

CANADIAN CONSTITUTION

WHAT IS OUR CONSTITUTION FOR?

The *Constitution* is the supreme law of Canada, a kind of ultimate written rule-book by which all the institutions of the Canadian state must abide. If any law contradicts the *Constitution*, it will be held by the courts to be of no force or effect on anyone. The *Constitution* tells us who has the authority to make laws, how the authority is divided among the levels of government (federal and provincial), and how government power is limited to protect individual rights.

What makes up the Constitution?

The Canadian *Constitution* has two written parts: the *Constitution Act, 1867* (formerly known as the *British North America Act, 1867*) and the *Constitution Act, 1982*.

Constitution Act, 1867

This legislation defines the institutions of government (for example, the House of Commons and Senate), establishes the justice system, and divides power between these institutions and well as between the different levels of government. For instance, s. 91 lists the federal “heads of power” (defence, printing money, the post office, unemployment insurance, etc.) and s. 92 enumerates the provincial competencies (healthcare, education, etc.).

Part VII of the *Constitution Act, 1867* (ss. 96 to 101) establishes the judiciary in Canada. The courts have the power to decide if the different institutions and levels of government are following the rules and acting within their constitutional authority (acting *intra vires*) or overstepping their authority and acting outside of their powers (*ultra vires*), thereby rendering their actions legally invalid.

Constitution Act, 1982

As a former British colony, under the *Constitution Act, 1867* Canada still required the consent of Great Britain to change its own *Constitution*. This changed with the *Constitution Act, 1982*. This is known as the “repatriation of the *Constitution*”. With some small exceptions, the *Constitution Act, 1867* lacked any individual guarantees of basic civil liberties against the power of the government. It also lacked a formula for changing the *Constitution* later on. Therefore, the second part of the *Constitution* – the *Constitution Act, 1982* – contained an amending formula and a *Charter of Rights and Freedoms*. This is probably the most important part of the *Constitution* for ordinary people because it guarantees certain individual rights and freedoms to everyone in Canada. It also provides mechanisms to enforce these rights and freedoms by making it the law that people can seek a remedy through the courts if they feel that their *Charter* rights have been violated by the laws or actions of government. In this way, the *Constitution Act, 1982* expanded the power of judges to ‘strike down’

laws created by legislators – rendering them of no force – if they conflict with the *Charter*.

CONSTITUTIONAL RIGHTS

The first part of the *Constitution*, the *Constitution Act, 1867*, gives meaning to our rights as citizens in a democracy. For example, it requires the federal government to stand for election at least once every 5 years, allowing Canadians to exercise the right to vote. However, constitutional “rights” are generally understood to be the rights and freedoms guaranteed by the *Charter*. These rights define the relationship between the state and citizens, and cannot be invoked in disputes between directly private persons.

Often what comes to mind when we think of *Charter* rights are those fundamental freedoms that are essential to a constitutional democracy, like freedom of conscience and religion and freedom of expression. However, there is much more to the *Charter*. Sections 7-14 outline legal rights, which pertain to interactions between individuals and the criminal justice system. These include the right to be free from unreasonable search and seizure (s. 8); the right to a lawyer when charged with an offence (s. 10(b)); and the right to be presumed innocent until proven guilty (s. 11(d)). Section 15 guarantees the right to be treated equally regardless of (among other things) race, age, religion, sex or sexual orientation (s. 15).¹

OVERRIDING AND LIMITING RIGHTS

Charter rights are not absolute and may be limited in two important ways. First, s. 1 of the *Charter* is known as the ‘reasonable limits’ clause. It can allow a court to find that a law that infringes a certain right or freedom can remain in force if it does so within reason given the importance of its objective. For example, Parliament’s requirement that tobacco companies print federal health warnings on cigarette packages is a reasonable limit placed on what those companies are free to express on their packaging.²

Second, some politicians worried that the *Charter* would put too much power in the hands of the courts, rather than elected officials. The result was a compromise: s. 33. Sometimes called the ‘notwithstanding clause’, s. 33 permits the federal government and the provinces to override some sections of the *Charter* so that even if the law violates guaranteed rights and freedoms, it will be valid ‘notwithstanding’ the *Charter*. However, the power to override is limited in important ways:

- First, the clause can only be used to override ss. 2 and 7 through 15.
- Second, the declaration of override must be expressly worded and passed by a majority in the legislature

¹ Refer to OJEN resource, *In Brief: Canadian Charter of Rights and Freedoms* for further discussion of *Charter* rights. The full text of the *Charter* is available at laws.justice.gc.ca/eng/charter.

² Refer to the case *RJR-MacDonald Inc v Canada (Attorney General)* [1995] 3 SCR 199 for more information. For the complete test used by the court to determine a ‘reasonable limit’, refer to the OJEN resource, *In Brief: Section 1 of the Charter and the Oakes Test*, available at www.ojen.ca/resource/980.

responsible for the law.

- Finally, a declaration only lasts five years before it must be renewed, requiring the overriding government to face an election before re-activating the clause.

Historically, the use of s. 33 has been politically unpopular and has been used by only three provinces and never by federal Parliament.

DISCUSSION QUESTIONS

1. What are the two basic pieces of legislation that comprise the *Canadian Constitution*?
2. Name two important differences in these two Acts.
3. Which part of the *Constitution* sets out the various responsibilities of different levels and branches of government?
4. What are the two ways in which constitutionally-protected rights and freedoms can be legally infringed upon?
5. In your opinion, why has the use of the notwithstanding clause been unpopular?

