From the BNA Act to the Charter: Defining Canada by Its Constitution

Carissima Mathen

For a considerable span of Canada's 150 years, constitutional negotiations have been the country's second national sport. The Constitution has been a mechanism for peaceful national emancipation, a crucible of federal-provincial tensions over the division of powers in the BNA Act and in the past 35 years through the Charter of Rights and Freedoms, a global standard for the protection of individual rights.

It is true that Canada's sesquicentennial has aroused diverse emotions. The very moniker of the "150th birthday" has stirred controversy. Nonetheless, it is worth noting, and appreciating, just what an unlikely anniversary it is.

-In 1867, the Dominion of Canada was formed out of a desire for economic and political stability. Little in its founding document, the British North America Act, portended true sovereignty. Monarch, imperial parliament, apex court—all remained firmly entrenched in a far-off land. The BNA Act's most important function was to allocate law-making powers between two orders of government—federal and provincial.

To be sure, the framework proved a hardy one. Over the next century, to the four original founding provinces it enabled the admission of six more. It permitted individual amendments to instantiate national programs like unemployment insurance. A distinctive form of legal review emerged too, neither British nor (yet) in thrall to American judicial supremacy.

The distinctiveness of the judicial system lay partly in the fact that, until 1949, Canadian courts were subordinate to the U.K. Judicial Committee of the Privy Council. The committee tended to protect provincial over federal powers. That provided some assurance to provinces, but it arguably thwarted the development of a national identity. The committee's frequent frustration of federal aims, such as gutting much of R. B. Bennett's New Deal, enraged critics and heightened calls to eliminate its continued role.

While much of the JCPC's work has lapsed into obscurity, some of its decisions have had profound consequences. The most famous is the 1929 Persons Case. There, the Committee considered whether the word "persons" in section 24 of the BNA Act precluded the appointment of female Senators. Deciding that the question turned on the meaning "persons" would have had in 1867, the Supreme Court of Canada concluded that it did. Overturning that decision, the JCPC declared the Act to have planted in Canada a "living tree" that, within its "natural limits", requires a "large and liberal interpretation". "To those who ask why the word should include females," it proclaimed, "the obvious answer is why should it not."

The Persons Case entailed a particular vision of the Constitution: evolving, forward-looking and liberal. The implications were dramatic, especially for the constitution's primary interpreters. Today, in terms of sheer power and authority, Canadian courts have few rivals anywhere in the world. For critics, that enhanced status has come at the expense of democratic legitimacy. But most Canadians, it seems, view the idea of a judicial guardian as a source of confidence, not threat.

The Persons Case was an early example of strategic litigation. Its primary movers—Emily Murphy and the "Famous Five"—successfully leveraged various tools to convince the federal government to put the dispute to the court. Theirs was a powerful illustration of citizen engagement in constitutional debate. Today, such engagement is both commonplace and widely seen as legitimate. Its importance has been confirmed by the courts and, as the reinstated Court Challenges program demonstrates, even accepted by government.

The constitutional shake-up of 1982 brought forth a new framework, the Charter of Rights and Freedoms, that forever changed the nature of constitutional inquiry. Until 1982, constitutional questions were rooted in federalism, which asks which order of government enjoys the power to do something. The key issue is one of jurisdiction—a law stands or falls

on that basis alone, no matter how draconian, racist or regressive it may otherwise be.

Now, the Constitution demands much more. The validity of a law depends, not just on whether it is jurisdictionally sound, but on what, precisely, it does and how, precisely, it affects the individual rights that the Constitution also protects. What is the impact of the law on, say, freedom of expression, or equality rights, or indigenous peoples? How does the government's choice comport with "a free and democratic society"? Such questions are deeply contested and inescapably controversial. But, for the most part, the resulting jurisprudence has been broadly faithful to the highest ideals of political liberalism and democracy.

That is not to say, of course, that the country faces no new or continuing challenges. Events in recent years have revealed numerous "pressure points". They will require ongoing engagement, and hard conversations.

The first challenge is the still-underdeveloped relationship between Canada and indigenous peoples. No doubt, the relationship has evolved in positive ways. Yet, challenging issues remain, such as the scope and nature of federal responsibility, and the prospects for nation-to-nation negotiation. In both jurisprudential and political terms, the constant theme has been one of reconciliation. What reconciliation means, and what it will require from all of us, will dominate national debate for many years to come.

The second challenge is the largely moribund nature of formal constitutional amendment. Following the failures of Meech Lake and Charlottetown, Canadian politicians have tended to treat constitutional negotiations as a political third rail. A recent suggestion by Quebec for renewed discussion was greeted with disbelief and almost immediately panned. But no constitution is static. Continued refusal to enter the field may avoid immediate political conflict, but it cannot evade forever the underlying issues.

Prime Minister Pierre Trudeau looks on as the Queen signs the Constitution Act with the Charter of Rights and Freedoms in front of the Peace Tower, April 17, 1982. *Library and Archives Canada photo*

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Finally, the Constitution will continue to confront difficult questions about rights limits and rights conflicts. Recent controversies involving freedom of religion and gender equality, or the non-discrimination rights of transgender persons versus the expression rights of others, have led to deep, at times painful, conflict. Related to that broader issue is the notwithstanding clause—a provision that is written into the Charter, and to some extent made it possible, but is often regarded with suspicion and hostility. After being a non-starter for years, the clause increasingly is invoked by politicians both in word (as seen in the Conservative Party leadership campaign) and in deed (most recently, by the premier of Saskatchewan). The contours of its legitimacy, and the limits to its use, remain to be seen.

For all the challenges that lie ahead, Canadians can and should take pride in this moment. If a constitution defines a country, then Canadians—more than the citizens of other developed nations—have demonstrated an unusual preoccupation with self-authorship. From the beginning, there has been haggling and fighting over what the Constitution means. The sesquicentennial provides an opportunity for Canadians to reflect on the nature of our constitutional journey thus far, and to chart a course for where we wish to go next. P

Contributing writer Carissima Mathen is a law professor at the University of Ottawa. carissima.mathen@uottawa.ca