Introduction

The Supreme Court of Canada has an absolutely undeniable role in intergovernmental relations. As the country’s only constitutionally entrenched body charged with the resolution of division-of-powers disputes, its decisions and rulings are always certain to influence the way in which governments interact with each other. Recently, however, the Supreme Court has come to be less highly regarded as a method of resolving the disputes that arise between governments. As Robinson and Simeon propose in their article “The Dynamics of Canadian Federalism,” Canada is moving from an era of constitutional federalism, governed by the courts, to one of collaborative federalism (Robinson and Simeon, 2004: 106). As the role of the Supreme Court begins to diminish, it is important to critically analyze the alternative provided by less formal intergovernmental agreements. In this paper I will first examine the changing role of the Supreme Court, showing how it has fallen into lesser use in recent years, and proceed to look at the rising popularity of intergovernmental agreements made in a spirit of collaboration between
levels of government. I will then go on to expose some of the problems inherent in the increased use of such agreements, discussing both the issue of legal enforcement, which is so rarely present in the agreements, and the problems associated with the executive form of federalism through which the agreements take place. In the end, I will attempt to show that the Supreme Court is the only intergovernmental dispute-resolution method that combines non-partisan decision-making processes, strong legal reinforcements to its decisions, and continued responsiveness to ordinary Canadian citizens. The popularity of collaborative intergovernmental agreements is on the rise; and although the role of the judiciary may be changing, the Supreme Court must retain a significant role in dispute-resolution, as it influences the terms and enforceability of these agreements, and allows ordinary citizens to participate in the process of intergovernmental negotiations.

The Supreme Court: Longstanding History in Intergovernmental Relations

Ever since Canada was first established as a federation governed by a parliamentary system, the country’s highest court has always had an extremely significant role to play in intergovernmental relations. In speaking about the role of Canada’s courts, Ian Greene says “Courts are the state’s officially sanctioned institutions of conflict resolution. Their primary purpose is the authoritative resolution of the disputes that elected legislatures have determined should come within their purview” (Greene, 2006: 16). The Supreme Court does have a very direct influence on intergovernmental relations. It is up to them to settle any disputes that may arise between governments, including those regarding the division of powers. The Court serves to clarify any ambiguities in Sections 91 and 92 of the Constitution, ensuring no government feels as though their jurisdiction is being unduly influenced by another.
The Supreme Court also has an impact on intergovernmental relations in other, less obvious ways. Their rulings on reference cases, setting out the standard for constitutional requirements of government policies, can have a huge effect on the way that governments interact with each other. For example, in the Secession Reference case brought forward in 1998, the federal government asked the Supreme Court to rule on the constitutionality of any move a province to separate unilaterally from Canada. In their decision, the Court said “The federalism principle... dictates that... the clear expression of the desire to pursue secession by the population of a province would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire” (Reference re Secession of Quebec, 1998). This ruling served to put some (albeit ambiguous) conditions on the way in which the federal government ought to proceed in its relationship with an increasingly separatist Quebec. The Secession Reference decision also set a precedent in the realm of intergovernmental relations, outlining how the federal government ought to be prepared to deal with any provincial government which expresses a desire to secede. In a unanimous ruling, the Court stated that, “a substantial informal obligation exists in Canada’s constitutional culture to address assertions of independence” (Baier, 2008: 27). This is very clearly an instance in which the Supreme Court, in answering a question on constitutionality of government policy, influenced the future of intergovernmental relations in Canada.

However, the Supreme Court does not only get involved in intergovernmental affairs at the behest of the government. On the contrary, it often finds itself at the very heart of intergovernmental conflicts because of the cases brought before it by Canadian citizens. In his article “The Courts, the Division of Powers, and Dispute Resolution”, Gerald Baier talks about the Supreme Court decision on the case of Chaoulli v. Quebec. Dr. Jacques Chaoulli was a
Quebec physician who argued that a law preventing citizens from purchasing private health insurance and private medical services was unconstitutional. He said that long delays and poor care in public hospitals threatened a patient’s right to life, liberty and security of the person as set out by section 7 of the Canadian Charter of Rights and Freedoms (Chaoulli v. Quebec, 2005). He claimed that the law was contravened of section 1 of the Quebec Constitution, which guarantees “a right to life, and to personal security, inviolability and freedom” (Chaoulli v. Quebec, 2005). The Court decided that the Quebec law preventing private health care violated both section 7 of the Canadian Charter, and section 1 of the Quebec Constitution. However, the rights violation was justified under section 1 of the Canadian Charter, meaning that only the province of Quebec would be required to allow for the provision of private health care. This ruling reinforced the idea of an asymmetrical view of federalism, allowing or requiring different provinces to provide different types of programs depending on their own cultural, social, and financial situation. As Baier explains, “Chaoulli did not challenge the constitutionality of provincial jurisdiction over health care; in that sense the case was not a typical division-of-powers controversy” (Baier, 2008: 27). However, since health care has become such a significant issue in the realm of intergovernmental relations, causing much conflict over which level of government ought to take responsibility for it, “the court’s decision on the case was bound to have an impact on the tone of intergovernmental relations, at the very least” (Baier, 2008: 27). The Supreme Court has proven that it has an important role to play in intergovernmental relations, whether directly or indirectly. It is almost impossible to imagine how the Court could operate without having some impact on the way in which governments interact. Even so, there are many who criticize the Court’s role in the relationships between governments, and who wish to see intergovernmental agreements move
out of the judicial realm and back into the hands of government administrators. Among these critics are some political parties, “such as the Reform Party, the Canadian Alliance, and most recently, the Conservative Party of Canada” (Kelly, 2008: 42). With Canada’s current governing party numbering among those who criticize the role of the Supreme Court, it is essential to examine what sort of influence the Court has held in recent Canadian politics.

_The Declining Role of the Supreme Court_

Since it became Canada’s highest court of appeal in 1949, the Supreme Court has been making landmark decisions influencing the workings of intergovernmental relations in Canada. However, in recent years it seems that there has been a decline in the reliance on the Court for such decisions in the political arena. Baier, himself a defender of the important role of the Supreme Court, says “One feature of the collaborative model is increased reliance on sector-specific accord and agreements, often directed by ministerial councils” (Baier, 2008: 23). As such agreements, driven by actors within the government, increase in popularity, the Supreme Court will find that it has a lesser role to play in the settlement of disputes between levels of governments. Katherine Swinton also pushes the Supreme Court into a secondary role, saying “The primary institution for dealing with the problems of interdependence and change in the Canadian federal system has been executive federalism” (Swinton, 1992: 137). As governments have come to realize that they will not be able to get the terms they want in the constitutional arena, they move towards agreements created through meetings between government executives. In fact, governments have become increasingly concerned about the limiting effects of relying on the judicial decisions instead of collaborative negotiation: “While governments can subsequently negotiate with one another to work around the result of judicial decisions, those very decisions can affect the
bargaining power that the participants have in such negotiations” (Baier, 2008: 35). This means that the Court is not looked to as often as it was in the years directly following the repatriation of the constitution. A review of the number of references cases brought before the court since 1982 shows that the majority occurred within 10 years of the patriation (Judgments, 2009). Rather than going to the courts to settle disputes, governments choose to work together to come up with agreements outside the realm of constitutional amendment, but still respecting the conditions of the constitution and the charter. As James Kelly explains, although the Supreme Court imagines itself to have an important role as the protector of Canadians’ rights, “this is principally a political responsibility, as the main responsibility for protecting rights and freedoms lies not with the Supreme Court but with Parliament and the provincial legislatures at the stage when legislation is developed” (Kelly, 2008: 43). The Supreme Court is less often needed to resolve intergovernmental disputes, and the government executives creating new agreements work to ensure their constitutionality before they are ever put in place. This way, the Court will less often be asked to examine legislation in order to protect the rights of individual citizens, and there is less chance that the Court will alter government legislation. Government actors will, therefore, not be as limited in their negotiations by the irrevocable decisions of the judiciary. Having already seen that the Court is experiencing a declining level of importance in the national political arena, the question remains: what is preventing it from regaining popularity and significance among citizens, who are so often shut out of intergovernmental negotiations? Perhaps the most obvious reason lies in recent governments’ reluctance to work in cooperation with the Court. We can certainly see in the arguments made above that “intergovernmental negotiations have replaced the courts as the primary venue of change in the federation” (Baier, 2008: 23). Governments are moving towards
intergovernmental negotiations as a means for institutional change, and away from the jurisdictional arena. However, governments are certainly not the only ones who impact the Court’s role by bringing cases before it. As we saw in the case of Chaoulli v Quebec, Canadian citizens are often the ones who impact intergovernmental relations by bringing their own challenges before the Court. On the other hand, some recent changes have decreased the Court’s potential responsiveness to Canadian citizens. In 2006, the current Conservative government announced that it was cancelling the Court Challenges Program, which was established “to financially assist Canadians launching Charter-based litigation against the government in two clearly specified areas: equality and minority-language rights.” (Asper, 2008). This means that it has become increasingly difficult for ordinary citizens to bring a case before the Supreme Court, since government funding which was previously available for this very reason has now been cut. One other factor which may contribute to decreased citizen reliance on the Supreme Court is increased governmental interest in intergovernmental negotiations as a means of national decision-making. If decisions on intergovernmental relations are being moved out of the realm of the judiciary, citizens may choose to interact more directly with government executives than through the Court. This recent rise in the popularity and profusion of intergovernmental negotiations and agreements, which could in part contribute to the declining role of the Supreme Court, is explored in the next section.

**Intergovernmental Agreements: The New Frontier**

On the surface, a new emphasis on collaborative intergovernmental agreements seems like a positive step in Canadian politics. Rather than relying on a third-party arbitrator like the Supreme Court, governments are moving to a friendlier relationship, working together to create agreements that satisfy all parties from the
moment of their implementation. Speaking about the transition into the most recent, collaborative era of Canadian federalism, Robinson and Simeon mention such agreements as the Social Union Framework Agreement (SUFA), the North American Free Trade Agreement (NAFTA), and the Agreement on Internal Trade (AIT) (Robinson and Simeon, 2004, 117-121). These agreements come as a result of intergovernmental discussions and negotiations, and they are designed to suit the needs and expectations of different levels of government. Some of these agreements even set out dispute-resolution policies, in the event that any government becomes unhappy with the terms of the agreement at a later date. These policies can sometimes be quite ambiguous, like the SUFA, which “outlines no specific mechanism or approach [but] promotes a ‘spirit’ of dispute resolution marked by intense collaboration and avoidance of formal processes and third parties” (Baier, 2008: 34). On the other hand, the AIT “includes provisions for dispute settlement in the event that either a government or a person complains that government policies are in conflict with the commitments of the Agreement. These mechanisms are contained in Chapter 17 of the AIT” (Baier, 2008: 31). The governments that are creating these agreements manage to reach a consensus without bringing cases before the Supreme Court, and then outline methods they can use to avoid judicial intervention in resolving any forthcoming disagreements. The dispute-resolution methods set out by these agreements show that governments are eager to move out of the jurisdiction of the Supreme Court and back into the executive realm. The collaborative era as defined by Robinson and Simeon certainly seems to be in full swing.

Problems: Legal Enforcement

Increased government collaboration, and a move towards collaborative dispute-resolution methods do seem to be positive steps for Canadian federalism. However, some problems have arisen since the
new popularization of intergovernmental agreements. The agreements are created in a spirit of collaboration and open discussion, but the terms set out within them amount to little more than friendly guidelines. Simeon and Nugent explain that, “Despite their format of clauses, sections, subsections, appendices, indemnity provisions, and signature blocks, these intergovernmental agreements exist in a legal limbo. They are not legally enforceable contracts. Nor are they equivalent to statutes” (Simeon and Nugent, 2008: 96). This seems like an obvious principle: agreements made in the political arena will remain there, allowing them to be untouchable by the judiciary, and amendable only by further collaborative decision-making. The problem is that, in an era of asymmetrical federalism, when federal governments are known to use their spending power to exert huge influence over the provinces, the lack of legal status for these agreements can be quite troubling. As Katherine Swinton explains, “To the extent that these instruments are relatively easy to change or are unenforceable, they may be unsatisfactory to a province like Quebec which is seeking a lasting rearrangement of jurisdiction” (Swinton, 1992: 140). Provinces seeking permanent institutions to ensure full government cooperation, even in times of political stress or government turnover, cannot rely on these unenforceable agreements.

Furthermore, provinces that would seek reliable and permanent financial cooperation from the federal government cannot rely on intergovernmental agreements made outside the legal realm. One does not need to look back too far to find an example of a federal government that refused to honour a supposedly fixed financial agreement. In the 1990 federal budget, huge cuts to the Canada Assistance Plan (CAP) were announced, leaving provinces scrambling to find adequate revenue for provincial programs without the government aid they expected. Though the provinces tried to hold the government to the longstanding terms of the CAP, the Supreme Court denied that the government had any
obligation to maintain its previous level of funding (Reference re CAP, 1991). In fact, the provinces could not even claim that the government had any obligation to maintain the CAP funding based on the expectations set out by provincial budgets across the country. “The Court also rejected the application of the doctrine of legitimate expectations in these circumstances. At most, the doctrine gives the provinces the right to make representations and be consulted; it does not confer a substantive right to consent to changes” (Swinton, 1992: 143). For provinces like Quebec seeking permanent resolution to their political conflicts over governmental jurisdiction, these agreements are unhelpful. For other provinces, struggling to pay for the social programs they must supply to their citizens, intergovernmental agreements can prove downright treacherous. Without any means of holding the government accountable to the terms set out by these agreements, poor provinces are left in a state of uncertainty. At a time when governments’ financial arrangements are consistently reliant on intergovernmental agreements, no province can ever guarantee that any particular revenues will continue to exist from one year to the next. The agreements, created to bring stability to intergovernmental relations, provide almost no guarantee of legal enforceability.

More Problems: Executive Federalism

Of course there is a degree of uncertainty inherent in the move away from the Court and towards collaborative agreements. More worrisome, however, is the way in which the shift towards collaborative intergovernmental agreements can negatively impact the participation of non-governmental actors in the decision-making process. There are two potential ways in which non-governmental actors can be represented in governmental processes; either indirectly through the representation provided for them by their elected officials, or directly, through personal participation in government negotiations. Both of
these methods for citizen participation are cut short when government decisions are made almost exclusively by high-ranking executives.

In the first, indirect form of citizen participation, it is expected that the wishes of citizens will be carried out by the MPs and Senators representing them in parliament, and the Members representing them in legislatures across the country. However, as Jennifer Smith explains, “Since there is little opportunity for public debate during the process, the only possibility is at the conclusion, [but] political leaders do not need to bring the agreement back to their respective legislatures to vote on it” (Smith, 2004: 105). Those who would hope that the provincial or federal legislatures could represent their interests in the process of creating intergovernmental agreements are sure to be disappointed. These agreements rarely if ever require any kind of legislative approval.

The second form of participation would see citizens and interests groups directly involved in the creation of the agreements that will impact them. This kind of participation is certainly not unheard of in Canadian history. Certainly one of the most famous recent examples of a non-governmental citizen organization participating in the political process is the representation of Aboriginal peoples at the negotiations on the Charlottetown Accord in 1991 (Robinson and Simeon, 2004: 117). Since so many agreements on government funding and policy are being made in the framework of executive federalism, it is possible that citizens feel that they should be trying to make their opinions heard in the political and executive realms, rather than by way of the judiciary.

However, the inclusion of citizens’ groups in intergovernmental negotiations poses some very serious problems for the efficacy of those discussions. Simmons notes that one of the most heated issues revolves around the selection of potential participants:

The question of who represents Canadians is even more complex when non-
governmental actors, representing themselves or a particular identity or interest... are part of the process. Should only those with something at ‘stake’ be involved in policy process? If so, who determines whether an individual is a ‘stakeholder’? (Simmons, 2008: 359).

Governments will often avoid the inclusion of any non-governmental actors in their negotiations because the mere selection of people or groups who would represent Canadians is nearly impossible. Intergovernmental negotiations are so often left to government executives in an effort to reduce debate and controversy, and to speed up the process of reaching consensus on the terms of the agreements. Thus, both the elected legislatures of Canada, and the interest groups that represent citizens from all walks of life, are excluded from the process of creating intergovernmental agreements. As Meekison, Telford and Lazar say in their discussion of the institutions of executive federalism, “the traditional institutions of the federation, aside from possibly the Supreme Court, appear to have become even less effective in managing intergovernmental agreements” (Meekison et al., 2003: 10)

Conclusion: A Return to the Court

If, as Meekison and his associates seem to suggest, the mechanisms of collaborative intergovernmental agreements and executive federalism are so unfit to represent Canadians and to manage intergovernmental relationships, then surely it is time to return to a system of federalism which places high value on the Supreme Court and its role. Baier certainly seems to think so. He concludes by extolling the virtues of a strong Supreme Court:

[J]udicial review still offers procedural advantages over its replacements. Unlike the new mechanisms of intergovernmental dispute resolution, it gives actors other
than governments an opportunity to influence the politics of intergovernmental relations. It also reinforces the constitutional character of the federal order, reminding governments that the Constitution is meant to be supreme. (Baier, 2008: 35-6)

Baier advocates a strong role for the Supreme Court as the reigning authority on intergovernmental dispute-resolution. In fact, such a move has already been predicted by recent intergovernmental agreements which include dispute-resolution methods, such as those outlined in the AIT, which are based on the existing structure of the Supreme Court. (Baier, 2008: 37). The problem, of course, is that these dispute-resolution methods which model themselves on the Court are redundant. A non-partisan dispute-resolution institution very much like the one set out in the AIT already exists in the Supreme Court, and for the government to try to re-create it outside the realm of the judiciary is both wasteful and downright dangerous. These dispute-resolution bodies become copies of the Court, but without the same legal authority, precedent-setting powers, or required expertise. This similarity to the structure of the Supreme Court could lead to a false sense of security, where governments assume that intergovernmental agreements have some kind of objective or legal enforceability. As Swinton reminds us, “parliamentary sovereignty reigns and... Parliament or a legislature has the ability to change its agreements without warning or in an unfair manner with the sanction being a political one, rather than a legal one” (Swinton, 1992: 143). In reality, governments can make alterations to their agreements without any advance warning, and will face no real legal consequences.

In the end, though governments may try to create dispute-resolution bodies that are modeled on the Supreme Court, they all fail to maintain some of the essential advantages that judicial review can provide. The Court has repeatedly shown itself to be much more
responsive to Canadian citizens than intergovernmental agreements at the executive level. Intergovernmental agreements, even those which contain dispute-resolution formulas, have little or no legal status, making them nearly impossible to enforce; and politically-created dispute-resolution bodies do not carry the same legal or precedent-setting powers that are available in the judiciary. In an era of collaborative federalism it may seem that the Supreme Court has a declining role in intergovernmental relations. On the contrary, the Court must maintain a strong role in order to ensure the continued representation of Canadian citizens in the realm of executive federalism, and a strong legal foundation for the terms of intergovernmental relations.

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