CANADA'S JUDICIAL STRUCTURE (1 – 6) ©

The government of Canada has its own description of the Structure of Canada's judiciary in Canada. You are welcome to visit its website through the following link:

- ***http://www.justice.gc.ca/eng/csj-sjc/just/07.html***

However, as with all government publications and descriptions, they are often incomplete and self-serving to their own purposes.

The Canadian judiciary, while split into Federal and Provincial Appointments, is extremely complex, with issue(s) still, to this day, unresolved.

Federal Appointments are governed by ss. 96-101 of the ***Constitution Act, 1867*** which read:

VII. JUDICATURE

Appointment of Judges

96. The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

Selection of Judges in Ontario, etc.

97. Until the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and the Procedure of the Courts in those Provinces, are made uniform, the Judges of the Courts of those Provinces appointed by the Governor General shall be selected from the respective Bars of those Provinces.

Selection of Judges in Quebec

98. The Judges of the Courts of Quebec shall be selected from the Bar of that Province.

Tenure of office of Judges

99. (1) Subject to subsection (2) of this section, the judges of the superior courts shall hold office during good behaviour, but shall be removable by the Governor General on address of the Senate and House of Commons.

Termination at age 75

(2) A judge of a superior court, whether appointed before or after the coming into force of this section, shall cease to hold office upon attaining the age of seventy-five years, or upon the coming into force of this section if at that time he has already

attained that age.

Salaries, etc., of Judges

100. The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada. (54)

General Court of Appeal, etc.

101. The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada. (55)

Provincial Appointments, ***and the administration of Justice in the Provinces***, even the administration of justice with respect to the Federally appointed Superior Courts, is governed by s. 92(14) of the ***Constitution Act, 1867*** which reads:

EXCLUSIVE POWERS OF PROVINCIAL LEGISLATURES

Subjects of exclusive Provincial Legislation

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

…

14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

The Governor-General makes federal appointments while the Lieutenant Governor of the Province(s) makes provincial appointments.

- ***Federal Appointments***

Section 96 of the ***Constitution Act, 1867*** provides for federal appointments to the Superior Courts of the Provinces. Tenure, under s. 99, is to 75 years of age. The structure provided for tenure in judicial appointments comes from the ***Act of Settlement (1701)***. Historically it was for life, but a constitutional amendment in 1960, the ***Constitution Act, 1960***, reduced the tenure from life to 75 years.

Section 101 ***Constitution Act, 1867*** also allows the Federal government to create Federal Courts that serve nationally. Under this section the Federal government established the Supreme Court of Canada in 1875, the Federal Court of Canada, in 1970, and the Tax Court of Canada, as a Superior Court, in 1983, as well as an array of Federal Tribunals such as the Parole Board, the Immigration and Refugee Board, and such.

The differences between the Superior courts of the Provinces, under s. 96, and the Federal Courts, under s. 101, is that the Superior Courts of the Provinces are general courts with "inherent" jurisdiction since they pre-date Confederation, and possess jurisdiction above and beyond their statutory authority granted under various statutes, both Federal and Provincial. Their full and plenary jurisdiction over constitutional issues ***cannot*** be ousted in favor of exclusive jurisdiction of the Federal Courts, even over Federal matters, although they have the discretion to defer to the Federal Courts, in cases of concurrent jurisdiction, i.e. ***Reza v. Canada, [1994] 2 S.C.R. 394.*** In rare cases the opposite is also true. ***(Commonwealth of Puerto Rico v. Hernandez, [1975] 1 S.C.R. 228).***

The section 101 Courts are restricted to their statutory authority granted under their Federal Legislation.

Provincial Courts, created by the Province, under s. 92(14) of the ***Constitution Act, 1867*** are also restricted to their statutory authority, which can be granted both under Federal or Provincial legislation.

- ***Administration of Justice***

Each Province, under their respective ***Courts of Justice*** legislation, administers the Courts and Administration of Justice both for Provincial Courts as well as the federally appointed Superior Courts, whose judges are appointed by the Federal government.

It is in this sense that we have a "unitary Court system" culminating to the Supreme Court of Canada, both with respect to Federally appointed judges across the Country in each Province, as well as a hierarchy of Provincial Courts, Superior Courts, of including Provincial Courts of Appeal to the Supreme Court of Canada.

Federal Courts are ***not*** part of this unitary court system. Thus, the Supreme Court of Canada ruled in ***A.G. Ontario v. Pembina Exploration Canada Ltd. [1989] 1 S.C.R. 206*** as follows:

> A provincial legislature has the power, by virtue of s. 92(14) of the Constitution Act, 1867 , to grant jurisdiction to an inferior court to hear a matter falling within federal legislative jurisdiction. This power is limited, however, by s. 96 of that Act and the federal government's power to expressly grant exclusive jurisdiction to a court established by it under s. 101 of the Act. Neither of these exceptions applied here.
>
> The court system in Canada is generally unitary; provincially constituted inferior and superior courts of original and appellate jurisdiction apply federal as well as provincial laws. The system dates from Confederation times. ***The major exception to this unitary***

system is the Federal Court of Canada to which Parliament has assigned jurisdiction, sometimes exclusive, sometimes concurrent, in respect of matters within its legislative competence.

and further stated:

The Principal Constitutional Issues

14. In assessing the constitutional issues, it is well to remember that the court system in Canada is, in general, a unitary one under which provincially constituted inferior and superior courts of original and appellate jurisdiction apply federal as well as provincial laws under a hierarchical arrangement culminating in the Supreme Court of Canada established by Parliament under s. 101 of theConstitution Act, 1867 . This goes back to the time of Confederation when previously constituted superior, county and small claims courts continued to be charged with the administration of justice in Canada. The major exception to this unitary system is the Federal Court of Canada (the predecessor of which was created in 1875 along with the Supreme Court of Canada under s. 101 of the Constitution Act, 1867) to which Parliament has assigned jurisdiction, sometimes exclusive, sometimes concurrent, in respect of matters within its legislative competence.

- ***A.G. Ontario v. Pembina Exploration Canada Ltd. [1989] 1 S.C.R. 206***

- ***Judicial Review- Balance and Lever to Rule of Law***

The function of the Courts is, in a large sense, with respect to public law involving governments, is to judicially review legislative and government action.

The constitutional right to judicial review was recognized, as early as 1765 in ***Entick v. Carrington [1765] EWHC KB J98.***

Post-patriation of the Constitution in 1982 the Supreme Court of Canada has recently articulated this right in ***Dunsmuir***, as follows:

[27] As a matter of constitutional law, judicial review is intimately connected with the preservation of the rule of law. It is essentially that constitutional foundation which explains the purpose of judicial review and guides its function and operation. Judicial review seeks to address an underlying tension between the rule of law and the foundational democratic principle, which finds an expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers. Courts, while exercising their constitutional functions of judicial review, must be sensitive not only to the need to uphold the rule of law, but also to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures.

[28] By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.

[29] Administrative powers are exercised by decision makers according to statutory regimes that are themselves confined. A decision maker may not exercise authority not specifically assigned to him or her. By acting in the absence of legal authority, the decision maker transgresses the principle of the rule of law. Thus, when a reviewing court considers the scope of a decision-making power or the jurisdiction conferred by a statute, the standard of review analysis strives to determine what authority was intended to be given to the body in relation to the subject matter. This is done within the context of the courts' constitutional duty to ensure that public authorities do not overreach their lawful powers: Crevier v. Attorney General of Quebec, [1981] 2 S.C.R. 220, at p. 234; also Dr. Q v. College of Physicians and Surgeons of British Columbia, [2003] 1 S.C.R. 226, 2003 SCC 19, at para. 21.

[30] In addition to the role judicial review plays in upholding the rule of law, it also performs an important constitutional function in maintaining legislative supremacy. As noted by Justice Thomas Cromwell, "the rule of law is affirmed by assuring that the courts have the final say on the jurisdictional limits of a tribunal's authority; second, legislative supremacy is affirmed by adopting the principle that the concept of jurisdiction should be narrowly circumscribed and defined according to the intent of the legislature in a contextual and purposeful way; third, legislative supremacy is affirmed and the court-centric conception of the rule of law is reined in by acknowledging that the courts do not have a monopoly on deciding all questions of law" ("Appellate Review: Policy and Pragmatism", in 2006 Isaac Pitblado Lectures, Appellate Courts: Policy, Law and Practice, V-1, at p. V-12). In essence, the rule of law is maintained because the courts have the last word on jurisdiction, and legislative supremacy is assured because determining the applicable standard of review is accomplished by establishing legislative intent.

[31] The legislative branch of government cannot remove the judiciary's power to review actions and decisions of administrative bodies for compliance with the constitutional capacities of the government. Even a privative clause, which provides a strong indication of legislative intent, cannot be determinative in this respect (Executors of the Woodward Estate v. Minister of Finance, [1973] S.C.R. 120, at p. 127). The inherent power of superior courts to review administrative action and ensure that it does not exceed its jurisdiction stems from the judicature provisions in ss. 96 to 101 of the Constitution Act, 1867 : Crevier. As noted by Beetz J. in U.E.S., Local 298 v. Bibeault, [1988] 2 S.C.R. 1048, at p. 1090, "[t]he role of the superior courts in maintaining the rule of law is so important that it is given constitutional protection". In short, judicial review is constitutionally guaranteed in Canada, particularly with regard

to the definition and enforcement of jurisdictional limits. As Laskin C.J. explained in Crevier:

> Where questions of law have been specifically covered in a privative enactment, this Court, as in Farrah, has not hesitated to recognize this limitation on judicial review as serving the interests of an express legislative policy to protect decisions of adjudicative agencies from external correction. Thus, it has, in my opinion, balanced the competing interests of a provincial Legislature in its enactment of substantively valid legislation and of the courts as ultimate interpreters of the British North America Act and s. 96 thereof. The same considerations do not, however, apply to issues of jurisdiction which are not far removed from issues of constitutionality. It cannot be left to a provincial statutory tribunal, in the face of s. 96 , to determine the limits of its own jurisdiction without appeal or review. [pp. 237-38]

See also D. J. Mullan, Administrative Law (2001), at p. 50.

- Dunsmuir v. New Brunswick, [2008] 1 S.C.R. 190

Thus the Supreme Court of Canada has ruled that the Courts are under a ***duty*** to review legislation for Constitutional conformity (***R. v. Morgentaler [1988] 1 S.C.R. 30 (SCC) / Vriend v. Alberta [1998] 1 S.C.R. 493***). Under a duty to review Executive action (***Operation Dismantle Inc. v. The Queen, [1985] 1 S.C.R. 441 / Canada (Prime Minister) v. Khadr, 2010 SCC 3***). They are also under a duty to review the common law, generated by the Courts themselves, for constitutional conformity, with respect to the criminal law (***R. v. Salituro [1991] 3 S.C.R. 654***) as well as civil law disputes (***RWDSU*** v. ***Dolphin Delivery [1996] 2 S.C.R. 573***).

Any legislative provision that pretends to block judicial review on constitutional grounds, referred to as a “privative clause”, has been consistently read down and declared invalid by the Courts because to bar judicial view, particularly on constitutional grounds, would effectively amount to unilateral and arbitrary change to the Constitutional structure itself.

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