



## Original Research Article

**Federalism and fragmentation: Addressing the possibilities of a food policy for Canada**Sarah Berger Richardson<sup>a\*</sup> and Nadia Lambek<sup>b</sup><sup>a</sup> McGill University, Montréal<sup>b</sup> University of Toronto**Abstract**

Canadian federalism poses unique challenges for the development of a national food policy. Under the *Constitution Act, 1867*, the federal government and the provinces are granted powers to govern exclusively in certain areas and to share jurisdiction in others. Where one level of government has exclusive jurisdiction, the other level of government is not permitted to interfere. However, good food system governance requires addressing policy coherence and coordination horizontally, *across* sectors such as agriculture, trade, health, finance, environment, immigration, fisheries, social protection, and vertically *between* the federal government, the provinces, and international and transnational actors. The development of a national food policy for Canada offers an opportunity to harmonize law and policymaking, and clarify the key roles that all levels of government play in the development and governance of food systems. This will require identifying sites of conflict and overlap, but also spaces for collaboration, coordination, and innovation. A national food policy will necessarily have to work within the constraints of Canadian constitutional law, but federalism and the division of powers can be harnessed to create a more just, equitable, democratic, and sustainable food system.

**Keywords:** federalism; food law and policy; divisions of power; fragmentation; democratic experimentalism; national food policy

\*Corresponding author: [sarah.bergerrichardson@mail.mcgill.ca](mailto:sarah.bergerrichardson@mail.mcgill.ca)

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## Introduction

Federalism is a fundamental feature of the Canadian legal system. Under the *Constitution Act, 1867*, the federal government and the provinces are each granted powers to govern exclusively in certain areas and to share jurisdiction in others. Where one level of government has exclusive jurisdiction, the other level of government is not permitted to interfere. For example, the provinces enjoy exclusive jurisdiction over farm workers and the development, conservation and management of non-renewable natural resources, and the federal government has exclusive jurisdiction over the regulation of inland fisheries, immigration, and trade. At the same time, the *Constitution Act, 1867* provides for shared jurisdiction between federal and provincial levels of government over social protection, health, and agriculture.

While some constitutional divisions of power are clear, many that relate to food law and policy are not. The implications of this ambiguity are twofold. First, governments may be reluctant to adopt broad reforms to food laws and policies out of concern that legislative overreach will expose them to constitutional disputes and litigation. Second, lack of clarity can be used as an excuse by governments to shirk responsibility by claiming no jurisdiction to act. Beyond ambiguity, Canadian federalism has contributed to fragmented food system governance by dividing up jurisdiction without requiring interaction or coherence between different legal structures and institutions that govern our food system.

Fragmentation in food system governance manifests itself across two broad axes: vertical and horizontal.<sup>1</sup> Vertical fragmentation occurs *between* the federal, provincial, territorial, and municipal levels of government as well as Indigenous governance structures that regulate aspects of the food system concurrently but not necessarily in a coordinated fashion. Domestic vertical fragmentation is further compounded by supra-national forces, such as international institutions and trade agreements that establish competing sites of regulatory authority. Horizontal fragmentation refers to divisions *within* every level of government or *between* the provinces. A range of governmental ministries, departments and administrative bodies divide and segment food system governance into categories such as agriculture, trade, health, finance, environment, immigration, fisheries, and social protection, each of which may be regulated separately.

The development of a national food policy for Canada offers a unique opportunity to address this fragmentation by harmonizing law and policymaking, and clarifying the key roles that laws and policies at all levels of government play in the development and governance of food systems.<sup>2</sup> Within this context, the constitutional constraints of federalism present certain challenges for systems thinking, but the principles of federalism also align neatly with many of the goals of a national food policy. The division of powers at the heart of federalism is meant to

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<sup>1</sup> The concept of vertical and horizontal fragmentation in food governance is drawn from Grace Skogstad (2006, p. 161).

<sup>2</sup> For a comparative perspective, Emily Broad Lieb et al. discuss the value of developing national food policies (and strategies) in federalist countries in *Blueprint for a National Food Strategy: Evaluating the potential for a national food strategy in the United States* (2017).

encourage greater opportunities for citizen participation and public decision-making, create spaces for experimentation and innovation, protect minority values, and foster an inclusive political order (Buchanan, 1997). These are also foundational aspects of the right to food, food democracy, food justice, and food sovereignty movements respectively (Desmarais & Wittman, 2014; Lambek, 2018; Levkoe, 2015).

In this paper, we explore how federalism has shaped governance of the Canadian food system, and reflect on how a national food policy can address the fragmentation resulting from the division of powers, while at the same time drawing on the benefits of federalism. Employing the doctrinal research methodology, case law is reviewed and analysed to describe how the Supreme Court of Canada as well as other courts have interpreted the Constitution since Confederation with respect to the division of powers over food system governance and how this has changed over time. Drawing from this jurisprudential study, this paper goes on to reflect on and draw conclusions about how courts and legislatures might engage with questions of jurisdiction and divisions of power around food system governance going forward.

Part I provides an overview of the legal foundations of Canadian federalism and discusses the implications of the division of powers over food and agriculture governance. It then explores the benefits and challenges that federalism poses to ensuring policy coherence and a systems approach to food system governance in Canada. Part II provides three examples of how federalism and fragmentation impact key areas of food law and policy: food safety, agriculture, and food security. Finally, Part III turns to the subject of Canada's forthcoming national food policy and the opportunity it presents to create a more just, equitable, democratic, and sustainable food system within a federal framework. We offer reflections on how vertical and horizontal fragmentation can be addressed in a national food policy, and how the benefits of federalism can be leveraged to improve food system governance in Canada.

## The Federalist state: A brief overview of federalism and food system governance

Canada's Constitution consists of multiple documents: the *Constitution Act, 1867*, the *Canada Act 1982*, including the *Canadian Charter of Rights and Freedoms*, and all amendments to each (*Constitution Act, 1982*, art. 52). When Canada was formed, the drafters of the *Constitution Act, 1867* carved out spheres of jurisdiction for the federal Parliament and provincial legislatures, dividing powers between them. This section provides a brief introduction to Canadian federalism and divisions of legislative power as they relate to the governance of the food system.<sup>3</sup> It highlights how federalism has shaped the architecture of contemporary Canadian food law and policy.

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<sup>3</sup> It is beyond the scope of this paper to provide a detailed account of the evolving intricacies of federalism and judicial interpretations of the division of powers. For a helpful introduction to principles of Canadian federalism more generally, see Hogg, P. *Constitutional Law of Canada* (Hogg, 2016, 2007).

### *Federal and provincial division of powers over food and agriculture*

At the time of Confederation, agri-food production was less industrialized and far more localized than our current food system. Although the drafters of the Constitution could not foresee the complexity to come, they nevertheless recognized the crucial role that agriculture could play in Canada's economic development. As a result, agriculture occupies a privileged place in the *Constitution Act, 1867*. It is one of only a few areas of concurrent jurisdiction between the federal and provincial/territorial governments. All other aspects of food system governance are split between the heads of power accorded to the federal government under section 91 and the provinces under sections 92, 92A and 93.

Under section 91, the federal government is tasked with making “laws for the peace, order and good government of Canada.” It is granted exclusive jurisdiction over a number of areas related to the food system including trade and commerce, sea coasts and inland fisheries, criminal law, the census and statistics, navigations and shipping, immigration in Canada, and Indigenous peoples and land (*Constitution Act, 1867*, s. 91). A constitutional amendment in 1940 also granted the federal government exclusive jurisdiction over employment insurance (*Constitution Act, 1940; Constitution Act, 1867*, s. 91(2)(a)). Under sections 92, 92A and 93, the provincial governments have exclusive jurisdiction over municipal institutions in the province, the incorporation of companies, property and civil rights in the province, forestry resources, and education. As of 1982, the provinces also have exclusive jurisdiction over natural resources (*Constitution Act, 1982*, s. 50; *Constitution Act, 1867*, s. 92A). Where Parliament or provincial legislatures enact legislation that is beyond their power (*ultra vires*), courts can declare the legislation invalid.

Over the last 150 years, the courts have been tasked with interpreting the scope and content of these different heads of power. A series of legal cases have made their way through the courts, many to the Supreme Court of Canada, providing opportunities for the judiciary to clarify the somewhat vague and ambiguous language of sections 91 to 95 and to define the contours of the complex system of federalism within which food system governance operates.

### *Interpreting Canadian federalism: Subsidiarity, cooperative federalism, and the living tree*

While modes of interpretation of the constitutional division of powers have changed over time (Brouillet & Ryder, 2017), a few features of Canadian federalism and constitutional interpretation are particularly relevant for food system governance. The first is cooperative federalism. Despite the complicated constitutional framework for the division of powers in Canada, for the most part Parliament and the provincial legislatures manage to cooperate quite well (Hogg, 2013). At its most basic, cooperative federalism is described as:

[...] a network of relationships between the executives of the central and regional governments. Through these relationships mechanisms are developed, especially fiscal mechanisms, which allow a continuous redistribution of powers and resources without recourse to the courts of the amending process (Hogg, 2013, p. 5-47).

The network principle underlying co-operative federalism allows for a generous interpretation of legislative powers at both the federal and provincial level, which in turn encourages a high tolerance for overlap and interplay between federal and provincial governments (Brouillet & Ryder, 2017). Since the mid-twentieth century, through the application of cooperative federalism, the courts have regularly recognized concurrent jurisdiction and maintained the validity of statutes enacted simultaneously at multiple levels of government (Brouillet & Ryder, 2017).<sup>4</sup>

A second feature of Canadian federalism is decentralization, which encourages an expansive reading of the scope of provincial legislative power and thus preserves provincial autonomy. Underlying decentralization is the principle of subsidiarity, which has been evoked by the Supreme Court on a number of occasions (Brouillet & Ryder, 2017). Subsidiarity is rooted in ancient Greek philosophy and Catholic social thought, and frames power-sharing in such a way as to allow different levels of government to contribute to law and policymaking without undue constraints from other levels of government, but also with the possibility of obtaining assistance if it cannot achieve its goal on its own (Blank, 2010). In the words of Justice L’Heureux-Dubé, the rationale for subsidiarity flows from a recognition that “law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity” (*14957 Canada Ltée (Spraytech, Société d’arrosage) v. Hudson (Town)*, 2001, para. 3).<sup>5</sup>

Over the past 150 years, the courts have interpreted provincial jurisdiction over property and civil rights in a manner consistent with the principle of subsidiarity, granting power to the provinces over many areas of food system governance, including property law, commercial law, consumer law, environmental law, labour law, health law, and social-services law (Hogg, 2013). However, the principle of subsidiarity in Canadian federalism is not fully settled and the courts continue to carve out a significant sphere of jurisdiction for the federal government (Brouillet & Ryder, 2017). Indeed, since World War II, the Supreme Court of Canada has articulated an expansive view of federal power, and held that Parliament can regulate matters that have a

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<sup>4</sup> The Supreme Court refers to the notion of cooperative federalism in several decisions, including *Husky Oil Operations Ltd. v. Minister of National Revenue*, 1995, para. 162; *Reference re Employment Insurance Act (Can.)*, ss. 22 and 23, 2005, para. 10; *Rogers Communications Inc. v. Châteauguay (City)*, 2016, para. 85 (concurring reasons of Gascon J.). See also *Multiple Access Ltd. v. McCutcheon*, 1982; *Law Society of British Columbia v. Mangat*, 2001; *OPSEU v. Ontario (Attorney General)*, 1987.

<sup>5</sup> See also *Canadian Western Bank v. Alberta*, 2007, para. 45 [hereinafter “CWB”].

national dimension under its powers over peace, order and good government, trade and commerce, transportation, or communication (Hogg, 2013).

Moreover, in situations of conflict or where inconsistencies are identified between a valid statute of Parliament and a valid statute of a provincial legislature, the doctrine of federal paramountcy provides that the federal law prevails (*Rothmans, Benson & Hedges Inc. v. Saskatchewan*, 2005). Federal paramountcy applies in two types of cases: where it is impossible to comply simultaneously with the federal and provincial statute, or where provincial legislation frustrates the purpose of federal legislation. As a result, despite principles of subsidiarity and the unique provision of concurrent jurisdiction over agriculture under s. 95 of the *Constitution Act, 1867*, the federal government enjoys ultimate legislative power. It should be noted, however, that federal paramountcy cannot be used to prevent provinces from establishing and imposing higher standards (for example, in the case of environmental protection) than the federal government.

Finally, the scope of Canadian federalism—that which falls within the jurisdiction of the federal or provincial governments—continues to evolve under the living tree doctrine. This principle dates back to 1930, when Lord Sankey famously wrote that the *British North America Act* “planted in Canada a living tree capable of growth and expansion within its natural limits.” (*Edwards v. Attorney-General for Canada*, 1930). The living tree doctrine has since become firmly rooted in Canadian constitutional law. It allows interpretive space for the Constitution to address areas of jurisdictional power not yet solidified, as well as adaptability to changing circumstances and conditions, and evolving areas of governance. This is important because the courts continue to adjudicate cases that require them to iron out the content and scope of the division of powers. For example, in 2018 the Supreme Court of Canada released its decision in *Her Majesty the Queen v. Gerard Comeau*, about the authority of the provinces to regulate cross-border trades of alcoholic beverages. The Court upheld the right of provinces to regulate the consumption and sale of alcohol widely within their borders, even if this has an incidental impact on the free flow of goods between provinces (*R v. Comeau*, 2018).

## The playing out of federalism in three areas of food law and policy

Canadian federalism and the division of powers over food and agriculture are firmly entrenched in the *Constitution Act, 1867*. However, as a living document, the Constitution must adapt to changing circumstances. When the federal government launched its consultation process for *A Food Policy in Canada* in 2017, it identified four proposed themes: 1) increasing access to affordable food; 2) improving health and food safety; 3) conserving our soil, water and air; and 4) growing more high-quality food (Government of Canada, 2017). Each theme raises distinct questions for a national policy within a federalist framework. For example, food safety governance is shaped by multiple levels of government as well as international and transnational actors. Environmental conservation and agri-food productivity will require negotiated cooperation in light of concurrent jurisdiction over agriculture. And increasing access to food

raises questions about the obligations of the federal and provincial governments to ensure food security. Rather than rely on the government’s framing of issues, which has been contested by civil society groups, we focus below on three broad issues of food system governance that intersect with those identified by the government. These three areas—food safety, agriculture and food security—provide a lens for understanding how fragmentation is manifest in food system governance today.

### *Food safety*

In 1997, the Codex Alimentarius Commission defined food safety as “the assurance that food will not cause harm to the consumer when it is prepared and/or eaten according to its intended use.” (Codex Alimentarius Commission, 1997). Recognizing that absolute protection from harm is both impossible and undesirable (the costs of absolute protection outweigh the benefits), the assurance of freedom from harm is generally understood as protection from *unacceptable levels of risk* caused by hazards in food (Motarjemi, 2014). Food safety can refer to the qualities of a product. It can equally refer to methods of production, processing, distribution, and preparation that protect products from contamination on the path from farm to fork.

The coordination of responsibility for ensuring the safety of our food supply has been described by the World Health Organization (2000) as a “shared responsibility temple” between government, industry, consumers, international organizations, and academia. In Canada, responsibility under the pillar of government is split vertically across federal, provisional, territorial, and municipal jurisdictions, and horizontally between departments and agencies.

Parliament’s power to regulate food and agricultural products for the purposes of ensuring food safety is rooted in the federal power over criminal law under s. 91(27) of the *Constitution Act, 1867*. Parliament also has authority to regulate food and agricultural products under its s. 91(2) power over trade and commerce. Health Canada and the Canadian Food Inspection Agency (CFIA) are the two main federal institutions responsible for food safety in Canada. Health Canada establishes food safety policies, regulations, and standards for all food sold in Canada, and the CFIA enforces them. In addition to Health Canada and the CFIA, the Canada Border Services Agency (CBSA) has responsibility for ensuring that food imports are safe. Food products that are imported to Canada are subject to the requirements of federal law. Import regulations are enforced by the CBSA through initial import inspection services at airports and other Canadian border ports.

The provinces have power to regulate food and agriculture in relation to property and civil rights (s. 92(13)), municipal institutions (s. 92(8)), and all matters of a merely local or private nature (s. 92(16)) (*Constitution Act, 1867*). This allows them to enact laws and regulations relevant to the inspection of agricultural production and food processing, as well as establishments that sell food and agricultural products. They can also implement regulations that promote food safety, public health, and the economic interests of the province (Buckingham,

2014, para. HFD-6). Each province and territory has its own legislation to regulate food premises, including safe food preparation, food handling, and food service. While provincial food safety measures must conform to minimum federal standards and regulations, they may also impose food safety measures that are more stringent than federal ones, provided they do not impact food that is traded interprovincially or internationally. Determinations of whether or not provincial regulations interfere with the federal power over trade and commerce have been the subject of multiple constitutional disputes, and will be discussed in further detail below.

Municipal institutions are also key actors in food safety governance. Section 92(8) of the *Constitution Act, 1867* permits the provinces to empower cities and municipal institutions to carry out a limited mandate of activities, including inspecting and regulating local establishments that manufacture, prepare, or process agricultural and food products, and premises that serve food (Buckingham, 2014, para. HFD-7). Empowering legislation has been enacted in all provinces and territories. Moreover, over the past twenty years, industry has become an important partner in Canadian food safety management. As the relationship between the government and industry shifts from one of policing to partnership, governments are increasingly delegating responsibility to producers and processors to decide how best to comply with safety standards (Skogstad, 2006, p. 165).

In practice, the policy objectives of food safety governance do not always align with one constitutional provision to the exclusion of all others. This has resulted in conflicts between Parliament and the provinces over the years. On several occasions, the Supreme Court of Canada has been called on to clarify the scope of federal and provincial powers over food safety. For example, a seminal case in Canadian constitutional law is the Supreme Court's decision in the *Reference re Validity of Section 5 (a) Dairy Industry Act*, [1949] SCR 1 (known as the *Margarine Reference*). The case dealt with a prohibition in the *Dairy Industry Act* on the manufacture or sale of margarine. At issue was whether this prohibition could be justified under Parliament's criminal or trade and commerce powers. The sale of margarine was originally prohibited in 1886 in response to concerns that margarine was injurious to health, but by 1949, new medical facts established that margarine was not a dangerous product. The provinces argued that the ongoing prohibition amounted to overreaching by the federal government and interference with provincial powers over property and civil rights. The Supreme Court agreed, holding that while it was within the federal government's criminal law power to prohibit the sale or manufacture of products that are injurious to health, the objective of the margarine prohibition was in fact economic and thus outside Parliament's jurisdiction.

In *Labatt Brewing Co. vs. Canada*, [1980] 1 SCR 914 the Supreme Court further clarified the scope of Parliament's jurisdiction over food safety, ruling that Parliament's criminal power over food law is distinct from its power to regulate marketing practices. At issue was whether provisions in the *Food and Drug Act* establishing compositional and food labelling standards for beer were an acceptable exercise of federal power. Since there was no health justification for the standards, the Court held that Parliament's detailed regulation of the brewing industry was outside the scope of its criminal law powers. This case marked a turning point from previous

case law that found that food standards and compositional recipes were indeed valid exercises of federal power.<sup>6</sup>

Following the Supreme Court's ruling, Parliament amended the *Food and Drugs Act* to clearly separate provisions relating to food safety standards and standards for any other purpose. In practice, however, the lines between health, trade and commerce, property, and civil rights, or matters of a purely local nature are not always clear when it comes to food policy (something Chief Justice Laskin noted in his dissenting judgment<sup>7</sup>). Moreover, distinguishing between food standards as they relate to health and food standards for the purpose of trade and commerce goes against recent trends in global food safety governance, which make explicit the connections between health and trade. Indeed, in today's global food market, food safety standards and international trade are closely linked. The proper functioning of global markets demands quality assurances that food being traded across borders is safe. Since the 1990s, multilateral trade negotiations have attempted to harmonize international regulatory structures for food safety to reach a common system to manage risks that restricts trade-distorting practices and promotes the freedom of movement of food products internationally. This has in turn influenced Canada's domestic food safety regulations (Health Canada, 2008).

Furthermore, while constitutional disputes over divisions of power narrow the scope of what constitutes a legitimate food safety concern, there are good reasons to broaden the definition of food safety. Currently, the main focus of Canada's food safety regulatory system is human health, but another conception of food safety could also address issues such as workplace safety and occupational hazards for agricultural labourers, as well as environmental health risks associated with agricultural pollution. This would allow for a more holistic approach to food safety governance and address the federal government's stated objective of improving health and food safety under a national food policy (Government of Canada, 2017). For now, however, constitutional constraints on federal and provincial actors encourage regulatory approaches to food safety that operate in isolation from other socio-economic dimensions of food policy.

### *Agriculture*

Agriculture is one of three areas of shared jurisdiction under the Constitution (the other two being immigration into the provinces and pensions). This power-sharing formula under section 95 has helped the courts navigate constitutional disputes about who has authority over aspects of food system governance that were not explicitly laid out in the Constitution or in cases of overlap between ss. 91 and 92. However, concurrent jurisdiction also comes with challenges, most notably a lack of accountability between different levels of government.

Agricultural law in Canada is contingent on the willingness of governments to be proactive and to cooperate with each other. In some cases, cooperation and harmonization have

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<sup>6</sup> See for example *Standard Sausage Co v Lee*, 1993 and *Berryland Cannon Co v Canada*, 1974.

<sup>7</sup> See *Labatt Brewing Co. v Canada*, 1980, pp. 918-922.

been successful. In 2005, Agriculture and Agri-Food Canada and all provinces and territories signed the intergovernmental Agricultural Policy Framework (APF) Agreement, which articulated a long-term strategic vision for agri-food policy across the country (Agriculture and Agri-Food Canada, 2005). The APF reflects careful balancing of federal, provincial, and territorial interests and efforts towards harmonizing economic, social, and environmental goals around agri-food production (Skogstad, 2011). The APF was followed by Growing Forward (2008-2012) and Growing Forward 2 (2013-2018), which successively renewed the intergovernmental agreement on agri-food sector goals.

In 2018, Growing Forward 2 was replaced with the Canadian Agricultural Partnership, a five-year, \$3 billion investment by federal, provincial, and territorial governments to strengthen the agriculture, agri-food, and agri-based products sector, signaling an ongoing commitment to principles of cooperative federalism (Agriculture and Agri-Food Canada, 2018). National supply management initiatives in the egg and dairy sectors are another example of successful cooperation across jurisdictions (notwithstanding ongoing debates about the desirability and legality of supply management in the context of international trade agreements<sup>8</sup>).

Power sharing under s. 95 also creates divergences across jurisdictions. At the federal level, pressure to coordinate and cooperate with provincial and territorial governments is counterbalanced with international and transnational agri-food policies and priorities (Phillips, 2004, at p. 288). Meanwhile, political and economic factors at the provincial/territorial level can contribute to regional disengagement from national coordination efforts. For example, despite a healthy working relationship between Quebec and the rest of Canada in national supply-managed sectors, Quebec farmers have a long history of disengagement from the federal system. During the late 20<sup>th</sup> century, a combination of Quebec nationalism and an extraordinarily organized provincial farmers' union contributed to a boom of provincial agri-food policies to strengthen rural and agrarian communities, which were often portrayed as the keystone of Quebec society (Skogstad, 1998). At a time when federal spending on agriculture was decreasing, Quebec strategically used its expenditure and regulatory powers to vigorously promote its agri-food sector to the point where Quebec farmers were recorded as having the highest net operating income of all farmers in Canada (Skogstad, 1998).

Disengagement can strengthen local food systems. But it also presents risks, particularly race-to-the-bottom policies that promote productivity at the expense of environmental conservation and resilient rural communities. For example, when a failing wheat industry during the late 1980s and 1990s threatened farmers' livelihoods in Manitoba, the provincial government responded by declaring that lower prices contributed to the so-called "Manitoba Advantage," an economically competitive environment where producers could raise hogs on cheap local grain (Novek, 2003, p. 6). Pork producers who faced strict environmental and regulatory constraints abroad were encouraged to invest in Manitoba instead. Hog production became a lucrative business for hog farmers; however, the expansion of Manitoba's hog industry came at a cost.

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<sup>8</sup> See for example Trebilcock, 2014, pp. 81-94; Trebilcock and Pue, 2014.

Foreign investment was geared towards export markets and this was best served by a model of intensive production with little concern for environmental stewardship and rural sustainability (Novek, 2003).

Section 95 signifies the importance of agriculture at the time of Confederation, and its unique role as a tool for nation-building and cooperation between the federal and provincial levels of government. However, 150 years later, as methods of production have evolved and given way to highly industrial agricultural practices that threaten ecosystems and public health, it may be time to consider s. 95 in a new light. Concurrent federal and provincial powers over agriculture are not only a privilege that can be used by each level of government to their advantage. They must also be understood as an obligation for both to regulate food systems sustainably and holistically.

### *Food security*

According to the most recent national estimates, 12.7 percent of Canadian households—including 1.15 million children—experience food insecurity (Tarasuk, 2012). Food security in Canada is defined as existing when “all people, at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preference for an active and healthy lifestyle” (Statistics Canada, 2018).<sup>9</sup> Food insecurity occurs when people do not have this access at all times. The *Constitution Act, 1867* does not designate jurisdiction over food security and unlike many other areas of food system governance, no one key governmental body at the federal level or within the provinces is tasked with ensuring food security. Nor does the *Charter of Rights and Freedoms* grant protection to an adequate standard of living or to the right to food.<sup>10</sup> As a result, food insecurity is most often addressed through a collection of policies and legislative frameworks at the federal and provincial levels, very few of which are directly concerned with food insecurity itself.

Both the federal and provincial governments participate in measuring food insecurity. The federal government has jurisdiction over the census and statistics (*Constitution Act, 1867*, s. 91(6)). Pursuant to this power, since 2005, Statistics Canada has measured food security through the Canadian Community Health Survey (CCHS) (Statistics Canada, 2018), which contains a series of questions that address household food security. Although the federal government is responsible for the CCHS, it is the provinces and territories that administer it and they can, and often do, elect not to administer the portion of the CCHS concerning food security. Furthermore, as it is the provinces that administer the CCHS, there is no data measuring food insecurity for populations under federal jurisdiction such as First Nations living on Crown Lands and full-time members of the Canadian Forces (PROOF, 2017). With no level of government taking full

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<sup>9</sup> This definition is used widely in Canada and beyond. It is adopted from the *Rome Declaration on World Food Security* (Rome Declaration, 1996).

<sup>10</sup> While Canada ratified the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) in 1976, which enshrines the right to food, Canadians do not have a legally enforceable right to food.

ownership of the collection of data on food insecurity, Canada lacks consistent and comprehensive data, and very few national statistics measuring food insecurity across the country exist.<sup>11</sup>

Ensuring food security in Canada is largely about ensuring economic access to food (i.e., ability to pay for or purchase food or the inputs to grow or gather food), though questions of physical access (i.e., ability to travel to locations where food can be purchased) do arise particularly in northern and remote communities. Food security is thus often dependent on a household member's employment and wages. The general regulatory power over labour relations falls to the provinces under their s. 92 competence over property and civil rights.<sup>12</sup> Through different provincial statutes, the provinces regulate the workplace for most industries (including agricultural work). Each province sets its own minimum wages, maximum hours, and other employment conditions. At the federal level, Parliament has carved out jurisdiction for itself under the *Canada Labour Code* (1985, c. L-2) to set a minimum wage (s. 178) for those working in federally regulated industries, including shipping, railway, air transport, radio broadcasting, and banking, as well as those areas under Parliamentary control (s. 2).

In recent years, civil society groups have pushed for increases to minimum wages. While the federal minimum wage will hit \$15 per hour on October 1st, 2018, the majority of those employed in Canada are subject to provincial and territorial minimum wages, which are by and large significantly lower (Government of Canada, 2017). Alberta will match the federal government's minimum wage increase in 2018 (Alberta, 2018). Ontario will match to \$15 per hour in 2019 (CBC News, 2017). The question remains, however, whether \$15 per hour is a liveable wage in Canada, and whether precarious work prevents people from making livable wages despite rising minimum wages.

Where people in Canada are unable to work or unable to find work, various social protection schemes provide income support. Theoretically, these should ensure the food security of recipients. In practice, however, this is rarely the case. At the time of Confederation, little to no social protection existed, and what protection did exist was often provided by private sources, such as churches (Hogg, 2007). Power was given to the provinces to regulate these entities under 92(7) of the *Constitution Act, 1867*, which provides for the establishment, maintenance, and management of hospitals, asylums, charities, etc. Initial attempts by the federal government to offer social protection in limited circumstances were struck down by the courts as unconstitutional (Hogg, 2007). In 1935, Parliament enacted legislation creating a national unemployment insurance plan; however, the Privy Council held that the scheme fell within the ambit of provincial jurisdiction over property and civil rights, and struck down the legislation as *ultra vires* (*A.G. Can. V. A.G. Ont. (Unemployment Insurance)*, [1937] A.C. 355). The *Constitution Act, 1867* was subsequently amended, and in 1940, Parliament was given authority

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<sup>11</sup> National statistics are only available for survey cycles in 2007-2008 and in 2011-2012 (PROOF, 2017).

<sup>12</sup> For an early Supreme Court discussion on the provincial power over labour relations, see *Toronto Electric Commission v. Snider*, 1925.

over unemployment insurance. A second amendment was passed in 1951, giving Parliament jurisdiction over old age pensions.

Other social protection schemes, such as income-support programs that do not involve compulsory contributions, fall under the jurisdiction of both the federal and provincial governments. Both levels of government are permitted to use their spending powers to spend public money, so long as they do not involve any form of compulsion and do not violate the *Charter of Rights and Freedoms*. For this reason, social programs that solely involve the expenditure of money cannot be challenged on the grounds of federalism or distribution of powers (Hogg, 2007). Both Parliament and the provincial governments use their spending power to create social programs, though provincial governments tend to have more robust social protection schemes. Federal intervention in social protection tends to come in the form of grants to provinces to support provincial schemes (Hogg, 2007).

In many parts of the world, it is common for social protection schemes to provide food directly to food insecure populations or to offer vouchers used only for the purchase of food. In the United States, for example, the Supplemental Nutrition Assistance Program provides vouchers that can be used for the purchase of food. No similar federal programs exist in Canada; instead, households receiving social assistance divide their funds to cover food, transport, rent, and other daily expenses. Some provinces provide additional income support in the form of a dietary supplement, which provides supplemental funds to recipients who have special dietary requirements.<sup>13</sup>

Under s. 91(24) of the *Constitution Act, 1867*, the federal government has jurisdiction over “Indians, and Lands reserved for Indians”. Northern communities and Indigenous peoples have the highest rates of food insecurity in Canada. In 2014, 36.2 percent of households in Nunavut experienced severe or moderate food insecurity, and 46.8 percent experienced any level of food insecurity (Tarasuk et al, 2014; Statistics Canada, 2012). The Northwest Territories also had high levels of food insecurity, with 24.1 percent experiencing any level of food insecurity (Tarasuk et al, 2014). The federal government manages programs meant to improve access to food in northern communities. One such program is Nutrition North Canada, a retail subsidy program aimed at providing northern and isolated communities with improved access to perishable food. It is not aimed at food security per se, but at improving nutritional outcomes. Current programming, however, fails to address food security concerns for Indigenous peoples as well as northern communities. Nutrition North has been heavily criticized over the years for not meaningfully lowering the price of food or preventing food insecurity (Galloway, 2017; Skura, 2016). And the federal government has been severely criticized recently for its failure to address drinking water advisories in First Nations communities (EcoJustice, 2017; MacClearn, 2016)<sup>14</sup>.

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<sup>13</sup> For details on the special diet allowance in Ontario, see [http://www.mcass.gov.on.ca/en/mcass/programs/social/special\\_diet\\_apply.aspx](http://www.mcass.gov.on.ca/en/mcass/programs/social/special_diet_apply.aspx).

<sup>14</sup> In 2014, four Alberta First Nations launched a lawsuit against the federal government, alleging it failed to provide resources and investments to ensure safe drinking water on reserves (*Tsuu T'ina Nation et al v. AGC*, FC T-1429-14).

## National food policy: A tool for addressing fragmentation and federal challenges

While a national food policy for Canada will have to operate within the constraints of the constitutional division of powers, it can also push us to re-examine the values underlying past agri-food policies and their continued relevance in the 21<sup>st</sup> century. The division of powers, as laid out in the Constitution, cannot be altered by a national food policy and cross-jurisdictional governance of the food system in Canada will persist. Yet, recognizing that effective food law and policy requires governmental coordination and collaboration, there are ways that a national food policy can negotiate the existing division of powers to address the negative impacts of fragmentation, while embracing its benefits. This paper will now address two such ways: norm setting to build coherence and leaving space for experimentation.

### *Norm setting to build coherence*

A national food policy is an opportunity for the federal government to build coherence in the areas in which it has exclusive or shared jurisdiction. Already, work on the policy has brought together sixteen federal ministries, agencies, and departments, with Agriculture and Agri-Food Canada as chair.<sup>15</sup> These governmental bodies rarely work collectively on policy-making related to the food system. Providing a venue for representatives of the different bodies to get together is an important step for cross-pollination of ideas, collective learning, the sharing of perspectives, creative problem solving, and system thinking.

Furthermore, a national food policy can shift the language and practice of food system governance in two key ways. First, it encourages policymakers across vertical and horizontal axes of government to think seriously about the food system as a *system*, and to engage with its interconnections and mutually interdependent areas of governance. Second, a national food policy offers an occasion to articulate what norms, values, or principles we want as the foundation of our food system. In his Mandate Letter to the Minister of Agriculture and Agri-Food, Prime Minister Trudeau requested the development of “a food policy that promotes healthy living and safe food by putting healthier, high-quality food, produced by Canadian ranchers and farmers, on the tables of families across the country” (Trudeau, 2015). Some of the priorities articulated in this Mandate Letter are vague: What is “high-quality food”? Does it require producing more or importing less food? How does healthy living align with a food policy? Yet, some values are clear, such as the emphasis on supporting domestic production, improving diets and health outcomes, and ensuring food is safe. The Government of Canada subsequently

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<sup>15</sup> These ministries, departments, and agencies include: Agriculture and Agri-Food Canada (Chair), Canadian Food Inspection Agency, Canadian Institutes of Health Research, Canadian Northern Economic Development Agency, Employment and Social Development Canada, Environment and Climate Change Canada, Finance Canada, Fisheries and Oceans Canada, Global Affairs Canada, Health Canada, Indigenous and Northern Affairs Canada, Innovation, Science and Economic Development, Public Health Agency of Canada, Privy Council Office, Statistics Canada and Transport Canada. Notably the Justice Department and Heritage Canada are not at the table.

expanded on the Mandate Letter, introducing the four themes already articulated above. Various civil society groups have articulated other possible guiding principles, with Food Secure Canada, for example, suggesting that the right to food form the basis of the policy (Food Secure Canada, 2017). Other questions include: should a national food policy place an emphasis on ensuring access to food for all Canadians or all people living in Canada? Should a national food policy focus on growing the agri-food sector or promoting a sustainable agri-food sector? Answers to these questions will reflect normative positions about what our food system should look like.

Requiring food system thinking and clarifying values, principles, and norms is an important step for addressing fragmentation and strengthening cooperative federalism. Another important step is determining what to coordinate and on what basis to be coherent. Although it may not—at least immediately—produce the coherence and coordination we need, the national policy can lay the groundwork and serve as a decisive turning point. At the very least, it provides a space for discussion, debate, and contestation. Moreover, the articulation of norms, values, or principles that will frame the national policy may also have a trickle-down/cross-pollination effect on the various federal ministries engaged in the governance of certain aspects of our food system, as well as provincial governments and ministries. This would foster more principled decentralization of power and subsidiarity.

### *Leaving space for experimentation*

Democratic experimentalism is heralded as one of the great benefits of federalism. As Justice Brandeis famously described in early jurisprudence of the United States Supreme Court: “It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” (*New State Ice Co. v. Liebmann*, 1932). The core constructs of democratic experimentalism are: (1) public-oriented pragmatism in policy-making; (2) coordinated decentralization based on local knowledge, continuous monitoring by a central authority, and benchmarking of performances; (3) participatory transparency; and (4) collaboration as a premise for political action of all kinds (Colburn, 2004). By underscoring the importance of localized decision-making, democratic experimentalism builds on conventional normative defenses of federalism, while at the same time highlighting “the virtues of mutually beneficial cooperation between and among local decision-making units” (Scheuerman, 2004, para. 24).

Democratic experimentalism is key to developing more sustainable, just, and equitable food policies, and for deepening their democratic legitimacy. Many of Canada’s greatest legislative and policy achievements are a result of democratic experimentalism. Medicaid started as an experiment in the province of Saskatchewan and laid the foundation for universal health care in the rest of Canada. Ontario is currently experimenting with universal basic incomes, initiating pilot programs in the province (Government of Ontario, 2018). If the universal basic

income pilots are successful, they will offer a transformative new model for addressing income insecurity at the heart of food insecurity in Canada.

Similarly, many of the most innovative moves in food law and policy are currently happening at the local level through deep participatory processes. For example, in Quebec, both the provincial government and the municipality of Montreal launched new food strategies in the past year following extensive public consultations (Government of Quebec, 2018; SAM, 2017). The themes identified at the provincial and municipal level in Quebec are different from those identified by the federal government for a national food policy, and this may be a good thing. In some cases, regional variation is desirable because it reflects more accurately local preferences and preoccupations. A robust practice of democratic experimentalism will see these local initiatives as complementary and inspirational to the design of federal initiatives. Creating spaces for creativity, innovation, and experimentation is extremely important to achieving more democratic, just, equitable, and sustainable food systems. A national food policy can encourage further provincial and municipal experimentation – while also articulating overarching principles, values, and norms as well as a food systems framework to guide it.

## Conclusion

Canadian federalism poses unique challenges for the development of a national food policy. Good governance requires not only addressing policy coherence and coordination horizontally, across sectors such as agriculture, trade, health, finance, environment, immigration, fisheries, and social protection, but also interjurisdictional vertical coordination and coherence. A national food policy can be cross-cutting, implicating all levels of government and reversing past trends of governing in silos, with limited communication between different government agencies and levels of government.

Despite Canada's history of food policy fragmentation, this paper has shown how the division of powers at the heart of federalism can now be harnessed to support a national food policy that encourages citizen participation and public decision-making, creates spaces for experimentation and innovation, protects minority values, and fosters an inclusive political order. A national food policy for Canada will necessarily have to work within existing constitutional constraints, but the principles of federalism are also consistent with a shift towards a food system that fosters equitable power-sharing under the unifying influence of a shared policy goal.

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