

Recent Constitutional Developments in Canada: directions and debates

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Research context

- Longstanding interests in Canadian government and politics; intergovernmental relations; and, social policy
- Current research on Aboriginal peoples – Canadian state relations

Relevance of this topic

- Constitutional practices relate to classic as well as contemporary legal, social, and political issues
- PM Stephen Harper interested in reforming certain aspects of the Canadian constitution
- Interesting comparisons with constitutional reforms and debates in the UK and elsewhere

Methodological notes

- Sources: academic literature, media reports, court decisions, legislation, treaties, political speeches
- Methods: central questions; key concepts; classifications; time period (post-1993)

The constitutional order

- Comprises fundamental rules and practices relating to the governance of a society
- Powers and relationships of state institutions (branches and levels of government)
- Individual rights and responsibilities – citizen to state
- Relations between collectivities – group to group

Types of constitutional change processes

1. Mega-constitutional politics
2. Constitutional normalcy
3. Informal constitutional change

Forms of constitutional change: formality/rigidity – flexibility

- Entrenched: fundamental constitutional law and judicial interpretations
- Enacted: statutory law, common law rules
- Emergent: constitutional conventions, customary practices, and understandings

Elements of the constitutional order under consideration

- Formal amendments to the Constitution
- Federalism and intergovernmental relations
- Parliament and Legislatures
- Supreme Court of Canada and the Charter of Rights and Freedoms
- Voting and Electoral Systems

Formal constitution amendments

- **1993:** New Brunswick English and French linguistic communities a right to distinct cultural and educational institutions
- **1997:** Nfld. to replace church-based education system with secular school system
- **1997:** Québec to replace denominational school boards with ones organized on linguistic lines

Formal constitution amendments

- **1998:** Nfld. enabled to end denominational quotas for province's religion classes
- **1999:** Nunavut granted representation in Parliament
- **2001:** Nfld. Change of name to Nfld. and Labrador

Federalism and Intergovernmental relations

- *Constitutional Amendments Act, 1996*
- Social Union Framework Agreement (1999)
- *Clarity Act, 2000*
- Parliamentary motions on the status of Québec/Québécois in Canada (1996, 2006)
- Council of the Federation (2003)
- First Ministers' Accord on Health Care Renewal and the Health Council of Canada (2003)

Federalism and Intergovernmental relations

- Harper's "open federalism" (2006-today)
- Limit federal spending power in areas of provincial exclusive jurisdiction (2007)
- Devolution of powers to 'territories' - *Métis Settlements Act, 2000, Yukon Act, 2002, Nunavik Land Claims Agreement Act, 2008*
- Formation of a third order of sovereign governments – *Nisga'a Final Agreement, 2000, Tlicho Land Claims and Self-Government Act, 2005*

Parliamentary reforms

- Representatives for Nunavut in House of Commons and the Senate (1999)
- Fixed terms for House of Commons and for a number of provincial legislatures
- New parliamentary watchdogs created (2004-08)
- Extended coverage of Access to Information

New parliamentary watchdogs

- Conflict of Interest and Ethics Commissioner (2004/2007)
- Commissioner of Lobbying (2007)
- Public Sector Integrity Commissioner (2007)
- Parliamentary Budget Officer (2008)

Parliamentary reforms: Senate

- Appointed provincially elected Senator (2007)
- A bill on fixed terms for new Senators: *Constitution Act, 2007 (Senate Tenure)*
- A bill on senate appointments: *Senate Appointment Consultations Act*

Supreme Court of Canada & Charter of Rights and Freedoms

Three topics:

- Appointment of judges to the top court
- Leading constitutional decisions
- Access of social groups and movements to the courts on fundamental rights issues

Appointment of judges to the Supreme Court of Canada

- Traditionally, PM advised the Governor General of nominees
- New review processes since 2006 involve MPs and legal specialists
- Feb. 2006: Ad Hoc Committee to Review a Nominee for the Supreme Court of Canada
- August 2008: Supreme Court Selection Panel (suspended by Harper September 08)

Leading constitutional decisions: recent opinions and judgments

- Reference re secession of Québec
- *R. v. Powley* (on the meaning of Métis)
- Reference re same-sex marriage
- Reference re parental and maternity benefits under the *Employment Insurance Act*
- *Chaoulli v. Quebec* (on public and private health insurance)
- *Charkaoui v. Canada* (on security certificates and procedural fairness)

Access of social groups to the courts

- Cancellation of the Court Challenges Program by the Stephen Harper government in 2006-07
- Program provided funding for groups to participate in court cases dealing with equality rights and other sections of the Charter of Rights and Freedoms
- Most adversely affected by this cancellation are women's groups, Aboriginal peoples, and organizations of and for persons with disabilities

Voting and Electoral System

Issues of:

- Extending enfranchisement to certain groups
- Outreach to marginalized groups of voters
- Singling out Muslim women voters
- Financing of political candidates and parties

Extending the franchise

- Off-reserve Indians eligible to vote in Band Council elections, though need not possess exactly the same voting rights (*Corbiere v. Canada*, 1999)
- On-territory non-Aboriginal citizens: limited rights of representation (e.g. Nisga'a)
- Incarcerated electors: right to vote by prisoners under sec. 3 of the Charter of Rights (*Sauvé v. Canada*, 2002)

Outreach to marginalized groups

Actions by federal and provincial elections offices to enhance registration and voting by groups with low rates of voting turnout:

- Persons with low literacy rates
- Homeless people
- Persons with disabilities
- Youth (aged 18 to 25)
- Aboriginal peoples

Singling out Muslim women voters

- Present election law enables electors to vote without needing to reveal their face if they produce two pieces of approved forms of personal identification
- Proposed federal legislation would require women who wear veils of burkas to uncover their faces to election officials in order to be identified visually

Financing of political candidates and parties

- Reforms contained in the *Federal Accountability Act, 2006*
- Political contributions by corporations, unions, and other organization prohibited
- Ban on gifts and trust fund transfers to political candidates
- Individual political donations to parties and candidates limited to \$1,000 a year

Conclusions: questions

- So, what kind of constitutional politics are being practised of late in Canada?
- How might we characterize the constitutional developments of the past 10 to 15 years?
- What lies ahead for constitutional debates and developments in Canadian politics?

Conclusions: observations

1. Canadians are living in relatively quiet constitutional times:
 - Unity of the country is not in crisis or even a serious concern
 - Constitutional reform low on public and political agendas, especially the large-scale restructuring packages of the mega-style

Conclusions: observations

2. But, this is not an inactive period of constitutional ideas, reform proposals and actual amendments:
 - Change is occurring in incremental and piecemeal ways
 - Indeed, recent years have witnessed far more constitutional changes than most Canadians realize, mostly through enacted and emergent processes

Conclusions: observations

3. While comparatively quieter today than in the 1980s and 1990s, our constitutional politics are not static, nor bland or singular:
 - Several referenda enabling citizen engagement and popular expression
 - Even so-called small-scale reforms engender strong emotions, strong debates and surface competing notions of identity, community, and citizenship

Conclusions: observations

4. Peter Russell calls Canada's modern history of constitutionalism an "odyssey"
 - Thinking of it as a long journey, it is more a *maze* than a *labyrinth*: a labyrinth has just one path, however winding it is, with basic choices of direction and pace; whereas, a maze has unknown cul-de-sacs, multiple crossroads and uncertain choices of adventure or misadventure

Conclusions: What lies ahead for the constitutional order?

On the Harper agenda are:

- Plans to pass legislation placing limits on the use of the federal spending power
- Senate reform proposals on term limits and nomination process
- Supreme Court nominee and nomination process decisions
- Voter identification Bill that may be re-submitted

Conclusions: What lies ahead for the constitutional order?

- Extending the application of the *Canada Human Rights Act* to on-reserve communities of First Nations
- Devolution of additional responsibilities to territorial governments in the North
- A few more third order Aboriginal governments