UNDERSTANDING CANADA

FEDERALISM IN CANADA

EVOLVING CONSTITUTIONAL, POLITICAL, AND SOCIAL REALITIES

Kathy L. Brock &
Geoffrey Hale

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Foreword

In 1867, a number of disparate British colonies in North America, that had not wanted to form part of the United States, joined into a single country. They were distant from each other and each had a society and polity distinct from the others; the only way these colonies could unite was thus to federate. This history requires interrogation. What does the concept of "federalism" mean and how does a federation differ from a unitary state? The foundational explanation of these questions was penned by the Oxford academic Kenneth C Wheare, now studied by generations of university students. The present study by Professors Brock and Hale focuses specifically on Canada as an example of a federal state and explains both the characteristics of Canadian federalism and the evolution of the practice of federalism in the decades since "Confederation."

For the practical citizen, federalism can appear to mean duplication: besides the federal Parliament, each province and territory has its own legislature. Similarly, it can entail a bewildering division in public services: employment insurance and old age pensions are delivered by federal departments, while education and health care are provided at the provincial level, entailing local differences and distinctions. The distinctions can be even more confusing when one realizes that substantive criminal law is within federal jurisdiction,

while the courts that administer this body of law are provincially created, named, and staffed, with lower court judges being provincially selected while superior court judges are federally appointed. Beyond this seeming confusion, the highest court in Canada is an exclusively federal body.

This regime of government and governance is grounded first in reason and rationality. The social and societal, linguistic, and ultimately political nature of the diverse parts of the population are so different in the various parts of the country that the powers, duties, and responsibilities of public authorities serving them must be the same across Canada in respect of some functions and there must be a structured variation of responsibilities for other matters. The Supreme Court of Canada emphasized this in the 1998 *Quebec Secession Reference* by indicating federalism as the first of the most fundamental characteristics of the country, even before democracy and constitutionalism and the rule of law. Similarly, federalism is both a historically permanent and a constantly evolving feature of Canadian public life. In this regard, the authors underline the expression "constitutional creativity and cooperative flexibility," drawn from the more recent Supreme Court *Reference re Pan-Canadian Securities Regulation.*

Whatever the appropriate expressions drawn from jurisprudence, both the practical citizen and the more specifically ambitious voter as well as the interested student, researcher, or scholar must take note of several realities. First, federalism is not exclusively a legal doctrine; rather, it is a method for the conduct of public affairs that combines a constitutional-legal framework with flexible public administration methodologies. Second, it is a method of governing that naturally incorporates practicality and mutual accommodation among layers of government. Finally, federalism is a vehicle of public life that generates its own controversies, difficulties, and indeed, sometimes crises, all of which require resolution through that very methodology of federalism.

Brock and Hale explore the most fundamental aspects of, and practices in, the Canadian form of federalism and go on to enlighten

all readers about a variety of aspects of this form of government. Their analysis is required for understanding Canada. Kenneth Wheare would be proud of this text as a serious and substantial continuation of his work!

Gregory Tardi, DJur
Editor, *Understanding Canada* collection
August 2022

CHAPTER ONE

Canadian Federalism Then and Now

Introduction

In 1867, British North American colonists came together to forge a new nation that would emerge from, but be loyal to, the British Empire. Unlike the United States with its stirring Declaration of Independence and Constitution that spoke of the "self-evident" truths that "all men are created equal" and entitled to rights including "life, liberty and the pursuit of happiness," the Canadian declaration of nationhood was much more subdued to reflect that its people were engaged in an evolution, not a revolution. The founders thus began their proclamation of union, the *British North America Act* (later renamed the *Constitution Act, 1867*), with the more prosaic description of its purpose:

> An Act for the Union of Canada, Nova Scotia and New Brunswick, and the Government thereof; and for Purposes connected therewith
>
> Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom:

> And whereas such a Union would conduce to the Welfare of the Provinces and promote the Interests of the British Empire:
>
> . . .
>
> And whereas it is expedient that Provision be made for the eventual admission into the Union of other Parts of British North America.[1]

And so Canada was constituted as a nation. The Preamble, though reserved in tone and concise, was remarkable for its fullness. Canada would be a legislative union similar in principle to the United Kingdom but also a federal union of the four former colonies that became the provinces of Ontario, Quebec, New Brunswick, and Nova Scotia with provision for the entry into Confederation of Manitoba (1870), British Columbia (1871), Prince Edward Island (1873), Alberta (1905), Saskatchewan (1905), and Newfoundland (1949), and the creation of three territories, Northwest Territories (1870/1880/1912/1999/2014), Yukon, (1898), and Nunavut (1999).[2] The founders envisioned Canada's peaceful evolution into a larger nation with the British principles of parliamentary and constitutional government embedded into a very different form of state with two orders of government. This federal nation-state would become known as the Peaceable Kingdom signifying the grand vision and pragmatic compromises of the founders.[3]

What Is Federalism?

The founders compromised on a federal system of government instead of a unitary one as in England in order to obtain the consent of the colonies to merge into Canada. As discussed in the next chapter, the merging colonies feared a centralized government that could engulf their status as responsible, self-governing, and representative governments but also one that might be so weak that the country could devolve into a bitter internal conflict as the United States had. The sweet spot of governing was to be found in a parliamentary and federal system that respected the "Welfare of the Provinces."

Federalism was still a new and evolving concept in 1867, although the United States, New Zealand, and Haudenosaunee federations provided working models of dispersed power. Its form, then and now, is captured in the definition provided by Peter Hogg:

> In a federal state, governmental power is distributed between a central (or national or federal) authority and several regional (or provincial or state) authorities, in such a way that every individual in the state is subject to the laws of two authorities, the central authority and the regional authority. . . . The central and the regional authorities are "coordinate", that is to say, neither is subordinate to the other.[4]

This definition has three implications. First, the powers of each authority are not granted by the other authorities and cannot be taken away or altered unilaterally by them. The powers of the central and regional authorities are derived from the Constitution, not the other order of government.[5] In contrast, under a unitary form of government, the sub-national level of government may be created, altered, or abolished by the central government. Second, consistent with the principles of parliamentary government, parliament and each legislature are sovereign within their own jurisdictions. They can make, unmake, or repeal any law within their jurisdiction subject to the Constitution, including those of preceding legislatures.[6] It must be added, though, that in practice, at least, there are limits to their ability to exercise this power, such as citizen dependence upon certain benefits of a law or legal agreements with other states, governments, and other entities. Third, while common parlance often refers to the two authorities as "levels" of government, this can lead to the misperception that the federal level is primary and the provincial level is secondary or subordinate to the federal government. It is more accurate to speak of two "orders" of government because this term captures their constitutional equality.[7] The Canadian provinces, led by Ontario, Quebec, and Alberta, have been especially vigilant in recent years to ensure that "orders" is used as a symbolic means of restraining

federal overreach into provincial jurisdiction, and of asserting provincial sovereign authority.

The Federalism Spectrum: From Centralized to Decentralized

Federal systems exist in many forms and can be placed along a spectrum[8] or continuum[9] according to the respective powers allocated to the two authorities or orders of government and their interface with citizens. Table 1.1 visually captures various conceptualizations of federal systems in contrast to unitary and confederal or hybrid systems in a simple continuum.

TABLE 1.1. SOME FEDERAL SYSTEMS COMPARED

Not Federal			
Unitary Government			
• Great Britain • New Zealand			
Federalism[10]			
Centralized Federalism	Moderate Centralized	Moderate Decentralized	Decentralized Federalism
Canada 1867 ⟶	⟶		⟵ Canada 2022
	United States 2022		⟵ United States 1865
Australia 2022			⟵ Australia 1900
		Germany ⟶	⟵ Germany
India 1947⟶		India 2022	
Loose Alliances			
Confederations / Hybrid Systems			
• United States – Articles of Confederation • European Union • Lebanon			

Federal systems can be centralized, where the central governments have overriding powers that are more consistent with a unitary system. In the Canadian case, federal scholar KC Wheare designated the Canadian system as quasi-federal because he found three sets of powers in the Constitution that allowed for federal intrusion into provincial jurisdiction, thus compromising provincial legislative sovereignty.[11] However, as these powers have fallen into disuse and as provincial governments have asserted their autonomy, Canada has become more decentralized in operation. Australia and, to a slightly lesser extent, the United States have tended to move in the opposite direction, particularly as those national governments have exercised more influence through economic and fiscal powers. However, this trend is moderating in Australia in recent years. Like Canada, India emerged from British control with a centrally dominated system, but regional pressures have influenced its development as a federation.

The danger in these classification systems is that they can be over-restrictive, as in Wheare's characterization of Canada as quasi-federal, or become so loosely defined of governmental powers and structures and societal influences that federalism loses meaning and resonance with the political reality, as happened in debates over the definition of federalism in the 1950s and 1960s.[12] However, the important element that emerges from these debates is that federalism is a multivariate form of government in which there are numerous configurations of overlapping and shared powers between the two independent and autonomous orders of government. Operational practices in each country may vary significantly from the constitutional principles.[13] As policies and societal and economic problems have become more complex, so too has the coordination of governmental powers with more conflict, contestation, and yet compromises in every federation but with the cleavages becoming particularly pronounced in some cases, such as Canada.[14]

Federalism Explained Through the Courts

The particular form and function of Canadian federalism has been captured by the Supreme Court of Canada in two important cases, the *Reference re Secession of Quebec*[15] and *Reference re Pan-Canadian Securities Regulation*.[16] These important judicial opinions merit separate discussions.

In 1998, the Supreme Court of Canada faced the challenge of offering its professional advice on whether and under what terms the province of Quebec had the right to secede unilaterally from Canada. Acknowledging that the Constitution did not explicitly pronounce on the issue of secession, the Supreme Court turned to four of the foundational principles that are vital in informing and sustaining the Constitution — federalism, democracy, constitutionalism and the rule of law, and respect for minority rights.[17] These principles incorporated by reference in the Preamble to the Constitution are intertwined and must be understood as part of the whole text while breathing life into that text by their normative force.[18] Federalism, being the key one for our purposes here, merits closer examination.

The Supreme Court offered a clear conception of federalism as an animating principle of the Canadian federation. The Court emphasized that the federal principle "recognizes the diversity of the component parts of Confederation, and the autonomy of provincial governments to develop their societies within their respective jurisdictions."[19] It explained that it is through this diversity that democratic engagement is encouraged by the allocation of powers to the appropriate order of government that can address particular societal needs. It quotes its words in an earlier case to underscore that the intent of the Constitution was:

> not to weld the Provinces into one, nor to subordinate Provincial Governments to a central authority, but to establish a central government in which these Provinces should be represented, entrusted with exclusive authority only in affairs in which they had a common interest. Subject to this each Province was to

> retain its independence and autonomy and to be directly under the Crown as its head.[20]

While collective goals should be pursued by the orders of government together, it was important to respect the constitutional choice that they remain autonomous with the powers to promote their own language, culture, and various societal and economic interests. This was as true for Quebec as for all the provinces entering into the federation.

The federal principle also tempered the principle of democracy when expressed as the sovereign will of a majority in a province or the federation as a whole unit, according to the Court. It explains that the relationship between the two principles "means, for example, that in Canada there may be different and equally legitimate majorities in different provinces and territories and at the federal level."[21] The federal system enables governments to serve these majorities appropriately as required by local circumstances and preferences but also requires them to act collectively to accommodate differences when necessary while acting within their jurisdictions as governed by the division of responsibilities and powers in the Constitution.[22] This dual system of government provides citizens with more means of participating and achieving their societal goals than they would have under a unitary system of government. The process of participation and discussion that ensues in the federation helps build public confidence in the governing structures and the law, contributing to their democratic legitimacy.

The Supreme Court provided a means of understanding how the federal, provincial, and territorial governments can operate separately and collectively to embody these four principles in the more recent *Reference re Pan-Canadian Securities Regulation*.[23] In this reference case, the Supreme Court of Canada evaluated the feasibility and constitutionality of the creation of a pan-Canadian securities regulator. In doing so, it not only outlined the relationship of the executive, legislative, and judicial branches but it also offered insight into and advice on relations between the two orders of government

(including the territories). The focus here is on the intergovernmental dimension of the opinion.

In its 2018 opinion on the federal scheme for a pan-Canadian national securities regulator, the Supreme Court eased back on a previous series of decisions made under Chief Justice Beverly McLachlin that had strenuously encouraged a cooperative federalism approach as the preferred means of conducting intergovernmental relations,[24] to offer a less directive approach that was more consistent with the Court's reminder later in the McLachlin era that the federalism principle did not mandate a particular approach to intergovernmental relations.[25] Under the guidance of McLachlin CJ's successor, Chief Justice Richard Wagner, in *Reference re Pan-Canadian Securities Regulation*, the Supreme Court recognized the prerogative of the executive branch of government to choose its preferred way of conducting intergovernmental relations provided that such a choice does not conflict with the Constitution or the will of the legislative branch and suggested that cooperative federalism is an "interpretive aid" to help the courts balance federal and provincial interests.[26] The Court observed that it would favour "constitutional creativity and cooperative flexibility" in the governments' choices and that cooperative federalism would allow them to "work together on the ground to leverage their unique constitutional powers in tandem to establish a regulatory regime that may be *ultra vires* the jurisdiction of one legislature on its own."[27] However, consistent with its adhesion to the federal principle, the Court cautioned the legislatures to reflect on whether any such intergovernmental agreements were truly in their best interests and properly respected their jurisdiction.[28] And, further in keeping with the federal principle as expressed in *Reference re Secession of Quebec* and in contrast with the early McLachlin CJ decisions, the Court observed that a national legislative scheme for intergovernmental cooperation, like the proposed pan-Canadian securities regulator, would not require all jurisdictions to participate, thus recognizing the need for and importance of provincial diversity and choice.[29] The opinion emphasized that federal and provincial laws can operate

in tandem or paired together as the governments and their legislatures choose, subject to the Constitution.

This reasoning is compatible with the traditional pragmatic view of federalism that intergovernmental "policy is the result of an interplay of complex and constantly evolving forces."[30] In operation, federalism allows both levels of government to press their advantages while engaging in cooperative arrangements with the ultimate result that this tension in negotiations will better serve the public. Martha Derthick, a US leading scholar on federalism and policy, explains that:

> Separation from local politics and administration . . . gives federal policy makers licence to formulate ideal, innovative objectives, because the political and administrative burdens of the innovations they conceive will be borne locally. . . . Not having ordinarily to decide concrete cases, they do not have to make the compromises that such cases require. The farther removed they are from the cases, the more principled they are able to be.[31]

The local governments can then contour the policies to meet their jurisdictional specificities and to be more practical and effective than federal policies acting alone would be for all parts of the union. Indeed, when federal policies become too directive or prescriptive, sub-national governments will rightly resent the intrusion into their affairs and any limits placed on their ability to set priorities and to devise practical solutions for complex policy issues that reflect important local variations despite the transboundary dimensions of an issue. This tension between the two orders of government can become heightened, especially during negotiations over transfer payments or where the federal government deliberately attempts to constrain provincial authority within the latter's jurisdiction in order to achieve federal policy priorities. Such instances of federal overreach can provoke sub-national governments to "game" the rules and regulations of cooperative arrangements and to treat the federal government as an "overturned Brinks truck."[32] In contrast, where the two orders of government negotiate and act with respect for the

jurisdiction of the other order, then good policy outcomes with a fair allocation of spending responsibilities is more likely. In sum, intergovernmental arrangements that are creative and cooperative but respect the sovereign authority of both levels of government and diversity within the federation are the clearest expression of the federal principle as traditionally understood and endorsed by the Supreme Court of Canada in 1998 and twenty years later in 2018.

Understanding the Canadian Federation: Structure of the Book

To understand the Canadian federation in theory and operation, this book begins with an excursion into the historical roots of the federal system and then moves into an analysis of its current functioning in key areas. The following ten chapters and conclusion demonstrate how the Canadian governments have operated over time to reflect, modify, and respect the federal principle as ensconced in the Canadian Constitution.

Chapters 2, 3, and 4 begin this journey by travelling back to 1867 and then returning to the 2020s. Chapter 2 situates Canadian federalism in its historical context by examining the intentions and words of the founders. It demonstrates how two competing views of federalism were embedded into the very foundations of the system of government. In Chapter 3, a cursory examination of Canada's development as fought through the courts from 1867 to 2022 provides insight into the complexities of governing this federation. Chapter 4 completes this historical trilogy by examining how the federation evolved through formal constitutional change and other constitutional means in three phases, 1867–1960, 1960–1982, and then 1983 to the present. These chapters capture the evolution of Canadian federalism in broad strokes and set the context for deeper dives into the working realities of the federation.

Chapters 5, 6, and 7 delve into the political, economic, and institutional realities of the Canadian federation. Chapter 5 begins this closer examination by unpacking the complex operation and

limits of intrastate and interstate federalism. Intrastate federalism refers to the accommodation of principles of unity and diversity within the institutions of the central government, while interstate federalism refers to accommodations that occur through formal and informal intergovernmental negotiations and structures. As part of this analysis, the chapter unfolds the role of political parties in embodying the federal spirit. If compromise is the operative mode in this world, competition is often the mode of operations in the world of fiscal relations examined in Chapter 6. This chapter examines how fiscal relations have constrained and empowered governments with the goal of the provinces and territories to constrain the federal spending power. What emerges is that this undefined, unbridled power may be the greatest threat to the federation and respect for diversity among the governments. Chapter 7, in contrast, examines the quieter, but no less powerful world of administrative intergovernmental relations to understand just how compromise and cooperation are achieved to ensure that the federation works reasonably well in serving citizens, especially when compared to other federations. In these chapters, the reader is given a sense of how difficult it is to govern this diverse federation but how important it is if the original spirit of the union is to be respected.

Chapters 8, 9, and 10 turn to current challenges in the federation. Chapter 8 examines how the dominant ethos of centralized federalism is being challenged from within. Jurisdictional and societal challenges are redefining the fundamental terms of the federal bargain to ensure it serves the various constituent parts of Canada equally well. The chapter focuses on how the original bargains in the federation are changing and being reshaped to reflect the new and emerging political, social, and economic realities of Canada and breathe new life into the constitutional pact. Chapter 9 turns to the third order of our constitutional system, Indigenous governance, to understand the implications of reconciliation for the Canadian federal system. Through accommodation of Indigenous difference, whether First Nation, Inuit, Metis, or Urban Indigeneity, the honour of the Crown and legitimacy of the governing federal structures

may be upheld. Or not. Moving outward from these transgovernmental pacts between Indigenous and Canadian governments, the book turns to the international dimension of Canadian federalism. The pandemic that began in 2020 starkly revealed how vulnerable the Canadian federation is to changes in the global economy and social well-being. Chapter 10 examines the interaction of international and Canadian intergovernmental relations to ascertain how the federation operates in the world order to protect and serve its citizens. Canada is a small actor on this stage but not entirely without its levers of power.

Chapter 11 concludes the book. It begins by distilling the key messages from the chapters to present a coherent picture of how Canada operates as a federation in theory and practice. It then turns to the ongoing and new challenges that the Canadian federation faces. An unrest has settled into the social fabric of the nation, exacerbated by an economic and fiscal turbulence that strains the ties of the federation. As the two orders of government struggle to maintain the vitality and well-being of the federation, they face an added institutional change. Can the federation survive the change in the head of state or will all these pressures pose an existential threat like no other in our past? Will this perfect storm that is brewing forever damage the Peaceable Kingdom, or are the institutions of this great federation sufficiently strong but flexible enough to weather this tempest?