

Amending authorities

Constitutional amendments may consist of changing existing law or of making new law. Authority to make constitutional amendments is, therefore, simply authority to make constitutional laws.

The question arises: Who now has authority to amend the Constitution of Canada? Considering that expression in its widest sense as indicated above, we must look first at the British North America Act of 1867. We find that there are provisions in that act that are subject to alteration either by the legislatures of the provinces or by the Parliament of Canada. Thus Sections 40, 41, 47, 130 and 131 begin with the words "unless the Parliament of Canada otherwise provides". These provisions are therefore amendable by the Parliament of Canada. Similarly, Sections 78, 83, 84, 134 and 135 apply unless the appropriate legislature "otherwise provides", and they are therefore subject to alteration by provincial enactment. Under Head (1) of Section 92, the legislatures of the provinces have express authority to amend the constitution of the province, except as regards the office of lieutenant governor. Under this authority, the legislatures have authority to change and have changed sections such as 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 83, 84 and 85. It should be pointed out, however, that the actual texts of these provisions of the B.N.A. Act are not subject to change by Parliament or the legislatures; it is not the act as such that is amendable but rather the law as expressed in those provisions. The enactment by Parliament or the legislatures, as the case may be, substitutes a new law for the law contained in those sections of the B.N.A. Act; but that is, in every sense, a constitutional amendment.

Constitutional laws may also be made by Parliament or the legislatures under the enumerated heads of Section 91 or 92. Thus, under Head (8) of Section 91 or Head (4) of Section 92, laws could be made respecting offices involved in the Constitution.

Section 129 of the B.N.A. Act of 1867 continues in force then-existing laws, but subjects them to repeal, abolishment or alteration by the Parliament of Canada or the legislatures of the respective provinces, according to the authority of Parliament or the legislatures under the B.N.A. Acts. It follows that any pre-Confederation laws of a constitutional character are amendable by Parliament or by the legislatures of the provinces according to their jurisdiction under the B.N.A. Acts. Originally, an important limitation on such powers was imposed by the exception from the provisions of Section 129 of Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland that extended to Canada.