A Province in all but Name: The Political and Constitutional Evolution of Yukon since 1979

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Introduction:

For much of its history as part of Canada, since being admitted into the Dominion of Canada through the *Rupert's Land and North-western Territory Order* of 1870, the part of the country now known as Yukon (until the 1898 passage of the first *Yukon Act*, when it was made a separate territory, part of the Northwest Territories, though it became a separate district of the Northwest Territories in 1895) was, in effect, an internal colony of the Government of Canada, administered by a Lieutenant Governor and, after 1898, a Commissioner appointed by the federal government. As the Yukon Legislative Assembly noted, the Commissioner, who had the powers of both a Premier and a Lieutenant Governor, was not only appointed by the federal government but received instructions from either the Minister of Indian and Northern Affairs or the federal Cabinet, through letters of instruction, and was responsible to the federal government, not to the residents of the Yukon.[1] Under the terms of the first *Yukon Act* of 1898, the Yukon government was to consist of the Commissioner and a council of no more than six members appointed by the Governor-in-Council to aid the Commissioner in the administration of the territory.[2] In 1900, the council was expanded to seven, with two of the members elected, and by 1908, the council was fully elected, though the Commissioner still ran the government and was still accountable to the federal government, not the elected territorial council.[3]

Beginning with the establishment of responsible government in the territory in 1979, though, Yukon has received a wide range of jurisdictions, including control over public lands and resources, to the point that the powers of the Yukon Government listed in the *Yukon Act* now look very much like the list of provincial powers in s. 92 of the *Constitution Act, 1867*. The territorial government has been a full participant in the intergovernmental processes commonly referred to as "executive federalism" for the last 20 years. The 2002 *Yukon Act* codified a significant degree of independence for the territorial government. For the first time, the 2003 Yukon election was called by the Commissioner, rather than the Minister of Indian Affairs and Northern Development. These developments lead one to understand why Meyer J. of the Yukon Supreme Court referred to the territory as an "infant province" in 1986.[4]

These developments have fundamentally, and, I would argue, permanently and constitutionally transformed Yukon from an internal colony into a self-governing "dominion" within the Canadian federation, with the powers and the constitutional protections for its system of governance and those powers that make it a province in all but name. The key question that I wish to explore is what exactly is the constitutional status of Yukon, as a matter

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[1] Yukon Legislative Assembly, *Information Sheet No. 7: The Differences Between Provinces and Territories* (Whitehorse: Yukon Legislative Assembly, 2008), 2.
[2] F.B. Fingland, "Recent Constitutional Developments in the Yukon and the Northwest Territories" *U. Toronto LJ* 15:2 (1964), 299, at 304.
[3] Ibid.
[4] *St. Jean* v. *R. and Commissioner of Yukon Territory*, [1987] 2 NWTR 118; 2 YR 116, at para. 25.

of constitutional law or constitutional convention. What effect does responsible government in the territory have on the authority of the federal government to alter the powers of the territorial government without its consent? In particular, can the federal government ever rescind the grant of responsible government without the consent of the territorial government? Is the territory now effectively a province in all but name?

The Constitutional Import of Granting Responsible Government to a Colony:

The grant by the Imperial Crown of responsible government to the British North American colonies, beginning with the colony of Nova Scotia, in 1848 was the beginning of a consistent evolution of British North America to the status of an independent Dominion in the British Empire. Responsible government provided the colonies with internal self-government and a right of self-determination that the Imperial Crown never unilaterally rescinded and led, ultimately, to the Imperial Crown's and Imperial Parliament's recognition of both the internal and external independence and equal status with Britain of the Dominions, first through the Balfour Declaration of 1926 and subsequently confirmed by the *Statute of Westminster* of 1931.[5] I would suggest, in fact, that the grant of responsible government to a colony is a watershed moment in its relationship to the Imperial authority; once granted, the Imperial Crown could not unilaterally rescind a colony's responsible government, as the principle of democracy is a fundamental principle of not only Canadian constitutional law but of the British constitution, going back to the *Magna Carta* of 1215. Certainly, the Balfour Declaration and the *Statute of Westminster*, let alone the *Canada Act, 1982* permanently and constitutionally altered the status of Canada. The only exception I know of to the grant of responsible government being permanent throughout the British Empire/Commonwealth was the end of Newfoundland's responsible government and the establishment of a Commission of Government, appointed by and responsible to the Imperial government, in 1934; this, however, was done not unilaterally by the Imperial Crown but at the request of the Newfoundland House of Assembly.[6]

The only question that remains unanswered about the evolution of British North America's and, subsequently, Canada's independence from Britain is when Canada's independent status was secured. I would argue that, since ours is a common-law constitution, the Balfour Declaration had binding constitutional import, even before it was confirmed by the *Statute of Westminster* five years later. Since the *Statute of Westminster* was passed, though, the precise date of the establishment of constitutional rule that Canada and the other Dominions were independent of Britain is likely inconsequential, and hence has never needed to be answered. Ultimately, certainly by 1931, but possibly as early as 1867 or even 1848, the

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[5] Inter-Imperial Relations Committee, *Imperial Conference 1926: Report, Proceedings and Memoranda* (London: His Britannic Majesty's Government, November 1926), 1; *An Act to give effect to certain resolutions passed by Imperial Conferences held in the years 1926 and 1930*, Statutes of the United Kingdom 22 George V (1931), chapter 4.

[6] See, for example, James Overton, "Economic Crisis and the End of Democracy: Politics in Newfoundland During the Great Depression" *Labour/Le Travail* 26 (fall 1990): 85 for a discussion of how the Newfoundland Assembly's decision to replace responsible government with a Commission of Government came about.

United Kingdom could not unilaterally take away responsible government and the legislative powers provided to those Dominions that had been granted responsible government.

The Transformation of the Constitutional Status of Yukon since 1979 – A Parallel to the Evolution of Canada's Status within the British Empire:

Why does this history of the evolution of Canada and the other Dominions of the British Empire matter for understanding the status of Yukon within Canada today? The evolution of Yukon's status within Canada since 1979 in many ways parallels the evolution of Canada's status within the British Empire since the British North American colonies were granted responsible government by Imperial act in 1848. We know from the *Constitution Act, 1982* and our constitutional jurisprudence that Constitution of Canada consists of more than just the *Constitution Act,* 1867 and the *Constitution Act,* 1982; the Constitution of Canada is made up of a whole number of Acts of both the Imperial and the Canadian Parliaments and, as a common-law constitution, our Constitution is also made up of declarations of various governments that are treated as being of constitutional weight and decisions of the courts on what the Constitution says, and even what are unwritten principles of the Constitution.[7] As the Supreme Court of Canada said in the *Reference re. the Secession of Quebec*, "In order to endure over time, a constitution must contain a comprehensive set of rules and principles which are capable of providing an exhaustive legal framework for our system of government. Such principles and rules emerge from an understanding of the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning."[8] Given that we know, thanks to the Supreme Court of Canada, that the principle of democracy is a fundamental principle of the Constitution of Canada, [9] the result of the evolution of the government of Yukon between 1979 and 2013 must be the same as the result of the evolution of the status of Canada within the British Empire between 1848 and 1931.

In the *Reference re. Secession of Quebec*, the Supreme Court of Canada defined democracy as "a fundamental value in our constitutional law and political culture. … The principle of democracy has always informed the design of our constitutional structure, and continues to act as an essential interpretive consideration to this day. … a sovereign people exercises its right to self-government through the democratic process. … Historically, this Court has interpreted democracy to mean the process of representative and responsible government and the right of citizens to participate in the political process as voters and as candidates … The consent of the governed is a value that is basic to our understanding of a free and democratic society. … Finally, we highlight that a functioning democracy requires a continuous process of discussion."[10] If the constitutional principle of democracy means anything, then, it must, at a minimum, mean that the system of government of a society cannot be altered without at least the consent of that society's democratically elected legislature and possibly unless initiated by

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[7] See, for example, *Schedule to the Constitution Act, 1982*; *Reference re*. Supreme Court Act*, ss. 5 and 6*, 2014 SCC21, [2014] SCR 433, especially at paras. 5, 74-6, 88-95; *Reference re. Secession of Quebec*, [1988] 2 SCR 217 (hereinafter the *Quebec Secession Reference*), especially at paras. 49-54.

[8] *Quebec Secession Reference*, at para. 32.

[9] Ibid, at paras. 61-9.

[10] Ibid, at paras. 61-8.

that legislature. We therefore must understand the Yukon to have constitutional protections for its responsible government and the powers it exercises (which are, to a tremendous extent, the same as the powers of the provinces in the Canadian federation) equivalent to the constitutional protections that the provinces have in the Constitution, albeit through another statute, the *Yukon Act*; as this Act, though, is constitutive of the territorial Legislature and government and provides that Legislature with its legislative jurisdiction, it must be understood as a statute of a constitutional nature and likely part of the broader Constitution of Canada.

How did this come about? The evolution of Yukon's constitutional status really began with the first letter of instruction given to the new Commissioner of the Yukon, Ione Christensen, in January 1979. For the first time, the government leader in the Yukon was consulted in the drafting of the letter of instruction and on some matters, the Commissioner was instructed to be bound by the advice of the government leader on the names and number of elected members on the executive committee, which provided advice to the Commissioner much like a Cabinet, and the Commissioner was required to accept the advice of the executive committee on some matters for the first time.[11] The election of Joe Clark's government in 1979 and the appointment of Jake Epp as Minister of Indian and Northern Affairs set the stage for the next step in the political and constitutional evolution of Yukon; Minister Epp sent Commissioner Christensen a letter of instruction on October 9, 1979 in which he instructed her that she shall "request the Territorial Government Leader that he shall constitute and appoint a body known as the Cabinet or the Executive Council which will have as its members those elected representatives of the Territorial Council who are designated from time to time by the Government Leader who enjoys the confidence of the Council. On the advice of the Government Leader you shall assign Department executive responsibilities to the appropriate members of the Executive Council."[12]

Minister Epp also instructed Commissioner Christensen to remove herself from participation in the new Executive Council, despite the fact that the Commissioner had sat with the previous executive committee; Minister Epp's letter of instruction (commonly known now as the "Epp letter") went on to say that "You [the Commissioner] will not be a member of the Cabinet or the Executive Council, and will not participate on a day-to-day basis in the affairs of the Cabinet or the Executive Council, and Council of the Yukon in those matters delegated in the Yukon Act to the Commissioner in Council."[13] He also stated: "I hereby instruct you to accept the advice of the Council in all matters in the said [Yukon] Act which are delegated to the Commissioner in Council, provided that those matters meet the requirements of Section 17 of the said Act and excepting Section 46 of the said Act;" section 17 stated that the powers to legislate could not exceed those granted to provinces, while Section 46 specified that all lands in the Yukon remain vested in Her Majesty in right of Canada.[14]

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[11] Steven Smyth, "Constitutional Development in the Yukon Territory: Perspectives on the 'Epp Letter'" *Arctic* 52:1 (March 1999), 71, at 73.
[12] Ibid, at 74.
[13] Ibid.
[14] Ibid.

Thus, Yukon received responsible government and the role of the Commissioner of Yukon became equivalent to that of a Lieutenant Governor of a province, rather than that of a Minister of the government, as had previously been the case. Lastly, the Epp letter authorized the government leader to refer to himself as "Premier" and the Executive Council members to refer to themselves as "Ministers"; Cabinet documents such as "Commissioner's Orders" became "Orders-In-Council" and "Records of Recommendation" were renamed "Records of Decision," to reflect the fact that the cabinet had replaced the commissioner as the ultimate decision-making authority in the territory.[15] As a consequence of these changes, Commissioner Christensen tendered her resignation to Minister Epp the same day.[16] The Epp letter has only ever been elaborated upon since October 1979, and had never been revoked; as Steven Smyth notes, this gives some credence to the argument that it attained "a measure of permanence", possibly even the status of a constitutional convention.[17] Smyth also notes that Yukon historian Brent Slobodin argues that the changes formalized in the Epp letter were politically irreversible; [18] to reverse these developments and return the Commissioner to a decision-making role in the Executive Council would have offended the fundamental constitutional principle of democracy.

In 1987, Prime Minister Brian Mulroney invited the provincial Premiers to the Prime Minister's summer retreat at Meech Lake, Quebec to negotiate a package of constitutional amendments, including an amendment to make the creation of new provinces from the territories require the unanimous consent of the existing provinces. The reaction to the exclusion of the territories from the Meech Lake meeting, a meeting at which the possibility of the territories ever becoming provinces was meaningfully altered (as it had been in 1982, also without the territories' participation) was sufficiently strong, including a constitutional challenge by Yukon Premier Tony Penikett to the Meech Lake Accord process,[19] that, when the Meech Lake Accord failed to become a constitutional amendment and the federal government initiated a new round of constitutional discussions in 1992, which would lead to the Charlottetown Accord, the territories were included as full participants in all aspects of the constitutional negotiations for the first time. While some federal officials involved in the Charlottetown Accord negotiations tried periodically to relegate the territorial delegations to something of a second-class status, the territorial delegations had strong allies among several provincial delegations so their equal status in the negotiations was assured. The participation of the territories in the Charlottetown Accord negotiations represented the establishment of the territories as full partners in the federation and in the processes of executive federalism by which intergovernmental relations in Canada is managed. Territorial Premiers have been invited to participate at all of the Annual Premiers Conferences, the meetings of the Council of the Federation, and First Ministers Meetings since 1992.

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[15] Ibid.
[16] Ibid, at 75.
[17] Ibid, at 76.
[18] Ibid.
[19] *Penikett* v. *R.*, 21 B.C.L.R. (2d) 1; [1988] N.W.T.R. 18, (sub nom. *Penikett* v. *Canada*); 45 D.L.R. (4th) 108; [1988] 2 W.W.R. 481, (sub nom. *Yukon Territory (Commissioner)* v. *Canada*); 2 Y.R. 314.

At the same time as the Yukon government was participating in the Charlottetown Accord negotiations, the territorial government began a public consultation process to receive public input on what it should propose to the federal government to be in a new *Yukon Act*. Through this process, the government developed an agenda for the continued political and constitutional development of the territory.[20] At the time Smyth wrote his article, 1999, there were still a number of questions about the constitutional status of Yukon to be settled. He commented, for example, that "A fundamental question remains: to what extent can the minister of Indian and Northern Affairs intervene in the governance of the Yukon by using the power of instruction granted under the *Yukon Act*? Could the minister restore the commissioner to Yukon's cabinet if the territorial economy suffered a severe setback and its population dwindled? What are the limits on the federal prerogative in the North?"[21] While I would argue that the constitutional principle of democracy meant that the Epp letter answered these questions to a great extent, they were clearly answered only a few years after Smyth wrote his article, in the provisions of the *Yukon Act* and the full implementation of that Act by 2013.

The new *Yukon Act* received Royal Assent on March 27, 2002. Section 17 of this Act defined the Commissioner and the Legislative Assembly as the Legislature of Yukon, rather than the Commissioner in Council, for the first time.[22] Sections 18 to 23 of the Act provided the Yukon Legislature with the authority to make laws on a list of subject-matters essentially the same as the jurisdictions that the provinces have under sections 92 to 95 of the *Constitution Act, 1867*.[23] As well, under section 45 of the Act, the Yukon government was given statutory control of the administration of public real property and oil and gas in the territory.[24] It is also important to note that, under section 56 of the Act, the federal government must consult with the Executive Council of Yukon before introducing any bill into the House of Commons to amend or repeal the *Yukon Act*.[25] This provision does not protect the powers or structure of government of the territory in the same way as amending formula of the *Constitution Act, 1982* protects the provinces, but it does give the Yukon government a statutory and, as I would argue that the *Yukon Act* is a statute of a constitutional nature, a constitutional right to be consulted. More importantly, I would argue that the unwritten constitutional principle of democracy imposes a higher, constitutional duty on the federal government than a duty merely to consult the Yukon government before amending the *Yukon Act* in any way that would affect the

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[20] Janet Moodie, personal communication, 2005.

[21] Smyth, at 78.

[22] *Yukon Act*, S.C. 2002, c. 7. In the Charlottetown Accord negotiations, federal Department of Justice officials refused to allow the Commissioner and Legislative Assembly to be defined as the "legislature", even with a lower-case "l", as it was suggested that this would imply that there was a "Crown in right of the Yukon" and the federal officials insisted that the territorial Crown was the Crown in right of Canada; this led to a number of heated discussions and, as the reference was to the equivalent of the Legislature in provinces, not just to the Legislative Assembly, the compromise was the use of the somewhat tortured phrase "territorial legislative authority". Thus, the use of the term "Legislature" in the 2002 *Yukon Act* was a major accomplishment in the constitutional development of the territory.

[23] Ibid, ss. 18-23.

[24] Ibid, s. 45.

[25] Ibid, s. 56.

Legislature's powers or the principles of responsible government; in such circumstances, the federal government must not merely consult with the Yukon government but secure its concurrence.

Possibly the most important provision of the 2002 *Yukon Act* for the constitutional evolution of Yukon was section 68. While subsection 4(3) of the Act, as passed in 2002, stated that "The Commissioner shall act in accordance with any written instructions given to the Commissioner by the Governor in Council [the federal Cabinet] or the Minister," as had been the case for all Yukon Commissioners, section 68 of the Act automatically repealed subsection 4(3) "on the day that is 10 years after the day on which that subsection [subsection 4(3)] comes into force."[26] As subsection 4(3) came into force on April 1, 2003, on April 1, 2013, the last remaining statutory vestige of federal control over Yukon's politics was repealed. The repeal of subsection 4(3) put the Yukon Commissioner in same relationship with the Government of Yukon as the Lieutenant Governors of provinces have with provincial governments.[27]

The evolution of Yukon's system of government and status within the Canadian federation does seem remarkably similar, then, to the evolution of Canada's status as a self-governing Dominion within the British Empire. The result, therefore, should also be the same. Since our understanding of what constitutes the "the Constitution of Canada" is "the global system of rules and principles which govern the exercise of constitutional authority in the whole and in every part of the Canadian state," including such things as the *Supreme Court Act* and the fundamental, but unwritten, principles that the Supreme Court of Canada defined as underpinning the Constitution in the *Reference re. Secession of Quebec*,[28] we really must accept that the *Yukon Act, 2002* and the Epp letter which preceded it are constitutional documents. Given that the principle of democracy is one of the fundamental constitutional principles of the Constitution of Canada, it must be the case that, despite the fact that, technically, the *Yukon Act, 2002* is federal legislation, the federal government can no more unilaterally amend the *Yukon Act, 2002* to take away those protections for responsible government and the jurisdictions of the Government of the Yukon contained in that Act than the British Imperial Parliament can amend or repeal the *Canada Act, 1982* or the *Statute of Westminster*. As a practical matter, this means that Yukon today, nearly 40 years after the Epp letter first

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[26] Ibid, at ss. 4(3), 68.

[27] Kirk Cameron, "A Constitutional Celebration!" *Northern Public Affairs* May 22, 2013, available at . I also find it interesting that, in her judgement for the Supreme Court of Canada in *First Nation of Nacho Nyak Dun* v. *Yukon*, 2017 SCC 58, [2017] 2 SCR 576, Karakatsanis J. twice linked the Yukon government to the "honour of the Crown"; first, she wrote that "In all cases, Yukon can only depart from positions it has taken in the past in good faith and in accordance with the honour of the Crown…" (at para. 52) and, secondly, she wrote that "As both the trial judge and Court of Appeal noted, Yukon's conduct was not becoming of the honour of the Crown." (at para 57). While her comments do not make it clear, one wonders whether the Supreme Court of Canada sees a third aspect of the Crown in Canada, a Crown in right of the territory, in light of the independence of the Yukon government and Legislature. The idea that there might be a Crown in right of Yukon, separate from the Crown in right of Canada, was anathema to federal officials at the time of the Charlottetown Accord negotiations, which was at the heart of their refusal to refer to the Commissioner and Legislative Assembly of Yukon as the "Legislature" in the Charlottetown Accord draft legal text.

[28] *Reference re. Resolution to Amend the Constitution*, [1981] 1 SCR 753, at 874; *Reference re.* Supreme Court Act*, ss. 5 and 6*; *Quebec Secession Reference*.

established responsible government in Yukon, is an independent, self-governing jurisdiction within the Canadian federation with virtually identical legislative jurisdictions to those of the provinces and the same level of protection for its independence, its right to self-government, and its legislative jurisdictions, albeit through a different constitutional statute, as the provinces have. Today, then, Yukon truly is a full, independent component part of the Canadian federation and, in terms of its governance, its role in the federation, and its powers, a province in all but name.