

## CANADA'S CONSTITUTIONAL STRUCTURE (1 - 7) ©

Canada is a constitutional democracy. In a constitutional democracy, any constitution will take basic characteristics. A constitution can either be written (constitutional document) or unwritten (through custom or common-law). A constitution can either be supreme (“entrenched”) to all other laws, or simply just another Act of the Legislature. A constitution can either be amended by simple Act of the Legislature, whereby it is “flexible” or may require constitutional amendment through an amendment formula whereby it is “rigid”. For example, the UK has an unwritten, flexible, non-Supreme Constitution; the U.S. has a written, extremely rigid, supreme constitution: Canada, in typical fashion, falls between the two, and has both a written (and unwritten), semi-supreme, semi-rigid constitution.

With the Patriation of the Constitution, in 1982, as has been set out by the Supreme Court of Canada many times, we moved from a system of Parliamentary supremacy to one of constitutional supremacy:

72 ... This Court has noted on several occasions that with the adoption of the [Charter](#), the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy. The Constitution binds all governments, both federal and provincial, including the executive branch (Operation Dismantle Inc. v. The Queen, [1985] 1 S.C.R. 441, at p. 455). They may not transgress its provisions: indeed, their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source.

- *Reference re Secession of Quebec, [1998] 2 S.C.R. 217*

This is both with respect to the Division of Powers as between the Federal and Provincial governments under ss. 91 and 92 of the *Constitution Act, 1867*, as well as the powers of the state over the citizen under the Canadian Charter of Rights and Freedoms under Part I of the *Constitution Act, 1982*.

Virtually, nothing in the expressed Constitutional texts of the *Constitution Acts, 1867 to 1982* can be amended without the consent of 7 or 10 of the Provinces. (The exceptions are some *Charter* rights which can be “over-riden” by expressed unilateral Legislation. Although this has not yet happened). The amendment formula was broadly described, by the Supreme Court of Canada, in the *Senate Reference* as follows:

[32] Part V contains four categories of amending procedures. The first is the general amending procedure (s. 38, complemented by s. 42), which requires a substantial degree of consensus between Parliament and the provincial legislatures. The second is the unanimous consent procedure (s. 41), which applies to certain changes deemed fundamental by the framers of the *Constitution Act, 1982*. The third is the special arrangements procedure (s. 43), which applies to amendments in relation to provisions of the Constitution that apply to some, but not all, of the provinces. The fourth is made up of the unilateral federal and provincial procedures, which allow unilateral amendment of aspects of government institutions that engage purely federal or provincial interests (ss. 44 and 45).

- *Reference re Senate Reform, 2014 SCC 32, [2014] 1 S.C.R. 704 @ paragraph 34*

The Supreme Court of Canada has pointed out that the constitution has unwritten constitutional imperatives as well:

106 *The historical origins of the protection of judicial independence in the United Kingdom, and thus in the Canadian Constitution, can be traced to the Act of Settlement of 1701. As we said in Valente, supra, at p. 693, that Act was the "historical inspiration" for the judicature provisions of the Constitution Act, 1867. Admittedly, the Act only extends protection to judges of the English superior courts. However, our Constitution has evolved over time.* In the same way that our understanding of rights and freedoms has grown, such that they have now been expressly entrenched through the enactment of the Constitution Act, 1982, so too has judicial independence grown into a principle that now extends to all courts, not just the superior courts of this country.

107 *I also support this conclusion on the basis of the presence of s. 11(d) of the Charter, an express provision which protects the independence of provincial court judges only when those courts exercise jurisdiction in relation to offences. As I said earlier, the express provisions of the Constitution should be understood as elaborations of the underlying, unwritten, and organizing principles found in the preamble to the Constitution Act, 1867. Even though s. 11(d) is found in the newer part of our Constitution, the Charter, it can be understood in this way, since the Constitution is to be read as a unified whole:* Reference re Bill 30, An Act to amend the Education Act (Ont.), [1987] 1 S.C.R. 1148, at p. 1206. *An analogy can be drawn between the express reference in the preamble of the Constitution Act, 1982 to the rule of law and the implicit inclusion of that principle in the Constitution Act, 1867:* Reference re Manitoba Language Rights, supra, at p. 750. Section 11(d), far from indicating that judicial independence is constitutionally enshrined for provincial courts only when those courts exercise jurisdiction over offences, is proof of the existence of a general principle of judicial independence that applies to all courts no matter what kind of cases they hear.

108 I reinforce this conclusion by reference to the central place that courts hold within the Canadian system of government. In OPSEU, as I have mentioned above, Beetz J. linked limitations on legislative sovereignty over political speech with "the existence of certain political institutions" as part of the "basic structure of our Constitution" (p. 57). However, political institutions are only one part of the basic structure of the Canadian Constitution. *As this Court has said before, there are three branches of government -- the legislature, the executive, and the judiciary:* Fraser v. Public Service Staff Relations Board, [1985] 2 S.C.R. 455, at p. 469; R. v. Power, [1994] 1 S.C.R. 601, at p. 620. Courts, in other words, are equally "definitional to the Canadian understanding of constitutionalism" (Cooper, supra, at para. 11) as are political institutions. *It follows that the same constitutional imperative -- the preservation of the basic structure -- which led Beetz J. to limit the power of legislatures to affect the operation of political institutions, also extends protection to the judicial institutions of our constitutional system. By implication, the jurisdiction of the provinces over "courts", as that term is used in s. 92(14) of the Constitution Act, 1867, contains within it an implied limitation that the independence of those courts cannot be undermined.*

- Reference re Remuneration of Judges of the Provincial Court (P.E.I.), [1997] 3 S.C.R.

In addition to the explicit text(s) of the constitutional documents there have always been unwritten constitutional rights and doctrines often read into our constitutional order through the pre-Amble of the *Constitution Act, 1867* which reads:

Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, *with a Constitution similar in Principle to that of the United Kingdom:*

...

Historically rights and requirements emanating from the *Magna Carta (1215)*, the *English Bill of Rights (1688)* and the *Act of Settlement (1701)* have been read into our constitutional order.

There is often confusion that the *Constitution Acts 1867-1982* are the *source* of Legislative and Executive authority. They are not.

Her Majesty the Queen is *the source* of all authority. The Constitutional texts and doctrines simply allocate the exercise and circumscribe that authority.

Thus, with respect to Legislative authority, s. 17 of the *Constitution Act, 1867* reads:

#### **Constitution of Parliament of Canada**

**17.** There shall be One Parliament for Canada, consisting of the Queen, an Upper House styled the Senate, and the House of Commons.

And with respect to Executive Authority s. 9 of the *Constitution Act, 1867* reads:

#### **Declaration of Executive Power in the Queen**

9. The Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen.

The exercise of that authority is circumscribed not only by the Constitutional text itself, but is also circumscribed under s. 52 of the *Constitution Act, 1982*;

#### **Primacy of Constitution of Canada**

**52.** (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

#### **Constitution of Canada**

(2) The Constitution of Canada *includes*

(a) the Canada Act 1982, including this Act;

- (b) the Acts and orders referred to in the schedule; and
- (c) any amendment to any Act or order referred to in paragraph (a) or (b).

### **Amendments to Constitution of Canada**

- (3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

It is also circumscribed by the underlying constitutional imperatives of the Rule of Law and Constitutionalism which the Supreme Court of Canada has summarized as follows:

[70]The principles of constitutionalism and the rule of law lie at the root of our system of government. The rule of Law, as observed in *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 142, is “a fundamental postulate of our constitutional structure”. As we noted in the Patriation Reference, supra, at pp.805-6, “[t]he ‘rule of law’ is a highly textured expression, importing many things which are beyond the need of these reasons to explore but conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority”. ***At its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action.***

[71]In the Manitoba Language Rights Reference, supra, at pp.747-52, this Court outlined the elements of the rule of law. We emphasized, first, that the rule of law provides that the law is supreme over the acts of both government and private persons. There is, in short, one law for all. Second, we explained, at p. 749, that “the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order”. It was this second aspect of the rule of law that was primarily at issue in the Manitoba Language Rights Reference itself. ***A third aspect of the rule of law is, as recently confirmed in the Provincial Judged Reference, supra, at para. 10, that “the exercise of all public power must find its ultimate source in a legal rule”.*** Put another way, the relationship between the state and the individual must be regulated by law. Taken together, these three considerations make up a principle of profound constitutional and political significance.

[72]The constitutionalism principle bears considerable similarity to the rule of law, although they are not identical. The essence of constitutionalism in Canada is embodied in s. 52(1) of the Constitution Act, 1982, which provides that “[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.” ***Simply put, the constitutionalism principle requires that all government action must comply with the law, including the Constitution. The rule of Law principle requires that all government action must comply with the law, including the Constitution. This Court has noted on several occasions that with the adoption of the Charter, the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy. The Constitution binds all governments, both federal and provincial,***

*including the executive branch* (Operation Dismantle Inc. v. The Queen, [1985] 1 S.C.R. 441, at p. 455). They may not transgress its provisions: indeed, their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source.

- *Reference re Secession of Quebec, [1998] 2 S.C.R. 217 @ para 70-72*

Where the constitutional excess is with respect to a citizen, under a *Charter* right, the remedial section in s. 24 of the *Charter* reads:

**Enforcement of guaranteed rights and freedoms**

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Where there is a dispute, either as between governments, or as between the citizen and the state, the Courts arbitrate those disputes, when not fashioning a specific right to the individual under s. 24(1), will issue a remedy under s.52(1) of the *Constitution Act.1982*, which reads:

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

One often hears, typically from politicians and citizens alike, that the Courts exceed their role, that they are too “interventionist”. This is complete nonsense. As set out by the Supreme Court of Canada in *Vriend*:

53 Further confusion results when arguments concerning the respective roles of the legislature and the judiciary are introduced into the s. 32 analysis. These arguments put forward the position that courts must defer to a decision of the legislature not to enact a particular provision, and that the scope of Charter review should be restricted so that such decisions will be unchallenged. I cannot accept this position. Apart from the very problematic distinction it draws between legislative action and inaction, this argument seeks to substantially alter the nature of considerations of legislative deference in Charter analysis. The deference very properly due to the choices made by the legislature will be taken into account in deciding whether a limit is justified under s. 1 and again in determining the appropriate remedy for a Charter breach. My colleague Iacobucci J. deals with these considerations at greater length more fully in his reasons.

54 The notion of judicial deference to legislative choices should not, however, be used to completely immunize certain kinds of legislative decisions from Charter scrutiny. McClung J.A. in the Alberta Court of Appeal criticized the application of the Charter to a legislative omission as an encroachment by

the courts on legislative autonomy. He objected to what he saw as judges dictating provincial legislation under the pretext of constitutional scrutiny. In his view, a choice by the legislature not to legislate with respect to a particular matter within its jurisdiction, especially a controversial one, should not be open to review by the judiciary: "When they choose silence provincial legislatures need not march to the Charter drum. In a constitutional sense they need not march at all. . . . The Canadian Charter of Rights and Freedoms was not adopted by the provinces to promote the federal extraction of subsidiary legislation from them but only to police it once it is proclaimed ~ if it is proclaimed" (pp. 25 and 28).

55 There are several answers to this position. The first is that in this case, the constitutional challenge concerns the IRPA, legislation that has been proclaimed. The fact that it is the under inclusiveness of the Act which is at issue does not alter the fact that it is the legislative act which is the subject of Charter scrutiny in this case. Furthermore, the language of s. 32 does not limit the application of the Charter merely to positive actions encroaching on rights or the excessive exercise of authority, as McClung J.A. seems to suggest. These issues will be dealt with shortly. Yet at this point it must be observed that McClung J.A.'s reasons also imply a more fundamental challenge to the role of the courts under the Charter, which must also be answered. This issue is addressed in the reasons of my colleague Iacobucci J. below, and that discussion need not be repeated here. However, at the present stage of the analysis it may be useful to clarify the role of the judiciary in responding to a legislative omission which is challenged under the Charter.

56 It is suggested that this appeal represents a contest between the power of the democratically elected legislatures to pass the laws they see fit, and the power of the courts to disallow those laws, or to dictate that certain matters be included in those laws. To put the issue in this way is misleading and erroneous. Quite simply, it is not the courts which limit the legislatures. Rather, it is the Constitution, which must be interpreted by the courts, that limits the legislatures. This is necessarily true of all constitutional democracies. Citizens must have the right to challenge laws which they consider to be beyond the powers of the legislatures. When such a challenge is properly made, the courts must, pursuant to their constitutional duty, rule on the challenge. It is said, however, that this case is different because the challenge centres on the legislature's failure to extend the protection of a law to a particular group of people. This position assumes that it is only a positive act rather than an omission which may be scrutinized under the Charter. In my view, for the reasons that will follow, there is no legal basis for drawing such a distinction. In this as in other cases, the courts have a duty to determine whether the challenge is justified. It is not a question, as McClung J.A. suggested, of the courts imposing their view of "ideal" legislation, but rather of determining whether the challenged legislative act or omission is constitutional or not.

The Courts are an explicit, defined, and entrenched part of our constitutional framework. It is their *duty*, when called upon, to adjudicate disputes. This adjudicative function of the Courts, is what distinguishes a constitutional democracy from rule by the Executive, or dictatorial rule.

Those who romanticize, or over-emphasize the separation between the Executive and Parliament, particularly in a majority government, are well-advised to recall the reality, and observation of the Supreme Court of Canada that:

53 On a practical level, it is recognized that the same individuals control both the executive and the legislative branches of government. As this Court observed in *Attorney General of Quebec v. Blaikie*, [1981] 1 S.C.R. 312, at p. 320, “There is thus a considerable degree of integration between the Legislature and the Government. . . . [I]t is the Government which, through its majority, does in practice control the operations of the elected branch of the Legislature on a day to day basis”. Similarly, in *Reference re Canada Assistance Plan, supra*, at p. 547, Sopinka J. said:

. . . the true executive power lies in the Cabinet. And since the Cabinet controls the government, there is in practice a degree of overlap among the terms “government”, “Cabinet” and “executive”. . . . In practice, the bulk of the new legislation is initiated by the government.

- *Wells v. Newfoundland*, [1999] 3 S.C.R. 199

This is one of the important reasons that the Supreme Court of Canada, in the “*Nadon Reference*”, *Reference Re Supreme Court Act, ss. 5 and 6, 2014 SCC 21*, ruled that a change to the composition of the Supreme Court of Canada would require *the consent of all the Provinces* to maintain the separation of powers which is essential to the maintenance to the Rule of Law, Constitutionalism and Democracy itself.

It was the Constitutional Rights Centre Inc., along with Rocco Galati, as co-Applicants, who challenged, in Federal Court, the Nadon appointment, and forced the Governor-General to file a reference at the Supreme Court of Canada, whereby the CRC and Galati brokered an agreement to suspend their Federal Court challenge, in exchange for status to be heard on the Supreme Court of Canada reference, whereby the Supreme Court, as a result of its ruling “constitutionalized” itself and removed itself from Legislative interference, without a constitutional amendment, with the consent of all ten (10) provinces with respect to its “composition”, or the consent of seven (7) provinces representing at least half of Canada’s population, with respect to any other “matter concerning the Supreme Court”.