

## REFORMING THE DIVISION OF POWERS IN CANADA: AN (UN)ACHIEVABLE ENDEAVOUR ?<sup>1</sup>

Formal amendments to the division of powers provisions of Canada's 1867 federal constitution<sup>2</sup> have always proved difficult to achieve. However, since 1982, this task has become hopelessly unachievable. Modifications to, and adaptation of, the division of powers has consequently been left to judges called upon to interpret sections 91 to 95 of the *Constitution Act, 1867* and to executives officers of the central and regional governments as they negotiate intergovernmental agreements. The end result of these two processes has been highly favourable to the central government. Courts have given a liberal interpretation to the central government's exclusive fields of jurisdiction. Moreover, the latter's spending power, unobstructed by the fragile legal framework imposed under interprovincial agreements, has enabled it to encroach upon the exclusive heads of power of the provinces.

As we will see, one of the main reasons behind the Canadian constitutional stalemate, and for the recurrent isolation of Québec – even where informal modifications are concerned – is the different conceptions of Canadian federalism respectively held by Quebecers and by English Canadians.

### I. Formal Amendments to the Division of Powers

Canada's 1867 federal constitution is the fourth written constitution enacted by the British Parliament for the better administration of its North American colonies. Adopted at the request of three of the six British North American colonies then in existence, the Act had as its purpose the unification of those colonies in one federal country.<sup>3</sup> The wish to find a way out of the economic crisis of the 1850s by creating a common market and the desire to put an end to the political and constitutional difficulties of the United Province of Canada (comprised of what would become in 1867 the provinces of Ontario and Qué-

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1 Paper delivered at the workshop "Reforming Federalism – Foreign Experiences for a Reform in Germany" hosted by the Institute for Legal Policy (University of Trier, Germany) and the German Bundesrat, December 2<sup>nd</sup>-4<sup>th</sup>, 2004.

2 Sections 91 to 95, reproduced in Annex A of this paper.

3 Between 1867 and 1949, other colonies joined the federation, and provinces were also created out of federal territories (*Morin & Woehrling* 1994: 401-408). Canada now comprises 10 provinces and 3 territories.

bec) were the main impetus for the adoption of the *British North America Act, 1867*, now known as the *Constitution Act 1867*.

Although a legislative union would have been the preferred choice of many English Canadians, the staunch opposition of the French Canadians made federalism the only politically realistic choice. Indeed, federalism enabled them to form a majority in Québec and thus control the legislature and, more importantly, their collective destiny. In the words of *Thomas Courchene*, "Quebec's gift to Canada was federalism" (2004: 21). The Supreme Court of Canada has recently emphasized that fact (*Re Secession of Quebec 1998*: ¶159):

The principle of federalism facilitates the pursuit of collective goals by cultural and linguistic minorities which form the majority within a particular province. This is the case in Quebec, where the majority of the population is French-speaking, and which possesses a distinct culture. This is not merely the result of chance. The social and demographic reality of Quebec explains the existence of the province of Quebec as a political unit and indeed, was one of the essential reasons for establishing a federal structure for the Canadian union in 1867. The experience of both Canada East and Canada West under the *Union Act, 1840* (U.K.), 3-4 Vict., c. 35, had not been satisfactory. The federal structure adopted at Confederation enabled French-speaking Canadians to form a numerical majority in the province of Quebec, and so exercise the considerable provincial powers conferred by the *Constitution Act, 1867* in such a way as to promote their language and culture. It also made provision for certain guaranteed representation within the federal Parliament itself.

Today this principle continues to be of particular significance to Québec. One of Canada's ten provinces, Québec is the place of residence of 23.6% of the Canadian population<sup>4</sup> and, more importantly, the home land of 85% of Canada's francophone community.<sup>5</sup> It is also the only territory in Canada where private law is administered under a civil law system.

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- 4 According to the 2004 Census of population – Statistics Canada, the percentage of population of the provinces and territories is as follows:  
- Atlantic Canada: Newfoundland and Labrador: 1.6%; Prince Edward Island: 0.4%; Nova Scotia: 2.9% and New Brunswick: 2.4%.  
- Central Canada: Quebec: 23.6% and Ontario: 38.8%.  
- Western Canada: Manitoba: 3.7%; Saskatchewan: 3.1%; Alberta: 10% and British Columbia: 13.1%.  
- Federal Territories: Yukon: 0.1%; Northwest Territories: 0.1% and Nunavut: 0.1%.
- 5 2001 Census of population – Statistics Canada – Mother Tongue, 2001 Counts for Both Sexes, for Canada, Provinces and Territories. Within Quebec, the mother tongue of the population is as follows: 81.2% French; 8% English; 0.8% French and English and 10% another language than French or English.

Coming back to 1867, notwithstanding the importance of the "francophone factor", for many English Canadians at the time, "federalism was at best a regrettable concession imposed by Québec and, to a lesser degree, the Maritimes" (*McRoberts 1997: 10*). Therefore, since "more than one spirit presided at the deliberations that led to Confederation" (*id.: 11*), it is no wonder that the Constitution of 1867 was an ambiguous text with a mixture of centralist and decentralist features, where the former nevertheless predominated (*Hogg & Wright 2004*).

In dividing powers between the central and provincial levels of government, the Fathers of Confederation intended the central government to be endowed with the power to regulate matters of general concern (section 91). In particular, these included all matters that affected Canada's economic life. In addition, the constitution of 1867 granted the central government exclusive access to the most important source of revenue at the time, indirect taxes.

As for the provinces, they were awarded the power to regulate matters generally seen as local in scope (section 92). Incidentally, these matters directly concerned Québec's distinctive cultural institutions: education, civil law, solemnization of marriage, and so on. Provincial sources of revenue were limited to direct taxes and the profit reaped from the exploitation of the public domain's natural resources.

Finally, some sections of the 1867 constitution specifically recognised Québec's special status in the federation. Section 94 for instance bestowed on Parliament, under certain conditions, the ability to legislate over property and civil rights – a provincial head of power – in all provinces, except Québec:

[The] Parliament of Canada may make Provision for the Uniformity of all or any of the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and of the Procedure of all or any of the Courts in those Three provinces [...]; but any Act of the Parliament of Canada making Provision for such Uniformity shall not have effect in any Province unless and until it is adopted and enacted as Law by the Legislature thereof.

This section – to which Parliament has never resorted – was meant to protect Québec's civil law heritage, that province being the only one with such a legal system.

Sections 91 and 92 expressly grant each level of government the exclusive power to legislate in relation to certain specific matters. The courts were quick to recognise that, because of this exclusivity of legislative jurisdiction, the failure by one level of government to exercise one of its powers under the constitution does not authorise the other level to do so in its stead. The legislative powers distributed under sections 91 and 92 of the Act are said to be "mu-

tually exclusive", therefore guaranteeing the autonomy of both levels of government, more particularly that of the provinces.<sup>6</sup> However, it is also agreed that sections 91 and 92 recognise the existence of classes of law, not of facts. Those sections grant exclusive legislative jurisdiction in relation to certain matters within the enumerated classes of subjects, but it is not the matters or subjects themselves that are granted. Instead, this exclusivity refers to the kinds of legislative purposes that can be fulfilled by exercising a given power. Envisaged in such a manner, the exclusivity principle does not prevent the two orders of government from legislating over the same issue.

According to the "aspect" doctrine developed by the courts, "a law which is federal in its true nature will be upheld even if it affects matters which appear to be a proper subject for provincial legislation (and vice versa)" (*General Motors 1989: 670*). This approach encourages the "overlap of legislation" (*id.*: 669) rather than compartmentalisation. As long as the main object – or dominant characteristic – of a provincial statute is to achieve a legislative purpose that falls within one of the heads of power listed in section 92 of the constitution, the statute will not be found unconstitutional even if it has a slight impact on an area of federal law. The question of whether the statute also has a federal aspect becomes irrelevant. Conversely, a federal statute whose main purpose is within the legislative authority of Parliament under section 91 of the constitution is not unconstitutional simply because it may affect an area of provincial authority.

What happens, though, when a statute relates to a subject that falls under a head of federal jurisdiction when looked at from one angle and a head of provincial jurisdiction when looked at from another angle? In such a case, the courts say that the subject has a "double aspect." Legislation on broad subjects such as pollution, for example, can therefore be passed by either Parliament or a province, in so far as each is pursuing a purpose that lies within its jurisdiction.

The aspect doctrine and its corollary, the double aspect doctrine, are both the expression of a certain form of judicial deference. The courts generally favour an approach that enables statutes to be found constitutional. When the double aspect doctrine is applied, federal and provincial norms relating to the same subject can both subsist. To resolve the conflicts that may result from the si-

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<sup>6</sup> Nevertheless, there are exceptions to the exclusivity principle. Some jurisdictions are expressly said to be concurrent: agriculture and immigration (s. 95), old age pensions (s. 94A) and export from one province to another of the primary production from non-renewable natural resources and forestry resources (s. 92A (2) and (3)).

multaneous application of the statutes in question, the courts apply the rule of federal paramountcy, according to which any provincial statute that conflicts with a federal statute becomes inoperative.

However, the aspect doctrine may not serve to endanger the rule of exclusive jurisdiction explicitly recognised in sections 91 and 92 of the constitution. It must not deny that exclusivity. On the contrary, it "can only be invoked when it gives effect to the rule of exclusive fields of jurisdiction." (*Bell Canada 1988: 766*) Thus, it can be applied only when the multiplicity of aspects is real. (*id.*) In *Bell Canada 1988 (id.)*, *Beetz J.* noted that the double aspect doctrine must be applied with caution:

The reason for this caution is the extremely broad wording of the exclusive legislative powers listed in ss. 91 and 92 of the Constitution Act, 1867 and the risk that these two fields of exclusive powers will be combined into a single more or less concurrent field of powers governed solely by the rule of paramountcy of federal legislation.

The courts have played a determining role, not only in fashioning interpretative tools such as the "aspect doctrine" just described, but also in defining the scope of the provincial and central government's respective jurisdictions. Although an expansive interpretation was initially given to the provincial heads of power by the Judicial Committee of the Privy Council to which appeals could be made until 1949 (*Cairns 1971; Hogg & Wright 2004; Hogg 2005*), it now appears that the pendulum is swinging toward the federation. Indeed, over the last thirty years, the Supreme Court of Canada has clearly been in the process of reinforcing Ottawa's power over the economy (*Leclair 2003*).

First, whenever the opportunity has arisen, the Supreme Court has given a generous interpretation to Parliament's *enumerated* powers. It did so by resorting to purely technical or functional tests which have great centripetal potential (*id.*). Nevertheless, none of these powers allowed for broad federal intervention in the field of commerce, especially at the intraprovincial level. Indeed, Parliament's trade and commerce power (ss. 91(2)) had always been interpreted to allow the Central government to regulate interprovincial and international trade, and to regulate intraprovincial transactions only to the extent that it was necessarily incidental to the effective regulation of interprovincial and international trade. And so, the second and most important reform initiated by the Supreme Court was the recognition to Parliament of a power over the regulation of "general trade and commerce affecting Canada as a whole" (*General Motors 1989*). This new power enabled Parliament, under certain conditions, to adopt legislation "concerned with trade as a whole rather than with a particular industry" (*id.: 661*). What it conferred on the Central gov-

ernment was jurisdiction over both the interprovincial and the intraprovincial aspects of trade (*Leclair 2003*). Finally, the Supreme Court enhanced Parliament's *residual power*, by giving a liberal interpretation to the "national interest" doctrine (*Zellerbach 1988*). According to that doctrine, when a subject matter is judicially found to have a "national dimension", it thereafter falls within Parliament's permanent and exclusive jurisdiction, pursuant to the residual power set out in the opening words of section 91 of the constitution of 1867. The main virtue of the doctrine is that the power it confers extends to both the interprovincial and the intraprovincial aspects of the subject matter (*Leclair 1993; Leclair 2004*).<sup>7</sup>

Consequently, the division of powers between the federal and provincial governments has been modified informally through judicial interpretation and, as we will see in part 2 of this paper, through the exercise of Ottawa's spending power.

This is not to say that the division of powers has never been formally modified since 1867. Three such amendments did occur (in 1940, 1951 and 1982) but they were the product of very special circumstances. The first added unemployment insurance to the central government's list of exclusive powers (s. 91(2A)), whereas the second allocated to Parliament a concurrent power to make laws in relation to old age pensions (s. 94A). Most importantly for our present purposes, these two formal amendments were not controversial; they were agreed to by the federal government and all the provinces, including Québec. As for the third amendment concerning provincial regulation and taxation of natural resources (s. 92A), it was part and parcel of a constitutional package adopted in 1982, about which more will be said in the next paragraph. The purpose of this last amendment was rather limited, since its design was to attenuate the impact of two controversial Supreme Court of Canada decisions that had jeopardized the provinces' ability to regulate the natural resources sector (*Tremblay 1995: 4-6*). Up until 1982, Canada was not empowered to modify its own constitution. And so these 1940, 1951 and 1982 amendments were performed by the British Parliament at the request of the Canadian authorities (federal and provincial).

When initially adopted, the Constitution of 1867 did not contain an amending formula. Being a British colony, no one at the time thought it necessary to provide for such a mechanism. In truth, "the Canadian framers of the B.N.A. Act were content for the imperial Parliament to play a part in the proc-

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<sup>7</sup> In recent years, the Court has distanced itself from this generous and invasive interpretation of Parliament's residual power (*Leclair 2003 and 2004*).

ess of amending the new Constitution" (*Hogg 2003: 3*). In 1931, the *Statute of Westminster* confirmed the sovereign status of the Canadian state by granting the latter the power, which it had lacked prior to that date, to repeal or amend imperial statutes to which it was then subject. Because no agreement could be struck between Ottawa and the provinces over an amending formula, subsection 7(1) of the Statute provided that "[n]othing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder." In the following decades, the provinces and the Federation met several times to try and agree on a particular formula, but all in vain. Consequently, until 1982, the task of formally amending our constitution therefore fell upon the English Parliament. Constitutional conventions – "constitutional rules which are not binding in any strict sense (that is in a legal sense) but which have come to be recognised and accepted in practice as part of the amendment process in Canada" (*Re: Resolution to Amend the Constitution 1981: 900*) – regulated the manner in which the Canadian authorities could seize London with a demand for constitutional reform.

Eventually, in 1982, Ottawa and all the provinces – with the important exception of Québec – agreed on the amending formula now enshrined in Part V of the *Constitution Act, 1982*.<sup>8</sup> The constitution of 1982 was adopted by the British Parliament at the request of the federal government and the nine English Canadian provinces.<sup>9</sup> In 1981, the Supreme Court of Canada had concluded that, according to the conventions of the Constitution, an amendment to the distribution of legislative power did not require the unanimous consent of all the provinces. "[A] substantial measure of provincial consent" was said to be sufficient for an amendment to proceed (*Re: Resolution to Amend the Constitution 1981: 905*). Québec's opposition was therefore no obstacle to the patriation of the constitution (*Quebec Veto Reference 1982*).

However, as demonstrated by the failure of the 1987 *Meech Lake Accord* and the 1992 *Charlottetown Accord* – both designed in part to reintegrate Québec within the constitutional family by recognising its cultural specificity<sup>10</sup> – the

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<sup>8</sup> Reproduced in Annex B of this paper.

<sup>9</sup> It provided for the repeal of ss. 7(1) of the *Statute of Westminster*.

<sup>10</sup> For more information about these two agreements, see *Morin & Woehrling 1994: 543-577*.

cumbersome mechanism established by the amending formula of the constitution of 1982 now renders major constitutional reforms impossible.<sup>11</sup>

A demonstration of this assertion requires a short description of the mechanisms put in place under Part V of the Constitution Act, 1982. Subsection 38(1) of the constitution of 1982 first establishes a general mechanism – a default mechanism – that does not require the unanimous consent of all provinces for an amendment to proceed. According to this provision an amendment to the Constitution may be made by proclamation issued by the Governor General under the Great Seal of Canada. This proclamation must first be authorized by resolutions of the Senate and the House of Commons and by resolutions of the legislative assemblies *of at least two-thirds of the provinces that have, according to the then latest general census, at least fifty per cent of the population of all the provinces*. Any amendment to the division of powers is subject to this general provision. Nevertheless, where such an amendment is concerned, ss. 38(2) further provides that a resolution *supported by a majority of the members* – as opposed to a majority of those present and voting – of each of the Senate, the House of Commons and the legislative assemblies required under subsection (1) is mandated.<sup>12</sup> Hence, an amendment to the division of powers does not require the unanimous consent of the provinces. However, s. 41 does require such unanimity for the amendment of five specific features of the Canadian constitutional order.<sup>13</sup>

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11 Although, pursuant to s. 43 of the Constitution Act, 1982, amendments to the Constitution of Canada in relation to any provision that applies to one or more, but not all, provinces have proven possible: see *Hogg 2003: 7*; footnote 28.

12 Ss. 38(3) and s. 40 also establish an "opting-out with compensation" mechanism: 38(3). An amendment referred to in subsection (2) shall not have effect in a province the legislative assembly of which has expressed its dissent thereto by resolution supported by a majority of its members prior to the issue of the proclamation to which the amendment relates unless that legislative assembly, subsequently, by resolution supported by a majority of its members, revokes its dissent and authorizes the amendment.

40. Where an amendment is made under subsection 38(1) that transfers provincial legislative powers relating to education or other cultural matters from provincial legislatures to Parliament, Canada shall provide reasonable compensation to any province to which the amendment does not apply.

13 1) The office of the Queen, the Governor General and the Lieutenant Governor of a province; 2) the right of a province to a number of members in the House of Commons not less than the number of Senators by which the province was entitled to be represented in 1982; 3) the use of the English or the French language; 4) the composition of the Supreme Court of Canada and 5) an amendment of the amending formula.



In practice, a stalemate always ensues when negotiations are entered into, because this unanimity principle inevitably imposes itself. The dynamics of constitutional negotiations tend to bring about a coalescence of all the negotiating parties' demands, some of which are subject to ss. 38(1), or to s. 43, and others to s. 41. The constitutional proposals, of which the 1992 *Charlottetown Accord* is an eloquent example, become a "package deal" necessarily subject to the most stringent amending formula, that of unanimity. And because of the precedent set by the *Charlottetown Accord*, it now appears that the consent of Aboriginal and Territorial leaders, as well as a nationwide referendum would be required to enable a constitutional amendment to pass. Many reasons explain the failure of recent constitutional proposals, but the rigidity of the amending formula certainly is an important one.<sup>14</sup>

The division of powers will, most probably, never be amended under the present formula unless unforeseen and radical changes supervene. The gap between the wishes of the Québécois and those of the English Canadians is too

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14 For an analysis of those reasons, see *Morin & Woehrling* 1994: 543-577. The dissatisfaction engendered by the rejection of Quebec's demands in the *Meech Lake* and *Charlottetown* accords led to the 1995 referendum where the "No" forces won the day by a only a hair's breath margin. The Supreme Court of Canada was afterwards called upon to decide whether, under Canadian constitutional law or international law, Quebec could unilaterally secede from Canada. In a very nuanced decision, although it answered no to both questions, the Court nevertheless declared that a clear vote for secession could not be ignored by the rest of Canada (*Reference Re Secession of Quebec* 1998: ¶151): "Quebec could not, despite a clear referendum result, purport to invoke a right of self-determination to dictate the terms of a proposed secession to the other parties to the federation. The democratic vote, by however strong a majority, would have no legal effect on its own and could not push aside the principles of federalism and the rule of law, the rights of individuals and minorities, or the operation of democracy in the other provinces or in Canada as a whole. Democratic rights under the Constitution cannot be divorced from constitutional obligations. Nor, however, can the reverse proposition be accepted. The continued existence and operation of the Canadian constitutional order could not be indifferent to a clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada. The other provinces and the federal government would have no basis to deny the right of the government of Quebec to pursue secession, should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others. The negotiations that followed such a vote would address the potential act of secession as well as its possible terms should in fact secession proceed. There would be no conclusions predetermined by law on any issue. Negotiations would need to address the interests of the other provinces, the federal government, Quebec and indeed the rights of all Canadians both within and outside Quebec, and specifically the rights of minorities. No one suggests that it would be an easy set of negotiations."

wide. Indeed, it is interesting to note that since 1982, most proposals for constitutional reform originating from outside the province of Québec have had more to do with changes to federal institutions than with an alteration of the division of powers as it now exists. For instance, the western provinces' primary demand is for a Triple-E Senate – elected, efficient and equal.<sup>15</sup> In Québec, on the contrary, the emphasis has always been put on reforming the division of powers, rather than reforming the federal institutions (*Morin & Woehrling 1994: 211 footnote 251; 436-438*).

The English Canadians' attitude is hardly surprising if one accepts the fact that they consider themselves to be part of the same national community.<sup>16</sup> Even in the Western part of Canada, where there are stronger demands for decentralisation, these are not based on the belief, commonly held in Québec, that *inherent* provincial rights exist and that, consequently, there are areas of public policy that are federal *non grata*. From this perspective, the English Canadians' wish to reinforce the central government's powers and, at the same time, their own regional representation in Parliament is quite understandable. Centralisation is not conceived of as a threat to their national identity; on the contrary, it reinforces it. This explains why many English Canadian scholars are pleased with the centralist bent adopted by the Supreme Court of Canada.

However, this is not true for many citizens of the Québec and First Nations – i.e. aboriginal – communities. Although the majority of these citizens do feel an allegiance to Canada, they nevertheless strongly believe that they belong primarily to a different national community; one whose autonomy, in the case of Québec, is guaranteed by the barriers established by section 92 of the *Constitution Act, 1867*. Being territorially concentrated in one single province, it is no wonder that Quebecers consider their own "Parliament", the National Assembly, to be the true voice of their concerns. Centralisation, therefore, is bound to meet with their displeasure.

In other words, what opposes Québec and the rest of Canada is their different conceptions of Canadian federalism. Whereas the former envisage Canadian federalism as a "multinational federalism", that is as "a system for dividing power so as to enable meaningful [national] self-government" (*Kymlicka 1998a: 20*), the latter look upon it as a "territorial federalism", that is "a means by which a *single* national community can divide and diffuse power." (*id.: 21; my emphasis*) These different conceptions of federalism account for the im-

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15 For an analysis of the many Senate reform proposals that have been made over the last four decades, see *Morin & Woehrling 1994: 193-221*.

16 The two following paragraphs borrow extensively from *Kymlicka 1998*.

possibility of modifying the Constitution in general, and the division of powers in particular. Whereas Québec wishes to be recognised as a distinct society within Canada, and claims that greater autonomy and thus more constitutional powers are necessary to its cultural development and growth, English Canada adamantly clings to the idea that all provinces should be treated equally and that no special status should be recognised to any one province. As we will now see, these different conceptions of Canadian federalism also explain the difficulty of modifying the division of powers in an *informal* manner.

## **II. Informal Adjustments to the Division of Powers**

Even prior to 1982, amending the constitution had proved to be an extremely difficult task. Only twenty-two amendments were reached between 1867 and 1982; and just two of them, as I said earlier, had to do with the division of powers. All of these 22 amendments, with one exception that did not relate to the division of powers, were agreed to by the federal government and *all* the provinces.

Since 1982, as we have seen earlier, the obstacles to the fulfilment of constitutional reform have been compounded by the new amending formula. Québec's quest for special status and English Canada's opposition to any treatment that would clash with the formal equality of all provinces have led Canada to an impasse. For example, in trying to conciliate the "distinct society" and "equality" principles, the text of the *Charlottetown Accord* became nothing but a watered down version of these contradictory concepts. No wonder this accord was a failure in waiting. As one commentator has observed, "[r]ather than a trade-off between Quebec's demands for additional powers and western Canada's demands for a triple-E Senate, the result was a package that did not meet either demand and did not give either Quebec or the western and Atlantic provinces any reason to support it." (*McRoberts 1997: 215*).

Formally amending the constitution has thus always proved to be a difficult road to travel. As a result, informal arrangements having no foundation in either statutes, conventions of parliamentary government or in the constitution have provided the channels through which constitutional adaptation was made possible. Arrangements such as the First Ministers Conferences (annual federal-provincial conferences of the provincial Premiers and the federal Prime Minister), the Annual Premiers' Conference – and since 2003 the Council of the Federation, the Western Premiers' Conference, the Atlantic Premiers' Conference, meetings of standing federal-provincial committees of finance ministers and line ministers, have given birth to what is generally referred to as "co-

operative federalism." *Peter Hogg (2003: 146-147)* provides the following definition:

The essence of cooperative federalism is a network of relationships between the executives of the central and regional governments. Through these relationships mechanisms are developed, especially fiscal mechanisms, which allow a continuous redistribution of powers and resources without recourse to the courts or the amending process. These relationships are also the means by which consultations occur on the many issues of interest to both federal and provincial governments. The areas where cooperative federalism has been most dominant is in the federal-provincial financial arrangements.

As the informal arrangements enumerated above attest, "cooperative federalism" is also synonymous with "executive federalism." The latter has been described as "the predominant role of governmental executives (ministers and their officials) in intergovernmental relations in parliamentary federations where responsible first minister and cabinet ministers tend to predominate within both levels of government" (*Watts 1996: 52*).

Quite apart from the rigidity of the constitutional amendment procedure, other factors have led to the dominance of executive federalism as the primary means of adapting the constitution and more particularly, the distribution of powers. First, as we recall, the "aspect" and "double aspect" doctrines have led to an "overlap of legislation." Accordingly, both levels of government are allowed to legislate concurrently over the same matters. Negotiations are thus required to demarcate the precise extent of each order of government's legislative territory.

Secondly, executive federalism was encouraged by the fact that intrastate federalism has proven to be a failure in Canada. The Canadian Senate, whose members are appointed by the federal Prime Minister<sup>17</sup> on the basis of pure patronage, is "not a provincial chamber, like the German *Bundesrat*, but a partisan one" (*Pelletier 2002: 4*). The failure of the Senate to adequately represent the regions only reinforced the provincial premiers' claim that they are the only legitimate voice of their constituents. Furthermore, our British Westminster style governance, based as it is on a first-past-the-post electoral system, on a fusion of the legislative and executive powers, on party discipline and ministerial solidarity has lent support to the establishment of all-powerful

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<sup>17</sup> According to sections 24 and 32 of the *Constitution Act*, 1867, senators are appointed by the governor-general. Nevertheless, constitutional conventions require of the governor-general that he/she perform his/her duties on the advice of the Prime Minister.

executives at both the provincial and federal level.<sup>18</sup> Party discipline in particular makes it impossible for individual members of the political party in power in Ottawa to express the wishes and preferences of their region's constituents, if these do not meet with the approval of Cabinet. All these elements prevent Parliament (Senate and House of Commons) from performing its role as an inter-regional bargaining forum.<sup>19</sup> Moreover, whereas national political parties have traditionally tried to make their deputation representative of the regional, linguistic and ethnic diversity of Canada, in recent years, we have witnessed a regionalization of political parties, with the Conservative Party representing Western Canadian interests and the Bloc Québécois intent on promoting Québec's right to secede from Canada.<sup>20</sup> In a word, since intergovernmental relations can not take place *within* the federal institutions, they must therefore take place *between* governments (*Bakvis 2002: 7*).

The understandings brought about through the channels of executive federalism are manifested in "intergovernmental agreements" (IGA). To this day, more than a thousand such agreements have been entered into between the federal and provincial governments; the same number of interprovincial agreements are said to exist (*Poirier 2004: 427-428*). These come in a variety of forms and are thus extremely flexible tools of intergovernmental governance. However, they suffer from being negotiated behind closed doors, from contributing to "an unduly low level of citizen participation in public affairs"; finally, they also "weak[en] and dilut[e] the accountability of governments to their legislatures and to the wider public" (*Smiley 1979*) Notwithstanding these deficiencies, IGAs remain the primary means of managing intergovernmental relations.

The function of IGAs is fourfold. First, they are used to delimit the jurisdictional reach of each order of government where concurrent powers are involved. Some of these powers, such as immigration, are explicitly recognised

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18 See *Franks 2004* and *Morin & Woehrling 1994: 171-2, 176* footnote 147, 178, 191-192, 224, 235-250.

19 On the diminishing role of Parliament in federal-provincial relations, see *Frank 2004*.  
20 During the June 28th, 2004 elections, the Liberal Party won 135 (75 of them in Ontario) of the 308 seats in the House of Commons, the Conservative Party 99, the Bloc Québécois 54, the New Democratic Party 19, and 1 independent member was also elected. Of interest is the regional distribution of the seats. In Atlantic Canada, the Liberals won 22 seats, the Conservatives 7 and the NDP 3. In Ontario, the Liberals won 75 seats, the Conservatives 24 and the NDP 7. In Quebec, the Liberals won 21 seats and the Bloc 54. In Western Canada, the Liberals won 14 seats, the Conservatives 68, the NDP 9 and there was one lone independent in British Columbia. The Liberals also took the three seats in the Territories.

by the constitution of 1867 (s. 95). Many IGAs have been reached by the federal and Québec governments in that particular field (*Tremblay 1995: 92-93*). As mentioned earlier, the existence of a concurrent power over certain issues can also originate with the application of the "double aspect" doctrine. This issue of environmental protection is one example. This dual authority has led to the negotiation of the *1998 Canada-Wide Accord on Environmental Harmonization (1998 CWAEH)*.

Secondly, IGAs can also serve to coordinate the exercise of exclusive federal and provincial powers that deal with closely related issues. Arrangements involving Ottawa's power over unemployment insurance and the provinces' authority over labour training is a good example. The *1995 Internal Trade Agreement (1995 ITA)*, agreed to by the central government and all the provinces, fulfils a similar purpose. This agreement is aimed at promoting economic efficiency by removing inter-provincial barriers to the movement of products and factors of production. Since provinces have authority over intra-provincial trade and Parliament over interprovincial and international trade, their collective involvement was necessary.

Thirdly, although IGAs cannot amend the constitution, they "can modify the exercise of constitutional competences" (*Poirier 2004: 449*). For instance, although legislative inter-delegation, or interparliamentary delegation<sup>21</sup> is unconstitutional, administrative inter-delegation is not so prohibited. For example, Ottawa can delegate to a provincial administrative agency the power to regulate, according to the legal mandate it establishes, a particular federal subject-matter. IGAs have thus enabled the establishment of federal-provincial natural products marketing schemes with boards to administer them. Once concluded though, these IGAs require the enactment of legislation allowing for the administrative inter-delegation envisioned by the scheme.

Fourthly, and most importantly for our purposes, IGAs are primarily known as the "conduits for the [federal] spending power" (*Poirier 2004: 449*). Although IGAs are not a necessary prerequisite, they are usually relied upon to establish the framework according to which the spending power is to be exercised. This power has certainly been the most important lever of change to the distribution of powers since the end of the Second World War.

One must bear in mind that the fiscal power of the federal government has always far exceeded that of the provinces. In 1867, the most costly jurisdictions had been allocated to the central government: the building of interprovincial railways, roads, canals, harbours and bridges to link the provinces with each

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21 I.e. the delegation of federal legislative powers to the provinces and vice versa.

other. These were necessary prerequisites to the establishment of a common market. Furthermore, the debts of all the provinces had been assumed by Ottawa. To compensate, the power to levy both direct and indirect taxes was given to the central government. Since then Ottawa has always been able to reap more revenues than it needs.

The provinces, on the other hand, were confined to direct taxation, a source of revenue seldom resorted to before the beginning of the 20<sup>th</sup> century. In 1867, no one thought that the provinces would need much revenue to operate efficiently. The Fathers of Confederation thought that the revenues generated by the public domain would be sufficient to pay for the public expenses of the provinces. Indeed, although the provinces had been allocated authority over education, health and welfare, in the *laissez-faire* context of the 1860s, these areas were not of much concern since, for the most part, they were left to the care of religious and charitable institutions. However, they have now become, by far, the most expensive jurisdictions of all, amounting today to 80% of all provincial spending (*Boadway 2004: 13*). A transfer of funds from the wealthier central government to the poorer provinces became a necessity, especially after the Second World War. This is where the federal spending power came in.

The federal spending power generally takes one of the two following forms. First, there are the unconditional transfers of funds to the provinces, better known as equalization payments. The purpose of these payments that "provinces can spend [...] according to their respective priorities," is to "[e]nsur[e] that less prosperous provinces have sufficient revenue to provide reasonably comparable levels of public services at reasonably comparable levels of taxation" (*Canada: Department of Finance*). Redistributive equity, therefore, is the basis of equalization. Being unconditional, these payments do not affect the division of powers. The same is not true though of conditional grants, better known now as "federal transfers."

These transfers are designed to support *provincial* programs in the fields of health, education and welfare so that "all Canadians receive reasonably comparable levels of public services, wherever they live" (*id.*). As of today, the most important ones are the *Canada Health Transfer* that provides provinces with support for health care; the *Canada Social Transfer* that provides support for post-secondary education, social assistance and social services; and finally, the *Health Reform Transfer* designed to support provincial health care reforms targeted to primary health care, home care and catastrophic drug coverage. These transfers are made up of a combination of tax points and cash grants.

They provide for some mandatory conditions to be met by the receiving provinces.

Before 1977, these social transfers were also referred to as "shared-cost programs" because, although usually set up unilaterally by the federal government, they were offered to the provinces as a joint venture project. The federal government would unilaterally set up the program and then, provided that provinces submitted to the conditions imposed by Ottawa, and that they were willing to bear part of the program's cost (initially 50%), the federal government would offer to provide funding. After 1977, with the introduction of *Established Programs Financing* (EPF), health care and post-secondary education were financed through "block grants." Although they remained conditional because provinces still had to spend them for certain broadly defined purposes, they were no longer related to levels of provincial spending (*Leslie 2004: 220*). After 1977, the *Canada Assistance Plan* remained the only social transfer (for social assistance and social services) where funding was split evenly between the two orders of government (except for the more well-off provinces). In 1995, it was merged with the EPF to become the *Canada Health and Social Transfer* (*Hogg 2003: 154-155; 159-160 and 161*). In 2004, the latter was subdivided into the three transfers described in the previous paragraph.

Failure to satisfy the conditions imposed by the central government results in the reduction of the cash grant to which a province is entitled. For instance, failure by a provincial health care insurance plan to satisfy the criteria of public administration, comprehensiveness, universality, portability and accessibility as they are defined by ss. 7 to 13 of the *Canada Health Act* will be sanctioned by a reduction of the cash contribution to which the province is entitled (s. 15). The same penalty will be inflicted on a province that would impose a period of minimum residency with respect to social assistance (*Federal-Provincial Fiscal Arrangements Act, ss. 24.3(1)b and 25*).

For provinces, federal social transfers are politically impossible to refuse. Such refusal leads to double taxation of the province's citizens. The citizens of the refusing province pay federal taxes to finance a program unavailable to them, and they also pay more provincial taxes so that their own provincial government can set up a similar program.

During the 1960s and 1970s, provinces were allowed to opt out of certain federal-provincial programs, such as hospital care and social welfare. Only Québec availed itself of this opportunity. What this meant is that Québec obtained additional tax abatements. By reducing the cash grant portion of the federal



transfers, this choice allowed for greater provincial autonomy.<sup>22</sup> Nevertheless, in 1984, the adoption of the *Canada Health Act* restored federal control by introducing the five criteria for funding enumerated above (*Pelletier 2002: 15*).

Ottawa is not about to relinquish its spending power in areas of provincial jurisdiction. Parliament's enumerated powers, however generously interpreted they might have been by the Supreme Court of Canada in recent years, are mostly concerned with specific and technical matters such as criminal law, banking, navigation and shipping, interprovincial and international trade and commerce, etc. None of these subject matters is electorally appealing. On the other hand, the spending power allows the central government to involve itself in issues that matter to the average Canadian: "Ottawa [...] seeks public credit for leadership and funding on matters that are profoundly important to all Canadians" (*Bakvis 2002: 14*). The central government has even gone so far as to completely bypass provincial governments by unilaterally introducing direct spending programs in areas of provincial authority (Millennium Scholarship Fund, Canada Research Chairs, Canada Foundation for Innovation, Medical Equipment Trust Fund, Canada Child Tax Benefit, various transfers to municipalities, etc.).

Although federal transfers certainly have been instrumental in providing Canadians with a "high minimum level of important social services" (*Hogg 2003: 160*), they have undoubtedly deeply affected the distribution of legislative powers in Canada. Under cover of its spending power, the federal government can regulate matters lying within provincial jurisdiction. As we have seen, provinces are not in a position to refuse the funds, even though they might strongly disagree with the conditions attached to them. Moreover, the IGAs that form the basis of these programs are extremely vulnerable to unilateral action on the part of the signatories. The Supreme Court has recently concluded that the principle of parliamentary sovereignty authorises Parliament to renege on a promise made to a province in an IGA. More precisely, the Court stated that Parliament could, by statute, unilaterally reduce the amount of

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22 The degree of autonomy thus recognized was very limited: "[T]he 'provincial autonomy' afforded by opting-out provisions has really amounted to nothing more than a transfer of administrative responsibility to the opting-out province. It has not given that province the freedom to divert the resources, which would otherwise be committed to a federally initiated programme, into other endeavours. Federal 'compensation' to the opting-out province has been just as conditional as the federal contribution to participating provinces" (*Hogg 2003: 163*).

transfer payments it had pledged to pay to a province (*Re Canada Assistance Plan 1991*),<sup>23</sup>

The vulnerability of IGAs to legislative intervention makes them a poor substitute for a formal constitutional amendment. This is one of the primary reasons for Québec's opposition to any kind of political arrangements that would not be enshrined in the constitution. Another is that the latter contains no explicit provision delimiting Ottawa's spending power in fields of provincial jurisdiction.<sup>24</sup> The jury is still out on whether such use of the federal spending power is constitutional or not.<sup>25</sup> And so, Québec does not wish to recognize the legitimacy of such spending in provincial areas of jurisdiction, even if only in an informal IGA.

Québec might be right in claiming that the constitution is silent on the question of federal transfers, since ss. 16(1) of the constitution of 1982 only indirectly alludes to them. However, ss. 36(2) certainly constitutes a strong basis in favour of the constitutionality of equalization payments:

36. (1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to

- (a) promoting equal opportunities for the well-being of Canadians;
- (b) furthering economic development to reduce disparity in opportunities; and
- (c) providing essential public services of reasonable quality to all Canadians.

(2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have suffi-

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23 The 1992 *Charlottetown Accord* established a mechanism according to which IGAs could be constitutionally protected, for a – renewable – period of five years, against unilateral legislative intervention: *Tremblay 1995*: 173-175. With the demise of the accord, these proposals never saw the light of day.

24 Attempts were made to limit the extent of the federal spending power in the defunct 1987 *Meech Lake* and 1992 *Charlottetown* accords. Both agreements provided for the adoption of the following provision: "106A. (1) The Government of Canada shall provide reasonable compensation to the government of a province that chooses not to participate in a national shared cost program that is established by the Government of Canada after the coming force of this section in an area of exclusive provincial jurisdiction, if the province carries on a program or initiative that is compatible with the national objectives."

25 For an overview of the arguments for and against the constitutionality of the federal spending power in areas lying within provincial jurisdiction, see Québec, *Commission on Fiscal Imbalance, Supporting document 2*, 2002. The Supreme Court, however, seems intent on casting a favourable eye upon it (*Re Canada Assistance Plan 1991*).

cient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.

In 1995, the federal government introduced radical cuts to federal transfers. These were met with outrage by the provinces accusing Ottawa of downloading its deficit upon them. This led to negotiations between Ottawa and the provinces aimed at reaching a unanimous agreement on a general framework for the use of the federal spending power in areas lying within provincial authority. Unfortunately, the *1999 Social Union Framework Agreement (1999 SUFA)* was agreed to by the federal government and all the provinces... except Québec. Once again Canada was playing the "9-1-1 federalism" game (*Bakvis 2002: 12*)<sup>26</sup>. This intergovernmental agreement was designed to provide a framework according to which "[w]hen the federal government uses [...] conditional transfers, whether cost-shared or block-funded, it should proceed in a *cooperative manner* that is respectful of the provincial and territorial governments and their priorities." (*SUFA; my emphasis*). In pursuit of this objective, all *new* initiatives relating to health care, post-secondary education, social assistance and social services require the prior agreement of a majority of provincial governments.<sup>27</sup> It is further specified that "[a]ll provincial and territorial governments that meet or commit to meet the agreed Canada-wide objectives and agree to respect the accountability framework will receive their share of available funding." The signatories also committed themselves to establishing a dispute avoidance and resolution procedure.<sup>28</sup> *Pelletier (2002: 13)* sums up the reasons for Québec's refusal as follows:

Quebec did not sign that agreement, seeing it as legitimizing the federal government's spending power without Ottawa offering anything tangible in return (such as a guarantee of stable funding), beyond a requirement to consult the provinces. It entrenched the federal government's role in the social sector without recognizing the primacy of provinces. Ottawa's flexibility and initiatives were preserved, while the constraints it would have to meet were fairly modest. Most important, the agreement remained silent on a major demand by Quebec: "the ability (of a province or territory) to opt out of any new or modified Canada-wide social program in areas of provincial/territorial jurisdiction with full compensation", as

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26 The nine English Canadian provinces and the federal government siding together, leaving Quebec all alone. In Canada, 9-1-1 is the standard emergency phone number.

27 The six smallest provinces totalising only 14.1% of the Canadian population – the ones that stand to gain the most from federal transfers – could thus impose their will on Quebec and Ontario.

28 In April 2002, provincial and territorial governments (with the exception of Québec) accepted what has been called the Canada Health Act dispute avoidance and resolution procedure. See (CHA Dispute Avoidance and Resolution).

stipulated by the news release issued in August 1998 at the Annual Premiers' Conference in Saskatoon.

In the words of an English Canadian political scientist, "whereas the rest of Canada appears to have affirmed the legitimacy of federal intervention in areas of provincial jurisdiction by signing the agreement, Quebec once again rejected it" (*Bodnar 2004: 11*). According to the same author, this is not very surprising since the 1999 SUFA, the 1995 ITA and the 1998 CWAHE all "re-affirm, if occasionally limit, the federal government's ability to direct policy developments throughout the country" (*id.: 10*).<sup>29</sup>

Québec was not against the set of social policy principles described in the Accord<sup>30</sup>, but it was of the opinion that although provincial cooperation is necessary and inevitable, it should be done in a manner that fully respects each level of government's jurisdiction (*Pelletier 2002: 14*).

The willingness of the English Canadian provinces to accept the legitimacy of federal interventions in their fields of jurisdiction (if the price is right) is not a recent phenomenon:

[T]here is a political cultural aspect to the decline [in jurisdictional autonomy] best illustrated by the tendency, noted as early as 1962 by James Corry<sup>31</sup>, for the nine English speaking provinces to simply accept 'transactions with a strongly centralizing effect, increasing the leverage of the national government on the policies of provincial governments as well as on the economy of the country.' This is not to suggest that resistance to federal incursions in areas of provincial jurisdiction are absent outside Quebec, but only that such resistance does not, typically, challenge the legitimacy of such moves."<sup>32</sup>

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29 SUFA even legitimises Parliament's power to unilaterally introduce direct spending programs in areas of provincial jurisdiction: "Another use of the federal spending power is making transfers to individuals and to organizations in order to promote equality of opportunity, mobility, and other Canada-wide objectives. When the federal government introduces new Canada-wide initiatives funded through direct transfers to individuals or organizations for health care, post-secondary education, social assistance and social services, it will, prior to implementation, give at least three months' notice and offer to consult. Governments participating in these consultations will have the opportunity to identify potential duplication and to propose alternative approaches to achieve flexible and effective implementation" (SUFA).

30 "Canada's social union should reflect and give expression to the fundamental values of Canadians – equality, respect for diversity, fairness, individual dignity and responsibility, and mutual aid and our responsibilities for one another" (SUFA).

31 *Corry* 1958: 103.

32 *Bodnar* 2004: 10. For a similar assessment, see *Pelletier* 2002: 13 and the authors to whom he refers.

As I said in section I, I believe that part of the reason for Québec's and the other nine provinces' respective attitudes towards the federal spending power has to do with the fundamentally different conceptions of Canadian federalism they each hold. For a majority of Quebecers, Canada is a multinational federation in which they, as members of the Québécois nation, are entitled to pledge their primary allegiance to their own local "national" government. For English Canadians, there is but one *legitimate* voice for the entire nation, and it rests with Ottawa. These different understandings of the Canadian federation and of Canadian federalism influence the way in which both Québec and the other provinces envisage the following question: which order of government should perform the most important function of the state, namely redistributive equity? Although the federal government refuses to acknowledge it, it is fair to say that there is a fiscal imbalance in Canada. Taking that as a given, two avenues are open to rebalance the federation.<sup>33</sup> The first solution is the one proposed by the *Québec 2002 Commission on fiscal imbalance*. It consists of a major reallocation of tax room from the federal government to the provinces, together with a reduction of the federal transfers. From Québec's perspective, such a solution has the advantage of putting an end to federal spending in provincial areas of authority. According to the commission, under this system only equalization payments would be tolerated. For Québec, enhanced taxing power would also mean enhanced autonomy and greater accountability to its citizens. Of interest here is that, underlying this approach there is the conviction that equity is primarily a provincial and not a national responsibility. This solution challenges the federal government's claim to primary control over the redistributive function in Canada. Furthermore, although the Québec commission argues for the maintenance of a revitalized equalization program, the solution it proposes jeopardises the latter's very existence:

Maintenance of an effective equalization program was a key part of the Seguin (sic) Commission's recommendations. [...] The decentralization of revenue-raising responsibility to the provinces makes it more difficult for the federal government to fulfil this mandate. It both increases the degree of disparities among the provinces and reduces the revenues available for the federal government to finance equalization. Perhaps as important, it might make it more difficult to maintain the political and societal consensus required to sustain an effective equalization program. (*Boadway 2004: 11-12*).

A second avenue is open: one that would provide a solution to the fiscal imbalance without compromising the federal government's redistributive function. It consists in maintaining the federal share of the tax room and in increas-

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33 Ideas in the following two paragraphs are extensively borrowed from *Boadway 2004*.

ing the amount of federal transfers to the provinces. In doing so, this option would preserve the existing tax harmonisation<sup>34</sup> that makes the maintenance of some national standards of redistributive equity possible. This would also prevent the tax competition to which the more decentralised taxing system proposed by the Québec commission would inevitably lead. Finally, and most importantly, such an approach is founded on a conviction that redistribution is, at least in some measure, national in nature<sup>35</sup>, and that the federal spending power in matters of provincial concern is legitimate because it "is arguably the only effective policy instrument available for the federal government to fulfil [its redistributive] commitments" (*id.*: 11). In the words of *Peter Hogg*, cash grants "[are vital to a continuing federal influence over health and social assistance, because it is the power to withhold all or part of the grant which is the sanction against non-compliance by a province with federal conditions" (2003: 155; see also 159-160).

In other words, the Québec commission's solution is problematic for English Canadians who share a "territorial" understanding of Canadian federalism, because "[t]urning over tax room to the provinces essentially reduces the ability of the federal government to use transfers to achieve national objectives, and possibly jeopardizes the efficiency associated with a harmonized tax system" (*Boadway 2004*: 12).<sup>36</sup>

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34 This harmonization has slowly dwindled in recent years: "There is no question that Canada now has a more diverse system of income taxes, personal and corporate, than was the case a few years ago" (*Leslie*: 225; see also 224-226).

35 I personally believe that a great number of Quebecers would agree with this assumption. A 2001 pole referred to by *Cutler* and *Mendelsohn* confirmed that, even though there was much less enthusiasm in Quebec for cooperative federalism, most Quebecers preferred this model of federalism over a more compartmentalized approach (2005: 84).

36 Public opinion polls seem to confirm English Canadians' acceptance of Ottawa's involvement in provincial affairs. At the end of an empirical study based on surveys and interviews, *Fred Cutler* and *Matthew Mendelsohn* came to the following conclusion (2005: 86): "Our data suggest that in the context of competitive state building and the constitutional authority of provincial governments over many areas of social life, the federal government has lost many battles but won the war. During times of intense intergovernmental conflict, public opinion does seem to coalesce around provincial grievances. But in the long run, it appears that citizens have come to value the steadying hand, and perhaps purse, of the federal government. Outside of Quebec, they support no retrenchment of the federal role in national programs and national life. If one construes the province-building argument as stressing a *shift* in support from the federal to the provincial one – as if citizens conceive of their support of multiple orders of government as zero sum – then we are confident in rejecting it. Al-

### III. Conclusion

For Canadian federalism to evolve, be it through formal amendments or informal procedures, one solution<sup>37</sup> might be to introduce the concept of asymmetry as a means of reconciling the relationship between Québec and the rest of Canada. The very recent September 2004 *Health Care Agreement* reached by the federal government and all the provinces might be a sign that times are changing. Indeed, after enumerating the principles upon which all the premiers had agreed, the official communiqué reads as follows (*10-Year Plan to Strengthen Health Care*):

Recognizing that an asymmetrical federalism allows for the existence of specific agreements for any province, First Ministers also agreed that a separate communiqué be released to reflect the arrangements between the Government of Canada and the Government of Québec regarding the interpretation and the implementation of the present communiqué. The funding provided by the federal government will be used by the government of Québec to implement its own plan aiming, notably, at ensuring access to quality care in a timely manner and at reducing waiting times.

As for the separate communiqué (*Asymmetric Federalism that Respects Québec's Jurisdiction*), it states that:

Recognizing the Government of Québec's desire to exercise its own responsibilities with respect to planning, organizing and managing health services within its territory, and noting that its commitment with regard to the underlying principles of its public health system – universality, portability, comprehensiveness, accessibility and public administration – coincides with that of all governments in Canada, and resting on asymmetrical federalism, that is, flexible federalism that notably allows for the existence of specific agreements and arrangements adapted

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though the division of powers may have structured some of the conflict and competition within Canadian societies, it has produced few Canadians who have any attachment to the division of powers as laid out the constitution. If there has been a neo-institutional effect of institutions on citizens in these areas, it is through the less formal institutions of the spending power and national standards: Canadians now see the federal government as an indispensable partner even in social policies that are the section 92 preserve of the provinces. Federal action in these areas since the Second World War has conditioned Canadians to support that involvement. Calls for a return to a classical model of federalism miss the point of what has happened over the twentieth century: Canadians support a practice of federalism where both governments are involved in most things, as governments have been for the adult lives of just about every Canadian."

<sup>37</sup> Another might be to reinforce the role of legislatures and of the wider public in the Canadian intergovernmental system. For reform proposals of this nature that would not entail formal constitutional amendments, see *Franks 2004* and *Cameron 2004*.

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to Quebec's specificity, the Prime Minister of Canada and the Premier of Quebec have agreed that Quebec's support for the joint communiqué following the federal-provincial-territorial first ministers' meeting is to be interpreted and implemented as follows:

Whether this will prove to be a radical change of attitude on the part of Ottawa and the nine English Canadian provinces or simply an exception that confirms the rule, is yet to be seen.

One thing is certain though: whether federal and provincial politicians achieve formal constitutional reforms or informal modifications by means of IGAs, courts will continue to incrementally adapt the division of powers along the lines that they choose to follow.



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## **Annex A**

### **CONSTITUTION ACT, 1867**

#### **VI. DISTRIBUTION OF LEGISLATIVE POWERS**

##### **POWERS OF THE PARLIAMENT**

###### **Legislative Authority of Parliament of Canada**

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

1. Repealed.
- 1A. The Public Debt and Property.
2. The Regulation of Trade and Commerce.
- 2A. Unemployment insurance.
3. The raising of Money by any Mode or System of Taxation.
4. The borrowing of Money on the Public Credit.
5. Postal Service.
6. The Census and Statistics.
7. Militia, Military and Naval Service, and Defence.
8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.
9. Beacons, Buoys, Lighthouses, and Sable Island.
10. Navigation and Shipping.
11. Quarantine and the Establishment and Maintenance of Marine Hospitals.

12. Sea Coast and Inland Fisheries.
13. Ferries between a Province and any British or Foreign Country or between Two Provinces.
14. Currency and Coinage.
15. Banking, Incorporation of Banks, and the Issue of Paper Money.
16. Savings Banks.
17. Weights and Measures.
18. Bills of Exchange and Promissory Notes.
19. Interest.
20. Legal Tender.
21. Bankruptcy and Insolvency.
22. Patents of Invention and Discovery.
23. Copyrights.
24. Indians and Lands reserved for the Indians.
25. Naturalization and Aliens.
26. Marriage and Divorce.
27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.
28. The Establishment, Maintenance, and Management of Penitentiaries.
29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

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

## **EXCLUSIVE POWERS OF PROVINCIAL LEGISLATURES**

### **Subjects of exclusive Provincial Legislation**

**92.** In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

1. Repealed.
2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.
3. The borrowing of Money on the sole Credit of the Province.
4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.
5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.
6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.
7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.
8. Municipal Institutions in the Province.
9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.
10. Local Works and Undertakings other than such as are of the following Classes:
  - (a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:
  - (b) Lines of Steam Ships between the Province and any British or Foreign Country:
  - (c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.
11. The Incorporation of Companies with Provincial Objects.
12. The Solemnization of Marriage in the Province.
13. Property and Civil Rights in the Province.
14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.
16. Generally all Matters of a merely local or private Nature in the Province.

## **NON-RENEWABLE NATURAL RESOURCES, FORESTRY RESOURCES AND ELECTRICAL ENERGY**

### **Laws respecting non-renewable natural resources, forestry resources and electrical energy**

**92A.** (1) In each province, the legislature may exclusively make laws in relation to

- (a) exploration for non-renewable natural resources in the province;
- (b) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and
- (c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.

### **Export from provinces of resources**

(2) In each province, the legislature may make laws in relation to the export from the province to another part of Canada of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the generation of electrical energy, but such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada.

### **Authority of Parliament**

(3) Nothing in subsection (2) derogates from the authority of Parliament to enact laws in relation to the matters referred to in that subsection and, where such a law of Parliament and a law of a province conflict, the law of Parliament prevails to the extent of the conflict.



### **Taxation of resources**

(4) In each province, the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of

- (a) non-renewable natural resources and forestry resources in the province and the primary production therefrom, and
- (b) sites and facilities in the province for the generation of electrical energy and the production therefrom,

whether or not such production is exported in whole or in part from the province, but such laws may not authorize or provide for taxation that differentiates between production exported to another part of Canada and production not exported from the province.

### **"Primary production"**

(5) The expression "primary production" has the meaning assigned by the Sixth Schedule.

### **Existing powers or rights**

(6) Nothing in subsections (1) to (5) derogates from any powers or rights that a legislature or government of a province had immediately before the coming into force of this section.

## **EDUCATION**

### **Legislation respecting Education**

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

- (1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union:
- (2) All the Powers, Privileges, and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall be and the same are hereby extended to the Dissident Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec:

- (3) Where in any Province a System of Separate or Dissentient Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education:
- (4) In case any such Provincial Law as from Time to Time seems to the Governor General in Council requisite for the due Execution of the Provisions of this Section is not made, or in case any Decision of the Governor General in Council on any Appeal under this Section is not duly executed by the proper Provincial Authority in that Behalf, then and in every such Case, and as far only as the Circumstances of each Case require, the Parliament of Canada may make remedial Laws for the due Execution of the Provisions of this Section and of any Decision of the Governor General in Council under this Section.

**93A.** Paragraphs (1) to (4) of section 93 do not apply to Quebec.

## **UNIFORMITY OF LAWS IN ONTARIO, NOVA SCOTIA, AND NEW BRUNSWICK**

### **Legislation for Uniformity of Laws in Three Provinces**

**94.** Notwithstanding anything in this Act, the Parliament of Canada may make Provision for the Uniformity of all or any of the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and of the Procedure of all or any of the Courts in those Three Provinces, and from and after the passing of any Act in that Behalf the Power of the Parliament of Canada to make Laws in relation to any Matter comprised in any such Act shall, notwithstanding anything in this Act, be unrestricted; but any Act of the Parliament of Canada making Provision for such Uniformity shall not have effect in any Province unless and until it is adopted and enacted as Law by the Legislature thereof.

## **OLD AGE PENSIONS**

### **Legislation respecting old age pensions and supplementary benefits**

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

## **AGRICULTURE AND IMMIGRATION**

### **Concurrent Powers of Legislation respecting Agriculture, etc.**

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

### **Transfer of Property in Schedule**

**108.** The Public Works and Property of each Province, enumerated in the Third Schedule to this Act, shall be the Property of Canada.

### **Property in Lands, Mines, etc.**

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

**Canada to be liable for Provincial Debts**

**111.** Canada shall be liable for the Debts and Liabilities of each Province existing at the Union.

**Canadian Manufactures, etc.**

**121.** All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.

## **Annex B**

### **CONSTITUTION ACT, 1982**

#### **PART III**

#### **EQUALIZATION AND REGIONAL DISPARITIES**

##### **Commitment to promote equal opportunities**

**36.** (1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to

- (a) promoting equal opportunities for the well-being of Canadians;
- (b) furthering economic development to reduce disparity in opportunities; and
- (c) providing essential public services of reasonable quality to all Canadians.

##### **Commitment respecting public services**

(2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.

#### **PART V**

#### **PROCEDURE FOR AMENDING CONSTITUTION OF CANADA**

##### **General procedure for amending Constitution of Canada**

**38.** (1) An amendment to the Constitution of Canada may be made by procla-

mation issued by the Governor General under the Great Seal of Canada where so authorized by

- (a) resolutions of the Senate and House of Commons; and
- (b) resolutions of the legislative assemblies of at least two-thirds of the provinces that have, in the aggregate, according to the then latest general census, at least fifty per cent of the population of all the provinces.

### **Majority of members**

(2) An amendment made under subsection (1) that derogates from the legislative powers, the proprietary rights or any other rights or privileges of the legislature or government of a province shall require a resolution supported by a majority of the members of each of the Senate, the House of Commons and the legislative assemblies required under subsection (1).

### **Expression of dissent**

(3) An amendment referred to in subsection (2) shall not have effect in a province the legislative assembly of which has expressed its dissent thereto by resolution supported by a majority of its members prior to the issue of the proclamation to which the amendment relates unless that legislative assembly, subsequently, by resolution supported by a majority of its members, revokes its dissent and authorizes the amendment.

### **Revocation of dissent**

(4) A resolution of dissent made for the purposes of subsection (3) may be revoked at any time before or after the issue of the proclamation to which it relates.

### **Restriction on proclamation**

39. (1) A proclamation shall not be issued under subsection 38(1) before the expiration of one year from the adoption of the resolution initiating the amendment procedure thereunder, unless the legislative assembly of each province has previously adopted a resolution of assent or dissent.

### **Idem**

(2) A proclamation shall not be issued under subsection 38(1) after the expiration of three years from the adoption of the resolution initiating the amendment procedure thereunder.

### **Compensation**

**40.** Where an amendment is made under subsection 38(1) that transfers provincial legislative powers relating to education or other cultural matters from provincial legislatures to Parliament, Canada shall provide reasonable compensation to any province to which the amendment does not apply.

### **Amendment by unanimous consent**

**41.** An amendment to the Constitution of Canada in relation to the following matters may be made by proclamation issued by the Governor General under the Great Seal of Canada only where authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province:

- (a) the office of the Queen, the Governor General and the Lieutenant Governor of a province;
- (b) the right of a province to a number of members in the House of Commons not less than the number of Senators by which the province is entitled to be represented at the time this Part comes into force;
- (c) subject to section 43, the use of the English or the French language;
- (d) the composition of the Supreme Court of Canada; and
- (e) an amendment to this Part.

### **Amendment by general procedure**

**42.** (1) An amendment to the Constitution of Canada in relation to the following matters may be made only in accordance with subsection 38(1):

- (a) the principle of proportionate representation of the provinces in the House of Commons prescribed by the Constitution of Canada;
- (b) the powers of the Senate and the method of selecting Senators;
- (c) the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of Senators;
- (d) subject to paragraph 41(d), the Supreme Court of Canada;
- (e) the extension of existing provinces into the territories; and

(f) notwithstanding any other law or practice, the establishment of new provinces.

**Exception** (2) Subsections 38(2) to (4) do not apply in respect of amendments in relation to matters referred to in subsection (1).

### **Amendment of provisions relating to some but not all provinces**

**43.** An amendment to the Constitution of Canada in relation to any provision that applies to one or more, but not all, provinces, including

(a) any alteration to boundaries between provinces, and

(b) any amendment to any provision that relates to the use of the English or the French language within a province,

may be made by proclamation issued by the Governor General under the Great Seal of Canada only where so authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province to which the amendment applies.

### **Amendments by Parliament**

**44.** Subject to sections 41 and 42, Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons.

### **Amendments by provincial legislatures**

**45.** Subject to section 41, the legislature of each province may exclusively make laws amending the constitution of the province.

### **Initiation of amendment procedures**

**46.** (1) The procedures for amendment under sections 38, 41, 42 and 43 may be initiated either by the Senate or the House of Commons or by the legislative assembly of a province.

### **Revocation of authorization**

(2) A resolution of assent made for the purposes of this Part may be revoked at any time before the issue of a proclamation authorized by it.



### **Amendments without Senate resolution**

47. (1) An amendment to the Constitution of Canada made by proclamation under section 38, 41, 42 or 43 may be made without a resolution of the Senate authorizing the issue of the proclamation if, within one hundred and eighty days after the adoption by the House of Commons of a resolution authorizing its issue, the Senate has not adopted such a resolution and if, at any time after the expiration of that period, the House of Commons again adopts the resolution.

### **Computation of period**

(2) Any period when Parliament is prorogued or dissolved shall not be counted in computing the one hundred and eighty day period referred to in subsection (1).

### **Advice to issue proclamation**

48. The Queen's Privy Council for Canada shall advise the Governor General to issue a proclamation under this Part forthwith on the adoption of the resolutions required for an amendment made by proclamation under this Part.

### **Constitutional conference**

49. A constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada within fifteen years after this Part comes into force to review the provisions of this Part.