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Alex Despotovic

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Book Review



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## The Constitution in a Hall of Mirrors: Canada at 150, by David E. Smith

### **Abstract**

Academics, media commentators, and political figures alike have each seized the opportunity presented by Canada's sesquicentennial to reflect upon the status of our nation, and upon the ways in which its institutions, demographic makeup, and standing in the global community have evolved over the past 150 years. The modern Canadian state—which is now home to thirteen provinces and territories; the world's tenth-largest economy; and one of the world's most diverse set of ethnicities, languages, and religions—only faintly resembles the state that was initially envisioned by Canada's founding fathers on the shores of Charlottetown.

## Book Review

***The Constitution in a Hall of Mirrors: Canada at 150*, by David E. Smith<sup>1</sup>**ALEX DESPOTOVIC<sup>2</sup>

ACADEMICS, MEDIA COMMENTATORS, AND POLITICAL FIGURES alike have each seized the opportunity presented by Canada's sesquicentennial to reflect upon the status of our nation, and upon the ways in which its institutions, demographic makeup, and standing in the global community have evolved over the past 150 years. The modern Canadian state—which is now home to thirteen provinces and territories; the world's tenth-largest economy; and one of the world's most diverse set of ethnicities, languages, and religions—only faintly resembles the state that was initially envisioned by Canada's founding fathers on the shores of Charlottetown.

Yet, the vision that was espoused in those historic deliberations, and later codified in the form of *British North America Act, 1867*,<sup>3</sup> continues to have a profound influence on all aspects of our society, just as it did in 1867. What has occurred, however, is that the textual provisions and related concepts envisioned in that founding document have taken on different meanings over time, with decades of economic, political, and legal pressures shaping the Canadian state along more contemporary lines.

There has been a wide array of academic commentary on many of these topics. For instance, though it is universally accepted that the deliberations that took place between the English-Canadian federalists and the Quebec and

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1. (Toronto: University of Toronto Press, 2017) 216 pages.
  2. JD/MBA Candidate (2019), Osgoode Hall Law School and the Schulich School of Business, Toronto, Canada.
  3. (UK), 30-31 Vict, c 3 [*BNA Act*].

Maritime provincial politicians provided the fundamental structure that governs modern federal-provincial relations, it is also widely accepted that the nature of those relations has evolved immensely over time.<sup>4</sup> Legal judgments and economic considerations alike have shifted the brunt of responsibility from one level of government to the other and back again, in ways that Canada's constitutional forefathers could have never imagined. At the same time, it is widely held that the bilingual and bicultural provisions of the *BNA Act*, which were originally intended to facilitate cohabitation between two distinct groups in Canada, have in some way propagated acceptance of multiculturalism in the modern Canadian state<sup>5</sup>—a feature that was neither conceived nor deliberated upon by the constitutional forefathers. The crux of this position is a logical one, as it stands to reason that, in large part, the modern state's multicultural policies are simply an expansion of Canada's founding principles of cultural cohabitation and coexistence, extended to a more diverse set of ethnic and religious peoples.

It is therefore somewhat of a mystery that fundamental changes, with respect to the political institutions that were joined at Confederation—including the Crown, the Senate, and the House of Commons—have gone largely unstudied, as remarked by David Smith in his recently released book, *The Constitution in a Hall of Mirrors*.<sup>6</sup> And though Smith is quick to caution that the purpose of his work is not to evaluate past changes to these institutions, but rather to evaluate the change that is currently underway (or about to begin), his thorough historical research tells a compelling story of the evolution of Canada's political system.

Smith's work begins with a comprehensive assessment of not only how the Senate, the House of Commons, and the Crown in Canada have each changed over time, but also how Canadians' perceptions of those institutions have changed throughout their respective histories. The first chapter, fittingly titled "Reflections," provides context for much of the rest of the work, and introduces several themes that run throughout the piece. Some of these include the differences between the "political and legal faces of the constitution", the role that federalism plays in shaping each aspect of Parliament, and the uniquely "sui generis" nature of our federation—which requires an independent constitutional analysis without comparison to any other country. The following three chapters

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4. See *e.g.* Peter W Hogg & Wade K Wright, "Canadian Federalism, the Privy Council and the Supreme Court: Reflections on the Debate about Canadian Federalism" (2005) 38:2 UBC L Rev 329.
  5. See *e.g.* Hugh D Forbes "Canada: From Bilingualism to Multiculturalism" (1993) 4:4 J Democracy 69.
  6. *Supra* note 1.

expand upon those aforementioned themes, and speak to the current changes manifesting throughout each part of Parliament. Specifically, the second chapter (“Refraction”), touches on the current changes present within the Crown. The chapter borrows from the book’s metaphoric title to suggest that the Crown in Canada has not “reflected” that of its British counterpart, but rather emerged from Britain’s monarchical shadow to effect constitutional development in a more uniquely Canadian manner. “Redefinition,” the third chapter, focuses largely on the impact of the Supreme Court’s judgement in the *Senate Reference*,<sup>7</sup> and the importance that was awarded to bicameralism<sup>8</sup> in that decision. The chapter also addresses the impact of recent events—including the Senate expense scandal, the new non-partisan selection process, and the work of the Senate on recent legislation—in order to highlight the Senate’s growing role and independence within Parliament. In doing so, Smith arguably produces some of his best work, provocatively concluding that “[a]lthough the claim runs counter to every political value Canadians hold, the Senate is the core institution of Confederation”.<sup>9</sup>

Chapter four, or “Readjustment,” focuses on the House of Commons and speaks to many timely issues including party discipline, tensions between a Member of Parliament’s various roles, and the relationship between the Crown and Parliament. In my view, the chapter is perhaps Smith’s least impressive, not only because of the relative strength of the others, but also given that it is no longer timely in the face of Prime Minister Justin Trudeau’s rescinded promise of electoral reform. Smith relies heavily on Mr. Trudeau’s promise of electoral reform to highlight the prospects for change going forward, and the recent rescission of that promise deals a heavy blow to Smith’s position. And although it is difficult to pin this shortcoming on the author, as it seemed a foregone conclusion at the time of this book’s publication that the promise would be fulfilled, Smith makes the subtle suggestion that Mr. Trudeau should have been more careful to put too much weight on this election promise. Specifically, in his introductory chapter, Smith suggests “for the governments of Canada, the most important impetus was always to seek and secure self-government...it explains antipathy to electoral reform, of whatever variety, at least until the election of the government led by Justin Trudeau.”<sup>10</sup>

Following this, Smith highlights the interrelatedness of each part of Parliament. Although previous chapters refer to the relationships between each

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7. *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 SCR 704 [*Senate Reference*].

8. *Ibid* at 97, 106-07.

9. Smith, *supra* note 1 at 87.

10. *Ibid* at 24-25.

branch of Parliament, Smith expands upon those themes and clearly summarizes the complex interdependence that binds all facets of Parliament under the heading of “Reconsideration.” Moreover, it is here that Smith poses his most thoughtful questions about the future of each institution; perhaps the most interesting one asks whether the general citizenry should play a role in parliamentary government in the future. In a concluding chapter, “Recapitulation,” he briefly wraps up this analysis, and highlights the potential for changes in the future and their potential impact on the broader workings of Parliament.

Fittingly, Smith concludes as he began, with the suggestion that it is often “misunderstanding about the function, structure, and interrelationship of the parts of parliament...that confound debate and complicate efforts to conceive reform.”<sup>11</sup> In fact, the title *The Constitution in a Hall of Mirrors*, borrows from this sentiment, acting as a metaphor for the uncertainty, confusion, and contradiction that so often has come to dominate political and constitutional debate in Canada.

Smith ultimately succeeds at illuminating and clarifying the complicated set of processes and interrelationships that are espoused in our Constitution, and that have come to define our parliamentary system. His thorough historical research, which draws on several different mediums, not only demonstrates the extent to which each institution has evolved, but also illustrates how public perception of these institutions has evolved. Moreover, his ability to draw on and summarize countless volumes of comparative research provides the reader with a more complete understanding of how each respective institution has come to embrace a uniquely Canadian structure, often differing considerably from its “similar in principle” American counterpart across the pond.

All this does not mean that his work is without its flaws. Although Smith does offer some degree of commentary on indigenous issues, the book would have been well served by added commentary in this regard, particularly with respect to the way in which reconciliation efforts may have an impact on the changing features of Parliament. As well, in some areas, Smith’s high degree of respect for Parliament—evidenced by the fact that his work is dedicated to the senators and members of the House of Commons—tends to border on romanticism for Parliament and its institutions, rather than an objective analysis of its features and flaws. For example, he places enormous weight on the potential for positive change in areas that support his narrative: such as the Court’s judgment in *Senate Reference*, the promise of electoral reform, and the increased attention that was

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11. *Ibid* at 142.

shed on the Crown following the recent prorogation debate.<sup>12</sup> Specifically, with regards to the latter, Smith fails to note that the recent prorogation debate, as with the King-Byng affair,<sup>13</sup> may have been a one-off event, only for the citizenry to return to generations of indifference towards the Crown's role in Canada.

Despite these minor flaws, Smith's work succeeds on a number of fronts, and achieves even more than it sets out to do. In discussing the role of the Governor General late in the book, Smith draws on a quote from the former official secretary to five governors general of Australia to suggest that "[t]he real question is not at all how much power does the Governor-General himself have or exercise, but rather how much absolute power does his presence in our... system of government deny to those who are in government and who must first seek to advise and persuade him."<sup>14</sup> In many ways, this quote personifies the approach adopted by Smith in his work. It is not what each institution does, or has done, that concerns Smith, but rather the constraints and processes that each part of Parliament bestows upon the others through their myriad of interconnected relationships. In effect, to borrow Theodore Roosevelt's metaphor, Smith concerns himself more with the size of the stick than the volume of the voice. In this sense, the book leaves the reader reflecting not on what Parliament has come to be, but rather, what it could be.

With the benefit of hindsight, the book could have benefitted from a slightly later release, so that Smith could speak to the effect of various recent events, including British Columbia's hung parliament following the May 2017 election and the Government of Canada's decision to abandon its efforts on electoral reform. An analysis of the former event would only have added to his compelling position on the Crown in Canada, while an ability to amend his work to account for the latter would only have strengthened the credibility of each of his positions. Nonetheless, *The Constitution in a Hall of Mirrors* is an invaluable resource to any student or scholar interested in understanding the intricacies of Parliament, and the limitations on any proposed reform efforts. More importantly, it is an invaluable resource to any Canadian who wishes to better understand how they are governed, how this nation's institutions have evolved, and how a uniquely Canadian system has developed to govern a uniquely Canadian federation.

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12. In December 2008, Prime Minister Stephen Harper asked Governor-General Michaëlle Jean to prorogue Parliament to avoid a vote of no confidence against his new minority government, which had only been formed following an election in October of that year.

13. The King-Byng affair occurred in 1926, after then Governor General of Canada, Lord Byng of Vimy, refused a request by prime minister, William Lyon Mackenzie King, to dissolve parliament and call a general election.

14. *Ibid* at 133.