

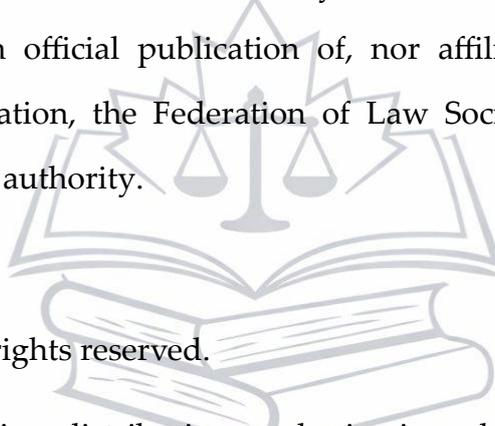
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CHAPTER 1: SOURCES AND NATURE OF THE CONSTITUTION

Introduction:

- “Constitutional law is the law prescribing the exercise of power by the organs of a State it explains which organs can exercise legislative powers (making new laws), executive power (implementing the laws) and judicial power (adjudicating disputes) and what the limitations on those power are:”. (Peter Hogg, 1-1)
- The Canadian Constitution does not emerge from a single document like the United States or India. (i.e. there are unwritten Constitutional principles in Canada).
- Canada: A Confederation.

Constitution act, 1867:

- The Constitution Act, 1867 finds its roots in the British North America Act, 1867 which was later renamed to the Constitution Act, 1867.
- The 1867 Act did not have any procedures for making amendments. It basically allowed the imperial parliament to play a role in making future amendments.
- The Law also did not create a bill of rights and instead relied on British common law.

Constitution act, 1982:

There were **3 major changes** made to the Canadian Constitution in 1982:

1. A formula for making domestic amendments was added.
 2. The authority over Canada of the UK Parliament was terminated.
 3. The Charter of Rights was adopted.
- The Constitution Act 1982 contains 60 sections. However, Section 52 of the Act establishes the primacy of the Canadian Constitution, defines it and establishes the power to make amendments.

- **The Supremacy Clause:** Section 52 (1): 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.

Section 52 (2): The Constitution of Canada includes:

- a) The Canada Act 1982, 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).
- ***New Brunswick Broadcasting Co. v Nova Scotia (1993)*** wherein It was held that the unwritten doctrine of parliamentary privilege should be included in the definition clause under Section 52(2) even though there is no mention of it. The court's decision opened the room for judicial expansion of the definition clause.
 - The Supreme Court held Nova Scotia legislative assembly could ban the televising of its proceedings as the power to exclude strangers from the legislative chamber was part of parliamentary privilege.
 - **Parliamentary Privilege** (unwritten principle): "The federal house of parliament and the provincial legislative assemblies possess a set of powers and privileges that are necessary to their capacity to function as legislative bodies" = Parliamentary Privilege.
 - Important case law: ***Canada v. Vaid (2005)***: The Supreme Court held that PP was not applicable and did not extend to the majority of the House's employees who were staff members in restaurant, library, public info, repair and maintenance, parking and traffic control etc. (those who were only indirectly connected to the legislative proceedings in the house.)
 - ❖ **The entrenchment clause:** Section 52(3) which provides as follows: "Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada."
- This means that the Constitution cannot be amended by an ordinary legislative action. Only by a special amending procedure in Part V of Constitution Act, 1982.

Unwritten constitutional principles:

1. Judicial Independence: *Re Remuneration of Judges (1997)*
2. Principles of Democracy, Federalism, Constitutionalism and the Protection of minorities: *Secession Reference (1998)*
3. Parliamentary Privilege: *New Brunswick Broadcasting Co. v Nova Scotia (1993)*

Important Terminology:

1. **Royal Prerogative:** Powers unique to the Crown. These are powers and privileges accorded by the Common Law to the Crown. The conduct of foreign affairs including treaty-making and declaring war, appointing the PM and other ministers, the issue of passports, the creation of Indian reserves, and the conferring honors such as Queen's Counsel. These are subject to Judicial Review.
2. **Convention:** Non-legal rules of the constitution that are not enforced by the law courts. These rules are important as they regulate the workings of the constitution and prescribe the way in which legal powers shall be exercised. Example: The Governor General of Canada has several powers granted to it by the CA 1867; however, by convention, the Governor General will only exercise these powers on the advice of cabinet or the PM.
3. **Usage:** Merely a governmental practice which is ordinarily followed, although not regarded as obligatory. A "usage" may develop into a convention if a practice is followed for a long period. The process of evolution from usage to convention may be called a "custom".

NCA SAMPLE EXAM – ANSWER SCRIPT

PART ONE (25 MARKS in total, 5 MARKS per question)

Approximately 45 minutes including reading time.

In a few sentences or short paragraphs on each question, assess the accuracy of the following five statements. The statements may be true, false or somewhere in between (e.g., partly true, partly false; misleading; incomplete etc.). Your characterization of the statements as true, false etc. is less important than supporting your characterization with compelling reasoning. Be sure to direct your response precisely to the statement in question. Points will be given for supporting your answers with references to relevant case law, constitutional provisions and readings listed in the course syllabus wherever possible.

1. Hospitals are bound to comply with the Charter of Rights and Freedoms. (5 MARKS)

ANS: The Statement is incomplete as no-where in the statement it mentions that there is any governmental activity which is being carried out by the Hospital or about the presence of governmental control.

Section 32 of the CA, 1982 clarifies that, the Charter only applies to governments, and not to private individuals, businesses, or other organizations.

Further, in the case of *Eldridge v. BC (1997)*, it was held that, there are some important nuances to how the Charter may apply to private entities deemed “government” for the purposes of s. 32. the precise way in which the Charter applies to a private entity can be on one of two bases:

1. **First**, it may be that the entity itself is simply “government.” This involves determining whether nature or degree of **governmental control** exercised over it means it can be properly characterized as “government.” In the instant statement it is not clear with respect to whether the Hospital in question is under government control or not. Generally, all hospitals cannot be put under this bracket.
2. The **second** possibility is that the entity is only subject to the Charter with respect to a particular activity that can be ascribed to government. This involves investigating the nature not of the entity but the activity itself.

The quality of the act is at issue, rather than the actor. If the act is “governmental,” such as the **implementation of a specific statutory scheme or a government program**, the entity performing it will be reviewable by the Charter only in respect of that act and no other private activities.

The instant statement is incomplete as it does not provide clear view/facts about its activities.



PART TWO (30 MARKS in total, 5 MARKS per question)

Approximately 55 minutes including reading time.

Which legislative bodies have jurisdiction to enact laws in relation to the following subject matters? In each case, indicate whether it is Parliament alone, or the provincial legislatures alone, or both Parliament and the provincial legislatures, that can pass laws in relation to the stated subject matter. Provide a brief explanation for your answer that makes reference to the relevant head (or heads) of power in the Constitution Act, 1867 as well as any relevant case law interpreting the scope of the relevant federal and/or provincial legislative powers.

1. The terms and conditions of employment of flight attendants working for airlines. (5 MARKS)

ANS: The Federal Parliament has the power to make laws with regards to the terms and conditions of employment of flight attendants working for airlines. This Power is not exclusively authorized for Federal Parliament or Provincial Legislature as such under Section 91 and 92. However, the 'aeronautics' subject matter is falling within the POGG power as enumerated in landmark case laws such as *Lacombe Case*, *Canadian Owners and Pilots Association case*.

Generally, the power to enact laws with respect to Employment is falling under the jurisdiction of provincial legislature under Section 92(13) within the province. The Federal entities such as Banks and Aeronautics have exemption from provincial labour laws owing to 'doctrine of Interjurisdictional Immunity' wherein the Federal Entities are adhering to the laws enacted by the federal parliament.

PART THREE (15 MARKS)

Approximately 45 minutes including reading time.

Bill C-22, currently before the House of Commons, proposes to change the formula in the Constitution Act, 1867 that determines the number of seats each province will have in the House of Commons.

The existing formula, set out in s.51 of the Constitution Act, 1867, allocates seats based on “representation by population” (or the principle of proportionate representation), although exceptions are made to ensure that the number of seats to which smaller provinces are entitled does not diminish over time. Because of these exceptions, if s.51 were not amended, the provinces with the fastest growing populations (Ontario, B.C. and Alberta) would see their number of seats in the House of Commons fall below the number they should have based solely on the principle of representation by population.

Bill C-22 proposes to put in place a revised formula that will better reflect the principle of “rep by pop” or proportionate representation. It does this by altering the formula so that, after the next decennial census, the number of seats in B.C. and Alberta would be increased so that their proportion of the seats in the House of Commons will match their proportion of the Canadian population. Under the Bill C-22 formula, Ontario’s proportion of seats would increase as well, but Ontario’s seats would still be significantly less than the number of seats necessary to match its proportion of the Canadian population.

The federal government is taking the position that Bill C-22 can be enacted by Parliament alone without the consent of any provincial legislatures. Members of the opposition have argued that Bill C-22 cannot be enacted without the approval of at least seven provincial legislatures representing at least half of the Canadian population. What provisions in Part V of the Constitution Act, 1982 could be cited in favour of the federal government’s position? What provisions in Part V of the Constitution Act, 1982 could be cited in favour of the opposition’s position? In your view, what is the legally correct position regarding which amending procedure in Part V of the Constitution Act, 1982 is applicable?

ANS:

Issue:

What is the Legally correct amending procedure to be followed/applied to amend the exception provision to representation by population in Section 51, Constitution Act (CA) 1867?

Rule:

- The Federal Parliament Alone: Section 44 of CA 1982;
- General Amending Formula: Section 38, 42 of CA1982;

Application/ Analysis:

In the event of amending the Constitution, whether CA of 1867 or of 1982, the Parliament or the Provincial Legislation must adhere to the amending procedures mentioned in the Part V of the CA, 1982.

In the instant case, Bill C-22 proposes to change the formula in the Constitution Act, 1867 that determines the number of seats each province will have in the House of Commons. The Amendment is focusing on maintaining the principle of representation by population by replacing the exception provision in S. 51 CA 1867 to better suit the principle.

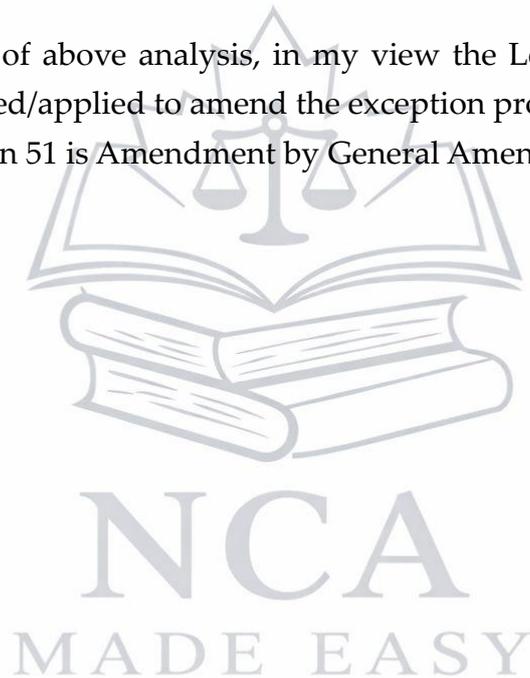
Part V of the Constitution Act 1982 provides 5 different amending procedures. In the instant case, the federal government is taking the position that Bill C-22 can be enacted by Parliament alone without the consent of any provincial legislatures. Federal Parliament could do so by citing Section 44 which provides for an amending procedure where the Federal Parliament can exclusively amend the Constitution relation to the executive government of Canada or the Senate and House of Commons.

However, Members of the opposition have argued that Bill C-22 cannot be enacted without the approval of at least seven provincial legislatures representing at least half of the Canadian population. The Provincial Legislation can amend the Constitution by this procedure under General Amending Formula stated in Ss. 38, 42. Section 42 specifies that amendments with respect to the principle of proportional representation of the provinces in the House of Commons must be made using the general amending formula among other matters.

As provided under Section 44, the amending formula of the Federal Parliament alone is subject to Section 41 & 42. Therefore Section 44 is ruled out in the instant case. In my opinion, Section 42 Subject matter applies and Amendment shall carry out as provided in Section 38 by resolutions of the Senate and House of Commons and two-thirds of the provinces (seven) having at least 50% of the population of all the provinces combined. The territories have no role in the amending process. A province that does not agree with an amendment affecting provincial legislative powers, or propriety rights, or other privileges, can dissent from it, also by resolution. In that case, the amendment has no effect within that province. After the last necessary resolution is passed, the Governor General can make the amendment by proclamation.

Conclusion:

Therefore, in the light of above analysis, in my view the Legally correct amending procedure to be followed/applied to amend the exception provision to representation by population in Section 51 is Amendment by General Amending Formula.



PART FOUR (30 MARKS)

Approximately 55 minutes including reading time.

Bill C-6, currently before the House of Commons, proposes to amend the Canada Elections Act to require that voters reveal their faces before voting in person.

Section 143 of the Canada Elections Act currently reads as follows:

143. (1) Each elector, on arriving at the polling station, shall give his or her name and address to the deputy returning officer and the poll clerk, and, on request, to a candidate or his or her representative

(2) If the poll clerk determines that the elector's name and address appear on the list of electors, then, subject to subsection (3), the elector shall provide to the deputy returning officer and the poll clerk the following proof of his or her identity and residence:

(a) one piece of identification issued by a Canadian government, whether federal, provincial or local, or an agency of that government, that contains a photograph of the elector and his or her name and address; or

(b) two pieces of identification authorized by the Chief Electoral Officer each of which establish the elector's name and at least one of which establishes the elector's address.

(3) An elector may instead prove his or her identity and residence by taking the prescribed oath if he or she is accompanied by an elector whose name appears on the list of electors for the same polling division and who:

(a) provides to the deputy returning officer and the poll clerk the piece or pieces of identification referred to in paragraph (2)(a) or (b), respectively; and

(b) vouches for him or her on oath in the prescribed form.

(4) If the deputy returning officer is satisfied that an elector's identity and residence have been proven in accordance with subsection (2) or (3), the elector's name shall be crossed off the list and, subject to section 144, the elector shall be immediately allowed to vote.

Bill C-6 would amend s.143 by adding the following subsections after subsection 3:

(3.1) An elector shall have an uncovered face when the elector is proving his or her identity under subsection (2) or (3) or providing identification under paragraph(3)(a).

(3.2) Despite subsection (3.1), an elector who is proving his or her identity under paragraph (2)(b) or subsection (3) is not required to have an uncovered face if

(a) the deputy returning officer is of the opinion that uncovering it would be harmful to the elector's health; and

(b) the elector takes the prescribed oath attesting to the fact that uncovering it would be harmful to his or her health.

The government has stated that the purpose of the proposed amendment is to safeguard the integrity of the voting process by providing greater protection against voter fraud. The issue of voting with a face covering came to the fore in the summer and early autumn of 2007 when the Chief Electoral Officer, Marc Mayrand, indicated in response to questions from the media that he would not require women who wear veils or burkas to remove their face covering in order to vote. During a press conference on 10 September 2007, Mr. Mayrand explained that the voter identification requirements of the Act do not require voters with a covered face to remove their face covering. He noted that voters are provided with two alternatives to voting without photo identification (i.e., providing two pieces of non-photo identification, or taking an oath, as stipulated in ss.143(2) and (3) respectively). He further noted that the Act provides for other means of voting that do not require the visual comparison of a voter with his or her photograph, such as voting by mail, an option that approximately 80,000 electors exercised in the 2006 election.

The Canadian Muslim Congress (CMC) is upset about the impact that the Bill will have, if passed, on the small number of Muslim women who are Canadian citizens and have sincerely held religious beliefs that require them to cover their faces in public. The CMC has contacted you, a renowned constitutional expert, to seek your views on the constitutionality of the Bill. They have asked you to assist them with the preparation of a brief for presentation to the committees that will be studying the Bill in the House of Commons and the Senate. To this end, they have asked you to advise them on whether, in your view, the new legal requirement to uncover one's face prior to voting in person, as proposed by Bill C-6, would violate s.2(a) or s.15 of the Charter of Rights and Freedoms. Prepare a memo to the CMC addressing these issues.

(Note: You need not address whether the Bill violates the right to vote in s.3 of the Charter; a different expert will be addressing this issue.)

ANS:

Issue: Whether the Bill C-6 is Constitutionally valid?

Rules:

- Section 2(a) of the Charter: Freedom of conscience and religion;
- R v Big M Drug Mart (1985);
- Syndicat Northcrest v Amselem 2004
- Section 15(1) of the Charter: Equality of rights;
- Andrews v Law Society of British Columbia, [1989]
- Frazer v. Canada, 2020;
- Section 1 of the Charter (Justification clause)
- *R v. Oakes (1986) – Application of Oakes Test*
- Alberta v Hutterian Brethren of Wilson Colony, 2009

Analysis:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

In the instance case, Bill C-6 proposes to amend the Canada Elections Act to require that voters reveal their faces before voting in person. The Bill would amend s.143 by adding the subsections 3.1 which states that, voter shall have their face uncovered when they are proving his/her identity under subsection (2) or (3) or providing identification under paragraph(3)(a) and provides exemption in case of health reasons under subsection 3.2 stating the purpose of the proposed amendment to safeguard the integrity of the voting process by providing greater protection against voter fraud. It is observed that the Canadian Muslim Congress (CMC) is upset about the impact that the Bill will have, if passed, on the small number of Muslim women who are Canadian citizens and have sincerely held religious beliefs that require them to cover their faces in public.

In order to verify the constitutionality of the proposed Bill C-6, one has to check whether it is violating Constitution of Canada (Ref. Section 52). In the instant case, the proposed Bill C-6 questions the presence of Charter of Rights and Freedoms violations. Therefore, it is necessary to look into the charter violations under Section 2(a) or Section 15.

For identifying the violation of section 2(a) **two-stage process** has been identified in the case of *R v Big M Drug Mart (1985)*:

1. **They are sincere in their belief:** In the instant case the small number of Muslim women who are Canadian citizens and have sincerely held religious beliefs that require them to cover their faces in public.
2. **Must show that they have a practice/belief, having a nexus with religion, (subjectively):** The Muslim community as a whole have sincere beliefs which is enshrined in their religious texts. Muslim women having the religious beliefs that require them to cover their faces in public is supported by the age-old practices and the texts.

Application of Oakes Test:

- Pressing and substantial objective — explained fully
- Rational connection — explained briefly

(Remaining limbs involve detailed proportionality analysis, case-law support, and value-added conclusion)