Canada and Belgium: Convergence and Dissonance in the Federal Accommodation of National Pluralism

Johanne POIRIER

Centre de droit public, Université libre de Bruxelles

In comparative law and politics, Canada and Belgium are prototypes of « pluri » everything ! They are undeniably plurilingual, multicultural, multiethnic. A vast body of literature also presents them as "plurinational federations" whose very architectural design was meant to accommodate minority nationalism.

This presentation will examine some similarities and some differences in the way in which the constitutional design of both federations reflects and consolidates "internal nations".

To do so, I will proceed with a partial and sketchy dissection of the two federal systems in parallel, to draw comparatives lessons and inferences on "multi" or "pluri" nationalism

For more detailed comparisons, see, POIRIER, Johanne

• « Les fédérations belge et canadienne : essai de comparaison synthétique et systématique », *in* Fédéralisme et protection environnementale : regards croisés sur les expériences belge et canadienne, Numéro spécial de la *Revue de droit de l'Université libre de Bruxelles*, vol. 39, 2009, pp. 13-33
• « Au-delà des droits linguistiques et du fédéralisme classique : Favoriser l'autonomie institutionnelle des francophonies minoritaires du Canada », *in* CARDINAL, Linda, GILBERT, Anne, Joseph-Yvon THÉRIAULT, eds., *L'Espace francophone en milieu minoritaire au Canada : nouveaux enjeux, nouvelles mobilisations*, Fides, Montréal, 2008, pp. 513-563
• « Protection constitutionnelle des minorités linguistiques : un exercice-fiction de transposition du modèle fédéral belge au Canada », *in* BRAEN, André, FOUCHER, Pierre, Le BOUTHILLIER, Yves (dir.), *Langues, constitutionnalisme et minorités / Language, Constitutionalism and Minorities*, Butterworths, Toronto, 2006, pp. 161-200 (repris dans *The Supreme Court Law Review*, vol. 31, 2006, pp. 161-200)
•« Protection sociale et (dé)construction de la citoyenneté dans les fédérations multinationales », *in* JENSON, Jane, MARQUES-PERRERA, Bérangère, REMACLE, Éric (dir.), *L'état des citoyennetés en Europe et dans les Amériques*, Les Presses de l'Université de Montréal, Montréal, 2007, pp. 195-214

Factors influencing the « pluri-national character » of the 2 federations

- Geography
- Socio-Demographics
- Multi-cultural / ethnic character
- Official Languages
- Federal History
- Constitutional Pathology
- Institutional Trajectory
- « *Raison d'être* »of federal régime
- Federal institutions and « federal political dynamics »
- Constitutive units and political dynamics
- Personal federalism ? Not really
- Multiple faces of assymmetry : belonging / institutional / competencies / IGR
- Senate and Senate Reform

Will not look at :

- Distribution of material competencies
- Functional competencies
- Judicial Organisation and Power
- Legal System and legal culture
- Relations between domestic and international/EU law
- Constitutional Monarchy (and its role)

CANADA – BELGIUM : SOME PARALLELS

o Western, democratic, pacific

o Parliamentary systems

o Constitutional monarchies (partly "republican" at CU level in Belgium)

o Bi(tri) lingual

o Bi-national (with assymmetry of belonging and identification, with one group identifying more with its "own" nation, and another identifying primarily with the "overall-country/nation". In Belgium, that latter group is composed of the French minority, in Canada with the English-speaking majority

o Chose federal solution to accommodate some forms of diversity... (though very differently)

o Federations « under tension » (centrifugal movements)

o Both highly studied in context of "post-conflict" state restructuring: from models to counter-models ?

CANADA – BELGIUM : SOME TELLING DIFFERENCES

o old vs. recent

o small vs. geographically large

o association/dissociation vs. dissociation

o number of constitutive units

o different approaches to immigration (and thus identity politics)

o different approaches to « regional integration » (NAFTA vs. EU)

o presence of aboriginal peoples (and not…)

o**Dissatisfaction mostly on the part of one minority group VS. from a the majority**

CANADA – Political

LA BELGIQUE

L'ETAT FEDERAL

LES COMMUNAUTES

LA COMMUNAUTE FLAMANDE

LA COMMUNAUTE FRANCAISE

LA COMMUNAUTE GERMANOPHONE

LES REGIONS

LA REGION FLAMANDE

LA REGION DE BRUXELLES-CAPITALE

LA REGION WALLONNE

	Belgium	Canada
Geography	30,528 km2 Population density: 354 pers /km2	9 984 670 km2 Population density : 3,6 pers /km2
Socio-demographics	Around 59 % NL (Dutch-speakers) 39 % French-speakers < 1 % German speakers 50 % of Brussels population has neither French nor Dutch as a first language (estimate) NB (estimates, are there are no official census data on language affiliation of the population !)	Around 60 % English-speakers 23 % French-speakers (huge numbers of non-native speakers) Around 4% Aboriginals in over 200 communities

	Belgium	Canada
Multi-cultural / ethnic character	Highly multicultural (no official recognition in state institutions or in constitutional norms)	Highly multicultural (art. 28 of the 1982 Constitution Act but no institutional recognition)
Official languages	3 Dutch / French / German Strict principle of territoriality (juxtaposed unilinguism of all public institutions except in officially bilingual Brussels and to a limited extent in criminal trials)	2 English / French Principle of « personality » for federal institutions and education rights Vast divergences between provinces Some aboriginal languages recognised in territories

	Belgium	Canada
Federal History	Recent (officially federal 1993, Probably federal since 1988-89)	Federal since 1867
Constitutional pathology	**Hyper-activity /bulimia ?** Recurring rand unending reforms (1970, 1980, 1988-89, 1993, 2001, 2013) Each time to transfer competencies to regions and communities (and reform federal institutions)	**Constitutional allergy / paralysis** Constitutional reform arguably more difficult since « Patriation of the Constitution » (1982) (allows for vigorous para-constitutional intergovernmental relations)

	Belgium	Canada
Institutional Trajectory	Federalism by Dissociation	Association and dissociation
	Continued centrifugal movement	Competing Centrifugal/centripetal and static tendencies
	Gradual evaporation of the federal order (no clear secessionist movement but a Flemish independance project ?)	Overt independentist/secessionist movement in Quebec
	Simulateneous European integration (enthusiastic !)	No equivalent (ALENA plays basically no role in identity politics)

	Belgium	**Canada**
« *Raison d'être* » of federal regime (cultural accommodation)	To respond to Flemish demands for cultural autonomy (and now economic autonomy) Also – in the 70s and 80s -to respond to Walloon quest for economic autonomy (ironic given state of Walloon economy today !)	2 competing readings : -Near unitary territorial federalism -« Compact between two founding peoples » (2nd vision = multinational from the start ?) Aboriginal peoples are not considered in either of the 2 historical readings

	Belgium	Canada
Federal institutions Federal political dynamics	Fundamentally **bipolar** -Linguistic groups in both chambers of Parliament (vetoes) -Linguistic parity((by law): • Council of Ministers • Constitutional Court • Conseil d'État •Court of Cassation •Top civil service (no longer ?) • Concertation committee (multilateral IGR assembly)	Waltzes between **multipolarity**, **regionalism**, and **bipolarity** (French-English) -No equivalent to institutional dual representation of the two major cultural/language groups (and thus of the minority "nation") - no language groups or vetoes (not even for Patriation -3/9 judges for Québec at SCC (civil law) -Seats reserved in Senate for « regions » (Québec counts as one) - Some minority protection in Senate (completely discretionary on part of federal PM, and to be removed if Senate reform ?)

	Belgium	Canada
Constitutive units And political dynamics	3 **Regions** (purely territorial) -Flemish -Walloon -Brussels-Capital 3 **Communities** (overlapping over regional territory but not perfectly: see map !) -Flemish (Flanders + Brussels) -French (Wallonia + Brussels – German speaking) -German-speaking **Despite multiplicity of CU, politics (and public law) are largely bipolar**	10 provinces and 3 territories (assymmetry but **all territorial**) 2 in which minorities are majorities Québec and Nunavut 1 officially bilingual : New Brunswick with 40% French-speakers **Multipolar relations: shifting alliances but not regarding "plurinationalism"**

	Belgium	Canada
Personal federalism ? SO.... **« ethno-federalism » in origins/raison d'être (contested for Canada)** BUT **Territorial solutions**	**NO ! (contrary to common misconception in comparative law and politics)** « Communities » have specific territorial competencies Only in Brussels do they meet/overlap and so far can only with regards to institutions not people People are free to use French or Dutch services in Brussels	NO Limited adaptation to « personal federalism » in some Self-government agreements with aboriginal peoples But NOT with French minority of the country

THE RANGE OF INSTITUTIONAL SOLUTIONS FOR GRANTING AUTONOMY IN THE SEARCH FOR THE PROTECTION OF DIVERSITY

1. **Territorial (including redesigning of borders) BUT**
   - the risk of the search for homogeneity
   - minorities within minority
   - those left out...

2. **Personal autonomy (« deterritorialised ») BUT**
   - problem of the connecting factors...
   - the « fossilisation » of identities
   - polarisation of society

3. **Hybrid systems : aboriginal self-government in Canada and in a very limited and particular way in the Brussels Capital Region**

Asymmetry of « sense of belonging » (who ARE the nations if the federations are MULTINATIONAL ?) Multiple/overlapping /concentric sense of identity (but not in identical ways)	Yes « Flemish »/Belgian vs. Confused/fluid/indist inct identity of French-speakers Emerging « Brussels » identity (more mixed, less bipolar) Love-hate relationship with EU institutions but still very « European »	Yes Canadian / provincial identities (secondary changing ?) Québec (nation) and Acadians (what ?) Aboriginals (nations) No more « French Canadians... » (one of the original founding peoples.... – replaced by the Québécois)

	Belgium	**Canada**
Institutional assymetry	Yes (« Fusion" between Flemish Community and Regional Institutions) while there is still a complex multiplicity of institutions on the French-side of the country, which reflects (and explains?) the lack of a francophone "national" identity Is « over-protection » of the French minority in federal institutions = asymmetrical ?	None (with the exception of the 3 Nordic territories which have the same competencies and institutions as provinces, but do not enjoy constitutional protection. Are – officially – under federal jurisdiction. They participate in multilateral political institutions (Council of the Federation, intergovernmental bodies etc.) but their consent is not required for constitutional amendments (nor do they have at the SCC)
Asymmetry in distribution of competencies	No	Limited (results from IGR not Constitution)

	Belgium	Canada
Distribution of material competencies (Symbolic and instrumental value of competencies for « nation-building purposes »)	Very detailed By « attribution to the CUs » Officially on an exclusive Basis. In fact, a great deal of interaction (notably, given degree of detailed distribution and existence of Communities and Regions with interrelated competencies	Dated ! 1867 (last modifications 1964 and 1982) Officially, largely exclusive (exceptions for pensions/immigration/agriculture) In practice, wide areas of overlapping and increasing constitutional interpretation leading to *de facto* concurrency This is more challenged by Québec (for whom exclusivity contributes to autonomy)
Functional competencies	Dualist (Limited federal « basic legislation »)	Dualist (with increasing informal transformation to « integrated form of federalism »
Dominant mode of Interaction between federal	Largely intergovernmental (link with Senate)	Almost exclusively intergovernmental

	Belgium	Canada
Judicial Organisation	Federal (with linguistic chambers) Constitution Court Administrative Court (Conseil d'État) Court of Cassation All with dual representation of NL-French speakers Slow emergence of Flemish administrative tribunals	Provincial and federal courts Supreme Court at top of hierarchy (3 or 9 judges from Québec, no formal language requirement)

	Belgium	Canada
Legal System	Civilist	Common law (outside Québec, including in French in New Brunswick!) Bijuridical for Québec (civil law in private law as an identity marker + common law in public law) Limited recognition of aboriginal legal cultures and law
Legal Culture	Legicentrist (hiding political pragmatism)	Rest of Canada = very pragmatic (cf recent call to Supreme Court not too be too dogmatic with the text of the Constitution in the Senate reference ! Minorities and « national groups » seek more institutionalisation and « respect for original deals »

	Belgium	**Canada**
Relation between domestic and international / EU law	Strict parallelism Some Flemish « para-diplomacy » French CUs play the « Belgian card »	Federal domination Strategic para-diplomacy on the part of Québec
Constitutional Monarchy	In theory: « asexual! » Challenged in Flanders (was opposite not so long ago) CUs are « republics! »	CUs = « sub-monarchies » A « non-issue » turned into power politics as the current federal government (Harper) uses traditional ol?

	Belgium	Canada
Senate	Has been altered numerous times ! NOW:40/71 are directly elected, others are nominated by Communities or chosen by other Senators Highly bipolar (2 language groups, alarm bell, etc.) « Imperfect » (limited) bicameralism	Antiquated chamber Some « regional representation » 105 members All nominated by federal PM Highly partisan Officially near co-equal to H of Commons (lack of legitimacy) Indirect minority protection

Senate Reform ?	As of 2014	Federal unilateral initiative (2011)
	Finally a chamber of CUs ?	Reference to Supreme Court of Canada (heard Nov 2013)
		Questions:
	Only partly:	
	•Highly bipolar still	1. **Can the federal order, by ordinary legislation:**
	•Brussels Region representation (2) divided by language	
	• competencies reduced	•Limit the terms of office of Senators ? (from life-tenure to 7-10 years mandates)
	•no longer « permanent »	
		• Introduce Provincial consultative process, including elections, into existing nomination process ? (Senators would still formally be nominated by PM as *per* Constitution, but would "take into consideration" these provincial results)
	60 members	
	•29 designated by Flemish Parliament (2 from Brussels)	
	•8 by Walloon Parliament (a first!)	
	•2 from French group of Brussels Region (hence bipolarity maintained)	
	•10 from French Community	2. **What amending formula would apply to abolition of Senate**
	•1 German	- 7/10 provinces (representing 50% overall Canadian population) OR
	•10 "coopted" (selected by peers but on basis of electoral results in House of Representatives: 6 Flemish + 4 French-speakers)	- Unanimity of provinces?
		NB: no provision for minority protection in either case, apart from provincial status

	Belgium	Canada
Lessons of Senate Reform for Plurinational federalism ?	Reinforces : -Bipolar (bi-natinal) vision of the country -Very coherent for Flanders -Far more problematic for -Brussels -And the rest of the « South » of the country -Neutral for German speakers ? -This takes place in the context of major State Reforms which – again – reinforce CU and weakens the Center. The Belgian "nation" continues to dissolve (if it ever really existed). Flemish nation is reinforced. Identity politics for the rest of the country continue to be complex and fluid. But not in a "nation-building process"	Abolition in view ? : no sense of « federal » plus-value. Nor of role of a second chamber to defend minority concerns Provincial input in selection : consistent with territorial federalism. Only consistent with multinational conception in the case of Québec (due to territorial solution !) Role of aboriginals ? Protection for language minorities ? : Unlikely Given risk of very opposite interests (equality of provinces as per USA model, multinational model, minority vetoes/quotas, etc.), unlikely to have sufficient consensus to allow for constitutional reform. Another

AS A WAY OF CONCLUSION

…

• Federalism as a means of Recognition of pluri-nationalism ?

• Federalism contributing to the consolidation of (some forms of) « sub-national » nation-hood or nationalism ?

	Belgium	Canada
Recognition of pluri-nationalism through federalism ?	Art. 33 Constitution 1831 (unchanged!)	Accommodation through territorial federalism (minority becomes a majority and enjoys the powers of a "state within the state")
	"Tous les pouvoirs émanent de *la* nation" (oh, so French)	Only applies to Québec and – recently – to Nunavut
	But which nation ?	No institutional recognition of multinationalism in federal institutions
	Was Belgium ever a "nation-state" ?	Is there a Canadian nation ?
	(the term was used in 1831 to limit monarchical powers, not in the context of identity politics. But of course, the only true identity was the "aristocratic francophone one!)	Perennial existential question since the 1960s (with rise of Québec nationalism)
		Under the Trudeau-ist vision: The Canadian nation included bilingualism. But not the recognition of multi-nationalism
		Today, vision of Canadian nation is even more evanescent…

	Belgium	Canada
Consolidation of « sub-national » nationhood through federalism ? (turning concept of "nation-without-state" on its head)	Flanders: From no state (apparatus) + no nation To « state » (CU) contributing to « nation-building » Now towards a « nation-state » ? (that evolution has NOT occurred in South of country)	Territorial federalism has transformed the French Canadian « nation » into a Québec « nation » Quid of the "other" French-Canadians (language rights, but hardly any political autonomy, key to federal accommodation) Quebec used the « state » apparatus to consolidate the Québec « nation » The (ever elusive) independence project: towards a « nation-state » ?
		Neutral for aboriginal peoples Territorial federalism has led to the fragmentation of the French Canadian nation

	Belgium	Canada
For Jean Leclair*one of the advantage of federalism it that it: allows for multiple/fluid/overlapping/non exclusive identifies ? BUT, it depends in what forms of institutional design the "ideal" of federalism is concretely translated * LECLAIR, Jean, « 'Vive le Québec Libre ! ' : Liberté(s) et Fédéralisme » (2010) 3 Revue québécoise de droit constitutionnel.	From limited "regional" identities, to parallel « mono-identities » to multiple identities ? Some of these identities correspond to "nations", others not Impact in any event is diminution of sense of Belgian 'nation' (movement is not linear)	Federal institutions do not require people to chose an exclusive identity But arguably, do not sufficiently recognised multi-national character of the country

Quo vadis ???

Canada: More of the same ? But of what ?

• Continued political fragmentation : rise of « the West »

• More and more multicultural and multi-ethnic, but institutional recognition of plurinationalism = weak

• « Quebec nation » somewhat recognised ? (federal Parliamentary resolution)

• But consequences denied in practice (anti-bilingualism politics, etc.)

• Can the « *Charte des valeurs* » proposed by the Parti Québécois contribute to « nation-building » ? (at this juncture is it "nation-dividing")

• Role of aboriginals ?

• French-speakers outside Québec ?

Quo vadis Belgium ?

Premature Necrology ?

•Renewed sense of compromise ? (6th reform)

•« Belgitude » is in fashion (football!)

•Strengthening sense of Flemish National Identity (their *revolution tranquille* ?)

•Undeniable sense of « German-speaking » identity (nation???)

•Confusing and fluid emergence of new identity in Brussels (despite institutional artificial « bipolarity »)

•«Fédération Wallonie-Bruxelles » ? Pragmatic, but no emerging sense of a French nation (illustrates, in fact, the two "regional" realities" by contrast to one "national" one

•Elections May 2014: litmus test : The New Vlaams Allancie (NV-A) ahead, with a further project of confederalism (2 nations vision, including by dividing the Brussels population). Does not correspond to the French-speaking/Brussels identity

•Long term ? : Slow Dissolution. Independence without Secession ?

GRACIES

GRACIAS