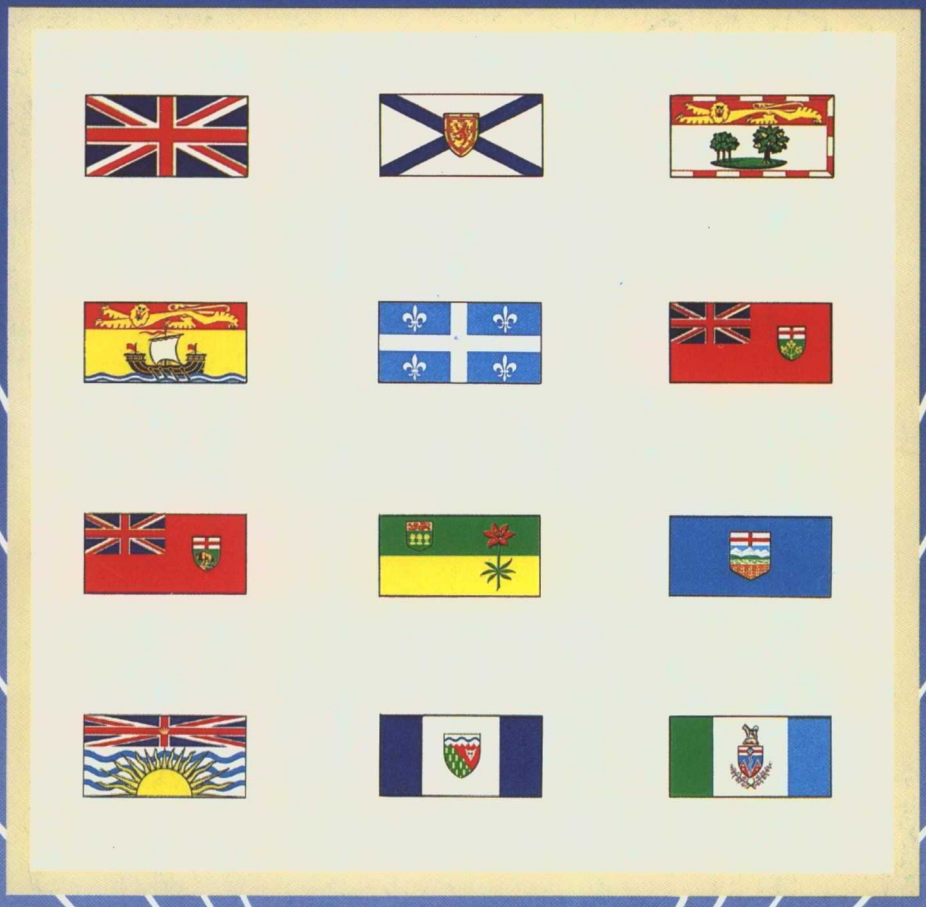
The Task Force on Canadian Unity

Coming To Terms
The Words of the Debate



The Task Force on Canadian Unity

Coming To Terms
The Words of the Debate

February, 1979

Available in Canada through

Authorized Bookstore Agents
and other bookstores

or by mail from

Canadian Government Publishing Centre
Supply and Services Canada
Hull, Quebec, Canada K1A 0S9

Catalogue No. CP 32-35/1979-1 Canada: $3.50
ISBN 0-660-10042-8 Other Countries: $4.20

Price subject to change without notice

Ottawa 1979
Reprinted 1980, 1982

Designer: George Nitefor

To His Excellency the
Governor General in Council

MAY IT PLEASE YOUR EXCELLENCY

We the Commissioners appointed under Part I of the Inquiries Act by Order in Council of 5 July 1977, P.C. 1977-1910, 24 August 1977, P.C. 1977-2361 and P.C. 1977-2362, and 28 February 1978, P.C. 1978-573,

BEG LEAVE TO SUBMIT TO YOUR EXCELLENCY THIS REPORT

Jean-Luc Pepin, Co-chairman

John P. Robarts, Co-chairman

Members:

Gérald Beaudoin

Richard Cashin

Solange Chaput-Rolland

Muriel Kovitz

Ross Marks

Ronald L. Watts

Contents

Preface

The Task Force on Canadian Unity was appointed by the prime minister of Canada in July 1977 to "support, encourage and publicize the efforts of the general public... and contribute [its own] initiatives and views... to the general awareness with regard to Canadian unity." From September 1977 to April 1978, it held more than fifteen major public hearings from one end of the country to the other, and scores of regional and private meetings to allow Canadians to express their views and to speak their minds.

From the very beginning, we, the Commissioners, witnessed, as we had expected, an intense debate on the past, the present and the future of our country. We soon witnessed also, even more than we had anticipated, the fact that communications were hampered in that debate because people were often giving quite different meanings to the key-words they were using.

That was not, of course, the only reason. There are in Canada, needless to say, real conflicts, major differences of philosophies, attitudes, objectives and interests among groups and regions. But conflict over words adds substantially to these differences, heightens controversy and undermines the search for solutions.

How many "communities," how many "societies," how many "states" does Canada have? Does the word "nation" convey the same message to French Canadians as it does to other Canadians? Is it important to distinguish between a confederation and a federation? Are language rights individual or collective rights; are they fundamental rights? What are the differences between devolution, delegation, decentralization and deconcentration of power? Is a plebiscite the same as a referendum?

That semantics can cause confusion is hardly news, either in Canada or elsewhere. Because words and concepts are alive, their meanings often vary in time and place, especially the political and social ones. Furthermore, in moments of intense political debate, when the future of societies is at stake, individuals and groups tend to bias meanings, consciously or otherwise, in their favour. Recognizing this danger and the need for greater clarification in the use of language, Unesco and the International Social Science Council are now making a concerted effort to focus the meanings of important social terms.

The proper use of words is indeed crucial to fruitful discussion. And we of the Task Force found ourselves awash in a sea of divergent usages.

If the Task Force was to serve a useful purpose, and if we all, as Canadians, were to progress towards solutions of our problems, it stood to reason that we had to seek a greater consensus on the meaning of key-words and concepts, or at least to reach a better understanding of how some groups of persons use them. These key-words had to be made as clear as possible to as broad an audience as possible.

We found no existing set of definitions that came close to doing what we felt had to be done. So we decided to try to prepare one, not only for the public but for ourselves as well.

We called upon our own diverse experiences. We consulted dictionaries, textbooks, learned studies and specialists. We debated among ourselves for hours on end. This book, **Coming to Terms**, is the result of our efforts.

We do not claim to present here an exhaustive, definitive "vocabulary." As a matter of fact, we hope some scholars will take over and improve on our attempts to synthesize.

We have attempted to define some important social and political terms as they are most commonly used in the world and in Canada. Most of the time, we make choices; we suggest our own definitions as concisely and objectively as we can. This enterprise constitutes Part I of the book.

Because we believe that confusion over words often stems from a lack of information about the institutions and processes they describe, we set out in Part II some of the basics of the Canadian political system.

We refer in Part III to some of the options available to Canadians and, in appendix II, to the constitutional changes suggested in the present discussions on the future of our country by parliamentary committees, governments and private organizations.

This book is meant to be a guide for those who have to or would like to understand better "the Canadian debate." Writing it has helped us. We hope that reading it and discussing it will help many other Canadians.

The Commissioners.

1.

Societies and Communities

The words that describe persons living together within geographical boundaries, words such as community, society, nation, people, are so close in meaning that they are often used interchangeably. An attempt is made here to distinguish between these words by explaining the nature of the relationships between persons that each of them expresses. The distinctions are important because these words reflect varied perceptions of Canada.

Community

A community is a group of persons joined together by a consciousness of the characteristics they have in common (for example, ethnicity, culture, language, race, religion, territory) and by a consciousness of the interests (social, economic or political) they share. Though many will often be, not all these elements have to be present in a particular community. In the definition of community, it is the element of **consciousness** which is most important. A community is, then, mainly a collective state of mind and of feeling.

All Canadians are members of several communities simultaneously (professional, linguistic, regional, ethnic, and so forth), though not all of these memberships may be equally valued.

Institutions

Institutions are either well-established organizations or broadly accepted sets of principles, procedures and practices in the social, economic or political life of a society which structure and sustain the relationships among persons and groups.

Institutions range from simple voluntary groupings, such as clubs and lobbies, to professional and labour associations, business enterprises (banks, credit unions, firms), educational centres (schools, universities, research institutes) and information media (newspapers, magazines, radio and television). Ultimately, they encompass the whole spectrum of government itself – legislatures, cabinets, courts, municipal councils, regulatory agencies – and so on. All these are institutions, and it is through such institutions that the activities of a community are structured and sustained.

In addition to these many forms of institutional organizations, the term institution also refers to broadly accepted sets of principles, procedures and practices in the life of a community; for example, the rule of law, ministerial responsibility and the prevalent economic and political systems.

Society

A community which succeeds in establishing and controlling a sufficiently wide network of institutions gives itself a cohesion and a control over its activities which justifies one in speaking of it as a distinct society. Societies can, of course, create institutions but institutions also create societies. The process works in both directions.

A society is therefore defined mainly by its structure, whereas a community is defined mainly by its state of mind or feeling. To speak of a Canadian "society" is to emphasize its social, cultural, economic and political structure, but to speak of a Canadian "community" is to emphasize its state of self-consciousness.

Thus, in the broadest sense, a society is the sum total of institutional organizations, relationships and activities among individuals living together in a given territory.

Since political organization is only one aspect of society, the territory occupied by a society can be narrower or wider than the territory of a state. Consequently it is legitimate to speak of a western Canadian society, an Acadian society, or a North American society. A French-speaking Quebecer,* for example, is a member of at least four societies simultaneously: the French-speaking society of Quebec, the society of Quebec as a province, the French-Canadian society across the country, and the total Canadian society fostered by the country-wide institutions, relationships and activities.

* In this book, Quebecer and Québécois will be used as synonymous: both words designate a resident of Quebec.

Culture

In day-to-day usage, culture is often considered to be the intellectual and artistic aspect of life in a community or society.

Culture has a broader meaning, however, when related to the character of a whole community. In this context, culture may be defined as the sum of the characteristics of a community acquired through education, training and social experience. It includes knowledge in all fields, language, traditions and values. It adds up to a collective way of thinking, feeling, and doing, a collective way of being.

Culture draws individuals together, supports thought, judgment and action, gives a community its character and personality, differentiates it from other communities and encourages its members to seek common objectives.

Integration

Cultural integration is the process by which an individual or group is incorporated into the institutional structures of another group.

Acculturation

Acculturation is the modification of the culture of an individual or group through prolonged and close contact with the culture of another group.

Assimilation

Assimilation is the full absorption of a person or a group into the culture of another group.

Race

In strict usage, the word "race" has a specific biological anthropological meaning: it identifies the hereditary physical traits of the major groupings of the world (caucasian, mongoloid or negroid).

In Canada, the word has often been loosely applied to distinguish between French and English Canadians, particularly in the expression the "two founding races." But in anthropological terms this usage of "race" is incorrect. Both French and English Canadians come from sub-divisions of the same caucasian race.

The Indians and the Inuit belong to the mongoloid race. This fact and the immigration of persons from all races has given Canada a multi-racial dimension.

Ethnicity

Ethnicity refers to an individual's sense of identity with a particular group of persons having a common origin. An ethnic group may consciously share aspects of a common culture, such as language and tradition, but is defined primarily by descent from common ancestry.

Canada is often described as a homeland for people of many origins, a pluri-ethnic or multi-ethnic society and state. Reflecting this dimension, statistics are kept on the "country of origin" and the "mother tongue" of the population.

Native communities and groups

"Native peoples" refers to Indians, Inuit and Métis as groups. In Canada it is preferred to "indigenous," "aboriginal" and "aborigines" used in other countries to denote their first inhabitants.

Indian

The term "Indian" broadly applies to anyone of Indian ancestry, including both status and non-status Indians. In French, "Amérindien" is more and more often used by Indians and non-Indians alike; it is not in widespread use in English-speaking Canada.

The expression "status Indian" designates persons registered, or entitled to be registered, under the Indian Act and thereby entitled to receive the benefits of that act. The expression describes a legal status rather than an ethnic background, since under the existing act it includes non-Indian wives of status Indian males.

Non-status Indians are persons of native ancestry who, though calling themselves Indians, have either not been recognized as being eligible for registration under the Indian Act or have been enfranchised under provisions of the act. Successive Indian acts have stated the criteria by which a person loses that eligibility and considerable controversy surrounds the processes whereby Indians have lost or been denied status.

Métis

Métis are persons of mixed Indian and European ancestry who are neither registered nor entitled to be registered under the Indian Act. The terms "Métis" in French and "half-breed" in English were first applied to the off-spring of Indian and white unions. In the nineteenth century these descendants became numerous enough, in what is now western Canada and the northern territories, to form an ethnic community separate from the Indians and the whites. Descendants of those Canadians who called themselves Métis or half-breeds in the last century tend to call themselves Métis today.

Inuit

Inuit (singular: Inuk) are persons of native ancestry speaking the Inuktitut language. At one time they were commonly referred to as Eskimos. According to a 1939 advisory opinion of the Supreme Court of Canada, the term "Indians" in the British North America Act includes Inuit.

Native land claims

When the Europeans arrived on Canadian soil the Indians and Inuit were already occupying and using much of it. Treaties signed with Indian tribes and bands transferred rights to about half of what is now Canada to the Crown.

Since 1973, negotiations have taken place with various native groups concerning their claims to lands deriving from traditional occupancy and use in those parts of Canada where Indian title to lands had neither been the object of treaties nor superseded by law. Thus the Canadian and Quebec governments have signed agreements (1975) with the Cree and the Inuit of the James Bay area by which, in exchange for certain benefits including title to some lands, the Cree and Inuit gave up all titles they may have had to a huge area in the watershed of the Hudson Bay located in Quebec. Subsequently a separate agreement was entered into in 1978 with the Naskapi Indians for their interest in those lands. An agreement in principle was reached also in 1978 by the Government of Canada with the Inuit of the western Arctic in exchange for defined lands and other benefits.

In their negotiations with governments, native peoples have been making **comprehensive claims** when, as in the cases already mentioned, they can refer to the fact that their title to an area was never extinguished. They have also been making **specific land claims** when, as in the case of some Indians in northern Saskatchewan, they can invoke the failure to set reserve lands aside in accordance with treaty undertakings or claim that these reserve lands were improperly taken away from them or taken without proper compensation.

Land claims, of both types, are currently being discussed with the Canadian government by many groups of Indians, Inuit and Métis.

In the debate on the future of Canada, the native communities have pointed to the need to recognize their "special (political) status" and their cultures, as well as their land rights.

People

The word "people" is one of those terms used in political discussions in a variety of ways. It is used interchangeably with community (as in the "Inuit people"), or with population, meaning the totality of persons inhabiting a specified territory (as in the "people of Alberta"), or with the electorate, in contrast to the government (as in the "will of the people.")

Nation and national community

"Nation" and "state" are often used interchangeably. For example, we say "the United Nations" to describe what is an association of states. But in textbooks on law, political science and sociology, whether French or English, a nation is most often defined as a form of community which can be perceived independently of any particular political embodiment. For instance, it has often been said that a Jewish nation existed before the foundation of the state of Israel, and Yugoslavia has been described as a multi-national state. Thus, if a nation can exist without a state and if a state can serve more than one nation, it is necessary to distinguish between the two concepts.

A nation is a community of persons bound together by a sense of solidarity and wishing to perpetuate this solidarity through some political means. Contributing to this solidarity are common "objective" factors such as history, territory, race, ethnicity, culture, language, religion and customs and common "subjective" factors such as the consciousness of a distinct identity, an awareness of common interests and a consequent willingness to live together. Because of the existence of such factors, there is a special relationship among members of a nation which enables them to cooperate politically more easily among themselves than with outsiders.

Some authors have defined a nation in terms of language and culture, some in terms of a common heritage, some in terms of territory (the homeland), some in terms of a prior political organization and some in terms of common aims. The main reason for these and other interpretations of the word nation is simply that national communities are, in fact, not formed according to any particular model, but by different combinations of objective and subjective factors. That is why it is often said that a nation exists when a large organized group of persons, having in common a number of factors, thinks of itself as a nation.

How do nations relate to states? Some national communities are the product of pre-existing states; some establish their own distinct states; some live, for a variety of reasons, together with other linguistic, cultural, ethnic and national communities, in single states, often organized under federal principles. Some of the largest states of the world, such as the Union of Soviet Socialist Republics and India, are in the latter group, as is Canada.

French-speaking Canadians have traditionally emphasized their distinct language, culture and common heritage – objective factors – in speaking of a French-Canadian nation. This has led to the "two nation" concept which refers to the existence of distinct French-Canadian and English-Canadian nations within Canada. Some other groups, notably the Indians and Inuit, have also referred to themselves as distinct nations within Canada in this sense. Most English-speaking Canadians and most of the members of the other ethno-cultural groups have been more at ease with the concept of nation relating to territory, political organization and willingness to live together, in terms of the whole of the Canadian population encompassing all the linguistic, cultural and ethnic communities within Canada. More recently, a significant number of French-speaking Quebecers have used the same criteria of nationhood in speaking of a "Quebec nation."

Thus, a problem in the debate on the future of Canada is that of reconciling differing concepts of nationhood held by different groups in the country.

Nationality

While nationality in its original sense defines the status of an individual as a member of a nation, its most common use today is as synonymous with citizenship. It indicates the legal status of the individual in relation to the state to which he or she belongs by birth or naturalization. That status confers rights, imposes duties and requires allegiance on the part of the citizen, and in return obliges the state to protect the citizen.

Nationalism

Nationalism identifies the nation as the primary political value. At least five meanings of the term can be distinguished: (1) a sentiment of loyalty to a nation; (2) an attitude attaching high importance to the distinctive characteristics of a nation; (3) a tendency to consider exclusively the interests of one's own nation, especially in cases where these compete with the interests of other nations; (4) a doctrine maintaining that national cultures should be preserved and (5) a political and anthropological theory asserting that mankind is naturally divided into nations, that there are determinate criteria for identifying a nation and recognizing its members and that each nation is entitled to a government of its own.

The self-determination of peoples

The last meaning is associated with the principle of nationality formulated in the eighteenth and nineteenth centuries to justify the right of national communities to establish, if they so wished, their own national states.

The principle was endorsed by President Woodrow Wilson in his "Fourteen Points" of 1918, and was reflected in the Covenant of the League of Nations (1919). In 1945 it was written into the Charter of the United Nations as "the right of self-determination of peoples." (It is generally recognized that the term "people" in this context includes the term "nation.")

The charter says in Article 1: "The purposes of the United Nations are . . . to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples." But as other declarations and resolutions of the United Nations demonstrate, the principle of self-determination, as a concept applying to relations between states, is not an unqualified one (see "Secession," page 27 – 28, for its application within states).

The principle of self-determination has been invoked by the Parti Québécois to claim a sovereign status for "the people" of Quebec. Some Acadians and native peoples have invoked it to claim a revised political status for themselves within Canada.

Bilingualism

The term "bilingual," applied to an individual, refers to the ability to speak two languages. While some definitions emphasize the ability to speak two languages with "equal facility," the Canadian standard seems to be that of a "working knowledge" of the other official language. Persons who are able to understand a second language, even though they are not able to speak it, are sometimes called "passive bilinguals."

The term "bilingual," applied to a society, may mean either: (1) a society in which individuals are bilingual, or (2) a society in which two distinct linguistic groups exist, the individual members of which are not necessarily bilingual. In societies of the latter type it has usually been found necessary to ensure that major common public services are provided in both languages in order that members of both linguistic communities may be adequately served. This latter policy is referred to as "institutional bilingualism" in contrast to "individual bilingualism."

The British North America Act (1867) enacted a limited form of institutional bilingualism in Canada. Under section 133, English and French were made the languages of legislation of the federal and Quebec legislatures and the language of the federal and Quebec courts.

Throughout the years, but particularly in the 50s and 60s, the bilingual character of the central government was amplified. Printed material (cheques, instruction manuals, publications), services (radio and television, simultaneous translation of parliamentary debates) and institutions (the armed forces, the diplomatic service) had by the mid-60s become more reflective of institutional bilingualism.

In 1969, following the recommendations of the Royal Commission on Bilingualism and Biculturalism, the federal Parliament adopted the Official Languages Act under which English and French "possess and enjoy equality of status and equal rights and privileges as to their use in all the institutions of the Parliament and Government of Canada." Institutional bilingualism applies fully in "every department and agency . . . judicial . . . or administrative body or Crown corporation within the National Capital Region, and . . . at the place of its head office or central office if outside the National Capital Region." Elsewhere, federal government offices must have the facilities – persons and materials – to provide services to the public in English and French where there is "significant demand" and "to the extent that it is feasible to do so." The act does not require that all federal employees be or become bilingual, nor does it oblige private citizens to learn the other official language. Indeed, it is designed on the assumption that most Canadians will not know the other official language and therefore should be served in their own. For that reason, the legislation requires that there be federal employees capable of providing services, in the specified circumstances, in either language.

Language of work

A related issue is the language of work. A right for federal public servants to perform their duties in their preferred official language is not stated in the act; present policies and practices stem from the general principle of equality.

According to the first commissioner of official languages – an officer responsible to Parliament for monitoring the implementation of the act – central government employees should be entitled to work in the official language in which they feel most at home. "Obviously," he added, "common sense demands some limitations. . . . No responsible person could insist absolutely on working in his or her preferred official language, anywhere, anytime." A right to work in English or in French, however, would not cancel out either an employee's obligation, if his or her job description so required, to provide services in either language.

Biculturalism

A bicultural person is one who has become so well-acquainted with the culture of another group that he or she is capable of functioning in either group as a member rather than as an outsider.

As applied to a society, the term "bicultural" can imply a mixing or synthesis of two cultures. However, the term is frequently applied to situations in which two groups within the same society continue to maintain their cultural distinctiveness. The latter usage was adopted by the Royal Commission on Bilingualism and Biculturalism (1963-70): "Just as bilingualism should not lead to a blend of two languages, so Canada's cultural duality cannot be taken to mean a mixture of two cultures. Each has its own existence."

Each culture, the Commissioners thought, must have the distinct institutions that any culture needs. In addition, both cultures have to be properly represented in common institutions. When participating in those common institutions, persons should have the opportunity "to conserve and to express their own culture."

The Commission on Bilingualism and Biculturalism indicated how biculturalism might be achieved in some fields, such as the operations of the central government administration, voluntary organizations and the workaday world. But it did not deal with the structures of distinct and common political institutions. How to enable them to reflect bilingualism and biculturalism has become an important element of the present debate on the future of Canada.

Multiculturalism

Following the passage of the Official Languages Act in 1969, the central cabinet enunciated, in 1971, a policy of multiculturalism.

It defined multiculturalism as cultural freedom "within a bilingual framework." As "multiculturalism is a more adequate" description of our society, as "cultural pluralism is the very essence of Canadian identity," and as "there is no official culture" in Canada, "every ethnic group has the right to preserve and develop its own," said Prime Minister Trudeau at the time.

"To ensure that Canada's cultural diversity continues," measures would be taken, he added, to "assist, resources permitting, the development of those cultural groups which have demonstrated a desire and an effort to continue to develop"; "assist to overcome cultural barriers"; "promote creative encounters and interchange among all Canadian cultural groups"; "assist immigrants to acquire at least one of Canada's official languages in order to become full participants in Canadian society."

Those who favour multiculturalism, while they reject cultural assimilation, generally accept the idea of "integration" within one or both linguistic mainstreams. Some ethno-cultural groups have requested that the principle of multiculturalism be enshrined in the Canadian constitution and applied to specific legislation, such as the Immigration Act. Some would also like to see their language guaranteed in provincial law as language of instruction, where numbers warrant.

The rationale for the policy of multiculturalism, as expressed by government authorities since 1971, and by interested ethno-cultural groups, rests on three main arguments. (1) Multiculturalism in Canada is a fact. Since 1867, ethnic, cultural, linguistic and religious diversity has grown. Of the total Canadian population, the proportion of those Canadians of ethnic backgrounds other than French and English has gone up from 7 to 25 per cent (excluding the native peoples). (2) All cultures are valuable and add to the richness of Canada. (3) The ethno-cultural groups have made an important contribution to Canada.

The advantages and disadvantages of this policy are among the issues relevant to the debate on Canadian unity.

Majority and minority communities

A majority is a group constituting more than one-half of the total population within a given territory.

In linguistic terms, English-speaking Canadians are a majority in nine provinces. French-speaking Canadians are a majority in one province.

The English-speaking and French-speaking Canadians are each in a minority position in one or more provinces. The francophone communities in English-speaking Canada and the anglophone community in Quebec are sometimes referred to as the "official language minority groups."

In addition, Canada has a variety of minority ethno-cultural communities and groups retaining some distinctive cultural characteristics – the Ukrainians, the Italians and the Greeks, to name only a few.

Duality, dualism

Duality is a term often used in Canada to describe the presence of two major communities, the English-speaking and the French-speaking Canadians. These communities have a great variety of distinct institutions and consequently are seen as forming distinct societies within the overall Canadian society. But these societies also share a great number of common institutions: public and private, cultural, legal, economic and political.

Besides demographic evidence, the principle of duality or **dualism** is often supported by a number of historical, legal and political concepts such as "the two founding peoples," the "compact theory of Confederation," "the two nations" and "equal partnership." For example, the Royal Commission on Bilingualism and Biculturalism wrote: "For us the principle of equal partnership takes priority over all historical and legal considerations, regardless of how interesting and important such considerations may be. We were not asked to consider merely the recognition of two main languages and cultures . . .; we were asked to examine ways in which the Canadian Confederation could develop in accordance with the principle of equal partnership."

Duality affects in a diversity of ways the structures and the functioning of the common Canadian institutions. For example, the British North America Act recognizes two legal systems, the civil law in Quebec and the common law elsewhere; the Supreme Court Act guarantees the presence of three judges from Quebec on that tribunal. The Official Languages Act defined an objective of "institutional bilingualism" in the central government. The Canadian Broadcasting Corporation and the National Film Board have distinct English and French services. The practice of alternating between French and English-speaking persons is applied in nominations to some public offices, among which are those of governor general and speakers of the House of Commons and Senate. Many professional and labour associations and business enterprises operate in English or French, or both, either on a Canada-wide or on a regional basis.

The adoption by Canadians of a federal system of government was in part at least intended to accommodate duality, by establishing provinces within each of which a major linguistic community would be in a majority. At the federal level, both linguistic communities share common institutions. Thus, the French-speaking majority in Quebec is able to express itself both through its own provincial government and through its participation in the central government.

While based essentially on linguistic considerations, duality is also expressed in social, cultural, legal, economic and political institutions.

The word is another of those very controversial ones in the present unity debate. Some persons and groups would like to see the "principle of duality" or "dualism" more extensively applied in Canadian institutions of all sorts. Others call the idea, particularly when defined as "equality," a violation of the rights of the numerical majority. Others, while accepting various degrees of dualism, reject the concept of "two founding peoples," pointing to the presence of native "pre-founders" and of early immigrants. Others, particularly in Quebec, would like to take dualism off its present linguistic or "multifaceted" base and set it up on a political one, a "one to one" relationship between Quebec and "the rest of Canada."

Pluralism

Generally speaking, the term pluralism refers to the existence within a society of social, economic and political communities and groups which maintain a degree of distinctiveness in their participation in the common institutions and activities of that society.

In Canada, ethnic pluralism, for example, is a feature of both major societies, of the various regional societies and of the population as a whole. In consequence, Canadians often view their country as a "homeland for peoples of many origins." Linguistic duality leads to forms of bilingualism and biculturalism, while ethnic pluralism adds to Canadian society a significant element of cultural heterogeneity.

Regionalism

Regionalism is a term with a great variety of meanings, depending on the context. The basic distinction to be made is between regionalism as a **fact** and regionalism as a **value**, but within these two basic categories many further refinements can be identified.

Regionalism as a fact refers to the existence of various areas of a country or continent (or parts of either) with characteristics which distinguish them from others. These characteristics may be natural or man-made but are usually a combination of both. The various regions of Canada can be defined in at least three ways, and certainly in many more. The Economic Council of Canada, for example, has identified thirteen major urban systems as the basic economic regions of the country. The importance of these intraprovincial divisions has been recognized by the recent introduction of regional governments in several provinces, including Ontario and Quebec. Another way to define the regions of Canada is in terms of five units: the Atlantic region, Quebec, Ontario, the west and the north, or the prairies and British Columbia. A third way to define the regions of Canada is in terms of the provinces themselves. The provincial definition is especially useful as one moves from economic analysis toward more political and social concerns, because regional communities require an institutional framework if they are to become variable units which can express themselves and organize their collective life in an effective manner. The provincial political institutions are the primary frameworks through which regional communities organize themselves because the provincial institutions tend in turn to develop social networks and vested interests which reinforce the provincial focus of the region. The regional or provincial communities of Canada, then, are a complex product of geographic, economic, historical, political, social, cultural and linguistic forces.

Regionalism as a **value** refers to the tendency to look upon the existence of regions within a country as a positive asset and to recognize or reinforce these regions as a worthwhile feature of its political and cultural life. Movements of thought or opinion which recognize regionalism as a value may seek to strengthen regional cultures, or to decentralize the activities of government, or to give the regions more effective control over the central decision-making process. Regionalism both as a body of theory and as a political and social movement has enjoyed a resurgence in recent decades in many other countries besides Canada, including France, the United Kingdom and the United States. The growth of regionalism in Canadian political life since the beginning of the 1960s is a reawakening of a very old feature of Canadian life, since the country was originally brought together from distinct regional communities which remain strongly attached to their local identities and which are reinforced by the complex institutional and social forces described above.

Canadian institutions attempt to reflect these realities of duality, pluralism and regionalism.

2.

Political Relationships and Organizations

Politics, the governing of a society, is a matter of power – who has it, by whose will and how it is exercised. To understand the relationship between governments and the governed, the distinctions between power, authority, sovereignty, competence and jurisdiction are important. Political organizations are the means by which a society governs itself. They are the state, its government, and the formal and less formal ways by which citizens seek to control government or influence its actions, essentially through political parties and interest groups.

Power

Power is the capacity to influence or control the actions of individuals or groups.

Power relationships exist in any area of collective activity, for example, in economics, culture and politics. In the last instance, it is referred to as political power.

Authority

Authority is the exercise of power made legitimate by the acceptance of those over whom it is exercised. It is the right to direct the conduct of the members of a group or society, in particular, to set policies, to settle controversies, and to impose obedience.

State

A state is a legal and political association having the power and authority to command obedience and loyalty from its members.

The essential elements of a state are: (1) a population; (2) a territory; (3) a sense of community, generated by shared characteristics and objectives; (4) a government, the set of agencies through which the policies of the state are formulated and carried out; and (5) sovereignty, the supreme authority to make decisions and to enforce them. It is that fifth element which distinguishes the state from any other organizations within it.

The creation of a state is not only a consequence of the social nature of human beings, of the existence of some common objectives among individuals living in a certain geographical area, and of international rivalries and conflicts. It is also a product of the minds and of the wills of men and women, legislators and citizens, an organization described in formal or informal agreements (constitutions, laws, conventions). This explains why different states have different concepts of the common good and different forms and processes of government.

The state has been regarded by some modern political philosophers and politicians as the perfect expression of political society. This view has been called into question in the last few decades, however, by a reaction against governments that attempt to control too much of life within society, and by the recognition of the importance of inter-state and supra-state interests. In other words, the state alone is no longer seen as capable of fulfilling all the aspirations of its citizens.

Within some federations, the name state is also given to the component units, as in the United States and Australia. The equivalent units are called Länder in Germany, cantons in Switzerland and provinces in Canada. Despite the different labels, there is no essential difference between these entities. In all cases, the component units of federations and the central government, have "sovereignty" over those areas of government activity which are assigned to them by the constitution of the country.

Country

Country is primarily a geographical term referring to the territory occupied by a state. More loosely, it is used as being synonymous with a particular society or state.

Sovereignty, competence and jurisdiction

The distinguishing element of the state, as the paramount form of modern and contemporary political organization, is its sovereignty.

After a long evolution, beginning at the end of medieval times, sovereignty came to mean the right of the government of a state to decide in the final recourse, internally and externally, on the direction to give to its own collective actions, a right generally considered to be absolute in legal terms. In order to implement this right, the government of a state has a monopoly of the instruments of coercion, for example, the enforcement of laws and regulations by the use of the army and the police.

A debate over the ultimate holder of sovereignty also went on for centuries. Did it belong to the king, to Parliament, to the people, to the state itself, or to the government of the state? Different aspects of sovereignty were assigned to the various claimants at different times and places in history.

The concept of sovereignty in its absolutist form raised a particular problem in the case of federal states. Could sovereignty, the ultimate and supreme authority, be divided? It is now generally accepted that in such systems sovereignty is divided in a single state between the two orders of government which, in turn, claim sovereignty in the areas of activity allocated to them by the constitution.

Observers have often noted that, in practice, sovereignty, however useful as a legal concept, was necessarily limited. The growth in our times of interdependence among states and among individuals and groups across state borders, has made this practical limitation more and more obvious. The progress of technology and its consequences, for example, on communications, the extraordinary development of foreign trade and multi-national business corporations, the increasing preoccupation of world opinion with the protection of human rights and of the environment everywhere, the world-wide concern about nuclear war, are only a few of the factors that have brought about a decline in the rigid classical distinction between internal and external affairs, and a consequent decline in the ability of states to exercise complete sovereignty. The growing number of world institutions and international conventions is but one illustration of this trend.

The notion that sovereignty is divisible and limited has led to the use of more positive concepts such as "competence" and "jurisdiction." These concepts define the state in terms of the fields of activities in which a government, be it central, provincial or municipal, exercises its authority under law. The charters of the League of Nations and the United Nations, for instance, have adopted the term "competence," although qualifying it as "national," "exclusive," or "discretionary," to suit the wishes of governments.

This guide will normally use the terms competence or jurisdiction instead of sovereignty.

In the present Canadian context, sovereignty is still used in the expression "external sovereignty" to express the idea that the central government has an overriding power in the conduct of Canada's relations with other countries.

The word is also used in the Parti Québécois proposal of "sovereignty-association" to indicate a desire to see Quebec achieve the status of a politically independent state while participating in a negotiated economic association with the rest of Canada.

Government

As an activity, government is the continuous exercise of political power and authority in a society.

As an organization, the government is the collection of agencies that exercise competence in the state and also the group of individuals who operate these agencies at any given time.

Modern government is usually subdivided into "branches" or "functions": the legislative, which makes the laws, the executive, which implements their provisions and most often also prepares them, and the judiciary, which interprets them and adjudicates the disputes they occasion. The public service is now often accepted as a fourth branch: it provides expert advice to the executive branch.

Within a federal system such as Canada's, political power and authority are exercised by a number of governments, central, provincial and municipal, the latter coming under the jurisdiction of the provincial governments.

To the extent that a society is democratic, governments are constrained, in principle, by the supremacy of the law, particularly the law of the constitution, by the continuous participation of the public in political party activities, elections, the making of representations, opinion surveys, and so on, and by the influence of the media. Agencies of government are also limited in their activities by such institutional constraints as the "distribution" and the "separation" of powers, and the rules of responsibility and accountability of legislatures and of ministers.

Because a government acts on behalf of the state, the words "government" and "state" are often used interchangeably as in "state intervention" which refers to government action. Also, because the executive branch at particular times acts on behalf of the government, the words "government" and "executive" or "cabinet" are often used interchangeably, as in "the federal government" or the "Trudeau government," to refer to the federal executive or the Trudeau cabinet. It should be emphasized, however, that, strictly speaking, "state," "government," and "cabinet" each describe distinct entities.

Political party

In any political society, persons with similar outlooks, views and interests associate in political parties to seek and exercise power, to control the agencies of government and to influence the direction of public activities.

In modern states, there are different types of political parties. Some are more interested in ideas and policies ("parties of principle"), while others accept compromises more easily in their pragmatic pursuit of power and service ("government parties"). Such considerations may determine whether a party will have a broad or a restricted membership. Some parties are constituted by a relatively small number of regular adherents who call on the general public mostly at election time ("cadre parties"), while others attempt to bring large numbers of members into close and continuous participation ("mass parties"). Obviously, these distinctions only indicate general trends.

There are different political party "systems." In some regimes, often called totalitarian or authoritarian, only one party is allowed to exist. In such cases, the party effectively rules the state by monopolizing government. In liberal-democratic countries a number of parties compete and there is a two-party or a multi-party system.

Canada has often been described as having, both federally and in the provinces, a "two-party system," in the sense that two parties usually predominate, though not the same two everywhere. This basic description is not really accurate. There have been two noticeable trends in the country in this matter: at both the federal and provincial levels, one party has tended to govern for long periods of time and "third parties" have tended to form, in some provinces even supplanting one of the older parties. It is more accurate, therefore, to say that Canada has federally, and in most provinces, multi-party systems characterized by relatively long periods of one-party predominance.

The two older parties, the Liberal and the Progressive Conservative, compete most of the time, both on the federal and provincial scenes. The New Democratic Party (NDP) founded as the Cooperative Commonwealth Federation (CCF) in the 1930s, now has a base in most provinces, as well as federally. It has formed governments in three provinces. The Social Credit party has members in the central Parliament and in some provincial legislatures; it governs in British Columbia. The Parti Québécois, first a third party, became the official opposition, then was elected to power in 1976. Recently, federal and provincial parties of the same name have, in some provinces, tended to operate as distinct federal and provincial organizations.

Interest group (pressure group)

An interest group, or as it is sometimes called, a pressure group, has as one of its objectives the exercise of influence on the public and on political institutions in order to secure decisions favourable to itself or to prevent unfavourable ones.

By comparison with a political party the distinguishing characteristics of an interest group are: the restricted and specific range of policies with which it is concerned; the rarity with which it takes part in elections and then usually only to influence specific issues; and its focus upon exercising influence on the political and bureaucratic process rather than obtaining and exercising office.

A lobby is a restricted form of interest group which has the sole purpose of influencing legislation or the execution of a policy. An interest group generally serves broader functions, such as acting as an information and public relations organization for its members.

3.

Rights, Liberties and Freedoms

Rights, liberties and freedoms define the relationships between an individual or a group and the state and between individuals and groups themselves. Because of their importance, citizens and groups are usually prepared to struggle against infringements on them.

Rights

A right is a claim possessed by a person or group of persons and protected by law. Such a right implies a corresponding obligation by other citizens and the state to respect that right. Citizens as members of a state, therefore, have both rights and duties.

Individual rights

Individual rights are those belonging to all individuals in a state regardless of their membership in a group or community within the state. Examples are the right of free expression and the right of association.

Collective rights

Collective rights are essentially of two types. The first are rights which can be claimed by an individual because of his membership in an identifiable group. An example of this type are the school rights of religious groups protected by the BNA Act. A second type of collective rights are those which apply only to collectivities as a whole. An individual cannot claim these rights for himself, but may claim them on behalf of a collectivity. An example would be the right to strike.

Generally speaking, while anglo-saxon Canadians have tended to think primarily of individual rights, French Canadians and some ethnic minorities have also stressed the importance of collective rights.

Liberties

A liberty may be thought of in two ways. First, it may refer to what a person may do without infringing the law. As such, a liberty is a right of non-interference by the state or by other citizens.

Second, a liberty may represent a right to claim state intervention to protect one's way of life from interference by others, or to provide an opportunity on a basis of equality with others. In this sense, a liberty is a claim for positive assistance by the state in securing certain opportunities.

Freedoms

A freedom exists in the absence of a restrictive law. For example, a person is free to say what he pleases – freedom of speech – provided that he does not offend against the laws relating to treason, sedition, libel, official secrets and so on. Most of the time "freedoms" and "liberties" are used interchangeably although jurists refer more often to "liberties."

The expression "civil liberties" is sometimes used in referring to all the basic rights and freedoms of the citizen. However, under the influence particularly of the United Nations Charter and the Universal Declaration of Human Rights, civil liberties have increasingly been referred to as "human rights and fundamental freedoms."

It should be noted in passing that the term "civil rights," as used in the British North America Act, in section 92(13), and assigned to the jurisdiction of the provinces, is not synonymous with "civil liberties." "Civil rights," in that context refers mainly to matters of private law, such as property, torts, contracts and estates, although they may include some aspects of the protection of fundamental rights, such as defamation, trade union certification and the status of married women.

In Canada, human rights, in the generic sense of the word, fall within the jurisdiction of eitner the Parliament of Canada or the provincial legislatures, or both, depending on the aspect under which they are treated. For example, an aspect may come under criminal law (federal), another under civil law (provincial).

Classification of human rights

Fundamental rights have been classified into at least four groups by most authors. The four groups usually advanced are:

- political rights – traditionally including freedom of association, assembly, expression, the press, conscience and religion;
- legal rights – including equality before the law, due process of law, freedom from arbitrary arrest, right to a fair hearing, access to counsel;
- economic rights – including the right to own property and the right not to be deprived of property without due compensation, freedom of contract, the right to withhold one's labour; and
- egalitarian rights – including the right to employment, to education, and so on, without discrimination on the basis of race, colour, sex, creed or economic circumstances.

Often added to these categories are minority rights, linguistic rights and social rights. Minority and linguistic rights will be discussed in Part II, chapter 4. There is a growing tendency in the world to consider as social rights the enjoyment of economic security, equality of opportunity and fair distribution of wealth.

In Canada, fundamental rights are defined by the British North America Act, by the Canadian Bill of Rights and by a number of other federal and provincial statutes. The protection of these rights in Canada is dealt with in Part II, chapter 4.

The rule of law

The preamble of the British North America Act states that our constitution is "similar in principle to that in the United Kingdom" and the courts have declared that in Canada, as in the United Kingdom, the "rule of law" applies.

The rule of law means that everyone is subject to the law. Political leaders are under the same obligation as anyone else to abide by the law. Neither the government, nor public servants, nor police officers are entitled to wield arbitrary power over any citizen.

Constitutional entrenchment of fundamental rights

The "entrenchment" of rights and freedoms involves placing them beyond the ordinary reach of a government or legislature by incorporating them in a part of the constitution which, to be changed, would require a special amendment procedure which is more difficult than the simple passage of an act of the competent legislature. Such a procedure may require a special majority in the legislature, participation or ratification by other orders of government or the consent of the electorate by way of a referendum.

4.

Forms of Government

The organization of government within a state may take different forms in relation to: (1) the number of persons in whom political authority is vested and the basis of their selection for office; (2) the method by which the people exercise democratic government; (3) the relationship between the executive and the legislative branch of government; and (4) the territorial distribution of sovereignty.

Monarchy, presidency, oligarchy, aristocracy, autocracy, republic, democracy

Governments may be classified according to the number of persons exercising ultimate authority and the basis of their selection for office. In a monarchy, political authority is vested in a single hereditary ruler, whereas in a presidency it is held by a single non-hereditary ruler. In an oligarchy, authority is exercised by a small, unrepresentative group; in an aristocracy, by an elite based upon heredity, education, race, caste, or ownership of property. An autocracy is a form of government in which one man, or a group of men with a clearly identifiable leader, exercises political power without legal or customary constraints, and without responsibility to an electorate or any other political body. A republic is a non-monarchical form of government in which the supreme authority rests with a president or appointed or elected representatives. In a democracy, either all the citizens or their elected representatives act as the governing body.

While these are the basic forms, there are many variations and hybrids of them. The United Kingdom and Canada, where the authority of the monarch is limited by constitutional practice, are usually classified as "constitutional monarchies." Because government is exercised in our country by politicians elected directly through a process in which all adult citizens have a right to participate, it may also be described as a democracy. Since the elected politicians act formally in the name of a monarch who is the head of state, but whose personal powers are extremely limited, Canada is at the same time a democracy and a constitutional monarchy.

It should be noted that the relative power of the political office holders in all these forms of government may be affected by the extent to which the holders of economic or social power are able to influence or control public policy. The degree to which the holders of economic or social power are responsible to the public is a major issue in contemporary states.

Direct and representative government

A direct democracy is one in which, in principle, all the citizens participate directly in the exercise of government through regular assemblies of the population. Because of the size of most modern states such participation by each citizen is extremely rare these days, although important aspects of direct democracy exist in some Swiss cantons and in some states, such as California, of the United States.

A representative government is one in which political authority is vested in elected persons who act on behalf of their electors. This is the usual form of government in contemporary democratic societies.

In some states where representative government is the rule, elements of direct democracy are introduced by popular consultative devices such as the referendum and the plebiscite.

Referendum

A referendum is a procedure in which the electorate is asked to give an opinion or a decision on a proposed or existing law, a project, a policy or a principle.

A referendum may be either "consultative," when an opinion of the electorate is sought by a government, or "deliberative," when it is part of the formal process whereby the electorate participates in the approval of legislation. Referenda may also be described as either "optional" when the calling of a referendum is at the discretion of the executive or legislature, or "obligatory" when its holding is required in certain circumstances by the constitution. In terms of the degree to which a government is bound to act according to the results, a referendum may be described as "free" when a government is not bound by the results or "binding" when it must act in conformity with the result.

Referenda may be used in constitutional matters, such as the approval of a new text, an amendment, or the secession of a section of the country; in matters normally subject to ordinary legislation, such as consideration of liquor prohibition or the death penalty; and in international matters as, for example, the approval of a treaty or the decision to join another country or an international organization. Newfoundland joined Canada in 1949 after two referenda, and in Europe three countries have, in recent years, submitted the issue of their membership in the European Economic Community to referenda.

When a referendum is part of a constitutional amending process, it is usually deliberative, obligatory and binding – as is the case in Australia and Switzerland; otherwise referenda are usually only consultative and optional, intended only to obtain the views of the population. In the latter case, rejection does not legally bind the government, although, of course, the expression of public opinion will carry considerable political weight. A government may, however, express in advance of the referendum its desire to be bound, as the British Government did in 1975 on the issue of remaining in the European Economic Community, and thus be morally held to its commitment when the result is known.

Most countries use the referendum very sparingly. Switzerland, however, is one that uses deliberative referenda as a matter of course for a wide range of ordinary legislation at all levels of government – federal, cantonal and communal, in addition to the procedure for constitutional amendments. Australia, like Canada a federal and parliamentary state, uses referenda to amend its federal constitution, certain provisions of some state constitutions, and occasionally in politically controversial matters. Although the preamble of the Australian constitution declares the union to be "indissoluble," the state of Western Australia held a referendum in 1933 in which a large majority voted in favour of secession. The consequent request was rejected by the British Parliament because it was not supported by the central government of the independent Australian federation. In a parallel situation, however, when a majority of Jamaicans voted in a referendum in favour of secession from the newly-established, but still colonial West Indies Federation in 1961, the British Parliament agreed, even though the government of the West Indies Federation was opposed.

The Canadian constitution makes no mention of referenda; they are not part of our formal constitutional amending process. However, the Quebec legislature has recently adopted a statute authorizing consultative referenda. In addition, a bill to permit consultative referenda in constitutional matters was introduced in the Parliament of Canada during 1978. These measures regulate the procedures for initiating and approving the questions to be posed, the conduct and funding of the campaign, and the balloting.

Referenda may play an important role in the present debate on the future of Canada.

Plebiscite

Some politicians and scholars define a plebiscite simply as synonymous with a referendum. For example, in Canada in 1942, Prime Minister MacKenzie King used a plebiscite to be relieved of his promise not to impose conscription.

However, in France and some other countries, the term "plebiscite" is normally used more specifically for occasions when the public is asked to express confidence in the head of state or a government rather than in a policy.

Referenda and plebiscites are often acclaimed as the best ways to get to know public opinion on a single specific issue and as genuinely democratic processes. Some commentators criticize them as undermining the concept of parliamentary responsibility which is based on the idea that representatives are elected to make complex decisions on behalf of the public at large after extensive analysis of all aspects of the question under consideration. They also observe that most questions cannot be answered by a simple yes or no.

Referenda and plebiscites are to be distinguished from two other methods by which the views of the electorate may have an impact upon political decisions.

Petitions

Petitions are non-binding requests for specific action signed by an individual or group of citizens and submitted to the executive or legislature. The persuasiveness of petitions usually depends on the number, personal reputation and influence of those signing them and also on the political context in which the petitions are introduced.

Initiatives

In Switzerland and some states of the United States, there is a specific provision for initiatives, a procedure whereby a proposal initiated by a prescribed number of citizens must be referred to the electorate in a mandatory referendum and, if passed, becomes law. The passage of Proposition 13 in California in 1978 is an example of this form of direct democracy.

Parliamentary and presidential government

In representative government, the nature of the relationship between the legislative and executive branches defines the difference between parliamentary or cabinet government and congressional or presidential government.

In parliamentary government, as in Canada or the United Kingdom, members of the executive are normally drawn from the membership of the legislature and each branch is dependent on the other. The executive is usually responsible to the elected house of the legislature and must leave office if it loses the confidence of that house. On the other hand, the legislature (or at least the elected house) may be dissolved upon the recommendation of the executive.

In congressional or presidential government, for example, in the United States, the principle of "the separation of powers" is applied. The head of the executive branch is not a member of Congress; he is directly elected by the citizens for a fixed period of time. He stays in office irrespective of the distribution of seats in the legislature among political parties or of the will of the legislative branch, except in the extreme case of impeachment. The members of his cabinet are also not members of Congress and he has a wider choice in the formation of his cabinet than the parliamentary prime minister who normally must draw from the members of the legislature. The members of Congress have fixed terms, and Congress is not subject to dissolution by the executive.

It is generally argued that the presidential form of executive has the advantage of stability but may be subject to deadlocks, particularly when the executive and legislative branches are dominated by different political parties. The parliamentary form has the advantage that where the government can count upon a legislative majority, it is normally in a position to take decisive action. But where no party holds a majority in the legislature, cabinet government may also be vulnerable to instability.

There are many varieties and hybrids of these two models. Real executive authority may be divided between a directly elected president with a fixed term and a prime minister and cabinet responsible to the popular house of the legislature, as in France. A parliamentary system may be headed by a president filling a role similar to a constitutional monarch, as in India and the Federal Republic of Germany. The cabinet may be a "collegial executive" chosen by the legislature from among its membership but holding office for a fixed term, as in Switzerland.

Unitary, federal and confederal government

The method of territorial distribution or division of powers within a political system determines whether the government is a unitary government, a federal government, a confederal government or an economic association.

In the unitary form of government, even when there is a good measure of administrative or legislative devolution or decentralization, sovereignty or competence resides exclusively with the central government, and regional or local governments are legally and politically subordinate to it.

In the federal form of government, sovereignty or competence is distributed between central and provincial (or state) governments so that, within a single political system, neither order of government is legally or politically subordinate to the other, and each order of government is elected by and exercises authority directly upon the electorate.

In the confederal form of government, even where there is a considerable allocation of responsibilities to central institutions or agencies, the ultimate sovereignty is retained by the member-state governments and, therefore, the central government is legally and politically subordinate to them. Furthermore, the members of the major central institutions are delegates of the constituent state governments.

An economic association, when it has common organizing institutions, is a confederal type of government in which the functions assigned by the participating states to the common institutions are limited mainly to economic cooperation and coordination.

While precise definitions distinguishing unitary, federal and confederal systems or between different forms of federation are helpful, it is important to remember that state-builders, unconcerned with the niceties of theories and more interested in the pragmatic value of institutions, have sometimes attempted "mixed solutions" or "hybrids," combining features from different forms within a single political system.

Indeed, some commentators have described the British North America Act, the basic written constitutional text of Canada, as establishing a quasi-federal form of government because of such unitary features as the central powers of disallowance and reservation of provincial legislation. The fact that these powers have been unused in recent decades means that the Canadian federation has been operating in practice in a more genuinely federal manner.

While dividing lines cannot always be drawn precisely, individual political systems can usually be described as "predominantly federal," "predominantly confederal" or "predominantly unitary."

5.

Federation, Confederation and Economic Association

The terms "federation" and "confederation" are often used loosely and sometimes even interchangeably. They both invoke the idea of a political union with a central government responsible for common interests and with provincial or state governments retaining authority over a substantial range of regional concerns.

While political scientists and constitutional lawyers now distinguish between federations and confederations, it should be noted that such distinctions have not always been clear or even made. For example, the establishment of the Canadian federal system by the British North America Act in 1867 is referred to as "confederation," the Swiss Constitution of 1874 is specifically entitled "the federal Constitution of the Swiss Confederation," and the American *Federalist Papers* (1788) made no sharp distinction between the two terms. "Confederation" in many of these usages referred simply to the process of bringing together political units rather than to the resulting form of government.

When these terms are used more precisely by scholars, a federal system of government is usually defined as one in which central and provincial governments each possess autonomous authority so that neither "order" or "level" of government is legally or politically subordinate to the other. A confederal political system is usually defined as one in which the central government is legally and politically subordinate to the regional governments.

Some scholars, in distinguishing federations from "confederations" or "confederacies," emphasize the distinction in terms of their structures rather than the relative balance of their functions. In federations, they observe, both orders of government are elected directly by the population, whereas in a confederation, the members of the central institutions are appointed as delegates by the constituent governments.

Federation

A federation is a form of political organization by which common desires for unity and diversity within a society are accommodated by the establishment of a single political system within which, as said above, central and provincial governments each exercise autonomous constitutional authority so that neither order of government is legally or politically subordinate to the other. The idea of non-subordination is an essential element of the "federal principle."

The federal form is defined by reference to such existing examples as Canada (1867), the United States (1789), Switzerland (1848 and 1874), Australia (1901) and the Federal Republic of Germany (1950).

Four points should be particularly noted about this definition of a federation:

Both the central and provincial legislatures are constitutionally "sovereign bodies" within their competence or jurisdiction, since sovereignty is distributed between them.

Political as well as legal relations between governments are relevant in determining the real as opposed to the formal status of governments within a federation.

Governments in federal systems are inevitably somewhat interdependent, but so long as the dependence of one order of government on the other does not become so one-sided as to involve subordination, the interdependence of governments is not inconsistent with the "federal principle."

The federal principle may be expressed by a whole range of institutional arrangements suitable to different conditions. In other words, there is no single and pure model of a federation.

Conditions

It should be emphasized that there are three conditions fundamental to the ability of a federation to accommodate demands for both unity and diversity.

Since the various political units and social communities coming together do not agree to be partners over the whole range of political action, a federal system involves a set of compromises. To be effective, the distribution of functions, responsibilities and resources between governments must reflect the political reality that there are areas of political activities in which there is agreement among the partners to centralize authority and other areas in which there is a desire for provincial distinctiveness.

Since, in practice, the functions assigned to the two orders of government cannot be totally isolated from each other, the activities of the two orders of government interpenetrate both administratively and politically. Effective intergovernmental relations are, therefore, a fundamental aspect of any federal system, as important as the distribution of powers.

Since a federal system represents a form of partnership, an especially crucial aspect of the system is the process through which diverse regional, ethnic, cultural, economic or political groups participate in the central institutions and a federation-wide consensus is developed. Unless the institutions for arriving at central policies and decisions ensure these distinctive groups effective participation in the process, a minimum consensus is unlikely to be achieved and the partnership is likely to dissolve in the face of increasingly hostile struggles between a central majority and alienated regional groups. Most federations have, therefore, found it necessary to structure central institutions and procedures in such a way that not only will the interests of minorities and regional groups receive special expression but the resolving of conflicts of interest and the widening of agreement and accommodation will be facilitated.

Features

The essential features of a federal political system are:

- two orders of government existing in their own right under the constitution and each acting directly upon the same citizens;
- a central government directly elected by the electorate of the whole federation and exercising authority directly by legislation and taxation upon the country as a whole;
- regional units of government, variously called "provinces," "states," "cantons," or "Länder," each directly elected by and directly acting by legislation and taxation upon its own regional electorate;
- a formal distribution of legislative and executive authority and of sources of revenue between the two orders of government;
- a written constitution defining the competence and resources of the two orders of government, and not unilaterally amendable in its fundamental provisions by only one order of government;
- an umpire to rule upon disputes relating to respective governmental powers and to interpret the constitution; it is usually a supreme court or a specialized constitutional court, but may sometimes take the form of the electorate acting through a referendum;
- processes and institutions to facilitate intergovernmental interaction.

Variations

Specific federations may vary in terms of:

- the organization of the central government, which can be parliamentary, presidential or collegial in form;
- the provision of regional representation in the institutions for central policy-making, such as the executive, the second chamber, the bureaucracy, and regulatory agencies;
- the number and relative size and wealth of the regional (provincial) units;

- the allocation of specific fields of legislative and executive competence and of spending authority and revenue sources between the two orders of government and among the regional (provincial) units, and the manner of distribution of "exclusive," "concurrent" and "residual" authority (see pages 47–48);

- the structure and jurisdiction of the judicial system, the supreme court or constitutional court, and the use of referenda and other devices for arbitrating and adjudicating disputes related to respective governmental powers;

- the processes and institutions through which intergovernmental consultation and cooperation are facilitated.

Within each federation the particular blend of these variables will depend on the social, economic and political forces which the federal system attempts to express and channel. That is why there are important differences between the Canadian, the American, the Australian, the Swiss and the German federations.

A particularly significant variation among federations, affecting their operation, is the extent to which the principle of the "separation of powers" between the executive and the legislature operates within each order of government. In federations such as the United States and Switzerland, where the principle of the "separation of powers" has been applied within central and state governments, the diffusion of authority within each order of government has enabled the development of many points of contact and interpenetration between the orders of government. Some authors have described this as "marble cake" federalism. In those federations where the central and provincial governments are organized along parliamentary lines (without separation of powers between the legislature and the executive) however, as in Canada and Australia, the dominance of the parliamentary cabinets has made these executive bodies the focus of relations between the two orders of government. This **executive federalism** seems often to operate in a manner not unlike international diplomacy. The result is a "layer cake" federalism in contrast to the "marble cake" character of non-parliamentary federations.

While in theory it is usually considered desirable for the constituent units (states or provinces) of a federation to be equal in constitutional status, in practice their inequality in size, power and character often leads to differences in the degree and areas of power exercised by different units. This has sometimes been described as **asymmetrical federalism.** The Canadian federal system belongs in this category since the British North America Act and subsequent constitutional acts have included provisions specific not only to Quebec but also to other provinces.

Confederation

In contrast to a federation, a confederation, in the strict sense of the term, is a form of political union in which the constituent states are joined together for military, diplomatic or economic purposes, in such a way that the common institutions derive their authority from the constituent states and are composed predominantly of delegates appointed by the constituent state governments. Among examples in modern history are the Swiss Confederation in its various forms between 1291 and 1848, the United States of America from 1781 to 1787, the German Empire from 1871 to 1919.

Generalizing from these examples, a confederation may be described as an association in which sovereign states are joined together by a pact or treaty of international law, or a constitution, in which they delegate specific limited authority, especially in matters of foreign affairs (defence and diplomacy), to a central agency. It may be called a "diet," "assembly," "council" or "congress" and its members are usually mandated delegates appointed by the member states. (A delegate has less independent authority than an elected representative as the delegate must carry out the instructions of the government that appoints him.)

Membership in the central organization is normally on the basis of equality for the constituent states; decisions usually require unanimity, at least in important matters, and are generally implemented by the member states themselves.

The central agency, having no direct authority over citizens and acting upon citizens only through the constituent state governments, is usually supported financially by "contributions" and militarily by "contingents" from the member states.

Usually there is also in the treaty or constitution creating the confederation a formal agreement on the part of the member states renouncing the right to go to war against each other, assuming the obligations of collective security with respect to each other, and agreeing to the arbitration of their conflicts.

Political confederations are rare today, but the confederal principle is very much alive in regional international organizations, in the United Nations and in inter-state economic associations, such as the European Economic Community.

The Parti Québécois has often described its proposal for sovereignty-association as leading to the creation of a "true confederation" between Quebec and Canada.

Economic association

Economic association is a type of confederal organization directed at inter-state economic objectives.

Politically independent states, through their governments, have for a long time found it useful to link up with other states to foster common economic advantage through agreements on tariffs, labour and capital mobility, immigration, currency, taxation, and so on.

There are many forms of such agreements producing varying degrees of economic integration. They are broadly categorized as follows:

Free trade area

A free trade area involves the removal of tariff barriers between or among member states, at least for certain goods, each participant retaining the right to determine its own tariff levels in relation to non-member countries.

Customs union

In a customs union, member states not only renounce all tariff restrictions between or among themselves, as in a free trade area, but the member countries also standardize customs barriers applied to imports from non-member states. Since that common tariff must be agreed upon unanimously by the member states, it often requires painful compromises because the different geographic parts of each participant state may not have the same economic interests.

Common market

A common market involves not only a customs union but the removal of restrictions upon the movement of labour and capital between member countries. Capital may now respond to variations in investment returns while workers may move from one state to another in accordance with differences in employment opportunities and wages. With the free movement of population within the common market, internal control by the constituent states over immigration is partially relinquished. But devices by which each participant state can unilaterally influence that "freedom" continue to exist – subsidies, preferential treatment to local industry, quality controls, tax concessions, among others.

Monetary union

A monetary union entails, in addition to a common market, the adoption of a single currency and rate of exchange. Each member state limits its competence over monetary policy and a common agency assumes this function for the union.

Economic union

An economic union involves, in addition to a common market, varying degrees of harmonization of state economic policies in order to remove discrimination arising from disparities in these policies. Examples of areas of harmonization are taxation, agriculture, transportation, social security and regional development.

In each of these forms of economic association, common agencies may be created to administer the common policies on behalf of the member states.

Economic integration, especially when accompanied by parallel action in other areas, such as defence or external affairs, may lead progressively to a real degree of political integration, which may go somewhat beyond the idea of an economic union and even of a confederation.

In the European Economic Community, which was created by the Treaty of Rome in 1957 and now comprises nine western European states, the main decisions are still taken by a council of ministers acting for the member states. However, a form of political integration is suggested by the existence of: (1) a commission to uphold the Community viewpoint and to prepare common proposals; (2) a judicial body, the European Court of Justice (the Community law, as interpreted by that court prevails over state law in cases of conflict); and (3) a consultative assembly, the European Parliament (which is expected to receive elected representatives in the near future). Such an objective, the goal of establishing "the foundations of an even closer union among the European peoples," is stated in the Treaty of Rome.

Economic association between a politically sovereign Quebec and the remainder of Canada is one of the elements of the "sovereignty-association" option proposed by the Parti Québécois.

Devolution, decentralization, deconcentration

Devolution refers to a general process by which some legislative, executive or administrative powers are delegated from a central government to a regional, provincial or local government. An example is the devolution at present being proposed in the United Kingdom for Scotland and Wales. Within Canada currently the government of the two federal territories – the Yukon and the Northwest Territories – is based on devolution of power from the federal Parliament; the territorial councils have extensive legislative powers, but they remain subordinate to the federal Parliament.

Decentralization refers to the dispersion or degree of dispersion of authority within a political system. For example, legislative decentralization refers to the distribution of legislative authority to provincial or local governments. Administrative decentralization may refer either to the distribution of administrative responsibilities to less central governments, or to the granting by a government of greater responsibilities to its own regional or local offices. One method, among others, of achieving decentralization is delegation of powers (see page 63). Sometimes the term "administrative decentralization" is mistakenly used to refer to "administrative deconcentration."

Deconcentration refers to the dispersal or relocation of administrative personnel to areas away from the capital. In a federation either order of government may have deconcentrated administrations, and in Canada both the central and provincial governments have placed greater emphasis on this in recent years. Deconcentration, so understood, is a very different concept from administrative decentralization; the latter describes relationships of authority, while the former describes physical proximity to the capital.

Secession and separation

Secession is the withdrawal of a component state from a federation with or without the agreement of the central government and of the other members of the federation.

The term separation is a more general term used (1) sometimes synonymously with secession; (2) sometimes as a broader term encompassing the detachment of a component state by the initiative of either that state or by the remainder of the federation, for example, the removal of Singapore from the federation of Malaysia; (3) sometimes as a narrower term referring to the division of a unit which remains within a federation, for example, the separation of Jura from the canton of Berne while remaining as a separate canton within the Swiss federation.

Withdrawal is permitted in some but not all confederations. Most federal constitutions have either expressly prohibited secession or made no explicit provision for it. Exceptions are the Union of Soviet Socialist Republics and Yugoslavia, which formally recognize the right of secession although subordinating it to the cause of socialism, and the short-lived Burmese constitution of 1947 which prescribed a procedure for orderly secession. The Canadian constitution makes no provision for secession. In such cases constitutionalists agree that for a state to withdraw legally would require a formal constitutional amendment. In practice, however, where secession movements have occurred, the issue has been decided by politics rather than law.

6.

Constitution

A society exists by a consensus among its members to follow a general set of rules which citizens generally agree should structure the workings of the society and the state. These rules altogether form a constitution in the broadest sense.

A constitution is a set of fundamental laws, customs and conventions which provide the framework within which government is exercised in a state.

A constitution contains essentially: (1) the basic principles, objectives and rules which command the political life of a society; (2) the definition of the principal organs of government in all four branches – the legislative, the executive, the judicial and the administrative – their composition, functions, powers and limitations; (3) the distribution and the coordination of powers between the two orders of government if the form of government is a federal one; (4) the definition of relationship between the governors and the governed, particularly the rights of the latter.

A constitution which commands respect among citizens is a unifying force within a country.

A constitution, in its essential parts, may be mostly written, as in the United States, mostly unwritten or customary, as in the United Kingdom, or partly written and partly unwritten, as in Canada where most of the provisions relating to the federal system are written and most of the practices relating to the parliamentary system are based on conventions.

The main document of the written constitution is popularly referred to as "the constitution." The written constitution also includes the amendments to the constitution, ordinary laws (or statutes) having a constitutional content, and important documents in the history of the political development of the country.

The main "unwritten" parts of a written constitution are the decisions of the courts, interpreting the written documents, and the conventions of the constitution.

Constituent assembly

A constituent assembly is a meeting of delegates or representatives with the power to devise a new constitution or amend an existing one.

The Americans in the summer of 1787 held such a constituent assembly in Philadelphia. Each state sent delegates. After four months, a new constitution was drafted. This was followed by a process of ratification by the states.

The Charlottetown (1864), Quebec (1864) and London (1866) "conferences," which preceded the adoption of the British North America Act by the United Kingdom Parliament, brought together delegates from the legislatures of the colonies. In the strict sense of the word, these were not constituent assemblies since the representatives of the colonial governments did not have constituent power, a power which was exclusively vested at that time in the United Kingdom Parliament. However, in practice, these conferences prepared a constitution and the Parliament of the United Kingdom enacted a statute, the British North America Act, embodying all the main resolutions of the conferences.

There is no provision for a constituent assembly in the present Canadian constitution, either written or conventional. Some individuals and groups have proposed that a constituent assembly be established in Canada in order to prepare a new constitution. The holding of such a meeting, the relative representation of the linguistic, regional or other communities of such a body, and the voting procedures to be used by it would require the prior settlement of some of the very same issues that divide Canadians now.

Page

Part II The Canadian System of Government

Sources of the Canadian Constitution

Having seen in general terms what forms of governments are and what a constitution is, the Canadian constitution may now be defined as monarchical, representative, parliamentary and federal. The next step is to look at the sources of the Canadian constitution, the main features of the Canadian parliamentary and federal systems, the provisions for the protection of fundamental rights and the nature of territorial and local government.

The present Canadian constitution is drawn from many sources, written and unwritten.

British North America Act (1867)

The British North America Act, 1867, a statute enacted by the British Parliament after extensive preparatory work by Canadians in Charlottetown, Quebec and London, is the most important source. By dealing with the distribution of powers between the central and the provincial governments, the use of French and English, and confessional (religious) school rights, the act defines the most important elements of the federal system in Canada. In relation to the parliamentary form of government, the act describes some of the major institutions of the central Parliament and, largely by reference to the United Kingdom, their operating practices. If one refers, however, only to the wording of the text, the central government of Canada appears to be conducted by the monarch and his or her representative (the governor general), when in fact government is conducted by the prime minister and the cabinet, and the House of Commons and the Senate, although in the monarch's name.

Formal amendments

Some twenty formal amendments have been made to the BNA Act by the United Kingdom Parliament following, since 1895, "joint addresses" of both houses of the Canadian Parliament to the Parliament of the United Kingdom. As a result of one of these amendments, in 1949, the Parliament of Canada may now amend, alone, the constitution of Canada except in some specified matters, many of which pertain to the federal system. In this latter category is the distribution of legislative powers between central and provincial governments.

Constitutional statutes

Also part of the Canadian constitution is a number of "constitutional," "quasi-constitutional," or "organic" statutes, i.e., ordinary acts of legislatures with a constitutional content. A few are British, such as the Statute of Westminster (1931), and many are Canadian, such as the Manitoba Act (1870) and other similar acts creating provinces and territories. Statutes on the succession to the throne, the governor general, Parliament, the Senate, the House of Commons, the Supreme Court, the speakers of the House of Commons and the Senate, citizenship, the elections, and fundamental rights should also be mentioned.

Orders-in-council

Also included are orders-in-council, decisions made by cabinet under the authority of a statute: some originated in the United Kingdom, for example, those admitting various territories and provinces; some are Canadian, for example, those creating certain government departments.

Provincial statutes

Provincial statutes constituting, amending and supplementing the provincial constitutions are part of the Canadian constitutional framework.

Decisions of the courts

The decisions of the Judicial Committee of the Privy Council in the United Kingdom, the final court of appeal for Canada until 1949, and of the courts of Canada, particularly of the Supreme Court, in interpreting the constitution, become part of it.

Conventions

The conventions of the constitution are accepted practices of government, held to be obligatory by political leaders. Many of our parliamentary institutions and practices, for instance, those relating to the status and role of the prime minister and cabinet,

and to some aspects of our federal system, such as the holding of federal-provincial conferences, are ruled by conventions.

Other sources

To complete the list of sources are some international treaties having a constitutional content, for example, the Treaty of Utrecht (1713) and the Treaty of Paris (1763) and other treaties affecting land and maritime boundaries, and prerogative instruments, such as letters patent and the commissions and instructions concerning governors general and lieutenant-governors.

Some political scientists and jurists believe that the lack of a more comprehensive and more precisely written constitutional document is detrimental to good government in Canada. Others believe that this reliance upon a diversity of sources allows for flexibility and evolution to suit changing social and political conditions.

The Parliamentary Form of Government

Most of the political content of the current debate on the future of Canada is about federalism. But some aspects of the parliamentary form of government are also criticized. And some issues in the debate touch on both the parliamentary and federal systems. Examples of this last category are the capacity of the House of Commons or the provincial legislative assemblies to control the conduct of the executives in complex federal-provincial matters, and the composition and powers of the Senate as an expression of regional or provincial interests in matters that fall under the jurisdiction of Parliament. Hence the need to look at our parliamentary institutions and practices.

"Representative government" and "responsible government" are concepts of fundamental importance in describing the parliamentary form of government.

Representative government

In most modern democracies, citizens govern generally through representatives chosen in elections. Representative government was introduced in the legislature in Nova Scotia in 1758, in Prince Edward Island in 1769, in New Brunswick in 1784, and in Upper and Lower Canada in 1791. But for another half-century or more, the executive council, led by a governor appointed by the monarch, was not responsible for its actions to the elected representatives.

Responsible government

Responsible government was won in the 1840s, before Confederation. It came first to Nova Scotia and then to the province of Canada, what is now Quebec and Ontario.

Government is said to be responsible, not when the executive branch acts well or even responsibly, but when it acts with the support of the legislative body and thereby fulfils its function of accountability to that body.

The executive branch, the cabinet, is said to have the confidence of the legislature when it has the support of a majority of votes in the popularly elected house. If the government loses a vote of confidence, the prime minister or premier must resign, making way for a new leader who can command the confidence of the house or advise the governor general or lieutenant-governor to dissolve the legislature and call an election. Only in exceptional circumstances may the governor general or lieutenant-governor refuse to call an election as advised by the prime minister or premier and instead invite another political leader, such as the leader of the opposition, to form a government (see "governor general," page 36).

It is becoming more and more accepted as a convention that the government can fall only on a specified motion of confidence or on votes that are clearly identified by the government as important, either before or after the vote.

The crown in Canada

Canada is a "constitutional monarchy," that is, a state headed by a monarch whose powers are limited by statutes and conventions. The statement "the queen reigns but does not govern" is the expression of that fact.

"The Crown" in Canada is (1) the symbolic and ceremonial head of state; (2) the personification of central and provincial executive authority; (3) a part of Parliament and the provincial legislatures; (4) a discretionary resolver of parliamentary deadlocks; and (5) the nominal dispenser of justice.

The queen

The Queen acts in Canada as the Queen of Canada and not of the United Kingdom.

To understand the role of the monarchy in Canada, one must make a distinction between its formal, symbolic, or "dignified" aspects and the real, effective process of decision-making. In brief, while constitutional documents state that the monarchy and its representatives in Canada, the governor general and the lieutenant-governors, hold the executive authority, it is the prime minister and the premiers and their ministers who exercise the real power. Similarly, on the legislative side, real

power rests with the House of Commons, the Senate and the provincial legislative assemblies.

Most of the symbolic and formal powers of the queen have been transferred to the governor general, particularly since 1947. The queen continues to act for Canada personally, however, when she appoints the governor general on the advice of her Canadian prime minister, and during visits to Canada when she performs the duties at other times delegated to the governor general.

The queen or her representatives performs a number of constitutional roles. As a non-partisan head of state, the monarch gives acts of party government the status of acts of state by endorsing them, ensures the continuity of government and the orderly transfer of power when a majority in the House of Commons is not easily identifiable, and enables the prime minister, the head of government, to concentrate his attention upon non-ceremonial duties.

It will be observed that these roles could be played by a non-monarchical head of state. The question is: could they be played as well? Some Canadians appreciate the hereditary aspect of the monarchical principle and empathize with the family that has symbolized it for two centuries in Canada. They also believe that an appointed head of state, whether named by the head of government or elected by the representatives of the people, could not maintain himself as clearly above politics as an hereditary monarch and his or her representatives are able to do.

Nonetheless, others wonder if the governor general in his own name is not capable of fulfilling these functions in Canada. The Constitutional Amendment Bill (Bill C-60), introduced in Parliament in 1978, includes provisions under which the queen would continue to be the head of Canada with the title "Queen of Canada," while the power of the governor general would reflect better the contemporary realities. Others, such as the Committee on the Constitution of the Canadian Bar Association (hereafter, CBA), have suggested that the queen continue to be recognized as head of the Commonwealth but be replaced as head of state by a Canadian chosen for a fixed term by the House of Commons.

The governor general

The office of the governor general is referred to in the British North America Act. His powers and duties have been defined by many letters patent (documents issued by the head of state on the recommendation of the prime minister of Canada), commissions, instructions and conventions.

The governor general is appointed by the queen on the recommendation of the prime minister of Canada, by convention, for a period of five years, which can be extended. Since 1952, the governor general has been a Canadian, and it has become a convention to alternate between an English-speaking and a French-speaking person.

The letters patent of 1947 established the basis for the governor general to discharge all the functions of the monarch with respect to Canada. Between 1947 and 1977, the functions were progressively transferred and now are, in fact, all discharged by him in her name – with the exception of the appointment of his successor.

The governor general summons and dissolves Parliament, assents to all legislation, signs orders-in-council and appoints judges, senators and privy councillors. But those powers are exercised on the advice of the prime minister or of the cabinet, which means that the real decisions are made by them. The term "governor-in-council" refers to actions of the governor general taken on the binding advice of the cabinet.

The governor general has, however, some discretion in certain very rare situations.

For example, if a prime minister dies, the cabinet ceases to exist, there is no recognized leader of the party in power and it would take months to choose a new one in a national convention. The governor general must then consult the leading members of the party in power to see who is most likely to be able to form a cabinet to carry on until the new leader has been chosen. The caucus of that party will probably give him the answer.

After an election, the choice of the prime minister is usually automatic: the governor general appoints the leader of the party which has won a majority of the seats in the House of Commons. If an opposition party has won a majority, the governor general appoints its leader. **If no party has won a majority,** the prime minister in office may resign – whereupon the governor general calls upon the leader of the opposition to take over as prime minister – or he may meet the new Parliament. If the new House of Commons votes confidence, the prime minister stays in; if the new house votes no confidence, the prime minister resigns, and the governor general calls on the leader of the opposition to form a new cabinet. If the house promptly votes no confidence in this new cabinet, and if there is a sufficiently large third party, the governor general might call on the leader of that party to form a cabinet. In these unusual circumstances, the governor general might also consult with the various party leaders to see whether coalition around any one of them might have a reasonable chance of securing the confidence of the house.

Normally, a prime minister **defeated** in the House of Commons on a vote of want of confidence (or anything he and his cabinet consider equivalent to want of confidence) will not resign to make way for a new cabinet in the existing Parliament but will ask for a dissolution of Parliament and a fresh election. But if the defeat occurs very soon after an election has been held, and there seems reason to believe that a new cabinet of the opposite party, or a coalition, could carry on without a fresh election, the governor general might refuse the request for dissolution, and call on the leader of the opposition or of that coalition. He would also have to refuse if the prime minister tried to prevent the house from even voting on a non-confidence motion; and of course he would have to refuse if the prime minister whose party had failed to get a majority in an election asked him to dissolve the new Parliament before it could even meet.

Lieutenant-governors

The lieutenant-governor is the direct representative of the Crown in a province. He acts on the advice of the provincial ministers just as the governor general acts on the advice of the federal ministers. He is, however, appointed by the governor-in-council. The lieutenant-governor may receive "instructions" from the governor-in-council (in effect, the cabinet of the central government) and, at least legally, can reserve bills for the approval of the central cabinet. In fact, no such instructions have been sent for many decades. The last time reservation of a provincial bill occurred was in 1961 and the then federal prime minister was most annoyed by the conduct of the lieutenant-governor responsible for it.

Among possible changes mentioned in public discussion on that subject is the appointment of the lieutenant-governor by the queen on the advice of the provincial premiers, the procedure followed for the appointment of the governors in the Australian states. It has also been suggested that the formal head of the province be appointed or elected by the Legislative Assembly (or l'Assemblée nationale) or by the governor-in-council after consultation with the cabinet or executive council of the province concerned. It should be noted that, under the BNA Act, the provincial power of constitutional amendment does not extend to the office of lieutenant-governor. Consequently, any change in the status of the lieutenant-governor will have to be made by formal amendment of the BNA Act or within a new constitution.

The executive branch

The privy council

The Privy Council is another one of our symbolic political institutions derived from Great Britain. Originally the British monarch was counselled by an inner group of that name. When Canada's executive institutions were established under the British North America Act, the Privy Council was continued. But the council meets rarely, and only for ceremonial purposes.

Members of the Privy Council are named by the governor general on the advice of the prime minister. The council includes all past and present ministers of the central

government and a few additional dignitaries, some of them former provincial premiers.

The Constitutional Amendment Bill of 1978 proposes that the name of the Privy Council be changed to Council of State.

The cabinet

Within both the central and provincial orders of government, the cabinet is the active executive committee. Yet it is not even mentioned in the British North America Act; it exists by convention. The cabinet is the group that actually advises the governor general or lieutenant-governor and thus, in effect, exercises executive authority, formulates policies and takes political decisions. It is presided over by the prime minister or the premier.

The central cabinet is composed of "ministers" and "secretaries of state" who are accountable to and can be questioned in Parliament and its committees on the operation of their departments. Similarly, provincial cabinets are composed of ministers accountable to their legislatures. The central and provincial cabinets may also include a few "ministers without portfolio," not responsible for any department. A third, recently created category in the central cabinet, is that of "ministers of state." They head policy-coordinating ministries or assist departmental ministers in specific domains such as "small business" or "physical fitness and amateur sport."

Members of the central cabinet are appointed by the governor general on the advice of the prime minister. In order that the principle of cabinet responsibility to the legislature be implemented, they must be, or must become, members of the House of Commons or the Senate within a reasonable period of time. Similarly, members of a provincial cabinet are appointed by the lieutenant-governor on the advice of the premier and they must be, or must become, members of the Legislative Assembly (or l'Assemblée nationale in Quebec).

Most legislation enacted in Parliament or in the provincial legislatures is introduced by cabinet ministers after preparation within the appropriate departments and study and approval by the cabinet and its committees. Private members may introduce bills, but only ministers may introduce money bills, those that entail expenditures. The cabinet decides collectively on the policies to be presented to the legislature, assumes "collective responsibility" in the House of Commons (or in the case of the provinces, the legislative assemblies) for those policies and is also responsible for their implementation. Under the principle of "cabinet solidarity" any member who cannot publicly accept a collective decision of the cabinet must resign. Ministers are also bound to "cabinet secrecy" in order that differences may be freely thrashed out in cabinet deliberations without fear of political embarrassment.

These conventions and practices, in addition to the tradition of party discipline and the fact that the cabinets have at their call the resources of the public services, make them powerful political units. One may consider such power in the executive to be simply a necessity of modern government, or consider it to be an excessive and unwise limitation of the legislative branch of government which, hence, should be strengthened. One of the reforms most often recommended as a counter-weight to the power of the executive is the more extensive use of legislative committees.

Historically, a feature which has characterized the Canadian central cabinet has been the care with which prime ministers have attempted to achieve a regional balance in its membership. In recent years, however, some critics have pointed to the under-representation of certain regions, notably the prairies, in the cabinet, the result of a situation where the party in power has had only a limited number of western members of Parliament from which to choose.

The operation of the central cabinet was not defined in the British North America Act. The government's proposed Constitutional Amendment Bill (1978) would include sections describing the main features of cabinet government as it is currently practised.

The prime minister

Nothing is said about the office of the prime minister of Canada in the BNA Act. The prime minister's powers and responsibilities are mostly determined by conventions. Yet he is at the centre of the parliamentary political process in Ottawa.

The prime minister is the head of the executive branch of government – the "first minister." He presides over and chooses the members of the cabinet who are formally appointed by the governor general. (Macdonald, our first prime minister, used to give his profession as "cabinet maker"). In that capacity he also initiates the appointments of the governor general, privy councillors, lieutenant-governors, speakers of the Senate and the House of Commons, senators, chief justices, deputy heads of departments, ambassadors, members of commissions and heads of Crown corporations.

The prime minister is responsible for the government legislative program although a "house leader" organizes for him the day-to-day business in the House of Commons, and a "government leader" does the same in the Senate. It is upon the prime minister's recommendation that the governor general dissolves and summons Parliament and prorogues sessions of Parliament.

The office of prime minister is normally held by the leader of the party which has a majority in the House of Commons. Where no party has a majority he will normally be the leader of the party with the largest number of seats, or a politician who is supported by a coalition commanding a majority or the largest number of seats. The basic principle behind this practice is that the prime minister must be able to command the confidence of the House of Commons.

The provincial premiers

The roles of provincial premiers or prime ministers in relation to their cabinets and legislatures are similar to those of their central government counterpart.

It might be noted that the prime minister and premiers in Canada are very powerful politicians as they combine the leadership of three major political forces: their parties, their cabinets and their majorities in the legislative branches.

The already formidable influence of the first ministers has been increased by developments in the party system, the electoral system and the public administration.

Parties in Canada now elect their leaders in flamboyant political conventions which focus attention on them. As elected party leader, the prime minister or the premier has a great deal of control over the formulation of party policy, the mobilization of the party membership and the spending of party funds.

Similarly, the electoral process focuses attention on the prime minister or premier, who, especially because of the organization of modern communications media, is able to set the tone and the style of his party and his government, to symbolize the issues of his time. That observation applies of course to other party leaders as well.

Finally, the power of the prime minister has benefited from a growth in administrative services. In the late 1950s and early 1960s there were two or three dozen employees working directly for the federal prime minister: now there are a few hundred in the Prime Minister's Office (PMO) and the Privy Council Office (PCO). Similarly, the staffs of the provincial premiers have also expanded to meet the needs of their offices.

The legislative branch

Parliament has the authority to debate, adopt, alter and repeal laws, including laws overriding judgments of the judicial branch. The actions of the executive are generally based on legislation passed by Parliament, particularly in cases necessitating the spending of money. The House of Commons can also vote a cabinet out of office.

Parliament

Notwithstanding its "supremacy" the powers of Parliament are limited. The distribution of powers between the central and the provincial authorities in our federal

constitution must be respected. Parliament cannot delegate its powers to provincial legislatures (see "delegation of powers," page 63). Furthermore, there are portions of the constitution of Canada which Parliament alone cannot amend (see "formal amendment," page 59).

The Parliament of Canada, as presently established, is composed of the Queen, the Senate and the House of Commons.

The house of commons

The House of Commons is the house of the people, the main representative body in the central government, the major forum of political debate in the country, and the focus of parliamentary authority charged with the enactment of federal laws. It is here that the "direct and necessary confrontation of representative and responsible government" takes place as the cabinet presents its legislative program to the elected representatives of the people, accounts for its executive actions and faces the possibility of defeat.

The house is composed of 264 members (to be increased to 282 at the next general election). Known as members of Parliament, or MPs, they are in reality members of the House of Commons. They are elected in single-member electoral districts (see below, "The Electoral System").

After each election, a cabinet is formed and its members sit on the "front benches," on the "government side of the house." The ministers present and defend their policy measures normally in the form of "bills" or draft laws for the scrutiny of the house. Sometimes bills are presented first in the Senate. Bills adopted by the majority in both the House of Commons and the Senate are presented to the governor general for assent, and after proclamation, become the laws of the land.

The head of the party with the second largest number of seats in the House of Commons is usually called upon to be the "leader of Her Majesty's loyal opposition." He selects members of his party to form a "shadow cabinet," to sit on the front benches opposite the cabinet. The task of the opposition, which is to criticize the cabinet's proposed legislation and administrative practices and decisions, to expose their weaknesses and deficiencies and to offer alternative policies and even an alternative cabinet, is a most essential function of the parliamentary system.

The debates in the House of Commons are regulated by a chairman, or "speaker." He is selected by the prime minister generally from his own party after consultation with the leader of the opposition and is elected by the house. He presides according to the provisions of the BNA Act and laws, traditions and "rules of procedure" which not only assure order but guarantee the freedom of speech, as well as establishing the privileges and immunities of the members of Parliament.

The vast majority of members are "backbenchers." Their role is to express their views and those of their constituents, to study and propose amendments to the bills in the house in its many "standing" and special committees, and in joint committees with the Senate, and to support the leaders of their party in debates and votes. When they want to criticize their own party, they normally do so in their private party meetings or "caucus."

One's assessment of the effectiveness of the House of Commons is very much related to one's perception of its true functions – about which there is a great diversity of opinion. Some see it as essentially too dependent on the initiative of the executive, others as generally providing an effective constraint upon the executive.

The electoral system

In democratic states with competing political parties, the electoral system – the set of rules by which elections are held – has a great influence not only on who wins but on how the whole political system performs.

franchise

The federal franchise, or the right to vote, is now governed by the Canada Elections Act. In the past, it has been restricted by conditions of age, sex and property holding. Voting is now generally the right of all Canadian citizens eighteen years of age and older.

duration

The duration of the House of Commons is at present established by the British North America Act, which requires an election at least every five years. However, the prime minister may ask the governor general to dissolve Parliament at any time prior to the five years and request a general election. In case of "war, invasion or insurrection" the House of Commons may be continued, provided that not more than one-third of the members are opposed. The constitution also states that the house must meet at least once in each year. In fact, it now usually sits for seven to nine months a year.

distribution of seats

The present distribution of seats in the House of Commons is based essentially on population. There are complex statutory provisions, revised from time to time, to account for changes in the population. Overriding rules are that the representation of a province will not decrease as a result of readjustment, and that the representation of any province cannot fall below the number of seats it has in the Senate.

boundaries

The boundaries of the federal electoral districts (or "constituencies" or "ridings") are redrawn following each decennial census to accommodate population shifts. Since 1964, the redistribution has been carried out by a representation commissioner named by Parliament. One of his tasks is to ensure that no riding deviates by more than 25 per cent from the average number of electors per riding.

balloting

The current electoral law of Canada allocates to each constituency one member of the House of Commons to be elected in a single round of voting, by a simple majority. If there are more than two candidates, majority means the highest number of votes, i.e., a plurality.

This system may contribute to some provinces being unrepresented or under-represented in the governing party. It is sometimes suggested, therefore, that Canada adopt some form of "proportional representation" (PR) which would allow parties to have a number of seats in the house more in line with the percentage of total votes they have won in the country at large or in a province. Critics of proportional representation point out, however, that the single-member constituency gives a representative a more direct link to the electors and promotes more effective constituency work. They also fear that proportional representation would lead to minority governments and hence to governmental instability. On the other hand, some countries with proportional representation have produced long-lived coalitions.

The senate

The Senate is the other legislative house of the Canadian Parliament created by the British North America Act. It resembles the House of Lords in the United Kingdom (although membership is not hereditary) more than the upper houses of other federal states. In the United States and Australia, for example, members of the upper houses are elected by the population of the member states. In the Federal Republic of Germany's Bündesrat, members are actually drawn from the executives of the member states of the federation.

Canadian senators are appointed by the governor general on the advice of the prime minister. He usually, although with some exceptions, chooses someone from his own party and does not need to consult provincial authorities. In 1965, a federal statute, amending the British North America Act, imposed a retirement age of seventy-five on all senators appointed thereafter.

A speaker appointed by the governor-in-council presides over the Senate and a "government leader," one of very few, if not the only senator to sit in cabinet, represents the executive in the upper house.

The role of the Senate and the method of selection of its members were extensively debated at the time of Confederation. The method adopted was meant to counterbalance the principle of "representation by population" applied in the House of Commons. The Senate was intended to act as a house of "sober second thought" in reconsidering the legislation of the more "radically democratic" lower house, to protect the interests of private property (hence, the property requirements for membership), and to reflect provincial and regional interests.

Nominally, senators represent the population of the "regions" of the country. Prior to 1949 each region had twenty-four senators – Ontario, twenty-four, Quebec, twenty-four, the maritimes, twenty-four (ten each for Nova Scotia and New Brunswick, four

for Prince Edward Island); the west had twenty-four as well (six each for the four western provinces); six were added for Newfoundland at the time of its entry into Confederation in 1949 and two were added in 1975 for the territories, one each for the Yukon and the Northwest Territories, giving a total of 104.

Formally, the present Senate has powers equal to those of the House of Commons with the important exception that "money bills" must be introduced in the lower house and that the Senate cannot vote non-confidence in the cabinet. While often originating worthwhile changes to bills and conducting useful enquiries into matters of public concern such as poverty, the media, science policy and trade, the Senate, in practice, seldom challenges the House of Commons and the executive on major issues.

Because of the method and the practice of appointment of its members which give the Senate at least the appearance of an institution rewarding friends of the government of the day, its credibility as a body representing regional interests and its general effectiveness have been undermined.

In consequence, throughout the history of Canada there have been many suggestions for Senate reform or abolition. In the current debate, proposals have been advanced for replacing it by (1) a House of the Federation (in the government's Constitutional Amendment Bill (1978)) to which members would be appointed in equal number by the central Parliament and provincial legislatures with party representation proportioned to the popular vote for each party in the last preceding election; or by (2) a House of the Provinces (advocated in varying forms by the federal Progressive Conservative party, by the government of British Columbia, by the Ontario Provincial Advisory Committee on Confederation, by the Canada West Foundation and by the Committee on the Constitution of the CBA) to which members would be appointed by the provincial executives and represent them, central government spokesmen being allowed to take part in the proceedings, without voting rights; or by (3) a binational second chamber representing French and English Canada equally (as proposed in some briefs to the Task Force).

The federal New Democratic Party has advocated that the Senate be abolished without being replaced. At the same time, that party has suggested a substantial expansion of the House of Commons to include members elected by proportional representation in order to make this house more representative of regional interests.

Each of these proposals defines the powers and the voting procedure of the contemplated institution (see appendix II). Some proposals suggest special majorities and vetoes for certain types of legislation. Some would give the upper house substantial authority in matters relating to federal-provincial relations such as the ratification of the nomination of high federal officers, the control of the exercise of the central spending power, the approval of shared-cost programs and the ratification of international treaties respecting matters which fall predominantly within provincial legislative jurisdiction.

The constitutional right of the central Parliament to amend the composition and the role of the Senate by federal legislation only is currently the object of a reference to the Supreme Court.

The provincial legislatures

The constitution of the four original provincial legislatures is referred to in the British North America Act. Amendments to those constitutions, and the constitutions of the other provinces, are contained mainly in legislation of the United Kingdom, Canada and the provinces themselves.

The provincial legislatures are composed of two elements, the lieutenant-governor and the Legislative Assembly. In Quebec, the Legislative Assembly is called "l'Assemblée nationale."

Since provincial upper houses have now been abolished, unicameralism, a single house system, has become the rule in all the provinces.

The legislative process in the provincial legislative assemblies is similar to that in Parliament.

The judicial branch

Canada has a judicial system in which generally the same courts interpret both central and provincial laws. Within that system there are two levels of courts. The federal courts are created by federal statutes and the judges are appointed by the governor general on the recommendation of the cabinet. The provincial courts are established by the provincial legislatures. However, the judges of the higher provincial courts are appointed by the governor general, on the recommendation of the central cabinet and not by the provincial executives as is the case for other provincial courts.

The supreme court

The Supreme Court is the final general court of appeal for Canada and the cornerstone of our judicial system. Appeals from lower courts, generally speaking, are heard by leave (permission) of the Court and not as a matter of right. The Supreme Court exercises the function of ultimate judicial review in cases relating to the interpretation of the constitution and in references (requests for opinions on constitutional validity) from central and provincial executives, in the latter case by way of appeal from provincial appeal courts.

Prior to 1949, the Judicial Committee of the Privy Council in the United Kingdom (to be distinguished from the Canadian Privy Council referred to in the section on the Executive) was the ultimate court of appeal for Canadian cases, except in criminal law appeals, which were abolished in 1933.

The British North America Act provided for the establishment of a general court of appeal for Canada. The Parliament of Canada established such a court by statute in 1875. Consequently, in Canada, unlike the United States where the existence of the Supreme Court is constitutionally guaranteed, Parliament can amend at will the constitution of the Supreme Court and, in theory, could even abolish it.

Under the Supreme Court Act, the nine judges of that Court are appointed by the governor general on the recommendation of the cabinet. The selection of the chief justice is, by virtue of a decision of cabinet, the prerogative of the prime minister. The provinces do not participate formally in the appointment of the Supreme Court judges, nor is the Senate called upon, as in the USA, to ratify their choice. The present practice is sometimes criticized, since the Supreme Court is the final authority in the interpretation of matters such as the distribution of powers, which are of equal interest to the two orders of government.

Because Quebec has a distinct civil law, guaranteed by the British North America Act, the Supreme Court Act provides that three judges be members of the Quebec Bar or Bench. Since 1949 the practice has been to have three judges from Ontario (a practice broken in 1978), two from the western provinces and one from the Atlantic provinces.

Among other federations. some, like the United States and Australia, have, like Canada, assigned constitutional interpretation to a general court of appeal, while others, like the Federal Republic of Germany, have established a specialized constitutional court.

The Constitutional Amendment Bill (1978), has proposed that the Supreme Court remain a general court of appeal, but would increase the number of judges to eleven, of whom four would be from Quebec, and at least one from each of the other four regions, including British Columbia. Furthermore, the bill proposes a procedure by which the provinces would have a voice in the appointment of judges and appointments would be ratified by the House of the Federation. At the same time, the existence, the composition and appointments procedure of the Court would be entrenched in the constitution, and, consequently, these matters would no longer be dependent exclusively on the will of Parliament. Changes would require constitutional amendment.

It should be noted that if fundamental rights and freedoms are also entrenched, as suggested by the same bill and many other proposals, the role of the Court would be enhanced because it would be called upon to rule on the compatibility of federal and provincial legislation with the entrenched bill of rights.

The Alberta government suggested, in 1978, a different approach to judicial interpretation: a specialized tribunal dealing only with constitutional issues. It would consist of seven judges chosen for each case, by rotation, by the federal authorities from a panel of forty to fifty names, established from lists of experienced judges submitted by the provinces.

Other federal courts

The Exchequer Court was also established in 1867. It became, in 1971, the Federal Court of Canada. It mostly hears cases involving the Crown, and concerning the administration of federal statutes. Other federal tribunals include: the Income Tax Appeal Board, the Tariff Board, citizenship courts, the Immigration Appeal Board.

Provincial courts

Provincial legislatures have jurisdiction in civil law, in civil procedure and in the administration of justice, civil and criminal. Criminal law and criminal procedure are the responsibility of Parliament. The provincial legislatures may establish provincial courts of civil and criminal jurisdiction. Courts in the provinces range from lower courts of specialized jurisdiction, such as small claims courts, sessions of the peace, provincial, county and district courts, to a superior court which has a general jurisdiction (also called Supreme Court) and to a court of appeal, the highest in a province.

Independence of the judiciary

As provided by the British North America Act for the judges of the superior courts and by ordinary legislation for all other federally appointed judges, a judge may be removed only by the governor general on an address from both central houses. Such provisions are intended to help insulate the judiciary from political partisan interference. As yet, no federally appointed Superior Court judge has been so removed.

Although in our parliamentary form of government there is no firm "separation" between the executive and the legislative branches, the judiciary is really separated from both branches, the "only respect in which we make any real separation of powers," in the words of an eminent judge. The keystone of the "rule of law" has been the independence of the judges. The Constitutional Amendment Bill of 1978 and the Committee on the Constitution of the CBA have proposed the incorporation within the constitution of the principle of the independence of the judiciary.

The administration

The term "administration" refers to that part of the central or the provincial government which provides expert advice to members of the cabinet in the preparation of policies and laws, and, once the policy or the legislation is established and regulations added, handles its implementation, interpretation (subject to decisions of the courts) and reporting.

Traditionally, the administration was considered part of the executive function of government. However, it has become so large and omnipresent in this age of expanded government activity that it is now often perceived as a fourth branch of government. The administration is also referred to as the "public service" or the "bureaucracy."

The term "administration" is used somewhat differently in the United States where it means the whole regime of a particular president (for instance, "the Carter administration") including its policies and the senior politically appointed personnel of the executive branch.

Public servants in Canada are generally recruited through the Public Service Employment Act. Over time, it has become understood, and this is now supported by law, that they will be non-partisan in their professional activities. Thus, their employment will normally not be affected when there is a change in the political party that forms the executive branch of the government. Deputy ministers and a few other top public servants are appointed by orders-in-council, that is, directly by cabinet and may be removed in the same manner.

The central and provincial administrations are composed of a number of different types of organizations set up to fulfil different functions. There are government departments, boards, councils, commissions, Crown corporations and other agencies.

Departments

Departments are the normal structures for carrying out regular government policies. In the central government, in recent years, there have been some twenty-five departments. Provincial governments usually have a smaller number. Some two-thirds of the 325,000 federal public servants (excluding the armed forces) work for departments. Each department is headed by a cabinet minister who is responsible to Parliament for its activites. Department budgets must be submitted as estimates and spent in the manner directed by Parliament.

Boards, councils and commissions

Boards, councils and commissions are set up by governments, central and provincial, to regulate and administer certain types of activity, sometimes in a quasi-judicial manner (for example, the Canadian Transport Commission), to provide advice (the Economic Council of Canada) and to seek information (royal commissions of enquiry). They may be required to report to government or to Parliament directly or through a minister. They have varying degrees of independence from ministerial control in their decisions or recommendations.

Crown corporations

Crown corporations, federal and provincial, are organizations owned by the governments but operating semi-independently. They have grown in numbers and diversity as a means of implementing policies. They have the advantage of retaining a degree of accountability to Parliament and the public while enjoying greater freedom of initiative and less political control than government departments. Cabinet ministers are not responsible for Crown corporations but most Crown corporations report to Parliament through a minister. Federal examples are Atomic Energy of Canada Limited, Air Canada, the Canadian Broadcasting Corporation and Petro-Canada.

Two particular questions concerning the administration have entered the unity debate. The first has to do with the selection of personnel. In the early public service, to overcome "patronage," a tradition of employment on "merit," based on demonstrable professional qualifications, was established as the main criterion for hiring and promotion. Strict adherence to this principle has resulted in various categories of the population, such as those coming from certain regions of the country and from non-anglo saxon cultures, being under-represented in the public services. Such a situation results in the administration inadequately responding to the needs and expectations of certain categories of the population.

This argument may also apply to appointments on federal boards and commissions. As the provincial interest in their operation is sometimes considerable, consultation on appointments between Ottawa and the provinces in this matter has been suggested. The government of Alberta has recommended that 40 per cent of the members of some regulatory agencies be appointed by the provinces collectively.

Secondly, as the administration has become so large and costly at all of the three – federal, provincial and municipal – levels of government, and as the relations between the three levels have become so complex and often even unwieldy, there has grown a concern to streamline and trim the structure and size of the bureaucracy and to diminish areas of administrative overlap. The western and the Quebec governments have recently attempted to document cases of overlap and duplication and the central government, in 1978, proposed that there be a joint "effort" to remove duplication.

Influencing parliamentary decision-making

This section on parliamentary government has explained the terms relating to the basic formal structure of the parliamentary system as it operates in Canada. It should be noted that the way these institutions operate is influenced and shaped by the way in which political parties are organized and obtain their support, by the

activities of interest groups and the impact of private representations influencing the decisions of cabinet ministers, legislators and public servants, and by the decisions of judges who interpret the laws and the constitution.

3.

The Canadian Federal System

Introduction

A federation has already been defined in chapter 5, Part I as "a form of political organization by which common desires for unity and diversity within a society are accommodated by the establishment of a single political system, within which central and provincial governments each exercise autonomous constitutional authority so that neither order of government is legally or politically subordinate to the other."

This form of government was introduced in Canada in 1867 by the British North America Act. The country comprised at the time four provinces – Ontario, Quebec, New Brunswick and Nova Scotia. Manitoba was created in 1870, Alberta and Saskatchewan in 1905, by federal statutes. British Columbia, Prince Edward Island and Newfoundland, all existing political entities before 1867, joined the federation in 1871, 1873 and 1949 respectively.

In Canada, as in all other federations, two fundamental aspects of the federal system are the distribution or division of powers, and the mechanisms of coordination between the central and the provincial orders of government.

In the following analysis of terms and concepts, attention is drawn to how they apply in the present constitution of Canada and to significant proposals advanced by governments, particularly those of the central government in the Constitutional Amendment Bill (1978) and of the provincial governments, most recently at the Regina meeting (1978), and such organizations as the Ontario Advisory Committee, the Canadian Bar Association and the Canada West Foundation.

The distribution of powers

The "distribution of powers" was made in 1867 on the basis of the principle that the central government should have competence in the areas of government activities of common interest to all Canadians, and that provincial governments should have competence in the areas of particular interest to the provincial and regional communities.

In a federation, in principle, the whole field of government activities is apportioned between the two orders of government. The distribution is made in terms of the legislative competence, but in Canada the executive competence is generally derived from allocation of the legislative competence.

Whether the present distribution of powers is adequate is one of the crucial questions in the present political debate. Should there be a more precise distribution of powers? Should more power or more of the powers be assigned to the provinces or to the central government?

The enumerated exclusive powers

An "enumerated power" is an area of competence allocated specifically to one order of government or the other, or both, in the BNA Act. Enumerated powers are found particularly in sections 91 to 95 of the act.

Most enumerated powers are assigned exclusively, in two separate lists, to one order of government or the other; they are the "exclusive powers."

By section 91 of the act, the central Parliament was assigned thirty powers (including the residual power), giving it jurisdiction over matters such as trade and commerce, the public debt and property, direct and indirect taxation, defence, banking, currency, criminal law, navigation, penitentiaries, postal services, marriage and divorce, naturalization and aliens, sea coast and inland fisheries and Indians and lands reserved for the Indians.

By section 92, the provincial legislatures were assigned sixteen powers, including property and civil rights, direct taxation for provincial purposes, administration of justice, prisons, municipalities, maintenance of hospitals, management and sale of public lands, local works, and the power to amend their provincial constitutions except the office of lieutenant-governor.

In a separate section 93, education was specifically assigned to the provinces.

By constitutional amendments, (see p. 33) Parliament has been given additional exclusive powers, such as the establishment of new provinces out of the territories (1871), the representation of the territories in Parliament (1886), unemployment insurance (1940), the power to amend the constitution of Canada, with some exceptions (1949) and, by the Statute of Westminster (1931), the power to give its legislation extra-territorial effect.

Some enumerated powers are fairly general and can be given wide or restrictive meaning: for example, "the regulation of trade and commerce" in the central government list and "property and civil rights in the province" in the provincial government list.

Most proposals for constitutional reform are favourable to the continuation of two lists of exclusive powers, a central one and a provincial one.

The enumerated concurrent powers and paramountcy

In most federations, in addition to matters assigned to the exclusive competence of one or the other order of government, some powers are allocated to both orders of government; these are the "concurrent powers."

Section 95 of the BNA Act designates such concurrence in matters of agriculture and immigration. In the event of conflicting federal and provincial legislation in these fields, the federal legislation prevails; this is described as "federal paramountcy." In 1951 and 1964 old age security and supplementary benefits were added to that short list of concurrent powers (to become section 94A of the BNA Act) but in this case it was expressly stated that the provincial legislation would prevail in cases of conflict. This is described as "provincial paramountcy."

It might be observed that Quebec has recently acquired a larger participation in the concurrent field of immigration by way of federal-provincial executive agreements (see p. 64) culminating in the Cullen-Couture agreement of 1978. Nova Scotia and Saskatchewan have gone some way along the same road.

It is sometimes suggested in the present debate on the future of Canada (for example, by the Joint Senate and House of Commons Committee (1972), the governments of British Columbia and Alberta and the Canada West Foundation) that other areas of government activities might be declared concurrent, either with provincial or federal paramountcy. Among areas mentioned are: economic development, culture, fisheries, environmental protection, consumer protection, communications, health and welfare. Other contributors to the discussion, believing that concurrence leads to conflict between governments, would accept it only when there is a "clear case" for it, as the Committee on the Constitution of the CBA puts it.

The residual power and the general power

No enumeration of specific legislative powers in a federal constitution can be exhaustive or anticipate every major development, technological, economic or political. To cover any eventuality, the "residue" of powers is usually assigned in a federation to one order of government or the other. That remainder is called the "residual power."

In the BNA Act, the central government was assigned the residual power by the introductory paragraph of section 91 — to "make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces." The federal list of enumerated exclusive powers is declared to be only illustrative "for greater certainty, but not so as to restrict the generality" of the competence of the

central authority. That is why courts and constitutionalists usually refer to the introductory clause of section 91 as "the general power."

Among items which the courts have over the years declared to be in whole or in part within the federal control under the general or residual powers are: aeronautics, radio and telecommunications, nuclear energy, citizenship, offshore mineral rights on the Pacific coast, the incorporation of companies having other than provincial objects, legislation on official languages in federal institutions.

The provinces also have their own general power. It is found in section 92(16) — "generally all matters of merely local or private nature in the province." Some authors refer to it as a "mini-residual power."

Among items declared by the courts to come under the provincial general power are the local public order, the closing hours in retail business operations, the regulation of the sale of alcohol and exceptions to the observance of the Lord's Day Act.

It has been suggested, particularly in Quebec, that, in a new constitution, the residual power should be attributed to the provincial legislatures, as is the case in most federal systems, rather than to Parliament. The Committee on the Constitution of the CBA takes a different view and would except from this principle "cases of matters clearly beyond provincial interests." The government of British Columbia in its proposals has opted for a form of double residual power, that is, one for Parliament in matters of national interest, and one for the legislatures in matters of provincial or local interest.

The emergency power

In some federations, there is a specific provision enabling the central Parliament to assume in times of emergency legislative authority over areas of activity that in normal times belong to the provincial legislatures. That power is the "emergency power."

It is not expressly written in the BNA Act but the Judicial Committee of the Privy Council has said that an emergency power was implied in the general "peace, order and good government" clause of section 91.

The emergency power can be invoked "in time of real or apprehended war, invasion or insurrection." In 1914, a war measures act made possible the delegation of extensive emergency powers from Parliament to the cabinet.

In 1976, for the first time, the highest tribunal recognized that the federal emergency power may be invoked in peacetime, for example, in "very exceptional" economic circumstances, such as when a high degree of inflation is combined with a high rate of unemployment.

A number of recent constitutional proposals from the governments of British Columbia and Alberta, the Constitutional Committee of the CBA and the Ontario Advisory Committee, while recognizing its necessity, have recommended some clarification of and restriction on the emergency power of Parliament. Among the requirements of these proposals are, for example, an express declaration, approval by both houses of Parliament, and in addition, prior consultation with the provinces. The emergency power would also have to be reconciled with a bill of rights should one be entrenched. It has been acknowledged that such a bill of rights might have to be suspended during a wartime emergency.

The declaratory power

In the BNA Act, sections 91(29) and 92(10c), the central Parliament is empowered, acting unilaterally, to declare "local works" to be "for the general advantage of Canada or for the advantage of two or more of the provinces."

This power has been used, for example, to declare Bell Telephone of Canada, uranium exploration, several hundred grain elevators and a number of local railways, to be under the legislative authority of Parliament. The word "works" has been interpreted by the courts to include a physical "thing," a "facility" or even the "integrated activity" carried on therein. Parliament is therefore left considerable latitude.

In an October 1976 meeting in Toronto, the provincial premiers agreed to recommend that the federal declaratory power should be used only with the consent of the province or provinces concerned. The central government's Constitutional Amendment Bill (1978) recommends consultation with the province(s) in which the "works" are located. The government of British Columbia and the Committee on the Constitution of the CBA suggest that the exercise of the declaratory power should require the approval of a House of the Provinces unless the province(s) concerned agree to its use.

The taxation powers

Under the current arrangements defined in section 91(3) of the British North America Act (1867), the central Parliament has the power to raise money "by any mode or system of taxation." The provincial legislature may levy "direct taxation within the province . . . for provincial purposes" under section 92(2).

Clearly, both orders can levy direct taxes, the provincial legislature for "provincial purposes," the central Parliament, implicitly, for central government purposes. Consequently, double taxation is possible in the field of direct taxation.

But what is a direct and an indirect tax? To distinguish them, the tribunals have used John Stuart Mill's definition. "A direct tax is one which is demanded from the very persons who it is intended or desired should pay it." An example of a direct tax is the personal income tax. "Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another." Examples are excise taxes and customs duties.

The distinction remains a difficult one to make in some practical instances, as court cases demonstrate. The courts have accepted some of the techniques adopted by the provinces to escape some of the limitations associated with the words "direct taxation," for example, making the receiver (the salesman) of an indirect tax a government agent, in so doing converting a sales tax into a direct tax.

A number of recent constitutional proposals would permit both orders of government to tax by any means or mode, except for tariffs and excise taxes which should remain solely under central government control. Provincial premiers, in 1976 at Toronto and 1978 at Regina, have expressed their wish to see the taxation powers of the provinces also "strengthened . . . in areas of primary production from lands, mines, resources and forests."

The BNA Act provides some limitations on taxation powers. Section 121 provides that "articles of growth, or produce or manufacture of any one of the provinces shall . . . be admitted free into each of the other provinces." Therefore, no tariff barriers may be erected between provinces. Under section 125, no lands or property belonging to the Crown, federal or provincial, are liable to taxation.

licensing

Governments have other sources of revenue. A licensing power, that is, the right to issue a permit, is attributed by section 92(9) of the BNA Act to the provinces. A similar licensing power for Parliament in its own fields of jurisdiction has been recognized by the courts over the years.

royalties

The provinces by virtue of section 109 benefit from royalties, that is, money due on the exploitation of lands, mines and minerals. Examples receiving a great deal of current attention are the royalties on oil and potash. The central authority may also levy royalties on the natural resources falling under its jurisdiction such as those located in the northern territories.

borrowing

The BNA Act gives both central and provincial governments independent borrowing powers. The provincial legislatures by virtue of section 92(3) may borrow money on the credit of the province. The central authority has a parallel borrowing power under section 91(4).

The spending powers

In a federation, a government has the right to spend money in the areas of its jurisdiction. Can it go further and spend money in the other order of government's jurisdiction? The question is particularly pertinent in Canada in view of the ample taxation powers of the central government. This issue, particularly the spending

power of the central government, has been one of great intergovernmental controversy in this country, especially in recent times.

The Government of Canada, using sections 91(3) and 91.1(a) has assumed the right to make payments to individuals, institutions or governments for purposes on which it does not necessarily have the power to legislate.

The courts have considered this issue, and have stated that legislation of Parliament which disposes of funds must be within central government competence, but the courts have not been called upon to clarify the issue further.

It may be observed that when the spending power is used by the central government either to reduce regional disparities or to make equalization payments, it is not generally disputed by most provinces. However, when it is used in other areas that are primarily or exclusively provincial, it is considered by many provinces as being an "intrusion" and therefore contrary to the principles of federalism.

Some politicians and commentators think that the key to the resolution of the problem of any government spending outside its enumerated powers is to limit this to cases approved by formal constitutional amendment rather than leaving the matter to the courts. Others believe that the solution lies in establishing recognized procedures for determining the agreement of the provinces to permit such spending by the central government.

The provincial premiers have repeatedly pressed for the limiting of the central government spending power. The way to do so would be to submit federal shared-cost programs in areas of provincial competence to the consent of the provinces or to a vote in a reformed upper house, with provision for a province to opt out of a proposed program with financial compensation. During the constitutional discussions of 1968-71 and again at the fall Constitutional Conference of 1978, Prime Minister Trudeau accepted the principle of limiting the federal spending power. Most provinces agree with its continuance: the problem, in their view, is the degree of provincial participation or consent that should be required for its use in particular instances.

Equalization payments are of major importance to more than half of the provinces. Consequently, many provincial governments have suggested that the principle of equalization and the central government's obligation to provide it be constitutionalized and even entrenched.

Transfer payments

In the years since World War II, a complicated system of transfers of money from the central to provincial governments has evolved that altogether now exceed $13 billion in the 1977-78 fiscal year.

conditional grants

Conditional grants are transfers of money by the central government to some or all provincial governments subject to executive agreement on the use to be made of the funds. Conditional transfers aim at creating new services, at raising the level or the quality of existing services to "minimum national standards," or at changing the features of a specific provincial activity in which a strong Canada-wide interest is perceived. Typical conditional grants are "shared-cost" programs whereby the central government matches provincial expenditures on a percentage basis.

In 1977-78 these conditional grants, the largest of which was the Canada Assistance Plan, claimed over $3 billion of federal funds. Conditional grants have recently been used less extensively as many provincial governments have complained that they distort their priorities by encouraging provincial expenditures in areas of particular central government interest.

unconditional grants

Unconditional grants are transfers of money made by the central government to provincial ones with "no strings" attached to the way the funds are spent. One form of unconditional grants is an equalization grant.

equalization grants

An equalization grant is an unconditional transfer intended to enable provincial governments in the relatively poorer provinces to provide their services at levels comparable to those of the richer provinces without imposing a heavier tax burden on their residents.

Introduced in 1957, they go to those provinces whose per capita yields, from applying national average rates to twenty-nine uniformly defined provincial revenue sources, fall below the national per capita average. All provinces except Ontario, Alberta and British Columbia presently receive these grants which amounted to $2.7 billion in 1977-78. The provincial premiers at their Regina conference in 1978 reaffirmed their consensus of 1976 in support of equalization and the removal of regional disparities.

established programs financing (EPF)

In 1977, three previously "established" conditional shared-cost programs – hospital insurance, medicare, post-secondary education – were replaced by a new transfer plan. In response to provincial requests for more flexibility and control in administering these federal-provincial programs, the federal contributions now combine income tax point transfers with some cash payments. National standards in the health care field are expected to be maintained through broadly accepted standards stated in the new agreements. This constitutes a highly important but not well recognized alteration to the funding of Canadian federalism. By far the largest form of federal transfer, "EPF," the Established Programs Financing, amounted to $7.3 billion in 1977-78.

Powers concerning the economy

The responsibility to legislate over economic matters is divided between Parliament and the provincial legislatures. The original scheme of the BNA Act has been the subject of much judicial interpretation, particularly the trade and commerce, property and civil rights, criminal law and residual authority clauses.

In addition to taxation and spending powers already referred to in preceding sections, and the powers over natural resources and communications discussed in following sections, the distribution of powers concerning the economy is broadly as follows:

The central Parliament has legislative jurisdiction over (1) monetary policy and banking operations; (2) trade and commerce (interpreted by the courts as meaning interprovincial and international trade), and related matters such as tariffs and customs, patents and copyrights, weights and measures; (3) interprovincial and international transportation and communications, including railways, telephones and telegraphs and pipelines; (4) postal services, navigation and aeronautics; (5) the incorporation of companies having extra-provincial objectives, business competition and bankruptcy; (6) labour relations in federal enterprises and unemployment insurance. As noted in preceding sections, Parliament has also assumed a responsibility for the equalization of tax revenues among the provinces and for the reduction of regional disparities.

The provincial legislatures have jurisdiction over (1) economic matters falling under "property and civil rights" including contracts, insurance and the regulation of securities in their provincial aspects; (2) intraprovincial production, trade and marketing; (3) intraprovincial transportation and communications, excluding aeronautics; (4) the regulation of professions generally, labour standards and labour relations except for enterprises coming under central jurisdiction; (5) the incorporation of companies with a provincial scope. Under section 121 of the BNA Act, the legislatures cannot erect barriers to interprovincial trade.

Agriculture is a concurrent matter with central government paramountcy. Consumer protection is a field in which both orders of government intervene on the basis of their enumerated powers, such as "trade and commerce" for Parliament and "property and civil rights" for the legislatures.

Most contributors to the discussion on constitutional reform appear to favour a solid economic union for Canada. The Constitutional Amendment Bill (1978) would add a specific provision ensuring the interprovincial freedom of movement of persons, in addition to the freedom of movement of goods and capital. In some proposals, a special role would be assigned to a House of the Provinces to facilitate the

harmonization of intra-provincial trade, to improve intergovernmental consultation and to ratify international trade agreements. The Committee on the Constitution of the CBA has recommended a provincial competence on credit unions, caisses populaires and provincial trust companies. The Alberta government has proposed that transportation and communications become a concurrent jurisdiction.

Powers over natural resources

Canadian constitutional documents provide that the provinces have residual "proprietary rights" over lands, mines and minerals situated in their territories. In other words, these are all provincial property unless owned by individuals, corporations or the central government.

In addition, provincial legislatures have the exclusive legislative competence in the management and the sale of these provincial public lands and the timber and wood on them. The courts have defined lands to include waters and mines. The same legislatures can also tax directly for provincial purposes and impose royalties. The power of the provincial governments over natural resources, particularly over energy sources – hydro-electricity, oil and gas – is consequently considerable.

On the other hand, the central Parliament has jurisdiction over lands, mines and minerals situated outside the boundaries of the provinces. By decision of the Supreme Court in 1967, this includes the offshore area of the Pacific coast. (The jurisdiction over other offshore areas has not yet been defined by the courts). Parliament may also legislate in relation to the interprovincial and international transportation and trade of natural resources and may levy taxes either direct or indirect on the profits made by private corporations.

Hypothetically, the central government, by exercising its declaratory power (see page 49) could declare "local works" such as oil wells and hydro-electric power facilities, which normally are the responsibility of the provinces, to be "for the general advantage of Canada" and therefore subject to federal legislation.

Furthermore, in the case of an emergency, the central authorities are entitled to intervene in the area of natural resources. An example occurred in 1973, in the petroleum crisis, when Parliament passed emergency legislation giving the cabinet power to set prices on oil and gas moving beyond the borders of the producing provinces if agreement could not be reached between them and the central government. In the end, that legislation was not put into effect.

This description gives some indication of the complexity of the jurisdiction over natural resources.

The situation is equally complex in the area of fisheries. The provinces have proprietary rights over the beds of some rivers and the right to fish is considered by the courts as an accessory to the rights of ownership. Provincial legislatures may control the catch, the transformation and the marketing of fish within their boundaries. However, the Parliament of Canada has jurisdiction over the "sea coast and inland fisheries," "navigation," interprovincial and international transportation and trade, confirmed powers on some offshore areas and taxation – not to mention external affairs, an important power in view of the number of international conventions on the conservation of species.

In current constitutional discussions, it has been suggested by most provincial premiers, but particularly by those from the western provinces, that natural resources need greater protection from central government encroachment. Suggestions have been made, for example at the premiers' conference in Regina (1978) for the "confirmation and strengthening of provincial powers with respect to natural resources," particularly with reference to taxation. Among specific proposals are those of some coastal provinces, supported by Alberta, that provincial jurisdiction be established over offshore mineral rights.

On fisheries, the premiers, at Regina, talked about "the establishment of an appropriate provincial jurisdiction." Newfoundland and Alberta are more specific in suggesting concurrent jurisdiction with provincial paramountcy. The Committee on the Constitution of the CBA would split "sea coast" and "inland fisheries"; the first would be federal, the second, provincial competence.

At the same time, many premiers and commentators are also concerned not to weaken unduly the federal jurisdiction over interprovincial and international trade.

Powers in the fields of culture, communications and research

The word "culture" does not appear in the BNA Act's distribution of powers. The act is also silent on "research." But both being related to specific provincial exclusive powers, namely education and property and civil rights, the provinces have not hesitated to occupy these fields of government activity. The central government has also claimed a role for itself in these same fields on the basis of the need to foster a national identity and interest. It has justified this activity in terms of some of its enumerated powers and its spending power. Examples are the CBC, the Canada Council and the National Research Council.

Radio and telecommunications were, of course, unknown in 1867. These jurisdictions have since been awarded to the central authority by the courts as coming under the residual clause and under "works" of an interprovincial nature. Cable distribution of radio and television broadcasts was recently held (1978) by the Supreme Court of Canada to be a federal matter.

In Toronto (1976) and in Regina (1978) provincial premiers agreed on assigning culture, defined as meaning "art, literature and cultural heritage," to the concurrent list of powers with provincial paramountcy. The Committee on the Constitution of the CBA supported this view, but added that the central Parliament should keep "adequate legislative power to maintain a national identity."

In radio and television, the distinction is often made between "the hardware" or "means of broadcasting" in the words of the 1972 Parliamentary Committee, and "the software" or "program content," it being often suggested that the central government keep exclusive responsibility for the first and allow some room to the provinces in the second, particularly in cable and educational television. Some of the provincial premiers have so recommended.

Health and social welfare powers

The BNA Act had provided for provincial jurisdiction over the establishment, maintenance and management of hospitals and similar institutions in the province. On that basis, by a decision of the Supreme Court (1938), the field of health was declared to be primarily one of provincial jurisdiction.

The central Parliament had been given jurisdiction over military hospitals in 1867. By virtue of its power over criminal law and the use of its spending power to make grants to provinces, it has intervened in the traffic of drugs and in the field of health generally.

The words "social security" or "social welfare" do not, of course, appear in the BNA Act. In the Supreme Court decision of 1938, it was declared that responsibility for that field also rested primarily with the provinces.

In this area, however, old age pensions have been the object of two constitutional amendments, one in 1951 and the other in 1964; old age pensions and supplementary benefits are now a concurrent power with a stipulated paramountcy in favour of the provinces. The responsibility for unemployment insurance which was first recognized by the courts as provincial was allocated to the central Parliament exclusively by a constitutional amendment in 1940.

The constitution is often said to require further clarification in social matters, but the courts have rarely been asked to provide it. Instead, the tendency has been to decide these matters through federal-provincial conferences and executive agreements. An "opting out" formula with a compensatory fiscal allocation has been devised over the years for those provinces that prefer to have their own health plans. More recently, the central government policy has been to loosen its control in this field. (See "Established Program Financing" p. 52)

The central authority, while recognizing the primary legislative jurisdiction of the provinces, appears more reluctant to vacate the field of social welfare. It wishes to maintain some direct link with citizens. The discussion has intensified in the last decade between Ottawa and the provinces on questions of jurisdiction in matters of social services and income guarantees.

At Victoria in 1971, Quebec claimed priority in the field of social security. It also sought to establish the right for a provincial government to displace federal spending for social purposes and to secure federal funds for spending under provincial legislation. That this was not accepted by other governments was one of the reasons for the rejection by Quebec of the Victoria Charter.

Recent public representations on this subject generally recommend "greater decentralization," as did the Joint Committee of the Senate and House of Commons (1972), or the allocation of the field of "social affairs" to the provincial legislatures either exclusively or concurrently with provincial paramountcy. Provincial paramountcy would apply, for example, to retirement plans, family allowances and old age security. However, the retention of the jurisdiction by Parliament over unemployment insurance and allowances for veterans and native peoples is generally recommended.

The treaty-making and treaty-implementing powers

The negotiation of treaties is an executive responsibility; the implementation of their content may require legislative action.

The powers of the British government in the conduct of external affairs as they existed in 1867 have been progressively taken over by the central government of Canada, by the use of royal prerogatives, by constitutional conventions and the exercise of the residual power. The process was legally completed in 1931 by the Treaty of Westminster.

Since 1937, the power of implementing treaties signed by Canada as a sovereign state has been held by the courts to be independent from the power of negotiating them. The power of implementation must respect the distribution of legislative powers in the constitution. In other words, the central government may make treaties, but if their subject matter falls under provincial competence, they will not be applied unless the provinces act to ensure that they are carried out. This is unlike the situation in the United States where the central government has the power to implement treaties regardless of the allocation of internal powers. But, of course, treaties in the United States must be ratified by two-thirds of the Senate.

Since more and more objects of contemporary international relations (for example, labour, health, education) come under provincial areas of competence, cooperation between the central and provincial governments of Canada is necessary if deadlocks are to be avoided.

Some involvement in the negotiation of international conventions and of some bilateral treaties in areas of their competence has been sought by a number of provinces, particularly Quebec, and has been accepted for more than a decade by the central authorities for the sake of ensuring implementation. For example, provincial delegates are invited to participate in negotiations when provincial jurisdiction is involved, sometimes as heads of Canadian delegations. In 1965, to permit a Quebec-France "entente" in the field of education, Canada signed first an "umbrella" agreement with France.

Among federal systems, four allow constituent states a role in treaty-making. In the USA this power exists on paper only since federal consent is never given. In the Federal Republic of West Germany an elaborate system of federal-provincial consultation exists. In Switzerland the power is exercised sparingly. In the USSR the power has been used to justify the presence of the Soviet Socialist Republics of Bielorussia and the Ukraine in the United Nations.

There have been repeated calls from Quebec and occasionally from other provinces in favour of the right of the provinces not only to adopt laws implementing Canadian treaties on areas of activities falling within their jurisdiction but also to negotiate and sign international treaties in these same areas. In 1977 provincial premiers, as a group, stated that they had "concerns in certain areas;" the government of Alberta requested, in 1978, "confirmation of a provincial role in certain areas" of external affairs. A recent report of the Senate Standing Committee defines "national foreign policy [as] includ[ing] both federal and provincial activities and suggests a greater solicitation of provincial views." The Committee on the Constitution of the CBA has

recommended that the central government maintain exclusive jurisdiction in foreign policy and external relations, but that provinces be empowered to enter into contracts and arrangements with foreign states in their fields of competence so long as they keep the central government informed.

Some premiers and the Committee on the Constitution of the CBA have recommended the requirement of ratification by a House of the Provinces for international treaties concerned with "matters falling within provincial competence."

The power to create provinces and change boundaries

In 1871, by a formal amendment to the British North America Act, the central Parliament was given by the United Kingdom Parliament the express and exclusive power to create new provinces from the "territories," to give them a constitution and to continue to administer the remaining parts of the territories. This constituting power could be used to give the whole or parts of the Yukon and the Northwest Territories provincial status. By the 1886 constitutional amendment, the central Parliament was empowered to give representation in the Senate and House of Commons to those territories still not organized as provinces.

Also under the 1871 amendment, the central authorities may make changes in provincial boundaries with the consent of the province or provinces concerned. In other words, provincial boundaries can only be changed by the Parliament of Canada and the legislatures of the provinces concerned, acting in concert.

The Constitutional Amendment Bill (1978) proposes that the central authorities be under an obligation to call a meeting of premiers for consultation in cases of a change of provincial boundaries and requires that the assent of any affected provinces be obtained before changes are made. In addition, the bill requires that the provinces be consulted before any new provinces are created out of territories under federal control. In their response, some provinces have recommended that their consent rather than consultation be required for the formation of new provinces.

The regrouping of provinces is not specifically provided for in the BNA Act and its amendments. Experts generally agree that for a regrouping of provinces, a formal constitutional amendment would be needed. The Committee on the Constitution of the CBA suggests that the central Parliament be empowered to regroup provinces with their consent, but that their representation in Parliament be, in such instances, approved under the general amending formula.

The powers of reservation and disallowance

The power of reservation of provincial bills, assigned to the lieutenant-governor by the British North America Act, entitles him not to assent to a bill duly adopted by the legislature of a province but instead to "reserve" it for the assent of the governor general acting on the advice of the central cabinet.

The power of disallowance, assigned to the governor-in-council, i.e., the central cabinet, by the British North America Act entitles him to annul, within a year, a statute duly adopted by a provincial legislature and given royal assent by the lieutenant-governor of that province.

Disallowance of provincial legislation, used frequently in the first half century of Confederation, has not been used since 1943. By the Second World War, the power of reservation had fallen into general disuse, but in 1961 a lieutenant-governor exercised the power of reservation somewhat to the embarrassment of the prime minister of the time.

The two powers are now considered "dormant if not entirely dead." They were from the start difficult to reconcile with the spirit of genuine federalism because they implied some subordination of the provinces to the central government.

In the Constitutional Amendment Bill (1978) the deletion of those two powers is recommended once a bill of rights is entrenched in the constitution. The premiers in Toronto in 1976 and again in Regina in 1978 suggested the unconditional deletion of these two powers. Most if not all constitutional reform projects recommend deletion.

Areas of uncertain jurisdiction

The distribution of powers in a federation can never be completely clear cut. Several expressions – "grey areas," "overlapping," "interlacing," "unwritten paramountcy," are used by political analysts and jurists to indicate the reality of interaction and interpenetration of federal and provincial powers and the imprecise frontiers of a number of them. Some have even used the term "de facto concurrent powers."

It is useful to distinguish the following concepts:

- Grey area: An area where it is difficult to see clearly the dividing line between a federal power and a provincial power is said to be "grey." It implies a no man's land between two exclusive powers, one federal and one provincial.

- Overlapping areas: The same fields of activity may, to a certain extent, be covered by legislation enacted by Parliament and a provincial legislature, each validly acting within a broad field of competence allocated to it by the constitution.

- Interlacing legislation: Because under the constitution, Parliament and provincial legislatures may be responsible for different aspects of the same fields of activity, they may, when exercising their legislative competences, create a network of activities which interpenetrate.

- Unwritten paramountcy: In cases where provincial and federal legislative powers overlap, where two statutes conflict, then the courts have said that the federal statute prevails.

An example of a grey area is that which results from the federal responsibility for criminal procedure and the provincial responsibility for the administration of criminal justice. The dividing line between those two responsibilities is sometimes difficult to trace. The Supreme Court has recognized the validity of provincial inquiries in organized crime but not of an inquiry in the administration of a federal police force. Jurists sometimes use the term "borderline case" in referring to these difficult instances.

The field of natural resources provides an example of interlacing legislation. The management of natural resources in the provinces is a provincial responsibility. But interprovincial and foreign trade in natural resources, for example, the quantity of oil, gas and hydro-electricity allowed out of Canada, which will affect production in the provinces, is a central government jurisdiction. Another example: industrial development is a provincial matter when on provincial territory but interlacing occurs when the federal government, by way of its trade power, develops bilateral trade relationships with foreign governments, the Canada-U.S. auto-pact, for instance, which affect industrial growth in the provinces.

Mechanisms of intergovernmental coordination

Although it has often been argued that in a federal system each order of government should be able to act independently within its own sphere of constitutionally assigned authority without any interference from the other order of government, in practice, the functions assigned to the two orders of government cannot be totally isolated from each other. Inevitably, when two orders of government exercise authority over the same population and the same territory their activities will overlap and, on occasion, conflict.

Furthermore, as societies have developed and become more complex and economically and socially interdependent, and as the role of all governments has expanded, the number of "areas of uncertain jurisdiction" has increased. Thus, in Canada as in other federations, in addition to a final court adjudicating constitutional disputes, there has been a growing need for effective institutions and processes to enable central and provincial governments to coordinate their actions and iron out their differences.

The need for effective intergovernmental relations has two dimensions: the relations between central and provincial governments and the interprovincial relations among provincial governments with each other. In practice a whole series of practical mechanisms has been established to facilitate intergovernmental consultation and

collaboration and from among these a number of illustrative examples are given below.

Federal-provincial conferences

Federal-provincial conferences bring together either first ministers (prime ministers and premiers) or ministers responsible for particular departments, for example, interprovincial affairs, finance or resources, to meet with each other. There are two types of such conferences: "ad hoc" conferences, which are called whenever there is a common problem to solve or need for consultation, and "continuing" conferences, which meet regularly over a period of years to deal with common tasks. The latter are usually supported by "working committees" of ministers or senior public servants and secretariats. There is now an average of 500 such meetings a year, including meetings of officials. The Canadian Intergovernmental Conference Secretariat was created in 1973 as a permanent administrative supporting staff to handle the administration of federal-provincial conferences.

The first federal-provincial conference of first ministers was called in 1906. Since the Second World War gatherings of first ministers have become increasingly frequent – some twenty have been held in the last ten years. Some are closed and some are open to the media. There is no constitutional provision for these meetings, their frequency or their procedures. Among the central government proposals at the Victoria Conference (1971) was the institutionalizing of the federal-provincial conference of first ministers as an annual event, and this proposal was subsequently embodied in the Constitutional Amendment Bill of 1978.

Interprovincial conferences

Interprovincial conferences bring together either premiers or other provincial ministers. The first took place in 1887 at the instigation of Prime Minister Mercier of Quebec, and such meetings were subsequently held from time to time. Since 1960, when Prime Minister Lesage of Quebec gave new life to the institution, they have taken place regularly, at least one a year. In 1967, on the initiative of the then Prime Minister Robarts of Ontario, a special "Confederation for Tomorrow" conference was held in Toronto. It was an interprovincial discussion on the state of the federation. The 1977 regular premiers' meetings at St. Andrew's and Montreal attempted to define common provincial policies on linguistic education rights. Interprovincial conferences work on both provincial matters and common concerns in the relations of the provinces with the central government. For example, at the 1978 Regina meeting, agreement was reached among the premiers on a common reaction to the federal government's constitutional proposals.

In addition to the meetings of premiers, interprovincial councils of ministers have been estabished in areas of joint interest, an example being the Council of Ministers of Education of Canada which has its own permanent secretariat.

There has also been in recent years an important development in the number of formal regional interprovincial conferences, especially among the leaders of the Atlantic and of the Western provinces. A notable feature of the western meetings has been the reports expressing concern about federal intrusions. In the east, for example, the three maritime premiers have met regularly. An example of their cooperation has been the single Maritimes Higher Education Commission which advises the premiers of the three provinces.

Improving intergovernmental coordination

The dominance of the parliamentary cabinets in both the central and the provincial governments has made these executive bodies the focus of relations between the two orders of government in Canada. This characteristic of Canadian federalism, whereby intergovernmental relations have taken the form predominantly of negotiations and agreements between the executives or their civil servants in a style not unlike international diplomacy, has been described as "executive federalism." This approach to federal-provincial collaboration has to its credit a considerable number of practical accomplishments in the form of federal-provincial agreements and programs.

Nevertheless, there have been many calls for improvement in the mechanisms for federal-provincial coordination. To begin with, the arrangements for federal-provincial consultation and collaboration are not specified in the written constitution

and, therefore, rest solely on convention and the willingness of the participating governments to support them. Furthermore, "executive federalism" is often criticized because it appears to encourage the participating leaders to emphasize publicly their differences, and to adopt confrontational stances. Other critics have argued that executive federalism tends to remove important areas of decision-making from legislative scrutiny by making them the subject of agreements arrived at behind closed doors by negotiations between government leaders.

Among the proposals for improving intergovernmental coordination have been those for a constitutional requirement of annual federal-provincial conferences of first ministers, the institutionalization of the process by a second chamber composed of direct representatives of the provinces (i.e., a House of the Provinces) who would participate in the approval of central legislation having an impact on areas of provincial jurisdiction, and the establishment of better procedures within the central and provincial legislatures for open review of executive agreements.

Means of constitutional change

Important changes, technological, social, economic and political, may well affect the constitution of a country and, if so, should be reflected in it. But, on the other hand, the stability and continuity of political institutions and practices must also be maintained. A constitution must, therefore, be both stable and adaptable at the same time.

In this context, scholars writing about the constitution describe it as "flexible," in the technical sense, when it can be amended by a legislature following its normal law-making procedure. If, on the contrary, constitutional amendment requires a special procedure, whether a reinforced majority in the legislature or popular approval by a referendum, the constitution is said to be "rigid." With some exceptions, the Canadian constitution is, general speaking, flexible in its parliamentary aspects and rigid in its federal aspects.

There are, in the present context, five means of altering, in law or in fact, the written parts of the Canadian constitution. These are: formal constitutional amendment, judicial interpretation, conventions of the constitution, delegation of power and executive agreements.

Formal constitutional amendment

The Canadian written constitution does not contain a complete formula for amendment.

the present situation

From 1867 on, the British North America Act could be amended by one of three legislative bodies, the British Parliament, the central Parliament or a provincial legislature, depending on the subject matter to be changed.

The **provincial legislatures** under section 92(1) can amend their provincial constitutions except for the office of lieutenant-governor. This power has been used, for example, to change the electoral laws, the acts concerning the legislatures and to eliminate upper houses. Certain specifically-designated sections of the BNA Act, relating to the operation of provincial governments, can also be changed by the provincial legislatures acting alone.

Prior to 1949 the power of **Parliament** to make formal amendments was very restricted. A few sections only of the BNA Act were amendable by the central Parliament alone.

But most substantial sections were left to the **United Kingdom Parliament** to amend. Since 1867, some twenty amendments to the BNA Act have been passed in the United Kingdom Parliament.

Under the Statute of Westminster (1931) the sole limitation to the constitutional independence of Canada was its inability to change the British North America Acts (1867-1930). As Canadians could not agree among themselves on a general formula of amendment, the United Kingdom Parliament reluctantly kept the power to amend the BNA Act, which it did only at the request of the Canadian authorities.

After 1895, a constitutional convention developed that a request for amendment should be made in the form of a joint address of the two houses of the Parliament of Canada. In law, the previous consent of the provinces is not necessary, though in practice it has been obtained in cases where, in the judgement of the central authorities, the provinces have a direct interest.

In 1949 an amendment of the BNA Act (now section 91(1)) enlarged the authority of the Canadian Parliament to amend "the Constitution of Canada" except as regards the following "reserved matters": the distribution of legislative authority between Parliament and the legislatures (s.91 to 95); the religious school rights (s.93); the use of the French and the English languages (s.133); the rights and privileges of provincial legislatures and executives; the annual session of Parliament (s.20); and the maximum five year duration of each Parliament (s.50). Only the Parliament at Westminster can amend those important sections of the BNA Act at the present time. In this sense, the Canadian constitution has not been fully "patriated."

the long search

The search for a general amending formula started in 1927 but despite many federal-provincial conferences since then (1931, 1935, 1949, 1950, 1960-61, 1964-65, 1968-71), and numerous parliamentary debates, no agreement has yet been reached.

A major issue of contention has been the degree and the form which provincial participation should take in the constitutional amendment process. How should the consent of the provinces be given? By a majority of the provinces? By a qualified majority? By all, unanimously?

Since 1927 several formulae have been discussed. Two recent proposals are commonly known as the Fulton-Favreau formula (1964) and the Victoria formula (1971).

The Victoria formula, the most recent, was part of the "Canadian Constitutional Charter, 1971," a set of constitutional proposals worked out in discussions with the provinces in the early months of 1971 and introduced by Prime Minister Trudeau. Under the formula, the BNA Act and amendments would have been formally amended by agreement of the central Parliament and of the legislatures of a majority of the provinces, provided that among them were the provinces that at any time have had more than 25 per cent of the population (Ontario and Quebec, thus far); two of the four provinces of the Atlantic region and two of the four western provinces (provided they made up together 50 per cent of the population of that region). An amendment would have been proclaimed by the governor general when authorized by resolutions of the Senate and the House of Commons and of the legislatures of the required number of provinces.

The Victoria formula would have applied to changes with respect to the "reserved matters" referred to above, and to the office of the governor general and the lieutenant-governors, the Senate (its powers, the number of senators per province, the residence qualification); and representation by province in the House of Commons.

The Victoria Charter was not accepted by all the provinces and the adoption of an amending formula was therefore postponed. The Victoria formula was subsequently endorsed by the Joint Parliamentary Committee on the Constitution in 1972.

recent developments

In 1978, the Government of Canada published a study paper on the amendments to the constitution and outlined, in addition to the Victoria formula, other possibilities, including some involving the use of referenda. A referendum, for example, might be Canada-wide and necessitate a majority in each of the four regions, or it might be used as a way of appeal in a province where the government had expressed a veto under the Victoria formula.

At the constitutional federal-provincial conference, in the fall of 1978, a majority of provincial premiers reaffirmed their preference for the Victoria amending formula. British Columbia, however, claimed a veto as a distinct fifth region and suggested that a reformed upper house be involved in the amending process. Alberta insisted on the equality of the provinces in the amending formula and urged that the "existing rights, proprietary interests and jurisdiction of a province not be diminished without

the consent of that province." Mr. Lévesque, on behalf of Quebec, was reluctant to consider any amending formula before complete constitutional revision had been worked out to the satisfaction of his government.

It is clear, then, that governments have not yet been able to reach agreement on a formula that would combine the necessary protection for all the provinces, in areas of critical importance, with an adequate degree of flexibility.

Patriation

"Patriation" would be the act of transferring from the United Kingdom Parliament to Canadian authorities (central and provincial) the complete power to amend the constitution.

Patriation would necessitate, in addition to the transfer of power through a patriation act of the United Kingdom, either the re-enacting in Canada by Canadian authorities of the constitutional statutes adopted in London over a period of a hundred years, or the enacting in Canada of a new constitution.

While the debate goes on, it is sometimes suggested that patriation should come first and a general amending "formula" be adopted later. Most provincial governments have resisted this idea, preferring to decide first on the general formula of amendment. Furthermore, in Toronto in 1976 and in Regina in 1978, the premiers reached a consensus on several other points on which they would insist before the constitution is patriated, namely, the clarification of the distribution of powers and the enlargement and strengthening of some areas of provincial jurisdiction.

Prime Minister Trudeau, on the other hand, has often expressed the view that there should be agreement on the general formula of amendment and on patriation as soon as possible.

Judicial interpretation in constitutional matters

In the constitutional matters, judicial interpretation is the power of the courts, particularly of the Supreme Court, to adjudicate disputes relating to the respective governmental powers as allocated in the written constitution. Such issues may be raised on the occasion of litigation between individuals, corporations or governments. The decisions of the courts may be considered as "de facto" amendments, giving to the words of the constitution their exact meaning.

The BNA Act does not contain any provision regarding judicial interpretation, though it foresees the creation of a Supreme Court.

The Judicial Committee of the Privy Council of the United Kingdom, acting as a final court of appeal for the British Empire and subsequently for the British Commonwealth, performed this function of judicial interpretation for Canada until 1949. It ruled on over 200 Canadian constitutional cases.

It has often been argued that the Judicial Committee altered the balance in the distribution of powers in the BNA Act by liberally interpreting the enumerated provincial powers at the expense of the federal general or residual power. Others have argued, on the contrary, that the decisions of the Judicial Committee resulted from the correct application of the rules of legal interpretation.

The Supreme Court, which was created in 1875 by the Parliament of Canada, without provincial participation, has, since 1949, taken over from the Judicial Committee as the tribunal of last resort.

In interpreting the distribution of powers for the purpose of determining the constitutionality of federal and provincial legislation, the Judicial Committee of the Privy Council established rules of interpretation, generally followed by the Supreme Court, such as the double aspect doctrine, the pith and substance doctrine, the ancillary power doctrine, the paramountcy doctrine, the emergency doctrine and the dimension doctrine. In the present debate, perhaps the most important are the following three:

- **the paramountcy doctrine:** In the field of concurrent powers, when there is a conflict of legislation, the paramountcy rule plays in favour of the Parliament of

Canada (s.95: agriculture and immigration) or in favour of the provincial legislatures (s.94A: old age pensions and supplementary benefits). When the paramountcy rule is not provided for specifically, and when the legislation of Parliament and of a provincial legislature come into conflict, this doctrine says that the central legislation prevails, the provincial legislation becoming inoperative in its conflicting part.

- **the emergency doctrine:** The Parliament of Canada, in very exceptional circumstances, such as those arising from "war, invasion or insurrection, real or apprehended," may legislate for the survival of the country as a whole, and in so doing may invade temporarily provincial areas of competence. This power has been declared to come under the opening clause of section 91, "peace, order and good government." It can also, in similarly exceptional circumstances, apply in peacetime.

- **the dimension doctrine:** A matter, which at the origin had been of local or provincial concern, may in some circumstances attain such size and importance as to affect the body politic of Canada and justify the Parliament of Canada legislating in relation to it. This theory, praised by some jurists, disliked by others, suffered notable restriction in the decision on the anti-inflation case of 1976. The validity of the Anti-inflation Act was recognized as being based on the emergency doctrine rather than on the dimension doctrine. The main difference between those two doctrines resides in the fact that the first one by its nature is of a transitory application while the second, when applied to a given case, applies permanently.

Conventions of the constitution

Customs, conventions and usages, as part of the Canadian constitution, contribute to its natural evolution.

Customs are unwritten laws sanctioned by the courts. Conventions are practices held to be obligatory by politicians, but not necessarily sanctioned by the courts. Usages are regular practices which are neither sanctioned nor held to be obligatory.

Conventions can supplement, restrict or replace, for all practical purposes, written rules of the constitution while leaving the words unchanged. A commentator has said: "Conventions are as much a part of the Canadian constitutional system as the laws which omit them." In the final analysis, the authority of conventions rests on agreements among political leaders to consider them as necessary and binding and on the approval of public opinion, the ultimate political tribunal.

As already seen, an important part of our parliamentary system rests on conventions. These conventions are constantly adjusting to circumstances. In recent times, for example, the rules governing the vote of non-confidence in Parliament have become more formal in the sense that the occasions on which the cabinet may fall have been reduced. Instances where this can happen are now mainly a specified motion of confidence, the regular vote on the throne speech and on the budget, a measure identified as very important by the cabinet either after or before it is voted upon.

Conventions have also developed and are developing with respect to the federal system. The progressive disuse of the powers of reservation and disallowance and the growing use of federal-provincial and interprovincial conferences are two examples of the effect of conventions on the development of the constitution.

A part of the current procedure for amendment also rests upon convention. A "mini-patriation" took place in 1949 when the Parliament of Canada was empowered to amend the constitution of Canada except in some areas. But the procedure to amend the excepted matters is still subject to an uncertain and much debated convention as to the obligation of the central authorities to consult or obtain the consent of the provinces before asking the Senate and House of Commons to make a joint address to the Parliament at Westminster for an amendment (see page 60).

Sometimes conventions are codified in the written law. In relation to Canadian independence, for example, the Statute of Westminster in 1931 consecrated in law that which had previously been developed by convention. The proposed Constitutional Amendment Bill (1978) attempts to have written into the constitution some of

the conventions relating to the powers and functions of the governor general, the prime minister and the cabinet, the dissolution of the House of Commons, and votes of non-confidence.

It would be wrong to believe that conventions are an exclusively British institution: all states have them, "above, under or alongside" their written formal constitutional texts, as a French author puts it.

Delegation of powers

Another way of making a federal constitution more flexible is to enable one order of government to delegate legislative power to the other. Such "delegation" (called "interparliamentary" or "horizontal" delegation) is not provided for in the British North America Act as it is in the Australian constitution, nor is it permitted by the Canadian courts on the basis that enumerated powers are mutually exclusive.

Some commentators, the Committee on the Constitution of the CBA for one, have argued against permitting interparliamentary delegation on the grounds that it could lead either to a substantial abdication of powers by some provinces contrary to the federal principle which condemns subordination, or because it could, by a process of devolution of powers to or from particular provinces, create situations of special status for those provinces.

On the other hand, many commentators have argued for a constitutional amendment permitting the interparliamentary delegation of powers. The Fulton-Favreau delegation formula of 1964 made provision for such an arrangement. That formula would have limited delegation to some enumerated provincial subjects (property and civil rights, prisons, local works) and would have been conditional on the consent of four provinces. However, if the Parliament of Canada had declared that less than four were concerned in the matter, delegation would still have been permitted for the remaining ones. The Fulton-Favreau formula is only one of a number of possible arrangements for interparliamentary delegation.

A form of delegation which is acceptable to the courts under the present constitution is "administrative delegation," that is, the power of a government, acting under the authority of a statute, to transfer to the agent of another government the authority to regulate an activity coming under its jurisdiction. The granting of interprovincial trucking permits on behalf of the central government by provincial transport commissions is an example of administrative delegation.

A delegation of power does not confer a permanent power on the delegate because the ultimate constitutional power remains with the delegator, who may take it back. Permanency can only be achieved through formal constitutional amendment.

Other ways of achieving constitutional flexibility are "referential legislation" (one legislature incorporates in one of its own statutes the law enacted by another) and "parallel legislation" (central and provincial governments agree on passing the same legislation in their respective spheres). These are ways of coordinating central and provincial legislation. An example of referential legislation is the Crown Liability Act, in which the central Parliament incorporates in its legislation the provincial rules of civil liability. An example of parallel legislation is found in the marketing of agricultural products.

In the view of some scholars and politicians, allowing interparliamentary delegation of powers would add flexibility to our federal constitution, particularly in the areas of government activities that cross jurisdictional boundaries (for example, transport and commerce). The limitations of the presently accepted forms of delegation are that they do not permit the comprehensive scope that the interparliamentary delegation would allow.

Although the Government of Canada envisaged a legislative delegation of powers in the Fulton-Favreau formula in 1964, no provisions for such procedure has been included in subsequent proposals of the central government. Alberta and British Columbia are known to favour interparliamentary delegation. Furthermore, British Columbia has recommended allowing Parliament to adopt laws for the provinces to administer.

Executive agreements

Executive agreements are policy-implementing agreements arrived at by negotiation between the central and provincial governments.

As a result of executive agreements, modifications to political relationships in Canada often take place during the ordinary process of intergovernmental relations without either formal constitutional amendment or judicial interpretation.

Executive agreements are signed mostly in areas of activity where neither order of government, on the basis of its own present constitutional powers, can act effectively alone. Even a short list of areas in which major agreements have been signed in recent years will help show the major role they play in solving problems arising from the distribution of powers between the two orders of government:

- Fiscal arrangements affecting the tax-structure and revenue sharing;
- Canada and Quebec pension plans;
- Medical and hospital insurance;
- Welfare assistance programs;
- Funding of post-secondary education;
- Manpower training programs;
- Interprovincial highway construction;
- Regional economic development;
- Environmental protection programs;
- External relations with respect to provincial jurisdiction;
- Immigration;
- Oil and gas pricing.

The importance of executive agreements in intergovernmental relations has led to the characterization of Canadian federalism as "executive federalism" (see "Mechanism of intergovernmental coordination," page 57).

4.

The Protection of Fundamental Rights

The nature, types and classification of fundamental rights have been outlined earlier (see pages 17-18). In the following paragraphs, the emphasis is on their protection in Canada.

Legal sources

Fundamental rights in Canada are currently protected by: (1) the principle of the rule of law, the common law, and various documents, such as the Magna Carta, inherited from the United Kingdom by virtue of a declaration in the preamble of the BNA Act which holds that the Canadian constitution will be "similar in principle to that of the United Kingdom"; (2) sections of the British North America Act, such as sections 20 (annual session of Parliament), 50 (five-year duration of a Parliament), 133 (linguistic rights), and 93 (confessional school rights); (3) sections of the Criminal Code; (4) articles of the Civil Code of Quebec; (5) central and provincial statutes such as the Canadian Bill of Rights (1960), the Saskatchewan Bill of Rights (1947), the Quebec Charter of Human Rights and Freedoms (1975); and (6) other statutes relating to the establishment of human rights commissions (the Canadian Human Rights Act 1977) hate literature, anti-discrimination in labour relations, etc.

Some theory

There are two main legal ways of ensuring the protection of fundamental rights. One is by legislative action, which invokes the principle of "parliamentary supremacy." The other is by constitutional action which better reflects the principle of "judicial supremacy."

In the first instance, the elected representatives of the population enact fundamental rights in specific statutes, taking into account their knowledge and awareness of the social "realities." Such statutes can be amended to suit changing conditions by following the ordinary legislative process. The courts are called upon to interpret those statutory rights.

The second way, which is known as constitutional entrenchment, involves declaring rights in the very body of a country's constitution. When this is done, rights can only be changed or circumvented thereafter by formal constitutional amendment, a much more demanding procedure than the passage of ordinary legislation. Furthermore, legislative bodies must thereafter take these entrenched rights into account, without exception, in their law-making activities. If they fail to do so, the statutes they enact can be declared invalid or inoperative by the courts. In other words, entrenched rights limit the legislative power.

Of course, these two approaches are complementary. But the different emphasis, whether on legislative bodies or on courts, is what matters.

Canada, in contrast to the United States, does not have a full "constitutionally entrenched" bill of rights; legal protection of fundamental rights is mainly statutory.

There are arguments for and against the constitutional entrenchment of rights. Those in favour say it gives greater certainty and consequently better protection against the possible abuses of governments and majorities. They add that many democratic countries have already moved in this direction. The United Kingdom itself is now bound by the European Convention on Human Rights and by the decisions of the European Court of Human Rights. Finally, they emphasize the educational and moral value of including human rights in the constitution. Those against entrenchment plead the requirements of flexibility and prefer to leave the assessment of these matters mainly and in final analysis to representatives of "the people" rather than to appointed judges.

In Canada, because of the federal system of government the problem of entrenchment has a further dimension: should rights be entrenched for both orders of government, the central and the provincial and, if so, how is this to be done?

The answer is not necessarily an "all or nothing" one. Some fundamental rights could be entrenched, while others are left to a combination of legislative and court

protection. It is also possible to entrench only general principles and to incorporate details in ordinary legislation, federal and provincial.

Some history

In 1960, Parliament enacted the Canadian Bill of Rights. It applied – and still does – only to federal legislation. 1960 was nevertheless a turning point.

Before 1960, the Supreme Court had proceeded to establish what certain authors have since referred to as an "unwritten bill of rights." Several cases that went before the courts became famous, such as the Alberta Press statutes, the Saumur, Roncarelli and Padlock Law cases. They dealt with matters such as freedom of religion, freedom of expression and equality before the law. The Court based its decisions on the distribution of powers, principles of common law, articles of the civil code and other principles such as the rule of law.

A debate took place in 1960 at the time of the adoption of the Canadian Bill of Rights on the desirability of entrenching it so as to make it binding on both orders of government, the central and the provincial. With the adoption of the Bill of Rights as an ordinary federal statute, capable of being circumvented by other federal legislation but only when expressly stated, Canada was said to have made "a compromise between English parliamentary supremacy and American judicial supremacy."

Some judges have since referred to the Canadian Bill of Rights as being of a "quasi-constitutional nature" to imply that, while it is only a statute, it is, in fact, more than that because other statutes must be consistent with it unless they are explicitly exempted. This is referred to as "statutory entrenchment." Other jurists have said, however, that the Canadian Bill of Rights is only a code of interpretation. In 1970, in the Drybones case, a section of the Indian Act was held to be inoperative by the Supreme Court, as contravening the "equality before the law" clause embodied in the Canadian Bill of Rights. But no federal statute has since been declared inoperative and the full significance of the Canadian Bill of Rights still remains to be clarified.

Because of these uncertainties, theoretical and practical, such questions as: "What is the best way of protecting fundamental rights in Canada?"; "What rights should be entrenched, if entrenchment takes place?"; and "Should the provinces agree to be bound by rights entrenched in the constitution, and, if they do agree, how is this to be done?" are very much part of the present unity debate.

The Constitutional Amendment Bill (1978), which contains Prime Minister Trudeau's main proposals for constitutional reform, would do the following: (1) entrench the standard individual rights and some new ones, such as the right "to move and take up residence in any province," some basic democratic rights already embodied in the BNA Act (sections 20 and 50), and some language rights; (2) require the central government to respect these entrenched rights in its own sphere of jurisdiction; (3) open up an opting-in procedure to the provinces desiring to be bound by these rights and (4) once all the provinces have opted in, amend the constitution to entrench formally the declaration of rights and make it binding on all legislative bodies.

Individual rights

Reacting to the Constitutional Amendment Bill, the provincial premiers stated in Regina in August 1978 that "while some [provinces] support the entrenchment of basic individual rights, others believe they are best protected by constitutional tradition and the ordinary legislative process."

In the fall of 1978, Ontario and the Atlantic provinces appeared to be favouring a degree of entrenchment of individual rights. The western provinces generally preferred to leave the last word in these matters to their own legislatures. The government of Quebec was not "against" as long as provincial language rights were "not affected." Some provinces were of the view that the rights entrenched should initially be kept to a minimum in order to facilitate the widest possible acceptance by governments.

The Ontario Advisory Committee on Confederation has recommended that basic political, legal, and democratic rights be entrenched. The Committee on the Constitution of the CBA has recommended entrenching political, democratic, and legal rights, protection against discrimination, certain linguistic rights and the right to public information.

A potentially important proposal has also been made which would entrench individual rights but include an "exculpatory clause." The clause would enable legislative bodies to contravene entrenched rights for specific reasons which would be expressly laid down in the contravening legislation. The expectation would be that such a clause would be invoked only in extreme cases and that, consequently, entrenchment would be operative most of the time.

Language rights

Besides individual rights, the Constitutional Amendment Bill (1978) would also entrench some language rights. These rights may also be constitutionalized and entrenched. Indeed, some have been entrenched since 1867.

Under section 133 of the British North America Act, English and French are mandatory in federal and Quebec legislation, permissive in the debates of the central houses of Parliament and the Quebec National Assembly and may be used by anyone at will before federal and Quebec courts. As stated by Chief Justice Laskin, in the Jones case, section 133 awards "constitutional rights." The Parliament of Canada cannot abridge them by ordinary legislation. A formal constitutional amendment by the United Kingdom Parliament would be needed to do so, at this time. Parliament may, however, add to them and this is what was done in 1969 by the Official Languages Act (which was declared valid in the same Jones case).

Section 23 of the Manitoba Act had the same effect in that province as section 133 of the BNA Act in Quebec. It was rendered inoperative, however, by a provincial statute in 1890, which was in turn held to be invalid (in the Forest case, in 1977) by a Manitoba Court. The decision has been appealed.

In the Blaikie case (1978), the Quebec Superior Court held that the legislature of Quebec cannot amend section 133 either. The court declared invalid Part III of Bill 101 (the Charter of the French language) which contradicted the terms of section 133. The courts of appeal confirmed that judgement. The decision has also been appealed to the Supreme Court.

But except for sections 133 and 23, the protection given the official languages by federal and provincial legislation is, so far, only statutory, not constitutionally entrenched. The federal Official Languages Act and the New Brunswick Official Languages Act are the two main examples.

The Victoria Charter (1971) contained a proposal which would have guaranteed linguistic rights (in courts and government services) to a greater extent than they are now. The Special Committee on the Constitution of the Senate and the House of Commons made a similar recommendation in 1972.

The Constitutional Amendment Bill of 1978 proposes, in section 13, to entrench the following principle: "The English and the French languages are the official languages of Canada for all purposes declared by the Parliament of Canada or the legislature of any province acting within the legislative authority of each respectively." It will be observed that this bill combines the principles of judicial supremacy and parliamentary supremacy.

Sections 14 to 21 of the bill detail the proposed status of the official languages. They would be compulsory in the statutes and records of the Parliament of Canada and the legislatures of Ontario, Quebec and New Brunswick, and their use would be optional in the proceedings and debates of all legislative bodies, central or provincial; in the federally constituted courts, in the criminal-law courts of the three provinces already mentioned and in all courts of the other provinces where "loss of liberty is an issue"; and finally in the communications of the public both with major federal institutions and with some major provincial ones where a substantial number of persons use the other official language, the provincial legislature having determined the acceptable number.

The views of the provinces on language rights have been expressed in a number of instances. In 1976, in Toronto, provincial premiers were looking for "a confirmation of English and French language rights along the lines discussed at Victoria in 1971." However, at Regina in 1978, "some premiers [felt] that the proposed language guarantees [of the Constitutional Amendment Bill] might present practical difficulties in their provinces, particularly in respect of provincial government services and courts."

In the fall of 1978, New Brunswick, Nova Scotia, Ontario, Newfoundland and Saskatchewan appeared favourable to the entrenchment of various degrees of language rights; Manitoba, Alberta, British Columbia and Quebec appeared not to be so inclined. Many provinces appeared to support, however, the entrenchment of the principle of English and French language equality.

Language of education rights

The provincial premiers signed a joint statement at the 1977 St. Andrews annual conference by which they committed themselves to ensure schooling in French or English "wherever numbers warrant." They also called on their ministers of education to conduct a study of minority language education in their respective provinces. Finally, each signing province agreed to formulate a program to further minority language education.

Quebec had hoped to win at St. Andrews acceptance of reciprocal and bilateral agreements between provinces which would provide for education in the official minority language wherever feasible and guarantee education in English to English-speaking Canadians moving to Quebec and education in French to French-speaking Canadians who live in provinces other than Quebec. This idea was rejected by the other provinces.

In Montreal, six months later, all provincial premiers agreed on the following formula: "Each child of the French-speaking or English-speaking minority is entitled to an education in his or her language in the primary or the secondary schools in each province wherever numbers warrant.... It is understood, due to the exclusive jurisdiction of provincial governments in the field of education, and due also to wide cultural and demographic differences, that the implementation of the foregoing principle would be as defined by each province."

Prime Minister Trudeau's Constitutional Amendment Bill, in section 21, would recognize the jurisdiction of provincial legislatures to define the meaning of "where numbers warrant," but would give to the courts the right to decide whether the definition was "reasonable" so that in case of dispute the courts would have the final word. The bill would entrench the right of anglophone and francophone parents, citizens of Canada and minority residents of any province, to have their children receive their schooling, in public school facilities, in the other official language than the one "primarily spoken."

Native rights

Indians were given special mention in section 91(24) of the British North America Act which places them under exclusive federal jurisdiction. The central Parliament has complete liberty, however, to legislate for "Indians and lands reserved for the Indians," an expression that includes Inuit and their lands. There are no entrenched rights for native peoples spelled out as such in the constitution. Such protection has been requested by many native groups, some proposing that reference be made to native rights, at least in the preamble of a new constitution.

Conclusion

It would be wrong to leave the impression that the protection of fundamental rights is exclusively a legislative, judicial, or constitutional question. The best protection is still an alert public opinion aware of infringements and prepared to oppose them. But legal recourse is nevertheless the main instrument of protective action.

5.

Territorial and Local Governments

Territorial governments

Besides its ten provinces, Canada has two "territories," the Yukon and the Northwest Territories. Under the 1871 amendment to the BNA Act, the Canadian government legislates for these areas and may, by way of devolution, delegate powers, legislative and executive, to local authorities, appointed or elected, while retaining final authority. The result is referred to as "territorial government."

Structures and powers

In each territory, a commissioner is the head of government. He is appointed by the federal cabinet and accountable to the minister of Indian affairs and northern development.

There is also in each territory a representative body, a council. It consists of fifteen elected members in the Northwest Territories and of twelve members in the Yukon – raised to sixteen since the November 20, 1978 election. Both councils are elected for a four-year term of office. They cannot vote non-confidence in the commissioners; there is consequently no full "responsible government" in the territories.

In administering the territorial governments, each commissioner is assisted by an executive committee modelled on a cabinet structure. In the Yukon, the committee is at present composed of the commissioner, as chairman, the deputy commissioner and four elected councillors as members. In the Northwest Territories, three elected councillors serve on the committee with the commissioner, his deputy and an assistant commissioner. The members are assigned portfolios by the commissioner, such as education and health and welfare.

Both councils may legislate, under the authority of federal statutes, in most areas of normal provincial jurisdiction, except for the legislation on natural resources which is reserved to the central government. The preservation of "game," however, is a local matter. Legislation must receive three readings and be given the assent of the commissioners. The governor-in-council, that is, the central cabinet, may disallow any territorial legislation or ordinance within one year after its adoption. The commissioners propose most legislation but private members' bills are allowed, except in money matters which are the prerogative of the commissioner. Besides enacting legislation, the councils give considerable time to policy matters in which the commissioners seek advice.

In practice, most policies are formulated by the commissioners on the advice of the councils. Funds can only be spent to the extent voted by the council and all new revenue measures are subject to council approval. The commissioners must obtain prior central government approval of major proposed legislation and budgetary measures that they, as chief executive officers, submit to the councils.

Both territorial governments now have the authority to impose their own personal and corporate income taxes, which are collected, as in most provinces, by the central government. At present, the Northwest Territories exercise their option, while the Yukon receives annual grants in lieu of these taxes.

In 1886, the BNA Act was amended to enable Parliament to provide for the representation of the territories in the central legislative houses. By act of Parliament in 1975, the territories now have two members in the Senate and two in the House of Commons, one in each house for each territory. The Northwest Territories will have two "MPs" after the next federal election. Under an amendment to the BNA Act, passed in 1871, the territories could be made into provinces, in whole or in part, by acts of Parliament. Some provinces object to this being an exclusive power of the central Parliament, and the Constitutional Amendment Bill (1978) provides for previous consultation with the existing provinces before new provinces are created.

Political development in the territories

Constitutional issues have assumed increasing importance in the territories in recent years. The pressures stem from three main sources: the general demand for a greater degree of self-government, whether at territorial or community level; the will of the native peoples – Indian, Inuit and Métis, to obtain recognition and political power, largely in the context of the settlement of their land claims; the need for the broadening of an economy long dominated by the fluctuations of non-renewable resources development.

Local government

Structures and powers

Under the British North America Act (sections 92.8, 92.9 and 93) local government in Canada is a responsibility of the provincial legislatures. It comprises all government entities created by the provinces, and also by the territories, to provide services that are judged to be more effectively discharged through local public involvement.

Broadly speaking, local government services are identified in terms of: community services, police protection, public transportation, environmental health, recreation, business development, land use control and education. Local government may operate, through the medium of government enterprises, such utility services as public transit and the supply of water, electricity and gas. The responsibility for education is normally carried out separately from the other local functions by means of elected school boards.

Within each province, the usual unit of local government, apart from the school board, is the municipality, incorporated as a city, town, village, township or other designation. The powers and responsibilities of each category of municipality are delegated to them by statutes enacted by their respective provincial or territorial legislatures. They vary from one category to another, from one province to another.

The most common form of municipal government is that of a council made up of councillors (often called aldermen) elected either from electoral sub-divisions of the municipality (ward system) or from the entire municipality (at-large system), and a mayor, elected at large. The council is then divided into committees each dealing with a major activity. Most larger municipalities have, as well, an executive body, either composed entirely of elected officials or of a mixture of elected and appointed officials. Some have city managers responsible to the executive body.

In recent decades, certain functions traditionally assigned to local government have been assumed in whole or in part by the provinces. Some provinces have encouraged the amalgamation of small units and some have also established special agencies and boards to provide certain services for groups of municipalities, and even a new level, "a second-tier," of local government, either in the form of regional government or metropolitan government.

The major source of revenue available to local government is the taxation of real property. It is supplemented in many cases by the taxation of personal property, businesses and amusements; by licences, permits, rents, concessions, franchises, fines and surplus funds from municipal enterprises. Local government revenues are also supplemented by provincial grants, either unconditional or for specific purposes.

Although municipal governments are the responsibility of the provincial governments, a number of areas of federal activity (for instance, railways, harbours, air transportation, housing) have significant impact on municipalities. The central government pays grants-in-lieu of taxes for federal buildings located in municipalities.

The federal Ministry of State for Urban Affairs, created in 1971, had been responsible for the coordination of federal policies in relation to urban areas. The ministry had also been involved in intergovernmental coordination, for example, through the setting up of tri-level (federal, provincial, municipal) conferences. An announcement of the central cabinet in November 1978 indicated that the ministry would be abolished in March 1979.

Local government and the constitution

Canadian municipalities, represented in particular by the Federation of Canadian Municipalities (FCM), have for some time sought more formal recognition as Canada's "third level of government."

Because municipalities speak for local communities, the FCM argues that there is a case to be made for municipal participation in the process of constitutional reform. On points of substance, the FCM has urged: (1) that a constitutional conference be convened in which all three levels of government would participate; (2) that the municipalities be accorded a constitutional status in any new federal constitution; (3) that their roles and responsibilities be expanded in order to ensure greater local autonomy; and (4) that local governments be guaranteed a fair share of provincial revenues. Generally speaking, however, most municipal leaders expect changes to come from provincial governments and be incorporated in provincial constitutions.

Page

Part III Options for the Future

1.

Constitutional Frameworks

Having defined or described some of the main terms of the social and political language, the institutions and the practices of the Canadian political system, the process of constitution making and change in a federal system, and having singled out for particular attention the important subject of the protection of individual and collective rights, it is now possible to sketch some of the basic choices, or options, being offered to Canadians at the present time.

Each of the options represents a proposed constitutional framework drawing together views on the following aspects:

- an assessment of the **situation** of Canada: including judgments on its gravity, its remote and immediate causes, and the interrelationship of its political, social and economic dimensions;

- the role of the **constitution**: its strength and weaknesses, its adequacy in terms of principles, objectives and needs, the success or failure of the processes for adaptation to change;

- the **distribution of powers** between the central and provincial governments: including views on some general questions – the essential powers of central and provincial governments, appropriate degrees of centralization or decentralization, distinctive status for Quebec – and some more specific ones such as the spending power of the central government, the residual power, the complex reconciliation between the provincial powers on natural resources and the central government's power in interprovincial and international trade;

- **the institutions of the central government**: the Senate, the House of Commons, the Supreme Court, the regulatory agencies, and the public service, including views related to their composition, their powers, their procedures, etc.;

- **federal-provincial relations**: involving an assessment of the effectiveness of current arrangements and proposals for improving existing instruments of coordination or for setting up new ones;

- **the methods of adaptation to changes**: encompassing formal constitutional amendment, judicial interpretation, conventions, delegation, federal-provincial executive agreements; their adequacy and recommendations for improving them in order to make them more flexible for their role in the drafting of a new constitution, or for the creation of special bodies dedicated to that objective;

- **the protection of fundamental rights and minority and language rights:** including whether they should be entrenched in the constitution. Supporters of each basic option usually also have **views on the other options**. Drawing attention to the points of similarity or contrast with other basic options often helps to define the nature of a particular option. The views of a government, a political party, a prime minister, an association – or, for that matter, a friend – on these topics will indicate the basic option favoured.

2.
Basic Options and Variations

In Part I we defined the concepts of sovereignty, confederation, federation and unitary states (see pages 14, 21-22). As stated there, the differences between these concepts are not simply differences of degree; they are qualitative ones.

The current debate on the future relationship of Quebec to the rest of Canada tends to polarize between two principal solutions: federation and political sovereignty.

Around each of these two poles several varieties of solution are proposed. For example, several forms of federation have been advocated, although they all have in common the division of sovereignty between two orders of government which are equal and not subordinate to one another.

Thus, federal solutions may vary in degree of centralization or decentralization of legislative and executive powers, composition of central institutions, and arrangements for intergovernmental relations and for adjudicating disputes. They may even take on the character of a "hybrid" by including some "unitary" features designed to enable the central government to ensure better the viability of the federation or to protect minorities within provinces, such as the powers of reservation and disallowance, the power of appointing lieutenant-governors, and the declaratory power, to name some examples already in the BNA Act. On the other hand, they may include some "confederal" features, such as the need of provincial consent for the ratification of treaties signed by the central government or for the exercise of certain specified central powers, and the appointment of members of the central second chamber by the provincial governments.

Around the other basic approach, **political independence**, there is also a cluster of variants. For example, a politically independent state may exist without any formal union or association with neighbouring states, or it may be associated with them in some form of economic association of which a free trade area, a customs union, a common market, an economic union, and a monetary union are possible variants (see pages 26 – 27). Some would even classify a political confederation in this group (see pages 25 – 26), although in most confederations, in practice, the limits on the ability of constituent units to exercise their political sovereignty is more limited.

The European Economic Community may be described as a hybrid in that it includes some confederal and even federal elements, such as the European Court and the proposed parliament, although at the same time some elements of an economic and monetary union are missing.

The proposal advanced by the Parti Québécois for sovereignty association (see pages 79 – 80), is a variant of the general group of associations among politically independent states. Indications are that when fully formulated the proposal may be a composite, with some elements of an economic and a monetary union, and even some of a confederation.

3.

Sovereignty-association

The Mouvement Souveraineté-Association was created in 1967, the Parti Québécois in 1969. The main themes of the souveraineté-association option have been there from the beginning of the movement, and some of them even before that as they belong to one of the trends in the political tradition of Quebec.

The constitutional aspects of this option rest on four guiding principles.

A concept of the Quebec society

The views of the Parti Québécois are based, first, on a concept of the **Quebec society**: French Quebecers, representing 85 per cent of the French-speaking population of Canada, form a majority, a nation, a people and a society, with a distinct identity and distinct collective aspirations. They are "proud of their roots" more and more "confident in themselves," "future oriented," and eager to achieve their own destiny. That society, the party says, has been dominated and exploited as a minority by English Canada, particularly by the central government of the federation. As a consequence, Quebec has only – and often in an "under-developed" condition – some of the necessary economic, cultural and political institutions of nationhood.

That society is an open one. It is hospitable to its own minorities – English, native and ethno-cultural – and intends to maintain amicable relations with the population of the rest of Canada and of the world.

A view of the Canadian federation

Second, the advocates of sovereignty-association also derive their position from a particular view of the **Canadian federation**. It rests, they say, on a misunderstanding. In 1867 English Canada wanted and obtained a centralized federation; Quebec, at the time, thought that it was getting a high degree of autonomy, an "insurance against centralization," "a true confederation." The solution they suggest, is to give each, now, what it thought it was getting then.

The central government of the federation, the supporters of this option say, is centralizing, English-Canada oriented, and ignorant of and indifferent to the Quebec society. Neither "plastic surgery," nor constitutional reform will change it. Recent decentralizing moves are only "superficial"; they touch on the workings of the system, not on its very essence. And the essence, they believe, is bad for Quebec.

They point to other Quebec political leaders – Duplessis, Lesage, Bertrand, Johnson, Bourassa – as all having felt this basic malaise. But those leaders offered only half-way solutions. Sovereignty-association simply follows on to the "logical end," in the best interests, its supporters believe, of both Quebecers and "Canadians."

A concept of the Quebec government

Third, this option is based on a view of the **Quebec government**. Péquistes argue that the Quebec government is the only one Quebecers can really call their own. Consequently, that government must exercise "complete" political sovereignty. The people of Quebec have a right to make this change under the internationally-accepted principle of self determination. Accession to sovereignty will be accomplished democratically and English Canada, it says, will accept the decision, in due course, because of "the dynamics of change" and its own democratic tradition.

A view of the world and of history

Fourth, this option is based on a view of **history and of the world**. Independence is the natural political condition of national communities. Less populous states than Quebec exist and fare well. Sovereign states can, of their own free will, associate with other states. Some fifty of them do. Confederation, supporters of this option declare, is the way of the future, not federation, as the former provides more autonomy to member states and consequently gives more expression to the identities of their populations. That, in their opinion, is the meaning and the message of the European Economic Community.

Sovereignty

In this context, how can one define sovereignty-association as put forth by its political advocates so far? They claim **sovereignty** for the state of Quebec, a full "national responsibility," a "complete state," a "single decision-centre completely at [our] own service," "one citizenship," "a single parliament" with "the exclusive power to make laws and raise taxes" on its own territory, with all the powers and "instruments necessary for the development of a distinct society," all the essential instruments for achieving a population balance, "internal development," "social policies," "culture," "economic progress," "foreign relations," etc. Having one unique "seat of power" is seen as the determining factor in the life of a society.

Association

But a state can voluntarily limit its own sovereignty, harmonize its policies with those of other states, delegate some of its powers to common institutions jointly set up. In this spirit, the objective of sovereignty is "twinned" with the objective of **"association"** with Canada, a "simultaneous process, not a consecutive one," to be achieved "concurrently," "without a break" – "renewal and continuity at the same time." That continuity, "mainly economic, political too," is a normal objective, "logical," and "evidently advantageous for all, particularly for Ontario."

Association would be **negotiated** "without anger," "between equal partners," – "not a majority-minority relationship" – "in mutual respect," on a "one to one basis," "between two peoples." The agreement would be consecrated in a "constitutive act" or "constitutional treaty."

The economic relationship could include, if the parties agreed, a customs union, a common market – "freedom of movement for goods, capital and persons," – "no customs, no passport," plus "a monetary union" and "various shadings of economic union," interprovincial reciprocity agreements on language rights and a possible "citizenship of the Association." Péquistes believe that after the initial shock English Canada will accept an economic agreement, although the Parti Québécois recognizes that there will be difficulties. But while "highly desirable," the economic association is not essential to their program, other alternatives being possible.

The areas of association would be "harmonized" by **joint institutions**, e.g., "a joint central bank" for the monetary union. Mention has been made of other common administrative, executive and political institutions – an intergovernment council, an interparliamentary or advisory parliamentary organization, joint public autonomous corporations, etc. – but they have not been officially announced at this time.

A **referendum** on the "content of sovereignty and the offer of association" will be called, probably before the end of 1979. Should the referendum not be favourable, the present government of Quebec would "remain provincial for a number of years" while constantly pursuing its objectives.

In the meantime, the Quebec government is willing, "respecting the rules of democracy," to work towards the decentralization of powers in the present federation – "so as to enlarge provincial jurisdictions" – and make arrangements that do not "compromise" its program. It feels it has "a mandate to do so."

That is, in capsule form, the constitutional framework of the sovereignty-association option as expressed mainly by the leader of the Parti Québécois, M. Lévesque.

One must add, however, that within and outside the party there are Quebecers committed to full and unqualified independence. Within and outside the party both the degree of economic association and the form of the central institutions of the future are subjects on which there is also a diversity of opinions.

4.

Federal Options

The federal approach to the structuring of a political system is not limited to only one model. Indeed, there are many variations among the twenty or so federations, bringing together more than a billion people, existing in the world today. A federal framework has been adopted in both continental and small countries, and has been combined with parliamentary institutions as well as with presidential systems and with constitutional monarchies as well as with republics.

Among the aspects on which federal systems vary is the distribution of legislative and executive powers and of revenues between the two orders of government; the number, relative size, and wealth of the provincial units; the degree of symmetry in the powers and constitutional status of these units; the composition and particularly the character of regional representation in the central policy-making institutions such as the executive, the second chamber, the bureaucracy and the regulatory agencies; the structure and jurisdiction of the judicial system, and particularly the supreme court or constitutional court which must act as an umpire in constitutional disputes; and the processes and institutions through which intergovernmental consultation and cooperation are facilitated.

Given the variations possible, it is not surprising that many revisions to the Canadian federal system have been suggested as a solution to the current problems of Canadian unity. Particular proposals in each of the areas listed above have already been referred to under each specific topic in Part II and therefore in this section we outline only the broad general approaches.

The basic federal options which have been proposed for Canada at the present time are:

- **The status quo**
- **Major decentralization**
- **Major centralization**
- **Provincialization of central institutions**
- **Asymmetric federalism**
- **Renewed federalism**
- **Restructured federalism**

All of these approaches start from the position that a federal system (see pages 23-25) is superior to any form of economic association and to a confederal system on the grounds that a federal system establishes a common central government, the members of which are directly elected by the citizens rather than by the constituent governments, which is in a position to take more effective action on behalf of the people of the federation on those responsibilities assigned to it. Supporters point out that, at the same time, in a federal system, provincial governments retain full competence or sovereignty over those subjects assigned to them by the constitution, thus enabling provinces to act autonomously in carrying out their own policies aimed at provincial distinctiveness. Moreover, they point out that confederal systems tend to be unstable and that a number of countries such as the United States and Switzerland adopted a federal constitution to replace a shaky confederal one and look back upon that change as a turning point in their effective development.

Status quo

The nature of the present federal structure in Canada is described in detail in Part II of this book.

Supporters of the existing Canadian constitutional structure point out that, through a process of evolution and adaptation since 1867, the BNA Act "has served Canada well" through a variety of extreme situations not foreseen by the Fathers of Confederation, such as two world wars and the world-wide depression of the 1930s.

Those who favour the "status quo" are satisfied, therefore, that the present fundamental laws of Canada do respond to our needs, and need not be changed, except by the ordinary processes of formal amendments to the BNA Act which are

adopted from time to time, the decisions of the courts on the distribution of legislative powers, and federal-provincial agreements, conventions and usages. These processes, particularly the decisions of the courts, have enabled our constitution to evolve gradually since 1867, particularly in the fields of legislative and executive powers, allowing for greater centralization in times of crisis, and greater decentralization in normal times, as at present. It should be emphasized that "status quo" does not mean "static." It means that the constitution should be adapted through the normal evolutionary process rather than radically altered.

Some supporters of the "status quo" express concern that the discussion of radical alternatives upon which there is no agreement serves only to undermine the legitimacy of the existing structures and to foster disunity. They also observe that too many specific changes affect the "delicate balance" of the constitution.

Those who are not in favour of the "status quo" for the present period of Canadian history, argue that our constitution needs a major revision or a complete redrafting. They argue that a clear, well articulated, attractive federalist option is urgently required, especially in view of the forthcoming referendum on Quebec's future position in Canada. The growth of regionalism, and the need to accommodate it, is also in their minds. Such critics do not necessarily reject the main characteristics of the constitution of 1867, that is, its federal character and its parliamentary form of government, but wish to modify and improve them substantially. Thus, they propose major revisions to clarify or change the distribution of powers, to alter the central institutions such as the Senate, to make the Supreme Court more acceptable as an independent adjudicator, to entrench a Bill of Rights, to devise a general formula of amendment, and to patriate the constitution. The changes which have been suggested in each of these various areas by various governments or groups have been referred to in the sections on the existing Canadian constitutional structure in Part II.

Major decentralization

One form of revision to the Canadian federal system which has been suggested is a major decentralization of powers. This would entail a substantial transfer of legislative and executive powers to the provinces, a corresponding transfer of tax revenues to enable provinces to perform these added responsibilities. It would also involve the removal or severe limitation of the ability of the central government to use such devices as reservation, disallowance, the declaratory power, the spending power, and the emergency power to invade areas of provincial jurisdiction. In addition, the residual power would be assigned to the provinces.

Supporters of this option argue that it would reflect more accurately the current social, economic and political realities of regionalism in Canada, particularly the increased maturity and capability of all the provincial governments. They also argue that resentment of over-centralization and the frictions engendered by central government action in areas of primarily provincial governments would be reduced, thus improving harmony within Canada. Furthermore, a major decentralization would, in their opinion, enable the government of Quebec to exercise the powers it needs in order to maintain its distinctive heritage without having to give Quebec a special status or powers not possessed by the other provincial governments.

The actual powers that would be transferred to the provinces vary according to different versions of this approach but would generally include a primary or even exclusive responsibility for the provinces over such areas as social and cultural development, social services, natural resources, including fisheries, some areas of economic policy, communications, consumer and corporate affairs, urban affairs, housing and land use, the environment and even some aspects of foreign relations.

Opponents of this view argue that such a shift of powers and of financial resources has already taken place over the last fifteen years, and that a further decentralization within a federation that is already "one of the most decentralized in the world" would weaken the capacity of the central government to work effectively on behalf of the country as a whole and "to speak for Canada." They stress the importance of the ability of the central government to deal directly with citizens through social welfare programs in order to engender their support and loyalty. It is particularly important, they argue, to maintain the capacity of the central government to redistribute income

among provinces and among individuals in order to ensure that the benefits of the federation are shared by citizens in all the regions.

Major centralization

There are fewer advocates at the moment of a major revision in the direction of centralization through a transfer of powers from the provinces to the central government. But some Canadians do argue that the central government should be given a greater capacity in the economic policy field in order for Canada to remain strong in "a more and more competitive world." They add that the capacity of the provinces to erect barriers to the mobility of people, goods and services within the federation should be reduced in order that Canada might more fully take advantage of the potential benefits of economic union. Others have suggested the desirability of a Canada-wide policy in education and culture in order to ensure the development of a stronger Canadian identity and a better appreciation of what Canadians have in common. They point, for example, to the divisive effect of the differing interpretations of Canadian history taught in the provincial education systems, and to the OECD study, which criticized the lack of a national education policy in Canada.

Opponents of this view argue that it is unrealistic in relation to the social, cultural and economic diversity of Canada, and that the imposition of greater central control and uniformity upon this diversity would create resentment and therefore greater tensions and friction rather than unity.

Provincialization of central institutions

Because of the difficulties in practice of delimiting precisely central and provincial powers in many areas or of effecting major shifts in the direction of decentralization, some Canadians have argued that, as an alternative to decentralization, the central institutions within the federation should be "provincialized." Among the proposals that have been advanced in this direction are those for replacement of the current Senate by a House of the Provinces composed of delegates appointed by the provincial governments or elected by the provincial legislatures. The intent is to give provincial interests a direct influence on those areas of central legislation or executive action which would have a direct impact upon legitimate provincial concerns, and by so doing to reduce the often deplored insensitivity of central politicians and civil servants.

Supporters of this view suggest that provincial resentment at and resistance to action by the central government in areas of provincial and regional concern would be reduced if the central institutions were redesigned to ensure that, when acting in a way affecting those areas, they would have to take provincial interests into account. Moreover, if provinces were confident of this, it is argued, the inflexible attitudes characterizing present federal-provincial conferences would be reduced.

Opponents of this view express concern that the central government should not be dependent in its own area of jurisdiction upon having to consult or seek the agreement of the provinces. They fear that the provincial governments would use such arrangements merely to obstruct effective central government action. Some argue that a major decentralization of powers is preferable and would make a provincialization of central institutions unnecessary.

Asymmetric federalism

While in theory, it is usually considered desirable for the provinces within a federation to be equal in constitutional status, in practice their inequality in size and character often leads to differences in their relative power and status.

In Canada there are two pressures for asymmetry in the power and status of provinces. One stems from the sharp disparity in size and wealth and hence capacity to perform and provide services of the provinces, ranging from Prince Edward Island with a population of about 120,000 to Ontario with over 8 million. The other, more important still, derives from the cultural distinctiveness of Quebec, as the single province with a French-speaking majority, and leads to the allocating to that province of those powers necessary to preserve its distinctive heritage.

There is, of course, already a degree of asymmetry among Canadian provinces in the differing financial arrangements, in the unequal representation in the Senate, in the recognition of Quebec's civil law, and in the protection of linguistic rights in Quebec (under s.133 of the BNA Act), to give only a few examples.

During the past decade, the debate on this issue has focused mainly on whether Quebec should be assigned substantially more legislative and executive powers and corresponding tax resources not available to the other provinces. In one form it has been advocated that Quebec should have a "special status" with additional powers over such areas as language, culture, communications, research, and social policy. These would be formally assigned to Quebec in the constitution.

Proponents of this approach argue that since Quebec desires greater decentralization in order that the provincial government may protect and enhance its distinctive society, and since the remainder of Canada appears to desire a greater concentration of powers in the central government, a different treatment for Quebec from other provinces would provide a compromise satisfying the desires of both Quebec and the more centralist English Canada.

Opponents of this view argue that no province should have a "privileged" or "favoured" treatment because it offends the belief that all Canadians should be equal under the constitution. Moreover, they argue that a corollary of "special status," formally defined in the constitution, would be a prohibition upon Quebec members of Parliament, preventing them from voting on those subjects when Parliament is legislating for the nine other provinces. Moreover, while some degree of asymmetry is evident in most federations, experience elsewhere indicates that such arrangements carried too far can be disruptive, as evidenced by the fact that Singapore's marked "special status" in the Federation of Malaysia lasted only from 1963 to 1965.

Another approach for accommodating the differing needs of the provinces is to grant to all provinces the powers which Quebec needs in order to meet its particular needs but to couple with this, provisions making it possible for the central government to act, in these areas for those provinces which do not wish to exercise their powers in these fields. Three mechanisms enabling this would be: (1) to place the legislative powers in question under concurrent jurisdiction with provincial paramountcy; (2) to include in the constitution provision for the delegation of legislative powers; and (3) to continue or expand arrangements for "opting out" of shared-cost programs. Proponents of this approach would argue that it would give Quebec the particular powers it needs to maintain its distinctiveness without giving it a privileged or "special status" in relation to other provinces. At the same time, it would enable those provinces wishing to leave these fields to the central government to do so.

Critics of this approach worry that provinces which might otherwise have not wanted these powers would feel constrained to exercise them once these powers have been assigned to them. Critics also worry about whether a "de facto" distinctive status evolving over time may lead to such wide variations among provinces as to become eventually a source of tension.

In a federation as diverse as Canada, different arrangements to meet the specific needs of particular provinces have often proved necessary. The issue in the current debate is more the form and scope which such arrangements should take rather than their existence.

Renewed federalism

"Renewed federalism" is the label which has been given to the proposals of the Liberal government embodied in the Constitutional Amendment Bill (C-60 of 1978).

Basically this approach involves a major revision to the current constitution by entrenching fundamental individual rights and some linguistic rights, by adding a preamble and a statement of objectives and goals of the federation, by clarification (although not, at this time at least, substantially altering the balance) of the distribution of powers, by constitutionalizing the Supreme Court with a role for the provincial governments in appointments, by replacing the Senate with a House of the Federation (composed half of members selected by the provincial legislatures

representing parties in proportion to their electoral votes, and half of members selected by the House of Commons representing parties in proportion to their electoral votes), and by including an agreed-upon general amendment formula for the constitution. The details of these proposals have been referred to in Part II in the various sections dealing with the current constitution where proposed revisions are also outlined.

The general purpose of these proposals of the Constitutional Amendment Bill is to bring our constitution up to date, to delete obsolete sections, to formulate provisions governing the practices of cabinet government and the monarchy, and to clarify areas of uncertainty. This approach aims at a clarification in the distribution of powers rather than at a significant centralization or decentralization, but couples this with an effort to achieve some provincialization of central institutions through the creation of the House of the Federation.

The main criticisms advanced against the proposals have been over the proposed staging of the revisions so that the amendment of central institutions would be completed before the review of the distribution of powers. It is often argued that this procedure fails to recognize that the revision to central institutions and the distribution of powers are interrelated and must take account of each other. Furthermore, the provincial governments have objected to amendments being made to such institutions as the Senate and the Supreme Court without obtaining the consent of the provinces.

Restructured federalism

"Restructured federalism" is the title given by the Task Force on Canadian Unity to its proposals set forth in its report, **A Future Together**, and represents its view of an integrated third option. That report should be read for the details of this approach.

In outline, the Task Force advocates a major restructuring of the federal framework in order to give better expression to the reality of duality and regionalism in Canada and to enhance the sharing of benefits and power. The proposal calls for a clarification and an adjustment of the distribution of powers involving a recognition of the constitutional equality (non-subordination) of the central and provincial governments and of the need for a measure of asymmetry among provinces to enable all provinces to preserve their distinctiveness and Quebec in particular to enhance its French heritage; the replacement of the Senate by a Council of the Federation composed of provincial appointees in order to facilitate more harmonious federal-provincial relations; an alteration to the composition of the Supreme Court in order to make it more representative of the legal and political duality of Canada and the introduction of measures to ensure its independence, such as the entrenchment of its main features; the acceptance of a mixed electoral system with an element of proportional representation to ensure a broader regional representation in federal political parties; the inclusion in the constitution of an amendment formula which would provide for ratification by regional majorities in a Canada-wide referendum, the entrenched fundamental individual rights, and the entrenchment of linguistic rights applying at the federal level.

The Task Force report also offers proposals for improving the effectiveness of the Canadian economic union, for a better recognition of diversity within Canadian society, particularly in relation to native Canadians, and for a greater exercise of provincial responsibilities for culture and for linguistic minorities.

These proposals are set in the context of the need to establish institutions which will encourage the development of attitudes leading to greater harmony within Canada.

Appendix I

Historical Documents

Treaty of Paris, 1763

IV. His Most Christian Majesty renounces all pretensions which he has heretofore formed or might have formed to Nova Scotia or Acadia in all its parts, and guaranties the whole of it, and with all its dependencies, to the King of Great Britain: Moreover, his Most Christian Majesty cedes and guaranties to his said Britannick Majesty, in full right, Canada, with all its dependencies, as well as the island of Cape Breton, and all the other islands and coasts in the gulph and river of St. Lawrence, and in general, every thing that depends on the said countries, lands, islands, and coasts, with the sovereignty, property, possession, and all rights acquired by treaty, or otherwise, which the Most Christian King and the Crown of France have had till now over the said countries, lands, islands, places, coasts, and their inhabitants, so that the Most Christian King cedes and makes over the whole to the said King, and to the Crown of Great Britain, and that in the most ample manner and form, without restriction, and without any liberty to depart from the said cession and guaranty under any pretence, or to disturb Great Britain in the possessions above mentioned. His Britannick Majesty, on his side, agrees to grant the liberty of the Catholick religion to the inhabitants of Canada: he will, in consequence, give the most precise and most effectual orders, that his new Roman Catholick subjects may profess the worship of their religion according to the rites of the Romish church, as far as the laws of Great Britain permit.

Royal Proclamation, 1763

We have thought fit to publish and declare, by this Our Proclamation, that We have, in the Letters Patent under our Great Seal of Great Britain[. . .] given express Power and Direction to our Governors of our Said Colonies respectively, that so soon as the state and circumstances of the said Colonies will admit thereof, they shall, with the Advice and Consent of the Members of our Council, summon and call General Assemblies within the said Governments respectively, in such Manner and Form as is used and directed in those Colonies and Provinces in America which are under our immediate Government; And We have also given Power to the said Governors, with the consent of our Said Councils, and the Representatives of the People so to be summoned as aforesaid, to make, constitute, and ordain Laws, Statutes, and Ordinances for the Public Peace, Welfare, and good Government of our said Colonies, and of the People and Inhabitants thereof, as near as may be agreeable to the Laws of England, and under such Regulations and Restrictions as are used in other Colonies; and in the mean Time, and until such Assemblies can be called as aforesaid, all Persons Inhabiting in or resorting to our Said Colonies may confide in our Royal Protection for the Enjoyment of the Benefit of the Laws of our Realm of England; for which Purpose We have given Power under our Great Seal to the Governors of our said Colonies respectively to erect and constitute, with the Advice of our said Councils respectively, Courts of Judicature and public Justice within our Said Colonies for hearing and determining all Causes, as well Criminal as Civil, according to Law and Equity, and as near as may be agreeable to the Laws of England, with Liberty to all Persons who may think themselves aggrieved by the Sentences of such Courts, in all Civil Cases, to appeal, under the usual Limitations and Restrictions, to Us in our Privy Council.

The Quebec Act, 1774

"V. And, for the more perfect Security and Ease of the Minds of the Inhabitants of the said Province," it is hereby declared, That his Majesty's Subjects, professing the Religion of the Church of Rome of and in the said Province of Quebec, may have, hold, and enjoy, the free Exercise of the Religion of the Church of Rome, subject to the King's Supremacy[. . .] and that the Clergy of the said Church may hold, receive, and enjoy, their accustomed Dues and Rights, with respect to such Persons only as shall profess the said Religion.

VIII. And be it further enacted by the Authority aforesaid, That all his Majesty's Canadian Subjects within the Province of Quebec, the religious Orders and Communities only excepted, may also hold and enjoy their Property and Possessions, together with all Customs and Usages relative thereto, and all other their Civil Rights, in as large, ample, and beneficial Manner, as if the said Proclamation, Commissions, Ordinances, and other Acts and Instruments, had not been made, and as may consist with their Allegiance to his Majesty, and Subjection to the Crown and Parliament of Great Britain; and that in all Matters of Controversy, relative to Property and Civil Rights, Resort shall be had to the Laws of Canada, as the Rule for the Decision of the same; and all Causes that shall hereafter be instituted in any of the Courts of Justice[. . .] shall, with respect to such Property and Rights, be determined agreeably to the said Laws and Customs of Canada, until they shall be varied or altered by any Ordinances that shall, from Time to Time, be passed in the said Province by the Governor, Lieutenant Governor, or Commander in Chief, for the Time being, by and with the Advice and Consent of the Legislative Council of the same, to be appointed in Manner herein-after mentioned.

"XI. And whereas the Certainty and Lenity of the Criminal Law of England, and the Benefits and Advantages resulting from the Use of it, have been sensibly felt by the Inhabitants, from an Experience of more than nine Years, during which it has been uniformly administered;" be it therefore further enacted by the Authority aforesaid, That the same shall continue to be administered, and shall be observed as Law in the Province of Quebec, as well in the Description and Quality of the Offence as in the Method of Prosecution and Trial; and the Punishments and Forfeitures thereby inflicted to the Exclusion of every other Rule of Criminal Law, or Mode of Proceeding thereon, which did or might prevail in the said Province before the Year of our Lord one thousand seven hundred and sixty-four; any Thing in this Act to the contrary thereof in any respect notwithstanding; subject nevertheless to such Alterations and Amendments as the Governor, Lieutenant-governor, or Commander in Chief for the Time being, by and with the Advice and Consent of the legislative Council of the said Province, hereafter to be appointed, shall, from Time to Time, cause to be made therein, in Manner hereinafter directed.

The Constitutional Act, 1791

"And whereas His Majesty has been pleased to signify, by his message to both Houses of Parliament, his Royal intention to divide his Province of Quebec into *two separate Provinces*, to be called the Province of Upper Canada and the Province of Lower Canada; (15) Be it enacted by the authority aforesaid, that there shall be within each of the said Provinces respectively *a Legislative Council and an Assembly*, to be severally composed and constituted in the manner hereinafter described; and that in each of the said Provinces respectively, His Majesty, His Heirs, and Successors, shall have power during the continuance of this Act, by and with the advice and consent of the Legislative Council and Assembly of such Provinces respectively, to make laws for the peace, welfare and good Government thereof, such laws not being repugnant to this Act . . .

The Union Act, 1840

And be it enacted that from and after the said reunion of the said two Provinces, all writs, proclamations, instruments for summoning and calling together the Legislative Council and Legislative Assembly of the Province of Canada and for proroguing and dissolving the same, and all writs of summons and election, and all writs and public instruments whatsoever relating to the said Legislative Council and Legislative Assembly or either of them, and all returns to such writs and instruments, and all journals, entries, and written or printed proceedings of what nature soever of the said Legislative Council and Legislative Assembly and each of them respectively, and all written or printed proceedings and reports of committees of the said Legislative Council and Legislative Assembly respectively, *shall be in the English language only:* Provided always, that this enactment shall not be construed to prevent translated copies of any such documents being made, but no such copy shall be kept among the records of the Legislative Council or Legislative Assembly, or be deemed in any case to have the force of an original record.

The British North America Act, 1867

Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom . . .

IV. Legislative Power

17. There shall be One Parliament for Canada, consisting of the Queen, an Upper House styled the Senate, and the House of Commons.

1. Ontario

69. There shall be a Legislature for Ontario consisting of the Lieutenant-Governor and of One House, styled the Legislative Assembly of Ontario.

2. Quebec

71. There shall be a Legislature for Quebec consisting of the Lieutenant-Governor and of Two Houses, styled the Legislative Council of Quebec and the Legislative Assembly of Quebec.

4. Nova Scotia and New Brunswick

88. The Constitution of the Legislature of each of the Provinces of Nova Scotia and New Brunswick shall, subject to the Provisions of this Act, continue as it exists at the Union until altered under the Authority of this Act.

VI.—Distribution of Legislative Powers

Powers of the Parliament

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next herein-after enumerated: that is to say,—

1. The amendment from time to time of the Constitution of Canada, except as regards matters coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces, or as regards rights or privileges by this or any other Constitutional Act granted or secured to the Legislature or the Government of a province, or to any class of persons with respect to schools or as regards the use of the English or the French language or as regards the requirements that there shall be a session of the Parliament of Canada at least once each year, and that no House of Commons shall continue for more that five years from the day of the return of the Writs for choosing the House: provided, however, that a House of Commons may in time of real or apprehended war, invasion or insurrection be continued by the Parliament of Canada if such continuation is not opposed by the votes of more than one-third of the members of such House.

1A. The Public Debt and Property.

2. The Regulation of Trade and Commerce.

2A. Unemployment insurance.

3. The raising of Money by any Mode or System of Taxation.

4. The borrowing of Money on the Public Credit.

5. Postal Service.

6. The Census and Statistics.

7. Militia, Military and Naval Service, and Defence.

8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.

9. Beacons, Buoys, Lighthouses, and Sable Island.

10. Navigation and Shipping.

11. Quarantine and the Establishment and Maintenance of Marine Hospitals.

12. Sea Coast and Inland Fisheries.

13. Ferries between a Province and any British or Foreign Country or between Two Provinces.

14. Currency and Coinage.

15. Banking, Incorporation of Banks, and the Issue of Paper Money.

16. Savings Banks.

17. Weights and Measures.

18. Bills of Exchange and Promissory Notes.

19. Interest.

20. Legal Tender.
21. Bankruptcy and Insolvency.
22. Patents of Invention and Discovery.
23. Copyrights.
24. Indians, and Lands reserved for the Indians.
25. Naturalization and Aliens.
26. Marriage and Divorce.
27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.
28. The Establishment, Maintenance, and Management of Penitentiaries.
29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

Exclusive Powers of Provincial Legislatures.

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next herein-after enumerated; that is to say,—

1. The Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of Lieutenant Governor.
2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.
3. The borrowing of Money on the sole Credit of the Province.
4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.
5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.
6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.
7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.
8. Municipal Institutions in the Province.
9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.
10. Local Works and Undertakings other than such as are of the following Classes:—
    (a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province;
    (b) Lines of Steam Ships between the Province and any British or Foreign Country;
    (c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.
11. The Incorporation of Companies with Provincial Objects.
12. The Solemnization of Marriage in the Province.
13. Property and Civil Rights in the Province.
14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.
15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.
16. Generally all Matters of a merely local or private Nature in the Province.

Education

93. In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:—

(1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union:

(2) All the Powers, Privileges, and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall be and the same are hereby extended to the Dissentient Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec:

(3) Where in any Province a System of Separate or Dissentient Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education:

(4) In case any such Provincial Law as from Time to Time seems to the Governor General in Council requisite for the due Execution of the Provisions of this Section is not made, or in case any Decision of the Governor General in Council on any Appeal under this Section is not duly executed by the proper Provincial Authority in that Behalf, then and in every such Case, and as far only as the Circumstances of each Case require, the Parliament of Canada may make remedial Laws for the due Execution of the Provisions of this Section and of any Decision of the Governor General in Council under this Section.

Uniformity of Laws in Ontario, Nova Scotia and New Brunswick.

94. Notwithstanding anything in this Act, the Parliament of Canada may make Provision for the Uniformity of all or any of the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and of the Procedure of all or any of the Courts in Those Three Provinces, and from and after the passing of any Act in that Behalf the Power of the Parliament of Canada to make Laws in relation to any Matter comprised in any such Act shall, notwithstanding anything in this Act, be unrestricted: but any Act of the Parliament of Canada

making Provision for such Uniformity shall not have effect in any Province unless and until it is adopted and enacted as Law by the Legislature thereof.

Old Age Pensions.

94A. The Parliament of Canada may make laws in relation to old age pensions and supplementary benefits, including survivors' and disability benefits irrespective of age, but no such law shall affect the operation of any law present or future of a provincial legislature in relation to any such matter.

Agriculture and Immigration

95. In each Province the Legislature may make Laws in relation to Agriculture in the Province, and to Immigration into the Province; and it is hereby declared that the Parliament of Canada may from Time to Time make Laws in relation to Agriculture in all or any of the Provinces, and to Immigration into all or any of the Provinces; and any Law of the Legislature of a Province relative to Agriculture or to Immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada.

VII.—Judicature.

96. The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

101. The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.

109. All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.

121. 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.

133. Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.

The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those Languages.

The Statute of Westminster, 1931

2. (1) The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.

(2) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule, or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion.

3. It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation.

4. No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.

7. (1) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder.

The Canadian Bill of Rights, 1960

The Parliament of Canada, affirming that the Canadian Nation is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person and the position of the family in a society of free men and free institutions;

Affirming also that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law;

And being desirous of enshrining these principles and the human rights and fundamental freedoms derived from them, in a Bill of Rights which shall reflect the respect of Parliament for its constitutional authority and which shall ensure the protection of these rights and freedoms in Canada.

PART I

Bill of Rights

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely

(a) The right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;

(b) the right of the individual to equality before the law and the protection of the law;

(c) freedom of religion;

(d) freedom of speech;

(e) freedom of assembly and association; and

(f) freedom of the press.

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of*

Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to

(a) authorize or effect the arbitrary detention, imprisonment or exile of any person;

(b) impose or authorize the imposition of cruel and unusual treatment or punishment;

(c) deprive a person who has been arrested or detained

(i) of the right to be informed promptly of the reason for his arrest or detention,

(ii) of the right to retain and instruct counsel without delay, or

(iii) of the remedy by way of *habeas corpus* for the determination of the validity of his detention and for his release if the detention is not lawful;

(d) authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel, protection against self crimination or other constitutional safeguards;

(e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;

(f) deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal, or of the right to reasonable bail without just cause; or

(g) deprive a person of the right to the assistance of an interpreter in any proceedings in which he is involved or in which he is a party or a witness, before a court, commission, board or other tribunal, if he does not understand or speak the language in which such proceedings are conducted.

PART II

5. (1) Nothing in Part I shall be construed to abrogate or abridge any human right or fundamental freedom not enumerated therein that may have existed in Canada at the commencement of this Act.

(3) The provisions of Part I shall be construed as extending only to matters coming within the legislative authority of the Parliament of Canada.

Official Languages Act, 1968-69

Declaration of Status of Languages

2. The English and French languages are the official languages of Canada for all purposes of the Parliament and Government of Canada, and possess and enjoy equality of status and equal rights and privileges as to their use in all the institutions of the Parliament and Government of Canada.

Statutory and other Instruments

3. Subject to this Act, all instruments in writing directed to or intended for the notice of the public purporting to be made or issued by or under the authority of the Parliament or Government of Canada or any judicial, quasi-judicial or administrative body or Crown corporation established by or pursuant to an Act of the Parliament of Canada, shall be promulgated in both official languages [and other instruments, judgments, advertisements, etc.] . . .

Construction of Versions of Enactments

8. (1) In construing an enactment, both its versions in the official languages are equally authentic.

Duties of Departments, etc., in Relation to Official Languages

9. (1) Every department and agency of the Government of Canada and every judicial quasi-judicial or administrative body or Crown corporation established by or pursuant to an Act of the Parliament of Canada has the duty to ensure that within the National Capital Region, at the place of its head or central office in Canada if outside the National Capital Region [. . .] members of the public can obtain available services from and can communicate with it in both official languages.

(2) Every department and agency of the Government of Canada and every judicial, quasi-judicial or administrative body or Crown corporation established by or pursuant to an Act of the Parliament of Canada has, in addition to but without derogating from the duty imposed upon it by subsection (1), the duty to ensure, to the extent that it is feasible for it to do so, that members of the public in locations other than those referred to in that subsection, where there is a significant demand therefor by such persons, can obtain available services from and can communicate with it in both official languages.

10 (1) Every department and agency of the Government of Canada and every Crown corporation of established by or pursuant to an Act of the Parliament of Canada has the duty to ensure that, at any office, location or facility in Canada or elsewhere at which any services to the travelling public are provided or made available by it, or by any other person pursuant to a contract for the provision of such services [. . .] such services can be provided or made available in both official languages.

11. (1) Every judicial or quasi-judicial body established by or pursuant to an Act of the Parliament of Canada has, in any proceedings brought or taken before it, and every court in Canada has, in exercising in any proceedings in a criminal matter any criminal jurisdiction conferred upon it by or pursuant to an Act of the Parliament of Canada, the duty to ensure that any person giving evidence before it may be heard in the official language of his choice, and that in being so heard he will not be placed at a disadvantage by not being or being unable to be heard in the other official language.

Commissioner of Official Languages

19. (1) There shall be a Commissioner of Official Languages for Canada, hereinafter in this Act called the Commissioner.

(2) The Commissioner shall be appointed by commission under the Great Seal after approval of the appointment by resolution of the Senate and House of Commons.

(3) Subject to this section, the Commissioner holds office during good behaviour for a term of seven years, but may be removed by the Governor in Council at any time on address of the Senate and House of Commons.

25. It is the duty of the Commissioner to take all actions and measures within his authority with a view to ensuring recognition of the status of each of the official languages and compliance with the spirit and intent of this Act in the administration of the affairs of the institutions of the Parliament and Government of Canada and,

for that purpose, to conduct and carry out investigations either on his own initiative or pursuant to any complaint made to him and to report and make recommendations with respect thereto as provided in this Act.

26. (1) Subject to this Act, the Commissioner shall investigate any complaint made to him to the effect that, in any particular instance or case,

(a) the status of an official language was not or is not being recognized, or

(b) the spirit and intent of this Act was not or is not being complied with

in the administration of the affairs of any of the institutions of the Parliament or Government of Canada.

(2) A complaint may be made to the Commissioner by any person or group of persons, whether or not they speak or represent a group speaking the official language the status or use of which is at issue.

34. (1) [. . .] the Commissioner shall each year prepare and submit to Parliament a statement relating to the conduct of his office and the discharge of his duties under this Act during the preceding year including his recommendations, if any, for any proposed changes in this Act that he deems necessary or desirable in order that effect may be given to this Act according to its spirit and intent.

38. Nothing in this Act shall be construed as derogating from or diminishing in any way any legal or customary right or privilege acquired or enjoyed either before or after the 7th day of September 1969 with respect to any language that is not an official language.

Appendix II

Proposals from Official Groups and Private Organizations

Canadian Constitutional Charter, 1971 (The "Victoria Charter")

(excerpts)

PART I — Political Rights

Art. 1. It is hereby recognized and declared that in Canada every person has the following fundamental freedoms: freedom of thought, conscience and religion, freedom of opinion and expression, and freedom of peaceful assembly and of association; and all laws shall be construed and applied so as not to abrogate or abridge any such freedom.

Art. 4. The principles of universal suffrage and free democratic elections to the House of Commons and to the Legislative Assembly of each Province are hereby proclaimed to be fundamental principles of the Constitution.

Art. 5. No citizen shall, by reason of race, ethnic or national origin, colour, religion or sex, be denied the right to vote in an election of members to the House of Commons or the Legislative Assembly of a Province, or be disqualified from membership therein.

PART II — Language Rights

Art. 10. English and French are the official languages of Canada having the status and protection set forth in this Part.

Art. 11. A person has the right to use English and French in the debates of the Parliament of Canada and of the Legislatures of Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, Prince Edward Island and Newfoundland.

Art. 12. The statutes and the records and journals of the Parliament of Canada shall be printed and published in English and French, and both versions of such statutes shall be authoritative.

Art. 13. The statutes of each Province shall be printed and published in English and French, and where the Government of a Province, prints and publishes its statutes in one only of the official languages, the Government of Canada shall print and publish them in the other official language; the English and French versions of the statutes of the Provinces of Quebec, New Brunswick and Newfoundland shall be authoritative.

Art. 14. A person has the right to use English and French in giving evidence before, or in any pleading or process in the Supreme Court of Canada, any courts established by the Parliament of Canada or any court of the Provinces of Quebec, New Brunswick and Newfoundland, and to require that all documents and judgments issuing from such courts be in English or French, and when necessary a person is entitled to the services of an interpreter before the courts of other provinces.

Art. 15. An individual has the right to the use of the official language of his choice in communications between him and the head or central office of every department and agency of the Government of Canada and of the governments of the Province of Ontario, Quebec, New Brunswick, Prince Edward Island and Newfoundland.

Art. 17. A person has the right to the use of the official language of his choice in communications between him and every principal office of the departments and agencies of the Government of Canada that are located in an area where a substantial proportion of the population has the official language of his choice as its mother tongue, but the Parliament of Canada may define the limits of such areas and what constitutes a substantial proportion of the population for the purposes of this Article.

PART IV — Supreme Court of Canada

Art. 22. There shall be a general court of appeal for Canada to be known as the Supreme Court of Canada.

Art. 23. The Supreme Court of Canada shall consist of a chief justice to be called the Chief Justice of Canada, and eight other judges who shall, subject to this Part, be appointed by the Governor General in Council by letters patent under the Great Seal of Canada.

Art. 25. At least three of the judges of the Supreme Court of Canada shall be appointed from among persons who, after having been admitted to the Bar of the Province of Quebec, have, for a total period of at least ten years, been judges of any court of that Province or of a court established by the Parliament of Canada or barristers or advocates at that Bar.

Art. 28. No person shall be appointed to the Supreme Court of Canada unless the Attorney General of Canada and the Attorney General of the appropriate Province agree to the appointment, or such person has been recommended for appointment to the Court by a nominating council described in Article 30, or has been selected by the Attorney General of Canada under Article 30.

Art. 35. The Supreme Court of Canada has jurisdiction to hear and determine appeals on any constitutional question from any judgment of any court in Canada and from any decision on any constitutional question by any such court in determining any question referred to it, but except as regards appeals from the highest court of final resort in a Province, the Supreme Court of Canada may prescribe such exceptions and conditions to the exercise of such jurisdiction as may be authorized by the Parliament of Canada.

PART VII — Regional Disparities

Art. 46. The Parliament and Government of Canada and the Legislatures and Governments of the Provinces are committed to:

(1) the promotion of equality of opportunity and well being for all individuals in Canada;
(2) the assurance, as nearly as possible, that essential public services of reasonable quality are available to all individuals in Canada; and
(3) the promotion of economic development to reduce disparities in the social and economic opportunities for all individuals in Canada wherever they may live.

PART VIII — Federal-Provincial Consultation

Art. 48. A Conference composed of the Prime Minister of Canada and the First Ministers of the Provinces shall be called by the Prime Minister of Canada at least once a year unless, in any year, a majority of those composing the Conference decide that it shall not be held.

PART IX — Amendments to the Constitution

Art. 49. Amendments to the Constitution of Canada may from time to time be made by proclamation issued by the Governor General under the Great Seal of Canada when so authorized by resolutions of the Senate and House of Commons and of the Legislative Assemblies of at least a majority of the Provinces that includes

(1) every Province that at any time before the issue of such proclamation had, according to any previous general census, a population of at least twenty-five percent of the population of Canada;
(2) at least two of the Atlantic Provinces;
(3) at least two of the Western Provinces that have, according to the then latest general census, combined populations of at least fifty percent of the population of all the Western Provinces.

Art. 53. The Parliament of Canada may exclusively make laws from time to time amending the Constitution of Canada, in relation to the executive Government of Canada and the Senate and House of Commons.

Art. 54. In each Province the Legislature may exclusively make laws in relation to the amendment from time to time of the Constitution of the Province.

Art. 55. Notwithstanding Articles 53 and 54, the following matters may be amended only in accordance with the procedure in Article 49:

(1) the office of the Queen, of the Governor-General and the Lieutenant-Governor;
(2) the requirements of the Constitution of Canada respecting yearly sessions of the Parliament of Canada and the Legislatures;
(3) the maximum period fixed by the Constitution of Canada for the duration of the House of Commons and the Legislative Assemblies;
(4) the powers of the Senate;
(5) the number of members by which a Province is entitled to be represented in the Senate and the residence qualifications of Senators;
(6) the right of a Province to a number of members in the House of Commons not less than the number of Senators representing the Province;
(7) the principles of proportionate representation of the Provinces in the House of Commons prescribed by the Constitution of Canada; and
(8) except as provided in Article 16, the requirements of this Charter respecting the use of the English or French language.

The Special Joint Committee of the Senate and the House of Commons, Final Report, 1972

Excerpts from the summary of recommendations

PART I — The Constitution

Chapter 1 — Constitutional Imperatives

1. Canada should have a new and distinctly Canadian Constitution, one which would be a new whole even though it would utilize many of the same parts.

2. A new Canadian Constitution should be based on functional considerations, which would lead to greater decentralization of governmental powers in all areas touching culture and social policy and to greater centralization in powers which have important economic effects at the national level. Functional considerations also require greater decentralization in many areas of governmental administration.

Chapter 4 — Patriation of the Constitution

3. The Canadian Constitution should be patriated by a procedure which would provide for a simultaneous proclamation of a new Constitution by Canada and the renunciation by Britain of all jurisdiction over the Canadian Constitution.

Chapter 5 — Amendments to the Constitution

4. The formula for amending the Constitution should be that contained in the Victoria Charter of June 1971 . . .

Chapter 6 — The Preamble to the Constitution

5. The Canadian Constitution should have a preamble which would proclaim the basic objectives of Canadian federal democracy.

PART II — The People

Chapter 7 — Self-Determination

7. If the citizens of a part of Canada at some time democratically declared themselves in favour of a political arrangement which were contrary to the continuation of our present political structures, the disagreement should be resolved by political negotiation, not by the use of military or other coercive force.

8. We reaffirm our conviction that all of the peoples of Canada can achieve their aspirations more effectively within a federal system, and we believe Canadians should strive to maintain such a system.

Chapter 8 — Native Peoples

10. The preamble of the new Constitution should affirm the special place of native peoples, including Métis, in Canadian life.

11. Provincial governments should, where the population is sufficient, consider recognizing Indian languages as regional languages.

Chapter 9 — Fundamental Rights

13. Canada should have a Bill of Rights entrenched in the Constitution, guaranteeing the political freedoms of conscience and religion, of thought, opinion and expression, of peaceful assembly and of association.

18. The Constitution should prohibit discrimination by reason of sex, race, ethnic origin, colour or religion by proclaiming the right of the individual to equal treatment by law.

19. Discrimination in employment, or in membership in professional, trade or other occupational associations, or in obtaining public accommodation and services, or in owning, renting or holding property should also be declared contrary to the Bill of Rights.

20. Other provisions already contained in the Canadian Bill of Rights (1960) protecting legal rights should also be included in the Constitutional Bill of Rights . . .

Chapter 10 — Language Rights

22. French and English should be constitutionally entrenched as the two official languages of Canada.

23. The Constitution should recognize . . .

(c) the right to use either official language in dealing with judicial or quasi-judicial Federal bodies or with courts in New Brunswick, Ontario, Quebec and the Territories;

(d) the right to communicate in either official language with Federal departments and agencies and with provincial departmental head offices or agency head offices in New Brunswick, Ontario, Quebec and the Territories.

25. The Constitution should recognize parents' rights to have English or French provided as their child's main language of instruction in publicly supported schools in areas where the language of their choice is chosen by a sufficient number of persons to justify the provision of the necessary facilities.

26. We support the general objective of making French the working language in Quebec. We hope that through the studies being carried out in Quebec on this matter, this objective can be reached with due respect for certain Quebec Anglophone institutions, and taking into account the North American and world reality.

27. The preamble to the Constitution should formally recognize that Canada is a multicultural country.

28. The Constitution should explicitly recognize the right of Provincial Legislatures to confer equivalent status with the English and French languages on other languages. Federal financial assistance to support the teaching or use of other languages would be appropriate.

Chapter 11 — Regional Disparities

29. The equitable distribution of income should be recognized in the preamble of the Constitution . . .

31. The preamble of the Constitution should provide that every Canadian should have access to adequate Federal, Provincial and municipal services without having to bear a disproportionate tax burden because of the region in which he lives. This recommendation follows logically from our acceptance of the principle of equality of opportunity for all Canadians.

PART III — Federal Institutions

Chapter 12 — The Head of State

34. The Committee itself prefers a Canadian as Head of State, and supports the evolutionary process by which the Governor General has been granted more functions as the Head of State for Canada. Eventually, the question of retaining or abolishing the Monarchy will have to be decided by way of clear consultation with the Canadian people.

Chapter 13 — The Senate

35. The present full veto power of the Senate over legislation should be reduced to a suspensive veto for six months . . .

36. The investigating role of the Senate, which has gained more importance in recent years, should be continued and expanded at the initiative of the Senate itself, and the Government should also make more use of the Senate in this way.

39. All Senators should continue to be appointed by the Federal Government.

Chapter 14 — The House of Commons

43. Every House of Commons should continue for four years, from the day of the return of the writs for choosing the House and no longer, provided that, and notwithstanding any Royal Prerogative, the Governor General should have the power to dissolve Parliament during that period:

(1) when the Government is defeated
  (a) on a motion expressing no confidence in the Government; or
  (b) on a vote on a specific bill or portion of a bill which the Government has previously declared should be construed as a motion of want of confidence; or

(2) when the House of Commons passes a resolution requesting dissolution of Parliament.

Chapter 15 — The Supreme Court of Canada

44. The existence, independence and structure of the Supreme Court of Canada should be provided for in the Constitution.

45. Consultation with the Provinces on appointments to the Supreme Court of Canada must take place. We generally support the methods of consultation proposed in the Victoria Charter, but the Provinces should also be allowed to make nominations to the nominating councils.

50. Concurrent powers which predominantly affect the national interest should grant paramountcy to the Federal Parliament and those which predominantly affect Provincial or local interests should grant paramountcy to the Provincial legislatures.

51. The Constitution should permit the delegation of executive and administrative powers (as at present), but not of legislative powers except where expressly specified in this Report.

Chapter 18 — The General Legislative Power of Parliament

53. Since the Federal General Legislative Power is counterbalanced by a Provincial power over matters of a Provincial or local nature, there is no place for a purely residuary power.

Chapter 19 — Taxing Powers

54. Generally speaking and subject to recommendation we endorse the principle that the Federal and Provincial Governments should have access to all fields of taxation. However, in order to bring about a division of revenues that may accurately reflect the priorities of each government, there should be Federal-Provincial consultations to determine the most equitable means of apportioning joint fields of taxation in the light of:

(a) the projected responsibilities of each level of government in the immediate future;
(b) the anticipated increases in their respective expenditures;
(c) economic and administrative limitations, such as preserving sufficient leverage for the Federal Government, by means of its taxation system, to discharge effectively its function of managing the economy.

55. Provincial legislatures should have the right to impose indirect taxes provided that they do not impede interprovincial or international trade and do not fall on persons resident in other Provinces.

Chapter 20 — The Federal Spending Power

56. The power of the Federal Parliament to make conditional grants for general Federal-Provincial (shared-cost) programs should be subject to the establishment of a national consensus both for the institution of any new program and for the continuation of any existing one.

57. If a Province does not wish to participate in a program for which there is a national consensus, the Federal Government should pay the Government of that Province a sum equal to the amount it would have cost the Federal Government to implement the program in the Province. However, a tax collection fee of about 1 per cent, equivalent to the cost of collecting the money paid to the Province, should be deducted from the amount paid to such non-participating Provinces.

Chapter 21 — Intergovernmental Relations

60. The Constitution should provide for a Federal-Provincial Conference of First Ministers to be called by the Prime Minister of Canada at least once a year unless in any year a majority of the First Ministers decide to dispense with the Conference.

61. The Federal Government should appoint a Minister of State for Intergovernmental Affairs to respond to the political challenges and opportunities resulting from closer intergovernmental relationships.

62. A permanent Federal-Provincial secretariat for intergovernmental relations should be established.

63. A tri-level conference among Federal, Provincial and Municipal governments should be called at least once a year.

Chapter 22 — Municipalities

67. In the light of the injustice done municipalities by their having to rely on the property tax for the bulk of their revenue, there should be a sharing of tax fields between Governments that would allow municipalities direct access to other sources of revenue.

Chapter 23 — The Territories

69. The objective of Government policy for the Yukon and the Northwest Territories should be the fostering of self-government and provincial status.

Chapter 24 — Offshore Mineral Rights

72. The Federal Government should have proprietary rights over the seabed offshore to the limit of Canada's internationally recognized jurisdiction, and the Federal Parliament should have full legislative jurisdiction over this subject matter.

73. There should be no constitutional provision as to the sharing of the profits from the exploitation of seabed resources. Nevertheless, we feel strongly that the Federal Government should share the profits of seabed development equally with the adjacent coastal Province rather than with all of the Provinces.

Chapter 25 — International Relations

76. The Constitution should make it clear that: the Federal Government has exclusive jurisdiction over foreign policy, the making of treaties, and the exchange of diplomatic and consular representatives.

80. Subject to a veto power in the Government of Canada in the exercise of its exclusive power with respect to foreign policy, the Provincial Governments should have the right to enter into contracts, and administrative, reciprocal and other arrangements with foreign states, or constituent parts of foreign states, to maintain offices abroad for the conduct of Provincial business, and generally to cooperate with the Government of Canada in its international activities.

PART V — Social Policy

Chapter 26 — Social Security

81. In the area of social security, there should be a greater decentralization of jurisdiction with a view to giving priority to the Provinces according to recommendations 82, 83 and 84.

82. With respect to social services, the present exclusive jurisdiction of Provincial Legislatures should be retained.

83. With respect to income insurance (including the Quebec and Canada Pension Plans), jurisdiction should be shared according to the present section 94A of the British North America Act, subject to the following exceptions:

(1) Workmen's Compensation should be retained under the exclusive jurisdiction of the Provincial Legislatures;

(2) Unemployment Insurance should be retained under the exclusive jurisdiction of the Canadian Parliament.

84. With respect to income support measures:

(1) Financial social assistance (Canada Assistance Plan, allowances to the blind, disability allowances, unemployment assistance) should be under the exclusive jurisdiction of the Provincial Legislatures;

(2) Veterans' allowances and allowances to Eskimos and Indians living on reserves should continue to be the exclusive responsibility of the Canadian Parliament;

(3) Demographic grants (old age pensions, family allowances and youth allowances) and guaranteed income payments (guaranteed income supplement) should be matters of concurrent jurisdiction with limited Provincial paramountcy as to the scale of benefits and the allocation of Federal funds among these income support programs. Thus the Federal Parliament would retain concurrent power to establish programs and to pay benefits to individuals under these programs. However, a Province would have the right to vary the national scheme established by Parliament with respect to the allocation within the Province between the various programs of the total amount determined by the Federal Government and with respect to the scale of benefits paid to individuals within the Province according to income, number of children, etc., within each program; provided that the benefits paid to individuals under each program should not be less than a certain percentage (perhaps half or two-thirds) of the amounts which would be paid under the scheme proposed by the Federal Government.

Chapter 27 — Criminal Law

85. Since we believe that each Province should be able to regulate the conduct of its own people in such matters as the operation of motor vehicles, Sunday observance, betting and lotteries, the Federal Parliament should have the right to delegate even to a single Province legislative jurisdiction over any part of the criminal law.

86. Because there is some ambiguity resulting from current practice, if not from the Constitution, the Federal power over the administration of criminal justice should be made clear so that the Federal Parliament would be seen to have clear and undoubted jurisdiction to enforce its own laws in the criminal field.

Chapter 28 — Marriage and Divorce

87. In keeping with our principle of control by the Provinces of their social destiny, the jurisdiction over "Marriage and Divorce" should be transferred to the Provincial Legislatures, subject to an agreed common definition of domicile.

Chapter 30 — Communications

90. The Parliament of Canada should retain exclusive jurisdiction over the means in broadcasting and other systems of communication.

91. The Provinces should have exclusive jurisdiction over the program content in provincial educational broadcasting, whatever means of communication is employed.

PART VI — The Regulation of the Economy

Chapter 31 — Economic Policy

92. The Federal Parliament and Government should retain the primary responsibility for general economic policy designed to achieve national economic goals. This means that they must have sufficient economic powers to regulate the economy through structural, monetary and fiscal policies.

93. National economic policies should take more account of regional objectives through coordinating mechanisms between governments and through considerable administrative decentralization in the operation of the Federal Government and its agencies.

Chapter 32 — Trade and Commerce

95. Parliament should have exclusive jurisdiction over international and interprovincial trade and commerce, including the instrumentalities of such trade and commerce. Intraprovincial trade and commerce should remain under the jurisdiction of the Provincial Legislatures.

Chapter 33 — Income Controls

96. In cases of national emergency, as defined by the Parliament of Canada, the Provinces should delegate to the Federal Parliament all additional powers necessary to control prices, wages and other forms of income, including rent, dividends and profits, to implement its prime responsibility for full employment and balanced economic growth.

Chapter 34 — Securities and Financial Institutions

97. The matter of securities regulation, which has hitherto been under provincial jurisdiction, should become a concurrent jurisdiction with paramountcy in the Federal Parliament.

98. Where financial institutions (trust companies, insurance companies, finance companies, credit unions, caisses populaires) do business in more than one province, they should have to meet national standards as defined by the Federal Parliament; where they confine their activities to a single province, the Province should retain exclusive jurisdiction.

Chapter 35 — Competition

99. The Federal Parliament ought to have a concurrent power with the Provincial Legislatures over competition in order that the regulation of unfair competition in all its aspects be subject to the national interest. In the event of conflicting legislation, the federal legislation should be paramount.

Chapter 36 — Air and Water Pollution

100. Control over the pollution of air and water should be a matter of concurrent jurisdiction between the Provincial Legislatures and the Federal Parliament, and, as in section 95 of the British North America Act, the powers of the Federal Parliament should be paramount.

Chapter 37 — Foreign Ownership and Canadian Independence

103. The power of the Federal Parliament with respect to aliens should be clarified to ensure that Parliament has paramount power to deal with problems of foreign ownership.

105. The Federal Parliament should have jurisdiction over citizenship, and that power should include the power to promote national unity and a national spirit and to create institutions for these purposes.

The Constitutional Amendment Bill (June, 1978)

(text of the "highlights" distributed by the office of the Prime Minister)

Prime Minister Trudeau has introduced a bill in the House of Commons to implement proposed changes in the Constitution of Canada, as promised in last week's policy paper entitled *A Time for Action*.

Constitutional reform is to be carried out in two phases: Phase I will cover matters under federal jurisdiction and Phase II will cover areas in which co-operation and consent of the provinces are required.

"It is not the intention of the Government to ask Parliament to pass the bill at its current session," the Prime Minister said. "The intention is to refer the subject matter of the bill to a joint committee of the Commons and Senate, and for the Government to have intensive discussions with the provinces, including a conference of First Ministers expected to take place in the fall.

"Thus, the purpose of the bill is to serve as a basis for public, parliamentary and intergovernmental discussion in the months ahead. The Government feels that by putting forward its proposals in detailed, legislative form the process of public examination can be more sharply focussed and the timetable for final passage expedited."

In the bill, the Government sets out in legislative detail how it plans to proceed with such major changes as replacement of the present Senate by a House of the Federation; reorganization of the Supreme Court of Canada; the establishment of a Charter of Rights and Freedoms; improved mechanisms for consultation with the provinces; a constitutional definition of the role of the Prime Minister and Cabinet, and strengthening of the office of Governor General.

The proposed new Constitution also, for the first time, would contain a Preamble and Statement of Aims, defining the principles of nationhood and the national goals of Canadians.

Following are highlights of the main elements in the proposed Constitutional Amendment Act 1978:

House of the Federation

- The Western Provinces and the Atlantic Region would have greater representation than they do in the present Senate. Quebec and Ontario would each retain their present 24 members in the Upper House. Western representation would increase to 36 from the present 24; the Atlantic region would have 32 seats, up from 30.
- Total membership in the House of the Federation would be 118. Of these, 58 would be selected by the House of Commons and 58 by the provinces, and one each from the two territories.
- All major political parties would be represented in the new House, on the basis of popular vote in each province. The House of Commons would appoint members after each federal election, while the representatives of the provinces would be named after provincial elections.
- The House of the Federation would have power to delay legislation passed by the Commons, and would be able to initiate legislation of its own, except for money bills.
- The new House would be asked to approve appointments to the Supreme Court and to some Crown agencies.
- A special provision to safeguard language rights would require that any measure deemed to have "linguistic significance" be passed by a majority of English-speaking and a majority of French-speaking members of the new House.

The Supreme Court

- The bill would expand the number of judges from nine to eleven. There would be four from the Quebec Bar rather than the present three. Of the remaining seven positions there would have to be at least one from each of four regions: the Atlantic, Ontario, the Prairies and British Columbia.
- The provinces would be consulted before judges are appointed. In the absence of agreement, appointments would be made by a nominating council. All appointments would be subject to approval by the House of the Federation.
- On matters concerning Quebec civil law, only the judges from Quebec would make rulings.

Federal-provincial relations

- An annual meeting of First Ministers would become a constitutional requirement (enshrining in law what has become current practice).
- The federal government would consult the provinces before appointing lieutenant-governors.
- Certain federal payments to the provinces may be made constitutionally binding, thus protecting them from sudden and arbitrary termination.
- The federal government would consult with the provinces before invoking its seldom-used "declaratory power," under which it may bring any work or project under federal jurisdiction.

Office of the Governor General

- The Governor General would exercise prerogatives, functions and authority in his own right. However, the Queen would remain as always the sovereign head of Canada, and exercise her full powers when in Canada.

The Council of State

- The present Privy Council would become the Council of State, a title which reflects more clearly its function.

The Federal Cabinet

- For the first time, the functions of the Prime Minister and Cabinet would be spelled out in the Constitution, recognizing them as vital elements in the system of government.

Charter of Rights and Freedoms

- The proposed charter would be binding on the federal government, Parliament and all federal institutions as soon as it becomes law. It would become binding on the provinces as and when they see fit to "opt in". Joint action by federal and provincial governments would be required to have the charter entrenched and beyond the power of any single government to change unilaterally.
- Among rights proposed in the bill are freedom of movement within Canada, and freedom from discrimination by reason of race, ethnic origin, color, religion, sex, language or age.
- Citizens belonging to an official language minority would have the right to choose the minority language for education of their children, where the number of children warrants the provision of minority language schools.
- Identifiable English-speaking and French-speaking communities anywhere in Canada would be protected from reduction of existing rights and practices.
- Persons giving evidence would have the right to use French or English before the Supreme Court or any federal court; before the courts of Quebec, Ontario and New Brunswick, and in any court dealing with a criminal matter or an offence under a provincial law that might result in imprisonment.

The proposed legislation would also add a new section to the Constitution, reaffirming the red and white maple leaf flag as the flag of Canada, *O Canada* as the national anthem, and *God Save the Queen* as the royal anthem. Canada's motto "A mari usque ad mare" (From sea to sea) would also be written into the Constitution.

The Prime Minister reaffirmed the Government's intention to have the first phase of the constitutional amendment process completed by July 1, 1979, and the second phase by 1981.

Special Joint Committee of the Senate and of the House of Commons on the Constitution

Report to Parliament (October 1978)

The Need for Constitutional Reform

- "The need for constitutional reform and for an appropriate amending formula to permit patriation of the Canadian constitution is apparent and is seen by many people as urgent. Nevertheless, unanimous agreement at the federal-provincial level is even less likely than in the past. Indeed, the basic goal of the present Government of the Province of Quebec is not constitutional reform but separation from the rest of Canada. Thus, in the forthcoming negotiations, a most important partner cannot be expected to play its full role."

  This dilemma exists but it is probable that a substantial majority of Quebecers want a renewed federalism sooner rather than later. Canadians should not get the impression that the constitution cannot be changed.

The Process of Constitutional Reform (Senate)

- In the face of conflicting opinions held by recognized experts the Committee adopted the following resolution:

  "That this Committee report to the Senate and House of Commons its concern with the position of the Government to the effect that it can proceed unilaterally, that is, by a mere Law of Parliament, with the provisions of Bill C-60 respecting the Senate of Canada and the position of the Crown.

  "That the Committee include in its report a recommendation that the Government consider the advisability of referring these provisions to the Supreme Court of Canada for a decision as to whether they are *intra vires* the federal government acting alone."

  On September 14 the Minister of Justice announced that the Government would seek an advisory opinion from the Supreme Court with regard to the Senate . . .

  The Committee welcomes this reference of the constitutional legality of the Senate provisions of the Bill to the Supreme Court. It notes, however, that the advisability of unilateral action in such matters is a separate issue.

The Phases of Constitutional Reform

- The Committee notes the clarification made by the Prime Minister and considers that the proposals on the division of powers to be put forward at the end of October will help greatly in its future work. However, some witnesses seriously doubted the possibility and the desirability of Parliament's dealing with all the matters covered by Bill C-60 before July 1, 1979, if concurrent consideration of the two phases ("jurisdictional" and "institutional" problems) and federal-provincial consultations are to take place as they should.

The Preamble and the Aims of the Federation

- The Committee recommends that the two parts of the Bill be redrafted in this spirit (people's emotion) and in a more concise form.

- Although we recognize that the concept of multiculturalism is implicitly covered by the phrase "equal respect for the many origins, creeds and cultures . . . that help shape Canada," we urge that the word "multiculturalism" should also be included.

The Canadian Charter of Rights and Freedoms

- A few witnesses said that an *entrenched bill of rights* would undermine the rightful prerogatives of Parliament and give the courts too much latitude. We do not feel the matter involves an opposition between Parliament and the courts. Rather, a constitutionally entrenched bill of rights combines the competences of both for the public benefit. The narrow limits within which courts now "legislate" would be somewhat broadened but only where the people most need protection from governmental action — their fundamental rights and freedoms.

  The unambiguous constitutionalization and effective entrenchment of a charter would mark another major advance in our law. We therefore recommend the adoption of a charter.

- The remedial provision in clause 23 is still too weak to remove all doubt that Parliament intends the Charter to be an *overriding* statute.

- We are also troubled by the limitation to native peoples or individuals of the right to the use and employment of *property,* and the right not to be deprived thereof except in accordance with law. We can see no *prima facie* reason why corporations and groupings of persons should be denied this protection. Moreover, the broadening of the protection would meet the concern expressed before the Committee by Inuit spokesmen, who feared that the limitation to individuals would deprive their preferred form of property holding of the protection of the Charter.

- We also heard evidence to the effect that the *legal civil liberties* protected under clause 7 are selective and incomplete. We share this concern, but we have some confidence that the appropriate expression of these rights will take place through the courts.

- We have grave reservations about clause 8 of the Charter. It would create two new rights but only for citizens. The first is the right *to move to and reside in* any part of Canada, the second the right *to acquire and hold property* and to pursue the gaining of a livelihood anywhere in Canada . . .

  While landed immigrants currently have the same rights as citizens to move, reside, hold property and work everywhere in Canada, we are aware that geographical limitations on immigrants as conditions of their admission have been considered in recent years. There may be circumstances which justify such limitations, but we would not wish to engrave in the constitution a permanent distinction between the rights of citizens and landed immigrants even to gain for citizens the expanded liberty referred to above.

- We recommend that the ground of *marital status* be added to the prohibited grounds of discrimination . . .

- We have resisted invitations to include *economic rights* in the Canadian Charter of Rights and Freedoms. In our view, the role of the Charter is to limit the powers of governments, not to increase them. In any event, we have suggested that economic rights be included in the clause on the aims of federation.

- The proposed Charter should not prevent special programs on behalf of *disadvantaged groups*.

- We believe there should be provision for reasonable access to government documents and records. We would not wish to attempt to spell out in a constitution precise requirements as to the ready availability of *information*, but we think that some obligation on the government to inform the people should be made explicit in a charter of rights. Without knowledge, there can be no democracy.

Linguistic Rights

- The Committee recognizes the need to protect basic linguistic rights by means of constitutional guarantees. Beyond that, progress in the use of a minority language can only be assured if Parliament and the Legislatures have the political will to promote it. Minority groups must also receive support from governments to help sustain and promote their cultures. A language cannot flourish without a cultural environment that protects it.

  Ultimately, the progress of bilingualism in Canada will depend upon the evolution of public opinion, not on compulsion. In that context, more rapid improvements will occur when Canadians realize that learning English or French as a second language is desirable not so much as a political concession to the other group but as a source of personal cultural enrichment.

Amendment

- With regard to entrenchment of the Charter we regard it as desirable that a satisfactory amending formula be arrived at prior to the formal proceeding necessary to entrench.

The Monarchy

- A number of Members of the Committee think it is undesirable to codify the functions of all the major institutions of government which are now defined largely by evolving conventions. In any case, we are not yet in a position at this time to redraft the provisions of Bill C-60 dealing with the Monarchy.

Senate

- Most of our witnesses have expressed views on the subject of a second chamber. Indeed, it is probably the topic on which the widest range of opinion has been manifested. Four major proposals have been advanced: an elected Senate, a House of the Federation as provided in Bill C-60, a House of the Provinces similar to the Bundesrat in West Germany, and modified versions of the present Senate. There has been no agreement among witnesses on an appropriate second chamber.

Committee on the Constitution
Canadian Bar Association

Excerpts from the Summary of Recommendations entitled* Towards a New Canada *(1978)

I Preliminary

1.1 There should be a new Constitution to meet the aspirations and present-day needs of all the people of Canada.

2.2 The new Constitution should be in the English and French languages.

2.3 The new Constitution should from the outset be accompanied by a legal procedure for its amendment.

II Constitutional Objectives

The preamble

3.1 The Canadian Constitution should have a preamble setting forth the essential attributes of Canadian federalism.

Fundamental Rights

4.1 The Constitution should have an entrenched Bill of Rights.

4.7 The Bill of Rights should recognize the right of every person to reasonable access to all public information in the possession of federal, provincial and municipal departments and agencies.

4.10 The Bill of Rights should provide that individual privacy not be subjected to unreasonable interference.

Language Rights

5.1 English and French should be constitutionally entrenched as the official languages of Canada.

5.2 Each province should have power to choose its own official language or languages, subject to the limitations set forth in these recommendations.

5.4 The Constitution should recognize the following rights regarding language in the courts:

(a) A person whose ordinary language is English or French who is charged with a criminal offence should have the right to be tried in that language.

(b) A person whose ordinary language is English or French should have the right to use that language in giving evidence and in any pleading and process in civil cases in any court in Canada.

5.5 The Constitution should guarantee the right of any person to the use of either English or French in communicating with the head office of all federal departments and agencies and with every principal office of federal departments and agencies in any area where a substantial proportion of the population uses that language.

5.6 The Constitution should guarantee the right of any person to use either English or French in communicating with the head office of provincial departments and agencies in every province.

5.7 The Constitution should guarantee the right of a parent to have English or French as the language of instruction of his children in publicly supported schools in areas where the number of people speaking that language warrants this course.

5.8 The Constitution should explicitly recognize the right of the federal and provincial legislatures to assist ethnic or linguistic groups in promoting their languages and cultures.

Regional Disparities

6.1 The alleviation of regional economic disparities should be a fundamental purpose of the Constitution.

6.3 The Constitution should recognize that the federal spending power, including the making of equalization payments, is a proper method of meeting the commitment to reduce regional economic disparities.

III Major Governmental Institutions

The Executive and Head of State

7.1 The Queen should be recognized as Head of the Commonwealth.

7.2 A Canadian should be Head of State.

7.3 The federal and provincial executive should function under a system of responsible government in a Parliamentary system, the broad lines of which should be spelled out in the Constitution.

7.4 The Head of State should be chosen for a fixed term by a majority vote in the House of Commons, and his salary shall not be reduced while in office.

7.5 The Chief Executive Officer of a province should be chosen for a fixed term by the legislature, and his salary shall not be reduced while in office.

7.6 The Chief Executive Officer of the province should not be subject to federal control.

The Upper House

8.1 There should be an Upper House in the federal Parliament to represent the regional interests in federal matters.

8.2 The members of the Upper House should be appointed and serve at the pleasure of the governments of the provinces.

8.3 In determining representation in the Upper House, regional, linguistic and population factors should be accommodated. Such an accommodation can be made by giving considerably more members to Quebec and Ontario while ensuring regional balance by giving an overall majority to members from the rest of the country, and by giving somewhat greater weight to the Western and Northern regions than to the Atlantic region.

8.4 The federal government should have power to name spokesmen to the Upper House but they should have no vote.

8.5 The principal function of the Upper House should be to review federal legislation having significant regional impact, and in particular it should have the following powers:

— power to amend or reject any legislation, subject to the overriding power of the House of Commons to reenact it;
— shared cost programs with the provinces would require a 2/3 vote in the Upper House to constitute the national consensus described in discussing the spending power;
— measures to regulate intraprovincial trade declared to be essential for the management of national or international trade would require a 2/3 majority of the Upper House;
— general economic objectives binding on the provinces would require the assent of a 2/3 majority of the Upper House and be subject to review yearly;
— a declaration that a work is for the general advantage of Canada would require a 2/3 majority of the Upper House unless the province concerned agreed;
— support of a majority of the Upper House would be required for use of the emergency power in matters other than war, invasion or insurrection;
— generally the Upper House should have a role in conciliating federal and provincial policies and administration, and could in effect be a continuing federal-provincial conference;
— the consent of the Upper House would be required for the ratification of treaties respecting matters predominantly within provincial legislative authority and multilateral trade treaties;
— the Upper House should consent to the appointment of Supreme Court of Canada judges by means of a judiciary committee working in camera.

IV Judicial Power

The Judicial System

9.1 The independence of the courts should be enshrined in the Constitution as a fundamental principle of Canadian federalism.

9.5 The courts in Canada should function as a single judicial system, not a dual system of federal and provincial courts, subject to Recommendation 9.6.

9.7 The Constitution should provide that the federal government should appoint all superior, county and district court judges, and all judges of federal courts.

The Supreme Court of Canada

10.1 The Supreme Court of Canada should be entrenched in the Constitution as a general court of appeal for Canada.

10.2 The federal government should have the power under the Constitution to appoint judges to the Supreme Court with the consent of a Judiciary Committee of a reconstituted Upper House working in camera.

10.4 The Constitution should provide that the Supreme Court should consist of nine judges, three of whom should have been Members of the Quebec Bar.

V The Powers of Government

The Division of Powers

11.1 The Constitution should give the provinces the legislative powers necessary to exercise primary authority over cultural matters, but the federal Parliament should have adequate legislative power in this and other areas to maintain a national identity.

11.2 The Constitution should give the federal Parliament the necessary legislative powers to regulate the national economy and international trade; but the provinces should have legislative power to regulate the provincial economy and other local matters.

11.3 The Constitution should have two lists of legislative powers, one assigning exclusive legislative powers to the federal Parliament, the other assigning exclusive legislative powers to the provincial legislatures, unless there is a clear case for assigning concurrent powers.

11.4 The Constitution should provide that where exclusive legislative powers overlap, federal legislation shall be paramount.

11.5 The Constitution should allow for the delegation of the administration of legislative schemes from one level of government to the other, as is now the case, but not legislative powers.

11.6 There should be no constitutional special status for any province, but it should be possible to have special arrangements between the federal government and any province to accommodate specific needs of that province, particularly in the cultural field.

Taxing Power

12.1 The federal Parliament and the provincial legislatures should each have power to levy taxes by any means of taxation, subject to the following recommendations.

12.2 Only the federal Parliament should have power to levy customs duties.

12.3 Neither the federal Parliament nor the provincial legislatures should have power to levy taxes creating barriers to interprovincial trade.

12.4 A province should not have power to impose a tax that has a tendency to be automatically passed on by the taxpayer to a person outside the province.

12.5 Neither the federal Parliament nor the provincial legislatures should have power to levy a property tax against the other.

The Federal Spending Power

13.1 The Constitution should expressly provide that the federal Parliament have a general power to spend money for national purposes and the general welfare of Canada, subject to the following recommendations.

13.2 The federal government could only initiate a national shared cost program with the provinces when a national consensus exists. A national consensus could be determined by the approval of a 2/3 majority in a reconstituted Upper House.

13.3 Any province could opt out of a shared cost program, and such province would be entitled to compensation equal to the amount of money it would have received from the federal government under the program, subject to its agreeing to provisions respecting interprovincial portability.

Social Security

14.1 The provincial legislatures should have exclusive legislative power respecting social security, except as provided in these recommendations.

14.2 The federal Parliament should have exclusive legislative power respecting unemployment insurance.

14.3 The federal Parliament should also have exclusive legislative power over specific allowances to groups falling within exclusive federal legislative jurisdiction, such as veterans, public servants and native people.

14.4 The federal Parliament and the provincial legislatures should have concurrent legislative power respecting retirement insurance and related benefits, with provincial paramountcy, but there should be a constitutional obligation to ensure portability between these schemes throughout the country.

14.5 The federal Parliament and the provincial legislatures should have concurrent powers respecting measures (such as family allowances, old age security and related benefits) to provide a minimum standard of living for Canadians, but each province should have paramount power, within the limits of a constitutional formula, to fix the scale of benefits under, and to transfer amounts between, federal programs to adapt them to the social conditions of the province.

The Regulation of Trade

15.1 The Constitution should contain a statement of principle that Canada constitutes an economic union.

15.2 The Constitution should provide

(a) that all manpower may move freely without discrimination throughout the country, and

(b) that goods, services and capital in any province shall be admitted to each of the other provinces, free of duties, quantitative restrictions or charges or measures of equivalent effect except as may be necessary for public health and safety.

15.3 The federal Parliament should have exclusive legislative power to regulate interprovincial and international commerce, and the provinces should have exclusive legislative power to regulate intraprovincial commerce, subject to recommendations 15.4 and 15.5.

15.4 The federal Parliament should have power to harmonize intraprovincial trade regulations upon a declaration that this is essential to the management of the Canadian economy, but the exercise of such power would require the assent of a 2/3 majority of a reconstituted Upper House representing the provinces.

15.5 The federal Parliament should have power to establish general economic objectives binding on the provinces regarding the ends to be achieved but leaving them free respecting the means, but this power would be subject to the following conditions:

(a) a 2/3 majority in a reconstituted Upper House representing the provinces would be required for the adoption of such a measure; and

(b) such a measure would be subject to review by both Houses each year.

15.7 Multilateral trade treaties should constitutionally require ratification by a majority of a reconstituted Upper House representing the provinces.

Competition

16.1 The federal parliament should have exclusive legislative power to regulate competition.

Securities

17.1 The provincial legislatures should have exclusive legislative power respecting securities transactions in the province. The federal Parliament should, however, have power to regulate the extraprovincial capital market as an aspect of its jurisdiction over international and interprovincial trade and commerce.

The Monetary System

18.1 The federal Parliament should have exclusive legislative power respecting the monetary system.

18.2 The federal Parliament should have exclusive legislative power respecting the incorporation, organization and operation of financial intermediaries with federal charters, such as banks.

18.3 The provinces should have exclusive legislative power respecting the incorporation, organization and operation of financial intermediaries with provincial charters, such as provincial trust, and mortgage and loan companies, credit unions and caisses populaires.

18.4 The federal Parliament should have exclusive legislative power respecting interest.

Resources

19.1 The Constitution should expressly provide that the provinces have exclusive legislative power respecting the exploration, exploitation, conservation and management of all natural resources in the province.

19.2 The natural resources of the public domain in the provinces should continue to belong to the provinces.

19.3 The federal Parliament should have exclusive legislative power respecting seacoast fisheries; the provinces should have exclusive legislative power respecting inland fisheries in the province.

19.4 The provinces should have exclusive legislative power respecting water resources in the provinces, subject to the concurrent and paramount power of the federal Parliament to legislate respecting situations having extraprovincial effects.

19.5 The sea boundaries of the provinces should be extended to at least the three-mile limit and the adjoining provinces should have the right to explore and exploit offshore resources up to the limit of the continental shelf, with consequential legislative power.

19.7 The federal Parliament and the provincial legislatures should have concurrent legislative power respecting atomic energy, with federal paramountcy.

19.8 The provinces should have exclusive legislative power respecting *agriculture.*

Transportation and Other Works and Undertakings

20.1 The federal Parliament should have exclusive legislative power respecting interprovincial and international transport undertakings; transport undertakings should include pipelines and other works for transporting commodities or energy.

20.2 The provincial legislatures should have exclusive legislative power to regulate intraprovincial transport undertakings, subject to paramount federal legislative power to regulate water and air navigation and works incidental thereto.

20.3 The federal Parliament should have power to declare any work to be for the general advantage of Canada and so within federal legislative jurisdiction, but such declaration could be made only with the consent of the legislature of the province where the work is located or with the consent of a 2/3 majority in a reconstituted Upper House representing the provinces.

Telecommunications

21.1 The federal Parliament and the provincial legislatures should have concurrent legislative power respecting broadcasting undertakings (radio and television stations and cable television systems) and closed circuit cable systems, with federal paramountcy, subject to Recommendation 21.2.

21.2 The federal Parliament should have exclusive legislative power respecting private radio communications, the allocation of radio frequencies and the technical requirements respecting the operation and specifications of apparatus used for transmitting and receiving radiocommunication.

International Relations

22.1 The Constitution should provide that the federal government has exclusive jurisdiction over foreign policy and international relations, including the making of treaties and the exchange of diplomatic and consular representatives, subject to the provisions of these recommendations.

22.2 The Constitution should provide that the provinces may maintain offices abroad for the conduct of provincial business and enter into contracts and administrative, reciprocal and other arrangements with foreign states and governments regarding matters within their legislative powers, but they shall keep the federal government informed of such activities, and no such office shall be maintained and no such arrangement shall be valid if it does not conform to Canada's foreign policy.

22.3 The Constitution should provide for the creation of a mechanism of consultation to assure the participation of the provinces with Canada in international relations involving matters falling within provincial legislative powers.

22.6 A treaty dealing predominantly with a matter falling within provincial legislative competence should constitutionally require ratification by a majority of a reconstituted Upper House representing the provinces.

22.7 Multilateral trade treaties should constitutionally require ratification by a majority of a reconstituted Upper House representing the provinces.

Citizenship, Immigration and Aliens

23.1 The Constitution should guarantee that no law shall in a discriminatory manner impede the free movement within the country of citizens or other persons lawfully in the country.

23.3 The federal Parliament and the provincial legislatures should have concurrent legislative power respecting immigration, with federal paramountcy.

Residuary and Emergency Powers

25.1 Any legislative matter not expressly granted by the Constitution should be within the exclusive legislative power of the provinces, unless it is clearly beyond provincial interests, in which case it should be within the exclusive legislative power of the federal Parliament. A matter ordinarily falling within provincial competence should not fall within federal jurisdiction merely because it has "national dimensions".

25.2 The federal Parliament should have express and separate power to deal with emergencies or crises of national significance subject to the following conditions:

(a) The power could only be invoked by means of a declaration either in the operative statute, or in the case of a real or apprehended war, invasion or insurrection, in the order-in-council bringing the statute into effect, that there exists an emergency or crisis or national significance.

(b) The approval of the majority of a reconstituted Upper House would be required for the invocation of the power for matters other than real or apprehended war, invasion or insurrection.

(c) The power would be subject to the Bill of Rights entrenched in the Constitution except that the Bill could be suspended by the federal government in the case of war, invasion or insurrection.

VI Amendments

26.1 A general amendment formula should be sufficiently rigid to maintain the basic constitutional balance, but sufficiently flexible to respond to majority desire for change supported by a high degree of support in all regions of the country.

26.2 The following formula reasonably responds to the principle set forth in Recommendation 26.1: a procedure requiring the agreement of Parliament and a majority of the provincial legislatures, including

(a) all provinces that at any time have had, or may in the future have, 25% of the population of Canada (currently Quebec and Ontario),

(b) at least two of the Atlantic provinces, and

(c) at least two of the Western provinces comprising at least one of the two most populous Western provinces (now Alberta and British Columbia).

26.6 The federal Parliament should be empowered to establish new provinces from territories not forming part of a province, and provide for their constitution and administration, and for such laws and conditions concerning their admission, as may be necessary, but their representation in Parliament should be approved under the general amending formula.

26.7 The federal Parliament should, with the consent of the legislatures of the provinces selected, be empowered to provide for the union of two or more provinces, for a province to be divided, or for the restructuring of

two or more provinces, but their representation in Parliament should be approved under the general amending formula.

26.8 Mere alterations of provincial boundaries should continue to be made by statute of Parliament with the consent of the appropriate legislatures.

Advisory Committee on Confederation
ONTARIO

Excerpts from the First Report (April 1978) and from the Follow-up Report of August 1978.

1. An Approach to a New Constitution

- The Advisory Committee considered carefully the current areas of dissatisfaction in Canada. It recognized that the present problems arise from a growth of *regionalism, provincialism* and *Québec nationalism* on the one hand, and the decline in the political effectiveness of the federal government and its institutions on the other.

  Regional grievances run deep in British Columbia, the Prairies, the East, and even in Ontario, due to perceived injustices of federal policies and their failure to transcend region and assert an overall national purpose. A strong sense of regional community and identity has also developed and provincial governments have grown to reflect this development. The Committee has based its work on the assumption that this regional identity should be recognized and constructively reconciled with the need to retain effective power and leadership, especially in economic matters, at the centre.

  Québec nationalism has been with us since before Confederation, but recently this nationalism has taken the form of a desire for greater political autonomy of which the Parti Québécois is only the current and furthest advanced manifestation.

- The conflicting interests of the nation and the provinces have resulted in a complex process of federal-provincial negotiation, with massive *overlapping and duplication* of activities and responsibilities, an elaborate network of inconclusive federal-provincial conferences and much contradiction and inconsistency in policy, which is so often frustrating to citizens.

- There have been too many federal-provincial conferences in which ministers from the two levels of government appeared as adversaries in confrontation rather than joint architects of national policy.

- We believe that any simple formula for the decentralization of power risks further fragmentation of the country and would leave the economically weaker parts even more vulnerable than they are today.

- As a vast, widely differentiated territory, Canada needs a strong *central government* to maintain and develop the national economy, and to enhance a sense of national identity and purpose. At the same time, it must be recognized that there is a growing demand in provincial and regional communities for greater control of their own destiny, and for government institutions which are closer to their own people. This represents the essential dilemma. In our view, it can be resolved partly by some redistribution of federal and provincial powers and by enlargement of the area of *concurrent* responsibility requiring full consultation and agreement on policy, but most importantly by constitutionally involving the provincial governments in the formulation of, and responsibility for, national policy decisions, as well as in the organization of vital *national institutions* such as the *Supreme Court* and the major *regulatory agencies*.

- In calling for substantial changes, the Committee has, at the same time, been mindful of the need to preserve much that has worked successfully in our existing arrangements. In many areas, Canada's present constitution has proved adaptable and flexible in determining the relationship between the central and provincial governments, and in responding to the changing role of government as Canada has developed into a modern industrialized society. . . . We have also tried to build on the consensus reached in previous constitutional discussions. . . . We have concluded that on some points dissatisfaction has become so profound and widespread that change is essential to the very survival of this country. The stark truth is that the legitimacy of the operation of the present federal system has been substantially eroded for many Canadians.

2. A New Second Chamber

The reform of the upper chamber into a House of Provinces is designed to reconcile some of these tensions. . . . It was agreed that the present Senate should be abolished since it is ineffective in serving the purpose of regional representation for which it was designed. However, the Committee believes that an upper house, if properly designed, could play an effective role in our federal system. . . .

The Committee opted for a second chamber to replace the present Senate which would be appointed by and represent the provincial governments — in effect, a *House of Provinces*. This proposal has many advantages:

(a) it would ensure that the federal government exercises its powers with greater sensitivity to provincial interests;

(b) it would ensure effective provincial representation at the centre, whatever the results of federal elections;

(c) it would give the provinces collectively a much greater weight in national policy-making;

(d) it would reduce the necessity for large-scale decentralization since rather than taking powers away from the federal government, it would ensure that those powers were exercised in cooperation with the provinces;

(e) it would encourage the provincial governments to become more sensitive to the national implications of their actions;

(f) it would make more effective, and to some extent replace, the existing structure for federal-provincial negotiation in matters of federal legislation. In so doing, it would assist and improve federal-provincial relations in other areas;
(g) by having the power of approval over certain federal appointments to national institutions, a persistent provincial concern could be resolved.

The option of an elected second chamber was considered and rejected by the Committee on the grounds that it would create more problems than it would solve, making the existing system more complex and competing with the House of Commons and the provincial governments.

- The alternative of giving regions power in the House of Commons in no way gives provincial governments more say; in the long run it likely undermines them. Any feasible proposal must be broadly acceptable to both levels.

- The proposal of the House of Provinces has significant implications for the party system in Canada. It would probably create a strong incentive towards closer ties between federal and provincial parties because of the increased national interest in the outcome of the provincial elections.

  Appointments: Provincial delegations will be direct representatives of provincial governments. They may include sitting members of provincial legislatures, premiers or cabinet ministers. Membership may change from time to time as the House discusses different issues, e.g., if a federal transportation bill is under discussion, provinces may wish to send their transportation ministers. In order to maintain continuity, the delegation should contain one or more permanent members.

- Representation should be a combination of geographic and population criteria. An example of this could be a total of 30 or a multiple of 30 votes distributed as follows:

Newfoundland	2	Ontario	6
Nova Scotia	2	Manitoba	2
Prince Edward Island	1	Saskatchewan	2
New Brunswick	2	Alberta	3
Quebec	6	British Columbia	4

Federal participation: Representatives of the federal government would be free and expected to participate in the House of Provinces in order to introduce and speak to bills and to take part in and observe the debates. They would not have voting privileges.

Powers: It would have the right to review and amend legislation passed by the House of Commons. The basic principle here is that the degree of power of the House of Provinces should vary depending on the degree to which proposed federal legislation affects or infringes upon regional/provincial interests. One way to classify federal bills is by their relation to the division of powers: if they are solely in federal jurisdiction, the House of Provinces would have no role, if they are concurrent, it would have a suspensive veto, if they are directly in provincial jurisdiction, it would have an absolute veto. The problem with this is that something may be undoubtedly in federal jurisdiction, but have great provincial impact (e.g., tariffs). Hence: a preferable method could be to classify bills by nature of impact:

a. The House of Provinces might have no veto over legislation which is classified as having no substantial provincial interest, e.g., classifications in the federal civil service;
b. The House of Provinces might have an absolute veto over legislation which encroaches on the jurisdiction of the provincial governments and is therefore of direct provincial interest, e.g., use of declaratory power, spending power, "peace, order and good government," (clause) or legislation in areas of concurrent jurisdiction with provincial paramountcy.
c. The House of Provinces might have a six month veto over legislation which is classified as having substantial provincial interest, e.g., freight rates.

- Classification of legislation: Classification of legislation would be determined by a joint House of Commons-House of Provinces rules committee. In case of disagreement, one possibility would be a reference to the Supreme Court for decision. Another possibility would be to give the deciding vote to an agreed-on chairman — possibly rotating between the speakers of the two houses.

- Other powers of the House of Provinces: Power to approve appointments of judges to the Supreme Court of Canada. Power to approve appointments to federal regulatory bodies such as the National Energy Board, the Canadian Transport Commission, the Canadian Radio-Television and Telecommunications Commission, and the Bank of Canada.

3. The Judiciary

- In general, the Committee accepts the current composition and role of the Supreme Court of Canada.

- Because the *Supreme Court of Canada* is the final interpreter of the constitution, the provinces should be involved in the process of appointing judges to this body. The only formal provincial role would be through approval of the appointments by the House of Provinces . . .

- The Committee discussed the possibility of the establishment of a separate *constitutional court*, but rejected it on the grounds that the power of the House of Provinces to approve nominations to the Supreme Court of Canada would make the court a more truly national institution. . . .

- The Committee believes that the court system should reflect the division of jurisdiction inherent in a federal state. It, therefore, recommends that provincial governments make appointments to all courts other than the Supreme Court and the Federal Court.

- Where a case before the Supreme Court of Canada involves questions of law relating to the civil law of the Province of Quebec, and involves no other question of law, it should be heard by a panel of five judges, or with the consent of the parties, four judges, at least three of whom have been members of the Quebec Bar. . .

4. Fundamental Rights:

(General)

- The Committee considered carefully the question of entrenchment of a bill of rights and came to the consensus that basic political and democratic rights should be entrenched in the Canadian constitution.

Recognizing that the Victoria Charter represents the greatest consensus which has been achieved to date on the issue, the Committee agreed to recommend the basic freedoms and political rights as outlined in that Charter.

The Committee also recommends that a section outlining the legal rights of the individual be included in the constitution.

There should be provision for emergency powers in the constitution. . . . No state of emergency shall continue for more than six months unless specifically re-legislated by both Houses of Parliament.

Language Rights

- The Committee recommends that Ontario opt in to any language obligations which might be entrenched in the constitution on the understanding that the timing of implementation of services would be negotiable.
- The Committee recommends the entrenchment of a constitutional obligation on the federal level of government to operate its institutions and provide its services in both official languages.
- The Committee has scrutinized the programs of the Ontario government that provide French language services to the Franco-Ontarian community in an increasing number of fields, e.g., education, courts, health, social services, transportation, official publications. It recognizes further steps should be taken perhaps along the lines of a French language services act supporting French language guarantees.
- Either English or French may be used by any person in the Supreme Court of Canada and in any court established under this constitution by the federal government and in those provincial courts so designated by the provincial legislatures.
- Each child of the French-speaking or English-speaking minority should be entitled, wherever numbers warrant, to an education in his or her language in the primary and the secondary schools in any province.

5. An Amending Formula:

The Committee believes that the constitutional amending procedure should not be so flexible as to allow for easy passage of any amendment . . .

The Committee has considered many methods for amendment which have been proposed in the past. It has concluded that the method that would best meet its requirements is the one contained in the Victoria Charter. Its own proposal is along the lines of the Victoria Charter formula.

. . . Its adoption within a broad package of constitutional reforms would be more acceptable than would be the case if it were adopted alone.

Canada West Foundation

Excerpts

Summary of Recommendations (1978)

Upper House

1. WE RECOMMEND the abolition of the Senate as it now exists.

2. WE RECOMMEND that there be created by constitutional amendment a new Upper House to be styled the House of Provinces, and that this House consist of provincial (and territorial) delegations casting a single weighted vote.

3. WE RECOMMEND that all provincial premiers serve as ex officio members of the House of Provinces, and that the position of the President of the House of Provinces be filled by a Provincial Premier or his representative on a rotating basis.

4. WE RECOMMEND that legislation in the reconstituted Parliament of Canada be divided into two categories as follows:

a) "ordinary" legislation, that is legislation coming clearly and completely within the area of federal jurisdiction, as under the enumerated headings of section 91 of the BNA Act; the House of Provinces would only be able to delay this kind of legislation;

b) legislation regarding conditional grants, or within areas of concurrent legislation; a joint session of the two houses would be necessary to resolve conflict.

5. WE RECOMMEND that a special class of federal legislation be created comprising matters directly related to language and culture, and that the special status of Quebec be recognized by giving the Quebec provincial delegation in the House of Provinces an absolute right of veto of federal legislation in these areas pertaining to Quebec.

6. WE RECOMMEND that final authority on the question of assigning legislation to a specific category be the Constitutional Court of the Supreme Court of Canada.

7. Deleted.

Courts

8. WE RECOMMEND that appointment to the Supreme Court of Canada be by the Governor-in-Council subject to ratification by the House of Provinces, with the stipulation that one-third of the members of the Court must be from the Province of Quebec and that no more than one-third of the members of the Court may be from any one province.

9. WE RECOMMEND that the Supreme Court of Canada be enlarged to comprise a Chief Justice and fourteen puisne judges; that eight puisne judges be appointed as judges of the Appeal Court and six as judges of the Constitutional Court; that the Chief Justice serve as the Chief of both courts; and that the function of the Constitutional Court be to give binding opinions on constitutional issues as requested by the Attorney-General of Canada, the Attorney-General of a Province, the President of the House of Provinces, the Speaker of the House of Commons, or the Chief Justice of the Supreme Court.

Executive

10. WE RECOMMEND that defeat in the House of Provinces, and/or defeat in joint session as described in our Recommendation 4, not be regarded as a question of confidence necessitating the resignation of the government or the dissolution of the House of Commons.

11. WE RECOMMEND that the Governor-General be nominated by the Prime Minister and selected by simple majority vote of both Houses of Parliament; that the term of a Governor-General be six years; and that a Governor-General be subject to dismissal by resolution of both Houses.

Division of Powers

12. WE RECOMMEND that the revocable delegation of powers from one level of government to the other be made constitutionally permissible.

13. WE RECOMMEND that equal access to direct and indirect taxation be afforded the governments by amending section 92(2) to give provincial governments the power of "Direct *and indirect* Taxation within the Province in order to allow the raising of a Revenue for provincial purposes."

14. WE RECOMMEND that the current division of powers of the British North America Act be maintained as they stand, except that the following powers be removed from the exclusive headings under Section 91, 92 and 93 and added to the concurrent powers:

a) transportation
b) communication
c) banking
d) education
e) health and social welfare

Legislative primacy in these areas is to remain with the government currently possessing the power under sections 91, 92 and 93.

Constitutional Amendment

15. WE RECOMMEND that any constitutional amendment resulting in reductions in the real assets and property of a particular province or provinces require the consent of that province or provinces.

16. WE RECOMMEND that constitutional amendments be proposed by the legislatures of any province or by the House of Commons; that they come into effect if they receive the approval of the House of Commons and the government of :

a) every province that has now or will have in the future a population of more than 20 per cent of the population of Canada;
b) two provinces of the Atlantic region; and
c) two provinces of the Western region whose combined population is more than half that of the region.

17. WE RECOMMEND that should any proposed amendment fail because of lack of support in only one region, the proposed amendment be submitted to the population of that region. The referendum would simply ask the electors to support or overrule the decision of their provincial government(s); if the provincial government(s) is/are overruled, then the amendment is ratified.

Provincial Constitutions

18. WE RECOMMEND that Lieutenant-Governors be appointed by nomination of the Prime Minister and election by simple majority of the legislature of the province concerned for a term of six years, subject to dismissal by a resolution passed by both Houses of Parliament; and that Lieutenant-Governors be paid by the provincial government.

19. WE RECOMMEND that Judges for Provincial Supreme, District and/or County courts be appointed by the Lieutenant-Governor of the province on the advice of the provincial cabinet, subject to dismissal by a resolution passed by both Houses of Parliament.

20. WE RECOMMEND the abolition of the Federal power of disallowance, and of the federal powers under Section 92(10)c of the B.N.A. Act (declaratory power).

Index

A Note of Thanks

We wish to thank those members of the staff who assisted the Commissioners in the preparation of this guide. They did so in a diversity of ways, from commenting and editing to translating and typing.

We are also grateful to the following persons whose comments, suggestions and assistance were very useful.

Edwin Black
Léon Dion
Léonard Ducharme
Alexander Farrell
Pierre Gaudet
Joan Harcourt
Jean-Paul L'Allier
William R. Lederman
Frank MacKinnon
James C. MacPherson
Edward McWhinney
John Meisel
William F.W. Neville
John Trent

DUE DATE

~~8/4/93~~			
~~27/12/94~~			
~~13/6/96~~			
~~3/12/96~~			
23/07/2004			
	201-6503		Printed in USA