The Canadian Constitution in Historical Perspective

WITH A CLAUSE-BY-CLAUSE ANALYSIS OF THE CONSTITUTION ACTS AND THE CANADA ACT

BAYARD REESOR

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PREFACE

The impetus for this book was the desire to have readily available, in a language appropriate for the undergraduate student of Canadian government, a reasonably concise analysis of what was then the British North America Act. The need for an analysis of the codified part of our constitution was accentuated by the passage of the 1982 Canada Act with its Schedule B, the Constitution Act. That analysis remains the major focus and comprises about two-thirds of the book.

Partly because of the breadth of our constitution, and partly because of the author's belief that a knowledge of history is essential to an understanding of the contemporary scene, the scope of this project rapidly expanded. A brief outline of the book follows.

Part One, entitled "The Road to Independence," focuses on the historical context within which the five major constitutional documents were created between the fall of New France and Confederation. These documents are the 1763 Royal Proclamation, 1774 Quebec Act, 1791 Constitutional Act, 1840 Union Act, and 1867 British North America Act (renamed in 1982 the Constitution Act, 1867). An attempt is made to show how each of these constitutional documents led to the next. In this way we can recognize that the Constitution Act was not created in a vacuum in 1867 but was the product of more than a century of British rule following the collapse of the French Empire on this continent.

This historical part is divided into three chapters. Chapter 1 traces our constitutional development from the fall of New France to the 1837 rebellions in Upper Canada and Lower Canada. Chapter 2 focuses on the struggle for reponsible government during the 1840s. Chapter 3 includes the causes of Confederation, Canada's subsequent territorial expansion, and, because the Constitution Act did not establish an independent country, a notation of the more significant post-Confederation steps in the development of total independence.

Part Two is entitled "The Nature of our Constitution." Chapter 4 considers the basic principles of our constitution—monarchy, rule of law, liberal democracy, responsible government, federalism, and semi-limited government. Chapter 5 acknowledges the multifaceted nature of the constitution. In addition to the 1867 and 1982 Constitution Acts, and the Canada Act, it considers the place of other formal documents, convention, and judicial decisions. Chapter 6 discusses the search by Federal and provincial governments for a formula that would permit Constitution Act amendment entirely within Canada. This search, sporadic and with varying degrees of enthusiasm, lasted for more than half a century and ended with the 1982 Constitution Act.

Part Three (Chapters 7 and 8), the original rationale for the book, makes up the bulk of the volume and consists of a clause-by-clause analysis of the 1867 Constitution Act (as amended) and the 1982 Canada Act and Constitution Act (as amended). Extensive use is made of Supreme Court of Canada rulings through mid-1991. Close attention is also given to some of the decisions of the Judicial Committee of the British Privy Council before 1949, and of our Supreme Court since 1949 (when it became Canada's final appeal body), in cases dealing with the federal distribution of powers between the two orders of government.

In the spring of 1987 the prime minister and the ten provincial premiers met at Meech Lake in the Gatineau Hills to discuss the conditions enumerated the previous year by Premier Bourassa for Quebec to sign the 1981 constitutional agreement. (This agreement had led to the 1982 Canada and Constitution Acts.) The result of the 1987 meeting was the "Meech Lake Accord" which included several proposed constitutional amendments. The eleven first ministers agreed to submit these proposed amendments to their legislatures for approval in accordance with the terms of section 41(e) of the 1982 Constitution Act. As is well known, the proposals were not approved by Manitoba and Newfoundland and so they lapsed on June 23, 1990. Since the death of Meech Lake there has been another flurry of activity by the governments in Ottawa, Quebec, and several other provinces. Some of these developments are noted in the Conclusion/Epilogue.

ACKNOWLEDGMENTS

I am grateful to Augustana University College for providing a sabbatical leave for me to begin this project, and for underwriting the expenses since then. I would also like to acknowledge the Supreme Court of Canada for allowing the use of many cases from *Supreme Court Reports*.

For reviewing the manuscript, I would like to thank Nelson Wiseman (University of Toronto), Patrick Malcolmson (St. Thomas University), Jennifer Smith (Dalhousie), F.L. Morton (Universtiy of Calgary), and Reg Whitaker (York University).

A professor's wife seems destined to spend much time without the companionship that is her due. During my many years of teaching, Sue has shown patience and understanding far exceeding any possible call of duty. I dedicate this book to her as a token of my deep appreciation for this selfless devotion.

INTRODUCTION

The Canadian constitution is rather baffling for it is so difficult to define. For more than a century we have had the British North America Act (in 1982 renamed the Constitution Act, 1867), but that document is of little assistance when we try to understand some of the basic constitutional principles. It explains parts of the political system such as the formal distribution of legislative authority between the Federal government and the provincial governments, but it sheds little light on the actual workings of government. The Act is silent, for example, on the critical principle that the cabinet is ultimately answerable to the House of Commons and cannot retain power if it loses the confidence of the Commons. The Act does not even indicate that the prime minister and cabinet must resign when a different political party wins a general election. Indeed, it fails to acknowledge the existence of a prime minister or cabinet. Neither does the Act contain an amending formula (so that until 1982 we had to ask a foreign government—Britain's Parliament—to make any important changes) or, for people seeking a formal guarantee of rights and freedoms, a bill or charter of rights. The Act is actually misleading in important respects, especially where it appears to attribute almost dictatorial power to the governor general who is the appointed representative of the monarch.

But we now have a "new" constitution, some people say—the 1982 Canada Act, and the Constitution Act which is appended to it. We now have a Charter of Rights and Freedoms and an amending formula, and we need no longer ask Britain to change any part of our constitution. We do indeed have these new documents but they are not a new constitution. They are additions to our existing one. They do add important elements but they do not address the "deficiencies" of the 1867 Constitution Act apart from creating an amending formula and the Charter.

Fortunately, the prime minister understands the principle of responsible government and would not attempt to retain power if defeated on an important matter in the House of Commons or if the party lost a general election. Joe Clark was defeated in the Commons in 1979 on his budget, and when he called an election the voters gave their support to Pierre Trudeau and the Liberal Party. Clark then resigned and Governor General Schreyer invited Trudeau to form the Government. The governor general understands the importance of deferring to his or her ministers and of not exercising most of the legal powers conferred by the Constitution Act.

The question naturally arises: "Why doesn't our constitution include these and other important principles in the operation of government?" The answer is: "It does!" The paradox is explained when we understand that our constitution encompasses far more than the documents noted above. For example, it

includes convention. It is convention which dictates that a defeated prime minister must resign. It is convention which determines that the governor general must accept the advice of ministers; nevertheless, as if to create an element of uncertainty, convention also gives to the monarch's representative a "reserve" power to act upon his or her own initiative in extraordinary (but undefined) circumstances. However, failure to act in accordance with conventional rules cannot be challenged in the courts because these rules are not justiciable. The only "court" that can punish those who violate constitutional conventions is the electorate.

Two other basic elements of our constitution are statutes whose subject matter is of constitutional importance (including those establishing government departments, courts of law, voting eligibility, citizenship criteria, or altering Federal-provincial financial relations), and court decisions that adjudicate conflicting jurisdictional claims of the Federal and provincial governments and, since 1982, interpret our new Charter of Rights and Freedoms.

It is useful, therefore, to view a constitution as "the whole body of fundamental rules, written and unwritten, legal and extralegal, according to which a particular government operates."[1] A brief elaboration of this definition reveals several important points. First, the adjective "fundamental" cautions against the inclusion of many laws, regulations, and other rules which, although significant, are of but secondary importance. Constitutional rules set the framework within which other rules are made, interpreted, and applied. Second, fundamental rules are more difficult to change. In a sense this statement is a truism; what may not be self-evident, however, is that the generalization applies even when the difficulty of change is political rather than legal.

Third, constitutional rules need not all be written. The British constitution, for example, relies heavily on the unwritten accumulation of court decisions (the common law) and convention. Some parts of that constitution are indeed written, such as the Magna Carta (1215), Habeas Corpus Act (1679), Petition of Right (1628), Bill of Rights (1689), Act of Settlement (1701), Great Reform Act (1832), and Parliament Act (1911). But in the absence of a single core document the term "unwritten" is frequently applied. By way of contrast the United States constitution is generally regarded as synonymous with the document entitled the "Constitution of the United States" and is therefore classified as "written." There are, nevertheless, significant conventional rules such as those establishing the actual procedure for electing a president and the role of parties in the political process. The convention that a president would serve no more than two terms was formalized (and therefore ceased to be a convention) as a 1951 constitutional amendment following Franklin Roosevelt's election to his fourth term in 1944. Court decisions have also been an important component of United States constitutional rules since 1803 (*Marbury v. Madison*) when the Supreme Court first struck down legislation as being unconstitutional.

Canada is a cross between Britain and the United States: it has always had the core Constitution Act of 1867, to which has been added the 1982 Canada

Act and 1982 Constitution Act, but many of our most important constitutional rules are, as in Britain, unwritten. Using the "written-unwritten" dichotomy our constitution is "partly-partly."

The fourth important point revealed by the above definition follows from the third: the enforcement of some constitutional rules (notably convention) is accomplished only by political means and not through the courts. The term "extralegal" in the definition acknowledges the fact that not all constitutional rules are justiciable.

In spite of their popularity the terms "written" and "unwritten" are really inappropriate to describe constitutions. A "codified-uncodified" classification more accurately expresses the intent, a codified constitution having its essence within a single document. Clearly, then, the British constitution is uncodified, and the United States constitution is codified. What is the Canadian constitution? Unfortunately, these terms do not resolve that problem. The 1982 Canada Act with its Constitution Act certainly strengthens the argument for the adjective "codified" but the degree of codification is far less in Canada than in the United States. We seem to be left with a British-United States hybrid.

The term "constitution" is used in both a narrow and a broad sense depending upon whether or not, or the extent to which, the constitution is codified. The British constitution has meaning only in the broad sense and is frequently spelled with a lower-case "c"; conversely, the United States constitution generally refers to the document bearing that name and is usually spelled with a capital "C." When we come to Canada the distinction between the narrow and broad meanings of "constitution" becomes critical. References in this book to the 1867 or 1982 Constitution Acts and their amendments—the codified parts of our constitution—will use the upper-case "C"onstitution. Reference to the constitutional rules in the broad sense will use the lower-case "c"onstitution.

There is one other use of capitalization which should be noted. Some ambiguity exists with the word "federal" because it means both a characteristic of our political system and the central government in Ottawa. Throughout this book, therefore, the word is spelled with a lower-case "f" when it refers to the system, and with an upper-case "F" when it means the central government.

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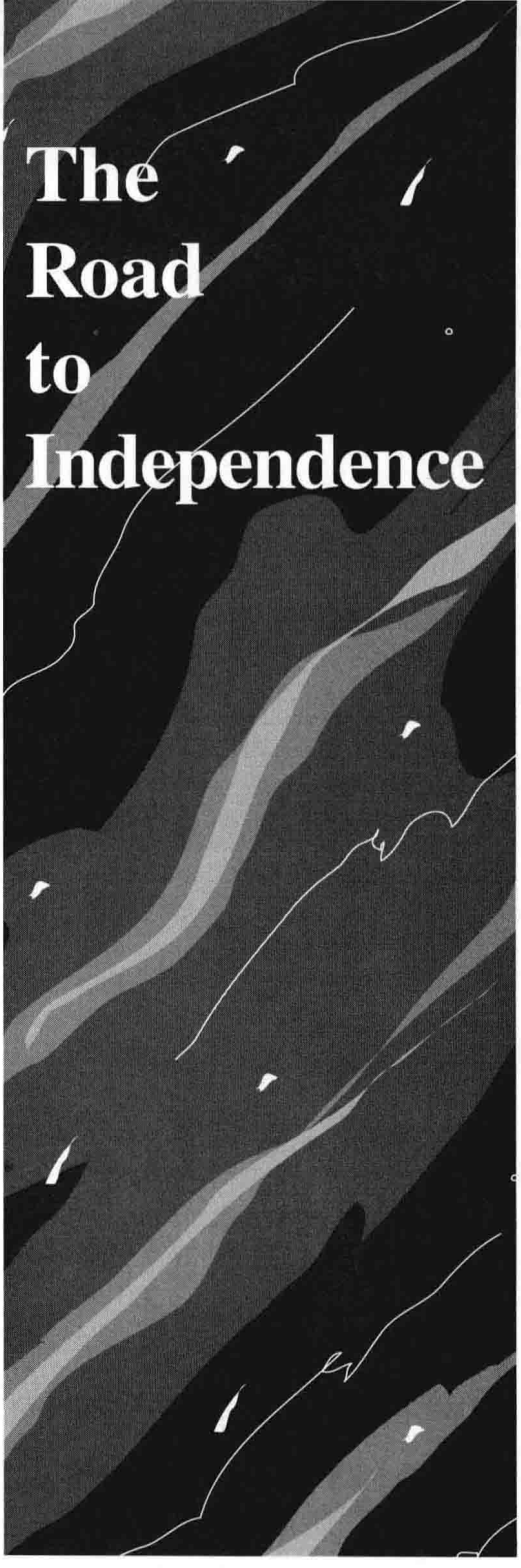

The Road to Independence

PART 1

CHAPTER 1

From the End of French Rule to Rebellion —1759-1837

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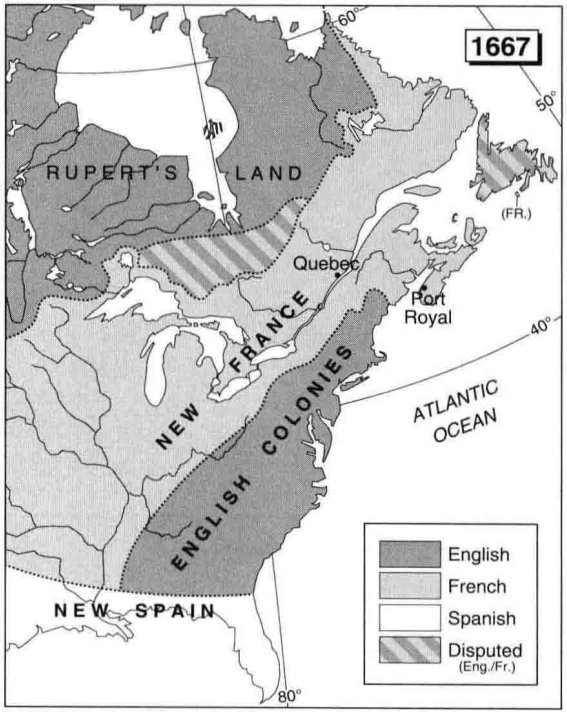
1. INTRODUCTION

A. Termination of French Rule, 1763

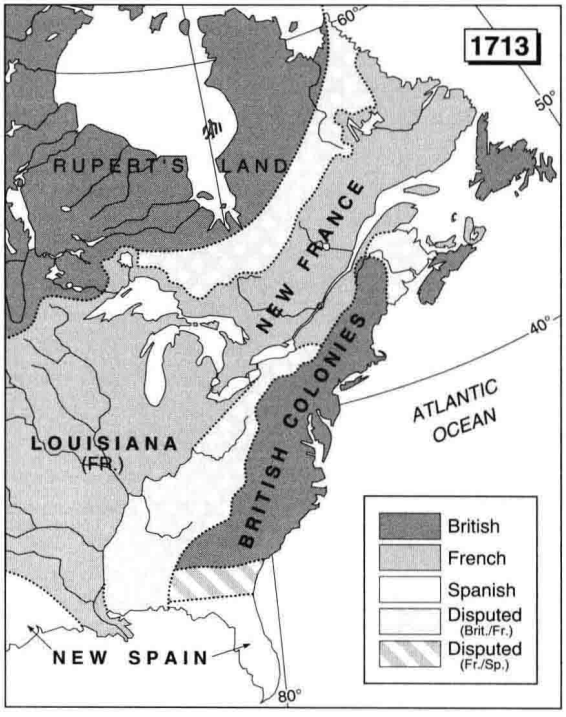
By the end of the seventeenth century Britain possessed its colonies along the Atlantic seaboard and, through the Hudson's Bay Company, the lands draining into Hudson Bay. France controlled New France (the territory between these two British possessions from the Atlantic Ocean west to the Mississippi River and south to the Gulf of Mexico), some territory west of the Mississippi, Isle St. Jean (renamed Prince Edward Island in 1799), and Cape Breton Island. Newfoundland and the land south of James Bay were disputed territory. See Map 1.



MAP 1

The beginning of the end for France in North America came in 1713 when the Treaty of Utrecht ended the War of the Spanish Succession (Queen Anne's War). By this Treaty, Britain received the Nova Scotia peninsula (although dispute continued over what is now New Brunswick), Newfoundland (along

whose north and northeast shores France retained fishing rights), and the islands of St. Pierre and Miquelon off Newfoundland's southern coast. Dispute continued over the boundary between Britain's Hudson Bay region and France's St. Lawrence-Great Lakes territory. See Map 2.



MAP 2

The fall of the towns of Quebec and Montreal to British forces in 1759 and 1760 heralded the virtual end of French rule in North America. This loss was confirmed by the 1763 Treaty of Paris ending the Seven Years' War (known in North America as the French and Indian War). France ceded to Britain all lands in northeast North America—New France, Prince Edward Island, Cape Breton Island (which had fallen in 1758), present-day New Brunswick, and other adjacent islands. France retained her Newfoundland fishing rights under the Treaty of Utrecht, and regained possession of St. Pierre and Miquelon which were to be used as fishing bases and therefore to remain unfortified. In addition, France