What You Need to Know About Canada's Constitution

What is a constitution?

A constitution is the supreme law of the land. It takes precedence over all other laws in the country. A constitution describes how a country governs itself. It contains rules or principles which tell the government what it can or cannot do. If the government makes a law that contradicts the constitution, a court can tell the government that the law is 'unconstitutional' and therefore that it has no effect. A constitution can also guarantee rights and freedoms for citizens. For example, in Canada, certain rights and freedoms are protected by the *Canadian Charter of Rights and Freedoms*, which is part of the Constitution. In this way, a constitution reflects a nation's values. It has been described as "a mirror reflecting the national soul".[1]

Constitutions come in different shapes and sizes. Some are entirely written (like the Constitution of the United States of America), and some are not (like the Constitution of the United Kingdom). Some are partly written and partly unwritten (like Canada's Constitution). Some constitutions change often, and some stay very stable. There are good reasons why it should be difficult for a country to change its constitution. Because Canada's Constitution is the country's supreme law, changing it is a very serious matter. If a government could easily change the constitution, there is the danger that changes could be made that would benefit the government's short-term interest at the expense of the principles on which it was founded. For example, changing the constitution to limit citizen's freedom of expression may help a government silence criticism, but this is a freedom that most Canadians feel is in the country's best long-term interest.

What is Canada's Constitution?

This question does not have a clear answer. Canada's Constitution is partly written, and partly unwritten.

Written parts

An important written part of Canada's Constitution is the *Constitution Act, 1867*. The *Constitution Act, 1867*, which was passed by the British Parliament, created the Dominion of Canada. It describes the basic structure of Canada's government. Among other things, the *Constitution Act, 1867* creates provincial legislatures, the Senate, and the courts. It also describes how the federal and provincial governments divide their powers. For example, only the federal government has the power to make laws about crimes, and only the provincial governments can make laws about education.

The *Constitution Act, 1982* was a major addition to the Constitution. Until 1982, the British

Parliament had the power to control Canada's Constitution. However, the federal and provincial governments patriated the Constitution in 1982. This means that the British Parliament gave Canada full control over its Constitution. Even though Canada patriated its Constitution in 1982, the *Constitution Act, 1867* remains in full force.

The *Constitution Act, 1982* has several parts. It includes the *Canadian Charter of Rights and Freedoms*. It protects the rights of Aboriginal peoples. It affirms that the Constitution is the supreme law of Canada, and that courts can "strike down" laws which are unconstitutional. It also describes the rules for changing the Constitution. These rules make it hard to change the Constitution because most provinces need to agree on important changes, and provinces often disagree on big issues.

The 1867 and 1982 Acts are probably the most well-known written parts of the Constitution. However, there are other British and Canadian laws which are also part of the Constitution. For example, the laws adding more provinces to Canada are constitutional documents. Older documents, like ancient treaties, royal proclamations, and even some British laws from the 18th century are considered part of the Constitution.

Unwritten parts

Canada’s Constitution is partly unwritten. How is that possible? This is possible because the Constitution is "similar in Principle to that of the United Kingdom” which is completely unwritten. The *Constitution Act, 1867* states that the Constitution is based on the Constitution of the United Kingdom, which contains unwritten principles and conventions. Courts are responsible for interpreting the unwritten elements. The Supreme Court of Canada has said that unwritten principles are “assumptions upon which the text is based” and understood to be a part of the Constitution even though they are not written in the text.[2] In that sense, the unwritten principles were always there, and the courts are merely describing them.

Some of these unwritten parts are called unwritten principles. These principles do not stand alone as rules. Instead, they “breathe life” into the Constitution and fill in some of the “gaps” in the text. For example, democracy is an important unwritten principle of the Constitution.[3] Courts use this principle as a tool in interpreting the Constitution. Democracy, in part, means that legislatures are elected by popular vote and that citizens have the right to vote.[4] The principle of democracy includes respect for human dignity, justice and equality, diversity of beliefs, and the participation of individuals in society.[5] When courts make decisions based on the Constitution, they can use democratic principles to guide their decisions.

Constitutional conventions are also unwritten. These are political rules, not legal rules. They are not found anywhere in the Constitution. They come from the practices of government officials. Politicians and government officials who do not follow them are not acting illegally, nor can courts enforce them. However, they are part of Canada’s political fabric, and a part of the Constitution. For example, the Constitution states that Royal Assent is required before any bill becomes law. However, it is a constitutional convention that the Governor

General cannot use his or her discretion to refuse to give Royal Assent to a bill after it has been passed by the House of Commons and the Senate.[6]

Canada's Evolving Constitution

Even though parts of the Constitution are centuries old, it has been referred to as a "living tree" because its meaning can evolve over time as society changes.[7] The Supreme Court of Canada has said that "the Constitution must be viewed as a 'living tree capable of growth and expansion within its natural limits'".[8] This metaphor is the way that courts in Canada should interpret the Constitution, "ensuring that Confederation can be adapted to new social realities".

The Constitution may have meant one thing in 1867, but it could mean something different today. For example, the Constitution since 1867 has said that the federal government can make laws about marriage. In 1867, the meaning of marriage was limited to being between a man and a woman. If the government had tried to change the definition of marriage, it probably would have been unconstitutional. However, in 2004, the Supreme Court of Canada said that the government was allowed to make laws about same-sex marriage.[9] The Constitution by that point had evolved to reflect society's values.

In contrast with how Canadian courts should interpret the Constitution, some judges in the United States prefer to interpret the American Constitution by what they thought it meant when it was first written, or by how other people living at the time would have interpreted it.

Where did Canada's Constitution come from?

Canada's Constitution was created by the United Kingdom because Canada was originally a colony of the UK. The *Constitution Act, 1867* created the federal system of government. Canada could not change or add to this. The Constitution at that point also included older documents like the *Treaty of Paris (1763)* and the *Quebec Act (1774)*.

After 1867, the Constitution began to evolve as the courts interpreted it. Until 1975, it was occasionally amended as Parliament grew and more provinces were added.

By the early 1980s, politicians decided it was time to patriate the Constitution. They wanted to have full control over it without having to ask the British Parliament for changes. What they needed was a formula or a process that would allow them to make changes to the Constitution that the federal and provincial governments could all agree to. Coming up with an amending formula that they could all agree with took many years. Finally, in November, 1981 the federal and provincial governments agreed to a formula. As a result, the British Parliament passed the *Canada Act 1982*, giving Canada the power to control its Constitution. This Act included the Constitution Act, 1982, which contains the *Canadian Charter of Rights and Freedoms*. Canada's Constitution was now truly its own. After 1982, the federal and provincial governments could use the amending formula to make their own changes.[10]

[1] Peter W Hogg, *Constitutional Law of Canada*, 4th ed (Scarborough: Carswell, 1997) at 3.

[2] *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 49.

[3] *Ibid*, at para 32.

[4] *Ibid*, at para 65.

[5] *R v Oakes*, [1986] 1 SCR 103, at 136.

[6] Élise Hurtubise-Loranger, "Constitutional Conventions" (11 July 2006), online: Library of Parliament <http://www.parl.gc.ca/Content/LOP/TeachersInstitute/ConstitutionalConventions.pdf>.

[7] *Edwards v Canada (Attorney General)*, [1920] AC 123, 1 DLR 98 (PC).

[8] *Reference re Securities Act*, 2011 SCC 66 at para 56.

[9] *Reference re Same-Sex Marriage*, 2004 SCC 79.

[10] *Constitution Act, 1982*, sections 35.1, 38-49.