

FEDERALISM

Why a federal country?

The years leading to 1867 explain why Canada became a country, and why it became a federation.

In 1858, there were seven governments in what is now Canada: Nova Scotia (1758), New Brunswick (1785), Canada West & Canada East (1791), Vancouver Island (1849), PEI (1851), Newfoundland (1854) and British Columbia (1858). (Seven governments, because Canada West and Canada East were one government, even though we now think of Ontario and Quebec as separate provinces).

Three issues led the different governments to consider confederation. Canada and the Maritimes had lost a lot of money on railways, so there was economic pressure. Second, the treaty of 1854 which gave preferential pricing to Canadian goods was at risk of ending. (It ended in 1866, after which Canada was subject to free trade). The governments were concerned that the end of protection from free trade would make Canada economically vulnerable.

Most importantly, the relations between the northern states of the USA and Britain were strained. During the American Civil War (1861-1865), the UK was seen as supporting the southern states. The different governments in Canada were long distances away from each other. There were concerns that Canada would be invaded once the American Civil War ended, and there was little appetite on the part of Britain to defend Canada.

Accordingly, in 1864, five of the seven governments met in Charlottetown—from what is now Ontario, Quebec (“Canada”), Nova Scotia, New Brunswick, PEI and Newfoundland and Labrador. PEI and Newfoundland decided not to proceed; the others became the founding provinces of Canada in 1867.

To avoid the centrifugal force exhibited by the American Civil War, the governments sought to create a much stronger central government than in the US.

In the years prior to 1867, a united province of Canada East and Canada West (Quebec and Ontario) had been part of a single legislature which had experienced deadlock frequently. Both “provinces” had equal numbers of seats in the legislature, although initially Quebec had a larger population and later Ontario had a larger population. Because they had an equal number of seats, the votes resulted in deadlocks on many of the individual issues.

The governments at Charlottetown were confronted with a primarily French speaking, Catholic province (Quebec) and a primarily English speaking Protestant province (Ontario), together with four other provinces which had both English and French and Catholic and Protestant components. Their solution was to give exclusive authority over the issues which were expected to lead to disagreement (language, education, religion) to each province. That way, each could proceed in a way which was workable for its population. On other matters, on which there was little dispute, the national government could be given jurisdiction.

To protect Quebec (given there would be more provinces that were English speaking), the Senate was designed to have equal numbers from Ontario and Quebec (and what we now think of as the Maritime Provinces). Each of the three regions would have 24 members.

Take a look at the Federal and Provincial areas of jurisdiction in the table on the next page:

In the debate camp materials, I include some general information about the structure of the federal government, starting at page 52. This essay complements those materials.

Federal

The Economy

- 1A. The Public Debt and Property
2. The Regulation of Trade and Commerce.
- 2A. Unemployment insurance.
4. The borrowing of Money on the Public Credit.
14. Currency and Coinage.
15. Banking, Incorporation of Banks, and the Issue of Paper Money.
16. Savings Banks.
18. Bills of Exchange and Promissory Notes.
19. Interest.
20. Legal Tender.
21. Bankruptcy and Insolvency.

Defence

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

Operating the Federal government

3. The raising of Money by any Mode or System of Taxation.
8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.
5. Postal Service.
6. The Census and Statistics.
17. Weights and Measures.

Shipping and Navigation

9. Beacons, Buoys, Lighthouses, and Sable Island.
10. Navigation and Shipping.
12. Sea Coast and Inland Fisheries.
13. Ferries between a Province and any British or Foreign Country or between Two Provinces.

(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.

Health

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

IP

22. Patents of Invention and Discovery.
23. Copyrights.
24. Indians, and Lands reserved for the Indians.
25. Naturalization and Aliens.
26. Marriage and Divorce.

Crime

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.

Provincial

Operating the Provincial Government

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.
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.

Prisons

6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.

Hospitals and Charitable institutions

7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.

Local

10. Local Works and Undertakings
16. Generally all Matters of a merely local or private Nature in the Province.

Justice

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.

Other forms of government

In contrast to a federal government, the majority of countries in the world are unitary governments, with a single government with legislative authority for all issues in the country. In Britain, the Houses of Parliament can legislate on any issue, and the government in Scotland and Northern Ireland have only the authority given to them by the British government. Their decisions can be overruled by London.

Just as the provincial governments in Canada have created municipalities—but the municipalities are subordinate and can have their powers revoked—a unitary government can give a local authority jurisdiction to govern itself, but can always overrule the local decision.

In Canada, the difference between a province and a territory is that authority. A territory only has the legal authority granted by federal legislation (which is always subject to amendment or revocation). By contrast, a province has authority under the Constitution Act which can only be changed with the province's consent.

The difference between a federal state and a unitary state is jurisdiction: in a federal state, each level of government has exclusive jurisdiction and (in the event of a conflict) each level has the last word on some issues. In a unitary state, the central government has final say in every matter.

A number of countries (chiefly because of their size or their religious differences) have also adopted a federal system. The United States of America, the Commonwealth of Australia, Mexico, Switzerland and other countries illustrate different federal systems.

Each federal system can assign legal jurisdiction according to its own rules. In Canada, any legal jurisdiction which is not assigned to the provinces in the Constitution Act belongs to the federal government. So jurisdiction over airplanes did not exist in 1867 and therefore belongs to the federal government. The rule is the reverse in the United States: any authority which is not given to the federal government, belongs to the states.

In the same way, countries with federal governments can divide the authority given to the local government and the federal government differently. In Canada, health care and education are provincial; in the US, education and health care are federal.

Are the powers distinct?

What do you think about the different authority given to each government?

Although these are described as exclusive heads of power, you will immediately see there is significant practical overlap.

How can the federal government have jurisdiction over marriage and divorce while the provinces have jurisdiction over the solemnization of marriage?

In the same way, the general powers given to one government overlap with the general powers given to the other. To take health care as an example, although health care is a matter of provincial authority, the federal government contributes funding to provinces if they follow particular federal rules. Accordingly, although the province always has the last word, if they want access to federal funding, the federal government has huge influence.

Similarly, there is overlap at a practical level with a number of other heads of power. The province regulates the speed limit in the province, and makes it a provincial offence to have a blood alcohol level of .05—but the federal government makes it criminal to drive with a blood alcohol level of .08. Both jurisdictions can enact legislation in their jurisdiction, even if it affects or overlaps the other jurisdiction.

Should we reconsider the division of powers in Canada?

Should we reconsider the division of powers in Canada, between the powers given to the provincial government and the powers given to the federal government? To take a few examples:

- Alberta and Canada have very different views of how oil and gas resources should be developed. Should we change the division of powers to respond to this?
- Quebec and Canada have very different views of how English and French language rights should be

protected. Should we change the division powers to respond to this? Or

- Quebec and Canada have very different views of how religious rights should be protected. Should we change the division of powers in that respect?

Should we abolish the provincial governments?

One recurring issue in Canada is the disagreement between federal and provincial governments on particular issues, such as the examples given above. One way to solve that disagreement is simply to abolish the provincial governments. Should we do that?

Reservation and Disallowance

In addition to the issue of overlap, there are several important federal powers which were inserted in 1867 to give the most important powers to the federal government. Should they remain in place?

A few of the most important:

-Under s. 90, the federal government can decide to pause or disallow any provincial legislation within one year of its enactment;

-Under s. 92(10)(c), the federal parliament can declare any "work" to be for the general advantage of Canada, and therefore subject to federal jurisdiction. Using this power, hundreds of bridges and railways and grain elevators have been declared to be "federal"

-Under s. 94, the federal parliament can enact uniform laws in the provinces of Ontario, New Brunswick and Nova Scotia

The power under s. 90 has not been exercised since 1941 and 1961; the power under s. 94 has never been exercised, and the power under s. 92 (10)(c) has rarely been exercised in the last 50 years. Should those powers continue to exist?