

## CANADA

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The division of powers and responsibilities in Canada reflects the country's unique history, social and economic makeup, and institutional design. Canada is one of the world's most decentralized federations. This is a result both of the federal character of Canadian society and of the design of its institutions. "Functional" criteria for the division of powers are deeply affected by alternative criteria rooted in the tensions between Canadian nation-building, Quebec nation-building, and "province-building" elsewhere. Canada is also an example of "dual" (or "divided") federalism rather than "shared" (or "integrated") federalism.<sup>i</sup> The logic is based on separate lists of powers, but the reality is considerable de facto concurrency as well as a considerable degree of de facto asymmetry. The result is a high degree of autonomy for the provincial governments combined with a high degree of interdependence among them. Intergovernmental cooperation and coordination are necessary if the needs of citizens are to be met effectively. Canada combines high levels of cooperation in specific areas of public policy with considerable competition among governments in other areas.

The division of responsibilities in Canadian federalism has adapted to changing economic, social, and political circumstances as well as policy agendas. This has been accomplished through limited constitutional amendments, judicial interpretation, fiscal arrangements, and intergovernmental negotiations. Nevertheless, debates about "who does what" in areas such as social, environmental, and economic policy remain on the intergovernmental agenda. As we discuss, it is perhaps in its capacity to adapt to political and social changes in Quebec that the federation has been somewhat less successful. A common view of Canadian federalism in Quebec is that it is a rigid system, unable to adapt to the specific reality of the sole political community in North America with a francophone majority. Other fundamental issues on the current agenda concern the potential powers and responsibilities of Aboriginal authorities and local governments.

This chapter explores these issues. After a brief description of the main geographic and demographic characteristics of the country, we discuss the confederation settlement and the division of powers set out in the British North America Act, 1867.<sup>ii</sup> We then trace the evolution of the division of powers through the major social and political changes in Canada over time before examining the contemporary division of roles and responsibilities. We conclude with a discussion of the continuing agenda and an assessment of Canada's capacity to adjust its division of powers to changing social and economic conditions.

### THE CONSTITUTION IN HISTORICAL-CULTURAL CONTEXT

#### *The Canadian Context: Geography, Economy, and Society*

The economic, social, cultural, and political environment in which Canadian federalism operates has changed enormously since 1867. At Confederation,<sup>iii</sup> Canada consisted of just four provinces – Ontario, Quebec, Nova Scotia, and New Brunswick. Soon afterwards, Prince Edward Island (PEI) joined. Westward settlement led to the creation of Manitoba in 1870, the admission of British Columbia in 1871, and of the prairie provinces of Alberta and Saskatchewan in 1905. Newfoundland (now named Newfoundland and Labrador), on the Atlantic coast, was the last province to join, in 1949.

Canada now comprises ten provinces. In addition, there are three territories established under federal legislation, covering the vast, resource-rich, but thinly populated Canadian North. These territories – the Northwest Territories, Yukon, and the recently created Nunavut – have been moving closer to provincial status. Their administrations are now responsible to locally elected leaders, and they are today full partners in the machinery of Canadian intergovernmental relations. Nunavut, established in 1999, has a public government that is elected just like the governments of the other two territories; however, because its population (26,000) is overwhelmingly Inuit, it constitutes Canada's most advanced example of Aboriginal government.

In 1867 Canada had a population of just 3.5 million; today it numbers over 31 million.<sup>iv</sup> Canada remains thinly populated, with its people heavily concentrated close to the southern border with the United States. The country's vast spaces remain a major part of Canadians' sense of place, but Canada is one of the world's most urbanized countries. Almost 80 percent of the population resides in cities of 10,000 or more, and 51 percent is concentrated in the four largest metropolitan regions of Montreal, Toronto, the Calgary-Edmonton corridor, and Vancouver. Canada's provinces vary enormously in their size, wealth, and economic and demographic bases. Their populations range from just over 135,000 in PEI to 11.4 and 7.2 million in the two largest provinces, Ontario and Quebec, respectively. Disparities in income are also large, though not as great as in some other federations. Per capita gross provincial product (GPP) in 2003 varied from US\$22,170 in PEI to US\$42,657 in Alberta. Ontario and Quebec had GPPs of US\$31,825 and US\$27,600, respectively.<sup>v</sup> More important, the structure of the provincial economies varies considerably. Manufacturing and finance are concentrated in Ontario and Quebec. Despite important recent progress towards economic diversification, the other provinces remain heavily dependent on natural resources – fishing and forestry in the Atlantic provinces and British Columbia, agriculture in the prairie provinces, and oil and gas mainly in Alberta but also in other provinces. These regional differences have important implications for the division of powers. Regional disparities place fiscal “equalization,” or sharing, high on the agenda. Differences in the economic bases of the provinces mean that it is often difficult to articulate a single national economic policy. The differences also generate provincial ambitions to manage their own development.

The other central feature of the Canadian economy is its increasing integration into the global and North American economies.<sup>vi</sup> Canada is the most export-dependent of the G-8 economies. More than 80 percent of all its exports go to the United States. In recent years, north-south trade has been increasing much faster than has east-west trade within Canada. These continental linkages have been cemented by the North American Free Trade Agreement (NAFTA). Continental integration has important implications for the division of powers, in that the provinces have been concerned that the provisions of international trade treaties would be imposed upon them without sufficient consultation or, indeed, provide a pretext for federal law to override provincial jurisdiction. Thus far these issues have been resolved cooperatively and without significant constitutional challenge, but if further integration requires deeper regulatory harmonization, issues of jurisdictional balance between the federal and provincial orders of government will continue to arise.

Canadian society has also changed fundamentally since Confederation. In the Canada of 1867 the fundamental divisions were language and religion, then seen in terms of Protestantism and Roman Catholicism.<sup>vii</sup> Section 93 of the Constitution guarantees rights to denominational education for Roman Catholic and Protestant minorities in certain provinces. The vast

proportion of Canadian residents, other than Aboriginal peoples, were of British or French descent. Nation-building and westward settlement were soon to add many others to the mix – Eastern Europeans to settle the Prairies, postwar immigrants from Europe to fuel Canada’s rapid growth following the Second World War, and so on. As a result, Canadian social life now revolves around four axes: two are old but remain highly salient; two are new. They interact in complex ways, and all of them have important implications for the roles and responsibilities of Canadian governments.

The first, and most fundamental, axis is language. Canada is a bi-national<sup>viii</sup> federation. Just under one-quarter of the Canadian population is francophone. They are highly concentrated in the Province of Quebec, where they constitute 85 percent of the population and share a deep sense of a Québécois national identity. This sense of nationhood has had a profound impact on the evolution of the division of powers in Canada. In 1867 it meant that the new country was to be federal. Later, it meant that Quebec vigorously opposed extension of the federal government’s powers. This resistance was especially strong in the years following the Second World War, when Ottawa was taking the lead in constructing the Canadian welfare state. Following the “Quiet Revolution” of the 1960s,<sup>ix</sup> Quebec governments sought to extend provincial jurisdiction in many areas in order to pursue a nation-building project, and it called for constitutional amendments that would recognize its “distinct status” within the federation.<sup>x</sup> The *Parti Québécois*, seeking an independent Quebec linked in an association or partnership with the rest of Canada, was formed in 1968 and first took office in 1976. Since then, it has alternated in Quebec government with the Liberal party and conducted two referenda on Quebec sovereignty (in 1980 and 1995). It lost both but, in 1995, only by a margin of a few thousand votes. Thus it is not surprising that “Quebec” and “national unity” have been at the heart of all Canadian debates about the division of powers and that pressure from Quebec has been the primary driver of a decentralized federation. For Quebec nationalists, the fundamental story of the division of powers is the struggle against domination by the federal government and the struggle for greater Quebec autonomy; for most scholars outside Quebec, it is a story of increasing provincial autonomy and decentralization.

The second axis is that of region. In the rest of Canada, provincial identities and distinctive regional interests remain strong. Residents of smaller provinces in the east and west often feel subordinate to the large provinces of Quebec and Ontario and the weight they have in the federal government.<sup>xi</sup> Strong provincial loyalties, combined with competent, assertive provincial governments, have also worked to strengthen the decentralist character of Canada’s federation.

Language and regional differences are the fundamental Canadian divisions that Canada’s federal system was designed to manage. The third and fourth axes cut across this territorial conception of the country. The first is “multiculturalism.” In recent decades, Canada has had the world’s highest rates of legal immigration. Its diversity is especially evident in major cities – Toronto, Montreal, and Vancouver – where the majority of newcomers settle.<sup>xii</sup> This too has implications for the division of powers, in terms of the sharing of responsibilities for immigration and for programs aimed at integrating new residents.

Finally, Canada’s original inhabitants, the Aboriginal peoples, are now central to the policy agenda.<sup>xiii</sup> Their struggle for land claims and self-government, and their distressed economic and social conditions, raise two sets of issues for the division of powers. First, as Aboriginal governments have taken on more responsibilities, there is the question of what powers they will exercise and how these will relate to existing federal and provincial orders of

government. Second, there is the question of how federal and provincial governments will divide the responsibility for services to Aboriginal peoples, a majority of whom now live “off-reserve,” usually in large cities.<sup>xiv</sup>

### *The Institutional Context*

The dynamics of Canadian federalism are greatly influenced by the political framework within which federalism is embedded. First, Canada is a parliamentary federation. Like Australia, both orders of government – federal and provincial - follow the British pattern of responsible parliamentary government. The legislative and executive branches are tightly bound together. Power is highly concentrated in the hands of the executive, especially the first ministers (the federal prime minister and the provincial premiers). This largely accounts for one of the primary features of intergovernmental relations; namely, “executive federalism,” in which the primary contacts are among first ministers, cabinet members, and senior officials representing the executive rather than the legislative function as such.

Second, Canada has a weak Senate. It has formal authority that is almost co-equal with that of the elected House of Commons, and it provides for representation by region (though not by province). However, its role as a representative of provincial populations or governments within the federal legislature is fundamentally vitiated by the fact that senators are appointed by the prime minister. Canadians have discussed a number of reform proposals (using the German Bundesrat and the American and Australian Senates as possible models), but the present-day reality is that the Senate plays little role in working out the balance between federal and provincial governments.

Third, Canada is a constitutional federation. The division of powers is enforced by the courts, which can deem federal or provincial legislation ultra vires of the powers assigned to them. In Canada the courts (until 1949 the British Judicial Committee of the Privy Council; since then, the Supreme Court of Canada) have had a notable impact on the division powers. In the view of some,<sup>xv</sup> they turned the centralist constitution of 1867 almost on its head, weakening federal powers and strengthening the provinces. Another aspect of constitutional federalism is the amending formula. Because the 1867 Constitution was an act of the British Parliament, only the United Kingdom could amend it. Soon the convention was established that Britain would do this only upon Canada’s request. However, until 1982, Canadians could not agree on a domestic procedure. The 1982 amending formula sets a high bar for constitutional amendment: those relating to the division of powers require the assent of the federal Parliament together with the legislatures of at least seven provinces comprising at least 50 percent of Canada’s population. The rigidity of these procedures, past and present, has meant that Canadian governments have generally sought non-constitutional ways to adapt the Constitution to new needs.

Some other features of the larger political system also underpin the image of Canada’s model of federalism as “divided” in contrast to, for example, German integrated federalism. Federal and provincial parties, even those of the same name, are distinct from each other. The national party system is highly regionalized, with, in recent years, only one party able to claim “national” status, and the official Opposition consisting largely of regionally based parties.<sup>xvi</sup> Political leadership is also fragmented, with little mobility of ministers or officials between the two orders of government. This contributes to a pattern of intergovernmental relations that has been labelled “federal-provincial diplomacy.”<sup>xvii</sup> The image of the division of powers that sometimes emerges is not so much one of eleven governments<sup>xviii</sup> that are collectively

responsible for managing a single polity but, rather, of eleven governing bodies, each using the fulsome juridical and fiscal resources they have available in order to pursue rival state-building projects. This, as we now discuss, can be traced to the very origins of the Canadian federation.

## THE CONSTITUTIONAL DISTRIBUTION OF POWERS

### *The Confederation Settlement*

The federation created in 1867 was both a “coming together” and a “coming apart,” a dynamic that has continued until the present.<sup>xix</sup> The “coming apart” stemmed from the political crisis in the pre-1867 Province of “Canada,” now the Provinces of Quebec and Ontario. After the British defeated the French in North America, the fundamental question remained: how would the two linguistic communities co-exist? A British commissioner, Lord Durham, reporting in 1838,<sup>xx</sup> found in Canada “two nations warring in the bosom of a single state.” His solution was a classic example of British colonialism: put the two linguistic groups together into a single political unit - Canada - and soon enough the French would assimilate to British values. As it turned out, the united province of Canada quickly took on the character of a consociational democracy with parallel French and English administrations. The rapid growth of anglophone “Canada West,” and the resulting demand for “representation by population” generated deep conflict, the best solution to which appeared to be the reversion to a predominantly English-speaking Ontario and a predominantly French-speaking Quebec. Federation made this possible.<sup>xxi</sup>

The “coming together” focused on the other British colonies along the Atlantic coast (Nova Scotia, New Brunswick, PEI, and Newfoundland) and far away on the Pacific, British Columbia. They faced two sets of problems. With the British embrace of free trade, they were economically vulnerable, and with a self-confident United States to the south, fresh from its civil war, they were politically and militarily vulnerable as well. Coming together could address both these concerns.

These considerations had major implications for the design of the Canadian federation and its division of powers. First, it was not the product of a revolution. Unlike that of the United States, Canada’s Constitution does not institutionalize a coherent theory of limited government, checks and balances, and the separation of powers; instead, it was a pragmatic response to a set of political, economic, and security challenges. Rather than repudiating the British model, it embraces it; Canada was to have a constitution “similar in principle” to that of the United Kingdom. Moreover, Canada was not to become fully independent in 1867; it would remain a “Dominion” of the United Kingdom and would not – until passage of the Statute of Westminster, 1931 – have a fully independent status as an international actor. Hence, the Constitution does not clearly delineate powers with respect to foreign affairs.

Second, two competing visions were in play in the debates preceding the creation of the federation. For the leading English-speaking advocate of Confederation, Sir John A. Macdonald, the goal was to create the institutional basis for a new British North American country that would eventually stretch from the Atlantic to the Pacific. His preferred model was unitary. The new national government should be endowed with all the instruments necessary to pursue this nation-building project. But Macdonald’s chief ally in the Confederation debates was Sir Georges Etienne Cartier of Quebec, for whom the new system would be one in which, endowed with its own province, the French-speaking community would be able to preserve, protect, and advance its values. If Canada were to be a country, it would have to provide the

political space for the francophone minority to exercise autonomy. He was supported by some leaders in Upper Canada, who also called for provincial sovereignty in local affairs, and by leaders of the other British North American colonies, especially in Nova Scotia, who feared that they might be submerged in the new union.<sup>xxii</sup>

### *The Division of Powers, 1867*

The division of powers in the BNA Act reflects the tensions of the Confederation settlement. On one view, it establishes a system so centralized that K.C. Wheare could conceive of it as only “quasi-federal.”<sup>xxiii</sup> The colonial model of British relations with Canada was replicated in the design of the new federation. The Senate represented the regions, but its members were appointed by the prime minister. The governor general would appoint provincial lieutenant-governors, who would have the power to “reserve” provincial legislation for consideration by the central government.<sup>xxiv</sup> Section 90 gives the federal government the unilateral power to “disallow” (invalidate) any provincial legislation; Section 92(10)(C) gives it the power to “declare” provincial works within exclusive federal jurisdiction. More generally, the opening words of Section 91, delineating federal legislative powers, states that the federal government has the power to “make laws for the Peace, Order and good Government of Canada” on any matter not exclusively assigned to the provinces – a powerful residuary clause in the hands of Ottawa.

Other sections of the Constitution Act, 1867, however, point in a more federalist direction. The “Peace, Order and good Government” clause is qualified by a list of specific powers set out in Section 91. This is followed by a list of subjects (Section 92) in which the provinces are empowered “exclusively” to make laws. This is the watertight-compartments model of Canadian federalism. In addition, the list of provincial powers includes two residual clauses – Section 92(13) “property and civil rights in the province,” and Section 92(16) “Generally all matters of a merely local or private nature in the province.”

However, the courts did not permit the “Peace, Order and good Government” clause to be a plenary allocation of power to the federal government; rather, it has been interpreted more narrowly, in two branches. First, it can justify federal action in a national emergency. Second, it can support federal action on issues of “national concern.”<sup>xxv</sup> These include matters not contemplated at the time of Confederation (such as aviation and broadcasting) or that assumed national dimensions with the passage of time. The key criterion for justifying federal jurisdiction is provincial “inability”; that is, that the issue is beyond the ability of the provincial power to deal with it. Even then, “it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the constitution.”<sup>xxvi</sup>

In its enumerated powers, the federal government is given the basic powers necessary to pursue continental nation-building. These include the regulation of trade and commerce, defence, navigation and shipping, banking, currency, and other such matters. The federal government is given exclusive jurisdiction over “Indians and Land reserved for Indians,” and responsibility for criminal law. Provinces are allocated responsibilities that may have seemed unimportant at the time but that were later to become of cardinal importance. These powers, set out in Section 92, include management of public lands, establishment of hospitals and “eleemosynary” institutions, local government, the incorporation of companies, and the

administration of justice. Section 93 gives provinces exclusive control over education (subject to some rights for religious minorities).

Only two areas were originally designated explicitly as concurrent: immigration and agriculture, both of which were critical to the developmental agenda of nineteenth-century Canada.<sup>xxvii</sup> Implicit concurrency was found in the combination of (1) federal responsibility for the criminal law and for penitentiaries and (2) provincial responsibility for the administration of justice and “public and reformatory prisons.”

Four other elements of the initial architecture are important. First, each order of government is to legislate, finance, and deliver the policies and programs in its assigned areas of jurisdiction. Second, the Constitution allocates to both orders of government not only responsibilities for specific policy areas but also policy instruments – taxation, spending, and regulation – that can be applied across a wide variety of policy areas. Both these characteristics had important implications for the evolution of roles and responsibilities because, as new issues of public concern (such as the environment) arose, both orders of government could find the constitutional means to become involved. Third, there is no constitutional provision for the delegation of legislative powers between governments, although the courts have permitted the delegation of administration and other devices, such as incorporation of other jurisdictions’ law by reference or the passage of mirror legislation. Fourth, the Constitution Act, 1867, did not include a bill of rights. While there would be debate about which government had jurisdictional responsibility in any field, there was no sense of any limitation on government in general until the Canadian Charter of Rights and Freedoms was enacted in 1982.<sup>xxviii</sup> In some ways, the Charter of Rights has transformed Canadian political culture, shifting the perspective from the Constitution as a contract between governments to the Constitution as a contract between people and their governments. It has dramatically increased the role of the courts in Canadian policy making. However, on federalism issues, the Supreme Court of Canada has in recent years emphasized a balance between federal and provincial powers, and it has been careful to avoid judgments that would swing the balance in one direction or the other.

## EVOLUTION OF THE DIVISION OF POWERS

For Canada as for other countries, federalism is a process, not a fixed state. In its first few decades the federal government vigorously exercised its powers over the provinces, including the powers of reservation and disallowance. But a powerful set of factors began to gather that would substantially erode federal dominance.

First, a drawn out economic recession in the late nineteenth century eroded the new federal government’s legitimacy. Second, strong provincial leaders emerged to challenge Ottawa. The first interprovincial conference, organized by the premiers of Quebec and Ontario, Honoré Mercier and Oliver Mowat, respectively, was convened in 1887 and mounted a strong attack on Ottawa. Mercier and Mowat articulated what came to be known as the “compact theory,” which was based on a confederal image of Canada.<sup>xxix</sup> Third, over time matters clearly within provincial jurisdiction, such as hydroelectric power, mining, and the nascent welfare state, became more important on the national agenda. Fourth, judicial decisions began to chip away at federal powers. The federal government’s powers over trade and commerce were interpreted narrowly. Its power in international affairs was reduced by a decision that stated that, while Ottawa has the power to negotiate treaties, their implementation must conform to the division of powers in Sections 91 and 92.<sup>xxx</sup> Canadian scholars debate the relative significance of these

influences. Some focus on the role of the courts; others focus on the evolution of the society and the economy.<sup>xxxii</sup> Both were important, but it is interesting to note that, while the draconian powers of disallowance and reservation remain in the Constitution, they have become constitutional dead letters.

By the 1920s Canadian federalism had come to look more like a classic dualist system. Then came the Great Depression of the 1930s. Only a strong federal government, many believed, could alleviate the crisis. The “dead hand” of the Constitution and the activism of distant courts came under increased criticism. The conclusions of Harold Laski concerning the “obsolescence of federalism” in the age of modern capitalism resonated strongly among many Canadians.<sup>xxxiii</sup>

After the Second World War, Canada, like all other Western democracies, embarked on the construction of the Keynesian welfare state, marrying a stronger government role in economic management with increased provision of income security and social services. Most responsibility for the building blocks of the welfare state lay in provincial hands; however, at the time, only the federal government had the resources and the pan-Canadian viewpoint to bring it about. One response to this dilemma was to transfer major new responsibilities to the federal government. Through constitutional amendment, this was done with respect to unemployment insurance and pensions. But provinces – led by Ontario, British Columbia, and Quebec – blocked any further transfer of responsibilities. Canada would develop the welfare state within its existing constitutional framework. The key instrument was a federal power that is only implicit in the Constitution – the “spending power.”<sup>xxxiii</sup> This means that Ottawa can transfer funds to provinces for matters within provincial jurisdiction, such as health and welfare, and that it can attach conditions to these funds. Expansion of the spending power through a wide variety of “shared cost programs” was the vehicle through which de facto concurrency was greatly expanded as Ottawa became deeply involved in social policy. As a result, the “difficulties of divided jurisdiction” and the “complexities of federalism” affected the timing and means of delivering the modern welfare state rather than its basic substance.<sup>xxxiv</sup>

By the 1970s the world was changing again. The welfare state project was essentially complete; now debts, deficits, and economic volatility called into question the expanded role of all governments. Moreover, a new set of regionally divisive issues had come to dominate Canada’s political agenda. Quebec’s “Quiet Revolution” in the 1960s generated intense pressure for decentralization and a weakening of federal conditions on provincial programs. The “energy wars” of the 1970s precipitated by the global spike in oil prices generated severe interprovincial and federal-provincial conflict with respect to jurisdiction over pricing, taxing, management, and regulation of energy-related resources.<sup>xxxv</sup>

By the turn of the century, two contradictory pressures were at work. On the one hand, the fiscal crisis of the state and the concomitant rise of neoliberal ideas about limiting the role of government were leading to “fiscally induced decentralization,” best reflected in the dramatic reductions of federal transfers to the provinces following the 1995 federal budget. On the other hand, many Canadians worried about the implications of these developments for country-wide standards in social policy. The intergovernmental response was the 1999 Social Union Framework Agreement, which attempted to set out broad pan-Canadian objectives and an intergovernmental consensus that would enable them to be achieved collectively.<sup>xxxvi</sup>

This discussion underlines some important features of the Canadian division of powers. First, no reading of the Constitution Act, 1867, describes what different Canadian governments actually do. Some powers assigned in 1867 have disappeared as significant issues; others have

assumed vastly greater importance. New areas of governmental concern, such as the environment, have arisen, about which the initial division of powers provides little guidance.

This suggests that a discussion of the contemporary division of powers should not begin with the words of the Constitution; instead, it should start with what governments do across the major areas of public policy, and it should ask what constitutional mandates, levers, instruments, and fiscal powers governments have at their disposal. This approach guides our analysis of who does what in the federal system today as well as our assessment of the adaptability of the existing division of powers in light of changing circumstances.

## THE CONTEMPORARY DIVISION OF POWERS: DYNAMICS AND ISSUES

As we have shown, the evolution of the division of powers has resulted in two strong orders of government in Canada, each with broad authority to act. In few areas do they act independently. In most policy areas, federal and provincial governments have to coordinate their actions, if only because many contemporary policy issues cut across the jurisdictional boundaries originally defined in the Constitution.

### *Economic and Fiscal Policies*

The federal government, through its exclusive responsibilities for currency, banking, trade, and tariffs, together with its spending power, controls most macroeconomic policy tools. Monetary policy is also in federal hands, through the arm's-length Bank of Canada. The federal government is also active in economic development by way of numerous programs supporting large and small businesses through tax incentives, regional development programs, research and development funds, trade promotion, and labour-market development and training programs. Provinces also play an important economic role through their tax powers, control over natural resources, ownership of public lands, and regulation of private economic activities, including financial markets. There is no federal equivalent of the U.S. Securities and Exchange Commission.<sup>xxxvii</sup> Provinces are active in promoting their own industrial development. Following a recent devolution (largely in an attempt to demonstrate federal flexibility following the close referendum result of 1995), provinces are now primarily responsible for labour market training.<sup>xxxviii</sup>

In fiscal terms, Canada is, together with Switzerland, perhaps the world's most decentralized federation. The federal share of total direct public spending is 37 percent, compared with 61 percent in the United States, 53 percent in Australia, and 41 percent in Germany. Canadian provinces are largely self-financing. Transfers from the federal government constitute only 13 percent of provincial revenues (though this varies greatly by province), compared with 30 percent in the United States and 41 percent in Australia. In Canada, the high-water mark in the federal share of taxing and spending occurred during the postwar period, with the construction of the welfare state. Since then provincial and local shares have increased steadily, a result not so much of declining federal spending as of rapid provincial growth.

### *Taxation*

Ottawa has the power to raise revenues “by any mode or system of taxation,” including customs and excise duties, which, in 1867, were the largest revenue source. Provinces may impose direct

taxes as well as property taxes (which are delegated to local government), licence fees, and royalties from public ownership of resources. Today, both federal and provincial governments now rely on much the same revenue base. Both raise personal and corporate income taxes, and both levy sales taxes on the same taxpayers.

Such joint occupancy of the major tax fields could easily generate high levels of conflict, but there is considerable cooperation in this area, achieved largely through a set of tax collection agreements. Under these, the federal government, through the Canada Revenue Agency<sup>xxxix</sup> (CRA), acts as the common income tax collector for all provinces except Quebec (and Ontario and Alberta, with regard to the corporate income tax). Federal conditions under the agreements have been steadily relaxed to allow provinces more freedom to design their own policies. Nonetheless, some provinces have recently debated the merits of departing from the arrangement in order to further enhance their autonomy. In general, however, these agreements have allowed a high degree of coordination within an otherwise highly decentralized revenue-raising regime, and they have greatly simplified the paper burden facing taxpayers.

### *Fiscal Transfers*

Despite Canada's decentralized tax structure, an important gap remains between the expenditure responsibilities of the provinces and their revenues. As noted, Canadian provinces vary widely in their wealth and per capita income and, hence, in their capacity to raise the revenues necessary to fulfill their constitutional responsibilities. Intergovernmental fiscal transfers are thus an important part of the economic union and a key to understanding the dynamics of the division of powers in Canada today.

There are two major sources of fiscal transfers in Canada, both based on the federal spending power. Equalization payments were first introduced in 1957, and the principle was entrenched in Section 36 of the Constitution Act, 1982. They are designed to permit each province to provide "comparable levels of services, with comparable levels of taxation." Under this program, the ability of each province to raise revenues across all important revenue sources is assessed. Using a complex formula that has been renegotiated several times, the federal government then makes unconditional payments to the poorer provinces in order to narrow the disparities. The sum involved was estimated at Cdn\$10.9 billion in 2005-06. In 2005-06 eight of the ten provinces were recipients of equalization payments, with only Alberta and Ontario not receiving such payments from the federal treasury.<sup>xi</sup> Equalization is the fundamental instrument through which the Canadian federation reconciles equality and autonomy. Payments per capita ranged from \$82 in Saskatchewan to \$1,996 in Prince Edward Island.

The second mechanism for redistribution uses the spending power to make federal payments in policy areas under provincial jurisdiction. Conditional grants were a critical instrument through which Canada built its welfare state. Working, for the most part, cooperatively with the provinces and often building on provincial innovations,<sup>xii</sup> the federal government used this power to create a wide variety of "shared cost programs." For example, in the 1960s universal, publicly provided health care was offered through the Medicare program, initially 50 percent funded by Ottawa. In the same period Ottawa assumed half the costs of provincially provided postsecondary education and welfare.<sup>xiii</sup>

In recent years, shared-cost programs have become much less prominent as instruments of public policy. This is partly due to provincial opposition to what were often considered federal intrusions into their areas of jurisdiction as well as to a perceived federal tendency to

introduce and then modify such programs without sufficient consultation. It is also partly a result of the fiscal crisis of the early 1990s, which led Ottawa to substantially reduce its transfers to the provinces. The trend, in contrast to what has been happening in the United States, has been towards attaching fewer, rather than more, conditions to them. In 1995 several shared-cost programs were combined into the Canada Health and Social Transfer (CHST). With the CHST the federal government imposed a new block-funding formula with fewer strings attached, but it also dramatically lowered the overall amount of transfers. There has been a partial recovery of funding levels since, especially for health care, and, in 2004, the CHST was replaced by two separate funds: the Canada Health Transfer and the Canada Social Transfer.

One result of these changes is that Canadian provinces are now much less dependent on federal transfers than are comparable units in other federations, and this trend is increasing.<sup>xliii</sup> There are big variations: Ottawa provides about 39 percent of revenue in Newfoundland but only 7 percent and 8 percent in Alberta and British Columbia, respectively. For the provinces and the territories as a whole, the downside of the overall reduction of the federal government's share in social expenditures is a constant struggle to cover the growing costs of social programs, most significantly the universal health care system.

More generally, Canadians are debating whether there may be a basic mismatch between provincial responsibilities and their revenue-raising abilities. Is there a "fiscal imbalance?" The provinces, led by Quebec, argue that current pressures for greater spending fall largely on areas of provincial jurisdiction, that collectively provinces are running substantial deficits while Ottawa has a surplus, and that federal revenues are more elastic than the government lets on. Consequently, a readjustment of the allocation of resources is necessary.<sup>xliv</sup> The federal government replies that its fiscal position is also precarious, especially in light of new responsibilities related to security and other matters, that provincial fiscal difficulties are a result of their tax cutting as well as expenditure increases, and that, in any case, there is no constitutional restriction on provinces' increasing their own taxes.<sup>xlv</sup> This is a highly politicized debate, and there exists no independent agency (such as the Finance and Fiscal Commission in South Africa) to make recommendations on these matters.

## *Trade*

Another important dimension of economic policy involves the power to regulate trade and commerce. The federal Parliament has the power to make laws in relation to "the regulation of trade and commerce." Despite this broad language, Peter Hogg notes that, as a result of judicial interpretation, Canada's "trade and commerce clause turned out to be much more limited than its American cousin," despite almost identical wording.<sup>xlvi</sup> This restrictive interpretation resulted from the overlap of trade and commerce with the power of provinces over "property and civil rights" (Section 92[13]) and the desire to avoid a broad interpretation that could open the door to sweeping federal powers. The courts thus made the economically dubious but politically important distinction between interprovincial and international trade (federal) and intraprovincial trade (provincial).

The limited coordination among provinces in regulating commercial activities created important non-tariff barriers to interprovincial trade. These became an issue in constitutional negotiations in the 1980s. Should Section 121, which guarantees free movement of "all articles of growth, produce or manufacture" across provinces, be strengthened? Should Ottawa gain greater powers to regulate the economy? or is strengthening the "Canadian economic union" an

intergovernmental matter? The general trend towards trade liberalization, notably NAFTA, led to the 1995 intergovernmental Canadian Agreement on Internal Trade, the first concerted attempt by federal and provincial authorities to reduce internal trade barriers. Its purpose was to limit barriers in specific areas and to prevent the erection of new ones, and it was written in a language similar to that used in international trade agreements.<sup>xlvi</sup> This is an important example of the achievement of “country-wide” policy through collaborative intergovernmental action.

### *Natural Resources*

Section 109 of the Constitution and the 1930 Natural Resources Transfer Agreements (NRTA) give provinces ownership over the extraction and commercialization of natural resources, except for offshore resources and uranium mining. The latter was brought under federal jurisdiction through the federal declaratory power.<sup>xlvi</sup> Otherwise, Sections 92 and 92A of the Constitution Act, 1867, give provinces exclusive legislative jurisdiction over resources and the production and distribution of energy. The federal government does regulate international and interprovincial movement of energy through the National Energy Board.

In the midst of the 1970s energy crisis the federal government sought to use its powers over interprovincial and international trade to strengthen the national dimension of energy policies and to protect the industrial core of the country from skyrocketing energy prices. It eventually led to the National Energy Program, which fostered Canadian ownership of extraction and distribution industries, established price controls to maintain a “made-in-Canada” oil price, increased federal taxation over extraction, imposed an export tax on natural gas, and created a national strategy for the development of Arctic and offshore energy resources, areas that lie under federal jurisdiction. The program, which was seen in central Canada as a national measure to respond to a national economic crisis, is still deeply resented in Alberta. It has been largely dismantled.<sup>xli</sup>

The federal government is responsible for the management of seacoast fisheries. The dramatic decline in fish stocks on the Atlantic and Pacific coasts in recent years has spurred much criticism of federal management, and some provinces, notably British Columbia and Newfoundland and Labrador, seek more control over this essential part of their local economies. Conflicts over resource ownership have also pitted local residents and provincial governments against Aboriginal nations, which have made important judicial gains in recent years over the recognition of their title to the land and traditional use of resources such as fisheries and forests. The federal government often plays a dual role of arbitrator and interested party in such conflicts.

### *Agriculture*

Along with immigration, agriculture was the only other domain defined as explicitly concurrent in 1867 (pensions were added in 1951). Both were key to Western expansion.<sup>1</sup> Concurrency remains the order of the day. National agricultural marketing boards that practise supply management are matters of both federal and provincial jurisdiction, the two orders effectively delegating their respective powers (over interprovincial and intraprovincial trade and commerce) to the marketing boards. Some provinces have sought greater control over export marketing of agricultural products, such as wheat, which is now managed through the federal Canadian Wheat Board.<sup>li</sup>

## *Social Policy*

In 1867 governments had little role to play in social policy. Such matters were considered best left to local charitable organizations and churches. All of that changed with the advent of the modern welfare state. Provinces have exclusive jurisdiction for the provision and administration of primary, secondary, and postsecondary education; health and welfare; and workers' compensation. As a result, programs and credentials are defined provincially, although there is increasing coordination among provinces to seek greater harmonization of programs.

The federal government is, however, deeply involved in this. First, as a result of constitutional amendments in 1940, 1951, and 1964, it provides the basic income-security programs of insurance against unemployment and old age through Employment Insurance, Old Age Security, and the Canada Pension Plan (CPP). In the case of pensions, the amendments provided that, in any conflict between provincial and federal laws, the former would prevail. This made it possible for Quebec to establish its own pension plan, the *Régie des rentes*, an important element of asymmetry. The Canada and Quebec plans are closely coordinated and Ottawa may not amend the CPP without provincial consent.

The federal government plays an important role in other areas of social policy, mostly through fiscal transfers and the use of its spending power to fund health, postsecondary education, and social services. It also directly supports research and student aid in the postsecondary education sector as well as bilingual education at the elementary and secondary level. It plays a direct role in health care through, for example, the testing and licensing of food and drugs, and through support for research and infrastructure. It also plays a direct (though contested) role in training and employment.<sup>lii</sup> Plus Ottawa provides some social benefits through the tax system.

There are two reasons for Ottawa's involvement in social policy. First is the financial story already discussed. At the end of the Second World War Ottawa had gained important fiscal leverage, while the provinces could not support the costs associated with the development of social programs. Second, the construction of a Canada-wide welfare system was closely associated with the development of a pan-Canadian citizenship regime.<sup>liii</sup> The development of universal social programs equally accessible to all Canadians was as much a nation-building project (i.e., Canada as a nation) as it was a socioeconomic one, hence the term "social union." This has created a complex dynamic where many - especially in "progressive" social movements - see Ottawa as the "guardian" of the social union. This conception, however, has little resonance in Quebec, where social citizenship is focused on the province, and where there are competing ideas of nationality (i.e., Québécois and Canadian).

As noted above, major federal transfers in this area are now covered under the Canada Health Transfer, which provides block funding for health care, and the Canada Social Transfer, which supports postsecondary education and social services. Unlike previous transfer formulas, both allow provinces great flexibility in program design. The only substantial conditions that remain - apart from a requirement not to discriminate against citizens from other provinces - are the "national standards" defined in the Canada Health Act.<sup>liv</sup>

The federal government's use of the spending power in areas of social policy remains controversial. Provinces have objected to Ottawa initiating programs without providing adequate consultation as well as changing funding formulae without providing sufficient notice. For its part, the federal government is concerned with ensuring relative uniformity across the country in terms of access to social programs as well as with political visibility and credit for programs that

it helps fund.

The 1999 Social Union Framework Agreement (SUFA) was an attempt to address these problems. The federal government agreed not to start new, shared-cost programs in areas of provincial jurisdiction without the prior agreement of a majority of the provinces, and it also agreed to give notice before making any changes in financial arrangements. However, its power to spend in areas of provincial jurisdiction was confirmed. Quebec did not sign the agreement, arguing that it should have the right to “opt out” of shared programs without financial penalty. In recent years, ongoing federal-provincial tensions regarding funding for health care suggest that the agreement has had limited impact.<sup>lv</sup>

### *Environmental Policies*

Environmental concerns cut across a wide variety of policy areas; as a result, a de facto regime of concurrency has been established. The courts have confirmed that the environment is not a single matter falling entirely within either federal or provincial jurisdiction.<sup>lvi</sup> The provinces derive their authority over environmental matters mainly from their powers over property, natural resources, local government, and public lands. The federal government can act using its jurisdiction over criminal law, navigation, fisheries, interprovincial and international trade, and, more broadly, its general power to legislate for “Peace, Order and good Government.”

Both federal and provincial governments established environmental departments in the late 1960s and early 1970s, creating a competitive dynamic in which both orders of government legislated and in which programs often overlapped, contradicted, or complemented each other. In the early 1990s talks of harmonization began under the auspices of an intergovernmental body, the Canadian Council of Ministers of the Environment (CCME). The Canada-Wide Accord on Environmental Harmonization was signed in 1998 by the federal government and all the provinces and territories, except Quebec. It emphasizes consensus-based decision making and single-window delivery of services together with a subsidiarity principle whereby the government closest to the problem is in charge of policy regulation and implementation. Many critics of the accord, especially environmental activists, suggest it amounts to an effective devolution of federal responsibilities to the provinces.<sup>lvii</sup>

### *Local Government*

Local and municipal governments play increasingly important roles in the lives of Canadians. Policing, zoning and land-use planning, education, recreation, and many other services are designed and delivered locally. Municipal responsibilities with respect to welfare, housing, and the like have also increased in recent years as a result of “downloading” on the part of provincial governments. Yet municipalities have very limited independent powers. Indeed, it has been suggested that, if Canada is one of the most decentralized federations in terms of the relationship between the federal government and the provinces, it is also one of the most centralized in terms of the relationship between provinces and local governments. Under the Constitution, local governments are creatures of provincial governments, which define their boundaries, powers, method of election, and revenues. Direct relations between federal and local governments are limited, in contrast, for example, to the situation in the United States. Municipalities have a limited capacity to raise their own revenues, depending heavily on property taxes and licence fees.

In recent years, there has been discussion about whether municipalities should play a greater role in Canadian governance. The need for urban planning, transit, housing, and other services is growing rapidly, as are calls for a “new deal” for cities, giving them greater jurisdictional and fiscal autonomy, more financial support from senior governments, and a place at the intergovernmental bargaining table.<sup>lviii</sup>

### *Citizenship and Immigration*

Citizenship and control over international boundaries falls under federal jurisdiction, while immigration is constitutionally defined as concurrent. Soon after Confederation, immigration law was essentially occupied by the federal government; provinces made no use of their authority in this area until recently. Quebec was the first province to negotiate agreements with the federal government, and this occurred in the 1970s.<sup>lix</sup> The Canada-Quebec Accord of 1991 gives Quebec powers over the selection of immigrants and control of its own settlement services, while the federal government retains responsibility for defining immigrant categories, setting targeted levels of immigration, and enforcing immigration law.<sup>lx</sup> Recently, more limited agreements have been signed with other provinces for funding and responsibility for settlement services as well as for a greater say in planning immigrant selection so as to attract business immigrants.

Municipal governments in the major urban centres, where most immigrants settle, are seeking support from Ottawa in order to respond to the growing needs of an ethnically, culturally, and linguistically diverse population. They need programs designed to help support settlement, language training, and labour-market orientation. In addition, a wide range of “multiculturalism” policies are now adopted by provinces and municipalities to facilitate the integration of newcomers to the host society.<sup>lxi</sup>

### *Aboriginal Peoples*

Despite their presence for centuries before French and English settlers came to create what is now Canada, Aboriginal peoples were not part of the negotiations leading to Confederation. The federal government inherited the fiduciary obligation of the British Crown, maintaining jurisdiction over “Indians, and lands reserved for Indians” (Section 91[24]).<sup>lxii</sup> For most of the last century federal policy regarding Aboriginal peoples alternated between benign neglect and proactive attempts at assimilation. Provinces have generally been reluctant to take over any responsibilities for Aboriginal peoples or to deliver social programs on reserves and in other Aboriginal communities. Aboriginal treaties and titles to land were seen to potentially conflict with provincial jurisdiction over public lands and natural resources.<sup>lxiii</sup>

The recognition of Aboriginal and treaty rights in the Constitution Act, 1982 (Section 35) represents an important historical shift in policy and legal structure, and it had a significant impact on Canadian federalism. While the extent and meaning of Aboriginal rights are not specified in this section, the Supreme Court has interpreted it broadly, giving a strong basis to Aboriginal claims to land and self-government. The main result has been to force the two orders of government to negotiate land claims and self-government agreements, especially in areas where no treaties had been signed previously (in British Columbia, northern Quebec and Labrador, and the northern territories) in order to avoid costly lawsuits and uncertainty about rights to resources.

While federalism has long been seen as a limit to the development of Aboriginal autonomy, given the federal-provincial “power grid” over the exercise of sovereignty, it is now increasingly seen as part of the solution for Aboriginal peoples.<sup>lxiv</sup> The creation of an Aboriginal order of government with constitutionally entrenched powers was part of the failed Charlottetown Accord of 1992, and it was also a core recommendation of the Royal Commission on Aboriginal Peoples’ final report, released in 1996. Self-government agreements, protected under Section 35, may be the first step towards a form of “treaty federalism” between Aboriginal peoples and the federal and provincial governments.<sup>lxv</sup>

### *International Affairs*

International relations, defence, and security all fall within federal jurisdiction. The federal government has sole power to engage Canada in international treaties and agreements, to represent Canadian interest in international forums, and to define foreign policy. While the federal government has exclusive jurisdiction over negotiation and ratification of international agreements and treaties, this authority does not extend to the implementation of provisions falling into provincial jurisdictions.<sup>lxvi</sup> In sharp contrast to federations such as those in force in Australia and the United States, where treaties, once ratified, bind all governments, a famous Canadian judgment held: “While the ship of state now sails on larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original structure” (*A.-G. Can v. A.-G. Ont.* [1937] A.C. 326). This important limitation has forced the federal government to consult the provinces extensively during negotiation of international agreements in areas that affect them, especially trade and the environment.

However, Ottawa has stopped short of sharing its executive power to negotiate and to sign international treaties. This has created some tension between the provinces and the federal government. The former have called for a more formal role in defining Canada’s position prior to international negotiations, while the latter is reticent to embark on a process that would limit its flexibility when negotiating with foreign states.<sup>lxvii</sup> And Quebec has argued for more autonomy as an international actor in affairs linked to provincial jurisdiction.

### *Criminal Law and Administration of Justice*

The criminal law is firmly within federal jurisdiction. The court system is also federally integrated, with federally appointed superior and appeal courts and the Supreme Court of Canada at the apex. This is perhaps the most important area in which, today, the United States and Australia may be considered to be more decentralized than Canada. The criminal law power also provides Ottawa with policy instruments (criminal sanctions) that strengthen its involvement in the environment and other regulatory arenas.

Again, however, the provinces are also involved in criminal law. They are responsible for the “administration of justice in the province,” which includes prosecution services, management of the court system, and legal aid. Provinces establish and appoint the lowest level of courts and may establish penalties, including prison sentences, for violations of provincial law. Policing is also shared. Some provinces – Ontario, Quebec, Newfoundland – have their own provincial police forces, and larger cities have their own municipal forces that are regulated provincially. There is as well a national police force, the Royal Canadian Mounted Police (RCMP), which is responsible for enforcing federal law. In addition, most provinces have

contracted with the RCMP to provide local policing in their provinces. In this role, the RCMP is accountable to the provincial government.

### *Language Policies*

The Constitution Act, 1867, provides some important guarantees of minority language rights as well as denominational rights to religious education in Quebec and Ontario. Both Ottawa and the provinces have the power to legislate in this contentious area. The federal government passed the Official Languages Act, 1969, which was designed to provide for French-language services in federal institutions across the country and to ensure greater equality of French and English in the makeup and operation of the federal public service.<sup>lxviii</sup> The first legislative enactment of the “indépendantiste” Parti Québécois government was Bill 101, which was designed to strengthen the francophone character of Quebec through regulations with respect to language use in the workplace, public signage, and access to education. Bill 101 has been subject to intense litigation, but its central provisions – such as requiring immigrant children to attend French-language schools – have remained intact. Canada’s most bilingual province, New Brunswick, has also legislated to provide for equality of the two official languages, a commitment now enshrined in the Constitution.

### *Marriage and Divorce*

Another historical anomaly in the original Constitution is that “marriage and divorce” are federal (Section 91[26]), while the “solemnization of marriage in the province” is provincial (Section 92[12]). This division of responsibility might have remained a historical artifact until the recent emergence of the issue of “same-sex marriage.” Could Ottawa decide to permit such marriages but the provinces refuse to perform them, or vice versa? In the event, such conflict may be averted because the superior courts in the provinces and the Supreme Court of Canada, invoking the Charter of Rights, have ruled that both federal and provincial marriage law must allow same-sex unions.

## EXPLANATION AND EVALUATION

No single factor or variable can explain the evolution or the current pattern of the Canadian division of powers. Institutional, cultural, and economic influences interact in complex ways. Several factors at the level of institutions have been critical. They include the basic structure of watertight compartments in the division of powers, despite the de facto concurrency; the Westminster pattern of parliamentary government, which places negotiation between strong executives at the centre of the process; the institutional design of the federal Parliament, which leads many regional interests to express themselves through strong provincial governments; and the role of the courts, which in the early years undercut federal power and later focused on balancing federal and provincial powers. But major shifts in the roles of federal and provincial governments have occurred with very little institutional change.

The second set of factors emphasizes the changing policy agenda, to which governing structures must adapt. In the early years the focus was on building a transcontinental Canada, with Ottawa in the lead; then the emphasis on resource-led development shifted the focus back to the provinces; the Great Depression, postwar reconstruction, and development of the postwar

welfare state shifted the pendulum back to Ottawa; and today, the question of how to respond to globalization and North American integration as well as to a knowledge-based economy poses new challenges for how governments share responsibilities. Despite criticism from many quarters, the Canadian evidence seems to suggest that the division of powers provides enough flexibility to permit the country to respond to the changing policy agenda.

But how the institutions have worked and how the policy agendas have been addressed depends most fundamentally on the regionally and linguistically divided Canadian society. Quebec, with its francophone majority and sense of national identity, has from the start provided the strongest pressure for a decentralized Canada – in earlier periods resisting expansion of federal power and intrusion into provincial jurisdiction, in later periods arguing for greater provincial legislative and fiscal powers and for asymmetrical federalism. On many occasions, and on many issues, it has been joined by other self-confident provincial governments seeking the economic and social levers to develop their own societies. Relatively homogenous federations such as Germany and Australia have reacted to the contemporary policy agenda very differently from Canada, for the most part with an increase in central authority. As new issues have emerged, Canada's provinces have claimed both the legitimacy and the capacity to respond; there has been no easy assumption that a “country-wide” problem requires Ottawa-determined responses; rather, the dominant view is that effective responses require various combinations of provincial initiative, interprovincial cooperation, and federal leadership. This is a direct consequence of the strong sense of national identity in Quebec.

## CONCLUSION

Despite its original rigidity, the division of powers in Canada turned out to be highly permissive. Each order of government is endowed with a wide range of substantive responsibilities and policy instruments that enables it to act in almost any it chooses. Canada thus has two powerful orders of government. Its original, highly centralized division of powers has evolved - through judicial interpretation and political developments – into a much more decentralized arrangement.<sup>lxix</sup> The limited asymmetry set out in the Constitution has also evolved into a high degree of functional asymmetry. The difficulty of finding consensus on constitutional amendment has meant that no fundamental reorganization of powers and responsibilities in light of changing circumstances has been possible; rather, adjustments have been the result of intergovernmental bargaining and informal agreements. The result is neither clear nor coherent, but it is workable.

### *A Continuing Agenda*

Nevertheless, Canadian federalism does confront a number of issues that pose important questions about how the division of powers should operate in the future. These issues include:

- The roles, responsibilities, and financial resources of local governments and their place in the Canadian system of multilevel federal governance.
- The roles, responsibilities, and financial resources of Aboriginal governments and their place in the Canadian system.
- How to ensure that federal and provincial responsibilities are best suited to promote Canada's effective participation in the global and North American economies as well as in a

knowledge-based economy. Does the implication that cities and provinces are best adapted to meeting these challenges suggest a diminution of federal powers or does adaptation require a more national response led by the federal government?

- How to ensure a proper fit between the roles and responsibilities of each order of government and the financial resources available to it.
- How to ensure the ability of the system to respond effectively when unexpected shocks occur. What is certain is that the system has been, and will be, assaulted by extraordinary events – security emergencies, natural catastrophes, health emergencies (such as the 2003 SARS outbreak), and others. A major challenge facing all governments in Canada is to devise institutions and processes to manage such events effectively.

Adapting the federation and its division of powers to the complex reality of a multinational state remains, as we have discussed throughout this chapter, a fundamental challenge facing Canadians. It means that purely “functional,” efficiency-based arguments about who should do what have relatively little influence. Those are important questions, but they can be answered only through the filter of Canada’s federal institutions and federal society.

In this interplay between federal society and federal state, public opinion plays complex roles. Survey evidence shows that Canadians identify strongly and positively both with their federal and with their provincial governments. Few want a fundamental transfer of powers either from Ottawa to the provinces or vice versa, though on balance and with important regional variations, pluralities trust provincial governments more than Ottawa to deliver services important to them, believe the federal government has too much power, and opt for more provincial powers.<sup>lxx</sup> Overwhelmingly, however, Canadians call for more intergovernmental cooperation to meet their needs, and reject the competitive, adversarial relationship that seems embedded in the institutional structure. Whatever the issue at hand, Canadians are telling their governments: we do not want to be hamstrung by the constitutional division of powers or by intergovernmental rivalries. They are saying, individually or collectively, get on with it.-- nothing in the formal division of powers stands in the way of that.

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<sup>i</sup> By dual (or divided) federalism we mean a federation in which powers are divided into separate federal and provincial lists, and in which each government is responsible both for designing and implementing its own policy. Shared (or integrated) federations are characterized by high levels of concurrency, provincial implementation of national framework laws, and a close link between national and provincial politics. See Richard Simeon, "Considerations on the Design of Federations," *SA Public Law* 13, 2 (June 1998): 42-72.

<sup>ii</sup> It is now relabelled the Constitution Act, 1867.

<sup>iii</sup> This is the term that, since 1867, Canada has consistently used to label its system, even though it does not conform to modern usage, which defines a confederation as a system in which the central government is created by and responsible to the constituent units.

<sup>iv</sup> Statistics in this section are from Statistics Canada, *A Profile of Canadian Population: Where We Live*, March 2002, <[www.statcan.ca:8096/bsolc/English/bsolc?catno=96F0030X2001003](http://www.statcan.ca:8096/bsolc/English/bsolc?catno=96F0030X2001003)> (26 May 2005).

<sup>v</sup> John R. Baldwin, Mark Brown, and Jean-Pierre Maynard, "Interprovincial Differences in GDP Per Capita, Labour Productivity, and Work Intensity, 1990-2003." Statistics Canada, 2005 <[www.statcan.ca/english/research/11-624-MIE/11-624-MIE2005011.pdf](http://www.statcan.ca/english/research/11-624-MIE/11-624-MIE2005011.pdf)> (accessed 26 May 2005).

<sup>vi</sup> For a discussion, see Richard Simeon, "Important? Yes. Transformative? No. North American Integration and Canadian Federalism," *The Impact of Global and Regional Integration on Federal Systems: A Comparative Analysis*, Harvey Lazar, Hamish Telford, and Ronald Watts, eds. (Kingston, ON: Institute of Intergovernmental Relations and McGill-Queen's University Press, 2003), pp. 125-171.

<sup>vii</sup> In the nineteenth century religion was at least as salient as was language in Canadian politics; it is much less so today.

<sup>viii</sup> If not tri-national, Aboriginal leaders would argue. While the multinational character of the Canadian federation remains politically ambiguous, as it is not clearly recognized in its institutional design, in the literature it is increasingly considered to be a sociological fact. See Michael Keating, *Plurinational Democracy: Stateless Nations in a Post-Sovereignty Era* (Oxford: Oxford University Press, 2001); and Alain-G. Gagnon and James Tully, eds., *Multinational Democracies* (Cambridge: Cambridge University Press, 2001).

<sup>ix</sup> Among the many works on the Quiet Revolution, perhaps the best is Kenneth McRoberts and Dale Posgate,

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*Quebec: Social Change and Political Crisis* (Toronto: McClelland and Stewart, 1980).

<sup>x</sup> For a discussion of the evolution of Quebec's political relations with Canada, see Kenneth McRoberts, *Misconceiving Canada: The Struggle for National Unity* (Toronto: Oxford University Press, 1997).

<sup>xi</sup> Some prefer to use the term "national" government; however, this is inconsistent with the bi-national view of the country.

<sup>xii</sup> In 2001, 48 percent of immigrants settled in Toronto, 15 percent in Vancouver, and 12 percent in Montreal. Immigrants (people not born in Canada) constituted 44 percent of Toronto's Census Metropolitan Area population, making it the most multicultural city in the OECD, before Miami and Sydney. See Statistics Canada, *Canada's Ethnocultural Portrait: The Changing Mosaic*, February 2003, <<http://www.geodepot2.statcan.ca>> (accessed 26 May 2005).

<sup>xiii</sup> 1.3 million persons reported Aboriginal ancestry in 2001, up 22 percent from the 1996 census. See Statistics Canada, *Aboriginal Peoples of Canada: A Demographic Profile*, March 2003, <[www.statcan.ca:8096/bsolc/English/bolsc?catno=97F0011X](http://www.statcan.ca:8096/bsolc/English/bolsc?catno=97F0011X)> (accessed 26 May 2005).

<sup>xiv</sup> See Frances Abele and Michael Prince, "Aboriginal Governance and Canadian Federalism: A To-Do List for Canada," *New Trends in Canadian Federalism*, eds. F. Rocher and M. Smith, 2nd ed. (Peterborough: Broadview Press, 2003), pp. 135-165.

<sup>xv</sup> This view was particularly prevalent among English-Canadian constitutional scholars in the 1930s, when the courts struck down federal legislation aimed at meeting the problems of the Great Depression. See F.R. Scott, *Essays on the Constitution: Aspects of Canadian Law and Politics* (Toronto: University of Toronto Press, 1977).

<sup>xvi</sup> The 2003 unification of two such parties, the western-based Alliance Party of Canada and the historically powerful Progressive Conservative Party (now largely confined to Atlantic Canada) is designed to try to overcome this problem. The new party is called the Conservative Party of Canada.

<sup>xvii</sup> Richard Simeon, *Federal-Provincial Diplomacy: The Making of Recent Policy in Canada* (Toronto: Toronto University Press, 1972).

<sup>xviii</sup> Ottawa plus ten provinces, or fourteen when the three northern territories are included.

<sup>xix</sup> See Daniel J. Elazar, *Federalism: An Overview* (Pretoria, South Africa: Human Sciences Research Council, 1996); and Alfred Stepan, *Arguing Comparative Politics* (New York: Oxford University Press, 2001), pp. 320-323.

<sup>xx</sup> Gerald M. Craig, *Lord Durham's Report* (Toronto: McClelland and Stewart, 1963).

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<sup>xxi</sup> John Meisel, Guy Rocher, and Arthur Silver, *As I Recall, si je me souviens bien: Historical Perspectives*

(Montreal: Institute for Research on Public Policy, 1999), pp. 45-53.

<sup>xxii</sup> Ibid., 58-63.

<sup>xxiii</sup> K.C. Wheare, *Federal Government*, 4th ed. (London: Oxford University Press, 1963), p. 19.

<sup>xxiv</sup> True to its British constitutional roots, Canada is a constitutional monarchy. The Queen of Great Britain and the Commonwealth is the formal head of state. On the advice of the Government of Canada, she appoints the Canadian governor general and the lieutenant-governors of the provinces. The Crown in Canada is thus divided between a “federal” and a “provincial” Crown. The governor general and lieutenants-governors exercise all the prerogatives of the monarchy in Canada, but they do so only “by and with the advice” of the elected Cabinet.

<sup>xxv</sup> Peter Hogg, *Constitutional Law of Canada* (Scarborough, ON: Carswell, 2000), p. 431.

<sup>xxvi</sup> *R. v. Crown Zellerbach* [1988] 1 S.C.R. 401.

<sup>xxvii</sup> Two other areas were added later. See below.

<sup>xxviii</sup> Without the support of the government and legislature of Quebec. However, the Charter remains the law in that province, and many parts of it have broad public support.

<sup>xxix</sup> See E.R. Black, *Divided Loyalties: Canadian Concepts of Federalism* (Montreal and Kingston: McGill-Queen’s University Press, 1975).

<sup>xxx</sup> In a famous phrase, the British judge Lord Haldane ruled that, “while [Canada’s] ship of state now sails on larger ventures and into foreign waters, she retains the watertight compartments which were an essential part of her original structure” (*A.-G. Can. v. A.-G. Ont.* [1937] A.C. 326).

<sup>xxxi</sup> For a review of these arguments, see Alan Cairns, “The Judicial Committee and its Critics,” *Canadian Journal of Political Science* 4, 3 (September 1971): 301-345

<sup>xxxii</sup> Harold J. Laski, “The Obsolescence of Federalism,” *New Republic* 3 (May 1939): 367-369

<sup>xxxiii</sup> See Hogg, *Constitutional Law of Canada*, pp. 163-168; Douglas Brown, “Fiscal Federalism: The New Equilibrium between Equity and Efficiency,” *Canadian Federalism: Performance, Effectiveness and Legitimacy*, Herman Bakvis and Grace Skogstad, eds. (Toronto: Oxford University Press, 2002), pp. 59-85.

<sup>xxxiv</sup> See Keith G. Banting, *The Welfare State and Canadian Federalism*, 2nd ed. (Montreal and Kingston: McGill-Queen’s University Press, 1987).

<sup>xxxv</sup> G. Bruce Doern and Glen Toner, *The Politics of Energy* (Toronto: Methuen: 1985)

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<sup>xxxvi</sup> The agreement is discussed in the following section under social policies.

<sup>xxxvii</sup> Many believe that, in an age of globalization and stricter controls over corporate behaviour, Canada should create a single national regulator; however, several provinces, including Quebec and Alberta, are opposed. See William D. Coleman, “Federalism and Financial Services,” in Bakvis and Skogstad, *Canadian Federalism*, pp. 178-196, at p. 191.

<sup>xxxviii</sup> See Herman Bakvis, “Checkerboard Federalism? Labour Market Development Policy in Canada,” in Bakvis and Skogstad, *Canadian Federalism*, pp. 197-219.

<sup>xxxix</sup> Until 2004, Canada Customs and Revenue Agency (CCRA).

<sup>xl</sup> The amounts per person ranged from Cdn\$1,195 in Newfoundland, to Cdn\$628 in Quebec to Cdn\$118 in British Columbia, which only recently became eligible for equalization payments. See Department of Finance Canada, Equalization Program (Federal Transfers to Provinces and Territories, March 2005).

<[www.fin.gc.ca/FEDPROV/eqpe.html](http://www.fin.gc.ca/FEDPROV/eqpe.html)> (accessed 26 May 2005).

<sup>xli</sup> The most dramatic case is the introduction of universal Medicare, pioneered by Saskatchewan.

<sup>xlii</sup> More than 100 shared-cost programs, most of them temporary in nature and designed for specific purposes, have been created since the Second World War. See Hogg, *Constitutional Law of Canada*, p. 157.

<sup>xliii</sup> In 1970 more than 20 percent of provincial revenue came from Ottawa; by 1999, it was 13 percent.

<sup>xliv</sup> See the 2001 report of Quebec’s *Commission sur le déséquilibre fiscal* (better known as the Séguin Commission) at <<http://www.desequilibrefiscal.gouv.qc.ca/en/document/publication.htm>> (26 May 2004).

<sup>xlv</sup> For a summary of Canada’s recent debates on fiscal federalism, see Centre for Research and Information on Canada, *Sharing the Wealth: For the Federation* (Ottawa: CRIC, 2002). For equalization, see pp. 9-13.

<sup>xlvi</sup> See Hogg, *Constitutional Law of Canada*, p. 434. The main case in Canada creating this restrictive interpretation is *Citizens’ Insurance Co. v. Parsons* [1881] 7 App. Cas. 96.

<sup>xlvii</sup> Opinions vary about the impact of the agreement. For a discussion, see Mark R. MacDonald, “The Agreement on Internal Trade: Trade-Offs for Economic Union and Federalism,” in Bakvis and Skogstad, *Canadian Federalism*, 138-158.

<sup>xlviii</sup> The federal “declaratory power” is another of the broad federal powers in the 1867 Constitution, and it permits the federal government to declare any “works and undertakings” to be to the general advantage of Canada. This too has fallen into disuse.

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<sup>xlix</sup> One response was the addition of Section 92A to the Constitution in 1982 in order to strengthen and clarify provincial jurisdiction over natural resources.

<sup>l</sup> Vernon Fowke, *Canadian Agricultural Policy: The Historical Pattern* (Toronto: University of Toronto Press, 1946), chap. 6.

<sup>li</sup> Under the “declaratory power,” grain elevators had been declared works for the general advantage of Canada.

<sup>lii</sup> The federal jurisdiction over training is contested by provinces, which claim it falls under their jurisdiction over education. In recent years the federal government has entered into a number of agreements with provinces to transfer responsibilities for training and employment programs to provincial governments.

<sup>liii</sup> For a discussion, see Keith Banting, *The Welfare State and Canadian Federalism* (Kingston: McGill-Queen’s University Press, 1987); and Jane Jenson and Susan Philips, “Regime Shift: New Citizenship Practices in Canada,” *International Journal of Canadian Studies* 14, 2 (June 1996): 111-135.

<sup>liv</sup> In the United States 100 percent of federal transfers to the states have significant conditions attached; in Canada the figure is 43.6 percent, but even here, conditions are minimal. See Ronald L. Watts, *The Spending Power in Federal Systems: A Comparative Study* (Kingston: Institute of Intergovernmental Relations, 1999), p. 56.

<sup>lv</sup> SUFA has generated a large literature, both pro and con. Two themes predominate. One is that SUFA has failed to strengthen the Canadian social union and national standards; the other is that, like previous federal initiatives, it undercuts the aspirations of Quebec. For a discussion, see Alain-G. Gagnon and Hugh. Segal, eds., *The Canadian Social Union without Quebec* (Montreal: Institute for Research on Public Policy, 2000).

<sup>lvi</sup> Although recent decisions have significantly increased the federal government’s jurisdiction. See, especially, *R. v. Hydro-Quebec* [1997] 1 S.C.R. 213. For a discussion, see Mark Winfield, “Environmental Policy and Federalism,” in Bakvis and Skogstad, *Canadian Federalism*, 124-137.

<sup>lvii</sup> See Winfield, “Environmental Policy and Federalism,” p. 133.

<sup>lviii</sup> See, for example, Federation of Canadian Municipalities, *Early Warnings: Will Canadian Cities Compete?* February 2002, <[www.fin.gc.ca/FEDPROV/eqpe.html](http://www.fin.gc.ca/FEDPROV/eqpe.html)> (accessed 26 May 2005). For a discussion, see F. Leslie Seidle, ed., *The Federal Role in Canada’s Cities: Four Policy Perspectives*. CPRN Discussion Paper F-27 (Ottawa: Canadian Policy Research Networks, 2002).

<sup>lix</sup> The Meech Lake Accord of 1987 would have entrenched the Cullen-Couture Agreement of 1979.

<sup>lx</sup> Under the Canada-Quebec Accord, 1991, Quebec has sole responsibility for selecting all independent immigrants

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and refugees abroad who wish to settle in Quebec. People who are selected receive a "Certificat de sélection du Québec," and the province advises the visa office responsible. Canadian Immigration and Citizenship (CIC) then issues immigrant visas to those who have met all other requirements, such as medical, security, and criminality checks. For more details on the agreement, see <<http://www.cic.gc.ca/english/press/fed-prov2004/bkgr-agreements.html>>. (Accessed November 2004).

<sup>lxi</sup> See Martin Papillon, "Immigration, Diversity and Social Inclusion in Canada's Cities," *The Federal Role in Canada's Cities: Four Policy Perspectives*, F. Leslie Seidle, ed., CPRN Discussion Paper No. F|27. (Ottawa: Canadian Policy Research Network, 2002).

<sup>lxii</sup> The term "Indian" applies to the majority of indigenous peoples in Canada but not all (i.e., not to Inuit or to Métis). Also, while the term "Indian" still has meaning in law, it is no longer the preferred collective term of the indigenous peoples themselves, who use "Aboriginal," "indigenous," "First Nations," or indeed the names of their specific nations, such as Mohawk, Mi'kmaq, Nisga'a, and so on.

<sup>lxiii</sup> J. Anthony Long, "Federalism and Ethnic Self-Determination: Native Indians in Canada," *Journal of Commonwealth and Comparative Politics* 29, 2 (June 1989), p. 193.

<sup>lxiv</sup> For the former point of view, see Radha Jhappan, "The Federal-Provincial Power-Grid and Aboriginal Self-Government," *New Trends in Canadian Federalism*, F. Rocher and M. Smith, eds. (Peterborough: Broadview, 1995), pp. 11-85.

<sup>lxv</sup> David Hawkes, "Indigenous Peoples: Self-Government and Intergovernmental Relations," *International Social Science Journal* 167, 1 (January 2001): 153-161; James (Sakej) Henderson, "Empowering Treaty Federalism," *Saskatchewan Law Review* 58, 3 (September 1994), p.242.

<sup>lxvi</sup> The Judicial Committee of the Privy Council made this crucial distinction in 1937 in the case of *Attorney General for Canada v. Attorney General for Ontario*, also known as the Labour Conventions case.

<sup>lxvii</sup> See Grace Skogstad, "International Trade Policy and Canadian Federalism: A Constructive Tension?" in Bakvis and Skogstad, *Canadian Federalism*, p. 159.

<sup>lxviii</sup> For a discussion, see Louis Balthazar, "History and Language Policy," *Languages and the State: The Law of Politics and Identity*, ed. David Schneiderman (Cowansville: Editions Yvon Blais, 1991), p. 84; and McRoberts, *Misconceiving Canada*, chap. 2.

<sup>lxix</sup> Many observers from Quebec would argue that the opposite is occurring, with increasing involvement of the

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federal government in provincial jurisdictions such as health care, postsecondary education, and childcare.

<sup>lxx</sup> See John Kincaid, Andrew Parkin, Richard L. Cole, and Alejandro Rodriguez, “Public Opinion on Federalism in Canada, Mexico, and the United States in 2003,” *Publius: The Journal of Federalism* 33, 3 (Summer 2003): 145-162. See also Fred Cutler and Matthew Mendelsohn, “What Kind of Federalism do Canadians (Outside Quebec) Want?” *Policy Options* 22, 8 (October 2001): 23-29.