

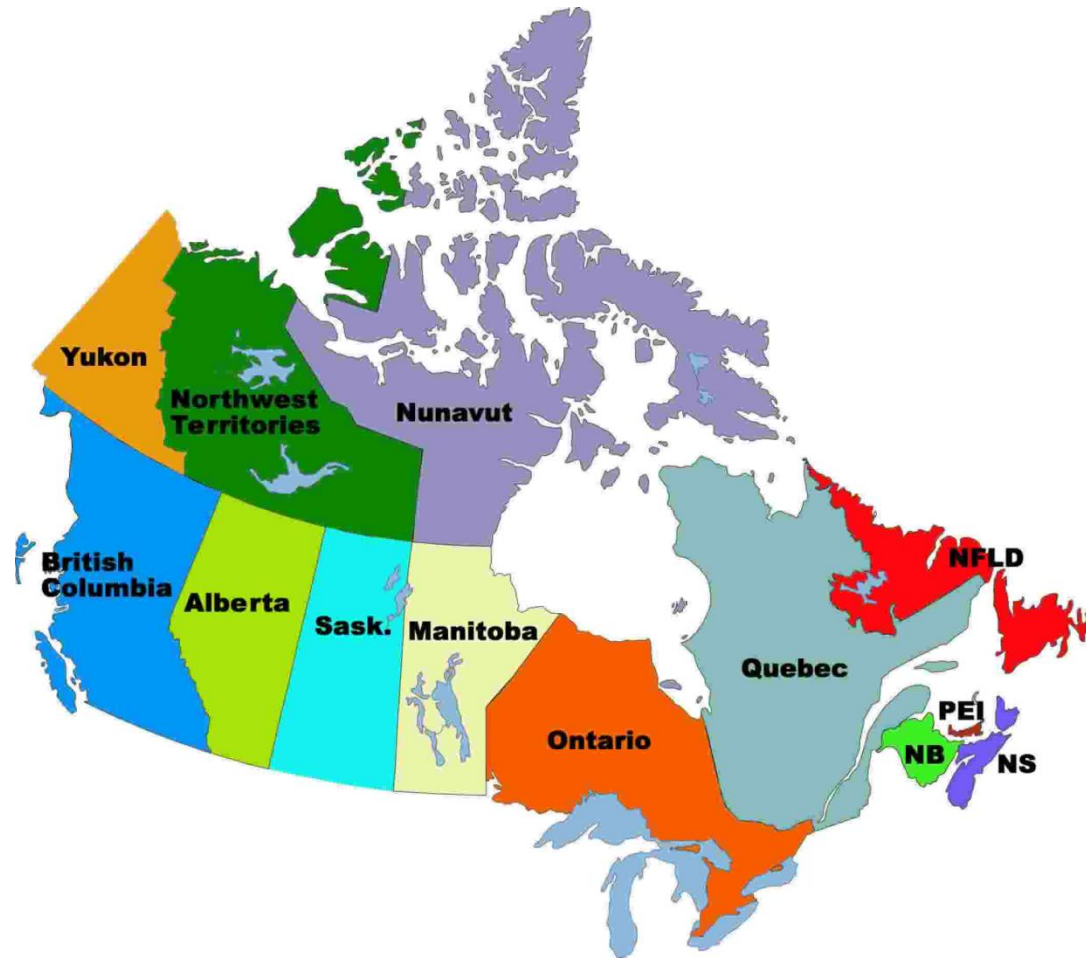


Canadian Federalism, Fundamental Rights and Minorities

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The Canadian federation



Canada in 1867



www.parl.gc.ca

Canada's "mosaic" of minorities

- First Nations (aboriginal peoples)
- Québec
- "New minorities":
 - 20% of Canadian population is foreign-born
 - 16% belong to "visible minorities" (in twenty years: 30%)
 - *"Canada is a country marked and enriched by the many different backgrounds of its population. It is a multicultural and pluralistic society":*
 - Official Canadian Report, *Universal Periodic Review*, UN Human Rights Council (2009)

A model for minority rights?

- ▶ Canada projecting itself as “example” in treating minorities:
 - Supreme Court, *Amselem* case (2004): Canada “*is in many ways an example for other societies*”
- ▶ Often seen abroad as “leader” in multiculturalist policies:
 - UN Independent Expert on Minority Issues, Report of Mission to Canada (2010): “*Canada [is] a leader in fashioning a State policy of multiculturalism*”

Questions today

- ✓ What status for fundamental rights in Canadian legal system?
- ✓ Specific approach(es) to minorities?
- ✓ Lessons?

Outline

1. The Canadian constitution: general aspects
2. The Canadian constitution and the protection of minorities: three distinct approaches

The Canadian constitution




General aspects

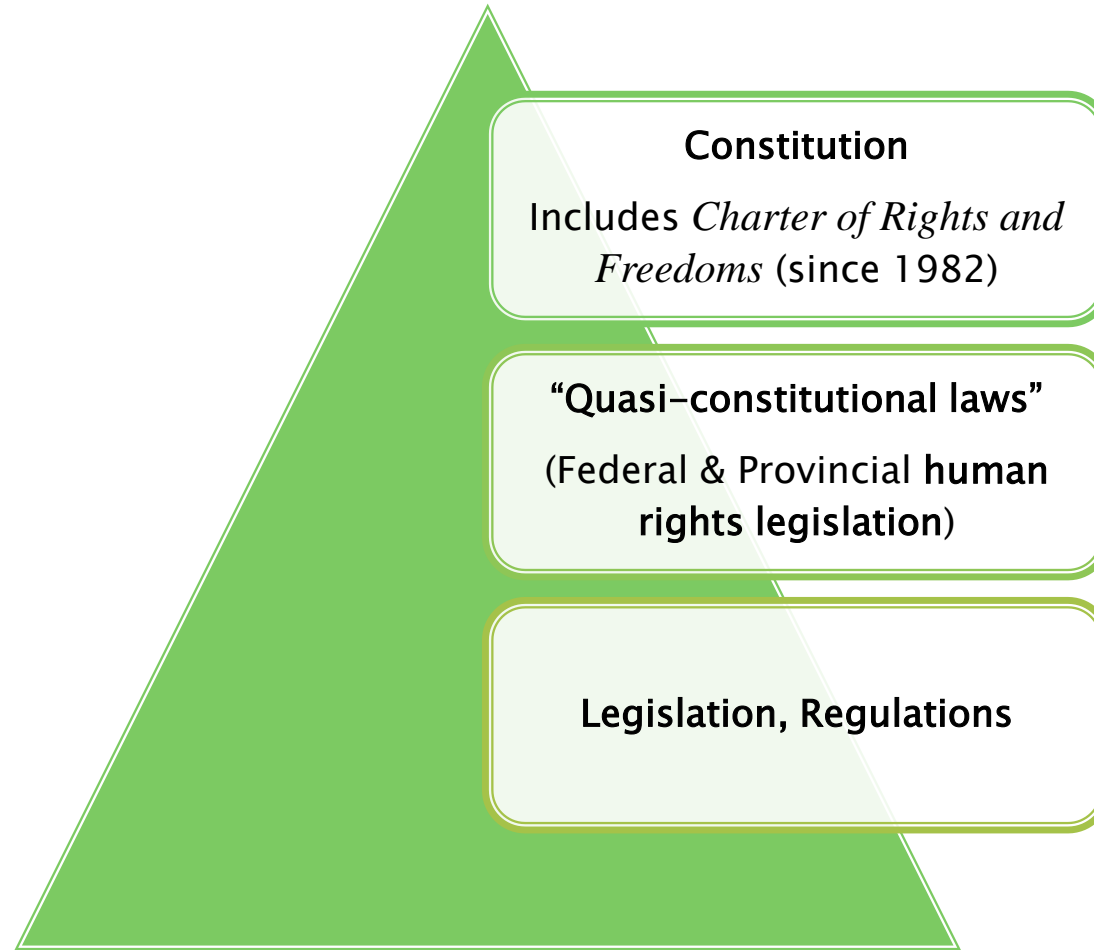
“Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom...”

- Constitution Act, 1867 (preamble)

Features of Canadian constitution

- ▶ Constitutional monarchy
 - ▶ Parliamentary system
 - ▶ Constitution is partly written, partly unwritten
 - ▶ Federalism: 10 federated units + 1 central government
- 

Structure of Canadian legal order



Supremacy of the Constitution

- ▶ “The Constitution of Canada is the supreme law of Canada”: s. 52 of *Constitution Act, 1982*
- ▶ Constitutional validity of **any law** can be challenged at **any time** by **any citizen** in **any court**
 - No Constitutional Court, no prior constitutional review
 - Judges of superior courts appointed by federal government

Underlying principles of Canadian Constitution

SCC, Advisory Opinion on Québec Secession (1998):

- Rights of minorities
 - Democracy
 - Rule of law
 - Federalism

Division of powers (1867)

Central government

- "Peace, Order & Good Government"
- Trade, Commerce
- Banking
- Defence
- Foreign Affairs
- Criminal Law
- Residual power

Provinces

- Property & Civil Law
- Education
- Hospitals
- Local Works
- "Matters of a merely local or private Nature"

Evolution of Canadian federalism since 1867

- ▶ Supremacy of federal laws over provincial laws
- ▶ Federal spending power
- ▶ Doctrine of federal emergency powers
- ▶ Doctrine of “national concerns“
- ▶ Doctrine of “co-operative federalism”



April 17, 1982: the Canadian constitution “comes home”

Patriating the Canadian constitution
from the UK

”Patriation” of constitution (1982)

- ▶ Canada can now modify its own constitution without UK
- ▶ With patriation comes new *Canadian Charter of Rights and Freedoms* (fundamental rights)
 - Part of the Constitution
 - Parliaments, governments must respect fundamental rights

The Canadian constitution and the protection of minorities



1. Human Rights

Canada's forgotten history of discrimination against minorities

- ▶ Immigration restrictions on **Asian workers** – voting rights restricted (19th c.)
- ▶ Internment of **Japanese-Canadians** (WW2)
- ▶ Current **anti-Muslim** discrimination (UN Rapporteur)

Protection for fundamental rights

▶ Constitutional:



◦ Canadian *Charter of Rights and Freedoms* (1982)

- Applies to Legislative & Executive branches, federal & provincial
- Fundamental freedoms – Democratic rights – Mobility rights – Legal rights – Equality rights – French & English as Official languages – Minority language educational rights

Protection for fundamental rights

▶ Legislative:

- In every province & federal level: **Human Rights Acts**
 - Non-discrimination
 - Also applies to private relations



Protection for fundamental rights

▶ International:

- Canada party to many international human rights treaties
- International law is **not part** of Canadian domestic law
 - May only serve to interpret Canadian human rights standards
 - *BC Health Services* (SCC, 2007)

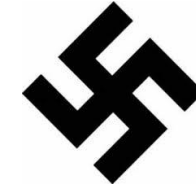
Rule of multicultural interpretation

- ▶ “This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians” :

- article 27,
Canadian Charter of Rights and Freedoms

Multicultural jurisprudence: examples

▶ Regulating "hate speech"?



- *“The commitment to a multicultural vision of our nation bears notice to the importance of eradicating hate propaganda from society”:*
 - SCC, *Keegstra* (1990)

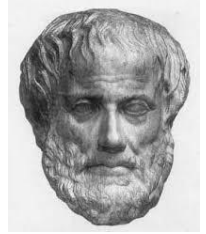
▶ Allowing kirpan in school?



- *“An absolute prohibition would stifle the promotion of values such as multiculturalism, diversity, and the development of an educational culture respectful of the rights of others”:*
 - SCC, *Multani* (2006)

Individual accommodation of diversity

- ▶ Equality sometimes requires differential treatment: Aristotle
- ▶ Canadian antidiscrimination law requires “reasonable accommodation” of differences:
 - Examples:
 - Seventh-Day Adventist may refuse to work after sunset – SCC, *O’Malley* (1985)
 - Civil servants may wear religious symbols



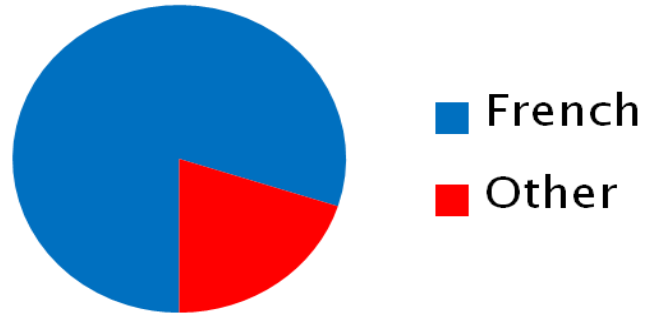
Royal Canadian Mounted
Police



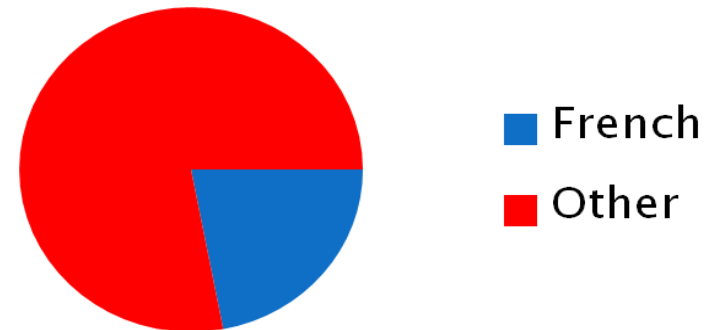
2. Territorial approach (federalism)

Québec: a minority within Canada

Language (Québec)



Language (Canada)



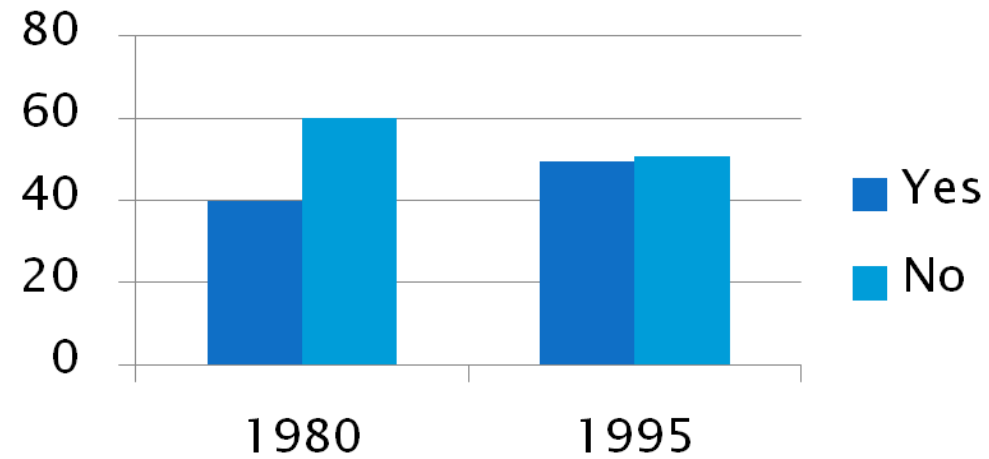
A territorial response to Québec concerns

- ▶ *Advisory Opinion on Québec Secession*, Supreme Court of Canada, 1998:
 - ▶ *“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 Québec, where the majority of the population is French-speaking, and which possesses a distinct culture.”*

Québec and patriation

- ▶ 1982 patriation rejected – Does Québec has veto?
- ▶ 1981 SCC ruling: patriation was legal (although “in violation of constitutional conventions”)
- ▶ Québec is now legally bound by patriation (including *Charter of Rights*), but still rejects it

Québec independence referendums



Québec secession: legal situation



- ▶ 1998 SCC advisory opinion :
 - “Clear majority” vote on a “clear question” will give **democratic legitimacy** to Québec secession;
 - **Negotiations will then have to ensue** between the majority of the population of Quebec and that of Canada as a whole;
 - Although Québec “shares many of the characteristics of a people”, it is **not a colonial or oppressed people**;
 - Therefore, cannot claim right of **external self-determination** (secession) under **international law**;
 - Ultimate success of unilateral secession would depend on **recognition by the international community**.



3. Communitarian approach: aboriginal rights

Article 35 of the Constitution Act, 1982

- ▶ “The existing **aboriginal** and **treaty rights** of the aboriginal peoples of Canada are hereby recognized and affirmed.”

Aboriginals

- ▶ 3% of Canadian population; 600 “Indian bands” recognized
- ▶ 19th & 20th c. policy of assimilation
 - ▶ “Unequal treaties”
 - ▶ “Reservation system”
- ▶ 1973 SCC *Calder* decision: recognizes aboriginal title to land
 - ▶ Creates pressure for negotiating on equal, nation-to-nation basis again



Aboriginal rights: why?

- ▶ “The doctrine of aboriginal rights exists [...] because of **one simple fact: when Europeans arrived in North America, aboriginal peoples were already here**, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which **separates aboriginal peoples from all other minority groups in Canadian society** and which mandates their special legal, and now constitutional, status.”
 - *R. v. Van der Peet* (SCC, 1996)

Example of an aboriginal right

- ▶ *Sparrow* case (SCC, 1990):

- Is fishing with a large net constitutionally protected?

- Salmon fishery part of native way of life

- *“Fishing rights are not traditional property rights. They are in keeping with the culture and existence of that group. Courts must be careful, then, to avoid the application of traditional common law concepts of property.”*



Ron Sparrow

Modern treaty rights

▶ The Nisga'a Treaty (2000)

- Establishment of Nisga'a government
- Nisga'a jurisdiction over aboriginal citizenship, language, culture, etc.
- Nisga'a laws must equal standards in state laws (child protection, education, forest protection, etc.)
- Nisga'a Treaty subject to Canadian Constitution, Charter of Rights



Aboriginal rights: human rights?

- ▶ Aboriginal ways of life recognized under anthropological definitions of **culture** in human rights treaties:
 - UN Human Rights Committee, *Ominayak v. Canada* (land expropriation)
 - Also: *Kitok v. Sweden* (restrictions on hunting)

Tensions with other human rights

- ▶ Gender equality vs. group belonging:
 - ▶ UN Human Rights Committee (*Lovelace v. Canada*, 1981):
 - Sexual discrimination in Canada's *Indian Act* (loss of Indian status for women marrying non-Indian men) – Prevented Ms Lovelace from enjoying right to take part in community's cultural life – *Indian Act* amended (1985) but gender issues persist

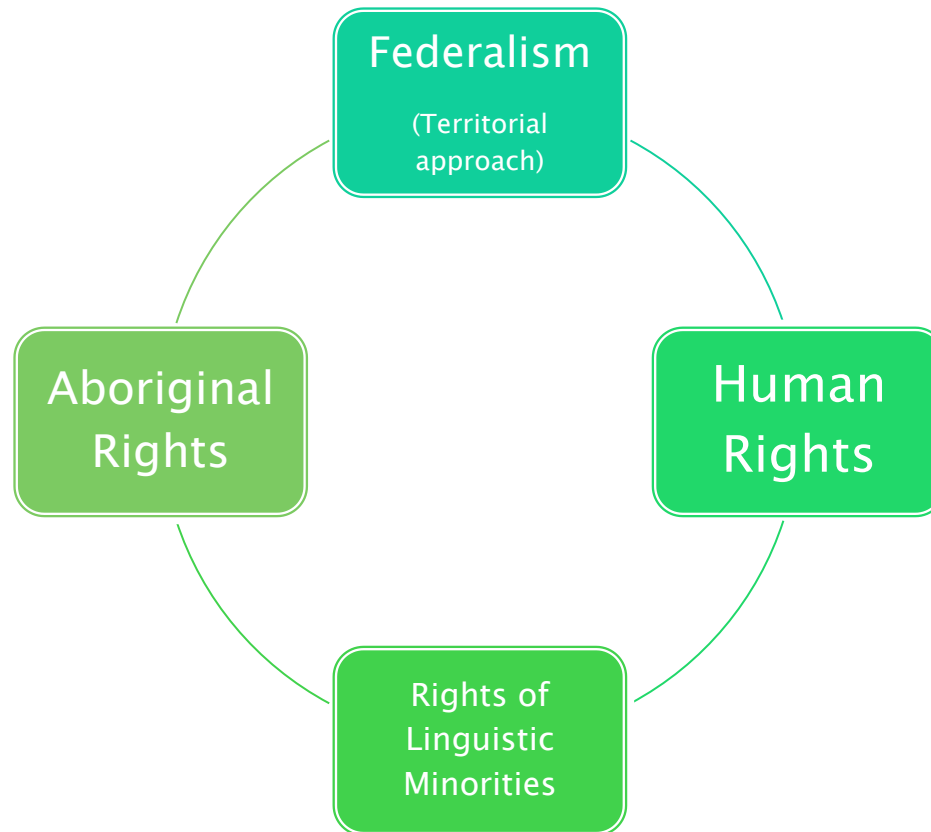
Self-determination

- ▶ UN *Declaration on Rights of Indigenous Peoples* (2007) relates indigenous rights to human **right to self-determination**
- ▶ Understood by Canada, Australia, New Zealand, U.S., etc. as **not** implying right to external self-determination (secession)
- ▶ Aboriginal title requires frequent litigation

Conclusion



Approaches to minority rights in Canada



Conclusions from Canada

- ▶ Principle of non-discrimination protects minority rights on individual basis; does not satisfactorily address “historical” minorities/group issues
- ▶ Asymmetrical federalism may be necessary to accommodate historical minorities
 - Canadian federalism remains symmetrical
- ▶ Aboriginal rights illustrates potential tension between group rights and individual human rights

Select bibliography

- ▶ BOSSET, P., “Complex Equality, Ambiguous Freedoms: Lessons from Canada (and Québec) on Human Rights in Plural Societies”, (2011) 29 *Nordic Journal of Human Rights* 4.
- ▶ GAGNON, Alain-G., *Minority Nations in the Age of Uncertainty*. University of Toronto Press, 2014.
- ▶ SLATTERY, B., “Understanding Aboriginal Rights”, (1987) 66 *Canadian Bar Review* 727.

Gracias
Merci
Thank you

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