Table of Contents

Detailed Table of Contents

Introduction to my Constitutional Law Notes

The NCA Constitutional Law syllabus was updated a few months after I published my June 2021 Version of the Constitutional Law note, thereby necessitating another revision November in order to keep with my promise of always updating my notes in line with the NCA syllabus. Fortunately for me, I had made use of the latest Student Edition of Peter Hogg as my reference in preparing the June 2021 Version. Therefore, when the January 2022 NCA syllabus was released, I discovered the job of updating my note had been clear-cut in advance. My June 2021 note turned out to be comprehensively adequate and sufficient. Truth is that I had envisaged that NCA would soon update the constitutional law syllabus because the last update was in 2015. So, my June 2021 Version was made in anticipation of that update and I had already included many other topics that were eventually added in the new update. Nonetheless, the update was substantial; so I just have to ensure that all my chapters align with the new syllabus, remove the deleted chapters and include the new ones on Ancillary Powers and Aboriginal rights.

This note was conceived to simplify the course, specifically for the purpose of the NCA exams. It consists of a summary of all the topics contained in the updated syllabus. More importantly, all the cases listed in the syllabus were duly summarized for ease of reference. The facts of each case are summarized in a few paragraphs and the most relevant portions of the decisions have been culled and inserted under each topic. In some cases too, only the ratios of the courts are listed in one or two sentences, to make things easier for you. There are also several other cases which are not even listed in the syllabus but contained in the required materials. Many of these, including SCC decisions in 2021, have been included here to provide you with additional resources for your reference. Now, you do not have to read hundreds of pages of law reports to understand the principles and authorities enunciated in each case. (I must advise though that you read all the facts and ratio listed in this note. It will broaden your knowledge of the topics and widen your understanding).

In preparing this note, I have made substantial and boundless references to the 2020 Student Edition of Constitutional Law of Canada by Peter W. Hogg. I have made use of this textbook expansively and referred to the contents extensively. This is in addition to dozens of other materials on Canadian constitutional law from other sources.

You will find this note very useful for preview and review. And during your examination, please ensure you make a printout of the note, familiarize yourself very well with it and take with you to the examination. It is going to be of tremendous assistance to you for quick reference during the exam. Therefore, while on the exam, you may not need to flip through multitudes of pages trying to look for an authority or a principle of law. This note will help you. It helped me in my exam and I passed at first attempt. Meanwhile, I have equally included a few exam tips.

And as I have always stated, it is recommended that you take time to read the required texts and any supplementary materials. The notes should only augment your study of the required texts because texts teach you much more about the course while the note is a summary, for reference purposes, and for use in the exam. In addition, I recommend you read the Constitution Acts, 1867 to 1982. These will enlighten and give you a better understanding of the subject. You can download these free and easily online.

I wish you the best in your examinations.

Manuel Akinshola

Section I: BASIC CONCEPTS

This section will introduce you to the basic concepts of Canadian Constitutional Law.

This is where you will learn about the history, development, sources and nature of the Constitution including the definition of the Constitution of Canada and where it is derived from. All these are in Chapter 1.

Chapter 2 deals with amendment of the Canadian Constitution. What are the procedures for amending the Constitution? Which level of government, federal or provincial, has the constitutional power to unilaterally amend what provisions in the Constitution? What provisions cannot be amended except with the unanimous consent of the provinces and/or the federal Parliament? All these are contained in Chapter 2.

Please note that Chapter 2 also contains another topic which is Secession. Hence, to make things easier for you, I divided Chapter 2 into Parts A & B. Therefore, Secession as a topic is dealt with in Part B of the Chapter.

Exam tips: amending procedures are among the very important topics you should get familiar with. You are most likely to encounter questions on these topics in your exams.

Chapter 1

Sources and Nature of the Constitution

In Canada as elsewhere, what constitutional law does is to prescribe the exercise of power and the limits in the exercise of those powers by the different organs of government, viz.:

- legislature – to make laws
- executive – to implement the laws
- judiciary – to adjudicate in disputes

Constitutionalism or rule of law describes the limitations placed on government officials which bind them to act in accordance with the law. On the other hand, remedies are provided for the citizens when these officials act outside the law. For this to be possible there must be an independent judiciary as well as an independent legal system.

Rule of law in Canada applies to the Parliament of Canada and the Legislatures of each province. It binds them to act only within the powers conferred on each of them by the constitution as well as respect the civil liberties which are regarded as part of the constitution. This is because civil liberties may be created by the rules which limit governmental exercise of power over individuals.

Constitutionalism or rule of law also allows the citizens to challenge laws enacted by any arm of government in breach of constitutional provisions. A successful challenge will result in such a law being struck by the court. Similarly, all the actions of government departments, public agencies, government officials and the police must be within the ambit of the constitution, or statutes or common law, otherwise the citizens are entitled to challenge any illegal action in the law courts and seek the appropriate remedy.

In Canada, the constitution comes from various sources. Some of these are written instruments while in many other cases, unwritten rules have been held to be part of the principles of the Canadian Constitution. We shall now list and examine below the various sources of Canadian constitutional law. But please note in advance that laws made by Parliament or the provincial legislatures are not principal sources of constitutional law:

a. The Constitution Act, 1867

Unlike the American Constitution, there is no single document in Canada that can be referred to as "the constitution". The closest to this is the British North America Act, 1867 (which was renamed as the Constitution Act in 1982). The British North America Act, 1867 (the BNA Act) created the dominion of Canada when it united the three British colonies in North America and provided guidelines for the other colonies and territories.

The BNA Act established federalism, which allocated governmental powers between the federal Parliament and the provincial Legislatures. While the main objective of the BNA Act was not independence from the UK, the Dominion of Canada enjoyed a considerable degree of self-government, even while it remained a British colony. However, this Act did not follow the US model which codified all the rules in the constitution; it only made sufficient provisions for the creation of a confederation. This is clear even from the preamble which states that the new nation was to have 'a Constitution similar in principle to that of the United Kingdom".

So, the BNA Act merely continued with the old rules in both form and substance just like before. Therefore, most of the rules surrounding Canada's constitutional law were found in various sources outside the BNA Act. In fact, most of the important constitutional rules were not matters of law at all, but rather conventions which were not enforceable in the courts.

The BNA Act thus operated with some noticeable gaps, as follows:

1. The absence of a general amending clause: This is an indication that the framers of the BNA Act wanted the status to continue. In that wise, any amendment to the BNA Act could only be carried out by the Imperial Parliament in London. As a matter of fact, all amendments to the BNA Act were carried out by the Imperial Parliament up until 1982 when the Constitution Act, 1982 (which was itself an imperial statute) was enacted and it then contained a Canadian amending procedure for the constitution.
2. The office of Governor General: There is no provision in the BNA Act for the creation of the office of Governor General who has been vested with general executive authority. The reason behind this is obviously the belief that the Governor General would continually be appointed by the Queen, acting on the advice of the British Colonial Secretary. And this omission was never rectified in all the amendments to the BNA Act, which in effect, remains that the Governor General is still appointed by the Queen till today, albeit on the advice of Canadian ministers.
3. Responsible (cabinet) government: this was practiced by the colonies before confederation and the framers of the BNA Act intended the system to apply also to the new federal government.

However, this was omitted in the BNA Act hence no mention was made of the Prime Minister, the cabinet, or that a cabinet will only be formed by the party which has majority in the House of Commons. Also, the composition of the actual executive authority and its relationship to the legislative authority remained unwritten conventions just as in United Kingdom, even till date.

4. The Supreme Court of Canada (SCC): although authority for the creation of the SCC, modeled after the US, is contained in s. 101 of the BNA Act, no such court was actually established by the Act. This was simply because the framers of the BNA Act were comfortable having the Judicial Committee of the Privy Council (JCPC) in England (which was not even mentioned anywhere in the BNA Act too) as the final appellate court. This gap ultimately resulted in the fact that the SCC was established by only a federal statute in 1875 and final appeals to the JCPC only stopped in 1949. So, till date, the existence, composition and jurisdiction of the SCC only depend on a federal statute – i.e., the Supreme Court Act.
5. Bill of Rights – unlike the American model, the framers also omitted a bill of rights in the BNA Act and left the protection of Canadian civil liberties to the moderation of their legislatures and the common law, just as it applies in the United Kingdom. Thus, when Canada adopted the Bill of Rights in 1960, it was enacted merely as a federal statute and only applied to the federal government. It was not until the Constitution Act was promulgated in 1982 that a bill of rights was added to Canada's constitutional law and named the Canadian Charter of Rights and Freedoms. It became entrenched (meaning it can only be altered by constitutional amendment procedures) in the constitution, and made applicable to provincial and federal laws.

b. The Constitution Act, 1982

The Canada Act, 1982 was promulgated by the UK Parliament, and Schedule B to that Act contained the Constitution Act, 1982, which in turn contains the Charter of Rights. The major changes brought about by this Act are:

- a domestic amending formula for the constitution was included;
- authority of UK Parliament to make laws for Canada was terminated;
- the Charter of Rights was adopted,
- it changed the name of the BNA Act to the Constitution Act, 1867.
- it provides for the first time a definition of the phrase, "Constitution of Canada".

However, the Canada Act, 1982 or the Constitution Act, 1982 were not technically an amendment or really a codification of existing Canada's constitutional law. They were merely two more self-sufficient statutes that add to the variety of sources of Canada's constitutional law.

c. Definition of the Constitution of Canada

Section 52((2) of the Constitution Act, 1982 defines the 'Constitution of Canada' as follows:

> 52 (2) The Constitution of Canada includes
>
> ***a)*** the Canada Act 1982, including this Act;
>
> ***b)*** the Acts and orders referred to in the schedules, and
>
> ***c)*** any amendment to any Act or order referred to in paragraph (a) or (b).

From the above definition, therefore, the following 3 categories of instruments all form components of the Canadian Constitution respectively:

a. Canada Act, 1982 which includes the Constitution Act, 1982 as Schedule B,
b. a list of 30 Acts and Orders which are included in the Schedule to the Constitution Act, 1982. This list includes the Constitution Act, 1867 and its amendments, the orders in council and statutes which admitted or created new provinces or which altered boundaries, and the Statute of Westminster.
c. the amendments which may in future be made to any of the first two categories above

And as stated earlier, the Charter of Rights is part of the Constitution Act, 1982 because it is Part 1 of that Act which in turn is Schedule B of the Canada Act, 1982, named in s. 52(2) above.

Generally, under Canadian statutes, the use of the word "means" is taken to indicate that a definition is exhaustive. But when the word "includes" is used in a definition, it indicates that the definition is not exhaustive. Therefore, the use of the word "includes" in the definition of the Constitution in s. 52(2) above indicates that the list of the sources of the Constitution of Canada is not exhaustive. This view finds support in the case of **New Brunswick Broadcasting Co. v. Nova Scotia (1993)** where the SCC held that the definition of the Constitution of Canada in s. 52(2) is not exhaustive. As a result, the court held that the unwritten doctrine of parliamentary privilege should be included in the definition, even if s. 52(2) did not specifically mention it. More so, preamble to Constitution Act, 1867 states that the constitution is to be 'similar in principle to that of the United Kingdom'.

Although many important instruments were omitted from the list of 30 instruments in s. 52(2), the argument in favor of a non-exhaustive view of the section is that it is intended to catch future constitutional amendments that are missed in paragraph (c) of (2). However, what the SCC judgment suggests is that the definition of the Constitution of Canada is capable of been judicially expanded in the future beyond the 30 instruments in the schedule and this renders uncertain the extent of the constitution.

One of the important statutes that were omitted from the schedule to the Constitution Act, 1982 is the Supreme Court Act. As indicated above, there was no provision in the Constitution Act, 1867 for the establishment of the Supreme Court of Canada. However, s. 41(d) of the Constitution Act, 1982 listed the composition of the SCC as one of the items that can only be amended through the "seven-fifty procedure". The test of this provision arose in the **Supreme Court Reference (2014)** case where the federal Parliament proposed a small change in the composition of the court. The SCC held that the implication to be drawn from the reference in the Constitution Act, 1982 to the SCC was that the provision dealing with the composition of the SCC should be treated as part of the Constitution of Canada which requires the unanimity procedure for its amendment. Therefore, Parliament alone could not change the composition. The effect here is that the provisions of the Supreme Court Act regarding composition and some other essential features of the Court have now been added to the Constitution of Canada.

Another instrument not included in the schedule to the Constitution Act, 1982 is the Act of Settlement, 1701 which settled the rules of succession to the English throne and forbade any Roman Catholic or a person married to a Roman Catholic from succeeding to the Crown of England. In 2003, a Canadian challenge was brought against this Act in **O'Donohue v. The Queen** on the ground that the Act discriminated on the basis of religion given the guarantee of equality under s. 15 of the Charter of Rights. In striking out the application, the court, like in the *New Brunswick case*, also made reference to the preamble of the Constitution Act, 1867 which emphasized a federal union "under the Crown of the United Kingdom". The court held that this requires that the rules of succession must be the same as those of Great Britain. And that if the court were to use the Charter of Rights to make a unilateral change to the rules of succession, it would amount to making a fundamental change to the office of the Queen without going through the procedure of a constitutional amendment.

The Supremacy Clause and Entrenchment Clause

What then is the legal significance of the definition of the Constitution of Canada? The definition is needed to give supremacy and priority to the Constitution of Canada if and where it is inconsistent with the provisions of other laws. S. 52(1) is the supremacy clause and it states that the "Constitution of Canada is 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".

Similarly, subsection (3) is the entrenchment cause which provides that amendments "to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada". The effect of this clause is to entrench the Constitution of Canada so that it cannot be amended by ordinary legislative actions but only by the amending procedures stipulated in Part V of the Constitution Act, 1982.

d. Imperial Statutes

In addition to the Constitution Act, 1867 and the Constitution Act, 1982 (both of which are also imperial statutes anyway), another source of Canadian constitutional law include the 17 other imperial statutes (which are mostly amendments to the Constitution Act, 1867), and 4 orders in council (made under s. 146 of the Constitution Act, 1867 and which admitted British Columbia and Prince Edward Island as part of Canada).

The difference between the imperial statutes that are part of the Constitution of Canada and those which are not, is that those that are part of the Constitution can only be amended according to constitutional provisions on amendment since they are part of the constitution. But those imperial statutes that are not part of the Constitution do not enjoy any special privilege or supremacy over other statutes of Parliament. Like any other laws, they can be amended by Parliament or repealed by the Parliament or provincial legislature that has authority over its subject matter.

e. Canadian Statutes

Eight Canadian statutes were enacted by the federal Parliament but have been included in the definition of the Constitution of Canada. Three of these statutes created the provinces of Alberta, Manitoba and Saskatchewan while the remaining five were amendments to the Constitution Act, 1867. Although these statutes were enacted in the ordinary way, their inclusion in the definition of

Constitution of Canada implies that they now enjoy supremacy over other laws and are entrenched; they can only be amended in accordance with the procedure stipulated by the Constitution.

Other statutes, similar to the Supreme Court Act, not included in the definition of the Constitution of Canada but which are constitutional in the sense that they establish or regulate some other important institutions, are the Canadian Bill of Rights (which purports to limit the powers of the federal Parliament), the statute creating the Federal Court of Canada, the statutes that establish the system of courts, the statutes that provide for elections into Legislature and regulate the proceedings of the Legislature, etc.

f. Parliamentary Privilege

The federal Parliament and the provincial legislatures all possess a set of powers and privileges that the courts have held are 'necessary to their capacity to function as legislative bodies'. These powers and rights are known collectively as 'parliamentary privilege'. For example, the SCC held in **New Brunswick Co. v. Nova Scotia (1993)** that the Nova Scotia legislative assembly has the power to ban the televising of its proceedings, because its powers to exclude strangers from the assembly was part of its parliamentary privilege.

Parliamentary privilege includes freedom of speech in debates, immunity from legal proceedings for things said in debates, right of members of parliament or legislative assemblies not to testify in court proceedings while Parliament or the legislature is in session, etc. See **Telezone v. Canada (2004)**.

However, the claim to parliamentary privilege must not fail the necessity test. In **Canada v. Vaid (2005)**, the chauffer to the Speaker of the House of Commons had complained that he was constructively dismissed on grounds that were contrary to the provisions of the Canadian Human Rights Act. The House objected on the ground that the regulation of employees was the House's internal affair, claiming that the decision of the House in this regard is not reviewable by any external body on the grounds of parliamentary privilege. The SCC rejected this claim on the ground that such a sweeping claim of parliamentary privilege failed the test of necessity. The court acknowledged that truly, decisions in respect of some employees of the House are not reviewable in order to protect the deliberative functions of the House and, therefore, are covered by parliamentary privilege. However, exclusive and unreviewable jurisdiction over all House employees was not necessary for the functioning of the House as a deliberative body. Some category of employees would include the claimant, or those who staffed the library, the parking and traffic control, repair

and maintenance, and those who performed manifold functions that were only indirectly connected to the legislative proceedings in the House.

Note that parliamentary privilege could be regarded as a branch of the common law because it is not contained in any statute or other written law. Secondly, it is the courts who determine the existence and the extent of such parliamentary privilege. However, it is different from royal prerogative and other common law according to the SCC in *New Brunswick Broadcasting case*, in the following ways:

i. Parliamentary privilege is part of the Constitution of Canada.

ii. Parliamentary privilege has immunity from the Charter. So, the powers authorized by privilege are not subject to the Charter challenge. On the contrary, all other common law powers must be exercised in accordance with the provision of the Charter of Rights.

Please note too that parliamentary privilege could be legislated or inherent. For example, it is inherent in the provincial legislature, while in the Parliament it is already legislated, by virtue of the power conferred under s. 18 of the Constitution Act, 1867 to enact laws defining the privileges of the Senate and House of Commons. This the Parliament did by enacting a law which defined its powers and privileges as being those possessed by the House of Commons in the UK in 1867. The federal privileges are therefore ascertainable by looking at the law and custom of the House of Commons at Westminster. But whether inherent or legislated, parliamentary privilege is exempt from the Charter.