

Legislation

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CONSTITUTIONAL LAW—CITING CANADA'S CONSTITUTION—PROBLEMS AND PROPOSED SOLUTIONS.—Canadian manuals on legal citation give no instructions for citing Canada's Constitution.¹ Until recently there was no need to do so because our Constitution, insofar as it was written, consisted of a number of statutes and orders-in-council which were cited by the ordinary rules of citation for such documents. The passage of the Canada Act 1982² has changed this situation. Although the documents constituting the written part of Canada's Constitution are still statutes and orders-in-council, they are now more clearly designated as constitutional enactments.³ Some types of amendments to constitutional statutes will continue to be made by ordinary legislative process, but others will require special procedures.⁴ This may lead to the adoption of a mode of citation for constitutional enactments different from that used for other statutes and related documents. Even before we have amendments under the new procedures it is, I think, desirable to devise a special way to cite constitutional enactments.

Citing the various components of the Canada Act 1982 presents problems. The main text of the Act is short, consisting of a preamble, an enacting clause, and four sections. Schedule A is a French version of this text. It is Schedule B, comprising the Constitution Act, 1982, in both English and French, which is likely to cause citation problems. To confuse the matter further, there is a schedule to the Constitution Act, 1982, the object of which is described as "Modernization of the Constitution". This modernization consists of changing the names of most of the British North America Acts in force to Constitution Acts (one is changed to Newfoundland Act), repealing those that are spent, and giving short titles to certain acts and orders which did not have them.

¹ See Samuels, *Legal Citation for Canadian Lawyers* (1968); Yogis and Christie, *Legal Writing and Research Manual* (2nd ed., 1974); Osgoode Hall Law Journal Citation Guide (1972); and Alberta Law Review Style Guide (5th ed., 1978).

² 1982, c. 11 (U.K.)

³ See the definition of the Constitution of Canada in s. 52 (2) of the Constitution Act, 1982, being Schedule B to the Canada Act 1982.

⁴ For the various procedures for amending the Constitution of Canada, see ss 38-49 of the Constitution Act, 1982.

Part I of the Constitution Act, 1982, is called "Canadian Charter of Rights and Freedoms". It consists of a preamble and thirty-four sections, the last of which reads: "This Part may be cited as the *Canadian Charter of Rights and Freedoms*." Each of Parts II to VII has a separate title, but the numbering is continuous throughout the Act; thus Part II begins with section 35. There are no separate citation instructions for Parts II to VII corresponding to these for Part I. The final section of the Act—section 60—reads as follows:

This Act may be cited as the *Constitution Act, 1982*, and the *Constitution Acts 1867 to 1975 (No. 2)* and this Act may be cited together as the *Constitution Acts, 1867 to 1982*.

Suppose one wants to cite section 3 of the Canadian Charter of Rights and Freedoms, which is also section 3 of the Constitution Act, 1982. How does one do it? Following the ordinary rules for statutory citation, I suggest that this would be a correct citation:

Canadian Charter of Rights and Freedoms, being Part I of Constitution Act, 1982, s. 3, being Schedule B to Canada Act 1982, c. 11 (U.K.).⁵

This includes the date of the enactment and the jurisdiction, both necessary in a complete statutory citation. However, as this form is very awkward, I wrote to Gérard Bertrand, Chief Legislative Counsel in the Department of Justice, Ottawa, for advice. It is his opinion that since the Constitution Act, 1982, was enacted for and has the force of law in Canada (note the words in section 1 of the Canada Act 1982), and since citation instructions which do not refer to the Canada Act are given in the Constitution Act, 1982 (sections 34 and 60), this constitutes ample authority for citing the Constitution Act, 1982, on its own. The citation he suggests for the Charter is:

Canadian Charter of Rights and Freedoms, being Part I of the Constitution Act, 1982.⁶

However, he emphasizes that this is only a suggestion, as other forms might be used. I am inclined to think that the Charter will come to be cited without reference to either the Canada Act 1982 or the Constitution Act, 1982, thus:

Canadian Charter of Rights and Freedoms, s. 3.
Perhaps it will even be abbreviated to C.C.R.F.

Citing the various Constitution Acts only by name and date appears to me unsatisfactory. "Constitution Act", unlike "British North America Act", is not a distinctive title. Recently, when checking a provision in the bill which became British Columbia's Election Amendment Act, 1982, I

⁵ Current United Kingdom practice is to include the date in the short title of an Act and, for Acts passed since 1962, not to insert a comma between the name and the date. Acts are now numbered and published by calendar year rather than by session. On the cover of an Act the date is given twice, thus: "Canada Act 1982, 1982 Chapter 11", but it seems to me unnecessary to give the date twice in a citation.

⁶ Gérard Bertrand in a letter to the author, Aug. 12th, 1982.

was confused by a reference in the accompanying explanatory notes to the Constitution Act until I realized that the statute in question was *British Columbia's Constitution Act*.⁷ The citation "Constitution Act, 1867" or "Constitution Act, 1982" in a treatise on comparative government would be inadequate. Adding "Can." at the end would be misleading because neither statute was passed by the Parliament of Canada. On the other hand, adding "U.K." would suggest that the Act deals with the constitution of the United Kingdom. The choice of the title "Constitution Act" with no reference to Canada was unfortunate. Similarly, citing other constitutional enactments, such as "Adjacent Territories Order" or "Alberta Act" by short title only, as proposed by the Schedule to the Constitution Act, 1982, is inadequate. They need to be identified as part of the Constitution of Canada.

A *Uniform System of Citation*, commonly called the "Harvard Blue Book", gives straightforward instructions for citing constitutions. They are to be cited by country or state and the abbreviation CONST. (all in capitals) followed by the article and section numbers in regular print, thus U.S. CONST. art. I, § 9, cl. 2; N.M. CONST. art. IV, § 7. No date is given unless the provision has been repealed or amended, in which case the date of adoption and the date of repeal or amendment are noted in parentheses.⁸ These rules cannot be completely followed in citing Canada's Constitution, because we have no one document called the Canadian Constitution. However, the American rules are helpful and I believe a satisfactory compromise is possible between the "Harvard Blue Book" instructions and those given in the Constitution Act, 1982. First it is necessary that at least an abbreviation for the name of the country be given. I suggest that all footnote citations to enactments that are part of the Constitution of Canada begin with the abbreviation "CAN. CONST." in capitals, followed by the name of the enactment in regular print. Secondly, in contrast with United States practice, a date is needed to distinguish one Constitution Act from another; this is adequately dealt with in the Schedule to the Constitution Act, 1982. Thirdly, the Canadian Charter of Rights and Freedoms may be cited without a date in the hope that its date will become as well known as that of the United States Constitution or the original British North America Act.⁹ However, when a section of the Charter is repealed or amended, the

⁷ See B.C. Leg. Assembly, 1981-82 session, Bill 13 (original version), explanatory note on p. 10. British Columbia's Constitution Act is c. 62 of R.S.B.C. 1979.

⁸ A Uniform System of Citation (13th ed., 1981), rule 11, p. 57.

⁹ Here I refer to the British North America Act, 1867, although the statutes that Canadians call the Quebec Act, 1774, and the Act of Union, 1840, are cited in the United Kingdom as The British North America (Quebec) Act, 1774; and The British North America Act, 1840, respectively. These short titles were assigned by The Short Titles Act, 1896 (59 & 60 Vict., c. 14), no doubt in imitation of the B.N.A. Act, 1867. Curiously, ss 28 and 29 of the 1840 Act continue to be printed in Halsbury's Statutes of England (3rd ed., 1968), Vol. 4, pp. 181-182, presumably because, although long since spent, they have not

date of the original adoption and the date of the repeal or amendment should be given in parentheses. This is in accordance with the "Harvard Blue Book" rules and gives a summary of the history of the section. Sample citations follow:

CAN. CONST. Constitution Act, 1867, s. 91.

CAN. CONST. Canada Act 1982, s. 2.

CAN. CONST. Constitution Act, 1982, s. 45.

CAN. CONST. British Columbia Terms of Union.

CAN. CONST. Alberta Act, s. 9.

CAN. CONST. Canadian Charter of Rights and Freedoms, s. 3. If section 3 of the Charter were amended in 1986, it would be cited as follows: CAN. CONST. Canadian Charter of Rights and Freedoms, s. 3 (1982, amended 1986).

The text of the Canada Act 1982, including its Schedule, is already widely available in Canada.¹⁰ A consolidation of the Constitution Acts, 1867 to 1982 will no doubt soon replace the consolidation of The British North America Acts, 1867 to 1975.¹¹ It is equally likely that all the documents listed in the Constitution Act, 1982, as being included in the Constitution of Canada will be published along with the next revision of federal statutes. Just as Canadians seldom go to the 1867 volume of United Kingdom statutes to look at the text of The British North America Act, 1867, so it is unlikely that we will go to the 1982 volume of United Kingdom statutes to find the Canada Act 1982 and its Schedule B, the Constitution Act, 1982. Thus, the complete statutory citation is unnecessary.

There are differences of opinion as to whether the definition of the Constitution of Canada in section 52(2) of the Constitution Act, 1982,

been expressly repealed. (They relate to the qualifications of members of the Legislative Assembly of the Province of Canada.) More interesting is the fact that part of s. 60 of the 1840 Act is also printed. It reads: ". . . nothing in this or any other Act contained shall be construed to restrain Her Majesty, if she shall be so pleased, from annexing the Magdalen Islands in the Gulf of St. Lawrence to Her Majesty's island of Prince Edward." To this is added a note stating that the Magdalen Islands have not been so annexed; they are part of the Province of Quebec. Clearly s. 60 should not now be listed as in force. The change envisioned by it if now desired would have to be brought about by the amending procedure outlined in s. 43 of the Constitution Act, 1982.

¹⁰ It is printed in the Canada Gazette, Part III, Sept. 21st, 1982. The Canadian government has also published the Constitution Act, 1982, as a separate document. Many of the books being published on the constitutional changes of 1982 contain all or part of the text.

¹¹ The 1867 to 1975 Consolidation was prepared by Elmer A. Driedger, Q.C., for the Department of Justice, Canada, which published it in 1976. Since the above was written, A Consolidation of the Constitution Acts, 1867 to 1982, Department of Justice (1983) has been published.

should be regarded as exhaustive.¹² For instance, the Supreme Court Act and the Canada Elections Act are not listed there or in the Schedule, but it is sometimes said that they are part of the Constitution.¹³ My recommendation is that the constitutional form of citation suggested in this article be reserved for the documents listed in section 52(2) and in the Schedule to the Constitution Act, 1982. If other documents are added either by amending the foregoing subsection or by court decisions, the constitutional form of citation should then be adopted for them.

According to the Schedule to the Constitution Act, 1982, the Statute of Westminster, 1931, is part of the Constitution of Canada. It may therefore be cited CAN. CONST. Statute of Westminster, 1931. However, Canada is not the only country to which it applies and, in some situations, it would be incorrect to cite it in this way. Unless the context is purely Canadian, the Statute of Westminster, 1931, should continue to be cited as a statute of the Parliament of the United Kingdom.¹⁴

It seems probable that the name "British North America Act" will continue to be used to some extent in historical writing. For instance, it is not correct to say that the Constitution Act was passed in 1867; it was the British North America Act which was passed in that year. Moreover, in view of the widely held, but incorrect, belief that we acquired a "a new Constitution" in 1982, it is doubtful if many Canadians know that the British North America Act, 1867, as amended, is still in force under a new name. Because of this it may often be desirable, when citing one of the Constitution Acts, 1867 to 1975 (No. 2), to add in parentheses "formerly B.N.A. Act" thus:

CAN. CONST. Constitution Act, 1960 (formerly B.N.A. Act, 1960), s. 3.

This article has dealt only with English language citation of the Constitution of Canada. It is hoped, however, that the same form can be applied to citation in French. "CONST. DU CAN." may be preferred, but the desirability of putting the name of the country first, combined with the fact that the spelling of "Canada" and "Constitution" is the same in both official languages, may make "CAN. CONST." acceptable.

¹² See Hogg, *Canada Act 1982 Annotated* (1982), pp. 92-94 and 105, Scott, *Pussycat, Pussycat or Patriation and the New Constitutional Amendment Processes* (1982), 20 U.W.O. L. Rev. 247, at pp. 265-275 and Banks, *The Canada Act 1982—Some Facts and Comments*, to be published in (1983), 21 U.W.O. L. Rev.

¹³ If the Supreme Court Act is not part of the Constitution of Canada, it is difficult to know what is meant by ss 41 (d) and 42 (1) (d) of the Constitution Act, 1982, which provide for amending the Constitution of Canada in relation to the Supreme Court of Canada. With regard to the Canada Elections Act, a booklet published recently by the Government of Canada lists it as part of "the overall Constitution." See *The Constitution and You* (1982), pp. 4-5.

¹⁴ 22 & 23 Geo. 5, c. 4 (U.K.). It is incorrectly cited as 22 Geo. V in Item 17 of the Schedule to the Constitution Act, 1982.

These suggestions for citing Canada's constitution are my own, designed to meet a new situation. Comments on whether they meet the need and suggestions for improvement will be welcome.

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