ECMI

WORKING PAPER

THE NOTION OF 'INSTITUTIONAL COMPLETENESS' IN CANADA: THE CONTRIBUTION OF THE JUDICIARY TOWARDS NEW AVENUES OF NON-TERRITORIAL AUTONOMY

Raphaëlle Mathieu-Bédard

ECMI WORKING PAPER #93
June 2016

The European Centre for Minority Issues (ECMI) is a non-partisan institution founded in 1996 by the Governments of the Kingdom of Denmark, the Federal Republic of Germany, and the German State of Schleswig-Holstein. ECMI was established in Flensburg, at the heart of the Danish-German border region, in order to draw from the encouraging example of peaceful coexistence between minorities and majorities achieved here. ECMI's aim is to promote interdisciplinary research on issues related to minorities and majorities in a European perspective and to contribute to the improvement of interethnic relations in those parts of Western and Eastern Europe where ethno-political tension and conflict prevail.
ECMI Working Papers are written either by the staff of ECMI or by outside authors commissioned by the Centre. As ECMI does not propagate opinions of its own, the views expressed in any of its publications are the sole responsibility of the author concerned.

ECMI Working Paper # 93
European Centre for Minority Issues (ECMI)
Director: Prof. Dr. Tove H. Malloy
© ECMI 2016

THE NOTION OF 'INSTITUTIONAL COMPLETENESS' IN CANADA: THE CONTRIBUTION OF THE JUDICIARY TOWARDS NEW AVENUES OF NON-TERRITORIAL AUTONOMY

The concept of 'institutional completeness', which refers to the organizational influence of a minority group and the degree to which it can provide its members with all necessary services, has recently enjoyed renewed interest in Canada. 'Institutional completeness' could represent an interesting avenue of 'non-territorial autonomy' for European minorities, one that might curtail some of the issues associated to current arrangements delegating power and autonomy to minorities, which often remain more ornamental than substantial. This paper exposes the recent jurisprudential developments in Canada pertaining to the modernization and revival of the concept of 'institutional completeness', most notable in the sphere of education for Francophone minority groups living outside of the province of Quebec, and encourages an in-depth exploration of the concept and of its potential not only for the autonomy of minorities, but also as a means of compensation for past harms and injustices.

Raphaëlle Mathieu-Bédard

June 2016

ECMI Working Paper #93

I. INTRODUCTION

Non-territorial autonomy (NTA) can be broadly understood as varying forms of institutional self-representation, self-organization and self-administration in order to fulfill public functions. NTA, taken as a means of mitigating ethnic tensions, has been used in multiple fashions in Europe over the fall of the USSR.

The implementation of NTA arrangements is becoming increasingly popular among governments, academics and minority activists alike[1], and its diffusion to other countries in Europe has recently been discussed[2]. So far, several European countries have adopted legislation setting up non-territorial or cultural forms of autonomy and self-government, such as

Croatia, Estonia, Ukraine as well as Russia – in fact, most of the scholarship available on NTA pertains to European cases. This is arguably because non-territorial autonomy allows for quite contained minority representation which does not directly threaten the integrity of states – whether or not these representation agreements lead to substantial power being conferred to minority groups often seems like a secondary consideration[3].

The concept of 'institutional completeness' (IC) has recently enjoyed renewed interest in Canada and could represent an interesting avenue for European minorities to obtain significant representation and non-territorial autonomy going forward, one which might curtail some of the issues associated to current NTA arrangements. This working paper will first expose the concept of IC as it was first coined by Raymond Breton in the 1960s, its explanatory potential and will provide an overview of the academic commentary and criticisms that are addressed to the concept and its application in the literature. Then, the paper will explore different Canadian case studies where the concept of 'institutional completeness' has been used in academic literature, before turning to an exploration of a parallel trend in jurisprudence and to the contribution of the Canadian judiciary to the revival of IC in recent years, to its more modern interpretation and recent applications in court judgments as well as in legislations and a few non-judicial agreements.

II. THE CONCEPT OF 'INSTITUTIONAL COMPLETENESS'

2.1 An overview of the concept and its role in the non-territorial arrangement literature

There is overall very little direct jurisprudence in Canada regarding non-territorial autonomy. Nevertheless, some authors have nevertheless argued that Canadian jurisprudence plays a very important role in defining non-territorial arrangements[4]. Indeed, Stéphanie Chouinard argues that the courts have, through several judgments, opened the door to an official recognition of positive group rights in Canada, and to a particular doctrine of 'institutional completeness', notably with regards to Francophone minority communities (FMCs) outside of the province of Quebec, the only officially francophone province or territory in Canada. This reading of the jurisprudence has however been disputed[5].

Raymond Breton first coined the concept of 'institutional completeness' in 1964 to capture the influence that a minority community's level of institutional development and organization exercised on its ability to retain and attract members, away from the 'host' society[6]. The level of institutional completeness varied on a very broad spectrum, from loose informal bonds to the ability to provide all services and resources to a community's members[7].

For Chouinard, Breton's 'institutional completeness' and the concept of non-territorial arrangements, as formulated at the beginning of the XXth century by Karl Renner and Otto Bauer – where individuals, rather than territories, bore rights – share an interesting normative

affiliation, and overlap on three main principles[8]:

1) Both concepts present a more 'personalist' and 'voluntary' alternative to previously existing models of minority self-determination which relied on territory;
2) Both concepts target specific contentious issues pertaining to the survival of a minority's culture;
3) Both IC and NTA address the issue of the legitimacy of a minority group's institutions and emphasize the need for official recognition of these institutions.

While Rémi Léger disagrees with Chouinard's insertion of IC into the existing literature on NTA (see below), he does believe that some new scholarship on the topic, notably that of Rodrigue Landry *et. al*. and Linda Cardinal and Eloísa González Hidalgo, "can become a sound normative benchmark for the treatment of FMCs and perhaps even other analogous ethnocultural groups"[9]. For him, it is NTA scholars whom would benefit from a turn to IC, not the other way around[10].

Indeed, Cardinal and González Hidalgo believe that institutional completeness ought to obtain a similar normative status as that of the principles of self-determination and non-discrimination for national and ethnic minorities[11-12]. They in fact see a right to IC as a more appropriate and adapted solution to the situation 'linguistic and historic minorities' are in. For them, the Canadian case highlights the beneficial impact that institutional completeness has on minority groups (e.g. FMCs), which occurs through confidence-building, leading to FMCs, for example, conducting and representing themselves as actors in their own right and shaping their own future[13].

2.2 Operationalization issues

One of the main criticisms addressed to the IC literature, and a recurring one since the initial formulation of the concept, is the difficulty of operationalization (and the under-operationalization) of 'institutional completeness'.

For Gunter Baureiss, the 'operationalization problem' stems from the fact that while Breton had limited the use of IC to the study of the integration of new immigrants, scholars have used the concept in a multitude of different ethnic relations research[14]. In fact, at least before his more recent work done in the 1980s and 1990s, Breton had never presented the concept of IC in a complete theoretical perspective and had operationalized it in a very simplistic manner (enumeration of institutions)[15]. Hence, for Baureiss, much of the literature that made use of IC in the decades following its initial formulation would have benefited from a more rigorous conceptualisation and operationalization of the concept[16].

Lance W. Roberts and Edward D. Boldt echo Baureiss' concerns. Indeed, for them, Breton's initial operationalization of the concept did not live up to its theoretical promise; his 'enumerative' approach implied that the mere existence of institutions was sufficient to bring about communal cohesion, and ignored the possibility that particular characteristics of ethnic institutions might make some institutions much more effective as instruments of boundary maintenance between minorities and the host society than others[17]. Breton did not address the possibility that institutions' impact might not be

measured through a simple addition, and his operationalization, firmly grounded in the quantitative, rather than qualitative, realm, remained largely untouched in much of the IC scholarship.

Similarly, for Sheldon Goldenberg and Valerie A. Haines, IC holds much potential for non-territorial/aspatial studies of community. However, while his conceptualisation and operationalization of the ethnic composition of immigrants paved the way for the introduction of a 'network dimension' to IC, Breton's assumption that the *social* boundaries of the ethnic communities he studied were coterminous with their *spatial* boundaries entrenched his work in an ecological approach to community. This was done to the detriment of an aspatial approach, which avoids the "standard ecological assumption that spatial proximity is a sufficient condition for community"[18], and led to most subsequent scholarship on IC limiting itself to an ecological conception of ethnic community.

2.3 Other limitations to the current use of 'institutional completeness' in the literature

Daniel Bourgeois and Yves Bourgeois, while arguing that IC can 'describe, explain and predict' conflicts between majority and minority groups, have identified multiple gaps in the literature on IC: IC scholars have not studied, first, the differentiation between types of institutions, second, which types of institutions contribute the most to minority survival, nor, finally, have they studied the actual use (or lack thereof) that minority groups make of civil and state institutions[19].

According to M. Michael Rosenberg and Jack Jedwab, there exists several other gaps in the IC scholarship: the literature has so far ignored how institutional development in itself is a contribution to the political, social and economic life of the host society, as well as ignored how institutional completeness initially emerged as a structural feature of ethnic groups in Canada, nor has it accounted for the different patterns of IC development among ethnic groups. Moreover, the existing IC literature features very little analysis of the relationship that exists between ethnic groups and the host society. But most importantly, the IC scholarship by and large ignores the role that the state plays in ethnic 'institutional completeness' [20-21].

Additionally, beyond its 'operationalization' problem and the sometimes limited scope of its analyses, another recurring concern with the concept of institutional completeness, especially with its use in practice, is that it might encourage insularism among minorities[22]. This could be particularly problematic in the case of Aboriginals, since one particularly important goal of institution-building and policy in their case is the building of bridges with the rest of the Canadian population in an optic of reconciliation. Indeed, that is specifically one of the main goals of the federal government's funding of Aboriginal Friendship Centres (AFCs) in urban centres. However, according to Jedwab, it would be wrong to believe that bonding (within one's community) is an obstacle to bridging[23]. Yet, Jedwab elsewhere argues that in certain conditions, IC may lead to disagreement with the broader/host community rather than lead to minority group vitality[24]. In the same article, he also criticizes the existing literature on IC for paying insufficient attention to the role government plays in determining the

capacity for institutional completeness a community enjoys, and argues that in fact, a community's ability to develop institutional completeness is "highly dependent on the nature and degree of assistance that is received from governments"[25].

Furthermore, and critically for our purposes, for Léger, Chouinard's equation of IC with NTA makes IC a "poorer analytical lens and normative benchmark"[26]. This is because, among other things, of definitional issues found in the literature when it comes to the content and objectives of non-territorial agreements, issues reproduced in Chouinard's work. For Léger, the NTA understanding Chouinard uses is closer to a larger, more general understanding of NTA than that of Renner and Bauer – a clearly defined scheme which protects and promotes ethnocultural groups' rights – which she assumes. For Léger, Chouinard's work uses a much simpler conception of NTA where "constitutional and institutional arrangements [...] do not entail exclusive control over a territory"[27]. However, this broader understanding boils down to IC not needing exclusive control over a territory, losing its promise of 'officiality' through constitutional and possibly legislative bases[28].

Another issue that associating the concept of IC with the NTA literature might pose is that, as Chouinard notes, the notion of territory may be difficult to completely remove from the equation when discussing IC, since, for example, the larger a minority group living on a given territory is, the higher is the possibility of IC and institutional autonomy on that particular territory as well[29].

Yet, Goldenberg and Haines believe that incorporating IC in the social network analysis literature could take the notion of institutional completeness beyond a more territorial lens by shifting the focus of the analysis from the attributes of places to that of relationships: "... grounding a study of institutional completeness in a network concept of community would shift the focus away from attributes of places to the relations among actors in one or more aspatial networks"[30]. More concretely, this would mean measuring the level of participation of co-ethnics in their institutions rather than counting the number of particular ethnic institutions within a geographic area, for example. This seems much more suited to today's interconnected world where advances in transportation and communication technologies have made it much easier for individuals to maintain ethnic identification "through ties with geographically dispersed co-ethnics"[31].

Overall, despite the concept's several initial shortcomings, there seems to have been a recrudescence of interest in the concept of 'institutional completeness' and in its potential as a form of NTA in recent years. The work done by authors such as Chouinard as well as Cardinal and González Hidalgo showcases the promise that some believe 'institutional completeness' holds. Only a few years before their work was published, Bourgeois and Bourgeois deplored that "although it has influenced the jurisprudence on minority rights, most notably in Canada [...], 'the concept seems ritualistically cited rather than examined'"[32].

*****

It is also important to note that despite the claims of authors such as Chouinard, who places the discussion of IC in Canada within the larger

framework and discussion on NTA, the emerging scholarship on NTA generally does not make mention of Canada, and instead focuses on cases such as Belgium, Estonia, Hungary, Russia and the Roma in Central and Eastern Europe[33].

III. CASE STUDIES, AND THE USE OF 'INSTITUTIONAL COMPLETENESS' IN THE LITERATURE IN CANADA

3.1 The case of Francophone minority communities (outside Quebec)

For Chouinard, "while the government of Canada has been timid in recognizing institutional completeness for FMCs, the courts have been more innovative, defining the right to NTA through various judgments"[34]. The Canadian courts have not only articulated the right of minority groups to have distinct institutions, but have also proposed, in their judgments, several practices to actualize these NTA recommendations[35]. In fact, for Cardinal and González Hidalgo, 'institutional completeness' has become increasingly more popular in Canada since the 1980s, and corresponds more and more to how Canadian Francophones perceive their own autonomy within the country as they demand control over their own institutions[36]. Similarly, Landry *et. al.* understand the aims of FMCs in their quest for autonomy as being the obtainment of substantive equality with Anglophones, which they strive for through cultural autonomy and institutional completeness[37]. Cardinal and González Hidalgo also highlight how IC in the Canadian discourse has evolved from being limited to the educational sphere to now being considered in the health care, justice and social services spheres as well, showcasing its fundamental normative potential for, among others, Canadian Francophones outside Quebec[38].

3.1.1 Acadians in New-Brunswick

The Acadians in New Brunswick, whose institutions enjoy an additional veneer of legitimacy thanks to special protections granted to them by the Canadian Constitution (in section 16.1 of the *Charter of Rights and Freedoms*, see below), constitute a particular subset of FMCs on which a portion of the IC literature is focused, notably Daniel Bourgeois' work[39]. According to Bourgeois and Bourgeois, institutional completeness "is a significant component of Acadian nationalist struggles in the Greater Moncton area, notably since 2002", among others[40]. Their case studies of civil and (sub) state institutions in the cities of Moncton and Dieppe have shown how IC can help minorities survive, and, they argue, show that sub-state institutions (e.g. school boards, hospitals, municipalities) are more effective in doing so than civil institutions. Indeed, their study of IC shows how parallel, sub-state institutions in the health and education sectors have, to some extent, become ideological tools in the nationalist struggle in New Brunswick. Yet, the fact that Acadians, a minority in the province, also represent a minority in the city of Moncton could show the limits of institutional completeness as a strategy for minority survival, which brings Bourgeois and Bourgeois to consider the concept of 'sub-institutional completeness': "Can a minority within a

municipality seek institutional arrangements to facilitate its survival and vitality?" they ask[41-42].

3.2 The case of urban Aboriginal communities

The concept of 'institutional completeness' has also been used to analyse the case of Aboriginals in Canada, as urban Aboriginal communities endeavour to become self-governing and to provide culturally appropriate education and health care to their members living in urban settings, notably. While the literature on 'institutional completeness' for Aboriginals is much sparser, one such example is that of the development of Aboriginal Friendship Centres. Yet, for Jedwab, it is beyond doubt that the extent of institutional completeness influences the preservation of Aboriginal identities in Canada, and contributes to Aboriginal well-being in urban centres by encouraging strong bonds among Aboriginals as well as healthy relationships between Aboriginals and non-Aboriginals[43].

3.3. Anglophones (and Allophones) in Quebec (including but not limited to, the Jewish, Italian and Greek communities in Montreal)

Pierre Anctil has analyzed the high level of institutional completeness enjoyed by the Jewish community in Montreal, which he explains as the result of a unique combination of private and public support for Jewish services in the city, and "is so original in North America, that it can be described as the Quebec model"[44].

For his part, Jewab has analysed the role governments play in IC, by taking a closer look at Quebec's Anglophone population which, by virtue of its level of 'institutional completeness', should exhibit a strong sense of group consciousness. However, there has been much debate as to whether or not language is actually "a powerful expression or marker of identity for Quebec's English speakers"[45]. He concludes that while they are often reluctant to acknowledge this, governments play a very important role in influencing institution-building and thus the legitimacy of such institutions. This inevitably translates into governmental influence over identity shaping for minorities[46]. An example of this influence might be the recent development in Quebec of a 'social contract' between the government and the Jewish, Italian and Greek communities which, while exhibiting different levels of IC, all participate in a new relationship with the state where the Quebec government supports the maintenance of ethnic diversity in exchange for compliance with state policy, notably regarding the "francization" of community institutions and practices[47]. Indeed, "the growth in the role, function and activism of the state has not diminished but enhanced the institutional development in these three communities"[48]. This has led to the development of bureaucratic linkages that illustrate the negotiation and arbitration that occurs between the provincial government and ethnic communities' institutions. By promoting such ethnic bureaucracies, the government is effectively promoting institutional completeness.

3.4 Minority women (Sikh women in Squamish, British Columbia)

In a completely different outlook, Margaret Walton-Roberts has questioned the role that 'institutional completeness' plays in perpetuating, or leading to, denial of social problems such as abuse and violence against

women by causing social closure[49]. She has argued that 'weak ties', meaning the relationships minority women entertain with mainstream service providers outside their ethnic kin, can facilitate women's access to protection and services[50]. Ultimately, Walton-Roberts shows how 'strong ties', understood as a high level of institutional completeness within an ethnic community, "rather than build social capital, can actually facilitate ethnic silence with regard to systemic social problems"[51].

IV. THE ROLE OF THE CANADIAN JUDICIARY IN PROMOTING 'INSTITUTIONAL COMPLETENESS' (AND SOME NON-JUDICIAL AGREEMENTS AND LEGISLATIVE ACTS)

First, it is important to note that most of the jurisprudence pertaining to the concept of 'institutional completeness' in Canada addresses official language minorities, especially Francophone minority communities outside of the province of Quebec. Thus, this is the first category of Canadian case studies that will be considered here.

<u>For Francophone minority communities outside Quebec:</u>

Pierre Foucher explains that *if* there is currently a right to institutions for FMCs in Canadian jurisprudence, it is still emergent in most sectors, and is currently limited to the administrative sphere[52].

In fact, he finds that it is in linguistically homogeneous institutions that a right to autonomy for official language minorities can be found in Canada[53]. This right touches first and foremost quasi-public institutions as well as private organizations which are accountable to governments, since they are then held to the same linguistic obligations as the governments themselves. Hence, Foucher shows how it is through 'non-offensive' and gradual jurisprudential developments that a 'linguistic right theory' [doctrine] has emerged in Canada, transforming linguistic rights into hybrid – individual and collective – rights[54].

Landry *et. al*. conclude that "in Canada, all actors seem to be positively engaged in actualizing the cultural autonomy of the Francophone and Acadian communities"[55], autonomy being seen as the most accomplished form of linguistic minority protection[56]. This is of particular interest since a right to autonomy – whether legal or constitutional – would have a crucial normative consequence in forcing the state, under the power of the courts, to delegate a portion of its power to the authority bodies charged with the task of embodying this autonomy in various institutions[57]. But even in the absence of such a right, autonomy structures imbued with real normative power are still possible, but dependent on the discretion of the legislator.

COURT CASE OR PIECE OF LEGISLATION	CONTRIBUTION TO NON-TERRITORIAL AUTONOMY AND THE CONCEPT OF 'INSTITUTIONAL COMPLETENESS'
Mahé *v*. Alberta (1990)[58]	Following a doctrine of 'political compromise' favoured until the 1990s, Canadian courts started to officially recognize collective language rights, mostly in the education sphere, especially from 1990 to 1999[59]. The Mahé case of 1990 marked a new development in the field of NTAs in Canada, by reintroducing the link between language and culture, and by interpreting 'generously' *Section 23* of the *Canadian Charter of Rights and Freedoms* regarding minority language education rights. This followed the new 1988 *Official Languages Act* adopted by the federal parliament, which already represented a step away from the previous doctrine of 'political compromise'. As Chouinard explains, not only did this judgment show an explicit turn towards collective language rights of FMCs in Alberta, but "*Mahé* is the first court judgment where the right of the FMCs to the ownership and management of their own (state-funded) institutions (where numbers warrant) is clearly stated"[60].
Official Languages Act (1988)[61]	For Cardinal and González Hidalgo, the 1988 *Official Languages Act could* represent the Canadian government recognizing a right to IC, and represents the government's recognition of the fact that languages need communal bases in order to subsist. While this last recognition does not in itself entail an engagement towards IC for linguistic groups, the courts have since been more sensitive towards FMCs' requests to manage their own schools[62]. As Landry *et. al.* note, this act underlines the federal government's commitment to enhancing the vitality and development of official language minorities, as well as its commitment to fostering the use and full recognition of both languages in society (146)[63]. Moreover, the *Official Languages Act* was amended in 2005, establishing a clear commitment towards 'positive measures' being taken in the implementation process of these principles, and clearly recognizing language rights as positive rights in Canada[64].
Reference re Secession of Quebec (1998)[65]	Furthermore, the 1998 *Reference re Secession of Quebec* provided FMCs a 'massive legal argument for further litigation' since it recognized the protection of minorities as an unwritten principle of the Canadian constitution[66].
R. *v*. Beaulac (1999)[67]	The Beaulac judgment of 1999 decisively overturned the previous doctrine of 'political compromise' by recognizing the collective aspect of language rights[68].
For Chouinard, the years 2000 to 2012 represented a shift in Canadian jurisprudence from the recognition of collective language rights to more outright support for institutional completeness.	
Arsenault-Cameron *v*. Prince Edward Island (2000)[69]	This shift started with the Arsenault-Caron judgement in 2000, which not only restated the collective aspect of language rights, but understood such rights as aiming to allow minorities to live in their own language, beyond a more simple 'tool of communication' understanding of language rights. This judgment also introduced in Canadian jurisprudence the notion that 'differential treatment' might be necessary for equality to exist between French and English communities[70].
Lalonde *v*. Ontario (Health Services	The 1999 Lalonde judgment articulated the argument closest to the idea of IC in

Restructuring Commission) (1999)[71]	Canadian jurisprudence. In fact, Foucher considers it as a jurisprudential consecration of institutional completeness in Canada[72]. The Lalonde judgment opened the door for health care to be another field where institutions were regarded as integral to a community's survival (in this case that of FMCs), in addition to the field of education wherein most of the discussion has previously been limited: […] institutions are vital to the survival of cultural communities. They are much more than providers of services. They are linguistic and cultural milieus which provide individuals with the means of affirming and expressing their cultural identity, and which by extension permit them to reaffirm their cultural adherence to a community… Any reduction in an institution's sphere of activity will negatively impact the community and increase the probability of assimilation[73].
Fédération franco-ténoise *v.* Canada (Attorney General) (2006)[74]	The 2006 Fédération franco-ténoise *v.* Canada (Attorney General) case judgment, which examined the linguistic obligations of Canadian provinces and territories and explored the usefulness of social, cultural, economic and political institutions within 'language regimes' for the survival of linguistic communities, includes specific mentions of IC[75].
Doucet-Boudreau *v.* Nova Scotia (Minister of Education) (2003)[76]	The Doucet-Boudreau case (2003) is also of interest here, as it more or less constitutes a reprimand of the government of Nova Scotia with regards to its constitutional obligations towards FMCs (the Supreme Court of Canada confirmed this ruling on appeal)[77].
DesRochers *v.* Canada (Industry) (2009)[78]	In the DesRochers case (2009) judgment, the Supreme Court of Canada ruled that services in English and French provided by federal public institutions or private institutions working on behalf of the federal government needed to be of 'equal quality' (with a quite substantive definition of 'equality')[79].
Section 16.1 of the *Canadian Charter of Rights and Freedoms*[80]	In addition to *Section 23* on 'Minority Language Educational Rights' which gives them a right to their own French-language schools and school boards, the right to separate linguistic and cultural institutions for Acadians is already entrenched in *Section 16.1* of the *Canadian Charter of Rights and Freedoms*, and also entails a responsibility on the part of the provincial government of New Brunswick to promote such institutions[81].
Law recognizing the equality of the two linguistic communities of New Brunswick (1981)[82]	Also, Law 88, or the *Law recognizing the equality of the two linguistic communities of New Brunswick*, is a provincial act, which represents one of the first instances of recognition of sectorial autonomy in the form of homogenous governance institutions in civil society for linguistic minorities[83]. However, this law remains, so far, more declaratory than enforceable, or enforced.
There also exist multiple funding agreements between the Canadian government and territorial or provincial organizations charged with representing the political interests of FMCs[84].	

For other minorities throughout the country (mostly non-judicial agreements):

As mentioned above, the bulk of the Canadian jurisprudence addressing the concept of 'institutional completeness' pertains to the rights of Francophone minority communities outside of the province of Quebec. There are a few instances of governmental agreements, however, that pertain to the autonomy of other minorities throughout Canada.

Pierre Anctil discusses different programs and long-standing agreements between the Quebec provincial government and the Jewish community regarding direct funding of Jewish institutions/organizations in order to compensate them as a religious minority since they could not previously secure allocations as Catholic or Protestant confessional institutions[85]. For example, the 1968 *Private Education Act* in Quebec allowed the Jewish community to further develop its institutions in the education sector, notably by giving rise to a substantial growth in the number of students enrolled in Jewish day schools[86].

Similarly, Jedwab discusses the federal government official language minority programs, and how funding and support was given in priority to minority language programs that aimed at "maintaining, expanding or establishing institutions, or strengthening access to educational, social, cultural and economic services"[87]. Yet, in Quebec, he shows how the Canadian government has traditionally supported English-language advocacy groups, while it is the provincial government that supports English-language schools, hospitals and social services[88]. He also discusses federal funding for Aboriginal Friendship Centres[89].

Whether it is for Francophone communities throughout the country or Anglophones in Quebec, Foucher shows how much of the decisions regarding bilingualism are not federal, but provincial (with the exception of New-Brunswick, the only officially bilingual province in Canada, which, in addition to the provincial approach, must respect the Canadian Constitution's stipulations regarding the protection of both language groups)[90].

Indeed, the 'welfare state' in Canada has developed on a provincial basis, and to varying degrees depending on the prevailing ideologies and economic forces, which has had an important impact on governmental influence over institutional completeness[91].

V. CONCLUSION

As this working paper has shown, 'institutional completeness' may be a form of non-territorial autonomy that would allow the concept to bypass existing limitations often associated to its implementation in Europe. 'Institutional completeness' is found in the realm of instrumental policies, rather than that of symbolic policies that partake in building a dominant public narrative without contributing significantly to minority self-determination or being translated into law and/or policy[92]. John Coakley also arrives at the same conclusion[93]. Indeed, NTA can often be used by authorities in order to distract from the ignored positive obligations they have towards minorities, to "diver[t] an ethnic group's aspirations, claims, and desire to fight for control over territory and a state apparatus"[94]. In this way, as Osipov concludes, NTA can be used within a 'real socialist' ideology and institutional set-up as a

tool to keep minorities' civil societies under government control[95]. This has notably been the case in post-communist European countries. In contrast, institutional completeness, by definition, would enable European minorities to build and develop their own institutions, to service their own needs in a culturally appropriate manner, and can thus become an empowering tool towards autonomy.

This is not to say that 'institutional completeness' in a cure-all, and that it can easily be transplanted in Europe. For instance, some minorities, such as the Roma, may be reluctant to associate themselves to autonomous institutions for fear of retaliation – one can indeed question whether or not it is desirable or defensible for individuals to register their ethnic affiliations[96]. Additionally, until further theorization is done, the problem of operationalization will persist and, as already noted by Chouinard above, it is difficult to do away with territory altogether – in fact, the distinction between territorial and non-territorial minorities is one of degrees, just as non-territorial governments can be territorially delimited, as it is the case for the Sámi in northern Norway, for example[97]. Moreover, one should not forget that different minorities have different institution-building capacities. For this reason, IC might necessitate, at least initially, significant government subsidies, which brings us back to problem of the lack of good will of many, if not most, governments when it comes to the minorities living on 'their' territory. Ultimately, as Coakley concludes, NTA can often be in fact territorial, and often fall short of real autonomy – it is important to analyze to what degree representative and administrative institutions allow minorities to dispose of substantial, and even executive, power as opposed to symbolic representation[98].

Nevertheless, NTA arrangements can also provide symbolic recognition, cultural and even material gains to minorities that could not hope to achieve territorial self-government[99]. Agreed, the Canadian context is characterized by several peculiarities, including official federal bilingualism. Yet, Canadian debates, and more specifically the progress made surrounding the concept of 'institutional completeness', could prove a fruitful avenue towards the resolution of European minorities' points of contention with more nationalist states. Interestingly, while this was not the focus of this working paper, it is important to note that 'institutional completeness', whether for official language minorities or Aboriginals in Canada, has also often been used in a remedial manner. In fact, in the case of FMCs in particular, there exists several court rulings that explicitly state that section 23 of the *Canadian Charter of Rights and Freedoms*, a unique set of constitutional provisions in Canada that addresses minority language educational rights, was meant as a remedial protection for past injustices endured by official language minority communities. For example, the Arsenault-Cameron ruling emphasized the remedial aspect of section 23, notably by noting that 'differential treatment' might be necessary in order to protect minority language education:

"Section 23 of the Charter mandates that provincial governments do whatever is practically possible to preserve and promote minority language education. It object is in part remedial, and it is not meant to reinforce the status quo by adopting a formal vision of equality that would focus on treating the

majority and minority official language groups alike. A purposive interpretation of s.23 rights is based on the true purpose of redressing past injustices and providing the official language minority with equal access to high quality education in its own language, in circumstances where community development will be enhanced. The historical and contextual analysis is important for courts in determining whether a government has failed to meet its s.23 obligations, and should guide governmental actors in reaching appropriate decisions to give effect to s.23"[100].

Later in the ruling, the Supreme Court of Canada once again pressed that "[e]mpowerment is essential to correct past injustices and to guarantee that the specific needs of the minority language community are the first consideration in any given decision affecting language and cultural concerns"[101]. As such, IC, as a medium for autonomy, and with the support of the judiciary, can become a mechanism for remedying past injustices, or at least represents a step in that direction.

Notes and References

---

[1] Alexander Osipov, "Non-Territorial Autonomy During and After Communism: In the Wrong or Right Place?", 12(1) *Journal on Ethnopolitics and Minority Issues in Europe* (2013), at 7.
[2] David J. Smith, "Non-Territorial Autonomy and Political Community in Contemporary Central and Eastern Europe", 12 (1) *Journal on Ethnopolitics and Minority Issues in Europe* (2013), at 27.
[3] *Ibid*, 32.
[4] Stéphanie Chouinard, "The Rise of Non-territorial Autonomy in Canada: Towards a Doctrine of Institutional Completeness in the Domain of Minority Language Rights", 13 (2) *Ethnopolitics* (2014), 141-58.
[5] Rémi Léger, "Debate – Non-territorial Autonomy in Canada: Reply to Chouinard", 13 (4) *Ethnopolitics* (2014), 418-27.
[6] Chouinard, Stéphanie (2014), *ibid*,144.
[7] Raymond Breton, "Institutional Completeness of Ethnic Communities and the Personal Relations of Immigrants", 70 (2), *American Journal of Sociology* (1964), at 194.
[8] Chouinard, *ibid*.,154, 145-6.
[9] Rémi, *ibid*, 424.
[10] *Ibid*, 425.
[11] Linda Cardinal and Eloísa González Hidalgo, "L'autonomie des minorités francophones hors au regard du débat sur les minorités nationales et les minorités ethniques", 1, *Minorités linguistiques et Société/Linguistic Minorities and Society* (2012), at 51.
[12] Chouinard believes recent Canadian jurisprudence on language minority rights already proves them right (429-30).
[13] Cardinal and González Hidalgo, *ibid*, 61-2.
[14] Gunter Baureiss, "Research Note – Institutional Completeness: Its Use and Misuse in Ethnic Relations", 9 (2), *The Journal of Ethnic Studies* (1981), at 101.
[15] The problem lies notably in the lack of conceptual clarity between institutions and formal organizations (*ibid*, at107).
[16] *Ibid*, at 104.
[17] Borhek in Lance W. Roberts and Edward D. Boldt, "Research Note – Institutional Completeness and Ethnic Assimilation", 7 (2) *Journal of Ethnic Studies* (1979), at 103.
[18] Sheldon Goldenberg and Valerie A Haines, "Social Networks and Institutional Completeness: From Territory to Ties", 17 (3) *The Canadian Journal of Sociology* (1992), 303-5.
[19] Daniel Bourgeois, and Yves Bourgeois, "Minority Sub-State Institutional Completeness", 22(2) *International Review of Sociology* (2012), at 294.
[20] M. Michael Rosenberg, and Jack Jedwab, "Institutional Completeness, Ethnic Organizational Style and the Role of the State: The Jewish, Italian and Greek Communities of Montreal", 29 (3), *Canadian Review of Sociology and Anthropology* (1992), 267-69.
[21] Jack Jedwab, "Follow the Leaders: Reconciling Identity and Governance in Quebec's Anglophone Population", 185 *International Journal of the Sociology of Language* (2007), 71-87.
[22] Margaret Walton-Roberts, "Weak Ties, Immigrant Women and Neoliberal States: Moving Beyond the Public/Private Binary", 39 *Geoforum* (2008), at 501.
[23] Jack Jedwab, "Institutional 'Incompletedness': The Challenges in Meeting the Needs of Canada's Urban Aboriginal Population", (winter) *Canadian Issues* (2009), at 82-3.
[24] Jack Jedwab, (2007), *ibid*, at 71.
[25] *Ibid*, 73.
[26] Léger, *ibid*, 421.
[27] *Ibid*, 422.
[28] *Ibid*, 423.
[29] Chouinard (2014), *ibid*, 154.
[30] Goldenberg and Haines, *ibid*, 305.
[31] *Ibid*, 309.
[32] Goldenberg and Haines in Bourgeois, Daniel and Yves Bourgeois, *ibid*, at 293.
[33] Léger, *ibid*, 419.
[34] Chouinard (2014), *ibid*, 146.

[35] *Ibid*, 154.
[36] Cardinal and González Hidalgo, *ibid*, 59.
[37] Rodrigue Landry, *et. al*., "Bilingual Schooling of the Canadian Francophone Minority: A Cultural Autonomy Model", 185 *International Journal of the Sociology of Language* (2007), 133-62.
[38] Cardinal and González Hidalgo, *ibid*, 60.
[39] Bourgeois and Bourgeois, *ibid*, 299.
[40] *Ibid*, 302.
[41] *Ibid*.
[42] The work of other authors, such as Anctil, and Rosenberg and Jedwab, which focuses on IC in cities, notably Montreal, seems to suggest that not only is it possible, but they do not consider it as 'sub-institutional' at all, rather using the concept of 'institutional completeness' wholesale.
[43] Jedwab (2009), *ibid*, at 79, 83-4.
[44] Pierre Anctil, "A Community in Transition: The Jews in Montreal", 31 (3) *Contemporary Jewry* (2011), at 232.
[45] Jedwab (2007), *ibid*, 72.
[46] *Ibid*, 85.
[47] Rosenberg and Jedwab, *ibid*, 267.
[48] *Ibid*, 284.
[49] Walton-Roberts, *ibid*, 501.
[50] *Ibid*, 499-500.
[51] *Ibid*, 509.
[52] Pierre,Foucher, "Autonomie des communautés francophones minoritaires du Canada: le point de vue du droit", 1 *Minorités linguistiques et société/Linguistic Minorities and Society* (2012), at 90.
[53] *Ibid*, 109.
[54] *Ibid.*
[55] Landry *et. al, ibid.,* 155.
[56] Foucher, *ibid*, 93.
[57] *Ibid*, 91-2.
[58] Mahé *v*. Alberta, [1990] 1. S.C.R. at 342.
[59] Chouinard, *ibid*, 148.
[60] *Ibid*, 149; Foucher, *ibid*, 106-7.
[61] *Official Languages Act*, RSC 1985, c 31 (4th Supp), at < http://laws-lois.justice.gc.ca/eng/acts/O-3.01/FullText.html > (Accessed: November 6, 2015).
[62] Cardinal and González Hidalgo, *ibid*, 60-1.
[63] Landry, *et. al., ibid,* 146.
[64] *Ibid*; Foucher, *ibid*, 108.
[65] Reference re Secession of Quebec, [1998] 2 S.C.R., at 217.
[66] Chouinard, *ibid*, 149.
[67] R. *v*. Beaulac, [1999] 1. S.C.R., at 768.
[68] Chouinard, *ibid*, 149.
[69] Arsenault-Cameron *v*. Prince Edward Island, [2000] 1. S.C.R., at 3.
[70] Chouinard,, *ibid*, 150.
[71] Lalonde *v.* Ontario (Health Services Restructuring Commission), [1999], 48 OR (3d), at 505.
[72] Foucher, *ibid*, 91.
[73] Lalonde *v.* Ontario (Health Services Restructuring Commission), [1999], *ibid*, at 505. 181 DRL (4th) 263 in Chouinard, *ibid,* 151.
[74] Fédération Franco-Ténoise v Canada (Attorney General), [2006] N.W.T.S.C. 20.
[75] Chouinard, Stéphanie (2014), *ibid*, 152.
[76] Doucet-Boudreau *v*. Nova Scotia (Minister of Education), [2003] 3 S.C.R., at 3.
[77] Chouinard, *ibid*.,152-3.
[78] DesRochers *v.* Canada (Industry), [2009] 1 S.C.R., at 194.
[79] Chouinard, *ibid*, 152-3.
[80] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, at < http://laws-lois.justice.gc.ca/eng/Const/page-15.html > (Accessed : November 6, 2015).

[81] Bourgeois and Bourgeois, *ibid*, 299; Landry *et. al., ibid,* 152; Foucher, *ibid*, 97, 105.
[82] *Law Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick*, S.N.B. 1981, c O-1.1, at < https://www.gnb.ca/0062/acts/RS-2011/198.pdf > (Accessed : November 6, 2015).
[83] Foucher, *ibid*, 104-5.
[84] *Ibid*, 103.
[85] Anctil, *ibid*, 232-3.
[86] *Ibid*, 276.
[87] Jedwab, 2007, *ibid*, 79-80.
[88] *Ibid*, 81.
[89] Jedwab, 2009, *ibid*.
[90] Foucher, Pierre, *ibid*, 98.
[91] Rosenberg and Jedwab, *ibid*, 272.
[92] Osipov, *ibid*, 15, 20.
[93] John Coakley, "Conclusion: Patterns of Non-Territorial Autonomy", 15(1) *Ethnopolitics* (2016), at 166.
[94] Osipov, *ibid*, 16, 20.
[95] *Ibid*, 19.
[96] Coakley, *ibid*, 180; Smith, *ibid*, 35.
[97] Coakley, *ibid*, 181-2.
[98] *Ibid*, 177.
[99] *Ibid*, 182.
[100] Arsenault-Cameron *v*. Prince Edward Island, *ibid*, 4-5.
[101] *Ibid*, 34-5, at para.45.

ABOUT THE AUTHOR

Raphaëlle Mathieu-Bédard
M.A. in Political Science – McGill University
***Contact: raphaelle.mbedard@gmail.com**

FOR FURTHER INFORMATION SEE

EUROPEAN CENTRE FOR MINORITY ISSUES (ECMI)
Schiffbruecke 12 (Kompagnietor) D-24939 Flensburg
☎ +49-(0)461-14 14 9-0 * fax +49-(0)461-14 14 9-19
*** E-Mail: info@ecmi.de * Internet: http://www.ecmi.de**