Constitutions
What is a constitution?

- It is a list of rules which govern the actions of any organization.
- Nations have more complex constitutions but the purpose is the same.
Characteristics of a Good Constitution

- It is easily understood by those to whom it applies.
- It is not ignored by those who are elected to power.
- It can be changed easily but not too easily.
Changing the Rules

- A constitution written one hundred years ago cannot always meet modern needs.
- Amending formulas must be written into a good constitution.
- Amendments must meet the needs of most people in an organization or nation.
National Constitutions

- These are often complex and lengthy legal documents.
- They may, however, be very simple.
- Great Britain has an unwritten constitution.
- Canada’s constitution is both written and unwritten.
The History of Canada’s Constitution
The History of Canada’s Constitution

There are several early Canadian constitutional documents including:

- The Proclamation of 1763
- The Quebec Act 1774
- The Constitutional Act 1791
- The Act of Union 1840
One of the most important early Canadian constitutional documents was the **British North America Act 1867**.

By this act the colonies of Canada (Ontario and Quebec) were united with the colonies of Nova Scotia and New Brunswick.
The British North America Act 1867

- This act described the union and set out the rules by which it was to be governed.

- The Fathers of Confederation who wrote this document were influenced by many factors including the American Civil War of 1860-1865.

- They decided that a strong federal union was best for Canada.

John A. MacDonald
A Federal Union

- This type of union provides for a sharing of power between a central government and the separate governments of individual provinces or states.
- A strong federal union places more power in the hands of the central government than it grants to the provinces or states.
- A legislative union which did not divide power was rejected as impractical.
A Federal Union

One Central Government

Ten Provincial Governments
Legislative Unions

- Legislative unions do not divide power between a central government and the provinces or states.
- Great Britain was established as a legislative union of England, Scotland, Wales and Northern Ireland.
Why a federal union for Canada?

- Our closest neighbor, the United States, had a federal union.
- Canada was a large nation with the potential to be much larger.
- Canada had two founding peoples with two languages and two cultures.
- A legislative union would not have been acceptable to the existing colonies.
A Federal Union for Canada in 1867

Canada in 1867

- Quebec
- Ontario
- Nova Scotia
- New Brunswick
The British North America Act and Federal Union

Two sections of this act listed the powers of the central government and the provinces.

- **Section 91** - listed the powers of the central or federal government.
- **Section 92** - listed the powers of the provinces.
Section 91

The powers of the federal government included:

- National Defense
- Fisheries
- Currency
- Postal System
- National Issues
Section 92

This section listed the powers of the provinces including:

- Justice
- Municipal Institutions
- Public Lands
- Hospitals
The strength of the federal union was indicated in section 91 which gave all left over power not granted the provinces to the central government.

This covered all matters concerning “... the Peace, Order and Good Government of Canada.”
The Struggle for Power

- Since 1867 the provinces have struggled to take power away from the central government.
- This struggle continues today and is often a source of considerable friction between the two levels of government.
Amending the BNA Act of 1867

The British North America Act was a British law enacted by the British government.

- This meant it could only be changed by the British Parliament.
- This was a complex process and resulted in few significant amendments.
Unwritten Canadian Constitution

- Much of Canada’s constitution was unwritten and consisted of British parliamentary traditions and practices.
- These were called conventions.
The Statute of Westminster 1931

- By this British law Canada became a self-governing dominion.
- This meant that laws passed by the Canadian government could not be overturned by Britain.
- It also meant that British law no longer applied in Canada.
Constitutional Patriation
The Winds of Change

- It was unusual for a sovereign and independent nation like Canada to have a foreign constitution.
- The growth of nationalism in Quebec was a catalyst to change this situation.
- The Liberal government of Pierre Trudeau finally undertook this difficult task and achieved **patriation** in 1982.
Constitutional Patriation
1982

To patriate means to bring home.
The process required that the British government revoke the BNA Act of 1867.
It further required that Canada enact its own written constitution.
What problems were faced by the Trudeau government?

- Federal-Provincial agreement in Canada.
- A formula to amend the constitution.
- The Charter of Rights and Freedoms.
Federal-Provincial Disagreement

The provinces and the central government had difficulty finding any common ground to achieve Mr. Trudeau’s goal of a patriated constitution.

The political leaders of each province wanted to ensure that new constitutional arrangements were advantageous to them.
Unilateral Patriation

- Frustrated by the provinces Mr. Trudeau asked the Supreme Court of Canada if he could patriate the constitution without their agreement.
- The ruling indicated that it was legal but not conventional.
Mr. Trudeau wanted an entrenched Charter of Rights and Freedoms.

Entrenched meant it was to be an integral part of the constitution.

The provinces objected to this as they feared loss of power as a result of judicial interpretations of an entrenched Charter.
The Amending Formula

It was necessary to have an effective way by which the constitution could be changed.

Both the provinces and the central government wanted to ensure that the wording of the amending formula protected their respective interests.
Compromise

Agreement was finally reached between the central government and nine of the ten provinces in November of 1981.

Only Quebec refused to be a party to this agreement.

On April 17, 1982, Royal Assent was given by the Queen to the Canada Act 1982.
The Canada Act 1982

There are two major components to the Canada Act 1982.

- The Constitution Act 1867 - This was the old British North America Act 1867.
- The Constitution Act 1982 - This was new and contained several important components.
The Canada Act 1982

The Constitution Act 1867

The Constitution Act 1982

Aboriginal Rights

Charter of Rights and Freedoms

Amending Formula

Equalization Payments
The Charter of Rights and Freedoms

- An *entrenched* Charter which could not be changed other than by constitutional amendment was included in the constitution.

- Provinces were allowed the *notwithstanding clause* which provided exemption from some provisions of the Charter.
Aboriginal Rights

“The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized...”

For many aboriginal people this was insufficient.
Amending the Constitution
The Amending Formula

- Seven of the ten provinces of Canada representing at least 50% of the population and the Canadian Parliament must agree to most changes.

- Changes to the monarchy, composition of the Supreme Court of Canada or language law require all ten provinces and the federal government to agree.
Amending Formula II

- The formula has proven difficult to apply.
- The agreement of seven provinces representing 50% of the population on any issue, let alone ten, is difficult to obtain.
- Provinces may ‘opt out’ of constitutional amendments that may diminish their power.
The Meech Lake Accord
1987

This was an effort to bring Quebec into the constitution and included the following:
1. “Distinct society” status was to be confirmed for Quebec.
2. Provinces were to be given the right to nominate judges for the Supreme Court.

The accord was not ratified by all ten provinces and failed.
The Charlottetown Accord 1992

This was a major constitutional amendment package which included:

3. Senate reform.

It failed to pass a national referendum in October 1992.
Summary

- Constitutional debate in Canada remains unresolved.
- Quebec is still not a part of the Canadian Constitution.
- Aboriginal Canadians feel that their right to self-government has not been achieved.
- For many Canadians Senate reform is long over due.
The Charter of Rights and Freedoms
What is the Charter?

A constitutional document that:

- defines the rights and freedoms of Canadians and establishes the limits of such freedoms.
- was proclaimed as an entrenched component of the Canadian Constitution in the Constitution Act of 1982.
What existed prior to the Charter?

Statutes such as
- The Canadian Bill of Rights 1960
- The Official Languages Act 1969
- Provincial Bills of Rights.

These laws could be changed either by Parliament or provincial legislatures. They were not entrenched in the constitution.
Categories of Rights and Freedoms
The Guarantee of Rights and Freedoms

"subject to reasonable limits"

- This is the “common sense” clause which allows governments to limit freedoms if it is reasonable.
- The courts must decide what is reasonable.
Fundamental Freedoms (s.2)

- Freedom of conscience and religion
- Freedom of belief and expression
- Freedom of association
- Freedom of peaceful assembly

The provinces feared that these were too broad and as a result they were limited by the **notwithstanding clause of section 33** of the Charter.
Democratic Rights (ss. 3-5)

- The right to vote
- The right to run for elected office
- Elections are to be called once every five years.
- Parliament and legislatures must sit once in every 12 months.
Mobility Rights (s. 6)

- The right to leave and to return to Canada
- The right to move anywhere in Canada to live and work
- Reasonable residency is required for access to social services and permanent residents in need could be given assistance first.
- Provinces cannot limit the right of non residents to own property.
Legal Rights (ss. 7-14)

“the right to life, liberty and the security of the person”

This limits the power of government to detain or to deny people basic liberty except “in accordance with principles of fundamental justice.”

Legal rights can be limited by the “notwithstanding” clause of section 33.
Legal Rights II

- Arbitrary arrest is not allowed.
- Police cannot unreasonably search any person.
- You must be informed of the reason for your arrest.
- You must be informed of your right to retain a lawyer.
Legal Rights III

- You must be informed of your offense.
- You must be tried in a reasonable time.
- You are presumed innocent until found guilty by the courts.
- You cannot be denied reasonable bail.
- You cannot be forced to give evidence against yourself.
Equality Rights (s. 15)

- You have legal equality regardless of race, national or ethnic origin, colour, religion, sex, age, mental or physical disability.

- Affirmative action programs do allow special treatment for those who are disadvantaged. These rights may be limited by the "notwithstanding" provisions of section 33.
Language Rights (ss. 16-22)

- The bilingual status of Canada is recognized.
- The equality of French and English in Parliament is confirmed.
- Federal agencies must provide services in both French and English.
- Either language can be used in federal courts.
- Native people can still use their languages in court.
Minority Language Rights (s. 23)

- These apply only to Canadian citizens and not new immigrants.
- English or French speaking minorities can have their children educated in their own language.
  - It must be the parents first language.
- Provinces need only provide minority language schools where there are sufficient numbers to justify the cost.
The Charter and Canadian Society
Enforcement of the Charter

- An individual may apply to the courts to stop any activity they believe to be discriminatory.
- Courts may challenge laws that take away basic individual rights and freedoms.
- The Charter takes power away from Parliament and provincial legislatures and gives it to the courts.
“Notwithstanding” (s. 33)

This section of the Charter allows governments to pass laws which may interfere with

- Fundamental Freedoms.
- Legal Rights.
- Equality Rights.

This action is only valid for five years after which it must be reaffirmed.
The Charter and Canadian Society

- Since 1982 the courts have applied the Charter to many aspects of Canadian life.
- All levels of government had to ensure that their laws did not violate the Charter.
- The wording of many parts of the Charter continues to be open to interpretation.
- Parts of the Charter have been found to be in conflict with each other requiring judges to balance one right against another.
Some people believe that Parliament and provincial legislatures have lost too much power to judges. Parliament and provincial legislatures can overrule the courts by means of constitutional amendment. There is fear that the Charter may have politicized the appointment of judges but there is little evidence to support this. Most people believe that the courts have been effective and fair in interpreting the Charter.
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