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Information is included to explain the provisions of a  
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Canada.

# THE CANADIAN CONSTITUTION 1980

## THE CANADIAN CONSTITUTION 1980

EXPLANATION of a  
resolution respecting  
the Constitution of Canada

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### Preface

This publication is intended to explain the provisions of a Resolution presented to Parliament respecting the Constitution of Canada. It is published by the Government of Canada in the interest of contributing to public discussion.

The full text of the Resolution and additional copies of this explanation may be obtained by writing to:

**Publications Canada**  
**Box 1986, Station "B"**  
**OTTAWA, CANADA**  
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### Introduction

The Parliament of Canada has before it a Resolution containing constitutional proposals of historic importance. When these proposals come into effect, they will signify the passing of the last vestige of Canada's former colonial status. After 113 years, we will finally have a Constitution which is completely our own and which can be amended entirely within this country. The changes are also momentous in that, for the first time, Canadians will have basic rights and freedoms enshrined in and protected by the Constitution. This booklet is published to help Canadians understand the nature and significance of the Resolution before Parliament. The reader interested in more detailed information should refer to the Resolution itself, which has been published with clause-by-clause explanatory notes.

### The Resolution

The four main objectives of the Resolution are discussed in detail below, but in brief they are as follows:

- To "patriate" the Constitution and provide for an amending formula
- To entrench a Charter of Rights
- To entrench the principle of Equalization
- To require the convening of a First Ministers' Conference each year

In addition the Resolution provides that for the first time both the French and English versions of the Constitution will be official texts.

### Patriation With An Amending Formula

When the Fathers of Confederation sat down in Charlottetown in 1864 to begin to draft the resolutions that would become the *British North America Act*, they did not include an amending procedure, since it was to be an act of the British Parliament and therefore subject to the normal provisions for altering legislation in Britain. Today, 116 years later, every time Canada wants to amend any part of the Canadian Constitution that relates to the division of powers between the Parliament of Canada and the legislatures of the provinces and certain other provisions it still has to ask the Parliament of the United Kingdom to pass an amendment to the *BNA Act*. Canada is the only sovereign country in the world that still has to turn to the Parliament of another country to amend its Constitution.

This unusual situation has been recognized for more than 50 years. It has not been corrected, however, because federal and provincial governments have been unable to agree on an amending formula.

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The search for a formula began in 1927. This first attempt was unsuccessful as was a subsequent attempt in 1931. As a result, Canada requested that the *BNA Act* be excepted from the terms of the Statute of Westminster, which recognized the independence of the self-governing countries of the Commonwealth and provided that the jurisdiction of the British Parliament no longer apply to them.

*In this account*

Again at federal-provincial conferences in 1935-36 and in 1950 attempts were made to find a formula—without success.

During the 1960s a concerted effort was made to find a formula that would satisfy the federal and provincial governments. In 1961 an amending procedure known as the "Fulton formula," named after the then Minister of Justice E. Davie Fulton, was developed. It did not receive unanimous support, but in 1964, at a federal-provincial conference, a modified version of this formula, advanced by the Minister of Justice of the time, the Honourable Guy Favreau, and known as the Fulton-Favreau formula, was approved in principle. Subsequently, it too failed to win unanimous provincial support and was set aside.

Between 1968 and 1971 a continuing Constitutional Conference discussed patriation and an amending procedure. All governments represented at the Victoria Conference in June 1971 agreed to what became known as the "Victoria" amending formula. It seemed that, at last, a satisfactory formula had been found. However, when the Government of Quebec decided after the Victoria Conference that it was not prepared to proceed with the full constitutional package, of which the amending formula was a part, this attempt failed as well.

The search was again taken up in 1975-76 and in 1978-79 and finally during the constitutional negotiations of the summer of 1980. While various formulas were discussed, no agreement was reached.

Fifty-three years after the search began, we still have not agreed on a formula. It is widely recognized that it is not only inconvenient to have to ask the British Parliament to amend the *BNA Act*; it is also inconsistent with our status as a sovereign state. Not only that, but the absence of a Canadian amending formula has made step-by-step constitutional reform more difficult. In 1980, no government can easily accept the affront to national pride of having to perpetuate the system of asking the British Parliament to amend our Constitution item by item, a procedure equally burdensome to the British and to Canadians.

The desirability of patriation has been acknowledged for years by both federal and provincial governments. As recently as May of 1980, a Progressive Conservative Member of Parliament introduced a resolution in the House of Commons calling for patriation. His resolution was given unanimous approval by the House.

The missing key to what all Canadians accept as a desirable goal, namely patriation, is agreement on an amending formula. The Resolution now before Parliament offers a way out of this predicament.

The Resolution now before the Canadian Parliament will permit the patriation of the Constitution. Since no amending formula has yet been agreed upon, any amendments to those parts of the *BNA Act* which must now be amended in London, will in future require the unanimous approval of Parliament and the provinces. This will be the situation until the first federal general election to be held in the normal course of events but no sooner than one year after the date of patriation. In the intervening period, the provinces and the federal government will have an opportunity to make a last, concerted effort to agree on an amending formula. If they succeed, the formula they adopt will come into effect. However, if they fail, yet again, two devices are provided to bring this process to a conclusion:

- if six or more provinces agree on an amending procedure which the federal government cannot accept, this formula and the federal government's preferred formula will be put to the people in a referendum to be held at the time of the federal general election that occurs at least one year after patriation;
- if, however, there is no consensus among the provinces on a formula, an amending procedure, based on the Victoria formula, will automatically come into effect at that time. In general, this formula would require that amendments to the Constitution be approved by Parliament and the legislative assemblies of at least a majority of the provinces that include
  - every province that has or has had a population of at least 25% of the population of Canada;
  - at least two Atlantic provinces with at least 50% of the population of all the Atlantic provinces; and,
  - at least two Western provinces with combined populations of at least 50% of the population of all the Western provinces.

In addition, the formula would provide for referenda, initiated by the electorate, which could override an attempt by either a federal or provincial government to block an amendment.

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These two devices will ensure that Canada will not be faced forever with the requirement of getting unanimity on constitutional changes. An amending formula which required unanimity would, in the long-run, be a recipe for constitutional stagnation. For while an amending formula must be sufficiently rigid to prevent the Constitution from being changed at whim or altered against the will of a significant proportion of the population, it must not be so rigid that constitutional change becomes almost impossible. It is not an easy task to strike this delicate balance—but it is possible.

We have come close on several occasions to achieving agreement on a formula, but unanimous consent has always eluded us and may continue to do so. In view of the fact that there is now a widespread belief that patriation has become essential for reasons of both national pride and practicality, the Government of Canada has laid a Resolution before Parliament to bring about the patriation of the Constitution. At the same time, there is provision for further intergovernmental discussions on an amending formula. If, however, governments are still unable to agree on the best available formula, then the Canadian people will be asked to choose by way of referendum.

### **The Canadian Charter of Rights and Freedoms**

It has long been acknowledged that in a free and democratic society an individual must be assured certain basic rights and freedoms. At one time it was believed that these rights and freedoms could be adequately protected simply by the ordinary processes of parliamentary democracy, but increasingly it has been recognized that more protection is required. The international community has expressed this need through such instruments as the Universal Declaration of Human Rights (1948), and the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights (1966). The Canadian government, after consultation with the provinces, joined many other nations in subscribing to these international commitments to foster and protect basic rights of people.

*OK*  
In Canada, there also has been a growing recognition that legislatures should provide more positive protection for basic human rights. In 1960, Parliament adopted the Canadian Bill of Rights. Saskatchewan, Alberta and Quebec, all have provincial bills of rights. In addition, Canada and all the provinces now have laws which proscribe discriminatory practices in a broad range of social and economic activities.

While these various statutes afford some measure of protection for basic rights and freedoms, this protection, by its very nature, is limited.

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*Freedom of thought, belief, opinion and expression,  
including freedom of the press and other media*

The legislature or Parliament that passed the law yesterday could decide to repeal or restrict it tomorrow.

The individual's only immediate redress would be to try to convince the same government that restricted the rights to reinstate them.

*Freedom of peaceful assembly and of association*

In a country as diverse as Canada, with two official languages and many cultural groups, basic rights and freedoms require more protection than this. Rights by their very nature pertain to individuals and minorities and their protection should not be left simply to the goodwill of the majority or the government of the day. They must be guaranteed in the Constitution, beyond the power of any single government, Parliament or legislature to change them.

Most contemporary Western societies have recognized that the best way to protect minority rights is to entrench them in the Constitution. In fact, virtually all federal states in the world have constitutionally-enshrined rights and freedoms. Even in Britain, where it has always been accepted that rights could be adequately protected by the ordinary law, consideration has been given to entrenching a Bill of Rights. Canadians are thus by no means alone in recognizing the need to guarantee rights in the Constitution.

The Charter of Rights, proposed in the Resolution, will entrench fundamental freedoms and democratic rights, mobility rights, and language of education rights in the Constitution, so that they cannot be changed by Parliament or by any provincial legislature acting alone. In addition, legal rights and non-discrimination rights will be entrenched at the federal level with the provision that each province may determine, at any future date, to accept these entrenched rights as binding upon the province.

Finally, the current constitutional status on language rights in Parliament, provincial legislatures, in the statutes and in the courts will be maintained, and French and English will be declared the official languages of Canada.

### **Entrenched Rights**

The rights and freedoms to be entrenched for all Canadians in all matters of federal, provincial and territorial responsibility are as follows:

#### **Fundamental Freedoms**

- *Freedom of conscience and religion*

This provides that an individual is free to follow equally his religious beliefs and the dictates of his conscience.

- *Freedom of thought, belief, opinion and expression, including freedom of the press and other media*

This conveys not only the right to express one's views but equally the right to hold those views, even though others may not share them. It explicitly mentions the press and other media to leave no question about their existing right to disseminate news and opinion.

- *Freedom of peaceful assembly and of association*

This ensures that there is no question about the right to demonstrate or associate for peaceful purposes and in a peaceable manner in Canada, and that the onus is on the Crown to prove that an assembly is for other than peaceful purposes.

**Democratic Rights**

- *The right to Vote and and to Stand for Office*

This ensures that Canadian citizens will have the right to vote in an election of members of the House of Commons or of a legislative assembly and the right to qualify for membership in either of those institutions.

- *The Right to Periodic Elections*

The Charter continues the current constitutional provisions that limit the time a government may remain in power without holding a general election to five years, and that require Parliament and provincial legislatures to meet at least once a year. The existing provision that permits the House of Commons to extend its duration in time of "real or apprehended war, invasion or insurrection" is extended to provincial legislatures.

*Actual restriction  
or more power*

**Mobility Rights**

- The Charter entrenches the well-established right that every Canadian citizen is entitled to enter, remain in or leave Canada. It also establishes for the first time the right of citizens and permanent residents of Canada to move freely throughout the country. This confirms the fact that Canadians, regardless of province of residence, should be able to establish themselves and seek employment anywhere in the country.

*without demand*

**Language Of Education Rights**

- Citizens of Canada, whose mother tongue is that of the English-speaking or French-speaking minority population of a province, will have the right to educate their children in that minority language at the primary and secondary school levels, wherever the number of children warrants the provision of such educational facilities. These are important new rights which give effect to the principle of minority language education rights agreed to by all Premiers in 1978.

**“Opting In” For Provinces**

Two other categories of rights in the Charter, which will initially only be binding in matters of federal or territorial responsibility are: “legal rights” and “non-discrimination rights.” Individual provinces would not have to subscribe to the enshrinement of these rights. Each province, however, may choose at any time to “opt in” to one or both of these categories of rights. At such time, these rights would become binding in matters of provincial responsibility in that province. The specific rights in these two categories are:

*Legal Rights*

- *Right to life, liberty and security of the person*

This ensures that there will be no interference by the State with these vital rights of individuals, except by duly specified legal procedures that are inherently fair in their application.

- *Right to security against unreasonable searches and seizures*

This protects an individual against actions by law enforcement authorities which although lawful, may unduly infringe the security of an individual or his property.

- *Protection against arbitrary detention or imprisonment*

This ensures that no individual in Canada may be held by police or placed in prison without lawful and reasonable justification.

- *Right to know reasons for arrest, right to counsel and to test validity of detention*

This protects individuals arrested or detained by law enforcement authorities against actions that may infringe a person's liberty. It ensures that the individual will know why he is being held, and will be able to seek advice from his lawyer on the matter and will have a court determine expeditiously whether the detention is lawful.

- *Rights when charged with an offence to certain fundamental protections*

These protections include the right to be informed promptly of the charge; to be tried within reasonable time; to be presumed innocent until proven guilty in a fair and public trial; and to be granted bail where appropriate. They also include protection against being found guilty if an act wasn't an offence when it occurred and against being tried twice for the same offence. In addition, if punishment is changed between the time the act occurs and sentencing, only the lesser punishment may be imposed.

- *Protection against cruel and unusual punishment or treatment*

This is designed to protect individuals against inhuman forms of treatment or punishment.

- *Right of a witness when compelled to testify not to have any evidence so given be used to incriminate that witness*

This right reflects the Canadian law that no one should be required to incriminate himself. While a witness may be compelled to testify, he is protected from having such evidence used to incriminate him in subsequent proceedings.

- *Right to assistance of an interpreter*

Guarantees a person involved in court proceedings the right to an interpreter if he or she doesn't speak or understand the language of the proceedings.

#### *Non-Discrimination Rights*

- This establishes the right to equality before the law and to equal protection of the law without discrimination because of race, national or ethnic origin, colour, religion, age or sex. This section of the Charter does not, however, prohibit "affirmative action" programs which are aimed at improving the conditions of disadvantaged persons or groups, who find themselves in that conditions as a result of past discriminatory practices.

#### **Existing Rights Entrenched**

A third set of rights, which at the present time are guaranteed either constitutionally or by federal legislation will now be codified in the Charter. They apply only to Parliament and the Government of Canada.

#### *Language Rights In Parliament*

- Any individual has the right to use either English or French in any debates or other proceedings of Parliament. The statutes, records and journals of Parliament must be printed and published in both languages.

#### *Language Rights In Courts*

- Any individual has the right to use English or French before the Supreme Court or any other federal court.

#### *Language Rights In Federal Institutions*

This entrenches English and French as the Official Languages of Canada and those provisions of the federal *Official Languages Act* which give the right to the public to communicate with and receive services from any head or central office of an institution of the Parliament or Government of Canada in either English or French, and, in some areas where numbers warrant, from any other office of such institutions.

The use of either English or French in the legislatures, the courts and in the statutes and records of the provinces of Quebec and Manitoba will continue to be protected by existing constitutional provisions.

It should be noted that a section of the Charter entrenching "Undeclared Rights," ensures that if individuals or groups of Canadians have rights which are not explicitly mentioned in the Charter, they will still be able to enjoy them fully. The provision makes specific reference to the rights and freedoms of the native peoples of Canada.

No right or freedom of an individual or minority exists in absolute terms. For example "freedom of expression" does not mean that an individual can defame his neighbour. Equally the "right to vote" does not mean that a person under the age of majority has the vote. That such limits exist is recognized by the opening sections in the Charter which indicate that the rights are subject to such reasonable limits as are consistent with a "free and democratic society." These limits will, as in the past, be spelled out in our laws. However, their reasonableness in any particular case will be determined by the courts and where the limits are found to be unreasonable they will be struck down.

## Questions And Answers

### Why do we need a Charter of Rights in the Constitution?

The argument usually made against an "entrenched" Charter of Rights is that, since our rights and freedoms are already well protected by tradition and, in some cases, even legislation, it is unnecessary to write them into the Canadian Constitution. Yet, we are all aware of instances in Canada where laws or administrative actions have resulted in a deprivation of rights. An entrenched Charter, by proclaiming specified rights to be beyond the normal power of legislative majorities, provides a sense of security and, moreover, a practical means of redress to many individuals and minorities who feel aggrieved. It also reminds governments at all levels that their powers are limited and must be exercised with care and respect for the inherent rights of the people. In addition, the Charter ensures that a person not only can move freely from one place to another in the country, but also that each individual will enjoy the same basic rights and freedoms wherever he or she lives.

### What are the "new" rights or freedoms in the Charter?

Several important new rights are included, for example, with respect to the use of the English and French languages in Canada. Freedom of conscience has been added to the traditional freedom of religion. Protection against unreasonable searches and seizures and against the retroactive application of criminal sanctions has been added as well as the right of a person charged with an offence to be informed promptly of the charge and to be tried within reasonable time. The right of Canadian citizens to move from province to province and to seek employment in another province would also be guaranteed for the first time. The right to vote and to stand for elective office would be expressly assured as well.

**Why are some rights entrenched for the provinces while others are not?**

Ideally, all the rights in the Charter could have been applied universally to both levels of government. This was the federal government's original hope. However, many of the provinces felt that it was either premature or inappropriate for certain "legal rights" and "non-discrimination rights" to be made binding on provincial governments. Therefore, the federal government has proposed that these rights be entrenched in its own sphere of jurisdiction, but it has left it open to each individual province to "opt in" to either or both of these categories of rights, whenever it chooses to do so.

**By "entrenching" a charter of rights are we restricting the power of the elected legislatures and giving too much power to the courts?**

An entrenched Charter of Rights will limit the power of Parliament and provincial legislatures to pass laws or take actions which contravene or restrict these guaranteed rights of Canadians. In this sense, therefore, the power of the legislatures including the Parliament in Ottawa will be restricted. Nothing in the Charter, however, prevents any legislature or Parliament from *adding* to our rights or *increasing* their protection. Moreover, in an age when activities of government affect almost every aspect of our social life, legislative majorities should not have complete freedom to act, inadvertently or deliberately, against the rights of an individual or a minority. If they do so, it is appropriate for aggrieved individuals to seek redress through the courts. Traditionally the courts have settled disputes between citizens and the state, and, in the future, they will have the guidance of a Charter to assist them in this. The basic question is not whether an entrenched Charter gives more power to the Courts or less power to the legislatures. The important point is that, in future, governments, legislatures and courts alike will be obliged to respect and defend the rights of all Canadians.

**How does the Charter deal with language rights?**

The Charter recognizes that English and French are the official languages of Canada. It ensures that all current constitutional and legislative language rights with respect to the institutions of the Parliament and Government of Canada are maintained. Where language minorities have had historic rights, such as the English-speaking community in Quebec and the French-speaking community in Manitoba, these rights will continue to be protected in the Constitution. The Charter does not make any specific provision for the extension of these rights to other provinces. However, if any province wants any of these language rights to be entrenched, there is a general provision in both the interim formula and in the proposed procedure based on the "Victoria formula" for the Constitution to be amended with the agreement of Parliament and that provincial legislature. Finally, the Charter protects any future or existing rights or privileges to use any other language, such as Cree, or Inuktitut, Ukrainian or Polish and specifically guarantees the right to an interpreter in judicial proceedings.

**How does the Charter treat the right to minority language education?**

In Quebec, Canadian citizens whose mother tongue is English could choose to educate their children in English where numbers warrant. In the other nine provinces and the Yukon and Northwest Territories, a similar right to educate their children in French would be conferred on Canadian citizens whose mother tongue is French. This constitutional right to choose would not apply to non-citizens, or to citizens who belong to the official language majority population of the province. Thus a province would remain free to place the children of immigrants in the majority language school system of the province and to require that children who are members of the language majority of that province receive their education in their mother tongue. The Charter, would, of course, in no way restrict the right of parents to have their children educated in the majority language of a province. Neither would it in any way prohibit the teaching or use of the majority and minority languages, or indeed, of other languages. Nor would it restrict a province from extending to all its residents a choice of either official languages in the field of education. Indeed, New Brunswick already provides a broad freedom of choice in this regard.

**Why is it necessary to include the question of language of education in the Charter?**

**Would it not be best to have it dealt with by the provinces among themselves, through reciprocal arrangements?**

It is the Government's strongly held view that only through an amendment of the Constitution can Canadians be definitely assured that certain common basic language rights will be observed throughout the country. Reciprocal arrangements cannot guarantee protections against alterations as a result of short-term political or social changes, or against withdrawal at any time by any province which may consider that its commitment is no longer desirable. In addition, although reciprocal arrangements have been discussed since 1977, none currently exist.

**Are the rights of the native people protected by the Charter?**

The provision specifies that nothing in the Charter can deny any other rights or freedoms that exist in Canada, including specifically those that may pertain to the native peoples. This will ensure that the native peoples, while gaining the added protection that all Canadians will enjoy through the entrenchment of the Charter, will not at the same time lose any other rights they now have. The federal government will be continuing discussions with the native peoples' groups to determine whether other rights, more specific to the native peoples, should be added to the Charter.

**Equalization**

The practice of using federal revenues to redistribute wealth to the poorer provinces of this country is well-accepted. Since 1957, unconditional transfers known as equalization payments, have been made by the federal government to enable every province to provide a reasonable level of public services, without having to impose an unreasonable tax burden on its residents. This practice has become so well established that it has now emerged as a fundamental "principle" of Canadian federalism.

The *Constitution Act, 1980* entrenches the principle of equalization and commits both levels of government to:

- promoting equal opportunities for the well-being of Canadians;
- furthering economic development to reduce disparity in opportunities; and, specifically,
- providing essential public services of reasonable quality to all Canadians.

At least once every five years the Prime Minister and the First Ministers will meet to re-examine the questions related to equalization and regional development.

### Conference Of First Ministers

Until the Second World War, federal-provincial Conferences of the First Ministers were held only infrequently. A decade could pass without such a meeting being called. In the post-war period, however, as the activities of all governments became more extensive and the fine line between federal and provincial responsibilities has become less clear, First Ministers' Conferences have become an integral part of our political system and an important means for airing and resolving federal-provincial differences.

The *Constitution Act, 1980* will require a conference of the Prime Minister of Canada and the First Ministers of the provinces to be convened by the Prime Minister at least once in every calendar year. If four or more provinces request a conference to be held earlier than the required date, then such a conference will be convened.

### How The Changes Will Be Brought Into Effect

It is not always recognized that the *British North America Act*, a British statute enacted in 1867, is only a part of our Constitution. In addition, there are subsequent Acts which amend the 1867 Act and which have been passed by the United Kingdom Parliament, or in some cases, by the Parliament of Canada or the legislature of a province. Certain notable British statutes, such as the Statute of Westminster, 1931, and other fundamental Canadian Acts, such as those creating the provinces of Manitoba, Alberta and Saskatchewan also form part of Canada's Constitution.

"Patriation of the Constitution" does not mean that a pile of papers will be physically brought home to Canada. Rather, it implies two things:

- (a) severing the last link between the Canadian and British Parliaments by bringing to an end any power of the British Parliament to make laws respecting the Constitution of Canada and
- (b) confirming the Constitution as part of the law of Canada alone and establishing an amending formula to permit the amendment in Canada of those parts of the Constitution that could previously only be amended by the British Parliament.

Patriation of the Constitution will be brought about by a Joint Address to the Queen, asking that the British Parliament pass legislation entitled *The Canada Act*, transferring to Canada the substance of all British Acts of Parliament bearing upon the Constitution of Canada, including full power of amendment and providing that no future British law should have application to Canada. The symbolic recognition of this change appears in the new titles given to the old acts: the *British North America Act* and its subsequent amending statutes, will in future be known as the *Constitution Acts, 1867 to 1975*. In addition, the *Constitution Act, 1980* containing the Charter of Rights and Freedoms, the proposed amending formula, the principle of equalization and the First Ministers' Conferences, will be added to the Constitution. The procedure for effecting these changes is as follows:

The Joint Address is laid before the House of Commons and Senate of Canada in the form of a Joint Resolution that is debatable in both Houses. When the Resolution is passed in the House of Commons and the Senate, the Government will transmit the Joint Address to the Queen and the British Government will ask the Parliament at Westminster to adopt *The Canada Act* as requested, to come into effect at a time to coincide with the issuance of a Proclamation by the Governor General.

This procedure will ensure the orderly transfer to Canada of complete authority over the Constitution. For the first time Canada will have a Constitution entirely its own.