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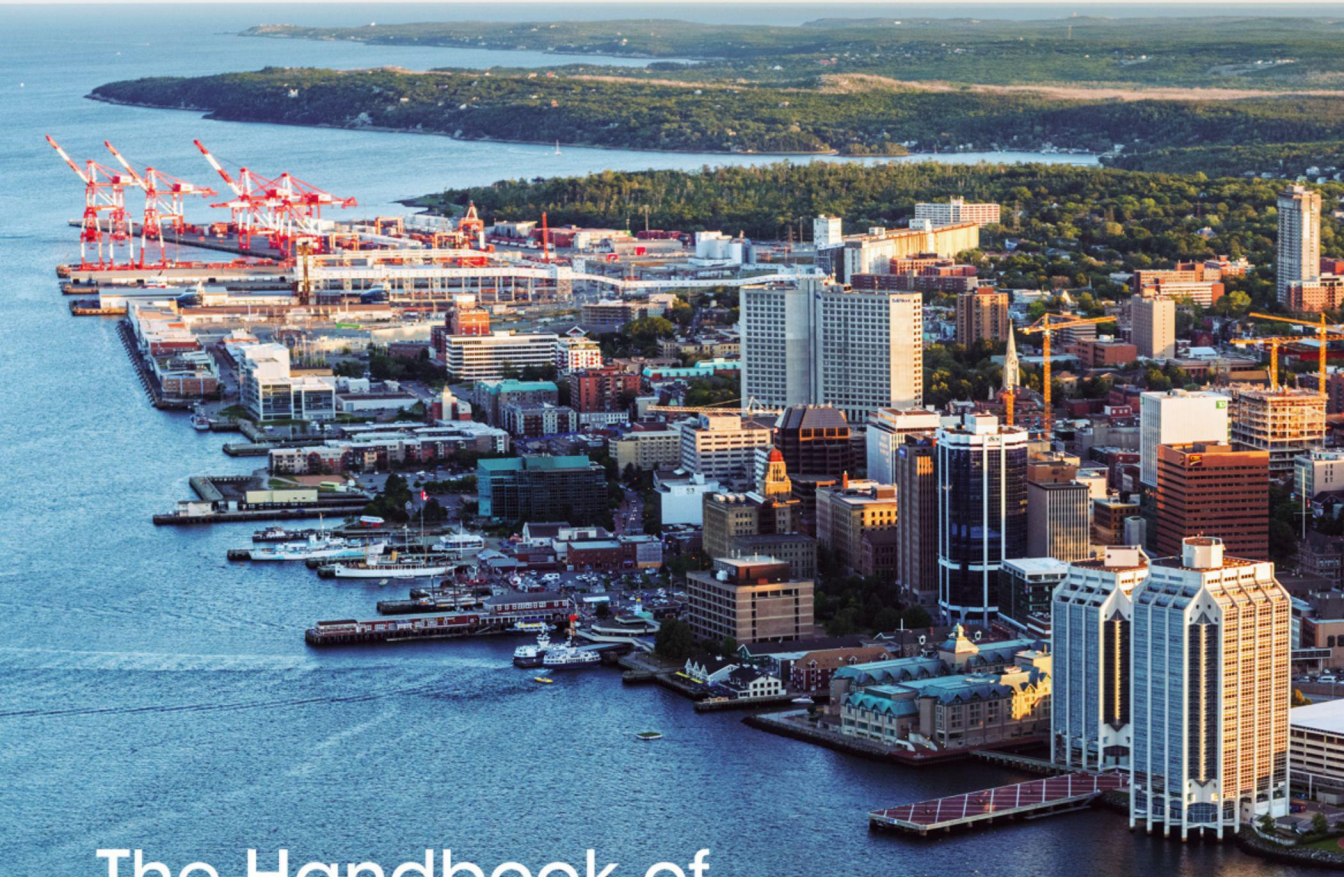

The Handbook of Canadian Public Administration

Edited by
Christopher Dunn

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Preface and Acknowledgements

This book came about at the request of colleagues who had used the first and second editions and made it the touchstone of their graduate and undergraduate public administration programs. Their feedback told of the strengths of the collection: informative pieces, written by expert contributors, that reflect new developments in the field; a consistent style throughout; and a certain edginess, namely a willingness to point out where the field is lacking and where it should be going. I am grateful to such colleagues and to their students.

This book was greatly shaped by the enthusiasm of the contributing authors. In the first book, I assembled a dream team that lent the book a sense of authority—with style. The same dynamic has repeated itself in the second and third editions.

Once again I have thoroughly enjoyed working with Oxford University Press. The professionalism and thoroughness of the staff has lent the same seamlessness and style to this edition as to the first. Kerry O'Neill, assistant editor in Oxford's Higher Education Division, coached the project along and saw to the slimming of the manuscript in a masterful way. Susan Bindernagel provided sensible and sensitive copy-editing. Steven Hall, the production coordinator from the Creative Services Division of Oxford, and expert indexers smoothed out the wrinkles in the text. To these and others I may have missed, I offer thanks.

Memorial University has provided me with a wonderful environment for teaching and research. Its Political Science Department has provided collegiality and inspiration, as well as leadership in the discipline. Its students are among the finest and most talented people I have met.

And lastly, to the people I do this all for. To Hilda, the love of my life; to Christopher, whose passion for life and learning is an inspiration; and to James, the beautiful one born the year of the first book, who gives me a new way of seeing the world.

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Kenneth Kernaghan was a professor emeritus in the Political Science Department at Brock University. Dr. Kernaghan was President of the Institute of Public Administration of Canada for 1987–8, and from 1979 to 1987 he served as Editor of *Canadian Public Administration*. He was named to the Order of Canada on 30 December 2008.

Alexandre Laurin joined the C.D. Howe Institute in 2008 and became Director of Research in 2014. From 1999 to 2008, he was with the Parliamentary Information and Research Service.

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Tribute to Dr Christopher (Chris) Dunn

On 7 November 2017, my esteemed colleague and dear friend Dr Christopher Dunn (simply Chris to me) passed away. News of his passing brought great sorrow and an outpouring of tributes within Memorial University, in the academic community of Canadian Politics, Policy, and Public Administration across the country, within the provincial and national public services, among the generations of students that he taught, and among his numerous friends in Canada and beyond.

Chris Dunn was a remarkable scholar, teacher, public servant, and family man. He never saw those four categories as separate and distinct; for him, they overlapped and intersected. His scholarship served a teaching purpose. Theory could help to inform practice. Academics, he believed, should not stand detached on the sidelines, but instead they should be engaged with public affairs. As a teacher, he believed that how you behaved as a person, including how you treated students, was as important, if not more important, than your academic credentials and your most recent publications. Chris was a wonderful husband, father, brother, uncle, and a generous friend. He was also somewhat of a private person, and so I reached out to his sister Catherine to learn about the more personal aspects of his rich life. I thank her sincerely for sharing her thoughts at this difficult time.

Chris began his academic preparation at the University of Manitoba, where he completed his BA (Hons.). This is where I first met him, and I was so impressed by his talent that I asked him to be my research assistant. We became lifelong friends, even though our contact fluctuated based on our busy lives. After a stint in the planning secretariat serving the NDP government of the day, Chris went on to obtain his MA and PhD from the University of Toronto.

This early government experience led Chris to a lifelong interest in the executive side of government and the processes of executive federalism. His dissertation became a book, *The Institutionalized Cabinet: Governing in the Western Provinces* (MQUP, 1995), which was nominated for a prestigious prize. He also wrote *Canadian Political Debates: Opposing Views on Issues that Divide Canadians* (OUP, 1995), a book that reflected his strong conviction that democratic dialogue required knowledge of contending arguments and evidence. An active researcher until his untimely passing, he was also one of three co-authors of *Canada's Politics: Democracy, Diversity and Good Government* (Pearson, 2017).

Reflecting his belief that scholarship could be a valuable teaching tool, Chris became well known for his inspiration and execution of several edited books dealing with relatively neglected topics in the Canadian politics and public administration/policy fields. This handbook, his edited volume *Provinces: Canadian Provincial Politics*, and his text *Deputy Ministers in Canada: Comparative and Jurisdictional Perspectives* (co-edited with Professor Jacques Bourgault) have all become indispensable sources to faculty, students, and practitioners in government. Both the ideas for such volumes and the efforts to bring them to completion represent major accomplishments.

Chris was a superb editor. He often persuaded academic colleagues from several disciplines to write original chapters for the volumes. Reflecting his collegial and helpful nature, he collaborated with and counseled contributors. He wrote the introductions and produced the other supporting material that made the volumes more valuable as teaching resources. And, of course, he had to master the task of "herding academic cats," who notoriously reside in their own worlds

and are unmindful of deadlines. Too often solo publications are heralded as top accomplishments and insufficient recognition is given to the intellectual effort and impact of a volume of edited essays like the present one and the others that Chris produced.

Chris was a dedicated teacher who spent three decades in the classrooms and seminar rooms of Memorial University helping young—and not so young—adults to embark on their careers and more generally realize their potential. He was strongly committed to the intellectual development and personal growth of his students. For him, a student at his office door was not an interruption of his research. On one occasion, a mature student visited his office to withdraw from his course because she could not master the course material while managing the workload of a civil service job. Chris retrieved her most recent essay, immediately read it, and persuaded her that, given some flexibility, she definitely had the capability to undertake university studies. She completed her degree and progressed in her civil service career. Teachers like Chris seldom know in their lifetimes where their positive influence on the lives of others begins and ends.

Chris was also a public servant in the broadest sense of that term. He loved to contribute original policy ideas to journals like *Policy Options*, which are targeted at decision-makers in legislatures and government. With his detailed knowledge of constitutional government issues and their machinery, he was regularly consulted by public officials. According to the judge who headed the inquiry, Chris played a crucial role in the 2007 report of the Review Commission on Constituency Allowances and Related Matters. As someone who was paid from the public purse, Chris felt an obligation to share his knowledge and insights with the media. His was always an informed, balanced voice of reason.

Beyond all these qualities and accomplishments, Chris was a fine, caring person. Throughout his busy life, he exhibited the virtues of thoughtfulness, respect, civility, consideration, and generosity towards others. We regularly shared drafts of work in progress and he offered me advice and encouragement in his late night (not so late where I was) emails from "The Rock." I wondered sometimes whether he was getting enough sleep. As a friend, and as a member of the academic community that held him in such high esteem, I will miss him greatly.

Our sadness is nothing compared to that of his family. His wife Hilda, sons Christopher and James, sister Catherine, and other members of his family are dealing with the loss of a wonderful husband, father, brother, uncle, and friend. Those closest to him must take some comfort in the hundreds of people from all walks of life that filled St Pius X Church in St John's, Newfoundland and Labrador, for his funeral mass on 11 November 2017. This was a sign of the deep respect and genuinely warm affection that so many people felt towards a brilliant, respectful, honest, and compassionate individual.

Paul Thomas
University of Manitoba
December 2017

To the memory of my mother, Patricia Mary Gracia Dunn, a former federal public servant who saw the potential in all people and helped it flourish. And to that of my father, D'Arcy Dunn who spoke the language of music. I love you.

Introduction

Parts I–V

The third edition of *The Handbook of Canadian Public Administration* reviews both the enduring structures of public administration and the challenges posed by new issues.

Part I, Mapping the Canadian Public Service, provides an introduction to the wide vistas of Canadian public administration, with several authors drawing taxonomies of the federal public service itself.

Part II, The Central Institutions, reviews stability and change in the major institutions of government—the central executive, Parliament and the public service, judicial administration, provincial and local public administration, departments, and the deputy minister cadre—and their capacity to learn from each other.

In Part III, The Broad Public Sector, the articles discuss some of the organizational forms outside the walls of the departmental public services, namely Crown corporations; agencies, boards, and commissions (ABCs or arm's-length agencies); and Indigenous public administration.

Part IV, The Processes of Canadian Public Administration, contrasts the twentieth- and twenty-first-century visions of public administration in Canada and considers the innovations that have come about in service delivery and employee relations.

Part V, Changing Expectations of Government, deals with societal pressures on the public service to deliver values-based government, equality-based public administration, justice for the third sector, balancing of the roles of exempt staff, regular public service, and horizontal management.

All this amounts to a large order. The *Handbook* does not have all the answers. But we believe it asks most of the right questions.

The Handbook's Conceptual Framework*

Public officials work in a multiplicity of organizational forms. The most familiar are government employees who work in departments under the political direction of a cabinet minister and the administrative direction of the deputy minister. However, central agencies and central departments have developed a considerable influence over the direction of government departments. Further, a variety of Crown corporations and semi-independent agencies, boards, and commissions do not operate according to the traditional departmental model of public

*The rest of this introduction is adapted from Dunn, Christopher, "The Public Bureaucracy," in *Canada's Politics: Democracy, Diversity and Good Government*, 3e, eds Eric Mintz, Livianna Tossutti, and Christopher Dunn. 2016. Pages 419–49. Reprinted with permission by Pearson Canada Inc.

administration. When we think of the staff of the various governing institutions, we often ignore those who work for Parliament and the courts. Of particular importance has been the establishment of various Officers of Parliament who, with their staffs, help Parliament in trying to hold the executive accountable for its actions and assist people who have complaints about government. With different forms come different issues.

Public Sector Bureaucracies

There is no Public Administration of Canada. There are multiple public administrations, and together they add up to what can be termed the "public sector of Canada." In other words, there are different components to the public sector, and they have developed according to different historical rhythms and multiple factors. This whole dynamic also exists at the provincial level. The most familiar component has been that of the departmental public service. There also exist public administrations for the legislatures and judiciary, and also for the health and education sectors, the Crowns, and various ABCs. Ironically, those bodies outside the departmental service often attract more public scrutiny than does the departmental service. However, both have been the object of significant attempts to calibrate the correct balance between representativeness, *neutral* competence, and executive leadership.

This introduction is meant to offer a conceptual overview of the public sector at large and some of the issues that preoccupy it.

In this introduction, the term *public sector bureaucracies* is used to refer to the staff of a variety of governing institutions. Governing institutions require sizable staff to be effective.

A New Way to Understand Bureaucracy

Beyond the departmental public service, a wide variety of organizations can be found whose staff also support the workings of the political executive (prime minister and cabinet). In addition, legislative and judicial institutions receive support from their own bureaucratic organizations and officials. In other words, bureaucracies take on many differing forms.

Since understanding the rather labyrinthine federal public service is a challenge, even for public servants themselves, this text takes a different conceptual approach. It arranges the public service according to a "rule of threes." The way to understand the shape of the service is to see it as a series of influences and bodies arranged in sets of three. In other words, there are

- three sectors of Canadian society,
- three national influences on the bureaucracy in Canada,
- three bureaucracies (executive, legislative, and judicial),
- three categories of executive institutions,
- three categories of executive departments,
- three levels of bureaucratic elite in departments,
- three kinds of officials in parliamentary institutions, and
- three kinds of officials in judicial institutions.

This is a unique and simple way to present complex information.

The Three Sectors of Canadian Society

Public bureaucracies exist in a specific context, namely a tripartite division of Canadian society. It is common to talk of the private (or market) sector, the public (or governmental) sector, and the third (or voluntary non-profit) sector. The *private sector* exists in a competitive environment and strives to maximize profit for private owners, be they corporations, family-owned businesses, or self-employed individuals. The *public sector*, which consists of the institutions and agencies of the state, is ideally concerned with acting in the public interest. The *third sector* consists of voluntary non-profit organizations that contribute to the general good of the public. This sector includes, among others, charitable organizations, religious and cultural institutions, and non-profit childcare facilities and nursing homes (see the Evans and Shields chapter in this collection).

There is also a tendency for one sector to influence another sector's administrative practices. In the last quarter century, the public sector has been deeply influenced by something called new public management, a school of public administration that modelled itself on private-sector precepts. The financial practices of the public sector (such as the accounting systems and planning and budgeting tools) more and more resemble approaches in the private sector.

For its part, the third sector depends increasingly on the public sector for funding. One implication of this trend is that non-profit organizations have begun spending more of their time and resources on meeting the reporting and accountability requirements that come with dependence on public financing. Some non-profit organizations even complain that such efforts sidetrack them from their core missions. As well, the third sector tends to mimic the private sector in its financial management practices: "Many voluntary organizations operate as if they were profit-and-loss entities, with cash flows (from fundraising, endowments, or fees charged for services) that dictate the scope of their activities in a similar way to [private-sector] firms that are fully revenue-dependent. While their objectives are public in a broad sense, they can act like private organizations from a money-management perspective" (Graham, 2007, p. 8).

The Composition of the Public Bureaucracy

The federal bureaucracy is just one among many in this country. Statistics Canada indicated at one point that over 3.6 million Canadians were employed in the many different public organizations. Indeed, the federal general government bureaucracy accounts for only a small proportion of total public sector employment (in 2011, 427,000 of 3,631,837) (Statistics Canada, 2012).

Some Canadians think of government as a collection of minister-directed departments, but this is only part of the picture. Andrew Graham (2007) insists it is necessary to define government expansively, given the extensive reach of the public sector in modern times. For example, he points out that there is a "shadow government": people working for the private sector under government grants or grants to non-profit organizations. As well, government often achieves its aims by using a variety of governing instruments, some of which are practices that depend on the private sector for their implementation, such as regulations, inducements, and persuasion designed to change private-sector behaviour.

The Three Origins of the Public Bureaucracy in Canada

There have been three national influences on the bureaucracy in Canada. The public bureaucracy, especially the departmental bureaucracy, owes its origins to British and American sources and to the Canadian nation-building ethos, which carried with it some aura of patronage and doing what was necessary.

British Influence

The traditional British style of public administration, modified by Canadian practice and convention, came to be known as the Whitehall Model. It consisted of a number of interrelated principles (see Table I.1).

The British model was a subject of both pride and consternation to Canadians. It offered a familiar and relatively workable set of principles that could be passed from generation to generation, but it also proved to resist easy change.

Table I.1 The Traditional Whitehall Model and Its Canadian Application

Traditional Whitehall Model	Modifications by Canadian Practice and Convention
Parliamentary supremacy	Subordinate (delegated) legislation
Ministerial responsibility	Answerability and accountability
Public service anonymity	Accounting officers Boards of Crown corporations and commissions Media access to public servants
Public service neutrality	Rights to engage in various forms of political activity
The secrecy norm	Access to information or freedom of information
The rule of law	Canadian Charter of Rights and Freedoms
The merit principle	Employment equity Representative bureaucracy

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American Influence

American influences have also left a lasting mark in Canada. In the late nineteenth century, the Progressive movement, spearheaded by individuals like Woodrow Wilson, sought to break the "spoils system" (in which the winning political party gave government jobs to its supporters) by making the public sector at all levels more business-like and shielding it from the political realm. The Progressive movement had its strongest effect at the local and state levels, where the patronage-ridden political "machines," the target of the Progressives, had their greatest hold. Among the Progressive movement's effects in Canada were the creation of city managers for urban governance, the foundation of special-purpose bodies to manage some politically sensitive services, and reforms in public budgeting.

Around the turn of the century, the second American influence, the scientific management school, first set in motion by Frederick Taylor (1856–1915), gained in popularity.[1] Frederick Taylor was a member of the New England upper class who was accepted to Harvard but instead chose to become immersed in the burgeoning American manufacturing sector, first as an ordinary worker, then as an engineer, then as what would be called today a "management consultant." Tireless study of the nature of work and management led him to publish his immensely popular work *The Principles of Scientific Management* in 1911.

Taylor's ideas on the organization of work found many expressions throughout his career; practitioners have tended to seize on discrete elements of his thought and use them as they see fit. He reckoned that the job of managers was to acquire the knowledge of work that traditionally belonged to workers and to organize it so as to make it available to current and future managers. He rather optimistically referred to this as "scientific management," by which he simply meant the organization and quantification of such knowledge as well as finding "the one best way" to perform tasks.

Scientific management principles influenced the federal public administration for the better part of the twentieth century. In particular, the Civil Service Commission (established in 1908) ultimately adopted an extensive employee classification system based on a report by American consultants (Dawson, 1929).

New Public Management

A third American influence was to come. In the final decades of the twentieth century, ideas and practices from Britain, the United States, and New Zealand influenced thinking about public administration: new public management (NPM), the adaptation of the practices of private business to the administrative activities of government (see Table I.2). It emerged as the result of two overlapping influences: rational choice theory and principal-agent theory. Rational choice theory (also known as public choice theory) assumes that all individuals, including bureaucrats, are self-interested. Principal-agent theory is based on the idea that the bureaucrat (the nominal agent, or "servant") who is supposed to follow the will of the

Table I.2 Principles of NPM versus Bureaucratic Government

Principles of New Public Management (NPM)	Traditional Bureaucratic Government
Entrepreneurial government	Emphasis on spending
Steering rather than rowing	Concentration on one or a few governing instruments (or means)
Competition	Monopoly
Performance measurement	Rule-driven
Customer-driven government	Ministerial responsibility
Decentralization	Centralization
Market orientation	Command and control
Empowerment	Service

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principals (the minister or the legislature) often uses specialized knowledge to thwart this arrangement. The emphasis of NPM was on establishing institutional and behavioural counters to these two alleged tendencies.

Other factors were at play as well. Ideologues such as British Conservative Prime Minister Margaret Thatcher and US Republican President Ronald Reagan convinced many people that behind poorly performing governments were self-serving bureaucrats who in some areas had scaled the heights of power and needed to be checked. The book *Reinventing Government* by David Osborne and Ted Gaebler (1992) was key to popularizing entrepreneurial government in Canada. In particular, Osborne and Gaebler argued that governing should involve "steering"—setting the policy direction—rather than "rowing"; the delivery of services should instead be contracted out to private business as much as possible. NPM was seen as the opposite of the traditional bureaucratic form of government. In fact, it was hailed as an antidote to bureaucratic ills, which, it was claimed, resulted in inefficient governing.

Canadian Development

Although influenced by British and American ideas, the Canadian public bureaucracy has developed, to some extent, in its own way. Until 1917, there was only nominal attention to the merit principle (the right person for a specific job) and more to patronage (a public-service job seen as a political favour to be bestowed on those who supported the governing party). For the next 50 years (1918–67), the merit system-focused Whitehall Model largely dominated. Since 1967, collective bargaining by public service unions and the adoption of the Charter of Rights and Freedoms have modified the Whitehall Model. For example, strict restrictions on the political activities of public servants to maintain their political neutrality were struck down by the Supreme Court as a violation of the freedoms protected by the Charter. New public management also had an effect—although not to the same extent as in some other countries. The long-term effect of these developments is the current blend of rights-based, bargaining-based, and entrepreneurial-based management.

The Three Bureaucracies (Executive, Legislative, and Judicial)

People often think of bureaucracy as involving the standard public service, with the employees in each department answering to a cabinet minister. However, there are many kinds of bureaucracies, and only one kind answers to ministers. The three powers or branches of government—the executive (prime minister and cabinet), Parliament, and the judiciary—each have their own bureaucracies with a variety of specific aspects.

The Three Categories of Executive Institution

Executive institutions are those that are tasked with the implementation of laws passed by the Parliament. They fall into three categories:

1. executive departments headed by cabinet ministers;
2. semi-independent public agencies: Crown corporations and assorted agencies, boards, and commissions; and
3. alternative service delivery (ASD), a variety of different methods for delivering public services.

Executive Departments Headed by Cabinet Ministers

Ministers preside over executive departments. Executive departments are those listed in Schedule I of the Financial Administration Act (FAA), a list that may only be amended by Parliament and not at the discretion of the minister or cabinet. Departments are financed through parliamentary appropriations. As of March 2017, there were 19 departments. Ministers, in the language of most of the acts creating departments, have "direction and management" of the department. According to convention, ministers are individually responsible to Parliament for implementing the mandate that is conferred upon them by the act.

A minister may have personal responsibility to Parliament for personnel management, staffing, and finances of the department, but does not in fact exercise direct responsibility over the employees

or finances of the department. The Public Service Commission is given exclusive responsibility for the staffing of departments under the Public Service Employment Act, which came into effect in 2005. This power is often delegated, but it is delegated to the deputy minister, not to the minister of the department. Personnel management other than staffing is the responsibility of the Treasury Board and the department's deputy minister, not the minister. Similarly, control over financial administration is shared between the Treasury Board and the department's deputy minister under the Financial Administration Act, and the minister is excluded. The reason for these exclusions is historical: in the past, ministers enjoyed much greater powers, but they abused them, aggrandizing the power of their departments, their parties, and themselves. Christopher Rootham in Chapter 1 deals with these and other acts that attribute responsibilities in the public sector.

Semi-Independent Public Agencies

The semi-independent public agency, the second type of executive institution, differs from its departmental counterpart in important ways. Although both have a designated minister, Parliament does not usually scrutinize the agency's affairs to the same extent. Ministers will generally submit less readily to questioning in the House of Commons on matters related to boards, commissions, or Crown corporations. These agencies generally have more freedom from central controls in their budgeting and staffing practices. Some are advisory agencies, some perform regulatory functions, and some engage in commercial or business activities—all activities that are rare for departments to perform.

ABCs (*or arm's-length agencies*). A wide variety of agencies, boards, and commissions (ABCs) serve a number of functions, which may overlap to a large extent. They may have *adjudicative* roles, such as the role played by the Canadian Human Rights Tribunal, which decides cases arising from the Canadian Human Rights Act. Some *regulate* particular industries. For example, the Canadian Radio-television and Telecommunications Commission (CRTC) determines which companies can have broadcasting licences and sets requirements for Canadian content in the broadcast media. Other agencies have *operating* responsibilities, like those undertaken by the Canadian Food Inspection Agency, whose mandate is to safeguard food, animals, and plants and to provide overall consumer protection. Some federal agencies have *research responsibilities*. For example, the National Research Council (NRC) conducts scientific research and development. Others combine *research and funding responsibilities*. For example, the Canada Council for the Arts, the federal government's arm's-length arts funding agency, provides funding to artists, endowments, and arts organizations and performs research, communications, and arts-promotion activities. Allan Tupper writes about arm's-length agencies in this *Handbook*.

Various rationales have been offered for the use of the agencies, boards, and commissions that generally operate at arm's length from government. One common rationale for the non-departmental form has been the alleged inability of departments to undertake business functions or similar activities, and the need for the organizational flexibility that these independent agencies provide. Some agencies have been set up in part to allow for freedom in personnel and wage policy that supposedly would not have been possible with directions by the Public Service Commission or the Treasury Board. As well, businesspeople and certain researchers may feel uneasy in highly organized departmental structures and prefer to join organizations that are less foreign to their experience and more open to expressions of opinion.

A second reason cited is the need to take away some functions from the controversial political arena. Some functions might be inefficient if too much political interference were allowed. It is argued that pricing policies, monetary policy, capital installation locations, and extension of services should be decided in a non-partisan environment.

A third related justification is to remove quasi-judicial functions from the political realm so that a specialized impartial body with no particular interest in the outcome can make the decisions after holding hearings in a court-like manner.

Other reasons for adopting the non-departmental form include the desire to have an "umbrella organization" to deliver services that involve different government departments or different levels of government. For example, the Canada Revenue Agency was transformed from a department (Revenue Canada) to agency status in 1999. This agency administers federal,

provincial, and territorial tax programs and other services. It is managed by a board of management with 15 members appointed by the cabinet, 11 of whom are nominated by the provinces and territories.

Crown corporations. Crown corporations are legal entities set up by the government to pursue commercial or other public policy objectives. The type of Crown corporation most Canadians are familiar with is called a parent Crown corporation. A parent Crown corporation is a legally distinct entity wholly owned by the Crown and managed by a board of directors. As of December 31, 2014, there were 45 parent Crown corporations, excluding subsidiaries (Treasury Board Secretariat, 2014).

Some of these affect Canadians directly every day, like the Canadian Broadcasting Corporation (CBC), Marine Atlantic, or the Bank of Canada, whereas others have a more indirect impact, like the Business Development Bank of Canada, Atomic Energy of Canada, and the International Development Research Centre (IRDC).

Crown corporations report through specific ministers to Parliament, but the relationship between corporation and minister is not as close or direct as is the case with ministers and departments. The reason the Crown corporations came into existence in the first place was to free them from the rules and political control that are evident in the regular bureaucracy. However, the arm's-length relationship raises difficulties for those used to thinking in terms of the orthodox doctrine of ministerial responsibility, where the minister is responsible for all matters administrative and political. This has been the problem Parliament has dealt with in various reform efforts over the past several decades. Accountability frameworks for Crown corporations are dealt with by Luc Bernier in this collection.

Alternative Service Delivery (ASD)

The third kind of executive organization features alternative service delivery (ASD). This category is aimed particularly at improving the delivery of government services, reducing the role of government, increasing flexibility, improving coordination among government departments and programs, and generally making government more business-like and responsive to the needs of the recipients of services.

ASD usually means turning to unusual organizational forms and instruments that do not fit the traditional view of government instruments. They may include establishing new organizational forms within departments or outside traditional departmental structures, termed *special operating agencies* (such as the self-financing Passport Canada). Alternative service delivery may also involve setting up partnerships with business and voluntary non-governmental organizations, commercializing the provision of services, or contracting out services to private business or to former government employees (Inwood, 2009).

The Three Types of Executive Departments

Three types of executive government departments exist:

1. central agencies and central departments;
2. central coordinating departments; and
3. line departments.

Central Agencies and Central Departments

Central agencies, the Privy Council Office (PCO) and the Prime Minister's Office (PMO), are headed by the prime minister and perform service-wide policy, facilitative, and control functions. Their authority comes from the statutory and conventional authority of cabinet itself, and their roles are to assist the prime minister directly and to help with the setting of objectives by cabinet. They have a formal or an informal right to intervene in or otherwise influence the activities of departments. The *central departments* (Department of Finance and the Treasury Board Secretariat) also perform these service-wide functions, but they are headed by ministers rather than by the prime minister, their authority comes from statute, and their objectives are usually collectively set or influenced by cabinet. They also have the right to intervene in or otherwise influence the activities of other departments. The term *central agency* is often used to refer to both types of structures. However, differentiating between the two can be useful, since one type, central agencies, provides a venue for direct prime ministerial power and the other, central departments, does not. In fact, one of the central departments, Finance, occasionally jockeys with the prime minister and the central agencies for relative influence.

In contrast, *line departments* are charged with delivering the basic services of government, such as health and defence. Line departments do not normally have a mandate to intervene in the affairs of other departments. Although the central agencies and central departments exert great influence over government policies and actions, they do not have as large a staff or budget as most government departments do. Despite their importance, the central agencies and central departments are the organs of government that parliamentarians (and most Canadians) know least about and whose workings are the least transparent, compared with the others.

Table I.3 Roles and Functions of Central Agencies and Central Departments

Central Agency/ Central Department	Role	Functions
Prime Minister's Office	The PMO gives partisan political advice to the prime minister and is staffed by supporters of the party in power. Staff are hired under the Public Service Employment Act (PSEA) but classified as "exempt staff" in order to free them from normal public service hiring practices.[2]	Advising on political strategy and prime minister's senior appointments Organizing the prime minister's correspondence and timetable Liaising with ministers, caucus, and national party
Privy Council Office	This central agency provides non-partisan policy advice to the prime minister and cabinet.[3] It serves as the secretariat for the cabinet and its committees The Clerk of the Privy Council serves as the prime minister's deputy minister, the secretary to the cabinet, and (since the early 1990s) the head of the public service, responsible for matters relating to public-service renewal.	Facilitates the cabinet decision-making process and implementation of government's agenda Acts as main designer and adviser for machinery-of-government issues Advises the prime minister (by Clerk) on the appointment of deputy ministers Coordinates strategy for federal–provincial and territorial (FPT) relations.
Treasury Board Secretariat	The Treasury Board Secretariat (TBS) is a central department that serves the central management board for the public service, the Treasury Board. The Treasury Board establishment and mandate is outlined in the Financial Administration Act, which gives the department responsibility for general administrative policy, financial management, human resources management, internal audit, and public service pensions and benefit programs. It also has responsibilities under a number of other acts, such as the Public Service Employment Act, the Official Languages Act, the Access to Information Act, and the Employment Equity Act.	In general, the responsibilities of the TBS include the following: • setting management policies and monitoring performance; • directing expenditure management and performance information systems; and • serving as principal employer of the public service. The Office of the Chief Human Resources Officer (OCHRO) within the TBS, centralizes human resources policy, and acts as the employer in relations with public-service employees.
Department of Finance	The most influential department in the government, Finance sets policy in the most important transfer and economic programs, as well as setting the annual federal budget.	Finance is instrumental in setting policy for • taxes, tax expenditures, and tariffs; • federal borrowing; • transfer payments to provincial and territorial governments; • Canada's role within international financial institutions such as the International Monetary Fund, the World Trade Organization, and the World Bank; and • major economic issues.

Central Coordinating Departments

In addition to the central agencies and central departments that are key actors in virtually all policy decisions and play a major role in coordinating government decisions, there are *central coordinating departments* that also have a coordinating role. For example, the Department of Justice has been responsible for "Charter-proofing" federal legislative proposals across government. Likewise, the minister (in effect, the department) of Public Works and Government Services is allocated exclusive jurisdiction under the Department of Public Works and Government Services Act of 1996 and under the Defence Production Act of 1985 to procure goods for other departments, as well as for the Armed Forces. Other departments are sometimes placed in this category.

Line Departments

Line departments are the third type of organization found in the executive government. They function as the backbone of government, delivering most of what we have come to expect in the way of services from government, from the military to the protection of aviation. As noted, they do not usually intervene in the affairs of other departments.

There are conflicting images of line departments in the literature. Line departments have often been portrayed as the drab, unexciting area of government. They are said to be the most driven by bureaucratic rules, the most dominated by politicians—their own ministers and the prime minister—and the most in need of, but at the same time the most deeply resistant to, basic reform (A.W. Johnson, 1992). At a broad level, there has been an almost constant tension between the need for rigorous accountability on one hand and the desire for creative and flexible management on the other (PCO, 2007).

However, others consider the line bureaucracy as a more independent and a more challenging place to work. Some theorists of the rational choice school, or those who are attracted by the principal-agent theory, see the average bureaucrat as a significant power-seeking agent, one whose nominal superiors do not under normal circumstances have enough information or resources to control their employees. The move to the new public management approach to public-sector organization and management is a sign of just how much politicians fear the power of the bureaucracy in Canada and Britain (Aucoin, 1995, and Aucoin chapter in the first edition of this *Handbook*, 2002).

The Three Levels of Bureaucratic Elite in Departments

Three levels of bureaucratic elite characterize departments:

1. the deputy minister (DM) level (and in some departments, associate deputy ministers),
2. the assistant deputy minister (ADM) appointments, and
3. director-level appointments.

Deputy Minister

Deputy and *associate deputy ministers* are called Governor-in-Council (GIC) appointments because they are made by the Governor General upon the advice of the cabinet (acting in the name of the Privy Council). In practice, it is the prerogative of the prime minister, not the minister of the department, to appoint these individuals. In doing so, the prime minister takes into account the need to ensure that the appointees can be trusted to carry out his or her will and see to the needs of the government of the day. The Clerk of the Privy Council provides advice to the prime minister on these appointments.

Despite being chosen by the prime minister and closely associated with the policies of the government, most deputy ministers are retained even when a new government is elected. The deputy minister is expected to be politically neutral and impartial—neither for the government nor against it, but rather the guardian of the administrative order. The task at hand is to advise, to speak truth to power, and to supply the government with the best and most cautious information in spite of how unpalatable this may be politically. The deputy minister controls the management of the department. Although traditionally it is the minister, rather than the deputy minister, who is responsible to Parliament for the actions of the department, the Financial Administration Act (2007) has modified this tradition. Specifically, the deputy

minister is the accounting officer for the department and, as such, is legally obliged to appear before parliamentary committees to report on conformity to that act (Inwood, 2009). Thinking about the role of the deputy minister has evolved in recent years, as Bourgault's article in this collection shows.

Assistant Deputy Ministers

Assistant deputy ministers are the second level of the administrative elite. Generally, they are charged with managing branches within a department. They are not Order-in-Council (OIC) appointments, but merit-based positions competitively chosen in recent years by the Office of the Chief Human Resources Officer.

Directors General

Directors general and directors are the third level. These are also merit-based appointments and are often considered to be the middle management level of the federal service. Several hundred individuals operate at this level. For example, reporting to the assistant deputy minister for science and technology at Environment Canada in mid-decade were five directors general (water, atmospheric, wildlife and landscape, science and risk assessment, and strategies) as well as a director of the Environmental Science and Technology Centre.

The Three Kinds of Officials in Parliamentary Institutions

In the Canadian Parliament, three sets of institutional players keep the institution running: political officers, officers of Parliament, and procedural officers. Although all play important roles, Officers of Parliament have gained the most public attention in recent years.

Political Officers (House Officers)

Political officers are not bureaucratic officers in the normal sense, but because they do some routine administrative work—administering rules, scheduling, monitoring, rendering accountability, and so forth—they might be considered part of the bureaucracy of Parliament. The political officers of the House of Commons, including parliamentary party officials such as the Speaker, the Deputy Speaker, the party House Leaders, and the party whips, have come to be known as *House Officers*. These individuals are at once politicians and administrators, in the sense of making the routine machinery of Parliament work. It should also be added that many of them have individuals working for them as well. The Speakers, for example, have legal and financial officers attached to their offices, who assist in deciding on matters of parliamentary law and in administering the precincts of Parliament.

Officers of Parliament

Officers of Parliament, along with the offices they head, have sometimes been called servants of Parliament, parliamentary watchdogs, or the parliamentary control bureaucracy. Paul Thomas (2003) has described them as "independent accountability agencies created first to assist Parliament in holding ministers and the bureaucracy accountable and, second, to protect various kinds of rights of individual Canadians" (Thomas, 2003: 288). As servants of Parliament, as they are sometimes called, these are officers that serve and are responsible to the legislative branch rather than the executive, and to that end they have been freed from the normal constraints that bind the executive government.

One of the most pre-eminent of the Officers of Parliament—and certainly the oldest, established in 1878—is the Auditor General (AG) of Canada. The AG audits departments and agencies, most Crown corporations, and other federal organizations as well as the three territories, and his or her reports are presented directly to Parliament. Since 1977, when the Auditor General Act was broadened to include "triple-E reporting"—commenting on whether government is implementing policies economically, efficiently, and with adequate means for judging their effectiveness (also referred to as "value-for-money [VFM] auditing")—the auditor's reports have become central to Canadian political life.

Over time, the category of officers has tended to expand, as have some of their powers. The present list of officers is Auditor General of Canada (established 1878), Chief Electoral Officer (1920), Commissioner

of Official Languages (1970), Information Commissioner (1982), Privacy Commissioner (1982), Conflict of Interest and Ethics Commissioner (2007), Public Sector Integrity Commissioner (2007), and Commissioner of Lobbying (2008).

Although the federal level has no exact equivalent to the post of ombudsman, a post found in many provinces and other jurisdictions, some of the federal officers have quasi-ombudsman roles. (There is, however, an Office of the Ombudsman for the Department of National Defence and the Canadian Forces.) In other words, they take complaints from citizens and public servants regarding the failure of government to perform duties it has taken on itself. Such analogies can be made with regard to the Commissioner of Official Languages, the Information Commissioner, the Privacy Commissioner, and the Public Sector Integrity Commissioner. Paul Thomas covers these officers and other aspects of parliamentary functioning elsewhere in this *Handbook*.

The Harper government also created another official, who was like an Officer of Parliament but not designated as such, called the Parliamentary Budget Officer (PBO). The PBO was an independent officer of the Library of Parliament who reported to the parliamentary librarian who, in turn, reported to Speakers of both chambers. The new Liberal government promised to increase the powers and independence of the PBO. The Office of the Parliamentary Budget Officer provides non-partisan financial and economic analysis to support Parliament's oversight role and to provide budget transparency.

Procedural Officers of Parliament

Procedural officers of Parliament are essentially the public servants of Parliament, providing the equivalent of department-like services to the House of Commons and the Senate. The key figures in the House who furnish these services are the Clerk of the House, the deputy clerk, the clerk assistant, the law clerk and parliamentary counsel, and the sergeant-at-arms. In the Senate there are analogous procedural officers.

The Clerk of the House is the senior permanent official responsible for advice on the procedural aspects of the plenary (whole) House and looks after the ongoing administration of the House of Commons. The Clerk of the Senate performs an analogous role for the Senate. The clerks' roles are comparable to the role of deputy ministers in the executive departments. In the Commons, the clerk is the permanent head responsible for the management of staff and daily operational affairs. The clerk takes direction from the Speaker in relation to policy matters. In turn, the Speaker takes overall direction in management from the Board of Internal Economy (BIE), an all-party committee statutorily charged with administering the House. In parliamentary matters, within the House itself, the Speaker is supreme and takes direction from no one in particular, except the will of the House.

Three Kinds of Officials in Judicial Institutions

Registrar

The Supreme Court of Canada, the Federal Court, the Federal Court of Appeal, the Tax Court, and the Court Martial Appeal Court are administered federally. Reflecting the principle of judicial independence, the administration of these courts operates at arm's length from the executive government.

The staff of the Supreme Court of Canada is headed by the registrar who is responsible to the chief justice of the court. The registrar and deputy registrar are Governor-in-Council appointees who oversee a staff of nearly 200 public servants who manage cases and hearings; provide legal support to the judges; edit, translate, and publish judgments; manage the flow of documents; and perform a variety of other essential tasks.

Courts Administration Service

Support for the four other federally administered courts is provided by the Courts Administration Service. The chief administrator, a Governor-in-Council appointee, is responsible for the overall operations of these four courts and their staff of about 600 public servants. The chief justice of any of the four courts may issue binding directives to the chief administrator.

Judicial Administrator

There is also a kind of third administrative option. In addition to the above, each chief justice has authority over such matters as determining workloads and court sittings and assigning cases to judges, and may appoint a judicial administrator from among the employees of the service for such duties as establishing the time and place of court hearings. Carl Baar and Ian Greene cover matters of judicial administration elsewhere in this *Handbook*.

Conclusion

These are just some of the contemporary questions that have given rise to the spirited debate in Canada about public bureaucracy; there are several others. They concern such matters as whether the federal spending power should be limited (dealt with by Dunn in the *Handbook*); whether the federal–provincial spending and taxing balance is appropriate (a matter Robson and Laurin cover); whether private/public partnerships, third-sector arrangements, Crown corporations, and arm's-length agencies are sufficiently accountable (Siemiatycki/Evans and Shields/Bernier/Tupper); plus others. How does one design a budgeting system (Prince)? Ethical frameworks tailored to the public sector (Brock and Nater)? What is the relationship between political staff and the regular bureaucracy (Craft) or between political staff and deputy heads (Bourgault)? We encourage the reader to pursue such avenues; they are of immense importance, as the coming years will prove.

Public-sector bureaucracies are necessary for the achievement of good government. A large, professional staff is required to administer the multitude of government programs. Designing how they work together is the overriding issue. It is to this we now turn.

Notes

1 The term *scientific management* was coined by lawyer Louis D. Brandeis in hearings before the Interstate Commerce Commission.

2 Each cabinet minister also has a small political staff separate from the public servants in the department.

3 The PCO's name comes from the Queen's Privy Council for Canada.

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Part I

Mapping the Canadian Public Service

It is a challenge to outline, or map, the public service of Canada. It is a complex network of legislation, subordinate legislation, conventions, and governmental practices. The following authors attempt to untangle the complexities for students of the field.

Christopher Rootham maps the legislative framework of the core and broader public service. He conceives of the federal public sector as a series of concentric circles, some of which overlap in interesting or challenging ways. The key legislation in this topic is the Financial Administration Act, which defines sections of the public service and then sets out who is responsible for what and in particular the Treasury Board's level of control. There is also the Public Service Rearrangement and Transfer of Duties Act, which is about how to transfer units around the public service. He then examines collective bargaining and terms and conditions of employment with a historical overview of two main topics: collective bargaining laws in the federal public service, and the legal status of Crown service, mainly concentrating on the Federal Public Sector Labour Relations Act (FPSLRA). His third part is a historical overview of staffing matters (such as hiring, transferring) in the federal public service, concentrating almost exclusively on the evolution of the Public Service Employment Act (PSEA) over time, with particular emphasis on the merit principle. His fourth topic deals with legislative protection of fundamental freedoms of public servants, such as political activities in the PSEA; whistle-blowing and public criticism, both common law and, post-Gomery, the Public Servants Disclosure Protection Act (PSDPA); human rights and pay equity, mainly the Canadian Human Rights Act (CHRA); and official languages. The fifth part provides a historical look at federal public service pensions. The sixth and last section covers legislation involving people we would think of as public servants who are not governed by the PSLRA or PSEA. These are military personnel (National Defence Act, and others), RCMP members (RCMP Act), parliamentary employees under the Parliamentary Employment and Staff Relations Act (PESRA), ministerial staff ("statutory orphans," but some PSEA rules apply when trying to get into the public service), and Governor-in-Council appointments (covering such persons as deputy ministers, heads of various tribunals and agencies, and so forth).

William B.P. Robson and Alexandre Laurin offer a comprehensive overview of most fiscal arrangements between Canada's federal and provincial governments. They review the history of various intergovernmental transfers and examine the rationales used in the literature to explain and/or prescribe particular aspects of Canadian fiscal arrangements. Prominent among them include

subsidiarity, the Tiebout hypothesis, public choice, externalities, economies of scale, regional redistribution to standardize services, and mitigating harmful internal migration. However, theory sometimes takes second place to fiscal stresses and political responses in particular circumstances. They strongly favour the principle of hard fiscal constraints and more closely aligning the revenue-raising and spending powers of governments in Canada.

Continuing with the intergovernmental theme, Christopher Dunn traces the checkered history of the federal spending power. Sometimes popular, sometimes denounced, the spending power has always been a central concern of federal and provincial politicians. The chapter traces the factors that have determined the rise and fall and then rise again of the use of the instrument. The spending power was an instrument of nation building after WWII, then a focus of the "constitutional reform industry" from the late sixties to the early nineties, followed by a drive for non-constitutional strategies to limit the power that culminated in the Harper Open Federalism policy. Justin Trudeau may be resurrecting the early Liberal tradition of vigorous use of the spending power.

Heather MacIvor contributes an important chapter to the collection, stressing the importance of administrative law to the practice of government. The decision-making power of public officials is derived from statutes enacted by the legislature and regulations issued pursuant to those statutes by the Governor-in-Council or Lieutenant-Governor-in-Council. MacIvor explains the key principles of administrative law for students of public administration. The case studies illustrate the concepts of jurisdiction, statutory powers of decision, the standard of review, and the rule of law. The chapter situates Canadian administrative law in its constitutional and legal framework. It focuses on the power of the Superior and Federal Courts to enforce the rule of law by ensuring that tribunals in the executive branch adhere to their legislative mandates.

"The key lesson for students of public administration," she says, is this: "if you want to know what government can do with a particular file, don't just look at the fiscal data or the latest managerial theories. Read the law. Start with the Constitution, then look at the enabling statute(s) and the applicable regulation(s). Which administrative structures are tasked with implementing the file? What powers do they have? How broad is their discretion? . . . Read the case law. You may find that where government documents are silent on key aspects of public administration, courts have spoken." This is important to remember.

As Kenneth Kernaghan reminds us in Chapter 5, different eras in public sector reform are distinguished by different sets of values. Recently *traditional values* in the public sector (accountability, efficiency, integrity, neutrality, responsiveness, and representativeness) have been challenged by *new values* (service, innovation, quality, teamwork). Yet values are not the only core ideas in Canadian public service: constitutional conventions are intimately linked with public service values. The three conventions integral to the Canadian system (the East Block conventions) are (1) ministerial responsibility, (2) public service anonymity, and (3) political neutrality. Kernaghan traces the action of all three in constructing Canada's values and ethics regime since 2003.

1

A Legislative Map of the Federal Public Service

Christopher Rootham

Chapter Overview

Canada is a country dedicated to the maintenance of the rule of law. One consequence of this dedication is that actions of the executive branch of government must be authorized by a statute enacted by Parliament or a regulation made in accordance with some legislative grant of authority.[1] The federal public service is therefore set up by an interlocking web of legislation, and administered by individuals acting pursuant to legislative power. This chapter is meant to map out the broad outlines of that legislative web.

Three major statutes establish the federal public service, and then a number of other statutes impact the federal public service sufficiently to warrant mentioning in this chapter. Those three major statutes are as follows:

1. the Financial Administration Act (FAA). The FAA is the statute that builds the fundamental architecture of the federal public service. It creates the Treasury Board of Canada and gives the Treasury Board the responsibility to regulate financial and human resources in the federal public service. The FAA also sets out the basic division of the public sector between the portions managed directly by Treasury Board on the one hand and separate agencies on the other. The FAA also contains financial management rules for Crown corporations.
2. the Federal Public Sector Labour Relations Act (FPSLRA). The FPSLRA sets out the rules for collective bargaining between public sector unions and the federal public service. It also sets out a regime for individual dispute resolution for both unionized and non-unionized federal public servants.
3. the Public Service Employment Act (PSEA). The PSEA establishes the rules for appointments in most of the federal public service, including statutory codification of the principle that appointments should be made on the basis of merit. The PSEA also establishes rules governing political activity by federal public servants.

In addition to those major statutes, other statutes regularly touch on the lives of federal public servants. The most important of those statutes, discussed very briefly below, include:

1. the Canadian Human Rights Act, which protects federal public servants against discrimination and requires pay equity;
2. the Public Servants Disclosure Protection Act, which permits whistle-blowing and protects whistle-blowers against reprisals;
3. the Official Languages Act, which gives public servants in certain regions of Canada the right to communicate in the official language of their choice while at work;
4. the Privacy Act, which prohibits the collection, use, and disclosure of certain personal information without consent, and gives public servants the right to access their personal information; and
5. the Public Service Superannuation Act, which sets out the pension benefits for federal public servants.

Finally, there are certain portions of the public service (such as the Canadian Armed Forces, Royal Canadian Mounted Police, and parliamentary employees) that have specific statutes governing their human resources.

Chapter Objectives

By the end of this chapter, students will be able to do the following:

- Understand and describe the broad outlines of legislation governing the federal public service.
- Outline the differences between collective bargaining in the private sector and the federal public service.
- Explain the merit principle and its enforcement.
- Describe some of the ways in which legislation protects and limits the fundamental rights and freedoms of public servants.

Topic One: What Is the Federal Public Service?

The first step in a legislative overview of the federal public service is to define and delineate the topic of this chapter—what is the federal public service? To do so, it is necessary to define four categories or subsets of the federal public sector:

1. the core public administration;
2. separate agencies;
3. departmental corporations; and
4. Crown corporations.

The first two categories are referred to collectively as the federal public administration—in this chapter, however, they will simply be referred to as the federal public service. The fourth category is not part of the federal public service.

As described further below, the third category of departmental corporation often overlaps with the previous two categories. It may also be useful to think of these four categories as concentric circles moving away from the core of the federal public sector, or as categories that move further and further away from central government control.

These categories (and the different level of central control exercised over each of these categories) are set out in the Financial Administration Act.[2] This statute, as the name implies, establishes rules for financial and human resources administration in the federal public sector—in particular, who is responsible for various aspects of financial and human resources for each of those four categories.

Nature of Crown Employment (or the Legal Status of a Public Servant)

Before defining those four categories, it is probably useful to discuss—in the briefest of terms—the theoretical underpinnings of employment by the Crown.

The concept of employment with the Crown was, for several centuries, considered a question of status. This meant that the rules governing employment with the Crown were set out either by statute or unilateral decisions by the Crown in the exercise of its prerogative. Until the eighteenth century, public servants were considered to be the personal servants of the reigning monarch. The monarch appointed his or her officials by letters patent. In the eighteenth century, the situation evolved so that public servants were appointed directly by their particular minister. They were also paid out of the revenues generated by that particular ministry.

Eventually, by the middle of the nineteenth century, the early versions of the Civil Service Act[3] created a system whereby public servants were servants of the Crown instead of their particular department or minister. Crown servants were still considered to be servants, however—meaning that their relationship with the Crown was based on status instead of the normal rules of contract that govern the modern employment relationship.

In the past three decades employment with the Crown has evolved away from a status-based relationship into a relationship based on contract. The leading case with respect to the status of Crown servants is *Wells v. Newfoundland*.[4] In that case, a former member of the Newfoundland Public Utilities Board was appointed to hold office during good behaviour until the age of 70. The Board was abolished by the Newfoundland Legislature, and Wells was not reappointed to the new board. He brought a claim for damages equal to lost salary up until age 70 (plus associated loss of pension benefits). The Supreme Court of Canada upheld his claim on the basis of contract. The Supreme Court of Canada reviewed earlier cases holding that junior civil servants were employees governed by either collective agreements or contracts of employment. It decided to apply those earlier cases to senior civil servants as well, stating:

> In my opinion, it is time to remove uncertainty and confirm that the law regarding senior civil servants accords with the contemporary understanding of the state's role and obligations in its dealings with employees. Employment in the civil service is not feudal servitude. The respondent's position was not a form of monarchical patronage. He was employed to carry out an important function on behalf of the citizens of Newfoundland. The government offered him the position, terms were negotiated, and an agreement reached. It was a contract.
>
> As Beetz J. clearly observed in Labrecque, supra, the common law views mutually agreed employment relationships through the lens of contract. This undeniably is the way virtually everyone dealing with the Crown sees it. While the terms and conditions of the contract may be dictated, in whole or in part, by statute, the employment relationship remains a contract in substance and the general law of contract will apply unless specifically superseded by explicit terms in the statute or the agreement.

The Supreme Court of Canada then set out the limited scope for exceptions to its rule for judges, ministers of the Crown, and others who fill constitutionally defined state roles.

The fact that employment with the Crown is contractual in nature does not, by itself, serve to identify the employer for a Crown servant. Nor does the contractual nature of Crown employment mean that the relevant statutory provisions prescribing their terms and conditions of employment are less important than they were before this recognition of the contractual nature of their employment. The Supreme Court of Canada has recognized that, at the very least, these statutory provisions form part of the terms and conditions of the contract of employment.[5] Lower courts have concluded that, despite the contractual nature of Crown employment, certain terms and conditions of employment may be amended without consideration or without the acceptance or approval of an employee—contrary to the normal approach to contracts of employment.[6] This is to say that the *nature* of the employment relationship with the Crown is contractual, but the *terms and conditions* of employment are an amalgamation of the rules of contract and various statutory and regulatory conditions.

This raises the question of who constitutes the employer of public servants. This question can be answered by reference to four principles:

1. in the executive branch of the federal government there is only one employer and that is Her Majesty the Queen in right of Canada;
2. as a general rule, Her Majesty does not exercise her functions of employer herself or through the Governor-in-Council; instead she delegates her functions as the employer to either the Treasury Board of Canada or to another agency;
3. Parliament has adopted an objective, simple, and easily verifiable test to determine those persons in respect of whom Her Majesty will be represented as employer by the Treasury Board and those in respect of whom she will be represented as employer by a separate employer; it has drawn up two lists in the Financial Administration Act; and
4. Parliament has chosen to indicate by legislation rather than by regulation the persons for whom the Treasury Board, on behalf of Her Majesty, will be the employer and those for whom it will not; any change of status in this regard therefore can only be made by legislation.[7]

In short, public servants are employed by the Crown (Her Majesty in right of Canada) through the agency of either the Treasury Board of Canada or a separate agency. Further, the Financial Administration Act delineates whether a particular worker is an employee of the Crown as represented by Treasury Board or the Crown as represented by a separate agency.

Category One: Core Public Administration

The core public administration refers to those departments and agencies listed in Schedules I and IV of the Financial Administration Act. More practically, public servants in the core public administration are employed by the Treasury Board instead of their particular department or agency. Most federal public servants are employed in the core public administration. As of March 31, 2016, for example, the core public administration had 197,354 employees (or 76 per cent of the federal public service) compared to 61,625 (or 24 per cent) in separate agencies.[8]

Treasury Board

The **Treasury Board** is a subcommittee of the Queen's Privy Council for Canada established pursuant to section 5 of the Financial Administration Act consisting of the president of the Treasury Board, the minister of finance, and four other members of the Queen's Privy Council (i.e., cabinet ministers). The Treasury Board, broadly speaking, is responsible for overseeing the administration of the federal public sector. The specific responsibilities of the Treasury Board for human resources are set out in sections 7 and 11.1 of the Financial Administration Act and include determining pay and allowances, determining the human resources requirements of the public service (i.e. headcount), classifying positions, and preparing policies for departments to follow when implementing human resources decisions. The Treasury Board is also the employer for collective bargaining purposes in the core public administration.[9]

The Treasury Board is also responsible for financial management generally in the federal public service, and for exercising powers under various other statutory instruments. The most notable of the Treasury Board's powers outside of the Financial Administration Act is its administration of the Public Service Superannuation Act; one less notable power is that it is responsible for auditing the Office of the Auditor General.[10]

Category Two: Separate Agencies

The second area of the public service comprises the separate agencies listed in Schedule V of the Financial Administration Act. The Crown has delegated to each individual separate agency the power to act as the employer for employees within each separate agency. The Treasury Board is **not** considered to be the employer of employees of a separate agency. The separate agencies all have their own constituting statutes. Those constituting statutes establish—with greater or lesser degrees of particularity—that each separate agency has the power to appoint staff and fix their remuneration.

The Treasury Board still exercises some supervision over separate agencies. For example, a separate agency may only enter into a collective agreement

with the approval of the Governor-in-Council.[11] In 1967, the Governor-in-Council[12] decided that separate employers could exercise the same power over their own employees as Treasury Board exercised over employees in the core public administration. However, that authority was subject to two limits: (1) the separate employer had to consult with Treasury Board before making or implementing new policies; and (2) the separate employer had to obtain the terms of reference (or a mandate) from Treasury Board before entering into collective bargaining negotiations.[13] Therefore, the Treasury Board indirectly controls the collective bargaining for separate employers by controlling the mandate for negotiations and the development of policies.

When it comes to determining terms and conditions of employment outside of collective bargaining, some separate agencies are still subject to approval by the Governor-in-Council before they can fix remuneration,[14] while other separate agencies retain that power in their own right;[15] and still others retain that power but must consult with the Treasury Board before setting pay and allowances.[16]

Since separate agencies can be created (or abolished) by a simple amendment to the Financial Administration Act, public servants have often been transferred en masse from the core public administration to a separate agency (or vice versa). When a new separate agency is created, the rules are set out in the statute creating that separate agency. When a group of employees are transferred from one portion of the public service (either a department or a separate agency) to another, the government need only enact a regulation to effect that transfer.[17]

Departmental Crown Corporations

The federal public sector includes a special type of corporation called a "departmental corporation." **Departmental corporations** are created by Acts of Parliament and are listed in Schedule II of the Financial Administration Act. They report to Parliament through a minister and are designed to function with greater autonomy than ministerial departments. Their governing bodies have roles specified in their constituting statutes. Some departmental corporations are also separate agencies; some are part of the core public administration; and some are outside of the federal public administration and considered a separate corporate entity.

A departmental corporation is treated as a department for the purposes of financial accounting and reporting required under the Financial Administration Act.[18] This means that Treasury Board is responsible for the financial management of departmental corporations, including "estimates, expenditures, financial commitments, accounts, fees or charges for the provision of services or the use of facilities, rentals, licences, leases, revenues from the disposition of property, and procedures by which departments manage, record and account for revenues received or receivable from any source whatever" as well as the review of annual or longer term expenditure plans and programs.[19] This control over financial management *does not* extend to control over human resources: in other words, a departmental corporation is not automatically subject to Treasury Board on human resources issues.

The funding of departmental corporations is supposed to be a combination of parliamentary appropriations and revenues earned through services performed by the departmental corporation.

Crown Corporations

Finally, there are **Crown corporations**. A Crown corporation is a "corporation that is wholly owned directly by the Crown, but does not include a departmental corporation."[20] Crown corporations are managed and operated by a Board of Directors,[21] who in turn are appointed by the responsible Minister with the approval of the Governor-in-Council.[22] The Treasury Board must approve the annual operating budget[23] and the capital budget of a Crown corporation.[24] The Treasury Board also sets some procedures for financial accounting (such as the types of forms used for audits of a Crown corporation).[25] Otherwise, Crown corporations are independent from Treasury Board and instead are accountable to Parliament and the Governor-in-Council through their minister.

Some Crown corporations derive most or all of their revenue from commercial activities, while others are largely or almost completely dependent upon parliamentary appropriations.

Finally, employees of a Crown corporation are subject to the same labour and employment laws as employees in the federally regulated private sector—in particular, the Canada Labour Code.[26]

Topic Two: Collective Bargaining and Terms and Conditions of Employment

Early Version of Collective Bargaining: The National Joint Council

Collective bargaining came later to the federal public service than to the private sector. The notion that the Crown could engage in collective bargaining with its servants was seen as antithetical to Crown sovereignty. According to this theory, the government needs to have free control of the public service in order to protect its capacity to govern.

Unionism among public servants dates to the late nineteenth century, with the formation of the Railway Mail Clerks' Association in 1889 and a union of letter carriers, the Canadian Postal Employees Association (a predecessor of the current Canadian Union of Postal Workers), in 1891. The Civil Service Association (an early predecessor of the Public Service Alliance of Canada) was formed in 1907, and the Professional Institute of the Public Service of Canada was formed in 1920 by public service professionals as a reaction against a job classification scheme.

Until 1944, wages and other terms and conditions of employment continued to be set unilaterally without negotiation or consultation with public sector unions. A strike by letter carriers in 1924 did nothing to change this legal regime—the government resolved the strike by announcing "bonuses" outside of the normal pay system, preserving a facade that there was no negotiation of wages.

In 1944, the government created the **National Joint Council** (NJC).[27] The NJC was based in part on the Whitley Council system then in place in the United Kingdom. Under the Whitley Council system, public service associations negotiated terms and conditions of employment and, if negotiations were unsuccessful, the disputes were referred to binding arbitration. The NJC did not go that far. The NJC was a council of two sides: employer and association. The NJC operated on the basis of consensus and consultation; there was no binding dispute resolution mechanism, so that the government retained control over the final outcome and could ignore or change the recommendations reached by the NJC. The NJC was also prohibited from dealing with compensation.

Despite these defects, the NJC was partially successful as a vehicle through which public servants could advance their interests. Through the NJC, public service associations won a reduction to a 5-day (40-hour) workweek, premiums for overtime pay, and dues deductions for members.

The NJC continues to exist to this day, despite the introduction of collective bargaining in 1967 (discussed below). The NJC is a council of public service unions and the various employers (including Treasury Board), tasked with addressing issues that ought to be dealt with similarly across the public service instead of permitting distinctions between bargaining units. While public service associations can (and have) opted out of various NJC Directives (as the agreements are called),[28] the NJC continues to deal with a number of issues outside of more regular collective bargaining. The NJC Directives, for example, set out rules for travel expenses, health-care plans, and the bilingualism bonus available to public servants.[29]

Collective Bargaining in the Federal Public Service: 1967–Present

Collective bargaining in the federal public service became a political issue in the 1960s. The Conservative government of John Diefenbaker permitted consultation on issues of pay for the first time in 1961, but then refused to implement a pay increase that had been decided upon through this consultation in 1963. In the subsequent election, the Liberal Party promised to introduce collective bargaining in the federal public service. When it was elected in 1965, it struck a committee to report on implementing collective bargaining in the federal public service. This committee prepared the so-called Heeney Report in 1965.[30] The government acted on most of the Heeney Report's recommendations, and introduced the Public Service Staff Relations Act[31] in 1967. Interestingly, one recommendation that was not acted upon was the Heeney Report's recommendation that strikes be prohibited in the federal public service. As a response to that recommendation, inside postal workers went on strike and, after resolving that strike, announced that

they would defy any prohibition against strikes in the future. This strike convinced the government that a total prohibition against strikes would be counterproductive: it would simply make strikes illegal for groups that were determined to strike regardless of what the law said. Therefore, the government decided not to ban strikes in the new Act.

The Public Service Staff Relations Act was amended in 1992[32] as part of an initiative called Public Service 2000. The Act was then repealed and replaced with a substantially similar statute called the Public Service Labour Relations Act in 2005 as part of the Public Service Modernization Act, which was in turn re-named the Federal Public Sector Labour Relations Act (FPSLRA) in 2017.[33] The FPSLRA was amended in 2013[34]; as of the date of publication, many of those amendments are in the process of being undone by the current federal government. Rather than explore in detail the historical evolution of these statutes, this chapter will attempt to provide a brief overview of the main features of the FPSLRA.

The FPSLRA is divided into two main parts. The first part deals with labour relations—the legal rules governing the relationship between unions and the employers in the federal public service. The second part deals with grievances—the method by which individual employees challenge certain decisions by the employer concerning their terms and conditions of employment.

The FPSLRA follows the standard Wagner Act model of labour relations that is common throughout Canada. The features of the Wagner Act model are as follows. A union may apply to become the certified bargaining agent on behalf of a group of employees called a bargaining unit. If the majority of employees in the bargaining unit wish to be represented by the union, then that union becomes the certified bargaining agent on behalf of the entire bargaining unit. This means that the union is the exclusive representative of the employees in the bargaining unit. The union and employer negotiate the terms of a collective agreement. If they are unable to reach an agreement, then the union may go on strike or the employer may lock out its employees to force the union to compromise until they reach an agreement. The union is also responsible for policing the collective agreement: any dispute with the employer may be grieved and then referred to a neutral arbitrator for resolution. Certain employees are excluded from this regime—typically managers and employees with duties that are confidential to the employer's labour relations strategies and decisions. Finally, the whole system is administered or regulated by a labour board—in the federal public service, this board is named the Federal Public Sector Labour Relations and Employment Board.

As stated above, the FPSLRA broadly follows the standard Wagner Act model. There are, however, some areas in which the FPSLRA departs from, or modifies, the normal legal rules that have developed in conjunction with the Wagner Act model. This chapter will set out four of those ways.

1. The Bargaining Unit

In a standard Wagner Act model, the bargaining unit comprises employees who share a community of interest. In some workplaces, this is an entire plant or workplace; in others, different crafts or jobs have their own bargaining unit.

When Parliament first introduced collective bargaining into the federal public service, it considered four possible alternatives. First, it considered simply applying the community of interest test—but rejected that alternative in order to avoid disputes between unions about the composition of each bargaining unit and therefore ensure an orderly transition to collective bargaining. It considered geographically based bargaining units—so that employees in a certain geographic region (province, city, or other location) would comprise a bargaining unit. It also considered a department-based bargaining unit, so that employees in different departments would constitute a bargaining unit. Parliament ended up rejecting these alternatives to ensure that federal public servants would be paid the same regardless of their department or location.[35]

Parliament adopted the fourth alternative and defined bargaining units on the basis of job classification. Each public service position has a corresponding classification depending upon the type of work performed. Bargaining units are determined by those classifications so that all (for example) auditors, veterinarians, or program administrators are in their own bargaining unit. This means that bargaining units in the federal public service are, for the most part, significantly larger than units in the private sector.

2. Scope of Bargaining

In the private sector, unions and employers are free to collectively bargain all issues concerning terms and conditions of employment, save for proposals

that are illegal in the sense that they violate a general law of Canada. The FPSLRA changes that approach and limits the topics that may be bargained. Section 113 of the FPSLRA states that a collective agreement may not alter any term or condition of employment if doing so would require an amendment to another statute, or if the term or condition is one established under the PSEA (i.e., dealing with appointments, layoffs, and political activities of public servants), the Public Service Superannuation Act (i.e., pensions), and the Government Employees Compensation Act (i.e., workers' compensation for workplace injuries).

This prohibition means that federal public service unions do not bargain pension-related issues. It also means that there are no seniority provisions in federal public service collective agreements—i.e., there are no provisions about laying off more junior workers before longer-service workers, and no provisions guaranteeing more senior workers first access to promotions. Some issues straddle the line between negotiable and non-negotiable. For example, the choice of which employees are laid off is non-negotiable, but the compensation paid to laid-off employees is negotiable.

3. Resolution of Bargaining Disputes

Bargaining disputes in Canada can be resolved in one of three ways: the union goes on strike, the employer locks out the employees, or the dispute is resolved by interest arbitration. Bargaining disputes in the federal public service are different.

First, nothing in the FPSLRA permits the employer to lock out its employees. Between the expiry of the last collective agreement and the start of the new collective agreement, the employer is prohibited from changing the terms and conditions of employment for its employees. This means no lockouts and no unilateral changes during bargaining.

Second, the right of unions to call a strike is limited in the federal public service by a corresponding obligation on the part of employees to continue to perform essential services. Essential services are those services that are necessary to preserve the safety and security of the public. Strikes in many Canadian jurisdictions—particularly in the public or broader public sectors—are limited by an obligation to continue to perform essential services. There are, broadly speaking, three different models for dealing with strikes and essential services:

1. *the "no strike" model*. Strikes are illegal and disputes are resolved by compulsory interest arbitration. This model is common for employees who perform extremely essential services, such as police officers and firefighters.
2. *the "unfettered strike" model*. There are no restrictions on strikes.
3. *the "designation model."* Strikes are permitted, but certain essential workers must remain at work during strikes to provide essential services to the public.[36]

The FPSLRA was, until 2013, the prototype of the designation model in Canada. Before commencing a strike, unions and employers had to enter into an essential-services agreement identifying the service that was essential, the level of service (which was determined exclusively by the employer), and the specific employees who had to remain at work to perform the essential service. In 2013, the government amended the FPSLRA so that it could unilaterally decide issues relating to essential services; the government in 2017, however, has indicated that it will be repealing that legislation and returning to the pre-2013 essential-services regime.

Third, until 2013 federal public service unions could choose whether bargaining disputes would be resolved by a strike or by binding interest arbitration.[37] Interest arbitration refers to a system whereby a neutral arbitrator decides the content of a collective agreement. In most systems the choice between strike and arbitration is determined by statute; the federal public service is unique in giving unions a choice between the two dispute resolution regimes. The trade-off, if you will, is that there are some limits on arbitration: an arbitrator may not make an award that affects the assignment of duties, classification of positions, or the organization of the public service.[38] When the FPSLRA was first enacted, the expectation was that most bargaining agents would elect arbitration instead of striking to resolve bargaining disputes. That has not turned out to be the case: partially as a result of the limits of topics that may be referred to arbitration, most bargaining

units have elected to strike instead of arbitrate their bargaining disputes.

Fourth and finally, the federal government has imposed legislated wage restraints during a number of periods, effectively suspending collective bargaining on wages for those periods. This includes the periods 1975–8 as part of the anti-inflation program,[39] 1982–3 with the "six and five" program,[40] 1991–7 with legislated wage freezes as a deficit-reduction measure,[41] and finally from 2006–11 as a response to the financial crisis of 2008.[42] This on-again, off-again treatment of collective bargaining has become a regular and unfortunate feature of collective bargaining in the federal public service.

4. Range of Employees Covered Permitted to Collectively Bargain

Fourth, the scope of coverage of collective bargaining is less than in unionized workplaces in the public and private sectors. The FPSLRA sets out a number of categories of workers who are not employees—i.e., are not covered by the Act for collective bargaining purposes.[43] For example, casual workers (those employed for less than 90 working days) are excluded. The FPSLRA also excludes managerial and confidential employees—as do all other collective bargaining statutes in Canada. The difference, however, is that the FPSLRA sets out a comprehensive list of categories of managerial and confidential employees that excludes a larger number of employees than in other workplaces. There is no federal public service equivalent to AMAPCEO, for example, which represents mid-level managers in the Ontario public service.[44]

Individual Disputes—The Grievance System

The dispute resolution mechanism for federal public servants is unique in Canada. Part II of the FPSLRA sets out a grievance procedure for federal public servants. All public servants, even executives and other employees who are not covered by a collective agreement, may grieve anything affecting their terms and conditions of employment—unless there is another avenue of redress set out in another statute except for the Canadian Human Rights Act. For example, if the employee's complaint is about his or her failure in a promotional exercise, the PSEA sets out a complaint procedure for those complaints—which in turn means that the employee may not file a grievance under the FPSLRA. Grievances are decided by the deputy head (i.e., deputy minister or equivalent) of the employee's department or separate agency.

Assuming that the grievance has been denied, there are two alternatives. Some grievances can be referred to adjudication—an arbitration system run by the Federal Public Sector Labour Relations and Employment Board. Other grievances may not be referred to adjudication; instead, a disappointed grievor must apply to the Federal Court for judicial review of the deputy head (or delegate's) decision. The rules about topics that may be referred to adjudication are also different for separate agencies than for the core public administration.

All employees may refer grievances about the following topics to adjudication:

- discipline resulting in termination of employment, a suspension, or a financial penalty (i.e., a fine); and
- grievances alleging a breach of the collective agreement.

Employees in the core public administration may refer the following additional topics to adjudication:

- demotion or termination for unsatisfactory performance;
- termination of employment for other reasons, except for layoffs or other dismissals under the PSEA; and
- deployments without the grievor's consent.

Finally, some separate agencies have been designated for special treatment under the FPSLRA.[45] Employees in those separate agencies may refer grievances about non-disciplinary termination of employment to adjudication.

The final eccentricity of the grievance system in the federal public service is that it is mandatory. Regardless of whether the grievance may be referred to adjudication, an employee must use the grievance system to complain about anything affecting his or her terms and conditions of employment. In other words, public servants cannot sue their employer in civil court, despite the fact that their grievance

may be finally decided by the deputy head of the department who did the thing being grieved in the first place.[46]

Topic Three: Staffing

Public services throughout the world have wrestled with the problem of the best way to hire public servants. The problem is typically expressed in terms of a tension between two schools of thought. The first school of thought, sometimes referred to as the Jacksonian school (after US President Andrew Jackson, who once famously said "if you have a job in your department that can't be done by a Democrat, abolish the job"), is that public servants should be hired based on their political affiliation. This way, elected officials can be certain that public servants will support their policies and fully implement their goals. The second school of thought, championed by US President Woodrow Wilson, is that public servants should be hired solely on the basis of merit. Since the early twentieth century, the Canadian federal public service has followed the second, merit-based school.

Appointments, deployments (i.e. permanent transfers to a position with the same classification), and layoffs in the core public administration and some smaller separate agencies[47] are regulated through the PSEA. The PSEA creates an entity known as the Public Service Commission of Canada (PSC). The PSC is responsible for making all appointments to the core public administration and a small number of separate agencies. The PSC also has the power to investigate and determine whether other separate agencies are appointing employees in accordance with merit. The PSC makes appointments on the request of the deputy head of a department, who in turn may delegate this power down to managers to request that the PSC make an appointment.

Unlike in the private sector, an appointment by the PSC is a legal precondition for a person to become an employee in the federal public service. For other employers, the question of whether a person is an employee is a question of fact instead of formality: persons are employees if they are sufficiently dependent and under the control of their employer, regardless of whether the employer has attempted to characterize them as contractors instead of as employees.[48] In the federal public service, by contrast, there is no such thing as a de facto public servant. Therefore, the thousands of contractors who work exclusively on a full-time basis for the federal government are not considered public servants despite the fact that they are dependent upon, and under the control of, the federal government.[49]

The pole star of the PSEA is the **merit principle**. The idea of merit evolved subtly in the 2005 changes to the PSEA. Prior to 2005, merit was an absolute value: the PSEA required that the Public Service Commission establish a list of all qualified candidates for a position (called an eligibility list) *and* rank those candidates in order of merit. The PSC would then appoint the most qualified candidate to the position; if he or she declined (or left the position shortly thereafter), the PSC would appoint the next most qualified candidate, and so on. The PSEA was amended in 2005 to change merit from an absolute to a relative value. The term *merit* is now defined as follows:

> **31(2)** An appointment is made on the basis of merit when
> **(a)** the Commission is satisfied that the person to be appointed meets the essential qualifications for the work to be performed, as established by the deputy head, including official language proficiency; and
> **(b)** the Commission has regard to
> **(i)** any additional qualifications that the deputy head may consider to be an asset for the work to be performed, or for the organization, currently or in the future,
> **(ii)** any current or future operational requirements of the organization that may be identified by the deputy head, and
> **(iii)** any current or future needs of the organization that may be identified by the deputy head.

In other words, an appointment is consistent with the merit principle so long as the candidate is qualified for the position. The deputy head (who, again, delegates this power to managers) sets two types of qualifications: essential qualifications and asset qualifications. The deputy head then assesses the candidates against those qualifications,[50] and decides which of the candidates meet the essential qualifications of the position. After having done so, the deputy head may

select among any of the qualified candidates on the basis of the asset qualifications, and the PSC appoints the selected candidate. Similar rules apply for layoffs: when there is a layoff among a group of similar positions, the selection of the employee being laid off must be in accordance with merit.

The PSEA contains a mechanism for unsuccessful candidates to file a complaint about the results of an appointment or layoff process—either to the Federal Public Sector Labour Relations and Employment Board, or to the PSC, depending on the nature of the appointment. The threshold for a successful complaint, however, is that the complainant prove that the appointment was the result of an abuse of authority. This is a difficult threshold to meet. Abuse of authority requires more than simply errors or omissions. The term *abuse of authority* means one of five categories of abuse:

1. when the decision-maker exercises his/her/its discretion with an improper intention in mind (including acting for an unauthorized purpose, in bad faith, or on irrelevant considerations);
2. when a decision-maker acts on inadequate material (including where there is no evidence, or without considering relevant matters);
3. when there is an improper result (including unreasonable, discriminatory, or retroactive administrative actions);
4. when the decision-maker exercises discretion on an erroneous view of the law; and
5. when a delegate refuses to exercise his/her/its discretion by adopting a policy which fetters the ability to consider individual cases with an open mind.[51]

If the Board concludes that there has been an abuse of authority, the Board may not simply appoint the complainant to the position. The PSEA prohibits the Board from ordering the PSC to make an appointment or conduct a new appointment process. Instead, the Board can order the PSC (or deputy head, as the case may be) to revoke the appointment and take other corrective actions other than an appointment. If the Board revokes an appointment, the PSC may simply appoint that person to another position if he or she meets the essential qualifications for that new position.

Finally, the PSEA states that appointments must be made on the basis of merit and must be free from political influence. The PSC hears all complaints about alleged political influence in a staffing process. Since 2005, the PSC has never found political influence in a staffing process.[52]

In addition to protecting merit, the PSEA sets out some other rules respecting staffing in the public service, including:

- setting out the probationary periods for employees—typically 12 months;
- requiring that the PSC (in most cases, actually the department) choose between advertised and non-advertised job competitions, and that this decision not be an abuse of authority;
- requiring that the PSC (or its delegate) assess candidates in the official language of their choice;
- creating priorities for employment. The PSEA sets out various categories of candidates who must be appointed in priority to other candidates. For example, employees who have been laid off in the past 12 months have a priority over other candidates for the same position—in other words, if they meet the essential qualifications of the position, they are appointed even if other candidates are more qualified. The priority lists are in turn ranked, so that certain categories of priority candidates are appointed ahead of other priority candidates; and
- giving unsuccessful candidates a right to informal discussion.

The larger separate agencies appoint their own employees, instead of the PSC. Public servants employed in those separate agencies are eligible for positions that are open only to persons employed in the public service. Some of those employees are also eligible to be deployed (i.e., transferred laterally) throughout the public service, depending upon the wording of the legislation creating those separate agencies.[53]

Topic Four: Legislative Protection of Fundamental Freedoms of Public Servants

Public servants are also citizens or residents of Canada. Like all people in Canada, they have certain fundamental rights and freedoms protected

by the Charter of Rights and Freedoms. Public servants also have various rights and freedoms protected or limited by legislation. This topic will provide a brief overview of the most important legislative provisions impacting the rights and freedoms of public servants.

Canadian Human Rights Act—Freedom from Discrimination

The Canadian Human Rights Act[54] prohibits discrimination on the basis of eleven separate grounds.[55] This includes a prohibition against refusing the employ or continue to employ any individual, or to differentiate adversely against an employee in the course of employment, on a prohibited ground of discrimination.[56] The Canadian Human Rights Act applies to all federally regulated employees, including all federal public servants.

A complete discussion of human rights law is beyond the scope of this chapter. However, as a brief overview, there are four types or categories of discrimination:

1. *Direct discrimination*. This is a rule or practice that is discriminatory on its face, such as a rule that only men need apply for a particular job.
2. *Indirect discrimination*. This is a rule or practice that is not discriminatory on its face, but has a disproportionate impact upon an identifiable group on the basis of a prohibited ground of discrimination. For example, a rule that a person be over six feet tall to apply for a job is neutral on its face, but has a disproportionate impact upon women.
3. *Systemic discrimination*. This is a pattern of behaviour, policies, or practices that are part of the structure of an organization and that create or perpetuate disadvantage on an enumerated ground.
4. *Harassment*. Harassment is comments or actions based on an enumerated ground that are unwelcome or should be known to be unwelcome. They may include humiliating or annoying conduct. Harassment requires a course of conduct, which means that a pattern of behaviour or more than one incident is usually required for a claim to be made to the Tribunal. However, a single significant incident may be offensive enough to be considered harassment.

A practice is not discriminatory if it is based upon a bona fide occupational requirement. To demonstrate that a policy or practice is a bona fide occupational requirement, an employer must demonstrate three things:

1. that it adopted the standard for a purpose rationally connected to the performance of the job;
2. that it adopted the standard in good faith; and
3. that the standard is reasonably necessary to accomplish its purpose. To show that the standard is reasonably necessary, the employer must demonstrate that it is impossible to accommodate the individual employees sharing the characteristics of the claimant without suffering undue hardship. This third criteria is often referred to as the "duty to accommodate."[57]

As mentioned above, public servants are protected by the Canadian Human Rights Act. However, the process they must follow to protect their rights is different from most other employees. The grievance process established under the FPSLRA permits an employee to grieve, and then refer to adjudication, an allegation that the employer has breached the Canadian Human Rights Act. The Canadian Human Rights Act has a separate complaints process, whereby a complainant may file a complaint with the Canadian Human Rights Commission, who will investigate the complaint and decide whether to refer the complaint to the Canadian Human Rights Tribunal for a full hearing and determination. The Canadian Human Rights Commission has the discretion, however, to refuse to investigate a complaint when the complaint could be more appropriately dealt with according to another procedure established by an Act of Parliament. Since the grievance procedure is established by an Act of Parliament, the Canadian Human Rights Commission will refuse to investigate most complaints by public servants and require them to pursue those complaints using the grievance process. The Canadian Human Rights Commission will still, on occasion, investigate a complaint by a public servant if it concludes that the grievance procedure is inappropriate for that complaint, but such cases are rare.

Pay Equity

Pay equity is a broad concept that refers to ensuring that rates of pay are not discriminatory, typically on the basis of gender. There are two types of protection of pay equity. First, there is equal pay protection: an employer may not establish two pay rates for the same job (historically, a men's rate and a women's rate). Second, there is the broader concept of pay equity, namely that it is a discriminatory practice to establish or maintain differences in wages between male and female employees who are performing work of equal value.

The Canadian Human Rights Act protects both the narrow and broad forms of pay equity. Section 11 of the Canadian Human Rights Act states that it is a discriminatory practice to "maintain differences in wages between male and female employees employed in the same establishment who are performing work of equal value." The Canadian Human Rights Commission has also published regulations called the *Equal Wages Guidelines*[58] which, as the name suggests, provides guidelines for how to assess pay equity and ensure equal pay for work of equal value.

Pay equity has been the subject of decades of legal battles in the federal public service, these battles being fought in the Canadian Human Rights Commission, the Canadian Human Rights Tribunal, the Federal Court, and the Federal Court of Appeal. The largest pay equity complaint was filed by the Public Service Alliance of Canada on behalf of clerical workers in the core public administration in 1984; it was finally resolved in 1999, requiring Treasury Board to fix pay rates going forward and pay out retroactive pay back to March 8, 1985—the date a joint pay equity study confirmed the existence of pay discrimination.[59] Since this only covered employees of Treasury Board, other pay equity complaints continued well after 1999 on behalf of employees in separate agencies or employees in other occupation groups.

Unlike other discriminatory practices, pay equity complaints cannot be addressed using the grievance process.

Political Activity

Restrictions on political activities by public servants have existed since 1878. At the time of Confederation, there were no restrictions on partisan political activities by public servants. In 1878, Parliament enacted An Act further securing the Independence of Parliament. That 1878 Act prohibited certain categories of people from sitting as a Member of the House of Commons, including government office-holders (i.e. public servants).

In 1968, as discussed above, Parliament enacted the PSEA. The 1968 version of the PSEA permitted public servants below the rank of deputy head to run for political office (federally, provincially, municipally, or otherwise), provided they obtained permission from the Public Service Commission. The PSEA also prohibited public servants from engaging in work for, or on behalf of, a political party. Public servants could donate money and attend political meetings—but could not go further.

After the advent of the Canadian Charter of Rights and Freedoms in 1985, there was considerable concern that the complete prohibition against political activity violated public servants' right to freedom of expression. As a result, several public servants challenged the constitutionality of the ban on political activity. In a 1991 decision, the Supreme Court of Canada struck down the provisions of the PSEA prohibiting political activity by public servants.[60]

Parliament took no action until it repealed and replaced the old PSEA with the new PSEA, effective December 31, 2005. Among other changes, Parliament overhauled the restrictions on public servants' political activities.

The current PSEA[61] distinguishes between political activity and running as a candidate in an election. The PSEA permits public servants below the rank of deputy head to engage in political activity, so long as that activity does not impair or is not perceived as impairing the public servant's ability to perform his or her duties in a politically impartial manner. The Public Service Commission then has the power to investigate any allegations that a public servant has engaged in an impermissible level of political activities.

The PSEA also sets out a regime for public servants who wish to stand as a candidate for a federal, provincial, territorial, or municipal election. A public servant who wishes to be a candidate, or seek nomination to be a candidate on behalf of a political party, must obtain permission from the PSC.

During the federal, provincial, or territorial election period, a public servant must take an unpaid leave of absence; the PSC may also order that the public servant take a leave of absence prior to the election period. There are also regulations[62] setting out how an employee must apply for permission to run as a candidate and, if necessary, a leave of absence. If the public servant is elected in a federal, provincial, or territorial election, he or she immediately ceases to be an employee on the day he or she is declared elected. For municipal elections, the PSC may require a public servant to take an unpaid leave of absence during the election or if elected. In any election, the PSC may grant permission to run as a candidate only if it is satisfied that the public servant's ability to perform his or her duties in a politically impartial manner will not be impaired or perceived to be impaired in light of the nature of the election, the nature of the employee's duties, and the level and visibility of the employee's position.

Public Criticism and Whistle-Blowing

Public servants, like all employees, owe their employer a duty of fidelity and loyalty. This duty of loyalty is owed to the Government of Canada, not the political party in power at any given time. This duty also limits a federal public servant's right to free speech. As a general principle, public servants have the right to criticize the government; however, their criticism is limited by their duty of loyalty. The degree of restraint expected from public servants depends on the position they hold, the visibility of their position, and the nature of the criticism. For example, measured criticism of government policies that jeopardize the life, health, or safety of Canadians is permitted; sustained and highly visible attacks on major government policies are not permitted. Further, the more senior the public servant, the less scope they have for criticism; for example, a data-entry clerk could attend a protest dealing with childcare funding whereas a deputy minister could not.

Disclosure of government wrongdoing—typically referred to as **whistle-blowing**—is protected by legislation in the federal public service. The **Public Servants Disclosure Protection Act**[63] protects public servants who make a protected disclosure of wrongdoing. A protected disclosure is a good faith disclosure made in one of four ways:

1. in accordance with that Act. The Act sets out three stages or types of disclosure:
   a. an internal disclosure made in accordance with procedures established by the employer;
   b. disclosure directly to the Public Sector Integrity Commissioner, who will investigate the alleged wrongdoing and make a report to the chief executive of an organization if it finds that wrongdoing has occurred and then table that report, along with the chief executive's response, in both Houses of Parliament within 60 days; and
   c. disclosure directly to the public. A public servant may only make a public disclosure when there is insufficient time to disclose the matter internally or to the Commissioner, and when the disclosure concerns an act or omission that constitutes a serious offence under a statute or constitutes an imminent risk of a substantial and specific danger to the life, health, and safety of persons or the environment;
2. in the course of a parliamentary proceeding;
3. in the course of another legal proceeding; and
4. when otherwise lawfully required.

The Act also defines *wrongdoing* as seven specific types of actions, including the broad phrase "gross mismanagement in the public sector."

Finally, the Act protects public servants against reprisals for having made a protected disclosure. A reprisal is a disciplinary measure, a demotion, a termination of employment, a measure that adversely affects employment or working conditions, or a threat to do any one of those things. A public servant may complain about a reprisal to the Public Sector Integrity Commissioner, who investigates and decides whether to refer the complaint to the Public Servants Disclosure Protection Tribunal. The Tribunal then holds a hearing, decides whether there has been a reprisal, and if so corrects the reprisal. The Tribunal can also order a payment of up to $10,000 for pain and suffering experienced as a result of the reprisal.

The Public Servants Disclosure Protection Act remains controversial. The Auditor General, who is responsible for investigating allegations of wrongdoing by the Public Sector Integrity Commissioner,

found that each of the first two Commissioners were themselves guilty of wrongdoing under the Act for, among other things, a reluctance to investigate wrongdoing and dilatory investigations.[64] There are also some structural weaknesses with the Public Servants Disclosure Protection Act. For example, the Commissioner may not deal with a disclosure of wrongdoing if a person or body acting under another Act of Parliament is dealing with the subject matter of the disclosure[65]—even if they are dealing with it poorly. The fact that wrongdoing is defined, instead of being an open list, has also been criticized.[66] As a result of these factors, there is a sense of frustration among many public servants or government critics that the Public Servants Disclosure Protection Act does not go far enough to promote a culture of accountability within the federal public service.

Official Languages

A federal public servant has various rights in respect of the use of her or his chosen official language (i.e., English or French). Those rights are predominantly set out in the Official Languages Act.[67] That Act prescribes that English and French are the languages of work in all federal institutions, and all employees have the right to use either official language in accordance with that Act.[68] More specifically, the Act prescribes several regions of the country—including the National Capital Region—where employees have the right to receive information and services at work in either official language.[69]

As a result of this statutory right, Treasury Board has enacted a policy whereby all executives who supervise bilingual positions or play a significant role in the management of the institution must be functionally bilingual.[70] Many other positions also require that the employee be functionally bilingual. To reward bilingual employees, there is an annual bilingualism bonus of $800 for employees who occupy bilingual positions.

The Official Languages Act is enforced by the Official Languages Commissioner. Any person may make a complaint to the Official Languages Commissioner if her or his right to receive government services in the official language of her or his choice has been violated. The Commissioner investigates the complaint and makes a report to the President of Treasury Board and the deputy head of the institution concerned. If no action is taken, the Commissioner may transmit the report to the Governor-in-Council, and then to Parliament. Finally, the complainant or the Commissioner has the right to proceed to Federal Court to obtain a formal court order requiring the institution to remedy the breach of the Official Languages Act.

Privacy

Finally, federal public servants have some rights to privacy. The Privacy Act[71] limits the government's right to collect, use, and disclose personal information about an individual—including public servants—without that person's consent. The term *personal information* has a lengthy definition in the Privacy Act, and that definition has in turn been the subject of numerous court cases. A complete discussion of the term *personal information* is beyond the scope of this chapter. It is sufficient to note that personal information does not include information that relates to the positions or functions of a public servant—such as the business address, salary range, or personal views of the individual given in the course of employment. In addition to the protection against disclosure of personal information, public servants (like all Canadian citizens and permanent residents) also have a right to access personal information about themselves held by the government.[72]

The Privacy Act is enforced by the Privacy Commissioner. If a government institution has improperly disclosed personal information, or refused access to personal information, the affected individual may file a complaint with the Privacy Commissioner. The Privacy Commissioner investigates the complaint and makes a finding about whether or not the Privacy Act has been violated. If the complaint concerns a right of access to personal information, the complainant or the Privacy Commissioner may proceed to Federal Court to obtain a court order requiring the government institution to provide a copy of that personal information to the complainant.

Topic Five: Pensions

One of the significant benefits of being a public servant is that public servants receive a pension upon retirement. The pension for federal public servants

is a statutory pension plan established by the Public Service Superannuation Act[73]—meaning that the terms of the pension are not negotiated individually or with a union. A full description of the federal public service pension is well beyond the scope of this chapter. In short, however, the pension provided under the Public Service Superannuation Act is 2 per cent for each year of pensionable service (to a maximum of 35 years) multiplied by the retiree's average salary over the best five consecutive years of service.

The Public Service Superannuation Act divides public servants into two categories: Group 1 and Group 2. Group 1 are all those hired before January 1, 2013; Group 2 are all those hired after January 1, 2013. The difference between the two groups is the date on which they are eligible for a full retirement pension. Group 1 employees can retire with an unreduced pension at age 60, or age 55 with 30 years of service; they can take "early retirement" starting at age 50, but with a penalty of 5 per cent for each year they are short from the full retirement age. Group 2 employees have to wait an extra five years for full retirement (i.e., at age 65, or age 60 with 30 years of service, or early retirement starting at age 55).

Public servants also receive a death benefit of twice their salary if they die before the age of 65, and then a steadily-reduced death benefit if they die before the age of 75. Public servants are also eligible for a disability pension if they must retire for medical reasons; essentially, they receive the basic pension with no reduction for retiring early.

Finally, there are a myriad of technical rules about buying back pensionable service with other employers or with the federal public service if there has been a break in service, and rules about other issues for that matter. The Public Service Superannuation Act recognizes that pensions are complicated and even the experts can get it wrong; therefore, there are provisions allowing public servants to correct mistaken decisions or elections when they have been given erroneous advice.

Topic Six: Non-Traditional Public Servants

The five topics discussed above relate mainly to traditional public servants. There are a number of what may be called non-traditional public servants—in other words, people who work within the federal government in jobs that take them outside of the normal rules applicable to public servants. Those non-traditional public servants are subject to distinct laws and statutes unique to their category.

Military Personnel

Military personnel—i.e., members of the Canadian Armed Forces—are governed by the National Defence Act.[74] Their terms and conditions of service, system of internal discipline, and even criminal justice system are set out entirely in that statute or in the orders, regulations, and policies determined by the appropriate level in the military chain of command. Members of the Canadian Armed Forces have the right to grieve issues concerning their terms and conditions of service, using an internal grievance system culminating in a decision by the Chief of Defence Staff. Finally, military personnel have a different pension from the rest of the public service, permitting earlier retirement in recognition of the serious physical toll of military service.[75]

RCMP Members

Police officers are typically treated differently from other public servants throughout Canada. Likewise, the Royal Canadian Mounted Police are treated differently from other federal public servants. Their terms and conditions of service are established by Treasury Board under the auspices of the Royal Canadian Mounted Police Act. RCMP members have a distinct disciplinary system, as well as a grievance system culminating in a decision by the Commissioner of the RCMP (or a delegate of the Commissioner). RCMP members also have a different pension from the rest of the public service that permits earlier retirement, again in recognition of the physical toll of police work.[76]

Until very recently, RCMP members were not permitted to join an employee association or attempt to engage in collective bargaining. In 2015, the Supreme Court of Canada struck down that prohibition against collective bargaining as unconstitutional.[77] As of the date of publication, members of the RCMP have not yet certified a bargaining agent.

Parliamentary Employees

There are a number of employees employed directly by the Senate, House of Commons, Library of Parliament, Senate Ethics Officer, the Conflict of Interest and Ethics Commissioner, and the Parliamentary Protective Service. These employees are governed by the Parliamentary Employment and Staff Relations Act (PESRA).[78] PESRA is very similar to the FPSLRA: it sets out a framework for collective bargaining similar to the FPSLRA, and it also contains a grievance process for all of these parliamentary employees.

There is no equivalent to the PSEA for parliamentary employees. This means that there is no statutory merit principle in place in Parliament: any rules about competitions can be negotiated in collective agreements, or are set out by policies enacted by the five parliamentary employers.

Parliamentary employees are employed directly by those five employers. Individual Members of Parliament or Senators also have a budget with which to hire employees. Those employees who are hired directly by Members of Parliament or Senators are not governed by PESRA—and in fact are not governed by any statute.

Finally, there is a category of employees referred to as "ministerial staff," i.e., those people employed directly by a minister or the Leader of the Opposition. The PSEA permits ministers to appoint their staff; it also states that ministerial staff with at least three consecutive years' service may participate in advertised internal (i.e., only open to public servants) competitions for the period of one-year after they ceased to be a ministerial staff.[79] Otherwise, ministerial staff are statutory orphans[80] without any legislative protection, subject to terms and conditions set unilaterally by Treasury Board.

Governor-in-Council Appointments

A Governor-in-Council appointment is an appointment made by the Governor General on the advice of the Queen's Privy Council of Canada, represented by cabinet. There are approximately 3500 Governor-in-Council appointments made by the federal government. Of those, there are approximately 1000 judges, 100 heads of foreign missions (including ambassadors and high commissioners), and some 500 full-time and 1900 part-time appointments to a wide array of agencies, boards, commissions, Crown corporations, and government departments. Deputy ministers, heads of agencies, and the CEOs and directors of Crown corporations are all Governor-in-Council appointees.

There are, broadly speaking, two types of Governor-in-Council appointments: appointments at pleasure and appointments for a fixed term during good behaviour. An appointment at pleasure can be cancelled at any time, subject only to a requirement that the office-holder be given relatively modest procedural rights to respond to any allegation of wrongdoing if this wrongdoing is the reason for terminating the appointment. An appointment on good behaviour, by contrast, may only be terminated for cause or incapacity on the part of the office holder.

The process for appointing these office holders has always had an element of political patronage—or, to be more kind, has always involved a political judgment. Several governments have promised reform while in opposition, only to abandon those efforts once elected. The Conservative government, for example, created a Public Appointments Commission in 2006 to put in place a more merit-based appointments process; however, its first nominee for commissioner was rejected in 2006 during a minority Parliament, and it never nominated a second commissioner—quietly abolishing the office in 2012. The Liberal government elected in 2015 has implemented what it calls a new approach to Governor-in-Council appointments, making a commitment to a more inclusive and merit-based appointment process. This was simply announced as a policy change, and there are no legal rules requiring a truly neutral appointment process.

Finally, Governor-in-Council appointees are bound by the Conflict of Interest Act[81] to avoid conflicts of interest during their period of office and for one year after their last day in office.

Important Terms and Concepts

Crown corporations
departmental corporations
merit principle
National Joint Council
Public Servants Disclosure Protection Act (PSDPA)
Treasury Board
whistle-blowing

Study Questions

1. What is the role of the Treasury Board in the federal public service?
2. What are the important differences between collective bargaining in the private and federal public sectors?
3. What is the merit principle and how is it protected?
4. What sorts of political activities are permissible for public servants?
5. What are some of the fundamental rights and freedoms of public servants that are protected by legislation?

Notes

1 The Crown has a very limited number of prerogatives unsupported by legislation, such as issuing passports and conferring honours.
2 Financial Administration Act, RSC 1985, c F-11.
3 An Act for improving the organization and increasing the efficiency of the Civil Service of Canada, (UK), 1857, 20 Vict. c 24. This was the forerunner of the Public Service Employment Act, SC 2003, c 22, ss 12, 13.
4 [1999] 3 S.C.R. 199.
5 *Vaughan v. Canada*, 2005 SCC 11 at para 1: "The terms and conditions of employment of the federal government's quarter of a million current workers are set out in statutes, collective agreements, Treasury Board directives, regulations, ministerial orders, and other documents that consume bookshelves of loose-leaf binders."
6 See *Babcock et al. v. Attorney General of Canada*, 2005 BCSC 513 and *Peck* v. *Parks Canada*, 2009 FC 686 among other cases.
7 These four principles are paraphrased from the Federal Court of Appeal decision in *Gingras v. Canada*, [1994] 2 F.C. 734.
8 http://www.tbs-sct.gc.ca/psm-fpfm/modernizing-modernisation/stats/ssen-ane-eng.asp. In case you were wondering, this means that 0.7 per cent of Canadian citizens are employed in the federal public service, or 1.4 per cent of Canadians in active employment.
9 Federal Public Sector Labour Relations Act, S.C. 2003, c. 22, s. 2, s. 111.
10 Answering the question "*quis auditoris, ipsos auditoris.*"
11 FPSLRA, s. 112.
12 Record of Cabinet Decision, November 30, 1967. This instrument is the delegation instrument contemplated by s. 11.2 of the Financial Administration Act.
13 This requirement to seek a Treasury Board "mandate" is also sometimes set out in statute: see Canada Revenue Agency Act, S.C. 1999, c. 17, s. 58.
14 See, for example, National Research Council Act, R.S.C. 1985, c. N-15, s. 5(g) and the National Capital Act, R.S.C 1985, c. N-4, s. 8(3).
15 See, for example, the Canadian Food Inspection Agency Act, S.C. 1997, c. 6, s. 13(2).
16 Canada Revenue Agency Act, SC 1999, c-17, s 51(1)(d).
17 Public Service Rearrangement and Transfer of Duties Act, RSC 1985, c P-34.
18 The Financial Administration Act includes a departmental corporation in the definition of the term *department*: s. 2(1) "department" paragraph (d).
19 Financial Administration Act, s. 7(1)(c) and (d).
20 Financial Administration Act, s. 83.
21 Financial Administration Act, s. 109.
22 Financial Administration Act, s. 105.
23 Financial Administration Act, s. 123(1), (5). A small number of Crown corporations listed in Part II of Schedule III to the Act are exempt from this requirement.
24 Financial Administration Act, s. 124(1), (8).
25 Financial Administration Act, s. 132(3).
26 Canada Labour Code, RSC 1985, c L-2.
27 The NJC was created by Order in Council P.C. 3676, 16 May 1944. It still exists, as amended by various Orders in Council: P.C. 1966–37/2106 of November 10, 1966; P.C. 1980–2413 of September 5, 1980; P.C. 1981–2443 of September 3, 1981; P.C 1987–884 of April 30, 1987; and P.C. 1994–2/752 of May 5, 1994.
28 The NJC Directive on "work force adjustment" (i.e., layoffs), in particular, has been modified in a number of collective agreements.
29 A complete list of NJC Directives is available on its website; http://www.njc-cnm.gc.ca/directive/index.php?lang=eng. For a more thorough discussion of the National Joint Council, see Richard P. Chaykowski, "Advancing Public-Sector Labour-Management Relations through Consultation: The Role of the National Joint Council of the Public Service of Canada" in Bruce Kaufman & Daphne Gottleib Taras, eds., *Nonunion Employee Representation* (Armonk, NY: M.E. Sharpe, 2000) 328; and Robert Vaison, "Collective Bargaining in the Federal Public Service: The Achievement of a Milestone in Personal Relations" in Barbara W. Carroll et al., eds., *Classic Readings in Canadian*

Public Administration (Toronto: Oxford University Press, 2005) at 197. Vaison's article was originally published in 1969.

30 Canada, *Report of the Preparatory Committee on Collective Bargaining in the Public Service* (Ottawa: Queen's Printer, 1965).

31 SC 1966–67, c 72.

32 Public Service Reform Act, SC 1992, c 54.

33 SC 2003, c 22.

34 SC 2013, c 40.

35 The federal public service does have some extra allowances for isolated locations, and certain Toronto employees are paid more than their colleagues in other locations, but generally pay remains constant across Canada.

36 For a more detailed discussion of these three models, see B. Adell, M. Grant, & A. Ponak, *Strikes in Essential Services* (Kingston: IRC Press, 2001).

37 Again, the government elected in 2015 has indicated that it is going to repeal the 2013 changes and revert to the pre-2013 version of the FPSLRA on this point.

38 FPSLRA, s 150.

39 Anti-Inflation Act, SC 1975, c 75 limited wage increases to 10 per cent, 8 per cent, and 6 per cent in those three years – below the prevailing rate of inflation.

40 Public Sector Compensation Restraint Act, SC 1980–1983, c 122, limiting wage increases to 6 per cent and 5 per cent for those years.

41 The Public Sector Compensation Act, SC 1991, c-30 imposed a 2-year wage freeze, which was then extended to 1995 by the Government Expenditure Restraint Act, SC 1993, c-13 and extended again by the Budget Implementation Act, 1994, SC 1994, c-17 to 1997. Arbitration was suspended until 2001 in a further attempt to keep wages down.

42 Expenditure Restraint Act, SC 2009 c-2, s 393. This Act legislated maximum wage increases of 1.5 per cent for the 2008–9 through 2010–11 fiscal years. It also retroactively legislated maximum wage increases for the 2006–7 and 2007–8 fiscal years for those bargaining agents that were still bargaining for those periods.

43 The full list is in the definition of "employee" in s. 2 of the FPSLRA.

44 See Crown Employees Collective Bargaining Act, 1993, SO 1993, c 38, ss 22–24.

45 At the time of publication, there are only two designated separate agencies: the Canadian Food Inspection Agency and the Canada Revenue Agency.

46 The Supreme Court of Canada concluded that there was nothing unfair about this system in *Vaughan v. Canada*, 2005 SCC 11.

47 As of the time of publication, there are five separate agencies where the PSC has the power to make appointments: the Financial Consumer Agency of Canada; Indian Oil and Gas Canada; the National Energy Board; the Correctional Investigator of Canada; and the Office of the Superintendent of Financial Institutions Canada.

48 See, for example, *McCormick v. Fasken Martineau DuMoulin LLP*, 2014 SCC 39.

49 The Supreme Court of Canada established this principle in *Canada (Attorney General) v. Public Service Alliance of Canada*, [1991] 1 SCR 614.

50 Typically this assessment is done by a group of managers commonly referred to as a "selection board."

51 *Tibbs v. Canada (National Defence)*, 2006 PSST 8.

52 The PSC has only investigated two such complaints; neither complaint was founded.

53 The Canada Revenue Agency Act, SC 1999, c 17, s 55, for example, states explicitly that employees of the Canada Revenue Agency have mobility rights within those parts of the public service governed by the PSEA, and vice versa.

54 Canadian Human Rights Act, RSC 1985, c H-6.

55 Those grounds are: race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability, and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered. Canadian Human Rights Act, RSC 1985, c H-6, s 3(1).

56 Canadian Human Rights Act, RSC 1985, c H-6, s 7.

57 *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 SCR 3.

58 *Equal Wages Guidelines, 1986*, SOR/86-1082

59 See *Canada (Attorney General) v. Public Service Alliance of Canada* (1999), [2000] 1 FC 146 for a Federal Court decision affirming the finding of discriminatory pay.

60 *Osborne v. Canada (Treasury Board)*, [1991] 2 SCR 69.

61 These provisions of the PSEA apply in the core public administration, and also apply to many separate agencies, including the Canada Revenue Agency and Parks Canada.

62 *Political Activities Regulations*, SOR/2005-373.

63 SC 2005, c 46.

64 *Report of the Auditor General of Canada to the House of Commons—Public Sector Integrity Commissioner of Canada*, December 2010, online: http://www.oag-bvg.gc.ca/internet/docs/parl_oag_201012_e_34448.pdf and *Report of the Auditor General of Canada under the Public Servants Disclosure Protection Act—Office of the Public Sector Integrity Commissioner of Canada*, April 2014, online: http://www.oag-bvg.gc.ca/internet/docs/parl_otp_201404_e_39215.pdf.

65 Public Servants Disclosure Protection Act, SC 2005, c 46, s 23(1).

66 Commission of Inquiry into the Sponsorship Program and Advertising Activities *Restoring Accountability: Recommendations* (Ottawa: Commission of Inquiry into the Sponsorship Program and Advertising Activities, 2006) at 186 [the Gomery Report].

67 Official Languages Act, RSC 1985, c 31 (4th Supp).

68 Official Languages Act, RSC 1985, c 31 (4th Supp) s 34.

69 Currently, those regions are the National Capital Region, New Brunswick, parts of Montreal, parts of Quebec, and parts of Eastern and Northern Ontario: see Treasury Board and Public Service Commission Circular No. 1977-46 of September 30, 1977, in Annex B of the part entitled "*Official Languages in the Public Service of Canada: A Statement of Policies.*"

70 Treasury Board, *Directive on Official Languages for People Management*, November 19, 2012, online: https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=26168.

71 Privacy Act, RSC 1985, c P-21.

72 Privacy Act, RSC 1985, c P-21, s 12.

73 Public Service Superannuation Act, RSC 1985, c P-36.

74 National Defence Act, RSC 1985, c N-5.

75 Canadian Forces Superannuation Act, RSC 1985, c C-17.

76 Royal Canadian Mounted Police Superannuation Act, RSC 1985, c R-11.

77 *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1.

78 Parliamentary Employment and Staff Relations Act, RSC 1985, c 33 (2nd Supp).

79 Public Service Employment Act, SC 2003, c 22, ss 12, 13, s 35.2. Parliamentary employees have a similar right.

80 L. Benoit, "Ministerial Staff: the Life and Times of Parliament's Statutory Orphans" in *Restoring Accountability: Research Studies Vol. 1* (Ottawa: Commission of Inquiry into the Sponsorship Program and Advertising Activities, 2005).

81 Conflict of Interest Act, SC 2006, c 9, s 2.

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Adaptability, Accountability, and Sustainability

Intergovernmental Fiscal Arrangements in Canada

William B.P. Robson and Alexandre Laurin

Chapter Overview

This chapter is a comprehensive overview of most fiscal arrangements between Canada's federal and provincial governments. It describes the history surrounding the current division of taxing and spending powers and various intergovernmental transfers. It pays particular attention to the justifications that have been advanced in federalist and public economics literature to explain and/or prescribe particular aspects of Canadian fiscal arrangements. Prominent rationales have included subsidiarity, the Tiebout hypothesis, public choice, and public finance (public economics) theories of fiscal federalism. Public finance theories include externalities, **economies of scale,** regional redistribution to standardize services, and mitigating harmful internal migration. The authors stress that these theoretical guidelines are not always realistic guides to what happens in fiscal federalism, which may be affected just as much by fiscal stresses and political responses in particular circumstances. They strongly favour the principle of hard fiscal constraints and more closely aligning the revenue-raising and spending powers of governments in Canada.

Chapter Objectives

By the end of this chapter, students will be able to do the following:

- Explain the importance of the division of powers in intergovernmental finance.
- List the major program landmarks in the evolution of intergovernmental finance in the nineteenth, twentieth, and twenty-first centuries.
- Understand how important theory is to what actually happens in intergovernmental finance.

continued

- Understand how important centralist and decentralist forces are in Canadian fiscal federalism.
- Explain the relative importance of fiscal discipline in intergovernmental finance.
- List the principles that are important in the design of federal/provincial/local finance.

Introduction[1]

Amounts raised and spent by different levels of government in Canada have never coincided: the federal government has always raised more, and provincial, territorial, and local governments less, than required for their own programs. Accordingly, transfers from the federal government to other levels of government have been a feature of Canadian fiscal policy since Confederation.[2]

Initially modest relative to Canada's economy, **intergovernmental transfers** grew as the role of governments in providing services and redistributing income grew through the 20th century. They now occupy a major place in the budgets of Canadian governments: about one-third of the spending of the federal government and almost one-fifth of the revenues of recipient governments. They are correspondingly prominent in public and official discussions. The 2015 federal budget devoted 11 pages to a survey of intergovernmental transfers and federal/provincial spending and taxing powers, and most provincial budgets that year also devoted considerable attention to the topic.

Transfers from central to sub-central governments are common throughout the world. Because they are particularly visible in federations, scholars and other commentators in federations, including Canada, have been prominent in elaborating possible justifications for divisions of taxing and spending powers, and for intergovernmental transfers for various purposes, including closing any fiscal gaps a particular division of powers creates. That literature naturally responded to the circumstances, including the specific mixes of taxes, programs, and transfers, that prevailed at the time. As a result, positive observations about what was happening have tended to be tightly interwoven with normative statements about what should be.

This chapter begins by describing the history that shaped Canada's current system, then reviews various insights about potential uses of federal–provincial transfers and comments on the degree to which they justify current practices. It next describes potential future evolutions of spending and revenue at the federal and provincial levels. It closes with some comments on how different types of intergovernmental transfers may affect the efficiency, accountability, and sustainability of Canadian fiscal policies and major programs.

An important theme in this survey is the fact just mentioned: particular circumstances, including fiscal stresses at either level of government, and the political responses to those circumstances, have been central in shaping Canada's arrangements. Notwithstanding the insights from public economics about how intergovernmental transfers can address externalities within a federation and provide public goods on a national scale, nothing in economic logic dictates that the gap between revenue and spending at the federal and provincial levels should be as large as it now is in Canada, nor that the gap must grow as it has done, nor that the transfers that bridge it should be structured along current lines.

A second key theme is that the key principle that federal and provincial governments are sovereign in their respective spheres coexists uneasily with federal–provincial transfers, especially when they are large and complex. A focus on the provincial autonomy that is desirable in a federation, as well as on responding effectively to challenges at each level of government, and limiting potentially adverse

influences of intergovernmental transfers on budgetary policy, would point towards smaller, simpler intergovernmental transfers. We see a strong case for more closely aligning the revenue-raising and spending powers of governments at each level.

The History and Current State of Intergovernmental Transfers in Canada

Canada's division of revenue and spending powers between the senior governments, and the transfers that reconcile gaps between revenue and spending at each level, have evolved in response to changing concerns and political pressures.

The Nineteenth Century

As is well known, the British North America Act—now formally termed the Constitution Act, 1867—and key political and legal decisions shortly after Confederation gave Canada a system in which the federal and provincial governments are sovereign in their respective spheres.

Looking first at responsibilities, some powers, notably those related to defence, money and banking, navigation, Indians, immigration, and criminal law, became federal matters. Others, notably those related to property and civil rights, natural resources,[3] municipalities, charities, and services now generally referred to as health care and education, became provincial matters.[4]

As for the resources to finance those responsibilities, the 1867 Act granted the federal government power to implement "any mode or system of taxation."[5] It granted the provinces "direct taxation within the province"[6]—a formulation intended partly to preclude tariffs on interprovincial trade, and which has been interpreted so elastically as to allow a variety of indirect taxes. As a result, the tax bases of the federal and provincial governments largely overlap. Both levels have legally unlimited power to borrow to finance any activity.

By today's standards, late nineteenth-century government spending was small relative to the economy. In peacetime, federal infrastructure—such as the national railway and other projects providing benefits on a national scale—was expected to dominate government spending. The indirect taxes—customs, duties, and fees—that then provided the bulk of revenues were also federal, and accounted for about 80 per cent of all government revenues (Hogg, 1997).

Responding to arguments that the provinces' revenue-raising capacity, largely dependent on property taxes from relatively rural populations, was inadequate to finance their responsibilities, the 1867 Act provided for transfers from the federal government. Originally, these included funding for public administration as well as per-capita transfers to reduce regional disparities. In addition, these transfers contained an incentive to control public debt.[7]

The federal transfers were originally fixed total sums or fixed dollar amounts per head, so growth of the economy and government budgets had reduced their importance in provincial revenues by the end of the century. From nearly 6 in 10 dollars of provincial revenue in 1874, federal transfers had fallen closer to 4 in 10 dollars by 1896 (Perry, 1997).

The Twentieth Century

Federal and provincial spending and revenues changed markedly over the course of the twentieth century.

Two world wars created a need, and demonstrated a capacity, for governments to mobilize resources on a much larger scale. The nineteenth-century model of relatively small governments mainly providing infrastructure and internal and external security transitioned to the post–Second World War welfare state. By the end of the century, health care, education, and social services—areas of provincial responsibility—had become major government programs in Canada, as in other developed democracies.

On the revenue side, Ottawa introduced personal and corporate income taxes in stages during the First World War. Many provinces started taxing corporate and personal incomes for the first time in the 1930s to finance the needs created by the Great Depression. Concerns about the complicated structure of taxes going into the Second World War, and then the fiscal stresses of the war itself, produced important changes in income taxes. Under **tax rental agreements**, the provinces vacated the personal and corporate income tax fields in return for federal transfers. After the war, **tax collection agreements** supplanted the tax rental agreements. Provinces progressively regained tax-policy autonomy, as long as they conformed to shared definitions of the base for taxable income. As provincial

spending responsibilities grew, the provincial share of personal income tax revenues increased. One formal change in tax fields occurred in 1980, when the federal government vacated the lottery and gaming field in return for an annual payment from the provinces (Desjardins, Longpré, & Vaillancourt, 2012).

As revenue and spending arrangements changed, intergovernmental transfers changed too. Notably, federal transfers became more incentivizing. An early example was a federal subsidy for technical education during the First World War. In 1927, long before the 1951 constitutional amendment that made old-age income supports a federal responsibility, Ottawa began paying half their cost. The Great Depression tested many provinces' access to credit, with Alberta defaulting in 1936. The federal government's superior access to credit, backed after the creation of the Bank of Canada by the power to monetize debt, increased its attractiveness as a subsidizer of provincial programs. In particular, Ottawa provided extensive supports for the unemployed, before the transfer of responsibility for unemployment insurance to the federal government in 1940.

During the late 1950s and 1960s, the appeal of federal support for national social programs was strong in most parts of the country, and rapid growth in the economy and federal revenues made relatively open-ended support of provincial programs seem affordable. Federal payments geared to half of aggregate provincial spending on publicly funded doctor and hospital care developed during those years. Ottawa replaced direct grants to universities with transfers to provincial governments, likewise geared to half of aggregate provincial spending on post-secondary education. Ottawa also supported provincial welfare programs through the Canada Assistance Plan (CAP), which underwrote half of relevant expenditures in each province individually.[8]

An exception to this general move towards **conditional grants** was the 1957 establishment of a formal **equalization program**. Equalization's essence is to top up the revenues of provinces that have lower-yielding tax bases.[9] The representative tax base used to determine equalization entitlements changed several times in later decades, reflecting a variety of tensions as the fortunes of specific provinces rose and fell, and as the federal government found its obligations under the program easier or harder to meet.

Another notable exception to the general narrative of federal inducements to provinces to expand their programs by subsidizing them was a series of federal offers, in 1964, 1968, and 1973, to withdraw from certain cost-shared programs and transfer tax room to the provinces instead. (At that time, provincial income taxes—with the exception of Quebec—were computed as percentages of federal income taxes, which gave rise to the terminology of "tax points"—each percentage point being one tax point.) Most provinces preferred the shared-cost subsidies; Quebec was the exception. Since 1965, Quebec taxpayers have received a special tax abatement in lieu of cash transfers Ottawa would otherwise have made.[10]

The end of the rapid growth of the 1950s, 1960s, and early 1970s put the federal budget under pressure and prompted changes to federal grants in support of health care and post-secondary education. New **Established Programs Financing (EPF)** arrangements replaced cost-sharing arrangements with a formal transfer of tax base ("tax points") and a cash transfer. These changes reduced federal subsidization and exposure to provincial spending decisions: no longer were the provinces collectively spending "50-cent dollars" on these programs.[11] To make its leverage over provincial health-care policy more explicit, the federal government passed the *Canada Health Act* in 1984, providing a formal basis for reduced transfers to provinces that did not adhere to its principles.

Ottawa's fiscal problems intensified during the 1980s, and the economic downturn of the early 1990s pushed its deficit and debt higher on the national agenda. The mid-1990s effort to balance the federal budget had a major impact on intergovernmental transfers. Ottawa first capped its CAP subsidies to several provinces. It then combined grants for health care and post-secondary education with the Canada Assistance Plan in one block fund, the **Canada Health and Social Transfer (CHST)**, eliminating the last of the "50-cent dollars" provinces had been spending on welfare programs. The total CHST was initially smaller than its predecessor programs—part of Ottawa's effort to eliminate chronic deficits. These changes were a rude shock to the provinces. After increasing in line with the economy in the early 1990s (Figure 2.1), federal transfers fell sharply in 1996/97 and 1997/98. Although they grew again as Ottawa's budgetary situation improved, provincial governments and other advocates were complaining of a fiscal imbalance as the twentieth century drew to a close.

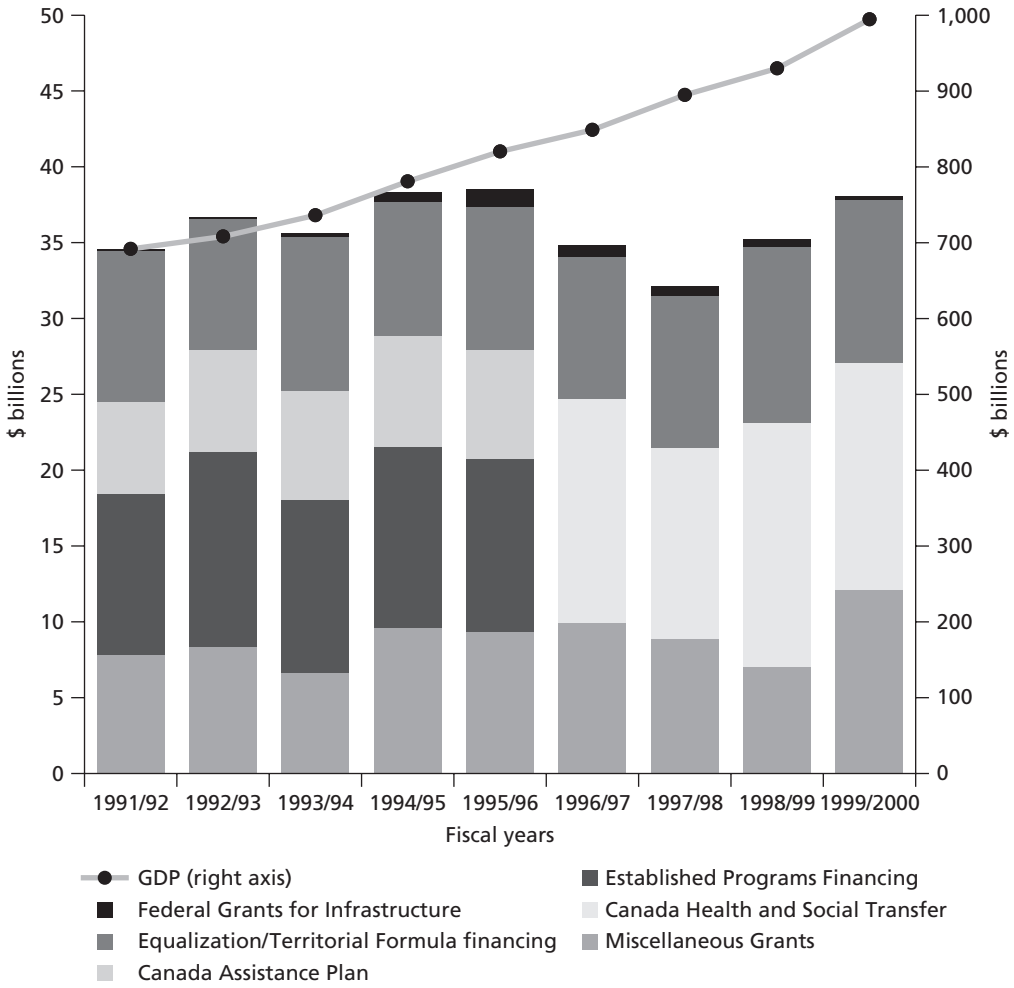

Figure 2.1 Federal Transfers to PTL Governments, by Major Category, 1991/92 to 1999/2000

Note: Data adjusted to take into account the effect of the Quebec tax abatement: federal cash transfers to Quebec are increased by the value of the federal income tax abated under the Alternative Payments for Standing Programs (13.5 tax points).

Sources: Government Finance Statistics (Statistics Canada 2015), Public Accounts of Canada RCG various years), and Canada (2015); authors' calculations.

The Twenty-First Century

In the early twenty-first century, the formal structures of spending and revenue-raising, and the intergovernmental transfers that bridge the gaps between spending and revenue, have changed relatively little, but the dollar amounts have changed markedly. In the 20 years from the early 1990s to the early 2010s, provincial, territorial, and local (PTL) governments increased their share of consolidated government spending—excluding intergovernmental transfers—from 63 to 72 per cent. They also increased their share of revenue, with their own-source revenues—that is, excluding intergovernmental transfers—rising from 56 to 60 per cent of the national total (Figure 2.2).

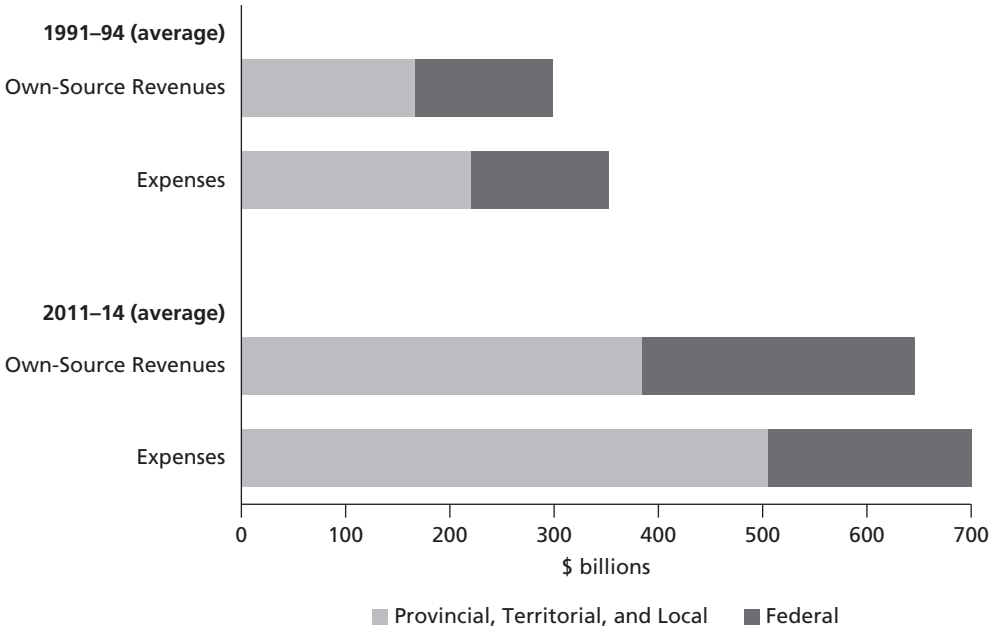

Figure 2.2 Consolidated Revenues and Spending by Levels of Government (Excludes Intergovernmental Transfers), 1991–4 and 2011–14

Note: Data adjusted to take into account the effect of the Quebec tax abatement: Quebec tax revenues are reduced by the value of federal income tax abated under the Alternative Payments for Standing Programs (13.5 tax points) and the discontinued Youth Allowances Program (3.0 tax points); federal revenues are increased by the same amount.

Sources: Government Finance Statistics (Statistics Canada 2015); authors' calculations.

Program Spending by Types

At present, and going a layer deeper, PTL governments currently make about 85 per cent of expenditures on operations—payments to employees, contractors, utilities, and so on—reflecting their role as public service providers. PTL governments also manage about 85 per cent of public infrastructure expenses, and hand out about 80 cents per dollar of business subsidies (Figure 2.3).

Ottawa continues to dominate transfer payments to households through employment insurance, benefits for seniors and families with children, and other purposes. About 70 cents of all government payments to individuals are now federal.

Revenues by Tax Bases

Turning to revenues (Figure 2.4), property taxes—still a field exclusive to the provinces—continue to raise a substantial amount of their revenue. By contrast, Ottawa's exclusive jurisdiction over customs and other levies on international trade and transactions has become less important as international trade has become freer.

As for shared tax fields, Ottawa is still the largest collector of personal and corporate income taxes, raising about two-thirds of the total. The provinces collect about two-thirds of consumption tax revenues, up markedly over the last 20 years, thanks to rate cuts at the federal level and rate increases at the provincial level.

Miscellaneous non-tax revenues—mainly investment incomes, profits of government business enterprises, royalties, user fees, fines and other penalties, asset sales, and various other sources—are important for PTL governments. The federal government collected only about one-eighth of such revenues in 2014.

Contributions to social insurance schemes and provincial payroll taxes that flow into consolidated revenue[12] now yield roughly equal amounts to each level. Ottawa has recently collected something less than

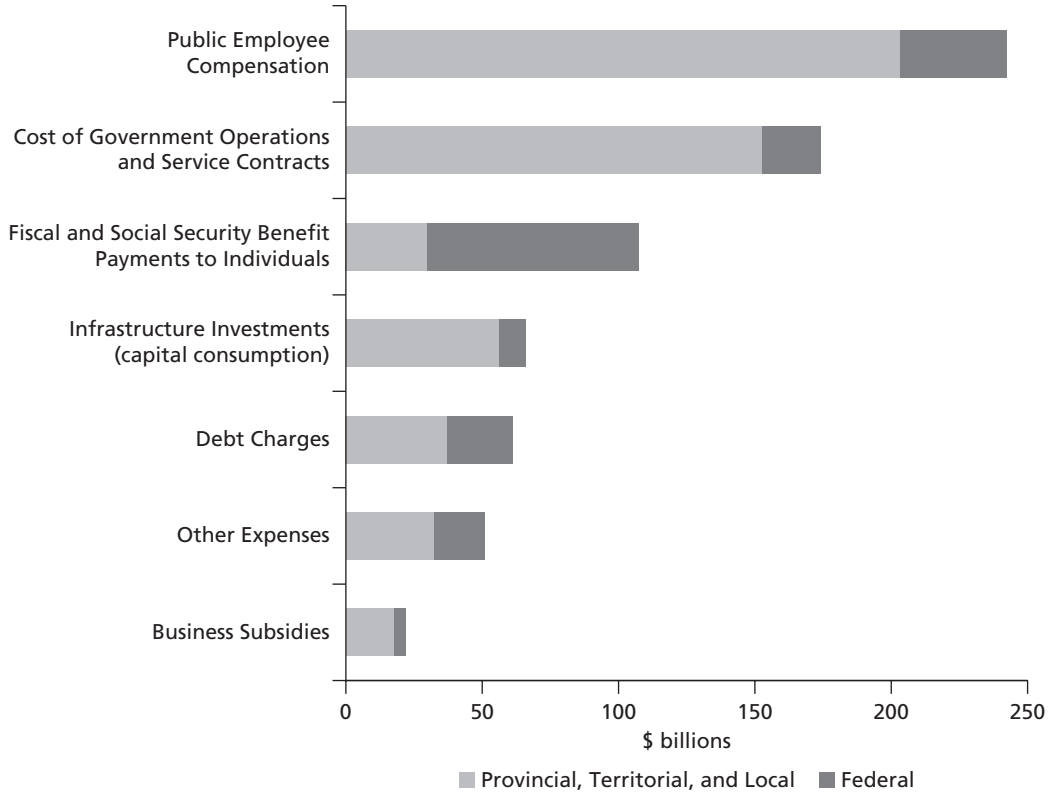

Figure 2.3 Government Spending at Federal and PTL Levels, by Category, 2014

Sources: Government Finance Statistics (Statistics Canada 2015); authors' calculations.

two-thirds of contributions to social insurance schemes related to employment, workplace injuries, and health care, down from more than three-quarters in the early 90s. This change reflects slower growth in federal employment insurance payouts and revenues than in provincial workers' compensation and drug programs.

Intergovernmental Transfers

The fact that provinces have increased their share of spending more than their share of own-source revenues since the 1990s implies that federal transfers have increased and/or that their budget balances have deteriorated relative to the federal balance. Both developments have occurred.

Improved federal fiscal health and pressure for larger transfers spurred faster growth in payments after 2004. Ottawa split the CHST into a Canada Social Transfer (CST) and a Canada Health Transfer (CHT). The former continued to grow with the economy, but the latter—responding to the higher public profile of health-care spending—grew faster. The net result was that federal transfers outpaced GDP. They also rose relative to PTL spending, from about 15 per cent after the cuts of the late 1990s to around 17 per cent recently. And they rose relative to Ottawa's resources: roughly one in three dollars raised by federal taxes recently has financed intergovernmental transfers (Figure 2.5).

Current Transfers and Commitments

That account brings us to the present, and a review of the current configuration of transfers and their likely growth. The largest single intergovernmental transfer is the CHT—$32 billion in 2014/15, expected to grow to $41 billion in 2019/20. The CST is also sizeable—$13 billion in 2014/15, expected to reach $15 billion in 2019/20

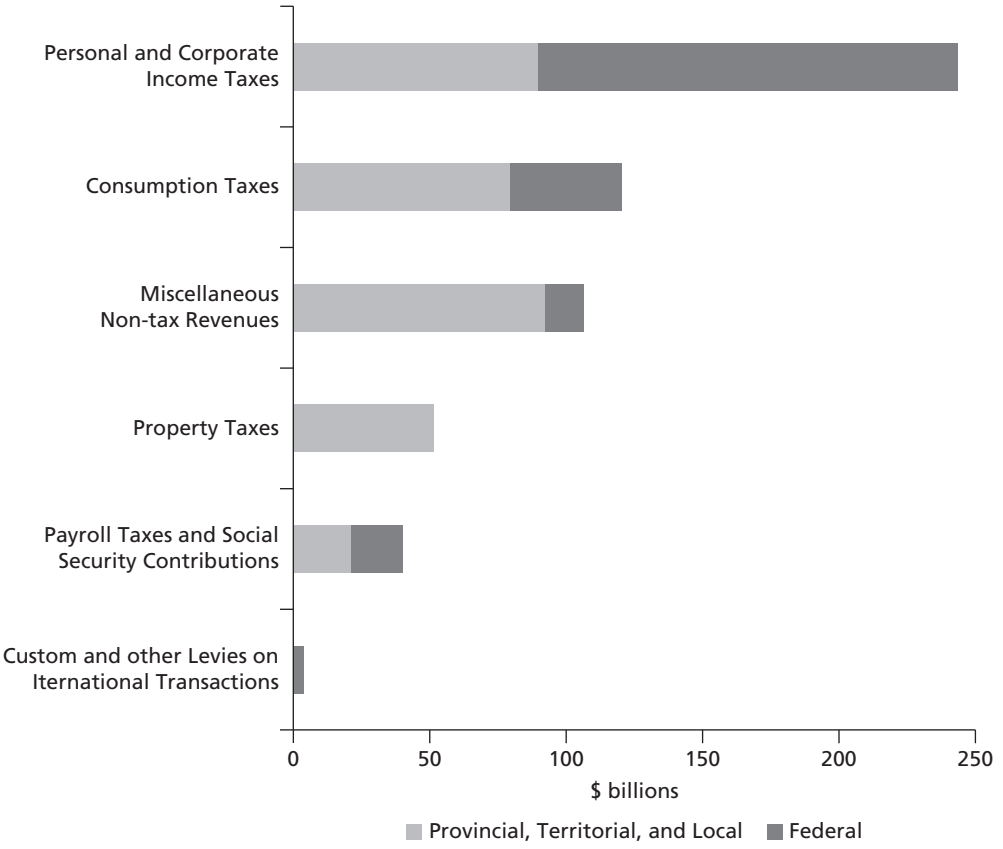

Figure 2.4 Government Revenues at Federal and PTL Levels, by Category, 2014

Note: Data adjusted to take into account the effect of the Quebec tax abatement: Quebec tax revenues are reduced by the value of federal income tax abated under the Alternative Payments for Standing Programs (13.5 tax points) and the discontinued Youth Allowances Program (3.0 tax points); federal tax revenues are increased by the same amount.

Sources: Government Finance Statistics (Statistics Canada 2015); authors' calculations.

(Figure 2.6). The CHT is legislated to continue its 6 per cent annual escalation until the 2016/17 fiscal year, and thereafter to increase at least 3 per cent annually up to the rate of growth of the economy. The CST is legislated to continue its 3 per cent annual growth.

The CHT and the CST, paid on a per-capita basis, are formally earmarked to support provincial spending on health care, post-secondary education, childcare, social assistance, and other social services. In practical terms, however, they resemble unconditional transfers. The money is fungible and can help provinces spend on anything, provide tax relief, or improve their budget balances. There are no recent instances of Ottawa withholding material amounts to penalize a province for deficiencies in its programs.

Rounding out the three largest transfers are the Equalization and the Territorial Formula Financing (TFF) programs—a combined $20 billion in 2014/15, expected to reach $24 billion in 2019/20. The equalization formula reflects differing yields of tax bases among provinces; TFF reflects differing tax yields among all 13 jurisdictions. A desire to create a predictable obligation has led Ottawa to gear total equalization payments to GDP since 2009.

Alongside these programs, Ottawa transfers several billion dollars annually for public infrastructure,