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## UNIT 2    CONSTITUTIONALISM BNA ACT OF 1867, CONSTITUTIONAL ACT OF 1982, CHARTER OF RIGHTS AND FREEDOMS

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### 2.1 INTRODUCTION

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Canada is an independent, self-governing democracy. Canada is ruled by the principles of Constitutionalism which means the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power. As Dicey points out, it also means equality before the law or the equal subjection of all classes to the ordinary law of the land. Constitutional rule forms the cornerstone of liberal democracy. It means regulating the state's power over its citizens. Another role of Constitution also is to set the structure of government. Canada being a liberal democracy is governed by the principle of rule of law. Its form of government is a constitutional monarchy. It is a Federal State and Parliamentary government with two **official languages** and two systems of law: civil law and common law. The present Constitution of Canada was initially a British statute, the British North America Act 1867 (BNA Act), and until 1982, its amendment required action by the British Parliament. Since 1982, when the Constitution was patriated – that is. when Canadians obtained the right to amend the Constitution in Canada – this founding statute has been known as the Constitution Act 1867. This Act of 1867 was the **culmination** of British legislations enacted from time to time for the governance of British North American colonies. It has also been developing further through processes of amendments, judicial decisions and establishment of some conventions.

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## 2.2 EVOLUTION OF THE CONSTITUTION

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Like many other Constitutions, Canada's Constitution is not a single document. It is made up of the Statutes enacted by the British and Canadian Parliaments as well as legislation, judicial decisions and agreements between the federal and provincial governments. It also includes unwritten elements such as British Constitutional Conventions, established customs, traditions and precedents. The Constitution's basic written foundations are the Constitution Act 1867, which created the Federation and the Constitution Act 1982, which entrenched a Canadian Charter of Rights and Freedoms and procedures for constitutional amendment. These documents, however, are not creation of particular years of enactment. They rather reflect the culmination of long processes of evolution.

### 2.2.1 Developments Upto 1867

As per Government to Canada Privy Council records formal constitutional development in Canada began with the Edict creating the Sovereign Council of Quebec in 1663, whereby the French established New France as a royal province and made provision for civil government. Following a transfer of Canada to British rule, the Royal proclamation of 1763 established, among other things, certain principles respecting civil government in Quebec and relations with aboriginal peoples. Canada was to be ruled by a Governor General on behalf of the King of Great Britain.

In the years immediately preceding the American Revolution, the British government became increasingly engaged in the question of how to maintain the loyalty of its new Canadian subjects. Mindful of the significant cultural differences between Quebec and the rest of British North America, the Westminster Parliament passed the Quebec Act, 1774, authorising the use of French civil law and permitting the free exercise of the Roman Catholic religion. The act is the original legal source of Quebec's subsequent position affirming its continuing recognition as a distinct society in North America.

Following the American revolution and the influx of many Loyalists, the Constitution Act, 1791 divided Quebec into two provinces, Upper and Lower Canada, each with an elected assembly. The elected assemblies permitted Canadians to enjoy representative government for the first time and to control the imposition of new taxes. However, the executive branch of government was not accountable for its policies, programmes, and activities to the elected assembly. He received instructions from the colonial office in London. This lack of accountability led in time to strong dissatisfaction among the elected leaders.

In 1837-38, there were revolts in the Upper and Lower Canada reflecting on the one hand English-French differences and on the other, demands for a system of responsible government. To deal with the situation, the constitutional government was suspended, and Lord Durham was sent to Canada to enquire into the situation and make recommendations. The Durham Report made two key recommendations:

- 1) That Upper and Lower Canada be joined in a single legislative union, the use of French be proscribed, and the assimilation of the Francophone population by the Anglophone population be fostered;
- 2) That responsible government be established.

Consequent to Durham report, the Union Act of 1840 allowed the Governor General of the Upper and Lower Canada to proclaim that they be joined under the name of the province of Canada. The Act provided for an institutional structure similar to that of all of the British North American colonies namely, a governor, an executive council, an appointed legislative council and an elected assembly. The original assembly had forty-two members from Canada East and Canada West, being increased to sixty five each in 1853. Although Upper and Lower Canada had been legally abolished, continuing recognition had to be given to the fact that culturally and sociologically the old provinces still remained within the new institutional structure. Although the Union Act had not provided for responsible government, this objective was achieved during the next 7 years under Canada's "unwritten" constitution – the traditions, customs, practices and legislation of greater or lesser importance.

## 2.2.2 Towards Confederation

With the establishment of some form of Parliamentary government, but not stability in the region, there were both aspirations and needs for change.

Ronald I. Cheffins suggests that series of economic, psychological, social and political factors began to force residents of the British North American colonies to consider some form of larger political unit. The presence of the United States has always been a factor with respect to Canada. Just South of this handful of sparsely populated and geographically very separated British colonies was a rapidly expanding nation increasingly bent on economic and territorial expansion. The thin red line of British control from the Province of Canada to the most remote colony of Vancouver Island established in 1849 was maintained essentially by ~~granting~~ control of the intervening territory to the Hudson's Bay Company. This land would undoubtedly be increasingly coveted by the rapid westward movement of the American settlers.

The British North American colonies had a myriad of other problems. The repeal of the British Corn Laws in 1846 and the resultant move towards free trade undermined the protected market in Britain for Canadian goods. Britain was pulling back from the idea of an Imperial economic union and was moving in the direction of free trade. All of the British colonies had to seek other outlets for their products rather than merely relying on Great Britain. It was, therefore, logical to turn towards the United States. As a result, in 1854, a reciprocity treaty was signed between the United States and British North America. Just prior to Confederation, however, the United States withdrew from the reciprocity treaty thus emphasising the need for a wider British North American market to replace the already lost trade with the United Kingdom. There is no doubt that the Province of Canada, with its slowly developing industrial base, felt that it needed some kind of hinterland as a market for its goods. The Province of Canada was looking both to the East and to the West. By the late 1850s and early 1860s, the feeling was growing, that the western regions of what is now Canada would soon have to be settled or they would be lost to the United States.

Between 1864 and 1867, political leaders from the province of Canada and the Atlantic provinces met in Charlottetown, Quebec city and finally in London to examine the possibility of creating a new federal union and to propose the terms on which the new federation would be based. On October 10, 1864 assembled at Quebec thirty three representatives, twelve from Canada, seven each from New Brunswick and Prince Edward Islands, five

from Nova Scotia and two from New Foundland. The fundamental principle earlier accepted at Charlottetown was that the new union should be a federation. In less than **18** days, seventy-two resolutions were agreed on. These resolutions were approved by the Parliament of Canada, but met considerable opposition in the Maritime Provinces. This led to the convening of a conference by the British government in London consisting of the representatives of Nova Scotia, New Brunswick and Canada. Ultimately, the terms for the creation of the new federation were agreed upon. Thus, the stage was set for the British North America Act **1867** (BNA Act). This Act was an act of the British Parliament passed on March 29, **1867** and which was proclaimed on May 22 and came into effect on July 1, **1867**. It created the Dominion of Canada and set out its constitution by laying out the structure of the government of Canada and listing the division of powers between the federal government and the provincial governments.

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## **2.3 BRITISH NORTH AMERICA ACT 1867: THE CONSTITUTION ACT**

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The BNA Act amalgamated the individual provinces into one country under a federal system. It set up a general government charged with matters of common interest to the whole country and local governments for each of the provinces charged with the control of local matters in their respective sections. Four provinces: Ontario, Quebec, Nova Scotia and New Brunswick, came together at the passing of the BNA Act in **1867**. The queen was given power, on the advice of the Privy Council and on the address from Parliament of Canada and legislatures of New Foundland, Prince Edward Island and British Columbia to admit the remaining colonies or any of them into the Dominion and with the same advice she was given power to admit Rupert's Land and North Western Territory. Under this process, the people of the Red River, Manitoba became part of Canada in 1870; British Columbian **1871**; and Prince Edward Island in **1873**. Thus Canada by **1873** consisted of these seven provinces, together with Rupert's Land and the Northwest Territories. By **1905** the provinces of Saskatchewan and Alberta were created, and in 1949 New Foundland joined in as the tenth province of Canada.

The BNA Act, thus is the instrument that created the Dominion of Canada and provided for its structure of government. The Act included sections on the following:

- i) The formation of Canada, including the date and the names of the four original provinces.
- ii) Executive power, with reference to the Governor General and Privy Council, but no mention of a cabinet or a Prime Minister.
- iii) Legislative power, including the creation, constitution and powers of the Senate and the House of Commons. The House of Commons had representation by population with Quebec as the pivotal province. It would have same **65** seats it had in the United Province of Canada and the others would have more or less depending on their relative population.
- iv) Provincial constitutions, with definitions of their executive and legislative powers.
- v) Distribution of powers, between the provinces and the federal government.
- vi) Judicature, the legal system.

It may also be pointed out that while the 1867 agreement created a highly centralised federation, parts of the agreement specifically recognised Quebec's distinctiveness in the tradition of the 1774 Quebec Act – including the official status of French in Quebec, and the protection of the province's civil law. It recognised Quebec's civil code as distinct from the English common law in effect in other provinces, and provided for the use of English and French in Parliament and the Quebec, legislature and courts, and for publicity funded separate schools for protestant and catholic minorities in Quebec and Ontario (and later in Manitoba, Saskatchewan and Alberta).

### 2.3.1 Towards Patriation

As mentioned above the British North America Act was an act of the British Parliament and was amendable in the same manner as all other British Acts and Statutes. Of course this formal authority of the British parliament was ruled by conventions of the Constitution which made the British parliament essentially an instrument of Canadian will that is amending on request from Canada. Seen in this context, the BNA Act can also be termed as the first step towards independence of Canada. Nevertheless, the fact is that Canada was a dominion of Britain, with formal powers to amend the Constitution with the British parliament and the Technical Committee of the Privy Council of Great Britain as the court of final appeal for Canada. Canada gradually was allowed to assume more autonomy over its own affairs. Tracing the history of repatriation Sir Ninian Stephen points out that in 1926, the Balfour Report signaled the impending advent of the British Commonwealth of Nations and with it, Canada's equal and independent status. Accordingly, beginning in 1927, discussions were held about patriating Canada's Constitution – transferring the amending authority from the British Parliament to Canada – but the provinces and the federal government could not agree on constitutional amending procedures. Consequently, when Canada officially ceased to be a British colony with passage of the Statute of Westminster in 1931, the authority to amend the Constitution remained with the British Parliament. In 1949, the Canadian Parliament was given a limited amending power in areas that did not concern provincial jurisdiction.

Discussions and demands for patriation, however, continued. Prior to 1968, discussions on the amending formula were always held on their own merits – in 1927, 1931, 1935-36, 1950, 1960-61, and 1964 – without being linked to other questions of substantive changes. Ultimately, these discussions all ended in failure.

In 1968, the Prime Minister and all the Premiers agreed to launch, for the first time in Canada's history, a broad constitutional renewal process that included not only patriation and an amending formula, but also changes to national institutions and the distribution of powers, as well as the entrenchment of rights in the Constitution. Agreement in principle was reached on a limited set of proposals at the Victoria Conference in 1971, but ultimately they were not adopted, and the Constitution remained a British statute. A more limited exercise, conducted in 1975-76, was aimed at patriation with an amending formula, without pursuing substantive changes to the Constitution at the same time. However, this also ended in failure.

Although Quebec has been calling for increased provincial powers for years, the election of the Parti Quebecois in 1976, on a platform calling for a dramatic distancing of Quebec from the rest of the Canadian federation, made constitutional renewal seem all the more pressing. The federal government responded by publishing its vision of constitutional

renewal in *A Time for Action* in June 1978. Between October 1978 and February 1979, governments worked intensively on a 12-item agenda for constitutional change, but the February Conference of first Ministers ended in failure to reach agreement on any change.

In late 1979, the Parti Quebecois government released a paper on Canadian federalism that called for a radical recasting of the Quebec-Canada relationship. The paper did not advocate Quebec's complete institutional withdrawal from Canada, but rather called for the creation of a very loose "partnership" between Quebec and Ottawa, called "sovereignty-association." A referendum to seek a mandate to negotiate such an arrangement was set for May 20, 1980. On May 14, the Prime Minister of Canada promised Quebecers a "renewed federalism" if they voted "No" in the impending referendum.

The referendum and the pledge of the Prime Minister and the majority of the other Premiers during the referendum campaign heralded the start of a new, vigorous effort to patriate the Constitution. The summer witnessed a series of federal-provincial ministerial meetings, which culminated in the First Ministers' Conference of September 1980. The First Ministers, however, failed to reach unanimous agreement on any single item. Consequently, on October 6, 1980, the federal government indicated that it intended to patriate the Constitution unilaterally, without the consent of the provincial premiers, by introducing a joint Address to the Queen in the House of Commons.

Eight of the provinces immediately protested this unilateral action. Manitoba, Quebec, and Newfoundland referred the matter to their courts and the matter was ultimately referred to the Supreme Court of Canada by the federal government. On September 28, 1981, the Supreme Court of Canada rendered its decision that a "unilateral" patriation of the Constitution was legal. But it added that a "substantial degree" of provincial consent was required by constitutional convention before the federal provincial relationship could be fundamentally altered by a request to Britain for constitutional amendment.

In the wake of the Court's decision, the federal government convened another First Ministers' conference on November 2, 1981. Here, Ottawa and the provinces, with the exception of Quebec, ultimately agreed on a package of constitutional reforms, including the patriation of the Constitution with an amending formula and a charter of rights; a commitment of equalisation; the strengthening of provincial control over natural resources; and the recognition and affirmation of the existing rights of Canada's aboriginal peoples.

The agreement represented a compromise between nine provinces and the federal government. These provinces accepted Ottawa's proposal for a Charter of Rights in exchange for both the right to override certain portions of the Charter by means of the notwithstanding clause, and the inclusion of an amending formula devised by the provinces. However, the Quebec government continued to dissent, arguing that Quebec's claims had been ignored, that a deal had been reached without Quebec's knowledge, and that the Prime Minister had reneged on his promise of "renewed federalism". On December 1, 1981, by resolution, the National Assembly rejected the patriation package. Indeed, throughout Quebec, the patriation experience left many feeling wounded and isolated. The Constitution was patriated on 17 April 1982 without the consent of the Quebec legislature but the Supreme Court of Canada subsequently ruled that the patriation process had respected Canada's laws and conventions and that the Constitution, including the Constitution Act 1982, was in force throughout Canada.

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## 2.4 NATURE OF THE CONSTITUTION

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As mentioned above with the passage of the Constitution Act 1982, by the Parliament of Britain, the BNA Act 1867 became the Constitution Act 1867. The constitution Act 1982 provided for a domestic amending process, a Charter of rights, an additional subsection with respect to the existing division of powers, a provision that there be a conference on the rights of the aboriginal people of Canada, and provisions with respect to equalisation and regional disparities. The Act, however, did not, in any substantial way, change the content of the many British statutes relating to Canada.

The preamble to the Constitution spoke of a country "federally united into one Dominion under the crown of the United Kingdom of Great Britain and Ireland, with a constitution similar in Principle to that of the United Kingdom. As Ronald I. Cheffins points out, three important principles are contained in this guiding phrase, namely the desire for a federal union, a monarchy and essentially a parliamentary system similar to that of United Kingdom. Arising out of these basic principles the constitution can be said to provide following essential characteristics for Canadian polity.

### 2.4.1 Liberal Democracy

Having expressed the desire to have a political system similar to that of Britain, the constitutional provisions, Judicial interpretations and conventions have established in Canada a liberal parliamentary democratic system. Thus there exists supremacy of the Constitution, multi-party system, universal franchise, fundamental freedoms, and independence of judiciary. Having accepted the Monarch of United Kingdom as Constitutional head, Canada is not a Republic. Nevertheless it is a democratic and secular state and provides equality of opportunity to all.

### 2.4.2 A Constitutional Monarchy

Canada is a constitutional monarchy. Since 1534, when the King of France claimed possession of what is now Canada, the history of that country has been marked by the reigns of an uninterrupted succession of monarchs, both French and British, who have had a significant influence on the country's development.

Under the Crown, Canada developed first as a colony of two empires, originally the French and subsequently the British, then as an independent dominion, and now as an entirely sovereign nation. The Crown occupies a central place in Canada's Parliament and Canada's democracy, founded on the rule of law and respect for rights and freedoms. The Crown embodies the continuity of the state and is the underlying principle of its institutional unity. The Crown is fused into all three branches of government. The Prime Minister, as head of the Executive, is the Governor General's principal advisor; the Crown is also a constituent element of Parliament, with the Senate and the House of Commons; and finally, all decisions made by the courts are given in the Crown's name.

The most important characteristic of Canada's constitutional monarchy has been its ability to adapt to changing conditions over the course of its evolution from colony to nation.

### 2.4.3 Rule of Law

The 'rule of law' is mentioned in the preamble to the *Constitution Act*, 1982. It refers to no one single idea; but to a cluster of ideas. It is a term often associated with the English legal scholar Albert Venn Dicey who described the 'rule of law' as a paramount characteristic of the English Constitution. It was comprised of three "kindered conceptions": (1) that government must follow the law that it makes; (2) that no one is exempt from the operation of the law – that it applies equally to all; and (3) that general rights emerge out of particular cases decided by the courts. According to Dicey, the last conception would provide a role for the judiciary in stemming what was called "collectivist" legislation. The English judiciary could monitor legislative activity "to ensure that legal change was slow paced and conservative."

The Supreme Court of Canada in the *Reference re Secession of Quebec* ([1998] 2 S.C.R. 217) identified the 'rule of law' as one of the "underlying principles" upon which Canada's Constitution is founded. The 'rule of law', according to the Court, guarantees the supremacy of law over persons and government, and that the exercise of public power requires a source in some legal rule. At its most basic level, the Court wrote, the rule of law provides a shield for individuals from "arbitrary state action". The Court went even further, suggesting that the 'rule of law', as a foundational principle of constitutional law, "may in certain circumstances give rise to substantive legal obligations." This suggests that a principle implicit in Canada's constitutional order can override otherwise constitutionally valid acts of Parliament or the legislatures – a troubling idea for a constitutional democracy. Others have argued that the 'rule of law' is a constitutional principle which limits arbitrary government action.

### 2.4.4 Parliamentary System

Although Canada's written constitution is silent about many of the details, the constitutional practice has defined Canadian government as Parliamentary. The roots of Canada's parliamentary system lie in Britain. In keeping with traditions handed down by the British Parliament, the Canadian Parliament is composed of the Queen (who is represented in Canada by the Governor General), the Senate and the House of Commons.

The Senate, also called the Upper House, is patterned after the British House of Lords. Its 104 members are appointed, not elected, and are divided essentially among Canada's four main regions of Ontario, Quebec, the West and the Atlantic Provinces. The Senate has the same powers as the House of Commons, with a few exceptions.

The House of Commons is the major law-making body. It has 295 members, one from each of the 295 constituencies or electoral districts. The Canadian Constitution requires the election of a new House of Commons at least every five years. As in the United Kingdom and the United States, in Canada also voters simply elect a single member for their electoral constituency, in one round of ballot.

Strictly speaking, the Prime Minister and Cabinet are the advisers of the monarch. De facto power, however, lies with the Cabinet, and the head of state (the Governor General) acts on its advice. Cabinet formulates government policy and is responsible to the House of Commons. The Government of Canada, headed by some 25 ministers, performs its duties through the intermediary of the federal departments, special boards, commissions and state-owned corporations.



Political parties are the mainspring of the Canadian Parliamentary system and the government is formed by the leader of the political party/coalition of parties able to command the support of the majority in the House of Commons. The leader becomes the Prime Minister and selects ministers to form his/her government usually from party colleagues in Parliament. The ministers i.e. the members of the cabinet are collectively responsible for formulating and implementing policies for governing the country. In order to remain in office, the cabinet must be able to commend the support of a majority of the members of the House of Commons as an issue of confidence.

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## 2.5 CHARTER OF RIGHTS AND FREEDOMS

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The BNA Act 1867, did not include a bill of rights because it was assumed that the unwritten conventions inherited from Britain provided effective protection for civil liberties. Canada entrenched its charter of rights more than a century after the country was founded. Parliament passed a Bill of Rights in 1961, but it applied only to federal institutions and did not have constitutional weight. The constitution Act of 1982, through its first thirty-four sections provided in the Constitution the Canadian Charter of Rights and Freedoms. The Charter begins with a cryptic revival that "Canada is founded upon principles that recognise the supremacy of God and the rule of law."

The Charter of Rights is divided into specific heads and each head enumerates the Rights and Freedoms relevant to it. These divisions include: Fundamental Freedoms, Democratic Rights, Mobility Rights, Legal rights, Equality Rights, Official Language Rights, Minority Language Education Rights as also protection of the Aboriginal Rights.

The Canadian Charter of Rights and Freedoms under the heading *Fundamental Freedoms* guarantees ~~some~~ of the same rights, called "fundamental freedoms," that are protected in the U.S. Bill of rights: freedom of conscience and religion; freedom of thought, belief, opinion and expression, including freedom of the press; freedom of peaceful assembly; and freedom of association. It guarantees legal rights, such as the presumption of innocence; the right to life, liberty, and security of the person; and security against unreasonable search and seizure. The first section of the Charter states that its guarantees are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society," a qualification not found in the U.S. Constitution.

As mentioned above the Charter also guarantees democratic rights such as the right to vote; mobility rights. such as the right to take up residence in any province; and equal protection under the law for all Canadians (while specifically permitting affirmative action programmes). It includes language provisions that are particularly Canadian: it establishes English and French as official languages and guarantees certain minority language education rights. The Constitution also preserves the rights and privileges acquired or enjoyed either before or after the commencement of the Charter of Rights and Freedoms with respect to any language that is ~~not~~ French or English. Under Minority Language Education Rights the Constitution provides that a Canadian citizen educated in Canada in English may send his or her children to a school in English in Quebec. In addition, a Canadian citizen, who has a child being educated in English in Canada may continue to send any of his or her children to a school in English if she or he moves to Quebec. The above provisions apply to the French minority in other ~~nine~~ provinces. In addition, the other ~~nine~~ provisions have agreed that any Canadian citizen whose mother tongue is French will be entitled to send his or ~~her~~ children to a school in French.

A feature of the Charter according to Sir Ninian Stephen is the two general qualifications made to the applicability of its otherwise far-reaching provisions. The first makes the rights and freedoms which the Charter guarantees subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Thus, no statutory denial of a right or freedom will contravene the Charter if it results in no more than a reasonable limitation such as can be demonstrated to be justified in such a society. What is reasonable and what can be so justified must necessarily remain for the courts to determine. The second and more specific qualification permits the Federal or any Provincial legislature to declare in any statute that that statute shall operate notwithstanding its inconsistency with the fundamental freedoms and legal and equality rights guaranteed by the Charter. Such a declaration only operates for five years, but may be renewed for successive periods of five years. These provisions means that the rights are not absolute. The state can place necessary restrictions on them, though limited and demonstrably just.

The Freedoms and Rights provided by the Constitution are enforceable by the Courts. Section 24 provides that anyone whose rights or freedoms, as guaranteed by this charter, have been infringed may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

The Charter of Rights at the same time protects rights of aboriginal people and does not allow general rights to be construed so as to abrogate or derogate from any aboriginal treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada. It is further provided that this Charter shall be interpreted in a manner consistept with the preservation and enhancement of the multicultural heritage of Canadians.

Inclusion of the Charter of the Constitution marked a departure from the principle of parliamentarysupremacy and an expansion of the role of the courts as federal and provincial laws must pow conform to the Charter as well as to the division of powers. However, the Charter includes a "notwithstanding" clause that permits Parliament or a provincial legislature to pass legislation which violates some of these rights by inserting in the law a declaration that it shall operate "notwithstanding" a certain provision of the Charter, for up to five years. This clause has been invoked by the Quebec and Saskatchewan legislatures.

Thus the Charter of Rights, included in the Constitution, through the Constitution Act – 1982 provides for Fundamental Freedoms, Democratic Rights, Mobility Rights, Legal Rights, Equality Rights, Minority Language, Educational Rights and Rights of aboriginal people. These are subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

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## 2.6 FEDERALISM

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Another important feature of Canada's Constitution is Federalism. Canada was the first country to ostablish itself as a Parliamentary federation i.e. a federal system in which sovereignty is divided between the central and regional governments. both constituted according to the principles of British Parliamentary democracy. In terms of division of powers. Canada is also an example of "dual" or "divided" federalism rather than shared or integrated federalism. The founders of Canada were determined to create a strong central government, while at the same time assigning substantive powers to provincial legislatures that would enable them to maintain their identity, culture and institutions. In terms of centralisation the 1867 Constitution provided that:

- The lieutenant-governors of the provinces were named and paid by the federal government and could, on federal instruction, reserve any provincial bill for approval or rejection by the Governor General in council;
- The Governor General in council could disallow any provincial law within a year of receiving a copy of it;
- The federal government had unlimited taxing powers, whereas the provinces were limited to direct taxes within the province;
- Parliament could declare any local work or undertaking, although wholly located within a province, to be for the general advantage of Canada or two or more provinces and, therefore, under the legislative jurisdiction of Parliament;
- Section 91 of the Constitution gave the federal government more exclusive powers than were held in the already existing federations of the United States and Switzerland;
- The federal government enjoyed residual plenary powers through its general power over "peace, order and good government", in contrast to the American and, later, Australian models, where residual powers were allocated to the state.

Federal authority was further strengthened by the fact that the Senators were appointed for life by the Governor General in council, whereas in 1867 American senators were indirectly elected by the state legislatures to represent state interests within the federal legislature. Furthermore, the Constitution gave authority to Parliament to establish a general court of appeal for Canada: the Supreme Court of Canada, created by Parliament in 1875, is not the final referee of constitutional disputes between the federal and provincial governments; moreover, its judges are named by the federal government.

### 2.6.1 Developments in Federalism

The economic, social, cultural and political environment in which Canadian federalism operates has been changing enormously. Therefore Federalism in Canada, rather than a static structure, has been an evolving process. Richard Simeon traces the following process of development in this regard.

In the first few decades of Confederation, the federal government vigorously exercised its extensive powers over the provinces, including the powers of reservation and disallowance. But a powerful set of factors began to gather, and they would substantially erode federal dominance. First, the drawn out economic recession of the late 19<sup>th</sup> century sapped the new federal government's legitimacy. Second, strong provincial leaders emerged to challenge the federal dominance. The first interprovincial conference, organised by the premiers of Quebec and Ontario, Honore Meercier and Oliver Mowat, was convened in 1887, and mounted a strong attack on Ottawa. They articulated what came to be known as the 'compact theory' of Canadian federalism that sees the federal government largely as the creature of the provinces. Third, matters assuredly within provincial jurisdiction, such as hydroelectric power, mining, and the nascent welfare state became more important on the national agenda, further strengthening the provincial role. Fourth, judicial decisions began to chip away at federal powers. Its powers over trade and commerce were interpreted narrowly. Its power in international affairs was reduced by a decision that stated that while Ottawa has the power to negotiate treaties, their implementation must conform to the division of powers. Canadian scholars debate the relative significance of these influences; some focusing on the role of the courts; others on the evolution of the Canadian society

and economy. Both were important but it is interesting to note that the potentially draconian federal powers of disallowance and reservation remain in the constitution; but they have now become constitutional 'dead letters,' unlikely to be revived.

By the 1920s, the Canadian model had come to look more like a classical dualist system. Then came the great economic depression of the 1930s. Provinces alone simply could not manage the crisis; several were on the verge of bankruptcy. Only a strong federal government, many came to believe, could alleviate the crisis. The 'dead hand' of the existing constitution, and the activism of distant courts came under increased criticism. Harold Laski's conclusions about the 'obsolescence of federalism' in the age of modern capitalism resonated strongly among many Canadians. A Canadian version of the American New Deal failed to meet judicial approval. Then came, the World War II, during which the federal government assumed sweeping powers and fiscal control. These developments provoked a major debate on the adequacy of the Canadian assignment of powers in light of social and economic development, including the work of an important Royal Commission.

Following the war, Canada, like all other Western democracies, embarked on the construction of the Keynesian welfare state. Most of the constitutional responsibility for the primary building blocks of the welfare state lay in provincial hands – but at the time, only the federal government had the resources and the national viewpoint to bring it about. One response to this dilemma would have been to transfer major new responsibilities to the federal government. This was done with respect to unemployment insurance and pensions, through constitutional amendment. But provinces, led by wealthy Ontario, British Columbia, and Quebec, blocked any further transfer of responsibilities. Canada would develop the welfare state within the existing framework of powers. The key instrument was a federal power that is only implicit in the constitution – the 'spending power'. This means that Ottawa can transfer funds to provinces for actions within provincial jurisdiction, such as health and welfare, and that it can attach conditions – 'national standards' – to these funds. Expansion of the spending power in a wide variety of 'shared cost programmes' was the vehicle through which the de facto concurrency was greatly expanded, and Ottawa became deeply involved in social policy.

Through the 1950s and 1960s, the fastest growing areas of public lay in areas of primary provincial jurisdiction. Provincial spending and revenues grew at a faster rate than Ottawa's. In addition, new public concerns were rising – social regulation, gender equality and the environment. None of these are mentioned in the initial division of powers; but that division also provided a wide variety of regulatory, spending and taxing tools that governments at both levels could employ to become involved in the new public agenda.

By the 1970s, the world was changing again. The welfare state project was essentially complete: now debts, deficits and economic volatility were calling into question the expanded role of all governments. Moreover, a new set of issues had come to dominate the Canadian political agenda. Quebec's 'Quiet Revolution' generated intense pressure for decentralisation, and for a weakening of federal conditions on provincial programmes. The 'energy wars' of the 1970s generated severe regional conflicts with respect to jurisdiction over pricing, taxing, management and regulation of energy-related resources.

By the turn of the century, two contradictory sets of pressures were at work. On the one hand, the fiscal crisis of the state and the concomitant rise of neo-conservative ideas about limiting the role of government were leading to what might be called 'fiscally-induced

decentralisation,' best reflected in the dramatic reductions of federal transfers to the provinces and the adoption of a general Canada Health and Social Transfer (CHST) in the 1995 federal budget. On the other hand, many Canadian citizens were worried about the implications of these developments for progressive social policy generally, and about their consequences for 'national standards' in social policy that would apply equally to all Canadians. The intergovernmental response was the 1999 'Social Union Framework Agreement,' which attempted to set out broad national standards, and an intergovernmental consensus to achieve them collectively.

The evolution of the division of powers, in response to judicial decisions, the aspirations of governments and citizens, and the evolving public agenda has produced two strong orders of government of Canada, each endowed with broad authority to act. Today, however, in few areas do they act independently. Most contemporary policy issues cut across the jurisdictional boundaries originally defined in the Constitution. This has given rise to a dynamic in which the two orders are simultaneously highly *independent* of each other in jurisdictional terms but highly *interdependent* in fiscal and policy terms. The Canadian federalism, thus, is an example of accommodating ethnic and regional aspirations, capacity to move with times and maintenance of a Canadian identity.

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## 2.7 AMENDING FORMULA

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As already mentioned, the British North America Act was British statute and thus was amendable in the same manner as all other British statutes. Put in its simplest terms this meant passage through the House of Commons and the House of Lords and the granting of Royal Assent. This formal authority of the British Parliament, however, was tightly ruled by conventions of the Constitution which made the British Parliament essentially an instrument of Canadian will. These conventions required an initiative by the Canadian government, a joint resolution of the Senate and the House of Commons, and on matters involving the distribution of powers, the unanimous consent of the provinces.

When Prime Minister Trudeau introduced the package which was ultimately to become the Constitution Act, 1982, he included in it essentially the formula for amendment which had been specified in the Victoria Charter of 1971. The provinces had very serious doubts about this formula as they felt it was much too susceptible to federal manipulation. They accordingly set about the task of devising an amendment formula of their own, largely led in this regard by the province of Alberta, but in the later stages of draftsmanship obtaining support and advice from other provinces. Ultimately, Prime Minister Trudeau compromised by accepting the provincial amending formula and a provision for opting out of certain sections of the Charter of Rights in exchange for the binding imposition of the Charter of Rights on both the federal and provincial governments.

Part V refers to the process necessary to amend the "Constitution of Canada". What is meant by the Constitution of Canada? This phrase is often used in a very broad sense as including constitutional conventions, judicial decisions and important provincial and federal statutes dealing with electoral matters and the creation of courts. In the context of amendment, however, the words "Constitution of Canada" are used as a term of art. That is to say, they are used in a precisely defined way. Accordingly, it was necessary to place in the Constitution Act, 1982 a definition of the phrase the "Constitution of Canada."

Thus we see that the entire Constitution Act, 1982 is entrenched and accordingly no portion of it can be changed without the use of the amending formula. It needs also to be mentioned that because of paragraph 52(2)(b), all the Acts and orders referred to in the Schedule to the Act are entrenched.

Subsection 38(1) contains the basic amendment formula. Required for an amendment to the Constitution of Canada are resolutions of the Senate and of the House of commons and resolutions passed by the legislative assemblies of at least two-thirds of the provinces that have, according to the latest general census, fifty per cent of the population. Where the amendment derogates from the legislative rights and powers of a provincial legislature or government, then according to the terms of subsection 38(3), this amendment will not have effect in a province which, through a resolution of its legislative assembly, has expressed in clear terms its dissent with respect to the amendment. Thus if the transfer of an important legislative subject matter from the provincial legislature to the federal parliament was attempted, a dissenting province could, by its dissent, preclude the amendment from applying to that province. For example, if it was decided to transfer Workers' Compensation jurisdiction to the federal parliament and the province of Manitoba dissented, the result would be that the federal parliament would have jurisdiction over workers' compensation in every province but Manitoba.

It must be remembered however that by virtue of section 40 it is only when the transferred provincial power deals with education or "other cultural matters" that the province shall receive a reasonable compensation for the subject matter lost. Thus, in the example of Workers' Compensation, Manitoba would retain jurisdiction but would not receive any recognition in terms of federal provincial fiscal arrangements to sustain what would then be a distinct and extraordinary matter of provincial jurisdiction. Thus finance becomes an important factor working against what was often referred to as the "checkerboard effect."

Certain matters were regarded as being sufficiently important that no change should be made to them unless the unanimous agreement of all eleven legislatures (Parliament and ten provincial legislatures) was obtained. These matters are, respectively, in shortened form, the monarchy and its representatives at the provincial and federal level, the assurance that no province will have less members of the House of commons than it will have senators, the use of the English or the French language, the composition of the Supreme court of Canada, and finally the requirement that the amending formula cannot be changed except with the unanimous agreement of all eleven legislatures.

This requirement of unanimity is indeed ironic in that one of the main arguments advanced in favour of constitutional review was the inflexibility of a tradition that required unanimous federal and provincial consent before proceeding to the United Kingdom Parliament for an amendment to the British North America Act, 1867.

Amending the Canadian Constitution is a topic of great debate in Canada. There seems to be general agreement among provincial governments that some parts of the Constitution need to be amended to deal with long-standing demands from many provinces. There are demands by western provinces for a greater share of power at the federal level, and demands from Quebec for greater protection for its status as distinct society. Quebec, in particular, has not formally signed the Constitution Act of 1982, although this is largely symbolic and does not affect the legal applicability of the Act.

Nevertheless, agreement on details of amendments has been elusive. Further complicating attempts to amend the Constitution is the complexity of the procedure for doing so, which in most cases requires approval from both the federal parliament and two-thirds of the provincial governments, and in some cases require the approval of all ten provincial governments.

In 1987 Meech Lake Accord, a package of constitutional amendments intended to deal with long-standing concerns of western provinces and demands from the province of Quebec, failed in 1990 when it was not ratified by the ten provincial governments. The last attempt at a comprehensive package of constitutional amendments was the Charlottetown Accord, which arose out of the failure of the Meech Lake Accord. The Charlottetown Accord was defeated in a national referendum in 1992.

There have been several relatively minor amendments to the Constitution since it was repatriated in 1982 including amendments dealing with provincial schooling in Newfoundland and Quebec and the changing the name of Newfoundland to Newfoundland and Labrador.

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## 2.8 SUMMARY

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Canada is a liberal democratic country governed through the principles of Constitutionalism, that is limited and responsible government and rule of law. As a former member of the British Empire, Canada has been widely influenced by the English law. The Constitution Act of 1867 is the first Constitution of the Canadian Federal State. It was adopted by the Parliament of Westminster after the proposition of three British colonies (United Canada, Nova Scotia and New-Brunswick), and it was the first step towards Canada's independence. After confederation Canada gradually assumed more autonomy over its own affairs. It officially ceased to be a British colony with the passage of the Statute of Westminster in 1931. Since the BNA Act of 1867 was enacted by the Parliament of England, power to make amendments in that also lay with it. It was only in 1982 that by an Act, the Parliament of England endowed that power to the Parliament of Canada. It is therefore said that the constitution of Canada was patriated in 1982. Also the BNA Act 1867 did not contain a bill of rights, this was also included by the Act of 1982. With the amendments of 1982 the BNA Act 1867 has been renamed as The Constitution Act 1867. The Constitution of Canada establishes in Canada a Federal system, parliamentary form of government, a liberal democracy and guarantees rights and freedoms to the citizens. The method of amending the Constitution is reasonably difficult and complex as it takes care of apprehensions of provinces as also ethnic differences. In general, however, the Constitution of Canada has remained a dynamic instrument evolving and developing along with the needs of time.

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## 2.9 EXERCISES

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- 1) Trace in brief the history of evolution and development of Constitution of Canada.
- 2) Analyse the basic characteristics of the Canadian Constitution.
- 3) Describe the nature and importance of Charter of Rights and Freedoms.
- 4) How has the system of Federalism in Canada been developing and changing?