

CANADA: THE STATE OF THE FEDERATION

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SUMMARY: I. *The creation of Canada: the reasons for the choice of a federal system.* II. *The “asymmetrical” nature of canadian federalism.* III. *A strongly centralized division of powers under the Constitution Act, 1867.* IV. *The evolution towards a more decentralized federal structure as a consequence of the role of the Judicial Committee of the Privy Council (1867-1949).* V. *The return to a more expansive view of the federal powers: the role of the Supreme Court of Canada since 1949.* VI. *Federal financial relations: the federal spending power-equalization.* VII. *Intergovernmental relations: cooperative federalism.* VIII. *Issues relating to the structure and functioning of institutions at the national level.* IX. *The changing relationship between Québec and english Canada.* X. *Selected bibliography.*

I. THE CREATION OF CANADA: THE REASONS FOR THE CHOICE OF A FEDERAL SYSTEM

The Canadian federation was created in 1867. At that time, several semi-autonomous British colonies felt the need to unite into a larger entity, mainly in order to respond to economic problems. A few years before, the United States had denounced the Reciprocity Treaty (a kind of free trade agreement) that had been in force for 12 years with the Canadian colonies. That decision had the effect of restricting access to the American market for the Canadian exports. As a consequence, the Canadian colonies were faced with the necessity to develop trade amongst themselves along East-West lines.¹

¹ On the reasons leading to Confederation, see: Careless, J. M. S., *A Story of Challenge* (rev. ed.), Toronto, McMillan, 1970, 230-249; Creighton, Donald, *The Road to Confederation*, Toronto, McMillan, 1964.

Another reason that motivated the colonies to unite was the need to find a more satisfying solution to the relations between the French-speaking Catholic majority in Lower Canada (which was to become the province of Quebec) and the English-speaking Protestant majority of Upper Canada (nowadays Ontario). One must remember that the territory now comprising Quebec and Ontario had been part of the colony of New France until the British conquest in 1759. After the Conquest, the British had tried to assimilate the French-speaking population but without success. At the time of Federation, French speakers still formed the overwhelming majority in Quebec and one third of the whole population of what was to become Canada. English-speaking Upper Canada and French-speaking Lower Canada had been united in 1840 in a single political entity: the United Province of Canada. In 1867, that province was again divided into two separate provinces, Ontario and Quebec.

Given the degree of autonomy attained by the colonies at that time in their relation with the Imperial government, any new constitution had to be the result of a consensus between Canadians themselves, even if the resulting arrangements needed still to be formally enacted in an Act of the Imperial Parliament at Westminster.

Out of three pre-existing colonies, the British North America Act, 1867 (its present title is *Constitution Act, 1867*)² created four provinces, namely Ontario, Quebec, New-Brunswick and Nova-Scotia. The other six provinces and the three territories have been admitted or created at later points in time. Yet, to a considerable degree, the negotiations leading to the adoption of the Constitution were conducted as discussions between the Anglophone majority and the Francophone minority. This historical fact soon gave rise to the “compact theory” under which the 1867 Constitution must be seen as a compact—or contract—between two founding peoples, and thus should not be modified without the consent of both original parties. A similar idea was later expressed by reference to the “duality principle”, a concept meaning that major decisions affecting the nature of the Constitution must receive the assent of the two main linguistic groups. One variation of the duality principle has been invoked by the Province of Quebec as justifying a constitutional convention that guarantees it a veto power over any amendment of the Constitution. In Quebec’s view, such an argument was supported by the fact that 90% of all Francophone in Canada

² 30 & 31 Victoria c. 3 (U.K.).

now reside in the Province of Quebec. However, this claim was rejected by the Supreme Court of Canada in 1982 and, in the same decision, the Court confirmed that the new Constitution Act, that had been adopted in 1982 against Quebec's staunch opposition, nevertheless fully applied to Quebec.³ On a more general level, the political context has changed in ways that make it more difficult today for Canadians outside of Quebec to accept arguments or arrangements based on the concept of national duality: the adoption in 1970 of the federal multiculturalism policy, the entrenchment in 1982 of a constitutional Charter of Rights centered on individual rights, and the claims of the First Nations for recognition have all contributed to delegitimize the idea of two founding nations. To many Canadians outside of Quebec the francophone population of Quebec now appears to be a minority among other minorities, rather than one of the two founding peoples.

II. THE "ASYMMETRICAL" NATURE OF CANADIAN FEDERALISM

While the "compact theory" and the concept of "duality" have never been fully accepted by all Canadians, it is nonetheless a historical fact that federalism was in large part adopted in Canada as a way of accommodating the Francophone majority in Quebec. The federal division of powers was arranged in such a way as to grant to all the provinces the powers that Quebec in particular needed to protect its distinct identity, deriving from the fact that the majority of its population was Francophone and Roman Catholic instead of Anglophone and Protestant, and that it was governed by a Civil law tradition instead of the Common law in matters pertaining to private legal relations. Indeed, the provinces were endowed with the exclusive power over, in particular, "property and civil rights", education, municipal institutions, the administration of justice in the province, the solemnization of marriage and, more generally, "all matters of a... local or private nature in the province".⁴ As well, the provinces were given a signif-

³ Patriation Reference (Re Resolution to Amend the Constitution), [1981] 1 S.C.R. 753; Quebec Veto Reference (Re Objection by Quebec to Resolution to Amend the Constitution), [1982] 2 S.C.R. 793.

⁴ Constitution Act, 1867, s. 92.

icant input into agriculture and immigration policy, which are concurrent jurisdictions with federal primacy.⁵

Canada is not the only example where federalism has been retained to protect one or several national minorities. Switzerland, India, Malaysia, and more recently Belgium, Spain and Russia are other prominent examples of multinational countries that have adopted federal or quasi-federal arrangements in order to accommodate the national aspirations of minorities. However, one defining feature of the Canadian situation, as opposed for example to the cases of Switzerland, Belgium or Spain, is that *only one federal subunit*, Quebec, serves as a vehicle for a self-governing national minority. The nine other provinces simply reflect regional divisions within English-speaking Canada. This asymmetrical reality explains that French-and English-speaking Canadians have two very different comprehensions of federalism.

For Francophone Quebecers, the Quebec provincial legislature is the only legislative body in which they form a majority and are thus in a position to control the decisions. On the other hand, only about 25% of the members of the federal Parliament in Ottawa are elected from Quebec. Quebec members of Parliament can thus be outvoted on every question by an English-Canadian majority. Hence, many Quebecers consider the provincial government as their only true “national” government and they tend to oppose any diminution in its powers. Rather, they have been persistently asking for a significant expansion of provincial jurisdictions. Conversely, English-Canadians form the majority in every other provincial legislature, as well as in the federal Parliament. They are naturally inclined to see the federal government as their “national” government because it represents the interests of the whole of Canada. English-Canadians therefore have a tendency to oppose any diminution in the authority of the central government. At the same time, they will approve initiatives of the central government—for example in matters of health or education— even when these policies encroach upon areas of provincial jurisdiction, resulting in a diminished provincial autonomy.

This opposition between the constitutional aspirations of Quebec on the one hand, and English Canada on the other could be accommodated by a sufficient dose of asymmetry in the federal structure, certain responsibilities being exercised by the provincial government for Quebec, and by the

⁵ Constitution Act, 1867, s. 95.

federal government for the rest of Canada. In fact, a number of asymmetrical arrangements of this kind have existed since the beginning of the 1960's. For example there exists an Canada Pension Plan and a separate Quebec Pension Plan. However, in the last 15 years, English-Canada has been very resistive to any addition of new elements of asymmetry, as well as to any formal recognition of Quebec's distinct character. This opposition to a "special status" for Quebec has been justified by invoking a double principle of equality: equality of all provinces, on the one hand, and equality of all Canadians, on the other. And yet, equality does not require the same treatment for people or communities in different situations. The province of Quebec embodies the desire of its French-speaking majority to remain culturally distinct and politically self-governing, while the other provinces serve as regional divisions of a single national community. Thus, some form of differential treatment would be justified by the differences existing in the two situations. Actually, the refusal of English Canada to accept that point of view seems to be explained by the denial, by most English-speaking Canadians, of the fact that Quebecers form a separate national community within Canada, and that Canada is a multinational federation.

III. A STRONGLY CENTRALIZED DIVISION OF POWERS UNDER THE CONSTITUTION ACT, 1867

When discussions began on the project to create the Canadian state, English-Canadian leaders would have preferred a unitary state with one level of government, dominated by an English-speaking majority. However, representatives for Quebec insisted that the future Canadian polity should be a federal union in which Francophones would at least form the majority in one constituent state, and in this way retain the control over their destiny in certain areas considered critical for their particular identity.⁶ In the end a compromise was reached. The Constitution of 1867 established a very centralized federation and, what is more, contained certain unitary mechanisms under which the provinces were subordinate to the central government rather than co-ordinate with it. The most striking of these unitary features was the power of the federal executive to "disallow" —that is to

⁶ Ajzenstat, Janet *et al.* (eds.), *Canada's Founding Debates*, Stoddart Publishing Co. Ltd., 1999.

nullify— any provincial statute within one year of its enactment, not only because of an alleged unconstitutionality, but also when the federal government considered the statute unjust or unwise. This federal disallowance power has been used, with a diminishing frequency, until the end of the 1930's. Later on, it has fallen into disuse while never being formally repealed. Today, its use by Ottawa would be considered as contrary to a convention of the Constitution and to the federal principle. Most of the other unitary features of the 1867 Constitution have also been neutralized, either by political usage or by judicial re-interpretation of the relevant provisions. However, certain constitutional characteristics that are difficult to reconcile with the federal principle have never been corrected. Members of the Canadian Senate are still appointed by the federal executive,⁷ instead of being popularly elected or selected by the provincial governments, the Senate thus being in no position to play the role of a federal second chamber. Members of the Supreme Court are still appointed by the same federal government, without any role given to the provinces, thus tarnishing the image of the Court as an impartial umpire of federalism. I will return later to these two topics.

Regarding the division of legislative powers, the framers of the 1867 Constitution clearly wanted to establish a high degree of centralism.⁸ One reason for this option was the desire to avoid what was considered to have been the mistake made by the framers of the United States Constitution in giving too much powers to the States. While in the United States the residuary powers belonged to the States, in Canada they were given to the Federal Parliament. The same is true for powers over criminal law and banking. The Canadian Parliament was also endowed with all the legislative powers needed to regulate the economy. In particular, the federal commerce power was expressed in a wider fashion than in the United States Constitution. While Congress received a restrictively defined power to regulate commerce “with foreign nations, and among the several states”, the Canadian Parliament was given jurisdiction over “the regulation of trade and commerce”, the words used containing no qualification.⁹ Parliament also received all the important taxing and borrowing powers, as well as the power necessary to carry out Canada's treaty obligations even if the

⁷ Constitution Act, 1867, s. 24.

⁸ Constitution Act, 1867, s. 91-95, 101 and 132.

⁹ Constitution Act, 1867, s. 91(2).

matter was otherwise in provincial jurisdiction.¹⁰ Finally, in the opening words of section 91 of the Constitution Act, 1867, Ottawa was given a general lawmaking authority enabling the national Parliament "...to make laws for the Peace, Order and Good Government of Canada...". Indeed, the balance was so heavily weighted in favor of the national government that a prominent scholar affirmed that in 1867 Canada was only a "quasi-federation".¹¹

IV. THE EVOLUTION TOWARDS A MORE DECENTRALIZED FEDERAL STRUCTURE AS A CONSEQUENCE OF THE ROLE OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL (1867-1949)

Ironically, while the United States was created as a decentralized federation, but has over time become one of the more centralized, Canada in contrast was created as a strongly centralized federation, but has later evolved toward a much more decentralized condition. The explanation for this seeming paradox is twofold. First, since no federal unit in the United States has served as a political instrument for a national minority, centralization has not been opposed as constituting a threat to anyone's national identity. By contrast, centralization in Canada has been forcefully resisted by Quebec as a menace to its national aspirations. Second, while in the United States the Constitution was interpreted by the Supreme Court, which acted during the critical formative period as an agent of nation-building, enlarging the powers of Congress, in Canada the final interpreter of the Constitution was until 1949 the Judicial Committee of the Privy Council, a Court situated outside of the Canadian legal and political system.

The Judicial Committee of the Privy Council, composed of British judges who were also members of the House of Lords, acted as final court of appeal for countries of the British Empire and later of the Commonwealth. The Canadian Parliament could have abolished all appeals to the Judicial Committee immediately after 1931,¹² but because of opposition by the provinces, to whose interests the Committee had proved favorable,

¹⁰ Constitution Act, 1867, s. 132.

¹¹ Wheare, Kenneth C., *Federal Government*, 4th ed., Oxford, Oxford University Press, at p. 20.

¹² Under the authority of the Statute of Westminster, 1931, 22 Geo. V, c. 4 (U.K.).

the civil appeals were abolished only in 1949. Indeed, the Judicial Committee proved very sensitive to provincial rights, and also to the special position of Quebec. Its accumulated decisions had the effect of increasing significantly the constitutional position of the provinces, first by removing their subordinate status and elevating them to coordinate status with the central government, and second by giving a restrictive construction to some of the main federal powers (in particular the commerce power, the residuary power and the treaty implementation power) and a generous interpretation to the principal provincial power (the power over property and civil rights). In this way, the Committee interpreted the highly centralized federal structure set out in the Constitution in a decentralizing fashion, allocating many of the most important responsibilities to the provinces and thus frustrating in good part the intentions of the framers. This attitude was of course much denounced at the time by advocates of a strong central government but more recent assessments of the Committee's influence have been more positive.¹³

The treatment given by the Judicial Committee to the Canadian federal commerce clause is not the only illustration, but can serve as a good example of the constitutional approach taken by that body, and it offers an interesting parallel with the situation in the United States. While the American Supreme Court has given the commerce power of Congress a much broader scope than was intended by the framers, the opposite has been true in Canada. Although the text of the Canadian Constitution did not limit the commerce power of Parliament to international trade and trade among federal units, as was the case in the American constitution, the Judicial Committee precisely read such a limitation into the relevant provision. The prevailing reason for this construction was the very large scope the Committee had already given previously to the most important provincial legislative power, over "property and civil rights", which was interpreted

¹³ No less an authority than former Prime Minister Pierre-Elliott Trudeau wrote in 1968, when he was still a constitutional law professor: "It has long been a custom in English Canada to denounce the Privy Council for its provincial bias; but it should perhaps be considered that if the law lords had not leaned in that direction, Quebec separatism might not be a threat today: it might be an accomplished fact": Trudeau, Pierre Elliott, *Federalism and the French Canadians*, Toronto, Mcmillan of Canada, 1968, at p. 198. For a positive assessment of the Committee's influence on the Canadian Constitution, see also: Cairns, Alan C., "The Judicial Committee and its Critics" (1971) 4 *Canadian Journal of Political Science* 301.

as bestowing on the Provinces the authority to legislate on all forms of legal rights possessed by persons within the province. The Committee then gave a narrow interpretation to the federal power over “trade and commerce” so it did not overlap with the provincial power. The result was that the Judicial Committee limited the reach of the federal commerce power to two dimension or “branches”: (1) international and inter-provincial trade and commerce (intra-provincial trade coming under the jurisdiction of the provinces); (2) general regulation of trade affecting the whole country.¹⁴ Furthermore, the Judicial Committee effectively sterilized the second branch of the federal commerce power by refusing to give it any real effect, and in relation to the first branch refused to apply the kind of functional and economic test that has been used by the United States Supreme Court. This meant that the Committee still refused to recognize jurisdiction to the Federal Parliament even when matters of local trade and commerce were inextricably bound up with international or inter-provincial trade. The Committee preferred to apply a formal test of a legal nature in deciding that exclusive provincial jurisdiction was established as soon as “contractual relations entirely within a Province” were involved. As a consequence, in Canada such matters as the regulation of insurance and other businesses, of labor standards and relations and of the marketing of natural products have been found to be mainly under provincial jurisdiction. In contrast, in the United States the commerce clause has justified a strong federal presence in all those fields.¹⁵

The Judicial Committee also curtailed the Federal Parliament’s power respecting the implementation of international treaties. In 1867 Canada was still a British dominion, and until the end of the 1920’s treaties were concluded on behalf of Canada by the Imperial government. Section 132 of the *Constitution Act, 1867* endowed the Federal Parliament with the authority to enact any legislation necessary to implement these “Imperial treaties” by incorporating their provisions into the domestic law of Canada, even when the matter was under exclusive provincial jurisdiction. When Canada became a sovereign state, it was clear that the power to *enter*

¹⁴ Citizen’s Insurance Co. v. Parsons, (1881) 7 App. Cas. 96.

¹⁵ On the construction given by the Judicial Committee to the Canadian commerce clause, see in particular: Monahan, Patrick, *Constitutional Law*, 2d ed., Toronto, Irwin Law, 2002, at 280 seq.; Hogg, Peter W., *Constitutional Law of Canada, looseleaf*, Toronto, Carswell, 1997, chapters 20 and 21.

into (conclude) treaties would now be exercised by the federal executive, irrespective of the subject matter. At the same time, the federal government expected section 132 to receive a dynamic construction, keeping the power to *implement* all treaties to the Federal Parliament. However, the Judicial Committee decided in the 1937 Labour Conventions case that the legislative authority to implement treaties was divided between Parliament and the provincial legislatures according to their respective jurisdictions.¹⁶ The main reason given by the Judicial Committee for adopting this view was the necessity to protect provincial autonomy, in particular Quebec's jurisdiction over private law. Indeed, the opposite solution would have provided the Federal authorities with an easy excuse to invade any provincial jurisdiction on the pretext of implementing an international agreement.

This solution has of course created certain difficulties for the federal government when it wants to conclude a treaty. The Canadian Constitution does not contain any mechanism allowing the central government to compel a recalcitrant Province to implement a binding treaty affecting provincial matters. The solution to the problem has generally been for Ottawa to obtain from the provinces, before concluding such an agreement, the assurance that they will do their part at the implementation stage.

V. THE RETURN TO A MORE EXPANSIVE VIEW OF THE FEDERAL POWERS: THE ROLE OF THE SUPREME COURT OF CANADA SINCE 1949

The decision in the Labour Conventions Case so displeased the federal government that it finally decided to abolish all appeals to the Judicial Committee in 1949. As a consequence, from then on the Supreme Court of Canada was free to move away from the precedents established by the Judicial Committee, and it was generally expected that it would expand the major federal powers. However, until now there has been no wholesale rejection or modification of the main lines of the Committee's decisions but rather some progressive expansion of federal legislative jurisdiction.

One of the areas in which the Supreme Court has moved away from the decisions of the Judicial Committee and increased federal jurisdiction is that of the trade and commerce power. First, the Supreme Court is more willing than the Judicial Committee to recognize federal jurisdiction on

¹⁶ Attorney General for Canada v. Attorney General for Ontario, [1937] A.C. 326.

intra-provincial transactions when it can be shown that they are “necessarily incidental” to *inter*-provincial or *international* trade and commerce.¹⁷ Second, the Supreme Court has revived the second “branch” of the commerce power that had been left dormant by the Judicial Committee, the “general regulation of trade affecting the whole country”. A federal legislation can be supported as a “general regulation of trade” if it is concerned with trade as a whole rather than with a particular industry or commodity, if it is of such a nature that provinces alone or jointly would be constitutionally incapable of passing such an enactment and, finally, if failure to include one or more provinces or localities in the scheme would jeopardize its successful operation in other parts of the country. It is not necessary that all criteria be met, the main consideration being whether the federal statute addresses a genuinely national economic concern and not just a collection of local ones. To give an example of the application of this test, federal legislation regulating anti-competitive practices has been upheld in its application not only to international and inter-provincial trade, but also to *intra*-provincial transactions. The Court considered that the negative effects of anti-competitive practices transcended provincial boundaries and that ensuring a competitive economy was an issue of national importance rather than a purely local concern. Restricting the application of the federal legislation only to international and inter-provincial trade would have rendered it ineffective.¹⁸

This double expansion of the federal jurisdiction over trade and commerce is considered by most commentators as supporting the constitutional validity of the legislation adopted by Parliament to implement the Canada-U.S. Agreement and North American Free Trade Agreement. Actually, this legislation has never been challenged in court. In so far as the implementing federal legislation has an effect on matters falling within provincial jurisdiction, such an effect would be considered as merely incidental to the main purpose of the acts that is international trade. It can also be argued that the federal Parliament’s authority to implement international trade agreements flows from the second branch of the trade and commerce power, the “general regulation of trade affecting the whole

¹⁷ *Caloil Inc. v. Attorney General for Canada*, [1971] S.C.R. 543.

¹⁸ *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641. For a comment and critique of this decision, see: Leclair, Jean, “The Supreme Court of Canada’s Understanding of Federalism: Efficiency at the Expense of Diversity” (2003) 28 *Queen’s Law Journal*, 411, at 425 seq.

country”, because the implementation of such an agreement is a national concern, and the failure of one or more provinces to comply would jeopardize the entire scheme.¹⁹ Thus, the experience with the FTA and NAFTA (as well as with the World Trade Organization) has demonstrated that the rule adopted by the Judicial Committee of the Privy Council in the *Labour Conventions Case* does not prevent Canada from entering into comprehensive trade agreements. As for other fields of international relations, if the federal government wishes to enter into treaties whose subject is under provincial jurisdiction, like education for example, it must negotiate with the provinces in order to secure their necessary collaboration for the implementation of those agreements into Canadian domestic law.

The re-interpretation of the federal commerce clause is not the only area in which the federal authority to regulate the economy has been expanded by the Supreme Court. Important cases have recognized that Parliament has the necessary authority to enact legislation designed to sustain and to promote the proper functioning of the Canadian economic union.²⁰ Such a federal authority finds its source in the various features of the Constitution that are designed to foster economic integration (one such feature is section 6 of the Canadian Charter of Rights and Freedoms contained in the Constitution Act, 1982,²¹ which guarantees the inter-provincial mobility of citizens and permanent residents). Leading commentators are of the opinion that under this authority Parliament can legislate to eliminate trade barriers and restrictions on the free movement of persons, goods, services and investments across provincial boundaries, as well as to provide rules for the mutual recognition of standards and regulations by provinces. However, the positive harmonization of provincial measures affecting internal trade would still require voluntary measures and cooperation between the provinces.²²

Finally, the Supreme Court of Canada has in recent years expanded the federal power over criminal law beyond the limits that had been set by the Judicial Committee of the Privy Council. Under the case law of the Committee, a valid criminal law had to combine a prohibition with a pen-

¹⁹ On this topic, see: Monahan, P., *op. cit.*, pp. 299-302.

²⁰ *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077; *Hunt v. T & N PLC*, [1993] 4 S.C.R. 289.

²¹ Constitution Act, 1982, enacted by the Canada Act, 1982 (U.K.) 1982, c. 11, Sched. B. The Canadian Charter of Rights and Freedoms forms Part I (s. 1-34) of the Constitution Act, 1982.

²² Monahan, P., *op. cit.*, at pp. 303-309.

alty in support of a typically criminal purpose. In contrast, the Supreme Court of Canada has allowed the criminal law to be used to ban advertisement for tobacco products, whose manufacture, sale, and possession remain perfectly legal,²³ and to control firearms through a requirement to register all firearms and to license all firearms owners.²⁴

An examination of the Supreme Court's positions on the division of powers clearly shows that the Court's vision of federalism is generally premised on considerations of economic efficiency and functional effectiveness. Of course, such a vision favors in the long-term centralism as opposed to decentralization and provincial autonomy.²⁵ Appraisal of the positions of the Supreme Court on the division of powers is quite contrasted depending on whether it comes from English-Canada or from Quebec. In English Canada, the Supreme Court's work is generally considered as meeting adequately the needs of Canada's evolution as a nation and as maintaining an acceptable balance between the central government and the provinces.²⁶ By contrast, in Quebec there is a widely held view that the expansion of federal powers, if continued in the future along the same lines, will endanger Quebec's provincial autonomy.²⁷ As we have seen, these diverging comprehensions are explained by the differences in the very conceptions of federalism held by Quebecers and by English-Canadians respectively. Quebecers see provincial autonomy as a means to preserve their distinct identity and political self-government; hence they want to protect it against any federal encroachment. English-Canadians, on the other hand, conceive of federalism more as a system of dividing powers in the most efficient way between two levels of government; if they can be convinced that administrative or economic efficiency, or national harmonization, require greater centralization, they will accept a weakening of their provincial governments' powers without to many qualms.²⁸

²³ *RJR-MacDonald Inc. v. Attorney General for Canada*, [1995] 3 S.C.R. 199.

²⁴ *Reference re Firearms Act (Can.)*, [2000] 1 S.C.R. 783.

²⁵ *Leclair, J., loc. cit. 445 et seq.*

²⁶ See for example: Hogg, Peter W., "Is the Supreme Court Biased in Constitutional Cases?" (1979) 57 *Canadian Bar Review* 721.

²⁷ See for example: Frémont, Jacques, "La face cachée de l'évolution contemporaine du fédéralisme canadien", in *Gérald Beaudoin et al. (ed.), Federalism for the Future: Essential Reforms*, Montreal, Wilson & Lafleur, 1998, at 45 *seq.*

²⁸ On the diverging comprehensions of federalism, see: Simeon, Richard E., "Criteria for Choice in Federal Systems" (1989) 8 *Queen's Law Journal* 131.

At any rate, judicial interpretation of the division of powers is no longer the most important factor in the evolution of Canadian federalism. The equilibrium between centralization and decentralization is increasingly determined by the financial relations between both levels of government and by the instruments they use for the collaboration and coordination of their policies.

VI. FEDERAL FINANCIAL RELATIONS: THE FEDERAL SPENDING POWER-EQUALIZATION

1. *The federal spending power*

The framers of the Constitution Act, 1867 were convinced of the necessity of entrusting federal authorities with the most important jurisdictions, and logically bestowed upon them the major financial resources. Conversely, they had given to the provinces much less financial range believing that it would suffice to meet what was considered their far lesser responsibilities. However, two factors have created an imbalance between the province's expenditure responsibilities and their financial resources. First, as we have already seen, the decisions of the Judicial Committee did broaden the jurisdictions of the provinces and narrow those of the federal government with respect to matters of economics, trade and social policy. Second, the changed social and economic conditions that appeared in the 1930's rendered some of the provincial policy areas, such as education, health and welfare, immensely more expensive than before. The fact that the financial means of the provinces do not match their enhanced responsibilities has created a *vertical financial imbalance* that favors the federal government, who has a greater capacity to raise and spend funds. By offering to provide all or part of the funding of programs under provincial jurisdiction, and by attaching conditions to the receipt of such money, the federal government has been able to intervene in areas that are under constitutionally exclusive provincial jurisdiction (it has been estimated that as much as 35% of all federal spending occurs in such areas). Some funding is unconditional (although it still has to be spent by the province in a particular domain), but in many cases federal funding is conditional on the respect of certain standards imposed by the federal government. The federal "spending power" has thus been used to encourage provinces to

create or expand major shared-cost programs in the fields of education, health care and social assistance, all areas under provincial jurisdiction but in which the federal government has been able to impose its own rules or standards (that may be contained in federal Acts such as the Canada Health Act and the Canada Assistance Plan).²⁹

The four main shared-cost programs established through the federal spending power relate to post-secondary education (since 1951), hospital and doctor services (respectively since 1958 and 1968) and social services and income support (since 1966). In 1996, these programs were joined in one single financial transfer: the “Canada Health and Social Transfer”. The federal contribution to the CHST is made through a combination of transferred tax points and cash grants, the withholding of all or part of the cash-grant being the sanction against non-compliance by a province with the federal conditions. Conversely, in so far as the federal contribution takes the form of tax points, the federal government loses some leverage because tax points cannot easily be taken back. As well, the direct cost sharing has been eliminated in so far as the transfer is no longer based on the actual spending, but on other factors like the GNP and the provincial population.

On the positive side, the spending power has allowed the federal government to persuade the provinces to provide important services to the population and to secure nation-wide standards of health, education, income-security and other public services. On the negative side, the use of the spending power can be viewed as disturbing the priorities of the provinces and undermining their autonomy. Furthermore, the federal transfers can be withdrawn unilaterally once a program has existed for a certain time and has created expectations in the provincial population. This is precisely what happened in Canada during the later years of the 1980’s and the first

²⁹ For a comparative perspective on the federal spending power in Canada and in other federations, see: Yudin, David W. S., “The Federal Spending Power in Canada, Australia and the United States”, (2001-2002) 13 *National Journal of Constitutional Law*, 437; Watts, Ronald L., “Federal Financial Relations: A Comparative Perspective”, in Lazar, Harvey (ed.), *Canada: The State of the Federation 1999/2000 – Toward a New Mission Statement for Canadian Fiscal Federalism*, Montreal & Kingston, McGill-Queen’s University Press, 2000, 371. On fiscal federalism in Canada, see: Hobson, P. & St-Hilaire, F., *Reforming Federal-Provincial Fiscal Arrangements: Towards Sustainable Federalism*, Montréal, Institute for Research in Public Policy, 1994; Perry, D. B., *Financing the Canadian Federation 1867 to 1995: Setting the Stage for Change*, Toronto, Canadian Tax Foundation, 1997.

half of the 1990's. In order to reduce its huge deficits, the federal government unilaterally diminished its contribution to many of the shared-cost programs ("off-loading" so to say its deficit on the provinces), while at the same time continuing to impose federal standards that were to be respected by the provinces.

Traditionally, provinces have asked that three kinds of limitations be imposed upon the federal spending power. First, the possibility for a province to withdraw, or "opt-out", of a program initiated by the federal government without being financially penalized. Second, that new programs should only be created with a broad provincial consensus. And third, the participation of the provinces in developing the principles and standards they must apply in administering the programs (instead of the unilateral imposing of such standards by the federal government). In 1999, the federal government and nine of the ten provinces, Quebec being the missing one, have signed the "Social Union Framework Agreement" (or SUFA) under which any new federal initiative respecting health, education or welfare must receive the prior consent of a majority of provinces. As well, a province opting-out of a new program will nevertheless receive its share of federal funding, under the condition that it accepts to abide by the objectives of the program and to submit to an "accountability framework". Quebec has refused to sign the agreement because it did not contain an *unconditional* opting-out arrangement. Only such a provision would give a province the possibility to use the federal financing for a venture of its own choosing and, in that way, recover the freedom to set its own priorities. The other reason for Quebec's opposition is that the 1999 Agreement did not put any limitation on the possibility for the federal government to use its spending power by making direct financial transfers to individuals and to subordinate provincial bodies like municipalities. In fact, since 1999, the federal government has created a major program of scholarships for university students (the Millennium Scholarship Fund) and has announced its intention to offer financing to municipalities, while education and municipal institutions are two fields under exclusive provincial jurisdiction.³⁰

³⁰ For an analysis of the SUFA, see: Poirier, Johanne, "Federalism, Social Policy and Competing Visions of the Canadian Social Union", (2001-2002) 13 *National Journal of Constitutional Law*, 356; Richards, John, *The Paradox of the Social Union Framework Agreement*, Toronto, C. D. Howe Institute, 2002 (available on www.cdhowe.org).

It must be stressed that both federalist and sovereignist Quebec political parties have for decades taken the same position on the federal spending power: while they cannot deny its constitutional validity, they challenge its political legitimacy. In their view, the only resolution to this problem is to allow Quebec the right to opt-out unconditionally from all Canada-wide programs within provincial jurisdiction. Such a solution has not been acceptable to the federal government under Prime Minister Chrétien, but with a different leadership in Ottawa, some form of opting-out arrangement may be adopted in the future.

In recent months, under the leadership of Quebec, provinces have begun to ask for a more fundamental correction of the revenue/expenditure mismatch through a reallocation of taxation powers, asking that the federal government evacuate some tax room to be occupied by the provinces. The federal authorities continue to deny that there exists any vertical imbalance. However, with the fiscal turnaround that took place in 1997, federal revenues in excess of federal expenditures are again in the 30 percent range and the Conference Board of Canada has concluded that there truly is a vertical imbalance favoring Ottawa in the current fiscal regime, and that this imbalance will widen in the future in the absence of structural change. In October 2003, Canadian newspapers reported that the surplus in the federal budget for 2002-2003 will be 7 billions and that between 1997 and 2003, the cumulative federal surpluses have reached 52 billions. The end of the deficit era will probably see Ottawa use the spending power in a more assertive way.

2. Equalization

As in most federations, there exists in Canada (since 1957) a comprehensive system of revenue sharing and fiscal equalization to reduce the *horizontal wealth imbalance* between the richer and the poorer regions and to ensure that all citizens wherever they reside are entitled to comparable services without being subject to excessively different tax rates. The Canadian system is based on the differential fiscal capacities of the provinces and is achieved through federal transfers to the poorer provinces. Since 1982, the standard of equalization has been the average per capita fiscal yield of five “representative” provinces: British Columbia, Saskatchewan, Manitoba, Ontario and Quebec — a list that excludes Alberta, the largest

recipient of revenue coming from non-renewable resources (gas and oil)—. The recipient provinces currently would like Alberta to be factored back in the average computation, which would of course increase the amount of equalization and its cost for the federal government.

Equalization payments are totally unconditional; recipient provinces are free to spend the funds on public services according to their own priorities. In 2003-04, provinces will receive approximately \$10.1 billion in equalization payments from the federal government. Currently, eight provinces qualify for equalization: that is all provinces except Ontario and Alberta.

As can be imagined, these complex fiscal and financial relations between the central government and the provinces, as well as the need to coordinate their different policies, necessitate an ongoing intergovernmental dialogue.

VII. INTERGOVERNMENTAL RELATIONS: COOPERATIVE FEDERALISM

As in other federations, there exists a high degree of cooperation and coordination between the central government and the Canadian provinces. Financial and fiscal relations must be adjusted and renegotiated over time. Governmental policies of both levels of government must be coordinated to avoid negative reciprocal impacts and maximize synergy. Most of the major social and economic problems can no longer be dealt with in an effective way by one single order of government. And while the Canadian Constitution expressly assigns concurrent powers over only two jurisdictional fields (agriculture and immigration), the Courts have adopted interpretive doctrines (like the “double-aspect” doctrine) that tend to favor overlapping or concurrent jurisdiction in many areas. Also, the need for cooperation will grow as domestic policies become increasingly subject to international standards, because international agreements entered into by the federal government must be implemented by provincial legislatures when their subject matters are within provincial jurisdiction. The negotiation and implementing of the Kyoto agreement on climate change are a good illustration.

With Canada having a parliamentary system of government based on the Westminster model, political life in general is characterized, both at the federal and at the provincial levels, by a predominance of the executive

over the legislature. This feature marks also intergovernmental relations, which are worked out by the executives and bureaucracies of the various governments. There is a remarkable lack of involvement of either the Canadian Parliament or the provincial legislatures in the process. As a result, major policy decisions are adopted behind closed doors, in intergovernmental forums where participants are all members of the executive—cabinet ministers of the federal and provincial governments—. These decisions are later laid before the corresponding legislatures and ratified without any possibility of change by the majority members under strict party discipline. Therefore, cooperative federalism is subject to a major democratic deficit. Furthermore, as Canadian senators are appointed by the federal government—on a political patronage basis—, the Senate has no political legitimacy and is in no position to provide for effective representation of provincial governments or interests (I will return to this topic later). The dominant role of the executive branches in intergovernmental relations explains why the system has been termed “executive federalism”.

The main institution of executive federalism is the First Ministers Conference that meets annually and is composed of the federal Prime Minister, the ten provincial Premiers and the leaders of the three Territories. There are also regular meetings of the ministers in charge of departments where there are overlaps in federal and provincial jurisdiction. Moreover, there are regular meetings of officials in the federal and provincial bureaucracies, to whom executive power in both federal and provincial governments is often delegated (which would justify the label of “bureaucratic federalism”).

In July 2003, Canada’s provincial Premiers and territorial Leaders agreed to create a new inter-provincial/territorial body, the “Council of the Federation”, to better manage their relations and ultimately to allow for a more constructive and collaborative relationship with the federal government. The Council met for the first time on October 24, 2003 in Quebec City and was hosted by Quebec Premier Jean Charest. This initiative holds some promise of establishing a basis for more extensive collaboration among provincial and territorial governments. It will merit attention as it develops in the future.

The small number of provinces (10) and Territories (3) keeps the number of participants to the intergovernmental process to an acceptable level and ensures that each government has an influence on the result. However, in all other respects there are great disparities in the respective influence

and bargaining power of the respective provinces and territories. The two geographically central provinces —Quebec and Ontario— have together over three-fifths of Canada’s population and GDP. Ontario is the most populous and wealthy province, with almost 30% of the population and the largest industrial base. The four Atlantic Provinces (New-Brunswick, Nova-Scotia, Newfoundland and Prince-Edward-Island) have together only 7.7% of the national population and produce less than 6% of the total GDP. Alberta has only 10% of the population but its rich oil and gas reserves give it an enhanced influence. The three northern territories (the Yukon, the Northwest Territories and Nunavut) make up two-fifths of Canadian territory but have only 0.3% of the Canadian population and contribute 0.45% of the national GDP. The territories enjoy no constitutional status and have legislative powers only delegated to them from the federal government. The territories participate in intergovernmental conferences, but without voting rights.

The distribution of the Canadian population among the provinces explains that Quebec and Ontario combined enjoy an absolute majority in the elected House of Commons, and are thus in a better position to influence the federal government and to impose their priorities on the other eight provinces. For this reason, the smaller provinces have for more than two decades called for a reform of the Canadian Senate that would give them a majority in the second chamber and allow them to effectively counterbalance the position of Ontario and Quebec in the House of Commons and in the federal Cabinet.

With the problem of Senate reform, I will now turn to the contentious issues existing in relation to the structure and functioning of institutions at the national Canadian level.

VIII. ISSUES RELATING TO THE STRUCTURE AND FUNCTIONING OF INSTITUTIONS AT THE NATIONAL LEVEL

1. *Senate reform*

Senate reform has been the subject of a great deal of debate and a large number of proposals for a very long time.³¹ Interest in the issue is explained

³¹ On this issue, see: Woehrling, José, “Cuestiones sobre la reforma del Senado en Canada” (1993), *Revista Vasca de Administración Pública* 125.

by the fact that the less populous provinces, in particular in Western Canada, see it as a way to obtain greater influence in the national political decision-making process. They send to few MPs to Ottawa to be able to wield an influence comparable to that of the two most populous provinces, Quebec and Ontario. In the late 1970's they called for a reformed Senate modeled on the German *Bundesrat*; but more recently they have turned to the so-called "Triple-E" formula, referring to a Senate that is elected, equal and effective, with each province represented by the same number of directly elected senators. This new Senate, which is inspired from the Australian model, would have a democratic legitimacy equivalent to that of the House of Commons and thus would be able to exercise comparable powers.

Currently, some of the smaller Canadian provinces are poorly over-represented or even under-represented in the Senate, which of course defeats one of the reasons for the existence of a federal second chamber where federal units should have equality of representation, or at least weighted proportional representation, with the intention that the smaller units be over-represented. Most notable is the situation of British Columbia and Alberta. Their respective shares of the Canadian population and of the Senate seats are, for British Columbia 13% to 5,7%, and for Alberta 10% to 5,7%. If one adds up the percentages of the four Western provinces (British Columbia, Alberta, Saskatchewan and Manitoba), it appears that with almost 30% of the population they have only 23.1% of the seats in the Senate. On the other hand, with 9.2% of the population, the four Atlantic provinces also have 23.1% of the seats in the Senate. It is easy to see why Western Canada is so insistently advocating the model of the "Triple E" Senate. Such a reform would almost double its representation in the Senate.

However, equality of Senate representation for all provinces would lead to undemocratic. The six smallest provinces (the four Atlantic provinces, Manitoba and Saskatchewan) would hold together 60% of the Senate seats, while representing only 17.4% of the Canadian population. In addition, the six least populous provinces are also the least wealthy and therefore the most receptive to federal initiatives using the spending power. There would be a risk that a Senate with equality of representation could become a rubber stamp for federal inroads in provincial jurisdiction.

If one concludes that equality of representation is not suitable, the remaining option would be to increase the number of seats attributed to Western Canada. But this would mean a reduction in seats for Ontario and

Quebec. Ontario might accept, given that it is the most populous province and therefore holds the largest number of seats in the House of Commons. Moreover, its relative share of Canada's population is growing. But Quebec's percentage of the Canadian population has been declining steadily since 1867, and so has its representation in the House of Commons. As well, the proportion of senators who represent Quebec has also declined since 1867, because of the admission or creation of new provinces and territories (it has fallen from 33.3% to 23.1%). It therefore is unlikely that Quebec would agree to a further reduction in its proportion of Senate seats, particularly if the Senate would in the future exercise a greater influence than now.

At the present time, senators are appointed by the Canadian Prime Minister, and appointments are almost always made on a political patronage basis. Thus senators represent neither the people nor the governments of the provinces. This lack of legitimacy, whether democratic or federative, means that the Senate cannot really exercise the powers it is endowed with in legislative matters, which are almost identical to those of the House of Commons. Senate reform must thus aim at re-establishing more coherence between senators' powers and their political capacity to exercise those.

Direct popular election of senators seems to have widespread support in English Canada. Although very democratic, this solution does however have serious drawbacks within the context of a Westminster-style parliamentary system, with responsible government and party discipline. A popularly elected Senate could be either too *similar* to the House of Commons, which would make it redundant, or too *different*, which could result in a confrontation between the two Houses and mutual neutralization. In any case, party discipline would lead the senators to align along party lines rather than in defense of the interests of the provinces or regions.

One of the best ways to guarantee that the loyalty of senators belongs to the provinces they represent is probably to have them appointed by the provincial governments. This is the system adopted in Germany, where the *Bundesrat*, or Council of the Federation, is made up of delegations whose members are members of the executive branches of the *Länder*. Supporters of the *Bundesrat* formula for Canada have stressed that it would transform the Senate into an *intergovernmental* body and allow it to function as a kind of permanent federal-provincial conference, thus institutionalizing cooperative federalism and making it more transparent and more democratic. Opponents of the formula claim that it would not fit in a federal system like Canada that is much more decentralized than Germany.

In the Canadian context, where provinces already have considerable authority over their own affairs, it would give the provincial governments too much influence over the federal legislative process and undermine the ability of the central government to play its national role.

Another option would be to have senators appointed jointly by the federal and the provincial governments. It was precisely such a model that was provided for in the 1987 “Meech Lake Accord”, whereby the senators representing a province were to be chosen by the federal government from a list drawn up by the concerned provincial government. Such a system would have endowed senators with a greater legitimacy as representatives of the provinces and would permit the Senate to make an increased use of the powers given to it by the Constitution. The “Meech Lake Accord” was a failed attempt at constitutional reform aimed at satisfying Quebec’s conditions for signing the 1982 Constitution Act. However, Senate reform was not one of these conditions and had been added to the package at the urging of the Western provinces.

One final observation: it should be noted that a Senate exercising significant powers would probably contribute to the long-term centralization of the Canadian federal system. The examples of Germany and the United States would seem to demonstrate that federal subunits are more willing to accept a diminution in their own powers when they benefit in return from an increased role in the national decision-making process through their representation in a federal second chamber (this situation has been called “Madison’s Paradox”). It is revealing that in Canada the Western provinces that are advocating the “Triple E” Senate are also strongly opposed to any reduction in Ottawa’s role. Quite the contrary : because they hope that Senate reform will enable them to play a more important part in the national institutions, they want those institutions to remain strong or even be reinforced. Electing senators by popular vote would give Senate reform a still more centralizing effect in so far as elected senators could claim to represent the interests of provincial electorates in the same or in a better way than provincially elected politicians.

2. Electoral reform

A well-known characteristic of the Canadian “First Past the Post” electoral system is that it results in significant distortions between the votes re-

ceived by the respective parties and the resulting number of seats they obtain in the legislature. For example, in the last federal election in 2000, the governing Liberal Party won 53.5% of the seats in the House of Commons with only 40.8% of the vote.

A less known consequence is that, in the Canadian context, the plurality system exacerbates electoral regionalism. First, this electoral system favors political parties with strong regional appeal and harms nationally oriented parties whose support is more evenly spread across the country. For example, in the 1993 election, the Reform Party, whose supports are concentrated in the Western provinces, received 18% of seats with 19% of the vote and the Bloc Québécois, who presents candidates only in Quebec, got 18% of the seats with 14% of the vote. Conversely, the Progressive-Conservatives, whose votes were evenly distributed across the country, won less than 1% of the seats with 16% of the votes. Second, the “First Past the Post” system amplifies both the strengths and the weaknesses of political parties in different regions. In the last federal election, the Liberals won all but 3 of the 103 seats in Ontario with only 49.5% of the vote, but only 14 of the 88 seats in Western Canada with 21% to 32% of the vote depending of the province. Conversely, the Canadian Alliance (which has succeeded the Reform Party) received 23 of Alberta’s 26 seats with 59% of the vote but only 2 of Ontario’s 103 seats with a respectable 23.6% of the vote.

As a consequence it becomes more difficult to form a federal Cabinet representative of all regions, as the governing party may have few or no elected members in some provinces. Government policies may be attacked as being unfavorable to unrepresented provinces or regions. In the three last elections, the governing Liberal Party was elected mostly in Ontario, Quebec and, to a lesser degree, in Atlantic Canada, while the party forming the official opposition (the Reform Party, which later became the Canadian Alliance and since has merged with the Conservatives) won the vast majority of its seats in Western Canada. Thus, electoral regionalism contributes to the phenomenon of “western alienation”, deriving from the poor representation of Western Canada in the central institutions. It explains why the West demands with such insistence a “Triple E” Senate initiative.

The two most credible reform options that have been discussed for the last two decades are full-fledged proportional representation and the German-style mixed system in which about half of the members are elected in single-member districts while the other seats are allotted in proportion to

the popular votes obtained by each party.³² If one of these options were adopted, there would be less distortions between the respective proportions of vote and seats. Regional polarization would be less pronounced as political parties would make gains in regions in which they are traditionally less or no represented. Liberals would loose seats in Ontario but make some gains in Western Canada, and the Canadian Alliance (now the Conservatives) would win more seats in Ontario. As a consequence, political parties would develop policies more acceptable to all regions. Another consequence of the House of Commons and Cabinet becoming more regionally balanced would be to render equal provincial representation in the Senate less necessary.

Also, the experience of countries in which proportional representation is practiced suggests that if it were adopted in Canada, single majority governments would be the exception rather than the rule, as is the case under the present electoral system. The more frequent occurrence would be single-party minority governments (which has taken place 8 times out of the 23 last elections) or coalition governments (of which Canadian parties have much less experience).

If coalition governments became habitual, the predominant position of the Canadian Prime Minister in relation to the other members of Cabinet would most probably decline. In coalition Cabinets, some ministers would not belong to the same party as the PM, which would diminish their loyalty to him and his authority over them. Some personal prerogatives of the PM, like dissolution of Parliament, appointment of Senators and Supreme Court judges, would progressively become to be exercised in a more collegial way. Such a development should be welcome as there is a consensus that at the present time the Canadian PM wields excessive personal power.³³

However, the introduction of some form of proportional representation by the ruling Liberal government appears very unlikely, as it would clearly not be in the interests of the Liberal Party. And since there is no federal legislation giving citizens a right to initiate a referendum, the introduction of a new electoral system by referendum would also depend on the will of the

³² Massicotte, Louis, *Changing the Canadian Electoral System*, Montréal, Institute for Research in Public Policy, 2001 (available on www.irpp.org).

³³ Savoie, Donald J., *Governing from the Centre: The Concentration of Political Power in Canada*, Toronto, University of Toronto Press, 1999.

government (the only referenda that can be held under the present federal legislation are non-binding on the government and must relate to constitutional questions).

3. *Supreme Court reform*

At the present time, Supreme Court members are unilaterally appointed by the Prime minister of Canada. The only prerequisite for which provision is made in the federal Supreme Court *Act* is that 3 out of the 9 Court members must be appointed from Quebec's Courts or bar. This provision reflects the dual nature of Canada's private law system—civil law in Quebec and the common law elsewhere— (it must be stressed that the Supreme Court serves as a final appellate Court for provincial as well as federal law). By convention of the Constitution, the 6 other members of the Court are appointed following a regional distribution within English Canada (3 judges for Ontario, one for British Columbia, one rotating among the three Prairie provinces and one for the four Atlantic provinces).

In recent time, two avenues of reform have been discussed concerning Supreme Court appointments, the first one being related to the “federalism deficit” of the present appointment process. The failed “Meech Lake Accord” provided for joint appointment by the federal and the provincial governments, the Quebec government drawing up a list for the 3 judges to be appointed from Quebec and the other provincial governments doing the same for the 6 remaining judges. Such a proposal would not have diminished in a great measure the control exercised by the federal executive over the appointments, since most Supreme Court members are appointed from the Federal Court or from Provincial Superior Courts and that judges making up all these Courts are themselves appointed by the federal government (under section 96 of the Constitution Act, 1867). At any rate, it seems quite reasonable that the provinces should play some role in the Supreme Court appointment process, since the Court acts as an umpire of federalism.

The other reform proposal that has been put forward is related to what could be termed the “visibility deficit” of the current appointment process. It has been suggested to borrow from the United States the idea of a legislative scrutiny of the nominees. In its present condition, the Canadian Senate would of course not be the proper forum for such a process, the House of Commons Justice Committee being the better choice. It has also been pro-

posed that that the Prime minister nominees should be subjected to a ratification vote by the full House, by a two-third majority, which would give some voice to the opposition parties in the selection process. If the Senate were reformed in a way that permitted it to act as a true federal chamber, representing the provinces, ratification by the Senate would at the same time give the Court a federal legitimacy. The appointment process would then be aligned on what exists in the United States for the appointment of Supreme Court judges as well as in many European countries for the appointment of Constitutional Court judges.³⁴

Supreme Court reform, unlike Senate reform, could be accomplished without any formal constitutional amendment, since the composition and appointment process of the Court are still governed by a ordinary federal statute, the Supreme Court Act.³⁵

IX. THE CHANGING RELATIONSHIP BETWEEN QUÉBEC AND ENGLISH CANADA

For the last 30 years Canadian political life has in good part revolved around the difficult relationship between Québec and english Canada (the Rest of Canada —ROC— as it is sometimes called). I propose to examine how the relationship between Québec and the Rest of Canada has evolved from 1867 to the present time. This will allow me to trace the roots of the current crisis. Second, I will specify wthat the main differences between Québec's and Canada's political and constitutional aspirations are. Finally, I will try to assess the possible outcomes of the crisis.³⁶

As we have seen at the beginning of this paper, when Canada was created in 1867, Francophones were already a minority throughout the British

³⁴ On the reform of the Supreme Court appointment process, see: Friedland, Martin, *A Place Apart: Judicial Independence and Accountability in Canada. A Report for the Judicial Council of Canada*, Ottawa, Canadian Judicial Council, 1995; Russell, Peter H., *The Judiciary in Canada: the Third Branch of Government*, Toronto, McGraw Hill Ryerson, 1987, at p. 107 seq.; Ziegel, Jacob, *Merit Selection and Democratization of the Appointments to the Supreme Court of Canada*, Montréal, Institute for Research in Public Policy, 1999 (available on www.irpp.org).

³⁵ R.S.C. (1985), ch. S-26.

³⁶ For an in-depth analysis, see: Woehrling, José, “La Constitution canadienne et l'évolution des rapports entre le Québec et le Canada anglais de 1867 à nos jours”, (1992) 10 *Revue Française de Droit Constitutionnel* 195.

colonies in North America, except in Québec. That is why they insisted that Canada become a Federation, and not a unitary State, because such an arrangement would give them the political and democratic control over one of the provinces. For nearly a century following the creation of Canada, Québec isolated itself from the rest of North America to avoid external influences, considered dangerous for the survival of traditional values and the French language. Such an attitude was also the result of the strong influence of the Catholic Church, which discouraged people from striving for economic success and technical progress. As for constitutional politics, the successive Québec governments of that era were more preoccupied with protecting their powers against federal encroachment than with extending their influence and taking on new responsibilities.

1. *Quebec's "Quiet Revolution" during the 1960's*

However, this passive and defensive attitude began to radically change at the beginning of the 1960's. Québec underwent a series of profound transformations that allowed it to modernize and to catch up with other western liberal and industrialized societies. This period is known as the "Quiet Revolution" because it brought drastic changes, but without any violence or significant social unrest. Four major transformations occurred during that period:

- The strengthening of provincial political institutions;
- Efforts to increase control over the economy by French-speaking Quebeckers;
- The beginning of a linguistic policy aimed at improving the status of the French language;
- Demands for more constitutional powers for Québec.

First, during the Quiet Revolution, Québec's governmental system was restructured and expanded: new departments were created to take on the responsibilities removed from the private sector and the Catholic Church, like education and health care. The Civil Service grew rapidly and became more professional. This expansion of the public sector created a new middle-class of Francophones whose economic well-being and interests became dependent on the continued existence and growth of the provincial Government.

Second, at the economic level, the new Francophone elite wanted to increase its control over the economy, which was traditionally controlled by Anglophone interests, both from within and outside Québec. To achieve this goal, Francophones used the resources of the Québec State to the fullest, without ever challenging the principles of North American capitalism. Many new public corporations were created, most notably Hydro-Québec (the State owned electric utility). All this was instrumental in facilitating the creation of a new class of Francophone capitalists and entrepreneurs.

Third, there was the beginning of a linguistic policy designed to improve the status of the French language. It emerged as a result of some disturbing findings concerning the position of Francophones and of the French language in Québec at that time. In the sixties, “allophone” immigrants—whose language was neither French nor English—were sending their children to English schools, instead of French schools, at a disproportionately high rate. Since the birth rate of Québec’s Francophones was rapidly decreasing, this trend would have threatened the majority status of Francophones in Québec in the long run. Another fact was that, from an economic point of view, the French language possessed far less attractive force than English. A consequence of this situation was that the income of Francophones in Québec was at the lower end, below Anglophones and even immigrants.

From these observations, it became obvious which aims ought to be given to Québec’s new linguistic policy.³⁷ The first objective consisted in bringing the children of immigrants back to French schools. The second objective was to raise the prestige and economic utility of the French lan-

³⁷ On Québec’s linguistic policy, see: Woehrling, José, “Choque de lenguas y políticas lingüísticas en Canadá y Quebec” in (Esther Mitjans y Josep M. Castellà, coords.), *Canadá. Introducción al sistema político y jurídico*, Barcelona, Publicacions de la Universitat de Barcelona, 2001, p. 227; Woehrling, José, “La Constitution du Canada, la législation linguistique du Québec et les droits de la minorité anglo-québécoise” in *Minorités et organisation de l’État* (sous la direction de Nicolas Levrat), Bruxelles, Bruylant, 1998, p. 561; Woehrling, José, “Language Laws and Language Conflicts in Canada and Quebec” in (Alessandro Anastasi, Giovanni Bonanno & Rosalba Rizzo, eds.), *The Canadian vision/La vision canadienne*, Villa San Giovanni, Edizioni Officina Grafica (Centro Studi Canadesi - Università di Messina), 1997, p. 125; Woehrling, José, “El estatuto del francés y del inglés en la administración de justicia en Canadá, especial referencia al de Quebec”, in *La administración de justicia en un estado plurilingüe* (Iñaki Agirreazkuenaga, ed.), Madrid, Consejo del Poder Judicial, 1999 (Cuadernos de derecho judicial), p.161.

guage so as to motivate Non-Francophones to learn and use French in order for it to become the common language (or language of contact) between the French speaking majority and the Non-Francophones. These two objectives have never been questioned ever since and the succeeding provincial governments in Québec have pursued them in a more or less systematic way since 1970. The Québec Liberal Party adopted the *Official Languages Act* in 1974; and in 1977, the Parti Québécois adopted the *Charter of the French Language* (or Bill 101).

Bill 101 regulates the use of languages in three main areas : provincial governmental institutions; the economic life; and public education. In these three sectors, the Act aims at raising the status of French, and to achieve that end it limits certain traditional rights of Anglophones in Québec. This was considered necessary because “free competition” of the two rival languages –French and English– would have to greatly favored English at the expense of French. So it was decided that legislative measures were needed to strengthen French in certain areas. As one could expect, Québec’s Anglophones have not easily accepted this linguistic policy. They have used political as well as legal means to fight it. A certain number of provisions of Bill 101 have been struck down by the Supreme Court of Canada after having been found to be in conflict with the Canadian Constitution.

However, this opposition to Bill 101 ignores the fact that Francophones, although they are a majority in Québec, form only a declining minority throughout Canada. Despite all the efforts made by the Canadian Government to promote the francophone minorities living outside Québec, these groups are rapidly assimilating into the English language. Even in Québec, where 90% of Canada’s all Francophones are now residing, the French language is not entirelyly secure, since immigrants still prefer to use English when given the choice. That is precisely the reason why the Québec government finds it necessary to strengthen French in certain areas and to limit the right to use English.

Finally, in constitutional matters, the “Quiet Revolution” has seen Québec begin to forcefully ask for new constitutional powers. Since 1960, all Québec governments, from whatever political party, have put forward such demands. They have asked either for a general decentralization of powers, applicable to all provinces (in the case the other provinces would adopt the same position as Québec), or for a particular status in which Qué-

bec would have special powers, not extended to the other provinces (in the case the other provinces would not seek the same kind of devolution of powers).

2. *The first referendum on sovereignty in 1980 and the passage of the Constitution Act, 1982*

With the passage of time, Québec's constitutional demands have become more radical. In 1967 the Parti québécois was founded; primary on its political agenda is the separation of Québec from Canada.³⁸ Only nine years later, in 1976, the Parti québécois won its first general election and formed the provincial government. In May 1980, it held a referendum in which it sought to obtain a mandate to negotiate with the Rest of Canada the political sovereignty of Québec, combined with an economic and monetary association with Canada. The results of the referendum of 1980 were 59,56% NO and 40,44% YES. However, after having clearly rejected sovereignty in the referendum, the Québécois voters reelected the PQ in 1981. Having been defeated on the main item of its agenda, the new government was seriously weakened. The Federal Government, under M. Trudeau, rapidly took advantage of this situation and in 1982 amended the Constitution with the approval of the nine English provinces, but without Québec's consent. Therefore, for the first time since 1867, the Constitution was amended without Québec's approval. Moreover, the new Constitution Act, 1982 contains an amending formula that will allow other constitutional modifications in the future without the need for Québec's consent. Furthermore, the new Constitution does not satisfy Québec's demands for extended powers, which have been put forward for more than 30 years. Finally, by recognizing additional linguistic rights to the Anglophone minority, the new Canadian Charter of Rights and Freedoms comes into conflict with Québec's language policy and limits its ability to protect the French language.

³⁸ On the quest for sovereignty, see: Woehrling, José, "Nacionalisme i independentisme al Quebec: la recerca de la igualtat a través de la reivindicació de la sobirania" in Fossas, Enric (ed.), *Les transformacions de la sobirania i el futur polític de Catalunya*, Barcelona, Centre d'Estudis de Temes Contemporanis, 2000, p. 125.

3. *Two failed attempts to reform the Constitution in order to satisfy Québec's demands (the "Meech Lake" and Charlottetown Accords; 1987-1992)*

In 1985, the Parti québécois was defeated and replaced by a federalist government formed by the Québec Liberal Party. The new government began negotiations with the federal government and the other provinces in order to secure constitutional amendments that would allow Québec to give its consent to the 1982 Constitution. The liberal government required that five conditions be met:

- Recognition of Québec as a "distinct society";
- An increased role for Québec in the matter of immigration;
- Participation of the Québec government in the appointing of 3 out of 9 Supreme Court of Canada judges;
- Limitation of the federal spending power;
- A veto power for Québec over the reform of Canadian central political institutions and the creation of new provinces.

In 1987, after two years of negotiations, all ten provinces and the federal government signed an accord (the "Meech Lake Accord") and committed themselves to amend the Constitution to satisfy Québec's five conditions. The benefit of four of these conditions was extended to all provinces, so the only modification specific to Québec was the recognition of its "distinct character". An additional modification introducing the joint appointment of Senators by both levels of government was added at the request of the Western provinces.

To enter into force, the Meech Accord had to be ratified by the federal Parliament and all ten provincial legislative assemblies inside a three year period. During these three years, critics against the accord multiplied in English Canada. By the end of the third year, in 1990, two provinces (Manitoba and Newfoundland) still had not given their consent—leading to the eventual failure of the Accord—. The main reason for this failure was the incompatibility between the constitutional positions of Québec and those held by a majority in English Canada. It is true that only two provinces, representing less than 8% of the Canadian population, have refused their support, but opinion polls show that in the seven other English provinces that supported the Accord, a large majority of the population (60% to 70%) strongly op-

posed Meech Lake. Thus, in these provinces, there was a considerable difference of opinion between the provincial politicians and the larger public. Another attempt to satisfy Québec's demands was made two years later, when a new series of constitutional amendments (the "Charlottetown Accord") were proposed and put to a national referendum on October 26, 1992. However, the Charlottetown Accord was decisively rejected by the voters, in Québec as well as in five other provinces. Thus, inside a five-year period, two attempts to renew the relations between Québec and the Rest of Canada have ultimately failed.

4. *The second referendum on sovereignty in 1995; the 1998 Supreme Court decision on secession and the federal Clarity Act, 2000*

This failure has probably contributed to the Liberal Party's defeat and the return to power of the Parti québécois in the 1994 election. The PQ government subsequently held a second referendum on sovereignty-association in October 1995 with very close results: 49,44% for the YES side and 50,56% for the NO side (with only a difference of about 50 000 votes).³⁹ After the 1995 referendum, the Canadian federal government has begun to take measures aimed at imposing stricter standards for a future referendum. In particular, it has asked the Supreme Court of Canada for an advisory opinion on Québec's possible secession. The opinion was rendered in 1998.⁴⁰

Interestingly, the Court began by dismissing the argument that the Canadian Constitution entirely prohibits a province to secede because this

³⁹ On the 1995 referendum, see: Fossas, Enric et Woehrling, José, "El referéndum sobre la soberanía de Quebec y el futuro constitucional de Canadá: federalismo, asimetría, soberanía" (1997) 48 *Revista Vasca de Administración Pública* 131; Woehrling, José, "Los intentos de reforma del federalismo canadiense tras el referéndum de 1995 acerca de la soberanía de Quebec", in (Esther Mitjans y Josep M. Castellà, coords.), *Canadá. Introducción al sistema político y jurídico*, Barcelona, Publicacions de la Universitat de Barcelona, 2001, p. 77.

⁴⁰ *Re Secession of Quebec*, [1998] 2 S.C.R. 217; for a comment, see: Woehrling, José, "El juicio del Tribunal Supremo de Canadá sobre la eventual secesión de Quebec" (1999) 54 *Revista Vasca de Administración Pública* 405; Woehrling, José, "The Supreme Court's Ruling on Quebec's Secession: Legality and Legitimacy Reconciled by a Return to Constitutional First Principles", in Hugh Mellon and Martin Westmacott (dir.), *Political Dispute and Judicial Review*, Scarborough (Ont.), Nelson, 2000, p. 83.

would “destroy” the Constitution. It said: “The Constitution is the expression of the sovereignty of the people of Canada. [A]cting through [*the*] various governments duly elected and recognized under the constitution, [*it can*] effect whatever constitutional arrangements are desired within Canadian territory, including, should it be so desired, the secession of Quebec from Canada” (para. 85).

The Court also stated that there is no right to unilateral secession under the Canadian Constitution or at international law. However, the Court added that “a clear expression by the people of Quebec of their will to secede from Canada” would “give rise to a reciprocal obligation on all parties... to negotiate constitutional changes to respond to that desire” (para. 87 and 88).

The Court emphasized that these principles led it to reject “two absolutist propositions”. The first proposition would confer on Quebec an absolute right to secede, and on the federal government and the other provinces, the obligation to consent to an act of secession whose terms would be dictated by Quebec. The second would require that a clear expression of self-determination by the people of Quebec impose no obligations upon the other provinces or the federal government (para. 90-92).

In its decision, the Court has repeated several times that the obligation to negotiate will only be triggered by “a clear majority vote in Quebec on a clear question in favor of secession”. However, the Court has left it to the political actors to determine what these notions mean, stating that they are by nature non-justiciable. The court also included within the non-justiciable aspects the conduct of parties during negotiations following a positive referendum outcome in Quebec.

Finally, the Court established a link between constitutional law and international law. It stated that the failure to respect the constitutional obligation to negotiate, to the extent that it would undermine the legitimacy of a party’s actions, could have important ramifications at the international level. If the government of Quebec were found in breach of the obligation to negotiate in good faith, its chances of obtaining recognition by the international community would diminish. Conversely, the probabilities of gaining such recognition would increase if Quebec had negotiated in conformity with the principles and was facing unreasonable inflexibility on the part of the other provinces or of federal authorities. To quote the Court: “In this way, the adherence of the parties to the obligation to negotiate would be evaluated in an indirect manner on the international plane” (para. 103).

One of the most remarkable aspects of the decision is the manner in which the Court gave its opinion without relying upon any specific provision of the Canadian Constitution. The decision is almost entirely based on four general principles that are present not only in the Canadian constitution but also in every democratic, liberal and federal constitutional system in the world. These are the *democratic principle*, which gives Quebecers the right to decide their own political future and grounds the obligation of the rest of Canada to negotiate a secession approved by a clear majority on a clear question; the *federal principle*, which forms the basis of the obligation of Quebec to negotiate with its federation partners to achieve the rupture of the federal union; the *protection of minorities*, which asks for respect of minority rights in the conduct as well as in the outcome of negotiations; and, finally, the *rule of law* and the principle of *constitutionalism*, which demand that secession of a province be achieved in an ordered way within the existing constitutional and legal framework. Thus, this decision admirably illustrates the freedom a Supreme or Constitutional court can exercise in applying the Constitution.

After the decision, the debate between sovereignists and federalists has centered on these two issues: the appropriate threshold of support the sovereignty option would require in a future referendum and the wording of the question. In 2000, the federal government has taken the initiative and had Parliament pass a statute titled the Clarity Act.⁴¹ In brief, the Act provides that, in the case of another referendum on secession in Quebec, the House of Commons must decide, before the referendum is held, if the question put to the Quebec voters is clear, and after the results of the referendum are known, if there is a clear majority in favor of secession. If one of these conditions is missing, the Act prohibits the federal government from entering into negotiations with the secessionist Quebec government.

Finally, in 2003, the Parti Québécois has lost the elections and a new provincial government has been formed by the Quebec Liberal Party under M. Jean Charest. The Liberal Party being opposed to secession, this particular issue has been put to rest, at least for the next 4 to 5 years. However, opinion polls show that support for “sovereignty-association” remains stable in public opinion at a 40% to 44% level. Furthermore, as has been already noted, during its long history in Quebec politics, the Liberal Party has always put forward constitutional demands on behalf of Quebec for more de-

⁴¹ S.C. 2000, ch. 26.

centralization of powers as well as for the formal recognition of Québec's distinct status. Moreover, the constitutional program of the Liberal Party has picked up the five conditions for constitutional renewal that formed the basis for the Meech Lake Accord. Therefore, it would indeed be premature to assume that the issues relating to Québec's place in Canada have been resolved or overcome.

5. The conflict between Québec's and English Canada's constitutional aspirations

The two main points of opposition between Québec and the Rest of Canada in the constitutional debate are first, the division of powers between the federal Government and the provinces, and second, the recognition of Québec as a distinct society.

As for the division of powers, it seems clear that a majority of English Canadians want Ottawa to play a leading role in economic matters as well as in such areas as education, culture, communications and social policy. As has already been noted, such a position is explained by the fact that many Canadians outside Québec consider a predominant federal presence necessary in such matters to equalize living conditions throughout Canada and to strengthen the national identity, particularly in defending it against the invasion of American culture and lifestyle. Yet, these areas are precisely those in which Québec seeks more decentralization. The conflict between Québec's and the Rest of Canada's positions regarding the division of powers could be resolved if English Canadians accepted to confer on Québec a special status by allowing it more powers than those possessed by other provinces. This would lead to an *asymmetrical* federalism. Yet, such a possibility collides with the principle of equality between all provinces, which seems to have become sanctified to English Canadians.

This same notion of equality between provinces is also invoked by the Rest of Canada to oppose the recognition of the distinct character of Québec's society. Indeed, the most drastic opposition between Québec and the Rest of Canada bears precisely upon Québec's demand to be recognized as a distinct society.⁴² This refusal is justified by a double equality principle:

⁴² On this point, see: Woehrling, José, "A Critique of the Distinct Society Clause's Critics", in *The Meech Lake Primer: Conflicting Views of the 1987 Constitutional Accord* (edited by Michael D. Behiels), Ottawa, University of Ottawa Press, 1989, p. 171.

equality of provinces, as we have seen, and equality between individuals. Regarding equality between individuals, this principle is given a somewhat simplistic interpretation. If equality is seen as asking always for an identical treatment, recognizing a special status for Québec appears to treat Quebeckers more favorably than other Canadians. However, true equality sometimes asks for a different treatment, to take into account the real differences that exist between two persons or two communities. Thus, when equality is understood as asking for identical treatment, one can also note a trend to centralize powers in a Federation. In the end, legislative unity is required to obtain complete uniformity of life conditions. The powerful equalitarian component of the modern democratic system does not easily combine with the protection of diversity that has historically been one the main objectives of Canadian federalism⁴³.

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⁴³ On this conundrum, see: Woehrling, José, "El principio de igualdad, el sistema federal canadiense y el carácter diferencial de Quebec", in Fossas, Enric y Requejo, Ferran (dir.), *Asimetría federal y Estado plurinacional. El debate sobre la acomodación de la diversidad en Canadá, Bélgica y España*, Madrid, Editorial Trotta (Colección Estructuras y procesos), 1999, p.141; Woehrling, José, "El reconocimiento constitucional de las diferencias culturales en Canadá", en Aparicio, Miguel Ángel (dir.), *La descentralización y el federalismo. Nuevos modelos de autonomía política (España, Bélgica, Canadá, Italia y Reino Unido)*, Barcelona, Cedecs Editorial s.l. (Centre de Estudios de Derecho, Economía y Ciencias Sociales), 1999, p. 115; Woehrling, José, "Le politiche della cittadinanza in Canada e nel Québec", in Rolla, Giancarlo (ed.), *Lo sviluppo dei diritti fondamentali in Canada*, Milano, Giuffrè, 2000, p. 241.

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