
UNIT 3 PARLIAMENTARY FEDERAL INSTITUTIONS IN CANADA – EXECUTIVE, LEGISLATURE AND JUDICIARY

Structure

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3.1 INTRODUCTION

The present Unit deals with the federal parliamentary institutions in Canada, viz executive, legislature and the judiciary. The British North America Act, 1867 passed by the British Parliament established a parliamentary system in Canada modelled on the same principles as that of the United Kingdom. The BNA Act was a very brief document, particularly with regard to Constitution and powers of the executive and judiciary. The Act was amended several times, most notably through the Constitutional Acts of 1907, 1915, 1930, 1940, 1949, 1951, 1960 and 1964 which affected directly or indirectly, the federal institutions. Through the Constitutional Act of 1931, Canada was given self-governing status. The last in the series was the Constitution Act of 1982, which not only gave a domestic formula for amending the constitution but also added a charter of Rights and Freedoms for Canadian citizens. This unit deals with the federal parliamentary institutions as enumerated in the Constitution and evolved through various Acts and constitutional and political development in Canada.

3.2 PARLIAMENTARY GOVERNMENT IN CANADA

The parliamentary system is the result of historical evolution in Great Britain. It is also known as the 'cabinet government' or 'responsible government' or even 'prime ministerial government'. The chief characteristic of this type of government is that the executive is a part of the legislature and is responsible to it for all its policies and acts. According to Max Beloff, the parliamentary form of government is a system of government in which the real executive or cabinet is immediately and legally responsible to the legislature or one branch of it for its policies and acts and ultimately responsible to the electorate. The chief of the

state occupies a position of titular head or the nominal executive. The nominal head of the state can be a hereditary monarch (as in the case of Britain) or an elected president (as in the case of India). The real executive is headed by a prime minister who, together with his cabinet, is a part of the legislature, selected by the members of the legislature and can be removed by the legislature through a motion of 'no confidence'. The Prime Minister and his cabinet are responsible for formulating the policies of the State. It performs all the administrative **functions** in the name of the titular head. The parliamentary system revolves around the institutions of 'confidence in the executive', wherein the parliament can force the **government i.e.** the executive to resign by voting 'no confidence' in it or at least compel the executive to dissolve the parliament and go for fresh elections.

British parliamentary government was brought to Canada during the colonial period and its main features have remained largely unchanged. The Constitution Act 1867 reaffirms this British parliamentary inheritance. The founders of Canada took these traditions as their starting point and grafted onto them certain institutions and procedures such as federalism for which the British parliamentary government provided no guide.

The parliament of Canada consists of the **monarch/governor** general, the prime minister and his cabinet and the House of Commons and the Senate. The monarch is the head of the state of Canada. When the monarch is not in Canada, the Governor General exercises **his/** her powers. The powers that reside formally in the monarch are exercised by the monarch's advisers, the Privy Council. The Privy Council includes all members of the present and past cabinets. However, only the present members of cabinet exercise the powers of the Privy Council and these people are usually elected members of the 'Canadian Parliament, led by the Prime Minister and his cabinet. The parliament comprises of both the executive and legislative branches of government. Those who hold the executive power are drawn from the legislature. The leader of the majority party in the House of Commons is elected as the Prime Minister.

The parliamentary government in Canada is based on the principle of responsible government **i.e.** if the government loses the confidence of the House, through a defeat on either an important piece of legislation or motion of no confidence proposed by the opposition party, it will not remain in power. Of the 36 governments elected between 1867 to 1997, five fell because of a defeat in the legislature. The responsible **government** follows the parliamentary process in the form of rights of the legislature and the corresponding obligations of the government. That is, the legislature has a right to scrutinise and debate the policies proposed by the government. For **this**, the legislature has a right to question the government and to demand explanations for its actions and for those of bureaucratic **officials** who act in the government's name.

The notion of responsible government is also expressed through the ministerial **responsibility**. It entails the obligation of a cabinet minister to explain and defend the policies and actions carried out in his name. Strong executive authority and democratic accountability come together in the concept of ministerial responsibility.

Another point worth remembering in the context of Canada is that unlike UK, the parliamentary supremacy has now been replaced by what is called constitutional supremacy. **The Constitution Act 1982** makes it very clear. Section 32 **provides** that 'the Charter applies to both the federal and provincial **governments** and to all manner under their authority'.

Section 52(1) states that 'the Constitution of Canada is the supreme law of Canada and any law that is inconsistent with the provisions of the constitution is to the extent of the inconsistency of no force or effect'.

3.3 MONARCH AND THE GOVERNOR GENERAL

Following the British tradition, the supreme authority of the Canadian state resides with the Crown. Government functions are carried out in the name of the Crown. In Canada, the term Crown refers to the composite symbol of the institutions of the state. The Crown may be involved in court proceedings and it assumes a variety of duties and responsibilities. Government property is held in the name of the crown. The reigning monarch is the personal embodiment of the crown. Section 9 of the Constitution Act, 1867 declares that the executive government of and over Canada is declared to continue and be vested in the Queen. Since the monarch was not based permanently in Canada, a representative known as the Governor General was appointed by the British Government. However, the imperial conference of 1926 sought to make the Governor General a representative of the Crown and not of the British government. In 1947, new Letter of Patent completed the process by allowing the Governor General the power to exercise the powers of the sovereign. However, the monarchical link was never abolished. The Queen of Britain continues to be Canada's monarch; she makes royal tour to Canada and acts as a symbolic head of the Commonwealth of which Canada is a member.

Since the monarch is not based permanently in Canada, a representative known as the Governor General is appointed by her Majesty on the recommendation of the Canada's Prime Minister and the cabinet. In 1952, the office was further Canadianised by the appointment of Vincent Massey, the first Canadian to hold that position. It has since become customary to alternate the position between the English and the French speaking Canadians.

The Governor General is often selected from outside the partisan political sphere, mainly from the diplomatic or military establishment. The tenure is usually five years but the officially recognised term is six years, which has, on occasions been extended to seven. In his absence, the Chief Justice of the Supreme Court of Canada acts as the administrator and may carry out all duties of the office.

The function of the Governor General is to provide the official monarchical structure of the Canadian government. Firstly, the many ceremonial functions such as conferring the Order of Canada awards or reviewing the troops may be carried out. Secondly, the Governor General acts as a representative of the state. The Governor General receives the visiting dignitaries. Foreign diplomats present their credentials to and take their leave of, the Governor General acting as the Canadian head of state. Also, the Governor General is expected to visit the country promoting national unity, demonstrating moral leadership, encouraging good work as patron of many service organisations and performing other ceremonial functions across the country.

As a part of the government, the Governor General is bound to act on the advice given by his government – the prime minister and the cabinet of the day. Bills passed by the House of Commons and the Senate must be presented to the Governor General for the Queen's assent before they can become Acts of Parliament. According to the parliamentary traditions, the Governor General usually gives his assent.

The Governor General also plays an important symbolic role in the legislative process by delivering the Speech from the Throne at the opening of each session of the Parliament or the provincial legislature. The speech from the throne is designed to outline the government's legislative intentions for the upcoming session; the speech is written by the government of the day and delivered by the Governor General.

Apart from the ceremonial and legal powers, the Governor General has certain discretionary powers as well. The most important is the appointment of the prime minister. As a matter of convention, the governor is bound to call the leader of the majority party in the House of commons to form the government. However, in the Canadian history, on two occasions, the Governor had to help find a person to be prime minister when the Conservative Party did not possess an obvious successor. Again, there have been two most controversial acts of Canadian Governor General in 1896 and 1926 when he refused to head the advice of the prime minister and his cabinet for the dissolution of the parliament. Another potential prerogative of the Governor General is to dismiss the government. The Constitutional convention allows a governor general to do so if the government refuses to resign after an electoral defeat or refuse to resign or call an election after a clear vote of no confidence. However, this has never happened in Canada so far.

An informal power of the Governor General is to advise the ministers. The Governor General meets regularly with the Prime Minister to discuss the matters relating to State, personnel or appointments and on such occasions, the Prime Minister have been known to solicit advice on policy matters as well. In other words, the Governor General has a degree of success that is denied to most individuals. Sir Wilfrid Laurier said 'the Canadian governor general long ago ceased to determine policy but he is by means or need not be the mere figurehead of the public image. He has the privilege of advising his advisers, and if he is a man of sense and experience his advice is often taken'.

The Governor General is also known as an insurance policy against the unforeseeable or a constitutional fire extinguisher whose emergency power can only be used 'when normal controls cannot operate and a crisis gets out of hand'. According to Andrew Heard, 'governor should intrude into the democratic process only to the minimum extent absolutely required for the basic functioning of parliamentary government'. Since the Governor General is to function as an impartial symbol of unity, any act that could remotely be interpreted as partisan must be avoided.

3.4 THE PRIME MINISTER AND HIS CABINET

The government of Canada is usually equated with the Prime minister and his cabinet. In spite of the unique importance of prime minister in the parliamentary system of government, it is ironic that the Canadian Constitution does not mention any functions and powers for him and allowed it to be based on customs and conventions. The Constitution Act 1867 provides a Privy Council to aid and advise the Governor General in the exercise of his powers. The cabinet acts as a committee of the Privy Council, rather than advising the governor general, and make the decisions in questions. With the rare exception of the Governor General interfering in the day to day functioning of the government. the cabinet exercises whatever powers are given to the Queen and the Governor General in the constitution. After an election, the Governor General calls on the leader of the majority party in the House of Commons to be the prime Minister and form the government. The

Prime minister assumes the title of 'Right Honourable' and selects the cabinet ministers, who are sworn into the Privy Council. Since these are life long appointments and titles members of the former cabinet remain in the Privy Council. only those in the cabinet of the day are invited to the cabinet meetings. ***All cabinet ministers and former cabinet ministers are always members of the Privy Council as are the chief justice of Canada and former chief justices and also the ex speakers of both the Houses.*** The Privy Council never meets. The cabinet, 'the committee of the Privy Council', is the Council's operative body.

By custom, almost all the members of the cabinet must be members of the House of Commons; if they are not members, they have to get elected. Since Confederation, 70 members who were not members of either house have been appointed to the cabinet but they had to get elected to the House of Commons or Senate within a reasonable time or resign. Since 1911, there has been only one cabinet minister in the senate (and that one without **portfolio**, the leader of the government in the senate). No senator can sit in the House of Commons or vice versa. But ministers from the House of commons may by invitation of the senate, come and speak. The same opportunities are extended to a senator. By convention, every province must have at least one cabinet minister. If no member of the ruling party is available from that province, then the Prime Minister appoints the senator from that province into the cabinet. Again, by custom, Ontario and Quebec must have 10 to 12 ministers each, provided each province has elected members of the ruling party. It is necessary that at least one minister from Quebec must be an English speaking Protestant and there must be at least one minister from the French speaking **minorities** from outside Quebec, normally from New Brunswick or Ontario.

The main function of the Cabinet is to formulate policy and direct administrative operations as long as they get the support of the House of Commons. In this context, they exercise the power of the Crown. They include the summoning and dissolving of the Parliament, the power of granting **pardon/amnesty**, the appointment of senators, judges and other **officials**. It is the Prime Minister and his Cabinet and not the Governor General who recommend the money bills to the Parliament. The general conduct of foreign relations including declaration of war or making treaties need legislation in the Parliament. The Prime Minister and the cabinet decide as to what problems to deal with, establish the general thrust and direction of new policies and determine the spending priorities of the government. Again the responsibility for initiation of legislation lies with the cabinet. The Speech from the Throne provides the prime minister and cabinet with an opportunity to outline their legislative programme at the beginning of the session. According to the constitution, all the money bills introduced in the House of Commons must have the prior approval of the cabinet.

Apart **from** the general leadership, specific acts of the Parliament also provide considerable **power** to the cabinet. For example, all laws delegate to the minister the power **to** make decisions of one kind or another. These include quasi-legislative power to issue regulations under a law. The cabinet is also given quasi-judicial powers such as hearing appeals from administrative agencies like the Canada Radio Television and Communication Commission. They provide direction and leadership, establish priorities and transmit the **prime** minister's or their personal or party perspective all in an effort to ensure that public servants remain accountable to democratically elected leaders and public opinion. In addition, the ministers are involved in Parliament answering questions about their department's operations, defending departmental spending proposals, and **piloting** bills emanating from the department.

3.4.1 The Canadian Prime Minister

Though the position of the prime minister is not mentioned in the constitution, it is understood that the person who holds this position is the most powerful person in the Canadian government. The system of government that Canada inherited from Britain is called the cabinet government but most observers agree that the cabinet government has now been transformed into a 'prime ministerial government'. Prime ministers have always lent their name and style to the government such as 'Trudeau government' or the 'Mulroney government'. Apart from being the head of the real executive, the prime minister holds a special position; he has a number of powers, rights or responsibilities some of which have always existed while others are of more recent origin. In many cases, these relate to the different arenas in which the prime minister must operate such as Cabinet, Parliament, party, media, federal provincial relations, international diplomacy and the economy. Let us discuss some of them.

Firstly, the Prime Minister is the *Cabinet maker*. He selects the ministers and subject to certain conventions, decides what portfolio to assign them. Ministers are also issued 'mandate letters' that inform them of the PM's policy expectations in their portfolio. Ministers owe their allegiance to the Prime Minister who can promote and demote them, ask for their resignation, and if necessary, dismiss them. All of these possibilities tend to keep the ministers submissive if and when there is any difference in their policy priorities. Secondly, the Prime Minister is the *chairman of the cabinet meetings*: To start with, the prime minister determines the agenda of such meetings. The PM may suspend meetings, summon additional meetings, dispense with or extend the normal record kept by the secretary or modify or set aside the normal rules of procedure. In addition to the usual advantages of the chair, the Prime Minister benefits from receiving a confidential memo prepared by the Privy Council on how to achieve the PM's own objectives. Even though many decisions are now made by the cabinet committees, the Prime Minister decides as to which committee will struck, who will chair them, and which matter will be sent to them. This delegation of power from the full cabinet does not necessarily reduce his control. Thirdly, the Prime Minister is the *leader of the Party*. His pre-eminence has increased over the years as political parties have become more cohesive and as election campaigns have come to focus on party leaders. As a leader, the prime minister can control party organisation, personnel, strategy and policy. Unlike other ministers, the PM is chosen by the party as a whole and can usually count on a broad base of power. Fourthly, the Prime Minister could be called chief policy maker. His is the first word on government policy, such as in deciding how seriously to take the party's election platform and in issuing mandate letters to new ministers. But he also has the last word regarding the personal interaction with individual ministers within the cabinet chamber, in Parliament or in other forums such as the media. Though the modern government is too complex for political leaders to have an active role in formulating all policies, the prime minister can pursue a number of personal priorities as well as play a critical role in defining other problems. In any case of real or apparent policy conflict between the party organisation and the government, between two ministers, or between a minister and the prime minister, the PM rules. Fifthly, the prime minister is the central player in the House of Commons. Some prime ministers have had greater control over the House and have been better performers than others. For example, Diefenbaker was always more comfortable in the Commons than Pearson. Ever since prime ministers have delegated direction of the business of the House to a government house leader, they are expected to be there for the Oral Question Period every day. A sixth source of PM's

pre-eminence is his power of appointments. Besides ministers, this includes the appointments of Senators, Supreme Court judges, deputy ministers, and heads of a wide range of government agencies. The appointment power can serve to keep those hopeful for appointment docile and supportive, as well as to impose the PM's ideological position on much of the government. Seventhly, the PM also has enough control over the government organisation, subject to parliamentary approval. On the advice of the machinery of Government section of the PCO, the PM can decide new departments and set out their mandates. Prime ministers can also reorganise government departments such as Trudeau's amalgamation of Trade and Commerce and External Affairs to give the latter a more commercial orientation.

The Prime minister personally advises the Governor General on such matters as when to call for the next election. This power is sometimes thought to be important in permitting the prime minister to get his own way in conflict with ministers, government backbenchers, or the parliamentary opposition because none of these members want to risk their position and the benefits of public office. Again at the international level, the Prime Minister overshadows the minister of foreign affairs on the world stage. The Prime Minister **functioned** as secretary for external affairs until 1946 and still functions as Canada's chief diplomat in annual bilateral meetings with the US president, annual meetings of the Group of Eight leading industrial countries, meetings of the Francophone and APEC. And last, but not the least, the prime minister is also the chief 'public relations officer' of the government.

Television has become the main instrument for transmitting the Prime Minister's message to his party, the government and the public and survival in the battleground of media relations threaten to become the key determinant of prime ministerial success. Prime Ministers like Trudeau and Mulroney used television to appeal to public opinion for support on **such** issues as wage and price control or constitutional reforms. In short, given all these powers as well as deferential majority in the House of Commons, the PM can usually succeed in terms of controlling the policy and personnel of government. Tracing the historical evolution of centre of power in Britain, Richard Crossman writes that this has shifted **from** Monarch to Parliament, from Parliament to Cabinet, from Cabinet to public service, and from public service to the Prime Minister. This applies to Canada as well.

3.5 CANADIAN PARLIAMENT

The Canadian Parliament consists of two chambers, the Senate and the House of Commons. The Senate usually has 104 members, 24 from the **Martime** provinces, 24 each from Quebec and Ontario, 24 from the Western provinces 9 each from Manitoba, Saskatchewan, Alberta and British Columbia, six **from** Newfoundland and one each from the Yukon Territory and the Northwest Territories. There is provision for four or eight extra senators one or two from the **Martime** provinces, from Quebec and from Ontario and from the west but this has been used only once in 1990.

The senators are appointed by the Governor General on the recommendation of the Prime Minister. They hold office until the age of 75 unless they miss two consecutive sessions of Parliament. Till 1965, they held office for life and the few remaining senators appointed before that date retain their seats. Senators must be at least 30 years old and must have real estate worth \$4000 net and total net assets of at least \$4000 reside in the province or

territory for which they are appointed; in Quebec, they must reside or have their property qualification, in particular Quebec's senatorial district for which they are appointed; the prime minister has the power to appoint four or eight extra senators; Prime Minister Brian Mulroney used this power in 1990 to get the goods and services tax passed.

The House of Commons is the popular house. It consists of 295 members one from each of the 295 constituencies. In each constituency, the candidate who gets the largest number of votes is elected. The number of constituencies can be changed after every general census but every province must have at least as many members of the commons as it had in the senate before 1982. The present position of the members of the various provinces is as follows: Ontario 99, Quebec 75, British Columbia 32, Alberta 26. Manitoba 14, Nova Scotia 11, New Brunswick 10, Newfoundland and Labrador 7, Prince Edward Island 4, Northwest Territories 2, Yukon Territory 1.

The senate can initiate any bill except the bills providing for the expenditure of public money or **imposing** taxes. It can amend or reject any bill whatsoever. It can reject any bill as **often** as it deems fit. No bill can become law unless it has been passed by the senate. However, for the past 40 years, the senate has not rejected a bill passed by the House of Commons. It was in 1988 that it refused to pass the Free Trade Agreement till it has been **submitted** to the people in a general election and in 1989-90 it insisted on amendment to the Unemployment Insurance Bill, an amendment that was rejected by Commons. Usually, most of the amendments recommended by the Senate are in the form of clarifications and they are usually accepted by the Commons. Most of the work of the senate is done through the committees where the bills are read clause by clause and the voice of all groups and individuals affected by the bill are heard. In recent decades, the senate has taken important public problems such as poverty, unemployment, inflation, the aged, land use, science policy, aboriginal affairs, relations with the United States and the efficiency of the government department.

3.6 POWERS AND FUNCTIONS OF THE CANADIAN PARLIAMENT

As stated above, in law, the powers of the House of Commons and Senate are more or less equal, except the power over the money bills which must be introduced in the House of Commons. The national Parliament has the power to 'make laws for the peace, order and good government of Canada except for 'subjects assigned exclusively to the legislatures of the provinces'. In the Canadian federation, the powers of the provinces have been enumerated in the Constitution and what is left is given to the national Parliament. The provincial legislatures have power over direct taxation in the provinces for provincial purposes, natural resources, prisons, charitable institutions, hospitals, municipal institutions, licences for provincial and municipal revenue purposes, local works and undertakings, **incorporation** of provincial companies, solemnisation of marriage, property and civil rights in the provinces, creation of courts and the administration of justice, fines and penalties for breaking provincial laws, matters of a merely local or private nature in the province and education. However, provincial legislatures are limited to the powers explicitly given to them by the written constitution; no provincial legislature can take over the powers of the Parliament of Canada.

However, apart from the vague power of making laws for the 'peace . order and good government of Canada'. the Constitution gave certain exclusive powers to the national parliament such as taxation, direct and indirect, regulation of trade and commerce (the courts have interpreted this to mean inter-provincial and international trade and commerce), 'the public debt and property', post offices, the census and statistics. defence . navigation and shipping, railways, telegraphs and other such international or inter-provincial works and undertakings, money and banking, interest bills of exchange and promissory notes, weights and measures, criminal law and procedure in criminal cases. The 1940 amendment gave the Parliament an exclusive power over unemployment insurance and a specific section to establish courts 'for the better administration of the laws of Canada'. This has enabled the Parliament to set up the Supreme Court of Canada and the Federal Court.

The national parliament has also the power to amend the Constitution in relation to the executive government of Canada and the Senate and the House of Commons except the ones related to the office of the Queen or the Governor General or those aspects of Senate and Supreme Court of Canada entrenched by the amending formulas.

Though the Parliament cannot transfer any of its powers to a provincial legislature, nor a provincial legislature any of its powers to Parliament, the Parliament can delegate the administration of a federal act to the provincial agencies and a provincial legislature can delegate the administration of a provincial act to a federal agency. This "administrative delegation" is an important aspect of the flexibility of the Canadian constitution.

The National parliament and the provinces have concurrent power over agriculture and immigration, old age, disability and survivors pensions and if there is a conflict between the two, the national law prevails. By virtue of the Constitution Act of 1867, those matters that are not mentioned as belonging to the provincial legislatures come under the National Parliament. The courts have interpreted the provincial powers especially the 'property and civil rights' as covering a very wide field but certain industries such as banking, broadcasting, air navigation, atomic energy, shipping, inter-provincial and international railways, telephones, telegraphs, pipelines, enterprises owned by the national government and works declared by the Parliament for the general advantage of Canada or of two or more provinces. Similarly, the national parliament has also established a nation-wide system of hospital insurance and medical care by making grants to the provinces.

Apart from legislation, the Parliament performs a number of functions basic to political democracy such as scrutiny of government performance, constituency representation, debate of issues and legitimization of the political system.

While the parliament is in session, various opportunities are there to probe, question and criticise the government. These include daily question hours, debate on the Speech from the Throne and the introduction of a new budget and the opposition day when the opposition parties determine the topic of debate. Committee hearings and special parliamentary task forces also provide opportunities for legislative scrutiny of government action and performance. Again, the parliament is also a contact point between the citizens and the government. The citizens often turn to their elected representatives when they experience problems with bureaucracy or when they want to express their views on government policy. The image most Canadians have of parliament is of heated exchange that takes place across the aisle of separating the government and the opposition parties. Although the

purpose of parliamentary debate is not for discussion of the issues because the minds of MP's is already made on party lines, but the debates reinforce the popular belief of open and competitive qualities of Canadian democracy. The stylised conflict between the government and opposition parties, which is the tradition of British parliamentary system, emphasises disagreements and differences.

The Parliament is both a legislative and a legitimisation institution. Laws must pass through the Parliament. It is the legitimising branch of government because most of the mechanisms of democratic accountability are embodied in the structure and procedures of parliament. It debates public issues and is one of the bulwarks against the danger of government and abuse of powers.

3.6.1 Relation Between House of Commons and Senate

A literal reading of the Constitution suggests that the powers of both the Houses are equal, the major difference being that money bill must be introduced in the House of Commons. But the superiority of the House of Commons has been clear from day one. The unelected character of the senate has always been an uneasy factor in Canada's democratic political culture. This fact, along with the brazen patronage of the government appointments to the senate, undermines its legitimacy. Also the superiority is reinforced by certain conventions of the constitution. For example, the Prime Minister is always chosen from the House of Commons. The senators are appointed as ministers only in exceptional cases. Another convention that reinforces the superiority of the House of Commons is found in the legislative process itself. All bills must pass both the Senate and the House of Commons before they become law. But until recently it was generally accepted that the senate did not have the right to obstruct or reject the will of the elected House of Commons. On certain occasions, the Senate would suggest minor revisions to legislature but after 1984 elections of the Progressive Conservative government, the senate, dominated by the Senators, appointed during the last two decades of liberal government became more recalcitrant and it delayed and in some cases rejected important legislations like drug patents, government spending, unemployment insurance etc. The constitutional law gives senators this right but constitutional convention suggests that they should not try to exercise it.

3.7 CANADIAN JUDICIARY

The British parliamentary system also incorporates the principle of judicial independence. Although courts are established by Acts of Parliament and the Minister and Cabinet appoint judges, the whole judicial system is expected to operate independently of the executive and legislative branches of government. This British tradition was adopted by the Canadian constitution makers also. Whereas in Britain, the judges lack the power of judicial review, the Canadian judiciary soon appropriated to itself the power to invalidate laws that violated the federal-provincial division of powers. The Constitutional Act of 1982 has further enhanced the powers of the judiciary. Let us consider them in detail.

The role of judicial branch of government in Canada is based on constitutional convention rather than law. The Constitution Act, 1867 included several sections that deal with the system of provincial courts including how the judges shall be selected or removed, and who will determine judicial salaries. ***But there is no mention of the Supreme Court of Canada or any other federal court.*** For most of Canadian history, the court of final appeal

was the Judicial Committee of the Privy Council (JCPC) of Britain. It tended to define federal authority as narrowly and provincial authority as widely as possible. Even the emergency powers given to the federal government were interpreted by the JCPC in a way that virtually nullified the apparent centralising intention of the constitutional makers. However, the constitution authorised the Parliament to establish a General Court of Appeal for Canada, which it did in 1875, by establishing the Supreme Court of Canada. But even that remained subject to the overriding authority of JCPC for another 75 years. As an intermediate appeal court between 1875 and 1949. It could be argued that the Supreme Court Act was not truly central to Canada's constitutional structure and that the Supreme Court Act was not a piece of constitutional legislation.

The reign of JCPC as the court of last appeal ended in 1949 with the establishment of the Supreme Court of Canada as the arbiter of constitutional review. The federal Government used the constitution power in 1971 to create the Federal Court of Canada. It has jurisdiction over civil claims involving the federal government, cases arising from the decisions of federally appointed administrative bodies like the Immigration Appeal Board and matters relating to federal income tax, copy-rights and maritime law, all of which fall under the federal law. Until 1982, the Supreme Court was somewhat hampered by the nature of the parliamentary system and the absence of an entrenched bill of rights. It was concerned mainly with jurisdictional disputes and did not take the activist role for which, for example, the American Supreme Court is widely known. Even the provinces had shown notable reluctance to take jurisdictional matters to the Supreme Court because of an alleged pro centralist bias. Disputes between the federal and provincial governments increasingly tended to be resolved outside the judicial process through the mechanism of federal/provincial conferences. But with the advent of the Charter of 1982, the Supreme Court's role as an authoritative interpreter of the constitution was dramatically expanded and its constitutional importance underlined. In short, the structure of Canada's judicial system consists of Supreme Court of Canada at the apex, Federal Court of Canada (Appeal Division) and (Trial Division) at the Federal level. At the provincial level, there are Superior Court of Province (Court of Appeal and Trial Court), County or District Court, and the Provincial Courts.

3.7.1 The Judicial System

The Supreme Court of Canada consists of nine judges, three of whom must come from the Quebec bar. The judges are appointed by the Governor General on the advice of the national cabinet, and hold office until the age of 75. They can be removed only on address to the Governor General by both houses of Parliament. No judge of any Canadian superior court has ever been removed.

The judicial system in Canada is committed to three aspects: **rule of law, independence and impartiality and accessibility to justice**. The Supreme Court has jurisdiction over disputes in all areas such as constitutional law, administrative law, criminal law and private law. It has jurisdiction both over civil law of the province of Quebec and common law of all the provinces. Federal courts jurisdiction is granted by statutes and generally encompasses any matter falling within the competence of the federal government. The Supreme Court of Canada is the final court of appeal from all other courts of Canada whether they are federal, provincial or district courts. Whereas in the case of civil laws, the request for appeal is granted, in the criminal case, the appeal may be brought as a matter of right where one judge of the court of appeal dissent on a point of law.

In addition to the final court of appeal, the Supreme Court could also be asked by the Governor General to hear references i.e. to consider important questions of law as the constitutionality or interpretation of federal or provincial legislation or the division of powers between the federal and provincial governments. Any point of law can be referred to the court. Constitutional questions can also be raised in regular appeals involving individual litigants or government agencies.

The constitutional Act 1982 greatly increased the political importance of the Supreme Court of Canada, mainly because of the Charter of Rights and Freedoms. Under the Charter, the Supreme Court of Canada can overrule legislation and executive acts of government not only on the grounds that they violate the federal division of powers but also on the grounds that they violate the fundamental rights and freedoms of citizens. The consequences of this new development has been that the Canadian judiciary has gradually become more powerful since its inception.

As the highest court in the land, the Supreme Court's decisions are binding on all the courts below. It primarily deals with cases that have already been appealed at least once in the lower courts. In these situations, the Court is appealed to in order to render 'an authoritative settlement of a question of law of importance to the whole nation'. On rather rare but important occasions, Canada's highest court also deals with questions referred to it directly by the federal government. It concentrates its efforts on questions of fundamental importance to the Canadian society and then shaping the direction of the law by applying general rules to the specific circumstances at hand. After 1982, the Supreme Court has not only become the final arbiter of the division of powers between the governments but also of the line between the powers of both levels of governments and the rights and freedoms of citizens.

Below the Supreme Court but separate from the provincial court structure is the Federal Court of Canada, which was established by the Parliament in 1871. The Federal Court, which has both a trial and an appeal division, settles claims by or against the federal government on matters relating to maritime law, copyright, patent and trademark law and federal taxation statutes. It also has a supervisory jurisdiction related to decisions of tribunals and inferior bodies established by federal law. There are a few other specialised federal courts as the Tax Court of Canada whose decisions are also subject to review by the Federal Court. Decisions of the federal Court of Appeal can be appealed to the Supreme Court of Canada when the matter in controversy exceeds a set amount of money. Otherwise an appeal to the Supreme Court requires either the volition of the Court itself or the agreement of the Federal Court of Appeal. If the dispute is inter provincial, or federal-provincial in nature, the route of appeal in the Supreme Court is automatically open.

Compared to many other countries, which operate under a federal structure. Canada's judicial system is one of the most integrated in the world. A federal judicial power is not mentioned in the Canadian Constitution. Instead the Constitution provides for an integrated system with federally appointed judges to provincial and intermediate courts. Canada is the only federation to have this element of judicial integration. The Parliament established the Supreme Court of Canada as a General Court of Appeal rather than the one limited to the federal law and constitutional law, Another integrating feature of the judicial system is that the parliament has exclusive jurisdiction in the area of criminal law. while the provincial legislature has the power to establish courts of criminal jurisdiction. This means that provincially established courts administer federal law.

3.7.2 Independence of Judiciary

An important aspect of the Canadian judiciary is judicial independence. Judicial independence means that judges are to be free from any and all interference in their decision making. Former chief justice Brian Dickson declared that the core of this principle involves the complete liberty of individual judges to hear and decide the cases that come before them. It is particularly important that judges be protected from interference by the government. The judges are appointed by the government but once appointed, they hold their office 'during good behaviour'. The Governor General, on the recommendation of the Prime Minister and his cabinet, appoints the judges and they can be removed only by a resolution of the Parliament. Judicial independence is also protected by the fact that law establishes the judges' salaries and conditions of service. Consequently governments cannot single out any individual judge for special reward or punishment. But what **must** be kept in mind is that the independence of judiciary is more in the sense of formal separation from the executive and legislative branches of the government. As Ralph Milliband pointed out, the judges are not independent from the dominant value system of their society. The government appoints the judges and the governments never appoint radical critics of society. The government controls the judicial promotions. Also, the fact that by law three of the Supreme Court's nine judges must be members of the Quebec Bar and that by tradition, three should be from Ontario, two from the West and one from Atlantic Canada shows that the essential political issue of regional representation has been considered important for judicial branch just as it is important in the executive and legislative branch of government. However, in spite of these limitations, after the entrenchment of rights in the Constitution and the declaration of the constitutional supremacy in the Constitutional Act 1982, the judges have been less deferential to governments and legislature than in the past. Moreover, a network of rights-oriented advocacy groups, professors, lawyers, journalists and bureaucrats working within the rights apparatus of the state has emerged. There is no doubt that since the addition of Charter of Rights and Freedoms, groups representing women, aboriginals, the disabled, gays and lesbians and other interests that could hardly be described as being near the epicentre of power in the Canadian society have frequently achieved success in the courts that were not possible in legislative and electoral forums. For example, in 1997 the Supreme Court gave a unanimous ruling on Native landownership which produced a victory for the Gitksan and Wetsuwet'n people and by extension for other Aboriginal communities claiming a Historic right of occupancy and use to land not covered by a treaty that years of political negotiations had not been able to achieve. In short, the judiciary in Canada has always played an important role in the Canadian politics but its influence has reached unprecedented heights since the Charter became part of Canada's constitution. Its place in the government machinery is a vital one.

3.8 SUMMARY

From the above discussion, we can summarise the federal parliamentary institutions of Canada in this way. Canada is a constitutional monarchy and a federal state with a democratic parliament, with two official languages and two systems of law: civil law and common law. In 1982, the *Charter of Rights and Freedoms* was entrenched in the Canadian Constitution. From the days of British rule, Canada has lived under a monarchy. It was declared as a self-governing dominion in 1867 and the Statute of Westminster established full independence for Canada in 1931. The Queen of England is also the Queen of Canada;

she delegates her powers to the Canadian Governor General. The roots of Canada's parliamentary system lie in Britain. Keeping those traditions, the Canadian Parliament is composed of the Queen (who is represented by the Governor General), the Senate and the House of Commons. The 104 members of Senate are appointed by the Federal government while 301 members of the House of Commons are elected by the people. The senate has the same powers as that of House of Commons except in the financial matters. The real executive authority in Canada is in the hands of the Cabinet headed by the Prime Minister who is the leader of the majority party in the House of Commons. The *de facto* power lies with the Cabinet and the Governor General acts on its advice. The Cabinet develops government policy and is responsible to the House of Commons. The Government of Canada performs its duties through the intermediary of the federal departments and agencies, boards, commissions and state owned corporations. The third factor without which no responsible government and federal government can function is the rule of law. It means that everyone is subject to the law. The constitution of Canada provides a number of courts headed by the Supreme Court of Canada and followed by the Federal Court of Canada, Provincial and District courts. The Supreme Court has jurisdiction over disputes in all areas of law whether it is constitutional law, administrative law, criminal law or the private law. With the inclusion of the Charter of Rights and Freedoms, the role of the courts has become vital to the parliamentary democracy in Canada.

3.9 EXERCISES

- 1) Write a note on the powers, functions and position of Monarch and Governor General.
- 2) Assess the role and position of Prime Minister and Cabinet in the Canadian Parliamentary System.
- 3) Evaluate the powers and position of Parliament in Canada, taking into account the relationship between House of Commons and the Senate.
- 4) Write an essay on the Judicial System in Canada.
- 5) How is independence of Judiciary maintained and what is its importance?