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THE CONSTITUTIONAL DEVELOPMENT OF CANADA

| Abstract

- ▶ *Goal* – The purpose of this article is to provide an overview of Canada’s fundamental law (the Constitution), to examine the Canadian constitutional system and perhaps most importantly, to delve into the history of Canada’s Constitution and the reasons behind its current form.
- ▶ *Research methodology* – The research methods employed in this article include the analysis of historical and legal sources pertaining to the development of Canada’s constitutional system and its current form, mainly by Canadian authors which helps to understand their perspective of the constitutional development of Canada.
- ▶ *Score/results* – This article demonstrates how Canada’s constitution has progressively evolved from its 1867 origins – establishing a flexible federal framework under British authority – through milestones like the Statute of Westminster, which affirmed legislative autonomy, and the 1982 patriation and Charter, which entrenched fundamental rights, Indigenous protections, the notwithstanding clause, and an amending formula, culminating in the robust, sovereign constitutional system in place today.
- ▶ *Originality/value* – This article was prepared independently, using predominantly Canadian sources and provides a comprehensive overview of Canada’s constitutional evolution. It integrates primary documents, judicial decisions, and historical records to trace each turning point in detail. By offering a unified narrative from 1867 to the present, it fills a gap in the literature where these developments have often been treated in isolation. The findings will serve as a valuable reference for scholars, policymakers, and students interested in understanding how Canada’s constitutional framework has been shaped over time.

| **Keywords:** Canada, Constitution Act 1982, The British North America Act 1867, Canadian Constitution, Canadian History.

1. Introduction

Canada's constitution embodies the nation's steadfast dedication to democratic values, equality, and the rule of law. Within its provisions lie the bedrock principles that govern the nation and safeguard the rights and liberties of its populace. Binding together ten provinces and three territories, the Constitution plays a pivotal role in shaping Canada into a stable and prosperous nation.

It is imperative to grasp the complexity of governing Canada. As the second largest country globally, a substantial portion of its territory remains remote and challenging to access, spread across vast expanses. Moreover, Canada boasts a significant minority of the French descendants who predominantly speak French and advocate for autonomy from the central government. The influence of this minority cannot be understated, particularly in Quebec, where their economic prowess and cultural significance are pronounced. There is also the not numerous but still important indigenous people minority who needs to be protected by the law. It is essential that the Constitution of Canada protects their rights and makes them feel a part of the Canadian nation. What is more, Canada in recent years is welcoming a lot of immigrants, mainly from India but also from Europe and other parts of the world. Creating a nation which consists of people of different cultural, religious and ethnical backgrounds is an incredibly difficult task. It is vital that the Constitution Act, 1982 protects all of their rights firmly and equally.

The Constitution of Canada serves as a remarkable cornerstone of legal authority, uniting diverse regions and peoples under its umbrella. This supreme legal document lays the foundation for Canada's governance and societal framework. The objective of this article is to provide readers with a deeper understanding of the Constitution and the historical context surrounding its development. By delving into its intricacies, readers can gain insights into the significance and relevance of this foundational document in Canadian society.

2. The British North America Act

2.1. Introduction

The first supreme act of law which was established in the Dominion of Canada was *The British North America Act* which is also known as *the Constitution Act, 1867*. The act was given royal approval by Queen Victoria on 29 March 1867 and came

into force on 1 July 1867. The formal name of the act is: *An Act for the Union of Canada, Nova Scotia and New Brunswick, and the Government Thereof; and for Purposes Connected Therewith*. The statute essentially united three colonies of British North America – Canada, New Brunswick and Nova Scotia into one entity – the Dominion of Canada. The Act also contained provisions which allowed other British North American colonies to join the Dominion in the future. Furthermore the province of Canada was partitioned into two provinces – Quebec and Ontario. The new central government and parliament were placed in the new capital – Ottawa. *The British North America Act* declared that the Dominion of Canada remained under the authority of the British Monarch and acted as Canada's constitution for 115 years.

2.2. History behind the Act

The concept to unify the British North American colonies under a single entity emerged in the first half of the nineteenth century. Lord Durham set things in motion with *the Report on the Affairs of The British North America* which was published in 1839 [*Britain and the Americas...*, 2005: 822]. John Lambton, the 1st Earl of Durham was sent by the Crown to Canada in 1838 following the uprisings of 1837–38, tasked with investigation and creation of a report on this pending issue. He was given the position of Governor General and was granted extraordinary authority as the special envoy to British North America. His report sparked significant interest and controversy. His idea of a unified colonial state found support in Lower Canada, which was predominantly English-speaking, however, at the same time faced rejection in Upper Canada where a significant portion of the population consisted of French Canadians. Lord Durham's concept essentially called for creating a unified Province of Canada, which would be given more autonomy in order to govern itself smoothly. From his perspective, a single responsible government could guarantee economic prosperity and stability for British North America.

As an aftermath of the Report, the British Parliament ratified *the Act of Union* in July 1840. The Act of Union was proclaimed in Montreal on February 10, 1841 officially marking the birth of the Province of Canada [www 1]. The provinces' capital was moved to Kingston. One of the most important aspects of the legislation was the formation of a single parliament, which would equally represent all of the regions. Despite the differences in population numbers between more populous Canada East compared to Canada West, both regions

were granted 42 seats in the Legislative Assembly. This allocation was perceived as unfair by the majority of French Canadians as well as some of the English Canadians. Francophone politician Louis-Joseph Papineau pressed for proportional to population size representation and advocated for the dissolution of the union upon his entry into the unified Canadas' new parliament. Furthermore, the debts of Upper and Lower Canada were merged and acquired by the unified Canadian province.

Following the creation of the Province of Canada, politicians from other British North American colonies also discussed the possibilities of unification. In 1864, the leaders of the provinces of New Brunswick, Nova Scotia and Prince Edward Island were considering the idea of forming a Maritime Union, aiming to bring those colonies together. Unexpectedly, the government of the Province of Canada expressed interest in participating in those discussions. Governor General Monck reached out to the Colonial Office for the approval of the British regarding the possible unification of those colonies [www 2].

Upon receiving the approval from London, on September 7, 1864, representatives from New Brunswick, Nova Scotia and Prince Edward Island responded affirmatively to the Canadian delegation. They expressed their interest in forming a federation of colonies under the condition, that satisfactory terms could be reached. With that the idea of a Maritime Union was set aside.

Following the initial talks between representatives of the involved colonies, additional meetings were held among the delegates. These gatherings showed enough interest to prompt the politicians to organize a second Conference.

The second Conference took place in Quebec City on October 10, 1864 [www 3]. The delegates had different visions regarding the form and system in which the newly found federation would operate. Despite those differences it was clear to them that it was a matter of time before the unified Canadian state would start to exist. People who took part in the second conference left Quebec City filled with optimism and a belief that soon all Canadians would be unified under one banner.

Sixteen official delegates from the British North American colonies travelled to London in December 1866 [www 4]. Their objective was to bring the idea of a unified Canada to their Queen and the British Parliament to gather support for its implementation. Each delegate was granted a private audience with Queen Victoria to discuss the matter. The Canadian delegation thoroughly examined and approved the 72 resolutions, now widely known as the London Resolutions. These resolutions were later communicated to the Colonial Office.

After the much needed Christmas break, the delegates focused on drafting the resolution. There were many discussions regarding the content of the act. One of the many decisions which had to be made was to choose the name of the new country. There were many propositions regarding this choice among them names such as “Franklin” and “Guelfenland”. Finally, a consensus was reached to name the unified British North America colonies “Canada”. Quebec and Ontario would replace Canada East and Canada West, respectively as provinces of the new federation. A significant discussion appeared over the designation of the new nation. Some delegates advocated for the term “kingdom”, some others supported “confederation”, finally it was decided that the new entity would be named the Dominion of Canada, which was supposedly suggested by sir Samuel Leonard Tilley.

By the end of winter 1867, the Canadian delegation finalised their draft of *the British North America Act*. Members of this delegation are often referred to as the “fathers” of a unified Canadian state [www 5]. The Queen Victoria was informed and given the act on February 11, 1867. Soon after the bill was presented before the British Parliament for approval. Ultimately the act officially received acceptance and legal authorisation from the British on March 29, 1867, with July 1, 1867 as the official date of the birth of the union.

2.3. Legal content of the Act

The first and most important resolution of *the British North America Act* is the unification of the provinces of Canada, Nova Scotia and New Brunswick into the Dominion of Canada, which would represent Canadian interest on the international scene [www 6]. At the same time, considerable authority was given to the provinces to self-govern themselves mainly regarding their internal matters.

Formally, the highest authority over the Dominion and its military forces was held by the British Crown. The act also consisted of resolutions regarding the position of Governor General and lieutenant governors for each province of the Dominion. The city of Ottawa was designated as the capital.

The British North America Act implemented the Parliament of Canada which consisted of the Queen, the Senate and the House of commons, in a system similar to the British. It also laid out unnecessary procedures and rules of functioning of those institutions. The Act ultimately laid out the legal foundation upon which the new Canadian state would operate, especially providing provisions regarding its federal structure, political system, judicial system and taxation.

3. The Constitution of Canada

3.1. History behind the Constitution, 1982

Statute of Westminster, which was passed on December 11, 1931 by the British Parliament, enhanced the autonomy of the self-governed states which were a part of the British Empire [www 7]. The act of law has essentially opened up the possibility of transferring constitutional power held before by the British to the Canadians. This has left the Canadian people with several uncertainties considering the way the new constitution would be implemented and whether it should be changed at all.

Concerns surrounding the Constitutional revision included the question whether all of the Canadian provinces and territories had to accept the new act or if a majority was sufficient. If gathering the support of majority of the regions would be enough, then how would that majority be decided, would it be simply by number of the provinces and territories or would their population or territory also matter. The French Canadians would argue that Quebec should be given a veto power to protect their interests considering they could be outvoted by the anglophones, this however could potentially lead to a constitutional paralysis. As long as Canadians could not settle these doubts, the right to create a new Canadian constitution would remain in the hands of the British.

Situation changed because of the Quebec independence referendum held in May 1980 [www 8]. Before the vote, Canadian Prime Minister Pierre Trudeau assured the people of Quebec that, after the referendum, constitutional talks would re-open. After the secession was ruled out, Pierre Trudeau immediately initiated the process of creation a bill of rights and revising method for the constitutional act.

Facing harsh opposition from all of the regions apart from Ontario and New Brunswick, the Prime Minister of Canada decided to continue on his own. He would approach the British to change *the British North America Act* accordingly to provisions from the Parliament of Canada. This was met by the opposition who stalled the resolution in the House of Commons. Additionally the leaders of the provinces took the government to court on the matter.

The Supreme Court of Canada issued a mixed sentence in September 1981 [www 9]. On one hand, the Prime Minister was legally empowered to continue with the bill in the Parliament, but, on the other hand, he was obliged to reach a compromise with the regions before he asked the British for amendments.

Pierre Trudeau continued with his actions and reached out to provincial leaders in an attempt to reach an agreement. Eventually, by the end of 1981, the central government and all of the provinces excluding Quebec reached a compromise. The newly created Constitution was going to contain a method for future revisions. On top of that it was agreed that it would be given a *Charter of Rights and Freedoms*.

3.2. The construction of the Constitution Act

The Constitution Act of 1982 consists of several significant parts, each addressing different aspects of Canada's constitutional framework.

The first part introduces the Canadian *Charter of Rights and Freedoms*, which serves as a safeguard against federal, provincial, and territorial encroachments on Canadian rights and freedoms. However, the notwithstanding clause allows the federal or provincial governments to exempt certain laws from specific Charter provisions [www 10].

The second part protects and guarantees the existing rights of Indigenous peoples in Canada, however these rights remain undefined [www 11].

The third part recognises the federal government's longstanding practice of providing equalisation payments to less affluent provinces. These payments aim to reduce disparities in services across provinces [www 12].

The fourth part obliges the Canadian government to organise an official convention to review the rights of Indigenous peoples earlier than April 17, 1983 [www 13].

The fifth part outlines the procedure for amending the Constitution, stipulating that most sections can be amended with approval from the Senate, the House of Commons, and at least two-thirds of the provincial legislatures, representing at least 50% of Canada's population. However, unanimous approval is required for amendments related to specific provisions such as the composition of the Supreme Court or the bilingualism of Canada [www 14].

Provisions affecting only certain provinces may proceed with approval from the Senate, the House of Commons, and the relevant provinces.

The sixth part amends the *British North America Act*, 1867 specifies that regional authorities have exclusive jurisdiction over irreplaceable natural resources [www 15].

Finally, the seventh part comprises miscellaneous provisions of lesser significance.

3.3. The system of Canada

Canada operates as a unique fusion of constitutional monarchy and parliamentary democracy. While governance is conducted in the name of the Crown, its legitimacy stems from the consent and support of the Canadian people [A *Crown of Maples: Constitutional Monarchy in Canada*, 2015: 18]. Canada's parliamentary system takes directly from British traditions. Therefore Canada's system of governance consists of the executive, the legislative and the judicial divisions. The Parliament of Canada is composed of three entities: the Crown, the Senate, and the House of Commons. Legislation can only be enacted when all three parties reach a consensus. It is important to notice that the central government is responsible for creating law at a federal level while due to high autonomy of the regions, territorial and provincial governments create law within their own jurisdiction.

The executive branch

The executive division is the first component of Canada's political system, responsible for decision-making. The Crown serves as the official Head of State in Canada. For practical reasons, this power is vested in the Governor General, who is appointed by the monarch in agreement with the Prime Minister who suggests appropriate candidates. Additionally, each province has a lieutenant governor who serves as a local representative of the Crown. Those representatives are selected by the Governor General, who acts on advice from the Canadian government.

As the representative of the Head of State, the Governor General carries out the powers and responsibilities of the monarch. Therefore, the Governor General is expected to be apolitical and non-partisan [A *Crown of Maples: Constitutional Monarchy in Canada*, 2015: 16, 19–20]. Among their many responsibilities, one of the most crucial one regards ensuring that Canada always has a prime minister and a government in place with the confidence of Parliament. The Governor General appoints members of the Senate on the advice of the Prime Minister and acts on the advice of the head of government, while also possessing the right to advise, encourage, and warn. Consequently, the Governor General can provide valuable counsel to the Prime Minister. Additionally, the Governor General holds certain reserve powers, serving as a democratic safeguard in Canada.

Following a federal election, the leader of the political party with the most seats in the House of Commons assumes the role of Prime Minister. As the head of the government, the Prime Minister advises the Governor General on matters

concerning the country's governance and formally conducts executive duties. The Prime Minister subsequently appoints the cabinet from among the Members of Parliament to provide advice and assistance in running the government.

The role of the Prime Minister is not extensively outlined in Canadian constitutional documents [*Canadian Democracy: An Introduction*, 2007: 233–234]. It is considered an “unwritten” element of Canada's Constitution, representing a tradition or convention that has evolved and become accepted as an integral part of the country's governance over time and history. Consequently, the role of the Prime Minister has acquired constitutional protection.

The legislative branch

The legislative division of Canada's government is known as the Parliament of Canada. As stated before, the Parliament consists of the Crown, the Senate and the House of Commons. The main responsibility of the legislature is to create law. Canada's Parliament operates under a two-house system which is a custom from the beginning of British colonialism in North America. Settlers living in British North American colonies favored bicameral system because it allowed to represent equally both the interests of the mother country and the colonists. Canadians of that era believed that the bicameral system prevented rash and oppressive legislation and best served the principles of democracy. This tradition of the two-house system is rooted deeply into the Canadian way of governance even today.

The House of the Commons serves as the primary legislative chamber in the bicameral system, it is also known as the lower house of Parliament. This chamber is responsible for introducing, debating, and passing laws, as well as proposals related to taxes and revenues. Its members, known as Members of Parliament, represent various political parties and are elected by Canadians in general elections. Currently, there are 338 Members of Parliament, although their number may decline or increase in the future, because it is strictly tied to the population size. Lower house seats are assigned to specific provinces and territories based on the percentage of Canadians living there. The House of Commons may not last longer than 5 years.

The Senate, known as the upper house of Parliament, serves as a certain kind of safety valve. It is tasked with carefully scrutinising legislation before it is enacted into law. The Senate consists of 105 senators, who are representing specific regions of Canada. Each of the regions is assigned a specific number of

senators according to its significance. Therefore twenty-four seats are assigned to the provinces of Ontario, Quebec, the Maritimes (consists of provinces of Nova Scotia, New Brunswick, Prince Edward Island) and the western provinces (consists of provinces of Manitoba, British Columbia, Alberta, Saskatchewan), additionally six senators are appointed from Newfoundland and Labrador and one from each of the territories (the Northwest Territories, the Yukon and Nunavut) [www 16]. To qualify, a senator must be a Canadian citizen, at least 30 years old, and own land valued at least \$4,000 [*Constitution Act*, 1867: 23]. Additionally, in the case of Quebec, a senator must own land within the province. Senators are also required to have at least \$4,000 in property and reside in the province or territory they represent.

Unlike members of the House of Commons, senators are not elected. Members of the upper house are appointed by the Governor General upon the recommendation of the Prime Minister, based on considerations of regional representation and specific individual qualifications [*Canadian almanac & directory* (159th ed.), 2006: 3–42]. Although senators typically align with a political party, some may choose to sit as independents.

The judicial branch

The judicial branch of government in Canada is responsible for interpreting and applying the law. It comprises judges and courts that operate independently from other branches of the Canadian government. Canadian federal structure leads to a division between federal and regional courts. Federal courts include the Supreme Court of Canada, the Federal Court of Canada (Trial Division and Appellate Division), and the Tax Court, while provincial courts encompass superior courts or courts of appeal in each province or territory.

Courts in Canada handle a wide range of legal matters, including administrative law, contract law, constitutional law, criminal law, property law, tort law, and many others. Judges have the authority to interpret legislation and can declare it invalid. The judicial branch also responds to reference questions, where the government seeks legal advice on significant legal issues.

Canada is a country that follows common law, which is characteristic of Anglo-Saxon countries. This system emphasizes on the court rulings which create the law itself. The precedent rule, serves as the legal basis for adjudicating similar cases in the future. It is obligatory for lower courts and appellate courts that established it, provided it has not been overturned. However, it generally

does not bind Supreme Courts. It is important to note that Quebec does not apply common law. Instead they use statutory law characteristic to continental European countries like France.

Appointments to federal courts, the jurisdiction of which reaches all of Canada, are made by the Crowns representative on the advice of the government. The Supreme Court Act governs appointments to the Supreme Court of Canada. It specifies that candidates must have served as a judge of a superior court of a province or have been a barrister or advocate for at least ten years. Additionally, at least three judges must be appointed from among the judges or advocates of the Province of Quebec, with specific qualifications outlined in the Act. This important issue was addressed in the famous *Reference Re Supreme Court* case.

4. Conclusion

Canada's status as a cohesive nation is intricately woven into its constitutional history. The enactment of the British North America Act played a pivotal role in uniting disparate colonies under a single banner. This act of union laid the groundwork for the emergence of the United provinces and territories of Canada, fostering a robust nation with a resilient government. Canada's reputation as one of the safest places to reside in North America is a testament to the stability and security afforded by its constitutional framework.

Navigating the complexities of cultural and ethnic diversity within its population posed significant challenges, yet Canada demonstrated its capacity to forge consensus for the collective welfare. The ability to reconcile differences and foster a sense of unity underscores the strength of the Canadian nation.

The Constitution Act of 1982 stands as a cornerstone of Canadian jurisprudence, embodying the nation's commitment to legal principles and democratic values. Serving as the bedrock of the country's legal system, this superior legislation shapes the framework of governance and ensures the protection of rights and freedoms for all Canadians.

Of course the Constitution Act of 1982 is not perfect. There will always be some issues regarding almost any given legal act. In this case, the greatest doubts arise not from the act itself, but from the manner in which it was adopted, disregarding the voice of Quebec, which is one of the strongest provinces. Some could argue that it was the only way to grant Canada a new constitution and gain full independency from the British. On the other hand, because of this action,

the people of Quebec, who are mostly French Canadian, can feel neglected and left out. In consequence, this resulted in deepening the differences and tensions between French Canadians and British Canadians which if there were different decisions made could potentially be avoided thus strengthening the nation.

The Constitution Act of 1982 was also given some criticism regarding its general character. In my opinion those voices are only partially correct. Canada is a federal state which gives much authority to the provisional and territorial governments. It is impossible to put many of the regulations directly in the Constitution Act itself because of the differences between the law in member provinces and territories. Of course, some specified legal regulations could be implemented in the Act, but it is not an easy task and would arise many difficulties and without doubt opposition from some provinces or territories.

Overall the Constitution Act of 1982 is a well-balanced superior act of law tying the provinces and territories of Canada together into one stable country.

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