, cultures and histories, but they take strength from important commonalities that emerge in their epistemologies. They agree on the importance of decolonizing knowledge and establishing a shared infrastructure to support the re-emergence of and renewed respect for their languages and knowledges.

This importance of this work is gaining recognition among Canadian pillars and funders of research, such as the tri-agency composed of the Canadian Institutes of Health Research, the Social Sciences and Humanities Research Council, and the Natural Sciences and Engineering Research Council.

Speakers agreed that language is an essential starting point for reasserting the value and application of Indigenous Knowledge, as they are indivisible. They agreed that the richness of Indigenous Knowledge systems arises from an intimate tradition of knowing and caring for the land and relationships, with a focus on continuity, and that it is time to for these traditions to be brought into the mainstream and given the same serious consideration as "western" knowledge.

Some speakers touched upon the intersection of western and Indigenous Knowledges, drawing attention to the value that can be derived from bringing traditional knowledge into universities and having Indigenous institutions work alongside western ones. These ideas are connected to the need to ensure access to quality education for Indigenous People everywhere and to ensure Indigenous ways of knowing are incorporated into educational institutions so they can be considered universal rather than western. That said, mainstream agencies must be pushed to reflect on the need to develop an ethical space from which to frame a relationship between themselves (and the state) and Indigenous Peoples.

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Many presenters spoke of the persistence of colonization or its effects in their communities in physical, linguistic, economic and cultural domains. All spoke about the daily challenges of pushing back to hold space in their minds to engage in the important work of cultural survival and to remain involved in supporting cultural reclamation.

All presenters were aware of the struggles involved in bringing Indigenous languages into the light. The reclamation and use of language and the participation of people in Indigenous cultural work is in itself a political act. As Kevin Lowe phrased it in his summation of the webinar: “We need to never forget that the ongoing work of the neo-colonial state has been to deny prior occupation, sovereignty and intimate connectedness between Indigenous People, their country and knowledge systems.”

Key recommendations

- Acknowledge Indigenous Knowledge as science.
- Recognize Indigenous spiritual practices as vital to guide and inform Indigenous Knowledge
- Support the revitalization of Indigenous cultures and languages, recognizing that they are integral to Indigenous Knowledge
- Work towards an understanding of science that prioritizes relationality – relationships with people, community, land and all creation.
- Recognize an Indigenous conception of time that ensures longevity of relationships and sustainability for future generations.

Speaker summaries

The following summaries are paraphrased and condensed from the webinar and seek to convey the essence of what each speaker said. A complete transcript of the webinar is available in a separate [document](#), and the webinar can be viewed [online](#). The summaries below are shown in the order in which participants spoke.

Moderator’s remarks

Laurie Robinson

Mahingan Sagaigan Nation, Executive Director, Indigenous Advanced Education and Skills Council, Canada

Thank you all so much for joining us here today. It is a pleasure to be with you all. I really appreciate all of you finding some time to be with us from your homelands across the world today. The discussions and expertise shared today will help UNESCO develop a recommendation on open science and the decolonization of knowledge.

I am an Anishinaabekwe, and my homeland is in the territory of the Wolf Lake Peoples. I am the executive director of the Indigenous Advanced Educational Skills Council in Ontario, Canada.

For some of us, when Indigenous Peoples gather to share knowledge and understandings, we do so in a circle, and particular protocols are taken to facilitate sharing information. For example, this may mean the passing of an eagle feather or another sacred item from one speaker to another.

Today, our circle is virtual. As best I can, I will honour those protocols as I facilitate our discussion. We will have an opening from the western part of the lands where I sit today and an opening song from the East, remarks from a few organizations, presentations by speakers from many parts of the world, and open dialogue with all participants. We will have summations by two scholars and a closing song.

Miigwech, everyone, for your cooperation. We will begin today's circle with an opening from Mr. John Elliott of WSÁNEĆ First Nation. John is a respected Elder and has taught at Lau, Welnew Tribal School in Saanich for over 30 years.

Openings

John Elliott

Tsartlip First Nation, Canada

[\[Greetings in SENĆOŦEN.\]](#)

First of all, I want to thank Lorna, my dear, respected friend, for asking me to join you all today. I feel very humbled by this opportunity. My SENĆOŦEN name is J,SINŦEN. It's an old name that goes back to the 1700s here in this area and means “He’s going up to people.” I was given that name when I received an honorary education degree from the University of Victoria.

I've worked in language—and the survival of our homeland language—for a long time. Forty years went by so fast! All of our languages are a God-given right, and the wellness of our language is connected to the wellness of the Earth. I wanted to keep that in mind during my opening prayer and song. I'll do the prayer in my language, followed by the song. The song that I will use today was gifted to us in a prayer circle many years ago. Ancestral ladies came into our circle and gave us this song. They said, “When you want your language to survive and you want to pray for the languages, use this song.” With that, I begin my prayer.

[\[Prayer and song in SENĆOŦEN.\]](#)

That's my prayer and my song. We've been singing that song for the last 40 years, since the ancestors passed it along to us. I use it every day and I pray that our languages will survive, that our people and our children will have dignified lives and find peace and harmony once again in this world.

HÍSWŦE (thank you).

Katsi Cook

Wolf Clan Mohawk, Akwesasne, Canada

Katsi Cook is an Akwesasne Mohawk, respected Elder, traditional Aboriginal midwife, and lifelong advocate for women's health and well-being. She is the director of the Spirit Aligned Leadership Program, which aims to elevate the lives, dreams and voices of North American Indigenous women Elders.

Katsi gave an opening song asking the spirits of the four directions to help direct participants.

Reason for gathering

Dr. Lorna Wanósts'a7 Williams

Lil'wat First Nation, Professor Emerita, University of Victoria

Thank you to each of you for coming to work together on this important topic. I want to thank the lands and the people whose lands I am on.

[\[Dr. Williams shares artwork depicting frogs.\]](#)

This is an important image. It's an image of the frogs that announce ceremonial gatherings at this time of year. They announce these gatherings that are used for transformation. It's a time for us to revisit who we are, where we are, who our ancestors are and where our teachings come from to help us to continue in a good way.

In a sense, that is what we're doing today. We're gathered today in a circle to shape what is in the middle—the bundle of knowledge that will guide the way in which Indigenous Peoples' knowledge is continued and created from all over the world. Our knowledge systems, our languages, our identities have been under assault for

generations and generations. And it was in a prophecy that the time would come when we would join together to ensure that our knowledges would continue.

As Indigenous People, we have been working with our ancestors and with the lands, with all our relatives, so our knowledge systems continue to be used and known and to be gifted by us to our descendants. We're here to add our knowledges to the world.

Each of us who speaks today will shape what that looks like. We will share to ensure that knowledge is used in a respectful way—that it doesn't become distorted, that it's honest and full of integrity, that it's protected yet part of the world. We're coming out from the shadows, and I want to thank each of you for contributing to that knowledge system. Each of you will add and shape that knowledge so it can be remembered, and so it can be a guide for all of us continuing forward in education and in research, in studies and in the reshaping of institutions to protect and to uphold our mother, the Earth, our father, the Sun and all of our relatives.

Opening remarks from organizations

Sébastien Goupil

Secretary-General, Canadian Commission for UNESCO

Welcome, everyone. I would like to acknowledge that I am speaking from the unceded territory of the Algonquin People on Turtle Island, which is known today as Canada.

Advancing reconciliation between Indigenous and non-Indigenous Peoples is extremely important to us at the Canadian Commission for UNESCO. I've been working hard with my team, our members and networks to position our Commission as a strong ally of Indigenous Peoples. It is a real honour to be invited to say a few words today.

UNESCO plays an important role in setting standards and norms on a variety of priorities, especially those relating to protecting and promoting all forms of rights, culture and heritage. It is currently working on a new recommendation on open science. It will invite its member states to take whatever legislative or other steps may be required to apply the resulting principles and norms at the national level.

This is why it is so vitally important that this new recommendation contributes to efforts underway to decolonize knowledge. It needs to accurately reflect a diverse knowledge system, especially the views and experiences of Indigenous Peoples around the world.

Science can no longer ignore the knowledge and wisdom that comes from these knowledge systems that have been around since time immemorial and can continue to benefit future generations. Moving forward, we need to ensure that science is open to local and place-based knowledge, as well as to previously excluded knowledge systems, including Indigenous ones. We need to ensure that science is a practice that is conducted with and for communities.

Kei'ki Kawai'ae'a & Kealani Makaiwi

World Indigenous Nations Higher Education Consortium (WINHEC)

We are grateful to be here in your presence. We are honored and filled with aloha. As we meet together, let us all be in tune as we share our thoughts and learn from each other.

[Kealani Makaiwi sings an opening prayer song, 'Ano'Ai.]

We pay respect to the Indigenous Elders and traditional owners, present and past, of the Lekwungen territory. And we bring greetings from member institutions across the globe, Indigenous Elders and knowledge holders who have been the inspirational foundations of World Indigenous Nations Higher Education Consortium (WINHEC) as an international Indigenous higher education consortium.

Established in 2002, WINHEC's membership represents Indigenous nations and educational institutions in eight countries. It is working to address our collective concerns for the rights of Indigenous People to access all levels of education and to address the barriers that impede the respectful engagement of Indigenous Peoples in teaching, research and other educational endeavors.

The founding members determined that WINHEC's goals and objectives must align with those of international instruments—including the United Nations Declaration on the Rights of Indigenous People, the International Covenant on Economic, Social and Cultural Rights, the Universal Declaration of Human Rights, and others—and must promote the sovereign rights of Indigenous Peoples. Through these global activities, WINHEC has promoted the right of all Indigenous People to enjoy full access to and participation in all levels of education. Action has been taken to develop principles and policies to protect and revitalize Indigenous languages and language systems.

WINHEC applauds and supports the open science proposal as it pertains to validating, legitimizing and recognizing Indigenous ways of knowing science as a gift that has been passed down to the generations since time immemorial.

Carrie Bourassa

Institute of Indigenous People's Health, Canadian Institutes of Health Research (CIHR)

Our vision is to improve the health and well-being of First Nations, Inuit and Métis Peoples through supportive, innovative research programs based on scientific excellence and Indigenous community collaborations that respect communities and the right to self-determination. We are committed to community-based research led by Indigenous communities in a culturally safe way that builds capacity at their direction.

Our strategic plan is evergreen. It incorporates Indigenous voices while aligning with the United Nations Declaration on the Rights of Indigenous Peoples, the Truth and Reconciliation Commission of Canada, and the Royal Commission on Aboriginal Peoples. During our consultations, four key themes emerged, and what we heard, which was no surprise, was self-determination. It is about having sustainable funding, about Indigenous communities being able to hold their own funds. We've been working to enhance the capacity, development and infrastructure while acknowledging, honouring and respecting Indigenous health research and histories. This includes ensuring that Indigenous Knowledge is prioritized.

Our new strategic plan will promote excellence, creativity and knowledge translation to mobilize health research for transformation and impact and achieve organizational excellence. It is really about prioritizing Indigenous Knowledge. We always say Indigenous Knowledge is science. We are the original scientists, and this is our ancestral knowledge that is inherently within us and must be acknowledged.

It is vitally important to acknowledge and honour our Elders, our Knowledge Keepers. They are our PhDs. We are working to close the existing gap in health status between Indigenous and non-Indigenous Canadians. That must include acknowledging, honouring and prioritizing Indigenous Knowledges.

Dominique Bérubé & David Newhouse
Social Sciences and Humanities Research Council (SSHRC), Canada

Dominique:

The council has really benefited from the last 10 years of advice and guidance from its Indigenous advisory circle. The circle allowed SSHRC to develop the new Indigenous research guidelines that we published in 2015. These recognize the importance of the Indigenous Knowledge system.

The Truth and Reconciliation Commission called on SSHRC to establish a multi-year program to better understand reconciliation. We started working on that in 2015 and 2016. Re-engagement with our First Nation, Métis and Inuit researchers, Elders and communities in Canada demonstrated the importance of renewing our relationships with partners and seeing them in terms of connections rather than silos.

Through a two-year engagement process, we developed a new Indigenous strategic plan, which we released in January 2020. During this pandemic year, we started to develop our implementation plan. This strategy presents four objectives that promote the leadership of First Nations, Métis and Inuit in research.

Recently, the SSHRC Advisory Circle reviewed the strategy and made some important, thoughtful comments about recognizing Indigenous Knowledge systems, their value and the importance of sharing them.

Thank you again for including us in this circle.

David:

I'm originally from Six Nations of the Grand River. I'm the Director of the Chanie Wenjack School and have been co-chair of the SSHRC Indigenous Advisory Circle for the last five years or so.

Over the last 20 years, I've had a front row seat as Indigenous Knowledge became part of the social and natural science research enterprise in Canada. I've seen it come from the margins to become part of the work we do as social scientists, Indigenous researchers and natural science researchers.

I call colonization, as it is practiced in this part of the world, the "long assault." It's a 500-year-long assault on our territories, our cultures, our languages and our knowledges. We don't often think about colonization as having an impact on our knowledge. But one of its most insidious effects has been its attempt to take the knowledge that we gained from living in our various places for millennia and systematically exclude it from institutions like education.

However, since the surge of research undertaken by the Royal Commission on Aboriginal People in the early 1990s in Canada, there has been a concerted effort to bring Indigenous Knowledge into our educational institutions. Over the past quarter-century, we've worked to create an ethical space based on respect, friendliness and collaboration. Indigenous Knowledge can be used to frame research, determine the object of research, determine research methodologies and methods, interpret and make meaning of the results, and solve the challenges we face in our own communities.

As a result, granting councils have become open to including Indigenous Knowledge and Elders in research applications. This adjustment has included changes to ethics. It has included the creation of a definition of Indigenous research and expanded the eligibility criteria for research grants to encourage and support new Indigenous researchers. All of this has been done through a collaborative process that required a willingness to take risks, to listen, to experiment and to learn from mistakes, and above all, to trust.

My strong belief is that if we do not bring our knowledge into one of the most powerful institutions that we have created as human beings — and universities are not going to disappear — we will continue the work of the residential schools here in Canada. We've been trying very hard to ensure that Indigenous Knowledge can become part of the institution, and that these institutions work alongside the development of Indigenous institutions.

Kevin Fitzgibbons
Natural Sciences and Engineering Research Council (NSERC), Canada

Good day, bonjour and aloha. I am speaking to you from Ottawa, which is on the unceded territory of the Algonquin Anishinaabe people.

NSERC is all about understanding the underpinnings of nature in all its forms. I think that what we're hearing today, and what we hope to go forward with, is a better appreciation of the value of Indigenous and traditional knowledge more generally in our scientific endeavors.

One thing that has struck us over the past several years of engaging with Indigenous communities is the inextricable link between people and nature, wildlife, the land and the waters. We feel that as an organization, we need to understand these links better in the way we fund science, the way we engage with Indigenous communities across Canada and the way we conduct our research.

We feel that we have a very important role to play, but also a long way to go. Our job is to listen and to engage and to implement. What I would like very much to do today is to hear what others have to say and see where it is that we can translate those insights into actions that NSERC can apply in its own programming and its evaluation of science.

The nine speakers

The foundations of science

Dr. Leroy Little Bear

Blackfoot First Nation, Professor Emeritus, University of Lethbridge, Canada

There are three major areas of science: the science of being (the cosmos), the science of the local (Newtonian physics, our everyday reality), and the science of the small (the subatomic world). But what is science? It is a search for reality.

In Western thought, it's "been there, done that, let's move on to something new." In Blackfoot thought, everything is related to place—it's space-oriented. Why? Because although land will change, it changes slowly. So place is something we can hang our hats on, at least for a time. That's why land is sacred.

Blackfoot science is about energy, and it's galactically, cosmically based. It looks at the big picture. That's why we have star stories and medicinal wheels. The Blackfoot paradigm is based on constant flux, energy waves, spirit and relationships, whereas western science is about matter, the inanimate, measurement and reductionism.

The goal of Blackfoot science is to sustain our existence, whereas Western science is about measurement. From a Blackfoot perspective, if it's not about relationships, it's not science.

"Let me very quickly compare science to a house. A house usually has a foundation and then a floor plan. And once you've got the floor plan, then you can think about decorating, furnishing and so on. A lot of times when we're talking about science, we end up talking at the furnishing level, not so much at the floor plan level, and even less so at the foundational level. I want to talk about the foundational level."

Integrating western and Indigenous science

Dr. Gregory Cajete

Tewa, Santa Clara Pueblo, Professor, University of New Mexico, U.S.

“These criticisms have to be brought forward in ways that allow us to build bridges toward a better future for our students, ourselves and our communities. We do need science to sustain ourselves into the 21st century in all areas. And we do need more Native students in science-related fields. Hopefully, with these kinds of strategies, we will be able to accomplish more rapidly within the next decade.”

What I want to emphasize in my time here today are the major issues that I see with regard to Native science and its integration with Western science—in the way Indigenous Peoples view and understand themselves in the world, what we call epistemology, how we come to knowledge, how we come to understand ourselves. That is very much in contrast with Western ways of knowing, education, forms of research, economics, politics. This forum is tackling a very important issue in the sense that we're beginning to put in place an infrastructure for thinking about this.

This is what I've been doing since 1974, when I first started teaching science. Even before the term decolonized was being used, I started a decolonized science curriculum initiative at the Institute of American Indian Arts, combining science with students' cultural histories. I was teaching with Native science and knowledge, weaving them together using the arts, creative writing and our talented students to describe their thoughts and perspectives in ways that reflected them as contemporary people.

Dr. Rayna Green, a Cherokee who was head of cultural knowledge and perspectives in the American Association for the Advancement of Science in the late 1970s and early 1980s, said: "The lack of Indian participation in science is as much due to an alienation from the traditions of Western science as from a lack of success or access to science education, bad training in science or any other reasons conventionally given for minority exclusion from science professionalism. Contrary to the insistence of Western scientists that science is not culture bound, that it produces good, is that many Native people feel that science and scientists are thoroughly Western rather than universal, and that science is negative."

Much of that, unfortunately, is still true. It's a kind of intellectual colonization that I think we need to take a serious look at because it's the systemic exclusion of Indigenous thought, Indigenous ways of knowing and Indigenous Peoples from the practice of science even though we have long traditions of science that we are now beginning to rediscover and reimplement.

Decolonization of people and language

Prof. Wangoola Wangoola Nduwala

Nabyama, MPAMBO African Multiversity, Busoga, Uganda

I speak from a background where we experience bareknuckle colonialism and oppression. I will address the issue of knowledge: where and what are its sources?

“The real feast of knowledge will come when there is a sort of Marshall Plan to support the languages, the knowledges, which have been ‘othered’ and handicapped for the last hundreds of years.”

In our experience, they are institutions like family, neighbourhood and community engagement in the production of material sustenance. They are an education system. (But in our case, a lot of missed education.) Other sources of knowledge struggle in countries where a small set of people oppresses the rest. There is also the global class struggle. And lastly, the struggle between countries, where a small set of countries oppresses the rest. All of this makes decolonization an issue.

Hence the talk of what is called mainstream or conventional knowledge in our country. We are weary of talking about knowledge in terms of compass directions—Western knowledge, Indian knowledge, African knowledge, Chinese knowledge. I think we need to start calling a spade a spade. If we talk about Chinese knowledge, African knowledge, Indian knowledge, then we should not be talking about Western knowledge. We should be consistent and call it European knowledge.

Instead of using the euphemism of Western knowledge, we should try to categorize knowledge and worldviews between dominative or hegemonic knowledge and knowledge that seeks to coexist with other knowledges. But in Africa, we generally find that it is not possible to decolonize knowledge when the people themselves are colonized. The point is that first and foremost, you need to decolonize countries, nations, peoples and their languages. Colonized people cannot have a decolonized knowledge.

Building trust to support cross-cultural dialogue and self-governance

Dr. Zanisah Man

Orang Asli, Professor, Universiti Kebangsaan, Malaysia

I am interested in the Indigenous relationship to land through the lens of community notions of territory and space. For the Jakun [Indigenous] community that I work with, the goal is to regain knowledge, autonomy and self-governance. The problem is that it is not easy to achieve self-government when the community cannot express who they are or have face-to-face communication with outsiders.

In that context, cross-cultural dialogue and collaboration are essential. Yet there are many challenges involved in getting a community to trust you—and trust is extremely important. For example, when I met the Jakun community for the first time in 1990, I assumed that as an Indigenous person, they would accept me. But they did not. They only accepted me because my friend was a Malay (Indigenous).

I'm now working on a project that involves translating Indigenous stories from the Jakuns of Malaysia and the Bribri of Costa Rica. The communities wrote their own stories. I translated them from English to Malay. When I work with the community, I have to convince them to put their stories in writing, and then I have to translate them. I have to work with the children to convince them of the importance of turning imaginary stories into pictures.

“To me, the idea of Indigenous open access is really interesting. It gives hope to people to work on something valuable to them.”

Using the study of language and culture to reclaim space

Dr. Sonajharia Minz

Vice-Chancellor, Sido Kanhu Murmu University, Dumka, India

I come from an Oraon tribe in India and am second-generation literate. About five months ago, I was selected to be the head of this liberal science and arts university in the tribal heartland of India.

“The term sustainability can only be understood, at least in India, in terms of how the Indigenous populations have continued to live.”

It is said that in India, there are more than 700 distinct tribes whose population numbers about 105 million among India’s total population of more than 1.3 billion. Along with the dividing line here between the Indigenous and the non-Indigenous, we have multiple other layers in Indian society. In terms of colonization or decolonization, we have had almost an onslaught of the mainstreaming of knowledge systems and society, even prior to British colonization.

The teaching of tribal languages in central India started in the mid-1970s. But there has rarely been any genuine effort to study the culture of Indigenous Peoples in India.

I am making efforts to start language and culture study programs. These programs are an effort by Indigenous populations to claim space, claim dignity and also thereafter try to claim what our constitution also tries to promise: equality, justice, fraternity and liberty. It’s so very important to bring out the richness of the Indigenous (or as it is called in India, tribal) knowledge systems and share what has been kept in the margins—and even outside the margins—for thousands and thousands of years.

Knowledge and language as a source of strength

Jazmin Romero Epiayu

Wayuu Activist, Colombia

Translation provided by Andrés Mejía

I have been an activist and feminist for many years. I defend Mother Nature and struggle for the rights of Wayuu women, especially girls and adolescents. Today, I want to talk about the importance of preserving ancestral knowledges and languages and about what we are doing to gather strength to struggle for the survival of our peoples.

“When we talk about spirituality, we talk about equilibrium. We talk about saving the planet, because the planet right now is in crisis. This ancestral scientific community deserves support from the broader scientific community. I consider myself to be a scientific researcher because I am researching my own ancestral knowledge for the purpose of defending Mother Earth.”

My focus is on defending our territories and the rights of women. The Wayuu community has also started to create alliances with other peoples to gain strength. We are creating a great spiritual pact for the defense of the territory. We want to safeguard and clean up our territories and recover them from the capitalist system and liberalism. We want to do this so we can look for strength from our ancestors and retake spirituality as a central force.

Our territories are in the Sierra Nevada de Santa Marta. We joined together there to create a great pact. Now, we must do it again in another mountain range, Serranía de Macuira, a sacred site for the Wayuu people. We will go there to invoke the spirits and seek guidance about how to better safeguard our territories, which are now mainly in the hands of multinational corporations.

I call upon the scientific community and UNESCO to join in this project to save the richness of my ancestral peoples.

Returning to language to restore health and wellness

Dr. Ed Connors

Kahnawake First Nation, Psychologist, Canada

I come from Kahnawake Mohawk territory—where my mother was born and raised—and from the Town of Mount Royal, which is part of Montreal. A river divides these communities, but a bridge also connects them. So I come from two sides of the same river—or in fact, two world views. I’ve learned to respect both, not only in terms of sustaining my life, but in understanding how to promote and support life on Earth.

When I left the Tower of Higher Knowledge, I chose to go out to learn from territories across what is now called Canada. I sat in the lodges of my ancestors and Elders to understand more about what we need to know to survive in the face of the difficulties resulting from colonization.

Since then, I and my Indigenous colleagues are resurfacing our Indigenous Knowledge in health care, justice and suicide prevention. Years ago, trying to understand suicide better, we relied upon so-called European knowledge. But we came to realize that we needed to return to the knowledge that exists within our languages. We began to speak about how we could understand suicide within the Anishinaabe language. We began to rethink our approach to prevention by thinking about it through an Anishinaabe lens. We began to redefine “Mino-bimaadziwin,” or living the good life. Through Indigenous Knowledge and teachings, we now encourage others to explore with us how we can support each other to live long and good lives and avoid premature, unnatural death.

This shift in thinking has created a dialogue within our Indigenous communities and within health-care systems. It is shifting the paradigm from suicide prevention to a focus on supporting long and good lives. This process of translating our Indigenous ancestral knowledge is informing much of what is helping our Indigenous communities to restore health and wellness and therefore to survive.

You can learn more about what we are doing by visiting our website, wisepractices.ca.

“I find it a great mystery that so much of the world’s population has come to believe in a myth that our valued knowledge as humans has only evolved since the emergence of what has been called civilization.”

“Contrary to these beliefs, I recognize that the accumulated knowledge we have formed throughout human time is not only significant and of value, but necessary for the continued existence of humans on Earth.”

Building a future for the world by honouring Indigenous voices and ideas

Dr. Manulani Aluli Meyer

University of Hawaii, West O'ahu, U.S.

Aloha to all of you. What a blessing to have so many cousins in the house.

Aloha 'Āina is the love of land. When you have Aloha 'Āina at the centre of science, you're not wondering if the bottom line is money for investors. Do you understand that science is linked to money? We love our lands here. And it is more than that. Aloha 'Āina is that which nourishes us, that has always loved us.

In the 1970s, we created a renaissance because research is renewal. We were renewing ourselves to relationality, dynamic coherence, interdependence, mutual causality, and what the post-quantum sciences are calling complementarity. Isn't that beautiful? We are heading into the rise of the feminine, the rise of the actualization of a kind of wisdom based on Aloha 'Āina. The ultimate sciences of the western world are called post-quantum world complementarity. Here, we have that in concepts. This is a form of simultaneity that isn't about reciprocity. It's about consciousness.

And when that consciousness is about serving people, that's a spiritual energy that builds a mutual emergent future for the world. Mutual emergence isn't about one culture over the other. Specification leads to liberality. And that's the localization of knowledge. That is the honouring of our Native voices, our Native ideas.

And when our principles become the centre of our "new" science, there's nothing "new." We have relationality. We will understand when our subjectivity changes things. We're not going to hide behind the false veil of objectivity. The maturity of the world is on fire.

Closing remarks

In many Indigenous communities, when people came together to solve problems, make agreements or note changes in the social world—such as births, deaths or unions, or changes in the ecosystem, state of plants, animals and water life—these were recorded in memory by those given or assuming the responsibility to remember. In times past, when Indigenous Peoples were an oral culture, transactions were recorded in memory and formal procedures were in place. This section expresses the voices of the invited witnesses who share the bundle of knowledge that took shape at this gathering for all to remember.

José Barreiro

Taino Nation of the Antilles

[Due to technical issues, José sent his summation in video shortly after the webinar. Below is a summary of some of his key ideas. His full summation appears in the transcript.]

At the beginning, John Elliott (Tsartlip First Nation) spoke about the health of our Native languages being the health of the Earth. He set a tone for the depth of culture that would emerge and sang a song for the language

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itself. Katsi Cook (Wolf Clan Mohawk Akwesasne) followed with a song to the Four Directions and the seeds, further situating the group in the actual practice: Mother Earth, Father Sun, honoring of the land. There was an early lesson, as well, in moderator Laurie Robinson's precise, respectful pronunciation of the speakers' Native names.

Lorna Wanostsa'7 Williams, Lil'wat First Nation, introduced the framework of the discussion: the opening of scientific thinking and the decolonization of knowledge, the de-westernization of knowledge, the localization of knowledge, and the knowledge within the people.

As the circle unfolded and we heard from all of the speakers, important themes emerged:

- **Longevity:** why important knowledge, including languages, lasted; the importance of work that is truly guided by the Elders and by community perception; and how long-term community thinking can be of use in the health and well-being of the people.
- **Self-determination:** the capacity for development, the rebuilding of infrastructures, the things that survive of the cultures of Indigenous Peoples, and how to rescue, remember and put them to use.
- **The assault on all Indigenous Knowledge and culture:** the impact of insidious policies, the wish to do harm, and the importance of bringing Indigenous Knowledge into educational institutions.
- **The ceremonial approach and the commitment to clear thinking:** a strong, clear Indigenous foundation and the understanding that science is a search for reality based on what one knows and what one is standing on; the importance of spiritual ceremony, messaging and dreams in sustaining memory and in the struggle to survive.
- **Place-based Indigeneity and thinking:** the land as a constant and language as a repository of much of that culture of the land; a multi-layered world of knowledge, interrelated yet locally specific and ecosystemic.
- **Sustainability:** as understood by the tribal peoples, based on closer bondings at the local and global levels. The knowing of the land, the territories, the working from place and time, historical and immemorial, is central to the foundation.

This work must continue; it must stay real—the ancient, the ancestral knowledge in the present world. It is about the rights of the feminine, the love of the land, spirituality at the base, local knowledge and long-term observation. It is empirical, practical, reality attached to cosmo-vision, to spirit, to dreaming, to our commonality as peoples. It is about the recovery of language and the renewal of Indigenous community.

What will it take to do that from the inside? What can allies do to help in that quest? There is a lot to ponder. This is just the beginning.

[Speaker using words spoken in traditional language].

Saludos, abrazos, greetings, and my love to all.

Kevin Lowe

Gubbi Gubbi, Scientia Indigenous Fellow, University of New South Wales, Australia

Due to technical issues, Kevin sent his summation in writing shortly after the webinar. Below is a summary of some of his key ideas. His full summation appears in the transcript.

The following points are meant as a response to some of the many issues raised by today's speakers. I have sought to pull together four touchstone issues that resonated with me as I listened.

1. Language and knowledge are issues of cultural survival and identity. Presenters acknowledged the conundrum (as painted by governments) of the immediacy of a community or family's economic well-being versus their survival and culture. For many, once this "choice" is enacted (by being removed or by choosing to move to larger centres), the challenge is to seek out opportunities to engage in language/knowledge work of country.

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Many spoke of people needing to keep a connection to "country" beyond a physical presence. They are preoccupied with the essence of being Indigenous and the claims we make concerning our Indigenous identities and our capacity to situate ourselves in place and space. Many spoke of the issues related to the ongoing colonization of communities, and its forever presence in the physical, linguistic, economic and cultural domains that situate dominant culture in the spaces where we live.

2. The second issue centres on the question of Indigenous Knowledge and its epistemic legitimacy within the eyes of the Western Academy. This is not a question of the epistemic legitimacy of Indigenous Knowledge, but rather of the way in which Indigenous Knowledge has been positioned and monitored within the Academy. The boundedness of western knowledge systems—and their claims to universal truths and "understanding"—judges and positions all other systems of knowing against the Academy's standards and assertions.

3. The third issue concerns the development of policies meant to safeguard the work of the non-Indigenous Academy in its acquisition and/or (mis)appropriation of Indigenous Knowledge. There is a concern that the development of policies and practices that attempt to codify how this work is to be done in itself cements institutional control over Indigenous People's engagement.

4. The fourth issue focuses on the political space. The reclamation and use of language and the participation of people in Indigenous cultural work are in themselves political acts. We need to never forget that the ongoing work of the neo-colonial state has been to deny prior occupation, sovereignty and intimate connectedness between Indigenous Peoples, their country and knowledge systems. This process is enacted in our schools daily. This is no accident, but a purposeful act of suppression of Indigenous sovereignty by denying the very acts of invasion and colonization.

Recommended reading

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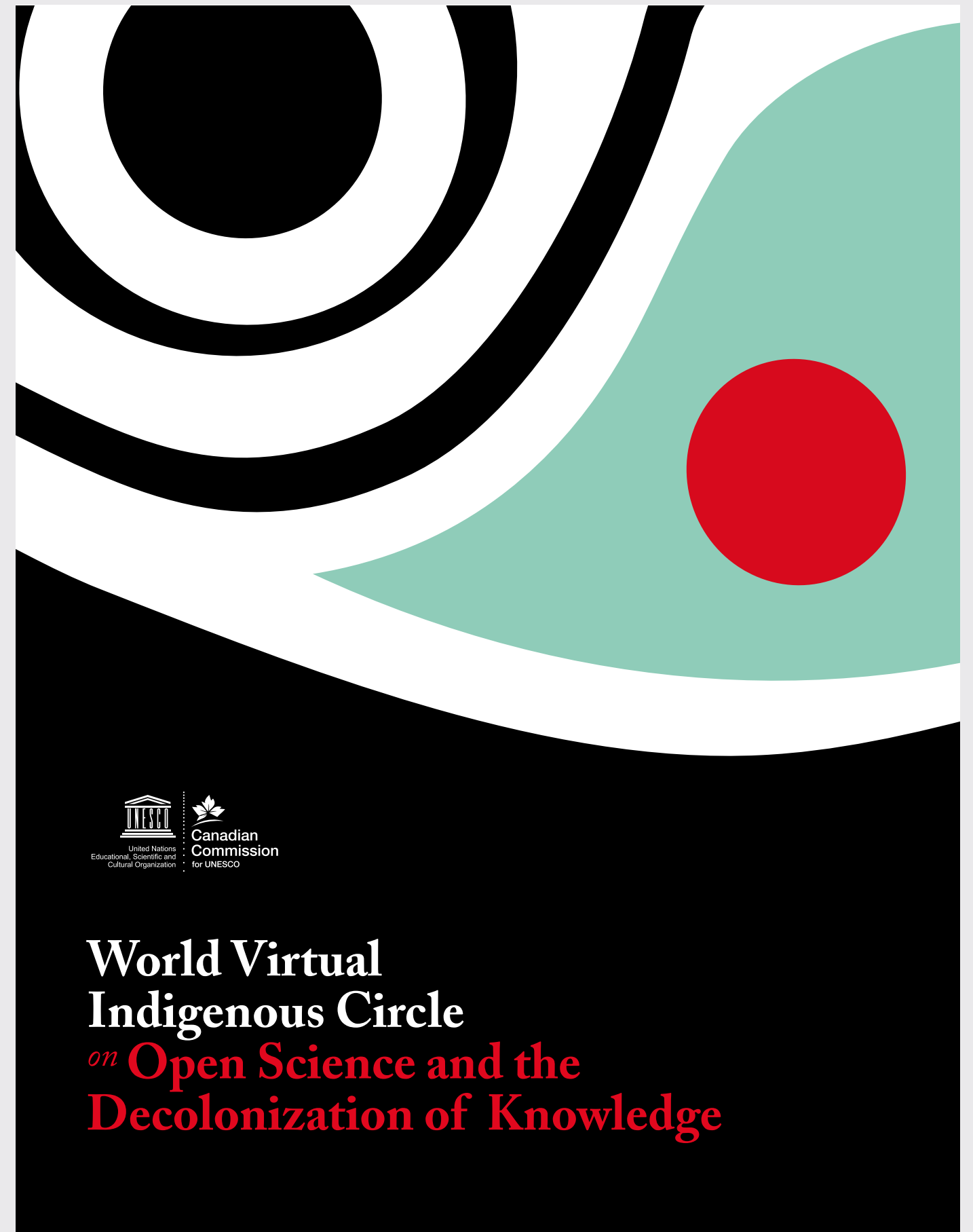
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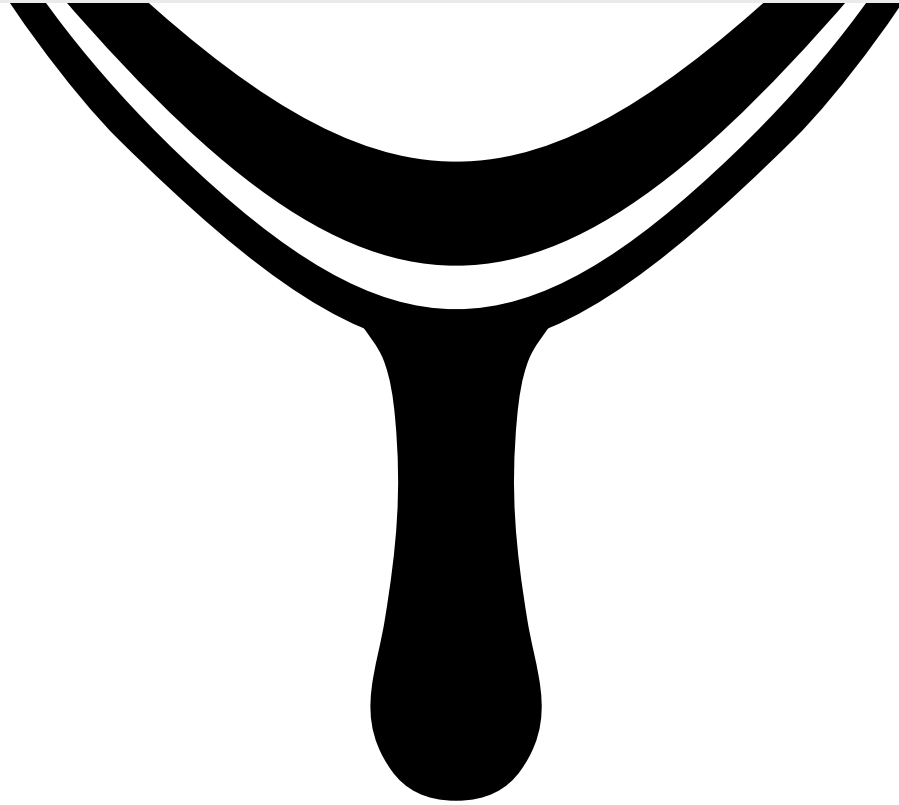
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**World Virtual
Indigenous Circle**
on **Open Science and the
Decolonization of Knowledge**



Acknowledgements

Dorothea Harris, BSW, PhD (student), was the webinar rapporteur, analyzed the discussions and provided written contribution to this summary.

Report copywriter: Patti Ryan, Southside Communications Inc.

Design: Spruce Creative

Artwork: Coast Salish Frogs by *Tseskinakhen*, William Good, Snuneymuxw First Nation

World Virtual Indigenous Circle on Open Science and the Decolonization of Knowledge, Canadian Commission for UNESCO, 2021.

“Leroy, I remember a talk you gave where I said something stupid like, ‘Land is a metaphor for our mother.’ And you scolded me and said, ‘Land is not a metaphor for our mother, land is our mother.’ That changed everything for me. Indigenous epistemology is about continuity. And in that centre of continuity is love. We call it aloha here in Hawaii. And it’s not a commodity. It is an energetic field of purpose, shared meaning, passion and commitment to the love of land and the service of people.”

Dr. Manulani Aluli Meyer
University of Hawaii, West O’ahu, U.S.



“I find it a great mystery that so much of the world’s population has come to believe in a myth that our valued knowledge as humans has only evolved since the emergence of what has been called civilization.

“Contrary to these beliefs, I recognize that the accumulated knowledge we have formed throughout human time is not only significant and of value, but necessary for the continued existence of humans on Earth.”

Dr. Ed Connors
Kahnawake First Nation, Psychologist, Canada.



World Virtual Indigenous Circle on Open Science *and the* Decolonization of Knowledge

Purpose of the webinar

The World Virtual Indigenous Circle on Open Science and the Decolonization of Knowledge took place November 12, 2020. It was organized by the UNESCO Chair in Community-Based Research and Social Responsibility in Higher Education and co-hosted by the Canadian Commission for UNESCO and the World Indigenous Nations Higher Education Consortium.

Its format was designed by Lorna Wanósts'a7 Williams. The Circle featured nearly 20 Indigenous speakers and attracted some 300 registrants from around the world. Its purpose was to inform UNESCO's forthcoming recommendation on open science and, in turn, to ensure Indigenous Knowledge is incorporated respectfully and with integrity to help reshape how institutions recognize and use it.

Ultimately, the aim was to take the next of many steps toward ensuring that Indigenous Knowledge is better recognized worldwide so it can guide individuals and institutions in education, in research and in protecting the Earth.

Coast Salish Frogs by
Tseskinakhen, William Good
Snuneymuxw First Nation

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Participants in order of appearance

Laurie Robinson
Mahingan Sagaigan Nation, Executive Director,
Indigenous Advanced Education
and Skills Council, Ontario, Canada

John Elliott
Tsartlip First Nation

Katsi Cook
Wolf Clan Mohawk Akwesasne

Lorna Wanósts'a7 Williams
Lil'wat First Nation, Professor Emerita,
University of Victoria, Canada

Sébastien Goupil
Secretary-General, Canadian Commission
for UNESCO

Keiki Kawai'ae'a & Kealani Makaiwi
World Indigenous Nations Higher Education
Consortium

Carrie Bourassa
Canadian Institutes of Health Research

Dominique Bérubé & David Newhouse
Social Sciences and Humanities Research
Council, Canada

Kevin Fitzgibbons
Natural Science and Engineering Research
Council of Canada

Leroy Little Bear
Blackfoot First Nation, Professor Emeritus,
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Gregory Cajete
Tewa, Santa Clara Pueblo, Professor, University
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Wangoola Wangoola Nduwala
Nabyama, MPAMBO African Multiversity,
Busoga, Uganda

Zanisah Man
Orang Asli Professor, Universiti Kebangsaan
Malaysia

Sonajharia Minz
Vice-Chancellor Sido Kanhu Murmu University,
Dumka, India

Jazmin Romero Epiayu
Wayuu activist, Colombia

Ed Connors
Psychologist
Kahnawake First Nation, Canada

Manulani Aluli Meyer
University of Hawaii, U.S.

Jose Barreiro
Taino, Cuba; Emeritus Smithsonian Institute, U.S.

Kevin Lowe
Gubbi Gubbi, Scientia Indigenous Fellow,
University of New South Wales, Australia

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Indigenous Circle format *and* themes

Despite its virtual format, the webinar adhered to Indigenous protocols, opening and closing with prayers, songs and territorial welcomes from respected Elders and Knowledge Keepers. As one speaker reminded everyone, “Songs and prayers are a very important part of science.”

The format emulated a Talking Circle that encouraged respect, information-sharing, attentiveness and interconnectedness. Speakers and attendees expressed their recognition that the webinar marked a time for Indigenous People to revisit who and where they are, who their ancestors are, and where their teachings come from to move forward in a positive way. They also expressed their appreciation for the use of the traditional Circle format and its ability to “bring out” Indigenous Knowledge.

Many participants used Indigenous languages, which are also integral to Indigenous or traditional knowledge and can indeed serve as a shortcut to knowledge. As one of the opening speakers put it, the “wellness of language is connected to the wellness of the Earth.”

Dr. Lorna Williams aptly summed up the purpose of the Circle and its format in her opening remarks: “We have gathered today in a circle and we are here to shape what’s in the middle: the bundle of knowledge that will guide the way in which Indigenous Peoples’ knowledge is continued and created from all over the world.”

“These criticisms have to be brought forward in ways that allow us to build bridges toward a better future for our students, ourselves and our communities. We do need science to sustain ourselves into the 21st century in all areas. And we do need more Native students in science-related fields. Hopefully, with these kinds of strategies, we will be able to accomplish more rapidly within the next decade.”

Dr. Gregory Cajete
Tewa, Santa Clara Pueblo, Professor,
University of New Mexico, U.S.

“Let me very quickly compare science to a house. A house usually has a foundation and then a floor plan. And once you’ve got the floor plan, then you can think about decorating, furnishing and so on. A lot of times when we’re talking about science, we end up talking at the furnishing level, not so much at the floor plan level, and even less so at the foundational level. I want to talk about the foundational level.”

Dr. Leroy Little Bear
Blackfoot First Nation,
Professor Emeritus, University of Lethbridge,
Canada

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Key messages

Many speakers contrasted Indigenous and western views of science, describing Indigenous science as the foundation for understanding the nature of the universe and our relationship with it versus western science as something that is more fleeting and focused on the temporal. Culture, tradition, spirituality, relationships and time are all important components of Indigenous Knowledge (which is science). The lack or loss of these has resulted in devastation, both for Indigenous Peoples and the world in general. There is fear that this may continue, but revitalizing these understandings is a source of hope for the next generation.

Each webinar participant brought a unique perspective—from the importance of storytelling and cross-cultural dialogue to the connection between Indigenous Knowledge and political activism to the global class struggle, the intersection of Indigenous language and mental health care, and more.



Some central themes emerged:

The knowledge that Indigenous Peoples accumulated for thousands of years before the emergence of “civilization” is not only valuable, but necessary for the continued existence of humans on Earth. Indigenous Knowledge systems have been around since time immemorial and can benefit future generations.

The Earth is facing a crisis. The broader scientific community can help to address it and restore equilibrium by supporting Indigenous scientific communities. A central goal of Indigenous Knowledge is sustainability, and it is built on relationships rather than on what can be measured.

Indigenous science is about love of land. Its continuity is therefore linked to the continuity of life on Earth.

Indigenous language and knowledge are intertwined, and both are at the heart of cultural survival and identity. A reinvigoration of Indigenous languages and cultures can help Indigenous populations reclaim space, dignity, equality, justice and liberty.

Despite long traditions of Indigenous science that are now being appreciated and reimplemented, the practice of Western science has systemically excluded Indigenous thought, Indigenous ways of knowing and Indigenous Peoples. This needs to stop.

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Central discussion points


- Indigenous Peoples in many parts of the world have experienced a 500-year attack on their territories, cultures, languages and knowledges. This systematic move to silence and devalue Indigenous perspectives can be seen as a form of intellectual colonization.
- We are engaged in the work of educating people about the fact that Indigenous Knowledge has value and that considering other knowledges does not jeopardize their own. This is an effort to appreciate that the Indigenous Knowledge people continue to hold is precious, and to recognize that it continues despite a centuries-long effort to silence it.
- Indigenous scholars and activists around the world have diverse languages, cultures and histories, but take strength from important commonalities in their epistemologies, and agree on the importance of decolonizing knowledge and establishing a shared infrastructure to support the re-emergence of and renewed respect for their languages and knowledges.
- The importance of this work is gaining recognition among pillars and funders of research. In Canada, these include the Canadian Institutes of Health Research, the Social Sciences and Humanities Research Council, and the Natural Sciences and Engineering Research Council.

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Language is an essential starting point for reasserting the value and application of Indigenous Knowledge, as they are indivisible. The richness of Indigenous Knowledge systems arises from an intimate tradition of knowing and relationship, with a focus on continuity. It is time for these traditions to enter the mainstream and receive the same serious consideration as “western” knowledge.

- Value can be derived from bringing traditional knowledge into universities and having Indigenous institutions work alongside western institutions. These ideas are connected to the need to ensure access to quality education for Indigenous Peoples everywhere and to ensure Indigenous ways of knowing are incorporated into educational institutions so they can be considered universal rather than western. Mainstream agencies should reflect on the need to develop an ethical space from which to frame a relationship between themselves (and the state) and Indigenous Peoples.

- Colonization has had persistent effects in Indigenous communities in physical, linguistic, economic and cultural domains. Indigenous scholars face an ongoing challenge to hold space in their minds to engage in cultural survival and to continue to support cultural reclamation.
- Bringing Indigenous languages into the light is a global struggle, and the reclamation and use of language and the participation of people in Indigenous cultural work is in itself a political act.



“The term sustainability can only be understood, at least in India, in terms of how the Indigenous populations have continued to live.”

Dr. Sonajharia Minz
Vice-Chancellor, Sido Kanhu Murmu
University, Dumka, India

“To me, the idea of Indigenous open access is really interesting. It gives hope to people to work on something valuable to them.”

Dr. Zanisah Man
Orang Asli, Professor, Universiti
Kebangsaan, Malaysia



Coast Salish Frogs by
Tseskinakhen, William Good
Snuneymuxw First Nation

Key recommendations

- Acknowledge Indigenous knowledge as science.
- Recognize Indigenous spiritual practices as vital to guiding and informing Indigenous Knowledge.
- Support the revitalization of Indigenous cultures and languages, recognizing that they are integral to Indigenous knowledge.
- Work toward an understanding of science that prioritizes relationality—that is, relationships with people, community, land and all creation.
- Recognize an Indigenous concept of time that ensures longevity of relationships and sustainability for future generations.

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For more information

A [full report](#) and a [complete transcript](#) of the webinar are available as separate documents. The [full webinar](#) itself is available to view online.

Recommended reading

Chan, L., Hall, B., Piron, F., Tandon, R., & Wanósts'a7 Williams, L. (2020). Open science beyond open access: For and with communities. <http://doi.org/10.5281/zenodo.3946773>

Kawai'ae'a, K. (2020, November 10). Position paper to the UNESCO World Virtual Indigenous Circle on Open Science and the Decolonization of Knowledge. World Indigenous Nations Higher Education Consortium. https://www.unescochair-cbrsr.org/wp-content/uploads/2020/09/World_Virtual_Indigenous_Circle_Transcript.pdf p.7

Kimura, K., Aton, K., Baybayan K., DeFries, J., Gionson, 'I., Kaluna, H., Kawai'ae'a, K., Kimura, L., Palecat-Nelson, S., Simons, D., & Tokunaga, A. (2019). A Hua He Inoa: Hawaiian culture-based celestial naming. Bulletin of the AAS, 51(7). <https://baas.aas.org/pub/2020n7i135/release/1>

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Meyer, M. A. (2013). Holographic epistemology: Native common sense. China Media Research, 9(2), 94-101. <https://education.illinois.edu/docs/default-source/default-document-library/hereca256a3980b76a29a33dff4b008a8698.pdf?sfvrsn=0>

Venkatesan, A., & Burgasser, A. (2017). Perspectives on the Indigenous worldviews in informal science education conference. The physics teacher, 55, 456-459. <https://aapt.scitation.org/doi/10.1119/1.5008336>

“When we talk about spirituality, we talk about equilibrium. We talk about saving the planet, because the planet right now is in crisis. This ancestral scientific community deserves support from the broader scientific community. I consider myself to be a scientific”

Jazmin Romero Epiayu
Wayuu Activist, Colombia

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• *“The real feast of knowledge will come when there
 • is a sort of Marshall Plan to support the languages,
 • the knowledges, which have been ‘othered’ and
 • handicapped for the last hundreds of years.”*

Prof. Wangoola Wangoola Ndwula
 Nabyama, MPAMBO African Multiversity,
 Busoga, Uganda

Open Science Beyond Open Access: For and with communities

A step towards the decolonization of knowledge

Prepared for the Canadian Commission for UNESCO
 By Leslie Chan, Budd Hall, Florence Piron, Rajesh Tandon and Lorna Williams
 Ottawa, July 2020

For further reading, see:

An introduction to UNESCO’s Updated Recommendation on Science and Scientific Researchers
<https://en.ccunesco.ca//media/Files/Unesco/Resources/2018/11/IntroductionToUNESCOUpdatedRecommendationOnScienceAndScientificResearchers.pdf> (2018)

Is Science a Human Right? Implementing the Principle of Participatory, Equitable, and Universally Accessible Science
<https://en.ccunesco.ca//media/Files/Unesco/Resources/2019/10/IsScienceAHumanRight.pdf> (2019)

The Status of Science. The UNESCO Recommendation on Science and Scientific Researchers: Issues, Challenges and Opportunities
<https://en.ccunesco.ca//media/Files/Unesco/OurThemes/EncouragingInnovation/IdeaLab/ReflectionPaperMicheleStanton-Jean.pdf> (2019)

Toward a UNESCO Recommendation on Open Science: Canadian Perspectives <https://en.ccunesco.ca/-/media/Files/Unesco/Resources/2020/04/UNESCORecommendationOpenScienceCanadianPerspectives.pdf> (2020)

To quote this article:

CHAN, Leslie, HALL, Budd, PIRON, Florence, TANDON, Rajesh, and WILLIAMS, Lorna, “Open Science Beyond Open Access: For and with communities. A step towards the decolonization of knowledge”, the Canadian Commission for UNESCO’s IdeaLab, Ottawa, Canada, July 2020

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Acknowledgements

We would like to thank the Canadian Commission for UNESCO for supporting our approach to Open Science and the decolonization of knowledge. In particular we would like to thank Eleanor Haine-Bennett who has contributed both to the process and the content of this brief and to Sébastien Goupil, Secretary-General of the Canadian Commission for UNESCO, for his support and contributions. Special thanks go to Baptiste Godrie for his review of our final drafts. Importantly each of us owes a deep debt of gratitude to the communities within which we have been born, lived and worked. We are grateful to the Indigenous and non-Indigenous women, men and young people of communities in British Columbia and Québec in Canada, Haiti, West Africa, Brazil and other countries in Latin America, and many parts of urban and rural India. Knowledge is everywhere.

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Wanósts'a7 Lorna Williams is Lil'watúl and Professor Emerita of Indigenous Knowledge and Learning, University of Victoria

We were brought together by Rajesh Tandon and Budd Hall, who are also Co-Chairs of the [UNESCO Chair in Community-Based Research and Social Responsibility in Higher Education](#). Collectively, we bring diverse perspectives and experiences to the challenges of Open Science.

Each being ought to have the strength to be tolerant of the beauty of cognitive diversity.

Leroy Little Bear¹

Summary

- While many countries and scholars understand “Open Science” to mean the same as “open access” to publications and data, we argue that it can and should go further.
- Analyzing all the possibilities of “openness” during the COVID-19 pandemic, we explain how science could also open itself to society to be more relevant—particularly to civil society organizations and social movements.
- We suggest greater openness to knowledges and systems of thought that come from Indigenous Peoples, minorities, and cultures from the Global South. These knowledges are often ignored or excluded from Eurocentric science even though they could enrich scientific conversations across boundaries.
- Finally, we propose considerations for each form of openness to bring about a fair, decolonial Open Science—for and with communities, and beyond open access.

Introduction

UNESCO is launching international consultations aimed at developing a [Recommendation on Open Science](#) for adoption by member states in 2021. Its Recommendation will include a common definition, a shared set of values and proposals for action.

At the invitation of the Canadian Commission for UNESCO, this paper aims to contribute to the consultation process by answering questions such as:

- Why and how should science be “open”? For and with whom?
- Is it simply a matter of making scientific articles and data fully available to researchers around the world at the time of publication, so they do not miss important results that could contribute to or accelerate their work?
- Could this openness also enable citizens around the world to contribute to science with their capacities and expertise, such as through citizen science or participatory action research projects?
- Does science that is truly open include a plurality of ways of knowing, including those of Indigenous cultures, Global South cultures, and other excluded, marginalized groups in the Global North?

The paper has four sections: “Open Science and the pandemic” introduces and explores different forms of openness during a crisis where science suddenly seems essential to the well-being of all. The next three sections explain the main dimensions of three forms of scientific openness: openness to

publications and data, openness to society, and openness to excluded knowledges² and epistemologies³. We conclude with policy considerations.

1. Open Science and the pandemic

Writing this paper at the time of the COVID-19 pandemic, we have been struck by the place science has taken in this highly specific context, but also by the multiple forms of scientific openness that have appeared.

On the one hand, the research community is racing to produce a vaccine that some governments are suggest is the only way we can return to “normal” life. Laboratories clearly need prompt, unconditional access to relevant and quality publications and data. As a result, some publishers have “opened” their paywalled journals to make certain articles freely available⁴; databases have been created that are completely open access, such as the [Open COVID Pledge](#); and other journals or platforms that were already open access are speeding up their peer-review processes⁵ by prioritizing access to data. This “opening” enables or assumes co-operation between laboratories rather than competition. Some laboratories are even sharing material⁶, hardware and specimens⁷.

On the other hand, while scientists have previously complained that governments do not listen to them, they are now in the spotlight and in the media, answering questions from the general public, guiding governments toward decisions and trying to predict the future⁸. But it is not clear whether science’s new role in public debate marks a new form of openness, is sustainable, or will extend to other global challenges, such as the climate crisis.

Research and the pandemic

Governments and public granting agencies are calling for what could be termed “emergency research” in medicine, biology and the social sciences and humanities. For example, the [Canadian Institutes of Health Research](#) announced two critical research funding programs in April 2020. Does this form of research—far removed from the much longer timeframes of fundamental research—indicate a shift of publicly funded research toward societal needs and general well-being? The answer is unclear. It is also worth considering whether the change heralds a new form of social responsibility of universities and research centres that will lead them to science that is less frightened of society’s interference and more open to concern for the common good.

Part of the answer to such questions will be perceptible in the status of the vaccine that may one day be found: it will either be patented (and therefore not free), or open source under an “open” licence (transformed into a common good)⁹. Another question worth asking is: will research focus solely on managing the economic, educational and health issues in this crisis, or will it also look at the effects of COVID-19 on social inequalities¹⁰, particularly gender, race, age, handicap and ethnicity?

Examining science’s place in society

The disruption of “normal” life caused by COVID-19 is transforming science’s place in society, even its standard practices. For example, researchers are launching partnerships with associations to advance their work and their research networks are offering multiple webinars to all internet users instead of in-person seminars for peers in “closed” research centres. As e-learning becomes the new norm, more use is being made of resources like massive open online classes, known as MOOCs. Citizen science movements are also taking on a more influential role¹¹, as demonstrated by [Just One Giant Lab](#), which brings scientists and non-scientists together “to develop innovations to adapt to the COVID-19 epidemic (detection tests, syringe pumps, etc.), all at a lower cost¹². Fablabs¹³ and other makerspaces are imagining new ways to produce masks¹⁴, syringes and prototype respirators¹⁵, while non-governmental organizations and scientists are bringing society into the fold by launching community-based, participatory research projects to fight inequalities¹⁶.

Critics of science and technology are also making themselves heard, most notably with regard to contact tracing applications and artificial intelligence. Meanwhile, suggestions emerging from Chinese traditional medicine, Ayurvedic medicine or African traditional medicine are neither being spoken about nor funded for clinical trials, and are sometimes quickly discredited¹⁷. This response purports to be based in science but could simply be a Western effort to silence other ways of knowing.

Challenging conventional research practices

This overview of the complex COVID-19 situation explores possible avenues for opening science. They include:

- Opening access to scientific publications
- Opening access to research data
- Scientists’ participation in public debates and governance
- Openness to public welfare issues and concerns (not just those of industry or governments)
- Openness to research partnerships with civil society associations and social movements
- Openness to hybrid knowledge, from citizen science to open makerspaces and laboratories
- Openness to Indigenous knowledge and ways of knowing
- Openness to knowledge from the Global South or marginalized communities in the Global North
- Openness to the idea that science is made up of complex debates rather than enduring certainties

All these forms of openness challenge the framework in which scientific research is carried out today—that is, the publication of results in pay-to-access journals that some cannot access; the reluctance to enter into equitable, non-financial partnerships to co-construct socially relevant research projects in the name of refusing to let society or politics “meddle;” and the exclusion of types of knowledge deemed unscientific, especially those originating from Indigenous Peoples or from projects involving people who are not professional scientists or who are from universities of the Global South. In the rest of this paper we examine ways to challenge these types of closures and inject openness.

2. Openness to publications and data

It is often said that open access to publications and data is a new science practice, associated with the digital age. Is this true?

Evolving science policies and practices

Surprisingly, many science practices are actually fairly recent, including the idea that journals should be owned by for-profit publishers rather than universities or learned societies. Between 1852 and 1908, academic journals were regulated by default by open licences¹⁸. This did not stop researchers from making and disseminating countless discoveries. Generally, academic journals were associated with disciplinary associations and published on a non-profit basis.

The idea that knowledge can become a commodity and create markets (for journals and patented innovations) is linked to the emergence of the knowledge-based economy in rich countries¹⁹. This orientation of science policy is part of the neoliberal ideology based on the promotion of competition²⁰, notably among universities, laboratories and scientists. More recently, some for-profit publishers have co-opted the idea of open access and conflated it with the pay-to-publish model of open access, which in fact covers only a small portion of the entire open-access universe²¹.

As a result one could argue that granting open access to scientific publications is less a daring innovation than a return to the conventional ethics of research²², which consider that science is a common good and that scientists must collaborate to advance knowledge, whatever their country or beliefs. But several surveys have shown that most researchers will prioritize a journal's reputation over accessibility when choosing where to publish - a reputation that is marked by commercial indices, such as the journal impact factor²³. More recently, digital technologies allow online and open-access journals to build their reputations through social networks rather than the journal impact Factor.

Understanding researchers' motivations

Researchers who advocate openness of publications and data may have varying motivations:

- Some see research as an immense scientific conversation and want full and immediate access to their colleagues' texts and data.
- Others appreciate open access for the chance to build a universal scientific legacy—a treasure trove of knowledge that would benefit humanity.
- Some believe the main purpose of open access is to democratize scientific knowledge.

Indeed, contrary to a widely shared preconception, many people outside of the scientific world can read, understand and use scholarly articles to improve their own knowledge base and working practices. Think about teachers, nurses, journalists, agronomists or social workers: all would benefit from continuous learning, but without a link to a university, they cannot access texts that might offer them opportunities to do so. In a true knowledge society²⁴, all knowledge is accessible to those who need it to advance and serve the common good.

Nowadays, an increasing number of public policies promote or require open access without forcing authors to pay to publish. In Latin America, most journals are operated by university departments. In South Africa, the Academy of Science of South Africa adopted the SciELO model of open access, pioneered by Brazil, for independent journal publishers to share publishing infrastructure²⁵. But pressures to publish in market-owned journals persist. The problem is that authors, funders and policymakers lack awareness of the diversity of models and initiatives that are available. This is why we think that UNESCO should support independent, community-based publishing initiatives, the [Latin American Council of Social Sciences](#) (CLACSO), the [Council for the Development of Social Science Research in Africa](#) (CODESRIA), the [African Books Collective](#), or the more recent [Grenier des savoirs](#) initiative. The [Radical Open Access Collective](#) is an interesting community of scholar-led, not-for-profit presses that publish open access books.

The risks of open access as a result of inequalities at the heart of science

We urge care in thinking about open access and most importantly not to reduce it to the pay-to-publish model promoted by for-profit publishers. That model has been designed through economic or market-based lenses that see it offering financial return on investment for funders, universities and libraries. This view normalizes the treatment of knowledge as a commodity, viewing the production and dissemination of science as a means of being economically competitive. This reasoning, typical of the knowledge-based economy, feeds into the growing trend of nationalism and regionalism, with European nations and the EU willing to make deals with multinational publishers to secure their presence in research outputs (e.g. [Projekt DEAL](#)).

Debates and policy recommendations from Global North institutions on Open Science and open access usually deal with access to and dissemination of research outputs (still largely in journals and books). Promotion of these policies has tended to focus on the benefits, such as increased visibility and citations, paying little attention to the burden and the risks—particularly for knowledge-holding communities on the margins or scholars from the Global South.

These risks are real. For example, open access as seen in francophone sub-Saharan Africa²⁶ reveals issues that are very different from those in the Global North. In this part of the world, open access cannot be separated from issues like difficult access to computers, the internet and local research grants, and weak digital literacy: many students touch a computer for the first time when they enter university. In this context, open access tends to reinforce the hegemony of science done and published in the Global North at the expense of local knowledge, seldom in open access. This reduces intellectual diversity and contributes to the homogenization of science and creativity. Ultimately, it leads to what Vandana Shiva²⁷ calls the “monoculture of the mind”—where Eurocentric and patriarchal knowledge structures are reflected and reproduced. Postcolonial open access²⁸ can thus be a tool of subjugation rather than empowerment. It can further entrench the deep-seated inequalities encoded in science's colonial and racial infrastructure²⁹.

One of these inequalities stems from the obsession of many universities in the Global South for rankings and impact factors, even if the latter are based on criteria set by powerful institutions in the Global

North which ignore their reality. Very few journals from the Global south are recognized as having enough value to be included in these rankings. Fortunately, impact factor and its clones are more and more contested in the Global North³⁰, for example through the [Declaration on Research Assessment \(DORA\)](#) and alternative models³¹. Organizations like the Directory of Open Access Journals reject rankings and aspire to index scientific and scholarly journals from all over the world according to their quality control system.

Policies and actions to implement open access have tended to strengthen the existing power structure and further marginalize small-scale, local and community-driven initiatives in the Global South. Therefore, we propose recommendations that criticize this flawed logic of open-access and instead challenge the deep-seated structural inequities it has created, while promoting open access as a tool for building the knowledge society.

3. Openness to society

The idea that science must be wary of society—especially of anything that seems political—dates back to the first learned societies. It was promoted by scholars to protect themselves from the arbitrariness of power, from threats and punishments against those who challenged religious dogma. It seemed to scientists of the time that only among equals (i.e., male peers) and protected from the whims of rulers and clergy could knowledge of the world advance. Scholarly communities thus closed themselves off from society for protection (or for creative space) in what is sometimes called an “ivory tower.” The result was the exclusion of anything that was not them or like them. It also led to the establishment of complex rituals to gain access to the ivory tower. The doctorate degree is one example. Academics’ use of jargon that outsiders find hard to understand is another isolation tool.

Shattering the ivory tower

However, the world has changed a lot. For instance, young researchers who wanted to do things differently began attacking “ivory tower syndrome” in the 1960s. They asked questions like: “How can we make science a ‘truly’ fair and egalitarian practice? How can scientific practice be made compatible with a concern for social justice?”³² The environmental disasters of the 1980s would heighten awareness of the potentially harmful effects of scientific research and technological innovations, and lead to the adoption of the precautionary principle in addition to the major ethical codes.

In the 1970s, led by scholar activists in the Global South, participatory research was put forward as a way to co-create knowledge for and with communities, especially marginalized ones, experiencing and documenting the challenges of their daily lives³³. However, this movement was largely ignored by mainstream academics. Around the same time in Europe, science shops³⁴ were invented. They invited civil society associations to propose research projects that students would carry out free of charge in the course of their training, particularly in environmental sciences³⁵. Several political actors began to demand public participation in the scientific and technological choices made by governments. This gave

rise to citizens' juries, consensus conferences³⁶ and other mechanisms aimed at building a “third sector of research” that is still running today³⁷.

In other words, science was opening itself to society.

But the advent of the knowledge-based economy and the public finance crisis of the 1980s took a toll on this emerging scientific citizenship³⁸. Dependent on governments or industry for funding, science became less concerned with social justice, equality and participation than with contributing to the prosperity of states and universities. Science was to become a source of income through patents and marketable innovations³⁹. Funding for social and human sciences gradually decreased⁴⁰ while industry-university partnerships multiplied, as evidenced by the renaming of campus buildings after funders.

Science and society today

The second decade of the 2000s has seen the traditions of participatory action research and critical research continue. Indigenous scholars, such as Linda Tuhiwai Smith⁴¹ with her seminal work on decolonizing research methodologies, have inspired a new generation of Indigenous and non-Indigenous scholars to work in engaged ways. Community-based and community-engaged research has become increasingly accepted in universities around the world, with many new structures to facilitate community-university research partnerships created⁴².

In Europe, the science shops’ pioneering work has found substantial support from European Commission funding and advocacy for the [Science With and For Society \(SWAFS\)](#) and [Responsible Research and Innovation \(RRI\)](#). International structures, such as the [UNESCO Chair of Community-Based Research and Social Responsibility](#), the [Talloires Network](#) and the [Global University Network for Innovation](#), have been established.

There are still tensions, as some scholars are wary of showing social or political commitment that could make them look “radical” and perhaps harm their careers. The normative expectation that scientists should separate their values and identities from their work remains powerful⁴³. It can be a source of stress for young researchers who begin their careers believing in the power of science to change the world only to learn that what really counts is research funding, quantity of publications and impact factor.

Interestingly, digital technologies have created new forms of openness to society within technoscience, notably within the open-source software and hardware movements in computing (see [Open Source Initiative](#), for example). The implementation of fablabs⁴⁴, makerspaces⁴⁵ and other do-it-yourself laboratories that integrate non-scientists and citizen science (using non-scientific citizens to collect or capture massive data via applications) have produced great advances in [botany](#), biology, [astronomy](#), geography and even [mathematics](#)⁴⁶.

Science at a crossroads

We are at a critical juncture. It is unclear whether we are moving closer to the 1960s ideal of scientific citizenship - making digital technology a tool for the democratization of science and knowledge - or

whether science is truly part of knowledge economy and cognitive capitalism⁴⁷, seeking industrial partners and "exploiting" citizen volunteers as cheap labour. The openness of science here is complex and uncertain, as exemplified by the fablabs in Africa, funded by organizations in the Global North: can they respect local values and practices to contribute to local sustainable development⁴⁸?

The consultations around the creation of the UNESCO Open Science Recommendation offer an exciting chance to explore what we have learned so far from opening to society and will support future initiatives. We are calling for respectful and transparent collaboration between scientists and social actors as well as the co-creation of knowledge and social innovation that includes all world views.

4. Openness to excluded knowledges

In this section, we deal with two families of knowledge that are excluded from mainstream or conventional science in a systemic way:

- Indigenous knowledges, ways of knowing and epistemologies; and
- scholarly knowledge from marginalized groups of people in western English-speaking science, such as women, minorities, Indigenous scholars, non-Anglophone scholars, or scholars from the less-advantaged countries in the Global South.

We argue that science should become much more pluriversal⁴⁹ by opening itself to these families of knowledge that are ignored by so many scientists in the Global North.

Science as a product of history and culture

Feminist, Indigenous and decolonial studies, particularly in Latin America⁵⁰ and India⁵¹, as well as social studies of science⁵² and the deconstruction of the Western knowledge as set out in great books, have helped show the extent to which science was European and male, a product of the intersection of colonialism and capitalism. Examples of these books include Mudimbe's *The Invention of Africa*⁵³, Said's *Orientalism*⁵⁴, Fanon's *Black Skin, White Masks*⁵⁵, and *Decolonizing the Mind* by Ngũgĩ wa Thiong'o⁵⁶.

The recent publication in English of the *Jewel of Reflection on the Truth about Epistemology* by the 12th century scholar Gangesa Upadhyaya⁵⁷, said to be one of the most important philosophical works in Indian and Sanskrit scholarship, is just one example of the vast bodies of knowledge that have been excluded from contemporary understandings of science. For an example closer to our times, the work on action research with Indigenous communities by the great Columbian sociologist Orlando Fals Borda had never been translated into French until very recently⁵⁸. This is also the case for the classic decolonial work, *The Invention of Africa*⁵⁹. Conversely, many scholarly books from the Global South published in French, Spanish or Portuguese have never been translated into English.

Contrary to the myth of scientific neutrality, science—steeped in history and culture—has always carefully selected the knowledge to which it will grant the status of "scientific". This knowledge has to prove that it meets certain normative and epistemological criteria. Depending on the era, these can

include the use of the experimental method, extensive doctoral training of its author, its ritualized presentation in meetings of learned societies, its publication in peer-reviewed journals, and more. Such filters obviously lead to exclusion.

Feminist social studies of science exposed the exclusion of women from this universe decades ago. Even today, during the COVID-19 crisis that closed universities, female academics had more trouble submitting papers and research proposals than did their male counterparts because of unequal divisions of household labour⁶⁰.

Some research indicates that Global South and Indigenous scientists have difficulty publishing in high-impact scientific journals, whose editorial boards are dominated by white males⁶¹. A full professor of physiology from Senegal told us that one of his articles was only accepted when he added a European author to the list of authors. Western science is increasingly unilingual English and hegemonic.

Beyond the nationality and language of the scientists and suspected systemic racism, exclusion also concerns epistemologies that come from outside the European tradition, especially Indigenous ways of knowing and political knowledges based on minority experiences of oppression⁶². Non-European or Indigenous epistemologies are so different from the framework that dominates Western science that the latter can neither see nor understand them and ends up ignoring and excluding them.

Western science vs. Indigenous ways of knowing: a fundamental divide

Leroy Little Bear, member of the Blood Tribe and an Indigenous constitutional scholar and philosopher, puts it this way: "One of the problems with colonialism is that it tries to maintain a singular social order by means of force or law suppressing the diversity of human world views"⁶³. For example, Indigenous ways of knowing generally reject the division of life into a series of disciplines—the basis of conventional science in most universities. Instead, these epistemologies propose a global vision of life focused on relations. In this sense, they are close to what Edgar Morin calls complex thinking⁶⁴. Can science open itself to these knowledges to enrich itself instead of excluding them?

According to Nakata⁶⁵,

an important aspect of Indigenous knowledge that is overlooked in some definitions is that Indigenous Peoples hold collective rights and interests in their knowledge. This, along with the oral nature, the diversity of Indigenous knowledge systems and the fact that management of this knowledge involves rules regarding secrecy and sacredness, means that the issues surrounding ownership and therefore protection are quite different from those inscribed in Western institutions. It therefore complicates things for our conception of openness. Western concepts of intellectual property have for some time been recognized as inadequate.

As Snively and Williams⁶⁶ note in their breakthrough book, *Knowing Home: Braiding Indigenous Science with Western Science*, "for Indigenous peoples, Indigenous Knowledge (Indigenous Science) is a gift. It cannot be simply bought and sold. Certain obligations are attached. The more something is shared, the greater becomes its value."

Canada has developed a set of principles that apply to all research involving Indigenous communities. The [principles of ownership, control, access and possession \(OCAP\)](#) of data from Indigenous communities means those communities have control of ancient ways of knowing, but also of new knowledge that is being shared in contemporary research settings.

Conversely, scholars from the Global South are fighting the invisibility of their scientific work within dominant science in order to put it at the service of their country's development⁶⁷. Open access can become a powerful tool in that fight.

Urgency of openness to excluded knowledge

Why is it important for mainstream science to open itself to these excluded families of knowledge? It is not only a social justice fight, but an epistemological one to improve the quality of science. As sociology Professor Boaventura de Sousa Santos famously said, no social justice can happen without cognitive justice⁶⁸. Feminist studies have clearly shown that knowledge based on alternative viewpoints has an immense advantage: it can understand both the dominant and the subalternized⁶⁹ perspectives, whereas the dominant knowledge sees only itself. Including more ways of knowing and understanding our common world within the great scientific conversation would enrich and diversify its collective ideas and creativity for the common good.

The concept of cognitive justice argues for the opening of science to all knowledges and epistemologies in a fruitful and respectful dialogue that presupposes the opening of science to something other than itself, its habits and rituals. Conceived by the Indian anthropologist Shiv Visvanathan⁷⁰, this concept has been recently developed by students and researchers from the [Open Science in Haiti and Africa network \(SOHA\)](#) to include the other two dimensions of openness discussed in this paper: open access and openness to society. For them,

Cognitive justice refers to an epistemological, ethical and political ideal aimed at the blossoming and free circulation of socially relevant knowledge everywhere on the planet, and not only in the countries of the North (which have the resources to develop science and heritage policies that suit them), within a science practicing an inclusive universalism, open to all knowledge and all epistemologies, and not an abstract universalism based on Western standards that exclude what is different from themselves. This ideal is of course opposed to the cognitive injustices that Santos⁷¹ first defined by referring mainly to the knowledge destroyed or killed by the positivist scientific hegemony: the epistemicides⁷².

We need to acknowledge that the dominant knowledge practices and institutions have been structured and implemented in such a way as to simultaneously privilege certain epistemic situated values (such as universality, objectivity and truth) while being unjust or dismissive with regard to other, more relational and complex modes of knowledge⁷³.

We need to restore the knowledge that has been erased or silenced in the current system.

5. Key considerations for UNESCO, other institutions, and decision makers

Interestingly and sadly, these three dimensions of science openness—to publications and data, to society, and to excluded knowledges—are rarely considered together. In fact, they tend to be ignored by the proponents of one or the other.

For instance, many action-research or citizen-science scholars do not really check if their work is accessible to society, since many choose to publish in “prestigious” journals or costly books published by for-profit publishers that only people linked to a university can access. The same can be said for many decolonial thinkers, who published in paywalled journals, making it impossible for Indigenous People, non-academics or even researchers and students from the Global South to read their work.

Conversely, open access practitioners, most of whom are from the Global North, tend to ignore the plurality of knowledge or even the fact that some interesting and important knowledge could exist outside of mainstream science.

We strongly suggest that UNESCO's future Recommendation on Open Science include all three dimensions. The 13 considerations below⁷⁴ would nurture such a move.

Consideration 1

Governments, universities and research funders should support strategies and systems for the co-creation and sharing of knowledge that are co-designed for and with the communities they serve—especially communities that have been historically marginalized or excluded from determining their own knowledge needs and provision. The goal is to regain knowledge autonomy and self-governance.

Consideration 2

To encourage fairer, more diverse open access practices worldwide, governments, research funders and UNESCO should financially and institutionally support a wide range of actors—including non-anglophone, small, local and endogenous publishing initiatives that can build local communication capacities, or university libraries that decide to become publishers—rather than giving precedence and fiscal advantage to international, for-profit, unilingual publishing industries.

Consideration 3

Universities and researchers should provide opportunities for all students and community members to understand the multiple dimensions of open access, including the perils of a homogenized science and the advantages of bibliodiversity and ecology of knowledges.

Consideration 4

Research funders and related bodies should provide targeted funding for translation and open-access sharing of scientific works from Indigenous knowledge holders and Global South researchers, especially

from non–English-speaking countries. This would support the creation of a truly plurilingual scientific commons.

Consideration 5

Research funders and related bodies should demand that publicly funded journals diversify their boards to include more women, Indigenous scholars and scholars from the Global South, and diversify their language practices by providing at least abstracts in many languages.

Consideration 6

Research funders and related bodies should provide targeted funding for research collaboration between communities and universities as exemplified by Canada’s many programs on partnership research.

Consideration 7

Higher education institutions should create courses and engaged learning spaces so all scholars-to-be can learn the principles of Open Science for and with communities, including community-based participatory action research, citizen-science approaches, and open-access–related issues. This would lead them to care about who can read their work.

Consideration 8

Universities should provide administrative infrastructure and resources to support community-university research partnerships that empower people of *all abilities* to make and use accessible, open-source technologies.

Consideration 9

All higher education institutions should teach works from the Global South and scientific approaches drawn from Indigenous ways of knowing. This would support the decolonization of knowledge.

Consideration 10

Higher education institutions should appoint scholars and knowledge-keepers from Indigenous or excluded groups, such as immigrants from the Global South.

Consideration 11

Higher education institutions should ask their professors to teach and cite scholars from Indigenous and other sidelined bodies of knowledge and to encourage students and researchers to quote works from women, the Global South and non-English works, using digital translation tools where available.

Consideration 12

UNESCO should help universities from the Global South offer better internet access and shared, community-governed digital infrastructure for their researchers and students.

Consideration 13

Higher education institutions and governments should abolish university rankings and evaluation based on criteria established by powerful institutions in the Global North and rethink the incentive and reward structure of research funding and evaluation so that it is more based on local relevance and participation.

Conclusion

Among other questions, the [online consultation on Open Science](#) conducted by UNESCO asked: “In your experience, are current Open Science practices beneficial for all the relevant stakeholders in your country? In your experience, are the current Open Science practices beneficial for the scientists and other relevant stakeholders in both developed and developing countries?”

We believe the answer to both of these questions is an emphatic “No.” But there is much that can be done about it.

In this paper, we offer a vision of Open Science that is just, fair and decolonial, but also realist and lucid. We have drawn attention to an understanding of science based on an inclusive universalism, open to Indigenous ways of knowing and all other theories, epistemologies and viewpoints.

We call for science to be a dialogue between knowledges rather than a knowledge that exists only insofar as it silences or eliminates other knowledges. We call for science that is based on values of co-operation, sharing, friendship, compassion, understanding and refusal to separate personal life and values from research. Science can support cognitive justice and situations where everyone contributes knowledge, regardless of their country, social class, gender and language. We call for science as a pluriversal and plurilingual open space—a science that is with and for communities and where knowledge is open and empowering.

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⁶⁶ Snively, G. & Williams, W. L. (2016). *Knowing home: Braiding Indigenous science with Western science, Book 1*. University of Victoria Press.

⁶⁷ Fonn, Sharon et al. 2018. Repositioning Africa in global knowledge production. *The Lancet*, Volume 392, Issue 10153, 1163–1166.

⁶⁸ de Sousa Santos, B. (2018). *The End of the Cognitive Empire: The Coming of Age of Epistemologies of the South*. Duke University Press.

⁶⁹ The term "subalternised" is inspired by the work of Antonio Gramsci and Gayatri Spivak, among others. It refers to a social group or knowledge that has been placed in a subordinate position in relation to the hegemonic power of another group.

⁷⁰ Visvanathan, Shiv. 1997. *A Carnival for Science: Essays on Science, Technology and Development*. Oxford University Press; Visvanathan, S. (1998). A Celebration of Difference: Science and Democracy in India. *Science* Vol. 280, Issue 5360, pp. 42–43. DOI: 10.1126/science.280.5360.42 <https://science.sciencemag.org/content/280/5360/42>; Visvanathan, Shiv. 2009. The search for cognitive justice. http://www.india-seminar.com/2009/597/597shiv_visvanathan.htm.

⁷¹ Santos, B. de Sousa (2014). *Epistemologies of the South: Justice against epistemicide*. Routledge. http://unescochair-cbrsr.org/pdf/resource/Epistemologies_of_the_South.pdf

⁷² Piron, F. (2018). Justice et injustice cognitives : de l'épistémologie à la matérialité des savoirs humains. In É. Tremblay & R. Dorcé (Eds.), *Les Classiques des sciences sociales : 25 ans de partage des savoirs dans la francophonie* (pp. 259–273). Éditions science et bien commun. <https://scienceetbiencommun.pressbooks.pub/classiques25ans/chapter/justice-et-injustice-cognitives> (translated, p. 260)

⁷³ Grosfoguel, R. (2002). Colonial Difference, Geopolitics of Knowledge, and Global Coloniality in the Modern/Colonial Capitalist World-System. *Review (Fernand Braudel Center)*, 25(3), 203–224. <https://www.istor.org/stable/40241548>; Grosfoguel, R. (2007). The Epistemic Decolonial Turn. *Cultural Studies*, 21(2–3), 211–223. <https://doi.org/10.1080/09502380601162514>; Christen, K. A. (2012). Does Information Really Want to be Free? Indigenous Knowledge Systems and the Question of Openness. *International Journal of Communication*, 6(0), 24. <http://ijoc.org/index.php/ijoc/article/view/1618>; Christen, K. (2015). Tribal Archives, Traditional Knowledge, and Local Contexts: Why the "s" Matters. *Journal of Western Archives*, 6(1). <https://digitalcommons.usu.edu/westernarchives/vol6/iss1/3>; Chan, L., Okune, A., Hillyer, R., Albornoz, D., & Posada, A. (Eds.). (2019). *Contextualizing Openness: Situating Open Science*. University of Ottawa Press. <https://press.uottawa.ca/contextualizing-openness.html>

⁷⁴ Some of these considerations are inspired by the work of the [Open and Collaborative Science in Development Network](#), which undertook a three-year study to better understand the promises and limitations of Open Science in the Global South. Collectively, the 12 research teams that comprised the network came to a set of shared principles and values. See Chan et. al. (2019); Chan, L., Okune, A., Hillyer, R., Albornoz, D., & Posada, A. (Eds.). (2019). *Contextualizing Openness: Situating Open Science*. University of Ottawa Press. <https://press.uottawa.ca/contextualizing-openness.html>

Expert-Based Information and Policy Subsystems: A Review and Synthesis

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This article reviews and synthesizes the uses of expert-based information in policy subsystems. The review begins by summarizing the different uses of information in the multiple streams theory, the punctuated equilibrium theory, the social construction theory, and the advocacy coalition framework. Three uses of expert-based information are identified as instrumental, learning, and political. The three uses of expert-based information are then compared across unitary, collaborative, and adversarial policy subsystems. This article synthesizes the findings in a set of propositions about the use of expert-based information in policy subsystems and about the factors that contribute to shifts from one policy subsystem to another.

KEY WORDS: science, collaborative management, the advocacy coalition framework, policy processes, policymaking, policy process theories

Introduction

The policy process is often conceptualized as a complex system of inputs and outputs (Easton, 1965). Among all the inputs and outputs, one of the most important is information. A deep literature exists about the role of information in various policymaking contexts (Adams, 2004; DeWitt, 1994; Fischer, 2000; Ingram, Schneider, & McDonald, 2004; Jenkins-Smith, 1990; Kingdon, 1995; Knorr, 1977; Lee, 1993; Ozawa, 1991; Pelz, 1978; Rich, 1991; Sabatier, 1987; Weiss, 1979; van Kerkhoff & Lebel, 2006). This literature shows that the use of information in policymaking ranges from the instrumental, where information directly impacts policy, to the political, where information is used to argue against an opponent (Knorr, 1977; Pelz, 1978; Rich, 1975). Over long periods of time, information can also foster learning, belief change, and policy change (Sabatier, 1987; Weiss, 1977). This article reviews the science and policy literature to generate propositions about (i) the different uses of expert-based information across three types of policy subsystems; and (ii) the expected role of expert-based information in contributing to shifts between policy subsystems.

Expert-based information is defined as content generated by professional, scientific, and technical methods of inquiry (Adams, 2004; van Kerkhoff & Lebel, 2006). It is often, but not always, based on accepted analytical approaches as defined by

professional peers. The sources of expert-based information include the social and natural sciences, policy analyses, government reports, and research coming from universities, think tanks, and consulting firms. Likewise, the term "expert" includes policy analysts, scientists, and researchers in government and nongovernment organizations. Expert-based information is not restricted to the sciences, but it also includes information coming from engineering and the humanities. For simplicity, science and expert-based information will be used interchangeably.

Expert-based information is distinguished from local (or community) information, which is based on trial-and-error learning about a topic in relation to a specific place (Adams, 2004; Huntington et al., 2002; van Kerkhoff & Lebel, 2006). Distinguishing expert-based information from local information is important because the former takes on a greater force as a legitimizing agent in the policy process. The legitimizing force of expert-based information derives from popular perceptions that science is neutral and dispassionate (Ozawa, 1991). Making a distinction between expert-based information and local information is also useful because it often parallels divisions between public and private interests (Adams, 2004) and between cultures (Huntington et al., 2002).

Groups of experts in any policy process are not homogenous. Compared to scientists from academia, government scientists face different financial and professional incentives in conducting research, writing reports, making public statements, and relating to other actors. To complicate matters, many academics have "inner-outer" careers that teeter between academia and government (Kingdon, 1995, p. 56). Similar arguments can be made about scientists from think tanks, nonprofit and private organizations, and consulting firms. In addition, research has shown that the type of information (from a benefit-cost analysis to a financial model) affects its utilization (Rich, 1991). In this article, I temporarily put aside issues related to the role played by different types of expert-based information and of the experts' organizational affiliations.¹

Every review bounds its phenomena. This article relies heavily on the theories of the policy process (Sabatier, 2007) to derive insights and propositions about the roles of expert-based information in policy. The referenced policy process theories include the multiple streams theory (Kingdon, 1995), the punctuated equilibrium theory (Baumgartner & Jones, 1993), the social construction theory (Ingram, Schneider, & deLeon, 2007; Schneider & Ingram, 1997), and the advocacy coalition framework (Sabatier & Jenkins-Smith, 1993). Among policy process theories, the advocacy coalition framework is used most because it already states hypotheses about the use of science in policymaking (Sabatier, 1987, 2005; Sabatier & Zafonte, 2001). Beyond the literature on policy process theories, this review draws heavily on the research utilization literature including Amara, Ouimet, and Landry (2004), Caplan, Morrison, and Stanbaugh (1975), Rich (1975, 1991), and Weiss (1977).

This article proceeds inductively in five parts. The first part summarizes the ways in which expert-based information is integrated in the different theories of the policy process. The second describes how the uses of expert-based information in policymaking can be simplified into learning, political, and instrumental uses. The third identifies unitary, adversarial, and collaborative policy subsystem types, and the

fourth describes the role of expert-based information in each. Building on the first four sections, the final part provides two sets of original propositions about (i) the use of expert-based information in policy subsystems; and (ii) shifts between subsystem types.

Part 1. The Use of Expert-Based Information in Four Policy Process Theories

There are many descriptions of expert-based information usage in the policy process. Dunn (1994), for example, takes the policy cycle and describes how science is used in each stage. He shows that science can be used to (i) identify problems in agenda setting; (ii) forecast impacts in policy formulation; (iii) compare alternatives in policy adoption; and (iv) monitor impacts in implementation and evaluation (Dunn, 1994, p. 17). Descriptions of expert-based information in the policy cycle tend to emphasize the instrumental use where science directly impacts policy without much reference to politics or learning. An instrumental interpretation of expert-based information in the policy process is not surprising considering the rational, apolitical, and sequential assumptions of the policy cycle. Fortunately, several theories have improved our depiction of the policy process beyond the faculties of the policy cycle (Sabatier, 2007). A summary of four of these theoretical frameworks provides a more complete depiction of expert-based information in policymaking.²

The Multiple Streams Theory³

The multiple streams theory describes how agenda setting and policy change result from policy entrepreneurs attempting to open windows of opportunity by merging previously independent problem, policy, and political streams (Kingdon, 1995; Zahariadis, 2007). The multiple streams theory places expert-based information in two of its streams. In the problem stream, actors use science to indicate the seriousness and causes of a problem and to help evaluate the effectiveness of current policies and programs. In the policy stream, science offers ideas, helps legitimize ideas, and provides a means for entrepreneurs to advocate for the technical feasibility of an idea. A principal strategy for policy entrepreneurs is to seek the right opportunity to utilize expert-based information to place an issue on an agenda, match an idea to a problem, and advocate for policy change. The implication from the multiple streams theory is threefold: (i) policy participants use science to identify problems and evaluate ideas as solutions; (ii) the effect of expert-based information is contingent on the presence of a skillful entrepreneur; and (iii) entrepreneurs use expert-based information to shape agendas and policies for political gain.

The Punctuated Equilibrium Theory

The punctuated equilibrium theory argues that policy change is not only mostly incremental but also marked by sporadic punctuations (Baumgartner & Jones, 1993;

Jones & Baumgartner, 2005). The causal driver in the punctuated equilibrium theory is the pace with which actors process information, shift their attention, and change the policy image. Policy images reflect both emotive and empirical social constructions of an issue (Baumgartner & Jones, pp. 25–7). Incremental policy change arises because actors resist changing their behavior or beliefs from challenging information, thereby maintaining a stable policy image. In contrast, punctuated policy change occurs when actors overcompensate for previous neglect of information and radically readjust a policy image. Policy images also play an important role in policy processes by affecting the scope of conflict and the mobilization of allies and opponents. Actors wanting to maintain the status quo will use science to fortify the legitimacy of current processes, limit any negative attention, and dampen the mobilization of potential opponents. Actors wanting punctuations will use science to challenge the legitimacy of current processes, publicize negative aspects of the policy issue, and mobilize allies for change (see Pralle, 2006). The seminal example is the nuclear power industry in the twentieth century (Baumgartner & Jones, pp. 59–82; Duffy, 1997). It was scientists who helped create the positive image of the industry immediately after World War II and fostered incremental policy change for nearly 20 years. It was also scientists who leaked safety concerns in the 1960s that eventually modified the policy image and led to major changes in the industry in the 1970s. The implication from the punctuated equilibrium is fourfold: (i) the causal driver within the punctuated equilibrium theory is the pace with which actors process expert-based information; (ii) disproportionate information processes result in creating, maintaining, or destroying a policy image; (iii) expert-based information affects the expansion of conflict expansion and mobilization of political interests; and (iv) expert-based information can be a contributing factor to both incremental and major policy change.

Social Construction Theory

The social construction theory, as presented by Ingram et al. (2007) and Schneider and Ingram (1997), focuses on the interdependence of power and social constructions of target populations to shape policy designs and to enhance or degrade democratic processes. The social construction theory depicts the perceived content and quality of expert-based information as socially constructed phenomena. The use of expert-based information is contingent on the composition of the scientific community, prevailing social constructions, and the distribution of power (Schneider & Ingram, pp. 150–88). Critical factors for understanding science in the social construction theory include the extent that (i) the scientific community is divided or united; (ii) the policy community is divided or unified; and (iii) the scientific and technical information presents risks or opportunities to powerful groups (Ingram et al., p. 109; Schneider & Ingram, pp. 150–88). The implication from the social construction theory is that expert-based information depends heavily on political context, and it can be used to reinforce or challenge prevailing social constructions of target populations and policy designs.

The Advocacy Coalition Framework

The advocacy coalition framework views policy as translations of beliefs from competing coalitions (Sabatier & Jenkins-Smith, 1993). Expert-based information affects policy indirectly by slowly altering the beliefs of policy actors in a process called “policy-oriented learning” (Sabatier, 1987; Sabatier & Zafonte, 2001; Weiss, 1977). During intense conflicts, the advocacy coalition framework predicts that (i) expert-based information becomes a valuable coalition resource to mobilize allies and to argue with opponents; and (ii) policy-oriented learning occurs within one coalition rather than between coalitions (Sabatier, 1987). Learning across coalitions will more likely occur when conflict is at intermediate levels, when there is a professional forum, when both coalitions have access to technical resources to engage in debate, and when discussions focus in part on secondary aspects of their belief systems (Sabatier, 2005; Sabatier & Weible, 2007, p. 220). Within the advocacy coalition framework, science indirectly influences policy through learning and belief change, and it is also dependent on both the level of conflict among coalitions and the availability of institutional forums enabling discourse among coalitions.

These four theories provide different insight into the use of expert-based information in policymaking, especially compared to the policy cycle. Expert-based information serves political uses from reinforcing social constructions of target populations to fortifying arguments of advocacy coalitions. Science often shapes policy indirectly by modifying policy images and by changing beliefs through learning. The multiple streams theory, the advocacy coalition framework, and the social construction theory emphasize that the role of science is dependent on the policy-making context.

Part 2. Three Uses of Expert-Based Information

One way to draw lessons from the policy process theories about expert-based information would be to make a list of all the ways that science is acquired, learned, and applied in policymaking. Such a list would showcase the nexus between science and policy but would not necessarily facilitate communication among scholars or guide research in the area. What is needed is a depiction of expert-based information in policy that simplifies the complexity. This section describes three uses of science in the policy process, drawing from the research utilization literature (Caplan et al., 1975; Dunn, 1994; Knorr, 1977; Pelz, 1978; Weiss, 1979).

Learning

The learning use of expert-based information focuses on the cognitive processes of policy participants. The learning use is derived from Weiss (1977) who argued that the accumulation of science slowly and indirectly affects policy by altering decision makers’ beliefs about the causes of problems and preferred solutions. The argument is that a single research study or report rarely has a significant impact on the beliefs of political actors or on any single policy decision; research instead affects policy

indirectly by accumulating, like sedimentation, and gradually altering the belief systems of the actors involved in a policy process. The learning use is the basis for policy-oriented learning and one path for belief and policy change in the advocacy coalition framework (Sabatier, 1987), and it also parallels the long-term effects of science on government in the multiple streams theory (Kingdon, 1995). In the punctuated equilibrium theory, the learning use is found in its theory of information processing, where expert-based information shapes learning disproportionately through a slow reluctance to accept contradictory information and with dramatic shifts in attempts to overcompensate for past decisions. From a punctuated equilibrium perspective, the learning use contributes to the accumulation of information and the radical shifts in attention and punctuations in policy.

Political

When decision makers rely on expert-based information to legitimize previously made policy decisions, information is being politicized (Fischer, 2000; Jasonoff, 1990; Jenkins-Smith, 1990; Ozawa, 1991; Schneider & Ingram, 1997). The political use may include the distortion and/or the selective use of information. In the policy process theories, examples of the political use include various strategies: (i) creating, maintaining, and destroying policy images in the punctuated equilibrium theory and social constructions in the social construction theory; (ii) convincing coalition allies to mobilize around a given issue or to counter arguments by opponents in the advocacy coalition framework; and (iii) attempting to tie policy ideas to problems by policy entrepreneurs in the multiple streams theory.

Instrumental

The instrumental use occurs when expert-based information directly affects policymaking. The instrumental use is based on the rational, ideal approach to problem solving where a problem exists, research is conducted, and the decision follows the research findings (Amara et al., 2004; Caplan et al., 1975; Weiss, 1979). Science used in this way might include direct impacts from science on forecasting impacts, highlighting trade-offs, and evaluating impacts of current policies and programs. In contrast to the political use, the instrumental use of expert-based information often requires a willingness to entertain outcomes that conflict with beliefs. Furthermore, the instrumental use is more observable and possibly more attributable to one or more information sources, in contrast to learning. Depending on the decision-making context, the instrumental use of expert-based information can be found in the policy process theories. For example, the advocacy coalition framework would predict that the instrumental use of science will more likely occur in professional forums where coalitions work cooperatively often with scientists. The social construction theory would predict that the instrumental use of science will more likely occur when there is consensus among scientists and policy participants. The instrumental use of expert-based information is not inconsistent with, but is harder to find in, the punctuated equilibrium theory and multiple streams theory. One could

speculate from a multiple streams perspective, for instance, that policy participants are more likely to use expert-based information instrumentally when the problem and policy streams are flowing independently from the political stream and less when entrepreneurs attempt to merge streams.

Part 3. The Three Policy Subsystem Types

If the political context is not considered, the three uses of expert-based information can oversimplify and misrepresent the nexus between science and policy. The question is not whether a use exists or does not exist—all three uses occur in a policy process at any moment in time. Instead, the question is under what contexts will one usage reinforce or dominate the others (Amara et al., 2004). The next challenge is to develop an understanding of different types of political contexts to subsequently draw lessons about the role of expert-based information in each.

The first step in understanding policy processes is to decide on a level of analysis. This article focuses on policy subsystems, as depicted explicitly in the punctuated equilibrium theory and the advocacy coalition framework (Baumgartner & Jones, 1993; Sabatier & Jenkins-Smith, 1993). Definitions of policy subsystems vary across the literature with a number of variants including whirlpools, subgovernments, iron triangles, and issue networks (see McCool, 1995, pp. 251–411). Borrowing from the advocacy coalition framework, policy subsystems are semiautonomous decision-making networks of policy participants that focus on a particular policy issue usually within a geographic boundary (Sabatier, 1987).

Taking a policy subsystem approach to understand political context is not enough to understand the use of expert-based information in policymaking. Depending on a person's perspective, the context of a policy subsystem might include cultural factors, institutions and rules, socioeconomic or environmental conditions, relations among actors, social constructions, power, and authority.⁴ To simplify, three ideal types of policy subsystems are defined and presented in Table 1. The first, a unitary policy subsystem, includes a single, dominant coalition that is similar to an iron triangle (Freeman, 1955) or a policy monopoly (Baumgartner & Jones, 1993). The second type, a collaborative policy subsystem, involves cooperative coalitions where conflict is at intermediate levels. The third is an adversarial policy subsystem, characterized by high conflict among competitive coalitions. Table 1 identifies five attributes of each policy subsystem type and the following paragraphs define each of these attributes.

1. *Coalitions* are defined mostly in accordance with the advocacy coalition framework. The advocacy coalition framework defines coalitions by compatible policy core beliefs and by similar coordination patterns (Sabatier & Jenkins-Smith, 1993). The advocacy coalition framework would predict high intra-coalition belief compatibility across all policy subsystem types. At the subsystem level, belief compatibility among actors refers to the degree of convergence or divergence in belief systems among all subsystem actors, including those from different coalitions (Jenkins-Smith, 1990, p. 95). The three subsystem types in

Table 1. A Summary of Three Ideal Types of Policy Subsystems

	Unitary Subsystems	Collaborative Subsystems	Adversarial Subsystems
1. Coalitions	Single coalition with high intra-coalition belief compatibility and high intra-coalition coordination	Cooperative coalitions with intermediate inter-coalition belief compatibility and high inter and intra-coalition coordination	Competitive coalitions with low inter-coalition belief compatibility and high intra-coalition and low inter-coalition coordination
2. Policy images	Single	Reconciled	Debated
3. Degree of centralization and interdependence	Authority is centralized and interdependence with other subsystems is ignored	Authority is decentralized, fragmented across policy subsystems, or both. Coalitions share access to authority.	Authority is centralized but fragmented within the policy subsystem, fragmented across policy subsystems, or both. Coalitions compete for access to authority
4. Venues	Coalition influences decisions in one or two amiable venues (legislature, agencies)	Coalitions use a variety of venues, including ones based on consensus-based institutions	Coalitions seek to influence decisions in any amiable venue (courts, legislatures, agencies)
5. Policy designs	Policies distribute benefits to single coalition	Policies are voluntary, win-win, and flexible in means	Policies are coercive, win-lose, and prescriptive in means

Table 1 vary from high compatibility in beliefs for unitary subsystems where opponents are largely nonexistent, to low compatibility in beliefs for adversarial subsystems where coalitions are very competitive, and to intermediate levels of compatibility where coalitions continue to disagree but agree enough to cooperate in collaborative subsystems.

Coalitions are also defined by their coordination patterns among allies and opponents. Coordination includes a range of activities from developing and executing joint plans to modifying behavior to achieve similar or noninterfering objectives (Sabatier & Jenkins-Smith, 1999, pp. 138–41). Whereas earlier versions of the advocacy coalition framework assumed that all coalition members interact, this assumption has been shown to be unrealistic (Nahrath, 1999; Schlager, 1995). It is more plausible and still consistent with the framework to assume that coordination among members will vary based on the centrality of a given issue to the members' beliefs and to the members' resources. Coalition members could then be classified as either auxiliary or principal members (Hula, 1999; Silva, 2007; Zafonte & Sabatier, 2004). Principal members are central to the coalition and coordinate the majority of coalition activities. The expectation is that principal coalition members are directly connected to nearly all coalition members or separated from other coalition members by one or two other coalition members. These principal members serve as entrepreneurs for a coalition in providing leadership and in bearing the transaction costs in coordinating activities. In

contrast, auxiliary members are peripheral to a coalition's network and coordinate with only a few other coalition members. This modified definition of coordination patterns within coalitions continues to assume that policy core beliefs are the glue that binds coalitions together but now assumes that some members will anchor the coalition as central participants whereas others will serve as auxiliary members on the periphery.

The three subsystems vary by the degree that coordination patterns are primarily within coalitions or between coalitions. In unitary and adversarial subsystems, coordination patterns will primarily occur within a coalition among allies. In collaborative subsystems, coordination patterns will include more cross-coalition interactions or a broker that connects opposing coalitions.⁵

2. *Policy images* are projected social constructions or public translations of a coalition's beliefs that frame events and serve as sound bites, campaign slogans, and causal stories (Baumgartner & Jones, 1993; Schneider & Ingram, 1997; Stone, 1997). To achieve their belief-driven objectives, coalitions project and defend policy images to contest an opponent or to attract positive or negative attention to the policy subsystem. Such a process is consistent with Jenkins-Smith's (1990) description of subsystem conflict as including the "struggle over the manipulation of the shape and content of the policy space" (p. 86). The principal audiences of a coalition's policy image include actors in other subsystems, the general public, and macropolitical actors. Following the logic of the punctuated equilibrium theory (Baumgartner & Jones, 1993; Pralle, 2006), a stable policy image serves to insulate policy subsystems from external interference whereas an unstable policy image can attract the attention of macropolitical actors with the potential to alter the distribution of resources and authority in the subsystem. The three policy subsystems vary with unitary policy subsystems showing a single policy image, collaborative policy subsystems showing a reconciled policy image, and adversarial policy subsystems showing contested policy images.
3. *Degree of centralization and interdependence.* Policies are made by actors with authority to make decisions and in most industrialized, democratic systems, authority is fragmented. The fragmentation of authority in a policy subsystem is a function of two factors: The first is the degree of centralization or devolution and the second is the degree of interdependence from other policy subsystems. In federalist systems, for example, as decentralization and devolution increases, authority shifts from federal government agencies toward state and local government agencies and from the exclusion to the inclusion of interested and affected nongovernment actors in decision making. As centralization increases, authority shifts toward federal government agencies and possibly state agencies. The implication is that some coalitions gain and others lose, as authority shifts between centralized and decentralized locales. The extent that centralization helps a coalition is contingent on the extent that the authority rests with government agencies sympathetic to the coalition's objectives or is divided with other government agencies counter to a coalition's objectives.

The authority in a policy subsystem is also affected by the degree of interdependence with other policy subsystems (Scholz & Stiftel, 2005). Policy subsystems are semiautonomous and always overlap so events in one policy subsystem will, to various degrees, affect other policy subsystems (Fenger & Klok, 2001; Zafonte & Sabatier, 1998). Given overlap with multiple policy subsystems, coalition members tend to pay attention to other policy subsystems when they can secure political gains or prevent political losses. Thus, the interdependence of policy subsystems should not be viewed as a politically neutral phenomenon but instead as a situation where coalitions can gain leverage over another coalition or where conflict emerges between coalitions from different policy subsystems.

A winning policy subsystem configuration from a coalition's perspective can be found in a unitary policy subsystem where authority is centrally located within one or just a few government agencies sympathetic to a coalition's objectives and where other policy subsystems are ignored. A more confrontational situation can be found in adversarial policy subsystems where authority is centrally located but also fragmented across multiple government agencies aligned with competing coalitions, where conflict between coalitions arises from the intersection with other policy subsystems, or both. In collaborative policy subsystems, authority tends to be more decentralized and devolved and the intersection with other policy subsystems can be a point of tension, but such tensions are also mitigated. In contrast to adversarial policy subsystems, coalitions in collaborative policy subsystems are more likely to use consensus-based institutions to help share access to authority and overcome the fragmentation within and between subsystems.

4. *Venues* are decision-making arenas where coalitions attempt to influence decisions made by each other and, particularly, by government agency officials (Baumgartner & Jones, 1993; Pralle, 2006; Sabatier & Jenkins-Smith, 1993). Traditional venues include legislative committees and subcommittees, courts, executives, and administrative agencies. These traditional venues dominate adversarial and unitary subsystems and are limited in resolving conflicts because (i) legislatures tend to sidestep conflicts by writing vague policies; (ii) administrative agencies respond to vague legislation by making coercive top-down decisions; and (iii) courts resolve procedural issues, not substantive disputes (Emerson, Nabatchi, O'Leary, & Stephens, 2003, pp. 5–9). These traditional venues also limit participation among interested and affected actors and limit discourse by relying mostly on hearings and testimonies. In contrast, collaborative subsystems not only include these traditional venues but also venues featuring a configuration of consensus-based institutions. These consensus-based institutions usually involve deliberative norms of engagement, inclusive participation, transparent decision rules, and face-to-face negotiation. The argument is not that coalitions solely engage in consensus-based institutions. Sometimes, for example, two cooperative coalitions will work together to pressure officials in a legislative venue. The argument, instead, is that collaborative policy subsystems

will feature a consensus-based institutional venue that fosters communication and cooperation between coalitions.

5. *Policy designs* are the content of a policy that "cause agents or targets to do something they would not do otherwise or with the intention of modifying behavior to solve public problems or attain policy goals" (Schneider & Ingram, 1997, p. 93). Policy subsystems vary in the extent that designs are coercive or voluntary and flexible as well as in their distribution of costs and benefits (Wilson, 1995).

Summarizing the patterns from Table 1, a unitary policy subsystem is one dominated by a single coalition. This dominant coalition will be supported by a single policy image that reflects a high degree of belief compatibility among members and facilitates coordination among members. If opposition exists, they will be unorganized and lack sufficient resources to pose any threat to the coalition's position. Authority in a unitary policy subsystem will be centralized within a few agencies that serve as principal members of the dominant coalition. The preferred instruments will distribute benefits to coalition members and costs across society or will be flexible and voluntary in compliance. The dominant coalition will maintain the status quo by continuing to assert influence in just a few venues, by making incremental policy choices, and by dampening internal and external events that might attract the attention of the general public or macropolitical actors.

Collaborative policy subsystems include cooperative coalitions who continue to disagree but who are able to find enough common ground to negotiate and work together. Access to authority is shared among coalitions, and negotiations occur in venues featuring open participation rules, transparent decision making, and consensus-based decision rules (Sabatier et al., 2005). Opponents regularly engage each other face-to-face; and cooperation between opponents is often aided by effective brokers. The coalitions continue to coordinate with allies but cross-coalition coordination occurs. Cooperative coalitions prefer policy instruments that are flexible in means or voluntary in compliance.

Adversarial policy subsystems will include competitive advocacy coalitions with incompatible beliefs and different patterns of coordination. Authority will be fragmented between coalitions. Competitive coalitions will usually be anchored by government agencies or a powerful interest group and have access to sufficient resources to challenge each other in framing the policy image and in accessing venues. Inter-coalition conflicts are compounded because coalitions prefer coercive and prescriptive policies. A competitive coalition trying to change the status quo will try to expand the scope of conflict outside of the policy subsystem by attracting attention of supportive macropolitical actors or other subsystem actors (Pralle, 2006). A competitive coalition wanting to maintain the status quo will try to keep decisions within a subsystem and dampen conflict escalation (Pralle, 2006).

Part 4. Expert-Based Information and Policy Subsystems

This section describes four attributes of expert-based information across the three types of policy subsystems.

1. *Analytic compatibility.* Analytic compatibility is the extent that experts active in a policy subsystem share similar theories and methods in understanding and explaining phenomena in a policy subsystem. Jenkins-Smith (1990) described a similar category called "analytic tractability" in reference to problem attributes. This article shifts his definition from problem attributes to expert attributes. The rationale is that complexity or tractability of a phenomenon is based on the state of existing theory and methods and less on the problem itself (King, Keohane, & Verba, 1994, p. 10). Analytic compatibility assumes that experts with similar analytical approaches or with similar "scientific paradigms" will elevate similar components of a system to study, use similar methods for measuring the chosen components, and make similar arguments of cause and effect within a system (Kuhn, 1970; Sabatier & Zafonte, 2001).

In studying experts in the policy process, analytic compatibility can be defined operationally by matching similar academic disciplines, subdisciplines, and other fields of study (Barke & Jenkins-Smith, 1993). The fundamental assumption underlying analytic compatibility is that disciplines represent a mobilization of bias in comprehending complex phenomena (Kuhn, 1970).⁶ The explanatory power of disciplines as an operational measure of analytic compatibility should not be overemphasized. Individuals are too complex to assume that the behavior of experts can be boiled down to their disciplinary training. Instead, the argument is that public policy researchers will be able to explain a portion of the variance in expert behavior in a policy process by measuring their discipline and matching the analytical assumptions of a given discipline to the coalitions' beliefs. Outside of policy core beliefs, the expectation is that analytic compatibility will provide a secondary basis for bonding experts to coalitions. The idea is that a coalition will more likely listen to experts if the experts' analytical approach reinforces a coalition's belief system.

2. *Treatment of uncertainty and risk.* Probably the most important attribute in studying expert-based information in the policy process is the treatment of uncertainty and risk. Scientific and technical uncertainty in a policy subsystem includes three dimensions: (i) inability of actors to know the components that define and affect a subsystem, including problem seriousness, various causes, or plausible actions and consequences; (ii) inability to measure and understand components of a subsystem; and (iii) inability to know the links or probabilities between actions and consequences (Jones, 2001, p. 48; Rowe, 1977). Uncertainties translate into risk when the probabilities linking actions to consequences are known (Knight, 1921). Both uncertainties and risks are used in subsystem politics. Uncertainty, for example, provides actors with an opportunity to use their beliefs to interpret unknowns in a decision situation. By emphasizing unknowns, subsystem actors can raise anxiety and fear among the general public and macropolitical actors or counter an opponent with a rival causal story (Stone, 1997). Emphasizing uncertainty can increase perceptions of formidable transaction costs, thereby threatening collective action within and between coalitions. Risks are also useful in

politics but for different reasons. The political power of risks is the ability to link a cause with an effect—no matter how probable or improbable.

3. *Experts and coalitions.* Experts will become members of a coalition based on shared beliefs and because their information will likely buttress a coalition's arguments. Experts join coalitions, especially in unitary and adversarial subsystems, because their information will be largely ignored otherwise (Sabatier, 1987). Coalitions seek experts as allies because of the legitimacy of expert-based information in helping to make and implement decisions. Extant research has shown that scientists can be coalition members by matching the beliefs of scientists with the coalition's beliefs and by asking all subsystem actors to identify information sources, allies, and coordination partners (Weible & Sabatier, 2005).
4. *Policy-oriented learning.* Policy-oriented learning is defined as "relatively enduring alternations of thought or behavioral intentions that result from experience and/or new information and that are concerned with the attainment or revision of policy objectives" (Sabatier & Jenkins-Smith, 1999, p. 123). Policy-oriented learning is adaptive learning and involves interpreting mistakes, making strategic adjustments, and trying new strategies for goal attainment (Sabatier, 1987). Learning, however, is limited by the actors' cognitive abilities. Responding to complex external stimuli, actors must simplify based on previously learned strategies, by belief heuristics as filters, and by focusing their attention (Jones, 2001). Actors with similar simplification strategies will probably find it easier to learn among each other. Thus, policy-oriented learning is easier within a coalition where members share similar belief systems than between coalition where opponents likely disagree (Sabatier & Jenkins-Smith, 1999, pp. 145–7). Among experts, another factor affecting policy-oriented learning is analytic compatibility. The argument is that the higher the analytical compatibility of scientists, the more likely they will learn from each other. Whether it is learning between coalitions or between experts, policy-oriented learning is not a politically neutral process but instead contributes to a policy subsystem's social constructions (Schneider & Ingram, 1997), policy images (Baumgartner & Jones, 1993), and policy spaces (Jenkins-Smith, 1990).

From Tables 1 and 2, the following arguments emerge about the use of expert-based information in the three subsystem types. In unitary subsystems, the analytical compatibility will be high because scientific and technical experts are aligned with the dominant coalition. In such a situation, experts will agree on which components of the subsystem to recognize, on methodological approaches, and on perceptions of uncertainties and risks. The political role of experts will be to report positive news to macropolitical actors and the general public. Scientists will be fairly central as a source of information but will be on the periphery as important allies and coordination partners. In unitary subsystems, learning will be constrained within the dominant coalition, largely reinforcing preexisting beliefs or the analytical approaches of active scientists.

In collaborative subsystems, subsystem actors will seek to integrate local information and expert-based information in consensus-based institutional

Table 2. The Use of Expert-Based Information in Three Types of Policy Subsystem

	Unitary Subsystems	Collaborative Subsystems	Adversarial Subsystems
1. Analytic compatibility	Experts agree on theory, data, and methods	Experts reconcile differences in theory, data, and methods	Experts disagree on theory, data, and methods
2. Treatment of uncertainty and risk	Uncertainty used for political gains	Uncertainty acknowledged and decisions proceed adaptively	Uncertainty used for political gains
3. Experts and coalitions	Experts serve as auxiliary allies	Experts serve as auxiliary allies or opponents	Experts serve as principal allies or opponents
4. Policy-oriented learning	High intra-coalition learning and no inter-coalition learning	High intra-coalition learning and high inter-coalition learning	High intra-coalition learning and low inter-coalition learning

venues. Actors will recognize the limits of information and proceed adaptively through joint fact-finding strategies (Dewitt, 1994; Lee, 1993; Norton, 2005; National Research Council [NRC], 1996). Cooperation across coalitions will coincide with cooperation across different analytical methods of inquiry. The result will be interdisciplinary approaches to problem solving. Scientists will continue to be coalition members but their centrality, especially in ally and opponent networks, will decrease.⁷ Policy-oriented learning occurs across coalitions and disciplines.

In adversarial subsystems, coalitions will diverge in their analytical approaches to problems solving and in their perceptions of uncertainties and risks. Coalitions will use uncertainty and risk to boost their preferred policy image or to challenge a policy image of a rival coalition. Because of the political value of expert-based information, experts will become central allies in their coalition. Consequently, experts will also become central opponents to a rival coalition. Learning will reinforce beliefs within coalitions and among experts with similar analytical approaches.⁸

Part 5: Stating Propositions

Given Tables 1 and 2, a number of propositions can be derived about the role of expert-based information in the policy process. Two sets of propositions are presented. The first set includes three propositions about the use of expert-based information in policy subsystems.

1. *The political use of expert-based information will be highest in adversarial subsystems.* The rationale for the first proposition derives from the high-value conflicts in adversarial subsystems, making expert-based information appealing as a political weapon to argue against opponents.
2. *The instrumental use of expert-based information will vary from the highest in collaborative, to an intermediate level in unitary, and to the lowest in adversarial policy subsystems.* Science will least likely be used instrumentally in adversarial policy subsystems because actors will primarily be set on defeating opponents and

reinforcing their policy positions and not on following the suggestions from expert-based information. The instrumental use will most likely be found in collaborative policy subsystems because of the potential for iterative, joint fact-finding to get the right science and to get the science right for decision-making actors (Ehrmann & Stinson, 1999; NRC, 1996). The instrumental use will be found in unitary, as long as the science reinforces the status quo of the subsystem, but will be ignored otherwise because of the homogeneity of beliefs among members of the dominant coalition.

3. *Learning will occur within coalitions or among experts with similar analytical approaches in all subsystems and will most likely occur across coalitions or across experts with dissimilar analytical approaches in collaborative subsystems.* In adversarial and unitary subsystems, learning will mostly reinforce existing beliefs or analytical methods. The intermediate level of conflict and presence of consensus-based venues in collaborative subsystems makes it the best type of policy subsystem for learning across coalitions or across different analytical approaches.⁹

The second set of propositions summarizes the rationales for shifts from one subsystem to another and the role of expert-based information in each.

1. *A shift from a collaborative subsystem to a unitary subsystem will occur under two conditions: (i) when there is a decrease over time in the diversity of participants relative to the diversity of the actors affected by subsystem decisions; and (ii) when there is a decrease over time in attention given to the subsystem by macropolitical actors and the general public.* The participation within a collaborative policy subsystem can be reduced by human time constraints, lack of media attention by the media, loss of subsystem salience, and the alienation of new actors by the emergent vocabularies and social constructions (Leach, 2004; Norton, 2005; Schneider & Ingram, 1997).
2. *A shift from a unitary subsystem to an adversarial subsystem will occur when there is an increase in participation by macropolitical actors and/or by new actors from the same or from a competitive policy subsystem.* This proposition is a simplified restatement of the collapse of a policy monopoly (Baumgartner & Jones, 1993; Redford, 1969; Schattschneider, 1960).
3. *A shift from a collaborative subsystem to an adversarial subsystem will occur when new actors begin to participate from a competing policy subsystem and/or after an internal or external event alters the balance of power between existing coalitions.* This proposition focuses on the increasing interdependence of competing policy subsystems (Redford, 1969) or from the reemergence of conflict from an event that radically shifts subsystem policies (Sabatier & Jenkins-Smith, 1993).
4. *A shift from an adversarial subsystem to a collaborative subsystem will occur after a hurting stalemate when the existing coalitions exhaust the available venues and view the status quo as unacceptable.* This proposition is a restatement from the advocacy coalition framework (Sabatier & Jenkins-Smith, 1999, p. 150).

Conclusions

This article seeks to understand the use of expert-based information in policy from the perspective of four major theories of the policy process, adding to the related literature (e.g., Ingram et al., 2004; Jenkins-Smith, 1990; Kingdon, 1995; Lee, 1993; Ozawa, 1991; Sabatier, 1987; Schneider & Ingram, 1997). Building on previous works, the emphasis here is on the comparison of different uses of expert-based information across three types of policy subsystems and by summarizing and deriving testable propositions.

The findings in Tables 1 and 2 rely mostly on the advocacy coalition framework, the punctuated equilibrium theory, and the social construction theory. These three analytical approaches are complementary because they share similar assumptions, share similar causal logic about the policy process, and can be easily applied to subsystem politics. The multiple streams theory was of less utility, probably because its logic applies more to macropolitics than subsystem politics. For instance, the multiple streams theory assumes fluid participation among participants, which better characterizes macropolitical behavior than subsystem behavior. However, the logic in the multiple streams theory about coupling ideas and problems is consistent with the relationships presented in Tables 1 and 2.

This review augments the advocacy coalition framework in at least four ways.

1. The advocacy coalition framework predicts that conflicts will generally occur between coalitions within policy subsystems. This article argues that conflicts can also occur between coalitions from different policy subsystems. While similar arguments are made by Fenger and Klok (2001) and Zafonte and Sabatier (1998), conflict between coalitions from different subsystems is better conceptualized through the expansion of conflict and venue shopping as found in the punctuated equilibrium theory.
2. The advocacy coalition framework defines coalitions as actors with similar policy core beliefs and coordination patterns. This article adds to this definition by formalizing two types of coalition members: principal and auxiliary (Hula, 1999; Silva, 2007; Zafonte & Sabatier, 2004).
3. Policy images (or social constructions) are among the most important concepts in the punctuated equilibrium and social construction theories. However, both of these theories have been unclear with respect to the source of policy images. In the advocacy coalition framework, policy images become public projections of belief systems.
4. The advocacy coalition framework connects scientists to coalitions based on similar beliefs. This article adds analytical compatibility as a secondary bond between scientists and coalitions.

In outlining the elements and relationships in Tables 1 and 2 and in deriving the propositions, an effort was made to meet the criteria for generating theories in King et al. (1994, pp. 99–114) and in Sabatier (1999, pp. 262–6). First, an attempt was made to

define clearly the concepts and to make them logically coherent. Second, relationships in Tables 1 and 2 have two causal drivers: either beliefs from the advocacy coalition framework or attention from the punctuated equilibrium theory. Third, the propositions are falsifiable. Fourth, the intended scope is one or more policy subsystems. Fifth, it offers nonobvious propositions. Sixth, it is based on a review of, and an attempt to improve, existing theories and frameworks.

To a great extent, this review and synthesis simplifies the use of expert-based information, the role experts, and policy subsystems. In the face of complexity, however, the best strategy is to proceed with explicit and clear simplifying strategies that can aid communication, guide behavior, and—most importantly—be tested and applied empirically. There is probably no better way of learning from mistakes and proceeding adaptively as researchers.

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Notes

Versions of this article have been presented at the 2007 annual meeting of the American Political Science Association, the 2007 symposium on Collaborative Governance in the West at Oregon State University, and the 2008 Arthur M. Sackler Colloquia at the National Academy of Sciences. I wish to thank Austin Dickson, Edella Schlager, Ed Weber, Brent Steele, Mark Lubell, Paul Sabatier, Dorothy Daley, Richard Barke, Gordon Kingsley, and two anonymous reviewers for comments.

1. Researchers can look to the work by Barke and Jenkins-Smith (1993), who show that different organizational affiliations of scientists shape perceptions of risks.
2. Another major policy process theory is the institutional analysis and development framework (Ostrom, 1990, 2005). The IAD framework seeks to explain individual behavior and collective action within action arenas that are shaped by physical, community, and institutional factors (Ostrom, 1990). In the IAD framework, information is used by actors mostly to reduce transaction costs, identify important strategies, and facilitate collective action (Schlager, 2007, p. 301). While the IAD framework mostly expects direct, instrumental uses of information, it does not preclude the opportunistic use of information for personal gain (Schlager, 2007). The implication from the institutional analysis and development framework is twofold: (i) information is typically used instrumentally and affects the extent that actors can act collectively; and (ii) the opportunistic use of information is possible. The institutional analysis and development framework is not discussed in this review because it downplays science, learning, and the role of coalitions and because it is not a subsystem framework.
3. The multiple streams theory has been labeled a framework (Zahariadis, 2007). In this article, I follow Ostrom's (2007) definitions of frameworks, theories, and models, and adopt Schlager's (1995) classification that multiple streams is better categorized as a theory than a framework. I use similar arguments for labeling the social construction theory. For simplicity, I often refer to the frameworks and theories of the policy process as just "theories."
4. Other researchers have categorized different kinds of policy subsystems (see Howlett & Ramesh, 2003; McCool, 1995).
5. Two types of coalitions are presented: competitive and cooperative. Competitive coalitions exist in adversarial policy subsystems and are defined by high levels of distrust, polarized beliefs, and mostly internal coordination patterns. In contrast, cooperative coalitions exist in collaborative policy subsystems and have intermediate levels of trust and belief differences and more cross-coalition interactions.
6. Empirical support for the analytical bias of academic disciplines can be found in Barke and Jenkins-Smith (1993). Recognizing that disciplines create analytical bias is not an original argument (e.g., Snow, 1964). It is, however, a salient topic today. The movement across academia for interdisciplinary edu-

ation is an institutional response to the limits of uni-disciplinary education in solving complex problems. Similarly, a number of recent publications discuss biases in academic disciplines and the effects on public policy (e.g., Cohen, 2006; Norton, 2005). Cohen (2006), for example, offers a multi-disciplinary framework to help policy actors counter the "deep analytic bias" in their disciplinary approaches to understanding environmental policy (p. 12).

7. Weible (2007) found that the citations to university scientists and consultant decreased for ally and opponent networks in two collaborative compared to two adversarial policy subsystems.
8. In collaborative and adversarial policy subsystems, the coalitions might vary in the extent that they rely on science. Some adversarial and collaborative policy subsystems will involve coalitions with active scientists as members. Other collaborative and adversarial subsystems will involve a coalition with members from the scientific community and another without. When a coalition with experts faces a coalition without experts, issues of technocracy and democratic accountability of expert-based decisions will likely emerge (see Fischer, 2000; Lach, List, Steele, & Shindler, 2003; Schneider & Ingram, 1997).
9. This proposition builds heavily from the advocacy coalition framework (Sabatier & Jenkins-Smith, 1993). A glance at the relationships in Tables 1 and 2 suggests additional propositions and hypotheses. For example, Table 2 suggests the following: In collaborative compared to adversarial policy subsystems, the centrality of experts in coalitions will decrease. One of the advocacy coalition framework's hypotheses is in Table 2: "Policy-oriented learning across belief systems is more likely when there is an intermediate level of informed conflict between the two coalitions" (Sabatier & Jenkins-Smith, 1999, p. 124).

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TITLE: Expert-Based Information and Policy Subsystems: A Review and Synthesis
SOURCE: Policy Stud J 36 no4 N 2008

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Policy Entrepreneurship and Policy Change

Michael Mintrom and Phillipa Norman

This article reviews the concept of policy entrepreneurship and its use in explaining policy change. Although the activities of policy entrepreneurs have received close attention in several studies, the concept of policy entrepreneurship is yet to be broadly integrated within analyses of policy change. To facilitate more integration of the concept, we here show how policy entrepreneurship can be understood within more encompassing theorizations of policy change: incrementalism, policy streams, institutionalism, punctuated equilibrium, and advocacy coalitions. Recent applications of policy entrepreneurship as a key explanation of policy change are presented as models for future work. Room exists for further conceptual development and empirical testing concerning policy entrepreneurship. Such work could be undertaken in studies of contemporary and historical policy change.

KEY WORDS: policy entrepreneurship, policy change, leadership, agenda setting, institutional change

Scholars of public policy often seek to explain how particular policy ideas catch on. The dynamics of policy change have been theorized and explored empirically from a range of perspectives during the past few decades. In these investigations, the role played by specific advocates of policy change has been frequently noted. Highly motivated individuals or small teams can do much to draw attention to policy problems, present innovative policy solutions, build coalitions of supporters, and secure legislative action. Of course, no political activity or policy initiative can go anywhere without many actors getting involved. The question then arises: By what means can advocates of policy change come to have broad influence? Several policy scholars have argued that such advocates achieve success because they exhibit a high degree of entrepreneurial flare. According to this line of argument, by closely observing the practices of advocates of policy change, we can come to appreciate how they perform a function in the policy process equivalent to entrepreneurs in the business context. Following an emerging convention, we here define such advocates of policy change as *policy entrepreneurs*.

This article foregrounds policy entrepreneurship as an explanation of policy change. While the activities of policy entrepreneurs have received close attention in several studies (Crowley, 2003; Kingdon, 1984/1995; Mintrom, 2000; Roberts & King, 1991; Weissert, 1991), the concept of policy entrepreneurship is yet to be broadly integrated within studies of policy change. We contend that new applica-

tions of the concept of policy entrepreneurship could yield many insights into the politics of policymaking. Those new applications could be made in both studies of contemporary policy change and historical studies. In trying to account for the somewhat limited use made to date of the concept of policy entrepreneurship, we note a weakness in prior theoretical work. That is, previous discussions that have highlighted the work of policy entrepreneurs have rarely considered the fit between the concept of policy entrepreneurship and broader, more encompassing theorizations of policy change. We show how that weakness in past accounts can be rectified. Indeed, the concept of policy entrepreneurship fits well with other explanations of policy change, and deserves a place in the mainstream of policy studies.

This review proceeds in three steps. First, we explore the concept of the policy entrepreneur. In so doing, we explain how this concept differs from others that have been used to label actors in the policymaking process. Following this, we examine the fit of the concept with established theories of policy change. These theories include Lindblom's (1968) work on incrementalism, Kingdon's (1984/1995) work on policy streams, March and Olsen's (1989) work on institutionalism, Baumgartner and Jones' (1993) work on punctuated equilibrium in policy communities, and Sabatier's (1988) work on advocacy coalitions. Finally, we note recent uses of policy entrepreneurship as a key explanation of policy change. We discuss how these applications could serve as models for studies of policy change in other areas. We also suggest directions for future research on policy entrepreneurship.

While the concept of policy entrepreneurship could be applied more widely than has been the case to date, indiscriminate application must be avoided. Just as entrepreneurs cannot be blamed or credited for all changes that occur in the business realm, we should not assume that policy change is always and everywhere driven by policy entrepreneurship. The extant literature suggests that policy entrepreneurship is most likely to be observed in cases where change involves disruption to established ways of doing things. Public policies are designed and implemented to address particular problems. Incremental changes are then made to those policies as new challenges arise. However, instances occur when new challenges appear so significant that established systems of managing them are judged inadequate. A key part of policy entrepreneurship involves seizing such moments to promote major change. Such action requires creativity, energy, and political skill.

Elements of Policy Entrepreneurship

Many actors and organizations participate in policymaking or seek to influence decision makers. Most of these participants are comfortable working within established institutional arrangements; doing their bit to achieve improved outcomes for themselves and their supporters without upsetting the status quo. Policy entrepreneurs distinguish themselves through their desire to significantly change current ways of doing things in their area of interest.¹

In his pioneering use of the term, Kingdon (1984/1995) noted that policy entrepreneurs ". . . could be in or out of government, in elected or appointed positions, in interest groups or research organizations. But their defining characteristic, much as in the case of a business entrepreneur, is their willingness to invest their resources—time, energy, reputation, and sometimes money—in the hope of a future return" (p. 122). Discussions of policy entrepreneurship have evolved over time, from instances where the term was used as a loose metaphor, to more sophisticated treatments. Ironically, the early emphasis on the individual as change agent appears to have served as an inhibitor to theorization. In any given instance of policy change, it is usually possible to locate an individual or a small team that appears to have been a driving force for action. But in all such cases, the individuals, their motives, and their ways of acting will appear idiosyncratic. And idiosyncrasy does not offer propitious grounds for theorization. To break this theoretical impasse, policy entrepreneurship needed to be studied in a manner that paid attention simultaneously to contextual factors, to individual actions within those contexts, and to how context shaped such actions.

In their analysis of change agents in local government, Schneider, Teske, and Mintrom (1995) offered a model for understanding the emergence and practices of entrepreneurial actors, given specific contexts. Applying a similar methodology, and combining it with event history analysis, Mintrom (1997a) showed how policy entrepreneurship could be studied systematically. That work, and subsequent studies (Mintrom, 2000; Mintrom & Vergari, 1998), demonstrated that the likelihood of policy change is affected by key contextual variables and by what policy entrepreneurs do within those contexts. When a range of contextual factors indicated that legislative change was likely to happen, the actions of policy entrepreneurs did not seem to have major impacts. However, in cases where contextual variables appeared to reduce the likelihood of change occurring, the actions of effective policy entrepreneurs could be decisive. Working with different sets of policy issues and different sets of policymaking contexts, Balla (2001) and Shipan and Volden (2006) reported similar findings.

Policy entrepreneurs can be identified by their efforts to promote significant policy change. Their motivations might be diverse. However, given their goal of promoting change, their actions should follow certain patterns. What does policy entrepreneurship involve? Following others, particularly Kingdon (1984/1995), Mintrom (2000), and Roberts and King (1996), we suggest that four elements are central to policy entrepreneurship. These are: displaying social acuity, defining problems, building teams, and leading by example.² We next review each element in turn, noting linkages between their discussion by those who have studied policy entrepreneurs and relevant discussions in the broader literature on policymaking and policy change. In this discussion, we do not rank the relative importance of each element. Our expectation is that all policy entrepreneurs exhibit these characteristics at least to some degree. Some policy entrepreneurs will be stronger in some of these characteristics than others. For example, Mintrom observed that some policy entrepreneurs were more effective than others at operating in networks (which relates to social acuity) and promoting and maintaining advocacy coalitions (which relates to team building).

Displaying Social Acuity

Kingdon (1984/1995) argued that within policymaking contexts, policy entrepreneurs take advantage of "windows of opportunity" to promote policy change. The metaphor holds appeal, and empirical evidence indicates the importance of context for shaping the prospects of success for advocates of policy change. However, in policymaking contexts, as in all areas of human endeavor, opportunities must be recognized before they can be seized and used to pursue desired outcomes. This suggests change agents must display high levels of social acuity, or perceptiveness, in understanding others and engaging in policy conversations.

Empirical evidence indicates that policy entrepreneurs display social acuity in two key ways. First, they make good use of policy networks. Stretching back to Mohr's (1969) studies of organizational innovation and Walker's (1969) studies of the spread of policy innovations, we find that those actors most able to promote change in specific contexts have typically acquired relevant knowledge from elsewhere. Balla (2001), Mintrom and Vergari (1998), and True and Mintrom (2001) have demonstrated that engagement in relevant policy networks spanning across jurisdictions can significantly increase the likelihood that advocates for policy change will achieve success. The second way that policy entrepreneurs display social acuity is by understanding the ideas, motives, and concerns of others in their local policy context and responding effectively. Policy actors who get along well with others and who are well connected in the local policy context tend to achieve more success in securing policy change than do others (Kingdon, 1984/1995; Mintrom & Vergari, 1998; Rabe, 2004).

Defining Problems

The political dynamics of problem definition have been explored extensively by policy scholars (Allison, 1971; Baumgartner & Jones, 1993; Nelson, 1984; Rochefort & Cobb, 1994; Schneider & Ingram, 1993; Schön & Rein, 1994). Problems in the policy realm invariably come with multiple attributes. How those problems get defined—or what attributes are made salient in policy discussions—can determine what individuals and groups will pay attention to them. Problem definition, then, affects how people relate specific problems to their own interests. Viewed in this way, definition of policy problems is always a political act. Effective problem definition requires the combination of social acuity with skills in conflict management and negotiation (Fisher & Patton, 1991; Heifetz, 1994).

As actors who seek to promote significant policy change, policy entrepreneurs pay close attention to problem definition. Among other things, this can involve presenting evidence in ways that suggest a crisis is at hand (Nelson, 1984; Stone, 1997), finding ways to highlight failures of current policy settings (Baumgartner & Jones, 1993; Henig, 2008), and drawing support from actors beyond the immediate scope of the problem (Levin & Sanger, 1994; Roberts & King, 1991; Schattschneider, 1960).

Building Teams

Like their counterparts in business, policy entrepreneurs are team players. Individuals are often the instigators of change, but their strength does not come from the force of their ideas alone, or from their embodiment of superhuman qualities. Rather, their real strength comes through their ability to work effectively with others. The team-building activities of policy entrepreneurs can take several forms. First, it is common to find policy entrepreneurs operating within a tight-knit team composed of individuals with different knowledge and skills, who are able to offer mutual support in the pursuit of change (Meier, 1995; Mintrom, 2000; Roberts & King, 1996). Second, as noted in our discussion of social acuity, policy entrepreneurs make use of their personal and professional networks—both inside and outside the jurisdictions where they seek to promote policy change. Policy entrepreneurs understand that their networks of contacts represent repositories of skill and knowledge that they can draw upon to support their initiatives (Burt, 2000; Knoke, 1990). Finally, policy entrepreneurs recognize the importance of developing and working with coalitions to promote policy change (Mintrom & Vergari, 1996). The size of a coalition can be crucial for demonstrating the degree of support a proposal for policy change enjoys. Just as importantly, the composition of a coalition can convey the breadth of support for a proposal. That is why policy entrepreneurs often work to gain support from groups that might appear as unlikely allies for a cause. Used effectively, the composition of a coalition can help to deflect the arguments of opponents of change (Baumgartner & Jones, 1993).

Leading by Example

Risk aversion among decision makers presents a major challenge for actors seeking to promote significant policy change. Policy entrepreneurs often take actions intended to reduce the perception of risk among decision makers. A common strategy involves engaging with others to clearly demonstrate the workability of a policy proposal. For several decades, those promoting deregulation of infrastructural industries in the United States—both at the state and national level—relaxed regulatory oversight in advance of seeking legislative change (Derthick & Quirk, 1985; Teske, 2004). These preemptive actions reduced the ability of opponents to block change by engendering fears about possible consequences. For similar reasons, foundations have funded pilot projects associated with expansion of health insurance coverage (Oliver & Paul-Shaheen, 1997), the use of school vouchers (Mintrom & Vergari, 2009; Moe, 1995), and support for early childhood programs (Knott & McCarthy, 2007). In all instances, the creation of working models of the proposed change served to generate crucial information about program effectiveness and practicality.

When they lead by example—taking an idea and turning it into action themselves—agents of change signal their genuine commitment to improved social outcomes. This can do a lot to win credibility with others and, hence, build momentum for change (Kotter, 1996; Quinn, 2000). Further, when policy entrepreneurs take

action, they can sometimes create situations where legislators look out of touch (Mintrom, 1997b). In such situations, the risk calculations of legislators can switch from a focus on the consequences of action to a focus on the consequences of inaction.

Other things being equal, policy entrepreneurs who exhibit the qualities discussed here are more likely to achieve success than those who do not. However, we should also recognize that policy entrepreneurs are embedded in social contexts, and that those contexts change across space and time. Given this, it might happen that a given policy entrepreneur can realize his or her policy goals without necessarily behaving in ways that are consistent with what has been said here. When attempting to assess why any particular policy entrepreneur or team of policy entrepreneurs happened to meet with success or failure, we need to look both at the broader conditions they faced and the actions that they engaged in. The elements of policy entrepreneurship noted here offer a starting point for thinking about the things that policy entrepreneurs might do to improve their chances of achieving success. At the same time, they suggest a means by which we might diagnose failure. Noting that particular policy entrepreneurs did not act in accord with our expectations, we might then go on to deduce how their choices contributed to the observed outcome.

Policy Entrepreneurship in Broader Explanations of Policy Change

Having reviewed four elements central to policy entrepreneurship, we now discuss how the concept of policy entrepreneurship can be integrated into five mainstream theorizations of policy change.³ In so doing, we seek to address a frequent limitation of previous discussions of the activities of policy entrepreneurs.

Policy Entrepreneurship and Incrementalism

In his conceptualization of the policy process, Charles Lindblom (1968) emphasized the role of proximate policymakers. These are actors with decision-making powers such as presidents, governors, legislators, council members, and bureaucrats. Proximate policymakers are subject to influence both from inside and from outside of their various policy venues. Motivated by their own interests and agendas, they interact with each other with the hope of gathering support for their policy preferences. Lindblom rejected the notion that policymakers conduct rational, comprehensive assessments of options and consequences when making policy choices. According to Lindblom, policies are often made in a reactive fashion. Among policymakers, there are often divergent views and unanimity is difficult to achieve. As a result, policies emerge as compromises. The political posturing and risk avoidance exhibited by proximate policymakers result in incrementalism. That is, policy changes occur slowly, one step at a time. This is a way of dealing with complex policy

issues. The policymakers do not do anything in haste, fearing the backlash associated with a misstep.

In this conceptualization of policymaking, there is room to consider the role of the policy entrepreneur. Policy entrepreneurs might come from the ranks of proximate policymakers or they might be more on the margins of policymaking circles. According to Lindblom, the key to successfully engaging proximate policymakers is to present your argument in an appealing form. Likewise, proximate policymakers can be influenced by their assessments of the interests represented in a policy entrepreneur's coalition, and the size and strength of it. When seeking to have influence from outside the centers of policymaking, policy entrepreneurs must be careful to cultivate close contacts with those who are in decision-making positions. In this way, they can demonstrate their trustworthiness and their commitment to their ideas for policy change. Provost (2003, 2006) has explored the systematic ways that state attorneys general have sought to influence policymaking in their jurisdictions. Rabe (2004) has shown how state-level policy analysts and others in bureaucratic positions can have influence when technical issues are at stake.

Incrementalism presents a frustrating inhibitor to dramatic change. However, patient actors who hold a clear vision of the end they are seeking can still move policy in directions they desire. The key is to see how a series of small changes could, over time, produce similar results as more dramatic, immediate change. To maintain a functioning coalition, under incrementalism, policy entrepreneurs must keep track of their small victories and explain to their supporters how those incremental steps are taking them in the right direction.

Policy Entrepreneurship and Policy Streams

John Kingdon's (1984/1995) policy streams theory is concerned with why and how certain issues get attention at certain times. Kingdon explored how ideas gain support through formal and informal routes. Within his theory, Kingdon recognized the role that policy entrepreneurs play in linking problems, policy ideas, and politics to draw attention to issues and articulate them onto government agendas. According to Kingdon, policy entrepreneurs must find effective ways to present problems and solutions within the community of relevant actors who can contribute to debate on a given issue. Often, a good sense of timing is critical; that is, the ability to perceive and take advantage of windows of opportunity.

Kingdon's theory of policy streams has informed the work of many scholars of policy change. His portrait of policy entrepreneurs as agents of change—people who make connections across disparate groups, and engaging with proximate policymakers—has also been influential. Taking Kingdon's work as a point of departure, several efforts have been made to advance discussion of timing in the policy process (Baumgartner & Jones, 1993; Geva-May, 2004; Zahariadis, 2007). In other works that have been influenced by Kingdon's theory, closer attention has been paid to the identification of policy entrepreneurs and the analysis of their actions (Mintrom, 2000; Roberts & King, 1996).

Policy Entrepreneurs and Institutionalism

The literature comprising the new institutionalism has developed in a number of distinctive ways (Hall & Taylor, 1996; March & Olsen, 1989; Ostrom, 2007; Thelen, 1999). However, despite the differences in methodological perspective and substantive focus, contributions to the new institutionalism all share a deep interest in the interplay between structures and the agency of actors operating within or across them. Understood as the rules of the game, institutions serve to provide stability and certainty to those operating within them (Eggertsson, 1990; North, 1990). Alongside the development of formal rules, it is common to find the emergence of informal norms of behavior that further serve to guide the behaviors of actors within the institutional structures (Barzelay & Gallego, 2006; Ostrom, 1990; Scott, 2001).

Institutionalist accounts of the policy process and policy change identify considerable space for the exercise of policy entrepreneurship (Feldman and Khademian, 2002; Majone, 1996; March & Olsen, 1989; Scharpf, 1997). However, these accounts are also useful for explaining the limits of such activity. The new institutionalism highlights several attributes of actors that can significantly increase their ability to instigate change. These include having deep knowledge of relevant procedures and the local norms that serve to define acceptable behavior. An implication of the new institutionalism, then, is that efforts to secure major change must be informed by insider sensibilities. That understanding helps us appreciate why the efforts of "outsiders" to make change often come to nothing. We are brought back to the importance of social acuity. Policy entrepreneurs must be able to understand the workings of a given context without becoming so acculturated to it that they lose their critical perspective and their motivation to promote change. Evidence suggests that policy entrepreneurs can be successful in this regard when they make good use of networks (Mintrom & Vergari, 1998) or when they form teams that contain both "insiders" and "outsiders" (Brandl, 1998; Roberts & King, 1996).

Policy Entrepreneurs and Punctuated Equilibrium

A discrepancy exists between incrementalist accounts of policy change and those that discuss instances of dramatic policy shifts. In seeking to reconcile these different accounts, Baumgartner and Jones (1993) developed their theory of the policy process as one characterized by long periods of stability punctuated by moments of abrupt, significant change. In this account of policy change, the role of policy entrepreneurs is noted, although more emphasis is placed on the broader dynamics that drive stability and change. As in Lindblom's account, Baumgartner and Jones suggested that stability is the product of the limited ability for legislators to deal with more than a few issues at a time (see also Jones, 1994; Jones & Baumgartner, 2005). Stability is further supported by the development of policy monopolies, controlled by people who go to considerable lengths to promote positive images of current policy settings and deflect calls for change. In this interpretation of policymaking and policy change, the task for the policy entrepreneur is to bring the policy issues out into the public domain and attempt to invoke a swell of interest

intended to induce major change. Even within stable systems, the potential for change exists. For policy entrepreneurs, the challenge is to undermine the present policy images and create new ones that emphasize major problems and a need for change.

Baumgartner and Jones (1993) noted that, particularly in federal systems of government, it is possible for policy changes to occur in multiple venues. When policy change appears blocked at one level—say, the level of state governments—it might be effectively pursued elsewhere—say, at the local level. That observation is consistent with the notion of the policy entrepreneur as a change agent who can lead by example. As we noted earlier, it is possible for policy entrepreneurs to prompt change in one policy venue by first pursuing it in another.

Drawing upon the work of Baumgartner and Jones (1993), several studies have subsequently explored linkages between the actions of policy entrepreneurs and the initiation of dynamic policy change. These include contributions by John (1999, 2003), Peters (1994), and True (2000).

Policy Entrepreneurs and Advocacy Coalitions

Paul A. Sabatier's theorization of policy change has generated the advocacy coalition framework and ongoing refinements (Sabatier, 1988; Sabatier & Jenkins-Smith, 1993; Sabatier & Weible, 2007). Advocacy coalitions are portrayed as "people from a variety of positions (e.g., elected and agency officials, interest group leaders, researchers) who share a particular belief system—that is, a set of basic values, causal assumptions, and problem perceptions—and who show a nontrivial degree of coordinated activity over time" (Sabatier, 1988, p. 139). Coalition participants seek to ensure the maintenance and evolution of policy in particular areas, such as environmental management, education, and population health. The advocacy coalition framework tells us how ideas for change emerge from dedicated people that coalesce around an issue. Policy entrepreneurship is not treated explicitly within the framework. However, there is considerable room for compatibility between explanations of policy change grounded in the advocacy coalition framework and those grounded in a focus on policy entrepreneurship. For example, within the advocacy coalition framework, change is anticipated to come from both endogenous and exogenous shocks. But, to have political effect, those shocks need to be interpreted and translated. This process of translation is directly equivalent to the process of problem definition, whereby objective social, economic, and environmental conditions are portrayed in ways that increase the likelihood that they will receive the attention desired of decision makers. Policy entrepreneurs typically display skills needed to do this kind of translational and definitional work.

Mintrom and Vergari (1996) considered the link between formation and maintenance of advocacy coalitions and the efforts of policy entrepreneurs. In that account, emphasis was given to how policy entrepreneurs define problems in ways that maximize opportunities for bringing on board coalition partners. The value to advocacy coalitions of strong team builders was also emphasized and demonstrated empirically. In subsequent studies, drawing on empirical evidence across a range of

policy areas and policymaking venues, Goldfinch and Hart (2003), Hajime (1999), Litfin (2000) and Meijerink (2005), among others, have indicated the merits of incorporating a discussion of policy entrepreneurship within discussions of advocacy coalitions.

The consensus found in most discussions of policymaking is that policy change typically occurs incrementally. However, instances arise where problems are not able to be readily addressed within existing policy settings. The concept of policy entrepreneurship helps us make sense of what happens in and around policy communities during these times. But the value of policy entrepreneurship as a concept is greatly increased when it is integrated with broader theorizations of the sources of policy stability and policy change. Our purpose here has been to show how that can be achieved. We have also noted empirical studies produced in the past two decades that have started to provide this kind of joining of policy entrepreneurship with other explanations of policy change.

Recent Empirical Investigations

Recently, those seeking to explain significant policy change have increasingly made use of the concept of policy entrepreneurship. The concept has been applied to a diverse set of policy areas. The set includes—but is certainly not limited to—the design of welfare policy (Crowley, 2003), the rise of school choice (Mintrom, 2000), efforts to reform health care (Oliver & Paul-Shaheen, 1997), abatement of greenhouse gas emissions (Rabe, 2004), and the disposal of radioactive waste (Ringius, 2001). Although the concept of policy entrepreneurship has been developed and refined primarily in the United States, it has now been applied to explain policy change in many countries, including Australia (Goldfinch & Hart, 2003; MacKenzie, 2004), China (Zhu, 2008), Germany (Dyson, 2008), New Zealand (Mintrom, 2006), Sweden (Reinstaller, 2005), and the United Kingdom (Petchey, Williams, & Carter, 2008). The concept of policy entrepreneurship has also been applied to explain the diffusion of policy ideas across countries (Dolowitz & Marsh, 2000; Stone, 2004). Here, we discuss two recent empirical investigations, one by Rabe (2004), and the other by Crowley (2003). Both investigations used the concept of policy entrepreneurship to explain instances of significant policy change.

Rabe (2004) documented the emergence of policy entrepreneurs who highlighted the issue of climate change and championed new approaches to environmental policy at the state level in the United States. According to Rabe, environmental policy entrepreneurs tend to have expertise in the energy or environment sectors. They are thus well placed within the relevant policy venues to promote issues onto state legislative agendas. Rabe particularly noted the ability of environmental policy entrepreneurs to build strong and decisive coalitions from within the pool of elected officials, industry, and interest groups. Rabe highlighted the major obstacle to greenhouse gas reduction initiatives as economic concerns, especially the “tendency to depict environmental protection efforts as posing a zero-sum trade-off with economic growth” (Rabe, 2004, p. 28). However, the policy entrepreneurs in Rabe’s study often worked to redefine the problem and how to approach it. Indeed,

it was common for them to emphasize the opportunities for economic development that could come from development of green technologies.

With respect to our interest in the integration of policy entrepreneurship within broader theorizations of policy stability and policy change, it is noteworthy that many of the policy entrepreneurs identified by Rabe were proximate policymakers. For example, Rabe identified several state governors and their advisors as policy entrepreneurs. Given the constraints they face around decision making and the need to strike compromises, such actors often settle for making small policy changes so that policymaking proceeds incrementally. Nonetheless, Rabe noted instances where these policy entrepreneurs used their specialized knowledge of policy processes and governmental systems to significant advantage. In particular, Rabe identified cases where policy entrepreneurs worked carefully over time to craft strategic coalitions of supporters. Having developed this kind of power base during periods of policy stability, they were then able to readily discern windows of opportunities for policy action when they emerged. At these times, the policy entrepreneurs acted rapidly to capitalize on their previous, patient efforts. Their early creation of advocacy coalitions, their efforts to keep their coalitions together, and their recognition of the value of even incremental gains built momentum that allowed them to secure significant policy change when the time was ripe. Rabe’s study showed that environmental policy change demands committed and well-informed leaders. Although such change is difficult to secure, some of the policy entrepreneurs in Rabe’s study met with considerable success.

Crowley (2003) conducted an investigation into the role of policy entrepreneurs in the development of policy concerning child support. In contrast to Rabe’s study, which focuses on a period consisting of just a few years, Crowley studied policy entrepreneurship over a period of several decades. In so doing, she highlighted the role of various groups who acted as policy entrepreneurs. Significantly, the policy entrepreneurs in Crowley’s study often worked to make policy gains that subsequently served as the platforms for successor groups to push for even more dramatic gains. This observed baton-passing across generations of policy entrepreneurs paralleled broader shifts in the political climate in the United States. Initially, the issue of child support was championed by charities. Later, in the 1960s, social workers campaigned to extend social services to mothers. Moving into more contemporary times, the key policy entrepreneurs included the leaders of groups seeking to advance the rights of women, and elected women politicians. However, these policy entrepreneurs also had to find ways to operate in policy communities where conservative groups, including fathers’ rights groups, increasingly sought to shape public policy. Crowley’s study highlights how a public policy issue can be picked up by many different individuals or groups who act as policy entrepreneurs and pursue the issue according to their own unique perspectives and proposed solutions. The study shows how complex and contentious policy issues call for long-term attention, and how the problems themselves, and how they are framed, can evolve over time.

For the purpose of our review, Crowley’s study is significant in two ways. First, it demonstrates how a movement for policy change is influenced by the political climate. We noted earlier the importance of context for shaping the actions of policy

entrepreneurs. Crowley shows how the interaction between actors and their context can be played out over a period of decades. Changes in the broader political climate can result in new groups forming, new arguments being made, and dramatic turns in policy design.

Second, Crowley's study highlights competition among policy entrepreneurs themselves. Often, discussions of policy entrepreneurship have characterized the policymaking context as consisting of a group of like-minded change advocates doing battle with myriad forces seeking to maintain the status quo. Crowley alerts us to more complicated possibilities. Indeed, the politics of policy change can get extremely interesting when the contest does not involve simply shifting the status quo but also involves debate over the direction that such a shift should take. Policy debate can grow heated when the jostling for position is among feminists, advocates for fathers' rights, and those who believe they speak mostly for the interests of children. Other policy issues might not generate quite as much confrontation. However, as we study policy entrepreneurship and policy change, it is useful to investigate the possibility that advocacy for change might be coming from multiple directions. The question then becomes how effectively policy entrepreneurs can counter each other, as well as the forces for maintenance of the status quo.

It is instructive to note some points of difference between these recent studies by Crowley (2003) and Rabe (2004). While both highlighted the actions of policy entrepreneurs, the issues they looked at were fundamentally different. Child support is an issue which permeates domestic life, if not directly, then indirectly through the persistence of child poverty as an inhibitor of social advancement. The issue of climate change is altogether different. Although there is increasing interest in this issue, to date, citizens have not felt real, tangible disadvantages because of global warming. This helps us to explain why serious attention has only been paid to the issue when the policy entrepreneurs have emerged from within government agencies. They are professionals, with specialist knowledge, who have a real grasp of the situation, and can foresee the risk of the status quo. The issue is also transnational, and so solutions are not narrowly focused to one jurisdiction; they must include the solutions and initiatives of other states and international targets and norms. Despite these major differences in the substance of the Crowley and Rabe studies, both highlight the value of the concept of policy entrepreneurship for helping to explain instances of significant policy change.

Future Directions for Studies of Policy Entrepreneurship

The activities of policy entrepreneurs have received close attention in several studies over the past decade or so, and new applications of the concept are appearing with increasing frequency. However, the concept of policy entrepreneurship is yet to be broadly integrated within analyses of policy change. Here, we have shown how the concept might be better integrated into mainstream theorizations of the policy process and change dynamics. We have also shown how recent applications of policy entrepreneurship as a key explanation of policy change have expanded our understanding of the role of policy entrepreneurs. New insights have begun to emerge

concerning when proximate policymakers are most likely to act as policy entrepreneurs. The role of information, risk, and trustworthiness become paramount in cases where the issues are complex and their effects on citizens seem remote, even if they could be significant in the future. New insights have also started to emerge concerning the sequencing of policy entrepreneurship over long periods of time and the ways that the broader political climate can affect the context for policy entrepreneurs, how they frame problems, and how they work with others. Finally, we are beginning to see how the context for policy entrepreneurship can be complicated when multiple perspectives exist concerning the direction that policy change should take from the status quo.

Room remains for more conceptual development and empirical testing concerning policy entrepreneurship. We here suggest two directions for fruitful future work. There is a need for closer study of the motivations and strategies used by policy entrepreneurs. There is also a need for more study of the interactions between policy entrepreneurs and their specific policy contexts. Various research methods could be employed in such studies; as always, methods must be shaped to the specifics of the research subjects and their contexts.

The motivations of policy entrepreneurs have gained limited attention to date. Why are people prepared to allocate large amounts of time and energy to activities where great uncertainty surrounds what impacts they will have? From a rational actor perspective, we like to believe that some degree of self-interest must be at stake. Indeed, evidence can be found of self-interest motivating the actions of change agents. Teodoro (2009) has investigated the career paths of bureaucrats and the tendency for individuals to introduce organizational innovations in new environments. His findings indicate that bureaucratic actors who develop track records for innovative action and who are prepared to move across organizations are rewarded in terms of faster-than-usual career progression. The evidence here points to clear incentives for such individuals to engage in activities that approximate those of the policy entrepreneur. In the history of political science, few systematic explorations have been conducted of political ambition (see, e.g., Herrick & Moore, 1993; Schlesinger, 1991). Systematic, comparative studies of the career trajectories of policy entrepreneurs could provide valuable answers to questions of motivation. They could also help to further build our knowledge of how policy entrepreneurs develop relevant social acuity, effectiveness in defining problems, building teams, and leading by example. Indeed, effective studies along these lines could serve as a catalyst for the systematic examination of political leadership—a topic that is of huge public interest but that has gained sparse attention among political scientists since the work of Burns (1978); see, for example, Jones (1989). Work along these lines could be effectively supported by a mixture of survey-based quantitative research and comparative case studies of political careers. They could be fruitfully informed by the vast amount of conceptual and empirical work that has been produced in recent decades concerning structure and agency, and the ways that institutions create opportunities for individual actors.

Exactly how contextual factors serve to constrain and shape the actions of policy entrepreneurs also requires more attention. Through our discussion, we have seen

that certain circumstances are more or less likely to favor the emergence of policy outsiders or insiders as policy entrepreneurs. The relative strengths and weaknesses of seeking change from inside or outside structures of political decision making need to be more carefully delineated. Mintrom (2000) presented a methodology for quantitatively exploring the relative significance of contextual factors versus the actions and attributes of policy entrepreneurs for affecting policy change. Quantitative work of this kind still promises to shed the most light on issues relating to structure and agency. However, systematic case studies can also generate important insights. In combination, case work and quantitative work could help to build cumulative knowledge that addresses questions concerning contextual effects.

Over the past decade, new studies of policy entrepreneurship have been conducted in a range of country settings. These studies have been important for confirming the portability of political entrepreneurship as a concept. However, as a research strategy, applying established concepts into new settings is subject to the problem of diminished new insights emerging from each new study. The research challenge is how to leverage the study of policy entrepreneurship in new contexts so as to achieve conceptual breakthroughs. Toward this end, cross-national studies of policy entrepreneurship hold considerable promise. Evidence has been emerging on how various international norms diffuse and become established within national policy settings (Checkel, 2001; Finnemore & Sikkink, 1998). Other evidence has emerged on how the federated nature of the European Union opens possibilities for the European Commission to serve a dissemination role through the creation of policy networks, the promotion of information sharing, and incentives for change (Grande & Peschke, 1999; Laffan, 1997; Zippel, 2004). This evidence suggests that careful cross-national investigations of the means by which popular policy ideas get translated into policy settings in specific jurisdictions could yield major insights into the roles played by policy entrepreneurs in promoting policy change and the transnational diffusion of policy innovations. Methodologically, such work could quickly become complex, suggesting the need for researchers to confine their studies to a small number of country cases and to focus their studies around one or two specific policy ideas or norms. This proposed research strategy holds appeal because, at a minimum, it would require researchers to add only one extra country case to their existing one-country empirical studies. However, the real value-added would come through the conceptualization of this cross-national work, and efforts to interpret how contextual similarities and differences might explain the observed behaviors of policy entrepreneurs.

To date, most studies of policy entrepreneurship have focused on contemporary episodes of policy change. However, significant insights can emerge from historical studies and from studies that involve a time frame of several decades. Importantly, in the study of policy change over long periods of time, it is likely that the policy entrepreneurs will change, the political climate will change, and change will occur in the nature of the arguments made for policy change. Much useful work could be done exploring how movements for change evolve over time.

In advocating new investigations along these lines, we return to the preoccupation of this review. That is, while the actions of policy entrepreneurs have been

gaining increased attention, the concept of policy entrepreneurship is yet to gain a central place within explanations of policy change. We believe that the truly breakthrough future work on policy entrepreneurship will come when the concept is integrated with more mainstream theorizations of policy change. Such an integration is possible. We have suggested ways that it might be done. We have also noted studies where efforts at such integration have been made. Of course, we realize that further work along these lines is likely to result in major shifts in how we think about policy entrepreneurship. That observation has a flip side. Further work to integrate policy entrepreneurship into mainstream theorizations of policy change holds the potential of changing our notions of the mainstream itself. We end, then, with a provocation. If you want to make a splash in the study of policy change, doing some innovative work with the concept of policy entrepreneurship would be a great place to start.

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Notes

1. Entrepreneurial behavior in a range of contexts has been studied by scholars across a range of disciplines. Important contributions have been made in economics, business, sociology, and psychology. Mintrom (2000) devotes two chapters to reviewing the broader literature and the history of the concept of the entrepreneur before detailing how the concept might be translated to the policy context.
2. We acknowledge that many additional entrepreneurial traits could be usefully studied to gain insights into how people promote policy change. For example, in their respective studies of entrepreneurial behavior among legislators, Thomas (1991) and Weissert (1991) placed emphasis on other entrepreneurial traits, such as assertiveness and commitment. However, for the purpose of this article, we assume that traits such as assertiveness and commitment are captured in the practice of leadership by example and effective team building.
3. The concept of policy entrepreneurship could potentially be integrated into a much broader range of explanations of policy change than those we have chosen to review. Here, our choice of explanations was based on their prominence and breadth of application within the field of policy studies. Many other theories exist concerning policymaking processes and how policy change occurs. For an overview of such theories, see Sabatier (2007).

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TITLE: Policy Entrepreneurship and Policy Change
SOURCE: Policy Stud J 37 no4 N 2009

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The Emergence of Local Government Policy Leadership: A Roaring Torch or a Flickering Flame?

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Abstract

State and local governments traditionally exerted leadership in policy areas that directly affected their communities and citizens. The leadership of cities, however, has expanded into a number of policy areas where the states and the national government have reduced their policy footprint. This article summarizes research on local policy leadership, examines it within the context of historical state–local intergovernmental relations, and reviews three expanding policy areas. As creatures of state government, localities are subject to legislative restrictions; however, recent research reveals a significant upsurge of state governments preempting policy actions of local governments. Therefore, it can be concluded that the flame of local government policy leadership burns brightly now, but forces appear to be gathering that may cause it to flicker.

Keywords

policy leadership, state–local intergovernmental relations, preemption

The mantle of policy leadership in the American federal system can be described as a shared, yet complex, endeavor among the various levels of government. While the constitution describes the scope and primary responsibility for the national and state governments in many policy areas, the founders were reluctant to specify these roles in order to provide flexibility and ensure that the states retain significant policy autonomy. In particular, the Tenth Amendment states: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” Federalism ensures that Washington, DC, and the state capitals share policy leadership.

Since the founding of the Republic, however, dominance in many policy areas

alternated between the national and state governments, especially where there is vague or unspecified leadership or responsibility. Even though the constitution provides broad boundaries between Washington and the states in many policy areas, the role of local governments in this framework remains unclear. Notably, the constitution does not mention cities and local government. Historically, state and local

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State and Local Government Review
2017, Vol. 49(4) 275-284
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sagepub.com/journalsPermissions.nav
DOI: 10.1177/0160323X17754237
journals.sagepub.com/home/slgr

governments tend to exert leadership in policy areas that directly affect their communities and citizens. Periodically, the federal government intervenes, providing varying levels of support through grants and direct assistance in many policy areas.

Trends, however, seem to indicate that the policy leadership roles of state and local governments have expanded, particularly in selected policy areas, where the national government has minimized its role. In fact, in a number of arenas, local governments have elevated their leadership position, while the states and the national government have reduced their policy footprint. Devolution or the delegating of policy responsibilities from the national government to the states clearly factors in this shifting of policy leadership, but it is also evident that Washington has systematically removed itself from numerous policy areas that have significant national relevance. Local governments have stepped in to fill that policy leadership vacuum in many cases.

This article examines the implications and challenges of this shift in policy leadership to local government. How enduring is this? First, it presents a discussion of research on local policy leadership, emphasizing the relationship between top elected officials and chief administrative officers. Second, it looks at policy leadership within a state–local intergovernmental context, summarizing extant research on the institutional dynamics of policy leadership at the local level. Finally, by reviewing three policy areas, it describes trends in local government policy leadership.

Local Policy Leadership

At the junction of administration and politics, and in the center of democratic governance at the local level, sits public policy. The development and delivery of public programs requires the collaborative efforts of a collection of diverse sets of actors and institutions in a range of policy actions. In the classical description, the policy development structure is dichotomous: Elected officials craft and enact policy while administrators implement policy and

deliver programs. Leadership, logically, initiates the policy development process. Policy leadership, as one would expect, is an action-oriented and purposive response by elected officials and key administrators to perceived social and economic situations. Eyestone (1971, 153) identifies three conditions that initiate policy leadership: “an opportunity or a problematic situation exists; political leaders perceive this opportunity or problem; and political leaders are legally and politically free to choose among alternative courses of action in light of this opportunity or problem.” Policy leadership, however, notably at the local level, is not solely within the hands of elected officials, as research demonstrates.

Classic studies of local government policy leadership primarily emphasize the role of individuals within local political environments. These studies find that mayors act as policy leaders in their deployment of formal and informal resources (Pressman 1972; Wilkstrom 1979), while city managers often work between political and administrative realms, rather than solely within the administrative domain (Morgan and Watson 1992). Kingdon (2003) describes policy leadership in terms of the function of a policy entrepreneur bringing various sets of actors together to develop policy. This research tradition implies shared authority and responsibility between elected and appointed officials. It challenges conventional wisdom that assumes local government policy-making occurs within at least two distinct and dichotomous realms—that is administrative and political (Boynton and Wright 1971; Svava 1985). Although these findings provide insight into policy leadership at the local level, little-to-no scholarly research on policy leadership utilizes local government as the unit of analysis. This may be due, in part, to scholars’ varied conceptualization of policy leadership praxis.

Some research, however, points toward a collaborative leadership arrangement between the chief elected official, such as the mayor, and the chief administrative officer, such as a city manager or city administrator (Zhang and Feiock 2009). Shared policy leadership at the

local level was among the range of topics explored by a team of researchers in the mid-to late 1990s as Europe underwent a series of structural changes in local government (Mouritzen and Svava 2002). The researchers surveyed 4,300 chief appointed administrators from fourteen countries including the United States. They examined a number of questions, but the one most relevant to policy leadership asked: “How do politicians and administrators engage in local government leadership?” Their research identified leadership at the local government apex as the “. . . point in the government process at which the perspectives and contributions of top politicians and administrators are blended” (Mouritzen and Svava 2002, 107). In terms of policy leadership, the researchers concluded that the elected officials and administrators form an interdependent and shared leadership structure that results in extensive and creative exchange of policy proposals. They noted that the political and administrative dimensions in local government can complement each other, resulting in a more democratic governance system, and that this partnership of leaders can result in expanded capacity for cities (Mouritzen and Svava 2002), notably in a range of policy domains. Based on their research, they conclude that policy leadership in municipalities consists of a merger of democratic mechanisms with administrative excellence and professional commitment. In other words, the emphasis of chief elected officials on political responsiveness complements the administrator’s focus on programmatic efficiency creating an effective policy leadership structure.

Scholars characterize the local government policy leadership structure in the federalist system and within intergovernmental relations in a number of ways such as *bottom-up federalism* (Riverstone-Newell 2012), *intergovernmental politics* (Sbragia 1996), *local defiance* (Fisk 2016), *municipal defiance* (Bowman 2017), and *local activism* (Riverstone-Newell 2012). These types of local policy activism then point to “a category of political behavior reserved to local officials who use their positions of authority to purposefully—pointedly—challenge

higher government laws and policies to bring about policy change” (Riverstone-Newell 2012, 402). Therefore, on all accounts, local policy leadership refers to situations wherein local government leaders, both political and administrative, respond to social and economic situations by enacting policies or taking actions that are discordant with actions and/or policies of higher governments (i.e., state and/or federal). These locally developed policies may not be intentional and direct challenges of authority; rather, they can be viewed as attempts to fill policy gaps left by higher levels of governments (Riverstone-Newell 2017). In summary, the limited amount of research that focuses specifically on local policy leadership concludes that it can be a contentious issue in a chaotic intergovernmental system of policy design and implementation. In the next section, this article examines the pertinent issues and challenges related to policy leadership in an intergovernmental environment.

Local Policy Leadership in an Intergovernmental Context

Conflict between states and localities is as old as the founding of the United States (Krane, Ebdon, and Bartle 2004). The long-standing tension in state and local government relations revolves around the central issue of the *locus of power* (Bowman 2017). That is, which government has the power to make local decisions? Swindell, Stenberg, and Svava (2017, 2) explicate the issue in terms of the following: “which people exercise this authority in their geographic area, in their particular branch of government, and over the public responsibilities assigned to their unit of government.” Unlike federal–state relations within the federalist system wherein the states created a national government through the U.S. Constitution, local governments are creations of their respective state and normally lack independent formal constitutional authority. Therefore, “through its constitution, statutes, court rulings, and practices, state government decides how much power and authority its local governments will possess” (Bowman 2017, 1120). Because local

governments are products of the state government, their legal and political powers are provided by the states that incorporate them.

Many local governments are not the small rural settlements that existed in the early years of the Nation's founding. Cities grew and transformed into large urban enclaves and vast metropolitan regions that deliver a complex range of public goods and services through a complex set of intergovernmental collaborative relationships (Parlow 2008; Swindell, Stenberg, and Svava 2017). They play a pivotal role in the governance of the state and, while often lacking significant levels of autonomy and formal authority, continue to amass and exercise considerable economic and political influence in the state, region, national, and increasingly, international arenas. Many American cities have emerged as major players on the global stage, possessing economies exceeding those of many nation-states. Berman (2003, 1) argues that, contrary to federalism's conventional wisdom, and despite lacking formal constitutional power, local government harnesses the ability "to defend or promote its interests in the intergovernmental system." Riverstone-Newell (2012, 401) adds, the very nature of the intergovernmental system, where governments depend on one another to govern, is less coercive and more collaborative in which "federal, state, and local leaders lobby, bargain, partner, and negotiate to accomplish mutually agreeable ends." In sum, although local governments often lack formal and structural power in the federal-state-local governmental relationship, they still possess informal powers that allow them to promote and protect their interests.

It can be argued that because of their unique position in the intergovernmental structure of the United States, local governments are fertile grounds for policy innovation and social change since their legal structures are not as intractable as higher levels of governments (Bowman 2017; Parlow 2008; Riverstone-Newell 2017). This structural flexibility encourages the expansion of democratic and economic values and responsiveness. Although many scholars acknowledge the many advantages of making policy decisions

at the local level, this type of decision-making also includes many hazards. For example, Sharp (2012) found that local social programs negatively affect citizen engagement and stifle citizen participation. Policy-making at any level of government in the United States includes many challenges, but the state-local intergovernmental system contains a special set of complexities.

As cities emerged as major players in the political, economic, and social fabric of the nation, and a key member of the intergovernmental system, relations between local and state government grew increasingly complex. Two competing legal principles traditionally served as interpretive frames for determining the level of local government autonomy in terms of state authority. The first, *Dillon's Rule*, a legal interpretation by a nineteenth-century Iowa state judge, views local governments as primarily administrative apparatuses in service to state's missions and policy goals (Parlow 2008; Swindell, Stenberg, and Svava 2017). Dillon's Rule posits local governments only have powers that are "expressly granted to them by the states" (Parlow 2008, 102).

On the other end of the autonomy spectrum, *home rule* is a legal principle that contends local governments should have legislative authority for matters concerning their respective localities that are not reserved as matters of state authority (Parlow 2008; Swindell, Stenberg, and Svava 2017). Although the U.S. Supreme Court has affirmed Dillon's Rule as the law of the land, the vast majority of states have adopted some variation of the home rule (Swindell, Stenberg, and Svava 2017). Still, home rule does not grant localities full autonomy. Dillon's Rule, as the preeminent legal doctrine, still enables states to preempt local government (Parlow 2008; Riverstone-Newell 2017). In a federal system of government, then, where states have significant levels of autonomy, it is difficult to sort their legal relationships with local units of government into two distinct categories: Dillon's Rule or home rule. The states widely differ in the manner in which they provide legal and policy authority to their local governments.

How states relate to their component units of local government is understandably complex and varied when it comes to the granting of local authority. According to a Discussion Paper Prepared for The Brookings Institution Center on Urban and Metropolitan Policy (Richardson, Gough, and Puentes 2003, 13),

In general, the literature treats Dillon's Rule and home rule as polar opposites with respect to local government autonomy and assumes that either one or the other exists in a state. But both of these assumptions are incorrect. The two doctrines often coexist with one another and neither implies any particular degree of local government autonomy.

In other words, the operative words for state-local relations in terms of the authority of localities are "it depends." Dillon's Rule and home rule, then, primarily guide ideologies and function less as opposing legal principles. While most states employ some measure of Dillon's Rule, they do not implement it in a uniform manner. However, recent evidence indicates an apparent strengthening of the application of Dillon's Rule—preemption.

Preemptive actions by state government are part of the relationship between state and local government. Preemption refers to "a higher level government us[ing] its legal authority to cancel out a lower level government's actions" (Swindell, Stenberg, and Svava 2017, 6). Legislative actions, executive orders, and administrative mandates all comprise varieties of preemption. While preemption has a long history in terms of intergovernmental relations, much of it involved the national government nullifying policy actions of states through the Fourteenth Amendment. Recent research reveals a significant upsurge of state government preempting policy actions of many local governments, as they grasped the mantle of policy leadership in a number of critical areas where the national government has relinquished its policy primacy.

Swindell, Stenberg, and Svava (2017) presented their research on preemption, a Big Ideas Work Paper (2017), to the Alliance for

Innovation, Local Research Collaborative, and the Research Seminar at the Annual Conference of the International City/County Management Association in October 2017. Their work reveals a growing trend where state governments across the country engage in efforts to curtail and restrict the ability of municipalities to "serve and improve their communities." Research released by the National League of Cities (DuPuis et al. 2017) mirrors the trends noted in the Swindell, Stenberg, and Svava's work. While many local government policy leaders will share the concern of state preemption raised by the Swindell, Stenberg, and Svava, and the National League of Cities research, others may claim that this movement is merely reaffirming historic state-local relationships established by the constitution. Dillon's Rule, they say, is consistent with the principles of federalism. Russell and Bostrom (2016, 3) write that "While local governments play an important role in states, it is unfounded for local jurisdictions to contend that they are equal to the states . . . [L]ocal governments must belong to the states and the people inside them."

The next section explores three brief examples of the emerging role of local government policy leadership in selected policy areas. This occurs, of course, within the context of state-local intergovernmental relations as described above.

Trends in Local Policy Leadership

Local governments, like other governmental units, develop policies to adapt to changes in their environment, addressing such policy issues as population increases and/or the development of new social issues (Swindell, Stenberg, and Svava 2017). The examples discussed below show that in addition to responding to the needs and desires of their citizens, some states appear to be raiding local government coffers and shirking their policy responsibilities (Bowman 2017). Local governments not only provide many of the essential public services to citizens, in recent years but have also taken on the leadership role in various

policy areas. Some of those policies include minimum wage, immigration, and sustainability/climate change, among others. The following section briefly explores these three policy issues in light of local policy leadership.

Minimum Wage

For most Americans, wage increases struggle to keep pace with inflation (Piketty and Saez 2003). While public welfare programs such as the Earned Income Tax Credit and Supplemental Nutrition Assistance Program help support families and persons in need, income inequality continues to grow (Soss, Hacker, and Mettler 2007; Brookings Institute 2016). Federal minimum wage policy does very little in the way of helping to close the gap. By passing local ordinances to increase the minimum wage, local governments have taken up the task of improving the quality of life for the working class. Many of these cities are acting within their own interest as they discover the federal and/or state minimum wage does not sufficiently meet their cost of living (Parlow 2008). Local governments have also passed other labor ordinances such as paid leave, fair scheduling, and prevailing wage in order to help support the working class. Some states have responded by enacting laws preempting these local ordinances. As of July 2017, twenty-nine states and the District of Columbia have minimum wages above the federal amount (Jones and Ell 2017), and twenty-five states have passed laws preempting local minimum wages above the state and/or federal level (Economic Policy Institute 2017). Although state preemption is always a possibility, local governments have other options for supporting the working class. Local governments have the means to improve the labor relations system, thereby supporting low-wage workers through policies that do the following: leverage their economic resources as purchasers, consumers, and contractors; support and partner with workers organizations; and/or uplift and enforce equitable labor and wage standards (Center for American Progress 2017). Although lower governments' formal legislative powers may be preempted,

informally they can mobilize their own economic resources and collaborate with nongovernmental organizations to promote their political aims.

Immigration

The United States has a long and sordid history with immigration policy; however, scholars remain hopeful that local governments can help atone past misdeeds (McKanders 2017). The increasing number of sanctuary cities and Deferred Action for Childhood Arrivals (DACA) protests and lawsuits characterizes today's local resistance to federal immigration policy. Having first appeared in the United States in the 1980s (Ridgley 2013) and still without a universal definition or criteria, the term *sanctuary city* refers to localities with policies that delimit interactions between local law enforcement and federal immigration agents (Lee, Omri, and Preston 2017). More specifically, Robbins (2017, A17) says these cities "generally do not comply with federal requests to detain undocumented immigrants who have been arrested on charges unrelated to their immigration status and turn them over to the federal authorities for possible deportation." Sanctuary cities are but one manifestation of the commitment local governments have made to their immigrant residents—a commitment that resists and defies higher governments.

In 2012, the Obama Administration established the DACA program that made concessions for undocumented persons living in the United States whom immigrated to the nation as children (National Immigration Law Center 2017; Immigration Equality 2015). The program outlines specific conditions (e.g., age at arrival, age at time of request, continuous residency, criminal history) for which these persons can remain in the United States. The program grants temporary residency and work permits at the discretion of the Department of Homeland Security. As is common among the trends in intergovernmental relations mentioned in the earlier sections of this article, the DACA program is a federal directive with no federal resource allocation and is dependent

upon local implementation. Researchers found that the program's implementation often occurs in the form of public-private partnerships at the local level (de Graauw and Gleeson 2016). In 2017, when the Trump Administration announced its decision to repeal DACA, local governments began to respond. For example, California's Sonoma County Board of Supervisors adopted a resolution in support of DACA recipients, thereby reaffirming its commitment to immigrants (County of Sonoma 2017). The Atlanta City Council passed an emergency resolution calling for "limited cooperation with the U.S. Immigrant and Customs Enforcement (ICE), in order to show that Atlanta opposes the decision to end DACA" (Merilan 2017). Again, local governments are taking a stand against higher governments in favor of immigrant communities.

Sustainability/Climate Change

Whereas with other environmental issues the federal government leads the way by setting baseline standards, climate change gained momentum as a state and local initiative (Engel 2006). Despite the absence of state and federal policies, in the 1990s, localities across the United States began to join the Cities for Climate Protection (CCP) campaign in order to reduce greenhouse gas emissions (Betsill 2001). Researchers found that, when the Bush Administration rejected the terms of the international climate change treaty, "action *within* the US"—meaning state, local, and regional—sought to advance climate protection (Byrne et al. 2007, 4556). Extant literature identifies correlations between economic, demographic, socioeconomic, and civic participation variables and local governments' commitment to climate-change policy initiatives (Zahran et al. 2008). Consistent with Bowman (2017) and Parlow's (2008) claims that local governments are amenable to policy innovation, Krause (2010, 45) concluded, "local-level characteristics are the dominant drivers of cities' decisions to commit to climate protection." Additionally, cities often commit to these initiatives without influence of or regard for

states (Rosenthal et al. 2015). In other words, the decision to participate in the CCP was largely dependent upon the unique characteristics and interests of each city—again, illustrating how local governments act within the interests of their citizenry, despite higher governments' decision to act otherwise.

Conclusion

This article briefly summarizes the emerging policy leadership role that local governments are assuming in a dynamic environment of intergovernmental relations played out within a federal system of government. Clearly, cities function as key units of government in the United States. They serve as focal points for addressing many social, economic, and political challenges of the day, as seen from a description of a very small sample of local government policy initiatives presented above. At the same time, there is evidence that other levels of government, especially the national government, seem reluctant to tackle the difficult policy issues, instead resorting to devolving them to the next level. Taking the torch of policy leadership by local government seems a logical next step. But, as noted above, there are many challenges and obstacles to navigate. Some are historical in nature; others are more recent. Most relate to the complicated relationship between states and local governments.

While some states delegate significant levels of policy autonomy to cities and local government, this does not seem to be a growing trend. In fact, current research, as outlined above, shows that most state governments are in a preemptive mode of operation. The ability of many city governments to chart their own course in the policy waters appears to be at risk. Of course, each state varies in the scope of policy autonomy it grants to local governments, but that too seems to be waning, according to current research. Cities, then, play an important, but uncertain, role in the U.S. federal system of government.

At this point, it is appropriate to ask the critical question: Is the emergence of local government policy leadership a roaring torch or a

flickering flame? The flame of local government policy leadership is burning brightly now, but the state government fire hoses are lining up. Do they have sufficient water pressure? Of course, time will tell.

Declaration of Conflicting Interests

The authors declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The authors received no financial support for the research, authorship, and/or publication of this article.

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State and Local Government Review

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State and Local Government Review 2013 45: 268 originally published online 16 December 2013
 DOI: 10.1177/0160323X13511647

The online version of this article can be found at:
<http://slg.sagepub.com/content/45/4/268>

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Collaborative Mechanisms in Interlocal Cooperation: A Longitudinal Examination

Robert Blair¹ and Christian L. Janousek¹

Abstract

Local government administrators have embraced intergovernmental collaboration as a viable alternative in the delivery of public programs for many years, characterizing an increasing emphasis on interlocal cooperation as a response to common problems and situational needs. In the process of collaboration, local governments often use a combination of linking mechanisms, ranging in degrees of formality and specificity. This study longitudinally examines the administrative networks and mutual organizations that comprise the collaborative mechanisms of municipalities in the state of Nebraska. The findings suggest that, over time, the nature and use of interlocal cooperation mechanisms have shifted toward the more informal and general varieties.

Keywords

collaborative mechanisms, interlocal cooperation, local government, Nebraska

Introduction


In the United States, there is an increasing demand for governments to be more effective and efficient. This mandate combined with decreasing revenues and decentralization requires that administrators and elected officials use alternative strategies to provide public programs. There are three common approaches: enhancing existing practices, outsourcing, and cooperating with other governments. Public officials often take the first approach—modifying their internal organization by reducing staff, adding tasks, or streamlining the organizational structure—because of its administrative simplicity relative to the other options. In the second approach, outsourcing, governments provide public services through various forms of public/private/nonprofit alliance, such as leasing, franchising, grants, vouchers, and by using volunteers (Morley 1999; Savas 2000; Warner and Hefetz 2008).

Cooperating with other governments constitutes the third approach. Intergovernmental collaboration (IGC), where one government voluntarily collaborates with one or more other governments, has a long history in the public sector and has steadily grown in importance (Chen and Thurmaier 2009; LeRoux and Carr 2010). Based upon the belief that “cooperation between those agencies minimizes cost” (Holzer and Callahan 1998, 95), governments collaborate to reduce transaction expenses (Alexander 1995 and Feiock 2009) or to realize economies

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State and Local Government Review
45(4) 268-282
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DOI: 10.1177/0160323X13511647
slgr.sagepub.com


of scale in providing public services to a larger set of citizens or a bigger territory (Henry 1995).

For local governments, the use of interlocal cooperation represents an opportunity to address common problems and integrate public enterprise. However, to create an effective and sustainable collaboration, administrators must select a method by which to forge a workable relationship that is suitable for the participating entities and the circumstances (Alter and Hage 1993). Therefore, an integral component of the interlocal cooperative process is the collaborative tool or mechanism utilized to create the initial bond, formulate the arrangement, and maintain the desired objectives. Local government cooperation is affected by many factors, particularly the situational context in which the collaboration is developed, that generally prescribe the appropriate linking mechanism. However, collaborative mechanisms may be subject to change and adaptability over time given transformations in the working environment, long- or short-term requirements, and/or public demand.

This study longitudinally examines the mechanisms of collaborative arrangements involving municipal governments in the state of Nebraska. Local government administrators need to understand the nature of these IGC tools to be able to employ the best management practices and take advantage of the benefits that collaborations may offer. A longitudinal perspective will help distinguish trends in how mechanisms are being used to materialize and maintain interlocal cooperation. Many administrators supervise an increasing number of intergovernmental projects, and this practice is often difficult and many times ineffectively executed (Agranoff and McGuire 1999; Kettl 2006; Wright and Krane 1998). The variety of permutations and applications of collaborative mechanisms complicates the selection and management process. Thus, management could be improved by a better understanding of the collaborative mechanisms that foster and sustain intergovernmental cooperatives over time; this study strives to achieve that goal.

In this analysis, we explore the nature and use of interlocal collaborative mechanisms in IGC and their changes over time. By tracking

trends, we hope to identify the types of mechanisms that offer evidence of prolonged functionality and sustainability in local government collaboration. First, based upon a review of the literature, we outline the roles of collaborative mechanisms in interlocal cooperation. Second, using a policy tools framework and focusing on select components and circumstances of the process, we offer a typology of collaborative linking mechanisms. Third, survey and case study data from the late 1990s to the present provide evidence of changes and trends in the use of interlocal collaborative mechanisms among municipalities within the state of Nebraska. Finally, we discuss the findings in relation to the implications for public administration theory and practice.

Collaborative Mechanisms in Interlocal Cooperation

Interlocal cooperation may be depicted as a series of related actions taken by two or more entities that include some type of collaborative structure and/or administrative linking mechanism. The collaborative mechanism used in interlocal cooperation is a form of organizational behavior (Alexander 1995) that reflects dimensions of governance, administration, and mutuality that contribute to the framework of the collaboration (Thomson and Perry 2006). Alter and Hage (1993) theorize that the IGC process begins with mutual organizational needs. There must be a willingness to participate and a shared purpose or circumstance that makes the cooperation beneficial. To avoid the common failures of collaboration and to mitigate transaction costs—such as financial/political expenses (Kwon and Feiock 2010), disparate benefits (Hawkins 2009), and/or performance accountability (Zeemering 2012)—the identification and application of the proper linking mechanisms are critical and formative steps in the cooperative process (Bryson and Ring 1990). The selection and nature of the collaborative mechanism must meet the needs of the cooperating members and the requirements of the situation or problem being addressed.

The management of interlocal cooperation requires certain procedures that initiate and maintain collaborative relationships among local government units (Agranoff 2006). Local governments operate within an overlapping jurisdictional environment, creating interdependency and encouraging forms of “intergovernmental exchange” (Christensen 1999, 26). Cooperating units need to exchange something of value, usually resources, which may include a specific public good or service, facilities, personnel, or money (Andrew 2009; Ansell and Gash 2007). The interlocal cooperative arrangement functions as the medium for the exchange of resources. Cooperation does not occur, then, until organizations decide on a collaborative mechanism.

Cooperating officials initiate collaboration in response to a common policy/service issue or an emergence of shared circumstantial needs. In other words, “something happens in the environment to start a search for a closer form of linkage . . . a perceived opportunity to achieve some mutual goals through concerted action” (Alexander 1995, 278). For local governments, the inducing stimuli take many forms, such as policy/sector failures (Bryson, Crosby, and Stone 2006), economic competition (Warm 2011), or metropolitan fragmentation (Visser 2002). The nature of the problem often dictates the choice and scope of the collaborative mechanism chosen to address the situation. Solving the problem serves as a mutual objective that can provide a “focusing effect of the collaborative efforts” (Chen and Thurmaier 2009, 540). In this way, the selection of the linking mechanism comprises both the need and purpose of the cooperative action.

In the interlocal cooperation process, collaborative mechanisms bind the local entities together. These mechanisms can span from informal partnerships and regional/social networks (Gazley 2008; Lee, Feiock, and Lee 2012; LeRoux, Brandenburger, and Pandey 2010) to formal, complex collaborative organizational structures created by negotiated contracts, legislative actions (Berman 1994), and/or operational charters (Abels 2012). The result

can range from autonomy (or no collaboration) to complete merger (Christensen 1999).

Studying the interlocal collaborative mechanisms that link organizations in terms of specific administrative or policy tools may provide a better understanding of the institutional nature of cooperation (Smith 2009) and the sort of issues being addressed by local governments through the use of IGC management and practices (Weber and Khademian 2008). Alexander (1995, 40–41) describes these mechanisms as “the basic elements to affect interorganizational cooperation.” Alter and Hage (1993) propose a range of mechanisms, where links differ according to the level of cooperation and number of organizations in a symbiotic relationship. In sum, the form of the linking mechanisms, determined by variations in context and need, typifies the purpose and breadth of collaboration (Abels 2012; Bryson, Crosby, and Stone 2006). As such, a further comprehension of the trends in collaborative mechanisms among local governments will be useful to the IGC process.

This article longitudinally examines the features and applications of collaborative mechanisms used in interlocal cooperation within two primary questions of inquiry: what is the nature of the IGC mechanisms/tools that forge organizational links? How has the use of these IGC mechanisms changed/evolved over time? In applying the concepts of policy tools to the cooperation process, we assess the status and purpose of interlocal collaborative mechanisms among municipalities in one state, Nebraska, over a period of approximately fifteen years. Nebraska, a Midwestern state with a population of 1.8 million, offers a suitable setting for an investigation of interlocal cooperation. Nebraska contains a set of growing metropolitan areas, an abundant number of small- and medium-sized communities, and a wide dispersion of regional affiliations. Like many U.S. states, a range of situational conditions over the last decade, including environmental crises, declining rural populations, and public funding cutbacks, has afforded opportunities for the use of a variety of interlocal collaborative mechanisms in Nebraska.

Examining the nature and use of the IGC mechanisms from a longitudinal perspective allows for the detection of changes and trends in the collaboration process beyond a cross-sectional snapshot, highlighting the dynamic contexts and varying temperaments of interlocal cooperation. Since the late 1990s, the situational needs and demands of local governments have adjusted to widespread financial instabilities, increasingly fragmented jurisdictional governance, and the exogenous character of many current public issues, which would seem to accommodate collaboration on a more structured and aggregated scale. In other words, complicated issues should mandate complicated solutions. Based upon assertions from the literature that emphasize the interdependency and multidimensionality of contemporary public operations/problems and the increasing demand for program economization among local governments and administrators, we hypothesize that, over time, the collaborative mechanisms of interlocal cooperation will require more formal and complex arrangements.

A Typology of Interlocal Collaborative Mechanisms

Understandably, the manifestations of collaborative mechanisms in interlocal cooperation vary, generally ranging from loosely organized networks to explicitly established hierarchical structures (Agranoff and McGuire 2003). Alexander’s (1995) typology describes the two ends of this spectrum: administrative networks and mutual organizations. The collaborative mechanisms of administrative networks and mutual organizations forge, bind, and maintain cooperation among partners.

While several researchers and theorists have developed typologies that describe the mechanisms of collaboration, Alexander’s typology is among the earlier formulations, building on the work of Alter and Hage (1993). The robustness of Alexander’s typology can be attributed to its foundation on previous research, combined with his extensive experience and study of interorganizational coordination and interaction.

Naturally, as in all research that employs a typology for classification, the validity and exclusivity of the categories are subject to debate. We chose to use Alexander’s typology for the relative conciseness of the classes and the clear dimensions that define them. It is important to note that it was not the objective of this research to propose a typology for interlocal collaborative mechanisms but rather to apply a time-tested model to examine changes in the types of mechanisms used over time.

According to Alexander (1995, 41), “coordination tools comprise formal and informal processes and linkages” in interorganizational collaboration, ranging in degrees of “solidarity” and “hierarchy” defined by the objective and method of exchange (56). This classification of collaborative mechanisms incorporates Alter and Hage’s (1993) typology, which accounts for the form, interests, and purpose of the cooperation. *Administrative networks* constitute the regular but nonhierarchical relationships that exist among organizations in collaborative arrangements. These varieties of the IGC mechanisms typically involve informal dealings among the administrative staff of participating entities, based on “shared beliefs or values, common affiliation, and long-term reciprocal interaction” (Alexander 1995, 58). *Mutual organizations*, on the other hand, can be described as more formalized and hierarchical relationships, generally characterized by the existence of a separate “governance structure” and a “coordinating unit” of administration (Alexander 1995, 200). As the more official variety of IGC mechanisms, mutual organizations often require legislative or legal actions by elected representatives.

Alexander’s (1995) classification categorizes collaborative mechanisms by two defining dimensions of IGC within administrative networks and mutual organizations: the level of formality in the organizational relationship (informal or formal), and the nature of the organizational exchange (general or specific). The importance of these distinctions relates to the nature and use of the mechanisms, indicating the organizational basis and scope of the collaborative arrangement. In particular, the

level of formality exemplifies the administrative approach and complexity of the cooperation (Alter and Hage 1993). Formal relationships include written or detailed arrangements, while informal relationships are usually unwritten or vaguely written. General exchanges may involve an expansive array of resources, while specific exchanges refer to a narrower range of resources.

Following this categorization, there are four types of collaborative mechanisms in administrative networks. The two types of informal mechanisms are *mutual aid*, where units pledge resources for general purposes, and *common understanding*, where governments exchange specific services on an implied or undefined basis. The two types of formal mechanisms include *agreements* and *contracts*. The difference between the two is the degree of specificity of the resource or service exchanged. Agreements may pertain to a wide variety of resources, while contracts often deal with exchanges that are more precise.

Similarly, in mutual organizations, four types of collaborative mechanisms fit within the categories. We use the term *association* to apply to informal relationships, where organizations exchange a broad range of services or resources using relatively simple arrangements. *Consortiums* also refer to informal pacts, but where more narrowly focused exchanges occur. Conversely, formal structures include explicitly written and more complex arrangements. In *federations*, organizations exchange a general or nonspecific variety of services or resources. In *joint ventures*, two or more local government organizations coproduce or deliver particular services under written terms and require higher levels of coordination and hierarchy.

Data and Methods

Interlocal collaborative mechanisms (agreements, contracts, associations, consortiums, etc.) among municipal governments in Nebraska constitute the units of analysis for this study. Because of the expected differences in the structure and comparability of collaborations, this research excludes the two largest

cities in the state: Omaha and Lincoln. The Interlocal Cooperation Act in Nebraska provides the legal foundation for local governments to collaborate on the delivery of a range of public goods and services. Local governments in Nebraska must file annual reports to the State Auditor that describe the character of these collaborations. This study examines the collaborative mechanisms of interlocal cooperation from a longitudinal perspective. Survey data from two points in time were analyzed in combination with case study data spanning an approximately fifteen-year period, looking for trends and shifts in the nature and use of the IGC mechanisms.

For the first data point, we utilized survey research collected and reported by the State of Nebraska Auditor of Public Accounts in November 2002, regarding interlocal cooperation arrangements and joint public agencies (Avery et al. 2002). On April 4–8, 2002, surveys were mailed to 3001 subdivisions (including municipalities, counties, school districts, and special districts) in the state that file budget or audit reports to the State Auditor. Of 531 municipalities in Nebraska, 322 returned valid surveys, for a response rate of 60 percent. The very high return rate from this survey can be attributed to the oversight authority exercised by the State Auditor, which would greatly encourage the submission of surveys. The annual audit report filed by local governments in Nebraska identifies the participating agencies and the purpose of interlocal arrangements. The 2002 survey was an attempt to compile all of the arrangements in that year. Using the dimensions of the typology categories, we sorted data based upon the degree of formality and specificity of the collaboration, the designations of the arrangements, and the descriptions provided by the State Auditor and respondents.

Data for the second point of time were collected in 2013 through information from city administrators and municipal clerks from Nebraska communities. The Internet survey was distributed on June 5, 2013, with e-mail reminders sent out on June 17 and the data collection completed on June 25, 2013. The

surveys were distributed through the Internet LISTSERV channels of the Nebraska city administrator and municipal clerk associations with links to the online survey. We received valid returns from 131 municipalities, for a response rate of 25 percent. Because of the time constraints for this research, it was not possible to do more than one follow-up appeal to increase the return rate.

The questions in the 2013 survey resembled those asked in the Auditor's 2002 survey. The questions requested information on the number and purpose of interlocal arrangements. Based upon the typology of mechanisms, respondents were asked to indicate the nature of their collaborative arrangements and the number of uses within the past year. The questions were structured to distinguish the categories of formality and specificity of the collaboration, with specific questions assigned to each of the types of mechanisms. We analyzed the returns and judged that they were representative of the universe of Nebraska municipalities, in terms of size and geographic location. While the number of returns from the 2002 Auditor's survey exceeded the 2013 survey, the representativeness of the most recent return deems it comparable to the earlier return in relation to the nature and use of collaborative mechanisms in interlocal cooperation.

In addition to the survey data, we collected case study information from both primary and secondary sources, ranging from the late 1990s to the present. The case studies were selected to represent and illustrate the various circumstances, situational needs, applications, and trends in the nature and use of collaborative mechanisms among Nebraska municipalities, covering an array of cooperative arrangements and functions. A principal resource for this portion of the analysis was *Tools for Intergovernmental Cooperation: The Experience of Nebraska Local Governments*, a study completed in 1999 by John Bartle and Robert Blair for the Nebraska Rural Development Commission. Other sources of case study data included conference presentations, government and research reports, municipal and county Web sites, interviews, newspaper articles, and

personal observations. The case study information was used to supplement the survey data, providing practical examples of mechanism usage and variation.

Alexander's (1995) typology of collaborative mechanisms supplied the archetype for analyzing the interlocal cooperatives of Nebraska communities over time. The survey and case study data provided an inventory of the scope and purposes of interlocal collaborative mechanisms in a single state during an approximately fifteen-year period. Because of the conceptual framework of the analysis, the findings may be applicable and generalizable to other states. However, since typologies often employ less precise measurement strategies, some of the classifications of data may be subject to debate. Additionally, differences in the survey design, temporality, and process of the data collection may warrant limitations in comparison. We acknowledge the potential for response bias due to the dissimilarity in the methods of administration of the surveys (i.e., standard mail vs. Internet). Even with the limitations in the data, this research will add to the existing knowledge and improve the understanding of collaborative mechanisms in interlocal cooperation.

Interlocal Collaborative Mechanisms in Nebraska

The following describes the range and purposes of interlocal collaborative mechanisms in Nebraska from the late 1990s to the present. The mechanisms are sorted into the typology previously explained, concentrating specifically on the informal and formal basis of the cooperation. This categorization distinguishes the administrative approach of the collaboration, the function and scope of the linking mechanisms, and the character of the situations/services being addressed. In this way, supported by case study and survey data, the status and changes over time in the nature and use of collaborative mechanisms are presented. Table 1 displays a comparison of the number of cases and percentages of total reported interlocal collaborative mechanisms

Table 1. Interlocal Collaborative Mechanisms among Nebraska Municipalities in 2002 and 2013.

	# of Cases Reported		Percentage of Total	
	2002	2013	2002	2013
Informal				
Mutual aid	270	150	11.8%	17.3%
Common understanding	142	115	6.2%	13.3%
Association	661 ^a	250	28.9% ^a	28.9%
Consortium	267	55	11.7%	6.4%
Informal subtotals	1,340	570	58.6%	65.9%
Formal				
Agreement	117	110	5.1%	12.7%
Contract	465	65	20.3%	7.5%
Federation	57	90	2.5%	10.4%
Joint venture	310	30	13.5%	3.5%
Formal subtotals	949	295	41.4%	34.1%

^a Estimated values.

Source: 2002 Nebraska State Auditor's survey; 2013 authors' survey.

among Nebraska municipalities in 2002 and 2013.

Informal Mechanisms

Informal mechanisms incorporate the regular yet unofficial and less structured collection of interactions and relationships among different local government units involved in IGC. The informal aspect of these types of interlocal collaborations generally refers to the absence of legislation or authorization, instead involving an implied, unwritten, and/or professional basis for exchange. These tools typically comprise some variation of mutual aid, common understanding, associations, and consortiums.

Mutual Aid. The mutual aid mechanism consists of the unwritten or informal arrangements among local governments pledging assistance in unspecified or general function areas. These informal commitments may "obligate cities to assist each other if either experiences a crisis situation" (Cooper et al. 1998, 107). Mutual aid often includes the traditional local government activities of fire protection, civil defense, police, and public works and appears to be a common form of support among municipalities in Nebraska. In many cases, it is executed simply through a pact among administrators in

neighboring communities to help each other in extreme emergencies, such as fires, floods, or other natural disasters.

A recent example of mutual aid among Nebraska local governments occurred in 2011, when a series of floods along the Missouri river contributed to a number of crisis situations for communities located in the northeastern region of the state. Particularly, the cities of Blair and South Sioux City experienced extensive damage, which severely affected utility and facility operations in both municipalities. In addition to support from federal and state agencies, the impacted cities received aid from surrounding communities and counties that included the sharing of resources, personnel, and volunteers. In one case, Washington county created an informal recovery team of resident volunteers to assist with case management, damage assessment, relocation, and cleanup in the Blair area (Green, Hedquist, and Schoemaker 2013).

In the late 1990s, data from twenty-one municipalities and four counties in southwest Nebraska indicated eighteen examples of mutual aid among these local governments, with public safety functions and utility operations as the most common (Nebraska Community Foundation 1998). At present, the utilization of mutual aid among Nebraska

municipalities appears to be on the rise, as survey data from 2013 show that 65.5 percent of respondents are engaged in mutual aid deals. As Table 1 displays, there was an increase in mutual aid from 11.8 percent of total reported interlocal collaborative mechanisms in 2002 compared with 17.3 percent in 2013. The use of mutual aid seems to be most prevalent in emergency management coordination, especially among fire departments, and in cooperative plans focused on improving efficiency in municipal services.

Common Understanding. This mechanism includes unwritten or informal arrangements between local government administrators and officials for cooperation in a more detailed service area. The common understanding tool differs from mutual aid in terms of the specificity of the resource exchanged. For example, one government unit owns a resource or an asset that another government may need, so an informal pledge between administrators provides for the borrowing or leasing of the resource. Reducing costs through sharing and borrowing of specialized resources often drives local governments to consider pursuing common understandings with neighboring governments, which represents a frequent use in Nebraska.

An example of this type of common understanding is the Kearney Volunteer Fire Department (KVFD). Established in 1883, KVFD provides fire protection services for the city as well as for area residences located in Suburban Fire District #1, which covers portions of Buffalo and Kearney counties. KVFD uses four fire stations, three situated within the city and one located northwest of Kearney in the village of Riverdale. Depending upon the location and nature of the fire call, different personnel and equipment may be dispatched from the appropriate fire station. Although some equipment is designated to a particular district/station, there is a deal for city/suburban/rural sharing of resources, including engines, trucks, ladders, and rescue vehicles, between the various fire jurisdictions (Blair, Drozd, and Deichert 2013).

Among Nebraska municipalities, 2013 survey data indicated that common understandings

were used by 61.2 percent of respondents, most typically in the apportionment of specialized equipment, personnel, and facilities in areas such as fire, water, sewer, airports, animal control, and other miscellaneous city services. Referring to Table 1, in 2013 Nebraska municipalities reported that 13.3 percent of their total interlocal collaborative mechanisms were of the common understanding variety. This value represented a substantial increase in common understandings from the 6.2 percent reported in 2002.

Association. This mechanism involves informal arrangements among administrators and elected officials for the exchange of resources in broadly defined areas. An association is often created to function as a medium for actors from different organizations to interact on a specialized and professional basis. For instance, in Nebraska, the expansive presence of professional practitioner associations provides a foundation for communication, assistance, and cooperation. A relatively large number of participants and the creation of an informal organizational structure to assist in the IGC process characterize this collaborative tool.

The Nebraska City/County Management Association (NCMA) and the Nebraska Municipal Clerks Association (NMCA), in conjunction with the Nebraska League of Municipalities, represent two primary professional associations for local government administrators. Members of NMCA, regionally served by five district units, created an informal Clerk's Association Handbook designed to assist members with information about the potentials for sharing equipment and personnel (Bartle and Blair 1999). As of 2013, these two local government associations include more than 300 members from Nebraska cities, villages, and counties, and both organizations maintain annual and regional conferences, current Web sites, and a LIST-SERV that provide members with informal modes for the exchange of communication and resources. The extensive incidence and usage of associations among Nebraska municipalities was corroborated by 2013 survey data as 87.1

percent of respondents indicated involvement in associations, comprising 28.9 percent of the total reported interlocal collaborative mechanisms in Table 1 and representing the highest overall proportion of all collaborative mechanisms. The 2002 State Auditor's survey did not collect data on associations.

Consortium. Like the association, the consortium mechanism employs informal mutual organizational structures, but it facilitates the exchange of more specific services and resources among local government units. Often an informal or unwritten understanding outlines the IGC process among the local government participants. For example, in a consortium, a set of local governments may come to an unofficial arrangement to collaborate and purchase items together (Cox and Rosenfeld 2001). In Nebraska, consortiums have been formed among municipalities for joint purchasing as well as regional and economic development projects.

We found a wide range of services involved within consortiums in Nebraska. In the area of law enforcement, the Western Nebraska Intelligence and Narcotics Group (WING), a special task force that focuses on criminal justice issues and drug trafficking, was formed in 1989 to assist counties in northwestern Nebraska (Haverman 1998). Currently, this consortium includes personnel from six cities, two counties, and the Nebraska State Patrol, which provide a variety of law enforcement services to an expansive area encompassing eleven Nebraska counties. Since its establishment, WING has conducted over 7227 arrests, and the high success rate of the task force has been partly contributed to the increased coordination of law enforcement activities made possible through the mutual organizational structure (Scotts Bluff County 2013).

The results of survey data revealed that the use of consortiums in Nebraska was predominantly in the areas of natural gas organization/distribution, risk management insurance consolidation, and, especially among villages, in the formation of mutual finance organizations. However, only 35.3 percent of 2013 survey

respondents confirmed participation in consortiums, and, as shown in Table 1, the reported number of consortium arrangements among Nebraska municipalities represented 6.4 percent of total interlocal collaborative mechanisms. Compared with 2002 data, this value indicated a decrease in consortiums from 11.7 percent.

Formal Mechanisms

Formal mechanisms can be defined as the more structured, hierarchical, and official set of interlocal collaborations among government units, which often require action by elected representatives. Unlike informal tools, formal mechanisms generally involve some type of established or semi-permanent arrangement for a specified duration. In some cases, this linkage includes the creation of a separate organizational structure to help facilitate the cooperative interactions among the local governments and may incorporate several informal mechanisms for the exchange of resources, services, or other terms of the IGC. Formal mechanisms, consisting of agreements, contracts, federations, and joint ventures, can be categorized according to the procedures and details of the relationship.

Agreement. The agreement mechanism can be described as a formal or written pact, often open ended in nature, which provides conditions for the exchange of a general set of resources, goods, or services. As we define it, administrators initiate agreements and normally require a formal endorsement by elected officials. Nebraska municipalities employ both bilateral and multilateral agreements. While intuitively it would seem that the relatively high transaction costs of initiating, negotiating, and maintaining agreements with several parties would result in fewer multilateral than bilateral varieties, research reveals that is not the case among Nebraska municipalities.

Agreements, according to the following example, may form a foundation for regional interlocal cooperation. South Sioux City has executed a range of interlocal agreements with

municipalities, school districts, and the county. Notably, officials from the localities have been meeting regularly on a joint basis since 1979, making this interjurisdictional collaboration potentially one of the oldest in the country (personal communication with Lance Hedquist, City Administrator, June 27, 2013). The survey by the State Auditor in 2002 showed that Nebraska municipalities averaged 10.5 interlocal agreements. The same survey showed that South Sioux City executed twenty-two interlocal agreements, and in 2013 they reported forty-three agreements. While agreements establish the formal basis for collaboration in the South Sioux City region, the history of partnering among the localities also fosters an atmosphere of informal cooperation and trust. A focus on achieving efficiencies in service delivery underlies the cooperative philosophy for collaboration among the local governments (personal communication with Lance Hedquist, City Administrator, June 27, 2013).

In the 2013 survey, 70.5 percent of respondents utilized agreements. This represented 12.7 percent of the total reported interlocal collaborative mechanisms among Nebraska municipalities in Table 1. Comparatively, this value indicates an increase in the use of agreements from the 5.1 percent reported in 2002. In Nebraska, agreements were found to be most common in the areas of public transportation, housing, economic development/grant coordination, and human services.

Contract. This mechanism consists of legally binding, formal documents that describe how particular services and resources will be exchanged among local governments. IGC contracts usually have definite time frames. The research uncovered a variety of these types of interlocal contracts in the state of Nebraska. As we define them, these arrangements often require approval from an elected body, and administrators typically initiate and maintain the contracts. In our categorization system, contracts differ from agreements in terms of the specificity of the resources involved in the collaboration.

In 2002, near the end of a three-year deal, the City of Gretna considered opting out of contracted law enforcement services provided by the Sarpy County sheriff's office and commissioned an evaluation of the potential for operating its own police force, similar to that of other Sarpy County municipalities such as Bellevue, Papillion, and La Vista (Olson 2002). Following a series of renegotiations, Gretna, along with the neighboring community of Springfield, decided to continue to contract the policing services despite an increase in cost; currently, the contracted protection includes traffic, crime, and emergency response (Olson 2002; Sarpy County 2013). However, this situation may be indicative of a growing trend among Nebraska municipalities in relation to the in-house provision of public services as opposed to the costs of alternative modes of delivery. For example, in 2008, Nebraska City (capitalized) elected to hire municipal personnel for fire and 911/emergency services in an effort to improve program efficiencies, supplementing the volunteer squad that had been used by the city since the 1960s (Ferak 2008).

According to the surveys, contracts were utilized among Nebraska municipalities in the employment of specific services regarding streets/road maintenance, natural resources, and technical equipment/programs. Most notably, a high incidence of contracts was found in the areas of law enforcement and 911/emergency services. However, only 38.1 percent of 2013 survey respondents confirmed the use of contracts. In Table 1, contracts represented only 7.5 percent of the total reported interlocal collaborative mechanisms in 2013, substantially lower than the 20.3 percent reported in 2002.

Federation. This IGC mechanism includes more formal organizational structures, often created by written resolution or other formal actions, among a set of local governments for the provision of a range of general services. Federations may establish new organizational entities to facilitate collaboration, merging existing governmental organizations or functions to form a third party. Other variations of this widely

used tool may consist of interlocking or overlapping memberships among existing organizations, the employment of ex officio members, and the use of liaisons among cooperating units.

Nebraska's Interlocal Cooperation Act authorizes the legal foundation for creating and sustaining federations. Regional councils of government and economic development districts provide excellent examples of the federation mechanism. Formed in 1965, the Siouxland Interstate Municipal Planning Council (SIMPCO) in northeast Nebraska and northwest Iowa claims the title of the longest lasting federation in Nebraska. Like the other seven regional councils of government in the state, SIMPCO delivers an array of services to its member localities, including but not limited to community improvement, housing, and economic development. Submitting applications and managing projects funded by the Community Development Block Grant (CDBG) program may be the most important service provided by development districts. From 1997 to 2012, the districts oversaw 794 CDBG grants in nonmetropolitan communities (Nebraska Department of Economic Development 2013). The two districts in the most populous part of the state managed 65 percent of the grants.

The diversity and assortment of services performed by federations may lend to their increasing popularity among Nebraska municipalities, with 48.6 percent of 2013 survey respondents indicating federation involvement. For instance, a commonly described usage of federations was in the formation and enforcement of planning and zoning policies. Referring to Table 1, in 2013 federations comprised 10.4 percent of total reported interlocal collaborative mechanisms, which was a comparative increase from the 2.5 percent reported in 2002.

Joint Venture. The joint venture, the most formal mechanism, involves the creation of an organization or organizational structure for the coproduction of public goods or the coprovision of public services by two or more units of local government. Like federations, joint ventures

consist of formal structures. However, they differ in terms of the acuteness of the resources exchanged, with joint ventures performing articulated functions. In this way, parts of existing organizations may merge for the coproduction of a particular task. As was revealed through the data in Nebraska, joint ventures may involve the sharing of personnel in joint programs, the multijurisdictional provision of public services, and specific purpose collaborations such as legal and environmental matters.

In addition to federations, the Interlocal Cooperation Act has likewise assisted with the formation of joint ventures in Nebraska. For instance, joint operations fostered the co-utilization of incarceration facilities in Dakota county (Bartle and Swayze 1997) and the shared function of local natural gas systems by the cities of Stromsburg and Central City (Nebraska Department of Economic Development 2000). Currently, a notable joint venture in the area of public utilities is the Nebraska Municipal Power Pool (2013; NMPP Energy) that is based in the capital city of Lincoln. NMPP Energy, initially founded in 1975 among nineteen municipalities, now serves approximately 140 Nebraska communities throughout the state with additional coverage of cities in five other regional states. NMPP Energy (2013) operates as a mutual organizational structure, providing the joint production and provision of electricity and natural gas as well as coordinated assistance with energy audits, personnel training sessions and workshops, and regulatory compliance for participating communities.

The findings of survey data demonstrated that the use of joint ventures was typical in the coordination of joint facilities, such as libraries, jails, community/park recreational centers, and, most notably, waste disposal. The highest reported usages of joint ventures were in the areas of electric energy distribution, namely NMPP Energy, and joint gaming/lottery enterprises. However, only 27.6 percent of respondents claimed participation in joint ventures in 2013, and, as shown in Table 1, the percentage of total reported interlocal collaborative mechanisms represented

by joint ventures comparatively decreased from 13.5 percent in 2002 to 3.5 percent in 2013.

Findings and Discussion

This study attempted to improve our understanding of the process of interlocal cooperation by longitudinally examining the IGC mechanisms used in municipal collaborations in the state of Nebraska. The authors addressed two primary research questions: what is the nature of the IGC mechanisms/tools that forge organizational links? How has the use of these IGC mechanisms changed/evolved over time? To answer these questions, we categorized mechanisms according to a typology for interlocal collaboration and assessed the status and purpose of these mechanisms over a period of approximately fifteen years. Our hypothesis was that, over time, the collaborative mechanisms of interlocal cooperation will require more formal and complex arrangements. Based upon the findings, several key points on the character and usage of interlocal collaborative mechanisms in Nebraska can be made.

The use of the IGC mechanisms among Nebraska municipalities has changed, to an extent, over time. As is illustrated in Table 1, the percentages of total reported interlocal collaborative mechanisms display a 7.3 percent increase in the utilization of informal mechanisms from 2002 to 2013. This was contrary to our hypothesis. Expressly, this trend denotes reported increases in the usage of mutual aid and common understanding, which, according to the typology, relate to both the general and specific exchange of resources. Incidentally, the use of consortiums, a more specific informal exchange, decreased over the same period. Of the formal mechanisms, there were substantial increases in the reported use of agreements and federations, representing general exchanges, with concurrent decreases in the more specific linkages of contracts and joint ventures. This would imply that, in Nebraska, the use of the IGC mechanisms in interlocal cooperation appears to be moving toward those of the informal and general varieties.

The explanations for this progressive utilization of more informal and general types of linking mechanisms may be multifold. Based upon the case study and survey data, the scope and situational needs/purposes for interlocal cooperation in Nebraska represent a broad spectrum of services and applications being addressed through collaboration, with informal and general mechanisms exercised in such areas as public utilities/facilities, professional associations, economic development, and emergency management. Conversely, the more formal and specific mechanisms, namely consortiums, contracts, and joint ventures, were commonly used for program conglomerations such as energy distribution and law enforcement. According to recent research, this shift to informality may signal preference for a more autonomous approach toward collaboration, independent of aggregated corporations, especially among smaller communities (Kraus 2012). It may also signify the desire for more regionally based cooperation, as was indicated in the common understandings, agreements, and federations of Nebraska case studies, and in-house provision options such as demonstrated in the Gretna contract situation. With the exception of a few major metropolitan areas, Nebraska has a majority of small- and medium-sized communities, and distinct regional separations may further impede large-scale cooperatives.

Correspondingly, indications from the 2013 survey suggest a wide variety of motivations for interlocal cooperation among Nebraska municipalities. In addition to reporting the types of mechanisms used, respondents were asked to rate a selection of reasons for IGC derived from the literature as strongly encouraging collaboration to strongly discouraging collaboration. While improving efficiency was a notable encouragement for cooperation by 80 percent of respondents, several other reasons rated highly as well including assistance in emergency situations (90.5 percent), increased quality of services (81.1 percent), improved availability/responsiveness (77.7 percent), and fulfilling short-term needs (76.8 percent). The highest rated discouragements for collaboration

of the respondents included overall costs exceeding benefits (41.9 percent), loss of availability/responsiveness (38.8 percent), lack of responsibility/accountability (36.2 percent), and loss of local control/management (34.1 percent). Findings from recent studies support the notion that the motives for interlocal cooperation are becoming increasingly diverse. Although economizing appears to remain a priority in IGC, other objectives such as effectiveness, reciprocity (Thurmaier and Wood 2002), and risk aversion (Bae and Feiock 2012) may be likewise as important, leading to potential shifts in organizational proclivity and mechanism usage as was observed among Nebraska municipalities.

Conclusion

Ten years ago, a state survey of Nebraska local governments revealed that 78 percent of municipalities were engaged in some form of interlocal arrangements for the improved provision of joint services (Reed 2003). While this trend appears to be continuing, the nature and use of these collaborations may be evolving. The results of this study indicate a shift toward informality and generality of the IGC mechanisms. This suggests a tendency for the more indefinite, casual, and need-based exchanges of resources in interlocal cooperation in Nebraska and raises additional questions pertaining to the configurations and motivations of collaboration among local governments.

What is evident is that collaboration is happening, and, accordingly, there is cause for further research in this area. As we have attempted to establish, the variety and functions of mechanisms/tools being employed in IGC exemplify the situational circumstances being addressed, the sort of public problems being confronted by local governments, and the nature and management of cooperation that is being implemented. Within the scope of formality and specificity, other issues require consideration: how have collaborative mechanisms been modified to meet the needs of cooperating entities? How do institutional context and organizational culture impact the use of

collaborative mechanisms? Are other subcategories or new forms of collaborative mechanisms emerging? In essence, collaborative mechanisms represent both the instrument and the framework for cooperative relationships, and a better understanding of the characteristics and applications of these linkages may offer practical improvements in the public administration of the local government collaboration process.

Declaration of Conflicting Interests

The authors declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The authors received no financial support for the research, authorship, and/or publication of this article.

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1. Développement des droits de la personne : Audace, résilience et collaboration

Le premier texte que je propose de partager est le produit de la Quatrième *Conférence mondiale sur les femmes : Lutte pour l'Égalité, le Développement et la Paix*, qui s'est tenue sous l'égide de l'Organisation des Nations Unies (ONU) à Beijing, du 4 au 15 septembre 1995.

J'ai choisi le texte de la *Déclaration et Programme d'Action de Beijing*, car il est le produit d'une conférence historique qui a marqué le développement des droits de la personne. Ce fut la plus influente conférence mondiale organisée sur la condition féminine. En outre, comme jeune avocate au Ministère des Affaires étrangères, j'ai eu l'occasion de participer à la négociation de la *Déclaration et Programme d'Action*, au siège de l'ONU à New York, dans les mois précédant et, par la suite, de participer aux discussions portant sur sa mise en œuvre avec des représentants de la société civile.

L'adoption de la *Déclaration et Programme d'Action de Beijing*, texte multilatéral qui aborde un large éventail de domaines, a fait l'objet de longues et ardues négociations entre plus de 180 États membres de l'ONU ayant des positions parfois diamétralement opposées. Il est donc remarquable qu'un tel consensus fut réalisable à l'époque. Dans le contexte de ces discussions, les délégués ont dû négocier en observant et en respectant la diversité des cultures, tout en assurant la défense et la promotion des normes et des principes universels de justice et de droit de la personne.

Le résultat des négociations illustre donc certains concepts-clé du curriculum de leadership engagé dont ont dû faire preuve les délégués: la collaboration dans le dialogue respectueux, l'audace et la résilience pour défendre leur position, et le devoir de service envers la promotion des droits de la personne.

En diplomatie tout comme en négociation, pour convaincre l'autre de se rallier à une position commune, il importe que chacun y trouve son compte. La clé du succès réside donc dans l'écoute, un dialogue empreint de respect, afin d'identifier et s'entendre sur le plus ambitieux dénominateur commun acceptable, tout en respectant et en faisant avancer le cadre normatif international.

Bien que plusieurs des termes et concepts aient évolué depuis, la conférence de Beijing demeure un moment fort de la diplomatie, car, grâce à ces discussions déterminées, on a pu atteindre un consensus sur un plan d'action, qui sert désormais de base à la mise en œuvre d'un ambitieux projet commun.

https://www.unwomen.org/-/media/headquarters/attachments/sections/csw/bpa_f_final_web.pdf?la=fr&vs=754

https://www.unwomen.org/-/media/headquarters/attachments/sections/csw/pfa_e_final_web.pdf?la=fr&vs=800

2. Servir le Canada à l'international : collaboration et promotion des droits de la personne

Le second texte que je partage est une entrevue accordée en espagnol au quotidien national panaméen l'Estrella et publiée le 7 juillet 2018. Cette entrevue marquant la fin de mon mandat d'ambassadeur (2015-2018) faisait le bilan des réalisations du Canada au cours des trois années précédentes et visait à mettre en valeur et à renforcer nos étroites relations bilatérales.

Divers thèmes y furent abordés (relations dans le secteur de l'éducation, liens commerciaux, projets de développement et accord de coopération en matière de sécurité nationale etc). Toutefois, seuls mes propos relatifs à la promotion du droit des femmes, notamment celui de prendre les décisions qui concerne leurs propres corps, firent la manchette. S'agissant d'un thème controversé au pays, l'article fut remarqué, mais généralement bien accueilli, puisque le Canada est reconnu pour sa politique féministe et pour ses actions cohérentes en faveur de la règle de droit, de l'inclusion et de la diversité.

Cet article illustre ma passion à renforcer les droits et la démocratie, et à faire avancer des projets et des politiques sociales en faveur des femmes et des populations vulnérables à l'étranger - comme au Canada - dans le cadre du service public. De plus, cette entrevue, comme toutes mes communications publiques en tant que diplomate canadienne fut accordée en espagnol, illustrant mon engagement envers la diversité linguistique. Dans ma profession, il s'agit d'un outil fondamental permettant de s'immerger réellement dans la culture et de comprendre l'identité d'un peuple où l'on est accrédité. C'est surtout une marque tangible du respect et de l'intérêt que nous manifestons envers notre pays hôte et qui nous permet de propulser les relations bilatérales.

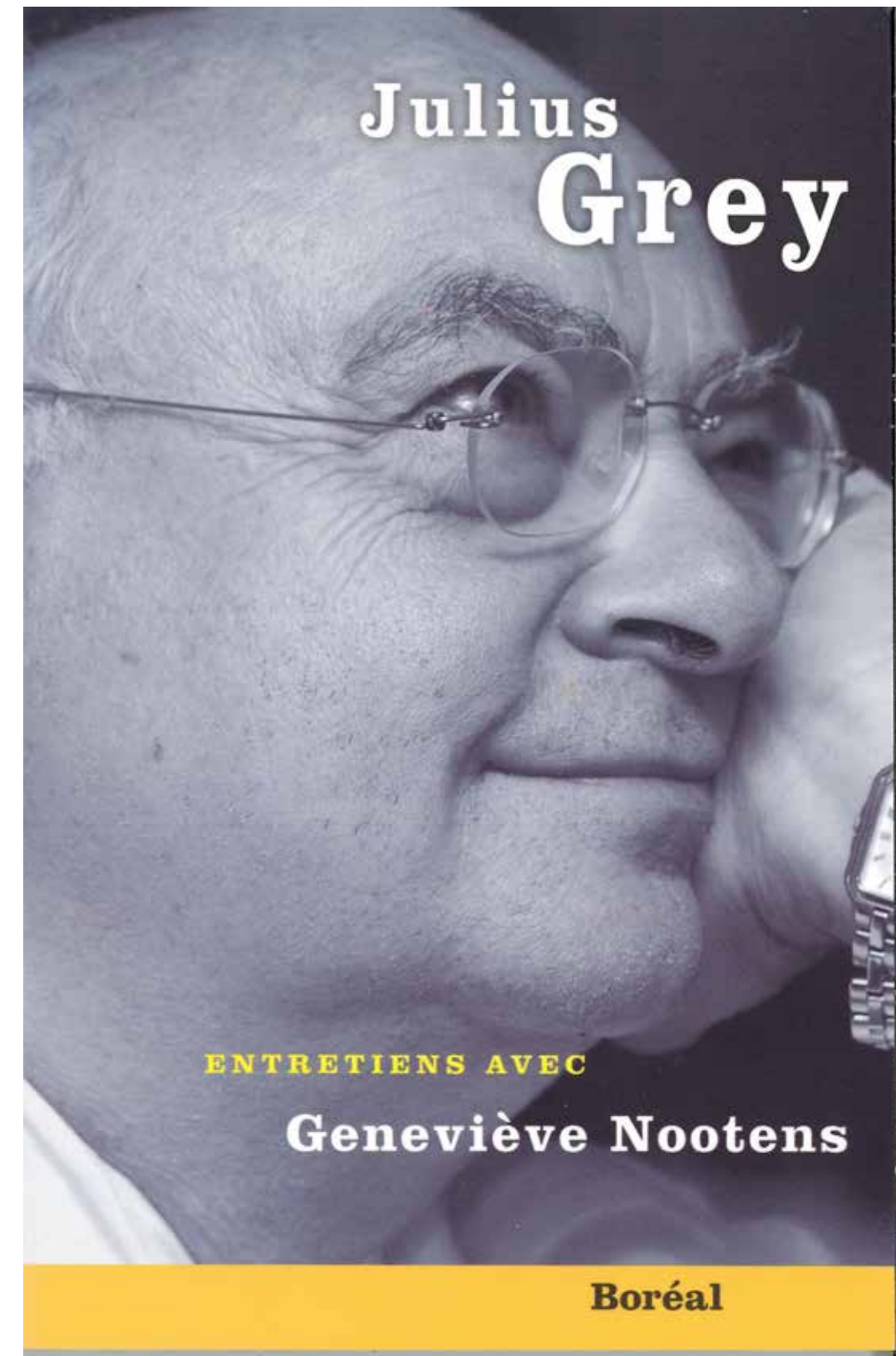
<https://www.laestrella.com.pa/internacional/america/180707/deben-cuerpo-mujeres-derechos>

Finalement, je partage aussi un lien à une initiative internationale mise de l'avant par le Canada cette année, et qui fut entre autres développée par l'équipe dont je suis responsable. La *Déclaration contre la détention arbitraire dans les relations états à états* est une initiative multilatérale pour laquelle le leadership du Canada est actuellement salué par plusieurs acteurs de la scène internationale. Cette déclaration a permis de mettre en lumière et de regrouper une coalition de pays diversifiée qui dénoncent la pratique inacceptable et malheureusement croissante, des détentions arbitraires de citoyens étrangers pour exercer une pression sur un pays tiers. Cette pratique est en contravention directe avec de nombreuses normes internationales de droit de la personne, de droit consulaire, ainsi que du droit diplomatique, car elle entrave la bonne conduite des relations pacifiques entre États.

Depuis plus de 25 ans en diplomatie, le devoir de service envers la promotion des droits de la personne et la justice sociale pour améliorer la vie de nos concitoyens dans le monde sont et resteront des fils conducteurs de mon engagement professionnel.

https://www.international.gc.ca/news-nouvelles/assets/pdfs/arbitrary_detention-detention_arbitraire-declaration-en.pdf

https://www.international.gc.ca/news-nouvelles/assets/pdfs/arbitrary_detention-detention_arbitraire-declaration-fr.pdf



Chapitre 3

LIBERTÉ D'EXPRESSION, NON-CONFORMISME ET TOLÉRANCE

■ *Vous pensez que la société n'est pas assez tolérante et qu'on devrait laisser les gens qui ont des opinions un peu dérangeantes les exprimer plutôt que de les obliger à se taire. Mais on ne peut pas tolérer tout et n'importe quoi dans le discours. Dans un certain nombre de cas, les tribunaux ont d'ailleurs eu à se prononcer sur cette question. Où pensez-vous qu'on devrait placer la limite, par exemple, en matière de discours haineux ?*

J'ai toujours pensé qu'en matière de discours, la limite qu'on doit tracer correspond aux véritables dommages. Et il faut faire très attention avec l'argument voulant qu'un discours puisse réellement causer du tort. Je crois que ce n'est vrai que dans des cas extrêmes. Par exemple, si quelqu'un se permet de prononcer un discours dans lequel il demande à la population d'aller tuer des membres d'une minorité ou la pousse à l'émeute, il y a un véritable dommage. S'il exhorte les autres à le suivre en disant qu'il va tuer d'autres personnes, c'est évident que ça dépasse la limite puisqu'il y a un risque que les gens suivent et qu'il est donc possible de dire que cet individu a incité au meurtre.

Mais un simple discours haineux ne crée pas nécessairement un dommage. Je pense qu'il faut laisser les personnes parler. Il y a une bonne raison pour le faire : on croit que parce qu'on prohibe certaines choses, ces choses-là n'existent plus dans l'esprit des gens. Mais c'est faux et c'est parfois même le contraire. Rappelez-vous que Tito avait interdit toute expression de haine interethnique en ex-Yougoslavie. On n'avait pas le droit de maudire les gens des autres ethnies ou des autres religions, de dire par exemple « maudit Serbe » ou « maudit musulman ». C'était absolument défendu. L'ex-Yougoslavie était un pays où tout le monde vivait en harmonie. Et ça fonctionnait. Il y avait beaucoup de mariages mixtes. Mais aujourd'hui, quand on rencontre ces familles-là dans lesquelles, par exemple, l'un des parents est musulman et l'autre pas, on se rend compte que beaucoup sont en exil. Elles ont dû partir parce qu'il n'y avait pas de place pour elles. Si on vit à Zagreb avec une femme serbe ou à Belgrade avec une femme croate, on n'est peut-être pas persécuté, mais il y a des commentaires, c'est mal vu.

Je pense qu'il vaut mieux savoir que quelqu'un pense ce genre de choses que de faire en sorte qu'il se taise. D'ailleurs, les gens plus intelligents, plus rusés – et donc plus dangereux – ont tendance à taire certaines opinions. Aujourd'hui, lorsque les gens ne veulent pas avoir quelqu'un d'une autre origine, ils ne le diront pas. La personne qui embauche ne dira pas que c'est parce que M. Jean est noir qu'elle ne veut pas de M. Jean. Elle dira plutôt qu'elle a considéré la candidature de M. Jean avec beaucoup d'attention, qu'elle était très bonne, mais que la candidature de M. Tremblay était meilleure. Donc, même pour les minorités, il vaut mieux ne pas occulter les différents points de vue. Non seulement parce que c'est inefficace et contre-productif, mais aussi parce qu'il est préférable de savoir qui pense quoi, même quand c'est terrible.

Dans une des causes que j'ai défendues – celle du Caba-

ret Sex Appeal –, le juge Baudoin avait d'ailleurs souligné qu'on a le droit de dire des choses dérangeantes. Ce sont seulement les choses qui sont absolument intolérables qu'on ne peut pas dire. Et c'est pourquoi il faut une preuve solide. Il ne suffit pas de décréter qu'aujourd'hui, on ne tolère pas tel truc. Ça ne peut pas être fondé seulement sur l'opinion du moment. On a notamment ce problème avec le tabagisme : il y a un projet de loi en Ontario qui prévoit d'interdire aux locataires de fumer dans leur appartement. Il ne fait aucun doute que fumer est mauvais pour le fumeur lui-même et c'est possible à la limite que ce soit mauvais pour sa famille. Mais rien ne prouve que si vous habitez au deuxième étage d'un immeuble et que le fumeur habite au quatrième étage, la fumée de sa cigarette vous nuise de quelque façon que ce soit. C'est la rectitude politique qui fait en sorte qu'on perçoit un dommage. Ce n'est pas assez. Il faut une preuve solide de l'effet néfaste. Par exemple, c'est facile de comprendre pourquoi on n'a pas le droit de crier « au feu » dans un cinéma. Il faut que le dommage soit clair et quantifiable.

En matière d'obscénité, comme dans la cause Cabaret Sex Appeal, la Ville de Montréal a fait témoigner un psychologue qui a produit une expertise dans laquelle il disait que lorsque quelqu'un voit un corps, même habillé, dans la vitrine d'un endroit où il sait que les danseuses sont nues, il fait l'association entre la femme nue et le corps humain, et c'est dégradant pour les femmes, ça mène à une déconsidération des femmes. Il disait aussi qu'une « bête mâle » rôde dans nos sociétés, qui a automatiquement des érections en regardant ces choses-là, et qu'il faut la réprimer, parce qu'elle est bien réelle. Mais la Ville n'a pas réussi à prouver que l'affichage causait un préjudice ou un effet nocif pour la société.

Vous savez, je ne suis jamais entré dans un de ces établissements. À la cour, le juge m'a demandé comment ça se passait là-bas. Je lui ai répondu que je n'en avais pas la moindre

idée, que je n'y étais jamais allé. Il a tellement ri qu'il a dû ajourner l'audience. Et les gens racontaient que j'avais plaidé vingt jours pour Cabaret Sex Appeal et que je n'y avais jamais mis les pieds. Quand la cause a été remportée, une journaliste – une amie – m'a appelé en me disant que la *Gazette* la forçait à se rendre dans un de ces endroits parce que j'avais gagné et que je devais donc l'accompagner parce que c'était de ma faute si elle était obligée d'y aller. J'ai trouvé ça parfaitement ennuyeux, sans intérêt. Il y a une absence totale de romantisme. Mais je suis contre le puritanisme, contre les gens qui veulent imposer des normes de comportement. Et je me réserve le droit de ne pas observer les règles, de ne pas être comme il faut, de ne pas exprimer les opinions qu'on attend de moi. C'est la liberté de chacun de mener sa vie privée comme il ou elle le veut. La rectitude politique et le conformisme peuvent avoir des conséquences néfastes sur la vie sociale ou la carrière des gens non conformistes. Il y a un certain nombre de choses qui sont interdites par les lois – secrets officiels, propagande haineuse extrême, etc. Mais il y a aussi un effet négatif à dire des choses qui dérangent. C'est pourquoi il faut définir le véritable dommage comme un dommage clair et quantifiable, pas comme un point de vue lié à la rectitude politique.

Maintenant, si on montrait que certains de ces endroits favorisent, par exemple, la prostitution juvénile – mais même dans ce cas, ce ne serait pas la publicité qui serait en cause, mais l'activité elle-même –, il pourrait être légitime de les interdire.

■ *Qu'est-ce qui constitue alors un dommage sérieux ?*

C'est un dommage concret et documenté. Je pense que si quelqu'un traite une personne de « sale nègre », il y a un dommage. C'est une insulte, c'est comme gifler quelqu'un. Mais je

crois que ce n'est pas suffisant. Par contre, je comprends que si quelqu'un s'adresse à un juge noir, le traite de « sale nègre » et dit qu'il n'est pas un véritable juge, cela a pour effet de détruire la justice et qu'il y a donc une raison pour l'empêcher de dire de telles choses.

■ *Et quand le Dr Pierre Mailloux affirme sur les ondes de Radio-Canada que les Noirs ont un quotient intellectuel inférieur, devrait-on l'en empêcher ?*

Je ne l'aurais pas empêché de parler. La sanction administrative imposée par le Collège des médecins soulève évidemment un point intéressant, parce qu'on pourrait peut-être démontrer que sa position était complètement antiscientifique. Mais ce n'est pas assez. La question en fait consiste à savoir s'il pratique d'une façon différente. Si, par exemple, un médecin dit à la radio qu'il ne croit pas à l'évolution, ce n'est pas une raison de penser qu'il pratique la médecine de manière primitive. Si un médecin disait qu'il est contre les antibiotiques et n'en administre jamais parce qu'il considère que c'est une erreur de le faire, il y aurait lieu de faire une enquête, pas parce qu'il a tenu ces propos, mais parce que l'inspecteur de l'ordre des médecins voudrait vérifier ce qu'il fait quand quelqu'un se présente avec une fièvre aiguë pour laquelle la majorité de ses collègues prescriraient des antibiotiques. Si le médecin répondait qu'il est personnellement contre les antibiotiques, mais qu'il comprend que c'est son opinion personnelle et qu'il a l'obligation de suivre le protocole, il n'y a rien à faire.

On a eu ce problème dans l'affaire Keegstra. James Keegstra a été poursuivi au criminel parce qu'il disait que l'Holocauste était le résultat d'un complot mené conjointement par les Juifs, Hitler et Staline, et que les Juifs l'avaient partiellement imaginé – des folies obsessionnelles et malades,

quoi. Il a aussi été relevé de ses fonctions de professeur d'histoire à l'école secondaire, et ça, je peux le comprendre. Quelqu'un qui croit que la Terre est plate ne pourrait pas enseigner la géographie ! Mais j'aurais retranché la condamnation criminelle. Il y a aussi eu une cause au Nouveau-Brunswick dans laquelle la Cour suprême a ordonné qu'un professeur qui tenait ouvertement et partout des propos antisémites soit écarté de l'enseignement. La Cour a souligné qu'un enfant juif pouvait être affecté pour la vie par quelqu'un qui l'insultait d'une telle manière. Et même si ça avait été le cas que d'un seul enfant, ça aurait déjà été trop. Je pense que là, il y avait une raison suffisante. Cependant, la Cour suprême a aussi précisé que rien n'empêchait la commission scolaire de lui donner un travail de bureau, sans contact direct avec les écoliers, pour qu'il ne meure pas de faim. On n'a donc pas ordonné qu'il soit congédié, mais bien qu'il ne puisse plus s'exprimer en classe. C'est le genre de distinction avec laquelle je suis d'accord. Mais il faut faire attention : ce n'est pas nécessairement une question de propagande haineuse. Comme je l'ai dit, quelqu'un qui croit que la Terre est plate – ou quelqu'un qui croit dans la génétique de Lyssenko – ne devrait pas pouvoir enseigner les matières liées à ces domaines sans pour autant être poursuivi au criminel. Pour qu'il y ait poursuite au criminel, il faut que ce soit absolument terrible. Par exemple, si quelqu'un tenait un discours antisémite devant une foule rassemblée près d'une synagogue au Yom Kippour et risquait de provoquer une émeute.

■ *Peut-on faire un parallèle entre ce que vous dites à propos de l'histoire ou de la géographie et le débat qui existe aux États-Unis entre les gens qui défendent la théorie de l'évolution et les tenants du créationnisme ? Est-ce que, comme le réclament certains créa-*

tionnistes, on devrait retirer la théorie de l'évolution des manuels scolaires ou même traiter l'évolution et le créationnisme comme deux théories ayant la même valeur ?

Je ne pense pas qu'il faille punir les gens qui sont créationnistes. Mais je pense qu'on a le droit, notamment dans un département de biologie dans une université ou une école secondaire, de dire que le créationnisme n'est pas sérieux. On n'a pas à enseigner toutes les théories ! J'ai un autre exemple. Quand j'étais président de la Fondation canadienne des droits de la personne, une commission scolaire en Alberta a conclu un accord avec les mennonites stipulant que leurs enfants iraient à l'école, mais n'auraient pas accès à la bibliothèque parce qu'elle contenait des livres « profanes ». Et par « profanes », ils entendaient « littéraires ». Les mennonites ne voulaient pas que leur progéniture lise des ouvrages où il était notamment question d'amour, comme *Roméo et Juliette*. J'imagine que si on avait été dans ma classe de onzième année à l'école Northmount, on aurait prévu un cours spécial pour ces enfants-là parce que *De grandes espérances* de Charles Dickens n'est pas conforme à leur vision des hommes et des femmes – pourtant, il n'y a pas de sexe dans Dickens !

Je me demande d'ailleurs parfois pourquoi l'Ontario n'a pas encore prohibé *Roméo et Juliette*. La panique concernant la pédophilie aurait pu y mener, puisque les personnages ont treize ans ! Même chose pour *Le Marchand de Venise*. En fait, si on suivait cette logique, plusieurs pièces de Shakespeare pourraient être interdites ! Dans le cas des mennonites, j'ai été outré par la position de la commission scolaire. Je leur ai dit que je préférerais qu'on envoie la police chercher les enfants pour les amener à l'école que de leur interdire l'accès à la bibliothèque.

Il y a donc une grande différence entre dire que tout est permis, qu'on ne peut pas porter de jugement sur la qualité

des choses – ça, c'est un peu les années 1960, où il y avait un professeur à McGill qui soutenait que les notes étaient complètement arbitraires, qu'on allait tirer au hasard dans un chapeau des notes situées entre 80 et 100 – et dire qu'il faut prohiber, réprimer les opinions qui nous semblent absurdes. Je me rappelle par exemple qu'en 1980 ou 1981, j'ai eu pour la première fois une cause de statut de réfugié où la demande était basée sur l'homosexualité de la personne. Je pense qu'elle venait de Roumanie, où Ceausescu n'appréciait vraiment pas les homosexuels. J'ai contacté le député André Boulerice, qui était un grand activiste gai. Il m'a transmis toutes sortes de renseignements. J'ai aussi mené mes propres recherches. Arrivé de ce que Boulerice m'avait envoyé et de ce que j'avais moi-même trouvé, je suis allé à la Section d'appel de la Commission de l'immigration et le type m'a ri au nez en me demandant s'il y avait une limite à mon imagination. Je n'ai pas eu gain de cause. Et pourtant, aujourd'hui, c'est la chose la plus simple du monde : si on prouve que quelqu'un est homosexuel et que dans son pays il y a beaucoup d'intolérance, il est accepté comme réfugié.

Ça montre que les opinions qui semblent absurdes peuvent devenir les bonnes et même celles qu'il faut exprimer. Donc pour moi, la liberté d'expression, c'est presque absolu. Il ne faut pas non plus oublier que les gens peuvent changer d'idée. Quand j'étais étudiant à McGill, on a découvert que les professeures étaient assurées seulement pour elles-mêmes, contrairement à leurs collègues masculins, parce qu'on disait que c'étaient les maris qui devaient subvenir aux besoins de toute la famille. J'ai proposé au Sénat de l'Université une motion, qui a été adoptée à la quasi-unanimité et qui obligeait l'assureur – la Sun Life – à changer la règle. Quelques jours plus tard, j'ai rencontré un avocat bien connu à Montréal, qui m'a dit que les femmes n'étaient pas égales aux hommes. Mais par la suite, ce monsieur est devenu juge et il a toujours été très

juste envers les femmes. On n'a jamais pu voir le moindre problème avec ses jugements en droit de la famille. Ingmar Bergman était nazi quand il avait vingt et un ans et il a admis avoir pleuré lorsque l'Allemagne a perdu la guerre. Il a réalisé son erreur deux ans plus tard et était très choqué. Il est devenu de centre gauche, progressiste, un peu tourmenté à cause de son ancienne allégeance.

Ce qui m'amène aussi à dire qu'il faut pardonner. Par exemple, jamais je n'aurais autorisé le genre de répression que la France libérée a menée contre les collaborateurs. J'aurais dit à la majorité d'entre eux – pas ceux qui avaient tué des gens, ceux-là on pouvait bien les emprisonner quoique je n'aurais jamais permis qu'on les exécute, mais ceux qui, entre autres, travaillaient dans des ministères – « Vous voyez comme vous avez été injustes ? La France vous pardonne. Mais vous devez comprendre que cette France est différente de celle de votre maréchal. » C'est tout. Aujourd'hui, j'arrêteraï aussi les procès relatifs à la Seconde Guerre mondiale. Ces accusés-là ont quatre-vingt-dix ans, ils ont l'âge de mon père, ce ne sont plus les mêmes hommes. Les gens changent, pas de façon fondamentale puisque nous avons tous certains traits de caractère qui demeurent, mais les gens changent.

Le pardon pour moi, c'est ce qui différencie le christianisme des autres religions et qui en fait une religion un peu plus acceptable que les autres. Attention : je n'aime pas les religions, et je ne pense pas qu'on a nécessairement besoin du christianisme pour penser comme moi. L'humanisme, qui est issu d'une tradition chrétienne, va tout aussi bien. Mais le pardon, les passages où Jésus dit qu'il faut pardonner soixante-dix-sept fois et plus, ça, c'est toujours pertinent.

■ Vous avez déjà dit, parlant d'un éventuel retrait de *Mein Kampf* des tablettes d'une librairie bien connue, qu'il faut

avoir confiance en la capacité du public à voir toute l'absurdité d'un tel livre.

Il ne faut évidemment pas être naïf, il y a des gens qui ne la verront peut-être pas. Mais avec l'éducation et la science, la population est mieux à même de comprendre, par exemple, que la théorie raciale d'Hitler est une absurdité totale. En plus, en voulant empêcher la lecture de cet ouvrage, on crée l'idée d'un martyr et on peut laisser croire qu'il y a quelque chose là, une si grande tentation qu'on ne veut pas permettre aux gens de le lire. Mais *Mein Kampf* ne devrait jamais être le fruit défendu !

J'ai lu *Mein Kampf* quand j'avais dix-sept ans, durant l'été 1965. Je l'avais emprunté dans une bibliothèque. J'ai commencé à le lire et je me suis demandé comment ça pouvait être aussi peu subtil. L'absurdité, le *non sequitur* étaient évidents, même si je n'avais pas encore étudié la philosophie, même si je n'avais encore rien fait. Parce qu'un Juif quelque part était un criminel, on pouvait conclure que tous les criminels de Vienne étaient des Juifs.

Je ne crois pas qu'il y ait de mal à ce qu'un garçon de dix-sept ans ait lu *Mein Kampf* en 1965. Et si ce garçon avait été moins exposé à l'histoire et y avait cru pendant six mois, je ne pense pas que ça aurait fait de mal. Il aurait appris plus tard. Je crois que, dans notre société, on peut avoir un niveau d'éducation grâce auquel *Mein Kampf* sera facile à démasquer. Je ne parle évidemment pas de propagande, mais d'une véritable éducation, qui permet aux gens de lire des choses différentes, d'en juger, d'en voir la valeur littéraire.

■ Que pensez-vous de ce que fait WikiLeaks, qui diffuse de l'information tenue secrète par les gouvernements ?

Je suis d'accord avec l'idée de diffuser des renseignements, mais je pense qu'il y a des limites à observer. Je ne crois pas qu'on a le droit de publier des choses purement privées. Les gens doivent faire très attention de ne pas divulguer qui couche avec qui, même pour les politiciens. Je ne pense pas que parce qu'on est en politique, nos électeurs ont le droit de connaître ces détails-là. Je ne crois pas que le fait qu'un chef ait deux ou trois femmes regarde qui que ce soit.

Par contre, les secrets du président Bush et de ses conseillers – le fait qu'ils savaient qu'il n'y avait pas d'armes de destruction massive en Irak –, c'est de bonne guerre de le rendre public. L'État a le droit de se défendre, mais l'État démocratique n'a pas le droit de se défendre par des mensonges. Est-ce que l'État a le droit de se défendre en prétendant qu'il faut absolument arrêter telle personne, alors qu'il existe un courriel datant d'un an qui demande de trouver un prétexte à cette arrestation ? Imaginons qu'un article publié dans le *New York Review of Books* ait raison et que l'Élysée ait été impliqué dans l'arrestation de Dominique Strauss-Kahn. Est-ce que l'État a le droit de se protéger en complotant contre un homme qui n'a pas commis de crime ? Sûrement pas. Par contre, l'État a le droit de ne pas vouloir qu'on publie les plans d'un avion secret à la une de *La Presse*. Si les États britannique et américain ont tout fait le 1^{er} juin 1944 pour ne pas laisser savoir que le débarquement aurait lieu le 6 juin, c'est complètement raisonnable. Mais la raison d'État ne doit pas servir de prétexte. Parce qu'à ce moment-là, il n'y a aucun moyen de la contrôler. Il ne faut pas créer un État qui ait la possibilité d'être très autocrate, de mentir aux citoyens, de défendre le bien public contre le savoir et contre toute forme de soulèvement intellectuel. Et de toute façon, maintenant, il existe déjà un pouvoir de contrôle qui est épouvantable. On en est arrivé à 1984, le « télécran » est chez nous. L'État peut diffuser des messages et vérifier comment nous réagissons à ces messages.

La possibilité de répression est immense. C'est pourquoi il faut être très indulgent avec Edward Snowden.

■ *Selon vous, quel a été le moment décisif pour cette augmentation de la capacité de contrôle et de répression par l'État ?*

C'est l'ordinateur, malheureusement. J'ai toujours pensé que les États totalitaires des années 1920 et 1930 étaient totalitaires parce qu'il n'y avait aucun autre moyen de contrôler les populations. Ils utilisaient la terreur, certains plus que d'autres. Si la Pologne des années 1950 était totalitaire, c'était à un niveau beaucoup moins élevé que l'Union soviétique des années 1930 ou que l'Allemagne nazie. Les gens n'allaient pas disparaître pour une blague. Ces États avaient recours à la terreur parce que c'était l'unique manière de contrôler leurs citoyens. En d'autres termes, si vous et moi nous nous faisons confiance, nous aurions pu dire n'importe quoi pendant un lunch à Moscou ou à Berlin en 1936. On aurait pu se moquer d'Hitler et de ses théories idiotes, de Staline et de sa paranoïa. Et personne n'aurait pu nous dénoncer, à moins que nous ayons parlé tellement haut que les gens des tables voisines nous auraient entendus. Ni vous ni moi n'aurions dénoncé l'autre le lendemain matin, nous nous faisons confiance. Mais la terreur était telle qu'on ne savait pas si, en cas d'arrestation, l'autre allait tout divulguer. J'aurais aussi pu me tromper sur votre compte, d'autant plus que ces sociétés avaient une armée de délateurs, puisque c'était la seule façon de contrôler la population. Vous vous souvenez du scandale de la Stasi en Allemagne de l'Est. En Russie stalinienne, si quelqu'un vous dénonçait, on vous arrêtait le jour suivant. En Allemagne de l'Est, on conservait plutôt le renseignement. Les gens ne savaient pas qu'ils étaient sur la liste de la police secrète. Ils allaient au travail, continuaient de vivre normalement. On

ne réprimait pas chaque personne qui faisait une blague. Mais on gardait l'information.

Mais maintenant, les délateurs, c'est dépassé. Un délateur peut mentir, un délateur peut dénoncer un innocent qui n'a rien dit juste parce qu'il veut son appartement. Ce n'est pas utile pour l'État que les bons citoyens soient dénoncés juste parce que quelqu'un a envie de les dénoncer. On a maintenant de bien meilleurs moyens d'obtenir les renseignements : les écoutes, les satellites, les ordinateurs, qui permettent, par exemple, de voir tout ce que les gens ont publié. Quelqu'un peut aller à la Cour d'appel et voir toutes les causes que j'y ai plaidées.

Donc, l'État totalitaire s'est estompé. Mais on ne peut pas être certains que l'État ne garde pas l'information, comme on le faisait en Allemagne de l'Est. J'ai des raisons de penser qu'il y a peut-être beaucoup plus de renseignements qui sont conservés sur chacun d'entre nous que nous ne le pensons. Mais la technologie a remplacé les délateurs et les camps de concentration. On sait tout et, si ça devenait nécessaire, on pourrait agir tout de suite, par exemple en déclarant l'état d'urgence. Ce serait un peu comme dans *La Servante écarlate* de Margaret Atwood – un livre qui me donne des frissons : ça s'installe graduellement. Un jour, toutes les cartes de crédit des femmes ne sont plus bonnes et elles doivent aller voir leur mari pour pouvoir dépenser. Ensuite, il se passe six mois où tout va comme avant, sauf pour les cartes de crédit. Et les gens se disent que ce n'est rien. Mais la chose est graduelle. Un peu, aussi, comme dans le film *Melancholia* de Lars von Trier : on voit tranche par tranche l'approche de la planète qui va tous nous écraser. Un jour, c'est l'électricité qui ne fonctionne plus à cause des champs magnétiques. Le lendemain, c'est l'air qui est un peu étouffant parce qu'il y a une poussière. C'est lent, progressif.

Ce serait la même chose si les gouvernements décidaient

qu'il est nécessaire d'utiliser tous les renseignements en leur possession. Et ils en ont beaucoup. En 1935, quand Staline a commencé la purge, il n'avait pas autant d'information que les gouvernements en ont aujourd'hui. Il y a un autre exemple : en France, entre 1940 et 1945, plus de 50 % des Juifs ont survécu. Ce n'est pas parce que les Français sont toujours meilleurs que les autres, bien qu'il y ait eu un mouvement de résistance assez fort. Mais si la situation se reproduisait aujourd'hui, le taux de survie serait probablement près de 0 %. Dès le départ, les autorités prendraient une année pour recueillir des renseignements : tous les citoyens d'origine juive devraient se présenter pour la prise de données biométriques – les yeux, les empreintes – et tout serait enregistré dans un ordinateur. Deux ou trois ans plus tard, aucun de ces citoyens ne pourrait passer une porte sans que ça sonne. Il n'y aurait que quelques survivants ici et là – les gens suffisamment courageux ou clairvoyants pour ne pas se présenter à la cueillette d'information. Mais la majorité se soumettrait à ces tests parce que, au moment où ils seraient effectués, les autorités ne tueraient pas et ne battraient pas les gens visés par cette mesure et les pénalités pour ceux qui ne se présentent pas seraient draconiennes. Alors que si vous y allez, dès la semaine suivante, la vie reprend son cours : vous allez au parc, vos enfants vont à l'école, tout semble normal.

■ *Comment peut-on se protéger contre les risques que comporte une éventuelle utilisation abusive des renseignements personnels ?*

C'est très difficile. Je crois que la seule façon, c'est une révolution morale, une société où on va juger moins sévèrement les faiblesses et même les crimes, une société qui attache moins d'importance au passé et aux paroles de chacun. Je pense qu'autour de nous, il y a des millions de personnes qui n'ont

pas rapporté tous leurs revenus, qui ont fraudé ou qui ont donné un coup de poing à quelqu'un un jour sans avoir été accusées ou citées à procès et tout va quand même bien. Il y a des gens qui, dans certaines circonstances, vont frapper quelqu'un et à qui on va dire qu'ils ne sont pas un bon modèle, qu'ils ne peuvent pas, par exemple, enseigner. Mais il y a d'autres individus qui n'ont jamais rien fait pour autrui, jamais aidé l'un de leurs semblables, jamais contribué à une œuvre de charité, mais que la société considère comme meilleurs juste parce qu'ils n'ont jamais été condamnés au criminel. Même si celui qui a donné un coup de poing peut prouver qu'il est un homme exceptionnellement bon, qu'il s'est sacrifié pour telle ou telle raison, on va dire qu'il n'est pas un bon exemple pour les enfants. C'est inexorable.

On se dirige vers une société où un politicien devra être un saint. Parce que s'il a fait quoi que ce soit dans sa vie, s'il a été condamné à dix-huit ans pour avoir brisé une fenêtre à l'université un soir où il était ivre ou s'il a eu une aventure, ça va ressortir tout de suite. Celui qui va réussir, c'est celui qui n'aura pas d'émotions, pas de tentations, pas d'âme. Et c'est curieux. En 1943, parmi les grands chefs d'État, on avait Churchill, qui était un ivrogne notoire, Roosevelt, qui aimait les femmes, et Staline, qui avait participé à des vols de banque. Mais il y en avait un qui ne trichait pas, qui ne buvait pas, qui ne mangeait même pas de viande : Hitler.

Celui qui possède une âme a une faiblesse quelque part et je crains que notre société permette à ceux qui n'ont pas d'âme de s'imposer. C'est pour ça que je dis qu'il faut une révolution morale, qu'il faut juger moins sévèrement les faiblesses. D'ailleurs, on est en train de créer deux classes de personnes, dont une sous-privilegiée de gens qui ont été punis. Et le gouvernement est tellement conservateur que n'importe quelle affaire devient un prétexte. Par exemple, j'ai été arrêté pour avoir protesté contre la guerre au Vietnam. J'ai évité un

dossier criminel, mais je pense qu'aujourd'hui, ça aurait pu être quelque chose de très sérieux. N'importe quelle infraction – un méfait, une émeute – prend une grande importance. Il faut que la société soit plus tolérante, de sorte que si quelqu'un a fait une chose stupide il y a vingt ans – par exemple casser une vitrine – et qu'il s'est soumis à la peine reçue, on ne va pas ressortir ça au moment où il décide de se présenter comme candidat pour un parti vingt ans plus tard. Quand notre ami Claude Charron a volé un manteau chez Eaton, c'était une sottise énorme, mais ce n'était pas la fin du monde, voyons donc ! On aurait pu lui dire qu'il avait peut-être besoin de six mois de repos, mais ce n'est pas une chose terrible dont il faut se formaliser et suffisante pour mettre fin à sa carrière. Il n'avait tué personne. Et même s'il avait réussi à voler ce manteau, ça n'aurait rien changé à l'économie du Québec ou du Canada ni à la faillite d'Eaton. C'était juste un événement assez triste, finalement.

■ *Est-ce que vous pensez que le projet de loi fédéral sur les peines minimales s'inscrit aussi dans cette tendance qui remet en cause la tolérance et le pardon ?*

Ce projet de loi est terrible. Prenez l'affaire Latimer¹, par exemple. Le problème avec Robert Latimer, ce n'est pas qu'on l'a condamné. Je ne suis pas en faveur du suicide assisté, et de toute façon, ce n'était certainement pas un suicide parce que sa fille n'avait pas demandé à être euthanasiée. Le problème avec cette histoire, ce sont les dix ans d'emprisonnement qu'il

1. Robert Latimer a été condamné à la prison à vie en 1997 pour avoir causé la mort de sa fille, Tracy, qui souffrait de paralysie cérébrale. Latimer affirmait avoir agi par compassion.

a reçus. C'était carrément excessif. Il aurait fallu pouvoir le condamner et lui donner deux ans de travaux communautaires et une amende, quelque chose comme ça. Lui dire qu'on dénonçait son geste, mais qu'on comprenait. Or, il y aura de plus en plus de situations où un juge se trouvera impuissant. Et ce qui va arriver, c'est que les magistrats vont acquitter les accusés. Évidemment, M. Harper va nommer des juges qui ne choisiront pas cette voie, mais la plupart des magistrats actuellement en poste qui se retrouveront devant un individu passible d'une peine minimale d'un an de prison alors qu'il n'a rien fait de grave refuseront de le condamner. J'ai déjà eu un cas d'extradition mettant en cause un jeune Canadien qui avait suivi un groupe de rock aux États-Unis et vendu pour 145 dollars de LSD à une femme parce qu'il n'avait plus d'argent. Or, cette dame était une policière en civil. Il a été accusé de trafic, avec une peine minimale de cinq ans ferme – on était en Ohio. Il a été libéré en attendant le procès et en a profité pour revenir au Canada. Comme il refusait de se livrer, la justice américaine a présenté une demande d'extradition. Le regretté juge Steinberg a écouté la preuve et a demandé au procureur représentant les États-Unis ce qui arriverait si le jeune était plutôt accusé de possession simple. Le procureur a expliqué qu'il ferait quelques semaines de prison, puis serait expulsé du pays et ne pourrait plus y retourner, mais qu'il ne pourrait pas écoper d'une peine minimale de cinq ans. Le juge a donné au procureur américain vingt-quatre heures pour changer la demande d'extradition, faute de quoi il la rejeterait. Et les États-Unis ont modifié leur requête.

Je pense que ce genre de situation va être de plus en plus fréquente. M. Steinberg était un juge tout à fait exceptionnel. Le procureur américain était offusqué et le magistrat lui a répondu : « Mais maître, comment pouvez-vous présenter une telle requête ? C'est une infraction pour laquelle j'imposerais au maximum une amende de 1 000 dollars et vous me

parlez de cinq ans fermes ? Si c'était un cas canadien, je serais disposé à procéder à une absolution pour ne pas lui donner de casier judiciaire. Et vous voulez que je l'envoie pour cinq ans en prison en Ohio ? » Donc, je pense que c'est une chose qui va être de plus en plus fréquente. Et il y a un parallèle dans l'histoire. En Angleterre au XVIII^e siècle, un faux était punissable de la peine capitale. C'était avant la période où on transportait les gens en Australie. Les faussaires étaient pendus. Ce sont les banques qui ont demandé au gouvernement anglais de changer cela parce que le taux d'acquiescement était de 80 ou 90 %. Les jurés ne voulaient pas condamner à mort pour ce type d'infraction. On avait beau leur dire qu'ils n'avaient pas à se préoccuper de la sentence, que c'était l'affaire du juge, ils savaient tous quelle était la peine associée à ce crime. Ils trouvaient que c'était insupportable et ils acquittaient les accusés. Un faux était devenu une infraction pratiquement sans pénalité. Bien sûr, c'était risqué, parce qu'on pouvait toujours tomber sur un jury moins clément. Mais généralement, les gens étaient acquittés et les banques ont exigé que la peine capitale soit remplacée par un emprisonnement de quelques années afin que les coupables soient condamnés.

■ *Pensez-vous que la société est plus conformiste aujourd'hui qu'il y a vingt ans ?*

C'est certain. Elle est plus conformiste et elle est aussi plus stratifiée. Il y a des gens, par exemple, qui ont occupé le square Victoria, à l'été 2012. Mais ce n'est pas la même chose que dans les années 1960. À cette époque-là, il y avait des gens comme moi qui allaient au square Victoria le jour et à l'opéra le soir. C'était moins restreint. Je pense que ce conformisme vient entre autres du fait qu'il y a beaucoup de concurrence, moins d'emplois et que chacun utilise tout ce qu'il a pour en décro-

cher un. Et on insiste beaucoup sur le respect des règles. Lorsqu'il était ministre de l'Immigration [de 2008 à 2013], Jason Kenney voulait révoquer la citoyenneté des gens qui ont menti dans leur demande – qui n'ont pas dit, par exemple, la vérité sur le nombre d'enfants qu'ils ont ou qui n'ont pas indiqué leur véritable profession parce qu'elle n'a pas la cote – et qui n'auraient pas été admis sans ces mensonges, et ce, même si ces personnes payent peut-être des impôts au Canada depuis dix ans et sont de bons citoyens. Je pense aussi au cas d'un médecin américain. Il avait échoué sa première année de médecine – c'était un excellent étudiant, mais il prenait ça à la légère. Il a été admis dans une autre université en ne mentionnant pas cet échec – il a dit qu'il avait pris une année de congé – et a terminé sa médecine. Et voilà qu'en voulant adhérer à une association médicale, on a constaté dans les bases de données informatiques qu'il avait raté sa première année dans telle université. On a refusé sa demande en lui disant qu'il avait fraudé et pris la place d'un autre étudiant. Il a insisté sur le fait que cette toute première année avait été un accident, comme le montraient les notes qu'il avait eues par la suite. Sa requête a finalement été acceptée, mais après bien des difficultés.

☒ *Comment peut-on faire pour favoriser la liberté d'expression dans un tel contexte ?*

Il faut éliminer les conséquences que la liberté d'expression peut avoir sur le plan social. Par exemple, une situation où elle me ferait perdre mon emploi ou me créerait des problèmes avec le Barreau, même s'il y a évidemment des limites à ce que je peux dire sur les tribunaux et la justice. Il faut créer un environnement où non seulement il n'y a pas de pénalité pour ceux qui s'expriment, mais où la population ne tient pas un registre des remarques non conformes de telle ou telle per-

sonne afin de lui dire que ses propos sont intolérables. Si on était dans les années 1970 ou au début des années 1980, mes parents feraient probablement pression sur moi pour que je ne parle pas de certains sujets, notamment en ce qui concerne Israël, parce que mon père travaillait à l'époque comme comptable dans une compagnie dont le propriétaire était un juif sioniste convaincu. Si on veut favoriser la liberté d'expression, il ne faut pas que ce genre de chose puisse se produire. Mais c'est très difficile à contrôler, parce que les gens qui sont malins n'admettront pas publiquement que c'est pour une raison comme celle-là que la personne perd son emploi. Le patron de mon père ne lui aurait pas dit par exemple que c'est parce que j'avais insulté les sionistes dans un forum public qu'il le mettait à la porte.

Vous savez, la suppression de la liberté d'expression frappe généralement ceux qui n'ont pas de pouvoir ou d'influence, ceux qui ne sont personne. Si dans un cocktail le fils d'un haut dignitaire de l'Allemagne de l'Est avait dit à Erich Honecker que la politique étrangère de son gouvernement vis-à-vis de la Roumanie ou de la Chine était une erreur, il n'aurait pas été puni. Honecker lui aurait suggéré de demander des explications à son père. Par contre, si un ouvrier dans une usine avait fait la même critique, il aurait risqué d'être renvoyé ou arrêté. Catherine II de Russie faisait des lectures de la Constitution des États-Unis avec ses courtisans. Ils s'asseyaient et parlaient démocratie, liberté, toutes ces choses qui étaient à la mode, ils réfléchissaient aux façons d'améliorer la Constitution américaine et s'amusaient bien. Mais je ne pense pas qu'un subalterne qui aurait soulevé la question de la Constitution de la France ou des États-Unis aurait eu un sort particulièrement agréable. C'était un peu la même chose avec Frédéric le Grand. Si vous étiez à sa cour, vous pouviez dire n'importe quoi. Vous auriez même pu, si vous aviez été un acteur, l'imiter sans crainte. Dans la majorité des cas, dans la

majorité des pays, on peut dire des choses si on est quelqu'un, on ne peut pas les dire si on n'est personne.

Je pense que je suis toujours pour les dissidents. Prenez la contestation de la loi référendaire devant la Cour suprême – l'affaire des comités-parapluies. La Cour a rendu un bon jugement. D'abord parce qu'elle a refusé l'interprétation américaine de la liberté d'expression en matière électorale, qui laisse les riches prendre toute la place. On ne veut pas une liberté totale qui fait que, si vous possédez vingt-cinq journaux et cent millions de dollars, vous allez accaparer les ondes et personne n'entendra l'autre camp. Il faut un montant raisonnable, qui permet à tout le monde de participer. Mais ce qui est particulièrement important avec ce verdict, c'est que dans un référendum, on présume que la réponse est oui ou non. Ça ne permet pas à celui qui veut proposer l'abstention, qui conteste la légitimité du référendum ou qui veut exprimer des opinions qui sont inacceptables pour le comité-parapluie de le faire. Si quelqu'un avait voulu dire « je suis pour l'indépendance du Québec parce que je veux que les Anglais partent », c'est certain que le président du comité du « oui » aurait refusé de publier cette opinion. Si quelqu'un avait dit voter non parce qu'il voulait que le français disparaisse et que, d'ici cinquante ans, tout le monde parle anglais au Québec, le président du comité du « non » n'aurait pas voulu rendre ça public. Donc, la mise sur pied de comités-parapluies a entraîné l'interdiction pour certaines personnes d'exprimer leur opinion. Et on ne peut pas permettre ça. Il faut autoriser la dissidence, des deux côtés. D'ailleurs, ce jugement n'a pas fondamentalement changé la loi référendaire. Il reconnaît seulement que les gens qui souhaitent partager un point de vue que les autres n'aimeront pas peuvent le faire.

Mais il y a aussi autre chose : je pense que la rectitude politique est en train de tuer la démocratie. Il y a toutes sortes de propos que les politiciens ne peuvent pas tenir et qui pour-

tant s'imposent. Il y a plusieurs raisons à cela. D'abord, les sources de renseignement sont généralement contrôlées. Je crois que la perte de la liberté d'expression est plus grande dans les pays où il n'y a pas de réseau étatique comme Radio-Canada, quoique même aux États-Unis, il y a la radio publique et il s'y dit des choses importantes. Mais un politicien ne peut pas exprimer la moitié des opinions qu'il devrait exprimer. Il n'est plus possible de se battre pour des idées dans notre société, parce que l'émotion principale est la peur et que toute idée est susceptible d'être transformée en épouvantail. On fait peur aux gens en leur disant que s'ils élisent un tel, il va les taxer davantage ou réduire les impôts pour mieux diminuer l'assurance maladie ou leur faire perdre toute leur liberté. Les politiciens ne peuvent plus parler et il n'y a donc plus de débat. Pendant la campagne électorale de 1993 au fédéral, Kim Campbell a eu le malheur d'affirmer qu'il y avait certaines choses qu'on ne pouvait pas dire pendant une campagne. Elle avait raison. Mais elle a été vivement critiquée pour avoir déclaré cela. Évidemment, elle a aussi perdu des points auprès de l'électorat en raison de publicités qui se moquaient des tics de Jean Chrétien. Et ça, c'est quelque chose qu'on ne devrait pas faire. On ne peut pas attaquer quelqu'un sur des choses comme cela. Mais il reste que les propos qui ont de la substance sont disparus.

■ *Comment expliquer ce sentiment de peur ?*

J'ai un sentiment assez pessimiste par rapport aux électorats. Peut-être que les gens sont naturellement à droite. Quand l'Allemagne était en pleine crise durant l'entre-deux-guerres, les Allemands ne se sont pas tournés vers le communisme. On aurait compris qu'ils le fassent ou au moins qu'ils poussent sociaux-démocrates et communistes à travailler ensemble

pour former un front populaire, comme ça s'est fait en France. Non, en Allemagne, on a élu Hitler. La crainte du Juif était plus forte que celle du riche. Aujourd'hui, l'individu moyen est plus choqué par la découverte qu'un tel a triché, qu'il a touché des prestations de l'assurance-emploi alors qu'il n'y avait pas droit, qu'il a travaillé au noir, que d'apprendre qu'un président de banque a eu une prime de vingt millions de dollars. Mais les gens ont du mal à comprendre où se trouve leur véritable intérêt. Il suffit de regarder les États-Unis : on savait déjà avant la dernière élection présidentielle que le Mississippi, l'Alabama, la Virginie-Occidentale – les trois États les plus pauvres du pays – allaient voter pour Mitt Romney. Pourtant, c'est dans leur intérêt d'avoir un système d'assurance maladie et des réformes dans l'éducation.

Une autre raison pour laquelle les politiciens n'osent pas parler, c'est que la science des prévisions électorales est devenue très fine. Les politiciens s'adressent à 5, 8, 10 % à peine de la population, soit les gens qui sont susceptibles de changer d'idée parce qu'ils n'ont pas d'opinions très fortes. Je pense qu'il y a deux types de personnes : celles qui ont une idée qui les obsède – Israël, par exemple – et celles qui sont vraiment dans le milieu, qu'il ne faut pas déranger. Il faut convaincre ces dernières qu'on est un meilleur chef et se faire rassurant pour ces individus qui ne sont ni pour ni contre, qui ne savent pas ce qui est mieux, qui sont fâchés parce qu'ils ont attendu cinq heures à l'urgence, mais qui ont peur du privé. Il faut leur dire qu'on va maintenir le système public, mais qu'ils n'auront pas à payer plus et qu'on va même le rendre plus efficace. Mais si on veut avoir un médecin de famille pour tout le monde, combien ça coûterait ? On ne le dit pas. On ne peut donc pas avoir de débat sérieux. Aux États-Unis, c'est la même chose. Il y a des débats en Ohio ou en Floride, mais c'est pour un groupe très restreint d'électeurs – 4 ou 5 %. En France aussi. Au premier tour, on peut

voter trotskiste ou Le Pen, on peut faire toutes sortes de choses, mais on sait qu'au deuxième tour, les socialistes et la droite partiront chacun avec 45 % des voix. Il y a 10 % des gens qui vont faire la différence et on ne peut pas tous les avoir. La question est de savoir qui va en avoir 6 et qui va en avoir 4. Les dernières élections se sont soldées par 51-49 %. Les socialistes ont gagné, mais par très peu.

Je pense aussi que lorsque les gens sont plus heureux, ils sont plus tolérants. Par exemple, ils sont plus favorables à l'immigration. Les années 1950 étaient peut-être en un sens moins prospères qu'aujourd'hui, mais il y avait un optimisme généralisé. Les professeurs qui m'ont accueilli ici étaient tout de suite prêts à me dire « c'est très bien » ou « explique-nous comment c'était en Pologne ». C'était un monde très ouvert parce que les gens avaient l'impression que les choses allaient de mieux en mieux. Je savais, dans le petit coin anglophone de Montréal où j'allais à l'école – ce n'était pas un espoir, mais bien une certitude –, que je rencontrerais les autres, que tout se passerait bien, qu'on serait tous ensemble, que l'université allait être une grande aventure, qu'on allait apprendre. Je crois que la majorité des gens savaient que ça irait mieux. Les politiciens pouvaient parler de mesures comme celle figurant au programme du NPD des années 1960, l'assurance maladie publique et universelle. Quand les sondages ont montré que cela allait mener à la victoire des néo-démocrates, les libéraux ont sauté sur l'idée et l'ont réalisée. Mais aujourd'hui, un tel projet ne serait plus possible. Si on décidait de faire la même chose avec les soins dentaires, il y aurait tout de suite quelqu'un pour affirmer qu'une telle initiative coûterait vingt-cinq milliards de dollars et qu'on ne saurait pas où les trouver. Ou l'ordre professionnel des dentistes soutiendrait que ses membres quitteraient le pays et qu'il n'y aurait plus de dentistes.

Aujourd'hui il y a beaucoup de restrictions sur ce qu'on

peut dire. En ce qui concerne la liberté d'expression, il y a évidemment des limites qui nous sont imposées par notre vie privée. Je pense que si, en 1975 ou 1980, j'avais tenu les mêmes propos que je tiens maintenant quotidiennement sur le Moyen-Orient – par exemple, que Jérusalem-Est doit être rendue aux Palestiniens – ça aurait mis l'emploi de mon père en danger ou on lui aurait demandé de se dissocier de mes propos. Mais il y a aujourd'hui beaucoup d'autres restrictions. Une de celles qui me choquent le plus, c'est la manière dont les ordres professionnels répriment la liberté. Prenons l'exemple du Barreau, parce que j'ai plaidé plusieurs causes concernant des gens qui étaient accusés pour des paroles qu'ils avaient prononcées. Il y a celle de M^e Goldwater, qui a dit à un collègue « Mange de la m... Tu ne veux rien entendre, alors mange de la m... » et a fait quelques autres remarques un peu grivoises. Mais les gens parlent comme ça. Est-ce que quelqu'un pense vraiment que les avocats ne sacrent pas ? Il y a une autre avocate qui a été sanctionnée par le Barreau pour avoir déclaré qu'à la Chambre de la jeunesse, un homme contre ses enfants, c'était David contre deux Goliaths. Elle critiquait le système et le Barreau nous dit donc qu'on n'a pas le droit de le faire. Ça, à mon avis, c'est vraiment dangereux. C'est également dangereux pour un avocat de critiquer un juge, non seulement parce qu'il peut se faire un ennemi, mais aussi parce que le Barreau va le lui reprocher. Or, on devrait pouvoir affirmer que tel jugement, c'est de la foutaise. Si un avocat a un rôle public, c'est parce qu'il peut critiquer les tribunaux.

Dans les autres ordres professionnels aussi, les gens doivent faire très attention. J'ai défendu un ingénieur qui avait envoyé une lettre très critique à l'égard de ses collègues qui siégeaient à un conseil d'administration juste avant les élections. Il a été accusé d'avoir voulu détruire la réputation du conseil. Il a été acquitté, mais il a fallu deux ans et beaucoup

d'argent. Et c'est la même chose dans la fonction publique. Aujourd'hui, on impose une discipline de fer. Or, il est essentiel pour les professionnels d'essayer d'ébranler les idées reçues, que ce soit en matière de jugements ou de médecine. Je comprends qu'on ne peut pas prescrire des médicaments qui ne sont pas autorisés, mais on doit pouvoir dire qu'il faudrait les prescrire. C'est une chose tout à fait différente et un médecin ne devrait pas craindre de dire des choses pareilles. La situation n'est pas différente pour les autres ordres professionnels. Il y a toujours le danger des cliques et des puissants qui dominant.

Je pense qu'en droit professionnel, les récentes restrictions de la liberté d'expression laissent présager une période de conformisme total. Et ce qui arrive à la liberté d'expression est le symptôme d'une attitude restrictive très dangereuse qu'on trouve aussi en droit criminel et en droit de l'immigration, par exemple. La destruction de la liberté d'expression, la nouvelle sévérité du droit criminel, l'intolérance en matière d'immigration, ça va ensemble. Je suis toujours surpris de voir que les gens ne sont pas troublés par le phénomène des jeunes venant des Antilles ou d'ailleurs, qui sont arrivés ici tout petits, qui n'ont jamais eu la citoyenneté et qu'on expulse à vingt-cinq ans pour un crime. C'est seulement si on pense que c'est entièrement génétique qu'on peut normaliser cela, parce que si on admet que c'est une question d'environnement social, alors il faut reconnaître que c'est nous qui avons fait une erreur ! Il y a par exemple un jeune homme qui a été expulsé vers l'Inde, alors qu'il vivait ici depuis l'âge de dix ans, parce qu'il a causé la mort dans un accident d'automobile. Ce n'est pas une raison, ce n'est pas justifiable. Mais la population ne s'indigne pas et la Cour suprême a autorisé l'expulsion.

Ce qui veut dire que les personnes les mieux placées pour critiquer n'osent pas le faire. Notre société devient une société corporatiste qui protège les forts. Or, la liberté d'ex-

pression, on en a déjà parlé, aide normalement les faibles parce qu'elle peut secouer les puissants. Si on la réprime, les puissants restent au pouvoir. Mais les gens ne se sentent pas concernés ou ils ne comprennent pas ou ils sont fatigués. Il faut dire que la majorité d'entre eux sont contre toute expression qu'ils n'aiment pas. Si quelqu'un déblatère contre Israël, la communauté juive va dire que c'est de l'antisémitisme. S'il déblatère contre les Palestiniens, la société arabe va dire qu'il a un discours haineux. Les gens ne sont pas très tolérants, en fait. Et dans notre société, depuis vingt ans, on réduit le champ de la liberté d'expression par toutes sortes de moyens, dont la poursuite en diffamation, qui est l'un des plus terribles. Comme les plaignants gagnent souvent, c'est tentant. On n'obtient pas d'énormes sommes, mais pour 50 000 ou 60 000 dollars, les gens se disent que ça vaut la peine d'essayer. Par contre, l'individu qui a un salaire annuel de 50 000 ou 70 000 dollars et qui craint d'être poursuivi, comme un journaliste dont le journal aurait décidé de ne pas le couvrir, va faire très attention avant de courir un tel risque. Or, je pense que, si la violation de la vie privée peut être un délit, la diffamation ne devrait pas l'être. Si on critique quelqu'un sur le plan professionnel ou par rapport à ses opinions politiques, cela ne devrait pas se retrouver devant les tribunaux. La diffamation atteint des proportions absolument inacceptables. C'est probablement le seul domaine au monde où les États-Unis ont réussi mieux que nous : ils sont moins sensibles à cela. Toutefois, ils ne sont pas plus libéraux en matière de liberté d'expression. Ils l'ont été sur l'expression sexuelle et la diffamation, mais ils ont été très autoritaires avec le Patriot Act et les choses de cette nature-là.

■ *Est-ce qu'on devrait appliquer cela aussi aux animateurs de radio qui s'en prennent systématiquement à certaines personnes ?*

Le problème, c'est la société, pas l'animateur. Ce genre de propos – par exemple, ceux que tenait André Arthur – devrait être complètement sans intérêt pour la majorité des gens. Malheureusement, ce n'est pas le cas. Le public l'écoute, donc c'est le public qui est à blâmer. J'ai déjà dit que la population n'est peut-être pas si évoluée que cela. Si la droite gagne les élections plus souvent que la gauche, c'est peut-être parce qu'instinctivement les gens ne veulent pas partager. Si Obama décrétait une amnistie pour les immigrants clandestins arrivés tout jeunes aux États-Unis et autorisait leur naturalisation, je crois qu'il y aurait une réaction véhémement contre lui et pourtant, cela relève du bon sens !

■ *Vous êtes donc plutôt pessimiste sur la nature humaine...*

Peut-être, oui. Mais je pense que l'éducation permet de la rendre meilleure. Je crois entre autres que nous devrions revenir à l'enseignement des classiques et de la philosophie. Les gens ressentiraient peut-être plus de sympathie pour les autres s'ils avaient lu Dickens, Zola, Dostoïevski ou Tolstoï... Vous savez, à Londres, au ^{xvi}^e siècle, ce sont les foules qui allaient au théâtre du Globe pour entendre ce que Shakespeare avait à dire. C'était un spectacle pour tout le monde. Nous ne faisons pas l'effort, nous cédon trop facilement. Et puis, notre langue a évolué très vite. Il y a une plus grande différence entre la langue des années 1950 et celle d'aujourd'hui qu'entre la langue de Dickens et celle que je parlais quand j'ai commencé à lire en 1957-1958. Par exemple, la disparition du passé simple risque de mettre un obstacle entre Flaubert ou Stendhal et les jeunes générations de francophones. Quand on lit quelque chose du ^{xviii}^e siècle, ç'a l'air très vieux et ça met une distance. Or, tout était en passé simple. Rappelez-vous la fin de *L'Éducation sentimentale* [Julius Grey cite de mémoire] :

« Il voyagea et connut la mélancolie des paquebots. Il eut d'autres amours encore, mais le souvenir du premier les lui rendit insipides. » C'est un autre monde, les jeunes seraient incapables d'écrire cela. Même si on ne peut pas figer la langue, l'empêcher d'évoluer, cette distance est un problème. C'est un peu la même chose en polonais, notamment avec certaines formules de politesse. Et en turc, on m'a déjà expliqué que sous Atatürk, on avait complètement modifié l'alphabet et la structure, et que les Turcs sont donc presque incapables de lire les œuvres du XIX^e siècle – un peu comme nous lorsque nous essayons de lire Rabelais.

Je suis pessimiste parce que je pense que les gens ne sont pas généreux. Ils ne veulent pas tolérer les autres. Ils sont très contents d'avoir la liberté d'expression quand ça leur convient, mais pas quand on exprime des opinions contraires aux leurs. L'éducation peut les rendre plus généreux, la prospérité aussi. Et la conviction profonde que l'avenir sera meilleur, plus que l'espoir. Finalement, c'était ça la grande différence dans les années 1950 et 1960.

Je crois que dans l'atmosphère dans laquelle nous vivons, avec par exemple l'absence du pardon et les sentences de plus en plus sévères, les gens ont tout simplement peur. Je pense qu'on ne remplit pas les conditions du droit criminel anglais qui voulaient que la preuve soit hors de tout doute raisonnable. Si ce critère est respecté, c'est bien. Il est néanmoins vrai qu'un juge est libre de dire qu'il ne croit pas à telle ou telle version. Mais s'il n'y a pas d'autre preuve qui montre le mensonge, ce n'est manifestement pas hors de tout doute raisonnable. Il faut que ce soit difficile de condamner quelqu'un, parce que c'est très sérieux. Il vaut mieux risquer des acquittements que des condamnations mal fondées. Or la dureté du droit criminel et du droit professionnel symbolise l'ambiance actuelle : les gens s'efforcent d'être particulièrement durs, de prendre des décisions dures. Par exemple, si un

juge acquitte un accusé, la population va affirmer qu'il n'a pas de couilles. Mais c'est le contraire ! Si on observe le droit professionnel, la sympathie du public est toujours du côté du syndic. C'est la même chose en droit criminel. Mais quand j'étais étudiant en droit, nous avions des héros de la défense ! Perry Mason, par exemple. Mais aussi Morris J. Fish, Frank Kaufman, Michel Proulx : tous les trois ont eu de grandes carrières de juge. Mais aujourd'hui, c'est le contraire, c'est la Couronne. Les avocats de la défense se font interpellés et demandent comment ils peuvent vivre avec eux-mêmes en ayant fait acquitter toutes ces personnes-là qui ont peut-être commis des crimes. J'ai la perspective inverse : comment peut-on faire condamner quelqu'un si on n'est pas à cent pour cent certain qu'il est coupable ? Il y a toute une mentalité à la Couronne qui exclut le doute parce que les gens se préparent. Je ne pourrais pas, j'aurais toujours un doute. Je ferais une enquête préliminaire avec moi-même avant de procéder à la cause ! Mais la majorité fait abstraction de la possibilité d'innocence.

Depuis vingt ans, le droit criminel est toujours un peu plus dur. Il y a toujours de nouveaux règlements, de nouvelles interdictions, mais on abroge rarement un règlement même s'il est dépassé. Le Code criminel est devenu aussi complexe que la loi fiscale et ça devient un casse-tête. Or, il devrait être simple et limpide afin de pouvoir être lu (et compris) par tout le monde. Bien sûr, ce n'est pas quelque chose qu'on peut invoquer devant les tribunaux. J'ai souvent souligné l'injustice du nouveau droit criminel, mais même chez les magistrats, il y a un populisme de droite qui s'installe. Il y a quelque temps, je plaçais dans une cause et le juge a commencé une attaque en règle contre la Charte en disant qu'il n'y avait plus de responsabilité. J'ai été très étonné.

En plus de cela, il y a aussi un néopuritanisme qui émerge. Sur la question sexuelle, par exemple. Ce n'est pas

qu'on a une plus grande liberté d'expression, mais plutôt que ce sujet relève en partie du domaine des affaires – ça se vend. Mais en matière de romantisme, les discussions sont toujours les mêmes. J'ai été surpris par les remarques que de jeunes étudiantes faisaient sur les grands romans d'adultère. Elles n'avaient pas beaucoup de sympathie. On ne comprend plus *Anna Karénine*.

■ Si nous revenions à la question de l'éducation. Pourquoi prendre la littérature comme modèle ?

Parce qu'il y a une littérature spécialisée très savante que la plupart des gens ne liront pas, je pense notamment à la science économique ou à la philosophie politique. Je crois qu'il est important d'enseigner à nos étudiants l'histoire de la philosophie : Platon, Aristote, Saint-Augustin, Saint-Thomas d'Aquin, Hobbes, Machiavel, Spinoza, les philosophes anglais, Marx... Mais ce n'est pas assez pour comprendre. Pour cela, il faut regarder comment était la vie à une autre époque. Et pour comprendre une époque, il ne suffit pas de lire les historiens. Pour saisir la nature subjective de l'histoire, pour voir comment était le monde, il faut la musique, les beaux-arts et, surtout, la littérature de cette époque-là. Il y a parfois des passages assez ennuyeux. Dans *Anna Karénine*, par exemple, Léon Tolstoï revient constamment sur les conséquences de la libération des paysans dix ans avant, ce qui devrait nous faire penser aux limites de ce qu'on peut prévoir sur le plan politique... Zola est magnifique, parce qu'il prend une société – celle du Second Empire – et la décrit du début à la fin. Il montre tout : les chemins de fer, les crimes, l'empereur lui-même (un homme qu'il détestait profondément), l'aspect militaire. Dickens aussi est excellent pour cela. Et Dostoïevski, pas parce qu'il livre un portrait réaliste de la façon dont les gens vivaient,

mais parce qu'il aborde des sujets universels, comme : y a-t-il un bien et un mal ? Plus personne ne pose cette question-là. Dostoïevski a posé les questions essentielles, se demandant par exemple : si le bonheur de l'humanité dépend de la souffrance perpétuelle d'un enfant innocent, est-ce que ça vaudrait la peine ? Il a répondu non. Il s'est demandé ce qu'il adviendrait s'il n'y avait pas de Dieu et a décrété que, si c'était le cas, alors tout serait permis. Ce sont des choses qu'il faut comprendre de l'intérieur et ressentir, et c'est ce que permet la littérature. Elle nous donne l'occasion de vivre plusieurs vies et de nous éloigner de notre époque pour mieux la juger. On ne peut pas tout évaluer à l'aune du moment présent – ce que désigne une expression devenue à la mode en anglais, le « présentisme ». Par exemple, il y a eu un débat dans le *Times Literary Supplement* sur la pièce *Samson Agonistes* de John Milton. Dans l'œuvre, Samson détruit le temple des Philistins et tue trois cents personnes. Un auteur britannique a dit qu'il fallait cesser d'enseigner *Samson Agonistes* aux enfants, parce qu'après les attentats du 11 septembre 2001, c'était faire l'apologie du terrorisme. Certains ont répliqué qu'il fallait continuer à l'enseigner, parce que Milton en réalité condamnait cet acte (j'ai du mal à penser que cette interprétation soit exacte, parce que ça aurait été hérétique de critiquer une histoire de la Bible. Mais ce n'est pas impossible, parce qu'il y a une certaine admiration pour le diable chez Milton). Un autre exemple, c'est Saint-Louis : il a toujours été considéré comme un grand roi, mais aujourd'hui, il a très mauvaise réputation parce qu'il était antisémite. Je suis sûr que si on retournait à cette époque, on s'apercevrait qu'il s'agit d'une petite partie de la réalité d'alors et qu'il ne l'était probablement pas de manière systématique. Il devait même avoir son prêteur favori, à qui il rendait des services et donnait de l'argent. On ne peut pas appliquer les normes d'aujourd'hui au Moyen Âge. En Ontario, il est arrivé que *Le Marchand de Venise* soit retiré de la liste

de lecture au secondaire ! Mais ce n'est pas antisémite, c'est une pièce contre le multiculturalisme ! L'usurier juif Shylock est détesté par les autres, qui le voient comme un personnage habillé de façon comique qui leur prête de l'argent, mais exige d'être remboursé jusqu'au dernier sou. Il est poussé par la soif de vengeance à commettre un crime. Mais c'est aussi une histoire de pardon. Portia, l'héroïne romantique, la femme parfaite, pardonne à Shylock et l'oblige à se convertir. Et ça, ça agace les gens, le fait que Shakespeare n'ait pas prôné la tolérance religieuse. S'il ne l'a pas fait, c'est parce que dans chaque société, il y a des choses fondamentales qui doivent être partagées. Et dans cette société-là, c'est la religion. Aujourd'hui, on demanderait autre chose à Shylock. De parler français, par exemple, mais pas de se convertir. Pour Shakespeare, dans le contexte de l'Angleterre de son époque où les gens pouvaient même tuer le médecin de la reine parce qu'il était juif, il n'y avait cependant qu'une façon de sauver Shylock et c'était la conversion. Mais on ne peut pas parler de ça en Ontario parce que ça va à l'encontre du multiculturalisme. Tant qu'on y est, on devrait aussi prohiber *Roméo et Juliette* : Juliette a treize ans et le troisième acte se passe au lit. C'est certainement inacceptable pour l'Ontario d'aujourd'hui de penser qu'une fille de treize ans a été séduite, même si la réalité d'alors était différente. Un autre exemple, c'est la réaction de ma fille et d'autres jeunes à *Anna Karénine*. À leurs yeux, si une femme est lasse de son mariage, elle n'a qu'à divorcer. Elles n'ont pas compris que c'était impossible dans la société où vit Anna Karénine. C'est pour contrer le présentisme que je veux que la population lise, et lise des choses très différentes. Une éducation humaniste est, à mon avis, le seul moyen d'amener les gens à être moins mesquins, moins étroits d'esprit, moins convaincus des « vérités » absolues du présent. Je pense que si on leur montre un autre monde, ils vont être plus nuancés.

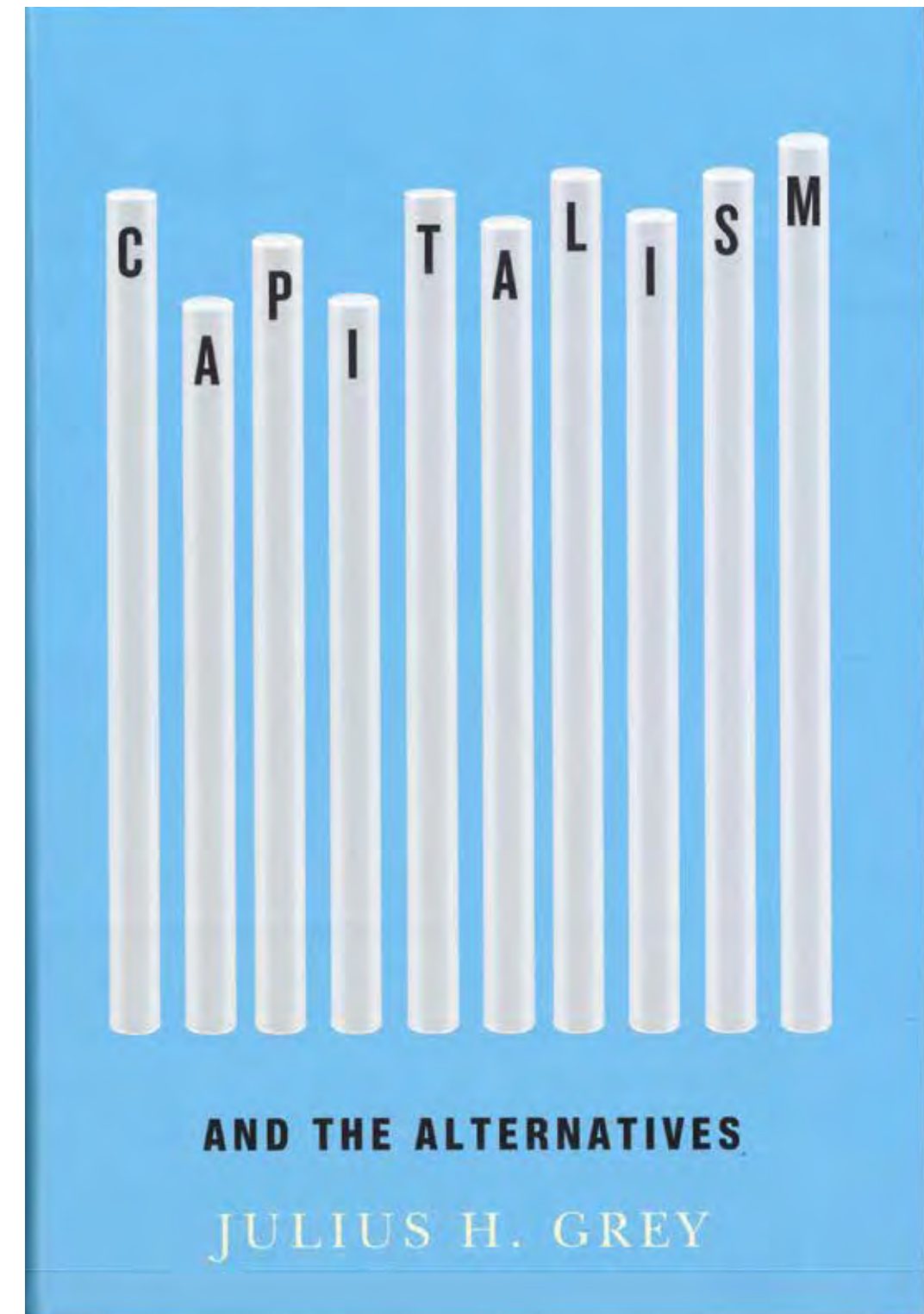
Pour la musique et les beaux-arts, on ne peut pas argu-

menter, ce n'est pas de l'ordre du rationnel. Mais je pense qu'il y a là une forme de transcendance. J'ai compris ça en 1970. J'étais allé avec mes parents à Burlington, dans un festival, voir une représentation du *Roi Lear*. J'ai été absolument bouleversé. L'immensité du bien et du mal m'a complètement choqué et je crois que je n'ai jamais plus été le même après. Les beaux-arts, la musique et parfois la littérature nous permettent d'entrer en contact avec la chose elle-même à l'intérieur, la partie non phénoménale, celle qui n'est pas scientifiquement déterminable. Et donc, quand on lit la littérature du XIX^e siècle, il est bien d'écouter en même temps Schubert et Beethoven, et de regarder Renoir et Goya.

■ Est-ce qu'on peut dire qu'il y a quelque chose d'universel dans cette grande littérature ?

Oui, parce que je crois que le bien et le mal existent, qu'ils ne sont pas relatifs et qu'ils ne sont pas simplement ce qu'on peut en penser. Je crois qu'en lisant *L'Idiot* ou *Les Frères Karamazov* ou *Le Roi Lear*, on a l'intuition de ce que sont le bien et le mal. Mais attention : je ne veux pas dire que les choses ne devraient pas changer. Par exemple, on peut expliquer la prohibition chrétienne du divorce en comprenant que c'était une époque où les femmes divorcées étaient complètement démunies. C'était donc injuste envers elles de permettre la dissolution du mariage. Mais aujourd'hui, ce n'est plus le cas. Il y a toujours des injustices envers les femmes, mais les statistiques démontrent que dans la majorité des cas, c'est l'épouse qui demande le divorce. Donc, c'est relatif. Mais le bien dans tout ça, c'est que la femme doit avoir droit à l'épanouissement autant que l'homme. C'est inutile de forcer Anna à rester pour toujours avec Karénine et il faut éviter des Emma Bovary ! Le grand auteur qui a réussi cela, c'est Ibsen, qui a écrit *Hedda Gabler* et

Une maison de poupée – Hedda Gabler est la femme fatale frustrée et Nora, l'héroïne de la deuxième pièce, celle qui se libère. Le bien et le mal ne changent pas, mais le résultat peut être différent. À une époque où les femmes n'avaient pas le droit de propriété, on disait à l'homme qu'il ne pouvait pas se débarrasser de son épouse parce qu'elle n'avait aucun moyen de survivre sans lui. C'est toujours le cas en Inde aujourd'hui : les veuves sont isolées et exclues, et comme les femmes divorcées elles n'ont aucun droit ; et certaines fiancées finissent brûlées. Tout ce qui porte atteinte à la dignité et à l'épanouissement de chaque être humain est mal. C'est pourquoi les droits individuels sont si importants : ils permettent à chacun de s'épanouir malgré l'idée que s'en fait le groupe. Je ne suis pas prêt à accepter que les sociétés aient toutes des critères distincts qui n'ont rien en commun et qu'on puisse se donner des morales tout à fait différentes. Le dramaturge anglais Tom Stoppard se moque d'ailleurs de cela, dans *Les Acrobates*. Le relativisme est une bonne chose seulement quand on considère qu'il n'y a pas de réponse finale et éternelle à des problèmes spécifiques, mais pas comme une vérité morale.



shortage of funds for social programmes. Equalization is a noble goal in itself.

It must be made clear that income includes all income from employment and from capital. The terms must include sums earned directly and indirectly, through trusts and other devices. If this were not so, the recipients of wealth would simply arrange the best possible characterizations to avoid the taxes – just as they do now. Further, if the goal is to prevent class formation and not only to raise money for social programmes, it is necessary to tax successions in a substantive manner,⁵ although personal objects and souvenirs will have to be treated indulgently for protection of individual dignity and private lives. Moreover, it is debatable whether the limit should be an absolute one or merely a very steep taxation over a certain limit, sufficient to prevent class formation.⁶

The neo-liberal decades have increased considerably the gap between rich and poor. Indeed, virtually all of the somewhat questionable gains in total wealth in the last twenty years have served to enrich the wealthy. In the long run, the present system will create new, impermeable classes served by separate schools and health institutions. Catching up will become virtually impossible, except, as Walter Scheibel suggests, by violent revolution.

To counter this trend, we should determine the maximum tolerable income differential between the richest and poorest and tax excess amounts for the express purpose of sustaining relative equality. Some will no doubt object to the attack on high salaries for the elite. They will argue that the possibility of high salaries contributes to the creation of wealth and jobs, despite evidence that there is little common measure between merit and reward. They will see the possibility of reaching fabulous summits as the most exhilarating part of the American dream.⁷ Finally, they will argue that the redistribution of the high corporate salaries would put very little into the average person's pocket.

The very rich have profited inordinately from all of the gains in production since 1980 and the wealth held by the top one per

cent is staggering.⁸ Taxing them would now really assist public finances. However, the argument against high differentials in income is far more compelling than a dispute about the amounts such taxes will raise.

In the first place, as a model for young persons, the American dream of fabulous wealth is sterile. It depends on the notion of constant expansion which is increasingly dangerous for humanity and it expresses the materialist values which are not admirable. It places no weight on goodness, creativity, generosity, and other great virtues. It relies on a false relationship between merits and enrichment.

In the second place, relative poverty has most of the social disadvantages of poverty just as much as absolute poverty. Only the issue of satisfying basic creature needs is irrelevant with relative poverty. In fact, much medical evidence has shown that relative poverty and relative social status has a greater effect on life expectancy, health, and psychological equilibrium than absolute poverty, except in situations of famine or total lack of material resources.⁹ In countries like Canada, the United States, and Great Britain, people who have more authority, greater control over their lives, and greater prestige, live longer and healthier lives than those under them even though everybody gets sufficient food and medical help.¹⁰

In *A Theory of Justice*, John Rawls suggested that a reasonable man who is offered a real increase of \$100.00 in his income while everyone else gets \$200.00 will accept because he too will benefit. Rawls's conclusion is incorrect and naïve. What Rawls forgets is the demoralizing effect of *relative* poverty, exacerbated by the materialism of our society which attaches supreme importance to material possessions. Relative poverty breeds insecurity and destroys the poorer person's self-esteem. Political power becomes inevitably a tributary of wealth which gives a relatively poor person a sense of his own impotence and saps his power to influence the future.

It may be that in a society which recognizes elites based on values other than material wealth, one can create academic or artistic classes which have prestige without wealth and where

the destructive effect of relative poverty is, for such classes, less clear. Our society's populist rejection of elitism leaves little room for this type of phenomenon. A person's prestige is inextricably bound to his means.

It is possible to salvage Rawls's idea by putting a value on the prestige or relative position and counting it as one of the factors which the reasonable individual will consider in deciding whether or not he is better off. However, in doing this, we are stepping away from the theory so widespread among American Republicans today that income disparity matters little and that the total production of a society is what determines its quality and prosperity. Moreover, such a value is impossible to determine objectively and would have to be arbitrary.

The third problem with high income and uneven distribution of capital, is that it allows those with relative wealth to monopolize the desirable and scarce commodities, notably access to power, health, education, and culture. Even if, in absolute terms, the relatively poor person will continue to be able to afford most material goods, he will be excluded from the elite schools, the private hospitals, and the elite cultural institutions which will serve the new ruling class. After a generation or two, this class will indeed appear to be superior, more refined, and more cultured than those left behind.

In every system, certain resources are scarce and their distribution tends to define the privileged classes. David Ricardo thought that land would be the ultimate scarce resource and he was not entirely wrong although certain other items – space, specialized services in health and education, perhaps some food and access to clean air – have to be added to the list. Even if we take manufactured goods, like much clothing and certain basic foods off the list because of increased production,¹¹ there would still be potential for a rigid class system, for the demoralizing effect of poverty, and for barriers between the privileged and the ordinary people. This is why it is necessary to have the government tax the wealthy and then redistribute precisely those things which the market forces would limit to the elite.

Obviously, the "profit motive" for small business would be *somewhat* more modest under the new system with the making of a fabulous fortune becoming impossible. As the Cambridge Keynesian economist Joan Robinson¹² wrote, people will strive as hard for modest gains such as extra trips, a slightly classier car, a marginally bigger house as they will to make mythical fortunes. Moreover, international corporations and big business as we now know them would either disappear or become partly public and very heavily regulated. It would not be possible to make a great fortune in business and people would not feel pressure to do so.

Both in order to avoid a black market and the accumulation of secret cash, certain luxury items such as yachts, sports cars, and private airplanes should simply become unavailable or available only through clubs and other communal organisms. In any event, possessing such items would constitute virtual proof of tax evasion, especially if each child were allowed a generous tax-free bequest from its family, but, beyond that generous amount, the steep tax rates would also operate in the sphere of succession. It would become impossible to explain the possession of fabulous wealth.

This is the flip side of not tolerating profound poverty – that great riches not be tolerated either. To think that a decent minimum can be guaranteed without the imposition of a maximum is a pipe dream. The dream of social justice can only be achieved at the expense of the old American dream that anyone can become rich through hard work and wise investment. In short, there is no great change without a price tag and we cannot keep both the benefits of primitive capitalism and of social justice. However, we must remember that the sacrifice is not great because, in reality, the American dream is not realized by many people and its pursuit mars the lives of many.

In a society which discourages great accumulation of wealth, would it be necessary to abolish lotteries which the majority of people never win? Such an act would appear too drastic and too dogmatic. On the other hand, limiting the winnings to amounts which are large, but not outrageously so, would be reasonable.

The neo-liberal propaganda has convinced large numbers of people that one should not discourage great personal wealth and that it is a legitimate and laudable goal. This debate clearly should be reopened. Great wealth implies considerable poverty of many others, at least in the relative sense. However, it is also undesirable in itself and in the materialism and in the crassness which it fosters and its negative effects on even those who succeed in amassing it.¹³

Despite the deafening propaganda in favour of wealth, the call on a limit to wealth has been heard before. In the United States, the myth of the capitalist dream that everyone can become wealthy and that wealth goes to the deserving has been questioned: Felix Adler¹⁴ called for a limit to wealth several decades ago. Further, in December 2011, the *New York Times* published an article by Ayres and Edlin entitled, “Don’t Tax the Rich. Tax Inequality Itself.”¹⁵ In it they suggest a percentage cap on high-end income. *Le Monde Diplomatique*,¹⁶ a more plausible forum for left wing polemics, has taken up this cry in February 2012. What is important is to link the limits on wealth to the other aspects of the new system – individual freedom, and the importance of leisure. Together, the proposals would calm the frenetic competition which is the essence of capitalism.

Thomas Piketty’s *Capital in the 21st Century* has justifiably attracted much attention on this issue. Using economic and mathematical analysis of historical trends, Piketty shows the effect of disparity of wealth on society and proposes international fiscal tools for limiting the degree of inequality. Since capital produces income, a notion of maximum income must include limiting returns on capital. In other words, wealth, as well as income, must be subject to limits. One can conceive of a situation where one individual possesses a priceless family heirloom or painting and this likely causes no difficulty. One would not want to confiscate such things. However, once wealth produces income, the rules imposing limits must be applied.

It is true that, at least since the invention of agriculture, inequality has tended to grow. This is shown by Kent Flannery and Joyce

Marcus in *The Creation of Inequality: How Our Prehistoric Ancestors Set the Stage for Monarchy, Slavery and Empire*.¹⁷ The more complex the society, the more evident the inequality.¹⁸ Indeed, the brief social democratic and communist era of declining inequality can be seen as a blip on the progressive concentration of wealth.¹⁹ This view can be derived from Piketty as well as, perhaps even from, Jared Diamond. Some, such as David Ricardo saw the trend towards inequality as inevitable. Although visionary, absolute equality is clearly unattainable and the twentieth century, with its successive attempts to apply Marx and Keynes, despite their mitigated success, permits a legitimate hope that, through state action, the inequality can decline to the point where the distance between the top and the bottom will not be sufficient to permit the creation of separate classes.²⁰

One important positive sign is the beginning of a preoccupation with inequality. The belief that predatory capitalism in the Ayn Rand mode is a good system, is waning.

Piketty and other authors²¹ are now being discussed. President Obama tackled inequality and proposed a wealth tax in his 2015 State of the Union address. It is, however, still unclear how one can legislate greater equality without an international authority (as Piketty would like) or an abandonment of dogmatic free trade as suggested earlier in this essay. Without such measures, wealth will simply migrate to avoid egalitarian legislation.²² The refusal to budge on free trade is one of the characteristics of “liberal” thinking. It must be added that anti-free trade rhetoric from the right preached by Donald Trump and Marine Le Pen are hardly encouraging for egalitarianism, anchored as it is in nationalism.

The Third Principle

The third feature of the new system, common to most social democrats, would be the high degree of economic regulation. Joseph Stiglitz²³ pointed out how the deregulation of the financial markets led to what he called the “free-fall” of 2008. In general,

economic deregulation has provided opportunities for the wealthy to acquire even greater financial power, to influence policy-making, and to reduce the level of democracy and equality. It must also be said that excessive respect for market distribution for instance, in the establishment of prices, leads to distortions and injustices. This is striking with respect to services which invariably become too expensive. It is therefore necessary to use regulatory structures to modify prices as established by the market, that is to make services in general accessible even if that means more expensive goods.

It goes without saying that the financial sector, banking, pension planning, interest rates, inflation, and creation of currency will have to be guided by the state. They already are to a large extent, and the disastrous attempts to deregulate in the US under Clinton and Bush should make us very reluctant to try again. Indeed, this is one area of the economy where a certain amount of direct public ownership might well be appropriate although that is something to be undertaken with great caution. President Trump has embarked on a programme of deregulation of financial institutions and environment controls; clearly, the lessons of 2008 fell on deaf ears in his case.

The high degree of regulation would undoubtedly pose a threat to individual freedom as it did under social democracy. This should be countered by a decline in non-economic regulation. The notion of personal romanticism, described further down in this section will expound on the liberating, almost anarchic side, of the new society.

The Fourth Principle

The fourth innovative feature of the new society would be the stress on leisure such as culture, free time, and family vacations. When France's socialists, under Prime Minister Lionel Jospin, limited weekly working hours to thirty-five in the late 1990s, they were pioneers in what should surely be the wave of the future.¹⁴

No more Protestant ethic of hard work and austerity. Instead – honest, but temporally limited work and a premium on personal

culture and on leisure activities that imply a high level of education, but do not require a great degree of wealth; this includes reading, theatre, opera, cinema, sports, volunteering, and tourism.

This type of policy does not produce lazy workers. Indeed, per hour the French workforce is more efficient than the American, but its output is less because it works fewer hours. Moreover, professionals, artists, and scientists whose work is part of their cultural activities would undoubtedly work as hard as ever because of their inner motivation. But the pressure to perform would be gone. Life would become more evenly balanced between career and work on the one hand, and enjoyment and learning on the other. Such a balance would almost certainly assist in promoting equality in the labour force between men and women.

The promotion of leisure begins with a humanist and scientific education not directed towards employment efficiency or market training. Students should be encouraged to travel in groups, to read independently and widely, and to favour their intellectual and social development over their practical skills. The time will surely come to learn a skill or a profession, but that is not to be the primary goal of education. Confusion between education and accreditation is to be avoided.

There is now considerable evidence that generous holidays and frequent rest increase productivity and that the attenuation of the extreme pressure of the “Protestant” model will not lead to a decline in output. This thinking can be found, for instance, in Tony Schwartz's¹⁵ article “Relax! You'll be More Productive,” published in the *New York Times* in February 2013.

The relative equality of income should reduce the histrionic competitiveness of modern education. Parents who start preparing their children for the elite school admission process from birth would have no elite schools to choose. The strain of the competition for professional schools and good universities, while it cannot be completely removed, would obviously subside as income becomes more evenly distributed.

There would surely be prestigious schools and academic honours to be won, but the influence of wealth would decline to almost nothing in the distribution of admission and rewards and as business sponsorship wanes. Academic merit could be its own reward, as would be academic freedom, freed from obsessive preparation of grant applications.

A word must be said about technology. At various times, people have expressed fears that technology would reduce available jobs. In the last few years, clerical and blue-collar jobs have certainly tended to disappear, at least in First World countries. The probability of massive job loss is considerable although the precise extent of this trend cannot be predicted.²⁶

It may well be that the victory of capital over labour is inevitable in the sense that it will be more efficient to produce goods and provide many services with technology and much less labour. If that is so, it is essential that the state redistribute so as to create more leisure time and more economic equality and not simply more profits.

However, it is also true that in many fields, technology has not reduced the work-load. In law, for instance, it has led to an exacerbation of court requirements of disclosure and presentation of materials which have put professionals under pressure and increased, instead of lowering, the high price of services. This is partly why law is now priced beyond what an ordinary man can pay. The same applies to most professional fields although high price is not always exclusively the result of technology. It may be that the time has come to use technology improvements to reduce work-time and increase leisure, rather than to augment the quantity or improve the quality or appearance of the product. This is another element in reducing the expansionism and competitiveness of modern capitalism.

It is this stress on leisure and the definitive abandonment of the capitalist dreams of wealth through hard work and frugality that tips the suggested new model towards socialism or social democracy rather than capitalism. Many features of capitalism will remain but the society will work on the basis of a philosophy

which is not capitalist in its goals and which values equality and freedom over financial success.

The central importance of leisure was the theme of *How Much is Enough?* by Robert and Edward Skidelsky.²⁷ That work is in fact quite close in spirit to the new system proposed here although it is rooted not in a critique of capitalism, but in a search for the good life in the spirit of Aristotle. The Skidelskys reject the fashionable moral and cultural relativism and ground the desirable limits on individual wealth or moral considerations. In their view a relatively frugal life enriched by reflection, education, and culture would be morally preferable to the frenetic race for wealth accompanied by its permanent partner, poverty for the losers.²⁸

Since the days of Keynes, the labour saving and productivity advances he had foreseen have been realized, but not the consequent leisure. Indeed, large segments of the population work more than ever.²⁹ Part of this may have to do with the growing inequality. People in traditional individual jobs and in low-skilled positions cannot find enough work and often work part-time. The very wealthy do not have to work although many of them do. However, they certainly have time for leisure and for other activities which they enjoy, but which do not necessarily bring in remuneration, such as politics. It is the upper middle class, perpetually fearful of falling out of the loop,³⁰ facing competition below and expectations above, worried about their children's opportunities that end up working long hours and avoiding holidays and leisure. Further, any spare time is often consumed by frenetic activities with children in order to position them for success in a "dog eat dog" world.³¹ These classes would benefit from a more egalitarian, more relaxed, and less competitive world.

Some fear that the world so organized would be an insipid, heavily controlled one and that it would eventually create a new form of soft totalitarianism in which conformism becomes the path to success. These types of fears have dogged democratic socialism since the criticism voiced by Hayek and Schumpeter and they cannot be completely discounted.

Of course, in our time, it is neo-liberalism not social democracy that has produced a soft totalitarianism of surveillance, harsh criminal law, and enforced conformism. Social democracy in the 1950s and 1960s offered much more freedom and clemency to citizens. However, the danger of creating a similar result with a left wing slant is a real one. Freedom, especially individual freedom, would need to be carefully tended and protected from being sacrificed on the altar of currently fashionable ideas.

Trotsky spoke of freedom from material necessity as a precondition for real freedom. He had a good point, but mere freedom from poverty does not suffice to guarantee liberty. Future social democrats or socialists would have to be more solicitous of individual freedoms and less preoccupied by the lure of collective projects.

Individual freedom can be restrained by many factors. Poverty, but also religious and ethnic allegiances of one's parents or of society, excessive zeal in enforcing the law, and an undue respect for those in authority are some of the most obvious. Clearly, great care would be necessary to prevent an eclipse of liberty. The argument against multiculturalism and communitarianism which find themselves normally among the tools of repression will be made further on in this book, but liberty must be an important consideration at all times and must rank higher than group claims.

The Fifth Principle

The elimination of wealth and poverty, of ethnic schools, and, hopefully, the waning of multiculturalism and of ethnicity would leave individuals more free to make their own choices. A personal romanticism and non-conformism would ensure that citizens benefit from the freedom.

The fifth and most innovative feature of the new system is indeed this "romanticism" and the individual freedom it requires. This means individual freedom in family relations, career, and everyday life. It means almost total free speech including the right to oppose the system and to say things which anger or limit

others, as well as freedom of religion, conscience, and association. It also means freedom from ethnic, linguistic, and religious groups and pressures from them to which we are constantly exposed. A romantic attitude is one in which one is free to travel anywhere, to marry anyone regardless of origin, gender, or religion, to change professions and lifestyles several times during a lifetime and to ignore the norms of current fashion. Such an attitude would surely be liberating. So would sexual and religious freedom. In many ways, romanticism means freedom from convention, political correctness, and tradition. Freedom from ethnicity and from collectivities is an essential part of this and it constitutes a break with the modern left which is often preoccupied with identity and with collective goals.

The relative decline of gender inequality and the empowerment of women promotes romanticism by making sexual relations take place between equals.³² Moreover, the removal of gender, ethnic, or racial barriers to sexual activity, the disappearance of the moralism of the nineteenth- and early twentieth-century bourgeoisie, and the weakening of financial incentives in the selection of partners in conditions close to equality would all enhance the romantic portion of human existence.³³ But romanticism and non-conformism are attitudes which have applications in all aspects of life, not only in law or in personal relations.

Since the new economy would be more regulated than the present one, it would, as we have seen, present certain dangers to freedom. There should therefore be less regulation of *non-economic* activities and a less zealous application of rules. The neo-liberals deregulated the economy and imposed rules everywhere else. The opposite is the desirable solution. *Every rule and regulation which is not economic or redistributive should be open to question at all times.* Moreover, all rules, including economic ones, should be applied flexibly. The law should never be inexorable. This means a less orderly, perhaps less predictable society – something capitalism usually opposes because financial markets prefer stability and certainty. It also means a freer one.

Excessive and casuistic municipal and state regulation, so common in our times, should be substantially lightened. Professions should be less standardized and less subject to discipline on grounds which do not involve moral obloquy. A more accessible justice system would reduce the powers of bureaucratic despots. An almost absolutist approach to freedom of expression would end the tyranny of political correctness. A compassionate criminal law system would reduce the number of prisoners to the bare minimum of those who cannot safely be released and would wipe out totally the effects of a criminal conviction several years after the event. The reduction of surveillance and the relaxation of the overwhelming panic about security would create more privacy, more room for dissent, and, indeed, for eccentricity.

Individual romanticism also means less dogmatic ideology. All human movements, even positive ones, develop a tendency towards creating an established dogma. Since many people fear to think independently, the dogma gives them a guide with which to evaluate events. Some people, for instance, adopt a resolutely pro-labour or anti-labour stance in disputes pitting a worker against an employer. Some are dogmatically religious or anti-religious whenever religious questions arise. Some dogmatically uphold the sanctity of marriage and condemn all adulterers while others approach such issues with pre-conceived ideas of a permissive or of a feminist kind. Individual romanticism makes all formal dogma suspect because it imposes rigid rules when individual freedom should hold sway and each matter should be considered on its own merits.

Whatever we do, the problem of individual freedom in the new system would remain a legitimate and permanent preoccupation. No perfect utopia will ever be reached and we shall never be safe from tyranny. Tyranny takes a different form in each period of history and is often not immediately recognized. Nor is it possible to vanquish completely the tyranny of fashion and political correctness because so many are conformists by nature.³⁴ There would therefore have to exist institutions

dedicated to challenging power, even under the best system; the courts are surely the most important of these institutions. Paradoxically, countries with problematic human rights records, such as the United States and Israel, are sometimes redeemed by the courage of some of their judges. Corrupt countries, such as Italy and India, exhibit far less venality in the justice system than elsewhere. The independent judiciary is therefore a necessary condition of individual freedom and a bulwark against the conformism and the obedience to rules that all majorities inevitably seek to impose and, thus, it must be given particular attention. The legal system will be discussed more elaborately below.

II. INCENTIVE AND INNOVATION

While the new society, based on leisure and freed from the cult of growth, may well be less concerned about incentive and innovation, it will still be important to improve technology, to protect the environment, and to motivate citizens to make a contribution.

We have already seen that liberal capitalism has a positive side. The maintaining of an incentive to innovate is surely one of the reasons not to embark on visionary or dogmatic socialism. In the last section we have postulated the maintaining of a considerable degree of competition and free enterprise, subject to the goal of not permitting the creation of classes. It will also be necessary to use incentives both at universities and outside the academic milieu to improve the use of technology.

There are a number of areas of human endeavour where technological innovations will be crucial. The environment is an obvious one. Without new technologies, humankind will be in danger of natural catastrophe under any system of government.

Medicine is, by its nature, important to the new individualistic, egalitarian society where every person represents a precious, irreplaceable value. There too, innovation will be necessary at all times in order to achieve the longest and healthiest possible lifespan for each individual.

One would hope that the attention devoted to weapons and rocket systems will not simply disappear but will be given to other projects, such as the protection of the environment and health. However, these will still have to be financed and a system of recognition of achievement and intellectual property and competition for funds will, to a considerable extent, be inevitable. In this way, the new society will resemble Western social democracies of the past decades. There is no serious alternative to competition and evaluation, and mystical attempts to replace them with narrow socialist values will fail with potentially disastrous consequences for human knowledge. Further, the communist experiment showed that competition and evaluation are often replaced by force and that is, morally, an unacceptable alternative.

The positive assessment of research and innovation should not lead us back into the expansionist frenzy of modern capitalism nor into its worship of innovation for its own sake, of eternal youth, and of endless growth. It is a much more modest incentive which is envisaged here. Granted, it is important to encourage scientific and engineering progress. It is not, however, necessary to reinvent society and individual lives in a frequent, drastic, and somewhat frenetic manner in the name of innovation. Nor is it necessary for the rewards of the innovations to be spectacularly large. People will be satisfied with moderate financial compensation if they feel appreciated and recognized for their achievements. All the incentives in the world will not hide the fact that the new society is not based on the "Protestant ethic" of hard work as the basis of virtue, but instead on culture, leisure, harmony, and knowledge.

III. POLITICAL STRUCTURE IN THE NEW SYSTEM

Much of this essay has been an attempt to demystify and challenge the concept of "democracy." It is not a system of government at all, and certainly not an instrument of regime change. Its best function is to change government or transfer power inside a system. It does not provide a guarantee against human rights

abuses, war, or racism. In some cases, non-democratic governments may be morally preferable to democratic ones.

Despite all that, it would be unthinkable either to suggest an undemocratic structure of government for the new system or to try to run it with some sort of "hyper-democratic" notion of direct, popular decision-making. There is reason to hope that, in the new system, democratic forums will be more successful than in the present world.

For one thing, one of the most significant dangers which lurk in Western democracy, the hijacking of the state by the wealthy, would be less serious in a world without great differences in wealth. This is at present an imminent threat to democracy in the US, but it looms everywhere in the West.

For another, in its narrow field, the rotation of political leaders, democracy is the most efficient system and it is often, but not always, more effective than its more authoritarian or "hyper-democratic" rivals in protecting individual liberty. Since the new state would have to choose and change leaders and this would probably become its major political function, representative democracy presents the best structure.

Particular care must be taken to avoid hyper-democracy and populism and automatically considering majority opinion as right. Such notions impose limits on freedom worse than most dictatorships and they enforce conformism and obedience not only to legal rules but to societal ones. In many cases, like Maoism, hyper-democracy is the flip side to brutal tyranny.

Even in representative democracy, there is danger of populism and majoritarianism and, in the early twenty-first century right wing populism is making gains in much of the world. It is therefore necessary to provide against it through a constitution which is difficult (although not impossible) to change, which enshrines an independent judiciary, and which guarantees protection to individuals against majority views.

In the new system, a constitution should shelter a number of core principles from the vagaries of popular opinion. Medical care for

all, universal and virtually free education, social security, and safeguards for culture should be protected in the same way as basic freedoms and as fundamental equality, most likely through a constitutionally entrenched Charter of Rights. Collective rights must not be allowed to dilute the basic individual guarantees of freedom and relative economic security for all and any Charter should be explicit about this. Nor should notions of “who belongs,” however widely held in society, be permitted to dilute fundamental rights of immigrants, illegals, or unpopular minorities.

Other safeguards will be needed. In some cases, federalism reduces the perils of the concentration of power and it is always something to consider. The existence of an independent judiciary certainly does and it will have to be constitutionally entrenched. The “romantic” individualism of the new society should make citizens less obedient and less conformist and therefore less susceptible to acquiesce in abuses of power or in morally unacceptable majority positions.

Subject to all of these caveats, a parliamentary structure with a voting system that reflects the popular vote directly or with very little distortion will have to be created. It will have safeguards both against power-hungry individuals and against righteous majorities and populism. However, the use of power by some over others is always dangerous and nothing will ever make it totally safe or justify a structure which favours efficiency over safeguards.

IV. JUSTICE AND JUDICIAL REVIEW IN THE NEW SYSTEM

The reason why freedom is always vulnerable is rooted deeply in the human urge to dominate and to have one’s way. While it is not necessary to agree with the forces of the right that capitalism itself is natural and cannot be substantively modified, it is naïve to adopt a view that economic differences alone are to blame for loss of liberty.

The tendency of idealists who try to save humankind in the name of an ideal and, in the process, destroy liberty, is too well known to need much debate. Only four years separated the radiant beginning of the French Revolution from the Reign of Terror and the guillotine. If Russia waited a little longer to descend to hell, it sank deeper and for a longer spell than revolutionary France. Moreover, the various religious and secular groups which withdrew from society and tried to share everything, including sexual partners, frequently ended in power struggles and oppression inside the new communities.³⁵ This happened several times during the Reformation and regularly afterwards. None of the efforts to build a private utopia bore fruit.

Those of us who are veterans of the student revolt of the 1960s often forget, in our sentimental recollections of a time when we were younger, that the attempt to enforce a new left “dogma” and to condemn or exclude non-believers became both very unpleasant and bizarrely stupid. A reading of Flaubert’s “*L’éducation sentimentale*”³⁶ shows that the same bovine stupidity was rampant in the ranks of radical students of the 1840s who were dreaming of a repeat of the French Revolution.

It is therefore folly to believe that if we overcome the present totalitarian “democracy,” which is the principal threat to freedom in our times, the day of perfect individual liberty or eternal prosperity will dawn. It is a pernicious myth to believe that any party or ideology has the keys to earthly paradise.

Nor can we rely on “democracy” or majority rule as the safety valve. It is not working today and may never be a reliable safeguard. This is evident both from our consideration of the institutions of democratic government and the alienation from them caused by capitalism and from the opinions held by the majority of their citizens. Majority rule is both difficult to achieve and disappointing in the result.

There is a great chasm between individual liberty and majority rule or populism. While societies often pay lip service to liberty, the elites in all political systems become impatient and frustrated

with dissenting voices, especially if they are effective in blocking their plans. The impatience frequently becomes anger when the criticism comes from former allies whose unbending support was taken for granted. It turns out that, all too often, majority opinion comes out in favour of conformism and respect for the rules. It is therefore virtually certain that any new society would continue to need strong protection for individual freedom and that the protection would have to be aimed at the new elites as well as at any populist ideology put forward by them.

Moreover, a social democratic society, with many social schemes and programmes, would have countless temptations to want to repress inconvenient protests. For instance, how understanding is today's left towards those who oppose new programmes aimed at eliminating sexual harassment on the ground that they impact freedom of expression? How would religious dissent on abortion, for instance, fare at the hands of a secular, possibly feminist state? The potential for impatience and repression is very great indeed.

It follows that an impartial, unaccountable, non-elected arbiter is necessary and would continue to be necessary in any imaginable society. Political majorities, leaders, and the bureaucrats empowered by them are simply not trustworthy, at least not with respect to fundamental rights. Nor are majorities. The arbiter would have to exist and possess great discretionary powers to override majority decisions and it could only be an independent court, or perhaps an arbitrator subject to the supervision of the court, who could fulfill this function. There may be other possible institutions, such as mediators, but such institutions could only supplement, not replace, an independent court.

The courts and judicial review already play a major role in protecting freedom. However, the legal system is not functioning well anywhere. It is failing in this most crucial role as well as in most others. It is not helping the ordinary man obtain justice.

Accessibility, practically non-existent today largely because of financial barriers, is essential for the judicial system to carry out its proper tasks. The cost of litigation must be reduced by cutting the

number of experts heard at trial, shortening trials, and eliminating procedural refinements that give such an advantage to the wealthy and to powerful law firms which have the work force to address those ever-increasing refinements. It would also be necessary to promote greater independence and discretion for judges since the nomination process as it stands now favours the naming of fairly conservative individuals. Nevertheless, once they are named and once they have nothing to fear from further government action, judges do sometimes challenge the system.³⁷

Of course, in a social democratic society, it would be the left which would usually manifest its impatience with meddling judges, and not the right which is often unhappy with them today.³⁸ The natural impulse on the part of any dominant group is to invoke "democracy" in order to silence judges. As mentioned, it is exactly what the neo-liberals do today.

The creation of safeguards to prevent abuse of authority in the new system is obviously both a delicate and a sensitive proposition. Judicial review, that is, the power to set aside administrative and legislative decisions by an independent judiciary, is a very important tool without which no system can protect the individual from bureaucrats and from swings in the majority's mood. However, it does diminish the efficiency and swiftness of government activity and it also has limits which must be observed in order to avoid a society run principally on the basis of judicial precedent.

The challenge is to rehabilitate judicial review in the eyes of citizens. As discussed previously, during the neo-liberal years, much pseudo-democratic verbiage has appeared, arguing that unelected judges should defer to elected legislators. In the United States this has become a dogma which neither major party can afford to doubt. According to this dogma, the role of a judge is to apply the rules and not to make or modify them. Implicit is the untenable assumption that rules of law can generally be objectively determined. Legal philosophers know that this is not so and that it is not possible to eliminate questions about the morality of law, about its practicability, or about the principles behind the exercise of discretion.³⁹

Successive Republican governments have packed the courts with advocates of “restraint” who refuse to assist individuals on the ground that policy decisions must be made by the legislator without considering the consequences for individuals and that the Constitution must be narrowly construed. If one analyzes the decisions of the republican courts, one sees little restraint when it comes to helping big business. It is only the individuals who are supposed to turn to the legislator. Indeed, the Roberts Court has been more consistently pro-business than socially right wing.⁴⁰ After all, the real beneficiary of conservatism is big business, not the social right.

Never mind that, to those with no money, the legislature is as difficult to access as the courts, that powerful lobbies tend to get their way, and that majorities, even when they are effectively represented, can be immoral and unjust. Public opinion has come to view judicial activism as elitist and everyone repeats the mantra that activist judges are dangerous and anti-democratic.

The theory that everyone must somehow be “accountable” is one of the culprits. While judges are not “accountable” in the usual sense of the word, except for truly egregious acts,⁴¹ unlike the legislators and the executive, they are at the same time not accountable to big business and other lobbies and are not subject to electoral pressures. As was pointed out by no less an authority than *The Federalist Papers*,⁴² judges’ power is very limited and they cannot step outside what is acceptable and possible in a society without being repudiated. However, they are the branch of government which faces the fewest personal consequences from a courageous, unpopular act.

The left in power has a questionable record in respect of accepting judicial review. The excessive reaction to judicial review in the labour field in the 1950s and 1960s came from the left.⁴³ Today, the left becomes very irate when judges say “politically incorrect” things on issues like sex or race. The same arguments of democracy and accountability so favoured by the right were raised by progressive thinkers in support of judge-bashing. The impulse to

use populist notions of democracy in order to silence judges is one of the most dangerous temptations of power.

The attitude towards judicial review has not been divided along left/right lines. The establishment “right” usually opposed review because of its distaste for contestation by students, prisoners, prospective immigrants, individual employees, and various types of idealists (e.g. environment activists) and of its tendency to trust those in authority and defer to them. On the other hand, they liked and used judicial review against organized labour and against economic regulations put in place by left of centre governments.⁴⁴

The established “left,” on the other hand, was impatient with judicial interventionism in the field of labour on the side of the employers and other economic regulations. While it tepidly supported some contestation by students, prisoners, and other pressure groups, the established left, on the whole, was distrustful of judicial review.

On the other hand, both the maverick right, especially libertarians, and the maverick intellectual and individualist left tended to support considerable judicial review. On this issue, a welfare conservative like Lord Denning and a liberal like Professor Ronald Dworkin might often find themselves on the same side. It is submitted that, within the limits of common sense, the proponents of judicial review were correct.

In fact, one of the ways to destabilize power-hungry bureaucrats and other would-be tyrants is through frequent judicial review. Sometimes, judicial decisions get in the way of policy and slow down reform; at other times, however, this forces those with power to reconsider their position and to exercise their power with more consideration and care for those affected by it.

If successful judicial review is too rare in a society, ordinary people will not invest money in contestations which will necessarily be very long shots. They will simply become alienated from the judicial system. As mentioned, this is what has happened in recent years. Of course, if judicial review is too common, it paralyzes government and leads to a clash between the judiciary and

the executive which the judiciary almost always loses. That is why both nuance and common sense are essential.

Judicial review is, of course, not a good tool for policy making. The judiciary does not have the research capacity nor the mandate to embark on novel legislation. Its function is to consider the individual cases in the light of all factors, including fundamental constitutional principles as well as basic morality, practicality, and common sense. Judicial review should not create a judicial shadow government. But it should not be an exceptional, unusual phenomenon.

The notion of deference to officials and lower courts, which has become fashionable, is particularly pernicious. Certainly, appeal courts should, in most cases, defer to those who heard the evidence on issues of credibility because of the importance of non-verbal clues in establishing veracity. A transcript is never a good substitute for a hearing. However, deference on moral matters is simply an abdication and a refusal to entertain challenges to the existing order.⁴⁵ The quintessential “deferential” trial was that of Jesus before Pontius Pilate. The new, fashionable deference is also often a moral abdication or desire not to review and to tolerate a considerable degree of injustice in order not to make controversial decisions.⁴⁶

Any society which cherishes individual freedom, whether the prevailing winds blow left or right, should institute a system of justice and judicial review as one of the most significant protections from imposed views and from majority whims; further, it would encourage a certain degree of judicial activism, even if one remained deferential on questions of fact, and tried to avoid the extreme result of government by judicial decree.

The support for judicial review with a moral component is obviously inconsistent with absolute judicial positivism – the idea that the law is a unique discipline and that its methodology permits us to determine with considerable certainty “legal” results, regardless of our political or philosophical views. Very few positivists have been that extreme, although Kelsen⁴⁷ came close. Others,

like Hart,⁴⁸ left room for discretion and even disobedience. It is submitted that Ronald Dworkin⁴⁹ provided a good compromise between natural law theory, which would require constant moral judgment and create unacceptable levels of uncertainty, and rule-bound technicality, which would deprive law of much of its moral prestige. He postulated the existence of principles which allows “rules of law” to be tempered by moral and cultural factors.⁵⁰ Certainly, any inflexible, inexorable systems of rules tend to become tools in the hands of the powerful to maintain their hold, since they are the ones who are in the position to draft and adopt such rules. Therefore, the new system should use law as a check on power, not as an exercise in technical, statutory interpretation. It is necessary to reduce the risk of abuse of power from two sources – groups and individuals who somehow succeed in accumulating excessive wealth and influence, and populism which can result from hyper-democracy or from majoritarianism run amok. The new system would not be an end to history. Power grabs, social changes, demagoguery, religious and national movements, and struggles for power would continue. A strong, independent, accessible justice system, not entirely positivistic, but not completely discretionary, capable of opposing current trends and prejudices, would remain as necessary as it is now. It is only to be hoped that unlike today, it would be more available to all.

V. THE SUBSTANTIVE LAW

Because the new system is not an end to history, no single corpus of substantive law can be formulated for it. The law would evolve over time, as it does now, through legislation, jurisprudence, and custom. However, the expected decline of populism and extreme majoritarianism in the new system, allows us to postulate certain trends in substantive law.

If the objective of relatively equal distribution were attained, the law would not reflect the interests of dominant groups, especially economic ones, as it has in the past. Undoubtedly, it would still

be subject to public opinion, to lobby pressures and to changes in technology, for instance in the fields of criminal evidence and intellectual property. However, the lobbies and groups would likely not attain the influence they exert today.

First and foremost, there would be a clement and humane criminal law, with rehabilitation as its main goal. Certainly, the very dangerous offenders would still have to be incarcerated. However, the use of prisons should, as much as possible, be limited to offenders who pose a direct physical threat. Prisons are both expensive and demoralizing and should become a penalty of last resort. Since the Enlightenment, Western societies have removed most corporal punishments and, in almost all countries, capital punishment from their law. Incarceration is the next target for reform.

The difficulty under the new system, the difficulty of accumulating vast capital sums and of displaying, through extravagance, that one had illegally accumulated them, would reduce the importance, if not the number of white-collar crimes and would permit the creation of penalties which would provide for retribution and compensation without prison in most cases.

The deregulation of much non-economic activity as part of romantic individualism would reduce the number of penal offences and of trials for infringement of various rules and regulations. The sexual and personal freedom implicit in romantic individualism and the equality of men and women would dramatically reduce the number and seriousness of sexual crimes although it is certain that some serious sexual crimes such as paedophilia, for instance, would still occur and be prosecuted.

One aspect of criminal law which would necessarily change in a clement system based on individual freedom is its long memory. We have seen that punishment today includes serious stigmatization for the rest of the offender's life. The new society would provide for relatively quick expiry of criminal records and the necessary effort to ensure that people convicted are reintegrated in society, would mean that a punishment would be confined to its term. The rules which prevent offenders from teaching, from

holding public office or membership in professions, from travelling abroad would all be abrogated, subject only to very narrowly defined considerations of safety. These changes would make the new technology, so useful in detecting crime, less threatening. The consequences of conviction would be far less drastic, at least in the middle and long run.

Family law would also change radically, given both the stress on individual freedom and the impossibility of accumulating vast fortunes to divide. There would still be issues of custody to children and access to them. Also, even if great fortunes became an extinct phenomenon, the society would not be so egalitarian as to prevent considerable patrimony (e.g. homes, cars, savings, and works of art) from being subject to division. The new society would surely adopt an egalitarian attitude in the division, but disputes would inevitably occur. However, the atmosphere of romantic individualism should reduce the level of acrimony and bitterness and the number of disputed cases.⁵¹

The law of succession would continue much as before, even though no great fortunes could be accumulated and if, for any reason a fortune were to be accumulated, taxes would reduce it considerably. The strong public welfare, pension, education, and medical system, would enable testamentary freedom to continue, since losing a bequest would not deprive a spouse or children of basic rights and since the spouse would, in any case, usually own half of the deceased's patrimony. Disputes about successions would thus continue to be tried, but likely on a smaller scale.

The society would retain most private enterprise. Therefore, law-concerning obligations, labour standards, and commercial practices would continue. However, the banking system would necessarily be adapted to the prevalence of small business rather than big business and the need to supply credit to less solid customers.

We have already seen that although the contract defence of capitalism does not work, the importance of contract and of the freedom to engage in contracts is considerable in any economic system.

SECTION TWO

Philosophical Justification

VII. PHILOSOPHY, SCIENCE, AND MORALITY IN THE NEW SYSTEM

One of the more bizarre aspects of Soviet socialism and of most twentieth-century Marxism was the insistence on the scientific nature of socialist teachings. It is true that, in the case of Karl Marx himself, there was great erudition and impressive logic in most of his writings. Yet it is also clear that his purpose was often normative and not descriptive and that it was different in nature from the theory of evolution which Marx and Engels admired and which they thought they were reproducing in social sciences. In any event, the type of rigorous verification of Marxist theory that physical science would demand was neither possible nor necessary. As for Marx's Soviet followers, their position was manifestly non-scientific or even anti-scientific in that, in all of their studies of Marxism, they were not prepared ever to entertain the possibility that the theory was simply wrong. Yet it is a fundamental characteristic of any scientific hypothesis that it can be disproved and must be abandoned or modified if this happens.

The myth of scientific status should never form part of political theory. The place which this myth occupied in the early twentieth century in several ideologies should instead be assigned instead to moral fervour. If capitalism is no longer acceptable, it

is because the inequality, self-interest, exploitation, and the apotheosis of commerce which it produces are morally wrong. Old and respected values, such as honour and indignation, should inspire the change, not belief in scientific inevitability. Further, in the Western world, the centrality of Christian morality – love, forgiveness, self-sacrifice – should be recognized and reinstated.

The eclipse of these fundamental positions of Christianity in Western civilization has opened the West to foolish moral relativism and to an untenable multiculturalism. The new society can only be built on the moral foundations of Christianity, even though espousing the Christian religion is no longer a requirement and, indeed, Christianity should have no state privileges, public position, or any legal advantage over other faiths or over disbelief. The proposition put forward here is certainly not a return to organized religion but rather a return to philosophy alongside science.¹

The twentieth-century attempts to create a socialist world were frequently based on the theories of Marx whose influence was not the only important one because social democracy, especially in English-speaking countries, was often philosophically explained by reference to John Stuart Mill and the utilitarian philosophers. Further, the influence of August Comte² was also present in many countries. One of the strands of reform was represented by Christian democracy and this meant that progressive theologians and Christian philosophers also played a significant part. Finally, one cannot overlook the contribution of moderate conservatives who often helped decentralize the state and remove dangers to individual liberty inherent in a state-run project. The input of the conservatives meant that the works of Machiavelli, Hobbes, Burke, Jefferson, Madison, and Tocqueville also played a role. However, Marx was clearly the pivotal political philosopher for twentieth-century reformers, both for those who followed his teachings and those who wanted to reject them.

The paradox is that so many of his followers, including virtually all who lived in the communist world and were not dissidents, did not see him as a philosopher at all, but as some sort of scientist

who could not be wrong and whose incorrect predictions had to be explained away in Marxist terms. Marx himself at times criticized “philosophy” and did not want to engage in metaphysical speculation as to the nature of what exists. Perhaps we could portray him as an early phenomenologist who “bracketed” what could not be explained and moved on to other things. However, his materialism and his vocal dislike of religion could lead one to think that he rejected the metaphysical traditions from Plato to Kant and simply assumed that the world which we see exists as well as the notion that the forms of all ethical and religious ideas can be explained by dialectical materialism and related to the economics of production and social organization.

Yet Marx’s goal was the liberation of humankind from economic necessity and the development of his potential through freedom and many of his radical followers such as Trotsky used such language. How can this be reconciled with mechanical determinism and with a rejection of transcendental values?

A better view is that Marx joined three disparate strands – one, British political economy of Smith, Hume, and Ricardo; two, French Enlightenment with Rousseau’s liberation politics; and, three, German romanticism and theory of knowledge, especially metaphysics and reasoning as exemplified by Leibniz, Spinoza, Kant, and Hegel. He did not reject freedom and the good as transcendental values, but thought that one could not, on that issue, go beyond Kant and Hegel. In a very controversial and contested way, Nietzsche would show that the debate could continue, but Marx was seeking a different type of liberation from Nietzsche and hoped that everyone could share it. He did not postulate mechanical materialism and indeed severely criticized it.³

It must be said that many confessed Marxists such as Lukacs⁴ and Gramsci⁵ did not accept that Marxism was deterministic or reductionist. To the extent that Habermas⁶ can be seen as Marxist, he too eschews determinism. Perhaps the problem lies less with Marx or Marxist scholars than with the type of dogmatism promoted by the Soviet Union, especially in the Stalin years.

It is now clear that, despite his vocal current detractors, Marx was indeed one of the handful of great Western philosophers. He was an Aristotelian, rather than a Platonist, in that he was interested in “becoming” rather than “being” and in empirical knowledge rather than a priori principles.⁷ He was not the first to discuss social change and the nature of history – Vico and Hegel had done it before him. However, he established more convincing arguments that humankind’s economic condition cannot be separated from his ideological and cultural traits. Even conservatives who consciously express no admiration for Marx, often exhibit Marxist influence when they recognize the link between culture and methods of production.

Of course, this does not justify quasi-religious acceptance of his views or dogma. Just as we can be Platonists or Aristotelians without turning their works into scripture, reliance on Marx does not require that it turn out that he was correct in every word he wrote. Indeed, it would be highly implausible that, two hundred years later, the details of his observations would remain applicable to details of current economic and social problems.

Yet Marx still speaks to us and stirs us. One important aspect of Marx’s writing, which is still fresh, was his theory of history and the relationship between economic and class structures on the one hand, and the progress of history and the evolution of culture on the other. Another feature which has not aged is the call for liberation from economic necessity, effectively a plea in favour of free will. Marx is thus a liberator from necessity and determinism. This whiff of Rousseau gives the lie to those who think that he does not believe in justice or freedom. In recent years, so many writers in the West have espoused scientific determinism and Darwinism as social philosophy. It is ironic that Marx – an early champion of Darwinism – can be the antidote to this bleak vision of humanity.

After the triumph of neo-liberalism in 1980, Marx fell out of fashion. Those who cited him were called outdated dinosaurs and some probably saw them as dangerous radicals. This is another

example of the convergence of the stultified Soviet Marxism and of the ascendant neo-liberalism.⁸ Both saw in Marx nothing but a recipe for the Soviet socialist experiment. The possibility of applying Marx for a second and more humanistic social transformation did not occur to either group. Yet Marx is making a come back and increasing numbers of thinkers, wearying of the mantras of neo-liberalism, are beginning to appreciate the “liberation” side of Marx. In February 2013’s edition of *Le Monde Diplomatique*, Antony Burlaud, in his article “Marx et le XXI siècle,”⁹ examines the new and numerous discussions about Marx and his work in modern France. In England, Terry Eagleton has published a book entitled *Why Marx was Right*.¹⁰ He has also divorced Marx from deterministic materialism. There is much more of this type of discussion every year. The period of Marx’s eclipse is clearly ending.

There is, of course, nothing surprising about Marx’s temporary eclipse in the 1980s and about the beginnings of a renewal. All great philosophers, including Plato and Aristotle, were at times more important and at times less important in current intellectual thought. That Marx should be subjected to the same ups and downs is a salutary sign that he is no longer being treated as a gospel or as a subversive and is simply taking his very important place in the history of human thought.

Marx was somewhat different from many of his philosophical predecessors because he acted also as a political organizer and revolutionary. Today’s renewal will surely concentrate more on Marx as a thinker than on his particularly nineteenth-century political activism. However, Marx’s activism cannot simply be written off because it demonstrates his conviction that political ideals and actions are inseparable and that political ideas have a place in the “real” world. Moreover, his political activism negates any deterministic interpretation of Marx.

Of course, Marx is not the sole philosopher whose works can be used to justify change. Marx sought to change the world but many philosophers before him did the same. Plato went into politics and emerged a sadder, wiser man. Cicero, Seneca, and Marcus



**ESME WITBOOI
COACHING**

Neuro Linguistic Programming for Effective Communication skills

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Learning Objectives

What You Will Learn

Awakening the Senses:

We organise what we see, hear and feel through our senses into our own distinctive model of the world. Discover how to do this in a way that most enables you to discover your strengths and abilities.

Identifying Non-Verbal Clues:

Linguists have long known that as much as 80% of communication is non-verbal. Develop your ability to effectively identify unconscious signals communicated by others.

Creating Rapport and Strong Relationships:

Creating meaningful personal relationships is important in all areas of life. Success can be hollow indeed if other people are not enriched by their experience of you as a person. Discover powerful ways to relate to people in away that acknowledges their (and your) deepest values.

Utilising the Magic of Language:

The ability to use language to maximum effect to clarify misunderstandings, solve problems and establish what you and others really want in a particular situation is of immense value. Discover how to use NLP's powerful *Meta-Model* of language to enhance your verbal communication with others, and in your own self-talk.

Determining Outcomes and Setting Goals:

Authentic power comes from knowing what you want and how to set goals in a way that is right for you and anyone else affected by them. You will learn a set of skills that empower you to focus on possibilities rather than limitations and then take action.



Coaching Skills to Facilitate Powerful Change:

The Coaching Revolution is providing Individuals and Corporations with powerful tools for transformation. Learn to help yourself and others with Coaching Models from the Cutting Edge.

Enhance Your Emotional Intelligence (EQ):

EQ is widely becoming acknowledged as a more important contributor to success and happiness than talent or hard work. NLP's *Anchoring* techniques will awaken your emotional awareness and enable you to easily and genuinely transform emotional states into resources.

Welcome to the world of Effective Communication skills



What is NLP?

NLP is a proven technology for personal achievement that helps people to understand themselves and those around them more fully; in such a way as to maximize personal growth and excellence.

Technically, NLP is **the study of human excellence**. NLP seeks to understand the natural learning processes of how great achievers use their minds to produce excellent results.

- *What are the thinking patterns that successful people use in the pursuit of their activities, their passion and their mission in life?*
- *How do people who are so good at what they do become so good and maintain that level through time?*
- *How are great communicators able to communicate so effectively?*
- *What are the decision and motivation strategies necessary for effective leadership, management, relationships, and parenting?*
- *What makes it possible for natural athletes and other super performers to achieve such a high level of excellence?*

"NLP offers unique ways to become more integrated and more aligned, so that regardless of your background, you experience your past as fully supporting the future you want. In whatever ways you desire growth, NLP meets it with respect and clarity, and awakens hidden strengths and abilities that lie within you." –Esme Witbooi

If you've ever wondered about these questions, and would like to have the skills, that make excellence possible, then this training is for you.

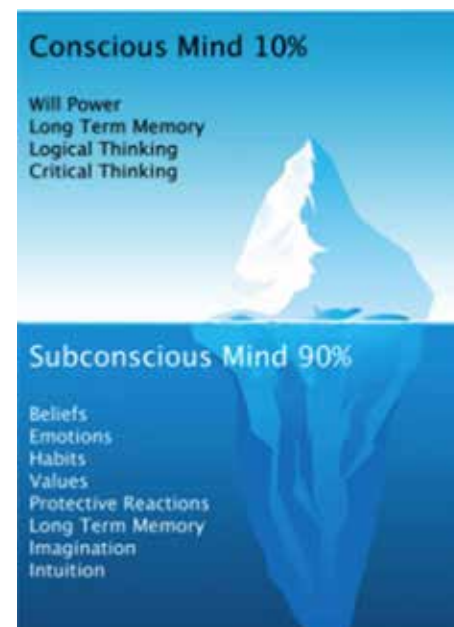


NLP Presuppositions

- Respect another person's world view
- Behaviour and change needs to be evaluated ecologically
- People are more than just their behaviour
- Everyone is always doing their best with the resources they are accessing
- Every behaviour is motivated by positive intent
- Calibrate on behaviour: the most important information about anyone is their behaviour
- *The map is not the territory*
- You are in charge of your mind and your results and everyone else is in charge of theirs.
- People have all the resources they need to succeed in their outcomes: there are no unresourceful people just un-resourceful states.
- If something is not working, do something else.
- There is no failure, only feedback.
- The meaning of your communication is the response you get.
- There are no resistant clients– only a lack of rapport.
- The person with the most flexible behaviour influences the system of action and interaction.
- Choice is better than no choice.
- All developments should increase wholeness.

Prime Directives of the unconscious mind

- Stores memories
- Organises memories
- Represses damaging or unresolved memories
- Is the centre of emotions
- Runs the body
- Preserves the body
- Serves the conscious mind
- Controls and maintains perceptions
- Generates, stores and transmits energy
- Maintains instincts and habits
- Looks for more to discover and experience
- Functions best when whole
- Works symbolically
- Takes everything personally
- Works with least effort



Rapport

Rapport runs like an iron rod through the art of effective communication. Without rapport we would achieve very little in communication as every question we ask would be countered, deflected and avoided. All feedback we offer would be rejected.

The communication outcomes would be dismissed and indeed the whole communication process would be perceived through a negative filter by the other party.

So what is rapport and how is it gained?

What is rapport?

Rapport is simply the feeling of being in tune with someone or being on the same wavelength. It may be experienced as liking, a sense of respect or a feeling of trust but it is not necessarily the same as any one of these.

It is very possible to be in rapport without a full sense of trust. However, rapport is key to the development of trust. Likewise, it's possible to be in rapport with someone and feel a sense of liking but actually not know them well enough to really say you like them. And you could feel rapport yet not respect someone – the rapport may be based upon a different quality such as a shared interest.

So, to go back to the start of this section, it's a feeling of being in tune with someone.

How do you gain rapport?

What is rapport really?

In a sense we all know what rapport is and we do it every day when we talk to friends, colleagues, family – in fact, anyone! There's no great mystery to it. Indeed, a lot is talked about regarding rapport which tries to codify it into some simple techniques such as mirroring body language, pace of language etc. These have their place in rapport building but what is really at the root of rapport?

Simple! A genuine and unfeigned interest in the other person.

The same goes for rapport in negotiation. Rapport is easy if you are genuinely interested in the other person and not merely in displaying your own ability, cleverness or importance.

All the mirroring in the world will not cover up a lack of interest in someone.

Indeed, worse still it could highlight it as mirroring done badly which serves to show up a lack of connection.

So rule number one for rapport building is don't try to build it – **BE IT!**

Be interested, listen acutely to the other party, try to really understand what is going on for them, and be empathetic. Rapport will follow naturally. There are techniques, which done well, can enhance rapport but to emphasise again, real interest will outweigh any matching of body language every time.

Be consistent

Rapport is maintained when people know what to expect. If you set the communication relationship up in a way that allows for constructive challenging of the client then the client can see the consistency of your approach and will remain in rapport.

If your behaviour is inconsistent, it will challenge the rapport.

Mirroring and matching

The use of similar body language can help build rapport. If the other party leans forward in the chair, a similar posture can be adopted by you. If the body language is animated and excitable, a similar energy can be displayed by you. If the other party speaks fast, it is helpful to match the pace to keep the energy going and maintain the rapport. In other words, being in tune with the client in the way they present themselves can aid the building and maintaining of rapport. In fact, as a technique this is more useful in avoiding breaking rapport. It may not in



itself build rapport but being aware of the pace of your language, your volume, your body position can all be useful in ensuring you don't lose rapport.

What causes loss of rapport?

- Fear
- Hidden agenda
- Having to be right
- Judging
- Incorrect assumptions
- Imposing values
- Lack of awareness



Rapport building skills:

Listening and questioning:

The art of listening

Listening is such a fundamental activity we all do that we usually assume that we do it well. And many people do. However, the majority of people only listen at a certain level and that level is simply not adequate for effective communication where you want to achieve results. Listening is a discipline that needs as much practice as anything else. Imagine that a friend begins to tell you about her

holiday – she went to the same place that you went to last year. She describes places you’ve also seen, sounds you also heard and even a nice restaurant that you also went to.

Be honest, what is the first thing you will do in your head or even out loud?

If you’re like most people you will start to think about your own trip and how what she is saying relates to your experience. This is normal and healthy. It’s how conversations work. It is not, however, how effective communication works.

In negotiations, mediations, presentations and client relationships we recognise three levels of listening.

**DO NOT LISTEN
WITH THE INTENT
TO REPLY, BUT
WITH THE INTENT
TO UNDERSTAND.**



Three Listening levels

Level 1 – self

This is the classic conversational style. It is as much about you as the other person. Things said by one person will create thoughts in the other person’s head about themselves and how they relate to what was just said. An example would be the friend described above. It might go something like:

Person A – Oh I have got this really annoying problem at work.

Person B – Really, what’s happening?

Person A – My boss doesn’t care about my ideas – he seems to think only he has the best ideas

Person B – Oh, I know just what you mean. My boss is the same. It’s a real pain isn’t it!

Does person B really know what Person A means? Of course not! But as so often happens, an assumption has been made and an internal connection has triggered off a response that is about the listener rather than the original speaker. This is very normal and, of course, not always as disinterested or blatant as the above example.

Level 2 – fully engaged with client

In this style, the listener makes far more effort to put aside their assumptions and understand what is really happening for the person talking. It is often characterised by detailed questioning and fact finding.

Person A – Oh I have got this really annoying problem at work.

Person B – Really, what’s happening?

Person A – My boss doesn’t care about my ideas – he seems to think only he has the best ideas

Person B – In what way?

Person A – Well, when I suggest something he just doesn’t even acknowledge it.

Person B – Hmm, that must be frustrating. How is he with other employees

Person A – Pretty much the same!

Person B – Has anyone told him about it?

The difference is clear. In this style of conversation, the listener is really trying to generate a much better idea of what is going on. Of course, the questions could go in many directions and could build very different conversations according to what the questioner is interested in.

Level 3 – learning centred

Traditionally, Level 3 listening in coaching is concerned with a holistic form of listening where everything comes into play at once – body language, intuition, the environment – almost an out of body style of being in tune with one another. This approach to the concept certainly has its merits and represents a rare quality of listening which is only occasionally achieved. However, for the EWC NLP Training, Level 3 listening is viewed somewhat differently as being listening which is concerned with how the listening shapes the learning. This is different from Level 2 where the quality of the listening was around fact finding but still for the benefit of the listener (e.g. what do I want to know, what do I find interesting?). Level 3 listening, the EWC way, is listening for what someone needs to talk and learn about not what you want to find out.

Person A – Oh I have got this really annoying problem at work.

Person B – Really, what's happening?

Person A – My boss doesn't care about my ideas – he seems to think only he has the best ideas

Person B – In what way?

Person A – Well, when I suggest something he just doesn't even acknowledge it.

Person B – What's your main concern?



Person A – Well, I know it's not personal 'cos he's like that with everyone but I just wish I could get my ideas across.

Person B – What do you want to happen then?

Person A – I think I need to figure out a way to raise the issue with him!

In this example, the listener has sought to ask questions which help the person talking come to a new level of understanding or decision. This is significantly different than simply finding out detail, which uncovers what the talker already knows rather than helping them find something new.

This is Smart Level 3 listening.

Listening to your intuition

Another form of listening, important in great effective communication, is that of listening to your instinct. What precisely creates the intuition is less important than the fact that you feel it. For some, instinct is a mystical sense of 'knowing', for others it is the accumulation of experiences over a lifetime that allow subtle messages to be understood almost unconsciously leading to a feeling we call intuition. Whatever it is, it has a role in effective communication which can create leaps in a negotiation / edition/client relationship process. Intuition can be felt in many ways and it would serve no great purpose to list every occasion where intuition can bear fruit. The key is to remember that when you get that intuitive feeling, then it is usually wise to pursue it with the client in some way.

A classic case for intuition is when a client says they are going to do something and you just feel that they are not. You may not have a lot to go on but remember your role is to help the client move forward. If you sense doubt or ambivalence then it is right to tackle this using questioning to get to the root of your intuitive concern.

Questions: Understanding types of questions

Like listening, we can easily assume that we all know how to ask questions. Well, of course, the style of question "Excuse me, do you know where the bank is?" is fundamental to how we interact in the world. Fact finding questions are a core part of how we talk and discover things.

Coaching questions, however, are by no means a natural style of questioning. For a start, a coach is generally not asking questions to find out facts for themselves but to help the client learn and make better choices. It is very important to understand this difference and to do so it is worth looking at what kinds of questions there are.



- Closed
- Open
- Rhetorical
- Hypothetical
- Leading
- Compound

Closed

These are questions that limit the answer primarily to "yes" or "no" although it could also result in "I don't know" or something equivalent. The aim of the question is to get a specific answer to confirm or deny a fact. These questions have been given a bad reputation from years of bashing in management training. In reality however they are extremely useful when used in the appropriate places. A simple "yes" or "no" can be all that is needed sometimes to move things to the next question. They are only problematic when used at the wrong time. Any question that aims to expand information should be phrased in an open manner avoiding the closed question.

Closed questions are typified by the fact that they begin with verbs such as "can", "do", "are", "will", "did" etc. The verb formation generally forces the "yes" or "no" answer. So, "Have you been to France?", "Did you do what I asked?", "Will you go back to the office again?" all suggest a "yes" or "no" answer. This is fine if that's all you need. They can also lead to open answers. In effective communication, however, they need to be used with care as they will often lead conversations down the path the coach is considering rather than in a more fluid manner allowing the client to explore their thoughts.

Open

Open questions emerge from the classic questioning words: how, who, what, when, where and why.

These words ask a question but allow the person answering to answer in many different ways.

When did you go to Paris? Oh, quite a while ago! On our wedding anniversary.

Hmm, it must have been 6 months ago! Emmm, let me check my diary – ah yes, March 7th! Even within the range of open questions there are those words which generally fact-find and questions which cause learning and thought. So, where, when and who generally find facts which are already known.

Where did you go? Paris

When did you go? Easter

Who with? Jim

How, what and why allow for broader thinking:

How will you go to Paris? Hmm, well I could fly, or maybe get the train, or perhaps I could swim!

What do you want to do in Paris? Well, I think I'll visit the Louvre, and maybe I'll go to the Eiffel Tower, oh and I want to go to the Moulin Rouge! *Why do you want to go to Paris?* I don't know, it just feels like a good place to go; maybe it's the old film I saw a few years back or maybe that holiday show I saw last week!

There is a certain amount of debate about the word "why" in coaching and traditionally it is avoided. This is understandable. "Why have you done that?" can sound accusatory. It can produce excuses. It is worth being aware of the strength of "why" to generate a negative response. However, "why" can also encourage exploration of the deepest reasons and values behind something. Ultimately, the key to questioning is the context, the rapport and the intonation. Be careful of "why" but don't be scared of it. It can be very powerful to ask why someone wants something. It's best to frame it as, 'What made you choose Paris?'

So open questions are more complex in the communication context than they may first appear. They are however the staple tool of a good coach and need to be developed into finely honed instruments to support and create client learning.



Rhetorical

Rhetorical questions don't need an answer. They are making a point not asking for a response. An appropriate irony may be: "Don't answer me when I'm asking a rhetorical question!"

"What on Earth did you think you were doing?" said in a certain tone of voice does not require an answer. You know you are in trouble and a logical answer is not expected at this point!

Similarly, "How long is a piece of string?" does not require an answer such as "two feet long". It is not a real question. Rhetorical questions don't have a big role in great communication as they don't create learning. They may have a use in general communication and rapport building but little else.

Hypothetical

These questions get the client to think about what would happen if... These 'what if' questions create an alternative reality or future possibility and are extremely useful in effective communication. "If you could have what you want tomorrow, what would it be?"

A question like this allows a client to explore something out of context and therefore come to a conclusion unencumbered by the complex reality of the situation. After all, the "complex reality" may merely be short term inconvenience and confusion. The clarity brought about by the hypothetical question could be crucial in developing a decision.

Compound

Compound questions are multiple questions asked as one big question. In themselves, they may contain good questions but asking a client more than one question at a time can cause confusion as they may not know which one best to focus on. A compound question such as "What would it look like if you were successful and what would it mean to you if you were unsuccessful and which is the biggest driving factor?" serves only to confuse and fog the issue. What should the client deal with first? Does he or she even remember the first question by the time the third one is posed? Steer clear of compound questions. Ask one question at a time!

Leading

Leading questions are the real no-no in effective communication. A question such as “Do you think you are being a bit unfair on your partner?” does not mean what it literally says, “Do you think....?”. What it’s really saying is “I, have judged that you are being unfair on your partner and I’m going to get you to admit it!” It doesn’t create client learning – it merely takes the client down a one way path to agreeing with you or, potentially, into a conflict where the client feels attacked, judged or lacking real choice in their response.

Using silence

Silence fulfils two main roles:

- Thinking time
- Inward reflection

Thinking time

Silence allows for the time that a client has with you to enter into their thoughts. When you ask a question they need to think and consider their response. This can take some time and any interruption from the coach will be at best diverting and worst an unwelcome break in their thought process. It is said that after asking a question, you should allow at least 9 seconds for someone to consider their answer. Try counting that now! 9 seconds feels like a long time when you think someone is stuck. It’s tempting to try to help them, to jump in and suggest an answer or, worse still, ask a different question. Don’t do it. Be patient. Silence is an intrinsic aspect of EC and it is necessary for you to become comfortable with it.

Inward reflection

EC can bring out some emotional memories. At these times, the coach should allow reflective silence if it’s needed. The client may need time to just put their thoughts or emotions in order before resuming the ebb and flow of the EC conversation. If the silence continues for what seems too long a time the coach may need to ask the client what the sticking point is. But allow that silence initially.



Reflection and Clarification

When people speak and listen they do so applying all their own filters to what they hear. This means that no two people ever fully understand what is going on in the mind of the other.

One of our jobs in EC is to try to get as near to the client’s perception of the problem as possible.

One of the ways we can achieve this is through using *reflection* and *clarification*.

Reflection

In reflecting, you repeat the words of the client back to them in exactly the same form. For instance:

Client: I feel like a rudderless ship on a wild ocean?

You: A rudderless ship on a wild ocean?

Client: Yeah lost and under siege?

You: How under siege?

Reflecting language in an EC context helps us:

- Build strong rapport by showing keen listening skills and a commitment to understanding
- Encourage a client to rethink their words or take a different perspective
- Encourage the client to develop their thoughts further.

Clarification

In clarifying, you’re repeating the words of the client back to them but in a different form.

So for instance:

Client: Under siege like I’m being attacked

You: So like you’re defending against the enemy in some way?

Client: Yeah, that’s right, like I’m having to defend.

You: What are you defending?

Clarifying in an EC context helps us:

- Create rapport with other people.
- By clarifying, we actively demonstrate that we have listened and that we care about understanding.
- Find out whether we've understood the client fully
- Ask the client the most appropriate questions
- Reframe the client's way of thinking about something
- Move the client forward in the EC process where they are beginning to lose focus, chat or ramble

Giving feedback

- What is feedback?
- How to use feedback?
- Developing feedback skills
- What does feedback achieve for the client?
- Dangers of feedback
- Feedback and intuition

Feedback in coaching is about objective and clear information offered to the client to facilitate thought, create change or elicit a new response. It is not a subjective opinion on your part, offered as fact, but an observation backed up by specific instances. This is key. Giving feedback is not an excuse for you to analyse the client or become the "expert".

So, what makes up effective feedback in EC:

- It is based upon an observed event or outcome
- It's attached to specific instances
- It leads to a question for the client to consider

So, good use of feedback might be:



You: I notice that when you talked about your boss then and a couple of times previously, you shook your head slightly. What do you think the meaning of that shake is?

A poor use of feedback would be:

You: I notice that you always shake your head slightly when you talk about your boss. It seems you find him difficult to think about!

In the first example, you are specific about the time that the client shook his head even if "couple" is a little vague. No assumption is made about what the shake of the head means – the question is put to the client to address.

How to use feedback

1. Ask for permission to offer the feedback
2. Stick to facts
3. Don't interpret these facts
4. Describe the impact of the observed behaviour on you
5. Link it with the client's goal
6. Ask for the client's view

It is important that feedback is perceived as useful and wanted. Anything that is seen to be gratuitous, pointless or plain wrong can only damage the relationship you have with the client and will fail to produce any positive result. So, the framework above is crucial.

Ask for permission.

This ensures that the client has bought into listening in the first place and is prepared to hear what benefit the feedback has for him.

Stick to facts not opinions

Only state what was observed. This way you are only ever dealing with the specifics and not the ambiguity of your opinions.

Don't interpret these facts

One of the dangers that most ECs, face is the desire to interpret what they see.

The problem with this is that we all see the world through our own eyes and our interpretation is a representation of our view not the client's.

This means that most times your interpretation will, at best, be not quite right and at worst wrong.

This will damage the EC outcomes.

Describe the impact on you

This allows for you to explain why you're offering the feedback and, to some extent, offer your opinion through the thought process it created for you. So, for instance: When you shook your head slowly just then it made me wonder if you found this train of thought a little difficult...

This is different from interpreting the facts since you are not offering it as a definitive explanation but rather as a feeling it gave you.

Link it to the goal

To take this a step further, you need to link it to the conversation since you are offering this feedback and you need to keep it focused on what the client wants. So, taking the previous phrase on a stage, you might say; "When you shook your head slowly just then it made me wonder if you found this train of thought a little difficult...and I wonder what impact this has upon your desire to change careers."

Ask for the client's view

So far you have offered a context for the feedback by gaining permission, stating the facts, describing what made you give the feedback and linking it to the goal. The final and most important step is to allow the client to respond. So to take the conversation to the final step:



When you shook your head slowly just then it made me wonder if you found this train of thought a little difficult...and I wonder what impact this has upon your desire to change careers. What are your thoughts on that?

Building Rapport

The basis for rapport is that when people are like each other, they like each other. The two primary ways in which people gain rapport is through *Matching* and *Mirroring*. Studies illustrate that the communication between people breaks down into three areas. Words count for 7% of communication, tonality was 38% and physiology 55%.

Matching and Mirroring

Rapport is the connection between two or more people. By having rapport with someone, you achieve much however without rapport, things can be impossible. To be a master communicator, it is important that you understand the varying styles of communication and adapt your behaviour appropriately so that what you communicate is received in the way you desire. Remember, *communication is the response you get*.

Think of people with whom you get on very well. Notice the kinds of words and body actions they use. Also, be aware of their speed of communication and volume. Do they speak in pictures a lot or do they prefer getting to grips with how they feel? You will probably notice that those you connect best with, naturally use a similar style of communication as yourself.

Six main elements

People like people like themselves or how they would like to be.

When we want to improve our communication with someone, the primary way to do this is by matching and mirroring them. This is the replication of what they are doing either exactly or as a reverse i.e. if you were facing them and they lifted their right hand, then you would lift your left hand to mirror them, and right hand to match them.

Match the modality

By realising someone's modality (Visual, Auditory, Kinaesthetic, Auditory digital), it is possible to communicate in a way in which they see, hear, feel and understand you best.

Match and mirror their physiology

When we replicate the physical actions of another such as their hand movements, posture, facial expression, eye blinking rate or movements, it undeniably sends a message to their unconscious mind that we are like them.

1.1.1 Match their voice and language

By matching the way that they speak such as the tone, volume and tempo. If they use specific words you can often use these too. By using their predicates, rapport will be reinforced.

1.1.2 Match their breathing

By breathing at the same rate, from the same location (high, middle or low). As this is a very subtle method, it can have a very high impact. In addition, it allows you to create empathy of how they are feeling.

1.1.3 Match the size of the pieces of information they use

If you are speaking with someone who is always talking about specific details, then by matching this, that will build rapport. Similarly, if someone is always talking about the bigger picture, then do likewise to build rapport.

1.1.4 Match their common experience

By matching other people's similar interests, rapport is built very quickly. Matching hobbies, backgrounds or beliefs is what we stereotypically determine rapport. This is what usually builds relationships when they first begin.

1.2 Calibration

To test whether you are in rapport with someone, you can become aware of their reactions to your communication. This is called calibration. By watching how they



react to you in these minute ways, you can change your communication with them accordingly.

1.3 Pacing and Leading

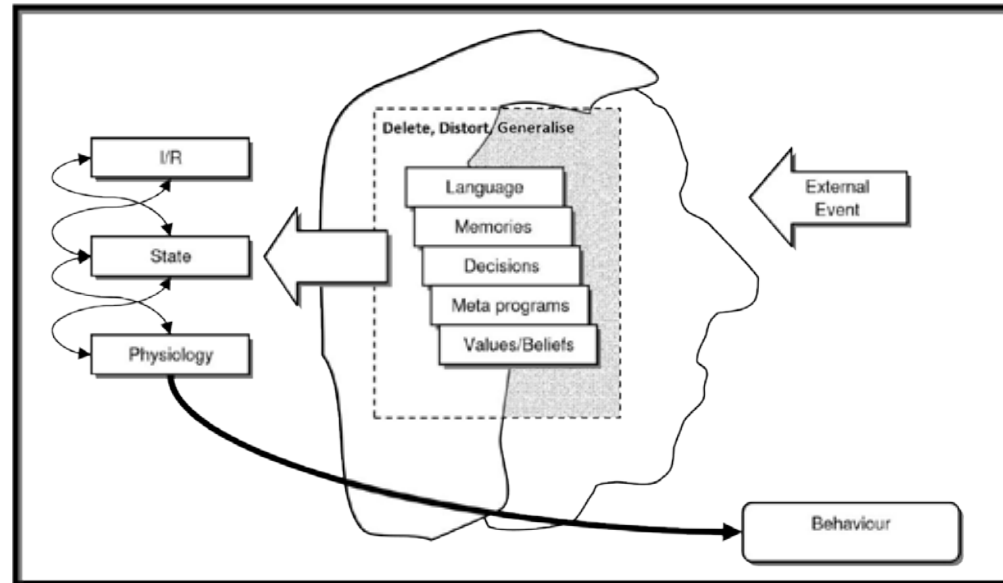
Another way to determine if you have rapport with someone is by noticing how their communication changes as you change yours. If someone is speaking very quickly and you match the speed and then slow down, if they also slow their speaking, then you are pacing them. By this rationale, if you notice someone copying you, i.e. they lift their glass just after you do, then you are pacing them.

This is a powerful sign of rapport.

The Communication Model

The Communication Model is a core concept in NLP and seeks to explain how we receive and process experiences and external stimuli in order to construct our maps and model of the world and how these in turn effect our emotional states, physiology and behaviour.

The first thing to recognise is that the model recognises that everything of importance happens inside the head. Anything that occurs externally is merely an event with no moral value, no intrinsic importance and no meaning. Taking this a step further we can say that nothing is either good or bad, right or wrong, beautiful or ugly, kind or cruel. As Hamlet says, "Nothing is either good or bad but thinking makes it so".



The above illustration simplifies the process by which people perceive and process external information and the effect that this has on their state of mind and their behaviour.

The process can be simplified as follows:

1. External stimulus:

A person experiences an external event through their five senses: sight, sound, touch, taste, smell.

2. Delete/Generalise/Distort:

Because we are bombarded by 2 million bits of information per second yet we can only consciously deal with 7 plus or minus 2 pieces of information then we have to quickly decide what is important. The way this is done is through filtering. And in the act of filtering information we end up doing three key things to that information:

a. We delete information

b. We make generalisations about the information

c. We distort the information in various ways



This notion of Deletion, Generalisation and Distortion is critical to understanding NLP's approach to the way that people see their world. You will come across this throughout this manual and module in different ways. The filters that we pass information through result in the deletion, distortion and generalisation process. Each filter accepts, deletes, changes or groups information according to its function. Here are the prime functions although there will be others:

Filters:

- *Values*
- *Beliefs*
- *Meta-programmes* (these are the equivalent of software we have running – optimist or pessimist, big picture or detail, etc.)
- *Time/Space/Matter* (our ability to interpret the physical cues)
- *Instinct and habit* (automatic actions)
- *Attitudes* (ingrained perspectives)
- *Language*
- *Decisions* (conscious choices made in the past)
- *Memories*

3. Internal representation:

The process of deleting, distorting and generalising using these filters produces an internal representation or thought about the thing that has happened. At this stage it has acquired meaning and a place in our understanding.

4. Emotional state:

The internal representation creates an emotional state (of excitement, sadness, anger, calm, etc.)

5. Physiological change:

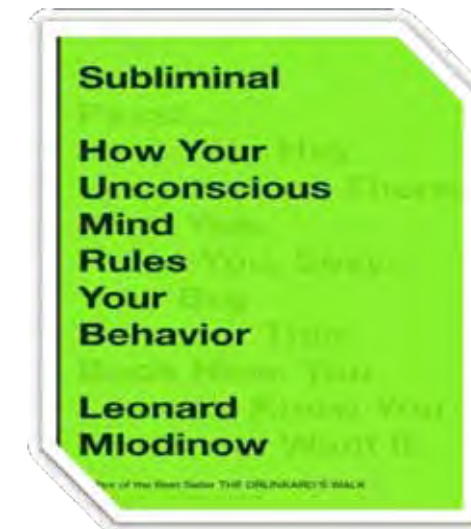
The emotional state leads to a physiological change (heartbeat, sweating, blushing, goose bumps etc.)

6. Interaction between Internal Representation, State and Physiology:

There is a process of communication as the three internal factors impact upon each other.

7. Behaviour:

The process finally leads to a state which creates behaviour (smiling, shouting, crying etc.). The behaviour is driven ultimately by the state not the physiology or internal representation. It is the emotional state that creates action.



A Model of Communication and Personality

Behavioural change work is based on how we communicate with ourselves and others. As an external event happens, we make an Internal Representation (I/R) of that event. That I/R combines with our physiology and creates a state. When we say 'state' we are referring to the emotional state of the individual. If you consider that life is simply a variety of states which we feel, then the value of understanding these components becomes more apparent.

The state that we are in is a combination of internal pictures, sounds, feelings and self-talk therefore any state we are in is the result of these components. The external event comes in through our sensory input channels which are:

- **Visual** – the things we see in our mind or in reality
- **Auditory** – sounds or words we hear. We hear them either externally or in our own minds
- **Kinaesthetic** – any emotions or sensations including touch and texture
- **Olfactory** – smells
- **Gustatory** – tastes

As the external event comes through these channels it is filtered and we then process the information for that event. We **delete**, **distort** and **generalise** what

comes in. This also explains why when an event happens to two people in exactly the same way, they respond differently.

1.4 Deletion

There are thousands of events happening all around us at any time so we selectively pay attention to certain aspects of our experience and not others. It has been said that we'd go mad if we didn't delete the things we don't need to focus on.

1.5 Distortion

Distortion is a form of misrepresenting experiences of our reality. '*The map is not the territory*' and '*this does not equal that,*' hence with distortion, we may choose to represent something to ourselves in a way to get us to take certain actions i.e. imagining that you'll get sacked if you don't get out of bed on time will make you jump out of bed if keeping the job is important to you!

1.6 Generalisation

When we draw conclusions based on a few experiences, this is generalisation. It is a way that we learn and if you consider that learning is simply the action of associating something you don't know to something you know, then by generalising some of the unique experiences we've had, it gives us a greater propensity to learn. It is also a form of creating alternatives.

In addition, we have 5 filters for our external experiences. These are:

Meta-programs

A meta-program is a general behaviour pattern that we all have. An example of a meta-program is called the '*Direction Filter*'. This has two principal elements which are: Towards and Away. Some people do things in life because they consider that by doing it that way they are moving 'Towards' pleasure. Other people do exactly the same thing, however they are doing it because they consider that they're moving 'Away' from pain. Neither is better, and both are useful. They get the same outcome for very different reasons – one is moving towards what they want, the other away from what they don't want.



Values

Values are essentially an evaluation filter. They are how we decide whether our actions are good, bad, right or wrong. They also help us decide how we feel about our actions. Unlike metaprograms, values are in a hierarchy where the value at the top is the most important. Challenges in life are sometimes values conflicts – i.e. the values of say variety and security when deciding where to go on holiday.

Beliefs

Beliefs are generalisations about how the world is. They are the presuppositions that we have about the way the world is that either create or deny us personal power. In effect, they are our on/off switch for our ability to do anything in the world. It is important to understand our beliefs as they explain why we choose to do what we do.

Memories

This is our representation to ourselves of how we reacted in the past. They lead to beliefs and support our values. Some psychologists believe that our reactions in the present are actually reactions to collections of memories which are organized in a certain way from the past (gestalts) and the present plays little part in our behaviour.

Decisions

Decisions relate to our memories and may create beliefs or affect our perceptions through time. Although we sometimes make these consciously, often it happens at an unconscious level therefore we may not be aware of the cause.

1.7 Cause Vs Effect

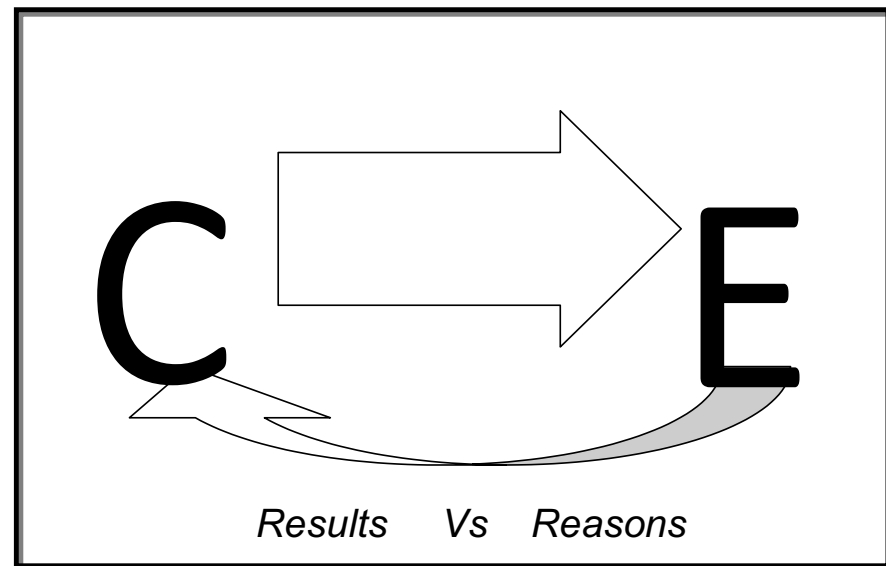


Figure 1: Cause vs Effect

The concept of Cause and Effect suggests that for any cause, there is a specific effect or result that occurs.

Those who choose to live at the Effect side of the equation are typified by telling you that life is happening to them. They complain a lot about how unfortunate they are or how people do things to them and it's not their fault. It could be their upbringing or the country where they were born or the fact that their boss doesn't pay them enough. They will tend to cast blame on others and one of their battle cries is, 'Why me?'

On the other hand, those who live on the Cause side of the equation act as if they're responsible for the outcomes in their lives. If something isn't working, it is likely that they'll do something to rectify it. They are the Richard Branson's, the Anthony Robbins', the Oprah Winfrey's, the Nelson Mandela's and the Mother Theresa's out there. Each and every one of these people chose to take a path which meant that they were responsible for their actions.

They lived in Cause and as a result they achieve or have achieved great things.



Those who live at Cause get Results and those who live in Effect have Reasons. When people don't succeed and give justifications to themselves why they didn't make it, they must be aware that this is a form of self-deceit. To justify is to give reasons.

1.8 Focus

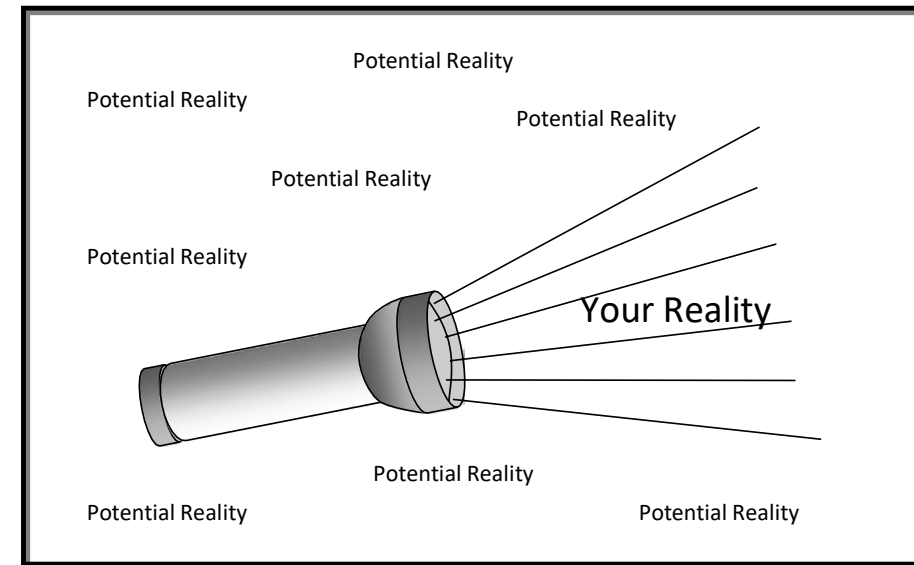


Figure 2: Focus - Reality and Potential

In life people get what they focus on consistently. If we revisit the Cause-and-Effect concept, people who consistently focus on what they *don't* want, tend to achieve what they don't want.

This is because we cannot think about what we don't want to think about, without thinking about it.

1.9 State Vs Goals

There is a difference between states and outcomes. Understanding this distinction is very valuable as it empowers you to reinforce your position at the cause side of the cause & effect equation.

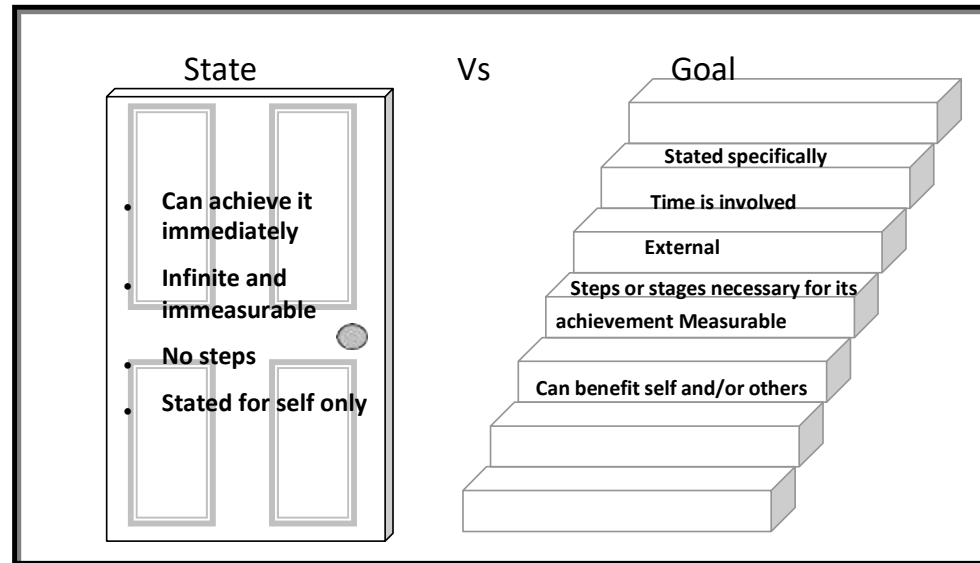


Figure 3: State Vs Goal

Value, State or Emotion	Goal or Outcome
<ul style="list-style-type: none"> • Can achieve it immediately • Infinite and immeasurable • No steps • Stated for self only 	<ul style="list-style-type: none"> • Stated specifically • Time is involved • External • Steps or stages necessary for its achievement • Measurable • Can benefit self and/or others
Examples	
<ul style="list-style-type: none"> • Happiness • Worthiness • Love 	<ul style="list-style-type: none"> • £10,000 • A holiday to Hawaii • A relationship



Model vs. Reality

A key concept to understanding human cognitive, affective, behavioural and relational issues is that everyone has their own absolutely unique model of the world.

You'll explore in this module how each person constructs their model. For now it is important to be aware of the basic assumption that a person's model is not the same as the reality it represents.

When two people experience the same event, their memories, attitudes, perceptual preferences, beliefs and much else create very different maps of that same experience. It is the collective set of maps that lead to their model of the world. Their model will influence how they see their life as a whole, how they experience individual events, how they interact with and perceive other people and much more.

The model however is not fixed. It can and will change over time as the person confronts and experiences events or moments that challenge the model. This of course is precisely the role of coaching. The model may change in small ways or it may even undergo a paradigm shift such as when someone faces death, birth, a religious experience etc.

When working with a client then we are always working with their model of the world not with reality itself. Of course, as a coach you are also experiencing the client's model of the world through your own model of the world. If you are excited, bored, frustrated, challenged, intrigued or anything else with a client, then you are experiencing them through your model of the world. It follows then that one of your aims, in order to be an effective coach, is to first try to understand the client's model of the world and then begin to help the client loosen their own model – assuming, of course, it is causing a problem in some way for them.

Collusion vs Collaboration

The second key concept to understand is that of collusion versus collaboration. Knowing what we do about the models of the world and the maps that we build one of the key roles of an EC is to remain detached from the truth of the meaning they attach to a given experience or to the bigger picture of life. The EC must be

able to empathise but not sympathise, respect but not validate, understand but not buy into. This is the difference between collusion and collaboration. When we collude in someone's story, or model of the world, we are enabling them to maintain, to believe it and to stay stuck in it.

When we collaborate we are working with that person to open themselves up to the possibility that they might not have it all right. This doesn't mean we become inhuman, devoid of feeling for the person. Empathy is a key element of EC but merely asks to understand what the experience means to the person not to reinforce that feeling, which is what sympathy tends to do. Collaboration is about respecting the person's ability to deal with the things they have in their life.

Collusion is about allowing the person to feel disempowered.

As an example, if a client reveals that they have had a very tough time recently due to a divorce, impending bankruptcy and loss of their job, we might feel sorry for them and sympathise. This doesn't respect that they can deal with it in time and merely backs up their feelings of being out of control. An empathic response coming from a collaborative approach would understand that these experiences have an impact but maintains the space for exploring what they can do to improve their situation. When emotions are running high, there's a risk that as an EC you could collude. Ask yourself whether you are buying into the story and keeping the client stuck or recognising the impact but helping them move forward.

Content vs. Process

The final concept to be aware of is that of content versus process. Content concerns what we say and what we do. Process concerns how we say it and how we do it. Content can be useful but it is often far more useful to look at how people do things since we will usually find the patterns that need to be changed in the process not the content.

Here's an example of this difference:

A client describes an argument between herself and her boyfriend. She might describe it as a series of he said, I said, so he said and I said. What was said by each person is the content. The pattern of how she gets into such arguments, how she conducts them in terms of being angry rather than calm, how they end



are all processes that could contain patterns of behaviour which offer room for change. This is well demonstrated in clients who continually repeat patterns of behaviour which are always justified by the content of the event even though other people around them don't have the same experience of it. For example, if someone always ends up falling out with friends each example of the dispute might seem reasonable and justifiable if we listen only to the content.

But seen as a pattern we can see there is a process for how they maintain, and break, friendships.

We can hear process in language too since the manner in which someone talks about their experiences will show how they think about the world and thus the process of how they unconsciously manage their subjective experience of the world. Neither content nor process is more important than the other. They simply represent a different piece of the picture. As a business coach you may work on the content, the business plan, targets, debtors, creditors etc or you may work on the process, how does that client deal with their business as a pattern, do they avoid bookkeeping, do they act rashly, do they fail to get the best from employees, etc.

Keys to an Achievable Outcome

When considering your outcomes, it is important to realise that it is possible to set yourself up for success or failure. For anything that you want to achieve or bring into your life, the guidelines are:

1. State your outcome in the positive

What specifically do you want?

Say it the way you want it. If you find that your outcome is a 'not' outcome or negative, simply ask yourself; *What do I want instead?*

2. Determine the outcome you desire with all your senses

What will you hear, feel, see and say to yourself when you have it?

- a) Create a compelling outcome
- b) As if now
- c) Put it in your future as a dissociated image

3. Specify the evidence procedure so that you may verify your movement toward its achievement

How will you know when you have it?

This will help determine where you are as you progress and ensure that you keep on track.

4. Is it appropriately contextualised?

What will this outcome cause for you or allow you to do?

This helps determine the gains from achieving your goal and also helps realise whether it is suitable to have this outcome in the situations you desire

5. Is it self-initiated and self-maintained?

Can you set this goal in motion and sustain it yourself?

You cannot control others or things outside you except by changing yourself. Make sure that you are the cause of this outcome.



6. What resources are needed?

Have you achieved this or a similar outcome before or do you know someone who has?

To achieve anything in life, we need resources. Do you know what resources you need and how to access them?

7. Is it ecological?

What will happen if you achieve it?

What won't happen if you achieve it?

What will happen if you don't achieve it?

What won't happen if you don't achieve it?



Sensory Acuity: Observing Other People

Sensory acuity is a master skill. By becoming outstanding in this area, you will be able to effectively determine whether people are achieving their desired outcomes. People make minute unconscious changes from moment to moment and by using your sensory acuity, in other words, your ability to recognise these, you will notice and be able to determine their meaning. This will help you adapt your behaviour appropriately if necessary.

Some of the things you can notice include:

Property	Scale	
Skin Colour	Light	Dark
Skin Tonus	Shiny	Not shiny
Breathing	Rate	Fast/Slow
	Location	High/Low
Lower Lip Size	Lines	No lines
Eyes	Focus	Focused / Defocused
	Pupil	
	Dilation	Dilated / Undilated

Physiological changes – developing sensory acuity

Sensory acuity is the awareness of the physiological shifts taking place for a client which represent deeper shifts at a psychological level. Sensory acuity is not about interpreting the changes as such but simply developing the sensitivity of perceiving them. The ebb and flow of a client's emotional state is written in physiological changes and our ability to notice these things can give us the edge to make breakthroughs. Areas that might otherwise be missed can be spotted by the flushing in the face, a momentary unfocusing of the eyes, a change in breathing.

Let's explore each area where change takes place:

Skin tone

The skin tone will change from lighter to darker and vice versa. For instance blushing will indicate some change of emotional state as will a blanching.

Skin tonus (muscle tone)

The muscles under the skin will change levels of tension. So you might notice a tightening of the jaw, a relaxing of the forehead etc.

Breathing

Breathing can indicate changes in two main ways.

- It may vary in speed and depth with typically a calmer, relaxed state producing a slower, deeper breathing pattern and a more excited state producing a quicker, shallower pattern.
- Breathing may also vary in location from high in the chest (usually a more excitable state) to low in the abdomen when relaxed.

Eyes

Eyes can give away several clues that changes are taking places in thought and feeling:

- They may change from focused to unfocused.
- Pupils may be dilated or constricted.
- Blinking may be frequent or occasional
- They may be more or less moist these are just the most common signs we can pick up from increasing our sensory acuity. There are more of course and you will notice these over time. In each case you are looking for the change between one state and another. The client may begin relaxed with slow breathing, occasional blinking and a relaxed muscle tone. Through the session though, they become slightly frustrated and you observe faster blinking, rapid breathing and tautness in their face. Yet they may maintain that there is no problem in their situation. The physiological changes give you clues that all is not what it seems.



Body language

Again, for the purposes of coaching we are not necessarily looking at interpreting body language since this can lead to erroneous second guessing. Instead, we are looking to be aware of changes in body language that indicate internal changes. For instance, when you ask a particular question, you might notice the client shifts uncomfortably and changes body position. Rather than interpret the behaviour, use it as an opportunity to ask further questions of the client to address his response.

Body language clues that indicate changing thoughts and emotions include:

- Moving their body towards or away from you
- Moving in unison or out of step with you
- Changing posture which either matches or mismatches you
- Abrupt movements that change state
- Touching the face, body or hair
- Starting to fidget or becoming still

This list is clearly not exhaustive but suggestive of some of the kinds of things to be aware of and sensitive to. Body language is a powerful indicator of change. There are many books that attempt to interpret body language but as a coach you are in a great position to not have to interpret it but to rather question it directly.

Summary

The key to both of these areas described here is simply observation.

It is easy to think you understand what is going on for someone because of a change you observe. However, in coaching you need to put such assumptions aside and simply accept the changes as clues of change happening.

Representational Systems

The main information processing styles are called: *Visual*, *Auditory*, *Kinaesthetic* and *Auditory digital*. They are also referred to as *modalities* or *representational systems* (*rep systems*) – these are ways we *re-present* the world through our five senses. When information reaches our brains, it is given meaning and forms a subjective experience of the world – this is our representation and perception.

Although we use all of the representational systems, we tend to have a preference, just like there are people who prefer certain types of food.

Statistics suggest that in a developed country, around 60% of people are predominantly visual with 20% Auditory and 20% Kinaesthetic. It is worth bearing this statistic in mind when creating marketing or advertising material.

The representational system that we use predominantly is our own special language of our experience and it embraces all the mental processes of thinking, remembering, imagination, perception and consciousness. By understanding these more clearly, it allows us to communicate better with ourselves and others and control the way we interpret things.

The representational systems we tend to use most frequently are:

- Visual (V) seeing
- Auditory (A) hearing
- Kinaesthetic (K) feeling
- Auditory digital (Ad) inner dialog or self talk.

1.9.1 Lead & Primary Systems

Within the representational systems, there is a lead and primary system. The lead system is accessed instinctively and may not reflect the thinking pattern of the person. For example, when asked a question, a person may instinctively look down and left (Auditory digital) as they are repeating the question to themselves in their head before responding.

The primary system is that which is preferred in communication (i.e. a predominantly Visual person) and may be different from the lead system.



When building rapport, matching rep systems proves very powerful. Reflected in the concept of pacing and leading, after having matched another's rep system, one may lead another to a preferred rep system.

1.9.2 Rep System Test

The following test will help you identify which is your preferred system:

For each of the following phrases, rate the level of importance of each phrase. Go with your instinct as there are only correct answers.

- 4 = Closest to describing you
- 3 = Next best description
- 2 = A little less like you
- 1 = Least descriptive of you

1. I make important decisions based on:	
	Gut level feelings
	Which way sounds the best
	What looks best to me
	Precise review and study of the issues
2. During a heated discussion, I am most likely to be influenced by:	
	The other person's tone of voice
	Whether or not I can see the other person's point of view
	The logic of the other person's argument
	Whether or not I am touch with the other person's true feelings
3. I most easily communicate what is going on with me by:	
	The way I dress and look
	The feelings I share
	The words I choose
	My tone of voice
4. It is easiest for me to:	
	Find the ideal volume and tuning on a stereo system

	Select the most intellectually relevant point in an interesting subject
	Select the most comfortable furniture
	Select rich, attractive colour combinations
5.	
	I am very attuned to the sounds of my surroundings
	I am very adept at making sense of new facts and data
	I am very sensitive to the way articles of clothing feel on my body
	I have a strong response to colours and to the way a room looks

Next: Take your answers from the questions and transfer them to the table:

Q	1	2	3	4	5
K		A	V	A	A
A		V	K	A _d	A _d
V		A _d	A _d	K	K
A _d		K	A	V	V

Next: List the numbers which correspond to each letter:

	V	A	K	Ad
1				
2				
3				
4				
5				
Total				



Add each column to get a total.

These will give you an idea of your relative preference for each of the representational systems. If you have two or more of a similar value, that indicates that you have a mutual appreciation in those representational systems.

1.9.3 Visual

Visual people tend to do things more quickly whether that be moving or speaking. A picture says a thousand words and they're describing in words the images which are flying through their mind. They may speak in a higher pitch and they tend to sit more erect on the edge of their seats, with their eyes up and generally breathe more shallowly from the top of their lungs. They use gestures a lot which tend to be nearer head height and have no problem throwing their hands in the air. They generally have a neat, organised and well groomed appearance and like things to 'look right.' They find it difficult to remember verbal instructions because their minds tend to wander. They are less distracted by noise and they use visual predicates like, *I see what you mean* or *I get the picture*.

Physically, they are often thin and wiry and their hands will reflect this too with long slender fingers.

Their handwriting will also likely have more sharp points to it and be written quickly.

1.9.4 Auditory

People who are predominantly auditory do things more rhythmically. Their voice tends to be mid range and they talk to themselves, either internally or externally; they may even move their lips when they're reading. They breathe from the middle of their chest and use some hand gestures but not extensively. They can repeat instructions back to you easily and are distracted by noise.

Auditory thinkers often tilt their head to one side in conversation, as if lending an ear or on the telephone. They memorise things in steps or sequence and like to be told things and hear feedback in conversations. They tend to use auditory predicates such as, *that rings a bell* or *that clicks*, and are interested in what you have to say. They can be excellent listeners and enjoy music and spoken voice. Their handwriting is between the visual and Kinaesthetic styles.

1.9.5 Kinaesthetic

Kinaesthetic people typically breathe from the bottom of their lungs so you'll see their stomachs going in and out. They do things much more slowly than a visual person and have a deep voice. When they speak, there are long pauses between statements and they process things that are said to them to determine the feelings they get. They respond well to touch and physical rewards. They use few hand gestures and generally stand closer to the person they're talking with. They use predicates such as, *I want to get a handle on it* or *a firm foundation* and will be able to access their emotions more readily. Physically they tend to be more solid looking and generally their hands are larger or chunky (so that they can get to grips with things). They are interested in how you feel and memorise by walking through the process or doing it. Their handwriting is more rounded and it is likely that they'll push more firmly on the page.

1.9.6 Auditory digital

The Auditory digital person will likely manifest characteristics of the other 3 representational systems. In addition, they will talk to themselves a lot and like to *make sense* of things and *understand them*. They place a high value on logic and also like detail. They also use words which are abstract with no direct sensory link. They use predicates like, *I understand your motivation* or *that computes with me*. As a result of their emotions being attached to the words that they're using to describe, they often are less emotionally attached to outcomes (double dissociation).



1.10 Predicates

Predicates are words which associate to a rep system.

Visual	Auditory	Kinaesthetic	Auditory digital
Appear	Be all ears	Catch on	Change
Clear	Be heard	Concrete	Conceive
Crystal	Deaf	Feel	Consider
Dawn	Dissonance	Grasp	Decide
Envision	Harmonise	Hard	Distinct
Focused	Hear	Scrape	Experience
Foggy	Listen	Slip	Insensitive
Hazy	Make Music	Tap into	Know
Illuminate	Question	Throw out	Learn
Imagine	Resonate	Touch	Motivate
Look	Rings a bell	Turn around	Perceive
Picture	Silence	Unfeeling	Process
Reveal	Sound(s)		Sense
See	Tune in		Think
Show	Unheard of		Understand
View			



List of Predicate phrases

Visual	Auditory	Kinaesthetic	Auditory digital
Appears to me	Afterthought	All washed up	A particular way
Bird's eye view	Call on	Boils down to	Can you
Catch a glimpse	Clearly expressed	Come to grips with	comprehend
Clear as day	Describe in detail	Control yourself	Change your mind
Clearly defined	Earful	Cool, calm, collected	Consider both sides
Dim view	Give an account of	Firm foundations	Consider your options
Get an eyeful	Give me your ear	Get a handle of	Decide what works
Get perspective of	Grant an audience	Get hold of	Deem it correct
Hazy idea	Heard voices	Get in touch with	Discern the answer
In light of	Hidden message	Get the drift of	Distinctly differently
In person	Hold your tongue	Hand in hand	Experience the best
In view of	Idle talk	Hang in there	Gain knowledge of
Looks like	Inquire into	Heated argument	Get them motivated
Make a scene	Keynote speaker	Hold it!	Get to know them
Make it out	Loud and Clear	Hold on!	Give me your opinion
Mental image	Manner of speaking	Hot head	I sense I know
Mental picture	Pay attention	Keep your shirt on Know-how	I suppose I can
Mind's eye	Power of speech	Lay your cards out	I think you're right
Naked eye	Purrs like a kitten	Pain in the neck	
Paint a picture		Pull some strings	
Scope it out		Sharp as a tack	
See to it		Slipped my mind	
Showing off			
Sight for sore eyes			

Staring off into space	Rings a bell	Smooth operator	I understand
Take a peek	State your purpose	Start from scratch	Know the details
Tunnel vision	To tell the truth	Stiff upper lip	Know what it's About
Under your nose	Tongue-tied	Too much of a hassle	Know what's Wrong
Up front	Unheard of	Underhanded	Learn about yourself
	Utterly		Learn what to do
	Voiced an opinion		Make your mind up
	Well informed		Perceive the truth
	Within hearing		Practice till Perfect
	Word for word		Process this
			Sensitive subject

You may sometimes hear phrases or words with an olfactory (smell) or gustatory (taste) connection like, *that puts a bad taste in my mouth* or *that smells fishy*. When creating rapport, simply match these expressions when they occur and consider them as the Kinaesthetic rep system.

1.11 Eye movements

The tiny involuntary movements of our eyes play a valuable role in determining the way we are thinking. It is possible to tell *how* someone is thinking by their eye movements, not what they are thinking, but how. In addition, you can voluntarily cast your eyes in a certain direction to aid you in either remembering something or creating a new idea.

The specific movements of the eyes are called the 'eye accessing cues' and can be seen in the following illustration. A simple way to remember them is by imagining a line of text with you looking at the centre. The text on the left you have already read and is in your past and the part on the right you haven't read and is in your future. As regards Visual, Auditory, Kinaesthetic and Auditory digital, if you remember the order and start at the top with Visual (up), Auditory (central), Kinaesthetic right (down) which means that Auditory digital is left (down).

When you are working with a 'normally' organised right handed person, these are the eye cues you'll see. It is the opposite for other people.

1.11.1 Eye Pattern Chart

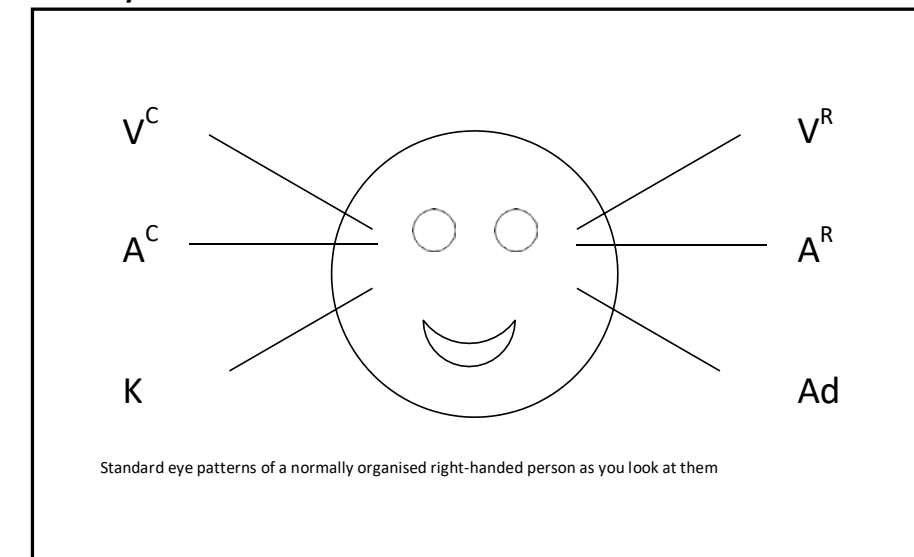


Figure 4: Standard eye patterns

1.11.2V^R Visual Remembered

Seeing images from memory, recalling things they have seen before. Some people access visual remembered by defocusing their eyes as they look straight forward – almost as if they're looking through whatever is there.



"What colour was your bedroom when you were growing up?"

1.11.3 V^c Visual Constructed

Images of things that people have never seen before. When people are making it up in their head, they are using visual constructed

"What would your boss look like in a clown outfit?"

1.11.4 A^R Auditory Remembered

When you remember sounds or voices you've heard before or things that you've said to yourself.

"What does the theme tune to your favourite film or show sound like" or "What did your mother's voice sound like when you knew you'd done something naughty?"

1.11.5 A^c Auditory Constructed

Making up sounds that you have not heard before. This could be using sounds that they know to make a new sound too.

"What would a saxophone sound like if you played it underwater?"

1.11.6 K Kinaesthetic

When people access this eye pattern, they're feeling emotions or physical sensation.

"What does it feel like when you're really happy?" or "What is the sensation when you get into a freshly made bed?"

1.11.7 A_d Auditory Digital

When you are talking to yourself or using internal dialogue.

"Tell yourself how amazing you are and how well you're learning this information."

Typically, every time we access our brain, we move our eyes in that particular direction which facilitates our use of that part of our neurology. The concept of

the mind body connection is illustrated here as each time we access the visual part of our brains, our eyes move up accordingly.

It is easy to think you understand what is going on for someone because of a change you observe. However, in coaching you need to put such assumptions aside and simply accept the changes as clues of change happening.

If and when it feels important to you, you can then use feedback and observation to find out what the change meant. You may be surprised to find it didn't mean what you expected or guessed.

Be observant and be ready but don't be the expert!

Structuring thinking:

NLP hierarchy of ideas or Chunking

Hierarchy of ideas, usually referred to as chunking, is a way of thinking about ideas that enables you to quickly and effectively think about those ideas at different levels of specificity. In other words, from any given starting idea you can move into broader thinking about it, get more detailed about it or move to equivalent ideas at the same level of detail.

Now, that sounds fairly abstract so another way to think about it is that it allows us to structure how we think about anything to think more constructively and clearly.

Chunking is invaluable for:

- Moving from detail to big picture (chunk up)
- Discovering the purpose or intention behind something (chunk up)
- Finding out what things have in common (chunk up)
- Discover where agreement can be found (chunk up)
- Explore what an idea is an example of (chunk up)



- Discovering belief structures (chunk up)
- Increase options (chunk across)
- Move from big picture to detail (chunk down)
- Finding out how things are different (chunk down)
- Finding where disagreement can occur (chunk down)

The key questions for achieving the change in specificity are:

Chunking up

- What is this a kind of?
- What are all these things examples of?
- For what purpose?
- What do these things have in common?

Chunking across

- What else is like this?
- What's another example of this?

Chunking down

- What's an example of this?
- What specifically?
- What kind of...?
- What part of it?

Example of chunking from the word "Man"- (Hand out)

Chunking up: You can chunk up to animal (a man is a kind of an animal) and further up to living thing (an animal is a kind of living thing).

Chunking down: One can chunk down to a particular man, "Jim" and further down to a part of Jim, his face.

Chunking across: One can chunk across to another kind of animal, "dog" or to a different kind of equivalent "woman" etc. Exploring specifically EC related applications, you might find yourself asking questions such as:

Chunking up:

- For what purpose do you want to maintain this relationship? (purpose)
- What do you and your husband both want? (agreement)
- What do you think his intention was behind saying that? (intention)
- All those ideas you have for businesses, what do they all share in common? (commonality)
- You mentioned this particular option as a solution, what is this an example of for you?

Chunking across:

- What else could you do?
- You mentioned you could talk with your boss, what other help could you seek?
- To give yourself more choice, what are other examples of this idea are there?



Chunking down:

- What specifically will you do? (big picture to detail)
- You said you were going to review your strategy, which part in particular? (part of)
- When you say you'd like to have your own business, can you give me an example of the kind of business you'd like to create? (example)

Case study: Cynthia

Getting constructive with chunking

Cynthia is exploring how she can handle her paperwork more effectively.

However, Cynthia is beginning to struggle for ideas.

You: OK, so far Cynthia you have the following on your list: adopt a one touch policy with paperwork; buy a new set of filing trays; talk to your office secretary; have a "spring clean" of old paperwork and come in on a Saturday to spend time just on tidying. So, let's take a look at these and see if we can expand them into different areas. Which do you think is the most important or effective task first?

Cynthia: I think having a "spring clean" is a really important task for me to do.

You: Great, so when you think of "spring cleaning" your office, what's the purpose of that particular act? (chunking up)

Cynthia: Well, I guess to help me get the head space – a sense of order before I create a new system.

You: So, it's about creating head space? OK. In terms of your goal to get paperwork in order, what other examples are there of creating head space for you? (chunking down from headspace or laterally from spring clean)

Cynthia: Hmm, well I guess having a clearer sense of what it will look like at the end! My head would feel clearer if I knew what I was trying to get to.

You: Great, so should we add that to your list of actions? What's another way of creating headspace? (chunk across – note how this has taken the conversation out of the problem – simply tidying her paperwork – and into purpose)

Cynthia: Another way to create headspace? I think this coaching is one way actually. But also, take time out with a coffee before I plough into it all. Almost take a fresh look.

You: Great, so how would you phrase that as an action?

Cynthia: Before I begin I will take 10 minutes with a coffee to relax and order what I'm about to do.

You: Great, let's take a look at another of your actions; to buy a new filing system. What's that an example of for you in connection with your aim? (chunking up)

Cynthia: Well, I suppose the equipment I need to be effective with this.

You: OK, so what other equipment.....(chunking down)



Challenging limiting language: Meta Model

We have already explored the idea that we delete, distort and generalise and we have seen how language is built up of presuppositions, or assumptions, which reflect the person's model of the world.

From a coaching perspective then, it is extremely useful to be able to recognise and challenge the way people delete, distort and generalise in their everyday language if this is having a limiting impact on them. The Meta-Model was a simple analysis of the ways people delete, distort and generalise in their language and how as coaches we can challenge this. The model was created by the founders of NLP, Bandler and Grinder, after they watched and modelled the work of the family therapist, Virginia Satir.

She was extremely effective at helping people see how they were limiting themselves with their language and reinforcing their limitations with patterns of language.

The Meta-Model is structured around the three outcomes of our filters: distortion, deletion and generalisation. It is not so important to get to know the technical names for the types of patterns but it is essential to understand them and to get used to spotting them. The skill will make you a master of challenging clients at a deep level and often the very process of unpicking their language will free them up to make more positive choices going forward.

The Meta-Model is shown below split into the three kind of patterns which reflect deletion, distortion and generalisation. It shows a plain language version of the pattern along with an example in practice, the technical NLP term (which is often more confusing than helpful) and an example of the kind of question which you could ask as a coach to **challenge the language pattern**.

(Delete/Generalise/Distort)- Hand out

1.12 Meta-Model: Language of Specificity

	Pattern	Example	Response	Prediction
HOW	Mind Reads Claiming to know someone's internal state, thoughts, motives etc.	<i>You don't like him</i>	How do you know I don't like him?	Recovers the source
	Lost performative Value judgements omitting the performer or holder of the value judgement	<i>It's good to eat 5 vegetables and fruit per day</i>	Who says it's good? How do you know it's good? According to whom?	Recovers the source of the belief, the performative (who does it), the strategy for the belief Gathers evidence
	Cause & Effect Where the cause is incorrectly put outside of self	<i>You make me angry</i>	How does anything I'm doing cause you to choose to feel angry? How specifically?	Recovers the choice
	Complex Equivalence When two experiences are given equivalent meaning	<i>He's always busy; he is important</i>	How does his being busy mean that he's important? Have you ever been busily doing something unimportant?	Counter example Recovers complex equivalence
	Presuppositions The linguistic equivalent of assumptions Some presuppositions of example: <ul style="list-style-type: none">• She doesn't realise• It hurts me• She could stop doing it	<i>If she realised how much that hurt me, she wouldn't do it.</i>	How do you know she doesn't know? How do you choose to feel hurt? How do you know she could stop doing it?	Recovers the internal representation and the complex equivalence Specifies the choice and the verb and what she does



	Pattern	Example	Response	Prediction
What would happen if?	Universal Quantifiers A set of words which have a universal or absolute character i.e. All, never, every	<i>I never get noticed</i>	Never? What makes you choose to feel that you're never noticed?	Eliminates the universal Helps determine the specifics Recovers counter examples
	Modal Operators Words which imply possibility/impossibility or necessity	<i>I have to stop spending</i> <i>I can't answer that question</i>	What would happen if you did/didn't? What prevents you?	Recovers effects and outcomes or causes
Who or what specifically?	Nominalisation Process words which have been frozen in time turning them into Nouns	<i>There is no understanding here</i>	Who doesn't understand what? How could you understand?	Turns it back into a process Recovers deletion and referential index
	Unspecified Verbs The process word (verb) lacks a complete description. The who, what, how or when remains Unspecified	<i>He lied</i>	How specifically? Who specifically? What specifically did he lie about?	Specifies the verb
	Simple Deletions Where certain words or concepts have been left out	<i>I am unhappy</i>	About what or whom?	Recovers deletion
	Lack of Referential Index Where the person or thing is left unspecified	<i>They don't come here any more</i>	Who specifically doesn't come where specifically?	Recovers the referential index

Comparative Deletions	<i>It's more or less a good thing</i>	Compared with what/whom? More than what, less than what etc.	Recovers comparative deletion
Where the comparison is left without attributes. You do know who or what it relates to. i.e. good, better, best, worse, give or take etc.			

Figure 5: Language of Specificity



Milton Model: Hypnotic Language

Pattern	Explanation	Application
Mind Reads	Claiming to know the thoughts or feeling of someone else without specifying the process by which you came to know the Information	<i>I know you are thinking about what I said earlier</i>
Lost performative	Value judgements omitting the performer or holder of the value Judgement	<i>One doesn't have to believe that I know that</i>
Cause & Effect	The implication that one thing leads to another. Words such as <i>because</i> or <i>make</i> illustrate implied Causatives and also include: <ul style="list-style-type: none"> • If ... then ... • As you ... then you ... 	<i>If you are listening then</i>
Complex Equivalence	When two things are given equivalent meaning: <ul style="list-style-type: none"> • It is late, you must be tired 	<i>That means you are absorbing this information</i>
Presuppositions	The linguistic equivalent of assumptions.	<i>And can use it for yourself and others</i>
Universal Quantifiers	A set of words which have a universal or absolute character. They generalise and have no referential index	<i>Everyone you know is going to benefit from all you have learned</i>
Modal Operators	Words which imply possibility or necessity: <ul style="list-style-type: none"> • Can, are able to, may – possibility • Should, must, have to – necessity 	<i>You can and must use these tools</i>
Nominalisation	Process words which have been frozen in time turning them into nouns. <ul style="list-style-type: none"> • Education, Respect, Learnings 	<i>And the learnings you have at an unconscious level</i>
Unspecified Verbs	The process word (verb) lacks a complete description. The who, what, how or when remains unspecified.	<i>Encourages their use</i>
Tag Questions	A question added after a statement, designed to displace resistance.	<i>Doesn't it?</i>

Lack of Ref Index	A phrase where the <i>who</i> or <i>what</i> the speaker refers to is left out	<i>People say that you are more confident than you realise</i>
Comparative deletions	Where the comparison is left without attributes. You don't know who or what it relates to.	<i>And that's more and more true</i>
Pacing current experience	Where you describe the verifiable external experience of the client so that it is undeniable.	As you sit there, listening to me, thinking those thoughts
Double binds	This creates the illusion of choice – two options are given. This presupposes that those are the only options available	The question is, are you going to start using what you've learned now or in a moment?
Conversational Postulates	The communication takes the form of a question which would normally invite a yes/no response but alternatively can be responded to by an action. This helps to avoid authoritarianism. <ul style="list-style-type: none"> • Can you tell me the time? • Can you speak more slowly? 	Can you tell me the time?
Extended quotes	A series of phrases which tend to dissociate the speaker from what is being said, overload the clients conscious mind and give disproportional value to the quote being delivered.	Because last week I was driving my car and I heard a radio program that had two famous speakers, and one of them said, "The fruits of your future, lie in the seeds you've just sown."
Selectional Restriction Violation	A sentence that is ill conceived, illogical and does not make sense.	"And those seeds are telling you to go out and make it happen now."
Phonological Ambiguity	Using homonyms (words with different meanings but the same sound) which can cause confusion and direct the unconscious attention to the other meaning. <ul style="list-style-type: none"> • <i>Hear hear</i>, used after a speech • <i>Bye now</i>, after a sales call 	Speakers can't lie



Syntactic Ambiguity	When you cannot determine the function of a portion of the sentence by its direct context	And speaking to you as an adult
Scope Ambiguity	When you cannot determine by linguistic context how much one portion of a sentence applies to another.	The sounds of the engine and radio
Utilisation	Using whatever is happening in the immediate situation in your communication.	Look after your conscious mind whilst your unconscious learns these lessons.

Figure 6: Hypnotic Language

Reframing

By now you are already seeing that language is absolutely key to understanding how a client views the world. You've also seen how you can begin to challenge this view by challenging the very language they use.

Another powerful way to help a client change the way they think about a situation is by reframing their perspective. Reframing is the process of changing the way you look at something. This is a hugely powerful way of challenging clients to rethink something to which they are attaching negatives thoughts.

Fundamentally, there are two forms of reframe:

Content/Meaning and Context/Relevance

A content/meaning reframe changes the meaning someone has ascribed to an event, behaviour or experience. It works on the assumption that the experience can be interpreted differently. A context/relevance reframe accepts the underlying meaning of the experience or behaviour but explores how it changes in a different context or in a more relevant situation.

Meaning reframe

In a content/meaning reframe, we are asking the client to look at how they could think differently about different aspects of their experience. We are asking them to consider a different meaning to the event or information or to think how they may have misunderstood the experience.

There are a number of things which represent content which can be explored for change. You won't explore each one every time of course. More likely you will focus on a key part of the statement to create the reframe. And like the Hearts and Minds construct for cognitive-behavioural work, we can use the acronym SPACER to think about that content

SPACER

- Situation
- Physiology
- Actions
- Cognition
- Emotion
- Results

In others words, any piece of information will contain content around these themes. How can the person think differently about the situation, the physiology, etc.

Situation reframe

Client's statement: "It was a horrible place, so busy and noisy!" EC question: "Were other people enjoying themselves in that atmosphere?"

Physiology reframe

Client's statement: "My wife's obviously in a mood, she's sunk with hands in her head"

EC question: "What else might that mean?"

Action reframe

Client's statement: "Whenever he says that, I know he's being selfish and I get annoyed!"

EC question: "What else might his behaviour mean?"



Cognition reframe

Client's statement: "I don't think much of my plan is any good"

EC question: "Which bits of the plan are good"

Emotion reframe

Client's statement: "I feel so nervous – clearly I'm not meant to be a speaker"

EC: "How could those nerves help you?"

Results reframe

Client's statement: "My life's been a complete failure!"

EC: "Are you sure? What have you achieved that you're happy with?"

Context reframe

With a context reframe we are accepting the underlying meaning of a statement or behaviour but asking how that behaviour, information or outcome could be seen differently in a different context. Like SPACER for content reframes we can think about context reframes using an acronym, in this case SPLAT!

SPLAT

- Size
- Person
- Location
- Action
- Time

Size reframe

Client's statement: "There's no problem just bending this rule – it's only me"

EC question: "What if everyone thought the same?"

Person reframe

Client's statement: "I think my need for adventure is bad for our relationship."

EC question: "What kind of person would suit you?"

Location reframe

Client's statement: "I love a busy life – the countryside doesn't work for me"

EC question: "Where's your natural home then?"

Action reframe

Client's statement: "I'm too detailed and analytical!!"

EC question: "In what situation would your ability to be detailed and analytical be useful?"

Time reframe

Client's statement: "For now I'm just going to keep doing this as it's easier."

EC question: "And if you do that for the rest of your life?"

Content and context then cover a multitude of different reframe styles.

Other framing techniques/Meeting techniques

The following frames are particularly useful in meetings and also to use on yourself to help you achieve your goals. A frame by its nature, encourages you to see things from another perspective – which inevitably creates choice.

1.13.1 Outcome frame

This is an excellent tool to use in meetings or when you have specific goals you want to achieve either alone or in groups. It frames the direction and the explicit result you want to achieve.

Question: What specifically do I/we want to achieve from this meeting/ situation?

Question: How does this compare with/relate to.....?



1.13.2 Agreement frame

An outstanding skill to have, use the agreement frame regularly to ensure better communication, especially when conflict is a high possibility. This tool allows you to dissipate the energy, align and redirect.

Questions:

- *I agree and ...*
- *I appreciate and ...*
- *I respect and ...*

1.13.3 Relevancy frame

This can be used to ensure that you prevent diversion from the core purpose for your discussion or goal. If you have a goal or specific outcome in a meeting or have used the outcome frame and you want to check whether some new input is relevant, simply ask:

Question:

- *So you agree that is something that would benefit us*
- *Let me see if I understand what you're saying ...*
- *As you said earlier, is something that you want, would you agree?*

1.13.4 Contrast frame

This can be used in conjunction with/or to complement the Relevancy frame. It allows you to compare the value of various items to the decision-making process.

Question: *How does.....relate to the outcome or goal we've agreed we're aiming for?*

1.13.5 'As if' frame

This is a very useful frame to help people realise what it would be like if they achieved their outcome and get them out of a stuck state. This gets them to associate to that outcome and by doing so, they create that as a possibility.

Question: *Imagine if you had achieved this goal completely in the best possible way. What would you see, hear, feel and say to yourself which would confirm that you'd already succeeded?*

1.13.6 Back track frame

A useful frame to use when summing up the details discussed for the purpose of making a decision or checking agreement. Very useful in a sales situation when you want to move forward, this tool can be used to encourage alignment for the areas you have agreement on.

However, one of the early NLP thinkers, Robert Dilts, identified 14 different kinds of reframe patterns which he called the Sleight of Mouth Patterns.

Let's now take a look at these.

Robert Dilts' Sleight of Mouth Reframe

Dilts' Sleight of Mouth reframes offer specific reframe types within the broader pattern of content and context. They are not exhaustive in terms of reframe types but they do offer some of the most powerful patterns to create significant shifts in a client's thinking.

The sleight of mouth reframes are:

1. **Intention:** An intention reframe explores the intention behind a statement, behaviour, belief etc. It asks what is it trying to achieve or what is its higher purpose. For example, if a mother shouts at their teenage child for coming home late, their intention is to try to keep their child safe even though the behaviour seems undesirable or based in anger.
2. **Redefine:** Redefining a statement accepts the basic premise of the existing statement but rephrases it in a way that opens it up for challenge. For instance,



if a client says, “I’m not a good boss as my staff are unhappy right now”, you might redefine by saying, “so you are judging how good a boss you are by how your staff feel at any moment in time?”

3. **Consequence:** A consequence reframe accepts the basic meaning offered in the statement but looks at what the consequence of that would be in the longer term. For instance, “I don’t want to leave my job even though I don’t like it as it gives me security” would be reframed by asking what would happen if they stayed in that job forever?
4. **Chunk down:** A chunk down reframe helps the client get more specific about something. A SMARTER goal is a chunk down reframe of the statement “I want to get fit”.
5. **Chunk up:** A chunk up reframe seeks to find out what the statement, experience etc is a kind of an example of. If a client says they want to get fit, it is an example of a goal around health. A client who wants to pay off their debt might be dealing with a number of issues that come under financial wellbeing.
6. **Counter-example:** A counter-example reframe seeks to find examples which refute the initial statement. “I always fail”, could be reframed by asking “when haven’t you?” Similarly, if a client says it’s not possible to be spiritual and wealthy, you may seek to identify people who are both of these things and so achieve a counter-example reframe.
7. **Analogy:** An analogy reframe tells a story that offers a different perspective in the situation or statement. The Ugly Duckling would be an analogy reframe for someone who doesn’t feel attractive.
8. **Apply to self:** An apply to self reframe seeks to turn the attention of the person making the statement back on themselves. If a client were to say, “you’re in a tough mood today!”, you might ask, “what’s happening for you that makes you read that in me?”
9. **Another outcome:** Another outcome reframe explores how the statement could have a different outcome from that implied. A client who says, “I don’t think I’ll apply for the job as it’d be embarrassing if I don’t get it” could be reframed simply by saying, “Or you might get it.”

10. **Hierarchy of criteria:** This reframe explores how priorities or values are weighed up in the statement. A client who says “I won’t go dating anymore as I hate getting rejected” could be reframed by asking “Which is more important to you, having a relationship that you love or keeping yourself safe from feeling hurt?”
11. **Change frame size:** A frame size change puts the statement in a bigger or smaller context which could include the size of time, population and so on. A client who says “There’s no-one single people left” could be challenged with, “what, in the whole of London?”
12. **Meta frame:** A meta-frame reframe refocuses attention onto the underlying filter that allows the belief, statement etc to be made. Many people say there must be a purpose to this experience. The meta-frame is that all things have a purpose. This underlies their assumption. An optimistic person will always expect the best in a situation because they have a meta-frame of optimism.
13. **Model of the world:** A model of the world reframe seeks to show how it is the client’s model of the world that is framing the existing statement. A client who grumbles about a manager might be asked to look at how another person experiences that same manager differently. You will explore perceptual positions later in this manual which is essentially a model of the world reframe.
14. **Reality strategy:** The reality strategy seeks to put the focus on the evidence for the statement. If a client says, “My manager can’t stand me”, a reality strategy reframe could be, “How do you know he doesn’t like you?”

By now you have probably noticed how these linguistic patterns are interlinked. The meta-model is fundamentally a chunking down reframe specifically looking to explore how things have been deleted, generalised and distorted. Perceptual positions, as you will see, is a reframing process. Understanding linguistic presuppositions enables us to reframe effectively. All these patterns are intrinsically linked.

Enabling the reframe

So we have now explored the reframe types. But as an EC, how do you achieve the reframe. There are three basic ways to reframe.



- Questioning
- Feedback
- Suggestion and provocation

Questioning

As an EC, you ideally want to facilitate the reframe rather than doing it for the client. Facilitating the reframe is achieved by asking questions: “What are the consequences of holding onto this belief?”; “What was your intention when you did this?”; “What else might be the outcome of this?”; “What might they be thinking about this?” – these are all facilitated reframes through questioning.

Feedback

Using feedback explicitly as shown on the Foundations module, you might reframe in this manner: “You said that you can’t start a business because you don’t have ALL the skills and you said similar things about getting qualified as NLP Trainer, before you feel confident. It made me think that maybe there’s an overarching feeling that you have to be perfect before you can get started. What do you think?” This would be a chunk up reframe using feedback.

Suggestion and provocation

In this style of reframe, the coach could offer the reframe as a way to start a new way of thinking.

An example of this might be:

Client: “I can never leave this job, I’m like a slave to it”

EC: “Nice to be a slave eh? Saves you having to make a choice!”

This is a fairly provocative intention reframe performed by the coach rather than the client. Knowing which is the right reframe is a judgement call by the coach and will depend on a number of factors including the rapport between the client and EC, the ability for the client to change their perspective, the client’s resistance to change and so on. Or to offer a counter-example, “When has this statement not been true?” For practice, try taking a statement and working through ways to change

the meaning using these patterns. Reframing is a hugely powerful way to help clients think differently about anything and as the saying goes: “change the way you look at things and the things you look at change.”

Reframing through perceptual positions

Perceptual positions, an incredibly powerful approach to helping clients see viewpoints other than their own in a difficult relationship. As mentioned in the previous chapter, this is essentially an extended reframe which produces a model of the world reframe and within each model of the world explore such issues as intention, consequences, detail, meta-frames etc.

We can each perceive a situation from a number of perspectives. Normally, we see things from our own perspective and react accordingly. We experience someone being selfish, someone being generous, someone being a terrible driver. In fact we don’t actually know they are a terrible driver. We simply see a terrible driver from our perspective. We don’t really know what is going on from his or her perspective.

It is useful to explore four key perceptual positions:

Our own (first position): we see the world, or a relationship, or conversation etc for what it means to us.

The other person’s (second position): we see the world through their eyes, or our impact on them through their eyes, or what something might mean to them.

An observer’s position (third position): we see ourselves and the person we’re talking to from a fly on the wall’s perspective – someone who isn’t directly involved in the situation and who can offer advice, more resources etc.

A distant position (4th position): we explore the relationship from the position of someone who explores types of that relationship. This might be an anthropologist, sociologist, psychologist or even a godlike character.

Using perceptual positions in an EC Communication

Wherever clients are feeling stuck with an interpersonal issue, the use of perceptual positions can be extremely effective.

This is achieved through physically moving position and anchoring different identities to places.



If you were in a one-to-one EC session you would follow these steps:

1. Set up a chair facing the client.
2. Ask the client to look at the person (imagined) sitting across from them and describe what they see as it relates to the problem.
3. Next, ask the client to physically move from their seat into the other.
4. Ask them to look at themselves sitting opposite and see what the other person sees through their eyes.
5. Next, ask them to stand up a little way from the chairs and ask what, as a fly on the wall, they see going on between the two people, what advice they might offer etc.
6. Then ask them to stand quite some distance away and take the view of someone with no involvement who understands that kind of relationship as a kind of relationship found in other place (a chunk up reframe).
7. Finally, ask them to sit down in their original seat with new insights and ask what they now think and what needs to change.

Strategies

Strategies are a sequence of external and internal experiences which consistently lead to a specific outcome.

The components include two fundamental parts: the *Elements* and the *Sequence*.

Types of Strategies

Everything we do is governed by our strategies. We have a strategy for everything...

Buying	Loving	Learning	Stress
Boredom	Motivation	Deciding	Success
Depression	Relating	Selling	Wealth
Moods	Joy	Parenting	Competition
Creating	Remembering	Resting	Vitality
Illness	Hate	Fun	Eating

...and everything else we do.

- Meta strategies
- Macro strategies
- Micro strategies

Notation and Elements

The components of strategies have their own notation so that you may quickly and easily describe a strategy.

Notation	Component	Definition
V	Visual	Images and pictures
A	Auditory	Sounds and tones
A_d	Auditory digital	Self talk, words
K	Kinaesthetic	Emotions and tactile sensations
O	Olfactory	Smell
G	Gustatory	Taste

e	External	From an outside stimulus
i	Internal	From within
c	Constructed	Constructed in the imagination
r	Remembered	Remembered from experience
t	Tonal	Tones

1.13.1 Examples

V _e	Visual external – seeing someone’s face in the street
V _i	Visual internal – seeing someone’s face in your mind’s eye
A _r	Auditory remembered – remembering something you heard
K _i	Kinaesthetic internal – feeling an emotion
O _e	Olfactory external – smelling something
A _{ed}	Auditory external digital – saying something to yourself out loud



1.14 Detection (Elicitation)

1.14.1 Chunking

Chunking is important to find the appropriate strategy. For the purchase of an item, there may be more than one strategy that takes place such as the 'motivation to buy' compared with the 'decision to buy'. Another example is the strategy for 'initial attraction' compared to 'deep love'. By chunking appropriately, you can break down the whole process into specific strategies.

Formal Strategy Elicitation

Establish rapport and set the frame	1. What I'd like to do now is to ask you some specific questions which will help understand how you achieve certain results. Would that be all right with you?
Get the person into the state you are eliciting by using the appropriate language and context	2. Can you recall a time when you were totally?
Make sure that the person is in a fully associated, intense and congruent state. They must be looking through their own eyes.	3. Can you recall a specific time? As you go back to that time now, see hear and feel what you did in that moment.
As they are in the appropriate state, anchor it if necessary so that you can get it back whenever you need it – especially if you're breaking their state by asking Questions	4. <i>Anchor the state if necessary</i>
Elicit the modalities. Calibrate all accessing cues: predicates, eyes, breathing, tonal shifts etc. and note the steps you observe	5. What was the very first thing that caused you to be totally? <ul style="list-style-type: none"> • Was it something you saw or the way you were looked at? • Was it something you heard or someone's tone of

	voice? <ul style="list-style-type: none"> • Was it the touch of someone or something or an emotion you felt? • Or something else?
Continue to elicit the modalities for each step and note these	6. After you (saw/ heard/ felt) that, what was the very next thing that happened as you were totally? <ul style="list-style-type: none"> • Did you picture something in your mind? • Say something to yourself? • Have a certain feeling or emotion?
Backtrack if necessary if you think you've missed any steps	7. What was the next thing that happened as you were totally?
Loop through 5, 6 and 7 till you have the complete strategy	8. After you (list previous), did you know that you totally, or did you do something else?
Test. Make sure you elicit and not install	9. Feed the sequence back and calibrate for congruency
(use neutral predicates)	
Watch for loops (recurring sequences that do not make progress)	
If necessary, go back and elicit the sub modalities	



1.14.2 Informal Strategy Elicitation

Strategies can be determined in casual conversation. For example by asking, "How did you *decide* to buy that shirt?" – for decision strategy.

1.14.3 Other questions to ask to Elicit Strategies

1. Has there ever been a time when you felt totally motivated? (motivation).
2. Think of a time where you felt totally resourceful? (resourceful)
3. Tell me about a time when you knew that you were completely unstoppable, when you knew you couldn't fail (powerful).
4. Think of a time when you felt that you were totally in 'the zone' – where everything flowed and you made great progress in what you were doing (in the zone).
5. Has there ever been a time when you were particularly creative? (creativity).
6. Can you tell me about a time when you were able to do? (a skill).
7. What is it like to?
8. Can you? or How do you? or Have you ever?
9. Would you know if you could?
10. What happens to you as you?

Utilisation

Once you've elicited someone's strategy it can be utilised by presenting information to them in the order and sequence they process information. They will find the information irresistible.

For example: Someone has a decision strategy which is $V^e \rightarrow A_d \rightarrow K^i$ so they see something external (V^e), they say something to themselves, they get a feeling and then they decide. If you were going to sell them a pen, then you could say the following:

1. "Take a look at this." V^e (show them either a picture or the real thing)
2. "You're probably saying something to yourself about how it looks" A_d
3. "And if it feels right, then you'll know that you should take one." K^i

Strategy Design

1. Make up what you think could work (taking into consideration their motivation strategy – toward or away)
2. Check your own strategy for applicability
3. Model someone else who has a good strategy

1.15 Motivation Strategies

People either move toward or away from things (meta program of Direction Filter). People who tend to move toward too strongly may never get around to doing unpleasant things which are necessary. Alternatively people who move away at an extreme may never take action until things get really bad. The key to motivation is to be easily and effortlessly able to do the things that may otherwise seem unpleasant but serve you.

Decision Making Strategy Exercise

Use a purchase that the person made themselves and decided to buy themselves.

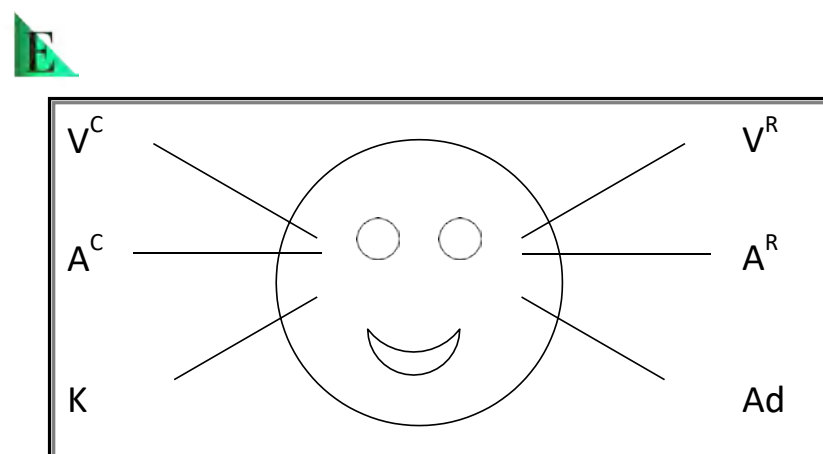


Figure 7: Standard eye patterns for a normally organised person

Determine something that the person is wearing or owns that they were happy about purchasing. It is important that they bought it themselves and were happy with it	<p>That's a nice What made you decide to buy that?</p> <p>Did you buy it yourself?</p> <p>Was anyone there when you bought it who influenced your decision to buy?</p> <p>Do you like it?</p>
Track eye patterns and determine organisation by asking questions and following their eyes. Also notice if they write with their right or left hand to help you.	<p>Would you mind if I ask you a few questions which may sound a bit strange and are to serve you best?</p> <ul style="list-style-type: none"> • Can you remember what your school uniform looked like? • Imagine if the sea were yellow • Say these words to yourself in a strange accent: "I'm the man/woman" • Imagine the sensation of putting your hand in a bucket of cold soup.
Elicit decision making strategy	<i>Use the appropriate script to do so conversationally</i>
Elicit convincer	How many items did you have to look at before you knew that that was the one for you?

Summary

You now have the core skills to get started with being an Effective Communicator!

Congratulations on beginning the journey. You are just at the start and there is an enjoyable path of learning ahead of you. But the priority for you is to get starting using these skills immediately. The more you use it, the more you become an expert at it.

So, get started, be active, try things out and allow yourself to learn. You now have the ability to influence people positively, moreover the ability to coach yourself.

Be an Effective Communicator in all areas of your life.

Oh, and most of all – Enjoy it!

All the best.

Esme Witbooi



Why Flying Without A Net has been transformational in my leadership journey and made me audacious & resilient

This book is a high-need-for-achievement professionals' guide on how to thrive in their careers and operate from a position of confidence and resilience in dealing with change, uncertainty or personal feelings of inadequacy. It's useful for managing the self as well as others in instances where anxiety gets in the way. It forces you to reflect on where you are in your journey and helps to refocus your attention towards driving changes in your behaviour that will guide you to growth & fulfilment.

One of the toughest things I've had to deal with as a leader was leading disengaged professionals. Utilising the tools in the book around confirming the purpose of the business and how their work fitted in with respect to realizing that purpose, proved to be invaluable. It is full of dos and don'ts for professionals and organisations alike.

The book further taught me about the importance of having difficult conversations early on and how this builds trust and allows for effective feedback to be given to team members early so that they can improve their performance. It also forced me out of the trap that most leaders of organisations fall into, that of results myopia. Where the obsession is with productivity & profit measures only and where the people who produce those results are essentially ignored instead of being affirmed & reassured. The SKS process contained in it has been a revolutionary tool I have used to elicit feedback from colleagues & subordinates regarding my leadership impact and I strongly recommend it. It's a process where you ask others what you should stop doing, keep on doing or start doing as you work alongside them or lead them. This process should happen regularly such that as a leader you are steeped in the present day realities rather than being anchored in achievements of the past.

What I like most about this book is that it is written for workers and leaders alike and is thus relevant for professionals at whatever stage of their careers. It provides a model for learning, changing and growing if you take heed of its advice.



The Pierre Elliott Trudeau Foundation is an independent, non-partisan charitable organization established in 2001 to honour the former Prime Minister. With the support of the House of Commons, the Government of Canada entrusted it with the management of the Humanities and Social Sciences Advancement Fund in 2002. The Foundation also benefits from the support of its donors. Through its doctoral awards, fellowships, mentoring program and public events, the Foundation encourages reflection and engagement on four themes of critical importance to Canadians: human rights, civic and the world, and people and their natural environment.

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