

TABLE OF CONTENTS

VOLUME I

In Appreciation	vii
Table of Contents	ix
Table of Cases	xxi
Books by Joseph E. Magnet	xxv
Q-L Systems	xxvi
Acknowledgments	xxviii

PART I - STRUCTURE OF CANADIAN GOVERNMENT

1. SOURCES OF CONSTITUTIONAL LAW	1
(a) Constitutional Theory, Constitutional Principle, Constitutional Law	1
Research Note - The Sources of Constitutional Law	1
Reference Re Provincial Judges	6
Reference Re Secession of Quebec	23
Montfort Hospital v. Commission de Restructuration des Service de Santé	45
(b) Constitutional Convention	58
Reference Re Amendment of the Constitution of Can. (Nos. 1, 2 and 3) “The Patriation Reference”	58
Osborne v. Canada (Treasury Board)	69
2. FEDERALISM	72
(a) General Characteristics and Trends	73
Keith S. Rosenn, “Federalism in the Americas in Comparative Perspective”	73
Daniel J. Elazar, “Federalism and the Way to Peace”	75
Douglas V. Verney, “Federalism, Federative Systems and Federations”	80
Ronald L. Watts, “Comparing Federal Systems”	86
(b) Characteristics of Canadian Federalism	89
D.V. Smiley, “The Federal Condition in Canada”	89
Albert Breton, “Supplementary Statement - In Royal Commission On the Economic Union and Development Prospects for Canada Report”	91
John A. Macdonald on The Federal System	99
Note Federalism Cases	100
Reference Re Amendment of the Constitution of Can. (Nos. 1, 2 and 3) “The Patriation Reference”	101

TABLE OF CONTENTS

Table of Contents

TABLE OF CONTENTS

TABLE OF CONTENTS

(c) Federalism, Confederatism, and Supra-National Political Association	108
(i) Quebec's Grievances and Proposals	108
Research Note - Quebec's Grievances and Proposals	108
Le Parti Québécois, Quebec in a New World: The PQ's Plan For Sovereignty	112
Comité National du Oui, "To Build a Quebec Society: Our Hearts Into Work"	114
Le Parti Quebecois, La Souveraineté: Des Réponses à vos Questions	116
(ii) Federalism and its Alternatives	118
Peter Leslie, "The Maastricht Model: A Canadian Perspective On the European Union"	118
Ronald L. Watts, "Comparing Federal Systems"	121
Lucien Bouchard, "Why we are Sovereignists"	122
(d) The Future of Federalism	123
Thomas M. Franck, "Why Federations Fail"	123
Keith S. Rosenn, "Federalism in the Americas in Comparative Perspective"	124
3. DEVICES FOR INTERGOVERNMENTAL COOPERATION IN A FEDERAL STATE	129
(a) General	129
Research Note - Federalism and Flexibility	129
Herperger, "Distribution of Powers and Functions in Federal Systems"	131
(b) Delegation	133
(i) General	133
G.V. La Forest, "Delegation of Legislative Power in Canada"	133
(ii) Administrative Delegation	140
Hodge v. R.	140
Research Note - Administrative Delegation	141
(iii) Interlegislative Delegation	144
A.G.N.S. v. A.G. Can.	144
R. v. Furtney	147
B.C. (Milk Board) v. Grisnich	150
Report of the Special Joint Committee of the Senate and House of Commons, Report on a Renewed Canada	152
(c) Executive Federalism and Intergovernmental Agreements	154
D.V. Smiley, "The Federal Condition in Canada"	154
D.V. Smiley, "An Outsider's Observations of Federal-Provincial Relations Among Consenting Adults"	156
Research Note - Democratic Deficit	159

TABLE OF CONTENTS

(d) Intergovernmental Agreements · · · · ·	160
Reference Re Canada Assistance Plan · · · · ·	160
Report of the Special Joint Committee of the Senate and House of Commons, Report on a Renewed Canada · · · · ·	161
Charlottetown Accord, 1992, s. 26 · · · · ·	162
Research Note - Intergovernmental Agreements · · · · ·	163
4. KEY CONCEPTS IN CONSTITUTIONAL LAW · · · · ·	166
(a) Supremacy of the Constitution · · · · ·	166
Constitution Act, 1982, s. 52(1) · · · · ·	166
Research Note: Laws Inconsistent with the Constitution · · · · ·	167
Law Society of Upper Canada v. Skapinker · · · · ·	168
Reference Re Manitoba Language Rights · · · · ·	171
(b) The Rule of Law · · · · ·	173
Research Note - Overview of the Rule of Law · · · · ·	173
Chief Justice Beverley McLachlin, “Rules and Discretion in the Governance of Canada” · · · · ·	180
Rodger Beehler, “Waiting for the Rule of Law” · · · · ·	181
Reference Re Manitoba Language Rights · · · · ·	183
Vanguard Coatings & Chemicals Ltd. v. M.N.R · · · · ·	189
(c) Limited Authority of Government Officials · · · · ·	193
Roncarelli v. Duplessis · · · · ·	193
R. v. Catagas · · · · ·	196
(d) Separation of Powers · · · · ·	198
Research Note - The Separation of Powers · · · · ·	198
R. v. Power · · · · ·	206
Douglas College v. Douglas/Kwantlen Faculty Association · · · · ·	211
Liyanage v. R. · · · · ·	212
Research Note - Crown Privilege and the Separation of Powers · · · · ·	217
5. JUDICIAL POWER · · · · ·	218
(a) Judicial Review and the Legitimacy Debate · · · · ·	218
Patrick Monahan, “Politics and The Constitution: The Charter, Federalism and the Supreme Court of Canada” · · · · ·	218
Weiler, “In the Last Resort” · · · · ·	222
K. Swinton, “The Supreme Court and Canadian Federalism: The Laskin-Dickson Years” · · · · ·	225
(b) Protected Status of Constitutional Review · · · · ·	230
Amax Potash Ltd. v. Sask. · · · · ·	230
Air Canada v. A.G.B.C. · · · · ·	231
(c) Interpretation of Section 96 · · · · ·	235
Constitution Act, 1867, s. 96 · · · · ·	235
Reference Re Residential Tenancies Act · · · · ·	235

TABLE OF CONTENTS

Nova Scotia (A.G.) v. Sobeys' Stores Ltd.	242
McEvoy v. A.G. N.B. and A.G. Can.	246
MacMillan Bloedel Ltd. v. Simpson	248
(d) Judicial Independence	256
Shetreet, "Judicial Independence: New Conceptual Dimensions and Contemporary Challenges"	256
R. v. Beauregard	261
R. v. Lippé et al.	265
Reference Re Provincial Judges	269
PART II – TECHNIQUES OF FEDERALISM REVIEW	
1. MATTERS COMING WITHIN CLASSES OF SUBJECTS	273
(a) General	273
W.R. Lederman, "The Balanced Interpretation of the Federal Distribution of Legislative Powers in Canada"	273
Strayer, "The Canadian Constitution and the Courts"	277
Richard E. Simeon, "Criteria for Choice in Federal Systems"	278
(b) Judicial Tools for Resolving Federalism Disputes	282
(i) "In Relation to" and "Ancillary" Doctrines	282
Constitution Act, 1867 (U.K.), ss. 91, 92	282
Walter v. A.G. Alta.; Fletcher v. A.G. Alta.	283
Research Note - Whitbread v. Whalley and "Pith and Substance"	286
Munro v. Nat. Capital Comm.	287
R. v. Morgentaler [1993]	289
B.C. Securities Commission v. Global Securities Corp. et. al.	296
Note: Firearms Reference	302
(ii) "Necessarily Incidental" Doctrine, "Rational Functional Connection" Test	302
General Motors v. City National Leasing	302
2. PARAMOUNTCY	305
(a) Double Aspect Theory	305
Lederman, "The Concurrent Operation of Federal and Provincial Laws in Canada"	305
Bell Canada v. Québec (C.S.S.T.)	312
(b) Duplication	314
Multiple Access Ltd. v. McCutcheon	314
R. v. Chiasson	318
(c) Contradiction	324
Gillespie v. Gillespie	324
Smith v. The Queen	326
Ross v. Reg. of Motor Vehicles	327

TABLE OF CONTENTS

Bank of Montreal v. Hall	331
M & D Farms Ltd. v. Manitoba Agricultural Credit Corp.	335
3. INTERJURISDICTIONAL IMMUNITY	338
Research Note - The Difference between Paramountcy and Interjurisdictional Immunity	338
Ontario Public Service Employees Union v. A.G. Ont.	342
Canada (National Battlefields Commission) v. Commission de Transport de la Communauté Urbaine de Québec	344
Mississauga v. GTAA	348
PART III – DIVISION OF LEGISLATIVE POWERS	
1. PROPERTY AND CIVIL RIGHTS IN THE PROVINCE	353
(a) Introduction	353
McConnell, “Commentary on the British North America Act”	353
Research Note - Section 92(16) - The Provincial Residuary Clause?	357
Lysyk, “Constitutional Reform and the Introductory Clause of Section 91: Residual and Emergency Law-Making Authority”	357
(b) The Scope of Section 92(13)	359
(i) General	359
Citizens Ins. Co. v. Parsons; Queen Ins. Co. v. Parsons	359
Bedard v. Dawson	361
McNeil v. N.S. Bd. of Censors	363
Research Note: Rio Hotel Ltd. v. N.B.(Liquor Licensing Bd.) and Local Morality	368
A.G. Que. v. Kellogg’s Co.	369
(ii) Power to Interfere Collaterally	370
Carnation Co. v. Que. Agricultural Marketing Bd.	370
(c) The Meaning of “Within the Province”	376
Royal Bank v. R.	376
Ladore v. Bennett	378
Interprovincial Co-op Ltd. v. R.	380
Research Note - The Treatment of Pollution and Crown Zellerbach	391
Churchill Falls (Lab.) Corp. v. A.G. Nfld.	392
Hunt v. T&N, PLC	396
Carom et. al. v. Bre-X Minerals Ltd. et. al.	402
Wilson v. Servier Canada Inc.	407
Black & Finkle, “Constitutional Requirements for Judgment Recognition in the National Marketplace”	414

TABLE OF CONTENTS

2. RESIDUARY AND EMERGENCY POWERS ······	416
(a) General ······	416
Lysyk, “Constitutional Reform and the Introductory Clause of Section 91: Residual and Emergency Law-Making Authority” ······	416
Note: Newness ······	421
(b) The Residuary Power ······	421
(i) Early Development ······	421
Russell v. R. ······	421
A.G. Ont. v. A.G. Can. ······	424
(ii) Matters “Not Coming Within” Section 92 ······	427
A.G. Ont. v. Canada Temperance ······	427
Research Note - Matters of National Concern ······	430
Reference Re Anti-Inflation Act ······	431
R. v. Hauser ······	441
(iii) Resurgence of “National Concern” Doctrine ······	444
R. v. Crown Zellerbach Can. Ltd. ······	444
Research Note - The Future of the National Concern Doctrine ······	457
(c) Emergency ······	463
Re Board of Commerce Act, 1919, and Combines and Fair Prices Act, 1919 ······	463
Fort Francis Pulp & Power Co. v. Man. Free Press Co. ······	465
Reference Re Anti-Inflation Act ······	469
3. TRADE AND COMMERCE ······	476
(a) General ······	476
Brian Morgan, “The Trade and Commerce Power” (1997) ······	476
(b) Intraprovincial Trade and Commerce ······	488
(i) Provincial Competence “in relation to” ······	488
Citizens Ins. Co. v. Parsons; Queen Ins. Co. v. Parsons ······	488
Home Oil Distributors Ltd. v. A.G.B.C. ······	489
Reference Re Farm Products Marketing Act ······	491
Reference Re Agricultural Products Marketing Act ······	499
(ii) Federal Competence to Interfere Collaterally ······	503
R. v. Eastern Terminal Elevator Co. ······	503
Reference Re Natural Products Marketing Act, 1934 ······	505
(c) Interprovincial Trade and Commerce ······	508
(i) Federal Competence “in relation to” ······	508
Caloil Inc. v. A.G. Can. (No. 2) ······	508
MacDonald v. Vapour Can. Ltd. ······	510
(ii) Provincial Competence to Interfere Collaterally ······	514
A.G. Man v. Man. Egg & Poultry Assn. ······	514

TABLE OF CONTENTS

Burns Foods Ltd. v. A.G. Man.	521
Canadian Industrial Gas & Oil Ltd. v. Sask.	524
Research Note - The Aftermath of CIGOL	530
(d) General Trade and Commerce Affecting The Dominion	531
Labatt's Breweries of Can. Ltd. v. A.G. Can.	531
A.G. Can. v. C.N. Transport Ltd.; A.G Can. v. C.P. Transport Co.	536
Research Note - Regulatory Schemes and the Trade& Commerce Power	540
General Motors of Canada Ltd. v. City National Leasing	541
(e) The National Market and the Division of Powers	550
Research Note - The Increased Importance of the National Market	550
K. Swinton, "Courting Our Way to Economic Integration: Judicial Review and the Economic Union"	553
4. TAXATION AND SPENDING POWERS	560
(a) Overview	560
Magnet, "The Constitutional Distribution of Taxation Powers in Canada"	560
Research Note - Analysing the Modern Taxing Power	562
(b) Is it a Tax?	566
Westbank First Nation v. B.C. Hydro and Power Authority	566
(c) Direct Taxation vs. Indirect Taxation	572
Magnet, "The Constitutional Distribution of Taxation Powers in Canada"	572
Can. Indust. Gas & Oil Ltd. v. Sask.	574
Reference Re Quebec G.S.T.	586
(d) Licenses and "Regulatory Charges"	592
Magnet, "The Constitutional Distribution of Taxation Powers in Canada"	592
Allard Contractors v. Coquitlam	595
Ontario Home Builders Association v. York Region Bd. of Education	598
(e) Section 121	601
Gold Seal Ltd. v. Dom. Express Co.	601
Murphy v. C.P.R.	603
(f) Section 125	606
Reference Re Tax Proposed by Parliament of Can. on Exported Natural Gas	606
Reference Re G.S.T.	617

TABLE OF CONTENTS

(g) The Spending Power	620
Magnet, “The Constitutional Distribution of Taxation Powers in Canada”	620
Research Note - The Spending Power and Attempts to Limit it	623
Winterhaven Stables Ltd. v. Canada (Attorney General)	624
Research Note - Cuts to the Canada Assistance Plan	627
Research Note - Procedural Requirements	627
5. CRIMINAL LAW	632
(a) General	632
LeDain, “Duff and the Constitution”	632
Constitution Act, 1867, ss. 91, 92	636
(b) Federal Jurisdiction	637
Proprietary Articles Trade Assn. v. A.G. Can. (Re Combines Investigation Act and s. 498 Criminal Code)	637
Reference Re s. 5(a) of the Dairy Industry Act (Margarine Case)	639
Morgentaler v. The Queen	641
Note: R. v. Morgentaler (1993)	643
R. v. Swain	643
RJR MacDonald Inc. v. Canada (Attorney General)	650
Reference Re Firearms Act (Can.)	658
(c) Provincial Jurisdiction	667
(i) Regulatory “Crimes”	667
N.S. Bd. of Censors v. McNeil	667
Rio Hotel Ltd. v. Liquor Licensing Bd.	671
A.G. Can v. Montreal	674
Allan Singer Ltd. v. A.G. Que.	679
Westendorp v. R.	681
Research Note - Provincial Regulatory “Crimes”	683
(ii) Administration of Justice in the Province: s. 92(14)	685
Di Iorio v. Montreal Jail Warden	685
A.G. Que. v. A.G. Can.	691
Starr v. Houlden	695
Canadian Red Cross et al. v. Krever	701
A.G. Can. v. C.N. Tpt. Ltd.; A.G. Can. v. C.P. Tpt. Co.	708
6. TRANSPORTATION AND COMMUNICATION	716
(a) General	716
Judge, “Communications: Distribution of Powers in the Internet Age”	716
Constitution Act, 1867, ss. 91, 92	720
(b) Federal Jurisdiction	721
(i) Introduction	721
A.G. Ont. v. Winner	721

TABLE OF CONTENTS

<p>Research Note - Interprovincial Undertakings in Transportation and Communication 728</p> <p>(ii) Basis of Federal Jurisdiction: “Interprovincial Workings and Undertakings” 737 Toronto v. Bell Telephone 737 Alberta Government Telephones v. C.R.T.C. 738 S.M.T. (Eastern) Ltd. v. Ruch 742 Westcoast Energy Inc. v. Canada (National Energy Board) 743</p> <p>(iii) Scope of Federal Jurisdiction 752 Capital Cities Communications Inc. v. C.R.T.C. 752 Dionne v. Public Services Bd. (Que.) 755</p> <p>(c) Provincial Power to Interfere Collaterally 758 Bell Canada v. Quebec (La Commission de la Santé et de la Sécurité Du Travail) 758 C.N.R. v. Clark 766</p> <p>7. TREATY-MAKING POWER 770 Research Note - The Labour Conventions Case 770 R. Sullivan, “Jurisdiction to Negotiate and Implement Free Trade Agreements in Canada” 772</p>	
PART IV - ABORIGINAL PEOPLES	
<p>1. INTRODUCTION 779 Constitution Acts, 1867, 1982 779 The Royal Proclamation, 1763 780 First Nations in Canada Dept. of Indian Affairs and Northern Development (1997) 782</p> <p>2. DISTRIBUTION OF LEGISLATIVE POWERS 792 (a) Federal Legislative Power 792 Slattery, “Understanding Aboriginal Rights” 792</p> <p>(b) Fiduciary Nature of the Crown’s Authority 795 Guerin v. The Queen 795 Reynolds, “Fiduciary Duty 17 Years After Guerin” 802 Research Note: Is There a Duty to Legislate for Métis? 805</p> <p>3. SECTION 25 CANADIAN CHARTER OF RIGHTS AND FREEDOMS 806 Hogg & Turpel, “Implementing Aboriginal Self Government: Constitutional and Jurisdictional Issues” 806</p> <p>4. ABORIGINAL RIGHTS 809 (a) General Concepts 809 Slattery, “Making Sense of Aboriginal and Treaty Rights” 809</p>	

TABLE OF CONTENTS

(b) Aboriginal Title ······	822
R. v. Sparrow ······	822
Delgamuukw v. British Columbia ······	834
(c) Aboriginal Rights ······	849
R. v. Van der Peet ······	849
R. v. Gladstone ······	868
R. v. Adams ······	873
R. v. Côté ······	879
Pape, “The s.35 Justification Test: The Developing Jurisprudence” ······	886
(d) Treaty Rights ······	890
R. v. Badger ······	890
Marshall v. The Queen ······	902
Marshall v. The Queen Marshall (II) ······	909
 PART V: PROBLEMS OF CONSTITUTIONAL PROCEDURE AND REMEDIES	
1. Bringing Constitutional Actions ······	917
(a) Standing ······	917
Minister of Justice of Canada v. Borowski ······	917
Research Note - The Interpretation of the Standing Trilogy ······	923
Hy and Zel’s Inc. v. Ontario (A.G.) ······	926
(b) Corporations and Charter Actions ······	933
Wholesale Travel Group v. R. ······	933
CEMA v. Richardson ······	936
Research Note - Corporations and Charter Rights ······	940
(c) Reference Cases ······	943
Research Note - Reference Re Secession of Quebec ······	943
(d) Mootness ······	946
Borowski v. Canada (A.G.) ······	946
Research Note - Mootness ······	950
Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy) ······	952
(e) Justiciability ······	955
Reference Re Secession of Quebec ······	955
2. Remedyng Constitutional Violations ······	958
(a) Introduction ······	958
Constitution Act, 1982, s. 52 (1) ······	958
Canadian Charter of Rights and Freedoms, s. 24 (1) ······	958

TABLE OF CONTENTS

K. M. Lysyk, "The Canadian Charter of Rights and Freedoms: General Principles"	958
Rodriguez v. British Columbia (Attorney General)	963
(b) Reading Down	965
Research Note - The Presumption of Constitutionality	965
(c) Severability	967
Reference Re Alta. Bill of Rights Act; A.G. Alta. v. A.G. Can.; A.G. Can. v. A.G. Alta.	967
Research Note - Severability	969
(d) Reading In and Delayed Remedies	970
Schachter v. Canada	970
Vriend v. Alberta	982
Corbiere v. Canada (Minister of Indian and Northern Affairs)	986
M. v. H.	990
(e) Constitutional Exemptions	992
Research Note - Constitutional Exemptions	992
(f) Structural Injunctions	998
Research Note - Structural Injunctions	998
Marchand v. Simcoe County Bd. of Education	999
Manitoba (A.G.) v. Metro Stores (MTS) Ltd.	1001
(g) Damages	1003
Research Note - Constitutional Damages.....	1003
Guimond v. Quebec (Attorney General)	1012
APPENDIX 1	
The Constitution Act, 1867	A1-1
APPENDIX 2	
Constitution Act, 1982	A2-1