

# CANADIAN CONSTITUTIONAL LAW

Get up, stand up  
Stand up for your rights  
Get up, stand up,  
Don't give up the fight.

Bob Marley, singer and song-writer

## DID YOU KNOW?

- ◉ In 1893, a special law was passed forcing the Law Society of Upper Canada to accept Clara Brett Martin into law school. Called to the bar in 1897, she became the British Empire's first female lawyer.

# 1960'S

- Not until the 1960's did specific human rights legislation become law in Canada. The 1960's saw virtually all the provinces in Canada pass their own human rights legislation. As well, the federal government enacted the *Canadian Bill of Rights* in 1960. This era of drafting, organizing, and implementing specific rights legislation reached an important point in 1982 with the inclusion of the *Canadian Charter of Rights and Freedoms*.

# WHAT IS A CONSTITUTION?

- ◉ A constitution is the supreme law of the land. It defines the government structure and the protocol to exercise power and authority. It also defines the limits of government power.
- ◉ A constitution often reflects the values, beliefs, and fundamental principals by which a society organizes itself. Many constitutions, such as the American Declaration of Independence and the French Declaration of the Rights of Man have formal written constitutional principals and rules of governance. Other countries such as Britain and Israel have an unwritten constitution that relies on customs, conventions, statues, and court decisions (i.e., case law) to define their constitutional reality.

# CANADIAN CONSTITUTION

- The Canadian constitution is a unique combination of both unwritten principals and rules from our British tradition and written documents such as the B.N.A., 1867 (now referred to as the "*Constitution Act, 1867*"). Here are the documents on which Canada's constitutional tradition is based.
  - Written documents and statues that define and describe Canada's three branches of government, the divisions of power, and the rights and limits of individuals serving government.
  - Conventions which, based on accepted practice and traditions, illustrate how government operates.
  - Common law traditions which rely on courts to establish precedence to guide legal practices.



# TWO MOST IMPORTANT ADDITIONS TO OUR CONSTITUTION IN 1982:

- ◉ the **Charter of Rights and Freedoms**, which outlined the basic rights and some responsibilities of Canadians, and
- ◉ the **Amending Formula** which defined how constitutional change would occur. It stated that on key constitutional changes, seven of ten provinces and half of the total population must agree on the proposed amendment to the Constitution

# CAN YOU THINK OF ANY RESTRICTIONS?

- ◉ Can you think of any restrictions on citizen's rights from Canadian history?
- ◉ You might think about discrimination against various people based on race, religion, or gender. Women were not considered "persons" until 1929 (*Edwards v. Attorney General for Canada*, [1930] A.C. 124).
- ◉ Immigrants experienced similar discriminative situations. Restrictions existed barring them from practicing certain professions. As well, limitation existed for hiring practices.
- ◉ During WW I and WW II, declaration of immigrants as enemy aliens, deportation, or forced expulsion from the country occurred in Canada.

- Our Aboriginal peoples experienced forced separation in residential schools, forced adoptions, forced relocation, and loss of Indian status for women who married non-Aboriginal men.



# DIVISION OF POWER AND RESPONSIBILITY

- ◉ The architects of the *Constitution Act 1867* included our first Prime Minister Sir John A. MacDonalD, who recognized that a meaningful and effective constitution required a strong central government.
- ◉ This constitution explicitly defined the roles of a federal government despite the various regional differences articulated by the cultures, customs, and language histories of the four original provinces: Ontario, Quebec, New Brunswick, and Nova Scotia.

- A federal system of government is one of the hallmarks of the *Constitution Act 1867*. Power and the responsibility to legislate are divided between the Federal (national) government and the Provincial (regional) governments.
- The Canadian Constitution grants the federal government all residual powers.

Levels of Government and Their Assigned Responsibilities

<b>Federal</b>	<b>Provincial</b>	<b>Municipal</b>
Financial	Welfare	Parks and Recreation
Canada Post	Natural Resources	Fire Service
Foreign Affairs	Supervision of Municipalities	Local Police Service
Citizenship	Provincial Taxation	Water Services
Economic Policy	Provincial Prisons	Snow Clearance
Taxation	Health Care	Local Schools
Penitentiaries	Worker's Compensation Plan	Road Maintenance
Sea Coast / Inland Fishing	Education Funding	Libraries
Aboriginal Affairs	O.P.P.	Recycling
Marriage and Divorce	Drivers Licencing	Sewage
Employment Insurance	Highways	Garbage Collection
Government Spending		Public Transit
Shipping and Navigation		
National Defence		
Criminal Laws		
Residual Powers: The Federal Government is responsible for all areas that are not directly referred to in the Constitution.		

# ULTRA VIRES, INTRA VIRES AND PITH AND SUBSTANCE

- ◉ From time to time legislatures pass laws that are said to be outside the power of their jurisdiction, **ultra vires**, and the courts are required to rule the law to be of no force or effect. Laws that are deemed within their jurisdiction are referred to as **intra vires**. The “pith and substance” rule helps courts determine the fundamentals of the law and determine its areas of jurisdiction.
- ◉ **Pith and substance** is a legal doctrine in Canadian constitutional interpretation used to determine under which head of power a given piece of legislation falls. The doctrine is primarily used when a law is challenged on the basis that one level of government (be it provincial or federal) has encroached upon the exclusive jurisdiction of another level of government.

## R. V. BOGGS, [1981] 1 S.C.R.49.

“Boggs was charged with operating a motor vehicle while his driver’s licence was suspended, contrary to section 238(3) of the Criminal Code. Bogg’s defence was that the Parliament of Canada has no constitutional authority to enact section 238(3). The federal jurisdiction, he argued, was limited to criminal law under section 91 of the BNA Act, 1867. Section 238, however, dealt with the regulation of licences to use highways, which is reserved to the provincial legislature as a local matter under section 92 of the BNA Act, 1867. Criminal law, he contended, was designed to prevent and punish conduct that was a threat to the public. Driving without a licence did not come within that conduct, but was simply a defiance of the province’s regulation of the use of its roads. Boggs argued that since Parliament had no authority to pass section 238(3), the section was of no force or effect, and he could not be found guilty of contravening it.”