

Chapter Three

CANADA'S CONSTITUTION



Figure 3–1 On April 17, 1982, Queen Elizabeth II joined Prime Minister Pierre Trudeau on the steps of the House of Commons (top left) to sign the Constitution Act, 1982, into law. The next day, Queen Elizabeth II flew back to Britain. After saying goodbye to the queen at Ottawa's Uplands Airport, Trudeau performed his famous pirouette (bottom right), which was snapped by a news photographer.



CHAPTER ISSUE

How is the 1982 Constitution shaping Canada?

During the 1960s and 1970s, some long-standing political and social issues challenged Canadians and threatened Canadian unity. Prime Minister Pierre Trudeau believed that a revamped Constitution would help resolve some of these issues, including the demands of Québec sovereignists.

One big problem stood in the way: Canada's Constitution was a British law called the British North America Act. That meant that Canada couldn't change it to address Canadian issues. Trudeau argued that no other country should control Canada's Constitution. He believed that **patriating** the Constitution — bringing it home — would allow Canada to create a new, made-in-Canada document that would be better designed to address Canadian issues and concerns.

So Trudeau set out to bring the Constitution to Canada. The process took years, but on April 17, 1982, he achieved his goal.

Examine the photographs on the previous page, and then respond to the following questions:

- Why was Queen Elizabeth II involved in the ceremony to bring the Constitution to Canada?
- What feelings might Trudeau have been expressing when he pirouetted for the news media?
- Would the government of a democratic sovereign country be more capable of doing its job if the country had control of its constitution? Why or why not?

Key Terms

patriating
amending formula
veto
sovereignty
association
distinct society
decentralization
entrenched
notwithstanding
clause
Aboriginal rights
treaty rights
self-government
comprehensive land
claims
specific land claims
reserves
traditional territories
omnibus bill
employment equity

Looking Ahead

The following inquiry questions will help you explore ways that the Canadian Constitution helps Canada work:

- Why bring home the Constitution?
- Will Québec ever sign the Constitution?
- How does the Constitution protect rights?
- How does the Constitution affect Aboriginal peoples?
- How does the Constitution affect individual Canadians?

LEARNING GOALS

In this chapter you will

- explore how the patriation of the Constitution has shaped and continues to shape Canada
- explain how the Constitution has led to both conflict and co-operation among Canadians
- examine how the collective protections of the Constitution have affected both Québécois and Aboriginal peoples
- examine how the Charter of Rights and Freedoms has affected women, LGBT Canadians, and Canadians with disabilities

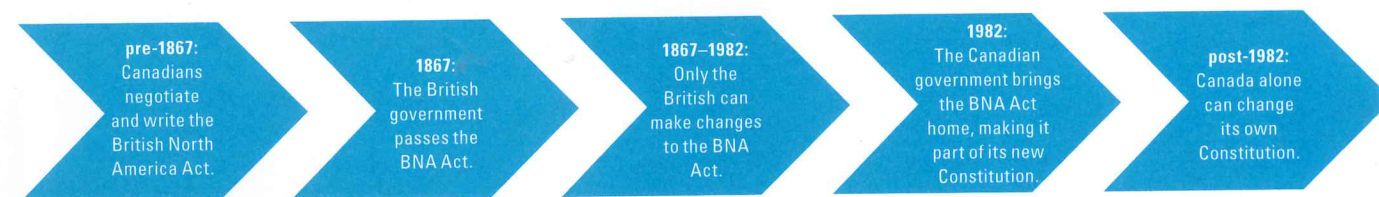
Why bring home the Constitution?

In the 1970s, Prime Minister Pierre Trudeau came to believe that changing the Constitution would give Canadians the tools they needed to deal with the most pressing political and social issues facing the country. The country was facing Québécois sovereigntists wanting to break up the country and Aboriginal peoples demanding that Canada fulfil the obligations of the treaties.

A constitution is the foundational document of a country. It sets out the rules governments use to run the country. Trudeau reasoned that if the rules were adjusted to better meet the needs and interests of key groups, these groups would be content to live within Confederation.

But the Constitution was a British statute passed in 1867. Should Canada, a sovereign nation, have to ask a foreign country to amend the Canadian Constitution? Trudeau didn't think so. He launched a plan to patriate the Constitution.

Figure 3–2 Why patriate the Constitution?



Canada's Constitution before 1982

In many countries, such as the United States, a constitution was written and approved by the country's leaders when the country was established. This was almost the case for Canada. Beginning in 1864, leaders of the British North American colonies who wanted to unite into a single country worked to develop a constitution. The document they produced was the British North America (BNA) Act, an act passed by the British Parliament to bring Canada into being on July 1, 1867. Today, the BNA Act remains one of Canada's key constitutional documents.

The BNA Act set out the powers of the federal and provincial governments. The federal government controls matters that affect all Canadians, such as defence, fisheries and oceans, and international trade. Provincial governments control matters that relate to their geographic area, such as health and welfare, education, and natural resources. It is this division of powers that makes Canada a federation — power is shared.

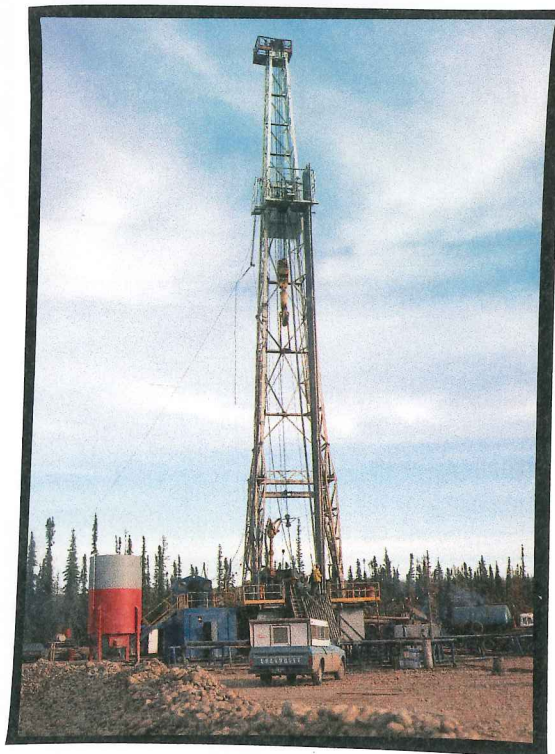


Figure 3–3 The BNA Act lays out which levels of government control what. So provinces control — and reap the profits from — all resources harvested on their lands. Alberta, for example, earns a royalty for every litre of oil pumped out of this oil well. How would this system ensure that people feel in control of the resources in their province?

Struggling to Find Common Ground

A constitution needs to be foolproof. You want to get it right the first time and you want to make it difficult to change. Otherwise, an irresponsible government could make dangerous changes.

At the same time, a responsible government may wish to make wise changes to meet the needs of a changing society. So a country needs an **amending formula** — a set process for changing the Constitution. It has to be demanding, so that it's clear that a strong majority of Canadians or the provinces agree with the change.

Prime Minister Pierre Trudeau began talking about patriating the Constitution in 1968. But gaining agreement on the amending formula was difficult. Québec wanted a **veto** (right to reject) on any constitutional change. To make matters worse, nearly all the premiers were skeptical of the new Charter of Rights and Freedoms that Trudeau proposed. They thought it would erode their powers.

For more than a decade, the federal and provincial politicians grappled with questions such as the following:

- How many provinces should be required to agree before constitutional changes are approved?
- Should provinces with larger populations have a greater say?
- Should Québec have the right to veto or opt out of constitutional changes?
- Should Québec receive special recognition within the federation?

Cause and Consequence: Why would Trudeau have wanted an amending formula in place *before* the Constitution was patriated? What problems might have arisen if no amending formula was built into the Constitution?

In Search of Agreement

During the campaign leading up to the 1980 Québec referendum on **sovereignty association** (two countries with formal ties), Trudeau had promised Québeckers that he would patriate the Constitution. When Québec voters rejected sovereignty association, Trudeau needed to live up to his promise. So he called a first ministers' conference — a meeting of the prime minister and the provincial premiers.

The first ministers once again failed to agree on an amending formula, so Trudeau decided to take unilateral action — he would patriate the Constitution without the involvement of the provinces. His decision forced the first ministers to meet again in a last-ditch attempt to reach agreement. Several days of negotiating produced no results.

However, behind the scenes, Federal Justice Minister Jean Chrétien and the attorneys general of Ontario and Saskatchewan were working on a compromise. After midnight on November 5, all the provincial premiers except Québec Premier René Lévesque, who was not staying in the same hotel, were hastily called to a meeting in a pantry at the conference centre. They were presented with the proposal. The premiers supported the compromise, which was nicknamed the “Kitchen Accord.”

Voices

I believe a constitution can permit the coexistence of several cultures and ethnic groups within a single state.

— Pierre Trudeau, during his first campaign for election to the House of Commons, 1965

Up for Discussion

Should any single group in Canada be recognized as distinct from other groups?

CONNECTIONS

René Lévesque was not just a separatist; he was the founder of the Parti Québécois and served as the champion of the separatist cause for 15 years. He had been a well-respected journalist before his political career, so he was well known and well respected in Québec for his fierce defence of the province he loved.

Voices

I have been stabbed in the back during the night by a bunch of carpetbaggers.

—René Lévesque, premier of Québec during the constitutional negotiations, in a memoir, 1986

The Deed Is Done

Lévesque awoke the next morning to find that an agreement had been reached without him. He was furious and walked out of the meeting.

According to the final document, the Constitution can be amended with the agreement of at least two-thirds of the provinces representing at least half the country's population. This arrangement means that it is possible to make changes to the Constitution, but it is difficult to achieve. It also means that the Constitution can be changed even if Québec objects.

Some historians argue that the events leading to the Kitchen Accord gave Québec separatists more evidence of the federal government's

betrayal. But some of those involved in the November 1981 conference, such as Alberta Premier Peter Lougheed, have said they believe that Lévesque was so dedicated to separation that no compromise would have satisfied him.

Because the agreement had the support of nine provinces, Parliament endorsed it in the House of Commons on December 2, 1981. When Queen Elizabeth II signed the document in April 1982, the process was complete. Canada controlled its own Constitution.

Although the Supreme Court later ruled that the Constitution applies in Québec, the province of Québec has never signed it.

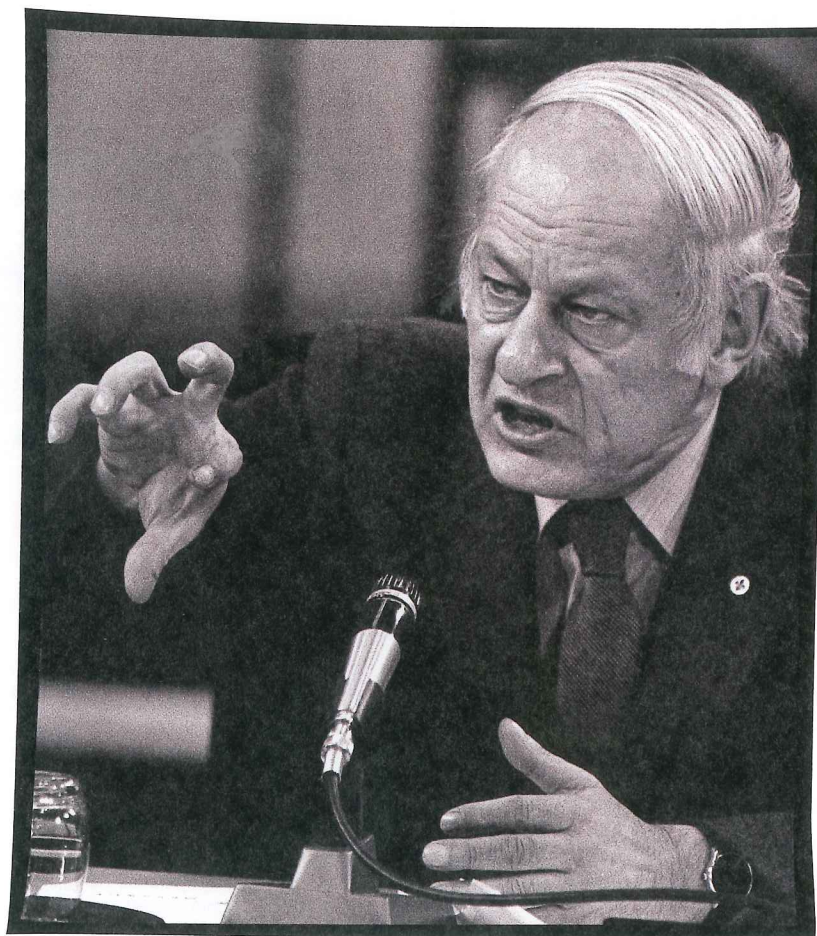


Figure 3-4 René Lévesque described the meeting leading to the Kitchen Accord as “the night of the long knives” and vowed to fight the agreement. On the day the queen signed the Constitution, Lévesque ordered the flag outside Québec’s National Assembly to be flown at half-mast. What message was Lévesque sending?

Recall... Reflect... Respond

- Figure 3-1 (p. 82) shows Pierre Trudeau pirouetting after Queen Elizabeth signed the Constitution Act. How might Francophone Québécois have interpreted Trudeau’s action? Explain your response.
- Tell the story of the patriation of Canada’s Constitution as a comic strip, rap, or poem. In the stanzas or speech bubbles, use the following terms in such a way as to demonstrate your understanding of them: patriation, amending formula, Constitution, BNA Act, Charter of Rights and Freedoms, compromise, and Kitchen Accord.

Will Québec ever sign the Constitution?

Patriating the Constitution failed to dampen the sovereignty movement in Québec. In fact, many Canadians believe that the process increased the strength of the separatists. “Rather than undermining the forces of Québec separatism, the strategy strengthens them, bringing Canada to the brink of collapse,” wrote political scientist Kenneth McRoberts. “In light of the Trudeau strategy’s original purpose of securing national unity, there can be no doubt that [the strategy] has failed.”

A Fresh Face

In February 1984, Pierre Trudeau resigned. He had achieved his goals of defeating the separatists in the 1980 referendum, patriating the Constitution, and creating a Charter of Rights and Freedoms. Yet his handling of the economy and Canada–U.S. relations were not widely admired. It was time for him to go.

In the 1984 election, John Turner’s Liberals were soundly defeated, and Brian Mulroney became prime minister. A bilingual Anglophone Québecker, Mulroney had strong support in Québec, especially among federalists. He viewed the failure to persuade Québec to sign the Constitution as a problem he would resolve. Soon after taking office, Mulroney decided the time was right: René Lévesque had retired; the Parti Québécois had been defeated in the 1985 provincial election; and Québec’s new premier, Liberal Robert Bourassa, was a federalist.

Mulroney launched discussions, and in April 1987, a first ministers’ conference brought Mulroney and the premiers together at Meech Lake, Québec. Mulroney’s goal was to persuade the premiers to accept the idea that Québec’s language and culture made it a **distinct society** within Canada, in other words, a component of Canadian society that has a unique character that should be legally protected.

Historical Significance: Meech Lake was created for one purpose: to entice a Québec premier to sign the Constitution. Why was this so important to the politicians in 1987?

Aiming for Constitutional Unity

Few expected much from the Meech Lake Conference. But Mulroney’s Progressive Conservatives believed in **decentralization** — the role of the federal government should be reduced while that of the provinces should grow. The premiers were delighted.

The prime minister and premiers hammered out the Meech Lake Constitutional Accord. All provinces would gain the following powers:

- a right to veto constitutional changes
- a greater say in nominating senators and Supreme Court judges
- the right to opt out of federal social programs and receive money to design their own programs
- shared control of immigration



Figure 3-5 Brian Mulroney stretches through a bus window to shake the hands of voters in Wabush, Newfoundland. It was his last stop on the campaign trail in 1984. He promised to strengthen the economy, shrink government, and improve Canada–U.S. relations. Why would some people see this as a breath of fresh air?

Voices

[The Meech Lake Accord] is an unprecedented historic attempt to maintain and consolidate the unity of our country, Canada. For Québeckers, Canada is the first choice, and I would like it to remain that way.

—Robert Bourassa, premier of Québec, 1987

Figure 3–6 Prime Minister Brian Mulroney (centre), Québec Premier Robert Bourassa (left), and New Brunswick Premier Frank McKenna chat at a 1989 meeting of the Francophonie in Senegal. At the time, relations between Mulroney and the premiers were friendly. Why had this relationship changed since 1982?



Voices

There were, of course, legitimate grounds for opposing a constitutional change that explicitly set Québec apart from the other provinces. But something less rational, and at times ugly, was also in play. Even today, the main players on both sides of the debate hesitate to discuss the degree to which outright anti-Québec bigotry was behind the fierce opposition to the [distinct society] clause.

— John Geddes, Ottawa bureau chief, *Maclean's* magazine, 2000

Québec Premier Robert Bourassa supported the accord because he believed that the additional powers would help Québécois protect and enhance their French language and culture. The other premiers were happy to receive more powers.

The accord gained parliamentary approval, but that was not enough. Because the accord amended the Constitution, all 10 provincial legislatures would have to approve the deal within three years. If it wasn't passed by June 23, 1990, the accord would fail.

Opposition to Meech

At first, public opinion polls showed that most Canadians supported the Meech Lake Accord. The national political parties and all 10 provincial premiers supported the agreement.

As the debate unfolded over the next three years, though, this support began to dwindle. Some opposed decentralization. Since 1867, Canada had worked by balancing power between provincial and federal governments.

For many, though, the sticking point was a clause that came to be known as the distinct

society clause. The Constitution would have to be interpreted in such a way that recognized “that Québec constitutes within Canada a distinct society.” Provincial and federal governments would be committed to preserving Canada as a largely Francophone society in Québec and largely Anglophone society everywhere else. For many Canadians, it just seemed too personal — calling just one part of Canada distinct just rubbed them the wrong way. Weren't all parts of Canada equally important to the country?

A further fear was the vagueness of the clause. What powers, exactly, would Québec gain by receiving this special status? Former Liberal Prime Minister Pierre Trudeau, a strong federalist, was one of the leading opponents. He argued that labelling Québec a distinct society would encourage separatists by making Québécois feel less a part of Canada and isolating them more than before. He was especially critical of Mulroney, arguing that Canada “was set to last a thousand years. Alas, only one eventuality hadn't been foreseen: that one day the government of Canada would fall into the hands of a weakling. It has now happened.”

Had Mulroney given up too much for the sake of bringing Québec into the Canadian constitutional family?

Rising Temperatures

Other critics argued that the accord's distinct society clause would allow Québec to override the Charter of Rights and Freedoms and deprive certain groups of their rights. For example, the National Action Committee on the Status of Women, an umbrella organization of Canadian women's groups, feared that Québec might use the distinct society clause to override women's equality rights, which were guaranteed in the Charter.

Aboriginal peoples were also angry. The Assembly of First Nations pointed out that the accord had been drafted by “11 men in suits.” They argued that, like Québec's Francophone society, their cultures were distinct too, so they should also receive distinct society status. Aboriginal peoples protested across the country.

Another group opposed to the Meech Lake Accord was a political party with roots in Western Canada. In 1987, the Reform Party had been created to give voice to Western Canadians who felt alienated from Central Canada. This party resented the additional powers the accord granted to Québec and argued that the agreement would make the provinces unequal. Reformers argued that the other nine provinces would begin to demand any additional powers that Québec gained, and that this would end up fragmenting Canada into competing regional groups.

The Deal Falls Apart

A challenge of timing arose during the ratification period. Three provinces — Manitoba, Newfoundland and Labrador, and New Brunswick — had elected new governments. Their new premiers had not attended the Meech Lake Conference and were not fully committed to passing the accord as quickly as possible.

The deadline of June 23, 1990, drew near when the Manitoba government scheduled a last-minute debate on the accord. The rules of the provincial legislature said that unanimous approval was required to allow the debate. And there was one member of the legislature who was not afraid to stand his ground. Cree Member of the Legislative Assembly Elijah Harper was firm in his position that Aboriginal peoples should have been included in constitutional discussions.

When he voted “no,” by raising an eagle feather, Harper ensured that no debate would be held and that Meech Lake would not pass.

Cause and Consequence: In what ways did the Meech Lake Accord contribute to unity in Canada? In what ways did it contribute to disunity? Which consequence do you think has had the more lasting effect? Explain your response.

Check Back

You read about the founding of the Reform Party in Chapter 2.



Figure 3–7 A pivotal moment in history was caught on camera when Wayne Glowacki snapped this photograph of Elijah Harper denying the Manitoba legislature the Meech Lake debate that it wanted on June 19, 1990. As Harper said later, “Canada can't be preaching about human rights and democracy elsewhere until it starts dealing with its Aboriginal people in Canada.”

Reflecting on the Impact of a Rejection

Events can be historically significant for many different reasons, depending on their impact. In the case of a major event such as the rejection of the Meech Lake Accord, these are the criteria:

1. whether or not the rejection caused a change
2. whether or not the change affected many people
3. whether or not the change lasted a long time

Without digging deeply, it may seem that the rejection of Meech caused no change at all. Its passage would have been noteworthy, of course. But since it was rejected, it had no effect . . . right?

As Andrew Coyne argues below, the rejection of Meech teaches us something important about Canada. Coyne wrote this 2010 article on the 20th anniversary of the rejection of Meech. He is a native Montréalais and award-winning journalist.

Long before the end of the Meech Lake Accord on June 23, 1990, politicians were warning that Canada would not survive its death. . . . That Canada endured . . . is one of the lessons of the Meech Lake Accord, the longest of the constitutional wars that seized Canada from the mid-1960s to the mid-1990s. There were other lessons.

Meech Lake taught us that constitutions could no longer be made in secret. The accord, a set of constitutional amendments, was negotiated in private by the first ministers in a day-long session on April 30, 1987, on the shores of Meech Lake in Québec.

At first, it was widely praised; there was hardly a politician anywhere who opposed it. But the more Canadians learned about Meech Lake, the more they distrusted it.

Had they been consulted, as they were in the making of the Charter of Rights and Freedoms in 1980 and 1981, they

might have claimed ownership. But they resented that Meech Lake was revolution from above; it was constitution-making by stealth and its collapse was a body blow to executive federalism. . . .

Why the popular opposition to these seemingly moderate constitutional reforms? While few Canadians cared about the spending power, immigration, or allowing the provinces a say in appointing high court judges and senators, they were suspicious of recognizing Québec as “a distinct society.” More generally, they worried about the devolution of powers.

Today, we can ponder the consequences if Meech Lake had passed. Perhaps Québec would have lived happily ever after within Canada. No Bloc Québécois, no Charlottetown agreement, no Clarity Act.

More likely, though, the Parti Québécois would have used the distinct society to claim significant powers for Québec in social policy. For sovereigntists, it was win-win either way. Had they succeeded, they would have moved Québec toward de facto sovereignty; had they failed, they would have said Meech Lake was a lie.

Meech Lake began with good intentions. It went badly wrong, divided English and French, and plunged Canada into psychodrama that drove us to [the] edge of the abyss in the referendum in Québec in 1995. It showed us that it is almost impossible to change our Constitution — and dangerous to try.

But it also showed that the people were right, the political class was wrong and that our Canada takes a lot of killing.

Explorations

1. From Andrew Coyne’s article, we can identify more than one reason that rejection of the Meech Lake Accord should be historically significant to Canadians. Spot them by answering the following questions.
 - According to Coyne, what three possible outcomes did Canada avoid by rejecting the accord?
 - How did the rejection discourage politicians from trying to change the Constitution in future?
 - How did the rejection reinforce to politicians the importance of public consultation?
2. Summarize Coyne’s opinion on whether the rejection of Meech was historically significant for Canada.

The Charlottetown Accord

Brian Mulroney tried again to get Québec to sign the Constitution. He had learned from the failure of Meech. This time, he consulted widely, holding five national conferences to talk about issues affecting the country.

In 1992, the negotiations with premiers and Aboriginal leaders led to the Charlottetown Accord. This accord was similar to Meech. It recognized Québec as a distinct society and promised greater powers for the provinces. But it went further, with two major proposals:

- constitutional recognition of Aboriginal peoples’ right to self-government
- an elected Senate with an equal number of senators from each province and with seats reserved for Aboriginal senators

This time, the fate of the accord was to be decided by a national referendum. If it passed, then the provincial legislatures would have to ratify. But it never got that far. Many Canadians were still concerned about decentralization and recognizing Québec as a distinct society.

In the months leading up to the referendum, various aspects of the accord were fiercely debated. On voting day in October 1992, the accord was rejected by more than 55 per cent of those who cast ballots, including in Québec. The defeat led to the election of a Parti Québécois government in Québec in 1994 and ultimately another referendum on Québec sovereignty in 1995. As of 2014, no further attempts have been made to reform the Constitution. Instead, the focus has shifted from sweeping constitutional reform to focused legislative reform.

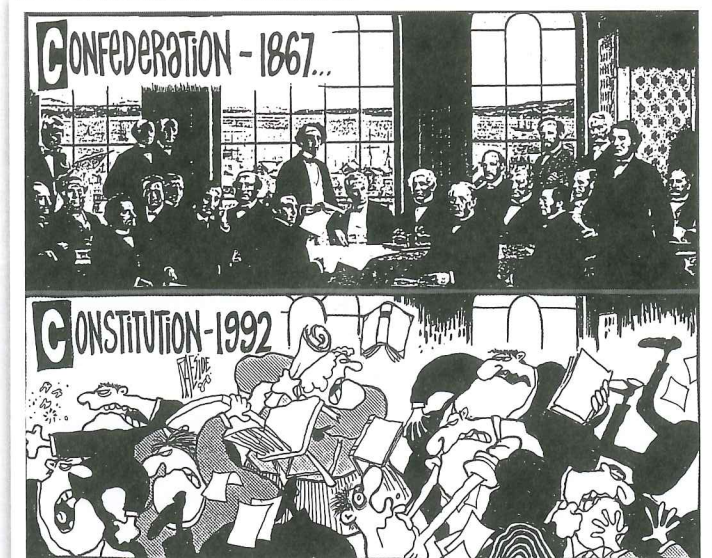


Figure 3-8 The final agreement on both Confederation in 1867 and the Charlottetown Accord in 1992 was reached in Charlottetown. Adrian Raeside drew on this fact to create an editorial cartoon comparing the two processes. Is Raeside’s comment on the 1992 politicians fair? On the one hand, the bad feeling generated by the negotiations was painfully obvious. On the other hand, consider that the 1867 half of the cartoon mimics the famous Robert Harris painting called *The Founders of Confederation*, which was never intended to symbolize the negotiation process.

Recall . . . Reflect . . . Respond

1. Analyze the proposed Meech Lake Accord from a variety of perspectives. Describe who held each perspective and why. Whose perspective was missing in the debate?
2. Who was responsible for the failure of the Meech Lake Accord? Identify the individuals and groups who played the greatest role in causing it to fail. Provide evidence to support your position.
3. Identify at least two political developments that took place between 1982 and 1992 that affected the sovereignty movement in Québec. Identify ways in which these developments both improved and eroded the relationship between Québec and the federal government. Record your ideas in a chart like the one shown.

Political Developments: 1982–1992	
Development	Effect on Québec–federal government relations

How does the Constitution protect rights?

The Constitution is the highest law in the land, and laws passed by governments in Canada cannot violate the Constitution. If a law violates the Constitution, it can be struck down.

Before 1982, Canadians did not have their rights guaranteed. They had two laws to protect their rights: the Bill of Rights, which was passed by the Conservative government under John Diefenbaker in 1960, and the Canadian Human Rights Act of 1977, which set out an antidiscrimination code. Both of these acts, however, could be changed with a simple act of Parliament.

The Charter of Rights and Freedoms in the Canadian Constitution is different. Because it is **entrenched** — anchored — in the Constitution, it cannot be changed except through the amending formula. So the federal and provincial governments cannot act in a manner that violates the rights and freedoms set out in the Charter.

The job of making sure that laws affecting individual rights conform to the Charter falls to the courts, and ultimately to the Supreme Court of Canada. One of the first tests of the Charter shows how this works. In 1986, David Oakes was charged with selling narcotics. At the time, the law presumed that anyone carrying drugs was going to try to sell them — a very serious charge. But David Oakes claimed that he was going to use them, not sell them. Oakes's lawyer argued that the law violated his client's Charter right to be presumed innocent until proven guilty. The Supreme Court agreed and declared the law unconstitutional. Ever since, no one can be assumed to be selling drugs just because he or she has them in their possession.

Figure 3–9 The Charter protects many rights. Which of those listed here have you taken for granted? Is it important to protect rights that seem obvious, such as the right to be free to travel from province to province?

Individual rights protected by the Charter of Rights and Freedoms

- **Fundamental freedoms** (Section 2), such as freedom of association (you can interact with anyone you like) and freedom of religion
- **Democratic rights** (Sections 3–5), such as the right to vote
- **Mobility rights** (Section 6), such as the right to travel in and out of the country
- **Legal rights** (Sections 7–14), such as the right to an interpreter in any court proceeding
- **Equality rights** (Section 15), such as equal protection from discrimination
- **Language rights** (Sections 16–22), such as the right to use either English or French when communicating with the federal government

Protecting Individual Rights

The Charter protects a wide variety of individual rights, as you can see in Figure 3–9. All of these rights are held by every individual citizen of Canada.

The Constitution does allow for some flexibility. Governments may restrict individual rights and freedoms for the purpose of protecting the interests of society. For example, the government restricts freedom of speech by outlawing hate speech.

Consider what happened in June 2007. The Canadian government created a “no-fly” list of people banned from travelling on public airlines. Federal officials suspected these individuals of being a threat to the safety of other travellers. So these individuals lost their mobility rights.

Examine this issue from both sides. What arguments urge you to disagree with the government restricting the individual rights of the Canadians on the “no-fly” list? What arguments urge you to agree with restricting their rights? Why is it important to find the right balance between these two arguments? What impact does the Charter have on how this situation is handled?

Protecting Collective Rights

Canada is the only country in the world to guarantee collective rights in its Constitution. Collective rights are different from individual rights because all citizens of Canada are guaranteed individual rights, whereas collective rights belong to the three founding peoples of Canada: Anglophones, Francophones, and Aboriginal peoples. The goal is to protect the collective identities of these peoples. The Charter guarantees these rights as follows:

- **Minority Language Education Rights** (Section 23), which guarantee the rights of English- or French-speaking populations to be educated in their own language where numbers warrant
- **Aboriginal rights** (Section 35), which guarantee both Aboriginal and treaty rights

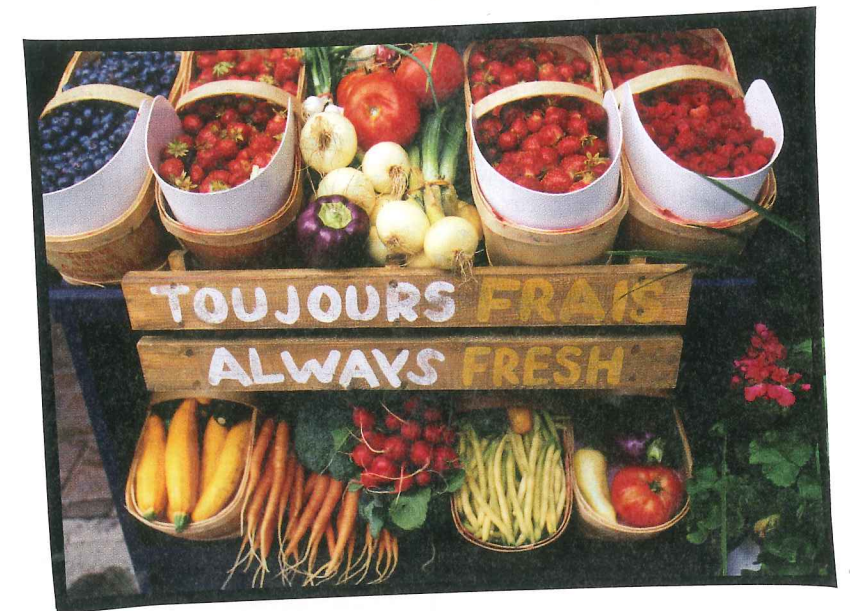
Unlike individual rights, collective rights do not apply to individuals. They apply to a population. For example, the French-speaking population in the Nipissing region of Ontario has the right to have their children educated in French. The Conseil Scolaire Catholique Franco-Nord runs 17 French-Catholic schools.

The Notwithstanding Clause

Though the Charter was the centrepiece of Trudeau's constitutional proposals, it had been viewed with suspicion by the premiers of many provinces, including Québec. They believed that the Charter handed too much power to judges, who are appointed by the government in power.

The Kitchen Accord provided a way out of the stalemate that had developed over the Charter. In exchange for agreeing to include the Charter in the Constitution, the provinces gained the right to invoke a **notwithstanding clause**. This clause enables the federal and provincial governments to declare certain laws exempt from the provisions of the Charter for up to five years. At that point, the declaration has to be reviewed and re-enacted.

Figure 3–10 Québec's Bill 101 was designed to help Québec keep its French character. Among other things, the bill banned languages other than French on signs in stores. The Supreme Court disagreed, so the Québec government used the notwithstanding clause to protect its bill.



CONNECTIONS

The notwithstanding clause was first invoked in June 1982, when the Québec government used it to make all past and future provincial laws immune from the Charter. The government let this lapse after five years.

Although it used the clause in 1988 to protect Bill 101, it again let this lapse after five years. Instead, it adjusted its language law to align with the Charter: English signs could be used in stores but only if they were lower or smaller than the French signs.

Recall... Reflect... Respond

1. What signs of co-operation or compromise do you find in the Canadian Constitution?
2. Does the Charter reflect Canadian identity? Take into consideration the protection of individual rights and freedoms, collective rights, and the notwithstanding clause. Justify your response.
3. Section 33 gives provinces the power to pass a law “notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.” Refer to Figure 3–9 on page 92. Which rights could be affected? Does the notwithstanding clause turn our rights into privileges (which can be revoked)? Is the clause too powerful? Explain.

How does the Constitution affect Aboriginal peoples?

Voices

It wasn't that long ago that it was illegal for First Nations to engage in self-government activities or even gather. [Self-government is] something that my parents wouldn't have even thought of, possibly even my grandparents.

—Ginger Gosnell-Myers,
Nisga'a First Nation, 2010

The negotiations leading up to the 1982 Constitution involved only federal and provincial politicians. Aboriginal peoples were not invited to sit at the negotiating table.

But Aboriginal peoples wanted a say, especially on issues such as **Aboriginal rights**, **treaty rights**, and **self-government**. So organizations such as the Assembly of First Nations began to lobby governments to include Aboriginal rights in the Constitution. The lobby grew into an across-the-country two-year protest that was so resounding in its message that politicians could not ignore it.

It was decided that two new sections would be included in the Charter of Rights and Freedoms. Section 25 guarantees the Aboriginal rights outlined in the Proclamation of 1763 made by King George III, namely that Aboriginal peoples have legal title to the lands they have occupied for thousands of years unless a treaty has been made. Section 35 “recognized and affirmed” Aboriginal rights and treaty rights. Aboriginal rights are based on the historical continued occupation of the land. Treaty rights refer to rights specifically set out in a treaty. First Nations, Métis, and Inuit are identified as the Aboriginal peoples of Canada.

Historical Perspective: Take the perspective of Aboriginal peoples before Sections 25 and 35 were included. Why would it seem important to include both Aboriginal and treaty rights in the Charter?

The Push for Self-Government

After Aboriginal and treaty rights were guaranteed in the Constitution, clarification was needed on just what these rights included. Many Aboriginal leaders regarded self-government as a key element of Aboriginal rights. Self-government involves the power to control one's own affairs, such as education and justice. The government took some steps, for example, by amending the Indian Act so that band councils would have the power to decide who could live on reserves.

If the Charlottetown Accord had passed, Aboriginal governments would have formed a third level of government, in addition to the federal and provincial governments. But the failure of that accord did not end Aboriginal peoples' demands for self-government. Many First Nations continue to work individually to negotiate self-government agreements with the government. As of 2014, Canada had signed 20 self-government agreements that relate to 34 Aboriginal communities. Of these, 17 involved a land claim.



Figure 3-11 Georges Erasmus (left), a Dene from the Northwest Territories, was the national chief of the Assembly of First Nations in 1987. He is seated beside John Anagoalik, chair of the Nunavut Constitutional Forum, and Louis Bruyere, president of the Native Council of Canada (at right). Here they hold a news conference to share Aboriginal opinion about constitutional change in 1987. All three helped lead the drive to increase Aboriginal self-government.

Thinking Historically: Historical Perspective

The Two-Row Wampum Treaty

The best way to understand what people were thinking and feeling long ago is to examine the evidence. Historians begin with the obvious. For example, forensic evidence that a wampum belt is 400 years old will confirm that the belt was made 400 years ago. Historians also make inferences from the evidence. For example, if we know that a wampum belt survived 400 years, we can infer that people must have valued it enormously. The long-standing regard for the belt isn't a fact we can know for sure, but it is a well-founded conclusion based on the evidence.

The Kaswhenta wampum belt, sometimes called the Two Row wampum belt, was made to record a treaty with the Dutch, who were the first Europeans to make treaties with First Nations in North America. As **ONONDAGA CHIEF IRVING POWLESS, JR.**, tells it, in 1613 Tadaho sent out messages to the five Haudenosaunee nations to send representatives to negotiate a relationship between the Dutch and First Nations.

After they made their agreement, the Dutch said to our leaders, “We think that in the future when we meet, it would be our idea that you would refer to us as father and we will refer to you as son.” Now we had a lot of men sitting there. How many men have been reprimanded by their fathers? Yeah. The father has authority, as you know. So we looked at what a family was like, and we realized that a father and son relationship would not be to our advantage. It would be better, because of our concepts, that we be equal. Brothers are equal in a family relationship.

Our leaders informed the Dutch people, “From this day forward, we will refer to each other as brothers.” . . . The Dutch agreed.

The Dutch recorded this historic treaty on paper. The Haudenosaunee recorded it in the Two-Row Treaty belt. **TAIAIAKE ALFRED**, member of the Kanienkahaka

First Nation and director of the Indigenous Governance Program at the University of Victoria, describes the relationship it records.

The metaphor for this relationship — two vessels, each possessing its own integrity, travelling the river of time together — was conveyed visually on a wampum belt of two parallel purple lines (representing power) on a background of white beads (representing peace). In this respectful (co-equal) friendship and alliance, any interference with the other partner's autonomy, freedom, or powers was expressly forbidden. So long as these principles were respected, the relationship would be peaceful, harmonious, and just.



Figure 3-12 The Two Row Wampum Treaty was recorded in the symbols in this belt made from the white shells of the Atlantic whelk and the purple shells of the Quahog clam. The belt is displayed and explained regularly so that the Haudenosaunee remember.

Explorations

1. What can you infer about the Dutch or the Haudenosaunee based on the Powless quotation?
2. What can you infer from the belt, or Alfred's description of it, about the thinking of the Haudenosaunee who made the treaty and the belt?
3. Compare the benefits and drawbacks of recording a treaty on paper versus recording it on a wampum belt.
4. What can you infer about the authors of the Constitution Act, 1982, based on your knowledge that they included Aboriginal and treaty rights?

Voices

Since the first treaty was signed with us in 1701, our peoples have believed that co-operation must pave the way for success. . . . We like to believe that all Canadians feel this way. Consider where that attitude has gotten us. Obviously, not very far.

— Phil Fontaine, national chief of the Assembly of First Nations, 2007

Check Back

You read about the Nunavut Land Claims Agreement, which was a comprehensive land claim, in Chapter 2.

Land Claims

The Aboriginal activism that had developed in the 1970s grew quickly after the recognition of Aboriginal rights in the Charter. Throughout the 1980s, Aboriginal peoples pushed even harder to resolve land claims. There was a backlog — many of these claims had gone unsettled for decades and longer.

Comprehensive Land Claims

Land claims fall into two categories. **Comprehensive land claims** involve areas where Aboriginal peoples have signed no treaty with either the British or Canadian government. In the 1980s, these areas included most of British Columbia and Yukon, northern Québec, and much of the Northwest Territories, including the eastern part, which is now Nunavut. In these areas, Aboriginal communities had never surrendered their rights to the land.

The goal of comprehensive land claims is to put in place a treaty that clearly identifies rights to lands and resources. The Nisga'a Final Agreement, which came into effect in May 2000, is an example of a comprehensive land claim. It gave the Nisga'a First Nation ownership of 2000 square kilometres, the right to resources on the land, and the authority to form its own local government.

Figure 3–13 Areas Covered by Aboriginal Treaties, 1725–1923

Many of the areas not covered yet by treaties have been purchased and developed by non-Aboriginal Canadians. How would this complicate the land-claim settlement process?



Ethical Dimension: What can we gain by studying historic examples of clashes between Canadian governments and Aboriginal peoples? How might such studies help us to understand the position of Aboriginal peoples?

Differing Perspectives

About half of Canada's First Nations signed historic treaties between 1725 and 1923. The government representatives agreed to set aside **reserves**, small parcels of land for the First Nations' specific use. The representatives thought that, in return, the First Nations were giving up their rights to the rest of their **traditional territories** — the lands that they had historically occupied. For their part, First Nations thought that they were simply sharing the land and its resources.

Historical Perspective: Speculate on how such very different perspectives could emerge from treaty negotiations. How does the difference explain current conflicts over the use of natural resources in various First Nations' traditional territories?

The Lubicon Cree Land Claim

Lubicon territory is in northern Alberta near Lesser Slave Lake. It is such a remote area that the government authorities missed the Lubicon Lake Nation in 1899, when they were negotiating Treaty 8 with the First Nations in the region. Consequently, the treaty includes the Lubicon traditional territory even though the Lubicon never signed the treaty. The Lubicon maintain that they have never given up their Aboriginal rights to the land.

Economic development of the area began in the 1970s, when oil was discovered. The government of Alberta licensed oil companies to extract oil and also allowed large-scale harvesting of the forests. Within 10 years, more than 100 companies were operating in the region.

These activities destroyed the traditional way of life of the Lubicon. From 1979 to 1989, the welfare rates among the Lubicon climbed from 10 per cent to 90 per cent. So, in 1980, the Lubicon sued the governments of Canada and Alberta for \$1 billion in compensation and started a land claim on the basis that they had never given up their Aboriginal rights. Negotiations over the land claim have been slow.

In 2005, the United Nations Human Rights Committee found that Canada was guilty of violating the International Covenant on Civil and Political Rights by ignoring the rights of the Lubicon people. The federal government argued that settling the claim is difficult because of the complications of Treaty 8 and the challenge of establishing just how many people belong to the Lubicon Lake Nation.

As of 2012, almost 1400 square kilometres of land has been leased for oil sands development. That's about 70 per cent of Lubicon territory. The Lubicon were not consulted.

Continuity and Change: How might sincere negotiations between Aboriginal peoples and the federal government change the pace of change? Would they lead to a more equitable outcome for all Canadians?

Voices

Since 1978, over \$14 billion have been taken out of our traditional territory. Yet my family still goes without running water. The more than 2600 oil wells on Lubicon territory make it difficult to live a healthy, traditional, and sustainable lifestyle.

— Melina Laboucan-Massimo, a member of the Lubicon Lake Nation and a Climate and Energy Campaigner with Greenpeace, 2012

Figure 3–14 Melina Laboucan Massimo, a member of the Lubicon Lake Nation, speaks at the Salish Sea Festival in North Vancouver, British Columbia, on September 2, 2012. Massimo is also a climate and energy campaigner with Greenpeace. How could Massimo use her perspective as a Lubicon to help her in her job at Greenpeace?



Voices

When I read Bill C-45, I was horrified. I got into a chat on Facebook with Jessica and Nina, and I started explaining to them the implications of C-45 for the environment, for the waters. I told them there's something in law called acquiescence. That means that if you're silent, then your silence is taken as consent. All of us agreed that we couldn't be silent.

—Sylvia McAdam, co-founder of Idle No More movement, 2013

Up for Discussion

Do omnibus bills fulfil the spirit of democracy?

Challenging the Government to Meet Its Constitutional Obligations

Many Aboriginal people and other Canadians question if the government is meeting its constitutional obligations to Aboriginal peoples. Some of their concerns relate to inaction in resolving ongoing problems such as poverty, poor housing, and insufficient education funding. Other concerns relate to government actions that erode Aboriginal rights.

In the fall of 2012, the federal government proposed Bill C-45. This was an **omnibus bill** — a large set of unrelated proposed changes that have to be voted on all at the same time. The purpose is to push through a lot of legislation without much scrutiny. At 400 pages, Bill C-45 changed 64 existing government acts.

One of these changes altered the Navigable Waters Protection Act. This 1882 act had protected all of Canada's navigable waters from industrial development that might harm fish populations and water quality. But Bill C-45 took away that protection from all waterways except 3 oceans, 97 lakes, and 62 rivers. All the rest are no longer protected from companies and governments building pipelines and power lines. The government claims that the original act was never intended to protect the environment but only to ensure that waterways remain navigable. It says that other laws protect water quality.

Four women — Sheelah McLean, Nina Wilson, Sylvia McAdam, and Jessica Gordon — exchanged emails about Bill C-45, planned a protest, and spread the word by creating a social media page they called Idle No More. The idea spread like wildfire, and within a month the movement staged a national day of protest with events across the country, including flash-mob dances, prayer circles, and blockades. The Idle No More page had 129 348 likes as of May 30, 2014.



Figure 3-15 Idle No More demonstrators march to the base of the Ambassador Bridge, which connects Windsor, Ontario, with Detroit, Michigan, on January 16, 2013. What issue would you feel so passionate about that you would join a protest like this to make your voice heard?

Aboriginal rights include rights to use the land and waterways in their traditional territories. Did the federal government fulfil its constitutional obligation when it passed Bill C-45?

Recall ... Reflect ... Respond

1. With a partner or in a small group, decide on several criteria that the federal government should use when deciding how to settle the land claim of the Lubicon Lake Nation. Prepare an email to send to your member of Parliament explaining your criteria and why the government should use these criteria.
2. Identify three ways that the Constitution has affected the relationship between the federal or provincial governments and Aboriginal peoples. Explain at least one from two or more perspectives. Which development improved relations most? Which eroded those relations most? Explain your choices.

How does the Constitution affect individual Canadians?

The Charter of Rights and Freedoms identifies the individual rights and freedoms of all citizens. Some citizens, though, had to fight to be included in the first place.

Women and the Charter

Initially, the proposed Constitution did not guarantee equality of men and women. But the government held a Special Joint Committee in 1980 to allow the public to make suggestions. The National Action Committee on the Status of Women (NAC) made a presentation, arguing that gender equality should be protected by the Constitution. Senator Harry Hays responded to the presentation with this remark: "I was just wondering why we don't have a section here for babies and children. All you girls are going to be working and you're not going to have anybody looking after them."

Participant Michelle Landsberg recognized the senator's mistake immediately. She knew it was a remark that would be reported in the media and spur to action men and women alike who believed that women should be guaranteed equality with men. She was right.

In February 1981, NAC organized a conference about the Constitution and the government cancelled it. So feminist groups organized another conference, formed a coalition, and called themselves the Ad Hoc Committee on the Constitution. They marched into Parliament on February 14 and demanded a specific clause on gender equality.

Their efforts resulted in Section 28, which says "Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons."

The Charter Levels the Playing Field

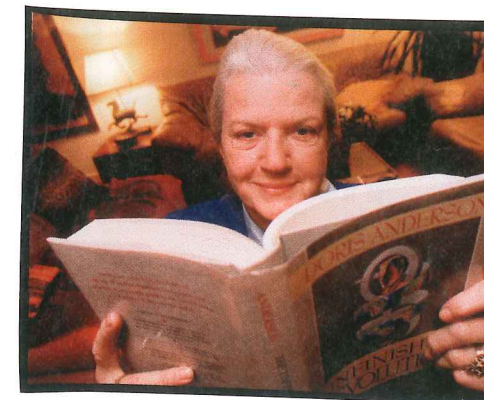
After the Constitution was passed, Canadians used the courts to achieve greater equality for women. During the 1980s, for example, three women who worked for a supermarket chain were denied company accident and sickness benefits while they were on maternity leave.

The women argued that this was discrimination and violated their Charter rights. The Supreme Court agreed. The justices ruled that bearing children benefits Canadian society and that women should not be placed at a disadvantage because they are the ones who bear children.

In another example, the Supreme Court found in 1988 that the Canadian abortion law was unconstitutional. The justices said that it violated the Charter provision that guarantees a woman's right to life, liberty, and security of the person. Since then, there have been no laws against abortion in Canada.

Continuity and Change: Compare and contrast women's inclusion in the Constitution with women gaining the vote. How are they the same and different? How is each a turning point? Which will have more impact in the long term?

Figure 3-16 Leading Canadian feminist Doris Anderson led the charge to ensure women's equality rights were included in the Charter. A feminist is someone who believes in the equality of men and women. Are you a feminist?



CONNECTIONS

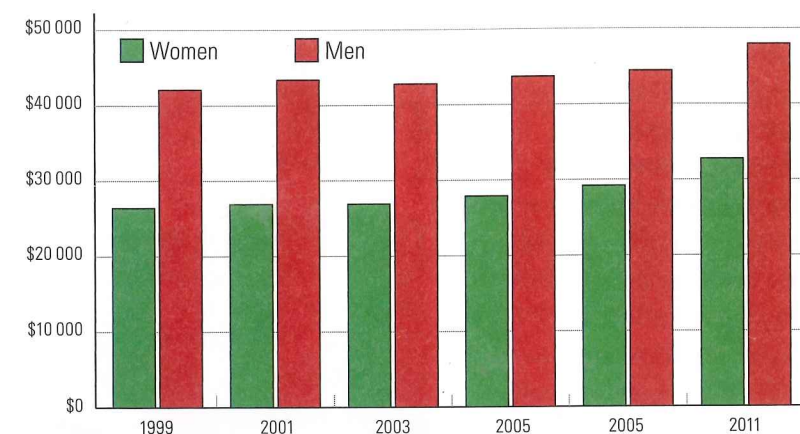
In 1982, Bertha Wilson became the first woman justice appointed to the Supreme Court of Canada. Wilson ruled on many issues relating to women's rights and was the author of the Supreme Court decision overturning the law on abortion. In 2000, Beverley McLachlin became the first woman to serve as chief justice of the Supreme Court. She is the longest-serving chief justice in Canadian history.

Limitations of the Charter

The equality rights guaranteed in the Charter gave many people hope that the gender wage gap could be reduced to zero — but this did not happen. Although women made some progress, the income gap between men and women has continued. By 2011, the income of women working full-time was only about two-thirds that of men who worked full-time.

Figure 3–17 Average Earnings by Gender, 1999–2011

What pattern do you see? Are you encouraged by it or not? Explain your response.



Source: Statistics Canada

The Charter can prevent governments from passing laws that create inequalities. But it cannot directly alter society. There are many reasons that women are paid less than men. Some women choose not to take high-paying but time-consuming jobs because they want work–life balance. Some women take time off from work to be with their young children, during which time their male colleagues may progress to a higher-paying position. In many cases, however, women are simply exploited — employers pay women less because they can get away with it. So the gender wage gap remains.

Employment Equity and the Charter

Although the Charter outlaws discrimination, it does allow one form of positive discrimination called **employment equity**. The Employment Equity Act requires federally regulated industries to actively seek out and favour candidates from groups such as women and visible minorities who have been historically underrepresented in a workplace.

Employment equity, sometimes called affirmative action, is not always welcomed. Critics argue that it is a form of reverse discrimination. They argue that standards are being unfairly lowered for women or visible-minority candidates. Richard Lawrie, president of the Fire Chiefs' Association of British Columbia, however, says, "No department that I know of has lowered its entry-level standards. That shouldn't be a concern for the public. If there's a woman in uniform, she's able to perform the same rescue as a male firefighter. The female firefighters we have in our organization are second to no man."

Women and members of other groups continue to be underrepresented in many occupations. Few women, for example, go into fields such as automobile repair. But wages in some male-dominated fields are higher than wages in female-dominated fields, such as childcare.

In your own words, define what equal opportunity in a civil society should be. Share your definition with a classmate and discuss the differences in your opinions.

Voices

Equality in employment will not happen unless we make it happen.

— Justice Rosalie Abella, in her landmark 1984 report *Equality in Employment*

Picturing Individual Rights and the Charter



Workplace Equity

Figure 3–18 When Andrea Lawrence joined the RCMP in 1987, she became the first Black woman to serve on the force. By 2004, more than a dozen Black women had become RCMP officers. How does requiring employment equity help improve public services such as policing?



Balancing Policing and Individual Rights

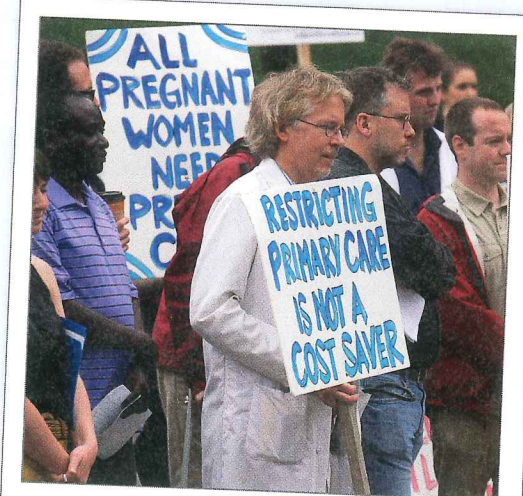
Figure 3–19 Sukanya Pillay is the general counsel of the Canadian Civil Liberties Association. This group works to protect Canadians' civil liberties guaranteed by the Charter. For example, in the spring of 2014, the association helped two students at Northern Secondary School in Toronto apply to the Ontario Superior Court of Justice to rule as unconstitutional the school's policy that all students must take a breathalyzer test before entering the prom. Should we protect freedoms, even when the goal is a social "good" such as a sober prom?



Equity for People with Disabilities

Figure 3–20 To be truly equal, as the Charter says we all should be, a citizen must have the opportunity to participate fully in society. Yet people with disabilities face both physical barriers and social stigma. To help create an accessible and inclusive Canada, Paralympic champion Rick Hansen launched the Man in Motion World Tour in 1985. How does the work of people like Hansen help fulfill the promise of the Charter?

Figure 3–21 In 1985, the Supreme Court of Canada ruled that the Charter guarantees not only Canadians but also refugee claimants in Canada life, liberty, and security of the person. Yet in April 2012, the federal government cut back on the level of health care it provides refugee claimants. An organization called Canadian Doctors for Refugee Care staged the 2013 protest pictured in this photograph. In 2014, they launched a court challenge. Should the Charter apply to everyone who arrives in Canada?



Equity for Refugee Claimants

LGBT Rights and the Charter

Protection from discrimination is guaranteed for all Canadian citizens by Section 15 of the Charter of Rights and Freedoms. You can read Section 15 in the Voices feature.

Voices

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

— Charter of Rights and Freedoms

Up for Discussion

Who opposes the increasing social acceptance of LGBT? Why?

Evidence: What are the two main points of Section 15? Is discrimination based on sexual orientation specifically prohibited? If the Charter were to be written today, do you think that discrimination based on sexual orientation would have been specifically prohibited? Why or why not? What inferences can you make about Canadian society in 1982? And today?

Section 15 was written in general terms (with key examples), so that as society changes, we can use it to protect ourselves from new forms of discrimination.

Consider discrimination on the basis of sexual orientation. For many years, this form of discrimination was legal. As recently as the 1960s, men engaged in homosexual activities could be charged as sex offenders and sent to prison. Pierre Trudeau initiated social change in 1967 when he said that “there’s no place for the state in the bedrooms of the nation. I think that what’s done in private between adults doesn’t concern the Criminal Code.”

Egan v. Canada was the 1995 landmark case that solidified protection for lesbian, gay, bisexual, and transgender (LGBT) citizens using Section 15. The case was brought to court by James Egan and John Norris Nesbit, a same-sex couple. Nesbit had applied for spousal benefits under the federal Old Age Security Act, but he did not qualify because the act defined a spouse as a person of the opposite gender. In its judgment, the Supreme Court held that Section 15 protected against discrimination on the grounds of sexual orientation. This ruling was a precedent that would change the lives of LGBT Canadians.

Civil Marriage Act

Another big change came in 2005. For years, Canadians had been torn about the definition of marriage. Some Canadians believed that marriage could occur only between a man and a woman. Others believed that all people should have the right to marry any person they choose and that withholding that right was discrimination according to Section 15.

After much debate, Prime Minister Paul Martin and his Liberal government proposed Bill C-38, the Civil Marriage Act, which would legalize same-sex marriages. This act defines marriage as follows: “Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others.” After the vote, Canada became the fourth country in the world to legalize same-sex marriage.

Figure 3–22 The House of Commons votes on the Civil Marriage Act, June 28, 2005

The act passed by a margin of 158 to 133. What patterns can you see in this record of the vote? What can you conclude?

Political Party	For	Against	Absentees	Total
Liberals	95	32	4	131
Conservatives	3	93	2	98
Bloc	43	5	6	54
NDP	17	1	1	19
Independents	0	2	2	4

Change — Not an Event but a Process

Queen Elizabeth II signed a proclamation on April 17, 1982, that made the Charter of Rights and Freedoms the law of the land in Canada. Did Canada become a more tolerant nation overnight? Not exactly. Changing a society involves more than just changing a law.

Think about how you change your mind about something. Let’s say that on Monday afternoon you get an online event notification for a Pride event. It doesn’t sound like your kind of thing. A day later, you overhear friends talking excitedly about going. On Friday, you see a Pride poster and it sticks in your brain. Finally, on Saturday afternoon, you check it out online and get permission. You made your decision on Saturday afternoon, but the change in your mindset took place over the course of a whole week.

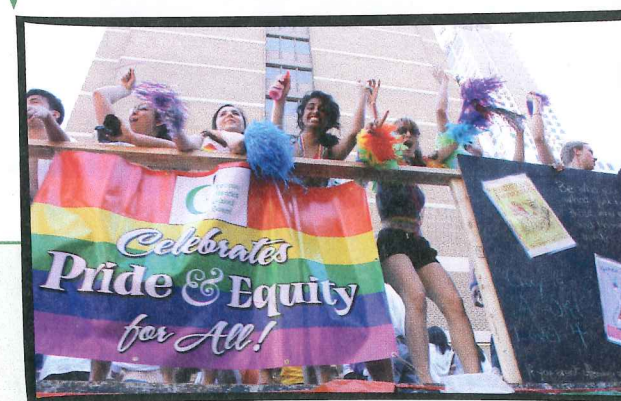
Social change takes place in much the same way except that, instead of one shift in mindset, millions of mindsets have to change. Think about how Canada has been transforming into a society more accepting of LGBT Canadians as equal citizens.

- In 1978, the federal government removed a ban on gay and lesbian immigrants.
- The 1995 ruling in *Egan v. Canada* made discrimination based on sexual orientation illegal.
- In 1999, a Reform Party motion to affirm the definition of marriage as “the union of one man and one woman to the exclusion of all others” passed in the House of Commons.
- In 2000, the Liberal government introduced Bill C-23, which gave gay and lesbian couples the same rights as common-law couples.
- In 2003, the Ontario Court of Appeal ruled that forbidding same-sex couples from marrying was an infringement of their rights. Ontario legalized same-sex marriage — the third government in the world to do so after the Netherlands and Belgium.

- In 2003, the Conservative party introduced a motion to again reaffirm the traditional definition of marriage. This time, the motion failed.
- In 2005, the Liberal government of Paul Martin passed the Civil Marriage Act, which extended marriage rights to same-sex couples.

The legal changes mirrored changes in Canadian society. While not every Canadian agrees on this topic, the past half a century has seen a significant shift in public opinion.

Figure 3–23 For years, many LGBT Canadians were fearful of social condemnation and some still are. Taking part in a Pride parade is a way of saying, “This is who I am, and I’m not going to live in fear anymore.” How might the actions of these participants in 2010 affect the speed of change?



Explorations

1. The first Toronto Pride event was a rally that took place in 1981, in response to harsh police treatment of gay men. The rally became an annual event, and in 1982, 2000 people attended in Grange Park, Toronto. By 1993, 150 000 people went to the Toronto Pride Parade. And in 2013, 1.2 million attended the final weekend of Pride Week. These estimates do not indicate that a growing number of people in Canada are LGBT. What process of change do they indicate?
2. Consider the timeline of events leading to increased social acceptance of LGBT Canadians. Describe the flow of change through time. When did it start? Was it slow or fast at certain points? Did it change direction? Or go backward? Why does change not always happen in a straight line? Why doesn’t it happen overnight?

Check Back

You read in Chapter 1 about the continuing struggle for the rights of people with disabilities.

People with Disabilities and the Charter

A disability is a physical or mental condition that limits a person's movements, senses, or activities. Disabilities can be either temporary or permanent. Examples of disabilities include paralysis, blindness, and deafness. Many people with disabilities overcome difficulties with day-to-day activities to make a valuable contribution to society.

People with disabilities often suffer discrimination in areas such as employment, housing, and transportation. They rarely have the same opportunities as people without disabilities.

The Charter's recognition of the equality rights of people with disabilities was a turning point. Governments could no longer argue that it was too costly to provide housing to meet the needs of people with disabilities. Employers, retail stores, theatres, and other private facilities and companies were required to accommodate people with disabilities. Nonetheless, many people with disabilities continue to face barriers to their full participation in Canadian society.

In the past, for example, some women with intellectual disabilities were sterilized against their will to ensure that they did not become pregnant. In the early 1980s, the case of a young woman known as Eve ended up at the Supreme Court. Eve, who had an intellectual disability, attended a special school, where she had met and formed a close relationship with a young man who was also a student at the school.

Worried that Eve might become pregnant, her mother applied to the court for an order authorizing her daughter's sterilization. The case made its way through the courts, and in 1985, the Supreme Court ruled that sterilization would be a "grave intrusion" on the rights of people with intellectual disabilities, unless the operation was necessary to deal with a serious medical condition.

Since then, the Supreme Court has made a number of rulings upholding the rights of people with disabilities.

Figure 3–24 In 1983, Barbara Turnbull was an 18-year-old Mississauga high school student with a part-time job at a convenience store. During an armed robbery at the store, she was shot and paralyzed from the neck down. Despite this disability, Turnbull earned a university degree in journalism and launched a career as a reporter at the *Toronto Star*. The Charter forbids discrimination. How might this affect her job prospects?



Recall... Reflect... Respond

1. In point form, list some of the activities you participate in during a typical day (e.g., going to school, computer gaming, posting on a social media site, meeting friends at the mall). Next to each activity, note how the Charter of Rights and Freedoms affirms your right to carry on the activity.
2. On a scale of 1 to 10 (1 = not very significant; 10 = highly significant), rate the historical significance of the Charter of Rights and Freedoms to Canadian women, LGBT Canadians, or Canadians with disabilities. Explain the criteria you used to arrive at your rating.
3. a) Work with a partner to identify five rights and freedoms that you think are most important to Canadians under the age of 18.
b) Bring your list home, and share your ideas with one or more family members. Explain your choices and ask for ways to improve your list. Revise your list as you see fit.
c) Share your revised list with your partner, and discuss the reasons for the changes you made.

Viewpoints on History

The Supreme Court versus Parliament

The debate over whether or not the Supreme Court should be able to throw out a law passed in Parliament has continued since 1982. Some people accuse the justices of engaging in "judicial activism," interpreting the Constitution in a way that aligns with their personal beliefs. Others say that justices are better qualified to measure laws against the criteria of the Constitution, while politicians may be swayed by public opinion.

The following are three views on the issue.



A journalist who specializes in national affairs, **RORY LEISHMAN** is the author of *Against Judicial Activism: The Decline of Freedom and Democracy in Canada*.

Prior to the Charter, Parliament and the provincial legislatures were supreme. . . . Today, the Supreme Court of Canada reigns supreme over the legislative as well as the judicial process. Time and again . . . unelected judges on this Court have issued guidelines on legislative policy to the democratically elected representatives of the people of Canada in what is supposed to be the legislative branch of government. . . .

This revolution in the Canadian legal order threatens all Canadians.



THOMAS AXWORTHY is Senior Distinguished Fellow at the Munk School of Global Affairs. During the debate over patriating the Constitution, he helped frame the Charter of Rights and Freedoms.



By 2014, **BEVERLEY MCLACHLIN** had served as chief justice of the Supreme Court for 24 years. She has dealt with many cases that relate to the Charter of Rights and Freedoms.

Some . . . argue that only those elected to office can legitimately exercise power on behalf of the people governed. That argument has a powerful logical appeal. However, it founders on the rocks of reality. . . . The reality in Canada is that our Constitution confers certain powers on unelected bodies, notably the Courts. To start from the assumption that any exercise of governance power other than by elected officials is illegitimate is to ignore the reality of our democracy, as defined by our Constitution.

Judges are human: they can make errors. But in my view the magnitude of error in the possible excesses of majoritarian legislature [majority governments overstepping their authority] are far greater than judicial excesses [the Supreme Court overstepping its authority]. . . . The essence of entrenched bills of rights are that a society makes a pre-commitment to protecting minority rights by putting in place judicial barriers to prevent emotions from getting out of control.

Explorations

1. Which of the three positions most closely reflects your understanding of the issue? Explain your position.
2. Who should have the final say on the constitutionality of our laws, the government or the Supreme Court of Canada? Explain the pros and cons of each scenario. Provide examples to support your conclusion.
3. With a partner, develop two or three criteria that Supreme Court justices could use when deciding whether or not to strike down a law passed by Parliament. Compare your criteria with those of another pair, exploring the reasons for the similarities and differences.

Chapter 3 Review

Knowledge, Understanding, and Thinking

1. Create a timeline that shows significant events in the constitutional debate. Start with Pierre Trudeau's promise to Québec sovereignists in 1980 and end with the 1995 referendum. For each item on the timeline, include a point-form note explaining its significance in the process. Identify the events that you believe have had the most lasting effect on Canada and explain your choices. Add drawings above and below your timeline to draw attention to key events.
2. Choose one person or organization that you think helped shape Canadian identity during the decades following the patriation of the Constitution in 1982. Explain your choice, using an example from the text.
3. **Historical Significance:** Compare the reasons three different groups discussed in this chapter would have for finding the 1982 patriation of the Constitution to be an historically significant event.

Communicating and Applying

4. **Evidence:** Conduct research in newspapers and magazines or online to find out more about one of the Supreme Court's Charter-related decisions mentioned in this chapter or about any other Charter-related case that interests you.
 - a) Summarize the arguments presented by those involved on both sides of the issue.
 - b) Explain the Supreme Court's decision and the reasons behind it.
 - c) Provide two quotations relevant to the case. Record who is speaking, what qualifies him or her (e.g., give a job title), and the date.
 - d) Decide whether or not the Supreme Court decision is the right decision for Canada. Explain the criteria you used to reach your conclusion.
 - e) Does your conclusion support or challenge the idea that Supreme Court justices, not Parliament, should make decisions on protecting the individual rights set out in the Charter of Rights and Freedoms? Explain your reasoning.
 - f) Present your findings to a small group or the class.

5. **Evidence:** Read the following excerpts from the speech made by Pierre Trudeau on the day Queen Elizabeth II signed the Constitution Act in 1982. Trudeau speaks of important clauses in the Constitution and describes what he hopes the Constitution will achieve.
 - a) List everything you know about the excerpt: what it is, who created it, when, and why. Explain the historical context of this excerpt.
 - b) Examine the excerpt for evidence about Trudeau. Make inferences about his values and world view. What kind of Canada did he dream of?
 - c) Trudeau died in 2000. If he were alive today, do you think he would be satisfied that patriating the Constitution was the right course of action? Why or why not? Summarize your thoughts in an illustration or a short paragraph that completes this idea: *If Pierre Trudeau were alive today...*

I speak of a Canada where men and women of Aboriginal ancestry, of French and British heritage, of the diverse cultures of the world, demonstrate the will to share this land in peace, in justice, and with mutual respect. I speak of a Canada which is proud of, and strengthened by, its essential bilingual destiny, a Canada whose people believe in sharing and in mutual support, and not in building regional barriers. . . .

We now have a Charter which defines the kind of country in which we wish to live, and guarantees the basic rights and freedoms which each of us shall enjoy as a citizen of Canada.

It reinforces the protection offered to French-speaking Canadians outside Québec, and to English-speaking Canadians in Québec. It recognizes our multicultural character. It upholds the equality of women, and the rights of disabled persons. . . .

The government of Québec decided . . . not to participate in this ceremony celebrating Canada's full independence. I know that many Québeckers feel themselves pulled in two directions by that decision. . . .

History will show, however, that in the guarantees written into the Charter of Rights and Freedoms, and in the amending formula . . . nothing essential to the originality of Québec has been sacrificed.

6. **Historical Significance:** The anniversary of the patriation of the Constitution took place on Tuesday, April 17, 2012. But for the federal government of Stephen Harper and the Conservatives, it was just a Tuesday like any other. Former Liberal Prime Minister Jean Chrétien commented the next day:

You know, it's a very important moment in Canadian history — whether you agree or disagree [with it]. . . . The first of July, I never refused to celebrate it because [Conservative] John A. Macdonald was the prime minister [at Confederation]. It would be ridiculous to say, no, he was not a Liberal.

- a) What is Chrétien saying about the historical significance of the patriation of the Constitution?
 - b) Create a set of criteria for deciding which historical events the federal government should help Canadians remember.
 - c) Should the government have taken any actions to help Canadians reflect on their constitutional history?
7. The notwithstanding clause was added to the Constitution in a last-ditch effort to reach agreement among the premiers in 1982. Pierre Trudeau hated it. But it provided a level of flexibility that reassured premiers that they had a way to opt out if something in the Constitution was overriding a provincial goal. It has rarely been used.

Prepare a persuasive argument consisting of at least three paragraphs in support of or in opposition to this statement: "The notwithstanding clause should not have been included in the Constitution."

Include

- statements that set out your understanding of the notwithstanding clause and the relationship between governments and the Supreme Court
- the criteria you used to reach your conclusion
- specific points to support your position

8. The Constitution protects both collective rights and individual rights.
 - a) Describe the difference between a collective right and an individual right.
 - b) Give an example of a collective right and an individual right that are protected by the Constitution.
 - c) The Constitution can be amended to specify additional collective or individual rights that should be included. In 1993, for example, an amendment guaranteed equality between Anglophone and Francophone residents of New Brunswick. Identify both a collective right and an individual right that you recommend be included in the Constitution. In a paragraph, state the reasons each should be included.
9. **Ethical Dimension:** In 2014, the Federal Court of Appeal upheld a federal court decision that Métis have the same rights as status Indians under the Constitution. This decision may dramatically affect the lives of the 350 000 Métis in Canada. The federal government is expected to appeal this decision to the Supreme Court.
 - a) Read the quotation below. What is Betty Ann Lavallée saying? Do you agree with this perspective?
 - b) What other perspectives and information would you like to examine before deciding if you agree that Métis should have the same rights as status Indians?

Métis and non-status Indians have never been granted the same recognition and rights as those provided [to] status Indians living on reserve. . . . They have been shut out for far too long on being recognized for who they are and where they fit within the Canadian society.

— Betty Ann Lavallée, national chief of the Congress of Aboriginal Peoples, 2014

10. On June 26, 2014, the Supreme Court ruled on the Tsilhqot'in First Nation's land claim. Grand Chief Stewart Phillip, president of the Union of BC Indian Chiefs, said, "We all heard the decision at the same moment, and the room just erupted in cheers and tears. Everybody is absolutely jubilant. It's very emotional." Research this ruling, and its potential impact for Aboriginal peoples and other Canadians.