

WHY ALBERTA NEEDS A FISCAL CONSTITUTION

F.L. (Ted) Morton

SUMMARY

Alberta will enter the third decade of the 21st century with an accumulated public debt of over \$70 billion and the highest per capita deficit of any Canadian province. This is a far cry from 2005, when then-premier Ralph Klein announced that Alberta was “debt free”; made the first deposit of energy revenues in the Heritage Fund in 20 years; and enacted a balanced budget law (BBL) that was intended to prevent future governments from ever running deficits again. This statutory BBL lasted only as long as oil prices remained above \$100/barrel. It was amended in 2009 to allow “temporary deficits”. Since then, four premiers from two parties chose to run large budget deficits to fund large spending increases to win their next elections.

Alberta’s experience proves that statutory rules are not sufficient to protect a positive fiscal legacy. Alberta’s balanced budget law, flat tax rates and protections of the Heritage Fund were all removed by simple majority votes in the Alberta legislature. Any meaningful re-instatement of these policies will require that they be put beyond the reach of future governments of whatever party – that is, that they be constitutionally entrenched.

The next Alberta government could address this problem by adapting a form of the BBLs found in most state constitutions in the United States. Under Sections 43 of the Constitution Act, 1982, Alberta could proceed bilaterally by negotiating with the Federal government to “patriate” the Alberta Act from Ottawa to Alberta; and to include in this act a new super-majority amending formula such as a two-thirds approval vote in the Legislature and/or approval by way of referendum. Once the Alberta Act were “back home,” Alberta could then make further changes per its new amending formula—such as adding a BBL, a tax-and-expenditure limitation (TEL) or rules to protect the Heritage Fund.

Alternatively, Alberta could proceed unilaterally under section 45 of the Constitution Act by legislating similar protections. However such unilateral

action would require “symmetrical entrenchment,” meaning that any policy restrictions placed on a future government would have to be enacted under the same super-majority procedures that would be needed to repeal them in the future.

Both options carry the risk that under the constitutional status quo, final interpretation and enforcement of an Alberta constitution would rest with the Supreme Court of Canada, a court with either one or no judges from Alberta. In the short term, this “made in Ottawa” risk of mis-interpretation could be minimized by ensuring that any new constitutional rules are clear, explicit and have broadly agreed-upon, objective meanings.

In the medium term, Alberta could begin to recruit other provinces that have an interest in their own provincial constitutions. If such a coalition were built, it could lobby Ottawa to give provincial courts of appeal the final interpretive authority over provincial constitutions and to return the power to appoint provincial superior court judges to the provinces. This reform would remove an outdated relic of 19th century British imperial rule and give Canada what is already the norm other mature federal states. Any Quebec government would immediately support such amendments. Presumably the current conservative governments in Ontario (Ford) and Saskatchewan (Moe) would as well. A coalition with this membership would be difficult for any federal political party to ignore.

1. INTRODUCTION

Alberta will enter the third decade of the 21st century with an accumulated public debt of over \$70 billion and the highest per capita deficit of any Canadian province (Lafleur, Eisen and Palacios, 2017). This is a far cry from 2005, when then-premier Ralph Klein announced that Alberta was “debt free”, made the first deposit of energy revenues in the Heritage Fund in 20 years and enacted a balanced budget law (BBL) that was intended to prevent future governments from ever running deficits again. This statutory BBL lasted only as long as oil prices remained above \$100/barrel. It was amended in Budget 2009 to allow “temporary deficits”. Since then, four premiers from two parties chose to run large budget deficits to fund large spending increases to win their next elections.

Alberta’s experience proves that statutory rules are not sufficient to protect a positive fiscal legacy. Alberta’s balanced budget law, flat tax rates and protections of the Heritage Fund were all removed by simple majority votes in the Alberta legislature. Any meaningful re-instatement of these policies will require that they be put beyond the reach of future governments of whatever party – that is, that they be constitutionally entrenched.

This is not just an Alberta problem, but a problem that all democratically elected governments face. Very few governments choose to pursue a policy of long-term public good – e.g., balanced budgets – if the short-term effect is to increase the risk of electoral defeat in the next election. In democratic politics, short-term electoral self-interest almost always trumps longer-term public interest.

This paper explains how the failure to entrench such rules led to Alberta’s current \$70-billion deficit-debt spiral; how BBLs and tax and expenditure limitations (TEs) could be used to ensure greater fiscal responsibility in the future; why these rules must be constitutionally entrenched, not statutory; some of the problems associated with a provincial constitution and how those problems might be resolved.

2. BUILDING THE ALBERTA ADVANTAGE: THE KLEIN ACHIEVEMENT, 1993-2006

By the early 1990s, the Alberta government’s fiscal ineptitude had reached its apogee. Through runaway program and capital spending, the government had amassed \$22.7 billion in debt. With its financial profligacy threatening its grip on power, the PC party opportunistically used a leadership change to try to get government finances – and its own electoral prospects – back on track.

In 1992, political outsider Ralph Klein won the PC leadership race, and launched what would come to be known as the Klein Revolution in Alberta politics. Choosing market forces over political micromanagement to grow the economy, Klein cut spending, eliminated the deficit (*Deficit Elimination Act*, 1993), made it illegal for a government to have a deficit (*Balanced Budget and Debt Elimination Act*, 1995) and increased transparency in the government’s accounting practices (*Government Accountability Act*, 1995). He also required a referendum before any future government could introduce a sales tax (*Tax Payer Protection Act*, 1995) and privatized a number of services (liquor sales, motor vehicle licensing).

In 1996, the Klein government enacted the *Business Financial Assistance Limitations Act* to stop loans, loan guarantees and outright subsidies to business (the exception being small businesses) (Alberta Legislature, 1996), and lived up to its new mantra – “Government is not in the business of business” – by turning off the taps on a number of diversification initiatives and divesting the government of its interest in a number of others. In 1999, the Klein government enacted the *Fiscal Responsibility Act*, which prohibited budget deficits (operating and capital) and forbade borrowing.

In 2002, Klein appointed a private commission to advise the government on how to avoid Alberta's petro-state, boom-bust, surplus-deficit syndrome. The subsequent report recommended the creation of a new savings account, in addition to the Heritage Savings Fund, "to provide for a gradual but sustained reduction in our reliance on natural resource revenues and a focused attempt to build financial and other strategic assets to maintain and improve the Alberta Advantage" (Alberta Government, 2002).

The Klein government responded by amending Alberta's *Fiscal Responsibility Act* to create a new Sustainability Fund that would alleviate the stop-and-go capital spending patterns of preceding years (Alberta Legislature, 2003). Under the amendment, only the first \$3.5 billion of resource revenues would be allowed to go into general revenues. The rest, if any, would be allocated to the new Sustainability Fund, which would be available to cover any budget deficits if energy revenues did not reach \$3.5 billion in a future year. For example, the "balanced budgets" reported by the Stelmach government in 2008 and 2009 were actually cash expenditure deficits, and were only "balanced" through the use of transfers from the Sustainability Fund. The fund's maximum balance was initially capped at \$2.5 billion.¹

In 2005, the \$23-billion net debt inherited in 1993 was officially paid off, and Klein celebrated Alberta's new debt-free status and budget surplus by sending out \$400 prosperity bonus cheques – or Ralph Bucks – to every Alberta resident. With respect to the future, Klein proudly declared:

"Never again will this government or the people of this province have to set aside another tax dollar on debt ... Those days are over and they're over for good, as far as my government is concerned, and if need be we will put in place legislation to make sure that we never have a debt again" (Wesley and Simpson, 2011a).

But in only four years, in Budget 2009, the law prohibiting deficits was repealed, and Alberta has not had a balanced budget since.²

Ed Stelmach succeeded Klein as premier in 2006, and by 2007 and 2008 virtually every resource dollar was being spent. When energy prices crashed in the wake of the 2008 financial crisis, so did government revenues. In a scenario eerily similar to the Lougheed-Getty era, the PC governments of Stelmach and Alison Redford began to run "temporary" budget deficits. By the time they were defeated in 2015, the Stelmach/Redford PC governments ran seven consecutive deficits and burned through over \$16 billion in savings in the now defunct Sustainability Fund, which Redford abolished in her 2013 budget. Indeed, if we count overall decline in net financial assets, the loss is even greater – from \$35 billion in 2008 to \$3.9 billion in 2015 (Lafleur, Eisen, Palacios and Lammam, 2017a, 3).

3. NDP BUDGETS 2015-2017: \$70 BILLION OF BORROWING

Premier Rachel Notley's new NDP government did not invent spending money it does not have. The Stelmach and Redford governments had already paved the way to deficit spending well before the NDP's surprise victory in May 2015. During the last decade of PC governments (2004-2015),

¹ Unfortunately, no sooner was this new savings rule created than it was broken. As energy resource revenues soared, the Klein government amended the act to allow for more than the original \$3.5 billion to be allocated to general revenues. In 2004, the limit was raised to \$4 billion; in 2005, to \$4.75 billion; and in 2006, to \$5.3 billion. At the same time, the rules governing what to do with resource revenues in excess of the \$2.5 billion mandated for the Sustainability Fund were soft and vague. Surplus funds could be directed into additional savings, but they could also be directed into the capital account or into balance sheet improvements, which turned out to mean just more program spending.

² In 2014-2015 Alberta's operating budget was balanced, but there was still a net deficit when borrowing for capital spending is included.

program spending doubled, increasing almost two times faster than population growth plus inflation (Lafleur, Eisen, Palacios and Lammam, 2017b, 4). What is novel about Notley's NDP budgets is how they are being financed: over \$70 billion of borrowing since 2015 – all on the back of the Triple A credit rating she inherited from her PC predecessors.

Since winning power, the NDP government has posted budget deficits of \$6.4 billion, \$10.8 billion and now \$10.3 billion (projected). Those are the official numbers. The Dominion Bond Rating Agency (DBRA) recently reported that the numbers for 2016 and 2017 budgets are potentially even higher – \$12.8 billion and \$13.6 billion, respectively. When measured as a percentage of provincial GDP, the 2017 deficit is 4.2 per cent, which makes it the largest deficit in Canada. The DBRA went on to downgrade Alberta's long-term debt from "stable" to "negative", noting that:

The negative trend reflects the fact that Alberta continues to erode its low debt advantage through sustained deficit spending. Moreover, the Province has yet to provide a credible plan to restore balance ... the fiscal plan demonstrates a lack of willingness to contain debt growth ... (Alberta Treasury Board and Finance, 2017).

Budget 2017 projects Alberta's debt at \$71 billion by 2019. The comparable figure for 1993 at the end of the Getty government's deficit streak was \$23 billion. On the revenue side, this meant that by 1993, 44 cents of every tax dollar (corporate and personal) collected went to pay for interest on the debt.³ On the expenditure side, debt servicing costs were equivalent to 33 per cent of the health budget or 75 per cent of all social services spending (Milke, 2013). Today's historically low interest rates have rescued Alberta from this calamity so far. This year, debt servicing is projected to consume three per cent of total government revenues. But interest rates are rising, and this figure is projected to double by 2023 (Lafleur and Ames, 2018a).

The other great unknown is the future price of oil and gas. The 2015 NDP budget forecast average annual oil prices of US\$50 for the current year, \$61 in 2016 and \$68 in 2017. So far, they have been wrong every time. To be fair, no one knows with any certainty what future prices will be – just the way nobody forecast the dramatic 60-per-cent price plunge in 2014. But while governments cannot control the price of oil, they can control spending. And that's what the NDP is not doing.

A big part of the NDP's spending problem is their predictable failure to rein in public sector salaries – especially in the SHE domain – social services, health and education. SHE spending has tripled in the past 17 years and consumes \$4 out of every \$5 of program spending (Lafleur and Ames, 2018b). While Stelmach and Redford share the blame for this, the last three budgets belong to the NDP. In each, public sector compensation constitutes about \$25 billion, or half the entire budget.

The other budget buster is the NDP's well-publicized plan to spend \$30 billion over their four-year mandate on infrastructure – new schools, health facilities, roads – all to be paid for with borrowed money.

In effect, the NDP has decided to use Alberta's Triple A rating to borrow \$70 billion over the next five years to help them win the next election. Notley's bet is that most of the voting public will not understand or care where this money came from or how it will ever be paid back. They will see the new schools, hospitals and roads in their communities and reward the NDP with another majority.

The PC governments' failure to constitutionally protect the fiscal policies that created the much-celebrated Alberta Advantage effectively handed Notley's NDP government the political equivalent of a platinum credit card to spend and borrow their way to winning the next election. In the upcoming 2019 election, Notley will find out if this strategy pays off.

³ In Budget 1993, debt servicing was \$1.654 billion, while combined personal (\$2.877 billion) and corporate (\$854 million) income taxes totalled \$3.731 billion. Source: Ron Kneebone, Alberta Budget Data, 1965-2017.

If it doesn't, the newly formed United Conservative Party (UCP) will have to deal with this \$70-billion debt legacy. The UCP's new leader, Jason Kenney, has already stressed a return to fiscal responsibility and balanced budgets. But the experience of the past decade demonstrates that balancing the budget and paying down the debt will not be enough. They will then have to "politician-proof" the Heritage Fund from future vote-hungry governments and put some meaningful fences around future tax increases and/or deficit spending. Failure to do this will simply be setting the fiscal table again for some future government – UCP or NDP – to use the "spend now, pay later" strategy to try to buy the next election.

4. CONSTITUTIONALIZING FISCAL RESPONSIBILITY: BALANCED BUDGET LAWS AND TAX AND EXPENDITURE LIMITATIONS

If the next Alberta government wants to make fiscal responsibility a permanent feature of its budgets, then it will need to constitutionally entrench a set of fiscal and budgetary rules that cannot be easily changed by simple majority votes in the legislature. The good news is that there are practical models from other jurisdictions on how this can be done successfully – the BBLs and TELs used in many U.S. state governments. The not-so-good news is that for these fiscal restraints to be successful, they must be constitutionally entrenched – something that is legally problematic, but not impossible, for Canadian provinces. This section of the paper summarizes successful examples of BBLs and TELs from U.S. and Canadian experience.⁴ Section 6 explains the potential legal obstacles to implementing similar fiscal policies in Canadian provinces, and how these obstacles could be resolved.

A BBL basically requires a government/legislature to balance expenditures with revenues. Some BBLs require this on an annual basis by prohibiting any annual deficits. Others allow a deficit or two in recession years, but require a net balance over the business cycle – typically three or four years. Most U.S. state BBLs apply only to operating budgets and not to capital budgets. They allow state governments to borrow and use debt to pay for longer-term infrastructure. There are sound reasons for this distinction. Unlike operating expenses such as salaries or supplies, a new school or hospital provides benefits for citizen-taxpayers for years into the future. But they must be paid for when they are built.

For this reason, Alberta (like most provincial and state governments) uses what are known as accrual accounting rules. In a given budget year, while the costs of new schools or roads must be paid in full, accrual accounting rules allow only the project's annual depreciation to be counted as an in-year expense, even though actual expenditures are much higher.

While there are sound accounting principles to support accrual accounting, in public sector accounting this can lead to misleading communication about whether or not a government's annual budget is balanced. While every first-year accounting student learns that "CAPEX is greater than DEPRECIATION", the general public (and, in my experience, most members of caucus) don't.

In Alberta, during the years that surging oil and gas royalties were creating huge, multi-billion dollar budget surpluses (2005-2008), this distinction did not make any practical difference. When this abruptly ended in 2008, the Stelmach government was able to cover the CAPEX-DEPRECIATION shortfalls with transfers from the \$18-billion rainy-day savings in the Sustainability Fund. This allowed us to tell Albertans that we had balanced the budget in 2009 and 2010. This was technically correct, but also misleading and self-serving. What we did not tell Albertans was that our own

⁴ Most of the information used in this section is drawn from the excellent study done in 2003 by the Fraser Institute: "Tax and Expenditure Limitations: The Next Step in Fiscal Discipline," by Jason Clemens, Todd Fox, Amela Karabegovic, Sylvia LeRoy and Niels Veldhuis.

internal projections showed that the Sustainability Fund would be drawn down to zero by 2014. In reality, it was empty by 2013. This explains – but does not excuse – why in 2013 the Redford government abolished the Sustainability Fund, changed Alberta’s budget definitions that had been in place since 1993, and then told Albertans that the budget was still balanced.

A TEL is related to but distinct from a BBL. TELs constrain the growth of government spending and taxation year over year. The most common type of TEL limits the rate of annual budget growth to population growth plus inflation. Under this rule, governments/legislatures can increase annual spending to pay for more services for more people, but real per capita spending cannot increase year over year.

U.S. experience confirms that a BBL by itself does little to slow the increase in the size of government or increases in taxes. So long as tax revenues rise at the same rate as government spending, the budget may be balanced, but there is no cap on government’s growth rate. Accordingly, advocates of lower taxes/smaller governments advocate the simultaneous use of both BBLs and TELs.

U.S. experience demonstrates that the most effective forms of both BBLs and TELs are those that are constitutionally entrenched rather than simple statutes (Clemens, Fox, Karabegovic, LeRoy and Veldhuis, 2003a, 17-19).⁵ Studies found that for the latter, legislatures were able and willing to circumvent the spending/taxing limitations by simply amending the statute.

Canadian experience has followed a similar pattern. By the end of the 1990s, eight out of 10 provinces had enacted some form of BBL, including all four western provinces (Wesley and Simpson, 2011b). While their specifics varied, all eight took the form of statutes. Their sponsors understood that this made them vulnerable to reversal by future governments through simple majority votes, but hoped that “the high costs associated with altering the regime ... an immense supply of time, political capital, and other resources, none of which a government is likely to possess during an economic downturn ... would deter future politicians from doing so” (Wesley and Simpson, 2011c, 4). This hope turned out to be unduly optimistic.

A 2003 study found that these BBLs were initially successful. Five of the eight, including Alberta, achieved balanced budgets or budget surpluses following adoption of their BBLs. But six of the eight, including Alberta, also experienced increases in the growth rate of government spending (Clemens, Fox, Karabegovic, LeRoy and Veldhuis, 2003b).

The early success of provincial BBLs evaporated in the wake of the 2008 recession. Faced with plummeting revenues, all of the western provinces save Saskatchewan amended their BBLs to allow deficits (Wesley and Simpson, 2011d, 21-22). Alberta was the first to cave. The Stelmach government amended Klein’s *Fiscal Sustainability Act* to help pay for operational expenses by withdrawing funds from the Sustainability Fund and borrowing to pay for new infrastructure spending. “Temporary deficits” of \$2.4 billion and \$1.8 billion were forecast for 2010 and 2011, couched in promises to be “back in the black” by 2012. The deficits were not temporary and the promises were never kept.

In retrospect, this is hardly a surprise. Without some form of constitutional entrenchment or super-majority amending formula, a statutory “balanced budget law is only as effective as the political will and public support surrounding it” (Wesley and Simpson, 2011e, 40). But precisely when BBLs are most needed – during economic downturns – is when the political will is most lacking. Always with an eye to the next election, “political leaders believed that there was greater political risk

⁵ Two other differences that increased the efficacy of TELs in U.S. states were initiation by citizen initiative/referendum and inclusion of municipal government spending as well as state spending.

associated with spending cuts than running a deficit” (Wesley and Simpson, 2011f, 40). Regardless of party affiliation, governments will almost always justify over-spending /deficit spending as the necessary means to winning the next election, and then dealing with fiscal balance. But the latter rarely arrives, and means becomes the end.

What if Alberta had entrenched a BBL and a TEL in 2004 – the year of the last election when Klein led the PCs? A recent study found that if the departing Klein regime had imposed a population-plus-inflation TEL on its successors, Alberta would still have today a balanced budget (Lafleur, Eisen, Palacios and Lammam, 2017c). During the Stelmach-Redford decade (2004-2015), program spending increased at an average of 7.1 per cent per year. This was nearly double the combined rate of population growth plus inflation – 4.4 per cent. Total program spending in 2004 was \$24 billion. By 2015, it had doubled to \$48.2 billion. Had there been an entrenched TEL to constrain spending growth to 4.4 per cent, program spending in Budget 2015 would have been \$38.9 billion, and Alberta “would have run surpluses in every year ... rather than 8 deficits in 9 years” (Lafleur, Eisen, Palacios and Lammam, 2017d, 1, 5). It would also still have at least \$35 billion in net assets, the highest of any Canadian province. Instead, in 2017, for the first time since 2000, Alberta fell into a net debt position – where its debts now exceed its total financial assets (Lafleur, Eisen, Palacios and Lammam, 2017e, 7).

Canadian experience thus confirms what has happened in the U.S. The key to successful BBLs or TELs is to make them difficult for future governments or legislatures to repeal, amend or otherwise circumvent. This requires that they be constitutionally entrenched or require some other form of super-majority process to be repealed or amended in the future. How this could be done in Canadian provinces is the subject of section 6 below.

5. POLITICIAN-PROOFING THE HERITAGE FUND

A unique and important aspect of Alberta’s fiscal system is the Alberta Heritage Savings Trust Fund. Established by former premier Peter Lougheed in 1976, the fund served several purposes.

The Heritage Fund held out the opportunity for Alberta to avoid the pitfalls that await wealthy petro-state regimes. The Heritage Fund would not only save current energy revenues for that inevitable future day that its non-renewable resources begin to decline. It would also reduce revenue volatility in annual budgeting cycles. The requirement that 30 per cent of the province’s annual non-renewable resource revenues (NRRR) must be transferred to the Heritage Fund would curb the opportunity to overspend in high revenue years. There would be 30 per cent less revenue available. Conversely, in low NRRR years, the interest and earnings from the Heritage Fund would provide a stable, alternative source of government revenues and reduce the probability of the three alternatives: raise taxes, cut services or run deficits.

Initially, the Heritage Fund was managed according to these rules, and was a great success. Between 1976 and 1982, it accumulated assets with a net value of \$8.3 billion (Mansell, 1997, 24). It didn’t hurt that the price of oil had tripled not once but twice during the 1970s – first after the 1973 Yom Kippur War and then again in 1979-1980 following the Iranian revolution. Early estimates were that the Heritage Fund could top \$50 billion by 2000.

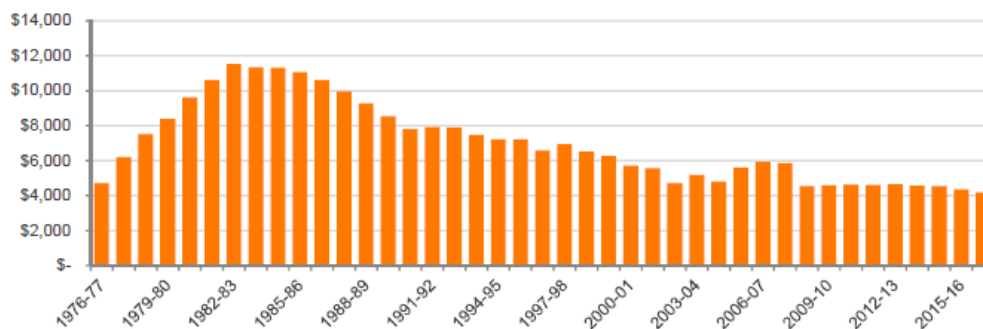
This was short-lived. As the price of oil dropped, NRRR declined. Faced with an election in 1982, the Lougheed government reduced deposits into the Heritage Fund to 15 per cent and used the remaining revenues to maintain spending and help win the election. Four years later, Lougheed’s PC successor, Don Getty, had to deal with another election and even lower oil prices. In 1986 the Getty government “temporarily” reduced NRRR transfers to zero per cent. Other than the three one-off deposits in the boom-year budgets of 2005-2007, that’s where they have stayed ever since.

The one variation from this depressing pattern was Klein’s decision in 2005 to give each Alberta resident a prosperity bonus cheque, more commonly remembered as Ralph Bucks.⁶ All Alberta residents and their children each received a \$400 cheque that was not taxed by either level of government. The total cost of the program was \$1.4 billion, which represented 20 per cent of that year’s \$6.8 billion budget surplus. While Klein said that there might be more such cheques in the future, there never were. NRRR peaked that year at over \$12.5 billion, never to reach that level again.

The result is that in real dollars, accounting for inflation, the Heritage Fund’s current value of \$17.4 billion is actually less than it was 30 years ago. Other than the inflation-proofing that began in 2005, under current government policy virtually all of the fund’s realized annual earnings are transferred to general revenue for in-year spending. This means that the fund’s value cannot grow as the market goes up. Indeed, when there are down years – such as 2009 – investment losses permanently reduce the fund’s size. Combine this with the fact that the Alberta government has made only three new deposits in the fund since 1987, and the fund begins to resemble the old Slinky toy – holding steady in good years, but dropping down in bad years – slowly but steadily working its way to the bottom.

The Heritage Fund’s deteriorating value is even worse when population growth and inflation are taken into account. Prices have increased fourfold since the fund started in 1976. Alberta’s population has grown by more than 130 per cent. As presented in the figure below, in per capita real dollars, the fund’s value peaked in 1983 at \$11,507 per Albertan. Today, that figure is \$4,034 (Alberta Treasury Board and Finance, 2018, 12).

MARKET VALUE INFLATION ADJUSTED PER CAPITA (2018 DOLLARS)



The sad fact is that of the \$216 billion in NRRR that the Alberta government collected between 1977 and 2013, less than six per cent has been saved. The fund’s current value is approximately \$17 billion. If the \$9.7 billion that sat in the Heritage Fund in 1982 had remained untouched (and no further contributions made) and allowed to grow simply at the rate of inflation, the value would have stood at \$24.2 billion in 2010 (Emery and Kneebone, 2011, 11). Instead, Heritage Fund earnings were diverted to finance a plethora of spending initiatives. Since 1976, approximately \$39.2 billion has been transferred from the fund to the province’s general revenues (Alberta Treasury Board and Finance, 2015). If this continues, the Heritage Fund will be slowly drained.

Compare this to Alaska’s Permanent Fund. Created in 1977 – the same year as the Heritage Fund – the Permanent Fund now has a balance of \$65 billion. And that’s after paying out \$20 billion in dividends to Alaska residents. Norway’s NRRR savings fund was started in 1990 and now has a balance of \$1 trillion.

⁶ It was truly Klein’s personal decision. As the MLA for Foothills-Rocky View at the time, I was at the special caucus meeting held on Sept. 12, 2005 at the Canadian Forces Base in Cold Lake to discuss the idea of a prosperity bonus cheque. There was vigorous debate, pro and con, all morning. At noon, we broke for lunch and all went to the cafeteria except the premier. While we were eating, Klein was holding a press conference in the foyer announcing the new bonus cheques. They were a done deal before we even got to dessert.

How have Alaska and Norway succeeded where Alberta has failed? The Alaska Fund was created by a constitutional amendment that mandates that 25 per cent of annual energy royalties and rents must be deposited in it. Unlike the Alberta fund, which was created by a statute, this means that deposits cannot be reduced or stopped when oil prices drop and the government wants more revenue to fund program spending. In Alaska, this would require a constitutional amendment and a referendum. For reasons explained below, no government has ever proposed this, knowing that it would be political suicide.

Norway's fund is not constitutionally entrenched in a legal sense, but is universally understood to be off-limits to the governments of the day. In Canadian terminology, we could say the fund's status as politically untouchable is a constitutional convention –widely recognized and followed. Originally named the Petroleum Fund of Norway, its name was changed in 2006 to the Government Pension Global Fund. While it is clearly not a pension fund in the normal sense (i.e., member-funded), this name change emphasizes that the fund belongs to the people of Norway – not the government of the day. In short, the Alaska and Norway funds were made politician-proof by protecting them from the government of the day's inevitable short-term priorities, i.e., winning the next election.

The three funds also differ in how they allocate their respective annual earnings. In Norway's case, the government is allowed to spend the fund's annual earnings –estimated at approximately four per cent – to pay for what it calls its “net oil deficit”. However, there was never a net withdrawal from the fund until 2016 (IMF, 2017, 12).

The Alaska fund's annual earnings are automatically transferred to general revenues, but can only be used for three specified purposes. They can be returned to the fund for inflation proofing, paying for the fund's operating costs and paying an annual dividend to all Alaska residents. These annual dividends have varied from a low of \$331/person in 1984 to a high of \$2,072 in 2015. Historically, these dividends consume 50 per cent of the fund's earnings. When oil prices dropped in 1999, the Alaska legislature tried to reduce the size of the dividends and use the savings to help balance the budget. Before making this change, a referendum was held. The “NO” option – blocking the transfer –won 84 per cent of the vote.

The same thing is happening again. In 2017, after five consecutive years of billion-dollar budget deficits, the governor proposed and the legislature approved a bill to restructure the Permanent Fund to reduce the amount used for dividends. Opponents have denounced this bill, arguing that if the politicians need money to balance the budget, they should cut spending or raise taxes. Proponents of the reform counter that it is illogical and inefficient for the government “to pay a dividend with one hand while taxing with the other” (Brehmer, 2017a). But opponents are not swayed:

“Taxes belong to the government,” they argue. “The Permanent Fund is the people's money. We set up a system where the Legislature was not involved. This is the people's Permanent Fund” (Brehmer, 2017b).

Alaskans appear to be siding with the opponents. A recent poll found that 68 per cent of respondents would rather pay an income tax or sales tax than give the fund's earnings to the government (Brehmer, 2017c). However, the reform took effect July 1 of this year, with the effect of reducing the dividend share of earnings to 37 per cent. The earliest opponents can force a referendum on this change is August 2020 (Brehmer, 2018).⁷

⁷ This reform (Bill 26) also changes how the dividend portion of the fund's earnings will be calculated. Rather than the 50 per cent of the fund's five-year rolling average for earnings, the new formula allocates 5.25 per cent of the fund's market value for dividend payments, again using a five-year rolling average. The allocation will drop to five per cent in 2022. The reform also prohibits the legislature from appropriating any monies from the Earnings Reserve in excess of this amount.

Third, the three funds differ significantly in how their principal is managed and invested. The Alaska and Norway funds cannot be used for domestic economic development, the kinds of politically useful but economically risky projects that Alberta governments indulged in during the 1980s (Morton and McDonald, 2015a). In that decade, the Lougheed-Getty governments lost over \$2.2 billion using the Heritage Fund to invest in new Alberta start-up companies (Morton and McDonald, 2015b). In 1996, the Klein government put an end to using the Heritage Fund for high-risk diversification projects, and instead directed it to be used to maximize long-term returns. The creation of the Alberta Investment Management Company (AIMCO) a decade later further insulated the fund from cabinet micromanagement. AIMCO's directive emphasizes that these monies are to be professionally managed for the long-term interests of Albertans, not the short-term interests of the government of the day. Recent developments, however, suggest that we have already forgotten our past mistakes.

Redford's 2014 budget proposed to resurrect the practice of using money in the Heritage Fund for "strategic investments". Bill 1, the misleadingly named *Savings Management Act*, would have diverted \$2 billion from the Heritage Fund into a new spending program to "provide government with the financial resources to take advantage of new opportunities, yet to be determined, that may require a large, one-time investment from the province" (Government of Alberta, 2014). Such politically driven investments are all but guaranteed to achieve the same dismal results as they did during the 1980s. Following Redford's sudden resignation in March 2014, Bill 1 was never implemented. But it is another reminder of the Heritage Fund's vulnerability to short-term political objectives.

Most recently, the NDP's first budget directed AIMCO to invest \$540 million from the Heritage Fund into Alberta-based "growth companies" to promote diversification of Alberta's economy. This directive risks eroding AIMCO's independence and autonomy and is a step in the wrong direction.

To put the Heritage Fund back on a sound financial footing and to begin to achieve results similar to Alaska and Norway, Alberta will have to resurrect the original Lougheed policy of legally mandating that a set percentage of NRRR be deposited in the Heritage Fund each year. Given Alberta's current structural deficit, initially it could not be 30 per cent. But it could start small – say five per cent – and be gradually increased in legally required increments over the next decade or two. More importantly, this time the contribution rule must be constitutionally entrenched; that is, put beyond the reach of simple legislative majorities. The same rule should apply to the fund's principal. Without this reform – a constitutional ring-fence around the annual contribution rule and the principal – it will continue to be raided by the government of the day for short-term political gains. The models of success are out there – Norway and Alaska – to be adopted by and adapted to Alberta.

The Alaska fund offers one other intriguing option for Alberta to consider: the annual energy dividend payment to the residents of the province. This option could take the one-off 2005 experiment with Ralph Bucks and make it permanent.⁸ While this might seem illogical for a government struggling to balance expenditures with revenues, there is a strong consensus among economists that "consumption taxes tend to have the lowest marginal cost of taxation" (MacKinnon and Mintz, 2017, 15). If Alberta were to replace these lost revenues with a sales tax, it would help to grow the economy and, over time, generate more incremental personal and corporate tax revenues. Perhaps more importantly, it would create a powerful new political constituency for saving NRRR rather than spending them.

⁸ At the time they were announced, I publicly criticized the prosperity bonus cheques policy in my local weekly newspapers. For this transgression I was summoned to the Chief of Staff's office and read the riot act. The premier himself never mentioned it to me, and my transgression didn't seem to affect our otherwise friendly relationship. After Klein retired and I became the minister of Sustainable Resources Development (2007-2010), we collaborated closely to help build the kids' fishing pond at the Bow Habitat Station in Calgary.

Under the status quo, all of the political incentives are to spend NRRR, not to save. Spending gives voters more services and benefits without imposing more taxes to pay for them – a politician’s dream. This is reality not theory. The Kneebone-Wilkins (2018) study confirms that for the past 50 years seven consecutive Alberta governments from three political parties have ramped up spending during years of high NRRR, and then have run deficits when oil and gas prices inevitably declined.

But what if citizens/voters were receiving annual cheques drawn from the fund’s annual earnings? The logic is pretty simple: The bigger the Heritage Fund, the bigger the cheque. Would voters reward or punish a government that was shrinking their non-taxable cash dividend?

As noted above, when the Alaskan legislature has tried to redirect more of the Permanent Fund’s earnings away from dividends and into general revenues, the voter reaction has been strongly negative. It seems probable that given the choice, Albertans would also prefer protecting their dividends to more government spending. Of course, an Alberta government would then have to find a new revenue source – the most obvious option being a sales tax. Would Albertans, like Alaskans, be willing to pay a sales tax in order to keep their annual energy paycheque? Would a sales tax still be the third rail of Alberta politics? We will never know unless we ask them. But those Ralph Bucks sure were popular.

6. PROVINCIAL CONSTITUTIONS IN CANADA: OPPORTUNITIES AND OBSTACLES

Constitutionally entrenched fiscal rules – such as a BBL, a TEL or the mandatory transfer of a defined per cent of annual NRRR to the Heritage Fund – would increase fiscal stability and decrease volatility in GOA finances. It would enhance economic security for future generations of Albertans. But implementing such rules is not a simple process.

For students of comparative federalism, Canada is an anomaly. Canadian provinces are arguably stronger (both politically and jurisdictionally) than their counterparts in other federal democracies. Yet, unlike the latter, no Canadian province, save British Columbia, has a written constitution. Even B.C.’s is only a statute, and so can be easily amended by the normal legislative process. For our present purposes, this means there is currently no clear or simple legal process for a province to entrench a new constitutional rule, such as a BBL or TEL.

The source of this anomaly can be traced to Canada’s heritage as a former British colony and the complementary British traditions of parliamentary supremacy and an unwritten constitution. In 1867 at the time of Confederation, each of the original four colonies had its own unwritten constitutions – a combination of British and colonial statutes, royal proclamations and charters, custom and convention – and these were duly noted and respected in the *British North America Act* (BNA) of 1867. Sections 58-90 of the *BNA Act* address the subject of provincial constitutions, but with the exception of the executive office of the lieutenant-governor (the Queen’s representative), the provinces were given complete authority to amend their constitutions as they see fit. Under this authority, for example, several provinces unilaterally abolished the upper chambers of their legislatures. The provinces’ “exclusive” authority over their respective constitutions (save the office of the lieutenant-governor) was re-affirmed more recently in s. 45 of the *Constitution Act*, 1982.⁹

Notwithstanding such authority, all provinces, save British Columbia, have chosen to adhere to the British practice of an unwritten constitution, or, to use more contemporary terminology, a flexible rather than a rigid constitution. In so doing, all provincial constitutions still adhere to the principle of parliamentary supremacy, within the confines of their section 92 powers and the limitations

⁹ S.45: “Subject to section 41, the legislature of each province may exclusively make laws amending the constitution of the province.” (Section 41 exempts the office of the lieutenant-governor from this power).

imposed by the 1982 *Charter of Rights*. This means that any attempt to define a province's constitution produces a lengthy list of statutes, orders-in-council, the rules of order and procedure of the legislatures, and constitutional conventions.

For example, the Alberta attorney-general's office, when asked to identify the written documents that are included in the constitution of Alberta, replied that there was "no listing or definitive statement", but identified 23 acts that might be included (Wiseman, 1996a, 269-294, at 289).¹⁰ The author cautioned that this list did not preclude other acts and added that the Departmental Acts and the Rules of the Legislature might well be included as well. And this is only for the written portion of Alberta's constitution.

The predictable result has been that provincial constitutions are barely acknowledged in either the practice or the theory of Canadian politics. As Wiseman (1996b, 270) has recently observed, "Provincial constitutions barely dwell in the world of the [Canadian] subconscious. They are too opaque, oblique, and inchoate to rouse much interest, let alone passion."

The absence of provincial constitutions in Canada (like the absence of a democratically elected and effective Senate) distinguishes Canada from other mature federal democracies. In the majority of mature federal countries,¹¹ the sub-units (U.S. states/Swiss cantons/German Länder) have their own written constitutions. The six Australian states also have their own written constitutions, but they are not entrenched. Even most of the newer federal states¹² have more developed provincial constitutions than Canada.

Canada shares with India the dubious honour of being one of only two mature federal democracies with no sub-national constitutional systems. This omission reflects mid-19th century British parliamentary and imperial practice, and the centralist and anti-democratic biases of the two nations' original constitution writers. It is not by coincidence that India and Canada are also the only two English-speaking federations in which state/provincial judges are appointed by the federal government.¹³ Both practices are outdated relics of 19th century British imperial rule that have no place in modern democratic federations.

Both Quebec and more recently Alberta have shown interest in developing modern, democratic provincial constitutions. Quebec nationalists and sovereigntists have discussed the idea of a Quebec constitution for several decades (Legault, 2000; Venne, 2000). In the run-up to the 2003 Quebec election, all three major political parties endorsed the idea of a provincial constitution. The Action Démocratique du Québec (ADQ) proposed "La Charte du Québec" that would serve as "un document de base ... la loi des lois de notre communauté politique" and would affirm "la liberté politique de Québec", including the right to self-determination (Le Devoir, 2001). In February 2003, the Parti Québécois government convened an estates general to discuss and recommend constitutional changes for Quebec. Eighty-two per cent of the delegates voted in support of "une réforme qui mène à une constitution québécoise".

¹⁰ These included the Alberta Bill of Rights, the *Auditor General Act*, the *Regulations Act*, the *Languages Act*, the *Ombudsman Act*, the *Electoral Finances and Contribution Act*, and the *Justices of the Peace Act*.

¹¹ The United States, Switzerland, Austria and Germany; the four South American federations – Argentina, Brazil, Venezuela and Mexico; and most recently Ethiopia. In the past decade Italy and Spain, while not technically federal states, have devolved significant powers to regional governments, which have in turn adopted constitution-like documents for governance.

¹² Spain, Russia, South Africa, Bosnia and Herzegovina.

¹³ Austria and Venezuela are two other federations in which this anti-federal practice occurs. In Venezuela, it reflects the centralist bias of South American political development.

In Alberta, citizens unhappy with the way the federal government treats their province have advocated a provincial constitution as part of a package of home rule reforms to strengthen the province's political autonomy.¹⁴ In response, the Alberta government struck a legislative committee to consult with Albertans on “how to strengthen Alberta's role in Confederation” (Walton, 2018). My own submission to this commission was to adopt a new provincial constitution to coincide with the province's centennial celebration in 2005 (Morton, 2003a, 15-16). However, the commission's final report did not accept this recommendation.

This constitutional status quo need not be permanent. All provinces have the constitutional authority to create and entrench a provincial constitution. There are two options – one unilateral, with Alberta acting alone; the other bilateral, with Alberta engaging with and obtaining the federal government's consent.¹⁵

The bilateral option may be the most straightforward. A provincial government may negotiate an amendment to the constitution of Canada that affects only that province, subject to the approval of the House of Commons and the Senate. Such an amendment could be used to patriate the *Alberta Act* from Ottawa to Alberta, just as Canada patriated the *BNA Act* from London in 1982. (The *Alberta Act* is currently part of the federal constitution). This type of bilateral constitutional amendment (i.e., Ottawa and one province) is authorized by section 43 of the *Constitution Act*, 1982, and has already been used by four different provinces.¹⁶

A similar section 43 amendment could be used to “patriate” the *Alberta Act* from Ottawa to Alberta. (The *Alberta Act* is currently part of the federal constitution.) Alberta could include in its “patriation package” a new supermajority amending formula—such as a two-thirds approval vote in the Legislature and/or approval by way of referendum. Then, once the *Alberta Act* were “back home,” Alberta could then make further changes per its new amending formula—such as adding a BBL or a TEL.¹⁷

Some have argued that the section 43 amending formula can only be used to change “an existing provision” that is unique to that province, not to add new rights or restrictions. (R. Newman, 2016) This restrictive view of section 43 does accurately describe what was done by Quebec and Newfoundland with respect to denominational school rights and by PEI and its guarantee of a link to the mainland.

But as others have pointed out, New Brunswick's addition of constitutionally entrenched minority language rights was entirely novel. Law professor Dwight Newman calls the New Brunswick amendment “a watershed moment,” and asserts that it sets a precedent for using section 43 to add new, province-specific rights/restrictions to their constitutions. Referring to a proposal to add a guarantee of property rights to Ontario's constitution, Newman says that this is “neither legally or conceptually problematic. (D. Newman, 2013) More recently, Newman again found that, “It is now clear and accepted that section 43 can be used for the adoption of new provisions” (D. Newman 2016, p,150). This broader reading of section 43 has also been embraced by other constitutional scholars. (Pelletier, 1999; Cameron & Krikorian, 2008, 407-411)

¹⁴ See www.albertaresidentsleague.com and www.citizenscentre.ca.

¹⁵ The same two options are recognized in the Clemens et al., (2003) study.

¹⁶ Quebec in 1997 to abolish denominational schools; Newfoundland in 1987 and 1997 to reduce denominational school rights and again in 2001 to change its official name to Newfoundland and Labrador; PEI in 1993 to replace its original guarantee to a mainland link from a ferry to a bridge; and New Brunswick in 1993 to extend the guarantee of minority language rights to its Francophone minority.

¹⁷ Rather than immediately “entrench” the entire *Alberta Act*, it would be more prudent simply to provide a procedure by which selected sections of the *Act* could be entrenched in the future. There may be sections of the *Act* that are no longer relevant or archaic that Albertans may want to delete or amend without having to go through the burdensome procedure (double-majority and/or referendum) required for formal constitutional amendment.

Assuming federal co-operation, this bilateral amendment would appear to be the simplest way to entrench a provincial constitution. There is, however, a potential downside to provincial constitution-making in Canada. If the purpose is to strengthen provincial self-government and democratic accountability within the province, adopting an entrenched constitution could end up having the opposite effect. Under Canada's current legal system, the final authority for interpreting a provincial constitution would be the Supreme Court of Canada. The prime minister appoints these judges unilaterally, usually along partisan party and/or ideological lines and without consultation with provincial governments.

This would hardly make sense for a province like Alberta. The meaning and enforcement of constitutional rules for Alberta would be made by a court on which there might not be a single Alberta judge! If the goal is to increase self-government for Albertans, entrenching a provincial constitution could end up having the opposite effect. The final word on their constitution's meaning would rest with nine, non-Alberta judges in Ottawa. Even allowing the Alberta Court of Appeals to serve as the final interpreter – analogous to the practice in the 50 U.S. states – would be problematic, since Ottawa also appoints all its members.

This made-in-Ottawa risk would be amplified if a provincial constitution contained broad guarantees such as principles of fundamental justice and equal protection of and equal benefit of the law. Our experience since adopting the 1982 *Charter of Rights and Freedoms* has shown that broad concepts such as these are subject to unanticipated, unintended and/or controversial interpretations, depending on the personal experiences, subjective values and/or policy preferences of any given judge.

By contrast, this concern/risk could be minimized if (at least in the beginning) the provisions of a new provincial constitution were limited to clear, explicit rules with broadly agreed-upon, objective meanings. Presumably, a BBL or a TEL could be framed in this manner.

For these reasons, a provincial constitution adopted via the bilateral amending process could actually weaken provincial autonomy, unless it were accompanied by constitutional amendments that transferred the power to appoint provincial superior court judges to provincial governments, and made provincial courts of appeal, not the Supreme Court of Canada, the final and exclusive interpreters of provincial constitutions.

While theoretically possible under section 43, it seems highly improbable that such fundamental constitutional change could be restricted just to Alberta. Given the competitive nature of Canadian federalism, it seems likely that other provinces—certainly Quebec—would demand similar concessions. Accordingly, such constitutional amendments would engage a broader set of political interests and actors, and would require approval under the “7/50” general amending formula. However, since the failure of the Meech (1987) and Charlottetown (1990) Accords, this type of constitutional amendment has proven to be near impossible. But without such amendments, adding a provincial constitution might have the opposite of its intended effect.

For this reason, the unilateral option may be the more appropriate way to proceed.¹⁸ Under section 45 of the 1982 *Constitution Act*:

“Subject to section 41, the legislature of each province may exclusively make laws amending the constitution of the province.”¹⁹

¹⁸ Wiseman (1996d, 279) seems to imply that the only way a province can place an entrenched constitutional limitation on itself is through amending the Constitution of Canada by using the s.43 bilateral amending procedure. For the reasons that follow, it is equally plausible that a province could use the section 45 amending formula and would not need to get Ottawa's permission to entrench a constitution of its own.

¹⁹ Section 41 exempts the office of the lieutenant-governor from this power.

As Wiseman (1996c, 282) observes, “Provincial constitutions – with the exception of the federal principle and parts of the Charter – are what provincial legislatures say they are.” So per section 45, a province could unilaterally enact an amending formula – say a two-thirds vote in its legislature, combined with majority approval (50 per cent +1) in a referendum. Following this logic, a BBL or TEL could then be added to the constitution, thereby putting such fiscal rules beyond the reach of simple legislative majorities. Indeed, Alberta has enacted legislation that places procedural limits on future Alberta governments twice since 1982.²⁰ But it’s not this simple.

An ordinary statute, enacted by a simple majority vote that explicitly restricts the substantive policy choices of future legislative majorities violates the principle of parliamentary supremacy. Under the British-Canadian system of parliamentary supremacy, it is not permissible for a present government to bind the policy discretion of a future government.

Fortunately, there is an important exception. Reasonable procedural or manner and form limitations have always been permitted. The Supreme Court of Canada has upheld several such procedural restrictions such as the requirement that all bills must be enacted in both English and French, or that tax increases must first be approved by a referendum (Hogg, 2007a, 11-12).

But, as constitutional expert Peter Hogg notes, these kinds of procedural restrictions are temporary, not permanent, checks on future legislatures, because they can be repealed by simple majority votes. They do not have the permanence of a true constitutional rule. Hogg argues that this weakness of normal manner and form rules can be remedied by what he calls “double entrenchment”:

[I]n order to be fully effective in law, a manner and form provision must apply to itself (be self-referencing or doubly-entrenched). The manner and form provision must not only apply to the protected category of laws ... it must also apply to laws amending or repealing the manner and form provision itself (Hogg, 2007b, 12-13).

While this double entrenchment would solve the easy-to-repeal-problem, it runs into a second problem. Hogg is clear that a current legislature may not bind a future legislature with respect to the substance of policy. This includes “an ostensibly procedural requirement that is virtually impossible of fulfillment, such as approval by eighty percent of the voters in a referendum” (Hogg, 2007c, 12-18. Fn. 71). What is not clear is at what point does entrenching the entrenching procedure become “an ostensibly procedural requirement that is virtually impossible of fulfillment”?

There are good reasons why any substantive policy restrictions on future governments must meet a higher standard of support than just a simple majority vote in a current legislature. Today’s democratically elected majority should not be allowed to protect its own policy preferences from future revision or repeal by a future democratically elected majority. If this were allowed, a government facing an imminent election and negative polling numbers might be tempted to entrench its own key policies against repeal by its soon-to-be victorious political opponents – a clear violation of democratic accountability (Hogg, 2007d, 8-12). To take a topical example, Alberta’s NDP government is not able to entrench a carbon tax – a policy that Kenney has promised to repeal if elected. The American scholarship describes this as “legislative entrenchment” and rejects it for the same reasons (O’McGinnis and Rappoport, 2003a, 385-445).²¹

²⁰ Alberta has in fact bound future legislatures in its *Constitution of Alberta Amendment Act*, 1990, which deals with Métis settlements and stipulates that its amendment or repeal “may be passed by the Legislative Assembly only after a plebiscite of settlement members.” Similarly, Alberta’s *Constitutional Referendum Act*, 1992, requires a referendum before ratification “of a possible change to the Constitution of Canada” and further declares the result “is binding on the Government of Alberta.” Based on the argument that follows, I believe that the 1990 *Metis Settlement Act* is in fact unconstitutional, since it purports to bind a future parliament with an amending/repeal procedure that was not used for its original enactment.

²¹ This article is a reply to and rebuttal of an earlier article by Eric A. Posner and Adrian Vermeule, “Legislative Entrenchment: A Reappraisal,” 111 *Yale Law Journal*, 1665 (2002).

A middle ground and path forward is found in what is called symmetrical entrenchment (O'McGinnis and Rappoport, 2003b, 385-445). There is a robust scholarship on this subject in the United States: whether, or how, a current legislature can enact rules that limit or restrict what future legislatures may do. Symmetrical entrenchment basically means that a policy restriction on a future government must be enacted under the same super-majority procedures that would be needed to repeal it (O'McGinnis and Rappoport, 2003c, 426). More formally stated,

“Symmetrical entrenchments are those that employ the same voting rule to govern the enactment of the entrenched measure as would be required to repeal it” (O'McGinnis and Rappoport, 2003d, 417).

Under this procedure, a government is legally required to achieve the same super-majority or double-majority support that it seeks to impose on future governments. By meeting the same higher, super-majority bar, this achieves a level playing field between current and future governments, and passes the test of democratic accountability.

Symmetrical entrenchment could be used to implement the practical task of Alberta (or any other province) unilaterally entrenching constitutional rules. The parliamentary supremacy principle argument could be met by ensuring that any new entrenched provincial constitutional limitation is first approved by the same higher threshold that it seeks to impose on future legislatures. This adoption procedure would satisfy the manner and form requirements that are part of Canada's parliamentary tradition and, in fact, would replicate the manner and form in which the *Charter of Rights* was adopted in 1982 – with the support of nine of 10 provinces and both houses of Parliament.

Suffice it to recognize here that at a certain point, manner and form requirements that are themselves entrenched become indistinguishable from a formally entrenched constitutional amending formula, such as, since 1982, is now found in the Canadian constitution. The new amending formula, combined with the adoption of the *Charter of Rights* in 1982, marks Canada's departure from and modification of Dicey's classical model of parliamentary supremacy. If entrenched constitutional limitations are now permitted in Canada's national constitution, there is no longer a principled reason why they cannot be included in a new provincial constitution, provided it is created using symmetrical entrenchment.

For this same reason, unilateral entrenchment, done as proposed above, would not trigger the only other limitation that constrains the provincial amending power. According to Wiseman (1996e, 285), section 45 does not permit “a profound constitutional upheaval by the introduction of political institutions foreign to and incompatible with the Canadian system.” Since 1982, neither entrenched rights nor a super-majoritarian amending formula are foreign to Canada.

The same holds true for the use of popular referendums to approve or disapprove proposals to amend the constitution. Whatever its prior legal status might have been,²² the use of the referendum to approve or disapprove proposals for constitutional change has become well entrenched in Canadian practice since 1982. The federal government and several provinces used the referendum procedure to decide the fate of the 1992 Charlottetown Accord, a collection of constitutional amendments that the voters decisively rejected. Quebec, Alberta and British Columbia all have statutory requirements that proposed amendments to the federal constitution must first be approved by the people in a referendum. Quebec has twice used the referendum process to vote on proposals to secede from Canada, in 1980 and again in 1995. In its 1998 ruling in the *Quebec Secession Reference*, the Supreme Court of Canada conferred constitutional legitimacy on the use of referendums by declaring that they embodied the unwritten constitutional principle of democracy. The subsequent enactment of the *Clarity Act* by the federal government (1999) and Bill 99 by the

²² See Reference re *Manitoba Initiative and Referendum Act*, [1919] A.C. 3 W.W.R. 1, 48 D.L.R. 18.

National Assembly of Quebec (1999), while diametrically opposed, both presuppose the use of and legitimacy of popular referendums to decide constitutional amendments.²³

In sum, under section 45, Alberta (and by extension, any other province) could unilaterally entrench a BBL, TEL or Heritage Fund contribution rule, if it used the same super-majority process to approve the new rules that it imposes on any future government to amend or repeal the rules.

Notwithstanding this capacity, unilaterally created provincial constitutional rules face the same paradox and risk as the bilateral option: that under the constitutional status quo, the meaning of such rules would ultimately be interpreted by the Supreme Court of Canada, a body on which Alberta has no guarantee of representation and no role in nominating or approving its nine judges.

This made-in-Ottawa risk could be mitigated if Alberta's initial constitution is limited to just a set of fiscal rules such as BBLs, TELs or mandatory minimum deposits of energy revenues into the Heritage Savings Fund. These rules would all be relatively straightforward and objective, leaving little room for judicial (mis-) interpretation. Presumably, such objective rules would be interpreted and enforced the same ways by judges in either Edmonton or Ottawa, regardless of which party appointed them.

U.S. state constitutions and Canadian provincial statutes provide many different models of both BBLs and TELs. Every state except Vermont has some form of BBL. They vary in stringency. Some are statutory, but most are constitutional. Of the 49 states with BBLs, one study ranked 36 as "rigorous", four as "weak" and the others in between. There is also the choice whether to make a BBL an annual requirement, or allow a more flexible term of business cycle or before the next election – typically two to four years. Some models require that the budget as enacted be balanced. Others require balancing of expenditures and revenues by the end of the fiscal year. Almost all BBLs have explicit exceptions that allow for temporary operating deficits. These typically include wars, natural disasters or a dramatic collapse in revenues, usually defined as greater than five per cent.

Almost all state BBLs exclude capital spending from the calculation. This means that their BBL requirement typically applies to only 50- to 60 per cent of total state spending. As noted earlier, there are solid policy reasons not to apply a strict BBL to capital expenditures. But the failure to have any restrictions runs the risks of politically motivated overspending and fiscally unsustainable debt accumulation. In most states, this risk is minimized by making it difficult to impossible for either governors or legislatures to unilaterally issue debt. Most states require special legislation to issue general obligation revenue bonds, and many require voter approval of such bonds via referendum. Some then require the creation of a stand-alone revenue stream to repay the bonds. The result in these states is that debt is fully in the public view, and that it is almost unheard of for state governments to borrow to pay for annual operating expenses.²⁴ These are practices that a future fiscally responsible Alberta government should consider.

One interesting variation in some of the Canadian BBLs is the imposition of financial penalties on members of executive council (e.g., cabinet ministers) in a government that fails to meet the BBL requirement. The prospect of losing 20- to 40 per cent of one's annual salary would presumably serve as a great incentive for cabinets to balance expenditures with revenues! These are all some of

²³ Following the federal government's adoption of the *Clarity Act*, the Quebec government adopted Bill 99 (An act respecting the exercise of the fundamental rights and prerogatives of the Quebec people and the Quebec state). This Quebec act emphasizes the right to self-determination according to public international law. Article 13 responds to the Canadian federal *Clarity Act* by stating: "No other parliament or government may reduce the powers, authority, sovereignty or legitimacy of the National Assembly, or impose constraint on the democratic will of the Québec people to determine its own future."

²⁴ The U.S. National Conference of State Legislatures has several useful publications that review the many different forms of state BBLs and TELs. See <http://www.ncsl.org/research/fiscal-policy/state-balanced-budget-requirements.aspx>

the practical choices that would have to be made should Alberta choose to adopt a constitutionally entrenched BBL or TEL.²⁵

8. CONCLUSION

In 2003, in preparation for Alberta's 2005 centennial celebration, I wrote the following:

A made-in-Alberta constitution could provide many benefits to Albertans, and any other provinces that chose to do the same. It would allow Albertans – if they chose – to “cement in” some of the most important Klein achievements by way of constitutional (as opposed to statutory) requirements for balanced budgets and referendums to approve tax increases. An entrenched Alberta Constitution could also be used to protect the Alberta Heritage Fund from future raids by vote-hungry politicians (Morton, 2003b, 15-16).

Would have ... could have ... should have. That fork in the road is now \$70 billion ago and long past. But it is not too late. The next Alberta government should undertake the constitutional entrenchment of the fiscal restraint rules described in this paper.

Given the relative risks of the two entrenchment options, it would be prudent for Alberta to proceed in a staged approach: begin with the unilateral option and then pursue the bilateral option, with the other necessary amendments, over the medium term. Ideally, the first could pave the way for the second.

Even the unilateral approach would require some rules to mitigate the risks of leaving final power of interpretation with the Supreme Court of Canada, a court on which Alberta has virtually no representation.

There are several options. Judicial decisions based on a new provincial constitution could be defined as advisory only, with final decisions left to the elected government. This is the approach the U.K. has chosen to use with respect to its recently adopted Declaration of Human Rights.

There is also the Canadian solution adopted in the *Charter of Rights* – the notwithstanding power – which allows a government to overrule an adverse judicial decision by re-enacting the impugned statute with the declaration that it shall take effect notwithstanding the specified section of the *Charter*.²⁶ The political stigma attached to the notwithstanding clause and governments' resulting reluctance to use it makes this a less preferable choice.

A third possibility would be a modified version of the British rule: judicial decisions that were unanimous would be final and binding, but decisions with one (or more?) dissenting opinion would be advisory only. This rule would capture clear violations of the constitution, but would leave constitutional issues over which there is reasonable disagreement to be resolved by the provincial legislature. This approach would capture the benefit of an entrenched provincial constitution – placing enforceable limits on the government of the day– but minimize the down side of final decisions being made by a faraway court in Ottawa with no Alberta judges.

Concurrent with the unilateral initiative, Alberta should undertake negotiations with other provinces and the federal government to implement the bilateral option, but accompanied by

²⁵ For examples of these choices, see Clemens et al., “Tax and Expenditure Limitations” (2003).

²⁶ Section 33 of the 1982 *Charter of Rights* reads: “Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act of a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7-15 of this Charter.” The federal government has not yet used the notwithstanding clause, but provincial governments have used it 16 times.

the risk-mitigation amendments identified above. Specifically, Alberta should consult with other provinces to gain their support for a constitutional amendment that transfers the power to the provinces to appoint their own superior court judges. This should be accompanied by a second, complementary amendment that confers exclusive final jurisdiction over provincial constitutions on provincial courts of appeal. If Ottawa deemed it necessary, these could be accompanied by a third amendment that makes explicit what is already implicit: the supremacy of the federal constitution over any contrary provincial laws or constitutions. This would ensure that new provincial constitutions would not result in any net loss of federal jurisdiction.

Presumably, Quebec would be an ally in such amendments, save perhaps the third. In addition to its longstanding and multi-partisan interest in a constitution of its own, Quebec Premier Philippe Couillard has recently released a 200-page policy document titled “Quebecers: Our Way of Being Canadians” that seeks to expand Quebec’s capacity for democratic self-government and policy autonomy within Canada (Canadian Press, 2017). Clearly, this objective would be strengthened by the first two amendments proposed here. Presumably, other provinces would also be supportive of gaining the authority to appoint their own superior court judges, even if they are not interested in a constitution of their own.

The federal Liberal and Conservative parties could be reluctant to give up the patronage powers they enjoy through the judicial appointments power. But in the court of public opinion, it is hard to imagine the perks of patronage carrying the day against enhanced self-government for each province. A political party that campaigns on a platform to protect its patronage perks risks paying a price in the next election.

While these amendments might appear radical, in fact they would implement in Canada what is already the norm in almost all other mature federal states. As noted earlier, returning the judicial appointment power to provincial governments would remove an outdated relic of 19th century British imperial rule that has no place in modern democratic federations.

For these same reasons, Alberta should concurrently propose the abolition of the federal powers of disallowance and reservation. There is little purpose in going through the time and trouble to draft and ratify provincial constitutions, if the government in Ottawa retains the power to change unilaterally the division of powers that are completely at odds with the very concept of federalism. Yes, there is already a strong unwritten convention of non-use for disallowance and reservation. But why not use this opportunity to entrench these conventions into Canada’s written constitution? Again, support from Quebec would be all but certain. Quebec has already enacted legislation declaring that any use of either the disallowance or reservation powers to reverse policies enacted by its National Assembly would be “illegal”.²⁷ Any Quebec government would immediately support such amendments. Presumably the current conservative governments of Ontario (Ford) and Saskatchewan (Moe) would as well. A coalition with this membership would be difficult for any federal political party to ignore.

At the federal level, there is a precedent. In 1970, then-prime minister Pierre Trudeau indicated a willingness to abolish these powers in return for provincial support for a new bill of rights that would apply to both levels of government. Perhaps Canada’s current prime minister could be persuaded to complete a journey his father began but never finished – renewed federalism.

²⁷ Section 41 exempts the office of the lieutenant-governor from this power.

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About the Author

Dr. F.L.(Ted) Morton is currently an Executive Fellow at The School of Public Policy and Professor Emeritus, Political Science, at the University of Calgary. He recently served as Minister of Energy for the Government of Alberta (2011-2012). Prior to that, he was the Minister of Finance (2010) and Minister of Sustainable Resources Development (2006-2009). In 2001, he was the Director of Policy and Research for the Office of the Official Opposition in the Canadian House of Commons. Ted is known for his expertise in the energy-environment interface in Western Canada and federal-provincial relations. He holds a BA degree (Phi Beta Kappa) from Colorado College and MA and PhD degrees from the University of Toronto.

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