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Compact is Back: The Supreme Court of Canada's Revival of the Compact Theory of Confederation

Sébastien Grammond

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Abstract

The compact theory of Canadian Confederation is the idea that the Constitution is the product of a political agreement (or "compact") among the country's constitutive parts. Although the theory has been widely criticized, this article shows how the theory has recently been used by the Supreme Court of Canada to explain the origins of certain parts of the Constitution and to guide its interpretation, in particular in cases involving constitutional amendment and indigenous rights. It then discusses how the Court dealt with instances where one party's consent to a foundational compact was vitiated or altogether lacking, and whether the Court's use of compact theory gives rise to the objection that it is an originalist method of interpreting the Constitution.

Keywords

Constitutional law; Canada. Supreme Court; Canada

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Compact is Back: The Supreme Court of Canada's Revival of the Compact Theory of Confederation

SÉBASTIEN GRAMMOND*

The compact theory of Canadian Confederation is the idea that the Constitution is the product of a political agreement (or "compact") among the country's constitutive parts. Although the theory has been widely criticized, this article shows how the theory has recently been used by the Supreme Court of Canada to explain the origins of certain parts of the Constitution and to guide its interpretation, in particular in cases involving constitutional amendment and indigenous rights. It then discusses how the Court dealt with instances where one party's consent to a foundational compact was vitiated or altogether lacking, and whether the Court's use of compact theory gives rise to the objection that it is an originalist method of interpreting the Constitution.

Selon la théorie du pacte fédéral, la Confédération canadienne est le produit d'une entente politique (un pacte) entre les éléments constitutifs du pays. Même si cette théorie a fait l'objet de nombreuses critiques, cet article démontre que la Cour suprême du Canada l'a récemment utilisée pour expliquer l'origine de certains volets de la constitution et pour guider son interprétation, particulièrement dans des cas où il est question d'amendements constitutionnels et des droits des Autochtones. Il discute ensuite la manière dont la Cour a traité certains cas où le consentement d'une des parties à un pacte fondateur était vicié ou tout bonnement absent, et se demande si l'usage par la Cour de la théorie du pacte fédéral ouvre le flanc à l'objection qu'il s'agit là d'une façon originaliste d'interpréter la constitution canadienne.

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THE COMPACT THEORY OF CONFEDERATION was long ago pronounced dead by generations of Canadian political scientists and historians. Yet the substance of this theory underpins several recent decisions of the Supreme Court of Canada (SCC) as an explanation of the origins of the Canadian Constitution and a guide to its interpretation—although they do not explicitly use the word “compact.” Has something gone wrong in these decisions? Or is compact theory more robust than its detractors are prepared to admit? This article will show that critics of compact theory misapprehended the connections between the theory’s factual underpinnings and its normative force. To say that Confederation was not a legal contract or an international treaty misses the mark. In recent SCC cases, the concept of compact is used metaphorically, and once this is understood, the role it can play in interpreting the Constitution according to modern interpretive methods becomes clearer.

I will begin by explaining what is meant by the compact theory, highlighting its descriptive and normative dimensions, and tracing its emergence and how it became the target of criticism as the dominant narrative of Confederation. I will then analyze how compact-based concepts, language, and reasoning figure prominently in recent SCC cases dealing with constitutional amendment and indigenous rights. Next, I will highlight how the Court has dealt with instances where one party’s consent to a foundational compact was vitiated or altogether lacking. In the end, I will discuss whether the SCC’s use of compact theory gives rise to the objection that it is an originalist method of interpreting the Constitution.

I. COMPACT THEORY: DEFINED, APPLIED, AND CRITICIZED

A. WHAT IS COMPACT THEORY?

Compact theory is simply the idea that political authority in a given country derives from an agreement, or compact, between the country's constitutive parts. It assumes that the country results from the coalescence of pre-existing political units or groups through a consensual process. This theory is not a new idea.¹ James Tully showed that mutual recognition, continuity, and consent have historically been the guiding principles of political relationships between diverse groups. He suggests that these principles are still relevant today: "Popular sovereignty in culturally diverse societies appears to require that the people reach agreement on a constitution by means of an intercultural dialogue in which their culturally distinct ways of speaking and acting are mutually recognised."²

Compact theory has both descriptive and normative dimensions. As a description of reality, it seeks to offer a simplification of the complex political processes that preceded the birth of a new political association. In the absence of a solemn agreement that is easily recognizable by everyone, to say that a country is based on a compact is to try to distil the dominant character of the political events at its inception and to conclude that it is, in substance if not in form, an agreement between the relevant political forces. This compact may take various forms. For example, democratic transitions in other countries have often been made possible by an explicit or tacit agreement between opposing factions that provides for the sharing of power or for certain guarantees for the outgoing rulers. We will focus here, however, on the application of compact theory to federal systems. As one Canadian court once noted, "The quintessence of a federation is such that in arriving at a consensus respecting the character of the country and the form and content of its Constitution there are inevitably negotiations between representatives of the different entities making up the federation."³

Compact theory may also bear a normative dimension. Accounts of a country's founding moments are deployed to give legitimacy to its constitution—that is, to provide reasons why citizens should adhere to the political regime created by the constitution and to help to understand the rationale of certain parts of the constitution. Based on the intuitive moral premise that one should

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1. Alain-G Gagnon, *Minority Nations in the Age of Uncertainty: New Paths to National Emancipation and Empowerment* (Toronto: University of Toronto Press, 2014) [Gagnon, *Minority Nations*].
 2. James Tully, *Strange Multiplicity* (Cambridge: Cambridge University Press, 1995) at 29.
 3. *Hogan v Newfoundland (Attorney General)*, 2000 NFCA 12 at para 54, 183 DLR (4th) 225.

keep one's promises, the theory provides a strong justification for requiring all parties to the original compact to comply with its basic terms. Those terms may include, in particular, the principle of federalism; the continuing existence of the political units that entered into the compact; a procedure for amending the initial compact; and the protection of minorities. They may also include norms of loyalty⁴ or the idea, prevalent in indigenous treaty-making traditions, that the compact must be periodically renewed.⁵

In this normative sense, compact theories play a role akin to theories of "popular sovereignty"—the idea that the state's powers are derived from the consent of the people. This idea may be inaccurate as a historical matter, however. In Canada, for example, "the people" never formally consented to the Constitution, in a referendum or otherwise. Nevertheless, the idea that the people are the ultimate source of legitimacy has become deeply entrenched as a political norm, even though it is not reflected in constitutional law. This is why, for example, politicians will comply with the results of a referendum, even though referenda are not legally binding.

One might think that compact theory is opposed to popular sovereignty, as they point to potentially conflicting sources of legitimacy. Yet the two may be combined to enhance a constitution's legitimacy, as the Australian example shows. In that country, the Constitution may only be amended through a referendum in which a majority of electors in a majority of states vote in favour of the proposed amendment.⁶ Thus, a nationwide majority, while necessary, is not sufficient. The formula ensures that there is enough support among the federation's constitutive units. The two theories may be in tension, however, where popular sovereignty is invoked to override the need to obtain the consent of the constitutive units.

In assessing compact theory, we must be mindful that all theories are simplifications of reality. Theories are tools to see regularities or meaningful relationships in a complex and often inconsistent set of facts. Especially in the field of human behaviour, theories must be judged on their usefulness in comprehending a complex situation, not on the total absence of contradictory evidence. Moreover, where a theory has a normative aspect, one must not forget that there is no automatic deduction from facts to normative propositions.

4. Gagnon, *Minority Nations*, *supra* note 1.

5. Robert A Williams, *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600–1800* (New York: Routledge, 1999) [Williams, *Linking Arms*].

6. *Commonwealth of Australia Constitution Act* (Cth), s 128, online: <http://www.austlii.edu.au/au/legis/cth/consol_act/coaca430/s128.html>.

Thus, disagreement about certain normative consequences does not disprove a theory altogether.

B. COMPACT IN CANADA

The idea of a compact as a foundational concept of the Canadian polity has deep roots that reach to the conquest of French Canada by Great Britain.⁷ When the British accepted the capitulation of Montreal, they guaranteed the free exercise of the Catholic faith. After Great Britain's initial hesitation, the enactment of the *Quebec Act, 1774* guaranteed the rights of Catholics and the maintenance of the civil law, two issues of major importance for French Canadians. Throughout the first century of British rule, French Canadians were able to resist attempts at assimilation and to assert themselves as a political unit that would not allow itself to be dissolved in a larger polity. The English-speaking part of the population came, perhaps reluctantly, to accept this fact, for example when restoring the official status of the French language in 1848. This led to a tacit agreement to the effect that French Canadians would retain their social and political distinctiveness and would not merge or assimilate into a wider British North American (or later, Canadian) polity.

Meanwhile, the advent of responsible government in the British colonies solidified the perception that each colony formed a political unit independent, in some respects, from the Imperial authorities. Some authors argue that over the course of the nineteenth century, a constitutional convention developed whereby the Westminster Parliament would not enact a new constitution for a colony without that colony's consent.⁸ The relationship between the colony and the Imperial government was also described by the idea of compact, in particular, in Upper Canada.⁹

Thus, the Constitution of 1867 was the result of negotiations between the existing colonies. In that process, Upper and Lower Canada acted as separate units, as it was by then widely accepted that their union in 1840 had been a failure. The main actors of this process described their endeavour in contractual

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7. George FG Stanley, "Act or Pact? Another Look at Confederation" (1956) 35:1 Rep Ann Meeting Can Hist Association 1 [Stanley, "Act or Pact"].
 8. Kenneth C Wheare, *The Statute of Westminster and Dominion Status*, 5th ed. (Oxford: Oxford University Press, 1953) at 80-81; Peter H Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* 2d ed (Toronto: University of Toronto Press, 1993) at 20 [Russell, *Constitutional Odyssey*]; Jacques-Yvan Morin & José Woehrling, *Les constitutions du Canada et du Québec du régime français à nos jours* (Montreal: Thémis, 1992) at 376.
 9. Paul Romney, "Provincial Equality, Special Status and the Compact Theory of Canadian Confederation" (1999) 32:1 Can J Pol Sci 21 [Romney, "Provincial Equality"].

terms, such as “compact” or “treaty.”¹⁰ The preamble to the *Constitution Act, 1867* specifically mentions that the colonies concerned had expressed a “[d]esire to be federally united,”¹¹ and section 145 expressed an “[a]greement” that the construction of a railway was necessary to the success of the union, and that it was essential to “the [a]ssent ... of Nova Scotia and New Brunswick” to the union.¹² Moreover, London did not force those colonies that did not consent to enter into the union, and Newfoundland remained a separate colony until 1949. Thus, it is understandable that the idea of compact became the dominant explanation of the Canadian federation for at least the first half-century of its existence.¹³ Over the years, Prime Ministers Macdonald, Laurier, Borden, Meighen, King, and Bennett all referred to Confederation as a compact, a pact, or a treaty.¹⁴

There have been two main variants of the relevant compact.¹⁵ One understanding is that it involved the colonies (or provinces) that initially joined to form Canada, and possibly provinces that later joined Confederation. However, when issues of language came to the fore, the idea of a compact between linguistic or national groups was also deployed, in particular by Henri Bourassa.¹⁶ As we will see in Part I(C), below, these two views of the founding compact are not necessarily exclusive.

Throughout the period of 1867–1930, approximately, compact theory was mostly used in the political realm. In particular, it became a rallying cry for the defence of provincial rights against Ottawa’s attempts at centralization. Compact theory was mostly invisible in legal discourse, however, as the then prevailing methods of legal interpretation focused on the text itself. Judges did not openly acknowledge recourse to historical context as a guide for the interpretation of the

10. Stanley, “Act or Pact,” *supra* note 7; Richard Arès, *Dossier sur le Pacte fédératif de 1867* (Montréal: Bellarmin, 1967) [Arès, *Dossier*].

11. *Constitution Act, 1867 (UK)*, 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5, Preamble [*Constitution Act, 1867*].

12. *Ibid*, s 145.

13. Ramsay Cook, *Provincial Autonomy, Minority Rights and the Compact Theory, 1867-1921* (Ottawa: Queen’s Printer for Canada, 1969) [Cook, *Provincial Autonomy*].

14. Paul Gérin-Lajoie, *Constitutional Amendment in Canada* (Toronto: University of Toronto Press, 1950) at 292-97 [Gérin-Lajoie, *Constitutional Amendment*]. See also Arès, *Dossier*, *supra* note 10 at 20-21.

15. See *e.g.* François Rocher & Miriam Smith, “Four Dimensions of the Canadian Constitutional Debate” in François Rocher & Miriam Smith, eds, *New Trends in Canadian Federalism* (Peterborough, Ont: Broadview Press, 1995) 45 at 45-56; Robert Schertzer, “Recognition or Imposition? Federalism, National Minorities, and the Supreme Court of Canada” (2008) 14:1 *Nations & Nationalism* 105 [Schertzer, “Recognition or Imposition”].

16. Al Silver, *The French-Canadian Idea of Confederation, 1864–1900* (Toronto: University of Toronto Press, 1982) at 191-94.

legal text. Nevertheless, they occasionally referred to the contractual origins of Confederation, such as in this excerpt from the Privy Council’s decision on the *Regulation and Control of Aeronautics in Canada*:

Inasmuch as the Act embodies a compromise under which the original Provinces agreed to federate, it is important to keep in mind that the preservation of the rights of minorities was a condition on which such minorities entered into the federation, and the foundation upon which the whole structure was subsequently erected. The process of interpretation as the years go on ought not to be allowed to dim or to whittle down the provisions of the original contract upon which the federation was founded, nor is it legitimate that any judicial construction of the provisions of ss. 91 and 92 should impose a new and different contract upon the federating bodies.¹⁷

So far we have concentrated on the relationships between Canada’s founding provinces or its two main language groups. But there is another political relationship that was impregnated with the idea of compact: that between the Crown and indigenous peoples. Since the early days of European colonization, treaties have been made with indigenous peoples in order to make peace, to engage into commerce, or to share land.¹⁸ Upon the British conquest, the *Royal Proclamation* of 1763 reaffirmed the separate political status of “nations or tribes of Indians” and required that treaties be made with them to acquire their lands. This tradition of treaty making continued during the nineteenth century, even after Confederation. To be sure, indigenous peoples were not invited to the negotiations that led to the 1867 Constitution. It would be entirely inconsistent with the facts to suggest that they were a party to the federal compact. Rather, there was a long, parallel tradition of consensual dealings, entirely independent of what took place in Charlottetown, Quebec, and London. In this connection, Brian Slattery notes the parallel

[b]etween the process whereby the provinces entered the federal union, and that whereby Aboriginal peoples became partners in Confederation. In both cases, the Crown usually proceeded by way of negotiation and agreement, a route not without its difficulties and conflicts. In both cases, it made solemn promises in order to secure the other party’s agreement to enter Canada. In both cases, the resulting pact was embodied in fundamental constitutional accords — termed “Constitution Acts” in the case of the provinces, “Treaties” in the case of First Nations.¹⁹

17. *In re The Regulation and Control of Aeronautics in Canada*, [1932] 1 AC 54 at 70 (PC).

18. Williams, *Linking Arms*, *supra* note 5; Sébastien Grammond, *Terms of Coexistence: Indigenous Peoples and Canadian Law*, translated by Jodi Lazare (Toronto: Carswell, 2013) at 50-51 [Grammond, *Terms of Coexistence*].

19. “The Aboriginal Constitution” (2014) 67 Sup Ct L Rev (2d) 319 at 330.

This long history of consensual relationships provides a normative basis for the current revival of the idea that relationships with indigenous peoples should be based on mutual agreement,²⁰ an idea often referred to as “treaty federalism.”²¹

C. COMPACT GOES OUT OF FASHION

Compact theory never went unchallenged. In 1887, a number of provinces held a conference to which the federal government was not invited. The result was a request to the Imperial Parliament to amend the 1867 Constitution without the concurrence of the federal government. London refused to accede to that demand.²² Yet compact theory remained popular, possibly because the 1887 rejection related more to the normative consequences that the provinces sought to deduce from it—namely, to exclude the federal government from the constitutional amending process—than to its factual accuracy.

Despite its factual underpinnings and early dominance in the country’s political life, compact theory became an inconvenient truth from the 1930s on.²³ Two events must be kept in mind when one seeks to understand the tide of criticism levelled against the theory. First, Canada’s gradual accession to independence and the adoption of the *Statute of Westminster* in 1931 brought a sense of urgency to the search for a domestic constitutional amending formula. In that debate, compact theory became associated with a requirement that the Constitution could not be amended without the consent of each province.²⁴ Second, the Great Depression underscored the need for more vigorous state intervention in the economy, a task that the provinces were perceived as unable to undertake. Thus, as many people advocated for greater centralization, compact theory and its insistence on observing the initial distribution of powers came to be seen as an obstacle to progress.

The seminal criticism of the compact theory is found in a paper published in 1931 by Norman Rogers.²⁵ At a time when the adoption of the *Statute of Westminster* brought the issue of an amending formula to the forefront, Rogers understood compact theory to lead to a requirement of unanimous provincial

20. Paul LAH Chartrand, “Indigenous Peoples: Negotiating Constitutional Reconciliation and Legitimacy in Canada” (2011) 19:2 *Waikato L Rev* 14.

21. James [sákéj] Youngblood Henderson, “Empowering Treaty Federalism” (1994) 58:2 *Sask L Rev* 241.

22. Russell, *Constitutional Odyssey*, *supra* note 8 at 40.

23. Romney, “Provincial Equality,” *supra* note 9.

24. Gérin-Lajoie, *Constitutional Amendment*, *supra* note 14 at 249-50.

25. Norman McL Rogers, “The Compact Theory of Confederation” (1931) 9:6 *Can Bar Rev* 395 [Rogers, “Compact Theory”].

consent to any constitutional amendment. That such a rule would, in his view, severely hamper the development of Canada prompted him to mount a fierce attack against the theory, which may be summarized as follows: The alleged parties to the compact or “treaty” had no formal treaty-making power; the establishment of a new federal constitution was within the exclusive purview of the Imperial Parliament, and colonial governments or legislatures could not purport to agree on that matter; the consent of New Brunswick and Nova Scotia was obtained through Imperial pressure; what was in the end approved by the legislatures of those two provinces did not match the Quebec resolutions adopted by the Canadian legislature; and it cannot be said that Alberta, Saskatchewan, and Manitoba were parties to a “compact,” as they were created later by the federal Parliament acting alone. These arguments came to be widely accepted among English-speaking authors.²⁶

At this juncture, an important feature of those criticisms must be highlighted. They were aimed not so much at disputing the existence of the facts underlying the idea of a compact, but rather at attacking the normative consequences flowing from those facts. In doing so, they focused on only two sets of rules that may be used to translate facts into normative consequences, namely, contract law and international law. On this view, the existence of a compact depends on whether the historical facts would lead to the conclusion that a valid contract (or, perhaps, a valid international treaty) had been entered into. Thus, Rogers insisted that the colonies lacked the capacity to enter into a binding agreement.²⁷ He and many others viewed the creation of the Prairie provinces by Parliament as incompatible with the idea that they could be parties to a compact. Scott, on his part, asserted that the two-nations compact and the provincial compact were mutually incompatible.²⁸

The critics, however, never developed a credible competing narrative of the origins of Confederation. The idea that Confederation could be explained as the result of an Imperial statute was purely formal and merely side-stepped the

26. FR Scott, “Areas of Conflict in the Field of Public Law and Policy” (1956–1957) 3:1 McGill LJ 29 [Scott, “Areas of Conflict”]; Donald Creighton, “The Myth of Biculturalism” in Donald Creighton, ed, *Towards the Discovery of Canada: Selected Essays* (Toronto: Macmillan, 1972) 256 at 256–60; Cook, *Provincial Autonomy*, *supra* note 13; Robert MacGregor Dawson, *Dawson’s The Government of Canada*, 6th ed by Norman Ward (Toronto: University of Toronto Press, 1987) at 285–86.

27. Rogers, “Compact Theory,” *supra* note 25 at 400.

28. Scott, “Areas of Conflict,” *supra* note 26 at 34.

question; it was “little more than an antidote to the compact theory.”²⁹ Some of the critics of compact theory were even prepared to admit that there was a ‘moral compact’ at the root of Confederation, although that moral compact was mainly described as an agreement between Anglophones and Francophones, not a compact of founding provinces.³⁰ For example, J.A. Corry said that “[i]t might not be a breach of contract but it would be a breach of faith” to remove provincial jurisdiction over certain matters, which was the basis of French Canadian consent to Confederation.³¹

Compact theory became even more unpopular as the federal government’s official ideology switched from “two nations” to multiculturalism under the leadership of Prime Minister P.E. Trudeau.³² Thus, the SCC’s *Upper House Reference*³³ of 1979 was criticized on the basis that it adopted compact theory in practice, if not in name.³⁴ Two years later, when compact arguments were made in the case concerning the patriation of the Constitution, a majority of the Court expressed serious doubts as to the validity of the compact theory and asserted that it could only operate in the realm of politics and political science, not law.³⁵ In fact, one could say that compact theory had by then been replaced by the “federal principle” as the underlying theory used by the Court to explain the federal aspects of the Canadian Constitution.³⁶ While the federal principle seeks to derive normative content from the abstract idea of federalism itself, it does so in a way that does not draw from Canada’s historical experience and that does not seek to reflect any particular commitments between the country’s constituent parts.

29. Jeremy Webber, *The Constitution of Canada: A Contextual Analysis* (Oxford: Hart Publishing, 2015) at 138 [Webber, *Constitution of Canada*].

30. Norman McL Rogers, “Mr. Ferguson and the Constitution” (1930) 11:122 Can Forum 47 at 49.

31. Gérald Lajoie, *Constitutional Amendment*, *supra* note 14 at 214, citing JA Corry, *Democratic Government and Politics* (Toronto: University of Toronto Press, 1946) at 375-76.

32. Kenneth McRoberts, “Canada and the Multinational State” (2001) 34:4 Can J Pol Sci 683.

33. *Re: Authority of Parliament in Relation to the Upper House*, [1980] 1 SCR 54, 102 DLR (3d) 1.

34. Patrick Monahan, *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (Toronto: Carswell, 1987) at 175-86.

35. *Re Resolution to Amend the Constitution*, [1981] 1 SCR 753 at 803, [1981] SCJ No 58 [*Patriation Reference*]. See also Schertzer, “Recognition or Imposition,” *supra* note 15 at 116.

36. *Patriation Reference* at 905-06. See also Jean-François Gaudreault-DesBiens, “The ‘Principle of Federalism’ and the Legacy of the *Patriation* and *Quebec Veto References*” (2011) 54 Sup Ct L Rev (2d) 77.

Despite the overwhelming tide of criticism, compact theory has remained popular in Quebec, where the compact of provinces and compact of linguistic communities intersect. It has provided a powerful argument to challenge unilateral assertions of power by the federal government. As Gérin-Lajoie presciently explained in 1950:

The so-called separatist movement in Quebec has never secured any general support because the people of the province believe that their association with the other provinces under what is called the Pact of Confederation is workable and advantageous. But should any attempt be made to override this Pact without the consent of Quebec the situation might be different.³⁷

Of course, patriation of the Constitution without Quebec's consent, in 1982, has given rise to an enduring narrative of the broken compact.³⁸ As Peter Russell asserts, this process "broke the bond of trust between French and English Canada that lies at the heart of Confederation."³⁹

During the same period—that is, roughly, 1930-1980—the idea that the relationship between indigenous peoples and the Crown was based on mutual agreement also came under fire. Treaties were concluded until the 1920s, but since the early days of Confederation the indigenous policy of the federal government was geared towards assimilation of indigenous peoples, which is hardly compatible with the idea of a continuing compact. The idea of assimilation was forcefully expressed in the Trudeau government's 1969 "white paper" proposing a new indigenous policy.⁴⁰ Among the policies designed to put an end to the separate treatment of indigenous peoples, the government proposed to find a way to equitably end "the anomaly of treaties between groups within society and the government of that society."⁴¹

II. COMPACT AND THE COURTS TODAY

By taking compact theory literally and rejecting it for lack of certain purportedly essential features of private law contracts or international treaties, the critics of

37. Gérin-Lajoie, *Constitutional Amendment*, *supra* note 14 at 263.

38. See *e.g.* Eugénie Brouillet, *La négation de la nation: L'identité culturelle québécoise et le fédéralisme canadien* (Sillery, Québec: Septentrion, 2005).

39. Peter H Russell, "The *Patriation* and *Quebec Veto* References: The Supreme Court Wrestles with the Political Part of the Constitution" (2011) 54 *Sup Ct L Rev* (2d) 69 at 76.

40. Jean Chrétien, *Statement of the Government of Canada on Indian Policy* (Ottawa: Ministry of Indian Affairs and Northern Development, 1969), online: <<http://www.aadnc-aandc.gc.ca/eng/1100100010189/1100100010191>>.

41. *Ibid.*

compact theory missed an important point. Although the idea of a compact has a legal dimension, it was never the intention of its proponents to argue that Confederation was an enforceable legal contract in the private law sense. As political scientist Peter Russell writes, “[T]his debunking of the compact theory tends to miss the point that Confederation was based on a political agreement – a deal – first between English and French political elites in the Canadas and then between those Canadians and their Maritime counterparts.”⁴²

What the critics overlooked was that there were means other than contract law or international law to translate the facts of compact into normative consequences. In particular, the interpretation of legislation (including constitutional legislation) may take into account the circumstances of its adoption. Such an approach helps to clarify the origins of constitutional provisions, the logic behind them, the interests they seek to protect, and their overall purpose. When this fact is appreciated, the use of compact theory in constitutional law may be seen in a new light.

A. COMPACT AS A NORMATIVE METAPHOR

During the era when compact theory was generally accepted, the dominant approach to legal interpretation was more formalistic or literal than it is today. Judges tended to focus on the text of the statute to be interpreted. Recourse to extrinsic materials such as historical evidence was considered inappropriate. By contrast, the modern method of interpretation seeks to situate the text within its context and to reconcile it with the purpose that the legislature sought to achieve.⁴³ Context includes not only other statutes, but also the historical and social context. For his part, Dworkin asserts that judges must seek to understand the overarching principles of the legal system and give legal texts an interpretation that is consistent with those principles.⁴⁴ In Canadian constitutional jurisprudence, concepts such as “underlying principles,”⁴⁵ “architecture” of the constitution,⁴⁶

42. Russell, *Constitutional Odyssey*, *supra* note 8 at 18.

43. Pierre-André Côté, *The Interpretation of Legislation in Canada*, 4th ed (Toronto: Carswell, 2011) at 4-9; Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham, Ont: LexisNexis Canada, 2014) at 1.

44. Ronald Dworkin, *Law's Empire* (Cambridge, Mass: The Belknap Press of Harvard University Press, 1986).

45. See *Reference re Secession of Quebec*, [1998] 2 SCR 217 at paras 1, 49-51, 77, 148, [1998] SCJ No 61 [*Secession Reference*].

46. See *ibid* at para 50; *Reference re Senate Reform*, 2014 SCC 32 at paras 26-27, 54, 59-60, 70, 97, [2014] 1 SCR 704 [*Senate Reform Reference*].

and “structural analysis”⁴⁷ have been used to describe the gist of the modern method of legal interpretation.

Concepts such as compact (or contract or agreement) may play a metaphorical⁴⁸ rather than technical role in modern statutory interpretation. By a metaphorical role, I mean that such concepts are used to describe a situation in a way that carries normative force. This point may be explained through an example from everyday life. If I say to my daughter that she may have ice cream after she does her homework, and I add, “We have a contract,” I am not suggesting that our exchange results in a legally enforceable contract. I am using a legal term in a metaphorical sense to convey the idea that we have a moral duty to abide by our undertakings. This is similar to the use of compact theory to guide the interpretation of the Canadian Constitution. No suggestion is made that the Constitution is somehow akin to a notarial deed. Rather, the point is that there was a mutual political commitment that predated and was “translated” into the constitutional text, and the text should be interpreted in light of that commitment. In this respect, Russell described compact theory as a “myth” not in the sense of a lie but in the sense that “its validity depends not on its historical accuracy, but on its capacity to serve as a set of ‘beliefs and notions that men hold, that they live by or live for.’”⁴⁹

B. COMPACT IN RECENT SUPREME COURT OF CANADA DECISIONS

Over the last twenty years, three major decisions of the SCC squarely addressed the nature of the Canadian Confederation and the process for amendment of the Constitution: the Quebec *Secession Reference*,⁵⁰ the *Supreme Court Act Reference*,⁵¹ and the *Senate Reform Reference*.⁵² Compact theory figures prominently in the Court’s reasons, if not by name⁵³ then by clear implication from the historical narrative deployed by the Court and the interpretive techniques used to

47. *R v Demers*, 2004 SCC 46 at para 86, [2004] 2 SCR 489.

48. Hugo Cyr, “Constitutional Metaphors for an Unfinished Constitution” (2014) 19:1 *Rev Const Stud* 1; Marie-Laure Mathieu, *Les représentations dans la pensée des juristes* (Paris: IRJS, 2014).

49. Russell, *Constitutional Odyssey*, *supra* note 8 at 48-49 [citation removed]; TJJ Loranger, *Lettres sur l’interprétation de la constitution fédérale* (Quebec City: Imprimerie A Côté, 1883) at 61.

50. *Supra* note 45.

51. *Reference re Supreme Court Act, ss 5 and 6*, 2014 SCC 21, [2014] 1 SCR 433 [*Supreme Court Act Reference*].

52. *Supra* note 46.

53. For one exception, see *ibid* at para 41, citing Benoît Pelletier, *La Modification Constitutionnelle au Canada* (Scarborough, Ont: Carswell, 1996) at 208.

give meaning to various parts of the amending formula. A more recent case, *Caron v Alberta*,⁵⁴ dealt with a claim that legislative bilingualism was a condition of the annexation of the North-West to Canada in 1870 and that the Province of Alberta was now bound by that condition. While the majority of the Court rejected the claim, both the majority opinion and the dissent analyzed constitutional provisions as the result of a compromise, an approach broadly compatible with compact theory.

In the 1998 *Quebec Secession Reference*, the making of the 1867 Constitution is described as the result of negotiations between the former colonies: “On September 1, 1864, 23 delegates (five from New Brunswick, five from Nova Scotia, five from Prince Edward Island, and eight from the Province of Canada) met in Charlottetown. After five days of discussion, the delegates reached agreement on a plan for federal union.”⁵⁵ Engaging in a hypothetical exercise, the Court then highlighted the fact that federalism was an essential term of that agreement, showing that the consent of certain “partners” was conditional on the adoption of a federal structure: “The significance of the adoption of a federal form of government cannot be exaggerated. Without it, neither the agreement of the delegates from Canada East nor that of the delegates from the maritime colonies could have been obtained.”⁵⁶

The Court also described how the consent of each unit was given (or withheld, in the case of Prince Edward Island and Newfoundland) through an election or a resolution of its assembly, and highlighted the political (as opposed to legal) necessity of such consent.⁵⁷ The Court emphasized that the intention was not to merge the colonies into an undifferentiated political entity: “At Confederation, political leaders told their respective communities that the Canadian union would be able to reconcile diversity with unity.”⁵⁸

Other nineteenth-century components of the Constitution are described in similar terms in subsequent cases. The Court began its judgment in the *Senate Reform Reference* by noting that the Senate “lies at the heart of the agreements that gave birth to the Canadian federation”;⁵⁹ the Senate was “the product of consensus.”⁶⁰ In *Caron v Alberta*, both the majority and the dissent described

54. *Caron v Alberta*, 2015 SCC 56, [2015] 3 SCR 511 [*Caron*].

55. *Secession Reference*, *supra* note 45 at para 36.

56. *Ibid* at para 37.

57. *Ibid* at paras 39-40.

58. *Ibid* at para 43.

59. *Senate Reform Reference*, *supra* note 46 at para 1.

60. *Ibid* at para 17.

the annexation of the North-West as the result of negotiation and compromise.⁶¹ Moreover, in the *Supreme Court Act Reference*, the Court described its own founding moment—the adoption of the *Supreme Court Act* in 1875—as a “historic bargain,” the substance of which must be taken into account in interpreting that law.⁶² In the end, the Court constitutionalized certain parts of the *Supreme Court Act*, in particular those that were related to that historic bargain.

In the *Supreme Court Act Reference* and the *Senate Reform Reference*, the Court told a similar story with respect to the making of the 1982 Constitution and its amending formula. The Court described the various proposals made since the 1930s. It noted that the amending formula finds its immediate source in the “April Accord” between eight provinces, including Quebec, which became the “provincial part” of the November 1981 bargain between the federal government and nine provinces. Thus, instead of ascribing the constitutional text to an abstract ‘constitutional legislator’ (or *pouvoir constituant*), the Court recognized that the amending formula was the result of a bargain and was crafted to protect provincial interests. Hence, Canada’s two main constitutional instruments are described not as the product of the will of an undifferentiated collective body, nor as flowing from an abstract “federal principle,” but as the result of specific bargains made between the country’s constitutive parts.⁶³ Only the word “compact” is missing from this account.

The Court also resorted to compact-based reasoning to inform the interpretation of specific provisions of the amending formula found in the *Constitution Act, 1982*.⁶⁴ This is of particular relevance, as the amending formula is not only the product of an agreement, but also embodies the procedure through which this very agreement may be varied in the future. The issue in the *Supreme Court Act Reference* was whether Parliament could, acting alone, amend the qualifications required of the SCC’s three Quebec judges, without following the Constitution’s amending procedure. Section 41(d) of the *Constitution Act, 1982* provides that “[a]n amendment of the Constitution of Canada in relation to . . . the composition of the Supreme Court of Canada” requires the unanimous consent

61. For the majority decision, see *Caron*, *supra* note 54 at paras 23-24, Cromwell and Karakatsanis JJ. For the dissent, see *ibid* at paras 165-95, Wagner and Côté JJ, dissenting.

62. *Supreme Court Act Reference*, *supra* note 51 at para 20.

63. Gareth Morley, “Dead Hands, Living Trees, Historic Compromises: The Senate Reform and Supreme Court Act References Brings the Originalism Debate in Canada” (2016) 53:3 *Osgoode Hall LJ* [page 745] [Morley, “Dead Hands”].

64. Catherine Mathieu & Patrick Taillon, “Le fédéralisme comme principe matriciel dans l’interprétation de la procédure de modification constitutionnelle” (2015) 60:4 *McGill LJ* 763 [Mathieu & Taillon, “Le fédéralisme”].

of the provincial legislatures.⁶⁵ However, the *Supreme Court Act*, which specifies the qualifications for the Quebec judges, is not formally part of the Constitution of Canada.⁶⁶ The federal government argued that section 41(d) would apply only if provisions regarding the Court were to be added to the Constitution, but not to amendments to the current provisions of the *Supreme Court Act*.

To solve this problem, the Court resorted to an interpretive technique well known to contract lawyers: identifying the intention of the parties to the “bargain” that was the amending formula.⁶⁷ The judges thus easily discovered that the intention (or purpose) behind the formula was the protection of provincial interests. They employed statements made by one side during the negotiations—namely, the explanatory notes to the April Accord prepared by the provincial governments—to isolate the precise interest at stake here: the protection of Quebec’s civil law system. As civil law cases would be heard in the last resort by the SCC, it was necessary for the protection of the civil law that at least three members of the Court be trained in that system. Indeed, this was also the gist of the “historic bargain” allowing for the creation of the Court in 1875.⁶⁸

The same kind of reasoning is present in the *Senate Reform Reference*, although perhaps less conspicuously. As the Senate was at the heart of the Confederation bargain, it follows logically that the parties to that bargain should have a say over any changes made to it. According to the Court, “The Senate is a core component of the Canadian federal structure of government. As such, changes that affect its fundamental nature and role engage the interests of the stakeholders in our constitutional design—i.e. the federal government and the provinces—and cannot be achieved by Parliament acting alone.”⁶⁹ Jean Chrétien, who was the federal Minister of Justice when the federal government proposed a constitutional amendment formula in 1980, is even paraphrased as having said at that time that “significant Senate reform which engages the interests of the provinces could only be achieved with their consent.”⁷⁰ As the changes proposed by the federal government (i.e., “consultative” elections and term limits) would have changed the nature and role of the Senate, they could only be made through

65. *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 41(d) [*Constitution Act, 1982*].

66. More precisely, it is not mentioned in the Schedule to the *Constitution Act, 1982*, which lists the statutes that are included in the Constitution of Canada. See *ibid*, Schedule.

67. See e.g. Sébastien Grammond, Anne-Françoise Debruche & Yan Campagnolo, *Quebec Contract Law*, 2d ed (Montréal: Wilson & Lafleur, 2016).

68. *Supreme Court Act Reference*, *supra* note 51 at para 104.

69. *Senate Reform Reference*, *supra* note 46 at para 77.

70. *Ibid* at para 76.

a constitutional amendment. The Court also noted that the amending formula was the result of discussions between the federal government and the provinces that began in the 1930s.⁷¹ While the Court did not offer a detailed review of the history of those discussions, an examination of the Fulton-Favreau formula and the Victoria Charter shows that the curtailment of any federal power to change the main features of the Senate was an important provincial concern, at least since the conferral of a partial amending power on the federal Parliament in 1949.⁷²

The Court also had to determine which amending formula—7/50 or unanimity—would apply to Senate abolition. Again, its reasoning relies heavily on the history of the negotiations leading to the adoption of the amending formula. The Court noted that at no time during the discussions of the 1970s was the abolition of the Senate seriously contemplated.⁷³ Hence, while section 42 of the *Constitution Act, 1982*—which lists topics subject to the 7/50 formula—mentions the Senate’s powers and the number of Senators for each province,⁷⁴ it could not be interpreted as encompassing abolition of the Senate. This would go beyond what the framers intended.⁷⁵

One question that has bedevilled proponents of the compact theory is the identification of the parties to the compact. In one passage of the *Secession Reference*, the Court describes the “participants” in Confederation by reference to the entities that are entitled to initiate and to vote on a constitutional amendment, namely the federal state and the provinces.⁷⁶ This description is repeated in the *Senate Reform Reference*: “Parliament and the provinces are equal stakeholders in the Canadian constitutional design.”⁷⁷ Note that these are different from the original “parties” to Confederation, which may be identified as the three founding colonies, or perhaps the four initial provinces. The federal state (acting through Parliament) appears now to be considered a participant in Confederation, although it did not exist prior to 1867 and could not be said

71. *Ibid* at paras 30-31. See also J Peter Meekison, “The Amending Formula” (1982-1983) 8:1&2 Queen’s LJ 99.

72. The Fulton-Favreau formula is reprinted in Anne F Bayefsky, *Canada’s Constitution Act 1982 & Amendments: A Documentary History*, vol 1 (Toronto: McGraw-Hill Ryerson, 1989) at 16-21. For the Victoria Charter, see Government of Canada, Intergovernmental Affairs, *Constitutional Conference – Victoria (1971)* (26 April 2010), online: <<http://www.pco-bcp.gc.ca/aia/index.asp?lang=eng&page=hist&doc=victoria-eng.htm>>. See also Louis-Philippe Pigeon, “Le sens de la formule Fulton-Favreau” (1966–1967) 12:4 McGill LJ 403.

73. *Senate Reform Reference*, *supra* note 46 at paras 18-19, 101.

74. *Constitution Act, 1982*, *supra* note 65, s 42.

75. *Senate Reform Reference*, *supra* note 46 at paras 67, 90.

76. *Secession Reference*, *supra* note 45 at para 69.

77. *Senate Reform Reference*, *supra* note 46 at para 48.

to be a party to the initial compact. Current participants also include Alberta and Saskatchewan, which were created by Parliament and did not pre-exist their admission into the compact, while other provinces existed as colonies prior to their admission to Canada and could thus negotiate their terms of union with the federal government.

Yet, when it comes to substance, there are clear dualist overtones in those cases.⁷⁸ Dualism in this sense refers to the idea of a compact between two founding nations, French and British, or two language groups, Anglophone and Francophone. Thus, in the *Secession Reference*, the Court indicated that a vote in favour of Quebec independence would lead to a “negotiation process [that] would require the reconciliation of various rights and obligations by negotiation between *two legitimate majorities*, namely, the majority of the population of Quebec, and that of Canada as a whole.”⁷⁹ Likewise, in the *Supreme Court Act Reference*, the agreement that paved the way for the creation of the Court in 1875 is consistently described as a bargain between Quebec and the rest of the country. The 1982 amending formula was an agreement to entrench the 1875 bargain. It gives Quebec a veto over any attempt to reduce its representation on the Court. This cannot be explained by the abstract “federal principle.”

At the same time, the Court suggested that there may be more parties to the compact. In the *Secession Reference*, it warned that negotiations following a successful referendum would need to “address the interests of the federal government, of Quebec and the other provinces, and other participants, as well as the rights of all Canadians both within and outside Quebec.”⁸⁰ In *Caron v Alberta*, the dissenting judges employed the concept of “founding peoples,” referring in particular to groups who negotiated their adhesion to Canada, in that case the Métis of the Canadian West.⁸¹

The idea of compact is also present in the Court’s Aboriginal law jurisprudence. The Court has repeatedly stated that the overarching goal of that area of the law is to achieve reconciliation between the Crown and indigenous peoples, and that negotiation is the preferred means towards that goal.⁸² In *Haida Nation*, the Court went as far as suggesting that that, absent a treaty, Canada

78. Mathieu & Taillon, “Le fédéralisme,” *supra* note 64; Schertzer, “Recognition or Imposition,” *supra* note 15 at 114.

79. *Secession Reference*, *supra* note 45 at para 152 [emphasis added].

80. *Ibid* at para 92.

81. *Caron*, *supra* note 54 at para 235.

82. Grammond, *Terms of Coexistence*, *supra* note 18 at 139-40.

held merely an “assumed”⁸³ or “asserted”⁸⁴ sovereignty over indigenous lands. The duty to consult and accommodate laid out in that case was said to promote an “ethic of ongoing relationships.”⁸⁵ In *Tsilhqot’in Nation*,⁸⁶ the Court strongly suggested that obtaining indigenous peoples’ consent was the preferred means of regulating the use of their lands. In the *Manitoba Metis Federation* case, the Court held that a provision of the *Manitoba Act* regarding Métis land rights was “treaty-like”—given its origins in the negotiations between the federal government and the Métis—and its implementation engaged the honour of the Crown.⁸⁷ These developments may be linked to the adoption (and Canada’s late endorsement) of the *United Nations Declaration on the Rights of the Indigenous Peoples*,⁸⁸ which requires discussions aimed at obtaining the “free, prior and informed consent” of indigenous peoples with respect to the exploitation of the natural resources of their lands and the adoption of administrative and legislative measures affecting them.

This use of the compact metaphor in different contexts suggests that Canada is a complex country with more than one underlying compact. Accommodating the situation of different political communities within the country may require different types of arrangements. Thus, the fact that the language of compact has been used to describe the union of pre-existing colonies, as well as the coexistence of Francophones and Anglophones, is not evidence of inconsistency but rather proof of the pervasiveness of the idea of consensual political association. This multidimensional compact was described by Justice Marie Deschamps of the SCC in her concurring reasons in *Beckman*, an Aboriginal law case, where she said that the Canadian Constitution’s principles were

interwoven in three basic compacts: (1) one between the Crown and individuals with respect to the individual’s fundamental rights and freedoms; (2) one between the non-Aboriginal population and Aboriginal peoples with respect to Aboriginal

83. *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 20, [2004] 3 SCR 511.

84. *Ibid* at para 26. See also *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 42, [2004] 3 SCR 550. In that companion case, the Court even talked about “*de facto* Crown sovereignty.”

85. *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 38, [2010] 2 SCR 650, citing Dwight G Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (Saskatoon: Purich Publishing, 2009) at 21.

86. *Tsilhqot’in Nation v British Columbia*, 2014 SCC 44 at paras 76, 90, [2014] 2 SCR 257.

87. *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at para 92, [2013] 1 SCR 623.

88. GA Res 61/295, UNGAOR, 61st Sess, UN Doc A/RES/61/295, (2007) [*Declaration on the Rights of Indigenous Peoples*].

rights and treaties with Aboriginal peoples; and (3) a “federal compact” between the provinces.⁸⁹

The only missing component in that description is the compact between Francophones and Anglophones, unless it is considered to be an aspect of the “federal compact.”

III. IMPERFECT COMPACT

The SCC has interpreted the *Constitution Act, 1982* as if it were the result of a new compact between the provinces and the federal government, but there is a major difficulty: Quebec did not consent to patriation and could not be said to be a party to that new compact. How does the Court overcome this hurdle?

In fact, this is not the only context in which the Court is faced with what could be called an “imperfect compact.” As mentioned in Part I, above, there is a long tradition of concluding treaties with indigenous peoples, but there is also, sadly, a long history of misunderstandings and breaches of those treaties. For example, indigenous peoples assert that the English text of the numbered treaties of the late nineteenth century—which contain a clause whereby they surrender all their land rights—is inconsistent with their own understanding, whereby land was to be shared, not ceded. It is interesting to note that, faced with such situations, the SCC usually does not apply the rules and remedies of contract law, which would have potentially resulted in the annulment of certain treaties. Rather, it engaged in various forms of “compact mending.” In a case where the validity of an indigenous group’s adherence to a treaty was challenged, the Court held that consent had been validly given, but that breaches of the treaty may have given rise to a fiduciary obligation.⁹⁰ Hence, the Court prefers to uphold the validity of a defective treaty and to “repair” it rather than declare it void. Faced with the ambiguities of treaties, the Court has adopted an interpretive method that admits oral evidence, favours the spirit of the treaty over a literal interpretation, and focuses on what the indigenous party would have reasonably understood.⁹¹ Where a treaty is silent on a relevant issue, the Court engages in an exercise of hypothetical negotiation to determine the terms to which the indigenous party

89. *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 97, [2010] 3 SCR 103.

90. *Ontario (Attorney General) v Bear Island Foundation*, [1991] 2 SCR 570, [1991] SCJ No 61.

91. Grammond, *Terms of Coexistence*, *supra* note 18 at 297-305; Dwight Newman, “Contractual and Covenantal Conceptions of Modern Treaty Interpretation” (2011) 54 Sup Ct L Rev (2d) 475.

would (or would not) have consented.⁹² Thus, gaps in the treaty must be filled according to the spirit of the treaty and what the parties intended to achieve.

These techniques may be compared with the Court's approach to the issue of Quebec's lack of consent to the 1982 Constitution. As mentioned in Part II(B), above, the question in the *Supreme Court Act Reference* was whether an amendment to the *Supreme Court Act* was covered by section 41(d) of the *Constitution Act, 1982*, which refers to "the composition of the Supreme Court of Canada."⁹³ To understand what section 41(d) means, the SCC undertook a review of the negotiations that led to its incorporation in the amending formula. But in doing so, it backtracked to the point where Quebec last consented: "The textual origin of Part V was the 'April Accord' of 1981 (*Constitutional Accord: Canadian Patriation Plan* (1981)), to which eight provinces, including Quebec, were parties."⁹⁴ Having established Quebec's assent to a set of proposals that included a provision identical to section 41(d), the Court moved on to identify the interests protected by the requirement of unanimous provincial consent. According to the Court, section 41(d) is explained almost exclusively by the need to protect Quebec's representation on the Court: "Requiring unanimity for changes to the composition of the Court gave Quebec constitutional assurance that changes to its representation on the Court would not be effected without its consent."⁹⁵ In other words, Quebec obtained a veto over changes to the number of seats on the Court reserved for Quebec judges. Moreover, the Court rejected the federal government's argument that section 41(d) applied only to future constitutional provisions: "Quebec, a signatory to the April Accord, would not have agreed to this, nor would have the other provinces."⁹⁶

It is remarkable that the Court resorted to contractual concepts—such as the parties' intentions, interests, or expectations—even though Quebec never assented to the final package. Perhaps, in an attempt to remedy that exclusion, the Court sought to reconstruct what would have been an acceptable deal for Quebec and ascribed that meaning to the text of the amending formula. Prior to that decision, there was a respectable body of opinion to the effect that section 41(d) applied only to future constitutional provisions. Yet Quebec emerged with a veto that was justified almost exclusively by its specific interests or expectations. Thus, Quebec was metaphorically brought back into the 1982 compact through

92. *R v Sioui*, [1990] 1 SCR 1025, [1990] SCJ No 48.

93. *Supra* note 65, s 41(d).

94. *Supreme Court Act Reference*, *supra* note 51 at para 92 [emphasis added].

95. *Ibid* at para 93.

96. *Ibid* at para 99.

a reaffirmation of the substance of previous compacts: first that of 1867, whereby Quebec obtained the assurance that its civil law system would be preserved, and then that related to the creation of the SCC in 1875, when Quebec obtained a guaranteed representation on the Court. It is, of course, impossible to compare the outcome of that exercise with what would have been the position of Quebec had the negotiations of 1981 been pursued until an agreement was reached. “Compact-mending” is then a counterfactual exercise.

“Compact-mending” techniques were less apparent in the *Senate Reform Reference*, in which the interests of all provinces were at stake. It is ironic, however, that Quebec alone obtained a veto over the amendment of a little-known provision dealing with the real property requirement for Senators, as that provision formed part of a specific arrangement for Quebec Senators.⁹⁷ It may well be that the practical result of that ruling is that Quebec’s number of Senators cannot be reduced without its consent, which would give Quebec a veto over many kinds of Senate reform.

IV. COMPACT AND ORIGINAL INTENT

One potential objection to the SCC’s renewed use of compact theory is that it relies on “original intent,” a method of constitutional interpretation that is largely discredited in Canada.⁹⁸ Instead, the Constitution is more commonly described as a “living tree,” the meaning of which is not fixed at the time of its enactment.⁹⁹ For instance, Parliament’s jurisdiction over marriage encompasses the legalization of same-sex marriage, even if the Fathers of Confederation would never have contemplated such a thing.¹⁰⁰ The living tree approach is usually defended on the basis that it allows the Constitution to adapt to the needs of changing times and to situations that could not have been envisioned by its framers.

In contrast, original intent doctrines assert that judges should be bound by the meaning that legal texts possessed at the time of their enactment or by the

97. *Senate Reform Reference*, *supra* note 46 at paras 91-94.

98. Ian Binnie, “Constitutional Interpretation and Original Intent” (2004) 23 Sup Ct L Rev (2d) 345; Webber, *Constitution of Canada*, *supra* note 29 at 138. Nevertheless, recent scholarship has tried to rehabilitate originalism in Canada, in particular by showing that the SCC has in fact used historical arguments to interpret the Constitution. See *e.g.* Léonid Sirota & Benjamin Oliphant, “Originalist Reasoning in Canadian Constitutional Jurisprudence” (17 March 2016), online: Social Science Research Network <<http://ssrn.com/abstract=2749224>>.

99. *Reference re British North America Act, 1867 s 24*, [1930] AC 124 at 136, [1930] 1 DLR 98 (PC).

100. *Reference re Same-Sex Marriage*, 2004 SCC 79 at para 30, [2004] 3 SCR 698.

actual intention of their authors. There are several variations on that core idea and it is beyond the scope of this paper to discuss them in detail.¹⁰¹ Originalism is usually defended on the basis that it fosters democratic accountability and prevents unelected judges from changing the meaning of a constitution. However, it is criticized for several reasons, in particular because it is difficult to know the intentions of people who died long ago or to ascribe a single intention to a group of lawmakers who may in fact have held conflicting views. Interestingly, these criticisms are similar to those that Rogers levelled against compact theory.¹⁰²

A close review of the SCC's reasons in the cases studied above shows, however, that compact theory is not used in a strictly originalist fashion. No attempt is made to link the meaning of specific constitutional provisions to the intentions of politicians involved in their enactment. For example, in the *Senate Reform Reference*, there was no evidence that the politicians involved in the discussions leading to patriation ever considered the issue of consultative elections for the Senate. The Court's judgment contains very few quotations from politicians, and then only to support broad principles. In particular, the Court did not mention two pieces of evidence forming part of the record that could have given an insight into original intent: first, the explanation given by then Deputy Minister of Justice Roger Tassé before the Special Joint Committee on the Constitution in 1980-81¹⁰³ regarding the inclusion of the "method of selecting Senators" in the list of topics subjected to the 7/50 amending formula; and second, a briefing book apparently prepared for the Minister of Justice on that occasion,¹⁰⁴ which contains a more detailed explanation of the reasons for that inclusion.

Moreover, the Court appears ready to adapt the terms of the original compact to changing circumstances or political realities. Original intent or meaning would be a relevant but not governing factor in the interpretation of the Constitution. For example, the inclusion of the federal government among the "partners of Confederation" cannot be supported by a purely originalist interpretation of the

101. See e.g. Jack M Balkin, *Living Originalism* (Cambridge, Mass: The Belknap Press of Harvard University Press, 2011). In the Canadian context, see Morley, "Dead Hands," *supra* note 63; Léonid Sirota & Benjamin Oliphant, "Has the Supreme Court of Canada Rejected 'Originalism'?" (17 March 2016), online: Social Science Research Network <<http://ssrn.com/abstract=2749212>>.

102. Rogers, "Compact Theory," *supra* note 25.

103. Canada, Parliament, *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, iss 53 (Hull, Quebec: Supply and Services Canada, 1981) at 53:68.

104. *Briefing Book for Clause-by-Clause Consideration of the Proposed Resolution* (Ottawa: Library and Archives Canada, 1981), R11344, vol 406, files 7-9.

compact, which would focus on the “inter-provincial treaty.” Rather, in treating the federal government as a partner in Confederation, the Court recognizes the crucial role that Ottawa has come to play over the years as an integral part of Canadian sovereignty. One suspects that a similar process of adaptation was at play in the *Supreme Court Act Reference*, where the outcome appears to have been influenced more by current perspectives on the role of the federal courts than by the speeches made by politicians when the *Supreme Court Act* was adopted in 1875. Hence, on certain issues, the Court does not resist the temptation to re-tell history in a manner that is politically acceptable now. And, as mentioned in Part III, above, where consent is lacking, the Court does not hesitate to engage in counterfactual reasoning about what would have been consented to—which is, to say the least, an unorthodox form of originalism.

Lastly, whatever may be said against originalism in other contexts, it is much more attractive where a constitution embodies an agreement between a majority and a minority defining the rights of the minority and the terms of its inclusion in a wider polity. In those cases, a dynamic method of interpretation that totally dismisses the relevance of original intent or meaning risks whittling down the protections given to the minority—for example, if the constitution is interpreted in light of the views currently prevailing across the whole country and those views have become unfavourable to maintaining protections for the minority. If there is moral force in the idea that promises should be kept, then efforts should be made to understand the substance of these promises. The original meaning, however, need not be a bar to subsequent evolution. As John Borrows says of Aboriginal treaties, “While treaty interpretation should exhibit a greater deference to history because it respects the parties’ agency when assigning them meaning, it should not be used to limit the availability of future rights not discussed during the negotiations.”¹⁰⁵

V. CONCLUSION

Analysis of recent SCC decisions allows us to see criticism of the compact theory of Confederation in a different light. The brunt of the criticism did not pertain to the factual accuracy of the theory but rather to its normative consequences. The critics never produced a successful alternative narrative of the origins of Confederation. Their influence lies in the adoption of an amending formula that avoids requiring the consent of all provinces for the amendment of any

105. John Borrows, “(Ab)Originalism and Canada’s Constitution” (2012) 58 Sup Ct L Rev (2d) 351 at 376.

part of the Constitution. But this does not negate compact theory. It is entirely possible to have a compact in which the parties agree that it may be varied with less than unanimous consent. Such is often the case in law firms. Thus, there does not appear to be anything wrong in principle with the SCC's adoption of compact-based methods of interpreting the Constitution.

This renewed focus on compact as the dominant explanation of the legitimacy of the Constitution, however, turns the spotlight back on Quebec's exclusion from the agreement that produced the *Constitution Act, 1982*, at a time when it was unclear that the parties to the compact had agreed to abandon unanimity. Quebec had always claimed a veto for itself but abandoned its claim in April 1981 in consideration of a right to opt out with full financial compensation, which it did not obtain in the 1982 Constitution.¹⁰⁶ Quebec's veto was justified in principle by the idea of a dualist compact, which is echoed in recent SCC decisions. The Court's efforts to reconstruct a narrative based on Quebec's hypothetical consent to certain parts of the package may provide useful protections to Quebec, including a veto over certain specific matters. One might also think that the Court's methodology could lead to a wide interpretation of the phrase "other cultural matters," found in section 40 of the *Constitution Act, 1982*,¹⁰⁷ which describes the areas for which Quebec would receive financial compensation if it dissented from a constitutional amendment. Whether the Court's adoption of compact theory and its method for repairing Quebec's exclusion will be enough to displace the narrative of exclusion that has taken hold in that province since 1982 is, however, uncertain at best.

The recognition of the consensual underpinnings of the Constitution could also have profound impacts on indigenous peoples. Many of them say that they never consented to their inclusion in Canada, and many object to their lands being used for resource extraction without their consent. A compact-based approach might support a requirement to obtain indigenous peoples' free, prior, and informed consent to such projects.¹⁰⁸

106. Peter C Oliver, "Quebec and the Amending Formula: Protection, Promotion and Federalism" in Stephen Tierney, ed, *Accommodating Cultural Diversity* (Aldershot, UK: Ashgate, 2007) 167 at 177.

107. *Supra* note 65, s 40.

108. *Declaration on the Rights of Indigenous Peoples*, *supra* note 88, arts 10, 11(2), 19, 28(1), 29(2); Grammond, *Terms of Coexistence*, *supra* note 18 at 163-66.