95B. Modifications for States of Sabah and Sarawak of distribution of legislative powers.

(1) In the case of the States of Sabah and Sarawak—

(*a*) the supplement to List II set out in the Ninth Schedule shall be deemed to form part of the State List, and the matters enumerated therein shall be deemed not to be included in the Federal List or Concurrent List; and

(*b*) the supplement to List III set out in the Ninth Schedule shall, subject to the State List, be deemed to form part of the Concurrent List, and the matters enumerated therein shall be deemed not to be included in the Federal List (but not so as to affect the construction of the State List, where it refers to the Federal List).

(2) Where by virtue of Clause (1) an item is included in the Concurrent List for a State for a period only, the expiration or termination of that period shall not affect the continued operation of any State law passed by virtue of the item, save as provided by federal or State law.

(3) The Legislature of the State of Sabah or Sarawak may also make laws for imposing sales taxes, and any sales tax imposed by State law in the State of Sabah or Sarawak shall be deemed to be among the matters enumerated in the State List and not in the Federal List; but—

(*a*) there shall not in the charging or administration of a State sales tax be any discrimination between goods of the same description according to the place in which they originate; and

(*b*) the charge for any federal sales tax shall be met out of sums collected from a person liable for that tax before the charge for a State sales tax.

95C. Power by order to extend legislative or executive powers of States.

(1) Subject to the provisions of any Act of Parliament passed after Malaysia Day, the Yang di-Pertuan Agong may by order

make as respects any State any such provision as may be made by Act of Parliament—

(*a*) for authorising the Legislature of the State to make laws as mentioned in Article 76A; or

(*b*) for extending the executive authority of the State, and the powers or duties of any authority of the State, as mentioned in Clause (4) of Article 80.

(2) An order made by virtue of paragraph (*a*) of Clause (1) shall not authorise the Legislature of a State to amend or repeal an Act of Parliament passed after Malaysia Day, unless the Act so provides.

(3) Clause (3) of Article 76A and Clause (6) of Article 80 shall apply in relation to an order under paragraph (*a*) and paragraph (*b*) respectively of Clause (1) of this Article as they apply in relation to an Act of Parliament.

(4) Where an order under this Article is revoked by a later order, the later order may include provision for continuing in force (generally or to such extent or for such purposes as the order may specify) any State law passed by virtue of the earlier order or any subsidiary legislation made or thing done under any such State law, and from the coming into operation of the later order any State law thereby continued in force shall have effect as federal law:

Provided that no provision shall be continued in force by virtue of this Clause if or in so far as it could not have been made by Act of Parliament.

(5) Any order of the Yang di-Pertuan Agong under this Article shall be laid before each House of Parliament.

95D. Exclusion for States of Sabah and Sarawak of Parliament's power to pass uniform laws about land or local government.

In relation to the State of Sabah or Sarawak, Clause (4) of Article 76 shall not apply, nor shall paragraph (*b*) of Clause (1) of that Article enable Parliament to make laws with respect to any of the matters mentioned in Clause (4) of that Article.

95E. Exclusion of States of Sabah and Sarawak from national plans for land utilisation, local government, development, *etc.*

(1) In relation to the State of Sabah or Sarawak Articles 91, 92, 94 and 95A shall have effect subject to the following Clauses.

(2) Subject to Clause (5), under Article 91 and under Article 95A the State Government shall not be required to follow the policy formulated by the National Land Council or by the National Council for Local Government, as the case may be, but the representative of the State shall not be entitled to vote on questions before the Council.

(3) Under Article 92 no area in the State shall be proclaimed a development area for the purposes of any development plan without the concurrence of the Yang di-Pertua Negeri.

(4) Under Clause (1) of Article 94 (under which in respect of matters in the State List the Federation may conduct research, give advice and technical assistance, *etc.*) the agricultural and forestry officers of the State of Sabah or Sarawak shall consider, but shall not be required to accept, professional advice given to the Government of the State.

(5) Clause (2) shall cease to apply to a State—

(*a*) as regards Article 91, if Parliament so provides with the concurrence of the Yang di-Pertua Negeri; and

(*b*) as regards Article 95A, if Parliament so provides with the concurrence of the Legislative Assembly,

but for each representative of the State of Sabah or Sarawak becoming entitled, by virtue of this Clause, to vote on questions before the National Land Council or National Council for Local Government, one shall be added to the maximum number of representatives of the Federal Government on that Council.

CANADIAN GOVERNMENT AND POLITICS

Institutions and Processes

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Chapter 7

The Constitution Today: Rights and Freedoms

When the *Constitution Act*, 1982, was proclaimed, the Charter of Rights and Freedoms became part of our fundamental law. While the entrenchment of such rights and freedoms constituted a significant symbolic act, it must be recognized that we did not thereby acquire any *new* rights or freedoms. These rights have been a part of our Constitution since the beginning and are reflective of the basic values that underlie it. The Charter must be seen as a codification of these rights, or as a transformation of part of our unwritten Constitution into written form. Hence, before turning to a discussion of the Charter and its effect on Canadian political life, we must look at the pre-Charter status of our rights and freedoms, which forms the legal and normative base upon which the Charter must function today.

▶ RIGHTS, FREEDOMS, AND LIBERTIES

The terms **civil liberties** and **fundamental freedoms** may be different in very subtle ways, but for the most part they are used synonymously. We will follow that practice here. However, it is not as easy to dismiss distinctions between the terms *right* and *liberty*. In Canada, the term **civil rights**, as used in section 92(13) of the *Constitution Act*, 1867, and as modified through extensive judicial interpretation, is closely connected, not just with the rights of individuals, but, specifically, with rights that accrue through *property* and through *contract*. The original significance of this clause was that it permitted Quebec to have its own system of property and contract law based on the French system of a *code civile* rather than the English common law.

The term *civil liberties* is properly used in the Canadian context to refer to our fundamental freedoms. The vocabulary is somewhat different in the United States. There the term *civil rights* means more or less what we in Canada would call civil liberties. The American term derives from the fact that the first ten amendments to the US Constitution, which set out what we would call civil liberties or fundamental freedoms, are referred to as the Bill of Rights.

In 1953, while delivering a judgement on a case involving the principle of religious freedom, Canadian Supreme Court Justice Ivan C. Rand attempted to clarify the distinction between civil rights and civil liberties. He explained that every individual, simply by virtue of being a person, is born with a total area of freedom, the limits of which are defined only by his or her physical strength, mental capacity, and other personal characteristics. However, we each give up a certain percentage of our absolute, or original, freedom and allow the government to regulate and limit everybody's behaviour in return for the predictability, order, and safety of a civil society.

Each piece of positive law, therefore, takes away some of our freedom but replaces it with both *rights* and *obligations*. For example, a law prohibiting patricide creates an obligation in all children not to kill their fathers, thus restricting the absolute freedom of children. At the same time, such a law creates a right in all fathers not to be killed by their sons and daughters. The positive law thus creates rights and obligations out of the existing area of absolute freedom.

To return to our definitions, then, *rights*, in the purest sense of the term, are created through the enactment of positive laws, while *liberties* are the residual area of freedom left to an individual after the totality of the positive law is subtracted from it. However, as Walter Tarnopolsky has pointed out, most fundamental freedoms are, in fact, beefed up by the positive law. By way of example, he cites religious freedom:

> We speak of "freedom of worship," but only as defined by law, and not including such practices as human sacrifice, for example. Such freedoms can also be protected by law, for instance, by forbidding unlawful interference with the conduct of a religious service.[1]

Finally, to torture our innocent readers one bit more, it should be noted that a partial distinction can be made *empirically* between civil rights and civil liberties. The former tend to be associated with the civil rights movement in the United States which focused on the elimination of discrimination on the basis of race by both government and private businesses dealing with the public. The Bill of Rights in the US deals with both public and private discriminatory practices. Civil liberties, on the other hand, tend to be concerned more exclusively with individual-to-state relationships. Civil liberties are thus viewed as freedom *from* interference or restriction by the government.

1. See W. S. Tarnopolsky, *The Canadian Bill of Rights* (Toronto: McClelland and Stewart, 1975), p. 2.

▶ RIGHTS AND FREEDOMS IN CANADA

Several implications derive from the fact that the BNA Act, 1867, gives Canada a constitution similar in principle to that of Britain. Because Britain's Constitution reflects, or did reflect in 1867, a set of principles that includes individual freedoms and democratic rights, Canada directly inherited a body of unwritten constitutional principles that protected our basic rights and freedoms from the beginning.

Democratic Rights and Freedoms

These include both substantive freedoms and political rights, and are implicit in and necessary to a democratic system of government. The democratic freedoms are instrumental in realizing the basic democratic values of popular sovereignty and political equality, and they function both by setting limits on governmental interference with the individual and by providing specific political rights.

The substantive **democratic freedoms** in Canada include freedom of association, freedom of assembly, freedom of expression, freedom of conscience, and freedom of the press. Collectively, these freedoms allow individuals to engage freely in the sort of discourse that is essential if free elections are to be effective in controlling the behaviour of our elected representatives. An election would be a meaningless exercise if the voters, parties, and candidates were not allowed to assemble and discuss the issues of the day free from interference by the current government. These democratic freedoms were only implicit in our Constitution until 1982 when they were set down explicitly in sections 2–5 of the Charter.

The basic **political rights** of Canadians start with the right to vote and to seek candidacy in an election. Again, such rights are necessarily implicit in an electoral democracy and were set down originally by the provincial and federal election acts. More will be said in Chapter 12 about the evolution of the right to vote and in Chapter 15 about the extension of the franchise. The right to vote is now stated explicitly in section 3 of the Charter.

A corollary of the right to vote is that in order to ensure fair and effective representation, each ballot should be weighted roughly equally. This has never been easy to achieve, in practical terms, for shifting populations have meant that the sizes of constituencies vary a great deal over time. As well, it was felt in the pre-electronic era that transportation and communication difficulties, not to mention a historical belief in the moral superiority of those who lived and worked on the land, justified an over-representation of rural and remote constituencies. Nevertheless, the principle that each vote should be roughly equal is an important – albeit yet to be attained – goal of truly representative democracy.

The *British North America Act* originally included two clauses that define our basic political rights. Section 20 specified that there must be a session of Parliament and of each provincial legislature at least once a year. This is to ensure that the executive branch, which exercises the prerogative power to *summon* Parliament, does not avoid a non-confidence vote in the House by

simply not summoning it. This clause has been deleted from the *Constitution Act*, 1867, and replaced by section 5 of the Charter.

Section 50 of the *Constitution Act*, 1867, provides that the life of a Parliament or legislature shall not exceed five years. This clause is intended to ensure that our right to express our political will through periodic elections is not thwarted by the device of simply not calling any. Again, it is intended to protect us from an unscrupulous executive branch, which having secured majority support in the House, might simply decline to exercise the prerogative power of dissolution, as a means of staying in power. This principle is now set down in the Charter as section 4, which also provides that in national emergencies, the five-year limit can be extended by a two-thirds vote of the legislature.

Procedural Rights (Legal Rights)

Procedural rights primarily involve criminal proceedings and include protection from arbitrary arrest, the right to a fair hearing, the right to counsel, and the right of *habeas corpus*. Moreover, they have come to include the rules of evidence that, in criminal judicial proceedings, determine the admissibility of evidence. As technologies have evolved, these procedural rights have been expanded to include protection from invasions of privacy through, for instance, wire-tapping or electronic eavesdropping. These procedural rights institutionalize the rule of law in the British sense of the term. They ensure *equality before the law* for all individuals and corporations and prevent arbitrariness and discrimination on the part of governmental officials or the police. These procedural rights, or **legal rights**, were traditionally protected by convention, by the common law, and by the provisions of the Criminal Code dealing with procedure and rules of evidence. Since 1982, our legal rights have been entrenched in sections 7–14 of the Charter.

Liberal Rights and Freedoms

Certain of our fundamental rights and freedoms are implicit in the values of liberalism, but not necessarily in the values of democracy. In large part, these **liberal freedoms** deal with an individual's rights in regard to property and contract. They include the right to own property, the right not to be deprived thereof except through due process of law, and the freedom to enter into private contracts. These rights and freedoms are rooted in the English common law, but the Canadian Bill of Rights of 1960 explicitly recognizes the right to "the enjoyment of property" unless deprived thereof by due process of law.

Twenty years later, the Charter omitted any mention of a right to private property, and despite extensive lobbying to that end, the Charlottetown Accord of 1992 also omitted any such clause. This might be a reflection of the fact that our political culture is gradually shifing away from classical liberal values, but it seems more likely that such values are so deeply ingrained that there is simply no need to reiterate them.

While it is difficult to separate liberal freedoms from democratic freedoms in a country whose values are liberal-democratic, a possible distinction is that the former are very closely tied up with the economic system of capitalism. The liberal freedoms are, therefore, more important in achieving the ostensible

liberal goal of *equal opportunity* within a free-market economy than they are in achieving the democratic goals of popular sovereignty and political equality. Two aspects of these liberal rights, the freedom of movement and the right to earn a livelihood, are entrenched separately in section 6 of the Charter as **mobility rights.**

Egalitarian Rights

Egalitarian rights or **equality rights** are the so-called *human rights*, which are instrumental in achieving the goals of social and economic equality. Stated in the extreme, liberal and egalitarian values tend to conflict with each other, although, in fact, in Canada, there is gradual acceptance of limitations on the liberal freedoms, in order to promote human rights and to combat discrimination. While the egalitarian rights would certainly limit governmental discrimination against various classes of individuals, they also involve private-sector relationships, and include freedom from discrimination in employment, accommodation, transportation, and other such areas by reason of race, religion, gender, ethnic origin, or nationality.

Most Canadians would agree that these are, indeed, fundamental human rights, and egalitarianism and non-discrimination are becoming more and more important values in Canadian society. By now, all of the provinces and the federal government have human-rights legislation, which guarantees protection from discrimination by government agencies and private corporations alike. The Canadian Human Rights Commission, created in 1977, has as its mandate the investigation and resolution of claims of discrimination made against federal government agencies and federally incorporated companies. The Commission has been very active since its creation and has likely accomplished a great deal in discouraging discrimination in employment.

Section 15 of the Charter of Rights and Freedoms, guarantees equality rights, although it does not directly protect individuals from discrimination in the private sector. In fact, it can be argued convincingly that, in the long run, the only effective way to eliminate discrimination is to eliminate the personal prejudice, stereotyping, sexism, ethnocentrism, and racism that underlie all acts of discrimination. In other words, legislation can only affect *acts* of discrimination, whereas it is the predisposition to discriminate or the discriminatory *attitudes* of Canadians that must ultimately be conquered if we are to eliminate the problem.

Privacy

It bears mention here that a positive individual right may be evolving in Canada in the area of *privacy*. The foundation of a **right to privacy** likely lies in in the common law (a man's home is his castle) and in some criminal provisions such as "peeping Tom" laws. Violations of privacy on the part of private individuals are viewed as trespassing; and encroachments, even by governmental officials such as the police, require significant justification and some level of judicial involvement, such as a warrant. However, most of the original tenets of a common-law right to privacy involve only the physical or *territorial* dimension of privacy, which is related to the law of property.

Modern electronic technology has created a situation where *information* concerning an individual can be gathered, collated, and retrieved with frightening efficiency. It has been recognized that the common-law protections of the right to territorial privacy have to be backed up by legislation to protect the informational privacy of individuals from unscrupulous business enterprises and governmental agencies, as well. The positive law response to this recent threat to individual freedom has been legislation that limits the operation of consumer credit ratings, and that imposes strict limits on the use of electronic surveillance devices, by both public and private organizations. The result is that a previously unrecognized and thought-to-be unnecessary *right to privacy* is being defined incrementally, through a series of positive law enactments:

The 1977 Canadian *Human Rights Act* provides for one of the members of the Commission to act as a "privacy commissioner." The job of this official is to investigate complaints arising out of part 4 of the *Human Rights Act.* This part of the Act requires the federal government to publicize the existence of the various information banks within the bureaucracy, to provide some access to this information on the part of the individual concerned, and to limit the use to which the information can be put. In the latter case, for instance, the federal government is restricted in the extent to which information gathered for one purpose and by one agency can be used by other agencies of the government or by other governments.

While this legislation was a step in the right direction, it will likely be necessary for a future government to introduce more comprehensive legislation dealing with privacy. Ultimately, similar legislation will have to be introduced in each of the provinces, so that comprehensive protection of the right to privacy can be attained for all Canadians in dealings with all governmental information-gathering institutions.

Finally, there is some indication that the courts may be willing to interpret sections 7 and 8 of the Charter as providing a right to privacy. Section 7 grants the right to "liberty and security of the person" and a violation of an individual's privacy by officals of the state could be construed, in some circumstances, as unreasonable. Similarly, the Supreme Court has stated specifically that the protection against "unreasonable search" in section 8 amounts to a privacy guarantee when it is the government that is snooping.[2]

Emergency Powers and Rights and Freedoms

Virtually all governments have the authority to suspend fundamental rights and freedoms in emergency situations. Whether such emergency procedures should be tolerated in a democratic society depends on how they are used. Great injustices were done to Canadians of Japanese extraction during the Second World War simply because Canada was at war with Japan, and to Ukrainian immigrants during the First World War because of their suspected allegiance to the Kaiser. In retrospect, this seems a shameful blot on the civil liberties record of Canada, although, at the time, the government's action

2. *Hunter v. Southam Inc.* (1984) 2 SCR 145.

under the *War Measures Act* was probably condoned by nearly everyone except the victims themselves.[3]

A similar interpretation appears to have developed with respect to the invoking of the *War Measures Act* in the fall of 1970 because of an "apparent insurrection" in the province of Quebec. While in retrospect it does not appear that the Quebec situation was indeed an insurrection, at the time, a sizable proportion of the Canadian population agreed with the governments involved that such drastic measures were justified. Now that the "crisis" has long faded, many Canadians, including many who, at the time, supported the actions of federal and Quebec authorities, look back on the October Crisis with something of the same sense of shamefacedness with which we regard the treatment of the Japanese Canadians in 1942. The only conclusion to which one can come in this regard is that, if a comprehensive emergency power is to be vested in the government, and if that emergency power is to be exercised unilaterally at the discretion of the government, the public must be aware of the potential for abuses in such procedures. Certainly, any government which does exercise its emergency powers must be prepared to submit to the harsh judgement of future generations which will see the impact of the legislation without feeling the pressure and anxiety of the time.

The more fundamental question here, however, is whether a political system can permit legislation such as the *War Measures Act* and still remain a liberal democracy. If it is possible to conceive of *any* circumstances in which fundamental freedoms may be legitimately abrogated, then perhaps those freedoms are not so fundamental after all. Possibly, even in societies deeply committed to individual rights and freedoms, the stability and survival of the system becomes a more fundamental value than the substantive values implicit in the regime. Liberal-democratic systems are thus caught in a dilemma: on the one hand, if they do not take severe and arbitrary measures under certain circumstances, they might be overthrown and replaced by an authoritarian regime; on the other hand, by taking such measures, they will be, *ipso facto,* more authoritarian themselves.

There is no easy answer to this problem, but it is critical to an appraisal of the protection of rights and freedoms in Canada to ask the question. It is also telling that the 1982 Charter, although not explicitly stating (as did the Bill of Rights) that the Charter itself is inoperative when the government has declared an emergency, is silent on this point. It would seem likely that the *Emergencies Act*, 1988, which replaced the *War Measures Act*, will be interpreted as valid by virtue of the fact that the limits it temporarily imposes on our rights and freedoms are "reasonable limits" in the event of a genuine state of emergency.

Aboriginal Rights

The *Constitution Act*, 1982, is associated in the public mind with the Charter of Rights and the amending formula for the Constitution. Another major impact of the 1982 Act, however, is that section 35(i) states that "the existing aboriginal

3. While many Canadians, particularly the CCF party, consistently opposed the treatment of the Japanese Canadians, they were definitely in the minority.

and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed." **Aboriginal rights** are rights that the Indians, Inuit, and Métis possess by virtue of their ancestors' use and occupancy of North America before European contact. These rights have continued to exist despite the fact that the continent has come to be populated by large numbers of "newcomers."

The Status of Aboriginal Rights As affirmed by the Canadian courts, and consistent with international law, aboriginal rights may be extinguished only by conquest, by treaty, or by an explicit act of the Parliament of Canada. Moreover, the courts have determined that, since the affirmation of those rights in 1982, even Parliament may not enact legislation that affects aboriginal rights unless it follows certain rules. The status of aboriginal rights flows from the fact that aboriginal people are deemed to be in a **fiduciary** relationship with the Crown, whereby all of their rights and titles are held in trust for them by the Crown in right of Canada. The Crown can extinguish or limit those rights and titles only through an act of Parliament in an ***honourable*** and just manner.

Following precepts set out in a 1990 Supreme Court of Canada decision,[4] the government can tamper with aboriginal rights only for fairly limited valid policy objectives, such as an overriding national interest, public health and safety, or conservation concerns. Even if there is a valid objective, the government must consult with the affected people, must limit the infringement to what is absolutely necessary to achieve the objective, and must provide compensation. The provincial governments likely have no authority to infringe aboriginal rights, and they do not have authority to enter into treaties with First Nations if the treaties involve the surrender of aboriginal rights or titles.

Constitutional Protection Aboriginal rights were originally incorporated into what would become our Constitution through the *Proclamation of 1763*, which recognized the existence of the Indian nations, and provided that their lands or rights could not be taken away except according to the fundamental principles of British justice – in effect, by negotiated treaty. The obligations under the Proclamation were automatically transferred to the Government of Canada by the *Constitution Act*, 1867, and, by section 91 (24) of that Act, it is only the *federal* government that has the legislative authority to accept the surrender of any aboriginal rights.

As we have seen, the *Constitution Act*, 1982, affirms aboriginal rights without defining them, and section 25 of the Charter provides that its provisions cannot be construed so as to abrogate aboriginal or treaty rights. Hence, the Constitution of Canada explicitly recognizes the existence of aboriginal rights and provides protection for those rights but does not tell us what those rights are, nor whether they might have been surrendered or extinguished at some time in the past.

The Land Since aboriginal rights derive from the occupancy and use of North America before European contact, one way of attempting to define the nature

4. *R. v. Sparrow* (1990) 70 DLR (4th) 385.

and extent of aboriginal rights is to ask what were the traditional or pre-colonial patterns of use and occupancy of the **land**. Indeed, because traditional aboriginal societies were based primarily upon hunting and gathering and, to a lesser extent, simple agriculture, the relationship of the aboriginal community to the land defines the aboriginal economy, culture, and society. But the aboriginal concept of land is very different from the European one. Where our system is based on the notion of private property, aboriginal societies base their system on the notion of shared *use* of the land. The rights to the land belong to everyone living today and to the unborn generations of the future. While, often, there were informal understandings among communities or tribal groups that recognized each others' more-or-less exclusive use of certain territories for purposes of hunting and fishing, the land was owned only by the Creator who put it there for the use of *all* people.

Thus, while aboriginal rights have not been exhaustively defined by the Constitution, statutes, or the common law, it is generally agreed that, at a minimum, such rights include the rights to hunt and fish and to harvest plants, and the necessarily incidental rights of access to and occupancy of the land upon which such resources are found. Hence, unless there has been an explicit surrender of rights through a previous treaty or land-claim agreement, governments, both federal and provincial, are constitutionally bound to protect or compensate the aboriginal interests in the land before they can sell it or otherwise grant interests that affect it to third parties.

The courts have indicated a willingness to find in favour of aboriginal-rights claimants in recent years and as a result, governments, both federal and provincial, have speeded up their attempts to negotiate comprehensive land-claims agreements in parts of Canada where there are no treaties. Such agreements are intended, in the government's vocabulary, to "exchange" the undefined aboriginal rights for a set of defined rights incorporated in a claims agreement or treaty. The aboriginal people are more likely to describe the process as one which simply "defines" aboriginal rights in a modern context, but the vernacular discrepencies have not prevented the negotiation of several major claims agreements. As well, even where there are treaties in place, the courts are broadening the definition of "treaty obligations," forcing governments to live up to these obligations and providing compensation where there have been breaches.

It is clear that aboriginal rights include at least a set of **usufructuary** rights associated with the use and occupancy of the land and that these rights remain alive and in effect until such time as they have been surrendered. The question that has not been answered by the courts is whether there is an aboriginal right to self-government. Whatever the verdict on this issue, the federal and several provincial and territorial governments have indicated a willingness to assume that there *is* such a right and to negotiate agreements with the various First Nations as to how aboriginal nations will relate politically, administratively, and constitutionally to other governments in Canada. We will deal with the issues of aboriginal self-government in Chapter 10.

▶ PRE-CHARTER PROTECTION OF RIGHTS AND FREEDOMS

Before the enactment of the Charter, the legal protection of our civil liberties was left, at first, for the courts to "discover," implicit within existing constitutional provisions and, later, in federal and provincial statutory guarantees of rights and freedoms.

Federalism and Civil Liberties: 1867–1960

In the period up to the enactment of the Bill of Rights in 1960, the federal division of powers was the main tool used to find oppressive or discriminatory legislation *ultra vires*. For example, some laws in British Columbia, which discriminated against Canadians of oriental or East Indian descent, were declared invalid because they interfered with the federal government's exclusive power to pass laws regarding "naturalization and aliens."[5] Similarly, as recently as the 1950s, provincial laws in Quebec that interfered with freedom of expression were declared invalid because they encroached on the federal government's exclusive authority over the criminal law.

A potential breakthrough in broadening the power of the courts to protect civil liberties occurred in the 1930s when several Alberta laws were thrown out on the basis of a clever interpretation by the Chief Justice of the Supreme Court, Sir Lyman Duff. This interpretation, which is known as **the Duff Doctrine** is based on the preamble to the *Constitution Act*, 1867, which states that Canada shall have a system similar in principle to that of Great Britain. Duff argued that this statement implied parliamentary democracy, which "contemplates a parliament working under the influence of public opinion, and public discussion,"[6] and, in effect, accepts as axiomatic that "the right to free public discussion of public affairs, notwithstanding its incidental mischiefs, is the breath of life for parliamentary institutions."[7] Consequently, Duff argued,

> the parliament of Canada possesses authority to legislate for the protection of this right. . . . That authority rests upon the principle that the powers requisite for the protection of the constitution itself are, by necessity, implications from the BNA Act as a whole (Fort Frances Case, [1923] A.C. 695) and since the subject matter in relation to which the power is exercised is not exclusively a provincial matter, it is necessarily vested in Parliament.[8]

However, while Duff concluded that any interference with a fundamental democratic freedom was beyond the competence of the provinces, he did not

5. *Union Colliery Company v. Bryden* (1899) A.C. 580. However, the Judicial Committee found that the *British Columbia Elections Act* which denied the vote to orientals was valid because it involved purely provincial matters. At this time, there was no separate federal franchise and, hence, the British Columbia election legislation barred orientals from voting in federal elections as well. More about this in Chapter 13. See *Cunningham v. Tomey Homma* (1903) A.C. 151, and *Quong Wing v. King* (1916) 49 SCR 440.
6. *Reference re Alberta Statutes* (1938) 2 SCR 133.
7. Ibid.
8. Ibid., p. 134.

suggest that such matters were beyond the competence of the federal Parliament as well.[9]

Thus, through a number of cases dealing with restrictive provincial laws, the courts began to sort out the federal-provincial distribution of legislative power with regard to civil liberties. However, up until 1960, decisions relating to civil liberties were viewed almost entirely in terms of deciding *which* level of government had the power to interfere with them, and never whether *any* government should in fact have such power. This *passivist* or literalist approach to judicial interpretation has haunted Canadian constitutional development throughout our history, and it has been particularly restrictive in the area of civil liberties. As J. R. Mallory has put it,

> this is not a very elevating way of looking at our much cherished liberties of speech, conscience and religion. . . . Before the enactment of the Charter, the dialogue – in constitutional terms – about basic political and civil rights was essentially confined to the narrow issue of jurisdiction.[10]

On the more positive side, long before the passage of the Charter in 1982, things did get better. A general agreement emerged in all provinces that certain rights and freedoms are too fundamental to be tampered with by any level of government, and legislative abrogation of substantive freedoms by the provinces has been rare since the late 1950s.

The Canadian Bill of Rights: 1960–1982

The Canadian Bill of Rights, enacted in 1960, sets out our basic rights and freedoms in much the same way that the Charter does. The list includes most of the things in the Charter, but the difference is that the Bill is only a federal statute and, hence, does not apply to the provincial legislatures. When this inherent limitation was combined with the fact that the Supreme Court's interpretation of the Bill was very inconsistent, it is not difficult to understand why many Canadians wished to see a constitutionally entrenched Charter. While it did supply "grist to the judicial mills"[11] throughout the 1970s, and although Mr. Justice (Chief Justice by 1975) Bora Laskin consistently presented articulate dissenting opinions, the court essentially stuck to a fairly restrictive application of the Bill of Rights.[12] With very few exceptions, such as the Drybones case in 1970,[13] which declared portions of the *Indian Act* to be invalid, the Bill of Rights did not substantially add to the *legal* protection of our fundamental freedoms in Canada.

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9. The Duff Doctrine is still alive in Canada. It was used in a decision of the Supreme Court of Canada in 1987. *OPSEU v. A-G Ontario* (1987) 2 SCR 2.

10. See J. R. Mallory, "Evolving Canadian Constitutionalism." Research paper prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (MacDonald Commission) (Toronto: University of Toronto Press, 1985), pp. 5–6.

11. *A-G. Canada v. Lavell and Bédard* (1974) SCR 1349. For those interested in the detailed arguments presented in this case, both the majority judgement delivered by Mr. Justice Ritchie and a lengthy dissent delivered by Mr. Justice Bora Laskin bear careful reading.

12. See, for instance, *Burnshire Case* (1975) 1 SCR 693; *Canard Case* (1976) 1 SCR 170; *Bliss Case* (1979) 1 SCR 183; and *Prata Case* (1976) 1 SCR 376.

13. *The Queen v. Drybones* (1970) SCR 282.

The overall effect of the Bill of Rights and corresponding provincial enactments was still beneficial in that such explicit statements of our political values have symbolic and educative utility. Their function is as much to educate as it is to provide binding *de jure* protection for our rights and freedoms.[14] Moreover, before moving to a discussion of the Charter, it is necessary to point out that any written guarantees of rights and freedoms may provide merely illusory protection. If the norms and values reflected in the constitutional, statutory, and common-law provisions defining our rights and freedoms are not congruent with the prevalent modes of thought and attitudes in the society at large, such laws will have little real effect on our substantive freedom. The best guarantee of fundamental freedom in any society, therefore, is a consensus among the members of the society as to what those freedoms comprise.

▶ THE CHARTER OF RIGHTS AND FREEDOMS

Perhaps the most significant component of the 1982 *Constitution Act* is the entrenchment in the Canadian Constitution of a Charter of Rights and Freedoms. While the sorts of rights and freedoms so protected are not all that different from those listed in the Bill of Rights, the Charter is an improvement over the Bill because the Charter applies equally to the provinces and the federal government, and is, in fact, entrenched in the sense that it can be altered only by all of the provinces and the Parliament of Canada through the constitutional-amendment process. The **entrenchment** of basic rights and freedoms is a major departure from previous constitutional practice in Canada, and likely should be considered a new *operative principle* of the Constitution along with parliamentary supremacy, responsible government, judicial independence, and divided sovereignty.

The Charter: Substantive Provisions

Section 2 of the Charter guarantees fundamental freedoms such as freedom of conscience, thought, belief, expression, assembly, and association. It also guarantees freedom of religion, despite the fact that the preamble recognizes the "supremacy of God." Although there is no jurisprudence yet to clarify this apparent inconsistency, we might guess that Canadians can worship as they choose – but that they *must* worship!

Sections 3–5 identify the **democratic rights**: the right to vote; the five-year limit on the life of a Parliament or legislature; and the requirement for at least one annual meeting of all legislatures. Where the Charter deviates a bit from the substance of pre-1982 rights is in the area of **mobility rights**. The deviation is not, however, in the inclusion of the right of free movement of Canadian citizens, and of the corollary freedom to seek employment in any part of Canada – for such rights already existed, both implicitly, in the structure of the *Constitution Act*, 1867, and explicitly, in common-law jurisprudence – but

14. While the 1960 Bill of Rights has been largely eclipsed in the public mind by the Charter, it is still in full effect and complements the provisions of the 1982 document. See *Singh v. Minister of Immigration* (1985) 1 SCR 177.

in the qualifier that laws creating "local preferences" in hiring practices are exempt from this provision if unemployment in that province is above the national average.

Sections 7–14 guarantee **legal rights**, or procedural rights, most of which were already protected by the Canadian Bill of Rights, the Criminal Code, and the British common-law precedents. The only distinctive provision with respect to legal rights is the "enforcement" section of the Charter, section 24(2), which states that the admissibility of evidence obtained illegally will depend upon whether the court feels that "having regard to all circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute."

Section 15 provides for **equality rights.** No individual can be discriminated against by reason of race, religion, gender, age, or disability. However, affirmative-action programs are acceptable where circumstances warrant. Official-language rights are protected in sections 16–22, although there is little here that was not already in effect before 1982. Finally, section 23 provides for the rights of linguistic minorities to have their children educated in the language of choice (French or English), out of public funds, "where numbers warrant."

Explicit Limits on the Charter's Applicability

While there are many qualifiers and exceptions written into the specific clauses of the Charter, a few sections have been and will continue to be critical in determining the scope and impact of the Charter on Canadian society. We have already encountered these in the context of the supremacy of Parliament, but each deserves more detailed consideration.

The Legislative Override The *legislative override* or *non-obstante* provision in section 33 permits Parliament or a provincial legislature to pass legislation that is to operate "notwithstanding a provision included in section 2 or sections 7 to 15." The Charter limits the applicability of such an override to five years, after which time the legislature must re-enact it. The impact of section 33 will ultimately depend upon the political determination of legislators to utilize this power, and their willingness to suffer the potential public criticism and embarrassment of having to re-enact it every five years.

The main use of this provision was by the *Parti Québécois* government of Quebec, which passed blanket legislation exempting all of Quebec's pre-1982 laws from the relevant sections of the Charter. From 1982 until their defeat in 1984, the *Parti Québécois* government routinely put a notwithstanding clause in all new legislation as well. This was partly a symbolic gesture to disassociate the Quebec government from a constitutional evocation it did not agree to in the first place, and not as a way of rejecting the basic principles entrenched in the Charter. In fact, Quebec has its own charter, which essentially guarantees all of the rights and freedoms enumerated in the Canadian Charter.

The exception to this was with respect to the French-only provisions in the Quebec language laws, which banned the use of English on commercial signs throughout the province. The courts, in 1988, determined that these provisions of the language legislation were *ultra vires* on the grounds that they infringed

freedom of expression.[15] The Government of Quebec re-enacted the law with a *non-obstante* clause to get around the Charter. Saskatchewan also used the *non-obstante* clause in 1986 in passing back-to-work legislation to end a public-service strike, but subsequent decisions of the courts have ruled that the right to strike can be limited. The use of the override provision was, in this case, unnecessary.

Reasonable Limits Prescribed by Law The second clause of the Charter that has been extremely important in determining its scope is section 1, which states that the Canadian Charter of Rights and Freedoms guarantees those rights and freedoms set out in it "subject only to such reasonable limits, prescribed by law, as can be demonstrably justified in a free and democratic society." By contrast to section 33, which allows the *legislature* to affect the scope of the Charter, section 1 is an interpretation clause that allows the *judiciary* to endorse limits on the scope of the Charter so long as those limits are 1) reasonable, 2) prescribed by law, and 3) demonstrably justified in a free and democratic society.

Faced with a Charter case, the courts ask first that the claimant demonstrate to the court's satisfaction that an impugned law does indeed place a limit on an entrenched right or freedom. If the claimant can demonstrate that there is a *prima facie* abrogation of the Charter, then the court assumes that the legislation being challenged is unconstitutional. To escape this fate, the government's lawyers must demonstrate that the *prima facie* abrogation is *reasonable* within the terms of section 1. The clause *demonstrably justifiable* has been interpreted by the courts to mean that the burden of proof is with the government, which must demonstrate that the limit placed on the right is reasonable. In other words, the courts have not allowed the presumption that, because an abrogation is enacted by a democratically elected legislature, it is automatically "reasonable" in a free and democratic society.

The test of reasonableness was established by the Supreme Court of Canada in a 1986 decision, *R. v. Oakes*.[16] The court stated that, first, the objective of the legislation must be important enough in terms of the interests of society to justify limiting the right or freedom. Second, the government measure cannot be in excess of what is minimally required in order to accomplish the objective. Thus, it should not be arbitrary or capricious; it should limit the right as little as possible and still accomplish the valid objective; and the effect of the limit must be in proportion to the societal problem being tackled, that is, the treatment cannot be so severe that it kills the patient. The other qualifier in section 1 of the Charter, that the limit be *prescribed by law*, has turned out not to be a problem because for the most part the only measures that have been challenged have been laws or actions taken by officials pursuant to laws.

Interpretation Clauses While sections 1 and 33 place the most important limits on the operation of the Charter, sections 24–32 limit the operation of the Charter by providing direction to the courts in the interpretation of its substantive provisions. Section 24(1) grants *standing* before the courts to any

15. *Ford v. A-G Quebec* (1988) 2 SCR 712; and *Devine v. A-G Quebec* (1988) 2 SCR 790.
16. *Queen v. Oakes* (1986) 1 SCR 103.

individual whose rights or freedoms under the Charter have been infringed. This is important because it allows any individual to directly and immediately challenge government enactments or the actions of governmental agencies and officials. The other side of the coin is found in section 32, which provides that the Charter applies to *all* governments, government agencies, and government officials in Canada. The significant point here is that the Charter does *not* apply to private-sector individuals or corporations.

Section 24(2) deals with the admissibility of evidence. It states that, in determining the admissibility of evidence that was obtained in a manner contrary to a provision of the Charter, the court may exclude it if it determines that to admit it would "bring the administration of justice into disrepute." The significance of this clause is that illegally obtained evidence is not necessarily excluded, as has been the case in the United States. Rather, it allows the *court* to decide to admit the evidence even when it is clear that the evidence was obtained illegally. This is intended to avoid the situation in criminal procedure in the US, where the courts must sometimes toss out a case on a minor technicality even if the individual is clearly guilty. On the other hand, if the breach of the Charter is not a minor one, such as a confession extracted by torture, the judge can still exclude it as evidence.

Other interpretation clauses that may, to some extent, limit the operation of the Charter include provisions that the Charter must be applied equally to men and women and that it should be interpreted in a manner consistent with the "multicultural heritage of Canadians." As well, the Charter is not intended to limit rights and freedoms set down elsewhere such as in statutory bills of rights and human-rights legislation, nor is it intended to *expand* the existing powers of governments. With the exception of section 25, which provides that the Charter should not be construed so as to limit aboriginal rights, these interpretation clauses are important mainly as symbolic affirmations of "good things" in our political culture and have not cropped up to any significant extent in the Charter cases to date. Section 25 will be discussed further in the section on aboriginal rights later in the chapter.

The Impact of the Charter

One fact has emerged uncontested in the experience of the first dozen years of the Charter's existence, and that is that the Charter has been raised in a very large number of cases. In the first three years, Peter Russell estimated that the Charter was raised at a rate of about 50 cases per month.[17] While most of these early cases were in the lower provincial courts, and while the flood of cases has abated significantly since the first few years, the Supreme Court of Canada has brought down over 200 decisions dealing with Charter issues since 1982. Today, about 20 per cent of the total decisions of the Supreme Court involve Charter arguments.

We cannot deal with all of these cases, nor can we devote a lot of time to explaining the complex legal arguments surrounding the decisions in an already very large textbook. However, in the following pages we will outline, in

17. See P. Russell, "The First Three Years in Charterland," *CPA*, Fall 1985, p. 369. See also F. L. Morton, "Charting the Charter—Year One: A Statistical Analysis," a paper presented at Canadian Political Science Association Conference, June 1984.

general terms, the substantive impacts of the most important cases, the overall impact of having an entrenched Charter on Canadian political life, and the impact on the political process, "writ large."

Important Cases: 1982–1994 The most general conclusion about Charter challenges in the courts is that most of them fail in the lower courts and are never appealed to the Supreme Court of Canada. While there were a number of successful challenges in the first few years, many of these involved violations of procedural rights by individual police officers and government officials. Where statutory provisions have been overturned by the Supreme Court of Canada, most of them involved relatively minor procedural flaws rather than issues of substance.

Since the first few years, the overall success rate of Charter cases has been around 15 per cent.[18] On appeals to the Supreme Court of Canada, approximately one-third of the Charter claimants have been successful. A second general conclusion about Charter cases is that most of the deft legal thrusts and parries are concentrated on section 1 arguments to justify rights infringments as "reasonable" limits. The low success rate of Charter challenges to legislation has to do with the relatively high success rate of government lawyers in convincing lower court judges that the legislative infringements on Charter rights and freedoms are reasonable.

Fundamental Freedoms With respect to laws infringing on our fundamental freedoms as set down in section 2 of the Charter, the Supreme Court of Canada declared the *Lord's Day Act ultra vires* because it infringed upon the religious freedom of non-Christians.[19] On the other hand, Ontario Sunday-closing legislation was declared valid because its purpose was to provide workers with a day of rest and not explicitly to recognize the Christian sabbath. The court ruled that the infringment of religious freedom was a reasonable limit in this case.[20]

The freedom of thought and expression clause of the Charter has been upheld in a number of cases. In a case in Ontario in 1983, the powers of the Ontario Board of Censors were challenged, and the Ontario Court of Appeal upheld the decision of the lower court that the board, as then constituted, interfered with freedom of expression.[21] The case was never appealed to the Supreme Court of Canada because the provincial government changed the legislation to bring the operation of the board in line with the provisions of the Charter. Unreasonable interference with freedom of expression was also the court's rationale in declaring *ultra vires* the French-only sign provisions of Quebec's Bill 101.[22] As discussed above, the Quebec legislature re-enacted the provisions with a section 33 notwithstanding clause. Provisions of the federal *Public Service Employment Act*, which restricted the political activity of public

18. See Radha Jhappan, "The Charter and the Courts," *in* M. S. Whittington and G. Williams, *Canadian Politics in the 1990s* (Toronto: Nelson, 1994), pp. 335–59.
19. *R. v. Big M Drug Mart* (1985) 1 SCR 351.
20. *R. v. Edwards Books and Art* (1986) 2 SCR 713.
21. *Ontario Film and Video Appreciation Society v. Ontario Board of Censors* (1983) 147 DLR (3d) 58.
22. See *Ford v. A-G Quebec.*

servants, were shot down by the Supreme Court in 1991, again as an unreasonable limit on the freedom of expression.[23]

On the other side of the ledger, various pieces of legislation that place a *prima facie* limit on freedom of expression have been upheld as constituting reasonable limits under section 1. These include mostly criminal-law provisions dealing with pornography, hate literature, publication bans in sexual assault cases, and prostitution.

Unions have generally not fared well in their attempts to define the scope of freedom of association. While the right to picket was upheld as an extension of freedom of expression,[24] the courts have determined that the right to strike is not a fundamental freedom flowing out of the freedom to associate. Hence, back-to-work legislation and laws prohibiting strikes by certain groups of employees have been deemed to be reasonable. As well, challenges to legislation capping public-sector wages have all failed.[25]

Legal Rights There has been a lot of Charter litigation with respect to section 7 which guarantees "the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." In a very early Charter case, *Queen v. Operation Dismantle Inc.*,[26] a peace group argued that the testing of the cruise missile in Canadian airspace violated our "security of the person," and the Cabinet's decision to allow the testing of the missile was therefore unconstitutional. While the Supreme Court agreed that nuclear war would, indeed, be bad for our health, they rejected this argument.

However, in the Morgentaler case in 1988,[27] the Supreme Court struck down the section of the Criminal Code dealing with abortion on the grounds that section 7 of the Charter included a woman's right to terminate an unwanted pregnancy. In the Borowski case,[28] the counter argument, that a *fetus* has the right to life, liberty and the security of the person was rejected in the following year as moot in light of the Morgentaler decision. In 1993, in the Rodriguez case, the Supreme Court rejected the argument that section 7 included an individual's right to a physician-assisted suicide and upheld the relevant sections of the Criminal Code.[29]

Finally, perhaps the most significant decision involving section 7 was brought down in the Singh case of 1985.[30] Here, provisions of the *Immigration Act* were invalidated because the court agreed that to deny refugee claimants a fair hearing before deportation was a denial of "fundamental justice." What was a new departure in this decision was that the court stated that the Charter provisions protect Canadian citizens, landed immigrants, and visitors, whether here legally or illegally.

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23. *Osborne v. Canada* (1991) 2 SCR 69.
24. *Dolphin Case* (1986) 2 SCR 573.
25. See *Re Public Service Employees Relations Act* (1987) 1 SCR 313; *RWDSU v. Saskatchewan* (1987) 1 SCR 460; and *PSAC v. Canada* (1987) 1 SCR 424.
26. *Queen v. Operation Dismantle Inc.* (1985) 1 SCR 441.
27. *Morgentaler v. The Queen* (1988) 2 SCR 30.
28. *Borowski v. A-G Canada* (1989) 1 SCR 342.
29. *Rodriguez v. A-G British Columbia* (1993) 3 SCR 519.
30. *Singh v. Minister of Immigration* (1985) 1 SCR 177.

The other sections of the Charter dealing with "legal rights" have been invoked many times and some have resulted in favourable judgements. In *Hunter v. Southam*,[31] the search and seizure practices of the Combines Investigation Branch were declared to be unreasonable, and had to be modified to bring them into line with section 8 of the Charter. Writs of assistance, which were open-ended warrants issued to police officers in the past, have been struck down as unreasonable; strip searches, while not unreasonable per se, can only be conducted if the individual is given the opportunity to retain counsel; and blood samples cannot be taken without legal authorization. On the other side of the coin, the court decided that it is not unreasonable for a police officer to demand to see an individual's driver's licence during a highway spot check.

In sum, one of the fears of the early critics of the Charter was that Canada could end up with a situation similar to the one in the United States, where obviously guilty criminals may elude conviction because of technical violations of the rights of the accused. It would appear that, for the most part, these fears were unfounded, for while there have been some successful challenges of criminal procedure on the basis of the Charter, judges have generally taken a fairly generous view of what is reasonable in such cases. With respect to the admissibility of evidence, judges have tended to shift the burden of proof, under section 24 challenges, from the Crown to the accused. In other words, the *defence* must show that to admit the impugned evidence would "bring the administration of justice into disrepute."[32]

Equality Rights The jurisprudence generated by the section of the Charter dealing with equality rights has not produced any startling results. Sections of the *Unemployment Insurance Act* that discriminated on the basis of gender and age were struck down,[33] and a provision of the Ontario Human Rights Code that exempted sports teams from its gender-discrimination provisions was declared invalid.[34] However, in other cases that invoked section 15 provisions, the courts have found that compulsory retirement laws, while *prima facie* discriminatory, were reasonable in a free and democratic society.[35]

In *Andrews v. The Law Society of British Columbia*, in 1989,[36] the Supreme Court of Canada ruled that discrimination on the basis of citizenship was not constitutional. Radha Jhappan finds it ironic that the Andrews case, while one of the more important of the decisions involving the non-discrimination section of the Charter, "upheld the equality rights of a healthy, wealthy, white male of British origin, rather than a member of a group that has been historically disadvantaged."[37]

Democratic Rights The only cases in which the courts have been asked to use the democratic-rights section of the Charter have involved the section 3 guarantee of the right to vote, and the only successful decisions have been those

31. *Hunter v. Southam Inc.*
32. Russell, "The First Three Years," p. 392.
33. *Brooks v. Canada Safeway* (1978) 1 SCR 1219; *Tetreault-Gadoury v. Canada* (1991) 2 SCR 22.
34. *Blainey v. Ontario Hockey Association* (1986) 54 OR (2nd) 513.
35. *McKinney v. University of Guelph* (1990) 3 SCR 229.
36. *Andrews v. The Law Society of British Columbia* (1989) 3 SCR 22.
37. Jhappan, *The Charter and the Courts.*

that struck down provisions of elections acts disfranchising prisoners and people in mental institutions. In general, while the courts have agreed that there can be reasonable limits placed on peoples' voting rights, the blanket exclusions in many election laws were deemed to be excessive. In the same way, the courts have determined that the right to vote in a provincial election can require a certain period of residency in the province, but that the period must be reasonable.[38]

As discussed above, limits on the political activities of public servants can be imposed in order to ensure a neutral public service, but the limits must not be greater than what is necessary to achieve that goal. Blanket provisions have thus been declared unconstitutional, not because they run up against section 3, but because they unreasonably restrict freedom of expression.

An important successful Charter challenge was the National Citizen's Coalition case in 1984. This involved a section of the *Canada Elections Act*, which made it an offence for private citizens and organizations to advertise independently for or against candidates or parties during a campaign. The Alberta Supreme Court held that such a restriction was not a "reasonable limit" because it could not be demonstrated that such independent participation in campaigns would damage the democratic election process.[39] This was not appealed to the Supreme Court of Canada. Amendments to the law that would bring it into line with the Charter have been enacted, but have not yet been tested in court.

Finally, in 1991 the Supreme Court dealt with a challenge based on section 3 that could have rendered inoperative every elections act in Canada, federal and provicial. The argument was made that section 3 implied *fair and effective* representation and that the variations in the size of rural and urban constituencies denied this right. The court decided that representation could be fair and effective without being *equal* and that, therefore, a reasonable discrepency between urban and rural ridings is acceptable.[40]

The Charter and Canadian Political Life The above discussion of the Charter is intended to provide an overview and does not pretend to explain the full complexity or all of the subtleties in the court interpretations of this important component of our Constitution. However, at the broadest level of generalization, it can be concluded that the Charter has not yet had a very great impact either on our system of government or on the multitude of statutes currently on the books. Thirteen years' experience with the judiciary's interpretation of the scope of the Charter indicate that the courts will not tolerate far-fetched attempts to overturn a wide range of policies of our elected governments. But neither have the courts taken the approach that because something is enacted by a sovereign democratic legislature it is automatically reasonable in a free and democratic society:

> Generally Canadian judges have not taken the easy way out of giving the legislature the benefit of the doubt and presuming the legislation to be reasonable and there-

38. See Ian Greene, *The Charter of Rights* (Toronto: Lorimer, 1989), pp. 110–25.
39. *National Citizens' Coalition Inc. v. A-G Canada* (1984) 11 DLR (4th) 48.
40. See R. Knopff and F. L. Morton, *Charter Politics* (Scarborough: Nelson, 1992), pp. 332–73.

fore constitutional. On the contrary they have, in effect, required the government to assume the burden of demonstrating the reasonableness of legislative limits on rights.[41]

By way of summary, the Charter has turned out to be neither as bad as its detractors feared nor as wonderful as its proponents hoped. It is clear, as well, that in the cases decided since 1982 we can see that the Charter has had and will continue to have a much greater influence on the way Canada is governed than did the 1960 Bill of Rights.[42] We will say more about the Charter and the changing role of the judiciary, particularly the Supreme Court of Canada, in Chapter 24.

▶ CONCLUSION

While the *direct* impact of the Charter through its application by the courts may not be as extensive as expected, it has undoubtedly had an impact on the attitudes of the lawmakers themselves. Because it exists, and because it is being applied by the courts, legislators are wary of possible court challenges. Governments not only screen all new policy proposals to ensure that they fall within the boundaries defined by the Charter, but they have also had to go back and "audit" exisiting laws in order to bring them in line with Charter decisions.

At another level, the values and attitudes of governmental officials dealing directly with the public, particularly police and security officers, are critical in determining the actual extent of our rights and freedoms and the quality of life in Canada. Given the wide discretionary powers that we have traditionally vested in members of the law-enforcement community, it is essential that such people understand and respect our basic political values. While we must certainly pay more attention to the recruitment and training of police and security officials to ensure that people with deep prejudices, closed minds, or little tolerance are not placed in positions of such power, it is also clear that the Charter, and the manner in which it has been interpreted, serves as a constant reminder to these officials of the enormous responsibility with which we have entrusted them.

Finally, as a general conclusion to this discussion of rights and freedoms in Canada, it is necessary to point out that the constitutional guarantees provided by legal instruments such as the Charter cannot in and of themselves protect our liberties. While such institutional guarantees do deter those who would try to abuse our freedoms, their more important role is as symbolic and educative devices. They teach Canadians about the importance of our rights and freedoms and about the importance of non-discrimination. In the final

41. Russell, "The First Three Years," p. 376.

42. Perhaps, in the first few years, the area in which the effect of the Charter on legislation was the most profound was that of language-education rights. Key sections of the Quebec Charter of the French Language were thrown out because they violated the rights of English Canadians under section 23 of the Charter of Rights (*A.G. Quebec v. Quebec Association of Protestant School Boards* [1984] 10 DLR [4th]) 321). In another case, the Ontario Court of Appeal upheld the rights of Franco-Ontarians to education in their own language (*Re Education Act of Ontario* [1984] 10 DLR [4th] 491). However, the early successes with respect to this section have not generated a lot of new decisions since.

analysis, it is the deep-rooted values and attitudes of Canadians that determine the kind of society we are going to live in. The symbolic role that formal statements and guarantees of rights and freedoms play in the process of political socialization may be more important than the positive-law remedies that are provided in them, for, in the long run, the most important sanction against repressive laws is a public opinion that is opposed to them. The danger lies either in the public's ceasing to pay much attention to the government, thus letting repressive legislation slip by unnoticed, or in the majority's uncritical acceptance of laws that suppress the freedoms of minorities.

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Chapter 22

Bureaucracy: Function and Structure

In this chapter and the next our focus shifts from the political part of the government to the administrative arm of the executive branch, the **bureaucracy**. The bureaucracy, or the **public service**, is populated by a large number of non-elected full-time employees of the government whose twin responsibilities, in the most general terms, are to tender policy advice to the Cabinet and to put into effect or to *implement* the laws passed by Parliament. In this chapter we look first at the concept of bureaucracy and at the central process of bureaucracy, which is **management**; then we turn to the specific functions of the Canadian bureaucracy and the various institutional species that co-exist within it.

▶ BUREAUCRACY: EPITHET OR TERM OF ART?

Long used as an epithet by the media and the public, the word "bureaucracy" has come to be associated in common parlance with negative qualities such as inefficiency, "red tape," depersonalization, and slowness of execution. "Bureaucrats" are similarly stereotyped as lazy, unproductive, and insensitive to the needs of the individuals they are supposed to serve. There is, however, a more proper use of the term, which is derived from the literature of organization theory and which refers only to the objective structural characteristics of a certain type of organization. In this sense, bureaucracy is a purely descriptive "term of art" rather than an epithet. From the perspective of the preeminent bureaucratic theorist, Max Weber, bureaucracy is the **ideal-type** of legal-rational social organization.

Routinization of Decision-Making

Before describing the bureaucratic structures in the Canadian government, we shall look briefly at the reasons for adopting a bureaucratic type of organization. Given all of its real or imagined malfunctions, what is good about the bureaucratic form? First, because equality is a value of our system of government, it is necessary, when applying the law to specific cases, to treat similar cases in a similar fashion. Bureaucratic organization permits a maximum of impartiality and rationality in dealing with the public by **routinizing** the decision-making process.

Second, the application of the law must be predictable, to be fair, and a bureaucratic system can be made highly predictable. The problem here is that, in applying the law equally and impartially, the person with the special case, who requires an *equitable* decision instead of an impartial one, is frequently penalized. How many times have we met with the standard bureaucratic answer: "If we do that for you we will have to do it for everyone else as well" or "We are sorry but our regulations do not permit any exceptions." Thus, while bureaucratic procedures are valid for perhaps 90 per cent of cases, for the 10 per cent that may be unusual or exceptional, the system can pose difficulties. The justification for such a system is that it is the only way we have of dealing fairly, and at reasonable cost, with the majority of the vast number of cases that come up.

Modern bureaucracies have, of course, developed some mechanisms for dealing with special cases. Many large programs dealing directly with the public have some form of appeal procedure, and individual bureaucrats at the operating levels of the government do have discretion in applying the law to individual cases. We have noted, too, in our discussions of the functions of Parliament, that one of the most important parts of the MP's role is helping constituents who have not been adequately dealt with by the bureaucracy.

Most provincial governments in Canada have supplemented the ombudsman role of members of provincial legislatures with the establishment of a special office of the legislature called the *Ombudsman*. The role of the Ombudsman is to ensure that special cases are fairly dealt with and that citizens have a complaints "window" through which they can express their grievances and seek redress. Nonetheless, in conclusion, we must return to the rather unsatisfactory comment that bureaucratic organization is the best way we know of to deal with "bigness" in government, and that some problems inevitably will arise.

Structural Characteristics

A bureaucracy is a form of organization with certain structural characteristics, the most obvious of which is its large size. Most of the other characteristics have evolved to accommodate the pre-eminent one of "bigness." First of all, there is a well-developed **division of labour**, whereby the officials occupying roles within the organization perform clearly defined functions. Ideally, there is no duplication of effort and no overlapping of roles within a bureaucracy, although this is difficult to achieve in practice. Furthermore, a bureaucratic role or "job" is defined by the office or the formal "job description," not by

the incumbent of the office. This is essential if bureaucratic behaviour is to be predictable in the short run and if there is to be continuity over time in the performance of the duties of that office.

Continuity over time is also facilitated by the keeping of detailed written records of all actions taken by the bureaucratic officers. In this way, every decision can be backed up by precedents established in the past, and in turn becomes part of the body of precedents for future decisions. There is no legal rule of precedent in bureaucratic decision-making, but the fact is that if someone else has made a certain decision in the past and has gotten away with it, the chances are that a similar decision today can be justified by the officer responsible. Hence, while a bureaucratic role is formally defined by the organization itself, it can still develop and evolve in orderly and predictable ways over time.

Also contributing to the continuity of bureaucratic decision-making is the fact that the holding of a bureaucratic office is a **full-time** occupation or a vocation. In recent years, bureaucratic officers have been tenured in the sense they do not hold office merely at the pleasure of their political employer. This means that being a public servant can be viewed as a **career**, and not simply as a temporary job. If he or she is interested, a faithful public servant can generally expect to spend a working lifetime in the same occupation, with periodic opportunities for career development and promotion. Even in a climate of restraint, wage freezes, cutbacks, buy-outs, and early retirement, employment in the public service is still essentially a career and not simply a way to "pick up a few bucks" while waiting for something better to come along.

Finally, although it is not unique to bureaucratic organizations, the basic mechanism of control within a bureaucracy is **hierarchy**. The principal of hierarchical authority, also called the **scalar principle**, means that authority is "top-down," flowing downward through the organization. Each level of the organization is responsible immediately to the level above and ultimately through a **chain of command** to a single "boss" at the top of the pyramid.

Bureaucratic Maladies

While it is our intention to use *bureaucracy* here as a "term of art" that describes a certain type of organization characterized by identifiable features, it must also be recognized that, in the real world, bureaucracies don't always work as well as Max Weber might have expected. We have already explained that in seeking to treat all of its clients **equally**, a bureaucratic agency may not be able to treat them **equitably**. To apply the law more equitably would necessitate a lot more discretion in the hands of public servants, which might result in personal bias being allowed to compromise the impartiality built into the notion of the rule of law. The balance between administrative discretion and routinization of decision-making is a delicate one and it is easy for any bureaucratic system to lean too far one way or the other.

A second malady of bureaucracy is its inherent **conservatism**. Again this is the direct result of the routinization that is the *raison d'être* of such organizations but it also generates resistance to change. In the extreme, this conservatism may manifest itself as a **pathology of persistence** whereby governments never stop doing something once they have begun. Bureaucratic agencies

quickly acquire an organizational "survival instinct," an imperative to live on at all cost. In a time of deep cutbacks to government they find it more difficult to survive, but examples abound in our recent past of government agencies that "soldier on" despite the fact that they have outlived their usefulness. One case in point is the Halifax Relief Commission, which was set up in 1917 to provide relief to victims of the Halifax harbour explosion, and was still in existence well into the 1970s!

A third common perversion of Weber's model is the tendency for bureaucratic officials to engage in **empire building.** While the conservative nature of bureaucratic organization inhibits change, the one form of change that always seems to be acceptable is growth. Hence there is a tendency for organizations to seek to expand their human-resources establishment and their jurisdiction, if necessary by raiding or absorbing other agencies. Such organizational imperialism can lead to bitter "turf wars" that are seriously dysfunctional in coordinating the efforts of departments of government that should be working together to serve the Canadian public.

Finally, it is often observed that the internal workings of government agencies are impaired by what we might call the **pathology of status.** While bureaucratic agencies are hierarchical, their positions in a hierarchy do not always allow career bureaucrats sufficient opportunities to differentiate themselves from their cohorts. Large numbers of people will find themselves at essentially the same levels of the hierarchy and will seek means of establishing relative status or prestige on the basis of criteria other than rank or salary. Hence, it is often possible to observe organizational snobbery, whereby agencies attempt to attain greater status for their employees on the basis of relative power and influence, relative size, or the relative luxuriousness of office accommodations. At the level of individual bureaucrats this can lead to jealousies over who gets a corner office, teak furniture, or a shag carpet. At one time in the 1970s, the importance of office carpeting in defining relative prestige came to be known as "rug ranking" in Ottawa bureaucratic circles.

Conclusion

To conclude, while individual bureaucracies do suffer from some all too familiar maladies, *bureaucracy* is simply a form of organization with definitive structural characteristics. While the term *bureaucracy* can be used to apply to governmental and non-governmental organizations alike, in common usage in the discipline of political science the term refers specifically to the **public service** or to the **administrative branch** of government. The focus of this chapter is on the role of the non-elective officials of government, the bureaucrats, who work within the Canadian public service, the public services of the various provinces, municipalities, and territorial governments, and the multitude of public-sector agencies and corporations that are not formally a part of the "Public Service of Canada."

We will also see that bureaucratic structures in Canada, as in other parts of the world, do not perfectly mirror the "ideal-type" of Weber. There is considerably more flexibility and variability in bureaucratic structures than is implied in the classical descriptions. This is a desirable attribute of real-world bureaucracies, since it enables them to react more effectively to the multifac-

eted strains imposed on them by the modern world. However, Weber's ideal-type provides us with a conceptual benchmark against which to measure real bureaucracies and is, as a first approximation, still a useful guide to understanding administrative structures in Canada. We will return to a more detailed classification and description of bureaucratic structures after we have examined the core process of bureaucracy, which is **management**.

▶ THE FUNCTIONS OF MANAGEMENT

Management is a generic concept common to all organizations that are oriented to achieving goals through group effort. Management can be defined simply as **coordination**, or more explicitly as the *the coordination of individual effort to accomplish group or organizational goals*. The mechanisms whereby goal-directed coordination is achieved, whether applied to policy goals or administrative goals, can be broken down into a number of sub-functions or activities.

The sub-functions that are common to the process of management are **planning, organizing, controlling, directing,** and **staffing**. Each of these will be discussed separately, but first it is important to identify the characteristics that differentiate management in the private sector from management in the public sector.

Public- and Private-Sector Management

The first and major difference is simply that private management is analytically less complex because the ultimate goal of private-sector organizations can, for the most part, be reduced to making a **profit**. This means that criteria for evaluating management systems, such as efficiency and economy, can be employed in their literal sense. The organization that survives and makes a profit for its shareholders is obviously blessed with "good management," and one that goes bankrupt or fails to make money is not. By contrast, for public management the criteria for being successful are not so clear. How, for instance, can one reduce the administration of a welfare program, the enforcement of the law, or the funding of medical research to profit?

The Profit Motive The goals of government are regulatory, distributive, redistributive, and punitive, but seldom profit oriented or **capital accumulative**, as are the goals of most private-sector organizations. The ultimate measure of the worth of government is how effectively it has contributed to the happiness of its clients or to the general well-being of the citizenry. Although the emphasis in government has been changing in the era of large deficits and heavy tax burdens, the success of government activities has not traditionally been measured in terms of how frugally it has managed to run its operation, let alone in terms of how much wealth it has been able to accumulate for its "owners." Thus, public management is different in part because the ultimate goals of the organization are so diffuse and because individual happiness and societal well-being are difficult objectives to define and even more difficult to measure.

The public manager faces a second problem, which his or her counterpart in a private corporation is able to avoid: the goals of government are sometimes mutually exclusive. Redistributive programs, for instance, take money through taxation from those who have more, and give it in the form of transfer payments to those who have less. The latter will inevitably find this arrangement more pleasing than the former. Indeed, it is almost axiomatic that all government policies will please some people and displease others. In the process of seeking the utilitarian golden mean of satisfying as many Canadians as possible and alienating as few as possible, managers in one department may be in direct competition with managers in another, with obvious negative consequences for interagency or interdepartmental coordination.

Control and Accountability Management in the public sector is also distinguished by the extent to which one of the sub-processes, **control**, is emphasized. The need for responsibility and accountability of bureaucrats to Cabinet and Parliament is a given in a democracy. The consequence of this for the bureaucratic process is that the systems of financial and personnel administration are oriented more towards *controlling* the public-service managers than facilitating the line managerial function. Thus, for instance, the process of budgeting in the public service has seldom functioned as effectively as a tool of planning as it does in private corporations; instead, it is focused almost entirely on keeping the bureaucracy in check.

Finally, the bureaucratic process in the government of Canada, as we have seen in earlier chapters, is distinguished by the extent to which public servants are called upon to tender policy advice to the political arm of the government when it is determining priorities and choosing modes of policy implementation. We will say more about this later in the book, but first we must turn to a discussion of the functional components of management.

Management: Functional Components

We have already remarked that the core components of management involve planning, organizing, controlling, directing, and staffing. In this section we look at these processes in the public sector at the conceptual level to set the stage for looking at the public service of Canada's role in the administrative process and the policy process.

Planning Planning is at the core of any system of management, whether in the private or in the public sector. At the simplest level, all this means is that it is necessary to decide what to do and how best to do it before actually launching into the task. However, a manager must define and redefine operational goals and develop and adjust the means of accomplishing those goals on an ongoing basis. Thus, the planning component of the process of management is not a one-time task, but is a constant in effective management. Moreover, the planning process must focus on both ends and means, on the problems of both **goal determination** and **goal attainment**.

In the private sector, because the ultimate goal of making a profit is fairly well agreed upon, the manager's task as a planner is more focused. In govern-

ment, however, the task is not so simple. Not only are the goals less clearly defined and less agreed upon, but the means of accomplishing them must fit within the particular norms of a liberal democratic polity. As well, both the program goals and the strategies or instruments of goal attainment must comply with the wishes of a set of decision-makers in Cabinet, whose main and quite legitimate motivation is to get themselves re-elected.

These constraints on the process of goal determination and on the choice of means have important implications for the planning process in the public sector. First, because one of the norms of a democratic system is that the activities of government should reflect the will of the public, the ultimate responsibility for goal determination falls to the political executive. Indeed, the Cabinet and its executive-support agencies take the major role not only in the determining of policy priorities, but also in approving the general means to be employed by the bureaucracy in implementing those priorities. The permanent officials of the government, who are *responsible* for administering programs and delivering services, do not have final control over what programs are put in place.

The politicians, as they sometimes are prone to do, can put policies in place against the advice of the bureaucrats, but the public-service managers are still responsible for trying to achieve those policy goals. In this sense the ultimate responsibility for setting goals is separated from the ultimate responsibility for accomplishing them, a situation all senior managers in the public service have found extremely frustrating at some point in their careers. This **bifurcation of planning** in government, where the responsibility for goal determination and goal attainment are split between different decision-making locales, is one of the key weaknesses of public-sector management.

A second limitation on effective planning in government is that there is a universal concern with keeping the bureaucracy *accountable* to the political branches of government. This has meant that managerial tools such as the expenditure budget, program review, and performance evaluation, which in the private sector are employed as tools of planning, in the public service have been geared almost single-mindedly to maintaining the accountability of the departmental managers to Parliament and the Cabinet. We will say more about this phenomenon when we discuss the administrative process in the next chapter.

Organizing In order for individuals to be able to work together effectively towards the attainment of organizational goals, a contrived structure of roles – an **organization** – must be designed and maintained. It is important to recognize, however, that the full story of an organization cannot be told by formal "org charts." Bureaucracies have both formal and informal organizational structures. The latter reflect unplanned patterns of personal interaction that develop within any group of people. Informal leaders will inevitably emerge in most work environments and these people sometimes rival the authority of the formal leaders or the "bosses" by virtue of their personal charisma, job competence, or long-time experience in the particular workplace.

The phenomenon of informal organization, which occurs in all formal social structures, has implications for the managerial function of *directing*, which will be elaborated upon later.

Controlling In this section we want to concentrate on the formal organizational aspects of bureaucracy and how the manager is responsible for defining the internal *span of control* and *chain of command* within government departments and agencies.

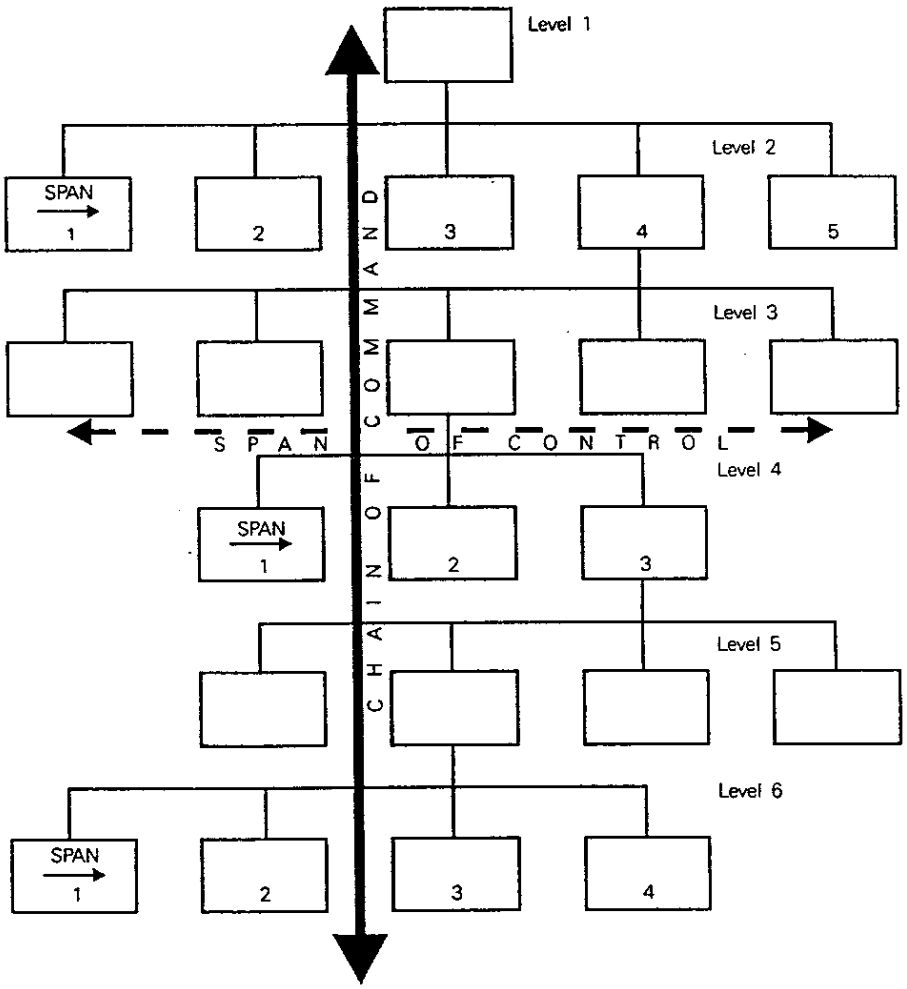
Span of Control The **span of control** in hierarchical organizations is defined by the number of individuals at any level who must report directly to a supervisor, senior manager, or boss. Thus, if a government department has six assistant deputy ministers (ADMs) who report directly to the deputy minister, the DM's span of control is six. Different textbooks on management have tried to define the optimum span of control, but without success, because the appropriate span of control will vary with the nature of the organization and the personalities of the people involved. Moreover, the most effective span of control will be affected by the extent to which informal organizational structures exist and the role they play in either facilitating or short-circuiting the vertical communication links. Generally, however, it is thought that a span of control of five to eight is optimum and that most managers cannot effectively direct or provide leadership to many more than eight immediate subordinates.

Chain of Command Where span of control defines the breadth of an organizational hierarchy, the concept of **chain of command** has to do with the length of the hierarchy. The length of the chain of command is the number of levels from top to bottom in the organization. Obviously, if the span of control is to remain manageable, as organizations grow, the chain of command must lengthen. While it is not possible to state that there is any universal optimum length of chain of command, generally, as the chain of command lengthens, the senior manager will be called upon increasingly to delegate authority and to trust subordinate managers. Thus, an important part of the managerial activity of organizing is to structure the formal organization in such a way that there is a balance between the span of control and the chain of command that permits delegation of responsibilities without sacrificing the ability of the top managers to "direct" the extremities of the operation.

Finally, closely related to the concept of chain of command is the concept of **unity of command.** What this means in a hierarchical organization is that there should be only one boss at the top. According to this principle, subordinate managers in a government department, for instance, must generally not have more than one superior, the chain of command must lead directly from top to bottom in the organization and it must be clear to managers at every level to whom they are responsible. It is difficult for a middle-level manager to function effectively if there is more than one boss giving orders.[1]

1. It should be noted that there is a mode of management known by the names *project management, matrix management,* or the *managerial grid.* This is a style of management sometimes applied to special projects requiring input from several departments or agencies. The "project manager" becomes the boss for purposes of the specific project assignment but the participants on the team from the various participating agencies still earn their pay and have their performance evaluations written by their superiors in their "home" department.

Figure 22.1
Span of control and chain of command in hierarchical organizations.



Directing In essence, **directing** means giving direction and providing leadership to subordinates in an organization. The key to the managerial activity of directing is to **motivate** the people within an organization so that they will be willing to put the goals of the group before their individual goals, at least while on the job. This can be achieved easily if the goals of the organization happen to be congruent with those of the individual, as is often the case with voluntary groups and associations. In bureaucracy, however, where employment is vocational and usually tied to a career, the organization motivates its workers by financial rewards (wages and salaries) and by incentives such as promotion, career enhancement, and oportunities for training and development.

In the private sector, the manager has considerable control over the relative material rewards (and penalties) to be allotted to his or her personnel. By

influencing the processes of promotion, by parcelling out the opportunities for advancement through training programs, and by having the power to impose disciplinary sanctions, the manager in the private sector has the tools, the material sanctions, and the inducements to motivate subordinates. By contrast, the manager in the federal bureaucracy has only limited direct control over the salary, benefits, and career-development opportunities of employees. The deputy minister must continually work within the personnel policy directives of central agencies such as the Treasury Board, which is formally reponsible for personnel management in the public service, and the Public Service Commission, which oversees matters of promotion and job competitions. Thus, the DM is limited in the extent to which the managerial prerogatives, which are used as motivators in the private sector, can be exercised.

Lacking personal control over the material factors of motivation, the public-service manager must therefore resort to the more ethereal leadership skills in attempting to get the most out of subordinates. It is the qualities of the individual manager *per se*, such as charisma, professional expertise, and overall job competence, and not what the manager can do for the employee, that must be employed as motivators. If the manager is liked and respected by the employees, or if the employees believe in the kinds of goals the manager is trying to accomplish, they will work harder and more enthusiastically at their jobs; on the other hand, if they hold the manager in low regard and spend a lot of time figuring out how to avoid work, the manager has somewhat limited options with which to discipline them.

The other problem is that, lacking the formal authority to reward and punish subordinates, a manager in the public service may find it difficult to compete with **informal leaders** in the organization. The big edge the manager in the private sector has when dealing with informal organization is the possession of full authority within the formal organization. In the government, however, the ability of the manager to motivate underlings may hinge on the ability to become part of, or at least to figure out how to use, the informal authority patterns in the organization. Thus, managerial leadership or direction in government is not "command" to the same extent it tends to be in other hierarchical organizations, but a complex of personality resources, social and political skills, and a full awareness of the informal alliances, friendships, and personal animosities among the people employed. Directing in this sort of an organizational environment resembles more an art form than a professional skill.

Staffing The managerial activity referred to as **staffing** essentially involves "manning" the organization. This is achieved by **recruiting** candidates for positions in the organization, by **selecting** the best people from those recruited, by **training** the ones selected so they can do the job required of them, and by facilitating the development of their careers through **promotion** within the organization. In the private sector, the senior manager has control over virtually all aspects of the process of staffing and usually is assisted in this process by a fairly sizable personnel branch. However, ultimate decisions as to hiring and firing of employees, and decisions as to promotion, transfer, and discipline rest with senior line management within the organization.

In the public service, however, the authority of the senior manager is not as comprehensive. In the federal bureaucracy, as we have seen, the senior manager must share the staffing function with the Treasury Board and the Public Service Commission. The staffing function, however, does not cease with recruitment. As with any organization, it is necessary to train the people who are part of it, not only with respect to the technical skills of the specific occupation, but also with respect to the goals of the organization. The employee who has been thoroughly socialized into a bureaucratic organization will likely function more enthusiastically, and even more efficiently, than the person who looks on his or her occupation as "just a living." Hence, there is an almost constant process of training and development within the Canadian bureaucracy, which, by moulding the attitudes of public servants, can affect the **bureaucratic culture** that underlies decision-making.

The staffing function can also be seen as the **personnel administration** function of a large organization. Personnel administration must be distinguished from **personnel management**. The latter is, in effect, the core of the management activity we have referred to as directing: in other words, it means "managing people." Personnel *administration* is the provision of support services to the line managers by helping them recruit and select new employees, by assisting in the process of labour-management relations, and by providing employees with opportunities for training and development.

In private-sector organizations, the personnel administration function is performed entirely by units *within* the organization and subject to the directives of the CEO. In the Canadian Public Service, while there are personnel branches within each department, much of the personnel administration function is controlled centrally rather than departmentally. We will discuss the way in which this separation of many of the personnel functions from the line departments has affected the administrative process in the next chapter. Now we must turn to a discussion of the primary functions of the bureaucracy in Canada.

▶ THE FUNCTIONS OF THE CANADIAN BUREAUCRACY

The two most important classes of functions performed by the bureaucracy in Canada are **administrative functions** and **policy functions**. By far the largest numbers of public servants are engaged in the former, which involve delivering government programs and enforcing or applying the laws in Canadian society. The latter, by contrast, are the services that the bureaucracy performs in assisting the Cabinet in deciding what policies, programs, and laws should be put in place. While the policy role directly involves far fewer public servants, as we have seen in earlier chapters, policy-making is the central function of government. The bureaucracy also performs a range of **systemic functions** and **representative functions** that are incidental to the performance of its main duties but nonetheless important overall in our political community.

The Policy Functions

That the bureaucracy in Canada has a significant role in the policy process is now accepted as fact, a point that is decried more than disputed. As we have indicated, this role is based largely on the concentration of expertise within the public service, making government departments and agencies the major sources of information about the technical and financial feasibility of policy options. As the technological complexity of our society increases, the reliance of political decision-makers on bureaucratic or technocratic specialists will tend to increase commensurately, and there is no indication that technological growth is slowing down.

Initiation and Priority Determination It has been mentioned in previous chapters that the bureaucracy performs important functions both as an **initiator** of policy and as a **channel** of policy initiation to be used by other institutions and actors in the political process. Beyond this first-stage policy role, the bureaucracy continues to be deeply involved in the business of policy making. When policy **priorities** are being established, the Cabinet documents that form the basis of discussion in Cabinet committees are, for the most part, generated within the line departments. Although it is clear that, at the stage of priority determination, the Cabinet must ultimately decide, much of the information about the substantive issues comes from the bureaucracy.

Because all substantive policies involve the expenditure of public moneys, bureaucratic institutions such as the Treasury Board Secretariat and the Department of Finance have a great deal of control over priority determination. Obviously, this control is due to their expertise in the areas of public finance, the public purse, and macro-economics. The complexity of the expenditure-management system has tended to regularize, consolidate, and further aggrandize the influence of the bureaucrat in the Canadian policy process. If anything, the fiscal imperatives of budget cutting and deficit reduction in the 1990s have increased the power and influence of the financial technocrats of these central agencies.

Federal-provincial committees at the bureaucratic level also play an important role in the setting of policy priorities in Canada. Specifically, these intergovernmental bodies are usually concerned with coordination of federal-provincial programs. For example, in the process of considering the problems of fiscal relations, the intergovernmental meetings of finance and treasury officials have great influence on the spending priorities of both levels of government.

Policy Formulation As we pointed out in Chapter 2, the bureaucracy is the core institution at the formulation stage of policy-making in Canada. Although Cabinet normally assigns the reponsibility for formulation in a certain policy area, more than one department, within an interdepartmental **steering committee**, may be involved in those policy decisions that affect more than one portfolio. The actual detailed formulation of specific policies is normally accomplished within the **sponsoring department** whose minister made the original recommendation to Cabinet.

Through ministerial briefing notes, discussion papers, white papers, and various "Cabinet documents," the department sets out the policy alternatives that are most feasible in technical, administrative, financial, and even political terms. The practical options for implementing a government policy priority are most frequently defined in this way, although Cabinet will not hesitate to come to a decision that runs counter to departmental advice if there is a consensus of the ministers that political considerations outweigh the advice of their officials. Similarly the choice of instrument for giving effect to a policy goal may be affected more by the financial and political concerns articulated by the central agencies than by the options presented by the line-department officials whose minister is sponsoring the proposal.

While policy formulation has been described here as a stage in the policy process that *follows* priority determination, it is, in fact, usually the case that the bureaucracy's formulation activity has begun long before any clear priority has been established. Indeed, the Cabinet often finds it impossible to make a clear priority decision in the absence of a good deal of detailed advice on policy formulation. The bureaucratic institutions are ever alert to indicators of future government priorities, and well before the priority decision has been taken, officials within the various line departments attempt to anticipate Cabinet-level decisions and begin to work on policy areas that are likely to be given priority.

One further reason for a department to begin looking at questions of formulation before a priority has been established by Cabinet is that the sponsoring department at the priority-determination stage will inevitably be given the responsibility for implementing the new program when it is legislated. As well, the administrative feasibility of a policy proposal may help to determine whether Cabinet will give it the go-ahead. Finally, the department may have played a role in the initiation of the policy in the first place, perhaps responding to the demands or complaints of a client group, and will have been thinking about the practical "doability" of the policy proposal from the outset.

The Legislative Stage The role of the bureaucracy at the legislative stage of the process is limited by the fact that, constitutionally, legislation must be put in place by Parliament and the political executive. However, even at this stage the bureaucracy does perform important functions. It is the Department of Justice that must not only give the final indication that the proposal is not inconsistent with the Constitution, but must also draft the bill. This translation of policy decisions from "policy-ese" to "legalese" is performed by specialized drafters in the Justice department and is based on "instructions" to the drafters prepared in the sponsoring department.

There should be very little discretion in the hands of public servants at this stage of the process, for the substance of the policy has already been determined by the preceding stages of the process. However, it is not uncommon for a bill, as drafted, to incorporate provisions that are not exactly what its sponsors intended. This happens more because of honest misinterpretations than from deliberate attempts to put a "spin" on the final product by the people who prepare the instructions to Justice or the Justice drafters themselves. The likelihood of such ambiguities or errors being written into a bill is increased by the fact that, in Canada, all bills must be passed in both official

languages. The technical drafters must translate the final decision of Cabinet into both "French legalese" and "English legalese," which increases the chances that mistakes will happen.

Once the "adult" bill has been introduced into the house of Commons, the role of the bureaucrats who "reared" it is pretty much limited to explaining it, if asked, in parliamentary committees. The significance of this role is not to convince the opposition MPs that the policy is "good" in global terms, but to explain the intentions of the government. It is at this phase that ambiguities in the draft legislation can be clarified and corrected, and the potential flaws in the design of the implementation provisions can be tidied up. The MPs in the committees take centre stage in this refinement of legislation, and the public servants called upon to clarify and explain the intentions of the bill play a passive, supportive role in the deliberations.

Administrative Functions

While the policy role of the Canadian bureaucracy may seem to place significant power in the hands of the bureaucrats and technocrats, we must recognize that, however pervasive this policy role may be, it is still, formally, only an **advisory** one. Although to a large extent the Cabinet does heed the counsel of its bureaucratic advisors, all policies are still subject to the ultimate approval of the elected officials of our government. However, there are many areas where even the formal power to convert policy to enforceable law is delegated directly to administrative, regulatory, supervisory, or quasi-judicial agencies of the government of Canada. In this sense, public servants become more than advisors – they become lawmakers, regulators, and adjudicators.

Delegated Legislation The **delegation of legislative power** to the executive is not a new phenomenon in Canada. Canadian legislation has, for many years, granted very broad powers to the executive to make law by order-in-council. While this delegation of legislative power achieves a short cut of the normal procedures of lawmaking by the sovereign Parliament, the concerned citizen might take some solace in the fact that the *de facto* executive in this country is the Cabinet, which is ultimately responsible to Parliament. However, since the Cabinet is not an expert body, it often must **redelegate** the power to make law to non-elected officials in government departments, in police forces, and in administrative boards and tribunals. As policies become more technical and more complex, the power to work out the details will tend increasingly to be passed on to non-elected officials.

Part of the problem is that legislation today requires more detail than the non-expert elected actors in the policy process have time to deal with. For instance, legislation aimed at regulating the transportation industries in Canada sets down certain broad objectives, and then sets up the Canadian Transportation Commission (CTC) to which it delegates the power to make detailed regulations as to air traffic, railways, and freight rates. Similarly, the regulation of the broadcasting and telecommunications industries is delegated to the Canadian Radio-Television and Telecommunications Commission (CRTC), which has wide powers over both private- and public-sector enterprises.

To take another example, Canada Post, which is set up to provide a service to Canadians on a cost-recovery basis, also makes regulations regarding postal rates, contents of packages, the use of mails, and so on, which directly affect our postal privileges and the quality of service we receive. In the case both of purely regulatory agencies and of those that have a commercial role as well as a regulatory one, elected officials may publicly criticize but must not meddle. Thus, while politicians may express strong views about increases in postal rates, the reduction of passenger rail services, or the licensing of cable-TV networks, they are not supposed to interfere directly in the regulatory process.

The key point to be taken here is that the power to make regulations that have the effect of law, and that directly affect the rights and privileges of citizens, frequently rests directly with non-elected officials, and has been taken out of the hands of Parliament and the political executive. A most important bureaucratic function, therefore, is the power to make decisions in matters delegated to administrative bodies that constitute **legislative** outputs of the government.

Internal Regulations Another important lawmaking or rule-making function of the bureaucracy is to make internal regulations regarding the administrative process itself. For instance, an agency such as the Public Service Commission is concerned directly and constantly with service-wide problems of staffing. The commission was created precisely to take matters of promotion, recruitment, and discipline out of the hands of the politicians. It was felt that public-service appointments should be based not on patronage but rather on the merit of the individual job applicant and the requirements of the position to be filled. It was felt that the logical way of removing such decisions from political interference was to create an independent central agency and delegate to it the power to make regulations necessary for bringing into effect a career public service based on the **merit principle**.

Each department and agency must also produce sets of rules outlining internal procedures and practices. The decisions as to what these rules should be are all made directly by administrative officials, and while they may be technically subject to ministerial approval, in practice they do not even come to the attention of the politicians. Although it is perhaps difficult to characterize these rules as "laws" of our government, such administrative regulations are very important because of their potential effect on the administrative side of the administrator-to-public relationship.

Applying the Law It has been seen that the Canadian Constitution distinguishes between executive and judicial functions. Under closer scrutiny, however, one finds that the executive function and the judicial function are broadly similar, in that they both require the application of general rules to specific cases. Viewed in this way, the **rule-application function** of the bureaucracy includes both executive and judicial decision-making, and with respect to time, resources, and immediate impact on the public, it constitutes the central function of the Canadian bureaucracy.

Administrative Discretion While in theory the role of the administrator is simply to implement the laws of the land, the application of general laws to specific situations always involves some interpretive and judgemental decisions on the part of the public servant. In applying the law, administrators are called upon to make **discretionary** decisions all the time. As an example, public servants or committees set up by the public service have to make decisions as to which students are eligible for financial support or scholarships. Similarly, customs officers have the authority to decide whose luggage should be searched and who should be waved past with a "welcome to Canada," and Revenue Canada tax assessors can decide what expenses we declare are allowable tax deductions.

In cases such as these, the legislation itself does not provide very detailed guidelines as to the practical application of the principles involved. These sorts of decisions are left to the discretion of the administrative officers charged with carrying the act into effect, who are expected to act in the spirit of the intentions of the statute. In the extreme case, peace officers charged with the responsibility for enforcing the law possess discretionary powers up to and including the right to use force, and even in some circumstances to shoot to kill. The law cannot specify all of the situations where the use of such extreme force is necessary, and the decision is left to the discretion of the officer, who must make a judgement call in the field and on the spur of the moment. As we shall see in the next chapter, there are judicial controls over the abuse of discretionary powers by officials of the state, but the only practical safeguards against abuse ultimately lie in the training, experience, and good faith of the individuals involved.

Adjudicative Functions In many areas of administrative decision-making, the distinctions among the legislative, administrative, and judicial functions become blurred. For instance, administrative boards and inspectors under public-health acts and liquor-licensing legislation are called upon to decide who gets a licence and under what circumstances a licence should be revoked for non-compliance with the conditions established by the legislation.[2] A decision that involves the granting or revoking of a licence, or the imposition of a fine in lieu of revocation of a licence, is not only administrative; because the decision can have a punitive or compensatory effect on individuals, it is akin to the kind of decision we normally think of as being within the purview of a court. Hence, administrative officals and bodies often are delegated powers that are almost judicial or **quasi-judicial**.

It is significant that quasi-judicial decisions can become precedents that form guidelines for future applications of the legislation in future cases that have a similar fact situation. A body of administrative decisions thus formed can also have the effect of altering and even redefining the long-run meaning and impact of the law. This has resulted, in part, because of the increased role of the government in the regulation of our behaviour and its increased positive role in regulating and licensing individuals and corporations in the interest of

2. In this and similar cases, the law usually states that the ultimate decision rests with the responsible minister, but in fact most cases never reach the minister's notice, so the real power resides in the inspector.

securing public health and safety. We will say more about the quasi-judicial role of the administrative branch of government in the following chapter.

A sort of hybrid function of some bureaucratic agencies in Canada is the **investigative function**, which combines the roles of policy advisor and adjudicator. This function is distinguishable from the policy function because the focus of the investigation is a specific, rather than a generic, case or situation, and it can be differentiated from the adjudicative function because the findings of the board or commission are not binding, but are only recommendatory to the minister. For example, many regulatory agencies in Canada such as the Atomic Energy Control Board (AECB) or the National Energy Board (NEB) are required by law to investigate accidents that occur in the industries they are regulating, and to report the findings to the minister. In the case of the NEB, the regulatory agency is vested with the powers of a superior court of record when conducting hearings, which implies the right to subpoena witnesses, to require the presentation of documents, and to convict people for contempt of court.

Systemic Functions

Beyond the policy and administrative functions we have described above, the Canadian bureaucracy also performs a number of ancillary or latent functions for the system as a whole. The main systemic **function** is **communication**; the incidental or latent functions include fostering of **support** and **stability** for the regime. We will look at each of these types of functions in turn.

Communication Dissemination of information, the communication function of the public service, is not so much incidental to its main functions as it is *ancillary* to them. Educating the public as to how the law changes is a logical extension of the bureaucracy's role as the set of institutions responsible for applying the law in society. Hence, the basic agencies for the dissemination of information from government, for advertising or publicizing new laws and regulations as they are put into effect, are found predominantly within the bureaucracy.

In order to ensure that the public is aware of new legislation, the responsible department will publicize changes widely on radio and television and in the newspapers. All new legislation is published in the *Canada Gazette*, and the onus in law is on the individual citizen to find out what the law is and to obey it. However, it is also recognized by the government that a piece of legislation dealing with matters such as gun control, impaired driving, or smoking in government facilities is designed to modify human behaviour and will be effective only if everyone is aware of it.

Information outputs are produced by the bureaucracy, possibly at the urging and certainly with the acquiescence of the Cabinet. Superficially the dissemination of such information appears to be purely **educational** — the message is, in effect, that there is a new law or program that citizens should be aware of so that they can obey it or take advantage of it. However, such government advertising can sometimes be used as a device for the government of the day to blow its own horn about the nice things it is doing for the voters.

It is difficult to draw a distinct line between using communication funding for informing the public and using it to sell the government's case for getting re-elected.

It must not be forgotten that one governing instrument that can be used to put into effect a policy priority is persuasion. Thus, from time to time, the dissemination of information through ad campaigns is intended not just to tell people about what laws are "in effect" but directly to "give effect" to a policy by **exhorting** Canadians to do something good or desist from doing something bad. Anti-smoking campaigns, the advocacy of Participaction, and AIDS awareness advertising are all intended both to inform us that certain patterns of behaviour are better for us than others and to convince us to mend our ways.

Most departments have information-services or communications branches, and some agencies, such as Statistics Canada, are concerned primarily with the collection, compilation, and publication of information. While the politicians will inevitably attempt to put a favourable partisan slant on such government publications, the people in bureaucratic roles may also let a bias creep into their communications function. While information officers will likely try very hard to be impartial, they are only human, with personal biases, prejudices, and misconceptions of reality. Thus, what is virtually unavoidable is that government information may intentionally or unintentionally be coloured with the personal values of the public servants who prepare the information for publication. We can hope that those values are congruent with the values of society at large, but what is more important is that citizens recognize the potential for bias in all information and be able to evaluate all outputs in a critical light. Finally, the movement to a more open bureaucracy with the *Freedom of Information Act* has gone some of the way to ensuring that the public can get information directly, instead of waiting to see what the ministers and public servants are willing to divulge.

Legitimacy and Stability While it is in some ways an extension of its role in the dissemination of information, and while it would surprise those in the media who consider the term *bureaucratic* to be an unmitigated adjectival epithet, the bureaucracy likely plays a part in the fundamental process of creating public support for the regime itself. The accomplishments of Canadian government agencies in world affairs, scientific research, and the effective delivery of services to Canadian citizens can have a **legitimizing effect** for the system. When a career diplomat gains worldwide recognition and praise for efforts in a far-away embassy, or when a film produced by the National Film Board receives wide accolades (or even an Oscar!), it certainly brings credit to the government agency that achieved the recognition. However, such international acclaim may have a wider impact, by helping to generate a pride in Canadians about Canadian accomplishments and fostering support for our political community.

Another systemic role played by bureaucracy, and here we need not confine the discussion to Canada, is that of maintaining stability and continuity over time. For those who are committed to radical and rapid social change, this may well be viewed as a dysfunction of bureaucracy, but any system must have a static or conservative element, which enables it to persist over time. A constitution, a stable party system, or a stable economy may perform this

function to varying degrees in different political systems. However, as we have seen, bureaucracies are by definition predictable, conservative, and, by empirical observation, sometimes pathologically inert; they provide continuity and stability even in a regime where other stabilizing institutions are failing.

The Representative Function

While public servants might not be *elected* by us, they still may represent us quite well because of the structure of the bureaucracy. Most departments of government can identify a **client group** in the political community at large. The function of the department, in the administrative process, is to implement programs designed to benefit that clientele, and, in the policy process, to represent the interests of that clientele in policy initiation and priority determination. Thus, policy advisors within **clientele-oriented departments** press their political masters to adopt new policies or new programs, which will serve the interests of their clients.

We cannot pretend that the department fosters the interests of its clients for purely altruistic motives; rather, the motivation is that, if the department can invent and sell fancy new programs to the Cabinet, the department's share of the budgetary pie and the size of its person-year or "full-time equivalent" establishment will grow accordingly. Thus, serving the interests of a clientele is merely "good business" – a device for building or expanding a departmental empire. But whatever the motives, it may well be that the clientele-oriented departments of government represent the larger interests in Canadian society better and more consistently than the MPs, and perhaps even better than interest groups. While we should not go so far as to suggest that bureaucracy has "slain" democracy, we can certainly conclude that the representative role of Parliament is complemented by the representative role of the bureaucracy.

The Meritocracy Until the turn of the century the process of recruitment and selection for jobs in the bureaucracy was based to a large extent on partisan patronage. As a result, the bureaucracy was representative in the sense that the party with the majority of seats in the House of Commons also had a majority of the positions in the civil service. However, the bureaucracy was not representative of Canadians in that its members did not represent a cross-section of our population, and at the time this did not seem to be of great concern to the citizenry.

It is ironic that when recruitment and promotion in the civil service was removed from the patronage system and came to be based on merit, the bureaucracy became more competent but less representative. It became a **meritocracy**, where people lacking in skills and ability were effectively shut out of opportunities for public-service employment. While lower-level positions in the public service did not require very high levels of education or training, the senior officials of government constituted an **educational elite** in the same way that Cabinet ministers and judges can be placed in such a category.

Indeed, the public service appears to provide an important path of upward mobility in Canada, provided that somewhere along the way our potential Horatio Alger manages to obtain a university degree. Among the educational

specializations of the senior bureaucracy, the largest number today have backgrounds in law, commerce or business, engineering, economics, political science, or public administration. The senior bureaucracy is an elite, based on merit, and merit is based to a large extent on educational achievement. Because education tends to correlate strongly with socio-economic status, this also means that the most influential bureaucrats tend to be drawn disproportionately from the upper middle class. As one might expect, the higher the rank in the bureaucracy, the higher the average level of educational achievement of the incumbents.

TABLE 22.1
Anglophones and Francophones in the Public Service

	Anglophones		Francophones		
Year	Number	%	Number	%	Total
1974	140,723	77	42,066	23	182,789
1978	158,479	75	53,406	25	211,885
1984	164,616	72	63,326	28	227,942
1993	155,904	72	60,751	28	216,655
1994	157,667	72	60,833	28	218,500

Source: *Official Languages in Federal Institutions, Annual Report,* 1993-1994.

Language In the case of language, it can be argued that the merit system was biased against francophones because literacy in English was assumed to be an important criterion of merit. Under the old patronage system, French-Canadian Cabinet ministers and members of Parliament were allowed to appoint their ethnic confrères to civil-service positions. Under the merit system, largely English-speaking boards tended to equate merit with facility in the English language, and French representation in the federal bureaucracy actually fell drastically as a result.

It was not until the 1960s that governments came to recognize that such biases in the public service did not reflect well on the image of the public service as the operational arm of a representative democracy. This was all the more obvious because the public sector in Canada had grown to become a significant proportion of the total labour force, and Canadians felt that there should be equal opportunity to compete for jobs in the government. While intelligence, competence, education, and training continued to be the main criteria for determining merit, it was recognized that in a bilingual country proficiency in both French and English was an important qualification for employment in the public service. The designation of many positions in government as **"bilingual imperative"** had the effect of greatly increasing the francophone component of the federal bureaucracy, largely because there were far fewer English Canadians who could speak French than French Canadians who could speak English. Today francophones are represented in the

TABLE 22.2
Executive-Category Public Servants by "Designated Group"

	1993		1994	
	Number	%	Number	%
Women	731	17.6	708	18.3
Aboriginal People	44	1.1	44	1.1
People with Disabilities	81	1.9	77	2.0
Members of Visible Minorities	98	2.4	88	2.3
Total Executive-Category Employees	4155		3875	

Source: *Employment Equity in the Public Service, Annual Reports*, 1992-1993, 1993-1994.

TABLE 22.3
All Public-Service Employees Classified by Age and Gender

	March 1994				March 1995			
Age	Men	Women	Total	% of Women	Men	Women	Total	% of Women
16-19	57	61	118	51.7	55	78	133	58.6
20-24	2,157	3,347	5,504	60.8	1,737	2,559	4,296	59.6
25-29	9,086	11,623	20,709	56.1	7,807	10,097	17,904	56.4
30-34	15,040	18,942	33,982	55.7	13,998	17,348	31,346	55.3
35-39	20,034	22,929	42,963	53.4	18,912	22,390	41,302	54.2
40-44	24,036	21,841	45,877	47.6	23,210	22,393	45,603	49.1
45-49	22,379	15,520	37,899	41.0	23,444	16,941	40,385	41.9
50-54	15,433	8,950	24,383	36.7	15,922	9,379	25,301	37.1
55-59	8,716	4,680	13,396	34.9	8,418	4,667	13,085	35.7
60-64	3,701	1,702	5,403	31.5	3,439	1,688	5,127	32.9
65-69	649	324	973	33.3	644	309	953	32.4
70+	123	61	184	33.2	128	56	184	30.4
Total	121,411	109,980	231,391	47.5	117,714	107,905	225,619	47.8

Source: Treasury Board Secretariat, *Employment Statistics for the Federal Public Service 1994-95*.

TABLE 22.4
Executive-Category Public-Service Employees Classified by Age and Gender

	March 1994				March 1995			
Age	Men	Women	Total	% of Women	Men	Women	Total	% of Women
16-19	0	0	0	0.0	0	0	0	0.0
20-24	0	0	0	0.0	0	0	0	0.0
25-29	0	0	0	0.0	1	0	1	0.0
30-34	13	8	21	38.1	6	3	9	33.3
35-39	89	70	159	44.0	79	59	138	42.8
40-44	513	237	750	31.6	421	224	645	34.7
45-49	1,035	243	1,278	19.0	996	271	1,267	21.4
50-54	974	112	1,086	10.3	951	120	1,071	11.2
55-59	425	30	455	6.6	454	33	487	6.8
60-64	110	8	118	6.8	103	4	107	3.7
65-69	10	0	10	0.0	9	0	9	0.0
70+	1	0	1	0.0	1	0	1	0.0
Total	3,170	708	3,878	18.3	3,021	714	4,449	17.5

Source: Treasury Board Secretariat, *Employment Statistics for the Federal Public Service 1994-95*.

highest levels of the bureaucracy on roughly the same proportion as they are of the population as a whole (see Table 22.1).

Affirmative Action and Employment Equity The philosophy of recruitment practices in the federal public service changed in the 1970s and became based not simply on merit, but on the need to make the public service more representative of certain categoric groups. Hence, **affirmative action** policies were introduced to increase the presence of women at the higher levels of the bureaucracy, and these policies were extended to hire more people from the aboriginal communities, from among visible minorities, and from the ranks of individuals with disabilities. As indicated in Table 22.2, while we do not have proportional representation yet, aboriginal people, the physically disabled, and visible minorities are becoming better represented at all levels of the bureaucracy.

In 1995, it can be said that these policies have generally, if not completely, been successful in making the federal bureaucracy as a whole more representative of the **designated groups**. Although progress has been somewhat slower at the highest occupational levels, the relatively high percentages of representatives of the target groups as a proportion of the total *new* appointees to the executive category would indicate that the ultimate targets will eventually be met.

While women comprise 48 per cent of the total public service (Table 22.3), they are only about 18 per cent of the executive group (Table 22.4). However,

the number of women in the bureaucratic elites has continued to grow, and when we take into account the relatively smaller number of women in the labour force, the inequities of representation by gender do not appear to be so severe. More importantly, perhaps, when we look at the age of our most senior bureaucrats, women are approximately one-third of those in the "up and coming" thirty-to-forty-five age bracket. As well, there are now seven female ministers out of a total of thirty-two and the Clerk of the Privy Council, who is also the "head" of the public service, is a woman. Hence, full gender parity is still in the future, but it is clearly possible.

To conclude this section on the functions of the bureaucracy, we have seen that, far from being only the passive instrument of the political executive, the modern bureaucracy has a very active role to play in government. Bureaucratic agencies not only implement law, they make law, they adjudicate, they have an enormous influence on policy, and they control much of the massive outflow of information to the general public. Moreover, because bureaucracy is such a pervasive force in the operation of our governmental system, it may well be performing broader systemic and representative functions, which heretofore have been considered the exclusive domain of other state institutions.

▶ THE STRUCTURE OF THE CANADIAN BUREAUCRACY

Before discussing the various structural types found in the bureaucracy we should say a few words about some of the terms used to describe the people who work in the government. The term **civil service** is no longer used with respect to the federal bureaucracy. "Civil servants" were full-time government employees, they worked in departments and agencies that reported directly to ministers, and they were eligible for pension benefits under the *Superannuation Act*. Civil servants became **public servants** under the 1967 *Public Service Employment Act* and the only difference in their status is that they have the right to bargain collectively with their employer. **Public-sector employees** at the federal level are a much larger group that includes the employees of crown corporations, the military, and other non-departmental agencies of the government, as well as the "true" public servants. At the provincial level, the "public-sector" category is very large indeed, including teachers, hospital employees, and municipal public servants.

The term *bureaucracy* is used here to describe the widest possible category, including the armed forces, the RCMP, government agencies of various types, and the public service. Clearly the key policy actors in the bureaucracy will be found in the public service and in the independent regulatory agencies, and while other public-sector actors can be included in one or more policy communities, they are definitely not at the core of the policy process. In Canada as a whole, all categories of public-sector employees, at all levels of government, make up over 40 per cent of the total labour force. In 1995, federal public-sector employees number about 500,000, and the public service itself has slipped from a high in 1975 of about 275,000 to just over 200,000.

There are several organizational types within the federal government. The main focus of our discussion here will be on the government **departments** and to a lesser extent on the **departmental corporations** and **crown corporations** that have an impact on the policy process. The Canadian Armed Forces and the RCMP are very large (115,000 and 20,000 employees, respectively) and have important roles to play but (thankfully in a liberal democracy!) have a very limited impact on the policy process.

The Government Department

Departments, or **ministries** as they are sometimes known, are the core of the bureaucracy in Canada. They are key actors in the policy process and they are the direct administrative branch of the executive. They are best defined, however, in terms of their characteristics and *modus operandi*.

Characteristics Several characteristics distinguish the departmental form of organization from other types within the Canadian bureaucracy. First, a government department is answerable directly to a **Cabinet minister**, who functions as its formal head and who, conversely, is formally responsible to Parliament for the actions of both the department and the departmental officials. As we saw in Chapter 21, the practical effectiveness of the minister in heading a department is severely constrained and the administrative decisions will generally be left to the permanent officials.

The second distinguishing characteristic of the government department is that it is subject to the **estimates system** of budgeting, which means simply that the money appropriated for the department by Parliament is done on an annual basis and must be spent only in the manner directed by Parliament. The coming of the system of Planning Programming Budgeting (PPBS) in the 1960s, the adoption of a more centralized *envelope* system (PEMS) of budgetary apportionment in the 1970s, and the more recent trends to decentralization in the expenditure-mangement system have not changed the annual basis of the estimates. However, the various expenditure-management systems have all encouraged departments to *plan* their budgets over multi-year time frames through multi-year program forecasts, multi-year operational plans (MYOPs), or departmental business plans. We will say more about the current expenditure-management system in the next chapter.

The third characteristic of the government department is that personnel administration matters such as staffing, promotion, and discipline are subject to the *Public Service Employment Act*. This legislation places such matters under the supervision of the Public Service Commission, which is tasked with maintaining the integrity of the **merit principle** in the public service. With the exception of deputy ministers and associate deputy ministers, who are order-in-council appointments, and some temporary and part-time help, all the personnel of government departments are *public servants* under the *Public Service Employment Act*, and are recruited according to the principle of merit.

The fourth feature that distinguishes a government department is that, under the *Financial Administration Act*, it is subject to the Treasury Board's directives with respect to job classification, pay equity, pensions, and human-

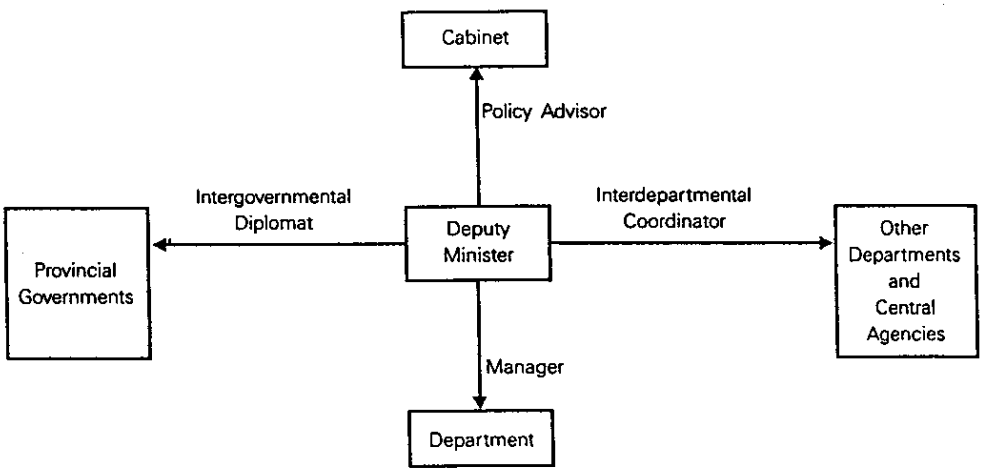
resources development strategies. As well, under the *Public Service Staff Relations Act*, the Treasury Board is the departmental "employer" for purposes of collective bargaining and staff relations.

The Deputy Minister Finally, one of the most important definitive characteristics of a government department is that the administrative head or CEO of the department is a **deputy minister**. The appointment of a DM is a prerogative, not of the department's minister, but of the prime minister, often on the advice of the secretary to the Cabinet. This process of appointment gives the prime minister some measure of control over individual departments, even if a minister becomes recalcitrant or remiss, but since the deputy minister usually works in very close contact with the minister and at arm's length from the prime minister, this power is more formal than real. The deputy minister, unlike a public servant, formally holds office only "at the pleasure" of the government, but as we saw in Chapter 21, the modern DM usually enjoys fairly secure tenure in practice. Experienced DMs are simply too valuable and too professional to be fired for partisan reasons.

In recent years, the position of **associate deputy minister** has evolved in the federal public service. Associate DMs are also order-in-council appointees, of deputy-ministerial rank, and their role is to take some of the responsibility off the shoulders of the DM. More than half of the federal departments today have an associate DM and there does not appear to be any sign of a reversal of this practice. Originally it may have been that the position was invented to provide a refuge for DMs who were either nearing retirement or whose departments had been reorganized out from underneath them. However, the associate DM position is evolving as an important component of departmental organization, and most of the individuals at this rank are future rather than former DMs, sharing the responsibilities for running the department while gaining valuable experience in the workings of the senior bureaucracy.

The Management Function As the chief executive officer of a large organization called a government department the most obvious role of a deputy minister is a **managerial** one. As a senior manager he or she must plan and direct the operations of the department. The DM must set intra-departmental policy, participate in the selection of officers for senior positions within the organization (subject to the merit principle), and *coordinate* departmental activities through executive leadership. The function of coordination is in part facilitated through the delegation of managerial functions to subordinates. As well, in many departments, coordination occurs through a **management committee** or **executive committee**, chaired by the DM and consisting of the DM, the associate DM (if any), all of the ADMs, and other senior officials as required. The management committee sets the broad objectives and priorities of the department, examines any new proposals that may emerge from the bowels of the organization, and may deal, as well, with such vital management questions as the date of the departmental picnic or the colour of ink to be used for the departmental mission statement. However, properly operated, the committee can do much, together with the budget process, to rationalize intra-departmental priorities, and it can be used effectively by the deputy minister as a tool

Figure 22.2
Functions of the deputy-minister.



Source: R. Van Loon and M. S. Whittington, *The Canadian Political System* (Toronto: McGraw-Hill Ryerson, 1987), p. 345.

of internal planning, coordination, and liaison. The committee may also function as a **senior policy committee** in some departments.

Interdepartmental Coordination The deputy minister is also formally responsible for the maintenance of liaison with people in other departments. This is necessary because each department must depend, to some extent, on service departments, such as the department of Public Works and Government Services, whose function it is to provide services for the rest. As well, it may be necessary to coordinate the efforts of two or more departments that are interested in similar policy objectives and whose portfolio boundaries overlap. Finally, in all cases, policy recommendations must be cleared with the central agencies before being submitted to the Cabinet, and the expenditure-mangement system requires almost constant interaction between the departments and the Treasury Board Secretariat.

Interdepartmental coordination is both extremely important to the department and a very delicate process. Much of it, being fairly routine, does not require the hands-on involvement of the busy DM, who delegates much of this responsibility to more specialized officals at lower levels in the hierarchy. All of this is achieved through a semi-institutionalized process of protocol and interdepartmental **diplomacy**, which has evolved to meet at least some of the needs of interdepartmental coordination and overall public-service efficiency.

Intergovernmental Diplomacy Much the same can be said about the role of the DM in the **intergovernmental** arena. We explained in Chapter 10 how the

process of **bureaucratic federalism** dominates the business of intergovernmental relations in the modern context. Next to the minister, the deputy minister bears the formal responsibility for ensuring that intergovernmental coordination is achieved expeditiously. There are extremely important omnilateral coordinating committees in the intergovernmental arena, such as the Coordinating Committee of Deputy Ministers of Finance and Provincial Treasurers, where the senior bureaucrats attend the meetings in the flesh. In fact, most departments with any significant relationships with provinces will have annual or semi-annual federal-provincial meetings at the deputy-ministerial level. However, for the most part, the process of intergovernmental coordination goes on at levels below that of the federal and provincial DMs.

The Policy Mandarin In terms of the policy process in Canada, the most important function of the deputy minister is to act as the senior departmental **advisor** to the government. The DM has the key role in the transmission of policy information from administrative underlings with many types of expertise to the minister and through the minister to the Cabinet. The policy role of the deputy minister has changed over time, and in order to understand the current influence of the DM in the policy process, it will be helpful to look at the evolution of these senior bureaucratic **mandarins.**

The evolution of the DM from senior manager to policy mandarin happened because the number and complexity of policy decisions increased to a point where most Cabinet ministers were unable to make good decisions without considerable input from their departments. The influence of the mandarins over the determination of priorities grew because of a number of factors, some related to structural features of the system and others to the personal characteristics of the individuals involved. The most important of the **structural** factors was the deputy ministers' control over the flow of information upwards from the departmental technocracy and downwards from the Cabinet. A large vestige of this particular source of policy influence, the control over the vertical flow of information, still resides with the senior bureaucrats.

The most important *personal* factor contributing to the hegemony of the mandarins was the combination of **expertise** in a substantive field and long **experience** as a participant in the policy process. Because a mandarin's experience extended over a number of years, and frequently through a series of different governments, this senior bureaucrat often could possess a perspective that was much broader than that of the political boss. The deputy minister could have a profound influence on the minister, not only because the DM possessed a higher level of technical competence in the field, but also because, over the years, a feel for the political marketplace had been acquired as well. The discerning and experienced deputy minister would inevitably develop a **political acumen** or "savvy" that would prove invaluable to the minister in assessing what the political traffic would bear with a given client group at a given time. While the influence of the mandarins would naturally also be related to the willingness of the individual ministers and the government of the day to take their advice, for the most part they either became trusted and, therefore, influential, or they simply ceased to be mandarins.

The Decline of the Mandarins Because John Diefenbaker deeply mistrusted the senior bureaucracy, during his era as PM, alternative advice was sought from the Conservative Party, from personal acquaintances, from the press, and from the mind of the leader himself. The somewhat strained relations between the PM and the bureaucracy during the Diefenbaker years ensured that there was a reduced chance of priorities being determined solely by the bureaucracy, and that more than normal attention was paid to alternate, if less expert, sources. Similar alternatives had been available during the Liberal years before 1957, and were available again under Lester Pearson, from 1963 to 1968. However, Liberal prime ministers, and in particular Mike Pearson, who was himself a "reformed mandarin," had shown little propensity to use them.

Prime Minister Trudeau and his advisors, on the other hand, appear to have believed that the most effective counter for one bureaucratic institution was other bureaucratic institutions with parallel responsibilities. The **political advisory power** of the mandarins was to be attenuated through the increase in size and influence of the PMO, and their **technical advice** was to be placed in competition with that coming from the departments and screened through a revamped and expanded PCO. As well, it was apparently the intention of the Trudeau government to temper the influence of the mandarins by moving deputy ministers about more rapidly, so that they were not in one position long enough to monopolize the field and, therefore, control their minister.

In fact, it can be argued that the eclipse of the traditional mandarins would have occurred even without the Trudeau reorganizations. The complexity of the technical aspects of policy determination increased to the extent that real "power as knowledge" came to be diffused among the myriad specialized public servants at lower levels of the departmental hierarchy. Moreover, with the size of departments growing so rapidly, the DMs were simply too busy being managers of large organizations to be able to develop either the political acumen or the technical know-how that had previously given them such influence over the ministers.

The New Mandarins While the DM is only one person and therefore incapable of a total understanding of the specialist decisions made by his or her administrative underlings, as a professional manager, the DM is in a good position to decide which of several departmental technical advisors the government should put its faith in. It has been mentioned before that one of the important aspects of Cabinet decisions at the policy-formulation stage of the policy process is deciding which policy advice to convert into government action. In this respect, the deputy minister, as a **manager of expertise,** is invaluable to the Cabinet. These "new-style" mandarins can tell the minister which advice is likely to be better, not because the DM fully understands the **substance** of the advice, but because he or she knows the ***people*** generating the advice. We will revisit the evolution of the "new mandarins" in the context of our discussion of the policy process in the next chapter.

As we have seen, several PMs have attempted to counter the power of the senior bureaucracy by developing alternate sources of policy advice. The main success stories have been the PMO and the PCO. The PMO, being frankly partisan, does, indeed, provide a counter to the professional bureaucracy when

it comes to political advice. The PMO is, in effect, a **political technocracy** whose advice may counter that of the "technical technocracy." The PCO, on the other hand, did cut into the exclusive power of the departmental mandarins. Thus, the departmental mandarins are limited by central-agency mandarins, and while competition between the two "mandarinates" is likely healthy, it is unlikely that cabinets today are, on the whole, any less dependent on senior public servants for the technical components of policy decisions.

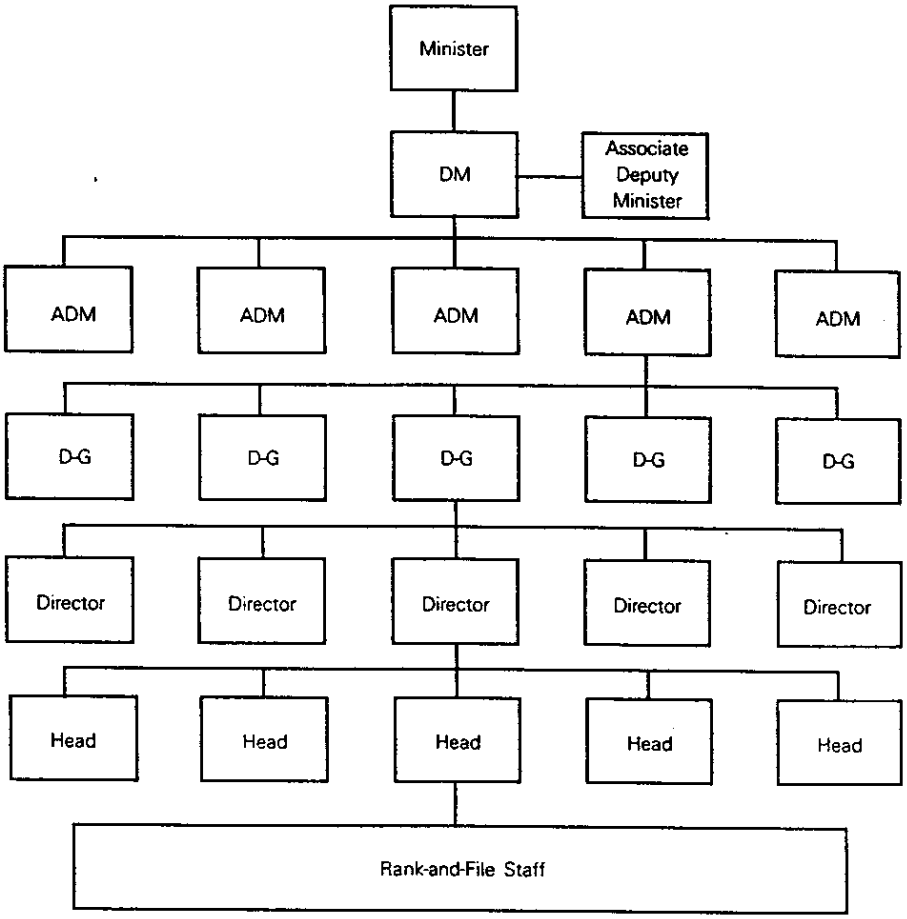
The DM: Conclusion In summary, the deputy minister of a Canadian government department plays the role of a manager of a very large organization. However, as we will see in the next chapter, the nature of government organization, with its emphasis on political accountability and control, places both unique powers and restrictions on the management function, and the extent to which the DM can exercise those unique powers and cope with those unique restrictions ultimately rests on personal ability. Deputy ministers, both in Ottawa and in the provinces, hold some of the most difficult and important jobs in Canada, and play a very central role in the overall working of the Canadian governmental process.

The Internal Structure of Departments The internal functions of an organization can broadly be classed as **line** or **staff**. In Canada, this distinction is based on the type of relationship between various intra-departmental administrative structures and the goals of the department as a whole. To use the example of a specific department, the operational goal of the Department of National Revenue, simply stated, is tax collection. Those branches of the department involved directly in collecting tax revenues, departmental "operations," are said to be performing **line functions**. On the other hand, there are branches or divisions of the same department involved in matters such as personnel administration, financial administration, and communications, none of which directly involves the performance of the line function. These branches of the department are said to perform **staff functions** and they exist to assist the line managers, either in an administrative support capacity or through the performance of a specialized service. The staff components of the organization carry no direct authority over the line managers.

The basic structure of a government department is hierarchical, with the deputy minister at the top of the pyramid. Under the DM, there are a number of subordinate levels, each of which is, itself, hierarchical in structure and directly accountable to the level above. This is called the **chain of command** in an organization and is one of the defining characteristics of all bureaucratic structures. Figure 22.3 is a schematic representation of how a typical federal department might be organized. The DM is at the top, and the chain of command descends through associate DM, assistant deputy minister,[3] director general, director, and thence to lower supervisory levels (managers, chiefs, supervisors, heads, analysts, officers, etc.).

3. The position of *Senior ADM*, while appearing on many departmental organization charts, is more an honorific title than a distinct level in the hierarchy. In fact, ADMs all report directly to the DM level.

Figure 22.3
Schematic departmental organization chart. Abbreviations: ADM: assistant deputy minister; D-G: director-general; DM: deputy minister. "Head" may also be called "chief," "supervisor," "manager," or other.



The reader will be relieved to know that a department-by-department analysis is beyond the scope of this text, so we must be satisfied with few generalizations and specific examples. However, it is useful first to look at how the various responsibilities of the government of Canada are parcelled out into discrete organizational entities called departments.

The Principles of Departmentalization The largest number of government departments are what we can refer to as **line departments.** These are operational departments of government that are set up to look after the interests of specific **client groups** (Agriculture, Indian Affairs, Veterans' Affairs), to deal with issues of relevance to given **economic sectors** (Fisheries and Oceans, Natural Re-

sources, Industry, Transport), to deliver certain categories of **service or protection** to the public (Human Resources, Health, Citizenship and Immigration, Defence, Solicitor General), or to **manage a national asset** or public good (Environment, Heritage). Most departments do not fit clearly into only one of these categories of departmentalization, instead spilling into more than one functional type. Thus, for instance, Agriculture Canada not only serves farmer-clients but also manages the agri-business industrial sector, Transport provides services as well as regulating an industry, and Fisheries and Oceans regulates an industry, serves a client group, and manages a national asset.

Other departments have a "horizontal" or **policy-service** rationale, being reponsible for coordinating a certain aspect of policy among a range of line departments. Thus, Justice provides legal services and coordinates constitutional matters for all departments, and Foreign Affairs and International Trade assists other departments in any matters within their portfolios that have international implications. Still other departments are set up to provide **administrative services**, not to the public, but to other government departments: Public Works and Government Services provides a wide range of services to the other departments; and Revenue Canada collects taxes on behalf of the government as a whole. Finally, there are the **central agencies**, which we discussed in the previous chapter, and which are exclusively concerned with policy development and coordination. All current federal departments and agencies are listed by category in Table 22.5. We will discuss the way in which government departments carry out their policy and administrative functions in the next chapter.

Departmental Corporations

A **departmental corporation** is an agency of the government of Canada, established by act of Parliament, that is engaged in administrative, research, supervisory, or regulatory functions of a governmental nature. Schedule II of the *Financial Administration Act* (FAA) lists the departmental corporations:

Atomic Energy Control Board
Canada Employment and Immigration Commission
Canadian Centre for Management Development
Canadian Centre for Occupational Health and Safety
Canadian Polar Commission
Canadian Transportation Accident Investigation and Safety Board
Director of Soldier Settlement
The Director, The Veterans' Land Act
Fisheries Prices Support Board
Medical Research Council
The National Battlefields Commission
National Research Council of Canada
National Round Table on the Environmant and the Economy
Natural Sciences and Engineering Research Council
Social Sciences and Humanities Research Council

TABLE 22.5
Federal Departments and Central Agencies by Category, 1995

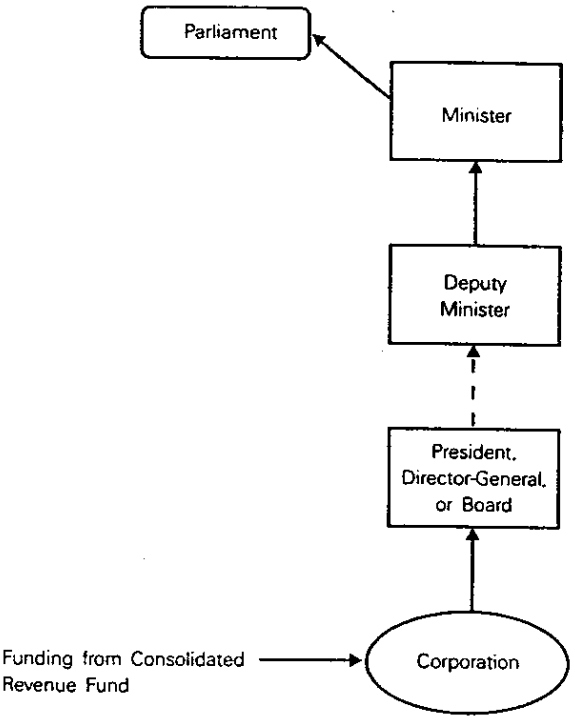
Line Departments	• Agriculture and Agri-Business • Citizenship and Immigration • Natural Resources • Environment • Fisheries and Oceans • Indian Affairs and Northern Development • Human Resources Development • National Defence • Health • Industry • Canadian Heritage • Solicitor General • Transport • Veterans' Affairs
Policy Service Departments	• Foreign Affairs and International Trade • Justice
Administrative Service Departments	• Public Works and Government Services • National Revenue
Central Agencies	• Finance • Treasury Board Secretariat • Privy Council Office

Basically, departmental corporations differ from government departments in the degree of direct political control exercised over them. As we noted above, a minister is the formal head of a department, and a deputy minister is the administrative head. However, a departmental corporation is expected to operate at arm's length from the government of the day. It would be inappropriate for partisan politicians to be in direct control of an organization which, for instance, awards research grants, regulates the nuclear industry, or investigates plane crashes. Hence, the departmental corporation is given a measure of independence from ministerial control and a freedom of action that line departments do not enjoy.

For purposes of the *Financial Administration Act*, departmental corporations have almost the same status as a line department. This is because departmental corporations do not have any significant revenue sources of their own and must be funded entirely out of the Consolidated Revenue Fund. A departmental corporation does not buy, sell, or own any assets in its own name, and all of its financial affairs are subject to the control of the Treasury Board and the auditor general.

However, while the money spent by a departmental corporation must be appropriated by Parliament and encumbered from the Consolidated Revenue Fund, there is a greater degree of independence than that exercised by a department in how the appropriated funds are actually spent. The estimates

Figure 22.4
Departmental corporation.



for a departmental corporation are usually put through Parliament in the form of one vote in the estimates of the department through whose minister the corporation must report to Parliament. Hence, the National Battlefields Commission reports to Parliament through the minister of Canadian Heritage and gets its money, for any given budgetary year, in the form of one item in the main estimates of the Department of Canadian Heritage.

By contrast to a government department, the budget for a departmental corporation is debated in parliamentary committee, if at all, as one item. However, the Treasury Board Secretariat *does* examine and approve the estimates for a departmental corporation before they are included in the departmental estimates. Hence, independence from parliamentary control may not mean very much when we consider that the Treasury Board, which exercises much of the real financial control over government expenditure, has as close a look at a Schedule II corporation's financial needs as it has at a department's.

A departmental corporation is usually headed by a president, director-general, or board appointed by the governor-general-in-council. The tenure of these positions varies from set ten-year periods to "the pleasure of Her Majesty." The corporation reports *through* but not directly *to* the DM. The employees of departmental corporations are, today, almost all public servants.