

The Canadian Constitution— its origins and evolution

*The following article is an edited excerpt from the booklet, **How Canadians Govern Themselves**, written by the Honourable Eugene A. Forsey for the Government of Canada. Mr. Forsey, a former Canadian Senator, is widely regarded as one of the foremost experts on Canada's Constitution. Interpretations and views expressed are those of the author, and do not necessarily reflect the official position of the Government of Canada.*

Our Constitution

The *British North America (BNA) Act* was the instrument that created Canada. It was an act of the British Parliament. But, except for two small points, it is simply the statutory form of resolutions drawn up by delegates from what is now Canada. Not a single representative of the British government was present at the conferences that drew up those resolutions, or took the remotest part in them.

The two small points on which our Constitution is not entirely homemade are, first, the legal title of our country, "Dominion," and, second, the provisions for breaking a deadlock between the Senate and the House of Commons, which have never been used.

That the federation resolutions were brought into effect by an act of the British Parliament was the Fathers' deliberate choice. They could have chosen to follow the American example, and done so without violent revolution. Sir John A. Macdonald, in the Confederation debates, made that perfectly clear. He said: "If the people of British North America after full deliberation had stated that it was for their interest, for the advantage of British North America to sever the tie [with Britain] I am sure that Her Majesty and the Imperial Parliament would have sanctioned that severance."

The *British North America Act, 1867* now renamed the *Constitution Act, 1867* contained no provisions for its own amendment, except a limited power for the provinces to amend their own constitutions. All other amendments had to be made by a fresh act of the British Parliament.

Canada comes of age

At the end of the First World War, Canada signed the peace treaties as a distinct power, and became a founding member of the League of Nations and the International Labour Organisation. In 1926, the Imperial Conference recognized Canada, Australia, New Zealand, South Africa, the Irish Free State and Newfoundland as "autonomous communities, in no way subordinate to the United Kingdom in any aspect of their domestic or external affairs." Canada had come of age.

This gave rise to a feeling that we should be able to amend our Constitution ourselves, without even the most formal intervention by the British Parliament. True, that Parliament always passed any amendment we asked for. But more and more Canadians felt this was not good enough. The whole process should take place here. The Constitution should be "patriated," brought home.

Attempts to bring this about began in 1927. Till 1981, they failed, not because of any British reluctance to make the change but because the federal and provincial governments could not agree on a generally acceptable method of amendment. Finally, after more than half a century of federal-provincial conferences and negotiations, the Senate and the House of Commons, with the approval of nine provincial governments, passed the necessary Joint Address asking for the final British act. This placed the whole process of amendment in Canada, and removed the last vestige of the British Parliament's power over our country.

The *Constitution Act, 1867*, remains the basic element of our written Constitution.

But the written constitution, the strict law of the Constitution, even with the latest addition, the *Constitution Act, 1982*, is only part of our whole working constitution, the set of arrangements by which we govern ourselves. It is the skeleton; it is not the whole body.

Responsible government, the national cabinet, the prime minister, the bureaucracy, political parties, federal-provincial conferences: all these are basic features of our system of government. But the written Constitution does not contain one word about any of them (except for that phrase in the preamble to the act of 1867 about "a Constitution similar in principle to that of the United Kingdom"). The flesh, the muscles, the sinews, the nerves of our Constitution have been added by legislation (for example, the *Elections Act*, federal and provincial, the *House of Commons Act*, the *Legislative Assembly Acts*, the *Public Service Acts*), by custom (the prime minister, the cabinet, responsible government, political parties, federal-provincial conferences), by judgments of the courts (interpreting what the act of 1867 and its amendments mean), by agreements between the national and provincial governments.

What does it say?

If the written Constitution is silent on all these things, which are the living reality of our Constitution, what does it say? If it leaves out so much, what does it put in?

Before we answer that question, it is necessary to understand that our written Constitution, unlike the American, is not a single document. It is a collection of twenty-