Constitutional Law

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Canadian Government

# Features

## Constitutional Monarchy

Formally, the executive branch acts in the name of the Crown

* Through constitutional convention of **responsible government**
* Practically, all the Queen’s formal functions have been delegated to Canadian roles/positions, which act on the advice of elected members of government

## Parliamentary Democracy

Members of government are elected by the legislature

- Not directly elected by citizens

## Federalism

Must have 2+ constitutionally protected orders of government which have some jurisdiction of their own (Federal and Provincial)

- s. 91-95 of the Constitution: division of powers

## Pluralism

More than one operative legal system

* Common law (all but Quebec) & Civil law (Quebec)
* Indigenous law (self-governed)
* Others (international law, municipal government…)

# Branches of Government

## Legislative

### Federal Legislature

**ROLE**:Make and unmake law, hold the government to account

**MEMBERS**: Crown (Governor General- appointed), House of Commons (MPs- elected), Senate (Senators- appointed)

* 3 members must concur to make law
* Senate cannot introduce money bills
  + Does not perform a role representing local/regional interests
  + Purpose: Chamber of sober second thought

### Provincial Legislature

**ROLE**: Make and unmake law, hold the government to account

**MEMBERS**: Crown (Lieutenant Governor- appointed), Legislature (MPPs/MLAs- elected)

* No upper house / senate

### Other Legislative Actors

Law-Making power often delegated:

* Cabinet, individual ministers
* Territorial legislature, municipalities
* Indigenous governance (Federally delegated or Inherent power of self-governance?)

## Executive

**ROLE**:Sets policy agenda, introduces laws for legislative consideration, implements and enforces laws

**MEMBERS**: Crown, Cabinet (PM, premiers, ministers), civil service, military, police, prosecutors, administrative decision-makers

## Judicial

**ROLE**: Review executive and legislative branches

**MEMBERS**: SCC (highest court provincially and federally after 1949 \*Privy Council)

# Key Concepts

### Rule of Law

: All exercise of state power must be consistent and under law

- from the 1982 Constitution Act preamble

- Constitutionalism: All government action must comply with the constitution

### Legislative/Parliamentary Supremacy

Ensures executive branch (& monarch) power is subject to legislature/elected government’s control

* modelled on UK Constitution, in 1867 Constitution Act preamble
* Guarantees democratic control

1. Omnicompetence: legislature can make/unmake any laws; other branches cannot suspend laws enacted
2. Legislature cannot bind itself for the future (~cannot be bound by a former legislature

**Limits on Legislative Supremacy**

1. Manner and form requirements
2. The Constitution: legislative v constitutional supremacy?

### Responsible Government

Ensures cabinet maintains elected federal and provincial support

ISSUE: reality of Executive Dominance (particularly in majority governments)

### Separation of Powers

Descriptive and normative concept

* D: No strict separation of powers in Canada; judicial independance, but legislative and executive branches are fused
* D: 3 Branches have different, distinct functions
* N: Common criticism of Charter (for allowing courts to infringe on legislative role)

The Constitution

## Sources

* Formal constitutional documents
* Actions by the British Crown
* Statutes
* Canadian and UK Court Decisions
* Conventions
* Unwritten const. Principles
* Indigenous laws
* Statutes can become constitutionalized over time

## Function

Traditional view: establishes, empowers and limits governments

Other functions: transformation, conflict management, recognition, aspirational/symbolic, stability and certainty, advancing a particular moral/political philosophy

## Big C & little c

|  |  |
| --- | --- |
| **The Constitution** | **the constitution** |
| Formal, Supreme & Entrenched (focus on status of rules and principles) | functional, informal (focus on how it impacts governance) |
| Body of rules and principles that are supreme/entrenched, and largely codified | All rules and principles related to the governing of the country |
|  | Includes the Constitution, and more…  - const. Conventions, historical documents, statutes, court decisions, indigenous laws on governance |

## Supremacy

Hierarchy of laws: Constitution>Legislation>Common law

* Constitution Act 1982 **s.52(2)**
* Legislation CAN override common law, but not the Constitution (exception: s.33 for Charter s. 1, 2, 7-15)

## Entrenchment

Constitution subject to special amendment procedures (Constitution Act 1982 Part V: **s.52(3**))

**Entrenched**:

* Const. Act 1867/BNA Act
* Canada Act 1982 (Const. Act 1982: Charter, recognition of Aboriginal & treaty rights, Equalization formula, Amending formula)
* Not an exhaustive list: **Other instruments** (includes unwritten constitutional principles, other written texts incl. Supreme Court Act

## Conventions

Rules that have emerged from political practice & are considered binding by and upon relevant government actors

* not directly enforceable by courts, but enforced through democratic routes
* Sourced in 1867 Const. Act “similar in principle to that of the United Kingdom”

## Unwritten Principles

### CASE: Quebec Secession Reference (SCC- 1998)

**FACTS**: Quebecois attempt to secede in 1995, re on what is required to secede

Federal govt: QB needs unanimous (provinces) amendment procedure

QB: QB needs just a simple majority of QB citizens

SCC: recognized 4 unwritten principles which have their own force & help make sense of the written constitutional documents, structures…

**HELD:** No, Quebec cannot secede unilaterally under the Constitution or International law

**4 UCPs**

1. Federalism
2. Democracy
3. Rule of Law & Constitutionalism
4. Respect for minorities

\*Additional LATER recognized **UCPs**:

* Judicial independence
* Honour of the Crown
* Cooperative federalism

QUESTIONS:

1) Are these UCPs derived from the written constitution or is the written text derived from the independent, pre-existing UCPs?

2) Which would have primacy if they conflict?

A: Decision can be read either way, For the written text: para 53, UCPs: para 55.

Ex: Written federal power of disallowance was overruled by the UCP of federalism

**ROLE of UCPs**: Interpreting the Constitution, understanding Const. structure, Invalidation? (independent substantive force?)

### Judicial Review

: The power of the courts in Canada to determine, when properly asked to do so, whether action taken by a governmental body or legal actor is or is not in compliance with our Constitution; and if not, to declare it unconstitutional

- supports constitutionalism/rule of law

- assumed in Canada (debated in US)

- rooted in Imperial British legacy, Colonial Laws Validity Act

Constitution Act- Supremacy Clause **s.52(1)**

**- CASE STUDY: BC v Imperial Tobacco**

### BC v Imperial Tobacco (2005- SCC)

**FACTS**: Provincial law passed allowing BC to sue tobacco companies for healthcare costs associated with BC smokers- Companies argued it violated rule of law and judicial independence

**SCC**: Judicial independence is an Unwritten Constitutional Principle

- source: **Charter s.11(d) impartial/independent tribunal, non-interference**

- to safeguard constitutional order, public confidence

- = security of tenure, financial security, administrative independence

Rule of Law

- that law must be prospective/ not retroactive?

- not at issue, court does not interfere with legislation

- **RULE OF LAW UCP speaks to form of legislation, not content**

- Issue: Can they be separated? How can form be considered without looking to the content of the law?

**HELD**: Neither Judicial independence or Rule of Law were violated by the law.

Constitutional Amendments

**Constitution At 1982 Part V s. 38-s. 47**

* prior to 1982, no domestic amending formula (no need with imperial legacy, and then could not settle on a formula)
* QB still not signed on (insists on a veto, all other provinces reject this assertion)

ISSUES with Amendment:

1. Locus of sovereignty: citizens or governments? Federalism? (by vote? referendum? What parts of government?) Incorporating indigenous population?
2. Balance of stability and flexibility: Considering protection of minority rights, consider changing circumstances, differing opinions on striking the right balance?
3. Indigenous communities: recognized in Part V?

# 5 Amending Formulas

In Part V of the Constitution Act 1982

* applies only to Constitution as defined in s.52(2)
* Locates amendment power in governments, not citizens
* Key concern: federalism

## 1. s.38 General Procedure: 7/50

Default formula: Federal Parliament + 2/3 of provinces (representing 50% of the population)

In Effect- Must Haves:

* min. 1 Western province
* min. 1 Atlantic prince
* min. Quebec or Ontario
* 3 year limit to reach consensus
* No Provincial vetos
* Provinces CAN ‘Opt Out’ in certain cases
* Max 3 provinces can ‘opt out’ and still pass 7/50

**s.42: 7/50 Rule application:**

1. principle of proportionate representation

2. Senate powers, appointment method

3. Senators per province, residence qualifications

4. SCC (other than its composition

5. Extending provinces into territories, establishing new provinces, territories

## 2. s. 41 Unanimity Procedure

1. Offices of the Queen, Governor General, Lt Governors
2. “Senate Floor”
3. Use of English/French in federal institutions
4. SCC composition
5. Changes to Part V Amending Procedures

## 3. s. 43 Bilateral Procedure

Formula requires federal parliament and the impacted provinces’ legislatures. Includes:

1. Provincial boundaries
2. English/french in-province

## 4. s. 44 Federal Unilateral Procedure

Applies to federal executive and “the Senate and House of Commons”

## 5. s. 45 Provincial Unilateral Procedure

Applies to provincial constitutions

# Analytical Framework: Amendment

Step 1: Is there an amendment to the Constitution?

- Includes **direct textual changes** and **indirect amendment** (by statute)

- **Indirect**: includes changes fundamental to constitutional architecture, fundamental features agreed to by framers, (e.g. Senate as a chamber of sober second thought), organically developed entrenchment (e.g. SCC act not entrenched by framers, but in SCC Act Reference)

Step 2: If so, which amending procedure applies?

- 7/50 Rule

- Exceptions

- s.41 unanimity

- s. 43 bilateral

- s. 44 unilateral federal

- s. 45 unilateral provincial

### CASE: Reference re Supreme Court Act, ss.5 and 6 (SCC-2014)

**FACTS**: PM Harper’s appointment of J. Nadon to SCC challenged by Ontario lawyer, arguing N was ineligible because he did not fulfil criteria for appointments from Quebec (was not a current member of the Bar in QB, and not a judge in QB court, but federal court)

* SCC: N did not meet required criteria for appointment from Quebec
* Q: Can Parliament unilaterally amend Supreme Court Act to make N eligible?

**HELD**: NO. SCC constitutionally entrenched, SCC composition amendment requires **s.41 Unanimous** consent

* even if NOT about SCC composition (some other aspect of SCC), **7/50 rule** would apply
* **TAKEAWAY**: X federal unilateralism, OK organic constitutional entrenchment, SCC amending (s. 41, s.38)

### CASE: Senate Reference (SCC- 2014)

**FACTS**: Parliament attempted to pass bill C7, reforming senate (bypassing Constitution), QB challenged, stating those changes require substantial provincial consent

**HELD**: Answers to Reference Qs:

* Can parliament unilaterally implement consultative election framework?
  + **SCC**: NO- Use 7/50
* “ Set fixed terms?
  + **SCC**: NO- Use 7/50
* What degree of provincial consent is required to abolish the Senate?
  + Unanimity (**s.41**)

**TAKEAWAYS**:

* UCPs inform how to interpret the Constitution
* Architecture: Individual elements are linked & must be interpreted with reference to this structure/ not in isolation
* Part V
  + Unanimity requirement allows a veto for matters “essential to state survival”
  + Federal and Provincial unilateralism only apply when other levels/interests are not engaged

Canadian Charter of Rights and Freedoms

# Background

First comprehensive and entrenched bill of rights

Trudeau’s objectives:

1. **Protect fundamental rights and freedoms**

- post WW2, concerned for human rights atrocities globally and domestically (D: 1970s QB War Measures Act, Japanese internment camps)

- largely negative/restrictive on government (later shift to more positive obligations under human rights instruments)

1. **Promote national unity**

- X QB secession, separatism

- unify nation with shared fundamental rights

PRIOR TO 1982, courts protected “a common law bill of rights”

- included private property rights, presumption innocence, Canadian Bill of Rights (regular statute)- all of which was NOT constitutionally entrenched

- Const Act 1867 included language and education rights, federalism, minority rights

## Sources/Input

* Advocacy groups; feminist groups
* Indigenous groups
* Federal government
* Provincial governments
* National and international human rights instruments
* SINCE has become an inspiration for other countries’ rights instruments
* HIGHLY criticized in its inception to present

# Debates

## Entrenched Charter

### Pros

* A product of the democratic process
* Protects democracy; not simple majority, but deeper democratic values (ss. 3-5)
* Guards against Tyranny of the majority
  + Protects minority groups’ interests where elected and other public actors may lack

### Cons

LEFT:

* unnecessary, undesirable; political branches are competent, this hinders their ability to help the disadvantaged
* “Democratic debilitation”; slows/stops change, people seeking change need the $ to pursue litigation in the judicial system
* Negative bill of rights ~ IDs government as the problem (but unjust concentrations of power, $ are in the private sector)

RIGHT:

* Anti-democratic; should be left to elected exec and legis branches, which are accountable to public

## Judicial Review

### Pros

* s. 24 remedies: Contemplated by framers, who wanted courts to have this ability
* Protects voices not heard in other democratic processes ~ further protecting minorities, democracy
* Judicial independence/impartiality; not subject to political pressures
* Helps courts overcome legislative & executive oversight and/or errors
  + And exec & legislature in turn correct judicial oversight/errors

### Cons

LEFT:

* Charter’s **vague language** allows judges to bring their (conservative) political views into review, ~unlikely to disturb status quo, existing power structures
* Charter challenges cost time and $$$, privileging the rich and powerful with resources to pursue them
* Institutional competence: lack of expertise in judges (e.g. judges with lay understanding of economics deciding an economically driven case

RIGHT:

* **Vague language** allows for liberal judges to bring in their ‘post-modern elite’ views
* Judges are too “activist”
* No room for ‘reasonable disagreement’ left once judges decide on one interpretation

BOTH: counter-majoritarian objection (democratic)

## Dialogue Theory

* **Thesis**: Charter decisions leave room for, and receive, a legislative response that accomplishes the main objectives of the original law, using means that respect the Charter
* descriptive; from Hogg & Bushell
* Ss. 1 & 33 are mechanisms for dialogue

**Critique: Morton & Knopff**

* overemphasizes political branches’ ability to respond to court decisions
  + Response: Political system just needs to use s.1 & 33 mechanisms and opts not to (lack of political will, not ability)

# Constitution & Charter Interpretation

## Sources of Interpretation

1. Historical: original understanding/intention of framers
2. Textual: from words of the Constitution itself
3. Doctrinal: judicial precedent set by courts in interpreting the Constitution (decisions & developed tests)
4. Prudential: cost-benefit analysis (instrumental, can be used for one side or another)\*critique: veers into legislative territory
5. Ethical: rules we believe should govern us (as a country)
6. Structural: drawing inferences from constitutional features

### Additional Charter-Specific Interpretation

1. Interpretive provisions in the Charter (ss. 25, 27, 28)
2. Legislative history (SEE Motor Vehicle Reference; given little weight)
3. Canadian pre-Charter case law
4. Academic writings (now very common)
5. Comparative domestic sources (e.g. US)
6. International sources (especially UN treaties, bodies)

## Theories of Interpretation

1. **Textualist**

* ‘Plain meaning’
* Used by early Privy Council (e.g. Persons case)
* No longer popular

1. **Originalist**

* Historical, rooted in idea that the Constitution is dead
* Unclear: which original meaning: Framers? Public/reasonable persons? Ratifiers?
* Popular in US, less so in Canada

1. **Purposive**

* Theoretically, the Canadian method
* Emphasis on the **goal** of the Constitution
* Less concerned with original purpose, leaves room for application of identified purpose
* Stated/accepted **theory in SCC decisions**; in practice:
  + Progressive: Constitution not frozen, but a **living tree (Persons case)**, courts have power to adapt interpretations over time
  + Generous: not narrow; “Large and liberal interpretation”

1. **Procedural**

* Looks at what enacted laws DO with effect to democratic processes
* More Canadian scholars than courts/judges

1. **Substantive**

* Measures content of laws with reference to some notion of ‘the good’
* More Canadian scholars than courts/judges

1. **Eclectic**

* Blends the above theories
* Canada in practice?

### CASE: ‘Persons’ Case (1928- SCC, -> Privy Council)

**FACTS**: On whether ‘qualified persons’ in s.24 of the 1867 Const Act includes women, ~ making them eligible to be Senators

**HELD by SCC**: NO. Originalist interpretation;

APPEALED- **HELD by Privy Council**: YES. Generous, progressive interpretation

- textualist: referred to other parts in the act which include women as persons,

- precedential, purposive…

- X rejects Roman & English law-based interpretations; not intended to be applied to other communities which may not share the same customs/traditions

**PC**: BNA Act planted a ‘living tree’ capable of growth and change; not court’s duty to limit/cut down

- WHY? Because Constitutions must provide a lasting framework (whereas regular statutes should/can be more strictly interpreted and applied

**TAKEAWAYS**:

* Purposive approach
* Must use large, liberal interpretation
* X custom, history
* X Roman & English law

### Hunter v Southam (SCC- 1984)

**FACTS**: s.8 claim of unreasonable search/seizure of newspaper office (under statute, without warrant)

**HELD**: Charter s.8 drafted with the purpose of reasonable expectation of privacy

**TAKEAWAYS**:

* Constitution not easily amended like normal statutes, ~ must be interpreted differently & be capable of development over time
* Confirms generous, progressive interpretation of Charter
* Confirms purposive approach to interpretation of Charter

### CASE: R v Big M Drug Mart (1985- SCC)

**FACTS**: Charter claim against ban on stores being open on Sundays

Gov’t: Purpose is to guarantee a day of rest for public

Big M: Freedom of religion/belief violation

**HELD**: s.2 Charter violated unjustifiably (purpose of the law at issue)

**TAKEAWAYS**:

* Affirms purposive approach
* Affirms generous approach
* Details how to conduct a purposive analysis

### TEST for a Charter Provision’s Purpose (From Big M Drug Mart- 1985)

* ‘Character and objects’ of the Charter;
* Language of the specific right/freedom;
* Historical origins of the enshrined concepts;
* Meaning and purpose of other associated rights

## When NOT to apply Oakes: Dore

When the challenge is to a discretionary administrative decision, rather than an actual law

\*From Dore v Barreau du Quebec (2012- SCC)

- these decisions to be reviewed for ‘reasonableness’, looking at whether the “relevant Charter value and ‘statutory objectives were properly balanced”

# 3 Views on Charter Application

## Governmental Approach

S.32(1) is an exhaustive list of Charter application ~ only applies to public/state action (and not courts)

- MUCH of private law is developed in courts/common law, ~ Charter cannot apply to courts, or it would catch almost all private law

## Comprehensive Approach

S. 32(1) is only affirmative, Charter applies broadly

- not exclusively to state actions, would include private relations

## Contextual Approach

Middle ground

* Application of Charter varies on context
* Closer to comprehensive than governmental

### CASE: Union Local 580 v Dolphin Delivery (1986- SCC)

**FACTS**: Union picketed Dolphin during their strike, for performing the work they were withholding; Labour code doesn’t cover secondary picketing ~ to be determined in common law.

- Union appealed decision restraining them from picketing Dolphin Delivery

**HELD**: Rejected 2(d) claim, found 2(b) infringement is reasonable under (s.1) (accepted governmental approach) Courts are not government actors, ~ private litigation does not engage the Charter

**TAKEAWAY**:

* Charter does not apply to litigation between private parties
* Charter does apply to common law INSOFAR as it is the basis for some government action
* Adopts governmental approach

# Charter Application by Source & Actor

|  |  |  |
| --- | --- | --- |
| ACTOR SOURCE | Statute | Common Law |
| A ‘Government’ party is involved | Applies due to gov’t actor & statute (both fall under Charter) | Applies where law is relied upon for an act alleged to breach Charter (All Gov’t activities) |
| Private Parties only | Applies where the statute is relied on for an act alleged to breach the Charter | DOES NOT APPLY (But courts must consider Charter ‘values’ in developing common law) |