Canada

Rainer Knopff and Anthony Sayers

Canada is geographically the world's second largest country.[1] Its nearly 10 million square kilometers traverse North America from the US border in the south to the Arctic Ocean in the north and from the Atlantic Ocean in the east to the Pacific in the west. A resource-rich land with a 2002 per capita gross domestic product of about US$27,112,[2] Canada encompasses the world's longest coastline,[3] countless interior waterways, extensive forests, substantial mineral and hydrocarbon deposits, the western prairie, the northern tundra, and the Rocky Mountains.

With a 2003 population of 31,714,637, Canada is sparsely populated, all the more so because 80 percent of Canadians live in centres with a population of 10,000 or more and because 90 percent live within 320 kilometers of the US border. The country is divided into ten provinces and three northern territories, with the national capital located in Ottawa. The largest provinces are Ontario (12.3 million people) and Quebec (7.5 million); the smallest is Prince Edward Island (138,000).[4]

Quebec is predominantly French-speaking, and there are francophone minorities in every province, most notably in the parts of Ontario and New Brunswick that border Quebec. Indeed, New Brunswick is constitutionally bilingual, as is the federal jurisdiction of Canada. English, the other official language, predominates outside Quebec and its borderlands. Based on its history, Quebec is constitutionally a civil-law jurisdiction, while the rest of Canada has a common-law tradition. Criminal law is a matter of federal jurisdiction.

Aboriginals comprise about 3 percent of the national population but are demographically more prominent in the West and the North. The Constitution groups indigenous peoples into three categories: "Indian," "Inuit," and "Métis." The Inuit live north of the tree line in the Northwest Territories, Nunavut, Northern Quebec, and Labrador. The Métis are of mixed Indian (Ojibway, Cree) and European (Scottish, French) ancestry.

In Canada's early history, the aboriginal "First Nations" were met by Christian settlers (Catholic and Protestant) from France and Britain. Subsequent immigration contributed to a much wider range of backgrounds, so much so that the concept of "multiculturalism" acquired constitutional status in 1982. Through the first half of the twentieth century, immigration was mainly from Europe. Now the majority of immigrants come from Asia, especially China and India. In 2001 Canada's most prevalent cultural groups were British (47 percent), French (16 percent), German (9.3 percent), Italian (4.3 percent), Chinese (4 percent), and Ukrainian (4 percent).[5]

Immigration has also affected Canada's religious composition.[6] The mainline Christian religions declined between 1991 and 2002 -- Catholics from 45 percent to 43 percent and Protestants from 35 percent to 29 percent -- partly because of postmaterial value shifts[7] but also because of the growth of religions favoured by non-European immigrants, especially Islam, Hinduism, Sikhism, and Buddhism. Canada has no official religion, although the preamble to its Charter of Rights acknowledges "the supremacy of God," and the Constitution protects certain publicly funded denominational schools that existed at the time of federal union.[8] However, the Charter guarantees "freedom of conscience and religion."

The Constitution of this sprawling and diverse country is dominated by two documents: the Constitution Act 1867 and the Constitution Act 1982. Formerly known as the British North America (BNA) Act, the 1867 statute transformed three colonies into a union of four provinces. The preunion colony of Canada, which gave the new entity its name, was divided into the current

provinces of Ontario and Quebec. Nova Scotia and New Brunswick were the other two provinces at the time of "Confederation," as the 1867 regime came to be known. The Preamble to the BNA Act states the desire of the participating colonies to be "federally united into One Dominion under the Crown ... with a Constitution similar in Principle to that of the United Kingdom." Federalism, of course, bore no resemblance to the constitutional structure of the United Kingdom; it was an innovation borrowed from Canada's southern neighbour, the United States. Britain's principal contribution was its regime of constitutional monarchy and parliamentary democracy, in which executive power is formally vested in the Crown's representative -- the governor general for Canada and the lieutenant governors for the provinces -- but is actually exercised by a prime minister and cabinet "responsible" to the majority in the House of Commons and provincial assemblies respectively. This combination of federalism and parliamentary "responsible government" has shaped Canadian public life in decisive ways. Although this 1867 Constitution has withstood many quarrels, including the threatened secession of Quebec, it has proved to be remarkably resilient. Canada may be a young country by world historical standards, but it has one of the older modern constitutions. Among current federal regimes, only the United States (1789) and Switzerland (1848) have more durable constitutional orders.

Through a series of orders in council and subsequent BNA acts, Britain admitted more colonies and territories to the new union after 1867. British Columbia and Prince Edward Island (PEI) joined in 1871 and 1873 respectively. In 1870 Britain added the vast Northwest Territories (NWT). In the same year, the Canadian Parliament passed the Manitoba Act, creating the province of Manitoba out of part of the NWT.[9] In 1905 Ottawa similarly carved the provinces of Alberta and Saskatchewan out of the NWT. Earlier, in 1898, Ottawa had created a new territory, the Yukon, out of the NWT, something it would repeat with the creation of Nunavut in 1999. The last colony the British Parliament admitted as a Canadian province was Newfoundland (now called Newfoundland and Labrador) in 1949.

Although Canada's Constitution was determined largely by British legal instruments, by the early 1930s Canada had become a fully sovereign country in all but two respects. First, Britain's Judicial Committee of the Privy Council (JCPC) remained Canada's final court of appeal, responsible for, among other things, policing the federal-provincial division of powers. Second, Canada could formally amend important parts of its Constitution only by asking the imperial Parliament to make the changes. Appeals to the JCPC were abolished in criminal cases in 1934 and in civil cases in 1949. The "patriation" (or "bringing home") of the Constitution occurred in 1982, although one final enactment of the British Parliament, the Canada Act 1982, provides that no further acts of the British Parliament "shall extend to Canada as part of its law."[10] The Canada Act incorporates the Constitution Act 1982, which gives practical effect to patriation by establishing fully domestic Canadian amending procedures. In addition, the Constitution Act 1982 renames many of the previous constitutional documents, thereby underlining their domesticated status. Thus the various BNA acts became the Constitution Act 1867, the Constitution Act 1871, and so on. At least 26 documents are said by Section 52 of the Constitution to be part of "the supreme law of Canada."[11] Finally, the Constitution Act 1982 adds the Charter of Rights and Freedoms to the Constitution.

CREATION OF THE CONSTITUTION

The Constitution Act 1867

Confederation was stimulated by commercial aspirations, military concerns, and the desire to maintain local and cultural identities. Many proponents of the new regime considered the

creation of a large, integrated British North American market to be key to achieving prosperity, although skeptics expressed the view, repeated ever since, that the centre (i.e., Ontario and Quebec) would be enriched at the expense of the periphery.[12]

Militarily, British North Americans had feared American expansion under the guise of "Manifest Destiny," a fear that was heightened by the outcome of the US Civil War (1861-65). As one father of Canadian Confederation put it, the American South had been "the best safeguard for British North America"[13] because of its reluctance to support expansion into slave-free territories. When the Civil War erased this "safeguard," many of Washington's postwar policies -- the end of trade reciprocity,[14] the arming of the Great Lakes, and the construction of a canal around Niagara Falls for the movement of warships -- were received in British North America as signalling annexationist intentions. Some kind of union of the British colonies, within the context of the British Empire, became an attractive solution. When the colonies were "all united," said George Etienne Cartier, a leading founder, "the enemy would know that if he attacked any part of those provinces ... he would have to encounter the combined strength of the empire."[15] The desire to carve out a political existence separate from the United States is a motivation that has animated Canadian public life ever since.

Of course, the founders could have achieved a common market and a more defensible regime by establishing a unitary state. To explain why British North Americans chose federalism, we must turn to another founding theme that remains at the heart of Canadian politics, namely the English-French tension that dominated pre-Confederation Canada. The 1867 Constitution was actually the fifth constitutional order devised to deal with cultural division in Canada. The other four, dating back to the Royal Proclamation of 1763, vacillated between attempts to assimilate the French population within a single unitary state and attempts to grant them their own unitary state. Nothing had worked, and the 1840 Act of Union -- the penultimate of these constitutions -- had proven so problematic that by the 1860s Canadians were prepared to consider a federal compromise between complete separation and complete unification of the two sections. Believing that federalism would work better if there were more than two provinces, the Canadians invited themselves to a conference that the maritime colonies were holding in Charlottetown, Prince Edward Island, in September 1864 to discuss the possibility of a maritime union. Having agreed on the merits of a wider British North American enterprise, the participants at Charlottetown met again a month later in Quebec City, where they produced a draft federal constitution. The maritime colonies increased the pressures for federalism not for the cultural reasons so prominent in Canada but simply because proud colonies did not want their identities and interests completely submerged in a new unitary state. Like the other causes of Confederation, provincialism and regionalism have remained enduring themes of Canada's public life.

The colonial delegations in these founding conferences were composed partly in anticipation of securing legislative consent for their handiwork. Political parties were then much less disciplined, and first ministers could not control their legislatures as easily as their modern counterparts often can. Thus such highly partisan figures as Charles Tupper, Nova Scotia's chief father of Confederation, knowing that it would be difficult to ram an agreement through his legislature, refused to attend the Charlottetown conference unless accompanied by the opposition leaders whose support he would ultimately need.[16] The draft that emerged from Quebec was debated in the legislatures of Nova Scotia, New Brunswick, Canada, Prince Edward Island, and Newfoundland. After it was approved, either in full or in principle, by Canada, Nova Scotia, and New Brunswick, a conference in London, England, made final modifications, and the British Parliament passed the BNA Act 1867. PEI continued its deliberations until 1873. Local debates also preceded the creation of Manitoba in 1870 and the admission of British Columbia in 1871.

Newfoundland joined in 1949 following local referendums on the issue. British statutes or orders in council provided the formal framework in all these cases, but the reality was arguably a domestic constitution in imperial garb.

If local input and consent created the Constitution, presumably the same was required to change it. Yet the BNA Act contained no general amending procedure. It became a constitutional custom that Britain would make only those changes requested by Canadians -- but which Canadians? The answer depended on how one understood the Confederation settlement. If the 1867 Constitution had created a new people, represented as such by the national government and in relation to which the provinces were subordinate administrative subdivisions, then Britain should make only those changes requested by Ottawa, paying no attention to the provinces. John A. Macdonald, a leading founder and Canada's first post-Confederation prime minister, held this view.[17] If, by contrast, Confederation was primarily a compact of two nations, English and French, then Quebec should have a veto over constitutional amendments. If, in yet another view, Confederation was a compact of equal provinces, then substantial amendments could not be made without equal (i.e., unanimous) provincial consent. These conflicting visions of the country later did vigorous battle from the 1960s on, as amendment politics came to consume Canadians.

Conflicting views similarly exist regarding the founding balance between centralization and decentralization. The American Civil War loomed large for the founders not only because its outcome increased the danger of American expansion, but also because it suggested to some of them the dangers of an overly decentralized federal system. Indeed, some prominent founders, such as Macdonald, would have preferred a unitary state.[18] Knowing this was impossible, Macdonald sought as centralized a federation as he could achieve and looked forward to a decline in the significance and stature of the provinces over time. They would, he thought, be little more than "glorified municipalities."[19] Needless to say, not all of those who agreed to Confederation were of this centralist persuasion. A genuine federalist strain was present among the founders and would be prominent in post-Confederation politics.[20] Each side in this dispute would emphasize some parts of the Constitution and downplay others.

There was certainly plenty of constitutional ground on which centralists could stake their claim. For example, the residual power -- the "Peace, Order, and good Government" (POGG) clause -- is vested not in the provinces but in the federal Parliament, something Macdonald thought would prevent Canada from splitting "on the same rock which [the Americans] had done."[21]

Even more strikingly centralist -- indeed, antifederal -- are the powers of reservation and disallowance. Reservation allows the lieutenant governor of a province (a federal appointee) to reserve provincial legislation for Ottawa's approval or rejection.[22] Disallowance permits Ottawa on its own initiative simply to disallow provincial legislation.[23] Britain enjoyed similar powers of control with respect to the federal government but, by convention, never used them.[24] Eventually, similar conventions arose to prevent the reservation and disallowance of provincial legislation,[25] but these powers were certainly used against the provinces for some time.[26]

Other centralizing features of the Constitution include Ottawa's authority to (1) bring "local works" under federal jurisdiction by declaring them to be for the "general advantage of Canada or for the advantage of two or more of the provinces";[27] (2) enact "remedial legislation" if, in its judgment, a province has used its jurisdiction over education to infringe the rights and freedoms of denominational religious schools existing at the time of Confederation;[28] and (3) appoint judges to the higher-level provincially constituted courts.[29] Of particular importance is Ottawa's power to tax much more broadly than the provinces and to spend in areas of provincial jurisdiction. This "spending power" has at various times been a major lever of centralization.

Such powers led K.C. Wheare to describe the Canadian constitution as "quasi-federal" at best.[30]

Those of a more federalist or decentralist persuasion could point to the fact that a significant list of powers was designated as "exclusively" provincial. These powers may not have impressed Macdonald, but for others they were an important reflection of the founding agreement that matters of primarily local concern must be left to the provinces. In this view, the major economic powers (e.g., trade and commerce, banking, and transportation), which were then seen as culturally neutral, could be left to Ottawa. However, this was not the case for the culturally relevant matters that had agitated politics in Canada under the Act of Union from 1840 to 1867. Thus the culturally sensitive matter of education was assigned to the provinces; so were "property and civil rights," partly to protect Quebec's civil code from interference. Without some protected jurisdiction over these and like matters, neither Quebec nor the maritime colonies would have agreed to Confederation.

From this provincial autonomist perspective, the ability of Ottawa to interfere through such powers as reservation and disallowance was as contrary to the true spirit of the Constitution as it seemed to Macdonald to embody this spirit. In the decades following Confederation, the autonomists waged political battles against the use of such powers, ultimately rendering them dead letters.[31] They also successfully persuaded the JCPC to interpret provincial powers generously and federal powers narrowly. At one point, Macdonald's precious POGG clause had been transformed from a broad, residual grant of power into little more than a power to enact temporary emergency legislation.[32] Correspondingly, the JCPC gave the provincial power over property and civil rights such a broad interpretation that it could plausibly be called the true residual clause of the Canadian Constitution.[33] The interpretive pendulum has since swung back from this decentralist extreme but has never come close to the highly centralist end of the arc envisioned by Macdonald.

A constitutional division of powers, of course, interacts with evolving circumstances to produce the actual -- and usually shifting -- balance of power between the national government and the component units of a federal system. Thus, despite generously interpreted provincial powers, the federal government was dominant during and immediately after the two world wars. The "emergency power" branch of the POGG clause enabled Ottawa to legislate temporarily in areas otherwise under provincial jurisdiction, and it used its greater taxation and spending powers to influence the priorities of provincial governments through the "cooperative federalism" of conditional grants.[34] Beginning in the 1960s, however, the provinces more fully exploited their constitutional space and, indeed, attempted to occupy or capture ground from the federal government. Conditional grants gradually gave way to unconditional transfers,[35] and the provinces emerged as major players in one of the world's more decentralized federations. As Ottawa tried to control its ballooning debt during the latter part of the twentieth century, it had its own reasons to limit spending in areas of provincial jurisdiction. At the dawn of the twenty-first century, the pendulum has begun to swing back in a somewhat more centralist direction, including more conditionality in fiscal transfers, although not as much as in virtually all other federations.[36] Constitutionally, and also in practice, Canadian provinces today are very far from Macdonald's glorified municipalities.

The Constitution Act 1982

The Constitution Act 1982 sought to counteract the decentralizing challenges of the late twentieth century. Not surprisingly, Quebec was a major engine of decentralization, especially after its "Quiet Revolution" in the 1960s. The Quiet Revolution overthrew Quebec's traditional portrayal of itself as the Catholic agrarian foil to English Canada's Protestant commercialism. Henceforth, Quebec would be an aggressive secular competitor in the commercial arena. This

meant wresting economic powers from the grasp of a federal government controlled by the English majority. In short, the survival of French in Quebec came to be associated with a significant decentralization of powers from Ottawa to Quebec. For some Quebecers, it required outright secession, and in 1976 the separatist Parti Quebecois (PQ) was elected as the provincial government on the promise to hold a secession referendum, a referendum that the PQ held, and lost (by a margin of 60 percent to 40 percent), in 1980.

At the same time, other forces of regional and provincial alienation gathered strength. Westerners, for example, had long nurtured grievances against the Canadian majority in Ontario and Quebec, whose common interests often trumped those of the West.[37] By the 1970s, Canadian provinces generally were at a "high tide of 'province building'" that involved them in competitive confrontations with Ottawa.[38] These forces led to a series of conflicting proposals for constitutional reform that culminated in -- although they were not all satisfied by -- the Constitution Act 1982.

Pierre Elliot Trudeau, Canada's prime minister during much of this tumultuous period, was the driving force behind the Constitution Act 1982. Trudeau's reforms implemented his long-standing strategy of employing constitutional "counterweights" to offset the centrifugal forces in Canadian federalism.[39] Central to his strategy was the constitutional entrenchment of a Charter of Rights and Freedoms. Whereas the federal parts of the constitutional structure emphasized what divided Canadians on territorial lines, Trudeau intended the Charter to underline what they had in common. Moreover, Charter issues on which Canadians were divided tended to be regionally cross-cutting and would thus ultimately be contested in a single national institution: the Supreme Court of Canada.[40] In addition to enacting the Charter, the Constitution Act 1982 patriated the Constitution by domesticating the amendment process.

Trudeau's reforms required one last amendment by Britain, which by convention would act only as Canada directed. Trudeau maintained that Britain would act on the federal Parliament's recommendation alone, without any provincial consent.[41] His depreciation of provincial involvement was consistent with the amending formula he proposed for the patriation package. This formula embodied a regionalist logic, requiring that amendments pass only with the consent of regional groupings of provinces, expressed either through their legislatures or, significantly, through referendums initiated by the federal Parliament. Trudeau was animated by a vision of the country as composed primarily of individual citizens rather than provincial communities. This national community of individuals would be represented first and foremost by the federal government and by the Supreme Court's implementation of newly entrenched individual rights.

Eight provinces vigorously opposed the entire package.[42] They saw the Charter as transferring policy-making power from provincial legislatures to a central court. They rejected Trudeau's proposal to minimize their role in future constitutional amendments. Consistent with their understanding of their current role in amendments, they also insisted that Britain could not pass the package without unanimous provincial consent, a formulation that satisfied both the two-nations veto desired by Quebecers and the equal-provinces sensibilities of the others.[43] Indeed, as intergovernmental negotiations broke down, the provinces launched legal challenges to Trudeau's proposed amendment in several provincial courts of appeal. These were ultimately consolidated at the Supreme Court in the *Patriation Reference*.[44]

Canadians in general did not share the opposition of their provincial governments. Both patriation and the Charter were popular ideas, and groups representing such constituencies as women, aboriginals, ethnic groups, the disabled, and the aged had worked hard to get their favoured rights included in the package. As provincial opposition mounted, the Trudeau government solicited the support of these nongovernmental constituencies, often accepting their

suggestions to strengthen and broaden certain rights. Calling the Charter the "People's Package," Trudeau hoped public support would justify passage of his constitutional amendments without provincial consent.[45]

Partly owing to the Supreme Court's opinion in the *Patriation Reference*, a compromise was reached.[46] Trudeau got his Charter but only with the addition of a "notwithstanding clause" enabling both federal and provincial legislatures to override many of the guaranteed rights for renewable five-year periods.[47] As for the main amending formula -- there were five in all -- it required the consent of two-thirds (i.e., seven) of the provinces, provided they collectively had at least 50 percent of the population of the provinces. This 7-50 formula did not require the unanimous consent implied by the equal-provinces vision of the country, but it treated provinces more equally than Trudeau's regionalist formula, and consent would be expressed by provincial legislatures, not by federally initiated referendums.[48]

All but one province agreed to this compromise package. Quebec dissented, not least because the 7-50 amending formula conflicted with its cherished (though contested) two-nations vision of the country (under which Quebec should have a veto over amendments)[49] and because the Charter's language rights threatened the province's legal protections of French.[50] Quebec's failure to endorse patriation and the Charter was a stain of illegitimacy on the Constitution, and when new governments were elected in both Ottawa and Quebec City, proposals were soon developed to bring the province "back into the constitutional family," especially by giving Quebec explicit constitutional recognition as a "distinct society" within Canada and by decentralizing some governmental powers. Once the Pandora's box of constitutional amendment had been reopened, however, it proved impossible to keep other constitutional demands at bay. The "special status" suggested by "distinct society" grated against the equal-provinces view widespread outside Quebec, and certainly other provinces also wanted any new powers that would go to Quebec. The West wanted to change the appointed, regionally based federal Senate into an elected institution with equal provincial representation -- the Triple E (Equal, Elected, and Effective) Senate -- something that offended Quebec's two-nations sensibilities.[51] Several constituencies worried that the constitutional victories they had won in 1982 would be watered down, while those who thought they had gained too little in 1982 wanted more attention this time. For example, aboriginals and women challenged the traditional categories of debate -- two founding nations and equal provinces -- preferring to speak of three founding nations and two founding genders.[52] Two major reform packages -- the Meech Lake and Charlottetown Accords -- were at the heart of this constitutional debate. Both failed, the Meech Lake Accord in 1990, when it did not gain unanimous provincial legislative support,[53] and the Charlottetown Accord in 1992, when it was rejected in a national referendum.[54]

THE PROVINCES AND OTHER ORDERS OF GOVERNMENT

One manifestation of Quebec's unhappiness was its desire for a more asymmetrical federal arrangement than that provided by the Constitution, not that the provinces are constitutionally equal in all respects. The French and English languages have constitutional status for certain purposes in Manitoba, Quebec, and New Brunswick but not in other provinces. Provinces are allocated unequal numbers of seats in the regionally based Senate. Until 1930 the western provinces did not have control of public lands or resources, whereas other provinces did.[55] Section 94 of the Constitution, which has never been used, gives Ottawa a role in establishing uniform laws respecting property and civil rights in Ontario, Nova Scotia, and New Brunswick but not in the civil-law jurisdiction of Quebec. The federal power of remedial legislation to protect denominational schools has never applied in Newfoundland. Most of these asymmetries,

however, are not very important, at least not anymore. In the most significant respects, the Constitution treats the provinces equally, assigning them the same powers. While Quebec wants more special status, the other provinces generally insist on equality. This contributes to a decentralizing dynamic in which any devolution in favour of Quebec must be extended to the other provinces as well, leaving Quebec's desire for special status unsatisfied and triggering further demands for decentralization.

For some Quebecers, the desire for asymmetry extends to outright separation. As noted above, in the 1980 referendum on this question, about 60 percent of Quebecers voted against separation. A second secession referendum in 1995, stimulated by the Quebec government's failure to achieve its goals in the Meech Lake and Charlottetown Accords, came within a whisker of being passed, with 50.6 percent voting "No" and 49.4 percent voting "Yes."

Not surprisingly, a widespread question was whether secession could be achieved constitutionally. Although the 1982 amending procedures provide for the creation of new provinces, they do not explicitly indicate how one could leave. However, in 1998, at the request of the federal government, the Supreme Court outlined elements of a secession procedure. Quebec could not legally separate through a unilateral declaration of independence, said the Court; a constitutional amendment would be required (although precisely which of the amending formulae would apply was left to another day). On the other hand, if Quebecers gave a clearly affirmative answer to a clear question on secession, the rest of the country would have a duty to negotiate in good faith.[56]

Short of secession, altering the number of provinces or provincial borders is now expressly governed by the 1982 amending procedures. Changes in provincial borders are covered by a formula for amendments that apply "to one or more, but not all, provinces."[57] Such amendments require the consent of the houses of the federal Parliament and of the Legislative Assembly of each province to which the amendment applies. The "extension of new provinces into the territories" and "the establishment of new provinces" are deemed to be of more widespread concern and are thus governed by the general 7-50 formula.

The Constitution Act 1867 gave the provinces the power to amend their own constitutions, and this provision reemerged, essentially unchanged, as one of the five 1982 amending formulae. The nature and content of provincial constitutions are left undefined, however, and are thus matters of some ambiguity and confusion.[58] Parts of these constitutions are found in the Constitution Act 1867 and in various constituent instruments that admitted or established later provinces, all of which are parts of the Constitution of Canada. Other parts -- electoral laws, judicature acts, bills of rights, and the like -- are found in ordinary provincial statutes. Still others are found in constitutional convention (i.e., tradition).

Obviously, the purely statutory parts of provincial constitutional law can be amended by ordinary legislation. What about those aspects of provincial constitutions that are found in the national Constitution? The provincial amending formula sets out one explicit limitation: The provinces' power to amend their constitutions does not extend to the lieutenant governor. Originally, this was a feature of Ottawa's predominance inasmuch as this federal appointee had the power to reserve legislation for federal-government approval. However, Canada's constitutional evolution has left behind such powers as those of reservation and disallowance. Moreover, just as the queen now rubberstamps Ottawa's choice for governor general, Ottawa now generally does the same for provincially designated lieutenant governors.[59] The exemption of the lieutenant governor from the provincial amending power remains relevant, however, inasmuch as it has been judicially interpreted to secure the rudiments of representative parliamentary government. For example, because the Crown's representative is part of the legislative process, a province (or the federal government, for that matter) cannot transform itself

into a direct democracy that legislates through initiatives and referendums. Legislation must be assented to by the Crown's representative, who can do so only upon the culmination of a representative assembly's deliberations.[60]

Another limitation on the power of some provinces to amend their constitutions arises out of Section 133 of the Constitution Act 1867 and Section 23 of the Manitoba Act 1870, both of which are parts of the Constitution of Canada. These sections, which mandate the use of both French and English in the legislative and judicial records of Quebec and Manitoba, have been held by the Supreme Court not to be among those parts of Quebec's and Manitoba's provincial constitutions that either province may amend unilaterally.[61]

However, each province may use its amending power to determine whether its legislature is composed of one or two chambers, even when bicameralism is specified by the national Constitution. Thus the five provinces that once had bicameral legislatures have abolished them.[62] Similarly, although prior to the 1982 Charter of Rights the Canadian Constitution specified a four-year limit for provincial legislatures, provinces extended this to five years through ordinary legislation.

As for interpretive authority over the Constitution, all laws, constitutional or otherwise, are subject to an integrated judicial hierarchy culminating in the Supreme Court of Canada. Thus, unlike in the United States, the Supreme Court is the final court of appeal for both federal and provincial law, including provincial constitutional law.[63]

Municipalities

If the provinces are Canada's second order of government, there are two contenders for the status of its third constitutional order: municipalities and First Nations. Most provinces have smaller populations than Canada's largest cities, and many cities are larger than at least some provinces. Canada is an urbanized country, and its cities play increasingly prominent economic, social, and political roles. Thus there are periodic calls to recognize municipalities constitutionally as a third order of government in the federal system and even to establish certain city-states.[64] All such proposals have failed. Municipalities remain the legislative creations of provincial governments. Most of their functions and responsibilities may be altered by provincial governments, as may municipal boundaries. Many provinces, notably Quebec and Ontario, have in recent years significantly restructured local government.[65]

The powers and manner of operation of municipalities are governed by provincial legislation. Cities generally have limited taxation powers -- usually with respect to property taxes -- but the provinces (and the federal government via provinces) make direct contributions to municipal budgets, most often in the form of grants tied to specific purposes (such as major infrastructure projects).

Municipalities usually select and organize their personnel and have control over their financial and legal existence within the bounds of provincial and federal legislation. They administer a range of services that include local road maintenance, waterworks, garbage collection, parks and recreation facilities, and libraries.

First Nations

Canada's indigenous First Nations have also called for recognition as a third order of government. Section 91(24) of the Constitution Act 1867 gives the federal Parliament jurisdiction over "Indians, and Lands reserved for Indians." In 1876 the Parliament passed the Indian Act, which set out the rules under which bands may engage in a variety of activities, such as governance, land use, and membership selection. The Constitution Act 1982 added two provisions on indigenous peoples. Section 25 provides that "[t]he guarantee in this Charter of

certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty, or other rights or freedoms that pertain to the aboriginal peoples of Canada." More important, Section 35 states that the "existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." Moreover, a 1983 amendment to Section 35 provides that "treaty rights" include "rights that now exist by way of land claims agreements or may be so acquired." These provisions signalled that aboriginal people deserve unique constitutional recognition and protection. Yet for many aboriginal groups, they did not go far enough in protecting and encouraging aboriginal title, rights, and self-government. Thus in 1992 an attempt was made through the unsuccessful Charlottetown Accord to constitutionally entrench aboriginal self-government and Senate representation as well as a veto for aboriginal peoples on any future constitutional amendments involving them.

With the failure of the Charlottetown Accord, attention turned to treaty negotiations and to giving First Nations self-government and greater control over their lands.[66] A treaty in British Columbia gave the Nisga'a Nation extensive self-governing powers, including taxation, land use, and bylaw powers.[67] Statutes such as the Sechelt Indian Band Self-Government Act, the First Nations Land Management Act*,* the Governance Act*,* and the proposed First Nations Fiscal and Statistical Management Act[68] gave First Nations greater control over governance, land management, and economic development. For the Inuit, the federal response was to create Canada's third territory, Nunavut, in which the majority of the population is of Inuit descent.

THE ALLOCATION OF POWERS

Sections 91 to 95 of the Constitution Act 1867 allocate powers to the federal and provincial jurisdictions. Section 91 begins with Ottawa's residual power "to make laws for the Peace, Order and good Government of Canada in relation to all Matters not ... assigned exclusively" to the provinces. To avoid the prospect of these provincial powers being interpreted too broadly, thus leaving too little authority to the federal government, the section then lists, "for greater certainty, but not so as to restrict the generality of the foregoing," 29 areas of exclusive federal jurisdiction. These cover most of the powers considered economically important in 1867, including jurisdiction over the public debt (Sec. 91(1A)), trade and commerce (Sec. 91(2)), the raising of money by any mode or system of taxation (Sec. 91(3)), the borrowing of money on the public credit (Sec. 91(4)), navigation and shipping (Sec. 91(10)), currency (Sec. 91(14)), banking (Sec. 91(15)), weights and measures (Sec. 91(17)), bills of exchange and promissory notes (Sec. 91(18)), interest (Sec. 91(19)), legal tender (Sec. 91(20)), bankruptcy and insolvency (Sec. 91(21)), patents of invention and discovery (Sec. 91(22)), and copyrights (Sec. 91(23)). Criminal law, which in the United States is predominantly a state jurisdiction, is a federal matter in Canada (Sec. 91(27)). Indians and their lands is another federal jurisdiction (Sec. 91(24)).

Section 92 then sets out 16 exclusively provincial powers, including direct taxation for provincial purposes (Sec. 92(2)), hospitals (Sec. 92(7)), the administration of justice (Sec. 92(14)), property and civil rights (Sec. 92(13)), and "generally all Matters of a merely local or private Nature in the Province" (Sec. 92(16)). Section 93 gives the provinces "exclusive" jurisdiction over education subject to the federal power of remedial legislation to protect the rights of denominational schools. The provincial list of powers has gained significance with the advent of the modern welfare state. While the federal government may have many of the most obvious economic powers, the provinces have jurisdiction over much social policy, including health care, welfare, and labour relations in provincially regulated sectors.

Jurisdiction over the administration of justice gives the provinces the "police powers" of prosecution and enforcement. Although Ottawa can appoint federal prosecutors for its own laws,

it has done so only in limited areas, such as prosecutions under the Narcotics Control Act.[69] On the whole, provincial officials prosecute violations of both federal and provincial law. Similarly, under its jurisdiction over criminal law, Ottawa established its own police force, the Royal Canadian Mounted Police (RCMP). Some provinces have contracted the RCMP to act as their provincial police forces as well,[70] while others have established their own provincial forces. Municipalities usually have their own local police.

The judiciary serves as the ultimate arbiter of jurisdictional conflicts that cannot be resolved by intergovernmental negotiation and agreement or that are challenged by nongovernmental actors even when the governments agree.[71] When the JCPC was Canada's final court of appeal, it favoured a jurisprudence with separate "watertight compartments" for the two orders of government.[72] Given the JCPC's tendency to interpret provincial powers generously, this usually meant giving federal powers a restrictive interpretation. For example, the JCPC interpreted the broadly worded federal "trade and commerce" power to cover only international and interprovincial transactions, leaving the provinces to regulate intraprovincial commerce.[73] Indeed, at one point, the JCPC allowed the trade-and-commerce power to be used only as additional support for federal legislation whose primary constitutional support lay elsewhere.[74] Thus a power that on its face is broader than the American commerce power became very much narrower.[75]

The JCPC pursued its "watertight compartments" agenda in order to minimize the implicitly concurrent jurisdiction that arises when powers overlap (e.g., the inevitable overlap between trade and commerce and property and civil rights), thus protecting the provinces against indiscriminate applications of the federal paramountcy doctrine, which holds that valid federal legislation trumps valid but conflicting provincial legislation in areas of concurrent jurisdiction. At the same time, it ensured that the provincial compartments were not dwarfed by federal powers. Many of the federal powers have recovered from their low point during the JCPC era, and one consequence is greater overlap and thus more concurrency subject to federal paramountcy.[76] The JCPC's "watertight compartments" are decidedly leaky.

In a limited number of cases, the Constitution explicitly provides for concurrent jurisdiction. Section 95, for example, establishes concurrent jurisdiction over agriculture and immigration subject to the usual rule of federal paramountcy. By contrast, Section 94A, which establishes concurrent jurisdiction over "old-age pensions and supplementary benefits," gives priority to provincial laws.

In addition to determining which government has the power to do something, the courts have, since the 1982 enactment of the Charter of Rights and Freedoms, decided whether a power can be denied to both federal and provincial governments. Before 1982, for example, if the issue was freedom of religion or of expression, the principal question was which order of government could violate such a freedom.[77] Since 1982 neither has been permitted to do so. When the Charter came into force, provincial governments and some observers worried that it would often entail the judicial resolution of what were in fact matters of reasonable policy disagreement. When this happened in areas of provincial jurisdiction, it was argued, the result would be the antifederal substitution of uniform policy standards where provincial governments had previously been free to differ. Some centralizing influence of this kind seems inevitable, although scholars disagree about the extent to which it has materialized. Certainly, the Supreme Court has shown sensitivity to the tension between the Charter and federalism and has worked to preserve room for provincial policy-making discretion.[78]

Another limitation on the provinces long predates the Charter. Section 121 of the Constitution Act 1867 sought to establish free trade within Canada: "All articles of the growth, produce, or manufacture of any one of the provinces shall, from and after the union, be admitted

free into each of the other provinces." This limitation, it is generally agreed, has been honoured mostly in the breach.[79] In the past, this had something do with Ottawa's inability to use a weak trade-and-commerce power to enforce this principle legislatively. Nowadays, when the trade-and-commerce power might be more effectively exploited, its exercise is more a matter of political will. In any case, provincial barriers to intranational trade are significant.[80]

THE STRUCTURE AND OPERATION OF GOVERNMENT

Parliamentary Government

The proverbial alien visiting earth would learn little about the workings of Canadian government by reading the Constitution. There he would find lengthy discussions of the generally invisible governor general and provincial lieutenant governors but no mention of the first ministers (prime minister federally; premiers provincially) who dominate the daily news. To learn the truth about Canada's governance, our alien would have to turn from the text of the Constitution to its conventions. Chief among these is the parliamentary convention of "responsible government," which requires the representative of the Crown to exercise the formal executive powers almost exclusively on the advice of the first minister and the Cabinet, who are members of the legislature and remain in power only with the "confidence" of a majority of their colleagues (in the "lower house" in bicameral legislatures). Through this convention, executive power passes from the monarch to the leaders of the democratically elected legislatures.

In adopting this system, the British North Americans rejected the starker separation of federal powers they saw in the United States. Certainly, the judiciary would be independent of the political branches, but the executive and legislature, although conceptually distinct, were much more closely integrated in a single institution.

The Canadian founders nevertheless embraced goals of liberal democracy that the American founders would have recognized. They wanted a regime of constitutional liberty that would promote self-government through elected legislatures and that would protect rights, including property rights. The American system, they thought, had become overly democratic in the populist sense and thus more dangerous to liberty. In their view, the British system of responsible government provided better liberty-protecting checks and balances.[81]

Many Canadians today would consider this view naive, pointing out that responsible government has generated highly disciplined governing parties that are controlled by the executive rather than the reverse. The Canadian House of Commons and the provincial legislative assemblies have become so executive-dominated that modern commentators sometimes apply the label of dictatorship,[82] echoing James Madison's dictum about the accumulation of all powers in the same hands being "the very definition of tyranny."[83] This exaggerates the Canadian reality. Among other things, power remains dispersed through the federal system itself and between the political and judicial branches. Moreover, even the so-called "trained seals" on the backbenches of government parties can be pushed only so far. Checks and balances are not absent in Canada, although there is no denying the very considerable and concentrated power of Canada's first ministers.

Bicameralism, which is traditionally conceived as a check on the power of lower houses, is also, in Canada, a potential check on executive power. Yet only the federal Parliament includes a second chamber. Ontario and Quebec each have 24 senators in the Senate, as do the four western provinces (six each) and the three Maritime provinces (Nova Scotia and New Brunswick with ten each and PEI with four). When Newfoundland entered Confederation, it was given six senators. The Yukon, NWT, and Nunavut have one senator each.

The Senate has virtually identical powers to those of the House of Commons. Money

bills may not be introduced there,[84] but the Senate may defeat them. The Commons may not override the Senate's veto except in the case of constitutional amendments, where it exercises only a suspensive veto.[85] As an appointed house in a democratic age, however, the Senate lacks the legitimacy to exercise these very considerable powers effectively.

On the assumption that the Senate would take care of regional representation in the federal Parliament, the House of Commons was supposed to be based on representation by population. Given the Senate's inefficacy, however, a degree of regionalism has crept into Commons representation. Constitutional amendments have ensured that no province has fewer members in the Commons than it has in the Senate and that a province's seats will not be reduced below 1985 levels.[86] The "senatorial floor" gives tiny PEI four seats, double what it would be entitled to otherwise. The 1985 "grandfathering" provision leads to overrepresentation in several other provinces, mainly at the expense of Ontario, British Columbia, and Alberta. This regionalization of the Commons, however, does not meet the need for effective regional representation in the federal government because most power lies in the Cabinet, not generally in the House.

Therefore, the Cabinet has borne much of the integrative burden within the federal government. From the outset, Canadian prime ministers, who choose their cabinets from among their partisan legislative colleagues, have made regional representation a central principle of "cabinet making," and strong regional ministers have been key to the success of many federal governments. In the past, religious representation also figured prominently in Cabinet selection, although nowadays characteristics such as race, ethnicity, and gender are more important. However, the Cabinet has not adequately filled the perceived need for effective provincial and regional representation, especially as more power has been gathered into the hands of the prime minister.[87] This has led many to call for reform of federal parliamentary institutions, including electoral reform, the creation of a Triple E Senate, or changes that would weaken party discipline (and hence executive authority) in the Commons.

What is true for the national Parliament is perhaps truer for the unicameral provincial legislatures, which do not experience even the sporadic limitations on executive power applied by the Senate. Moreover, the limited formal mechanisms for representing regional and provincial interests in the national Parliament have cleared the way for premiers to portray themselves as the best representatives of provincial interests in national politics. In effect, the combination of federalism with increasingly executive-dominated parliamentary systems has produced the characteristic pattern of intergovernmental relations known as "executive federalism" (to be discussed in more detail below).

The Judiciary

Canada's judiciary is an integrated hierarchy composed of provincial courts, joint federal-provincial courts (known as "superior courts"), and federal courts. With some exceptions, all of these courts settle disputes arising under both federal and provincial law.

The purely provincial courts are constituted and staffed by the provinces under their Section 92(14) authority over the administration of justice. These lower trial courts deal with matters arising under provincial private law, but they also try more than 90 percent of cases arising under the federal Criminal Code.[88]

Moving up the hierarchy, we find the only courts mandated by the Constitution Act 1867 (Sec. 96). Composed of a trial division and a court of appeal in each province, these "superior courts" are also constituted by the provinces (Sec. 92(14)), but their judges are appointed (Sec. 96) and paid (Sec. 100) by the federal government. The trial division of these "Section 96 courts" hears the more important civil and criminal cases and may hold jury trials; the courts of

appeal give authoritative interpretation to both federal and provincial law subject only to the ultimate authority of the Supreme Court of Canada.

Section 101 of the Constitution Act 1867 authorized, but did not require, the federal Parliament to establish a supreme court. Constituted in 1875, eight years after Confederation, the Supreme Court did not actually become "supreme" until appeals to the JCPC were ended in 1949.[89]

Section 101 also permits the Parliament to establish additional courts to hear cases arising under federal law, thus allowing the federal government to remove areas of federal law from the jurisdiction of the Section 96 courts and give them to federal courts. Ottawa has established two such courts: the Federal Court of Canada, which is responsible for federal administrative law, and the Tax Court.[90] With these exceptions, courts throughout the system can decide matters of both federal and provincial law, including issues of constitutional law that emerge in the course of ordinary litigation. All levels of the judiciary can invalidate -- and sometimes even rewrite[91] -- both federal and provincial laws on constitutional grounds subject to review by the Supreme Court.

The Supreme Court exercises its ultimate authority over constitutional law partly because it sits atop the appellate hierarchy. But the federal government can also pose "reference questions" to the Court. The provinces can similarly refer issues to the provincial courts of appeal, whose decisions can then be appealed to the Supreme Court. Many of Canada's most important constitutional decisions, including the 1981 *Patriation* and 1998 *Secession* rulings, were reference cases.[92] Formally considered "advisory opinions," these decisions are in practice given the same precedential weight as judicial opinions in appellate cases.

As one would expect for such a powerful body, Supreme Court appointments are subject to representational concerns. By law, three of the nine judges must come from Quebec; by convention, the other regions must be fairly represented. Appointment of judges is constitutionally a discretionary executive prerogative, falling in practice to the minister of justice and the prime minister, who receive behind-the-scenes advice from a variety of sources, including provincial bar associations. In the case of the Supreme Court, there have been many proposals to make the process more open and consultative and to include some provincial input. None have thus far succeeded.[93]

INTERGOVERNMENTAL RELATIONS

Intergovernmental relations are inevitable given interjurisdictional overlap, Ottawa's power to spend in areas of provincial jurisdiction, and the provincial premiers' claim to champion provincial interests in areas of federal jurisdiction.

Because parliamentary government concentrates power in the executive, intergovernmental interaction is dominated by an extensive system of "executive federalism" in which cognate ministers and/or their deputies meet to work out matters of common concern.[94] First ministers' meetings, which deal with the matters of highest importance, are particularly prominent and often conflictual, although their use depends on the preferences of federal prime ministers. In a real sense, the institutions of executive federalism are Canada's true "third order" of government. Although executive federalism is for the most part a constitutionally unofficial practice, Section 35.1 of the Constitution Act 1982 commits first ministers to calling a conference, to which aboriginal representatives have been invited, before amendments are made to any of the constitutional provisions concerned directly with aboriginal matters. Similarly, Section 49 mandated a first ministers' conference to review the new amending procedures within

15 years after they came into effect (i.e., by 1997). From a democratic perspective, executive federalism poses difficulties. Policy agreements transcending jurisdictional boundaries are reached by ministers in an entirely unofficial forum and then given a stamp of approval by their executive-dominated legislatures. Critics wonder what happens to democratic accountability.[95]

Constitutional influences on interjurisdictional relations at the level of society and the economy, rather than of governments, include the "mobility rights" guaranteed to Canadian citizens and permanent residents by Section 6 of the Charter. These rights, which apply only to natural persons, not corporations, include the right to move to and take up residence in any province and to pursue a livelihood in any province. Section 6 mobility rights are subject to valid provincial laws of general application and to reasonable residency requirements for the receipt of publicly provided social services. Provincial restraints on the professional activities of out-of-province residents have been held to be unconstitutional by the Supreme Court.[96]

The free movement of goods is not protected by the Charter, but Section 121 of the Constitution Act 1867 requires that "all articles of the growth, produce or manufacture of any one of the provinces shall ... be admitted free into each of the other provinces." This section "precludes customs duties between the provinces" but "has never been used to strike down non-fiscal impediments to interprovincial trade" and prohibits "only the crudest and most direct provincial restrictions on the mobility of capital."[97] As a result, interprovincial economic barriers are substantial.

FISCAL AND MONETARY POWERS

The federal government was given most of the obvious economic powers, including banking and monetary policy. In addition, Ottawa can flex its muscle within areas of provincial jurisdiction because of the "vertical imbalance" between its taxation and spending powers and those of the provinces. Ottawa may raise money by "any mode or system of taxation,"[98] but a province may impose only "direct taxation" and license fees.[99] Legally, direct taxes are imposed on those intended to pay them, while the direct payer of indirect taxes passes them on to others.[100] Given that the most important direct tax, the income tax, did not exist at the time of Confederation, the limitation of provinces to direct taxes reflected the founding perception that their responsibilities would be much less costly. This changed dramatically as provincial powers gained significance with the rise of the welfare state. Provincial social-policy responsibilities such as health care and education are hugely expensive.

Since Confederation, of course, provincial revenues have grown significantly. The income tax has become well established in both orders of government, and the JCPC gave provinces access to what might seem the quintessential indirect tax, the sales tax, by defining retailers as government collectors of a tax imposed directly on consumers.[101] Significantly, the provinces may also collect royalties from natural resources within their boundaries.[102] In addition, both orders of government may borrow money on their own authority without restriction,[103] and there is no constitutional stricture on deficit financing by any order of government.[104] Nevertheless, the revenues of provinces regularly fail to meet their constitutional expenses, whereas Ottawa takes in more tax revenues than it spends in its own areas of jurisdiction. Ottawa addresses this imbalance by spending in areas of provincial jurisdiction. This federal "spending power" is constitutionally implied rather than explicitly stated.

Ottawa's fiscal transfers address not only the vertical imbalance between itself and the provinces, but also the "horizontal imbalance" between richer and poorer provinces. These "equalization payments" are intended to ensure that citizens enjoy similar levels of government

services in all the provinces. In effect, Ottawa uses its taxation and spending powers to transfer resources from so-called "have" provinces to the "have nots."

The principle of federal transfers to the provinces was established in Section 118 of the Constitution Act 1867, which early on provided for federal subsidies to provincial governments. This provision has since been repealed, but Section 36 of the Constitution Act 1982 states that the federal government is "committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation." What qualifies as "reasonable levels" is, of course, open to interpretation.

FOREIGN AFFAIRS AND DEFENCE POWERS

Under the Constitution Act 1867, Ottawa has exclusive authority over "militia, military and naval service, and defence" (Sec. 91(7)). Moreover, it can enact temporary domestic-emergency legislation during and after wars under the emergency component of its POGG power.

Foreign policy is not as straightforward. Making treaties is a prerogative of the federal executive and requires no legislative approval. However, in the 1937 *Labour Conventions Case*,[105] the JCPC ruled that the power to enact any legislation necessary to implement a treaty followed the normal federal division of powers; thus only provinces may enact implementing legislation in their areas of jurisdiction. "While the ship of state now sails on larger ventures and into foreign waters," wrote the JCPC, "she still retains the water-tight compartments which are an essential part of her original structure." *Labour Conventions* remains the black-letter law. Today, however, where it remains unclear which government has the relevant legislative authority, the Supreme Court will sometimes be influenced by treaty obligations to find in favour of Ottawa.[106] As a consequence of the division of legislative authority to implement treaties, Canada often seeks the inclusion of a "federal state clause." Such a clause informs all signatories that the fulfillment of Canada's obligations may depend in part on the cooperation of provincial governments.

The federal government will also negotiate with the provinces prior to signing a treaty involving their jurisdiction in the attempt to bring them onside. Because the provinces have an interest in successful international trade negotiations, they increasingly cooperate in this area. This was true, for example, in negotiations under the General Agreement on Tariffs and Trade in the mid-1980s, the 1989 Free Trade Agreement with the United States, and the 1994 North American Free Trade Agreement.

Although provinces may not make full-fledged treaties, they have entered into international agreements in areas of provincial jurisdiction. Consequently, provinces, and most notably Quebec, have established a number of foreign offices to represent their interests. In the main, these offices are directed at encouraging investment and trade. Cooperation with the federal government, and even among provinces, is also the rule. However, Quebec's offices have had a more cultural and quasi-diplomatic role, particularly under separatist governments and especially with respect to relations with the francophone world.

CITIZENSHIP

The federal Parliament has exclusive jurisdiction over citizenship. The Constitution Act 1867 is silent about citizenship because Canadians were then simply British subjects. In 1947, as part of rising nationalist sentiment following the Second World War, the federal government introduced

legislation establishing a statutory category of Canadian citizenship. The federal government's authority to define the requirements of citizenship is accepted by most scholars, but it is unclear whether the power is part of its jurisdiction over naturalization and immigration (Sec. 91(25) of the Constitution Act 1867) or an exercise of its general power to legislate for the "Peace, Order and good Government" of Canada.[107] Citizenship is granted on both the "law of soil" (*jus soli*) and the "law of blood" (*jus sanguinis*). Anyone born on Canadian soil is automatically a Canadian citizen. Children born abroad to a Canadian parent also have a right to Canadian citizenship (second-generation nonresidents lose their right to citizenship at the age of 28). Permanent residents may apply for Canadian citizenship if they have resided in Canada for three of the four years prior to application. Such residents also need to demonstrate adequate knowledge of Canada and of one of the official languages in order to complete the citizenship process. Since 1977 Canadians have been allowed to take foreign citizenship while keeping Canadian citizenship, thus permitting dual or multiple citizenship. All regulations and procedures related to citizenship are defined and administered by the federal government.

Despite its statutory status, citizenship developed a constitutional aspect with the enactment of the Charter of Rights and Freedoms. While most Charter rights are extended to everyone in Canada, three rights are exclusive to Canadian citizens: democratic voting (Sec. 3), mobility (Sec. 6), and minority-language education (Sec. 23). In 1989 the Supreme Court ruled that discrimination on the basis of citizenship is unconstitutional,[108] but the Court subsequently upheld civil-service hiring and promotion preferences for citizens.[109] Discrimination on the basis of citizenship remains an unsettled area of Canadian legal and constitutional doctrine and is therefore certain to attract future judicial determinations.

VOTING, ELECTIONS, AND POLITICAL PARTIES

Although the Constitution is silent about the organization and behaviour of political parties, it does have provisions governing elections and electoral districts. The Constitution Act 1867 established the House of Commons and the provincial assemblies as elected institutions, provided for an initial distribution of seats (subject to readjustment after each decennial Census), and set the maximum period between elections (five years for the Commons and four years for provincial assemblies). As noted earlier, provinces amended their constitutions to increase the maximum term for provincial assemblies to five years. The 1982 Charter of Rights and Freedoms confirmed the five-year maximum duration of the Commons and provincial assemblies, except in times of emergency, and mandated that they sit at least once a year.

The Charter also guarantees "every citizen" the right to vote in elections for these assemblies and to stand for election.[110] The courts have held that the right to vote is infringed by too great a variation in constituency size but that the equally sized constituencies suggested by the "one person, one vote" principle are not required.[111] Deviation limits of plus or minus 25 percent have been upheld.[112] As far as the franchise is concerned, a reasonable age threshold for voting is constitutionally permissible, but the disenfranchisement of prisoners is not.[113]

Within these limits, each legislative body is free to administer and organize its own electoral operations, including the exact form of the franchise. All Canadian citizens 18 years of age or older are qualified to vote in federal elections, with the exception of officials responsible for running elections, which includes the chief electoral officer, the assistant chief electoral officer, and the returning officers in each electoral district (except when required to vote to break a tie on a recount). The same is true of provincial elections. Provincial governments monitor municipal elections, and the federal government, under the Indian Act (Secs 74-79), administers elections for band councils on Indian reserves.

Until 1996 voters were registered, or enumerated, in the lead up to each election. Since then a permanent database, the National Register of Electors, has been used to produce the preliminary voters' lists for federal elections, by-elections, and referendums as well as for provincial, territorial, municipal, and school-board elections when the relevant authority has a formal agreement with Elections Canada.

INDIVIDUAL AND COMMUNAL RIGHTS

Under the pre-1982 Constitution, there were few substantive, as opposed to jurisdictional, limits on Canadian governments. The federal government and the provinces of Manitoba and Quebec were constrained by the requirement to make provision for the use of either English or French in their legislatures and courts and by the requirement to produce the records, journals, and laws of these institutions in both languages. Similarly, some of the jurisdiction of the "superior" courts established by Section 96 of the Constitution Act 1867 is fully entrenched and beyond the authority of either order of government to alter or repeal.[114] In addition, beginning in the 1930s, certain judges of the Supreme Court, but never a majority, opined that an "implied bill of rights," protecting such principles as freedom of political expression, was inherent in the parliamentary system of government established by the Constitution.[115]

Parliament and three provinces (Alberta, Saskatchewan, and Quebec) also enacted statutory bills of rights applicable only within their own areas of jurisdiction. Although these statutory bills are still in force (and occasionally applied), the Charter of Rights and Freedoms has largely superseded them.[116] Unlike the statutory bills, the Charter applies within both federal and provincial jurisdictions. Its rights and freedoms are protected against abridgment by government, not by private actors, although the distinction is not altogether clear. Although the Charter does not explicitly incorporate international human-rights instruments, the Supreme Court sometimes uses international (and comparative) law and jurisprudence as interpretive aids.

The Charter's rights and freedoms are not absolute. Section 1 guarantees the Charter's rights and freedoms "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[117] Section 4(2) allows a legislature to continue beyond the normal five-year limit because of "real or apprehended war, invasion or insurrection" if it receives the support of at least two-thirds of its members. Most dramatically, as a result of the 1981 compromise between Prime Minister Trudeau and the dissenting provinces during the patriation process, even unjustified laws can be immunized against the Charter for renewable five-year periods by including in them a declaration that the law shall operate "notwithstanding" certain Charter rights (Sec. 33). This notwithstanding clause was initially used extensively by Quebec, including in its omnibus immunization of all the province's legislation immediately after the Charter came into force. Elsewhere, the override clause is more apt to be seen as illegitimate. Nevertheless, it has been used in 16 pieces of legislation by provinces other than Quebec. [118] The clause has never been invoked by the federal government.

The notwithstanding provision protects laws only against the Charter's "Fundamental Freedoms" (Sec. 2), "Legal Rights" (Secs 7-14), and "Equality Rights" (Sec. 15). These sections include many familiar liberal-democratic rights. The fundamental freedoms, for example, are the classic freedoms of religion, expression, assembly, and association. The legal rights include the right to "life, liberty and security of the person," the right to counsel, the right to be presumed innocent until proven guilty, the right to protection against self-incrimination, and the right to protection against double jeopardy. The equality-rights section guarantees equality "before and under the law and ... the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin,

colour, religion, sex, age or mental or physical disability." This provision contains unnamed grounds of discrimination analogous to the enumerated ones. The courts have found foreign citizenship[119] and sexual orientation[120] to be among these "analogous grounds."

One classically liberal limitation on government that was deliberately left out of the Charter is the protection of property rights. This has led some advocates of these rights to call for a constitutional amendment to include them and others to explore the interpretive possibility of bringing property rights within the guarantee of "security of the person."[121]

Not subject to the notwithstanding clause are the Charter's "Democratic Rights" (Secs 3-5), "Mobility Rights" (Sec. 6), and "Language Rights" (Secs 16-23). These more strongly protected provisions include additional rights common to liberal democracy, such as the rights to vote and to move about freely. Many of these "strong" rights, however, are more peculiar to the Canadian situation. The democratic rights, for example, speak mostly to the parliamentary system, limiting elected assemblies to five-year maximum terms and ensuring a sitting of the federal and provincial legislatures "at least once every 12 months" (Sec. 5). The mobility-rights section permits a government to engage in otherwise unjustified discrimination in favour of its own citizens if its unemployment rates are above the national average. The Charter's language rights clearly respond to Canada's ethno-linguistic history. Indeed, some of them were designed to invalidate language laws passed by the separatist Government of Quebec.[122]

Much of the Charter emphasizes individual rights. Its provisions generally guarantee rights and freedoms to "every citizen," or (indicating the protection of noncitizens as well) to "everyone," "every individual," or "every person." This individualistic orientation is true of the rights to use either official language or to have one's children educated in the minority language (i.e, French), which is why these rights jeopardized Quebec's policy of limiting individual rights of language choice in the name of collective survival. In certain respects, however, the Charter tends toward a group-rights vision. Thus the Section 15 guarantee of equality rights "without discrimination" immediately goes on to say that this "does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups." This provision permits group-based affirmative action, although it does not require it.

Similarly, the right to have one's children educated in the minority official language of one's jurisdiction is available only to two specified groups: (1) Canadian citizens for whom the minority language is their first language or (2) citizens who received their own primary-school education in this language in Canada. Moreover, the right to have such education publicly paid for applies only when "numbers warrant" -- that is, when there is a sufficiently sizeable group. Additionally, the rights of denominational schools protected by the Constitution Act 1867 are, in an important sense, rights of religious communities.

The right to publicly funded denominational and minority-language schools are positive rights that require government action rather than simply inaction, as is the right to have the legislation of Quebec, Manitoba, New Brunswick, and Canada enacted and published in both official languages.[123] Positive rights to such social-policy goods as housing and health care are not explicitly mentioned in the Charter, and, as in the case of property rights, their advocates argue about whether to pursue them through constitutional amendment or judicial interpretation. The courts have certainly made interpretive forays into positive social rights. They have ruled, for example, that if governments choose to enact legislation prohibiting discrimination in employment, housing, and the like, they must extend the protections of this legislation to all groups covered by the Charter's equality-rights provision, including such unnamed analogous groups as gays and lesbians.[124] In the realm of health care, they have required governments to pay for interpreters for deaf patients.[125]

CONSTITUTIONAL CHANGE

The Constitution Act 1982 sets out five amending procedures, most of which were discussed above. The general amending formula (Sec. 38), governing all matters not explicitly covered by the other four, is the "residual" formula, which requires the consent of the Senate, the House of Commons, and the legislative assemblies of two-thirds (i.e., seven) of the provinces having 50 percent of the population. Section 42 provides a list of matters that are expressly covered by this 7-50 formula. These include the principle of proportionate representation of the provinces in the House of Commons, the powers and composition of the Senate and the appointment of its members, and the establishment of new provinces. Changes to provincial powers are also covered by the 7-50 formula, although dissenting provinces may opt out, in some cases with compensation, of any diminution of their powers (with the option to opt in later). In 1996, in response to the 1995 referendum on Quebec secession, the federal Parliament passed what Peter Hogg calls the "regional veto statute,"[126] which "loans" Ottawa's veto under Section 42 to each of five "regions": Quebec, Ontario, British Columbia, Atlantic Canada, and Prairie West. In each of the latter two regions, consent would be signified by the approval of two provinces with 50 percent of their region's population. This legislatively transformed the constitutional formula, giving a practical veto to each of four provinces: Quebec, Ontario, and British Columbia (because they coincide with three of the regions) plus Alberta (because it has more than 50 percent of the population of the three prairie provinces).

The second amendment formula (Sec. 41) specifies some matters -- the office of the governor general and lieutenant governors, the right of a province not to have fewer members in the Commons than in the Senate, the use of English or French, the composition of the Supreme Court, and the procedures for amendments themselves -- that require the unanimous consent of the federal and provincial legislative houses.

The third formula (Sec. 43) provides that a constitutional amendment applying only "to one or more, but not all, provinces" requires the consent only of the federal houses and the legislative assemblies of the provinces to which the amendment applies.[127] This includes altering provincial boundaries and amending the use of English or French within a province. The latter is an express qualification of the language clause in the unanimity formula, allowing, for example, other provinces to follow New Brunswick in making themselves officially bilingual without requiring the consent of all the other provinces. The fourth formula (Sec. 44) allows the federal Parliament, in matters not covered by other amending formulae, to amend "the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons." Finally, the fifth formula (Sec. 45) enables provinces to amend their own constitutions. In addition, some observers argue that the 1992 referendum on the Charlottetown Accord established a convention that the formal amending rules be supplemented by referendums in the case of major amendments.[128] There have been several amendments under the provisions established in 1982,[129] but most constitutional adjustment occurs by way of judicial interpretation.

EMERGING ISSUES

Many of the perennial issues of Canadian public life -- relations between Quebec and the rest of Canada, provincialism, regionalism, First Nations issues, and the like -- dominated a public agenda of "megaconstitutional" change from the 1960s to the 1990s. With the failure of the Meech Lake and Charlottetown Accords, however, came widespread constitutional fatigue, and the 2003 election of a federalist government in Quebec dampened calls for formal constitutional

change from this quarter. Indeed, the "C" word became one that many public actors assiduously avoid. Nevertheless, the yearning for substantial institutional change survived the declining appetite to achieve it through formal constitutional amendment. In effect, attention shifted from "large C" to "small c" constitutional change, or from constitutional amendment to legislative, bureaucratic, and interpretive reform.

The mid-to-late-1990s were notable for the degree to which important institutional change was achieved via ordinary legislation, a trend that seems set to continue. We have already noted, for example, Ottawa's 1996 legislative promise to use its veto over constitutional amendments to block any that do not have the consent of specified regional groupings of provinces, thus significantly altering the amending procedures. True, this change is itself not constitutionally entrenched, but given the conventional nature of Canadian constitutionalism, it may be politically difficult to undo. Four years later, in the spring of 2000, the federal government enacted the Clarity Act, which essentially underlined the Supreme Court's decision in the 1998 *Secession Reference.*[130] This Act requires that a clear question be passed by a clear majority of voters in any future referendum and stipulates some of the items that must be agreed to in a secession amendment.[131] We have similarly noted how the growing assertiveness of First Nations, in combination with the difficulty of dealing with their claims at a constitutional level, has led governments to offer legislative solutions such as that found in the Nisga'a Agreement.

More recently, a Royal Commission initiated by the Government of Newfoundland and Labrador suggested that the province has both benefited and lost as a result of joining Confederation in 1949. In particular, limitations on access to taxation revenue from offshore oil and gas production are seen as unfair by Newfoundland and other Atlantic provinces. It is quite likely that we will see legislative action to alleviate some of this discontent.

Legislative proposals also exist to address the interest among voters and governments in improving the accountability of Canada's political institutions. For example, the federal government has introduced a range of measures, including party-financing legislation and ethics guidelines, aimed at improving both the operation of political institutions and public perception of their operation. Prime Minister Paul Martin has indicated a desire to pursue other changes, including attempts to reduce party discipline in the Commons that will alter the nature of central institutions.

In the provinces, British Columbia has legislatively implemented fixed-term elections, and other provinces are considering doing the same. Equally dramatic, governments in British Columbia, New Brunswick, Quebec, and Prince Edward Island have initiated formal procedures aimed at assessing the democratic adequacy of their traditional "first-past-the-post" electoral systems, with other provinces soon to follow. Reform of provincial legislatures is also on the agenda. For example, a recent electoral redistribution report in Alberta raised the issue of a second chamber for the province. One can easily imagine a domino effect if electoral and legislative change occurs in a number of provinces. The implications for federalism are potentially complex. For instance, more proportionally elected provincial legislatures -- particularly if they produce coalition governments -- might, on the one hand, undercut the logic of executive federalism, which rests on executive dominance, and, on the other, provide premiers greater legitimacy in their negotiations with other federal actors.

As for intergovernmental relations, the current preeminence of social policy (e.g., health care) in provincial-federal interaction is reminiscent of the period before constitutional issues came to dominate executive federalism. The appeal of fiscal prudence, combined with federal surpluses, cements Ottawa's domination of these negotiations and may produce new types of intergovernmental agreements. External pressures, such as negotiations under the World Trade Organization, the Free Trade Zone of the Americas, and relations with the United States, may

spawn new ways of reaching agreements on security as well as on international trade and encourage the federal government to assert its authority in this area. However, policies such as health care, which have serious implications for budgets and government direction, are so contested that a return to the bureaucratic cooperation of earlier times seems improbable. One area in which we might expect to see both greater activity and more conflict is with respect to municipal government. The new federal government has promised to provide financial aid to municipalities, many of which -- notably large cities -- face severe difficulties financing infrastructure. Settling on a mechanism for such assistance may prove controversial because federal intervention in an area of provincial jurisdiction will not sit well with many provinces and because the needs of municipalities are diverse.

Finally, much constitutional reform comes by way of judicial interpretation. The balance of power between the federal and provincial governments is constantly being adjusted by the courts. This is an old story, but now the growth in Charter litigation and the broadening of the Charter's application due to Supreme Court interpretation shape public policy in new and often more publicly visible ways. Given that most public policy in Canada has a federal (and constitutional) component, the growth of Charter politics will continue to affect the nature of Canadian constitutionalism and federalism.

AUTHORS' NOTE: We acknowledge the contribution of all those who participated in the conference "Constitutional Origins, Structure and Change in Federal Democracies*"* in Calgary, 28 February to 1 March 2003. For their additional comments and advice, we thank Roger Gibbins, Patrick Fafard, F.L. Morton, Richard Simeon, Ian Stewart, and Ronald Watts. Their suggestions improved this chapter, and if space had allowed, they would have improved it even further. We are also grateful for the indispensable organizational and research support provided by Christopher Alcantera, Dennis Baker, Jeremy Clarke, David deGroot, Royce Koop, and Christopher Northcott.

[1]The largest country is Russia, which has a landmass of 17 million square kilometers.

[2]Canada, "E-Book: Complete List of Tables, Gross Domestic Product," *Statistics Canada*, 7 January 2003, http://www.statcan.ca/english/Pgdb/econ04.htm.

[3]Canada's coastline is 208,080 kilometers. See Canada, "Coastlines," *Atlas of Canada*, 21 May 2003, http://atlas.gc.ca/site/english/facts/coastline.htm.

[4]The following are the 1 October 2003 populations (and percentages of the total Canadian population) of Canada's jurisdictions: Canada, 31,717,637 (100%); Ontario, 12,280,731 (38.7%); Quebec, 7,503,502 (23.7%); British Columbia, 4,158,649 (13.1%); Alberta, 3,164,400 (10.0%); Manitoba, 1,164,135 (3.7%); Saskatchewan, 995,003 (3.1%); Nova Scotia, 936,878 (3.0%); New Brunswick, 750,460 (2.4%); Newfoundland and Labrador, 520,170 (1.6%); Prince Edward Island, 137,941 (0.4%); Northwest Territories, 42,040 (0.1%); Yukon, 31,371 (0.1%); Nunavut, 29,357 (0.1%). See Canada, "The Daily," *Statistics Canada*, 7 January 2003, www.statcan.ca/Daily/English/031218/d031218c.htm.

[5]Canada, "Canada's Ethnocultural Profile: The Changing Mosaic," *Statistics Canada*, 21 January 2003, http://www12.statcan.ca/english/census01/Products/Analytic/companion/etoimm/contents.cfm.

[6]Canada, "Religions in Canada," *Statistics Canada*, 13 May 2003, http://www12.statcan.ca/english/census01/Products/Analytic/companion/rel/contents.cfm.

[7]Neil Nevitte, *The Decline of Deference: Canadian Value Change in Cross-National Perspective* (Peterborough, ON: Broadview Press, 1996), pp. 210-11.

[8]Section 93 protects denominational schools but only in five provinces: Ontario, Nova Scotia, New Brunswick, British Columbia, and Prince Edward Island. Active but modified versions of Section 93 can also be found in the statutes constituting Manitoba (Sec. 22, 1870), Saskatchewan (Sec. 17, 1905) and Alberta (Sec. 17, 1905). Quebec and Newfoundland are not subject to the Section 93 protections for denominational schooling by virtue of Constitutional Amendment Proclamation 1997 (Quebec), Can. Stat. Instruments, SI 97-141, and of Constitutional Amendment Proclamation 1997 (Newfoundland Act), Can. Stat. Instruments, SI 98-25. See Peter Hogg, *Constitutional Law of Canada,* loose-leaf edition (Scarborough, ON: Carswell, 1997), p. 53-24.1.

[9]Britain retroactively confirmed Ottawa's authority to do so in 1871.

[10]Canada Act 1982, UK, 1982 c. 11, s. 2.

[11]Section 52 refers to a list found in the Schedule to the Constitution Act 1982.

[12]See, for example, Albert J. Smith, in the New Brunswick House of Assembly, 14 March 1866, *Canada's Founding Debates*, ed. Janet Ajzenstat et al. (Toronto: Stoddart, 1999), pp. 129-30. See also Robert Pinsent, in the Newfoundland Legislative Council, 14 February 1865, Azjenstat et al., eds, *Founding Debates*, p. 149.

[13]Charles Tupper, in the Nova Scotia House of Assembly, 10 April 1865, Ajzenstat et al., eds, *Founding Debates*, p. 170.

[14]Some Americans thought that by ending reciprocity, the BNA colonies would be forced by economic circumstances to seek union with the United States on their own. See R.D. Francis, *Origins: Canadian History to Confederation* (Toronto: Harcourt Brace Canada, 1996).

[15]George-Etienne Cartier, in the Legislative Assembly of Canada, 7 February 1865, Ajzenstat et al., eds, *Founding Debates*, p. 183.

[16]Christopher Moore, *1867: How the Fathers Made a Deal* (Toronto: McClelland and Stewart, 1997), p. 42.

[17]Garth Stevenson, *Unfulfilled Union: Canadian Federalism and National Unity*, rev. ed. (Toronto: Gage, 1982), pp. 199-200.

[18]"[L]egislative union would be preferable ... it would be the best, the cheapest, the most vigorous, and the strongest system of government we could adopt." John A. Macdonald, in the Legislative Assembly of Canada, 6 February 1865, Ajzenstat et al., eds, *Founding Debates*, p. 279.

[19]R. MacGregor Dawson, *The Government of Canada*, 5th ed., rev. Norman Ward (Toronto: University of Toronto Press, 1970), p. 27.

[20]Robert C. Vipond, *Liberty and Community: Confederation and the Failure of the Constitution* (Albany: State University of New York Press, 1991), pp. 22-3.

[21]John A. Macdonald, in the Legislative Assembly of Canada, 13 March 1865, Ajzenstat et al., eds, *Founding Debates*, p. 314.

[22]Constitution Act 1867, Section 90.

[23]Ibid.

[24]Ibid., Sections 55 and 57.

[25]In *Re Resolution to Amend the Constitution* [1981] 1 S.C.R. 753 at 802, the Supreme Court noted that "reservation and disallowance of provincial legislation, although in law still open, have, to all intents and purposes, fallen into disuse." See also Hogg, *Constitutional Law of Canada,* p. 5-19 n. 70.

[26]For a historical account of how the powers of disallowance and reservation have been used, see Guy V. LaForest, *Disallowance and Reservation of Provincial Legislation* (Ottawa: Queen's Printer, 1965). See also, generally, Vipond, *Liberty and Community;* and Hogg, *Constitutional Law of Canada,* p. 5-19.

[27]Constitution Act 1867, Section 92(10)(c). According to Hogg, this declaratory power has been used 472 times, mostly for the construction of railways but also for bridges, harbours, mines, and so on. Hogg also notes, however, that the federal government is "sensitive to the anomalous character of the power" and is "now inclined to use the power only sparingly" (22-18). The failed Charlottetown Accord of 1992 would have required provincial consent for the exercise of Section 92(10)(c). See Hogg, *Constitutional Law of Canada,* pp. 22-15 to 22-18.

[28]Constitution Act 1867, Section 93(4). Section 93(4) has never been used.

[29]Constitution Act 1867, Section 96.

[30]K.C. Wheare, *Federal Government*, 4th ed. (London: Oxford University Press, 1963), p. 19.

[31]Vipond, *Liberty and Community*, chapter 5.

[32]See discussion of *Fort Frances Pulp and Power Co. v. Manitoba Free Press* [1923] A.C. 695 in Peter H. Russell, Rainer Knopff, and F.L. Morton, eds, *Federalism and the Charter: Leading Constitutional Decisions*, 2nd ed. (Ottawa: Carleton University Press, 1989), pp. 68-72.

[33]The broad scope of Section 92(13) is demonstrated by Lord Atkin's comments in *Attorney General of Canada v. Attorney General of Ontario (Employment and Social Insurance Act Reference)* [1937] A.C. 355. H. Carl Goldenberg described Section 92(13) as "wide enough to cover nearly all legislation outside of criminal law" in "Social and Economic Problems in Canadian Federalism," *Canadian Bar Review* 12 (September 1934): 422-30 at 423. See Alan C. Cairns, "The Judicial Committee and Its Critics," *Canadian Journal of Political Science* 4, no. 3 (September, 1971): 301-45 at 306.

[34]Keith Archer et al., *Parameters of Power: Canada's Political Institutions*, 2nd ed. (Scarborough, ON: ITP Nelson, 1999), p. 158.

[35]For instance, the cost-shared (federal transfer based on provincial expenditure) Established Programs Financing and the Canada Assistance Plan were replaced by the "block-grants" (federal transfer based on population, regardless of provincial need) of the Canada Health and Social Transfer (CHST), although some believe that the

CHST's effects on federal expenditure have been only modest. See Tracy R. Snodden, "The Impact of the CHST on Interprovincial Redistribution in Canada," *Canadian Public Policy* 24 (March 1998): 49-70.

[36]Ronald L. Watts, *Comparing Federal Systems*, 2nd ed. (Kingston, ON: Institute of Intergovernmental Relations, Queen's University, 1999).

[37]Archer et al., *Parameters of Power*, p. 80.

[38]Peter Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* 2nd ed. (Toronto: University of Toronto Press, 1993), pp. 96-7.

[39]Pierre Elliott Trudeau, *Federalism and the French Canadians* (Toronto: Macmillan of Canada, 1968).

[40]Rainer Knopff and F.L. Morton, *Charter Politics* (Scarborough, ON: Nelson Canada, 1992).

[41]Archer et al., *Parameters of Power*, p. 95.

[42]Only Ontario and New Brunswick initially supported it.

[43]Archer et al., *Parameters of Power*, pp. 90-1.

[44]*Re Constitution of Canada* (1981) 125 D.L.R. (3d). For a discussion of this case, see Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Wall and Thompson, 1989), pp. 24-34.

[45]Russell, *Constitutional Odyssey*, p. 111.

[46]For a discussion of the nature of the decision and how it contributed to federal-provincial compromise, see Rainer Knopff, "Legal Theory and the 'Patriation' Debate," *Queen's Law Journal* 7, no. 1 (1981-82): 41-65 at 41. See also Peter Russell, "Bold Statescraft, Questionable Jurisprudence," *And No One Cheered: Federalism, Democracy & The Constitution Act*, ed. Keith Banting and Richard Simeon (Toronto: Methuen Publications, 1983), pp. 210-38.

[47]Constitution Act 1982, Section 33.

[48]Alan Cairns, "Citizens (Outsiders) and Governments (Insiders) in Constitution Making: The Case of Meech Lake," *Disruptions: Constitutional Struggles from the Charter to Meech* Lake, ed. Douglas E. Williams (Toronto: McClelland and Stewart, 1991), pp. 108-38 at 110.

[49]See *Re: Objection to a Resolution to Amend the Constitution (Québec Veto Reference), 1982,* [1982] 2 S.C.R. 793, in which the Supreme Court subsequently rejected this claim that Quebec retained a two-nations veto. See Russell, Knopff, and Morton, eds, "Québec Veto Reference," *Federalism and the Charter*, pp. 760-70 at p. 760. For a critical analysis of this decision, see Marc E. Gould, "The Mask of Objectivity: Politics and Rhetoric in the Supreme Court of Canada," *Supreme Court Review* 7 (1985): 455-510.

[50]Russell, *Constitutional Odyssey*, pp. 111-12.

[51]From the "two-nations" perspective, an equal senate would give one-half of the political community only one-tenth of the representation.

[52]Alan Cairns, *Charter versus Federalism* (Kingston, ON: McGill-Queen's University Press, 1992), pp. 114-18.

[53]Patrick Monahan, *Meech Lake: The Inside Story* (Toronto: University of Toronto Press, 1991); Ronald L. Watts, "Canadian Federalism in the 1990s: Once More in Question," *Publius: The Journal of Federalism* 21 (Summer 1991): 169-87.

[54]Kenneth McRoberts and Patrick Monahan, eds, *The Charlottetown Accord, The Referendum and The Future of Canada* (Toronto: University of Toronto Press, 1993); Robert C. Vipond, "Seeing Canada Through Referendums: Still a House Divided," *Publius: The Journal of Federalism* 23 (Summer 1993): 39-56.

[55]See Constitution Act 1930.

[56]*Reference re Secession of Quebec* [1998] 2 S.C.R. 217, paragraph 88. See also Peter Leslie, "Canada: The Supreme Court Sets Rules for the Secession of Quebec," *Publius: The Journal of Federalism* 29 (Spring 1999): 135-51.

[57]Constitution Act 1982, Section 43.

[58]See Nelson Wiseman, "Clarifying Provincial Constitutions," *National Journal of Constitutional Law* 6 (March 1996): 269-94. See also Campbell Sharman, "The Strange Case of a Provincial Constitution: The British Columbia *Constitution Act*," *Canadian Journal of Political Science* 17 (March 1984): 87-108.

[59]Jean Chrétien's appointment of Jean-Louis Roux as lieutenant governor of Quebec in September 1996 is a rare example of the appointment being made over the objections of the provincial government. Roux had spoken against the sovereigntist position in the 1995 referendum, thus making him an attractive candidate to the federal Liberals but unacceptable to the Parti Quebecois government. Roux resigned in November 1997 as a result of a minor scandal (Roux had worn a swastika in 1942 to express his contempt for conscription).

[60]*Re Initiative and Referendum Act* [1919] A.C. 935.

[61]This is the case by virtue of Quebec's and Manitoba's place in the national Constitution. *Attorney General of Manitoba v. Forest* [1979] 2 S.C.R. 1032; *Attorney General of Quebec v. Blaikie* [1979] 2 S.C.R. 1016.

[62]These are Quebec, Ontario, Prince Edward Island, Nova Scotia, and New Brunswick.

[63]*Ontario (Attorney General) v. Pembina Exploration Canada Ltd* [1989] 1 S.C.R. 206.

[64]Andrew Sancton, "Municipalities, Cities and Globalization: Implications for Canadian Federalism," *Canadian Federalism: Performance, Effectiveness, and Legitimacy*, ed. Herman Bakvis and G. Skogstad (Oxford: Oxford University Press, 2002), pp. 261-77. Sancton notes that former Toronto mayor Mel Lastman "speculated that Toronto might be better off comprising its own province" (271).

[65]For instance, both Ontario and Quebec have recently incorporated a number of formerly autonomous communities into their largest cities: Toronto in 1998 and Montreal in 2001 respectively.

[66]See Peter H. Russell, "The End of Mega Constitutional Politics in Canada?" *PS: Political Science and Politics* 26 (March 1993): 33-37 at 37. Although a comprehensive land claim was negotiated between the Cree in northern Quebec and the Quebec government in 1975, the number of land claims has grown exponentially since 1992.

[67]The Nisga'a final agreement came into effect on 11 May 2000.

[68]Bill C-19, the proposed First Nations Fiscal and Statistical Management Act, was introduced in the House of Commons and read the first time on 2 December 2002. It was read a second time and referred to the House of Commons Standing Committee on Aboriginal Affairs on 25 February 2003. The bill was referred back to the House on 24 September 2003 but died on the *Order Paper* when the Parliament was prorogued on 12 November 2003.

[69]*The Queen v. Hauser* [1979] 1 S.C.R. 984 (approving federal prosecutions under the Narcotics Control Act); *Attorney-General of Canada v. C.N. Transportation* [1983] 2 S.C.R. 206 (approving federal prosecutions under the Combines Investigation Act); and *R. v. Wetmore* [1983] 2 S.C.R. 284 (approving federal prosecutions under the Food and Drugs Act).

[70]See, for instance, Section 21 of the Alberta Police Act.

[71]*Reference re Anti-Inflation Act* [1976] 2 S.C.R. 373.

[72]*Attorney General for Canada v. Attorney General for Ontario et al.* [A.C. 326] 1937. The "watertight compartments" metaphor competed with another strand of jurisprudence that did not emphasize exclusivity: the "double aspect" theory, which allowed both orders of government to legislate on the same matters from different angles.

[73]*Citizens Insurance Co. v. Parsons; Queen Insurance Co. v. Parsons* (1881) 7 App. Cas. 96.

[74]*Re Board of Commerce Act* [1922] 1 A.C. 191; *Toronto Electric Commissioners v. Snider* [1925] A.C. 396.

[75]This change was emphasized by the Supreme Court of Canada in *Severn v. the Queen* [1878] 2 S.C.R. 70.

[76]Fields such as securities regulation present a "double aspect," where one aspect of the law falls within federal jursidiction (in the case of securities, the federal power to incorporate companies, and power over criminal law) while another aspect falls within provincial jurisdiction (the provincial power over property and civil rights). In such cases, concurrence is granted (*Multiple Access Ltd. v. McCutcheon* [1982] 2 S.C.R. 161). Where there is an operational conflict between "double aspect" laws, the federal law is paramount (*Law Society of British Columbia v. Mangat* [2001] 3 S.C.R. 113).

[77]See, for example, *Switzman v. Elbling and Attorney General of Quebec* [1957] S.C.R. 285.

[78]See James B. Kelly, "Reconciling Rights and Federalism during Review of the Charter of Rights and Freedoms: The Supreme Court of Canada and the Centralization Thesis, 1982 to 1999," *Canadian Journal of Political Science* 34 (June 2001): 321-55.

[79]In *obiter dicta*, Justice La Forest has included Section 121 as part of the "common market," which forms "one of the central features of the constitutional arrangements incorporated in the Constitution Act, 1867." *Morgaurd Investments Ltd. v. De Savoye* [1990] 3 S.C.R. 1077 at 1099; *Hunt v. T&N plc* [1993] 4 S.C.R. 289 at 322.

[80]Kevin Clifford Wasson, "Non-Tariff Barriers to Trade in Canada," MA thesis, University of Toronto, Faculty of Law, 1990, p. 1; Thomas Courchene, *Economic Management and the Division of Powers* (Toronto: University of Toronto Press, 1986), p. 215. These barriers have been reduced somewhat by the 1995 Agreement on Internal Trade.

[81]See Ajzenstat et al., eds, *Founding Debates*, chapter 2.

[82]Jeffrey Simpson, *The Friendly Dictatorship* (Toronto: McClelland and Stewart, 2001).

[83]James Madison, "Federalist No. 47," in Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers* (New York: Mentor Books, 1961), pp. 300-308 at 301.

[84]Constitution Act 1867, Section 53.

[85]Constitution Act 1982, Section 47(1).

[86]Constitution Act 1985.

[87]Donald J. Savoie, *Governing from the Centre: The Concentration of Power in Canadian Politics* (Toronto: University of Toronto Press, 1999).

[88]Peter McCormick and Ian Greene, *Judges and Judging* (Toronto: Lorimer, 1990), p. 18.

[89]Cases that had begun prior to 1949 could be decided after that date.

[90]However, there appear to be limits to how far the federal government may move in this direction. See Peter H. Russell, *The Judiciary in Canada* (Toronto: McGraw Hill, 1987), pp. 68–9.

[91]See, for example, *Vriend v. Alberta* [1998] 1 S.C.R. 493.

[92]*Re Constitution of Canada* (1981) 125 D.L.R. (3d); *Reference re Secession of Quebec* [1998] 2 S.C.R. 217.

[93]See, for example, Peter H. Russell and Jacob S. Ziegel, "Mulroney's Judicial Appointments and the New Judicial Advisory Committees," *University of Toronto Law Journal* 41 (Winter 1991): 4-37; and F.L. Morton, "Debate: Should there be Confirmation Hearings for Supreme Court Judges? Affirmative," *Law Politics and the Judicial Process in Canada*, ed. F.L. Morton, 2nd ed. (Calgary: University of Calgary Press), pp. 117-19.

[94]See, Richard Simeon, *Federal-Provincial Diplomacy: The Making of Recent Policy in Canada* (Toronto: University of Toronto Press, 1972).

[95]Donald Smiley, "An Outsider's Observations of Federal-Provincial Relations among Consenting Adults," *Confrontation and Collaboration: Intergovernmental Relations in Canada Today*, ed. Richard Simeon (Toronto: Institute of Public Administration of Canada, 1979), pp. 105-13.

[96]See *Black v. Law Society of Alberta* [1989] 1 S.C.R. 591.

[97]Hogg, *Constitutional Law in Canada*, p. 43-11.

[98]Constitution Act 1867, Section 91(3).

[99]Ibid., Section 92(2 and 9).

[100]The classic definition is John Stuart Mill's in book 5, chapter 3, of *Principles of Political Economy,* 7th ed., ed. William J. Ashley (London: Longmans, Green, and Co., 1909). Mill's definition has been accepted by the courts. The leading case is *Bank of Toronto v. Lambe* (1887) 12 App. Cas. 575. See Hogg, *Constitutional Law of Canada,* p. 30-6.

[101]*Atlantic Smoke Shops v. Conlon* [1943] A.C. 550.

[102]Only the federal government may levy taxes on offshore resources (as territorial waters are a federal responsibility). The federal government owns and taxes natural resources in the territories. Territories are granted taxation powers under federal statute, and a number of indigenous communities have taxation powers granted them by federal and provincial statutes. Municipalities have access to property taxes and some other miscellaneous taxation via provincial legislation.

[103]Constitution Act 1867, Sections 91(4) and 92(3).

[104]Some provinces have introduced balanced-budget legislation; in some cases, they apply this to municipalities.

[105]*Attorney General of Canada v. Attorney General of Ontario* [1937] A.C. 327.

[106]Hogg, *Constitutional Law of Canada,* p. 11-16.

[107]Ibid., pp. 34-5, 43-5 n. 17.

[108]*Andrews v. Law Society of British Columbia* [1989] 1 S.C.R. 143.

[109]*Lavoie v. Canada* [2002] 1 S.C.R. 769.

[110]Constitution Act 1982, Section 3.

[111]*Reference re Prov. Electoral Boundaries [Sask.]* [1991] 2 S.C.R. 158.

[112]Ibid., 173. Even greater deviations are permitted in sparsely populated northern constituencies.

[113]*Sauvé v. Canada (Chief Electoral Officer)* [2002] 3 S.C.R. 519.

[114]Russell, *The Judiciary in Canada,* pp. 255–56.

[115]See, for example, *Reference Re Alberta Statutes*, [1938] 2 S.C.R. 100, p. 133.

[116]The statutory bills of rights are still important because they extend to matters not covered by the Charter of Rights. For example, the federal Bill of Rights covers property rights.

[117]Some of the Charter's rights contain their own similar qualifiers. Thus the document's "legal rights" preclude only "unreasonable" searches and seizures (Sec. 8) and "cruel and unusual" punishments (Sec. 12) and guarantee that no one will be deprived of "life, liberty, and security of the person ... except in accordance with the principles of fundamental justice" (Sec. 7).

[118]Tsvi Kahana, "The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the Charter," *Canadian Public Administration* 44 (Fall 2001): 255-91.

[119]*Andrews v. Law Society of British Columbia* [1989] 1 S.C.R. 143.

[120]*Egan and Nesbitt v. Canada* [1995] 2 S.C.R. 513.

[121]Alexander Alvaro, "Why Property Rights Were Excluded from the Canadian Charter of Rights and Freedoms," *Canadian Journal of Political Science* 24, no. 2 (1991): 309-29.

[122]For example, Section 23, which gives parents who were educated anywhere in Canada in the minority official language (i.e., French) the right to educate their children in this language, was designed to overcome Quebec's restriction of English-language schooling to children whose parents had been educated in English in Quebec.

[123]The constitutional text simply requires that statutes be "printed and published" in both languages, but the Supreme Court has ruled that it requires "enactment" in both languages as well. *Attorney General of Quebec v. Blaikie* [1979] 2 S.C.R. 1016 at 1022.

[124]*Vriend v. Alberta* [1998] 1 S.C.R. 493.

[125]*Eldridge v. British Columbia (Attorney General)* [1997] 3 S.C.R. 624.

[126]Hogg, *Constitutional Law of* Canada, p. 4-22. Hogg's "regional veto statute" does not have an official short title. Its long title is**:** An Act Respecting Constitutional Amendments, S.C. 1996, c. 1.

[127]Six of the eight constitutional amendments since 1982 have used the Section 43 mechanism. See Hogg, *Constitutional Law of Canada,* p. 1-7 n. 28.

[128]Some believe that the "citizens' constitution" has changed the Canadian consciousness in such a way as to render the "top-down" accommodation of elites an illegitimate method of substantive constitutional change. See Russell, *Constitutional Odyssey*; and Alan C. Cairns, *Disruptions: Constitutional Struggles from the Charter to Meech Lake* (Toronto: McLelland and Stewart, 1991).

[129]Hogg lists eight amendments since 1982: 6 using Section 43 (1987, Nfld; 1993, NB; 1993, PEI; 1997, Nfld; 1997, QC; 1998, Nfld), 1 using Section 38 (1983) and 1 using Section 44 (1985). Hogg, *Constitutional Law of Canada,* p. 1-7 n. 28.

[130]*Reference re Secession of Quebec* [1998] 2 S.C.R. 217.

[131]These items include the division of the national debt, borders, the rights of aboriginals, and the protection of minorities.