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[Halsbury's® Laws of Canada – Constitutional Law \(Division of Powers\)](#)

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[Halsbury's® Laws of Canada – Constitutional Law \(Charter of Rights\) 2014 Reissue forthcoming](#)

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▼**HCL-1▼** **Constitution of Canada.** A fundamental principle of law in Canada is the supremacy of the Constitution which is enshrined in the *Constitution Act, 1982*.¹ All laws, whether common or legislative, must comply with the Constitution. Furthermore, all government action must also comply with the Constitution. The Supreme Court of Canada has clarified that the executive branch of our government is not exempt from this principle, stating that “their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source”.² This principle guides the development and application of laws in Canada, and therefore the daily lives of its citizens. The enactment of the *Constitution Act, 1982*³ allows courts to invalidate laws that are either in breach of the Charter,⁴ or contravene the Division of Powers.⁵ With the introduction of the Charter,⁶ Canada went from a system of Parliamentary supremacy to one of constitutional supremacy.⁷

Notes

1. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 52(1), provides that “any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect”.
2. *Reference re Secession of Québec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217 at para. 17 (S.C.C.).
3. Particularly, s. 52 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

4. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
5. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 52; see discussion in *Chaoulli v. Québec (Attorney General)*, [2005] S.C.J. No. 33, [2005] 1 S.C.R. 791 at paras. 85-95 (S.C.C.).
6. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
7. R.G.B. Dickson, “Keynote Address”, *The Cambridge Lectures 1985* at 3-4; see also *Vriend v. Alberta*, [1998] S.C.J. No. 29, [1998] 1 S.C.R. 493 (S.C.C.).

2. Major Sources

▼**HCL-2▼** **Overview.** The sources of constitutional law originate from the past historical events, and especially from the tensions between the Crown and its subjects. The sources have evolved in a set of rules governing our democracy. Some of these have been written while others are not. Another category of unwritten principles have evolved and became constitutional conventions. The written sources of the Canadian Constitution are numerous. Unlike the Constitution of the United States, the Canadian Constitution is not found in one or two founding documents, but in numerous Imperial statutes adopted by Parliament in Westminster, in statutes adopted by the Parliament of Canada, as well as in unwritten principles. Normally, however, the sources of constitutional law would be comprised of the Constitutional document itself and potentially amendments made to it; some special statutes that acquire quasi-constitutional form; unwritten rules that have been followed by governmental actors since time immemorial and that have crystallized in norms of fundamental importance; and may also include judicial decisions interpreting the Constitution, where the common law may have confirmed unwritten rules or principles, such as that of democracy, the separation of powers and the principle of responsible government. *The Constitution Act, 1982*¹ provides a schedule of constitutional documents. The list provided pursuant to the *Constitution Act, 1982*² was held to be exhaustive.³

Notes

1. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
2. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 53.
3. See *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] S.C.J. No. 2, [1993] 1 S.C.R. 319 (S.C.C.).

(1) The Constitution Act, 1867

▼**HCL-3▼** **Overview.** The *Constitution Act, 1867*,¹ or the *British North America Act, 1867*² as it was known, is the most important constitutional source of the Canadian Constitution, along with the *Constitution Act, 1982*.³ The *Constitution Act, 1867*⁴ provides for the rules of government by establishing the principle institutions of the Canadian government, including the powers of the Executive, the Parliament of Canada and the provincial legislatures. The *Constitution Act, 1867*⁵ provided for a constitutional federation, and divided the legislative powers or jurisdictions between the Federal and Provincial governments. It also established the Canadian courts system, provided for an economic union and provided rules governing the admission of new colonies into the federation. Notably, however, the *Constitution Act, 1867*⁶ did not create the country of Canada. Such was done in 1931, with the adoption of an Imperial statute, the *Statute of Westminster*.⁷

Notes

1. (U.K.), 30 & 31 Vict., c. 3.
2. (U.K.), 30 & 31 Vict., c. 3.
3. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
4. (U.K.), 30 & 31 Vict., c. 3.
5. (U.K.), 30 & 31 Vict., c. 3.
6. (U.K.), 30 & 31 Vict., c. 3.
7. *Statute of Westminster, 1931* (U.K.), 22 & 23 Geo. V., c. 4.

(2) Constitution Act, 1982

▼**HCL-4▼** **Overview.** The *Constitution Act, 1982*¹ is the second most important constitutional written document. It mainly filled some gaps that had been omitted² in the *Constitution Act, 1867*.³ The *Constitution Act, 1982*⁴ includes the *Canadian Charter of Rights and Freedoms*⁵ and confirms the rights of the First Nations.⁶ Notably, the *Constitution Act, 1982*⁷ provides for an amendment formula⁸ and provides that the Constitution of Canada is now 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.⁹ The *Constitution Act, 1982*¹⁰ grants to the courts the power to strike any statute adopted by Parliament or any provincial legislature if they are against any provision of the Canadian Constitution,¹¹ and provides an exhaustive list of all those constitutional documents which must be respected for a statute to conform with the Canadian Constitution.¹²

Legislation that is constitutional may be found to violate the Charter. A finding that legislation does not offend the division of powers doctrine will not doom a Charter challenge to that legislation. There is no conflict between finding that a federal law is validly adopted under s. 91 of the *Constitution Act, 1867*, and asserting that the same law, in purpose or effect, deprives individuals of rights guaranteed by the Charter. The Charter applies to all valid federal and provincial laws. Laws must conform to the constitutional division of powers and to the Charter.¹³

Notes

1. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
2. These had not really been “omitted” or forgotten, but rather it was a conscious decision not to provide for an amendment formula.
3. (U.K.), 30 & 31 Vict., c. 3.
4. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
5. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
6. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 35.
7. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
8. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, ss. 40-44.
9. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 52(1).
10. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
11. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 52(1).
12. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 52(2).
13. *Canada (Attorney General) v. PHS Community Services Society*, [2011] S.C.J. No. 44, 2011 SCC 44 (S.C.C.).

(3) Section 52(2) of the *Constitution Act, 1982*

▼HCL-5▼ **Overview.** The *Constitution Act, 1982*¹ provides a list of the Imperial and Canadian statutes which are recognized as being part of the Canadian Constitution. The list of documents includes: (a) the *Canada Act 1982*,² including this Act; (b) the Acts and Orders referred to in the Schedule; and (c) any amendment to any Act or Order referred to in paragraph (a) or (b). The Constitution will include the Acts and orders referred in the Schedule. The schedule lists 24 Acts and Orders.³ The Constitution will also include the amendments to any Act or order listed in the schedule⁴ or to the *Canada Act, 1982*⁵ and the *Constitution Act, 1982*.⁶

Notes

1. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 52(2).
2. *Canada Act 1982* (U.K.), 1982, c. 11.
3. *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3; *Manitoba Act, 1870*, 33 Vict., c. 3; *Rupert's Land and North-Western Territory Order*, R.S.C. 1985, App. II, No. 9; *British Columbia Terms of Union*, R.S.C. 1985, App. II, No. 10; *Constitution Act, 1871* (U.K.), 34 & 35 Vict., c. 28; *Prince Edward Island Terms of Union*, R.S.C. 1985, App. II, No. 12; *Parliament of Canada Act, 1875* (U.K.), 38 & 39 Vict., c. 38; *Adjacent Territories Order*, R.S.C. 1985, App. II, No. 14; *Constitution Act, 1886* (U.K.), 49 & 50 Vict., c. 35; *Canada (Ontario Boundary) Act, 1889* (U.K.), 52 & 53 Vict., c. 28; *Alberta Act* (U.K.), 4 & 5 Edw. VII, c. 3; *Saskatchewan Act* (U.K.) 4 & 5 Edw. VII, c. 42; *Constitution Act, 1907* (U.K.) 7 Edw. VII, c. 11; *Constitution Act, 1915* (U.K.), 5 & 6 Geo. V, c. 45; *Constitution Act, 1930* (U.K.), 20 & 21 Geo. V, c. 26; *Statute of Westminster, 1931* (U.K.) 22 Geo. V, c. 4; *Constitution Act, 1940* (U.K.) 3 & 4 Geo. VI, c. 36; *Newfoundland Act* (U.K.), 12 & 13 Geo. VI, c. 22; *Constitution Act, 1960* (U.K.), 9 Eliz. II, c. 2; *Constitution Act, 1964* (U.K.), 12 & 13 Eliz. II, c. 73; *Constitution Act, 1965*, R.S.C. 1985, App. II, No. 39; *Constitution Act, 1974*, R.S.C. 1985, App. II, No. 40; *Constitution Act* (No. 1), 1975, R.S.C. 1985, App. II, No. 41; *Constitution Act* (No. 2), 1975, R.S.C. 1985, App. II, No. 42.
4. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 52(2)(c).
5. *Canada Act 1982* (U.K.), 1982, c. 11.
6. *Constitution Amendment Proclamation, 1983*, S.I./84-102, reprinted in R.S.C. 1985, App. II, No. 46; *Constitution Act, 1985 (Representation)*, S.C. 1986, c. 8, reprinted in R.S.C. 1985, App. II, No. 47; *Constitution Amendment, 1987 (Newfoundland Act)*, S.I./88-11; *Constitution Amendment, 1993 (New Brunswick)*, S.I./93-54; *Constitution Amendment, 1993 (Prince Edward Island)*, S.I./94-50; *Constitution Amendment, 1997 (Newfoundland Act)*, S.I./97-55; *Constitution Amendment, 1997 (Quebec)*, S.I./97-141; *Constitution Amendment, 1998 (Newfoundland Act)*, S.I./98-25; *Constitution Act, 1999 (Nunavut)*, S.C. 1998, c. 15, Part II; *Constitution Amendment, 2001 (Newfoundland and Labrador)*, S.I./2002-117.

▼HCHR-1▼ **Canadian Charter of Rights and Freedoms.** As explained in both the headings and in s. 34, the *Canadian Charter of Rights and Freedoms* (the “Charter”) consists of the first 34 sections of the *Constitution Act, 1982*.¹ The Charter is a constitutionally entrenched bill of rights, seeking to guarantee to Canadians certain rights and freedoms. These include both many of the same rights and freedoms as in other bills of rights internationally and some provisions specific to Canadian contexts, such as specifically defined language rights.

Major parts of Charter. The Charter has several major parts. Although the headings within the Charter are not legally definitive in the interpretation of the Charter,² the main headings do correspond well to the major parts of the Charter. Those sections under the heading “General”, from s. 25 to s. 31, provide a number of mainly interpretive provisions largely discussed in this Chapter. Section 32, under the heading “Application”, sets out principles for the application of the Charter, discussed in Chapter II. Section 1, under the heading “Guarantee of Rights and Freedoms”, both sets out the guarantee of rights in the Charter and principles applying

to the limitation of these rights, discussed in Chapter III. The derogation clause in section 33 is a further provision under the “Application” heading within the Charter and is discussed in Chapter IV. Sections 3 through 5, under the heading “Democratic Rights”, set out a number of such rights discussed in Chapter V. Section 2, under the heading “Fundamental Freedoms”, sets out freedom of religion, of expression, of assembly, and of association, all discussed in Chapter VI. Section 6, under the heading “Mobility Rights”, expresses such rights, discussed in Chapter VII. The heading “Legal Rights” precedes a more general right in s. 7, discussed in Chapter VIII, and a set of more specific rights arising in criminal justice contexts in ss. 8 through 14, discussed in Chapter IX. The heading “Equality Rights” precedes the equality rights guarantees of s. 15, discussed in Chapter X. The heading “Official Languages of Canada” precedes ss. 16 through 22 and “Minority Language Educational Rights” precedes s. 23, with both discussed in Chapter XI. The heading “Enforcement” precedes s. 24, which is discussed along with other relevant concepts in Chapter XII.

Aboriginal rights provision outside Charter. Section 35 of the *Constitution Act, 1982*, provides constitutionalized recognition of Aboriginal and treaty rights.³ Despite common errors on this point, s. 35 is not part of the Charter.⁴

General approach of this volume. Much scholarly writing on the Charter is, in some manner or another, aspirationally motivated in seeking to advance particular rights interpretations fitting with authors’ policy views. Even works oriented in large part to accurate and helpful description and analysis of the law often comment upon it to at least some extent. This volume attempts to restrict itself to a description of the law of the Charter as it is on the authorities and to thus serve an important role through doing so.

Variation in degree of judicial examination of different Charter sections. There are significantly different amounts of jurisprudence on different Charter sections, with some sections and issues arising from sections having received fairly definitive interpretation from the Supreme Court of Canada and other appellate courts, others having been left to the lower courts, and others having received little interpretation at all. This volume seeks to reflect what jurisprudence is available. Perhaps counter-intuitively, the amount of case law cited will sometimes actually be less on parts that have received more interpretation, partly because these sections have received more authoritative interpretations from higher courts. The task with some other sections is more constructive from lower court decisions. In any case, there is an effort to describe objectively what the case law to date implies.

Notes

1. (CAN) *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 34.
2. *Law Society of Upper Canada v. Skapinker*, [1984] S.C.J. No. 18, [1984] 1 S.C.R. 357 (S.C.C.) (though headings assisting with resolution of certain ambiguities).
3. It recognizes and affirms "existing aboriginal and treaty rights...": (U.K.), 1982, c. 11, s. 35.
4. See (CAN) *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 34 (specifying that ss. 1 through 34 are the Charter).
5. For a leading treatise of this sort, see G. Régimbald and D. Newman, *The Law of the Canadian Constitution* (Markham: LexisNexis Canada, 2013).

▼**HCHR-3**▼ **Limited role of Charter.** The Charter is one piece of the Canadian Constitution, and it does not supplant other areas of constitutional law. Nor does it provide an exhaustive statement of the rights and freedoms held by Canadians. In this respect, s. 26 of the Charter provides explicitly that "[t]he guarantee 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".¹ Section 26 does not create any new rights.² However, it makes clear that there can be rights or freedoms originating from other sources that are not set out in the Charter. The Charter does not take away from rights or freedoms arising from constitutional or other sources outside the Charter. In order to ensure this, the Charter contains several sections designed to ensure that the enactment of the Charter does not have unforeseen effects against other rights.

Judicial circumspection in use of Charter. There are strong principles to the effect that courts should refrain from using the Charter in circumstances where other legal norms work equally well in resolving the dispute at issue, this having particular significance in administrative law contexts where the Charter need not supplant the ongoing common law development of administrative law.³ That said, administrative law decision-makers also need to take proper account of the Charter where they are required to do so.⁴

Religious schooling. Section 29 specifies that "[n]othing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools."⁵ The denominational school rights guaranteed elsewhere in the Canadian constitution reflect particular constitutional arrangements between significant communities and cannot be extended

to other communities through Charter litigation.⁶

Division of powers. Section 31 specifies that "[n]othing in this Charter extends the legislative powers of any body or authority."⁷ This section is in the Charter, in part, to make clear that the Charter is not to affect the division of powers. A concern arose from American constitutional history, where the Bill of Rights has had some effects of strengthening powers of the federal government at the expense of the states.

Language rights provisions. It is worth noting that it has also been held that it is not possible to use the equality rights section of the Charter to challenge the scope of the language rights in the Charter. The latter is a code on language rights and is saved by its very nature from challenge by other Charter sections.⁸

Notes

1. (CAN) *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 26.
2. *Léger v. City of Montréal*, [1986] J.Q. No. 1044, 3 Q.A.C. 241 at para. 20 (Que. C.A.).
3. See *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39, [1999] 2 S.C.R. 817 (S.C.C.) (stating that courts should not deal with Charter issues on judicial review application unless necessary to do so). Cf., *Blencoe v. British Columbia (Human Rights Commission)*, [2000] S.C.J. No. 43, [2000] 2 S.C.R. 307 (S.C.C.) (dissenting judgment of LeBel J.).
4. See *Doré v. Barreau du Québec*, [2012] S.C.J. No. 12, [2012] 1 S.C.R. 395 (S.C.C.).
5. (CAN) *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 29.
6. *Adler v. Ontario*, [1996] S.C.J. No. 110, [1996] 3 S.C.R. 609 (S.C.C.).
7. (CAN) *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 31.
8. *Mahe v. Alberta*, [1990] S.C.J. No. 19, [1990] 1 S.C.R. 342 at 369 (S.C.C.).

(2) Interactions with Canadian Bill of Rights

▼**HCHR-4**▼ **Ongoing relevance of Canadian Bill of Rights.** Section 26 states that "[t]he guarantee 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."¹ Amongst other instances of fundamental rights held by Canadians from a source outside the Charter, s. 26 thus makes clear that the Charter does not affect the ongoing relevance of the *Canadian Bill of Rights*.² Although the Charter has nonetheless supplanted the *Bill of Rights* in many contexts given its larger and more fully

constitutionally entrenched guarantees, there are areas in which the *Bill of Rights* may remain highly relevant. In some areas, the *Bill of Rights* contains guarantees that were omitted from the Charter, with the most important instance being property rights. Section 1(a) of the *Bill of Rights*, provides protection for an inherent "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."³ Post-Charter interpretation has re-emphasized that this section does not provide a guarantee against expropriation carried out by clear and unambiguous legislation, although the further interpretation of property rights recognized in the *Bill of Rights* has been explicitly left for potential future consideration.⁴

Notes

1. (CAN) *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 26.
2. (CAN) *Canadian Bill of Rights*, S.C. 1960, c. 44.
3. (CAN) *Canadian Bill of Rights*, S.C. 1960, c. 44, s. 1(a).
4. *Authorson v. Canada (Attorney General)*, [2003] S.C.J. No. 40, [2003] 2 S.C.R. 40 (S.C.C.).

Supplemental Readings**Constitutional Law**

[Canadian Charter of Rights and Freedoms, 5th Edition, / Charte canadienne des droits et libertés, 4^e édition](#) (Mendes and Beaulac)

[Canadian Human Rights Law & Commentary](#) (Corbett)

[The Supreme Court of Canada and Social Justice – Commitment, Retrenchment or Retreat](#) (Rodgers and McIntyre)

General

[Legal Problem Solving – Reasoning, Research & Writing, 6th Edition and The Ultimate Guide to Canadian Legal Research](#) (Fitzgerald)

[Legal Writing and Research Manual, 7th Edition, Student Edition](#) (Whitehead and Matthewman)

[Understanding Lawyers' Ethics in Canada](#) (Woolley)

[Lawyers' Ethics and Professional Regulation, 2nd Edition](#) (Woolley, Cotter, Devlin and Law)