

# Lecture 2 — Constitution and Charter

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# Part I

## The Canadian Constitution

The Constitution Acts of 1867 and 1982 are documents providing the legal foundation for the country of Canada.

The original act of 1867 was called the British North America Act.

The constitutional documents were patriated in 1982.

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The Constitution Act, 1867 defines:

- Canada as a union of provinces
- The executive power of the government
- The legislative powers of the Senate and House of Commons
- The executive and legislative powers of the provinces

These define the composition and running of the government and the various legislative bodies, e.g.

## **Duration of House of Commons**

**50.** Every House of Commons shall continue for Five Years from the Day of the Return of the Writs for choosing the House (subject to be sooner dissolved by the Governor General), and no longer.

The constitution requires that any public spending or tax must come from the House of Commons.

No other entity can make the government spend money or introduce/raise taxes.

**53.** Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.

Canada is officially a federation of provinces.

The head of state is Her Majesty, Queen Elizabeth II, who is represented by the Governor General.

Note that Queen Elizabeth II is Queen of Canada (in addition to being Queen of the United Kingdom. The titles are separate, but held by the same person).

The head of state for each province is also the Queen, represented by the Lieutenant Governors.

There is no hierarchy; all are direct representatives of the Queen.



The constitution allows a federal government and a provincial government.

What about municipalities/regions, e.g., City of Toronto or Region of Waterloo?

Authority is delegated to these entities from the province.

They have only the powers and authority the province chooses to grant.

Provincial legislatures and the federal parliament can both pass laws.

Sometimes there is a conflict.

What happens if the federal government passes a law related to engineering, and it is in conflict with some part of the Professional Engineers Act in Ontario?

Which takes precedence and why?

The constitution designates certain matters as federal; others as provincial.

Federal powers: national defence, foreign affairs, banking, criminal law...

Provincial: health care, prisons, education...

Some are shared: agriculture & immigration...

If a law relates to matters where another legislature has jurisdiction, this law may be challenged in court.

The court may find that the law (or part of it) to be **ultra vires**.

*Ultra vires*: beyond the powers.

Recently there was an attempt to create a national securities regulator.

The federal government wished to unify the regulatory regimes in the various provinces which have similar but not identical rules.

The question was: is the proposed act within the legislative authority of the Parliament of Canada?

The Supreme Court of Canada (SCC) ruled that the matter was not.

Included in the decision of the Supreme Court was:

*... Canada's problem is that the proposed Act reflects an attempt that goes well beyond these matters of undoubted national interest and concern and reaches down into the detailed regulation of all aspects of securities. In this respect, the proposed Act is unlike federal competition legislation, which has been held to fall under s. 91(2)<sup>1</sup> of the Constitution Act, 1867. It would regulate all aspects of contracts for securities within the provinces, including all aspects of public protection and professional competence within the provinces. Competition law, by contrast, regulates only anti-competitive contracts and conduct – a particular aspect of economic activity that falls squarely within the federal domain. In short, the proposed federal Act overreaches the legislative interest of the federal government.*

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<sup>1</sup>The Regulation of Trade and Commerce

The subject of the Supreme Court has already appeared.

As the name suggests, it is the highest court in the land.

We will return to the subject of the courts shortly.

Prior to 1982, the Constitution Act, 1867, was the British North America Act, 1867 and was an act of the British parliament.

Thus, a simple majority of the British House of Commons and House of Lords was adequate to change it.

The act had been amended between 1867 and 1982, but only with the consent of Canada's representatives.

The Canada Act, 1982, was passed in the British parliament to grant Canada its own constitution.



As the constitution is now a Canadian Act, it must include in it a formula for constitutional changes.

General procedure for amending Constitution of Canada:

**38.** (1) An amendment to the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by

- (a) resolutions of the Senate and House of Commons; and

- (b) resolutions of the legislative assemblies of **at least two-thirds of the provinces** that have, in the aggregate, according to the then latest general census, **at least fifty per cent of the population** of all the provinces.

Do not underestimate how difficult this makes amending the constitution...

## Part II

# The Charter of Rights and Freedoms

In ancient times, monarchs of England ruled on the principle of *vis et voluntas*, or “Force and Will”.

They made arbitrary decisions and operated on the principle that the King was above the law.<sup>2</sup>.

In theory, a King was supposed to rule justly and fairly, following both custom and law, and with the advice of others.

But there were no rules about what happened if the King did not.

Henry I<sup>3</sup> decided to voluntarily limit his powers with a Charter of Liberties.

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<sup>2</sup>“Well, when the president does it, that means it is not illegal. ” - Richard Nixon

<sup>3</sup>One of the sons of William the Conqueror

By 1215 the situation in England was dire for the monarchy.

The taxes and arbitrary rule of King John caused barons (lower level nobility) to rebel against his rule.

He had also lost Normandy to the French and felt compelled to pledge himself as a crusader to win the favour of the Pope.

His barons forced King John to sign the *Magna Carta* - Great Charter - at Runnymede in 1215.

King John immediately wanted to take it back, so he asked the Pope to officially annul it.

Pope Innocent III did so, and this sparked more war (whoops).

In spite of this, the principles of it remained in force.

The charter was central to the establishment of parliament.

It also contained a clause enshrining the right to Due Process.

**29.** NO Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will We not pass upon him, nor condemn him, but by lawful judgment of his Peers, or by the Law of the land. We will sell to no man, we will not deny or defer to any man either Justice or Right.

Another step in liberty came with the founding of the United States of America.

The constitution as originally drafted had no statement of rights, so the first ten amendments were introduced and passed and were known as the Bill of Rights.

From watching US TV shows or news you may know more about these rights than the ones you have in Canada...

In 1947, Saskatchewan introduced a provincial Bill of Rights.

In 1960, the federal government introduced the Canadian Bill of Rights.

It protected numerous rights<sup>4</sup>:

- Freedom of speech in Canada and freedom of religion in Canada
- Equality rights
- The right to life, liberty and security of the person, rights to fundamental justice
- The right to enjoyment of property, which is not enshrined in the Charter
- The right to counsel

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<sup>4</sup>[https://en.wikipedia.org/wiki/Canadian\\_Bill\\_of\\_Rights](https://en.wikipedia.org/wiki/Canadian_Bill_of_Rights)



## THE CANADIAN BILL OF RIGHTS

*An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms.  
Statutes of Canada 1960, c-9 Elizabeth II, Chapter 44, assented to 10th August 1960.*



THE Parliament of Canada, affirming that the Canadian Nation is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person and the position of the family in a society of free men and free institutions

Affirming also that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law;

And being desirous of enshrining these principles and the human rights and fundamental freedoms derived from them, in a Bill of Rights which shall reflect the respect of Parliament for its constitutional authority and which shall ensure the protection of these rights and freedoms in Canada:

WHEREFORE Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

### PART I BILL OF RIGHTS

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

a) the right of the individual to life, liberty, security of the person and enjoyment of property and the

right not to be deprived thereof except by due process of law;

- b) the right of the individual to equality before the law and the protection of the law;
- c) freedom of religion;
- d) freedom of speech;
- e) freedom of assembly and association; and
- f) freedom of the press.

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, in particular no law of Canada shall be construed or applied so as to

- a) authorize or certify the arbitrary detention, imprisonment or exile of any person;
- b) impose or authorize the imposition of cruel and unusual treatment or punishment;
- c) deprive a person who has been arrested or detained (i) of the right to be informed promptly of the reasons for his arrest or detention,
- (ii) of the right to retain and instruct counsel without delay, or
- (iii) of the remedy by way of habeas corpus for the determination of the validity of his detention, and for his release if the detention is not lawful;
- d) authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel, protection against self incrimination or other constitutional safeguards;

- e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;
- f) deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal, or of the right to reasonable bail without just cause; or
- g) deprive a person of the right to the assistance of an interpreter in any proceedings in which he is involved or in which he is a party or a witness before a court, commission, board or other tribunal, if he does not understand or speak the language in which such proceedings are conducted.

3. The Minister of Justice shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine every proposed regulation submitted in draft form to the Clerk of the Privy Council pursuant to the Regulations Act and every Bill introduced or presented to the House of Commons, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of the Part and he shall report any such inconsistency to the House of Commons at the first convenient opportunity.

4. The provisions of this Part shall be known as the Canadian Bill of Rights.

*"I am a Canadian, a free Canadian, free to speak, without fear to membership in my own race, free to stand for what I think, right, free to oppose what I believe wrong, free to choose those who shall govern my destiny. This heritage of freedom I pledge to uphold for myself and all Canadians."*

The Right Honourable John G. Diefenbaker, Prime Minister of Canada, House of Commons Debates, July 1, 1960.

Reynold Johnson, 1961, Queen's Printer, Ottawa, Canada.



# The Charter of Rights and Freedoms

This was merely a federal act and not part of the constitution.

A great deal of debate arose about whether it was binding on other levels of government or even future governments.

These weaknesses plus the success of the US Bill of Rights led to the Charter as part of the Constitution Act 1982.

# The Charter of Rights and Freedoms



## A horizontal banner featuring silhouettes of a diverse group of people of various ages and ethnicities on the left, followed by the Canadian flag (a red maple leaf between two red vertical bars), and then silhouettes of another group of diverse people on the right.

Guarantee of Rights  
and Freedoms

### Guarantee of Rights and Freedoms

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

## Fundamental Freedoms

2. Everyone has the following fundamental freedoms: (a) freedom of conscience and religion; (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; (c) freedom of peaceful assembly; and (d) freedom of association.

## Democratic Rights

Section 3 Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein: (1) if the House of Commons or no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs at a general election of its members; (2) in case of real or apprehended war, invasion or insurrection; a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond five years if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons or of the legislative assembly as the case may be; (3) there shall be a sitting of Parliament and of each legislature at least once every year.

### Mobility Rights

Article 15 (1) Every citizen of Canada has the right to enter, remain in and leave Canada. (2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right (a) to move to and take up residence in any province, and (b) to participate in the economic life of any province. (3) The rights specified in subsection (2) are subject to (a) any laws or practices of general application in force in a province other than those that discriminate against persons primarily on the basis of province of present or previous residence; and (b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services. (4) Neither subsection (2) nor (3) prohibits any law that is justified by a pressing and substantial objective in the public interest and that is demonstrably justified in a free and democratic society. (5) The rights of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

### Legal Rights

[illegible][illegible]

## Equality Rights

— **§ 119** If every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability, *prohibition (s)* does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

## Official Languages of Canada

— 46. (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada. (2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick. (3) Nothing in this Chapter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French. 47. (1) Everyone has the right to use English or French in any debates and other proceedings of Parliament. (2) Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick. (3) The statutes,

translations of the New Zealand text are prepared and published in French and English and both language versions are equally authoritative. 32) Either English or French can be used by any person in, or as evidence in or before any court, tribunal or authority, or in any proceedings, or in any document or French may be used by any person in, or as any pleading in or process, or in any document, from any court or New Zealand, in 33) Any member of the public has the right to communicate with, or to receive available services from, any government department, or any other public body, in English or in French. 34) Any member of the public has the right to communicate with, or to receive available services from, any government department, or any other public body, in English or French, in writing, in relation to any request for a document or documents. From any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is contained by virtue of any law, or any agreement, or any arrangement, or any understanding, or is to be abrogated or deleted from any law, or customary right or privilege acquired or implied either before or after the coming into force of the

### Minority Language Educational Rights

...to (i) *Citizens of Canada* (if whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or (ii) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province, have the right to have their children receive primary and secondary school instruction in that language in that province. (i) *Citizens of Canada* of whom any child has received or is to receive primary or secondary school

in French in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language; (4) The right of citizens of Canada under subsection (3)(d) is to have their children receive primary and secondary school instruction in the language of the English or the French majority of the minority population of the province of application whenever in the province the number of children of citizens who have such a right is sufficient to warrant the provision of them out of public funds of minority language instruction; and (4) includes, where the number of those children is sufficient, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

### Enforcement

§ 12. [1] Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. [2] Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

## Genera

30. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada, including those rights or freedoms that may be more fully recognized or asserted by the Supreme Court of Canada pursuant to the Proclamation of October 1, 1982, and any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlements. All the guarantees in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada, including those that may be recognized or asserted by the Supreme Court of Canada pursuant to the Proclamation of October 1, 1982, in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians. All the foregoing notwithstanding, in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons. No thing in this Charter or in any other rights or freedoms shall be construed as denying the existence of any other rights or freedoms that exist in Canada, including those that may be recognized or asserted by the Supreme Court of Canada pursuant to the Proclamation of October 1, 1982, in Canada in respect of discrimination, separate or divergent schools, in accordance with this Charter or in pursuant to or to the legislative assembly or legislature of a province shall be deemed to include a reference to the "law of the province" or "the law of the territory" or "the law of the legislative authority thereof, as the case may be. Nothing in this Charter extends the legislative powers of any body or authority.

### Application of Charter

12. (1) This Act applies to all the Parliament and government of Canada in respect of matters within the authority of Parliament, including the House of Commons, the Senate, the Privy Council and the Ministers and all persons in the executive branch of government, and to the legislature and government of each province in respect of all matters within the authority of the legislature of each province (hereinafter referred to as the "jurisdiction of the legislature of each province"). (2) Where the jurisdiction of the legislature of each province may expressly depend on the Act or on the regulation, in the case may be, that the Act or a provision therein shall appear therein that a provision included in section 1 or section 2 of this Charter, (3) An Act or a provision of an Act in respect of which a declaration is made under subsection (1) shall not be subject to a declaration if it would have for the provision of this Charter referred to in the declaration (4) A declaration made under subsection (1) shall come into force five years after it comes into force or on each earlier day as may be specified in the declaration. (5) Parliament or a legislature of a province may, in exercise of its authority under subsection (1), (2) or (3),

## Citation

— 14. This Part may be cited as the *Canadian Charter of Rights and Freedoms*.

"We must now establish the basic principle, the basic values and beliefs which hold us together as Canadians is that beyond our regional loyalties there is a way of life and a system of values which make us proud of the country that has given us such freedom and such immeasurable joy."

*B. L. Under*

FE, Dresden 1980

# The Charter of Rights and Freedoms

The charter forms the first 34 sections of the Act.

- Fundamental freedoms
- Democratic, mobility, legal and equality rights
- Official languages of Canada
- Minority language education rights
- Enforcement, general, and application
- It is also subject to the notwithstanding clause (s. 33)

The Charter begins with:

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. (Section 1).

In Regina v Oakes, 1986, Chief Justice Dickson developed the Oakes test for violations:

- 1** There must be a pressing and substantial objective
- 2** The means must be proportional
  - a** The means must be rationally connected to the objective
  - b** There must be minimal impairment of rights
  - c** There must be proportionality between the infringement and objective

2. Everyone has the following fundamental freedoms:

- a freedom of conscience and religion;
- b freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- c freedom of peaceful assembly; and
- d freedom of association

3. Every citizen of Canada has the right to vote in an election of the members of the House of Commons or of a legislative assembly and to be qualified for membership therein

4. (1) No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs at a general election of its members. (2) The war, invasion or insurrection exception...s

5. There shall be a sitting of Parliament and of each legislature at least once every twelve months.

The mobility rights include:

- (1) Every citizen of Canada has the right to enter, remain in and leave Canada.
- (2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right
  - a to move to and take up residence in any province; and
  - b to pursue the gaining of a livelihood in any province.



The legal rights include:

7. Everyone has the right to life, liberty and security of the person...
8. Everyone has the right to be secure against unreasonable search or seizure.
9. Everyone has the right not to be arbitrarily detained or imprisoned.
10. Everyone has the right on arrest or detention to be informed promptly of the reasons therefore, to retain and instruct counsel without delay and to be informed of that right, and the habeas corpus clause.

11. Any person charged with an offence has the right to be informed of the specific offence, be tried within a reasonable time, not be compelled to be a witness, be presumed innocent, not be denied reasonable bail, be tried by a jury if the maximum punishment is five or more years, not be found guilty unless the action constituted an offence, not to be tried again, and receive a lesser punishment.

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, ...

14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

The next section is a guarantee of equal rights:

15. (1) Every individual is equal before and under the law and has the right to the **equal protection and equal benefit** of the law without discrimination and, in particular, **without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability**.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The next sections cover the official languages of Canada, minority language education rights, the enforcement of the Charter, and other general sections.

Section 32 states that the charter only applies to the federal and provincial governments.

It also gave some time for equality rights to come into effect.

# The Notwithstanding Clause

Recognizing that there are very few rules that don't have exceptions, the authors included one in the charter.

This is known as the Notwithstanding Clause.

It is controversial and has been a subject for much debate over the years.

It allows the legislature to ignore certain provisions of the charter (!).

# The Notwithstanding Clause

(1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15.

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

Any Act of Parliament or of a legislature may violate the fundamental freedoms, the legal rights or the equality rights of Canadians...

As long as the act expressly says it is doing so.

All other rights are inalienable.

If the next sitting of the legislature does not re-enact the declaration, then it is no longer in effect.



The charter is a written collection of rights in the Constitution Act, 1982.

The notwithstanding clause, however, protects the Supremacy of Parliament.

In the words of Jean Chrétien, it prevents the Supreme Court from legalizing hate speech or child pornography as freedom of expression.

To date, the federal government has not used it.

The Alberta provincial government tried to use to prevent the legalization of same-sex marriage.

But the Supreme Court found this law to be *ultra vires*.

The Parti Québécois used it in all of its laws in 1982.

Bill 101 (“The Charter of the French Language”) was found to be unconstitutional because it restricted freedom of expression.

Bill 178 was used to insulate it from the charter.

The law was later amended so as not to require the clause.

Saskatchewan included it, unnecessarily, in back-to-work legislation.

The Supreme Court is the final interpreter of the Constitution and therefore the Charter.

If a law is ruled unconstitutional because it violates the charter, the only way to enact that law is to use the notwithstanding clause.

This is the second time we have mentioned the Supreme Court of Canada and its role in the legal system.

The Supreme Court receives a lot of attention, but most cases are resolved in lower courts.

Next, we will examine the Canadian Legal System in more detail.

- [1] D. W. Harder, "ECE 290 Lecture Materials," 2013.  
Online; accessed 31-May-2016.
- [2] J. Vale, "ECE 290 Course Notes," 2011.

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