

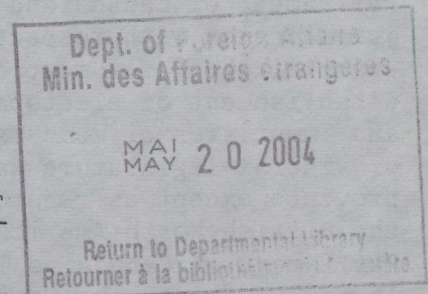
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1964 June



CANADA

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INFORMATION DIVISION
DEPARTMENT OF EXTERNAL AFFAIRS
OTTAWA - CANADA



No. 70

THE CONSTITUTION AND GOVERNMENT

(Revised
June 1964)

OF CANADA

I The Constitution of Canada

In 1867 the British North America Act united the British North American provinces of Canada, New Brunswick and Nova Scotia in one country known as Canada. The new state was originally composed of four provinces - Ontario, Quebec, New Brunswick and Nova Scotia. Manitoba was admitted to the union in 1870, British Columbia in 1871 and Prince Edward Island in 1873. The Provinces of Saskatchewan and Alberta were formed in 1905. In 1949 Newfoundland joined the Canadian federation. At present, therefore, Canada consists of ten provinces and several territories, known as the Yukon Territory and the Northwest Territories, which are not included in any of the provinces.

The British North America Act of 1867 established a complicated division of legislative and executive authority between Canada on the one hand and the several provinces on the other. Judicial authority was not similarly divided, provincial and federal courts having jurisdiction with respect to both federal and provincial laws.

While the British North America Act of 1867, together with its subsequent amendments, is popularly regarded as the Constitution of Canada, it is not an exhaustive statement of the laws and rules by which Canada is governed. The Constitution of Canada in its broadest sense includes other statutes of the British Parliament (e.g., the Statute of Westminster, 1931), statutes of the Parliament of Canada relating to such matters as the succession to the Throne, the demise of the Crown, the Governor General, the Senate, the House of Commons, electoral districts, elections, royal style of titles, and also statutes of provincial legislatures relating to provincial government and provincial legislative assemblies. Other written instruments, such as the Royal Proclamation of 1763, the offices of governors and governors general, and orders in council passed pursuant to the British North America Act, also form part of the Canadian constitutional system. In addition, the Constitution of Canada includes well-established usages and conventions. The preamble to the British North America Act states that it was the desire of the original provinces to be united "with a constitution similar in principle to that of the United Kingdom" and accordingly many of the usages and conventions of government that have been developed in Britain over the centuries are followed in Canada. For example, the Cabinet system of responsible government as

developed in Britain obtains in Canada, although no mention thereof is made in the British North America Act.

No provision was made in the British North America Act, 1867, for amendment thereof by any legislative authority in Canada, but both the Parliament of Canada and the provincial legislatures were given legislative jurisdiction with respect to some matters relating to government. Thus, for example, the Parliament of Canada was given jurisdiction with respect to the establishment of electoral districts and election laws, and the privileges and immunities of members of the House of Commons and the Senate, and each provincial legislature was empowered to amend the constitution of the province except as regards the office of lieutenant-governor. An amendment to the British North America Act passed in 1949 provided authority for the Parliament of Canada to legislate with respect to constitutional matters, and it may now amend the Constitution of Canada except as regards the legislative authority of the provinces, the rights and privileges of provincial legislatures or governments, schools, the use of the English or French language, and the duration of the House of Commons.

Canada's Status in the Commonwealth of Nations

The several stages in the development of the status of Canada have been authoritatively described in the reports of successive Imperial Conferences, including that held at London in 1926, which defined the group of self-governing communities consisting of the United Kingdom and the Dominions as "autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations". That Conference also recognized that, as a consequence of this equality of status, the Governor General of a Dominion "is the representative of the Crown, holding in all essential respects the same position in relation to the administration of public affairs in the Dominion as is held by His Majesty the King in Great Britain", and that "it is the right of the Government of each Dominion to advise the Crown in all matters relating to its own affairs". Simultaneously with this change in the constitutional relation between the several parts of the British Commonwealth of Nations, there developed, as a complementary aspect of nationhood, the assumption by the several Dominions of further responsibilities and rights of sovereign states in their relations with other members of the community of nations. Membership in the League of Nations and, more recently, in the United Nations, the exercise of treaty-making powers and the establishment of separate diplomatic representation in a number of foreign countries have characterized this phase in the growth of Canada. More explicit recognition of the implications of the principles of equality of status was accorded in the Statute of Westminster of 1931, which provided for the removal of the remaining limitations on the legislative autonomy of the Commonwealth nations.

Thus Canada, under the Crown, has equality of status with Britain and the other Commonwealth Nations in both domestic and foreign affairs; its Government advises the Crown on all matters relating to Canada. Canada has membership in the United Nations; makes its own treaties; appoints its own ambassadors and other representatives abroad; levies its own taxes; makes its own laws, which are executed by a Government dependent on the will of a majority of the people; and maintains its own military, naval and air forces. In short, Canada has achieved the full status of democratic nationhood within the Commonwealth of Nations.

II The Government of Canada

1. The Federal Government

The Executive

The Crown

The British North America Act provides that "the Executive Government and authority of and over Canada is hereby declared to continue and be vested in the Queen". The functions of the Crown, which are substantially the same as those of the Queen in relation to the Government of Britain, are generally discharged by the Governor General. A few Canadian prerogative powers, such as the granting of honours and awards and the appointment of ambassadors and ministers plenipotentiary, are dealt with by the Queen personally; most are, however, performed on her behalf by the Governor General, and in either case the prerogative power is exercised on the advice of the Government of Canada, in accordance with established principles of responsible government. The practical executive functions of government are exercised by the Cabinet.

Apart from her constitutional position in relation to the various governments of the Commonwealth countries, the Queen is head of the Commonwealth and symbolizes the association of the member countries. Until 1953, the title of the Queen was the same throughout the Commonwealth. Constitutional developments put the title somewhat out of accord with the facts of the position and in December 1952 it was decided by the prime ministers of the Commonwealth countries meeting in London to establish new forms of title for each country. The title for Canada was approved by Parliament and established by a royal proclamation on May 29, 1953. The title of the Queen, so far as Canada is concerned, now is:

"Elizabeth the Second, by the grace of God of the United Kingdom, Canada and her other realms and territories Queen, Head of the Commonwealth, Defender of the Faith."

The Governor General

The Governor General, appointed by the Queen, on the advice of the Prime Minister of Canada, traditionally serves for a term of five years, representing the Queen in relation to the Government of Canada and exercising authority under the letters patent constituting the Office of the Governor General, and the provisions of the British North America Acts, 1867 to 1952. Acting under the recommendations of the responsible advisers, the Governor General summons, prorogues and dissolves Parliament and assents to bills and exercises other executive functions.

The Cabinet

The Cabinet is a committee of the Queen's Privy Council for Canada and is responsible to Parliament. By convention, the members of the Cabinet are members of either the House of Commons or the Senate. Ordinarily, most of the Cabinet members have seats in the House of Commons. At the present time one member of the Cabinet, who is a Minister without Portfolio, is a member of the Senate.

The Cabinet initiates nearly all public bills placed before the Parliament and, following established precedent, resigns office when it becomes evident that it no longer holds the confidence of the representatives of the people. Its members are chosen by the Prime Minister and each generally assumes charge of one of the various departments of government, although a minister may hold more than one portfolio at the same time, or may be without portfolio.

The Privy Council

The Queen's Privy Council for Canada is composed of about 113 members, who are sworn of the Council by the Governor General, on the advice of the Prime Minister, and who retain their membership for life. The Council consists, chiefly, of present and former ministers of the Crown. It does not meet as a functioning body, and its constitutional responsibilities as adviser to the Crown in respect to Canada are performed exclusively by the ministers who constitute the Cabinet of the day.

The Legislature

The federal legislative authority is vested in the Parliament of Canada, consisting of the Queen, an Upper House styled the Senate, and a Lower House known as the House of Commons. Bills may originate in either the Senate or the House subject to the provisions of Section 53 of the British North America Act, 1867, which provides that bills for the appropriation of any part of the public revenue or the imposition of any tax or impost shall originate in the House of Commons. Bills must pass both Houses and receive the royal assent before becoming law. In practice, most public bills originate in the House of Commons, although there has been a marked increase recently in the introduction of public bills in the Senate. Private bills usually originate in the Senate.

Under Section 91 of the British North America Acts, 1867 - 1960, the legislative authority of the Parliament of Canada extends to the following matters: the amendment of the Constitution of Canada subject to certain exceptions; the public debt and property; the regulation of trade and commerce; unemployment insurance; the raising of money by any mode or system of taxation; the borrowing of money on the public credit; postal service; the census and statistics; militia, military and naval service, and defence; the fixing and providing for the salaries and allowances of civil and other officers of the Government of Canada; beacons, buoys, lighthouses, and Sable Island; navigation and shipping; quarantine and the establishment and maintenance of marine hospitals; sea coast and inland fisheries; ferries between a province and any British or foreign country or between two provinces; currency and coinage; banking, incorporation of banks, and the issue of paper money; savings banks; weights and measures; bills of exchange and promissory notes; interest; legal tender; bankruptcy and insolvency; patents of invention and discovery; copyrights; Indians and lands reserved for the Indians; naturalization and aliens; marriage and divorce; the criminal law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters; the establishment, maintenance, and management of penitentiaries; such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces.

In addition, under Section 95 the Parliament of Canada may make laws in relation to agriculture and immigration concurrently with provincial legislatures, although in the event of conflict federal legislation is paramount. By the British North America Act 1951 (14-15 Geo. VI, c.32), it was declared that the Parliament of Canada might make laws in relation to old-age pensions in Canada, but that no such law should affect the operation of any provincial laws in relation to old-age pensions.

The Senate

From an original membership of 72 at Confederation, the Senate, through the addition of new provinces and the general growth of population, now has 102 members, the latest change in representation having been made on the admission of Newfoundland to Confederation in 1949.

The House of Commons

In Section 37 of the British North America Act of 1867, it was provided that: "The House of Commons shall, subject to the provisions of this Act, consist of 181 members, of whom 82 shall be elected for Ontario, 65 for Quebec, 19 for Nova Scotia, and 15 for New Brunswick." Further, under Section 51, it was enacted that, after the completion of the census of 1871 and of each subsequent decennial census, the representation of the four provinces should be readjusted by such authority, in such manner, and from such time, as the Parliament of Canada provided, subject to and according to certain rules set out in the original Act. Membership in the House of Commons was accordingly increased from time to time until it reached 255.

In 1949, as a result of the union of Newfoundland with Canada, provision was made for the Province of Newfoundland to be represented by seven members in the House of Commons (the British North America Act, 1949). This increased the number of Members of Parliament to 262. By Chapter 15 of the Statutes of 1952, the Parliament of Canada, acting under the authority conferred by the British North America Act of 1949, amended Section 51 of the British North America Act, providing for a new method of re-adjustment of representation in the House of Commons. Pursuant to this amendment a new Representation Act was passed (R.S.C. 1952, c.334 as amended), providing for a total of 265 members of the House of Commons.

The representation of the various provinces is as follows under Section 2 of the Act, as substituted by 1962 Statutes of Canada, c.17:

"Eighty-five members of the House of Commons shall be elected for the Province of Ontario, 75 for the Province of Quebec, 12 for the Province of Nova Scotia, ten for the Province of New Brunswick, 14 for the Province of Manitoba, 22 for the Province of British Columbia, four for the Province of Prince Edward Island, 17 for the Province of Saskatchewan, 17 for the Province of Alberta, seven for the Province of Newfoundland, one for the Yukon Territory and one for the Northwest Territories, thus making a total of 265 members."

The Opposition

The Opposition occupies an essential place in constitutions based on the British Parliamentary system. Like many other institutions, such as that of the premiership for instance, it is founded on unwritten customs that have been accepted and become firmly established.

The choice of the Canadian electorate not only determines who shall govern Canada but, by deciding which party receives the second largest number of seats in the House of Commons, it designates which of the major parties becomes the official Opposition. The function of the Leader of the Opposition is to offer intelligent and constructive criticism of the Government of the day.

When criticism by the Opposition becomes sufficiently effective, it can overthrow the existing Government, and the Leader of the Opposition might then, as a result of the ensuing election, become Prime Minister.

Although the position of Leader of the Opposition is not recognized in the British North America Act, it received statutory acknowledgment in Canada in 1927. The Senate and House of Commons Act of that year provided for an annual salary to be paid to the Leader of the Opposition in addition to the indemnity as a Member of the House. In 1963, the Senate and House of Commons Act was further amended to provide for an annual allowance to each member of the House of Commons (other than the Prime Minister or Leader of the Opposition in the House of Commons) who is the leader of a party that has a recognized membership of 12 or more persons in the House.

The Federal Government Franchise

The present franchise laws are contained in the Canada Elections Act, 1960 Statutes of Canada, c. 39. The franchise is conferred upon all Canadian citizens, men and women, who have attained the age of 21 years, as well as upon British subjects ordinarily resident in Canada for the 12 months immediately preceding polling day at such election. In the case of by-elections only (which occur between general elections), the voter must continue to be ordinarily resident in the electoral district between the date of issue of the writ and the polling day. Persons disqualified from voting are:

- (1) The Chief Electoral Officer;
- (2) The Assistant Chief Electoral Officer;
- (3) The returning officer for each electoral district during such person's term of office, except when there is an equality of votes on the official addition of votes or on a recount as provided in the Canada Elections Act;
- (4) Judges appointed by the Governor General in Council;
- (5) Persons undergoing punishment as inmates of any penal institution for the commission of any offence;

- (6) Persons restrained of their liberty or deprived of the management of their property by reason of mental disease;
- (7) Persons disqualified from voting under any law relating to the disqualification of electors for corrupt or illegal practices.

The Judiciary

The Federal Judiciary

The Parliament of Canada is empowered by Section 101 of the British North America Act to provide, from time to time, for the constitution, maintenance and organization of a general Court of Appeal for Canada and for the establishment of any additional courts for the better administration of the laws of Canada. Under this provision, Parliament has established the Supreme Court of Canada, the Exchequer Court of Canada and certain miscellaneous courts.

Supreme Court of Canada

This Court, first established in 1875 and now governed by the Supreme Court Act (R.S.C. 1962, c.259, as amended) consists of a chief justice, who is called the Chief Justice of Canada, and eight puisne judges. The chief justice and the puisne judges are appointed by the Governor in Council and they hold office during good behaviour but are removable by the Governor General on address of the Senate and the House of Commons. They cease to hold office upon attaining the age of 75 years. The Court sits at Ottawa and exercises general appellate jurisdiction throughout Canada in civil and criminal cases. The Court is also required to consider and advise upon questions referred to it by the Governor in Council and it may also advise the Senate or House of Commons on private bills referred to the Court under any rules or orders of the Senate or the House of Commons.

Appeals may be brought from any final judgment of the highest court of final resort in a province in any case where the amount or value of the matter in controversy exceeds the sum of \$10,000. An appeal may be brought from any other final judgment with leave of the highest court of final resort in the province; if such court refuses to grant leave, the Supreme Court may grant leave to appeal from any judgment, whether final or not. Appeals in respect of indictable offences are regulated by the Criminal Code. Appeals from federal courts are regulated by the statute establishing such courts.

The judgment of the Supreme Court of Canada in all cases is final and conclusive.

Exchequer Court of Canada

The Exchequer Court of Canada was first established in 1875 as part of the Supreme Court of Canada, but is now a separate court governed by the Exchequer Court Act (R.S.C. 1952, c.98 as amended). The court consists of a president and five puisne judges who are appointed by the Governor in Council.

The president and the puisne judges hold office during good behaviour but may be removed by the Governor General on address of the Senate and the House of Commons. They cease to hold office upon attaining the age of 75 years. The Court sits in Ottawa and also at any other place in Canada for which sittings may be fixed by the Court. The jurisdiction of the Court extends to cases where claims are made by or against the Crown in right of Canada. Proceedings against the Crown are taken by petition or right pursuant to the Petition of Right Act, (R.S.C. 1952, c.210). The Exchequer Court also exercises admiralty jurisdiction in Canada.

An appeal lies to the Supreme Court of Canada from any final judgment of the Exchequer Court in which the amount in controversy exceeds \$500; an appeal also lies with leave of the Supreme Court in certain cases where the amount in controversy does not exceed \$500 or where the judgment is not final.

Provincial Judiciaries

Certain provisions of the British North America Act govern, to some extent, the provincial judiciaries. Under Section 92 (14), the legislature of each province may exclusively make laws in relation to the administration of justice in the province, including the constitution, maintenance and organization of provincial courts, both of civil and criminal jurisdiction. Section 96 provides that the Governor General in Council shall appoint the judges of the superior, district and county courts in each province, except those of the courts of probate in Nova Scotia and New Brunswick. Section 100 provides that the salaries, allowances and pensions of judges of the superior, district and county courts (except the courts of probate in Nova Scotia and New Brunswick) are to be fixed and provided by the Parliament of Canada and these are set out in the Judges Act (R.S.C. 1952, c.159, as amended). Under Section 99 of the British North America Act, 1867, the judges of the superior courts hold office during good behaviour but are removable by the Governor General on address of the Senate and House of Commons. By virtue of the B.N.A. Act, 1960, Judges of Superior Courts now cease to hold office upon attaining 75 years of age. The tenure of office of country court judges is fixed by the Judges Act as being during good behaviour, and their residence is required to be within the county or union of counties for which the court is generally established.

2. Provincial and Territorial Governments

In each of the provinces, the Queen is represented by a Lieutenant-Governor appointed by the Governor in Council. The Lieutenant-Governor acts on the advice and with the assistance of the provincial cabinet or executive council, which is responsible to the legislature and resigns office when it ceases to enjoy the confidence of that body.

The legislature of most provinces is unicameral, consisting of the lieutenant-governor and a legislative assembly. An exception exists in the case of the Province of Quebec, where there is an appointed Legislative Council as well as an elected Legislative Assembly. The Province of Prince Edward Island originally had a legislature consisting of two Houses, known as the Executive Council and the Legislative Council, but in 1893 the province combined both into a single Legislative Assembly. Some of the members of the Prince Edward Island Legislative Assembly are elected on the basis of a property

franchise, and the remainder are elected on the basis of a broad popular franchise similar to that used in the election of members of the legislative assembly in other provinces.

The maximum duration of an elected legislative assembly was originally fixed by the British North America Act, 1867, at four years, but Ontario and Quebec have enacted legislation permitting a five-year maximum term in those provinces. A legislature may, alternatively, be dissolved by the lieutenant-governor of the province on the advice of the provincial premier, at any time within the maximum period.

The source of legislative authority of the provincial legislatures is the British North America Act, 1867 (30 Vict., c. 3 and amendments). Under Section 92 of the Act, the legislature of each province may make laws exclusively in relation to the following matters: amendments of the constitution of the province except as regards the lieutenant-governor; direct taxation within the province; borrowing of money on the credit of the province; establishment and tenure of provincial offices and appointment and payment of provincial officers; the management and sale of public lands belonging to the province and of the timber and wood thereon; the establishment, maintenance and management of public and reformatory prisons in and for the province; the establishment, maintenance and management of hospitals, asylums, charities and eleemosynary institutions in and for the province, other than marine hospitals; municipal institutions in the province; shop, saloon, tavern, auctioneer and other licences issued for the raising of provincial, local or municipal revenue; local works and undertakings other than interprovincial or international lines of ships, railways, canals, telegraphs, etc., or works which, though wholly situated within one province, are declared by the Federal Parliament to be for the general advantage either of Canada or of two or more provinces; the incorporation of companies with provincial objects; the solemnization of marriage in the province; property and civil rights in the province; the administration of justice in the province, including the constitution, maintenance and organization of provincial courts both of civil and criminal jurisdiction, and including procedure in civil matters in these courts; the imposition of punishment by fine penalty or imprisonment for enforcing any law of the province relating to any of the aforesaid subjects; generally, all matters of a merely local or private nature in the province.

Further, in and for each province, the legislature may, under Section 93, make laws exclusively in relation to education, subject to certain restrictions relating to the establishment of schools by certain religious denominations. These powers, with similar restrictions, were conferred on the more recently admitted provinces on their inclusion as units in the federation.

The provincial legislatures may also make laws under Section 95 in relation to agriculture and immigration, subject to any laws of the Parliament of Canada in relation to these subjects.

Provincial Franchise

Any man or woman who is 21 years of age or more, fulfills certain residence or domiciliary requirements, is not otherwise disqualified, and is a Canadian citizen (or, in some provinces, any other British subject) is, generally speaking, entitled to vote in a provincial election. Similar

requirements exist with respect to voting in the Northwest Territories or the Yukon Territory. The minimum age for voting has been reduced to 19 by the Provinces of British Columbia and Alberta, and to 18 by the Provinces of Saskatchewan and Quebec.

Yukon and Northwest Territories

The Yukon was created a separate territory in June 1898. Provision is made for a local government composed of a chief executive officer styled Commissioner, and an elective Legislative Council of seven members with a three-year tenure of office. The Commissioner administers the Government under instructions from the Governor in Council or the Minister of Northern Affairs and National Resources. The Commissioner in Council has power to make ordinances dealing with a broad variety of matters, including direct taxation for local purposes, territorial offices and officers, municipal institutions, election of members of the Council, licensing of businesses, etc., incorporation of various kinds of companies with territorial objects, solemnization of marriage in the Territory, property and civil rights in the Territory, administration of justice in the Territory, various matters relating to the courts, issuing of licenses or permits to scientists and explorers, levying of fur taxes, preservation of game, education, roads, intoxicants, hospitals, agriculture, expenditure of territorial funds, matters of a merely local or private nature in the Territory, imposition of fines and penalties for violation of ordinances, and, generally, such other matters as are from time to time designated by the Governor in Council.

The seat of local government is Whitehorse, Yukon Territory.

Northwest Territories

The Northwest Territories comprise:

- (i) all that part of Canada north of the Sixtieth Parallel of North Latitude, except portions thereof within the Yukon Territory, the Province of Quebec or the Province of Newfoundland, and
- (ii) the islands in Hudson Bay, James Bay and Ungava Bay except those islands within the Provinces of Manitoba, Ontario or Quebec.

The Northwest Territories are constituted under an Act of Parliament which provides for a Commissioner of the Northwest Territories, appointed by the Governor in Council. The Commissioner administers the Government of the Territories under instructions given from time to time by the Governor in Council or the Minister of Northern Affairs and National Resources. There is a Legislative Council consisting of elected members and members appointed by the Governor in Council. The Commissioner in Council has power to make ordinances for the Government of the Territories respecting such matters as direct taxation within the Territories to raise revenue, establishment and tenure of territorial offices, maintenance of municipal institutions, licenses, administration of civil justice, education, public health and generally all matters of a local nature. The administration of the Territories comes under the Department of Northern Affairs and National Resources. The seat of government is at present at Ottawa. There are two District Administrators in

the field, at Fort Smith for the Mackenzie District, and at Ottawa for the Keewatin and Franklin Districts in the Eastern Arctic. The District Administrator is assisted by Regional and Area Administrative Officers at various places throughout the Territories.

3. Municipal Government

In addition to the Federal Government and the separate governments of the provinces and territories, there are also various units of local government. These may take a number of different forms, such as cities, towns, villages, counties, townships, etc. Their powers are laid down by legislation enacted by the appropriate provincial or territorial government. In some cases the powers are found in special charters or statutes creating a particular city, town or other form of government; in most cases, however, the form of local government and the powers and responsibilities attached thereto are to be found in municipal acts or other general statutes applicable throughout the province or territory. The qualifications of electors, as well as the qualifications for holding office are similarly regulated either by a special act or charter, or by general legislation establishing such forms of government.

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