

# Table of Contents

<i>Acknowledgments</i> .....	ix
<i>Table of Contents</i> .....	xiii
<i>Illustrations</i> .....	xxiii
<i>Table of Cases</i> .....	xxv

## PART I — AN OVERVIEW OF THE CONSTITUTION

<b>Chapter 1 — Canada’s Legal Framework — Then and Now</b> .....	3
1. Introduction .....	3
2. The Constitution and Canada: House and Home .....	3
3. What Constitutes Canada’s Constitution .....	5
(a) The Constitution is not a Single Document, nor Entirely Written .....	5
(b) The Constitution Includes Both Legal and Political Rules .....	5
(c) The Constitution is Evolving .....	7
4. The Study of the Constitution .....	7
5. How the Canadian Federation was Formed .....	8
6. The Functions of the Constitution .....	15
7. Canada: A Brief Historical Chronology .....	16
8. Managing Relationships and the Rule of Law .....	18
9. Some Issues of Fundamental Constitutional Importance .....	19
(a) Quebec Nationalism and the Secessionist Movement .....	20
(b) The Recognition and Implementation of the Rights of Aboriginal Peoples, including an Inherent Right of Self-Government .....	22
(c) Summary .....	25
<b>Chapter 2 — Canada’s Constitutional Documents and Conventions</b> .....	27
1. Introduction .....	27
2. Terminology .....	27
3. The Main Constitution Acts .....	28
4. The Structure and Content of the <i>Constitution Act, 1867</i> .....	28
5. The Structure and Content of the <i>Constitution Act, 1982</i> .....	30
6. Some Constitutional Documents Related to the <i>Constitution Act, 1867</i> .....	31
7. Some Constitutional Documents Related to the <i>Constitution Act, 1982</i> .....	33
8. Conventions .....	33
9. Responsible Government: Some of the Main Conventions .....	34

10. Other Conventions .....	35
<b>Chapter 3 — The Constitution and the Courts .....</b>	<b>37</b>
1. How the Courts in Canada are Established and Organized .....	37
(a) Federal Courts .....	37
(i) Supreme Court of Canada .....	37
(ii) Federal Court of Canada .....	38
(iii) Tax Court of Canada .....	38
(b) Provincial and Territorial Courts .....	39
(i) Federally Appointed Judges.....	39
(ii) Provincially Appointed Judges .....	40
2. Different Types and Sources of Law.....	40
(a) Types of Law.....	40
(b) Sources of Law .....	41
(i) Statutes.....	41
(ii) Case Law .....	42
3. How Constitutional Issues Get Before the Courts .....	42
(a) Methods of Raising Constitutionality Before the Courts .....	43
(i) Factual Disputes.....	43
(ii) Legal Disputes .....	43
(iii) Reference Cases: Asking the Court's Opinion.....	43
(b) Standing — Who May Raise Issues of Constitutionality Before the Courts.....	45
4. Courts and the Charter .....	45
(a) Court of Competent Jurisdiction .....	45
(b) Burden of Proof.....	46
5. The Main Doctrines of Constitutional Interpretation Used by the Courts .....	47
(a) General.....	47
(b) Sources of Authority for the Courts.....	47
(i) Common Law and the Inherent Supremacy of the Constitution .....	47
(ii) Sections 24 and 52 of the <i>Constitution Act, 1982</i> .....	48
(c) Specific Doctrines Relating to the Division of Powers .....	48
(i) The “Object and Purpose” of the Legislation .....	48
(ii) The “Colourability” Doctrine .....	49
(iii) The “Effects” Test and “Ancillary” Doctrine .....	49
(iv) Fields of Concurrent Jurisdiction and the Doctrine of Paramountcy .....	50
(v) The Doctrine of Interjurisdictional Immunity .....	52
(vi) The Doctrine of “Severability” .....	52
(vii) Principles of Statutory Interpretation.....	52
(d) Use of <i>Stare Decisis</i> and Precedent by the Courts.....	53
(e) Conclusion .....	53

## PART II — DIVISION OF POWERS

<b>Chapter 4 — The Federal Level of Government .....</b>	<b>57</b>
1. Some General Concepts Relating to Powers .....	57
(a) A Federal Union with Two Levels of Government .....	57
(b) Three Branches of Government.....	57
(c) The Division of Powers.....	58
(d) Theory Behind Distribution of Powers .....	59
(e) Nature and Scope of Powers .....	59
(i) Scope .....	60
(ii) Nature .....	61
(iii) Most Powers are Exclusive .....	61
(f) Legislative and Executive Powers.....	62
2. The Federal Legislative Institutions .....	63
(a) How Parliament is Established and Organized .....	63
(b) The Senate .....	64
(c) The House of Commons .....	64
(d) The Federal Legislative Process .....	66
(e) Financing Federal Legislative Measures .....	67
(i) Raising Revenues and Spending Public Funds .....	67
(ii) Government Property and Assets.....	68
(iii) Offshore Areas .....	70
(iv) Provincial Subsidies.....	70
(v) Equalization .....	70
(vi) Other .....	71
3. The Federal Legislative Powers .....	71
(a) A List of Federal Legislative Powers.....	71
(b) Interpretation of Federal Powers: An Overview .....	73
(c) How Courts Have Interpreted Federal Legislative Powers .....	75
(i) Peace, Order and Good Government: Opening Words of Section 91.....	75
(ii) The Public Debt and Property: Section 91(1A).....	78
(iii) Regulation of Trade and Commerce: Section 91(2) .....	78
(iv) Unemployment Insurance: Section 91(2A).....	81
(v) Taxation Powers: Section 91(3).....	81
(vi) Militia, Military and Naval Service, and Defence: Section 91(7) .....	82
(vii) Navigation, Shipping and Maritime Law: Sections 91(10) & 92(10).....	83
(viii) Sea Coast and Inland Fisheries: Section 91(12) .....	83
(ix) Banking, Incorporation of Banks, and the Issue of Paper Money: Section 91(15) .....	84
(x) Bankruptcy and Insolvency: Section 91(21) .....	85

(xi) Indians and Lands Reserved for the Indians: Section 91(24) . . . . .	86
(xii) Marriage and Divorce: Section 91(26) . . . . .	87
(xiii) Powers in Relation to Criminal Law: Section 91(27) . . . . .	88
(xiv) The Federal Power to Create Courts: Section 101. . . . .	90
(xv) The Federal Spending Power: Section 106 . . . . .	91
(xvi) The Federal Treaty Power: Section 132. . . . .	92
4. The Federal Executive Powers . . . . .	93
(a) How the Federal Executive is Established and Organized . . . . .	93
(b) Structure of the Formal Executive. . . . .	93
(c) Structure of the Conventional Executive. . . . .	94
(i) Responsible Government. . . . .	94
(ii) Political Parties . . . . .	95
(iii) Choosing a Party Leader . . . . .	95
(iv) Running Candidates in Elections. . . . .	95
(v) Winning Elections: First Past the Post. . . . .	96
(vi) Forming a Government . . . . .	96
(A) Majority Government. . . . .	96
(B) Minority Government. . . . .	97
(C) Coalition Government . . . . .	97
(vii) The Prime Minister . . . . .	97
(viii) Choosing a Cabinet . . . . .	98
(ix) Directing Parliament and the Civil Service . . . . .	98
(d) The Main Executive Powers Set Out in the Constitution Acts . . . . .	99
(e) Common Law, Conventional and Statutory Rules Relating to the Executive . . . . .	102
<b>Chapter 5 — The Provincial Level of Government. . . . .</b>	<b>103</b>
1. Provincial Powers and Responsibilities . . . . .	103
(a) Blurring of Roles and Responsibilities . . . . .	103
(b) Social Programs. . . . .	104
(c) Social Policy Reform. . . . .	104
(d) Equalization and Regional Disparities. . . . .	105
(e) The Dynamics of Federalism. . . . .	106
2. How Provinces' Legislative Powers are Organized . . . . .	106
(a) Any Power Left Over is Federal Because of Doctrine of Exhaustiveness. . . . .	107
(b) Exclusive Provincial Legislative Powers. . . . .	107
(i) Direct Taxation Within the Province: Section 92(2). . . . .	107
(ii) Management and Sale of Public Lands: Section 92(5). . . . .	108

(iii) Municipal Institutions: Section 92(8) .....	108
(iv) Provincial Licensing: Section 92(9) .....	109
(v) Local Works and Undertakings: Section 92(10) .....	109
(vi) Solemnization of Marriage: Section 92(12) .....	109
(vii) Property and Civil Rights Within the Province: Section 92(13) .....	110
(viii) Administration of Justice in the Province: Section 92(14) .....	111
(ix) Penal Sanctions: Section 92(15) .....	111
(x) Matters of a Local Nature: Section 92(16) .....	111
3. The Provincial Executive Powers .....	112
(a) How the Provincial Executive is Established and Organized .....	112
(b) Structure of the Formal Executive .....	113
(c) Structure of the Conventional Executive .....	113
(i) Who Governs the Governors? .....	115
(ii) Responsible Government .....	115
(iii) Political Parties .....	115
(iv) Choosing a Party Leader .....	115
(v) The Premier .....	116
(vi) Choosing a Cabinet .....	116
(d) The Main Executive Powers and Their Source .....	116
(i) Powers Set Out in the Constitution Acts .....	116
(A) <i>Constitution Act, 1867</i> .....	116
(B) <i>Constitution Act, 1982</i> .....	117
(ii) Common Law Powers of the Executive .....	117
(iii) Powers Delegated by the Legislature to the Executive .....	118
<b>Chapter 6 — Shared Federal/Provincial Powers</b> .....	119
1. Concurrent Powers Specified in the Constitution .....	119
(a) Natural Resources: Section 92A .....	119
(b) Education: Section 93 .....	120
(c) Pensions: Section 94A .....	121
(d) Agriculture and Immigration: Section 95 .....	121
(e) Environment .....	122
2. Natural Fields of Overlap .....	124
(a) Criminal Law .....	125
(b) Shared Cost Programs .....	125
(c) Courts .....	125
(d) Property .....	125
(e) Navigation and Shipping .....	126
3. Common Law Doctrines .....	126
(a) Doctrine of Paramountcy .....	126

(b) Pith and Substance.....	126
(c) Effect .....	126
4. Delegation of Powers .....	127
<b>Chapter 7 — Territorial Government in the Northwest Territories, Yukon and Nunavut.....</b>	<b>129</b>
1. Introduction.....	129
2. Terminology .....	129
3. Federal Jurisdiction over the Territories.....	132
4. Territorial Constitutions .....	133
5. Territorial Representation in Parliament.....	135
6. Powers of Territories.....	135
(a) Territorial Legislative Powers .....	135
(b) Interpretation of Powers .....	139
(c) Territorial Executive Powers .....	139
7. Aboriginal Land Claims and Self-Government Agreements .....	141
<b>Chapter 8 — Rights of Aboriginal Peoples of Canada .....</b>	<b>143</b>
1. Introduction.....	143
2. The Main Constitutional Provisions Dealing Directly with Aboriginal Peoples .....	143
3. What is the Nature of Aboriginal Rights?.....	145
4. The Treaty Process and Treaty Rights .....	147
5. Interpreting s. 35 of the <i>Constitution Act, 1982</i> .....	150
(a) Constitutional Conferences on Aboriginal Issues .....	150
(b) Overview .....	151
(c) A Closer Look at Section 35 Aboriginal and Treaty Rights .....	152
(i) Background .....	152
(ii) Court's Analysis of Aboriginal and Treaty Rights.....	152
(iii) Meaning of the Word "existing" .....	153
(iv) Meaning of "recognized and affirmed".....	154
(v) The Legal Tests in <i>Sparrow</i> .....	154
6. Applying the Legal Principles in Practice .....	155
7. Aboriginal Title.....	157
(a) Nature of Aboriginal Title .....	157
(b) Content of Aboriginal Title .....	158
(c) Proof of Aboriginal Title .....	158
(d) Fiduciary Relationship.....	158
(e) Self-Government .....	159
(f) Infringement of Aboriginal Title .....	159
(g) Implications of <i>Delgamuukw</i> .....	159
8. Honour of the Crown .....	160

9. Consultation and Accommodation .....	160
10. Aboriginal Self-Government .....	161

### PART III — THE CHARTER

<b>Chapter 9 — Charter of Rights and Freedoms — The Main Provisions .....</b>	<b>167</b>
1. Introduction: Fundamental Rights and Freedoms Before the Charter.....	167
(a) Significance of the Entrenchment of the Charter.....	168
(b) Courts' Expanded Power of Review .....	169
(c) Documents Relating to the Charter .....	169
(i) Canadian Bill of Rights .....	169
(ii) Human Rights Codes.....	169
(d) Process of Charter Adjudication .....	170
(e) Influence of American Bill of Rights.....	170
2. Doctrines Relating to the <i>Charter of Rights and Freedoms</i> .....	171
(a) Purposive Approach.....	171
(b) Contextualism .....	171
(c) Unconstitutional Purpose or Effect .....	172
3. Steps in Analyzing a Charter Problem .....	172
(a) Does the Charter Apply? .....	172
(i) Is the Conduct of the Alleged Infringer Restricted by the Charter?.....	172
(ii) Is the Complainant Entitled to Claim the Protection of a Particular Charter Provision? .....	174
(iii) Does the Charter's Application Extend Beyond Canadian Territory? .....	174
(b) Has a Charter Provision Been Infringed? .....	175
(c) If there is an Infringement, is the Infringement Justified Under Section 1 of the Charter? .....	175
4. Main Provisions of the Charter.....	175
(a) Guarantee and Limitation of Rights and Freedoms:	
Section 1 .....	175
(i) Is the Limitation of the Charter Right or Freedom "Prescribed by Law?" .....	175
(ii) Is the Violation a "Reasonable Limit?" .....	176
(iii) Can the Limit be "Demonstrably Justified in a Free and Democratic Society?" .....	178
(b) Fundamental Freedoms: Section 2.....	178
(i) Freedom of Conscience and Religion: Section 2(a).....	178
(A) Freedom of Religion .....	179
(B) Freedom From Religion.....	180

(ii) Freedom of Expression: Section 2(b) .....	180
(A) Is the Activity an “Expression” that Falls Within the Meaning of Section 2(b)?.....	181
(B) Does the Government Action, in Purpose or Effect, Restrict Freedom of Expression? .....	181
(C) Hate Speech .....	182
(D) Expression in a Public Place .....	183
(E) Right of Access to Government Information?.....	184
(iii) Freedom of Peaceable Assembly: Section 2(c) .....	184
(iv) Freedom of Association: Section 2(d).....	185
(c) Democratic Rights: Sections 3, 4 and 5.....	185
(d) Mobility Rights: Section 6.....	186
(i) Mobility Rights of Citizens: Section 6(1) .....	186
(ii) Rights to Move and Gain Livelihood: Sections 6(2)(a) and (b) .....	187
(iii) Limitations on Mobility Rights: Sections 6(3)(a) and (b) .....	188
(e) Legal Rights: Sections 7 to 14.....	188
(i) Life, Liberty and Security of the Person: Section 7 ..	188
(ii) Unreasonable Search and Seizure: Section 8.....	192
(iii) Arbitrary Detention or Imprisonment: Section 9.....	194
(iv) Rights on Arrest or Detention: Section 10.....	194
(A) Right to Reasons on Arrest or Detention: Section 10(a) .....	195
(B) Right to Counsel: Section 10(b).....	196
(C) Right to Habeas Corpus: Section 10(c) .....	198
(v) Rights on Being Charged: Section 11 .....	199
(A) Right to be Informed of the Specific Offence: Section 11(a) .....	199
(B) Right to Trial Within Reasonable Time: Section 11(b) .....	200
(C) Right of Non-Compellability: Section 11(c) .....	203
(D) Presumption of Innocence: Section 11(d) .....	203
(E) Right to Reasonable Bail: Section 11(e) .....	204
(F) Right to Trial by Jury: Section 11(f) .....	204
(G) Retroactive Offences: Section 11(g) .....	205
(H) Double Jeopardy: Section 11(h).....	205
(I) Right to the Lesser Punishment: Section 11(i) .....	206
(vi) Right to be Free from Cruel and Unusual Punishment: Section 12 .....	206
(vii) Right Against Self-Incrimination: Section 13 .....	207
(viii) Right to an Interpreter: Section 14.....	208

(f) Equality Rights: Section 15 . . . . .	209
(i) Preventing Government Discrimination: 15(1) . . . . .	210
(A) Purpose . . . . .	210
(B) Result of Application or Operation of Law . . . . .	210
(C) Legal Test . . . . .	210
(D) Use of a Comparator Group . . . . .	211
(E) Enumerated or Analogous Ground . . . . .	212
(ii) Proactively Combating Discrimination: 15(2) . . . . .	213
(iii) Conflicts in Equality . . . . .	213
(g) Language Rights: Sections 16 to 22 . . . . .	214
(i) Official Languages: Section 16 . . . . .	215
(ii) Parliamentary Proceedings: Section 17 . . . . .	215
(iii) Parliamentary Statutes and Records: Section 18 . . . . .	215
(iv) Languages of the Courts: Section 19 . . . . .	215
(v) Languages of Federal Institutions: Section 20 . . . . .	216
(h) Minority Language Educational Rights: Section 23 . . . . .	216
(i) Enforcement of Charter Rights: Section 24 . . . . .	218
(j) Application of the Charter: Section 32 . . . . .	220
(k) The “Notwithstanding” or Override Clause: Section 33 . . . . .	221
(l) The Constitution as Supreme Law: Section 52 . . . . .	222
<b>PART IV — AMENDING THE CONSTITUTION</b>	
<b>Chapter 10 — The Constitutional Amendment Procedures . . . . .</b>	<b>227</b>
1. Introduction . . . . .	227
2. The Amending Procedures . . . . .	228
3. The General Formula . . . . .	229
4. The Unanimity Formula . . . . .	232
5. The One-or-More-but-not-all Formula . . . . .	232
6. The Unilateral Federal Formula . . . . .	233
7. The Unilateral Provincial Formula . . . . .	233
8. Review of Amending Formulae . . . . .	234
9. Secession . . . . .	234
10. Conclusion . . . . .	238
<i>Appendices . . . . .</i>	239
<i>Selected Bibliography . . . . .</i>	261
<i>Index . . . . .</i>	263

