

## COMING INTO FORCE OF FEDERAL LEGISLATION

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## COMING INTO FORCE OF FEDERAL LEGISLATION

### INTRODUCTION

Once a bill has been adopted by the Senate and the House of Commons, and has been given Royal Assent by the Governor General, it becomes an Act of Parliament and, as such, part of the Laws of Canada. An Act, however, is not binding unless it has commenced.<sup>(1)</sup> There is a distinction between the enactment of an Act and its commencement. The former relates to the time it receives Royal Assent,<sup>(2)</sup> and the latter to the time when it becomes binding and capable of producing legal effects.

The Constitution of Canada is silent as to the commencement of an Act of Parliament. Pursuant to the common law rule, inherited from the United Kingdom, an Act is deemed to have commenced on the first day of the session in which it was enacted. That rule was, however, changed in the United Kingdom in 1793,<sup>(3)</sup> and all Canadian jurisdictions now have statutory provisions prescribing rules applicable for the commencement of legislation. The purpose of this text is to provide an overview of these rules for the legislation enacted by the Parliament of Canada.

Rules pertaining to the commencement of federal legislation originate from multiple sources. While the Canada *Interpretation Act*<sup>(4)</sup> provides for default and general rules, an Act may itself provide for its own coming into force mechanism. Acts of Parliament may come into force on Royal Assent, on a day fixed by the Act itself, or by order of the Governor in

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- (1) “Commencement” and “coming into force” are synonymous and are used interchangeably in this text.
  - (2) In Canada, the Governor General gives Royal Assent, in the Queen’s name, to bills that have been passed by both Houses of Parliament. See the *Constitution Act, 1867*, 30 & 31 Vict., c. 3. (U.K.), s. 55.
  - (3) *Acts of Parliament (Commencement) Act*, 1793, 33 Geo. 3 c. 13.
  - (4) *Interpretation Act*, R.S.C. 1985, c. I-21.

Council.<sup>(5)(6)</sup> Before studying the rules pertaining to each mechanism, this paper will review provisions that authorize preliminary proceedings pursuant to an Act, but before its coming into force.

## PRELIMINARY PROCEEDINGS BEFORE COMMENCEMENT

The *Interpretation Act* authorizes that things be done or regulations be made pursuant to an Act that is not yet in force, in order to make the Act in question effective on its commencement. Such a thing done or regulation made has no effect until the Act has commenced, or only insofar as may be necessary to make the Act effective on the day of its commencement.<sup>(7)</sup> Needless to say, these preliminary powers can be exercised only pursuant to an Act, and they cannot be exercised in relation to powers that could be granted by a bill that is still before Parliament.

The appointment of the first and current Conflict of Interest and Ethics Commissioner gives an example of preliminary actions accomplished pursuant to, but before the commencement of, an Act. The office and position of the Conflict of Interest and Ethics Commissioner were created by the *Federal Accountability Act*,<sup>(8)</sup> assented to on 12 December 2006. New provisions added to the *Parliament of Canada Act* provided for a mechanism for the appointment of the Commissioner: the appointment was to be made by the Governor in Council after consultation with the leader of every recognized party in the House of Commons and approval by resolution.<sup>(9)</sup> While these amendments to the *Parliament of Canada Act* were not yet in force, the appointment procedure for the Commissioner began. The leader of every party recognized in the House was consulted. A certificate of nomination was tabled in the House of Commons on 12 June 2007 and referred to the House of Commons Standing Committee on Access to Information, Privacy and Ethics for consideration. The Committee

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(5) The Governor in Council is the Governor General acting on the advice of, and with the consent of, the Cabinet. See s. 35, “Governor in Council,” of the *Interpretation Act*.

(6) It is to be noted that regardless of its coming into force mechanism, an Act is effective on the first moment of the day it commences (see the *Interpretation Act*, s. 6(1)), unless otherwise provided. This rule necessarily entails retroactive effect for Acts that come into force on Royal Assent: although they are enacted at some time during the day, they are deemed to have commenced on the first moment of that day.

(7) *Interpretation Act*, s. 7.

(8) *Federal Accountability Act*, S.C. 2006, c. 9.

(9) See s. 28 of the *Federal Accountability Act*, which added ss. 81ff. to the *Parliament of Canada Act*.

reported to the House on 14 June 2007 that it agreed with the appointment, and the proposed appointment was approved by a resolution of the House of Commons on 18 June 2008. All these preliminary proceedings were accomplished before the commencement of the provisions creating the office and position of the Conflict of Interest and Ethics Commissioner. On 29 June 2007, the Governor in Council fixed 9 July 2007 as the date on which the provisions of the *Federal Accountability Act* creating the office and position of the Conflict of Interest and Ethics Commissioner were to come into force.<sup>(10)</sup> On the same day, the Cabinet formally recommended the appointment of Mary Dawson as Commissioner, effective 9 July 2007.

### COMMENCEMENT ON ROYAL ASSENT

Royal Assent “is the constitutional culmination of the legislative process”:<sup>(11)</sup> it means that the Governor General, in the Queen’s name, approves of a bill that has been passed by the Senate and the House of Commons. Upon receiving Royal Assent a bill becomes an Act of Parliament. The date of the Royal Assent is endorsed on each Act by the Clerk of the Parliaments, i.e., the Clerk of the Senate, and that endorsement itself is part of the Act.<sup>(12)</sup>

Should an Act be silent as to its commencement date, the default rule is that the Act comes into force on the day it received Royal Assent.<sup>(13)</sup> For example, *An Act respecting payments to a trust established to provide provinces and territories with funding for community development*,<sup>(14)</sup> which contains no coming into force provision, commenced on the day it was assented to, that is on 7 February 2008.

An Act will sometimes provide for a coming into force mechanism for some of its provisions and be silent with regard to others. In such a case, the provisions for which there is no coming into force day will commence on Royal Assent.<sup>(15)</sup> For example, section 64 of the *Tackling Violent Crime Act*<sup>(16)</sup> provided that the provisions of that Act, other than sections 61 to 63, were to come into force pursuant to an order of the Governor in Council. Therefore, sections 61 to 63 came into force on the day that Act received Royal Assent.

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(10) Order in Council, P.C. 2007-1111, SI/2007-0075.

(11) *Royal Assent Act*, S.C. 2002, c. 15, preamble.

(12) *Interpretation Act*, s. 5(1).

(13) *Ibid.*, s. 5(2).

(14) *An Act respecting payments to a trust established to provide provinces and territories with funding for community development*, S.C. 2008, c. 1.

(15) *Interpretation Act*, s. 5(4).

(16) *Tackling Violent Crime Act*, S.C. 2008, c. 6.

Although a commencement provision may prescribe the coming into force of an Act or any of its portions on a day later than its Royal Assent, such a commencement provision itself comes into force on the day of Royal Assent.<sup>(17)</sup> For example, section 6 of the *Official Development Assistance Accountability Act*<sup>(18)</sup> provided that the Act was to come into force 30 days after it received Royal Assent.<sup>(19)</sup> That commencement provision itself came into force upon the Act receiving Royal Assent. The rationale for this rule is self-explanatory: a commencement provision has to be in force at the pre-established day of coming into force of the other provisions of an Act in order to trigger their commencement.

### COMMENCEMENT ON A FIXED DATE

The commencement provision of an Act may prescribe that the Act or any of its provisions come into force on a pre-established day. That day may be before or after Royal Assent.

A common practice is to give legislation a retroactive effect, meaning that its provisions are deemed to have come into force on a date prior to Royal Assent. Such an Act, although it is not enforceable before its Royal Assent, can apply, once enacted, to facts and situations that occurred before its Royal Assent. The *Budget Implementation Act, 2008*<sup>(20)</sup> contains such provisions that were deemed to have come into force before its Royal Assent.<sup>(21)</sup>

Although the Parliament of Canada may enact Acts that have retroactive legal effect, its powers in this respect are not unlimited. One of such limitations can be found in section 11(g) of the *Canadian Charter of Rights and Freedoms*,<sup>(22)</sup> which prescribes that a person may not be found guilty of an offence if, at the time when the conduct involved took place, that conduct did not constitute an offence.

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(17) *Interpretation Act*, s. 5(3).

(18) *Official Development Assistance Accountability Act*, S.C. 2008, c. 17.

(19) *Ibid.*, s. 6.

(20) *Budget Implementation Act, 2008*, S.C. 2008, c. 28.

(21) See, for example, subsections 49(4), 54(3), 55(2), 57(2) and 63(3) of the *Budget Implementation Act, 2008*.

(22) *Canadian Charter of Rights and Freedoms*, Part I of Schedule B of the *Canada Act 1982 (U.K.)*, 1982, c. 11.

Acts may come into force on a pre-established day following Royal Assent. The reasons to delay the commencement of an Act or any of its provisions are multiple, and may include reasons such as giving time to the population to adjust to the new Act, or giving time to the government to make the necessary preparations to administer the new Act once effective – for example, by staffing an office, obtaining financial resources, or preparing regulations.<sup>(23)</sup>

The pre-established day of commencement may be a fixed day established in advance, e.g., 1 January 2008, or fixed based on the date of Royal Assent of the Act, e.g., 30 days after its Royal Assent.<sup>(24)</sup>

In many cases, commencement on a fixed day will result in an Act awaiting a specific day for its commencement or having retroactive effect to that same specific day, depending on the date of Royal Assent of the Act. This situation occurs because the government wants provisions of an Act to apply to certain facts starting from a specific date, but is unsure about the date the Act will be enacted by Parliament. The *Budget Implementation Act, 2008* gives, once again, examples of such provisions.<sup>(25)</sup>

## COMMENCEMENT PURSUANT TO AN ORDER IN COUNCIL

The coming into force provision of an Act may prescribe that the Act as a whole<sup>(26)</sup> or any of its provisions<sup>(27)</sup> comes into force on a day, or days, to be fixed by order of the Governor in Council. Such a delayed commencement of legislation gives the government discretion as to the commencement of an Act and may afford more time to await consensus or agreement on the legislation before its coming into force. It may also give the government an

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(23) John M. Keyes, “May the Force Be With You: The Netherworld of Unproclaimed Statutes,” *Canadian Journal of Administrative Law & Practice*, Vol. 20, No. 3, 2007, p. 266; Richard Tremblay, *L’entrée en vigueur des lois : Principes et techniques*, Les Éditions Yvon Blais, Cowansville, 1996, pp. 58–59.

(24) For an example of the latter, see s. 6 of the *Official Development Assistance Accountability Act*.

(25) See, for example, subsections 64(3) and 65(3) of the *Budget Implementation Act, 2008*.

(26) See, for example, s. 15 of the *Nunavik Inuit Land Claims Agreement Act*, S.C. 2008, c. 2, which provides: “This Act comes into force on a day to be fixed by order of the Governor in Council.”

(27) See, for example, s. 7 of *An Act to amend the Canada Labour Code, the Canada Student Financial Assistance Act, the Canada Student Loans Act and the Public Service Employment Act*, S.C. 2008, c. 15, which provides: “The provisions of this Act come into force on a day or days to be fixed by order of the Governor in Council.”



opportunity to achieve the policy goal underlying the Act using other ways to achieve the same purposes.<sup>(28)</sup>

The wording of a commencement provision enabling the government to order the coming into force of an Act or any of its provisions is important because it will circumscribe the government's discretion in that respect. Should a coming into force provision of an Act read "This Act comes into force on a day to be fixed by order of the Governor in Council," the government will have to order the commencement of that Act in its entirety on the same day.<sup>(29)</sup> However, a commencement provision that reads "The provisions of this Act come into force on a day or days to be fixed by order of the Governor in Council" will enable the government to bring into force parts, sections, paragraphs, subparagraphs, etc., of an Act on different days and at a time of its choosing.<sup>(30)</sup> Be that as it may, the government's prerogative to bring into force an Act is not unlimited. Indeed, it was held in *R. v. United Kingdom (Secretary of State for the Home Department)*,<sup>(31)</sup> a United Kingdom case decided by the House of Lords, that while the government had no obligation to bring into force an Act or any of its provisions, it had an obligation to consider from time to time the coming into force of that Act. However, with the coming into force of the *Statutes Repeal Act*<sup>(32)</sup> in 2010, Acts of Parliament or any provisions thereof not in force 10 years after the end of the year of their Royal Assent will be automatically repealed.

Parliament, on occasion, has delegated to the government the power to bring an Act into force, but has at the same time restricted the government's discretion on that matter. For instance, Parliament may provide that two Acts will have to come into force on the same day.<sup>(33)</sup>

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(28) Keyes (2007), p. 266.

(29) See, for example, Order in Council SI/2008-0072 ordering the commencement of the *Nunavik Inuit Land Claims Agreement Act*.

(30) See, for example, *Reference concerning the Proclamation of Section 16 of the Criminal Law Amendment Act, 1968-69*, [1970] S.C.R. 777.

(31) *R. v. United Kingdom (Secretary of State for the Home Department)*, [1995] 2 All. E.R. 244 (H.L.).

(32) *Statutes Repeal Act*, S.C. 2008, c. 20.

(33) See, for example, s. 85 of the *Department of Human Resources and Skills Development Act*, S.C. 2005, c. 34, and s. 70 of the *Department of Social Development Act*, S.C. 2005, c. 35, which provided that most of the provisions of both Acts had to come into force on the same day. Orders in Council SI/2005-0097 and SI/2005-0099 fixed the day of the Acts' commencement.

## CONCLUSION

This paper has outlined the commencement mechanisms more commonly used for federal legislation. It is to be noted that the provisions of an Act may come into force in stages, using one mechanism for some of its provisions while using another mechanism for others. While common law rules pertaining to the coming into force of legislation have been replaced by default rules provided for mainly by the *Interpretation Act*, each Act of Parliament may, and often does, prescribe for its own coming into force mechanism. It is, therefore, always crucial to consider an Act's coming into force provision, if any, in order to determine the day of its commencement.