

REFERENCE PAPERS



INFORMATION DIVISION  
DEPARTMENT OF EXTERNAL AFFAIRS  
OTTAWA - CANADA

No. 70 THE CONSTITUTION AND GOVERNMENT  
OF CANADA

I The Constitution of Canada

The Canadian federal state was established by the British North America Act, 1867, which united the three British North American provinces of Canada, New Brunswick and Nova Scotia into one country, divided into four provinces, namely, Ontario, Quebec, New Brunswick and Nova Scotia. British Columbia entered the Union in 1871 and Prince Edward Island in 1873. The Provinces of Manitoba, Saskatchewan and Alberta were created out of portions of the territories formerly held by the Hudson's Bay Company and admitted to the Union in 1870, and Newfoundland entered the Union in 1949. At the present time, therefore, Canada consists of ten provinces and the remaining territories, not included in any province, now known as the Yukon Territory and the Northwest Territories.

The British North America Act of 1867 divided 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 United Kingdom 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, early instructions to Governors, letters patent creating 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 the United Kingdom over the centuries are followed in Canada. For example, the Cabinet system of responsible government as developed in the United Kingdom 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 relationship 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 the United Kingdom and the other Commonwealth nations in both domestic and foreign affairs; its government advises the Crown in the person of the Governor General 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 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 the United Kingdom, are discharged by the Governor General 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. He exercises the executive authority of the Queen in the relation to the Government of Canada, under the Letters Patent constituting the Office of the Governor General and the provinces of the British North America Acts, 1867 to 1952. Acting under the recommendations of his responsible advisers, he 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. Normally, most of the Cabinet members have seats in the House of Commons, at the present time the Government Leader in the Senate is the only member who is not a member of the House of Commons.

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 representative 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 seventy 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 the House of Commons. Bills may originate in either the Senate or the House subject to the provisions of Sect. 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, 1867-1952, 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 no such law shall 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 Sect. 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 one hundred and eighty-one members, of whom eighty-two shall be elected for Ontario, sixty-five for Quebec, nineteen for Nova Scotia, and fifteen for New Brunswick". Further, under Sect. 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.

Under the Terms of Union of Newfoundland with Canada, provision was made for the Province of Newfoundland to be represented by seven members in the House of Commons. This increased the number of Members of Parliament by 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 (1952, c.48) 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:

Sect. 2 Eighty-five members of the House of Commons shall be elected for the Province of Ontario, seventy-five for the Province of Quebec, twelve for the Province of Nova Scotia, ten for the Province of New Brunswick, fourteen for the Province of Manitoba, twenty-two for the Province of British Columbia, four for the Province of Prince Edward Island, seventeen for the Province of Saskatchewan, seventeen for the Province of Alberta; seven for the Province of Newfoundland, one for the Yukon Territory and one for Mackenzie district of the Northwest Territories, thus making a total of two hundred and sixty-five 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 the 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 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 acknowledgement 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 his indemnity as a Member of the House.

### The Federal Government Franchise

The present franchise laws are contained in the Canada Elections Act, RSC, 1952, c.23. The franchise is conferred upon all Canadian citizens or British subjects, men and women, who have attained the age of 21 years and who have been ordinarily resident in Canada for 12 months prior to polling day at a federal election, and ordinarily resident in the electoral district on the date of the issue of the writ ordering such election. Persons denied the right to vote are:-

- (1) Judges appointed by the Governor General in Council;
- (2) The returning officer for each electoral district;
- (3) Persons undergoing punishment as inmates of any penal institution for the commission of any offence;

- (4) Indians ordinarily resident on an Indian Reserve who were not members of Her Majesty's Forces in World Wars I and II, or who did not execute a waiver of exemption under the Indian Act from taxation on and in respect of personal property;
- (5) Persons restrained of their liberty or deprived of the management of their property by reason of mental disease;
- (6) Doukhobors who are exempt from military service and are disqualified by provincial law from voting at elections of members of the Legislative Assembly.
- (7) Persons disqualified, under any law relating to the disqualification of electors, for corrupt and illegal practices.

### The Judiciary

#### The Federal Judiciary

The Parliament of Canada is empowered by Sect. 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.C.S. 1952, c. 259) 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 is controversy exceeds the sum of \$2,000. 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 of Canada may grant leave to appeal. 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). The Court consists of a president and four 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 of 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 Sect. 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. Sect. 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. Sect. 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.157). Under Sect. 99 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. The tenure of office of district and county court judges is fixed by the Judges Act as being during good behaviour and their residence within the county or union of countries for which the court is established.

## 2. Provincial and Territorial Governments

In each of the provinces, the Queen is represented by a Lieutenant-Governor appointed by the Governor General in Council. The Lieutenant-Governor acts on the advice and with the assistance of his Ministry 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 each province is unicameral, consisting of the Lieutenant-Governor and a Legislative Assembly, except for the Province of Quebec where there is a Legislative Council as well as a Legislative Assembly.

The Legislative Assembly is elected by the people for a statutory term of five years but may be dissolved within the period by the Lieutenant-Governor on the advice of the Premier of the Province.

The source of legislative authority of the Provincial Legislatures is the British North America Act, 1867 (30-31 Vict., c. 3 and amendments). Under Sect. 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 eleemosnary institutions in and for the province, other than marine hospitals; municipal institutions in the province; shop, saloon, tavern, auctioneer and other licenses issued for the raising of provincial 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 of 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 Sect. 93, make laws exclusively in relation to education, subject to certain restrictions relating to the establishment of schools by religious minorities. 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 Sect. 95, in relation to agriculture and immigration, subject to any laws of the Parliament of Canada in relation to these subjects.

#### Provincial Franchise.

The main qualifications of persons entitled to be registered as voters in provincial elections are given below and apply, with modifications, to voters in all provinces:-

Every person, male or female, at the age of 21 years, who is a Canadian citizen and was resident in the province of registration 12 months prior to the election date and with two months residence in the electoral district of polling, and who does not fall under any statutory disqualifications, is entitled to be registered as a voter.

The principle exception to the above gives voting privileges to persons in Saskatchewan and Alberta at the age of 18 and 19 years, respectively.

Residence required in the Province of Quebec for provincial elections is two years and in British Columbia six months. In Manitoba a residence period of three months in the electoral district is necessary for registration.

### Yukon and Northwest Territories

#### Yukon Territory

The Yukon was created a separate Territory in June 1898. Provision is made for a local Government composed of a Chief Executive, styled Commissioner, and an elective Legislative Council of five 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 the imposition of local taxes, sale of liquor, preservation of game, establishment of territorial offices, maintenance of prisons and municipal institutions, issue of licences, incorporation of companies, solemnization of marriage, property and civil rights, administration of justice, and generally all matters of a local nature in the Territory. The seat of local government is at Whitehorse, Yukon Territory.

#### Northwest Territories

The Northwest Territories comprise:

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

The Northwest Territories Act provides for the Government of the Territories by a Commissioner under instructions given from time to time by the Governor in Council or the Minister of Northern Affairs and National Resources. There is a council of eight members, three of whom are elected, and five 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, licences, administration of civil justice, education, public health and generally all matters of a local nature. The administration of the Territories under the Northwest Territories Act

and the ordinances passed by the Commissioner in Council is carried on by the Department of Northern Affairs and National Resources. A federal Administrative Officer serves at each of the following Territorial centres: Fort Smith, Aklavik, Hay River and Yellowknife. The seat of government is at Ottawa.

### 3. Municipal Government

The earliest local government in Canada was carried out by the seigneurs of New France who bore, along with military command and the administration of justice, the responsibilities of appointing justice of the peace and clerks of roads. Some of these officers were soon replaced by a 'syndic' elected by the people, the first in 1644, though a mayor and two aldermen had held office briefly in the city of Quebec in 1643. When the syndics fell into disuse, such powers were delegated by the Governor to officials. The City of Quebec was incorporated in 1832, and the system of local government for the province decreed in 1840 was later remodelled by Acts of 1845, 1850 and 1860.

In the Atlantic Provinces, Saint John, N.B., had attained the distinction of becoming Canada's first incorporated city in 1785. Incorporation of Halifax, N.S. came in 1841 and Charlottetown, P.E.I., in 1855. In Newfoundland, St. John's was created a town in 1888.

The Ontario Parish and Town Officers Act of 1793 provided for an annual meeting in a parish or township to appoint local officers responsible to Parliament and the courts, but the meetings had no law-making powers. Brockville, in 1832, gained from the Governor in Council some local powers that had previously been exercised through the courts. In 1834, York was incorporated as the self-governing city of Toronto. The Municipal Act of 1849 became the foundation of the local government in Ontario and later provided a model for the western provinces. Subsequently, Acts have been passed in all provinces governing aspects of municipal incorporation, powers and duties. Constitutional provision that jurisdiction over municipal affairs would rest with the provinces has resulted, quite naturally, in dissimilarity in the organization of local government across the country. This stems not only from the difference in beginnings and subsequent independent growth in each province, but also from variations in requirements arising out of geographical and population differences.

The situation remains in a state of flux, with constant amendment of provincial Acts and charters in an attempt to solve old problems and to meet new ones. Just as the call for new and additional services has enlarged the scope of federal and provincial activities, the municipalities have had to assume responsibilities unheard of a few decades ago, or considered beyond their sphere of activity. As a result, amendments to Acts have varied from those enlarging the powers and the boundaries of municipalities, to those establishing closer provincial control and greater financial aid.

RP/A

May, 1954.

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