

Chapter 2

The Constitution and the legal system

As the society of a country becomes more highly developed, the body of law, in response to the changing needs of its citizens, becomes more complex. This Chapter attempts to show some of the features of the Canadian legal system, particularly those which have a federal concern. The Canadian Constitution, the major written aspects of which are contained in the British North America Act, is considered in some detail, followed by a discussion of the distribution of legislative power between the federal and provincial governments. There are also short notes on the Canadian legal system, the development of Canadian criminal law, the courts and the judiciary, the legal profession and the federal legal aid scheme. There is a description of the organization and work of the federal Department of Justice. Information concerning the enforcement of the criminal law and on correctional institutions is set out in the concluding sections.

2.1 The Constitution

The Canadian federal state of 10 provinces and two territories, as we know it today, had its foundation in an Act of the British Parliament, the British North America Act, 1867, which was fashioned for the most part from the Seventy-two Resolutions drafted by the Fathers of Confederation at Quebec in 1864. That Act provided for the federal union of the three British North American Provinces — Canada (Ontario and Quebec), Nova Scotia and New Brunswick — into one Dominion under the name Canada. The country that was brought into existence on proclamation of the BNA Act on July 1, 1867 consisted of only four of its present provinces, Ontario, Quebec, New Brunswick and Nova Scotia. However, Section 146 of the Act made provision for the possible future entry into Confederation of the colonies or provinces of Newfoundland, Prince Edward Island and British Columbia, and of Rupert's Land and the North-Western Territory, a vast expanse of territory then held by the Hudson's Bay Company. In 1870, the Company surrendered its territories to the British Crown which transferred them at once to Canada. In exchange it received a cash payment from the Canadian government of £300,000, one twentieth of the lands in the southern part, "the fertile belt", of the territory, and designated blocks of land around its trading posts. From this new territory was carved the province of Manitoba in 1870 which was much smaller at its inception than at present, and later, in 1905, the provinces of Saskatchewan and Alberta. British Columbia entered Confederation in 1871 on the condition that a railway linking it with eastern Canada be commenced within two years. Despite the original provision in the BNA Act for their entry into Canada, it was not until 1873 that Prince Edward Island entered the Union, and much later, 1949, that Newfoundland became part of Canada (see Table 2.1).

Although the BNA Act of 1867 and its amendments contain a substantial portion of Canada's Constitution, and is popularly referred to as the Constitution, it is not a comprehensive constitutional document presenting an exhaustive statement of fundamental laws and rules by which Canada is governed. There are unwritten parts which are of equal importance such as common law, convention and usage which were transplanted from Great Britain over 200 years ago and which are fundamental to the Canadian style of democratic government. Among these are the principles governing the Cabinet system of responsible government with its close identification and functioning of executive and legislative branches.

The Constitution of Canada, in its broadest sense, also includes other British statutes (Statute of Westminster — 1931) and British Orders in Council (those admitting various provinces and territories to the federation); statutes of the Parliament of Canada pertaining to such matters as succession to the Throne, the Royal Style and Title, the Governor General, the Senate, the House of Commons, the creation of courts, the franchise and elections; as well as judicial decisions that interpret the BNA Act and other statutes of a constitutional nature. Moreover, the constitutions of the provinces of Canada form part of the over-all Canadian Constitution, and provincial acts which are of a fundamental constitutional nature similar to those listed above would also be considered part of the Constitution. The same can be said of both federal and provincial Orders in Council that are of a similar fundamental nature.