

NCA LIBRARY · STUDY GUIDE

Constitutional Law

A complete guide to the NCA Constitutional Law syllabus, topic by topic, with case snapshots, exam tips and practice problems with model answers.

-
- Part I** Basic Concepts
 - Part II** Distribution of Legislative Powers
 - Part III** Aboriginal Rights and the Constitution
 - Part IV** The Canadian Charter of Rights and Freedoms

Follows: NCA Constitutional Law syllabus, revised January 2023 (Topics 1–25)

Edition 1.0 · September 2026

© 2026 Lexn · lexn.ca. All rights reserved. Licensed for the personal study use of the purchaser only; not for resale, sharing or redistribution.

This guide is a study aid, not legal advice. Always check the current NCA syllabus and the primary sources.

Contents

Parts and Topics follow the numbering of the NCA syllabus, so you can move between the syllabus and this guide directly. Each Part ends with a review: quick checks, essay angles and practice problems with model answers.

PART I	Basic Concepts	3
	Topic 1: Sources and Nature of the Constitution	4
	Topic 2: Amending Procedures	8
	<i>Part I review</i>	15
PART II	Distribution of Legislative Powers	22
	Topic 3: Federalism	23
	Topic 4: Judicial Review and Principles of Interpretation	27
	Topic 5: Property and Civil Rights	33
	Topic 6: Trade and Commerce	38
	Topic 7: Peace, Order, and Good Government	41
	Topic 8: Criminal Law	46
	Topic 9: Ancillary Powers	50
	Topic 10: Paramountcy	52
	Topic 11: Interjurisdictional Immunity	55
	<i>Part II review</i>	57
PART III	Aboriginal Rights and the Constitution	66
	Topic 12: Introduction	67
	Topic 13: Aboriginal Rights	69
	Topic 14: Aboriginal Title	73
	Topic 15: Treaty Rights	76
	Topic 16: Duty to Consult	78
	<i>Part III review</i>	81
PART IV	The Canadian Charter of Rights and Freedoms	89
	Topic 17: Interpreting the Canadian Charter of Rights and Freedoms	90
	Topic 18: Application of the Canadian Charter of Rights and Freedoms	93
	Topic 19: Override of Rights	96
	Topic 20: Freedom of Conscience and Religion	99
	Topic 21: Freedom of Expression	103
	Topic 22: Life, Liberty and Security of the Person	107
	Topic 23: Equality Rights	112
	Topic 24: Limitation of Rights	116
	Topic 25: Remedies	120
	<i>Part IV review</i>	124
	<i>Putting it all together</i>	132

Basic Concepts

Syllabus Topics 1–2

ON THE SYLLABUS

What the syllabus assigns for Part I

Topic 1, Sources and Nature of the Constitution: Hogg, chapter 1 ("Sources"); *Reference re Secession of Quebec*, [1998] 2 SCR 217.

Topic 2, Amending Procedures: *Constitution Act*, 1982, Part V, ss 38–49; Hogg, chapter 4 ("Amendment") and chapter 5.7 ("Secession").

Everything on this list is examinable, including the Hogg chapters. The *Secession Reference* is the only case assigned, so it is the case to cite whenever it supports your point.

Learning objectives

By the end of Part I you should be able to:

- explain what "the Constitution of Canada" includes, and why it is larger than any single document;
- distinguish entrenched text, ordinary law of constitutional importance, the prerogative, unwritten principles and conventions, and say what courts can do with each;
- use the *Secession Reference* accurately, including its four underlying principles and the duty to negotiate;
- identify which of the five Part V procedures governs a proposed amendment, and state exactly whose consent it needs;
- argue both sides of the unresolved question of which procedure would govern a secession amendment.

How Part I is examined

Foundations and amendment appear in three forms on the NCA exam.

Short answers. You are given a statement and asked whether it is true, false or partly true, usually for a few marks, and you must support your answer with the best authority. Amending-formula statements are a favourite, because they are either precisely right or precisely wrong.

Short problems. A government proposes a change and you are asked which procedure applies and why. The mark scheme rewards the exact section, the exact consents required and a reason drawn from the facts.

Essays. You may be asked for a reasoned opinion, for example whether unwritten principles give judges too much power, or whether the amending formula is too rigid. The examiner wants an argument supported by syllabus authority, not a description of the law.

EXAM TIP

The one habit that earns marks here

Never stop at the name of a procedure. Write out who must pass what: "resolutions of the Senate, the House of Commons and the legislative assemblies of at least seven provinces representing at least 50% of the population of all the provinces (s 38(1))." Precision is most of the mark.

Topic 1: Sources and Nature of the Constitution

1.1 Supremacy and entrenchment: s 52

Three subsections of **s 52 of the Constitution Act, 1982** do the foundational work.

Section 52(1): supremacy. The Constitution is the supreme law of Canada, and any law inconsistent with it is of no force or effect *to the extent of the inconsistency*. Parliament and the legislatures are sovereign only within the space the Constitution leaves them. The phrase "to the extent of" is the textual basis for tailored remedies such as severance and reading in (Topic 25, Remedies).

Section 52(2): definition. The Constitution of Canada *includes* the *Canada Act 1982* (and the *Constitution Act, 1982* within it), the Acts and orders listed in the schedule (the *Constitution Act, 1867* chief among them), and amendments to any of them. The word "includes" signals that the list is not closed.

Section 52(3): entrenchment. Amendments to the Constitution of Canada may be made only under the authority contained in the Constitution. This is what makes the documents in s 52(2) *entrenched*: an ordinary statute cannot change them. Only the procedures in Part V can.

Put together, s 52 means that a constitutional problem always has two layers: is the law consistent with the entrenched Constitution, and if a government wants to change the Constitution itself, has it used the right Part V procedure?

1.2 The sources of Canadian constitutional law

Hogg's chapter 1 treats "the Constitution" broadly, as every rule that creates and limits the organs of government. It helps to sort those rules by how they can be changed and whether courts enforce them.

Source	What it is	How it changes	Enforced by courts?
Entrenched instruments	The documents in s 52(2), especially the 1867 and 1982 Acts	Only by a Part V procedure	Yes
Ordinary statutes of constitutional importance	For example the <i>Supreme Court Act</i> , the <i>Canada Elections Act</i> , the <i>Parliament of Canada Act</i> and provincial election statutes	By ordinary legislation, unless they touch an entrenched matter	Yes, as ordinary law
Imperial statutes and orders	UK instruments that still apply, such as the <i>Statute of Westminster</i> , 1931	Now through Canadian processes; no UK statute passed after 1982 extends to Canada (<i>Canada Act</i> 1982, s 2)	Yes
Case law	Judicial interpretation of the text, and the common law	By later decisions or by legislation (within constitutional limits)	Yes
The prerogative	The residue of discretionary legal power left in the Crown by the common law	Can be displaced by statute	Yes, courts decide whether a prerogative power exists and its limits
Unwritten principles	Principles underlying the text, identified by the courts	Not amended as such	Yes, mainly as interpretive and gap-filling tools
Conventions	Political rules that the relevant actors treat as binding	By practice and agreement	No; courts may recognize them but will not enforce them

Two practical points follow from this table.

First, **not everything with constitutional significance is entrenched**. Most of the rules on elections, the size of cabinet or how Parliament runs its business are ordinary statutes. They can be changed by ordinary legislation, subject to the Charter and to any entrenched matter they touch.

Second, **the prerogative is narrower than it sounds**. Most government power in Canada is now exercised under statute. What remains of the prerogative (for example, the conduct of foreign affairs, the making of treaties, the issue of passports and the prerogative of mercy) is exercised in practice by ministers, and Parliament can abolish or limit any prerogative power by statute.

1.3 The Crown, the executive and conventions

The *Constitution Act*, 1867 vests executive power in the monarch (s 9) and gives the Governor General wide formal powers, including the power to grant or withhold royal assent (s 55) and to appoint and dismiss ministers. Read literally, the text describes an executive-dominated system. It says almost nothing about the Prime Minister or cabinet.

Conventions fill the gap between the text and practice. The central one is **responsible government**: the Governor General (and each Lieutenant Governor) acts on the advice of ministers who hold the confidence of the elected House. As a result:

- the **King** is Canada's head of state, represented federally by the Governor General and in each province by a Lieutenant Governor;
- the **Prime Minister** is head of *government*, an office that rests almost entirely on convention;
- royal assent is, by convention, never refused to a bill passed by both Houses.

The key legal point is that **courts do not enforce conventions**. A court can be asked whether a convention exists, and may answer, but breaching a convention has political consequences, not legal ones. A convention also cannot override a statute.

BEYOND THE SYLLABUS

the *Patriation Reference*

The leading authority on conventions is the *Patriation Reference* (*Re Resolution to Amend the Constitution*, [1981] 1 SCR 753). The Court found that a convention required a substantial degree of provincial consent before the federal government asked the UK Parliament to patriate the Constitution, while also holding that the federal plan was legally valid without it. The Court identified a convention by asking three questions: are there precedents; did the actors believe they were bound; and is there a reason for the rule? The case is discussed in Hogg chapter 1, but it is not a syllabus case, so treat it as supporting authority only.

COMMON MISTAKE

Writing that a government action "is unconstitutional because it breaches a convention." The accurate statement is that it is *unconventional* (politically illegitimate) but *legal*, unless it also breaches a written rule or an enforceable principle.

1.4 Unwritten principles

The preamble to the *Constitution Act, 1867* says Canada is to have a constitution "similar in principle" to that of the United Kingdom. The Supreme Court has read this, together with the structure of the text, as a doorway to principles that are not spelled out anywhere.

Unwritten principles do three things. They guide the **interpretation** of the written text. They **fill gaps** where the text is silent; secession, below, is the clearest example. And in some cases they give rise to **legal obligations**, such as the duty to negotiate in the *Secession Reference*.

What they do not do is give judges a free-standing power to strike down laws that are consistent with the text because a court considers them undemocratic or unfair. The written text has primacy. In the *Secession Reference* itself, the Court stressed that the principles are not an invitation to dispense with the text.

BEYOND THE SYLLABUS

Toronto (City) v Ontario (AG), 2021 SCC 34

A majority of the Supreme Court held that unwritten principles cannot on their own be used to invalidate legislation; they inform the interpretation of the text and can fill structural gaps. This is useful background for an essay on judicial power, but the *Secession Reference* remains the syllabus case to cite.

1.5 Case snapshot: the *Secession Reference*

CASE SNAPSHOT

Reference re Secession of Quebec, [1998] 2 SCR 217

Context. After the very close 1995 Quebec referendum, the federal government referred three questions to the Supreme Court.

Issues. (1) Can Quebec secede unilaterally under the Constitution of Canada? (2) Does international law give Quebec a right to secede unilaterally? (3) If domestic and international law conflict, which prevails?

Holding. (1) No. Secession would change the Constitution, so it requires a constitutional amendment, which in turn requires negotiation. (2) No. A right to external self-determination arises only for colonial peoples, peoples subject to foreign domination or oppression, and possibly peoples denied any meaningful exercise of self-determination within their state; Quebec fits none of these. (3) Because there was no conflict, the Court did not need to answer.

Why it matters. It is the leading case on unwritten principles, on secession, and on how democracy and the rule of law fit together. Its four principles are the vocabulary you should reach for whenever a question concerns the "nature" of the Constitution.

The four principles. The Court identified four principles that underlie the Constitution. They must be read together, and none trumps the others.

Principle	What it contributed to the answer
Federalism	Provinces are not administrative subdivisions; a province's democratic choice carries real constitutional weight.
Democracy	A clear expression of the will of a province's population cannot simply be ignored by the rest of Canada.
Constitutionalism and the rule of law	Democracy operates within the law; a majority vote alone cannot change the Constitution.
Protection of minorities	Minority interests, including linguistic minorities and Aboriginal peoples, must be protected in any negotiation.

The duty to negotiate. A **clear majority** on a **clear question** in favour of secession would create a **reciprocal obligation** on the federal government and all the provinces to negotiate constitutional change in good faith. Quebec could not dictate the terms, and the rest of Canada could not refuse to

engage. The negotiations would have to respect all four principles, and would have to address difficult issues including the interests of Aboriginal peoples, minorities, borders and the national debt.

The courts' limited role. What counts as a clear majority and a clear question, and how negotiations are conducted, are political judgments. Courts define the legal framework but do not supervise the negotiations.

Effectiveness is not legality. The Court acknowledged that a unilateral declaration of independence might succeed in fact, if the seceding government gained effective control of its territory and international recognition. That possibility would not make the declaration lawful in advance. A legal right cannot be built on the prospect of successfully breaking the law.

NOTE

What happened next

Parliament responded with the *Clarity Act* (2000), which lets the House of Commons decide whether a referendum question and result are clear before the federal government enters negotiations. Quebec responded with its own statute affirming Quebecers' right to decide their political future by a simple majority. The two positions have never been tested in court.

EXAM TIP

Exam strategy: sources and nature

When a question asks about the "nature" or "sources" of the Constitution, organize your answer around what courts can do with each source: enforce it (text), use it to interpret and fill gaps (principles), or only recognize it (conventions). That structure alone earns method marks. Use the *Secession Reference* whenever you need the proposition that democracy and the rule of law must be balanced.

Topic 2: Amending Procedures

2.1 Why Part V exists

The *British North America Act*, 1867 contained no general amending procedure. Until 1982, the key parts of Canada's Constitution could be formally amended only by the UK Parliament, acting at Canada's request. Patriation in 1982 ended that role and, for the first time, gave Canada a domestic amending formula: **Part V of the Constitution Act, 1982**.

Part V is not one formula but **five procedures**, each matched to a type of change. The design logic is that the more a change affects the federal bargain as a whole, the more governments must agree to it.

2.2 The five procedures at a glance

Procedure	Section	Whose consent	Covers
Unanimity	s 41	Senate, House of Commons and every provincial legislature	The five matters listed in s 41
General ("7/50")	s 38, with s 42	Senate, House of Commons, and legislatures of at least 7 provinces with at least 50% of the population of all the provinces	Everything not assigned elsewhere, plus the matters listed in s 42
Some-but-not-all provinces	s 43	Senate, House of Commons and the legislature of each province affected	Provisions that apply to one or more, but not all, provinces
Parliament alone	s 44	Parliament by ordinary statute	The federal executive, the Senate and the House of Commons, subject to ss 41 and 42
Province alone	s 45	The provincial legislature by ordinary statute	The constitution of the province, subject to s 41

Two further points apply across Part V. First, once a valid amendment is made it becomes part of the Constitution, and courts will not use one part of the Constitution (such as the Charter) to strike down another. Second, the procedures apply only to the Constitution of Canada. Ordinary statutes of constitutional importance (1.2 above) are changed by ordinary legislation.

2.3 The general procedure: s 38

Section 38(1) requires resolutions of the Senate, the House of Commons, and the legislative assemblies of at least two-thirds of the provinces (seven of ten) that together have at least 50% of the population of all the provinces, according to the latest census.

The population condition means that, in practice, a 7/50 amendment needs the support of Ontario or Quebec, because the other eight provinces together hold well under half the population. No single province, however, has a veto under s 38.

Protection for provinces that lose power. Some general amendments take power away from the provinces. For those, s 38 adds protections:

- **s 38(2):** an amendment that *derogates from* the legislative powers, proprietary rights, or other rights or privileges of a provincial legislature or government needs resolutions passed by a **majority of all members** (not just a majority of those voting) of the Senate, the House of Commons and each assenting legislature;
- **s 38(3):** a province may **opt out** of such an amendment by a resolution of a majority of its members passed before the amendment is proclaimed, and the amendment then has no effect in that province;
- **s 38(4):** a province may **revoke** its dissent at any time, before or after proclamation, and so opt back in;

- **s 40:** if the amendment transfers provincial legislative power over **education or other cultural matters** to Parliament, Canada must provide **reasonable compensation** to an opting-out province.

Because seven provinces must assent, **no more than three** can ever opt out of a given amendment.

Timing (s 39). A s 38 amendment cannot be proclaimed within **one year** of the resolution that started the process, unless every province has already voted to assent or dissent. It cannot be proclaimed **more than three years** after that resolution. If the window closes, the process must start again.

2.4 Matters listed in s 42

Section 42(1) sends six matters to the 7/50 procedure:

- (a) the **principle of proportionate representation** of the provinces in the House of Commons;
- (b) the **powers of the Senate** and the **method of selecting senators**;
- (c) the **number of senators** for each province and their residence qualifications;
- (d) the **Supreme Court of Canada**, except its composition (which falls under s 41(d));
- (e) the extension of existing provinces into the territories;
- (f) the establishment of new provinces.

The listing matters for two reasons. It prevents Parliament from arguing that these matters fall under its s 44 power over the Senate and the House of Commons. And under **s 42(2)**, the opt-out in s 38(2)–(4) does **not** apply to these matters: once 7/50 is reached, they bind every province.

The House of Commons and s 42(1)(a). The formula for allocating Commons seats is in s 51 of the *Constitution Act, 1867*, and Parliament has changed it several times since 1982 by ordinary statute under s 44. That is possible because s 42(1)(a) protects the *principle* of proportionate representation, not perfect representation by population. Rules that give smaller or slower-growing provinces some protection against losing seats have been treated as consistent with the principle. By contrast, a change that abandoned the principle, for example allocating seats equally regardless of population, would need 7/50. And any change must respect the **Senate floor** in s 51A (no province may have fewer MPs than senators), which s 41(b) protects by unanimity.

BEYOND THE SYLLABUS

the House of Commons cases

The BC Court of Appeal upheld a 1985 federal statute that changed the seat formula under s 44, reasoning that the principle of proportionate representation tolerates departures from strict representation by population (*Campbell v Canada (AG)* (1988), leave to appeal to the SCC refused). Use the reasoning, not the name, unless you are confident of the citation.

2.5 Unanimity: s 41

Section 41 requires the consent of Parliament and **every** province for amendments in relation to:

- (a) the **office of the King** (the text still says "the Queen"), the **Governor General** and the **Lieutenant Governor** of a province;
- (b) a province's right to at least as many members of the House of Commons as it has senators (the **Senate floor**);
- (c) subject to s 43, the **use of English or French**;
- (d) the **composition of the Supreme Court of Canada**;
- (e) **amendments to Part V itself**.

A memory aid: **Crown, Floor, Language, Court, Formula**.

Any one province can therefore block these changes. That is deliberate: they are structural features so basic that no province should lose them without its consent.

2.6 Some-but-not-all provinces: s 43

Where an amendment concerns a provision that applies to **one or more, but not all**, provinces, s 43 requires resolutions of the Senate, the House of Commons and the legislature of **each province to which the amendment applies**. Other provinces have no say.

Section 43 expressly includes (a) **alterations to boundaries between provinces**, and (b) amendments to provisions on the **use of English or French within a province**. Language provisions that apply to particular provinces include s 133 of the *Constitution Act, 1867* (Quebec), s 23 of the *Manitoba Act, 1870*, and the New Brunswick provisions in ss 16–20 of the Charter.

Section 43 has been used more than any other procedure since 1982. Examples include the 1993 amendment adding s 16.1 to the Charter (equality of the English and French linguistic communities in New Brunswick), and the 1997 amendments that changed denominational school rights in Newfoundland and in Quebec.

2.7 Unilateral procedures: ss 44 and 45

Section 44: Parliament alone. Parliament may, by ordinary statute, amend the Constitution in relation to the **executive government of Canada** or the **Senate and House of Commons**, subject to ss 41 and 42. It cannot use s 44 for anything listed in those sections.

Section 45: a province alone. Each legislature may, by ordinary statute, amend **the constitution of the province**, subject to s 41. This covers the internal machinery of provincial government: the size of the legislature, electoral rules and legislative procedure. It cannot touch the office of the Lieutenant Governor (s 41(a)).

COMMON MISTAKE

Treating s 44 or s 45 as unlimited. Both are subject to s 41, and s 44 is also subject to s 42. And "the constitution of the province" means the province's internal machinery of government. A province cannot use s 45 to change the division of powers or any part of the federal structure, even where the change seems to affect only that province.

BEYOND THE SYLLABUS

the 2014 references

Two Supreme Court references show that the Court asks not only what a provision says but whether a change alters the **Constitution's architecture**, its basic structure and the relationships it establishes. Hogg chapter 4 discusses both.

Reference re Senate Reform, 2014 SCC 32: consultative elections for senators change the method of selection (s 42(1)(b), 7/50); fixed terms change the Senate's fundamental nature (s 38, 7/50); abolishing the Senate requires unanimity, because Part V itself relies on the Senate. Parliament could repeal the personal net-worth requirement for senators under s 44, but a full repeal of the real-property requirement would also need Quebec's consent under s 43, because of the senatorial divisions specific to Quebec.

Reference re Supreme Court Act, ss 5 and 6, 2014 SCC 21: the "composition" of the Court under s 41(d) includes the eligibility requirements for the three seats reserved for Quebec, so Parliament cannot change them alone.

2.8 Procedural sections: ss 46–49

- **s 46:** an amendment may be **initiated** by the Senate, the House of Commons or a provincial legislature, and a legislature may **revoke** its resolution of assent at any time before the amendment is proclaimed.
- **s 47:** the Senate has only a **suspensive veto**. If it has not adopted a resolution within **180 days** of the House of Commons adopting one, and the House adopts the resolution again, the Senate's resolution is not needed. Periods when Parliament is prorogued or dissolved do not count. This applies to amendments under ss 38, 41, 42 and 43.
- **s 48:** once the required resolutions are adopted, the King's Privy Council for Canada advises the Governor General to issue a **proclamation**, which is what brings the amendment into force.
- **s 49:** required a constitutional conference to review Part V within 15 years of 1982. It no longer has practical effect.

2.9 Two further layers that affect amendments

Section 35.1 of the Constitution Act, 1982. Before any amendment to s 91(24) of the 1867 Act, s 25 of the Charter or s 35 of the 1982 Act, the federal and provincial governments are committed to holding a constitutional conference to which representatives of the Aboriginal peoples are invited. We return

to it in Part III (Topics 12–16).

The federal "regional veto" statute (1996). An ordinary federal statute, *An Act respecting constitutional amendments*, bars a federal minister from proposing most s 38 amendments unless they have been approved by **Ontario, Quebec, British Columbia**, at least **two Atlantic provinces** with at least half the Atlantic population, and at least **two Prairie provinces** with at least half the Prairie population. It does not apply to amendments a province can opt out of under s 38(3). Because it is ordinary law binding only federal ministers, it does not change Part V, which could be changed only by unanimity (s 41(e)). In practice, it makes the general procedure much harder to use than the text of s 38 suggests. Some provinces, including British Columbia and Alberta, also require a provincial referendum before their legislatures approve an amendment.

2.10 Secession by amendment

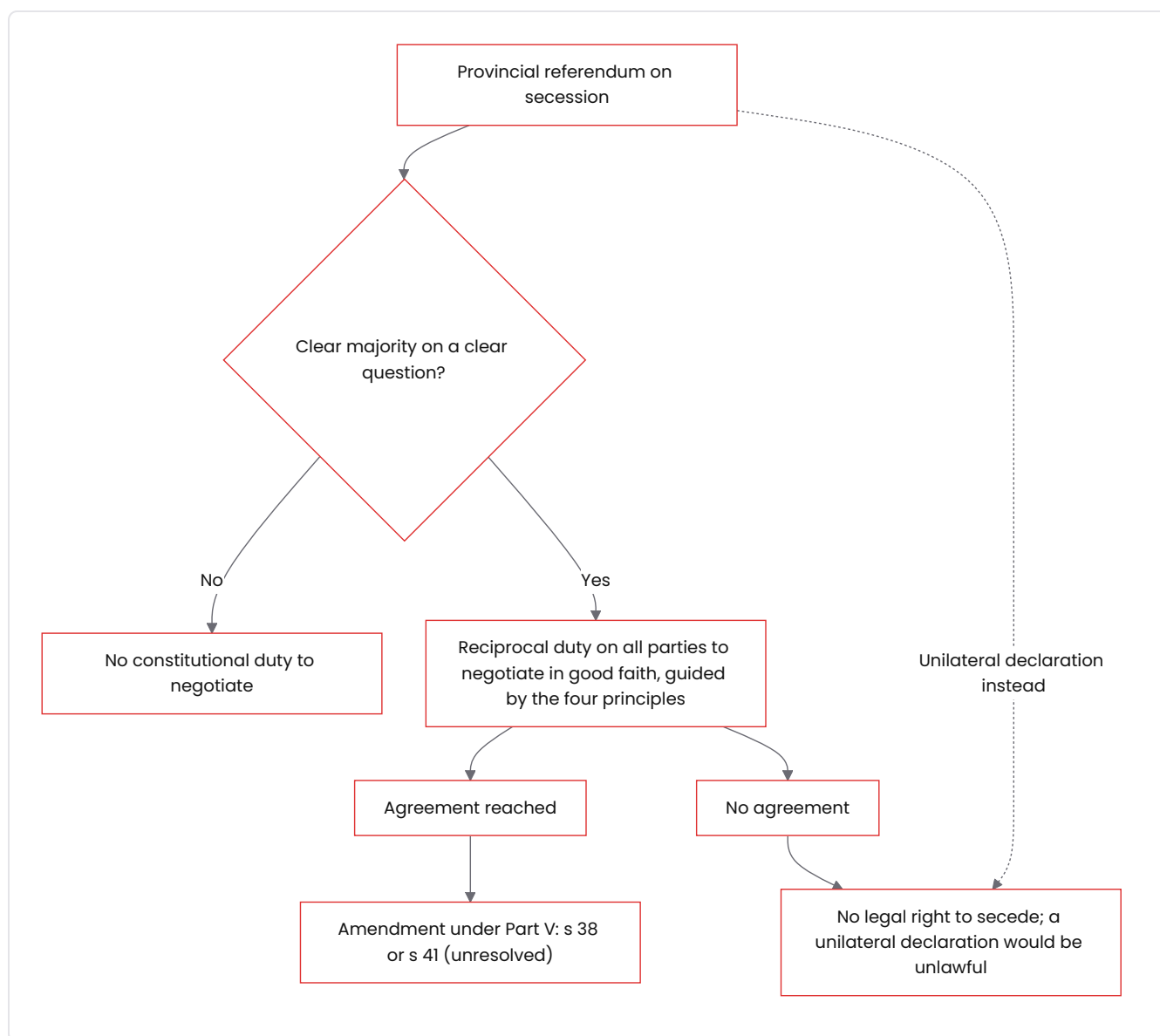
The *Secession Reference* held that secession is lawful only through a constitutional amendment, but the Court did not say which procedure would apply. Hogg's chapter 5.7, which is assigned reading, sets out the competing views.

It is clear what does **not** apply. A province cannot secede under s 45, because leaving the federation is not an amendment of the constitution of the province. Parliament cannot achieve it under s 44. And s 43 does not fit, because secession would change provisions that apply to all provinces and would affect the whole federation.

That leaves two candidates:

- **The general procedure (s 38).** Secession is not mentioned anywhere in Part V, and s 38 is the residual procedure for any amendment not otherwise provided for.
- **Unanimity (s 41).** A secession amendment would almost certainly have to change matters listed in s 41, such as the office of the seceding province's Lieutenant Governor and the operation of Part V itself (whose 7/50 arithmetic assumes ten provinces). It would also be odd if the most fundamental change imaginable could be made more easily than changing the composition of the Supreme Court.

A good answer sets out both arguments and reaches a reasoned view. The unanimity argument is generally regarded as the more cautious reading, because a realistic secession package would inevitably touch s 41 matters.



2.11 A method for amending problems

Work through these questions in order and stop at the first "yes." It is a thinking tool, not a script to copy into your answer: the marks come from applying each step to the facts.

Step	Ask	If yes, the procedure is
1	Does the change touch a s 41 matter: the Crown, Governor General or Lieutenant Governor; the Senate floor; English or French; the composition of the Supreme Court; or Part V itself?	Unanimity: Senate, House of Commons and all ten legislatures (s 41)
2	Is it a s 42(1) matter: proportionate representation in the Commons; Senate powers or selection; Senate seats per province; the Supreme Court (other than composition); extending or creating provinces?	7/50 with no opt-out (ss 38(1), 42)

Step	Ask	If yes, the procedure is
3	Does it concern a provision that applies to some but not all provinces, such as a boundary or language rights within one province?	Parliament plus each affected province (s 43)
4	Is it confined to the federal executive, Senate or Commons , without altering the Constitution's architecture?	Parliament alone (s 44)
5	Is it confined to one province's own machinery of government , touching nothing in s 41?	That province alone (s 45)
6	None of the above	General 7/50 (s 38). If it takes power from the provinces: majority of all members, opt-out (s 38(2)–(3)), and compensation for education or culture (s 40)

COMMON MISTAKE

Common mistakes on amending questions

- Saying "Parliament can do this under s 44 because it concerns the Senate" without checking s 42(1) (b) and (c).
- Forgetting the population half of 7/50.
- Applying the s 38(3) opt-out to a s 42 matter.
- Missing that s 45 is subject to s 41, so a province cannot alter the office of its Lieutenant Governor.
- Describing the regional veto statute as part of the Constitution. It is ordinary federal law.
- Naming the procedure without stating whose resolutions are required.

Part I review

The review brings Topics 1 and 2 together in the three formats the exam uses: short answers, essays and problems.

Quick checks: true, false or partly true?

Answer each in two or three sentences, then compare with the suggested answer. This mirrors the short-answer format, where the reasoning matters more than the label.

1. A statute that conflicts with the Constitution is void in its entirety. *Partly true.* Under s 52(1) of the *Constitution Act, 1982*, an inconsistent law is of no force or effect only to the extent of the inconsistency. Often only part of a statute is struck down, and the rest survives.

2. Because the *Constitution Act, 1867* gives the Governor General the power to withhold royal assent, the Governor General may lawfully refuse assent to any bill she disapproves of. *Partly true.* The legal power exists in the text (s 55), and a refusal would not be illegal. But by the convention of

responsible government, the Governor General acts on ministerial advice, so a refusal would be unconventional and would provoke a constitutional crisis. Courts would not enforce the convention.

3. Courts can rely on the unwritten principle of democracy to strike down a statute that complies with the written Constitution. *False.* The *Secession Reference* treats unwritten principles as underlying the text, guiding its interpretation and filling gaps, but the Court stressed that they do not displace the written text.

4. If a province votes for secession by a clear majority on a clear question and negotiations then fail, the province acquires a legal right to secede unilaterally. *False.* The *Secession Reference* holds that secession is lawful only by constitutional amendment. A clear result triggers a reciprocal duty to negotiate, not a right to secede if negotiations fail. A unilateral declaration might succeed in fact, but it would not be lawful.

5. Any province can avoid being bound by an amendment made under the general procedure by passing a resolution of dissent. *False.* The opt-out in s 38(3) applies only to amendments that derogate from provincial powers, rights or privileges, and s 42(2) excludes it entirely for the matters listed in s 42(1).

6. Parliament may change the number of senators assigned to each province by ordinary statute. *False.* The number of senators per province is listed in s 42(1)(c), so the change needs the 7/50 procedure. Section 44 is expressly subject to s 42.

7. A province may amend its own constitution by ordinary statute. *Partly true.* Section 45 allows it, but only for the internal machinery of provincial government and always subject to s 41. A province could not, for example, alter the office of its Lieutenant Governor.

Essay angles

The essay question rewards a clear position, defended with syllabus authority and a fair account of the other side. Here are two debates to prepare.

Should unwritten principles be able to invalidate legislation? *For:* the *Secession Reference* shows that the principles are real constitutional norms with legal effect, including a duty to negotiate; a constitution "similar in principle" to the UK's implies commitments (democracy, the rule of law, the protection of minorities) that should constrain governments even where the text is silent. *Against:* allowing judges to strike down laws on the basis of principles they identify themselves would undermine the certainty and democratic legitimacy that entrenchment provides; the text was carefully negotiated, and the proper way to add constraints is through Part V. A strong essay might argue that the principles are most legitimate when used to interpret or fill genuine gaps, as in the *Secession Reference*, and least legitimate when used to override clear text.

Is Canada's Constitution too difficult to amend? *For:* since 1982 there has been no significant multilateral amendment; the Meech Lake Accord (1987–1990) and the Charlottetown Accord (1992) both failed, and the regional veto statute and provincial referendum requirements make the general procedure harder than its text suggests. *Against:* s 43 has worked well for targeted changes, s 44 and

s 45 allow ordinary institutional reform, and rigidity protects minorities and smaller provinces, which the *Secession Reference* identifies as a core constitutional value. A strong answer distinguishes between the procedures instead of treating "the amending formula" as a single thing.

Practice problems

NOTE

How to use these problems

The fact patterns are original and different from the Exam Simulator questions. Time yourself, write your answer in full sentences and paragraphs as you would on the exam, then compare. The model answers show the depth and style an examiner rewards; do not memorize them as scripts.

Problem 1: The Lieutenant Governor's pen (about 12 minutes)

The legislature of the Province of Aldmere passes the *Democratic Renewal Act*. It (i) sets provincial elections for the third Monday in October every four years, while preserving the Lieutenant Governor's power to dissolve the legislature earlier; (ii) increases the legislature from 60 to 72 seats; and (iii) provides that bills passed by the legislature become law when signed by the Speaker, removing any role for the Lieutenant Governor in granting royal assent. Aldmere enacted the statute without consulting Parliament or any other province.

Is each part of the Act a valid constitutional amendment?

Model answer

Issue. The question is whether Aldmere can make each of these changes by ordinary provincial statute under s 45 of the *Constitution Act, 1982*, or whether any part requires a multilateral amending procedure.

Rule. Section 45 allows a provincial legislature to amend "the constitution of the province" by ordinary statute, but only subject to s 41. Section 41(a) requires the consent of Parliament and all provinces for any amendment in relation to the office of the Lieutenant Governor.

Application. Parts (i) and (ii) concern the internal machinery of Aldmere's own legislature: when elections are held and how many members sit. These matters fall within the constitution of the province. Part (i) is also drafted carefully: because it preserves the Lieutenant Governor's power to dissolve the legislature early, it does not alter the office in any way. Neither part touches another s 41 matter, so Aldmere can enact both alone.

Part (iii) is different. Granting royal assent is one of the core legal functions of the Lieutenant Governor, who represents the Crown in the province; without that assent, a bill does not become law. Transferring the function to the Speaker would change the powers of the office, and not merely how the province uses it. That is an amendment "in relation to the office of ... the Lieutenant Governor" under s 41(a). Aldmere cannot make it alone; it would need resolutions of the Senate, the House of Commons and all ten provincial legislatures.

Conclusion. Parts (i) and (ii) are valid amendments under s 45. Part (iii) is beyond Aldmere's power and is of no force or effect under s 52(1). Because the three parts are independent of each other, a court would most likely sever part (iii) and leave the rest of the Act in force.

Problem 2: The elected Senate Act (about 15 minutes)

To "bring the Senate into the 21st century," Parliament enacts the *Senate Modernization Act*, relying on s 44. It provides that (i) the Prime Minister must recommend for appointment the winner of a Senate election held in each province, and (ii) senators serve a single, non-renewable 12-year term. No province passed a resolution approving the changes. Several provinces argue that the Act is unconstitutional.

Advise the provinces.

Model answer

Issue. The issue is whether Parliament can make either change alone under s 44, or whether each requires the general 7/50 procedure.

Rule. Section 44 allows Parliament to amend the Constitution in relation to the Senate, but only subject to ss 41 and 42. Section 42(1)(b) assigns the method of selecting senators to the 7/50 procedure, and changes to the Senate's fundamental nature and role fall under the general procedure in s 38.

Application. Although the Governor General would still formally appoint senators under part (i), the Prime Minister would be bound to recommend the winner of a popular election. In substance, senators would be chosen by the electorate rather than by executive appointment. That is a change to the method of selecting senators under s 42(1)(b), which Parliament cannot make on its own.

Part (ii) replaces tenure until age 75 with a single fixed term. Long tenure without any need to seek reappointment is central to the Senate's independence as a chamber of sober second thought. Changing it alters the Senate's fundamental character, which engages the interests of the provinces in the federal Parliament and requires the general procedure rather than s 44. The Supreme Court reached both conclusions in *Reference re Senate Reform*, 2014 SCC 32, which Hogg discusses in chapter 4.

The opt-out does not assist the federal government. Part (i) falls under s 42, where s 42(2) excludes the opt-out altogether, and a change to senators' tenure does not derogate from any provincial power, right or privilege, so s 38(3) is not engaged.

Conclusion. Both parts of the Act are beyond Parliament's power under s 44 and are of no force or effect. Each requires resolutions of the Senate, the House of Commons and at least seven provincial legislatures representing at least 50% of the population of the provinces. The provinces could seek a declaration to that effect, most practically by referring the question to their own court of appeal.

Problem 3: The river border (about 10 minutes)

A river forms part of the boundary between two neighbouring provinces and has changed course over the decades. Both provincial governments agree to redraw the boundary along the river's current channel, which moves about 40 km² of land from one province to the other. A third province objects, claiming a national interest in any boundary change.

Which amending procedure applies, and does the third province have a say?

Model answer

Issue. The issue is which procedure governs a change to the boundary between two provinces, and whose consent it requires.

Rule. Section 43(a) of the *Constitution Act*, 1982 provides that an alteration to the boundaries between provinces may be made with resolutions of the Senate, the House of Commons and the legislature of each province to which the amendment applies.

Application. The change affects the territory of only the two neighbouring provinces. It touches no s 41 matter and none of the matters listed in s 42, and it does not alter the structure of the federation. Section 43(a) was drafted for precisely this situation. The provinces "to which the amendment applies" are those whose territory changes. The third province's interest is general and indirect, and s 43 deliberately gives unaffected provinces no role. It may still lobby members of Parliament, because the Senate and the House of Commons must both pass resolutions.

Conclusion. The s 43 procedure applies. The amendment requires resolutions of the Senate, the House of Commons and the legislatures of the two affected provinces. The third province's consent is not required.

Problem 4: A narrow referendum (about 15 minutes)

After a long campaign, the government of the Province of Westmark holds a referendum asking: "Do you agree that Westmark should negotiate a new economic and political partnership with Canada and, if those negotiations fail, become a sovereign country?" The "Yes" side wins 50.4% of the vote on a 71% turnout. Two weeks later, Westmark's legislature passes a statute declaring Westmark independent and providing that federal law no longer applies there.

Discuss the legal position of Westmark, the federal government and the other provinces.

Model answer

Issue. Three issues arise: whether Westmark's declaration of independence is legally effective; whether the referendum result imposes any legal obligation on the federal government and the other provinces; and, if Westmark is ever to secede lawfully, which amending procedure would apply.

Rule. In the *Secession Reference*, the Supreme Court held that a province has no right to secede unilaterally under Canadian or international law, because secession requires a constitutional amendment. A clear majority on a clear question in favour of secession creates a reciprocal duty on

all parties to negotiate in good faith, guided by the principles of federalism, democracy, constitutionalism and the rule of law, and the protection of minorities.

Application. Westmark's statute purports to remove the province from the federation. That would change the Constitution of Canada, which can be done only under Part V (s 52(3)). Section 45 does not help, because leaving the federation is not an amendment to the constitution of the province, so the statute is of no force or effect under s 52(1). International law does not assist either: the people of Westmark are not a colonial people, are not subject to foreign domination and participate fully in provincial and federal government.

Whether the referendum triggers the duty to negotiate depends on the clarity of the question and of the majority. The question links sovereignty to the failure of negotiations for a "partnership," so a voter could have voted yes while wanting a renewed partnership rather than independence. That points against a clear question. A majority of 50.4% is also very narrow. The Court required a "clear" majority, which is a qualitative standard, and left its assessment to political actors rather than the courts. Under the *Clarity Act*, the House of Commons would make that assessment. On these facts, there is a strong argument that the duty to negotiate has not been triggered.

If a future referendum did produce a clear result, all parties would be bound to negotiate in good faith, and the interests of minorities within Westmark, including Indigenous peoples, would have to be protected. Any agreement would then have to be implemented by amendment. The Court did not identify the procedure. The general procedure in s 38 is the residual rule, but a secession amendment would almost certainly change matters listed in s 41, such as the office of Westmark's Lieutenant Governor and the operation of Part V itself, which points to unanimity.

Conclusion. Westmark's declaration is legally ineffective. On these facts the referendum probably does not trigger a duty to negotiate, because both the question and the majority lack clarity. Even if it did, secession could be achieved lawfully only by a negotiated constitutional amendment, probably requiring unanimity under s 41.

Part I summary

- **Section 52** makes the Constitution supreme (s 52(1)), defines it non-exhaustively (s 52(2)) and entrenches it so that only Part V can change it (s 52(3)).
- The Constitution's sources include entrenched text, ordinary statutes, case law, the prerogative, **unwritten principles** (interpretive and gap-filling, not a free-standing ground to strike down laws) and **conventions** (recognized but not enforced by courts).
- The **Secession Reference** supplies the four principles, rules out unilateral secession and creates a reciprocal duty to negotiate following a clear majority on a clear question.
- **Part V** contains five procedures: unanimity (s 41), general 7/50 (s 38, with s 42), some-but-not-all provinces (s 43), Parliament alone (s 44) and province alone (s 45). Check s 41 first, and always state whose resolutions are required.

- Which procedure governs **secession** is unresolved: s 38 is the residual rule, but the s 41 argument is strong.

Coming up: Part II, Distribution of Legislative Powers

Part II moves from how the Constitution is built to how legislative power is divided under it, following syllabus Topics 3 to 11. It begins with the federal structure of ss 91–95, judicial review on federal grounds, the **pith and substance** analysis (*R v Morgentaler* (1993), *Canadian Western Bank*), and the provincial power over property and civil rights (*Parsons*, *Chatterjee*, the *Securities Reference*).

END OF THE FREE SAMPLE

That was Part I. Three Parts to go.

Parts II to IV carry most of the marks on the Constitutional Law exam: division of powers, Aboriginal rights and the Charter. The full guide covers every one of the remaining 23 syllabus topics in the same depth.

PART II • TOPICS 3–11

Distribution of Legislative Powers

Pith and substance, property and civil rights, trade and commerce, POGG, the criminal law power, ancillary powers, paramountcy and interjurisdictional immunity, with a step-by-step method for the validity problem.

PART III • TOPICS 12–16

Aboriginal Rights and the Constitution

Section 35, the *Van der Peet* and *Powley* tests, Aboriginal title after *Tsilhqot'in*, treaty interpretation, *Sparrow* justification and the duty to consult.

PART IV • TOPICS 17–25

The Canadian Charter of Rights and Freedoms

Application, the override, religion, expression, s 7, equality, the full *Oakes* analysis and remedies, including suspended declarations and Charter damages.

132

pages, following the
NCA syllabus topic by
topic

41

case snapshots
covering every
syllabus case

15

practice problems
with full model
answers

36

true, false or partly
true quick checks

\$49

CAD • one-time

Lifetime access to the complete Constitutional Law guide,
plus one month of Lexn Exam: timed mock exams with AI
feedback.

lexn.ca

Prices in Canadian dollars, before applicable taxes. This guide is a study aid, not legal advice. © 2026 Lexn.