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CHALLENGES FOR WESTERN INDEPENDENCE

BY BARRY COOPER



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INTRODUCTION

The following paper was developed from remarks delivered on November 15, 2019 in Red Deer, Alberta at the 7th Essentials of Freedom Conference hosted by the Economic Education Association. The conference had three categories of topics around the theme “Meeting the Unity Challenge”, namely, The Case for Separation, Fixing Canada, and Getting Government Right. As readers will learn soon enough, the greatest historical challenge to Canadian unity is derived from the imperial pretensions of Laurentian Canada. The current problems with the federation are simply derivative of a historical political, economic, and mythical structure that long antedates Confederation. Before discussing the challenges for Western independence, it is important to consider the context within which these obstacles have emerged. Some are as recent as the 2019 election (Part 1); others are a simple reflection of the geopolitics of Canada and the self-understanding of Canadians in different parts of the country (Part 2). These latter considerations were in existence long before Confederation.

Part 1. The Significance of the 2019 Election

The 2019 election reminds one of the several elections of the 1980s insofar as the results emphasized the regional divisions of Canada. The West is more or less Conservative; Quebec is a mixture of Liberals and nationalists; Ontario and the lower mainland of British Columbia are Liberal and NDP. The major parties conducting the election embodied a regrettable combination of mendacity on a national scale by the Liberals, with timidity by the Conservatives, especially regarding Quebec and its odious “secularist” legislation that banned public servants in positions of authority from wearing religiously required clothing – hijabs, kippahs and turbans. As might be expected with such an electoral combination, nothing decisive emerged from this trip to the polls. Indeed, it simply postponed some serious decisions and guaranteed that the circumstances under which several well-known and long-standing problems must eventually be faced will make a moderate compromise much more difficult. The most significant consequence of 2019 was that the Liberals returned to office with the smallest share of the vote of any government in Canadian history. Previous and precarious minorities all had greater popular support. And the Conservatives? Despite the remarkable series of (once again) Quebec-centred corruption scandals and the Prime Minister’s bizarre personal behaviour, the Liberals were still able to take advantage of the Conservatives’ many shortcomings, especially their questionable leadership.

The result was deeply disappointing to Westerners. Worse, the manner of the Liberal victory was especially insulting. Rather than attempting to defend a questionable and likely indefensible record, the Liberals attacked Conservative Leader Andrew Scheer as a continuation of the Liberally-detested Stephen Harper. They claimed Scheer and the Ontario premier, Doug Ford, were northern Trumpians, neither of which charge was remotely plausible to normal people. The Liberals added to their sanctimonious virtue-signalling by claiming they would ensure that Canada remain a “progressive” northern bastion against nativism,

polarization, authoritarianism, and the demonization of enemies, all evils they attributed to the Trump Administration. That is why they expended so much energy (and who knows how much money?) to lobby Barack Obama to endorse Justin Trudeau. *That* kind of election interference by foreigners is perfectly acceptable to the progressive left.

The data summarizing the October 21st results are clear, even eloquent. The Conservatives won 68 percent of 104 seats in the West. The Liberals won 60 percent of 234 seats in the non-West. As one insightful observer put it, Canadian elections have become opportunities for Ontario to decide how much money the West will send to Quebec. Several commentators recalled the advice of the Liberal campaign manager of the 1980s, Keith “The Rainmaker” Davey and his 35-year-old advice: “Screw the West; we’ll take the rest.” It worked for the first Trudeau and now it has worked for his son, who (along with Kathleen Wynne) then had the temerity to accuse Alberta premier Jason Kenney of fomenting national division, disunity, and Alberta independence. As Trudeau’s then environment minister, Catherine McKenna, famously tweeted from a St. John’s bar: “if you say it loud enough and often enough, people will believe you. For sure.” Thank you, Dr. Goebbels.

Looking back, the 2019 minority is quite unlike, the Conservative minority of 2006. Following the 2004 Liberal minority, the Harper conservatives tailored their policy to appeal to Quebecers – cancelling their plan to end corporate subsidies to Bombardier, for example. When Westerners have endured Liberal minorities, as in the present, there is no pressure for the government to appeal to Westerners. On the contrary, we can look for the Liberal Laurentians to double down on the damage they have imposed on the West. Westerners know this, which is why there has been a spike in media chatter reflecting increased support for Western independence.

The actual public opinion data have in fact been pretty stable. About a year ago an Angus Reid poll

found that nearly three out of four Westerners thought that Ottawa doesn't treat them fairly. Shachi Kurl, executive director of the Angus Reid Institute, told Global News that the West "does not see itself reflected or represented in our so-called national institutions" and suggested that the data reflected the position of the Reform Party in the late 1980s and cited their slogan: "The West Wants In."¹ Westerners are still not represented in our so-called national institutions. The difference this time is that increasingly the West wants out.

The response of the Laurentian media, particularly in Toronto's national newspaper, has been entirely predictable. On October 24, 2019 in the *Globe and Mail*, Eric Reguly said Westerners, particularly Albertans, were punishing themselves. They should have been "sophisticated" like the admittedly "cynical," which is to say, corrupt electorate of Quebec, and voted strategically to "keep the federal favour-train running." Instead, masochistic fools that we are, Alberta "rendered itself totally defenceless in Ottawa" and now must "prepare itself to take a few lashings."²

The next day, Reguly's colleague, Marcus Gee, revealed to an expectant nation that "Toronto and the dynamic communities in its orbit have become the key to winning elections in the country." This, of course, is good news. "Whether Canada succeeds depends on whether its biggest city succeeds." Accordingly, "Toronto deserves every bit of its growing influence. Sensible Canadians will cheer it on." For those miscreants suffering from a regrettable lack of enthusiasm for Toronto and all for which it stands, and thus who have no reason to cheer, his advice was brutally clear: "Get used to it." Like it or lump it, the shining sun of Laurentian triumphalism rises and sets on TO the Great.³

Even Andrew Coyne, who is often sensible, writing in the *National Post* on October 26, 2019, half-endorsed Reguly's notion that the Government of Canada is really a "national protection racket." He certainly starts off, like his *Globe* colleague, on the wrong foot. Evoking *The Sound of Music*, he begins: "How do you solve a problem like Alberta?" He asks with indignation not irony: whatever are they

complaining about now? The Liberals just bought them a pipeline. They have "one of the highest standards of living on earth" and the highest of all the provinces. And yet they claim the federation "does not work for them." Ottawa, which passed Bills C-69 and C-48, is not to blame for the destruction of the Alberta economy (low world oil prices are, he says; but then why is the American oil and gas sector doing well?).⁴ The carbon tax, Coyne avers, is "good policy in the national interest." The courts and activist groups, not the Government of Canada, are responsible for the absence of pipe. But who other than the Liberal Government of Canada has encouraged them both with poisoned rhetoric about social licence? Coyne did, however, condescend to observe: "But for goodness sake, it is hardly unreasonable for Albertans to feel themselves besieged."

Thank you, Andrew. But for goodness sake, get a grip. Albertans do not *feel* themselves besieged, they *are* besieged. Indeed, they have been under attack for the past four years. Have you not noticed? Probably not. It is so hard to see past Mississauga. Nor have you noticed that the only significant question discussed nowadays in this province is: how deliberate, how calculated, and how malicious has the attack on Alberta been? And what are the dark motives of the Laurentians?⁵ Coyne has since departed the *Post* for the presumably more congenial *Globe and Mail*.

A few weeks later, Gary Mason, based in Vancouver and Toronto's eye on the West, weighed in with his own interpretation of the post-election political landscape. He was indignant that Jason Kenney "would like to see Alberta carve out almost the same level of independence that Quebec has." *Quoi? Quel scandale!* "For students of history," such as the estimable Mr. Mason, it is all redolent of the notorious Firewall Letter of a couple of decades ago. "And so here we are today," Mason opines, "with conservatives in the province once again upset about the outcome of a federal election, once again stoking divisions because they don't have a government in Ottawa that reflects their ideological leanings." All the talk about pipeline expansion, Bills C-48 and C-69 and so forth, is "tedious to the point of being

irrelevant.” And he ended by quoting Rachel Notley, clearly an unbiased observer of Alberta politics, who uttered the old canard that Kenney was “intentionally stoking the fires of Western alienation.”⁶ A few weeks later, as talk of independence increased in Alberta, Mason observed that such talk was “hurting Alberta.” The whole thing, evidently, was “backward ... patently ridiculous” and “just dumb.”⁷

The Laurentian journalistic consensus is something like this: Alberta and Saskatchewan have only themselves to blame for whatever adverse policies Laurentian Canada imposes on them because they were stupid enough not to vote Liberal. Who knows why, but they just refuse to go along to get along. Trying to change things by asserting provincial powers and provincial jurisdiction is (somehow) a dangerous threat to the great Laurentian bugaboo, “national unity.” In order to avoid having to specify just what the danger might be, these deep thinkers quickly invoke the spectre of “Western alienation.” The term has been around since at least the 1980s.

The great problem with using the phrase is that it forestalls further thought and categorizes the injustices of Confederation in a way that serves both the interests and the moral certainty of Laurentian Canada. Alas, it is entirely bogus. Ask yourself: what would it take not to be alienated in the eyes of Laurentian Canada? What policies would Westerners embrace to show the rest of Canada they had overcome their alienation and were once again normal, smiling, and healthy? At the very least, they would have to acknowledge that Quebec and Ontario are the real Canada. Our job in the boonies is to support the real Canada by providing whatever real Canadians want, no questions asked. To show our good faith we will become enthusiastic supporters of the CBC and especially of Radio-Canada. We will also petition – nay beg – for a local edition of the *Toronto Star* to keep us properly informed. Of course, we will heartily cheer on the growing influence of Toronto. Torontonians deserve nothing less. Indeed, they deserve much, much more. We will also gratefully support the shutting down of the oil and gas industry on the Prairies, particularly the filthy tar sands. Why? Because we must save the planet by reducing to zero our nearly

1 percent contribution of global CO₂ production, which (unquestionably) causes global apocalyptic climate change. Here we show our good faith by applauding in unison the tanker ban on the north coast of BC, and the shutting down of any expansion of Trans-Mountain pipeline that would have released a shocking additional 0.6 percent of oil production into the global market. Of course Westerners will embrace joyfully the wisdom of Bill C-69 to ensure no other pipelines get built, ever. Also, we will, as a Liberal MP from the Lower Mainland put it, support our Prime Minister come what may. Here our non-alienation will be reflected in the public approval we accord the dear leader for his great and wise actions on behalf of all Canadians, especially middle-class Canadians and those who are working so hard to join the middle class. As he so often reminds us.

One hopes such a thought-experiment conveys the degree of nonsense embedded in the notion of Western alienation, particularly when uttered by the spokespersons of Laurentian Canada, wherever they may reside. In a word, alienation-talk is just another insult to Western pride. One way or another, the use of the terms means more “lashings” are in order. They will be delivered with a stern sense of justice and a good conscience until we come to our senses. It’s for our own good, too.

Ted Morton provided a very moderate Western appraisal of the significance of the election in the *Calgary Herald* on October 26, 2019. The spike in support for independence has moved a long way past anger, to say nothing of alienation, he said. The difference between the response of Westerners, particularly in Alberta and Saskatchewan, in 2019 and the response, say, to the National Energy Program of Pierre Trudeau a generation ago is that many Westerners see a pattern, even if they don’t remember first-hand the devastation caused by the NEP. As Morton observed, “our vulnerability to federal politics and policies is structural not temporary.” Very simply, Keith Davey was right: “the Liberal party doesn’t need any votes from the West to form a government.” This “demographic vulnerability,” as he calls it, is not episodic but historical and, so to speak, permanent. Moreover, the political consequences are “compounded by our

very different regional economies,” namely that efficient resource extraction has made the West, with around a quarter of the population, a major element in the Canadian economy, contributing nearly a third of Canada’s GDP. The result, as Morton also pointed out, is a net fiscal transfer from Alberta in particular of \$611B since 1961. Since 2010 Alberta has provided Ottawa with over \$20B a year, even when the province was running budgetary deficits. In contrast, Quebec, which contributes under 20 percent of Canada’s GDP now receives two-thirds of every equalization dollar. “The electoral math is that simple,” Morton concluded.⁸

A few weeks after the election an exchange took place between Premier Kenney and Monsieur Yves-François Blanchet, leader of the Bloc Québécois. After a pleasant meeting with the Prime Minister, Monsieur Blanchet announced there was no national unity problem because of the election. Coming from the leader of a party that advocates Quebec sovereignty, at least as a vague future hope, he was indicating quite clearly that the sovereigntists in the Bloc are not serious. In fact, they never have been. The current crop of separatists are just a contemporary version of Robert Bourassa’s *fédéralisme rentable*, profitable federalism. Westerners have known this for years.⁹

In a speech in Calgary a couple of days later Kenney said: “If you are so ‘opposed to’ the energy that we produce in Alberta then why are you so keen in taking the money generated by the oilfield workers of this province and across Western Canada? You cannot have your cake and eat it. Pick a lane.” To which Monsieur Blanchet replied: “You know what? I like my cake and I will do what I like about it.” The miraculous option of having your cake and eating it too, the absence of any need to “pick a lane,” was made possible, as Monsieur Blanchet perfectly well knew, because next year another \$13B cake is on its way from Alberta.¹⁰ *Bon appétit*. Monsieur Blanchet’s condescending remarks, to say nothing of Monsieur Trudeau’s comments on how fortunate we all are to have so many Quebec francophones in cabinet, indicate the main contextual problem: the never-serious threat of Quebec sovereignty excuses every insulting remark from the mouths of Quebec

politicians. Any criticism, especially from Alberta, is met with serious and sombre admonitions to pipe down and quit endangering “national unity.”

Shortly after the exchange between Kenney and Blanchet, Campbell Clark, also writing in the *Globe and Mail*, reminded his readers that Monsieur Blanchet “is not trying to promote national unity.” Just in case we didn’t know: “He is a separatist. When it comes to the parts of Canada getting along, he’s not here to help.” Once again, a sophisticated Laurentian journalist seeks to instruct the Western rubes who clearly were unaware of how dangerous Monsieur Blanchet truly is. “And when he shoots off his mouth, Mr. Kenney should not treat the Bloc leader as he does. Because he’s not rooting for Canadian unity.”¹¹ Across the West we are enjoined not only to root for Canadian unity but to do so with the same enthusiasm we are to show for the “growing influence” of Toronto. Really?

The centrality of Quebec in Canada, which constitutes the foundational myth of Laurentian Canada, was reiterated the same in the pages of the *Calgary Herald*. Don Braid, who has lived here for a while and really ought to know better, advised Kenney to “brush off Blanchet as a separatist crank who’s poking a stick into Canadian divisions. That’s only the truth.”¹² The “truth” it seems to me, is that there are and always have been “divisions” in Canada but that Quebec and Ontario, and their government in Ottawa, are on one side and the West is on the other. This brings us to the perennial problem of Canadian geopolitics.

Part 2. Canadian Geopolitics

Historically, the largest resource deposits have always been in the West – apart from cod, nickel, and white pine. This has been so since before Confederation. Since 1867 the population has been centred in the St. Lawrence valley, mostly downstream from Lake Huron. Fur, especially beaver, was replaced by grain, mainly wheat, then potash, uranium, oil, and gas. That is, the resources are still chiefly in the West. Federalism was supposed to reconcile population and resource wealth, and for many years Westerners believed it. That is why, as David Smith observed, Westerners initially worked within the dominant parties to get their interests acknowledged. Then they tried third parties – Social Credit, the CCF, the Progressives, Reform. Westerners have engaged with every party under the sun and deployed strategies from balance-of-power to disruption. None of them worked.¹³

The reason is simple: Laurentian Canada has *never* seen the West as part of a federation. The Canadian federation, so far as they are concerned, is made up (as was implied by *all* the Laurentian journalists cited in the previous section) of Ontario and Quebec. The Maritime provinces were sidelined during the nineteenth century within a generation of Confederation. Newfoundland managed to hold out until 1949. The important thing to notice is that the West was never considered part of the deal. So what were we?

For an initial hint, consider the Latin motto on the Canadian coat of arms: *a mari usque ad mare*. The text is from the Vulgate translation of Psalm 72:8. It does not include the rest of the verse: *et a flumine usque ad terminos terrae*, nor does it contain the opening words, *et dominabitur*. The King James version translates the entire verse: “He shall have dominion also from sea to sea, and from the river unto the ends of the earth.” The Latin *dominium* and related words referred to a territory that was mastered and was used in its English form by the British to refer to their colonies and possessions. Before the American Revolution the colonies were often referred to as the Dominion of New England.

When, out of fear of offending the United States, the British Foreign Office objected to the name Kingdom of Canada, which the Canadian colonials preferred, Sir Leonard Tilley of New Brunswick suggested the term Dominion. It has remained the formal title of the country ever since though it is hardly used today. More interesting for present purposes are the additional implications: the Canadian Dominion shall extend from the river to the ends of the earth. There is no question that the river is the St. Lawrence and the contemporary West is their *terminos terrae*, the ends of the earth, excluded from Confederation in order to be dominated by it. Hence the expression “out” West.

When the ends of the earth were transferred from the Imperial Crown to the Crown in right of Canada – and it is important to remember that Rupert’s Land and the Northwest and Northeast Territories were *not* purchased by Canada from the Hudson’s Bay Company the way the Americans purchased Alaska from Russia – the Northeast Territories were given to Quebec and some of Rupert’s Land was given to Ontario.¹⁴ The rest was administered from Ottawa “for the purposes of the Dominion.” It is important for understanding the current relations between the West and Laurentian Canada to recall that 180 years ago Canadians were oblivious of the fact that the inhabitants of Rupert’s Land and the Northwest constituted a distinct society.

However, contemporary historians of Rupert’s Land and of the “distinctive regional way of life” achieved by the fur-trade society that lived there have recalled for contemporary Westerners as well as Laurentian Canadians that a sense of distinctiveness was central to the inhabitants of the contemporary West whatever their nineteenth-century ethnic composition was.¹⁵ For a generation after 1821, with the amalgamation of the Hudson’s Bay Company of London and the Northwest Company of Montreal, Canada showed no interest in Rupert’s Land. As with the New England settlements a century before, this neglect enabled something like a political self-awareness to develop at the Red River Settlement.

When Red River looked towards Canada at all it was in order to find political allies, not because the inhabitants sought to become Canadians. For their part, Canadians – that is, the inhabitants of the old colony of Canada – seem never to have understood this, not in the nineteenth century, not now.

Meantime, the inhabitants of Rupert's Land and the Settlement underwent the more or less futile experience of petitioning Imperial Parliament for redress of such familiar imperial abuses as taxation without representation and rule without consent. In 1845-6 the inhabitants of Red River even petitioned the U.S. Congress for help. In 1861, following yet another unanswered petition to Parliament, the inhabitants raised the possibility of forming a Crown colony at the Settlement. To state only the most obvious and significant consequence: by its failure to attain the status of Crown colony, Red River and the whole of the North-West could never join Confederation. The inhabitants of the Settlement could only be annexed. And in the event, annexed by force of arms. The consequences of the failures of the 1860s constitute an important structural feature of Canadian federalism to this day.

Thus, when Red River was transferred to Canada, neither the Imperial government nor the Canadian government saw any reason to consult the inhabitants of the Settlement. When, in 1869-70 the rebellion, resistance, or insurrection erupted, this showed, in the understated words of W.L. Morton, that "there was . . . little active sentiment for union with Canada."¹⁶ As Ted Morton (no relation to W.L.) has often said, it is unlikely in the extreme that Alberta and Saskatchewan today would join Canada under existing economic circumstances or legal and political conditions. In this respect contemporary critics of the relationship between the West and Laurentian Canada echoed Alexander Kennedy Isbister, a London barrister and opponent of the Company born in Cumberland House, in present-day Saskatchewan: the pretensions of Canada to Rupert's Land and the Northwest degraded his homeland into "a colony of a colony." The inhabitants of Rupert's Land and of Red River were, in contrast, determined to enter Canada, if at all, on their own

terms, as did British Columbia.

So far as the understanding of the West in Laurentian Canada is concerned, where better to look than the founder of Laurentian School of Canadian Historiography, Donald Creighton? The opening words of his first (and to my mind his best) book are worth recalling: "When in the course of a September day in 1759, the British made themselves the real masters of the rock of Quebec, an event of apparently unique importance occurred in the history of Canada."¹⁷ French power in North America collapsed and the basis to achieve the empire indicated by the title of his book was established. As he remarked a few pages later, "The whole West, with all its riches, was the dominion of the river The dream of the commercial empire of the St. Lawrence runs like an obsession through the whole of Canadian history and men followed each other through life, planning and toiling to achieve it."¹⁸ The great problem with empires, whether commercial or political, particularly in the context of British political culture, is that the inhabitants of them tend to look upon themselves as self-governing citizens rather than as quiet subjects fit only to be ruled from lands far away. The British first discovered this with respect to their North American colonies in 1776. Laurentian Canada seems to be discovering the same reality today.¹⁹

As a final contextual citation, consider the words of James R. Mallory, a serious and distinguished political scientist of an earlier generation.²⁰ Jim Mallory taught for many years at McGill, where I knew him briefly. In his contribution to the multi-volume deployment of (mostly Laurentian) intellectual power to the study of Social Credit in Alberta and other untoward Western eruptions such as the Progressive Movement, he wrote a balanced and fair appraisal of *Social Credit and the Federal Power in Canada*.²¹ I first read it as an undergraduate in a course on Canadian federalism directed by Alan Cairns where I came across Mallory's description of the new (1905) provinces of Saskatchewan and Alberta. They "were provinces not in the sense as were Ontario and Quebec, but in the Roman sense." Because Mallory's readers today are unlikely to be

familiar with the implications of the Roman sense of the meaning of "province" a brief elaboration is required. The Latin word, *provincia* carries with it the implication of rule on behalf of (*pro*) the vanquished or conquered (*vincia*). A Roman province, Trans-Alpine Gaul, for example, was a territory where *imperium*, administrative power, was exercised by an agent of Rome, a governor. In addition, unlike the Roman inhabitants of Italy, those of the "provinces" paid tribute – taxes – to the imperial capital. Mallory's meaning therefore was clear: the West was ruled by the new Rome on the Rideau as conquered territory; in return for such a favour, the West was granted the right to pay taxes to Ottawa. Such a deal!

The context of the 2019 election, as interpreted and understood by the Laurentian media is continuous with the historical understanding of Canada's (and Britain's) involvement in the West, which long antedated 1867. The problem for Westerners today is that we see ourselves as part of a federation, not the vanquished members of a Laurentian empire; we see ourselves as living in provinces like Ontario and Quebec, not Roman provinces. We have forgotten that from the start Sir John A. Macdonald referred to the West as a Crown colony, the nineteenth-century British version of a Roman province, or that Isbister warned that the West would soon become "a colony of a colony." Stupid us.

Part 3. Challenges to Western Independence

Having sketched the enduring context for Western political action, the challenges or obstacles to independence can be specified easily enough.

In the *Declaration of Independence* the authors acknowledge that “all experience hath shown that mankind are more disposed to suffer, which evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed.” Such is certainly the position of contemporary Western politicians. On October 26, 2019, Brad Wall wrote an op-ed in the *National Post* setting out his views for a “new federal deal with the prairies.” That is, a new deal between Laurentian Canada and the West. He drew attention to Justin Trudeau’s post-election words in favour of reconciliation, which he characterized as “nice.” Wall suggested it would be a good idea to have Western representatives in cabinet, but he also pointed out that when there actually *were* Western cabinet ministers, such as the “formidable” Ralph Goodale, they were members of a government that brought us to the present situation of endlessly sufferable evils: no Northern Gateway, no KXL, no TMX, the disastrous attacks embodied in C-69 and C-48, all of which injuries and abuses are quite familiar. Wall concluded by suggesting that this time, Canada might be serious in its desire for “reconciliation.” He gave no reason why Canada might desire reconciliation nor any evidence that Canada had entertained such a notion, not recently, not ever.

A second example of a politician endorsing sufferable evil is, of course, Premier Kenney. In response to a letter from Peter Downing, founder of Wexit Canada, which urged the premier to introduce legislation to hold a referendum on independence from Canada, Kenney said: “We should not let Justin Trudeau and his policies make us feel unwelcome in our own country ... I’m not going to let Trudeau push me out of my country.”²² As with Brad Wall, Premier Kenney apparently believes Canada will eventually be persuaded to give Alberta a “Fair Deal.” That at least is the premise of the “Fair Deal Panel” tasked with “consulting Albertans on strategies to secure

a fair deal in the Canadian federation,”²³ and the trip of the “Fair Deal” delegation to Ottawa in mid-December 2019. As with Wall’s op-ed, Kenney gave no arguments as to why Canada would be interested in a genuine fair deal nor did he provide evidence that such a notion had ever crossed the minds of Canadian politicians and bureaucrats.

A third example is Scott Moe, Premier of Saskatchewan. Despite a meeting with Justin Trudeau where the Prime Minister provided, in Moe’s words, “more of the same,” namely nothing, not on the carbon tax, equalization restructuring, or promoting market access for Western resources. Moe nevertheless declared that independence is not “the way forward.”²⁴ As with Premier Kenney, his was an *ex cathedra* pronouncement, not a plausible argument.

Consider these remarks together: with all due respect to former premier Wall, his is nought but wishful thinking. There is zero possibility of a new deal with Canada. As for Premiers Kenney and Moe, they are cautious politicians, not risk-taking incendiaries or even reforming statesmen. Ralph Klein used to joke that politicians like to see which way the parade is going so as to take up a position at the head of the line – and look over their shoulders to see they are still being followed. This may not be an edifying spectacle, but it does mean that if the parade gets large enough the two premiers will seek the front rows and pretend to lead. Nevertheless, the first obstacle to independence is that, to use the language of the *Declaration*, the “long train of abuses and usurpations, pursuing invariably the same object” has not yet persuaded these two political individuals to abolish the evidently adverse political forms to which they are accustomed. To Laurentian Canada and Alberta alike, the Fair Deal Panel looks like a timid effort at postponing action.

The real question facing Western politicians is actually quite plain and simple: how much more abuse will it take to persuade Westerners that serious action is required? How many times must polite petitions be answered with repeated injuries?

As in eighteenth-century America, so in twenty-first century Canada, these are not theoretical issues but practical ones. Westerners will determine in practice what the outcome will be.

If the first and, in my opinion, the major obstacle to independence is therefore clearly political, there are also a number of minor and merely legal ones that can be discussed in a more summary fashion. I will endeavour to show that these so-called legal problems and obstacles are really political as well.

In recent weeks, as Gary Mason reported with evident disdain, there has been considerable discussion of resurrecting the policies outlined in the "Firewall Letter" or "Alberta Agenda" first articulated in early 2001.²⁵ At the Alberta United Conservative Party convention in late November, 2019, a series of straw votes endorsed several of these proposals and Premier Kenney has indicated he was interested particularly in withdrawing from the Canada Pension Plan. Withdrawing from CPP was a no-brainer in 2001 and it remains so today. In 1966, under S.94A of the *Constitution Act, 1867*, Quebec established its own pension plan. With a relatively young population, higher than average wages, and greater participation in the workforce than the Canadian average, Alberta could provide the same benefits to pensioners with lower premiums to contributors. And it would hurt the rest of the country. And to be clear, that is precisely the idea: to inflict a little pain on Canada, and especially on Ottawa.²⁶ The same effect would follow from leaving the Employment Insurance scheme. Leaving the supply-management of milk and milk products would target Quebec, which supplies Alberta and Saskatchewan with inordinate amounts of expensive and inefficiently produced milk and milk products. Alberta and Saskatchewan could also immediately give notice to the RCMP that their contracts would expire in two years and announce to Canada that they would be replaced with a new Northwest Mounted Police.

More serious changes would involve court challenges and perhaps even constitutional amendments. These are obviously significant obstacles, but they are also political, not legal or constitutional ones. And always in the background is the real possibility

of independence. It goes (almost) without saying that, for Westerners independence is *not* a bargaining position. As with the Thirteen Colonies, the serious consideration of independence entails some additional and existential political measures, as we shall see.

Several groups have urged Premier Kenney, perhaps in conjunction with Premier Moe, to hold a referendum on the need to amend s.36.2 of the *Constitution Act, 1982*, which governs equalization payments. There are several constituent-elements to this proposal that need to be distinguished. Referenda are not unknown in Canada but they, like another populist measure, the Initiative, are rare and the language involved must be crafted with care.

In the first place, however, s.36 is about as far from the black-letter law of the Constitution as one can get. It is a statement of commitment by the several governments to promote "equal opportunities," to further "economic development," to reduce "disparities in opportunities" and to provide public services "of reasonable quality to all Canadians." On the basis of such desiderata Parliament is committed "to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation" (*Constitution Act, 1982*, s.36). Section 36.1 speaks of the well-being of Canadians, which seems to imply that individual *citizens* would benefit from the promotion of opportunities and so on; section 36.2, however, speaks of recipient provincial governments getting revenue to provide public services. The connection between individual opportunities and government-to-government transfers is never discussed or accounted for. Accordingly, several analysts have observed that it may easily happen that income may be taxed from poor citizens in wealthy provinces such as Alberta and Saskatchewan to pay for services in poor provinces such as Newfoundland and Quebec to benefit the rich citizens of those provinces.²⁷ Finn Porschmann found in 1997, for example, that an Alberta family making between \$30K and \$40K

contributed 9 percent of their income to federal programs but a family in Newfoundland making over \$100K *received* benefits equal to 1.2 percent of their income.²⁸

Section 36.2 on its own is a tissue of ambiguities. The several governments are committed to the “principle” of equalization payments but nothing is said about the actual practice. Nor is the meaning of a “reasonable” or “comparable” level of public services or taxation defined or discussed. If Alberta has a lower level of taxation than other provinces does this imply that Alberta should have higher taxes or the other provinces have lower ones? The question practically answers itself, which is why equalization has been called a welfare trap for provinces.²⁹ For these reasons alone legal scholars (to say nothing of ordinary common sense) have reached a rare consensus that s.36 is non-justiciable. That is, in the view of these experts, no court can legitimately determine that s.36 imposes any obligations on any of the governments that have pledged their “commitments.”³⁰ This means that the actual working out of equalization is entirely political. The law of the constitution is simply irrelevant. In the language of the *Declaration of Independence*, how can this be anything other than a usurpation? In this instance, it is a usurpation of the foundational principle of what we now call responsible government. Since the days of the First British Empire and, for example, the representative institutions of 1619 Virginia, the problem has always involved limiting executive power and especially instituting financial controls over the executive.

Simply raising the foundational question of responsible government introduces another question of principle: from where did the central government gain the constitutional authority to collect federal revenues and give them to the provinces? Of course, under s.91 of the *Constitution Act, 1867*, the central government can *raise* “money by any mode or system of taxation” but whether Ottawa can *spend* money as it sees fit is a distinct question that once received a distinct answer. In the *Unemployment Insurance Reference* of 1937, the Judicial Committee of the Privy Council observed that “it by no means follows” from the power to raise money by any mode of

taxation “that any legislation which disposes of it [money] is necessarily within Dominion competence.” Accordingly, federal expenditures made in areas of provincial jurisdiction under s.92 of the *Constitution Act, 1867*, were prohibited.³¹

Apart from the explicitly limited and very specific provisions of s. 118 of the *Constitution Act, 1867*, what has come to be called the federal spending power was clearly circumscribed. Nothing was changed by the amendment to s.118 in the *Constitution Act, 1907*.³² The point, very simply, is this: given that the expression “spending power” does not occur in any judicial decision or statute,³³ and given that the *only* jurisprudence in defence of the spending power is the very odd view of Frank Scott that the Royal Prerogative under the common law does not prohibit “generosity” nor the giving of gifts to real and legal persons, including provinces.³⁴ The fact that the legality of the equalization clause depends for its constitutional validity on the legality of the spending power, would it not seem imperative to litigate the legality of *that* power?³⁵ It is practically self-evident to the taxpayers of Alberta and Saskatchewan that the equalization or transfer payments formula and program are unjust. Indeed, equalization is a major element in the long train of abuses that sustains the current support for independence. If the current equalization program is also beyond the jurisdiction of Ottawa, its inclusion in the *Constitution Act, 1982*, was invalid. Unless the unconstitutionality of s.36 of the *Constitution Act, 1982*, is acknowledged, its questionable continuation in force and effect will simply make independence more attractive. Once again, therefore, we are dealing with questions of politics and political leadership, not constitutional law. In fact, the whole problem is political, all the way down.

The argument has occasionally been made that the *Clarity Act* might be enlisted on behalf of Alberta and Saskatchewan to challenge s.36 of the *Constitution Act, 1982*. The theory is that, under the terms of the *Clarity Act*, a clear majority on a clear question would oblige the Government of Canada to engage in good faith negotiations regarding amendments to the Constitution. However, the *Clarity Act* was passed as a specific response to the

1998 secession reference to the Supreme Court of Canada and the content of the *Act* was based on the question of the secession of Quebec, which would require a constitutional amendment. Let us first look upstream to the *Reference re Secession of Quebec*.³⁶ The Supreme Court of Canada was given three questions to decide, only the first of which bears on the present issue: can the Quebec National Assembly effect unilateral secession from Canada? The short answer is “no,” but the Court’s reasoning was more interesting than their answer. The first question contemplates “a clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada.” Such an expression of the popular will is required in a democratic system of government, the Court said. Such a government, they went on, must consider “dissenting voices” and seek to acknowledge those voices “in the laws by which all the community must live” (¶68).

The *Constitution Act, 1982*, gives expression to this democratic principle “by conferring a right to initiate constitutional change on each participant in Confederation.” That is, each province, including Alberta and the central government, can initiate constitutional change, including secession as well as to provisions of s.36 of the *Constitution Act, 1982* (¶ 69). To be clear: the reference decision applied to all provinces, not just Quebec, and it covered all constitutional issues, not just secession. Paragraph 69 was confirmed in Paragraph 85.

Later in the decision, the Court wrote that a clear majority on a clear question “dictates that the clear repudiation of the existing constitutional order,” including secession, “would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire.” This ability to initiate the process of constitutional amendment “is the responsibility of democratically elected representatives of the participants in Confederation,” which once again, is to say the provincial and national governments. “The corollary of a legitimate attempt by one participant in Confederation to seek amendments to the Constitution is an obligation on all parties to come to the negotiating table” (¶ 88).

The Court’s decision looks to be pretty clear. However, they also said that it was up to “political actors” to determine what constituted a clear majority on a clear question. The courts thus have no “supervisory role” in that political negotiation (¶ 100). The *Clarity Act* was supposed to provide some guidance in these matters. It did not, however, discuss amendments to any other parts of the Constitution except amendments dealing with secession. As a result, the *Clarity Act* does not provide a legal mechanism by which Alberta and Saskatchewan, even after putting to a referendum vote their desire to amend s.36, might oblige the other provinces and Ottawa to negotiate. Moreover, since the actual terms of the formula used to calculate payments have changed over the years, the argument would be made by Ottawa and the recipient or “have-not” provinces that no constitutional issues are involved anyhow. One might anticipate that Ottawa and the have-not provinces would be joined by Ontario – all in the name of “national unity, of course.

On the other hand, if a referendum on s.36 were linked to a referendum on secession in the (likely) event that initial negotiations regarding the equalization formula went nowhere, we can easily anticipate further political complications. Let us make a couple of simplifying assumptions: if there were no meaningful negotiations to change s.36 within a relatively short period, say three months, a second referendum, on secession, might be held. Such a constitutional two-step would be rather complex, but the threat of secession might be sufficient to inspire some serious negotiation for changes in the funding formula or even the spending power, which sustains it. Again, much would depend on the political leadership of Alberta and Saskatchewan and, while modifying the formula or amending or repealing s.36 might go some distance to restoring a sense of justice in the West, it would obviously not meet the requirement of independence.

Even if a referendum on independence were held, either in connection with an equalization referendum or not, there are further obstacles to consider. The first is that, under the *Clarity Act*, the House of Commons, not the province or provinces holding the referendum, decides *before*

the referendum whether the question is clear. The House of Commons also decides, *after* the vote on a notionally clear question had been held, whether there was a clear majority in favour of secession. Whatever the vote and whatever the question, and however clear the question and the vote may be to common-sense or to the voters, the House can always “deem” things to be otherwise. Moreover, the Government of Canada can disallow or reserve *any* provincial legislation. That disallowance and reservation have not been used since 1943 and 1961 respectively suggests only that *by convention* these provisions of the Constitution are no longer in force and effect. It may be politically unwise for the Government of Canada to disallow a referendum on equalization, particularly if it were coupled to another referendum on secession, but that would be a political choice not a question of legal capacity. So: what then?

Then all bets are off because it would be clear as can be that the legal path to independence is a fraud. If Alberta and Saskatchewan and, for the sake of the argument, Manitoba as well, held referenda anyway they would be illegal and Canada would have no duty to negotiate. Such an impasse reinforces the contention made several times already that the problem of Western independence is political, not legal. So let us propose the following hypothetical: following an intensive and effective educational campaign detailing the long train of abuses suffered by the West, Alberta and Saskatchewan vote overwhelmingly (say, 95 percent) in favour of a straightforward question: do you wish Alberta and Saskatchewan (and perhaps other parts of the existing country of Canada) to be independent of Canada? Then what?

Let us be clear: this is uncharted territory and these observations are both speculative and hypothetical. The major assumption is that, for reasons already outlined, Canada will not negotiate any significant changes, either negative ones, such as changes to equalization, or positive ones that would encourage resource development, such as pipeline construction, withdrawal from the Paris climate accords, and so on. Under such circumstances, let us then consult Niccolo Machiavelli, the greatest

modern political philosopher. One of his still pertinent observations, which was echoed in the *Declaration of Independence*, is that the experience of lengthy injustices by necessity leads to political action. More to the present point, in Chapter 12 of *The Prince* he argued that good arms make for good laws. This is the existential question alluded to above: where are our arms? Not in the Edmonton Garrison or the Alberta Sheriffs. In the absence of any agreement on how to divide the Canadian Forces along the lines contemplated with regard to Quebec secession, it is evident that the great weakness of the West is its lack of an army. This means that if Westerners are serious about independence we must have American assistance for the same reason that the Thirteen Colonies required the assistance of France. The implications of this Machiavellian necessity are significant. From the oil sands as a strategic North American petroleum reserve to the use of the third largest air base in the world at Cold Lake, Alberta, Westerners certainly have military bargaining chips to offer the Americans. Why wouldn't we?

The penultimate paragraph of the *Declaration of Independence* recalls how often the Colonies had warned their “British brethren” against their extension of unwarrantable jurisdiction by Parliament. The colonists had by 1776 often appealed to the “native justice and magnanimity” no less than the anticipated pain of disrupting the close connections across the North Atlantic, but always to no avail. Since before the Confederation of Canada, Westerners have done the same regarding their imperial masters in London and then in Ottawa. Westerners may yet await their own Thomas Jefferson, George Washington, or James Madison, and there can be no guarantee that one such will arrive. On the other hand, as the alternatives to independence are, by anticipation, successively forestalled by Laurentian Canada, the likelihood increases that Westerners will not resign themselves to the endless experience of “sufferable evils.” It seems to me that one way or another, the windows of opportunity to avoid the acceleration of sentiments in favour of independence are, one by one, shutting. 

ENDNOTES

1. See <https://globalnews.ca/news/4925521/western-canada-party-angus-reid-poll/>.
2. See <https://theglobeandmail.com/business/commentary/article-how-alberta-will-pay-the-price-for-its-vote>.
3. See <https://theglobeandmail.com/Canada/Toronto/article-get-used-to-it-toronto-is-the-key-to-winning>.
4. For the first time since records have been kept, 1949, the U.S. became a net exporter of petroleum in September, 2019. See Stephen Cunningham, "U.S. Posts First Full Month as a Petroleum Exporter," *Financial Post*, 30 November, 2019, FP13.
5. See <https://www.nationalpost.com/news/politics/election2019/andrew-coyne-sorry-albertchewan-cabinet-ministers-are-supposed-to-be-elected-not-selected>.
6. See <https://www.theglobeandmail.com/opinion/article-jason-kenneys-dangerous-power-play>.
7. Gary Mason, "Why Talk of Separatism is Hurting Alberta," *The Globe and Mail*, December 6, 2019, A15.
8. See <https://www.calgaryherald.com/opinion/columnists/morton-its-time-for-albertas-revolutionary-boston-tea-party-moment>.
9. See David. J. Bercuson and Barry Cooper, *Deconfederation: Canada without Quebec*, (Toronto, Key Porter, 1991).
10. Maura Forrester, "Clash of Alberta and Quebec," *National Post*, (14 November 2019), p.1.
11. Clark, "Kenney Should Not Attack Quebec for Blanchet's Remarks," *The Globe and Mail*, 15 November, 2019, A6. A few weeks later, the equally sophisticated Konrad Yakabuski chastised Manitoba premier Brian Pallister for his "unhelpful role in national affairs" for taking out ads in Quebec newspapers criticizing Bill 21. "Good Job, Brian Pallister: You've Only Make Bill 21 Even More Popular in Quebec," *Globe and Mail*, 5 December, 2019, A15.
12. Braid, "Alberta Premier Shouldn't Take Bloc Quebecois Bait," *Calgary Herald*, 19 November, 2019, A1.
13. David E. Smith, "A Comparison of Prairie Political Movements in Saskatchewan and Alberta," *Journal of Canadian Studies* 4:1 (1969) 17-25.
14. For a discussion of the details of the transfer and of the several legal ambiguities of the Hudson's Bay Company Charter, see Barry Cooper, *Alexander Kennedy Isbister: A Respectable Critic of the Honourable Company*, (Ottawa, Carleton University Press, 1988), ch. 7, "The Charter Challenged," pp.175-202.
15. See Sylvia van Kirk, *Many Tender Ties: Women in Fur-Trade Society, 1670-1870*, (Winnipeg, Watson and Dwyer, 1980) 2.
16. Morton, "Introduction," to *Alexander Begg's Red River Journal*, (Toronto, Champlain Society, 1956), 12.
17. Creighton, *The Commercial Empire of the St. Lawrence, 1760-1850*, (Toronto, The Ryerson Press, 1937), 1.
18. Creighton, *The Commercial Empire*, 6-7.
19. I have discussed the political evolution of the West and the parallels with the Thirteen Colonies during the eighteenth century in *It's the Regime, Stupid! A Report from the Cowboy West on Why Stephen Harper Matters* (Toronto, Key Porter, 2009), ch. 3.
20. See David. E. Smith, "James R. Mallory: His Legacy," *Canadian Journal of Political Science*, 37 (2004) 715-29.
21. Toronto, University of Toronto Press, 1954.
22. Allison Bench, "Hundreds Gather for Wexit Rally in Edmonton as Group's Leader Pens Letter to Jason Kenney," *Global News*, 2 November, 2019.
23. See <https://www.alberta.ca/fair-deal-panel.aspx>.
24. Arthur White-Crummey, "Separatism Not the Answer, says Moe, While Refusing to Denounce Views [on independence]" *Regina Leader-Post*, 13 November, 2019. See also Brendan Ellis, "'No Opportunities for Any Benefits': Premier Moe Curbs Separatism Speculation," CTV News, 26 November, 2019. Available at: <https://regina.ctvnews.ca/no-opportunities-for-any0benefits-premier-moe-curbs-separatism-speculation-/4703477>.
25. See Tom Flanagan, "The Return of the Alberta Agenda" *C2C*, 22 November 2019. See also Mark Milke, "Firewall Fantasies" available at markmilke.com. 1 December 2019.
26. See Niels Veldhuis and Jason Clemens, "How Alberta Can Make Ottawa Feel the Pain," *National Post*, 25 October, 2019, A8.
27. See Peter W. Hogg. *Constitutional Law of Canada*, 3rd Edition, (Toronto, Carswell, 1992) ch. 6.6; Dan Usha, *The Uneasy Case for Equalization Payments*, (Vancouver, The Fraser Institute, 1995).
28. *Where the Money Goes: The Distribution of Taxes and Benefits in Canada*, (Toronto, C.D. Howe Institute, 1998) Commentary No. 105. That is, a moderate-income family in Alberta contributes around \$6,500 a year whereas a wealthy family in Newfoundland receives around \$1,200. How can normal people support such a perverse policy is a mystery to many Westerners. Does it even make sense to Laurentians?
29. See Cooper, *It's the Regime, Stupid!*, 177.
30. See: Dale Gibson, "The Canada Health Act and the Constitution," *Health Law Journal*, 4 (1996) 1-33; Hogg, *Constitutional Law of Canada*, ch. 6.6; Lorne Sossin, "Salvaging the Welfare State? The Prospects for Judicial Review of the Canada Health and Social Transfer," *Dalhousie Law Journal*, 21 (1998), 141-98.

31. See also the remarks of Pierre-Elliott Trudeau (of all people), *Federalism and the French-Canadians*, (Toronto, Macmillan, 1968), 81.
32. See Cooper, *It's the Regime, Stupid!*, ch.5 and Burton H. Kellock and Sylvia Le Roy, *Questioning the Legality of Equalization*, (Vancouver, The Fraser Institute, 2006), 12-18.
33. E.A. Driedeger, "The Spending Power," *Queen's Law Journal*, 7 (1981), 124.
34. Scott, "The Constitutional Background of Taxation Agreements," *McGill Law Journal*, 2 (1955) 1-10. I have discussed this opinion at length in *It's the Regime, Stupid!*, 186-9. See also Andrew Petter, "Federalism and the Myth of the Federal Spending Power," *Canadian Bar Review*, 68 (1989), 448-79.
35. Alternatively, if the *Constitution Act, 1982*, is, as a whole, a valid constitutional amendment, then it effectively may have overturned the 1937 JCPC decision, at least with respect to equalization. It would not, however, change the questionable constitutional status of the health and social transfers nor federal spending in areas of provincial jurisdiction such as education. So far as I know, there was no discussion of the spending power with regard to s. 36 during the mega-constitutional negotiations leading to the final text of the *Constitution Act, 1982*. I have benefited greatly from an email exchange on this question with Rainer Knopff.
36. [1998] 2 SCR 217. References are to paragraphs in this decision and are given in the text.

