



The role of constitutional courts, a comparative law perspective

Canada: The Supreme Court

STUDY

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THE ROLE OF CONSTITUTIONAL COURTS, A COMPARATIVE LAW PERSPECTIVE

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Summary

This study is part of a wider project investigating, from a comparative law perspective, the role of constitutional courts of different states.

Following a brief historical introduction to the jurisdiction of the state in question, the various reports examine the composition, internal organization, functioning, jurisdiction of the various highest courts, as well as the right of access to its courtroom, its procedural rules, and the effects and the execution of its judgments.

The present study examines Canada's highest court, the Supreme Court. While all judicial courts may rule on constitutional matters, the Supreme Court of Canada enjoys a privileged status in the Canadian legal landscape. As the ultimate arbiter of the Constitution, it has the final word with respect to constitutional interpretation, notably in constitutional matters. It thus plays a central role in Canada's federal democracy.

AUTHOR

This study was written by Professor Johanne Poirier of McGill University's Faculty of Law, Montreal, at the request of the Comparative Law Library Unit, Directorate-General for Parliamentary Research Services (DG EPRS), General Secretariat of the European Parliament. The author wishes to thank Elena Sophie Drouin, Mélisande Charbonneau-Gravel and Catherine Mathieu for their effective research assistance.

NOTE FROM THE AUTHOR, PROF. JOHANNE POIRIER

This Report was written at the request of DG EPRS, following the publication of Johanne Poirier, 'Legal Proceedings available to Individuals before the Highest Courts: a Comparative Law Perspective – Canada', European Parliament Research Service, Brussels, 2017, 94 pp. (http://www.europarl.europa.eu/RegData/etudes/STUD/2017/608733/EPRS_STU%282017%29608733_EN.pdf). Given some overlap between themes covered by the two reports, several sections of the present one are updated excerpts of the 2017 Report. This said, the latter is more detailed and readers may want to refer to it, in particular to address sources of Canadian law over which the Supreme Court of Canada may base its rulings and advisory opinions. I wish to thank Maryna Polataïko and Sajeda Hedaraly for their help in drafting the 2017 Report.

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List of Abbreviations

AG	Attorney General
BNAA	British North America Act
C de D	Cahiers de droit
c	chapter
CA	Quebec Court Reports: Court of Appeal (1970—1985)
Can J Pol Sci	Canadian Journal of Political Science
CHRT	Canadian Human Rights Tribunal
CJC	Canadian Judicial Council
DLR	Dominion Law Reports
ed	edition
eds	editors
et al	and others
<i>ibid</i>	in the same source
JCPC	Judicial Committee of the Privy Council
JR	Judicial Review
LJ	Law Journal
LRC	Law Reform Commission of Canada
McGill LJ	McGill Law Journal
NJ	New Jersey
NJCL	National Journal of Constitutional Law
para	paragraph
QCCA	Quebec Court of Appeal
QCR	Quebec Court Reports (1975 to today)
QSRR	Quebec Statutes and Regulations Report
RDUS	Revue de droit de l'Université de Sherbrooke
RGD	Revue générale de droit
RQDC	Revue québécoise de droit constitutionnel
RQDI	Revue québécoise de droit international
RSC	Revised Statutes of Canada
SCC	Supreme Court of Canada
SCR	Supreme Court Reports
SORS	Statutory Orders and Regulations (Canada)

UK	United Kingdom
UKPC	UK Privy Council
US	United States
Vict	Victoria

Executive Summary

This study is part of a wider project investigating, from a comparative law perspective, the role of constitutional courts of different states. The present study examines Canada's highest court, the Supreme Court. While all administrative tribunals and courts of justice in Canada have jurisdiction to decide constitutional matters, the Supreme Court of Canada, sitting at the apex of the judicial hierarchy, is uniquely positioned to shape the development of constitutional law. The report is divided into eight (8) Sections, and follows the general outline developed in the context of comparative exercise designed by the Comparative Law Library Unit of the European Parliament.

- Section I offers a brief introduction and history of the Supreme Court.
- Section II discusses the composition of the Court, as well as mechanisms by which judges may be removed from the bench.
- Section III deals with the principle of judicial independence and sketches the Court's organization.
- Section IV outlines the Supreme Court's jurisdiction, particularly in constitutional matters.
- Section V addresses the issue of 'standing' and of the actors who may seize the Court.
- Section VI describes the procedures applicable both in appeal and in the context of the Court's advisory opinion role.
- Section VII analyses the effect and execution of judgments.
- Section VIII offers summary conclusions.

I. Introduction and History of the Supreme Court of Canada

Canada is a federation, composed of ten (10) provinces and three (3) Northern territories.¹ Consequently, there are, in Canada, fourteen (14) distinct and largely parallel legal and judicial systems, each with lower, superior, and administrative courts. The structure is pyramidal, with the Supreme Court of Canada (SCC) at its apex. With a few exceptions, most administrative tribunals and all courts of justice in Canada – whether superior, lower, administrative, federal, or provincial – have jurisdiction to decide on constitutional matters. In this respect, the Supreme Court of Canada, which sits at the top of the judicial hierarchy, is not a ‘specialized constitutional court’. It is rather the final court of appeal of Canada’s judicial system, with jurisdiction over every areas of the law, including in constitutional matters where it wields unparalleled influence.²

The usefulness of a Canadian court of final appeal had been debated during discussions leading up to the creation of Canada in 1867. Quebec, in particular, argued that its civilian legal system (which it inherited from the French colonial period) could not be adequately enforced and sustained by judges who had not received training in this legal tradition. Others saw the institution as an unnecessary expense.³ Nevertheless, section 101 of the *Constitution Act, 1867* provided that the federal Parliament could establish a general court of appeal for Canada.⁴ This was done in 1875, although the Supreme Court did not constitute the final court of appeal for Canada until 1949, when appeals to the Judicial Committee of the Privy Council (JCPC) in London ceased.⁵ The Supreme Court’s existence and composition have now (partly) been constitutionalized through sections 41 and 42 of the *Constitution Act, 1982*⁶ and through judicial interpretation.⁷

While all judicial courts may rule on constitutional matters, the Supreme Court enjoys a privileged status in the Canadian legal landscape. As the ultimate arbiter of the Constitution, it has the final word with respect to constitutional interpretation, including, of course, individual and collective rights. The Court may ‘declare null the decisions of all other courts in

¹ For a general overview of Canadian constitutional law, see Henri Brun, Guy Tremblay and Eugénie Brouillet, *Droit constitutionnel*, 6th ed (Cowansville, QC: Yvon Blais, 2014) [Brun, Tremblay and Brouillet, 2014]; François Chevrette, Herbert Marx and Han-Ru Zhou, *Droit Constitutionnel: Principes fondamentaux: Notes et jurisprudence*, 2th ed (Montreal: Les Éditions Thémis, 2016); Peter W Hogg, *Constitutional Law of Canada*, 2018 Student Edition (Toronto: Thomson Reuters, 2018) [Hogg, 2018]; Patrick Monahan, Byron Shaw and Padraic Ryan, *Constitutional Law*, 5th ed (Toronto: Irwin Law, 2017) [Monahan, Shaw and Ryan, 2017]; Jeremy Webber, *Constitution of Canada: A Contextual Analysis* (Oxford: Hart Publishing, 2015) [Webber, 2015].

² The Supreme Court may also issue advisory opinions – relatively frequent in constitutional matters – at the request of the federal executive branch, or on ‘appeal’ of advisory opinions issued by provincial courts of appeal, at the request of provincial executives. Individuals do not have access to this type of proceedings: see *infra* Section IV.2 of this Report.

³ John Cavarzan, ‘The Jurisdiction of the Supreme Court of Canada: Its Development and Effect on the Role of the Court’ (1964) 3:3 Osgoode Hall LJ 431 at 432.

⁴ Legislation authorised by section 101 of the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act, 1867* or *BNA*].

⁵ See Diane Teeple, ‘The History and Role of the Supreme Court of Canada’ (2002) 10:3 Australian Law Librarian 216 at 221–22; Gérald-A Beaudoin, ‘Le contrôle judiciaire de la constitutionnalité des lois’ (2003) 48:2 McGill LJ 325 at 327 [Beaudoin, 2003] at 327.

⁶ Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [Constitution Act, 1982].

⁷ See *Reference re Supreme Court Act, sections 5 and 6*, 2014 SCC 21, [2014] 1 SCR 433 [*Re Supreme Court Act*].

all areas of law',⁸ including those dealing with the most controversial legal (and social) issues in Canada.⁹ The Supreme Court itself has repeatedly underlined the importance of its role as the 'guardian of the Constitution'.¹⁰ This constitutional status of the Supreme Court was recognized relatively recently, with the Court itself declaring that it is an integral part of Canada's constitutional and federal architecture, and that its composition cannot, therefore, be unilaterally amended by Parliament.¹¹

The composition of the Court, as well as the proceedings before it, are governed by the *Supreme Court Act*, which describes it as the 'general court of appeal for Canada, and as an additional court for the better administration of the laws of Canada'.¹² The same Act provides that 'the Court shall have and exercise exclusive and ultimate appellate civil and criminal jurisdiction within and for Canada, and the judgment of the Court is, in all cases, final and conclusive'.¹³

Constitutional review in Canada is 'decentralised' (or 'diffuse'). All courts and many administrative tribunals may rule on constitutional matters, as they arise in the context of other forms of litigation for instance (see Canada's Court System in annex to this study).¹⁴ The issue would then proceed, through appeals, to the Supreme Court of Canada. In other words, the distinction between 'judicial', 'administrative', and 'constitutional' courts – that is widespread in European judicial systems – does not really apply in Canada, and the Supreme Court may rule on every legal issue, regardless of the domain.

⁸ See the Honourable Marie Deschamps, 'Les tribunaux canadiens et le contrôle constitutionnel des lois: une jurisprudence homogène au sein d'un régime fédératif' in Natalia Bernal Cano et al, eds, *Cooperation between judges and the Independence of their decisions in Comparative Law*, 1st ed (Venice: European Research Center of Comparative Law, 2013) [Deschamps, 2013].

⁹ John Cavarzan, *supra* note 3 at 435.

¹⁰ See e.g. *Reference re Manitoba Language Rights*, [1985] 1 SCR 721 at para 68 [*Re Manitoba Language Rights*]: 'A declaration that the laws of Manitoba are invalid and of no legal force or effect would deprive Manitoba of its legal order and cause a transgression of the rule of law. For the Court to allow such a situation to arise and fail to resolve it would be an abdication of its responsibility as protector and preserver of the Constitution'. See also *Re Supreme Court Act*, *supra* note 7 at para 89: 'The existence of an impartial and authoritative judicial arbitrator is a necessary corollary of the enactment of the supremacy clause. The judiciary became the 'guardian of the Constitution' [...]. As such, the Supreme Court of Canada is a foundational premise of the Constitution'.

¹¹ This is despite the fact that this structure is provided for in a federal statute (which acquires, as a result of this decision, a status that is partly constitutionalized). See *Re Supreme Court Act*, *supra* note 7.

¹² Section 3 *Supreme Court Act*, LRC 1985, c S-26 [*Supreme Court Act*].

¹³ Section 52 *ibid.*

¹⁴ For a more detailed discussion on the Canadian judicial structure, see section I.4. in Johanne Poirier, 'Legal Proceedings available to Individuals before the Highest Courts: a Comparative Law Perspective – Canada', European Parliament Research Service, Brussels, 2017, online: http://www.europarl.europa.eu/RegData/etudes/STUD/2017/608733/EPRS_STU%282017%29608733_EN.pdf [Poirier, 2017].

II. Composition of the Court

II.1. Nomination of Judges

Officially, the nine Justices of the Supreme Court are named by the Governor General, who is the Queen's representative in Canada.¹⁵ By convention, the nominations are done upon the advice of the federal prime minister.¹⁶ In practice, and in obvious contradiction with the federal nature of the country, all the judges of the Supreme Court are thus appointed by the federal executive. An informal advisory committee – without a legislative or *a fortiori* constitutional basis – consults and prepares a 'short list' of candidates for the prime minister.¹⁷ In May 2019, the governments of Canada and of Québec concluded an agreement creating a distinct advisory board for the selection of Québec judges to the Supreme Court. It provides for significant input from the Minister of Justice and ultimately the Québec Prime Minister, in recommending a candidate to the federal Prime Minister. Pursuant to Canadian constitutional law, the latter retains the final word, however.¹⁸

The federal Parliament has no defined role in the appointment process. In recent years – at the executive's initiative – members of a special committee of the House of Commons were invited to take part in a questions and answers session with the announced nominee. This committee was not asked, however, to approve the nomination.¹⁹

Conditions to be named as Justice of the Supreme Court differ slightly for Québec and non-Québec judges. As a general rule, '[a]ny person may be appointed a judge who is or has been a judge of a superior court of a province or a barrister or advocate of at least ten years standing at the bar of a province'.²⁰ By contrast, the three Québec judges must be appointed 'from among the judges of the Court of Appeal or of the Superior Court of the Province of Québec or from among the advocates of that Province'.²¹ This distinct requirement is, as was mentioned,²² designed to ensure that judges from Québec are trained and familiar with the province's civil law. This issue was at the center of the 2014 *Reference re Supreme Court Act* which resulted in the annulment of the nomination of a Québec Justice who had been appointed from the Federal Court.²³

¹⁵ Section 96 *Constitution Act, 1867* and section 4(2) *Supreme Court Act*.

¹⁶ For a detailed discussion of constitutional conventions, see Monahan, Shaw and Ryan, 2017, *supra* note 1 at 7: 'Conventions are rules of political behavior that are regarded by political actors as binding but are not enforced directly by courts'. See also Hogg, 2018, *supra* note 1 at 1-22.1: 'Conventions are rules of the Constitution that are not enforced by the law courts. [...] What conventions do is to prescribe the way in which legal powers shall be exercised. Some conventions have the effect of transferring effective power from the legal holder to another official or institution'.

¹⁷ Office of the Commissioner for Federal Judicial Affairs, 'Supreme Court of Canada Appointment Process – 2017', online: <http://www.fja-cmf.gc.ca/scc-csc/index-fra.html> (accessed on 26 January 2019).

¹⁸ The final nomination remains the formal prerogative of the Governor General, who, by convention, always acts under the advice of the federal prime minister. See *Arrangement concerning the appointment process to fill the seat that will be left vacant on the Supreme Court of Canada following the departure of Justice Clément Gascon, concluded May 2015 between the governments of Québec and Canada*: <https://pm.gc.ca/eng/news/2019/05/15/arrangement-concerning-appointment-process-fill-seat-will-be-left-vacant-supreme>.

¹⁹ Webber, 2015, *supra* note 1 at 121.

²⁰ Section 5 *Supreme Court Act*.

²¹ Section 6 *ibid.*

²² See *supra* section I.

²³ *Re Supreme Court Act*, *supra* note 7. Justice Nadon had been a member of the Québec Bar, but had renounced

There is no age requirement for the nomination of judges. Nevertheless, in practice, Justices that have all acquired significant legal experience prior to their appointment.²⁴ Between 1970 and 2006, the average age of nomination was fifty-seven.²⁵ The youngest Justice appointed to the Supreme Court during that period was forty-six years old and the oldest was sixty-five years old.²⁶

II.2. Mandate and Destitution

There are no fixed time limits to the Justices' mandate at the Court. They may occupy their position until they reach the age of 75 unless they resign or are destituted earlier.²⁷ The actual length of tenure varies considerably from one judge to another.²⁸ Justices of the Supreme Court are, as all members of the judiciary, protected by the judicial independence principle, which offers a number of safeguards and immunities. These protections are conditioned on a number of rules. The most prominent of these is the obligation to 'hold office during good behaviour'.²⁹ In Canada, removal of judges from the bench is extremely rare, and no judge of the Supreme Court has ever been formally removed.

A judge could be removed from office when it is proven he or she did not meet the highest standard of personal conduct required, inside and outside of court. This is done through an independent investigation, as provided by the *Judges Act*,³⁰ the legislation which applies to all judges appointed by the federal executive.³¹ The Act describes the appointment procedure and provides rules relative to retirement and salaries, as well as the procedure for hearing a complaint against a judge's improper behaviour or suspected partiality.

Responsibility for investigation lies with the Canadian Judicial Council (CJC), which is composed of the Chief Justice of the Supreme Court of Canada, the chief Justices and associate chief justices of every provincial superior court and courts of appeal, as well as the Chief of the Court Martial Appeal Court of Canada, that is, in total, around forty members.³² This 'self-regulation' by judges has raised a number of criticisms.³³

this adhesion when joining the Federal Court.

²⁴ Donald R Songer, *The Transformation of the Supreme Court of Canada: An Empirical Examination* (Toronto: University of Toronto Press, 2008) at 21 [Songer, 2008].

²⁵ *Ibid* at 33.

²⁶ Songer, 2008, *supra* note 24 at 22.

²⁷ Section 9 *Supreme Court Act*.

²⁸ See Supreme Court of Canada, 'Current and Former Judges', online: <https://www.scc-csc.ca/judges-juges/cfpju-jupp-eng.aspx> (accessed on 5 June 2019). Although there is no official data on the average length of tenure at the Supreme Court, it is possible to calculate this information according to the dates of appointment and departure of each Justice, which are available on the web page. The average tenure of a Supreme Court Justice is approximately 13 years (156 months).

²⁹ Section 9(1) *ibid*.

³⁰ *Judges Act*, RSC 1985, c J-1 [*Judges Act*].

³¹ That is, all judges of provincial superior courts and courts of appeal, the Federal Court of first instance, the Federal Court of Appeal, the Martial Court, as well as the Supreme Court of Canada.

³² Section 59(1) *Judges Act*. See also Canadian Judicial Council, 'About the Council', online: https://www.cjc-ccm.gc.ca/english/about_en.asp?selMenu=about_main_en.asp (accessed on 26 January 2019).

³³ Nicole Ireland, 'Robin Camp case: What does it take to remove a judge from the bench? Only two federally appointed judges recommended for dismissal since 1971' (15 November 2015), Canadian Broadcasting Corporation (CBC) News, online: <https://www.cbc.ca/news/canada/judge-removal-canadian-judicial-council-1.3314962> (accessed 26 January 2019).

To fulfill its mission, the Council may investigate any complaints or accusations relating to a superior court judge, including judges of the Supreme Court. If a complaint were to involve the Chief Justice, the investigation would, of course, proceed under a different Chair.³⁴ The investigation is a multi-step process. A complaint is first received by the Executive Director of the Council. It is then reviewed by the Chair of the Conduct Committee, before being analysed by a review panel. The Council may then establish an inquiry committee to investigate and report back to the Council which can make recommendations to the Minister of Justice of Canada as to the suitability of the investigated judge continuing to perform his or her duties.³⁵ The Minister will then report to Parliament. In the case of the Supreme Court, justices may be removed 'by the Governor General on address of the Senate and House of Commons'.³⁶

³⁴ Canadian Judicial Council, 'Procedure for the Review of Complaints or Allegations About Federally Appointed Judges' (2015), online: <https://www.cjc-ccm.gc.ca/cmslib/general/CJC-CCM-Procedures-2015.pdf> (accessed 26 January 2019).

³⁵ Section 65 *Judges Act*.

³⁶ Section 9(1) *Supreme Court Act*.

III. Judicial Independence, Internal Organisation and Functioning of the Court

III.1. Judicial Independence

The principle of judicial independence is deeply entrenched in Canadian law. It was considered as an implicit component of the preamble of the *Constitution Act, 1867*, with its roots in English common law history, most notably as an element of the *Act of Settlement of 1701*. Further legal grounding for the principle can be found in both the 1867 and the 1982 *Constitutional Acts*.

Judicial independence, in substance, insulates judges from interference, 'most notably the influence of the executive',³⁷ as well as other actors such as corporations or pressure groups. It is understood to be 'that [which] allows the judge to render decisions based solely on the requirements of the law and justice'.³⁸ A multifaceted concept, judicial independence has individual, institutional and collective aspects.³⁹

The institutional dimension stems from the courts' constitutional function as guardians of the Constitution and its values.⁴⁰ It may also emerge when courts are called upon to adjudicate disputes between the federal and provincial governments. At the individual level, judicial independence protects matters of security of tenure, salary, and other forms of benefits.⁴¹ According to case law, sections 96 to 100 of the *Constitution Act, 1867*, as well as section 11(d) of the *Canadian Charter*,⁴² implicitly provide for three conditions ensuring judicial independence: security of tenure, financial security and institutional independence pertaining to the administration and exercise of the judicial function.⁴³ Combined, these three elements are interpreted by courts to mean that any apprehension of bias should be eliminated. Concretely, these principles have been used to force governments to create independent commissions whose goal is to determine issues pertaining to salaries and pensions of judges.⁴⁴

Judicial independence also comes into play when courts invoke their broad powers to manage court affairs and hearings. These all apply to the Supreme Court of Canada.

III.2. Internal Organisation and Functioning of the Court

The Chief Justice is in charge of the Court's internal administration. The selection of the Court's Chief Justice is made by the Governor General, on advice of the Prime Minister.⁴⁵ As with the Justices' term of office, there is no time limit to the Chief Justice's mandate, except for the

³⁷ See *Ocean Port Hotel Ltd. v British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52 at para 23, [2001] 2 RCS 781.

³⁸ See *Mackin v New Brunswick (Minister of Finance)*, 2002 CSC 13 at para 37, [2002] 1 SCR 405.

³⁹ See *Beauregard v Canada*, [1986] 2 SCR 56 at 70 [Beauregard].

⁴⁰ See *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3 at para 123 [Reference re Remuneration] citing *Beauregard*, *supra* note 39 at 69.

⁴¹ See *Reference re Remuneration*, *supra* note 40; *Valente v The Queen*, [1985] 2 SCR 673 [Valente].

⁴² *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act 1982*, being Schedule B of the *Canada Act 1982 (UK)*, 1982, c 11 [Canadian Charter].

⁴³ See *Reference re Remuneration*, *supra* note 40; *Valente*, *supra* note 41.

⁴⁴ *Ibid.*

⁴⁵ Section 4(2) *Supreme Court Act*.

mandatory age of retirement. Informally, the position has alternated between a justice of a common law jurisdiction and one of civil law training (in essence, a Quebec justice).

An Executive Legal Officer assists the Chief Justice in his or her administrative duties. In addition, a number of actors support the role of the nine Justices. Each judge has four law clerks – usually recent law school graduates – selected by the judge through a very competitive process and for a one-year term. Clerks conduct an in-depth analysis of each case and assist the judge in considering the issues submitted to the Court. In addition, members of the Court Operations Sector – who are permanent staff – provide legal advice and operational support to the judges respecting all aspects of the case management process.⁴⁶ This includes the review and the translation in French and English of each decision of the Court by a team of lawyers and jurilinguists. Finally, the Registrar is responsible for the management of the Court, including the appointment and supervision of Court staff, and exercises the quasi-judicial powers conferred by the *Rules of the Supreme Court*.⁴⁷

Unlike certain constitutional courts, the Supreme Court is not divided into specialized chambers, nor is its organization particularly detailed. The panels are constituted of seven or nine judges (or, more rarely, five) and their composition is decided by the Chief Justice. The sole constraint is that Quebec judges sit on civil law cases,⁴⁸ and that sessions of the Court require a quorum of five judges.⁴⁹

⁴⁶ Supreme Court of Canada, 'Administration of the Court', online: [https://www.scc-csc.ca/about-
apropos/administration-eng.aspx](https://www.scc-csc.ca/about-
apropos/administration-eng.aspx) (accessed on 26 January 2019) [Supreme Court of Canada, 'Administration of the Court'].

⁴⁷ *Rules of the Supreme Court of Canada*, SORS/2002-156 [*Rules of the Supreme Court*]. See also *ibid*.

⁴⁸ Benjamin Alarie and Andrew Green, 'The Power of the Chief Justice: Choosing Panels on the Supreme Court of Canada' SSRN, 23 January 2012, at 13–14, online: <https://ssrn.com/abstract=1884428> (accessed 26 January 2019).

⁴⁹ Section 25 *Supreme Court Act*.

IV. Powers of the Supreme Court of Canada

The Supreme Court has ‘plenipotentiary jurisdiction’. In other words, it sits as a final court of appeal in constitutional, administrative, criminal, family, civil, military and commercial litigation. Of particular interest in a comparative context, the Court may also provide advisory opinions at the request of the federal executive (or on ‘appeal’ of the advisory opinion given by a court of appeal to a provincial executive).

This section surveys the role of the Court in the *a posteriori* constitutional review of legislation (IV.1) as well as its advisory opinion function, notably in constitutional matters (IV.2). Both avenues allow for the adjudication regarding the federal distribution of competences (IV.3) as other areas of law. Hence, the Court’s role in reviewing the respective powers of the legislative and executive branches of each order of government (IV.4), the Court’s jurisdiction in civil and criminal matters (IV.5) as well as the Court’s approach to the status of international law (particularly of treaties) in the domestic legal order (IV.6) will also be addressed.

IV.1. A *Posteriori* Constitutional Review of Legislation

In Canada, constitutional review is ‘decentralized’ (or ‘diffuse’) in the sense that it is not the exclusive purview of a specialized institution, as is generally the case in Europe. This ‘diffuse’ mode of control gives the power to rule on constitutional issues and to grant appropriate remedies in the event of constitutional violations to the vast majority of Canadian courts, including most prominently the Supreme Court of Canada.⁵⁰

Experts disagree on the origins of constitutional review in Canada. While some suggest that it was inspired by the American experience,⁵¹ the dominant theory is that constitutional review is grounded in the country’s British origins.⁵² The practice of judicial review (analogous to constitutional review) already existed in Canada before Confederation in 1867.⁵³ Although they already possessed a certain degree of legislative autonomy, British colonies were subject to judicial review designed to assess the conformity of their laws with certain imperial statutes.⁵⁴ This model persisted after Canada became independent, with the Canadian constitution as the benchmark of review.

The adoption of the *Constitution Act, 1982* undeniably – and *explicitly* – reinforced the role of the judiciary in constitutional review. Paragraph 52(1) states 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’. According to the Supreme Court, this section ‘does not alter the principles which have provided the foundation for judicial review’, namely the principle of the invalidity of laws adopted by the federal

⁵⁰ See Maxime St-Hilaire, ‘Du non-droit de l’application de la Charte canadienne des droits et libertés’ (2015) 45:1–2 RDUS 157; Mark V Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton, NJ: Princeton University Press, 2008) at 24, 31.

⁵¹ See in particular *Marbury v Madison* 5 US 137 (1803).

⁵² See Matthew P Harrington, ‘The Incoherence of Judicial Review in Canada’ (2012) 17:2 JR 177 at 177; Jennifer Smith, ‘The Origins of Judicial Review in Canada’ (1983) 16:1 Can J Pol Sci 115.

⁵³ For a more detailed discussion on the origins of constitutional review in Canada, see section I.3. in Poirier, 2017, *supra* note 14.

⁵⁴ See section 2 *Colonial Laws Validity Act*, 1865 (UK), 28 & 29 Vict c 63; Hogg, 2018, *supra* note 1 at 3-4.

Parliament or the provincial legislatures that exceed the powers conferred on them by the Constitution.⁵⁵

The mandate of the courts is now expressly constitutionalized. It is their responsibility 'to interpret and apply the laws of Canada and of each of the provinces' in order to ensure the pre-eminence of the Constitution.⁵⁶ The adoption of the *Constitution Act, 1982* therefore constitutes, for many, the start of the constitutionalist era in Canada.⁵⁷ This development led to fears that a 'government of judges' would emerge, particularly with regard to the treatment of critical social questions. In response to questions of institutional legitimacy, the Supreme Court replied that elected representatives are the ones 'who have extended the scope of constitutional decisions and entrusted the courts with these new and heavy responsibilities'.⁵⁸

While the Constitution now explicitly recognizes the principle of constitutional review, it does not explicitly designate the jurisdictional bodies that can exercise this control. Paragraph 24(1) of the *Canadian Charter* provides that 'a court of competent jurisdiction' has the necessary competence to grant 'such remedy as the court considers appropriate and just in the circumstances' in response to a finding of a violation of guaranteed rights. It does not, however, specify what constitutes a competent court (this mostly affects administrative courts). This said, there is no doubt that the Supreme Court is a court of competent jurisdiction which may craft appropriate remedies for *Charter* violations.

IV.2. Court's Advisory Opinion Role in Constitutional Matters

The Court frequently receives requests for abstract reviews (*references*), either from the federal government, or on 'appeal' from similar advisory opinions issued by one (or more) provincial courts of appeal. Hence, the Governor in Council (the federal executive) can submit to the Supreme Court "for hearing and consideration important questions of law or fact concerning:

- a) the interpretation of *Constitutional Acts*;
- b) the constitutionality or interpretation of any federal or provincial legislation;
- c) the appellate jurisdiction respecting educational matters vested in the Governor in Council by the Constitution Act 1867 or by any other Act or law;
- d) the powers of the Parliament of Canada, or of the legislatures of the provinces or of the respective governments thereof, whether or not the particular power has been or is proposed to be exercised."⁵⁹

These legal proceedings are *not* accessible to individuals, or, by contrast to preliminary rulings by the Court of Justice of the European Union, to judges of other courts. Only the executive branch may request such advisory opinions. The latter consist almost exclusively of *a priori* constitutional review (before a law enters into force), although it is not legally excluded for existing laws to be subject to the abstract review procedure. The questions submitted by the executive branch are – by statute – deemed to be important and so deserve attention by the

⁵⁵ See *Re Manitoba Language Rights*, *supra* note 10 at para 51.

⁵⁶ *Ibid.*

⁵⁷ See Nicole Duplé, *Droit constitutionnel: Principes fondamentaux*, 6th ed (Montreal: Wilson & Lafleur, 2014) at 84.

⁵⁸ *Reference re Motor Vehicle Act (C-B)*, [1985] 2 SCR 486 at para 16. See also Beaudoin, 2003, *supra* note 5 at 335.

⁵⁹ Section 53(1) *Supreme Court Act*.

Court.⁶⁰ The latter may nevertheless refuse to answer if it deems it inappropriate, although this is extremely rare.

As in the case of a judgment, the Supreme Court must render its opinion on each question asked, with its reasons for each answer. Justices who disagree with the majority may dissent and give their own set of reasons. The advisory opinion is also pronounced in the same manner as any other decision rendered by the Court (the opinion is published and made public).⁶¹

“References” are a fundamental part of constitutional case law in Canada, although issuance of advisory opinions at the request of governments is not part of the traditional judicial function.⁶² In some common law jurisdictions – such as Australia and the United States – courts have found references to be contrary to the principle of the separation of powers between the executive and judicial branches. In Canada, this argument was raised before the courts – and rejected – on two occasions.⁶³ In the *References Reference*, their lordships agreed that in rendering such opinions, courts were not acting in a judicial fashion, but as advisors to the executive branch. Nonetheless, the Privy Council held that the function could be conferred, by statute, unto the Court.⁶⁴

As is the case of opinions delivered by provincial courts of appeal, Supreme Court references are not *per se* binding.⁶⁵ Yet, they are invariably respected.⁶⁶ In what may seem like an oddity for jurists unfamiliar with the British constitutional law tradition, this is another way in which Canadian constitutional law is infused with conventions and practices there are not formalised, do not have the status of “positive law”, and yet are invariably respected by relevant actors.⁶⁷ In fact, a vast body of seminal constitutional “decisions” are not judgement in Canada, but “references” and, as such, are truly part of the Court’s jurisprudence.⁶⁸

IV.3. Adjudicating Conflicts between Federal Partners

The adoption of a federal system and of a written Constitution in 1867 required ‘a form of constitutional arbitration between the provinces and the federal government’.⁶⁹ The role of the judiciary in constitutional review was thus rapidly ‘understood to flow from the nature of things’.⁷⁰ Indeed, ‘[i]f Parliament or a provincial legislature exceeds the powers granted to it by the Constitution in adopting a given law, the incompatibility of this law with the provisions of

⁶⁰ Section 53(3) *Supreme Court Act*.

⁶¹ Section 53(4) *ibid*.

⁶² Hogg, 2018, *supra* note 1 at 8-19; see also Carissima Mathen, *Courts without Cases: The Law and Politics of Advisory Opinions* (Oxford: Hart Publishing, 2019).

⁶³ See Webber, 2015, *supra* note 1 at 126. See also Hogg, 2018, *supra* note 1 at 8-19.

⁶⁴ *Attorney General of Ontario v Attorney General of Canada (References Reference)* [1912] AC 571 (UK JCPC) [*References Reference*]; Hogg, 2018, *supra* note 1 at 8-19.

⁶⁵ See *References Reference*, *supra* note 62.

⁶⁶ In *Canada v Bedford*, 2013 CSC 72 at para 40, [2013] SCR 1101, the Supreme Court affirmed that ‘[w]hile reference opinions may not be legally binding, in practice they have been followed’ citing Gerald Rubin, ‘The Nature, Use and Effect of Reference Cases in Canadian Constitutional Law’ (1960) 6 McGill LJ 168 at 175.

⁶⁷ Courts may rule on the existence and scope of conventions but not actually enforce them. For a discussion on the concept of conventions in Canadian law, see *supra* note 16.

⁶⁸ See Mathen, *Courts without Cases*, *supra*, note 61.

⁶⁹ Louis LeBel, ‘Reconnaissance et effectivité des droits fondamentaux : la fonction démocratique des tribunaux constitutionnels’ (2015) RQDI, Special Edition June 2015, *Mélanges en l’honneur de Jacques-Yvan Morin (Festschrift in Honour of Jacques-Yvan Morin)* 25 at 30; Hogg, 2018, *supra* note 1 at 5-26.

⁷⁰ Brun, Tremblay and Brouillet, 2014, *supra* note 1 at 180.

the BNAA shall ensure that the law in question was rendered “absolutely null and ineffective”.⁷¹

The issue of constitutional review was not, however, extensively discussed during the drafting and adoption of the *Constitution Act, 1867*.⁷² The power to arbitrate constitutional matters between the federal order and the provinces was granted, almost implicitly, to existing tribunals and courts, with the possibility of a final appeal to the Judicial Committee of the Privy Council, which, as we saw above, was the final court of appeal for Canada until 1949.⁷³

Until the incorporation of the *Canadian Charter* into the Constitution in 1982, the vast majority of constitutional law decisions and references issued by the Supreme Court dealt with federalism issues. However, in a contemporary era, where few policies may be elaborated exclusively by one order of government, conflict, friction, overlap and cooperation are frequent and the Supreme Court continues to play the arbitrator of the federal division of powers in Canada. Over the years, the Court’s interpretation of the division of powers has *partly* (and not always consistently) moved from a dualist conception which favours clearly bounded exclusive powers, to one that allows more overlap between orders of government.⁷⁴

In addition, the role of the Supreme Court as the final constitutional arbitrator in the plurinational Canadian context has been the subject of numerous analyses, some rather critical.⁷⁵ Hence, the Court’s place at the summit of the Canadian judicial system, combined with the importance of *stare decisis* in Canadian law, has tended to favour the development of a uniform and even homogeneous human rights case law, particularly since the adoption of the *Canadian Charter*.⁷⁶

With respect to federalism, some observers have repeatedly argued that the Supreme Court’s case law favours the federal order at the expense of provinces, and that this was particularly so in the decades following the abandonment of final appeals to the Judicial Committee of the Privy Council in London, in 1949.⁷⁷ A former Premier of Quebec derisively said: ‘The Supreme Court is like the Tower of Pisa: it always leans to the same side.’⁷⁸ This assessment is

⁷¹ *Re Manitoba Language Rights*, *supra* note 10 at para 51

⁷² The creation of a general court of appeal had been contemplated but was not immediately adopted; see Barry L Strayer, *Judicial Review of Legislation* (Toronto: Toronto University Press, 1968).

⁷³ From 1867 to 1949, the JCPC heard 120 jurisdictional disputes between the federal order and the provinces: Beaudoin, 2003, *supra* note 5 at 327.

⁷⁴ Jean-François Gaudreault-DesBiens and Johanne Poirier, ‘From Dualism to Cooperative Federalism and Back?: Evolving and Competing Conceptions of Canadian Federalism’, in Peter Oliver, Patrick Macklem and Nathalie Desrosiers, eds, *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017) at 391–413; Eugénie Brouillet and Bruce Ryder, ‘Key Doctrines in Canadian Legal Federalism’ in Peter Oliver, Patrick Macklem and Nathalie Desrosiers, eds, *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017) at 415–31; Peter Oliver, ‘The Busy Harbours of Canadian Federalism: The Division of Powers and Its Doctrines in the McLachlin Court’ in David A Wright and Adam Dodek, eds, *Public Law at the McLachlin Court: The First Decade* (Toronto: Irwin Law, 2011) at 167; Johanne Poirier, ‘Le partage des compétences et les relations intergouvernementales: la situation au Canada’ in Bernard Fournier and Min Reuchamps, eds, *Le fédéralisme en Belgique et au Canada: Comparaison sociopolitique* (Bruxelles: de Boeck, 2009) at 107–22.

⁷⁵ See e.g. Eugénie Brouillet, *La négation de la nation : l’identité culturelle québécoise et le fédéralisme canadien* (Quebec, Septentrion: 2005).

⁷⁶ See Deschamps, 2013, *supra* note 8, citing Peter W Hogg.

⁷⁷ The JCPC had developed a jurisprudence that was remarkably protective of provincial interests. See Noura Karazivan, ‘Cooperative Federalism and Securities Regulation’ (2016) 46:2 RGD 419.

⁷⁸ Maurice Duplessis, cited in Sébastien Grammond, ‘Le bouc émissaire’ (19 April 2014), *Le Devoir*, online: <http://www.ledevoir.com/politique/quebec/406000/le-bouc-emissaire> (accessed 26 January 2019).

not – or no longer – unanimous. The Supreme Court undoubtedly is a federal institution with a certain vision of Canada, and with judges who are all appointed by the Canadian Prime Minister. It is, nevertheless, an institution attuned to the advantages of the federal balance, particularly with respect to the protection of minorities and the stability of the country.

IV.4. Conflicts of Jurisdiction between the Legislative and the Executive Branches

Canada is a parliamentary democracy. Both at the federal and provincial levels, the executive must have the confidence of the legislature (the House of Commons in the case of the bicameral federal parliament). Hence, major conflicts between the legislative and the executive branch which can arise in presidential regimes, such as that of the United States, are extremely rare.

There are two main cases in which the tension between the executive and the legislative branch can occur. One concerns administrative law (IV.4.1), the other the definition of the 'royal prerogative', that is, powers held in a residuary fashion by the executive branch (IV.4.2.).

IV.4.1. Role of the Supreme Court in Administrative Law

In Canada, all courts, including the Supreme Court, may review the conformity of regulations (and other executive-type instruments adopted by the executive branch) for their conformity with statutory law (adopted by the legislative branch).⁷⁹ Provincial courts and provincial superior courts are charged with the review of decisions by provincial administrative actors and tribunals, while the Federal Court is mandated with reviewing decisions of federal administrative actors and tribunals. Those decisions may themselves be appealed to the provincial courts of appeal and to the Federal Court of Appeal, following the federal division of powers. The Supreme Court is, in this area also, the court of final appeal overseeing the entire field.⁸⁰

This said, courts tend to exercise a degree of deference when reviewing administrative decisions. The applicable standards of judicial review of administrative actions are among the most contested and elusive aspects of Canadian public law. Relevant case law is in constant evolution, and it is often perilous to predict the degree of deference that administrative tribunals (and subsequently, the judicial courts sitting on appeal) will grant the administration.⁸¹

To be very schematic (and necessarily reductive), courts will show a fair degree of deference for the specialised knowledge of administrative bodies, essentially verifying that a decision made in that sphere of specialisation is 'reasonable'. In some cases, and particularly when a tribunal's decision touches on constitutional law, the standard will be higher, and the court will verify if the decision (on that matter) was actually correct.⁸² This would notably be the case

⁷⁹ For more information on the different sources of Canadian law, see Nancy McCormack and Melanie R Bueckert, *Introduction to the Law & Legal System of Canada* (Toronto: Carswell, 2013).

⁸⁰ See Patrice Garant, Philippe Garant and Jérôme Garant, *Précis de droit des administrations publiques*, 6th ed (Cowansville: Yvon Blais, 2018) at 245–47 [Garant, 2018]; Sara Blake, *Administrative Law in Canada*, 6th ed (Toronto: LexisNexis, 2017) at 193–204.

⁸¹ See *Doré v Quebec Bar*, 2012 SCC 12 at para 31 and ss, [2012] 1 SCR 395 [Doré]; David Mullan, 'Administrative Tribunals and Judicial Review of Charter Issues after Multani' (2006) 21 NJCL 127; Stéphane Bernatchez, 'Les rapports entre le droit administratif et les droits et libertés: la révision judiciaire ou le contrôle constitutionnel?' (2010) 55 McGill LJ 641.

⁸² *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 at para 37, [2015] 1 SCR 613 [Loyola]. See also *Doré*,

of an administrative board or tribunal's ruling on the division of powers between provinces and the federal authorities. On such matters, a specialised administrative decision-maker has no discretionary power and courts will overturn decisions which are 'incorrect'.⁸³

An unreasonable decision will generally be returned to the (executive) decision maker,⁸⁴ although in certain cases a judicial court may substitute its decision *in lieu* of the challenged one. When the standard is one of 'correctness', the reviewing court – including the Supreme Court – will proceed with the review and correct the erroneous constitutional interpretation. It can then either substitute its decision for that of the administrative tribunal,⁸⁵ or it may send the issue back to be decided *de novo*, the legal/constitutional issue having been clarified. The reviewing court may also issue an order that is halfway between these two options.⁸⁶

IV.4.2. Remnants of the 'Royal Prerogative'

Canada is a constitutional monarchy, modeled on the British one. Over centuries, the absolute powers of the Crown were limited through the recognition of the powers of Parliament and particularly in Canada, the role of courts in judicial review of executive action. While most powers exercised by the executive branch will find a basis in legislation, some are still grounded in the residual 'royal prerogatives'.

In Canada, those cover a surprisingly broad-range of issues, including, as we shall see below, the conduct of international relations, the issuance of passports, and the ratification of treaties. In those cases, courts may be asked to assess whether actions by the executive branch are taken pursuant to the royal prerogative or through the powers delegated to it by the legislative branch. It is noteworthy that – in pursuance with democratic principles – the latter may always legislate to frame or curb the royal prerogative. Moreover, even actions taken pursuant to the latter, may be the object of judicial review.⁸⁷

In short, then, courts may review actions and decisions of the executive branch taken in what we could call its 'inherent' capacity (but one that, by democratic evolution, may be restricted by legislation) or through statutory authorisation. The judicial branch, and of course the Supreme Court, may review both, and as such can play a role in resolving tensions between the executive and the legislative branch.

supra note 81 at para 57.

⁸³ For a more detailed discussion of this aspect, see section II.2.3 in Poirier, 2017, *supra* note 14

⁸⁴ See *Loyola*, *supra* note 82; *Nguyen v Quebec (Education, Recreation and Sports)*, 2009 SCC 47 at para 47, [2009] 3 SCR 208.

⁸⁵ See *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190. At the time of writing, the Supreme Court has taken under advisement a possible revision (and hopefully clarification) of the standards of review. For a helpful discussion on the standard of review, see Shaun Fluker, 'The Great Divide on Standard of Review in Canadian Administrative Law' (13 July 2018), ABLaw.ca, Blog of the Faculty of Law, University of Alberta, online: <https://ablawg.ca/2018/07/23/the-great-divide-on-standard-of-review-in-canadian-administrative-law/> (accessed 26 January 2019). The author also cites the trilogy of cases in which the Supreme Court has chosen to seek to clarify the blurry division between various standards of review.

⁸⁶ Thus, in *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44, [2011] 3 SCR 134 [PHS], the Supreme Court ordered a federal minister to issue a constitutional exemption to end the violation of a fundamental right.

⁸⁷ See David Philip Jones and Anne S. de Villars, *Principle of Administrative Law*, 6th ed (Ontario, Carswell: 2014) at 25; Garant, 2018, *supra* note 80 at 16–29.

IV.5. Role of Court in Civil and Criminal Matters

While addressing this issue is not required in the context of this comparative exercise, to be complete, it is important to reiterate that the Supreme Court holds jurisdiction as a court of final appeal in all matters, including civil and criminal ones.

IV.6. Role of Court in Domestic Application of International Law

Canada's legal system is 'dualist' with respect to the relationship between domestic law and international law. In other words, international law and domestic law are two distinct legal orders.⁸⁸

In what might appear as derogations to the democratic and federal nature of Canada, the negotiation, conclusion, and ratification of international treaties are the sole responsibility of the federal executive branch. However, pursuant to Canada's dualist approach to international law and its federal character, to be enforceable under domestic law, treaties must be 'incorporated' into the domestic legal order, and this implementation follows the federal division of powers.⁸⁹ This can be done through a variety of means, the most obvious being through either a federal statute (if the matter at issue lies in the federal sphere of competences) or a provincial one (if the matter at stake falls within provincial jurisdiction).⁹⁰ The statute in question will then formally be the source of rights and obligation in the domestic legal order, rather than the treaty itself. And it will not have supra-legislative status.

There are no procedure in Canadian law to allow courts to assess the compatibility of domestic law with a treaty *prior* its ratification. There are also very limited possibilities of judicial review *after* ratification, in the absence of implementing legislation.⁹¹ This said, there is a presumption of conformity between Canada's international legal obligations and domestic law.⁹² While this is not free from doubt, there is an increasing understanding that only clear statutory language could reverse this presumption and give priority to domestic law over and above an international treaty to which Canada is a party.

⁸⁸ Hugo Cyr and Armand de Mestral, 'International Treaty-Making and Treaty Implementation' in Peter Oliver, Patrick Macklem and Nathalie Desrosiers, eds, *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017) at 595–615 [Cyr and de Mestral, 2017]; René Provost, 'La ratification des traités internationaux, une perspective de droit comparé – Canada', European Parliament Research Service, Brussels, 2018, online: [http://www.europarl.europa.eu/RegData/etudes/STUD/2019/633186/EPRS_STU\(2019\)633186_FR.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2019/633186/EPRS_STU(2019)633186_FR.pdf), at 7-9 [Provost, 2018]. See also Johanne Poirier, 'A Paradoxical Source of Canadian Constitutional Law: Intergovernmental Agreements' (2009) 32:1 RQDC 1 at 20, online: http://aqdc.quebec/wp-content/uploads/2016/11/poirier-une_source_paradoxale.pdf.

⁸⁹ The seminal decision holding that treaty *implementation* ought to follow the division of powers is *Attorney General of Canada v Attorney General of Ontario (Labour Conventions Reference)*, [1937] AC 326 (UK JCPC). See also Library of Parliament, *Canada's Approach to the Treaty-Making Process* (Ottawa: Library of Parliament, 2018) at 7, online: <https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/BackgroundPapers/PDF/2008-45-e.pdf> (accessed 26 January 2019); Joanna Harrington, 'Redressing the Democratic Deficit in Treaty Law Making: (Re)Establishing a Role for Parliament' (2005) 50 McGill LJ 465 at 483; Brun, Tremblay and Brouillet, 2014, *supra* note 1 at 563.

⁹⁰ Cyr and de Mestral identify thirteen different means of incorporating international treaties into the domestic legal order. Cyr and de Mestral, 2017, *supra* note 88 at 607–13.

⁹¹ Provost, 2018, *supra* note 88, at 19-21. See notably his discussion on the (limited) scope of judicial review by Canadian courts of international obligations that might contravene indigenous rights, notably the "duty to be consulted".

⁹² *R v Hape*, [2997] 2 SCR 292, par 53.

Of course, this raises issues of democratic legitimacy (absent legislative action, the executive can engage Canada not only in the domestic legal order, but also alter domestic law).⁹³ It also challenges the federal equilibrium since – in application of the presumption of compatibility – the *federal* executive can introduce into the domestic legal order rules that may fall within the provincial sphere of constitutional competences.

It is in the area of international human rights law that the impact of international law on the domestic legal order – even in the absence of clear implementation mechanisms – is the most vivid. Clearly, through interpretative methods, the Supreme Court seeks to avoid putting Canada in violation of its international obligations.⁹⁴ Faced with an ambiguous domestic legislation, the Court will opt for an interpretation that complies with international law.⁹⁵

Furthermore, the contextual approach adopted by judges in the context of the judicial review of discretionary decision-making can be informed by the values expressed in international treaties.⁹⁶ In *Baker*, the appellant invoked the International Convention on the Rights of the Child – which Canada had not incorporated into its domestic law – to contest her deportation under the federal *Immigration Act*. Baker had appealed the order on humanitarian and compassionate grounds, as her deportation would have resulted in the effective separation from her Canadian-born children. The order was, however, maintained by Immigration Canada. In that case, the Supreme Court interpreted the *Immigration Act* in a manner that complies with Canada's international obligations under the Convention and concluded that the best interest of the child – a guiding principle of the Convention – should have been given greater consideration by federal immigration authorities.⁹⁷

In the end, however, if domestic law is clearly and explicitly contrary to international law, or to a treaty to which Canada is a party, domestic law will prevail in Canadian courts.⁹⁸ Fortunately, this type of contradiction seems rare.

In short, international treaties are not directly applicable in Canada. However, courts will attempt, as far as possible, to interpret domestic law – and above all the fundamental rights – in a way that also complies with international law. While the negotiations, signature and ratification lie with the federal executive branch, implementation lies either with the federal or the provincial order of government, depending on the matter at stake. The Supreme Court's case law has not officially departed from the formal dualist approach to the interaction

⁹³ Cyr and de Mestral, 2017, *supra* note 88 at 600–01.

⁹⁴ As soon as international treaties are ratified, Canada is bound at international law and has a duty to execute them in good faith, in compliance with the customary principle of international law *pacta sunt servanda* ('agreements must be kept'), codified in section 26 of the *Vienna Convention on the Law of Treaties*, May 23, 1969, 1155 UNTS 331, (entered into force 27 January 1980, accession by Canada 14 October 1970). If it fails to do so, it could be liable at the international level.

⁹⁵ Mark C Power and Darius Bossé, 'Une tentative de clarification de la présomption de respect des valeurs de la Charte canadienne des droits et libertés' (2014) 55 C the D 775 at 803; *Salomon v Commissioners of Customs and Excise*, [1967] 2 QB 116, [1966] 2 All ER 340; Gibran Van Ert, *Using International Law in Canadian Courts*, 2nd ed (Toronto: Irwin Law, 2008) at 112.

⁹⁶ See *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 70, 174 DLR (4th) 193 [*Baker*].

⁹⁷ Cyr and de Mestral, 2017, *supra* note 88 at 611. See also Laura Barnett, 'Canada's Approach to the Treaty-Making Process' Library of Parliament Research Publications, Ottawa, 2008 (updated in 2018), online: https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/200845E.

⁹⁸ Meanwhile, of course, Canada could see its international responsibility engaged in the international legal order for failure to implement.

between international and domestic law.⁹⁹ Whenever possible, however, it interprets domestic law in line with international treaty obligations. In the case of treaties related to human rights, this extends to treaties that Canada has signed but not yet ratified.

⁹⁹ See Provost, 2018, *supra* note 94 at 8–9.

V. Right of Action and Standing: Applicants before the Supreme Court

The Supreme Court allows, *prima facie*, appeals from any legal actor with sufficient legal interest. In this respect, cases brought before the Court may arise from actions brought by private individuals, corporations, public interest groups, government actors, Indigenous groups, and others. For individuals, access to constitutional justice is facilitated by a number of institutions, governmental programs, and legal mechanisms designed to reduce both practical and institutional obstacles.

V.1. Private Interest Standing

Constitutional litigation provides access to courts for individuals and groups directly affected by a constitutional issue, but also to some interested third parties. A person who wishes to bring an action before the courts to assert a constitutionalized right must have a sufficient interest in the matter (*locus standi*). This is a cornerstone of Canadian procedural law, present in all jurisdictions as a common law rule, and codified in Quebec.¹⁰⁰

Sufficient interest to bring a matter to court is not presumed.¹⁰¹ This creates the first hurdle for litigants, who bear the burden of proving their interest, which must generally be direct and personal.¹⁰² The sufficient interest criterion is sometimes given a broader and more generous interpretation when an individual applies for a public law remedy (including judicial review) than in the context of private law proceedings. This condition is satisfied as soon as the litigant obtains an 'improvement of their legal position'.¹⁰³

The issue of sufficient interest does not arise in the context of proceedings for an 'exception of unconstitutionality', because the party to a dispute, subject to the provisions being challenged, clearly has a direct interest.¹⁰⁴ Thus, in criminal proceedings, the Supreme Court has stated that 'an accused in a criminal case will always be able to raise a constitutional challenge to the provisions under which he or she is charged'.¹⁰⁵ An individual who is not recognized as having a sufficient interest in a proceeding in constitutional review can also request that the Attorney General, who always has standing to act in the general interest, bring the action.¹⁰⁶

¹⁰⁰ See section 85 *Code of Civil Procedure*, QSRR c C-25.01 [*Code of Civil Procedure*]: 'Whoever brings an action at law [...] must have a sufficient interest therein'.

¹⁰¹ *Ibid.*

¹⁰² Séverine Menétrey, 'L'immixtion de tiers amicaux dans le mécanisme juridictionnel' (2004) 45:4 C de D 729 at 752 [Menétrey, 2004]. See also Pierre Giroux, Stéphane Rochette and Nicholas Jobidon, 'Les recours judiciaires en droit public' in Louis Béland and Barreau du Québec, eds, *Droit public et administratif*, Law Collection 2017-2018 (Cowansville : Yvon Blais, 2017) at 241 and ss [Giroux, 2017].

¹⁰³ Giroux, 2017, *supra* note 102 at 250.

¹⁰⁴ On the difference between the exception of unconstitutionality and the declaratory judgment, see section II.3.1. in Poirier, 2017, *supra* note 14.

¹⁰⁵ *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at para 69, [2012] 2 SCR 524 [*Downtown Eastside*].

¹⁰⁶ See the Quebec codification in section 79 *Code of Civil Procedure*. See also Menétrey, 2004, *supra* note 102.

V.2. Public Interest Standing

In addition to the recognition of sufficient interest on one's own behalf, Canadian law facilitates access to courts via the recognition of standing 'in the public interest'. This mechanism allows a person or a group, whose constitutional rights are not directly affected, to bring a case before a court of justice to ensure the protection of the rights of others, particularly of vulnerable persons.¹⁰⁷ According to the Supreme Court, public interest standing prevents the State from shielding itself from diverse forms of challenge.¹⁰⁸ Judicial recognition of public interest standing is discretionary.

Rules governing public interest standing have given rise to a significant body of jurisprudence, which has evolved over time. A trilogy predating the adoption of the *Canadian Charter* recognised the need to ensure effective judicial review of the actions of the state through public interest remedies.¹⁰⁹ The *Downtown Eastside* decision, delivered in 2012, is the most recent iteration of the eligibility conditions.¹¹⁰ The plaintiff must first establish that the action addresses a serious legal matter. He or she must then demonstrate having a real or genuine interest in the outcome of the case. Finally, the applicant's proceeding is no longer required to be the sole reasonable means of addressing the issue (in this case, constitutional), but it must be a reasonable means of doing so.¹¹¹ By relaxing this last criterion, the Supreme Court has greatly facilitated the ability of parties whose rights are only indirectly affected to raise constitutional and public interest issues.

In *Downtown Eastside*, an advocacy group for prostitutes, together with a former sex worker who had since become a violence prevention coordinator in Vancouver, sought to challenge the constitutionality of *Criminal Code*¹¹² provisions that prohibited certain forms of prostitution. They argued that these prohibitions violated prostitutes' rights to liberty and security of the person.¹¹³ The parties were 'involved with the issues that they sought to raise' and satisfied the three established criteria. They were thus able to obtain standing to act in the public interest. In this case, the Court did not consider it desirable to wait until a prostitute who was directly affected (by being charged with a criminal offence, for example) raised an exception of unconstitutionality in her defence. The Court considered the vulnerability of prostitutes and the absurdity of waiting until they were accused to assert their rights. In short, public interest standing facilitates constitutional proceedings that are distinct from those

¹⁰⁷ See e.g. the facts in *Downtown Eastside*, *supra* note 105 (third party acting on behalf of sex workers); *Canadian Council of Churches v Canada (Minister of Employment and Immigration)*, [1992] 1 SCR 236 (third party acting on behalf of refugees) [*Canadian Council of Churches*].

¹⁰⁸ *Canadian Council of Churches*, *supra* note 107 at 252.

¹⁰⁹ *Thorson v Attorney General of Canada*, [1975] 1 SCR 138; *Nova Scotia Board of Censors v McNeil*, [1976] 2 SCR 265; *Minister of Justice (Can) v Borowski*, [1981] 2 SCR 57. See also *Finlay v Canada (Minister of Finance)*, [1986] 2 SCR 607.

¹¹⁰ *Downtown Eastside*, *supra* note 105 at paras 39–52.

¹¹¹ See Giroux, 2017, *supra* note 102. This principle is codified in section 85 *Code of Civil Procedure*, which also describes the conditions under which it applies: '[t]he interest of a plaintiff who intends to raise a public interest issue is assessed on the basis of whether the interest is genuine, whether the issue is a serious one that can be validly resolved by the court and whether there is no other effective way to bring the issue before the court'. The Supreme Court nevertheless stresses the importance of avoiding the use of this mechanism to answer purely academic questions, which squander public resources or that inundate the justice system with requests, see e.g. *Downtown Eastside*, *supra* note 105 at para 50.

¹¹² *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*].

¹¹³ For example, a total ban on third parties living on the profits of prostitution – aimed at pimps – could have the effect of depriving prostitutes of protection from their violent clients.

brought by individuals who are directly affected, but that have the same objective of protecting fundamental rights.

V.3. Interveners and *Amicus Curiae*

Canadian public law recognizes the presence of ‘interveners’ who can contribute, through their specific perspective or their expertise, to litigation brought by individuals in their own name, or whose public interest standing has been recognized.¹¹⁴ The courts may thus receive a variety of insights on the problem at stake, beyond the interests and representations of the parties. To give but one example, the Canadian Civil Liberties Association regularly appears before the courts as an intervener.¹¹⁵ This intervention is not a right: it is derived from the discretionary power of a judge who must authorize it, with the exception of federal prosecutors and attorneys general, who may always intervene *ex officio*.

In certain disputes pertaining to very sensitive social issues, particularly before the Supreme Court, the number of interveners can be impressive: 26 in a recent case on physician-assisted dying¹¹⁶ and 8 in a case on the obligation of parliamentary bilingualism in the province of Alberta.¹¹⁷ Of particular importance is the intervention of the various attorneys general – federal and provincial – who must be notified in every case in which an appeal to the Court (or a request for an advisory opinion) raises a constitutional issue.¹¹⁸

In addition, the Court can appoint one or more *amicus curiae* (i.e. ‘friend of the court’) to ensure that all issues arising in the appeal are fully addressed.¹¹⁹ Note that ‘amicus curiae’ in this sense differs from the term used in the United States and the European Court of Justice or the European Court of Human Rights, where the term ‘amicus curiae’ corresponds to what are called ‘interveners’ in the Canadian context.¹²⁰ The Court may decide to appoint an *amicus curiae* when a respondent does not intend to defend the appeal, when both parties decide not to address an issue that was raised by the court of appeal or when it seeks to have a neutral perspective on a specific point of law.¹²¹ An *amicus curiae* can also be appointed by the Court in the context of a reference initiated by the federal government.¹²² For instance, in the *Reference re Senate Reform*,¹²³ the Supreme Court appointed two *amici curiae*, one practising lawyer and one law professor, to assist it in deciding whether the federal Parliament could unilaterally reform certain aspects of the Canadian Senate.¹²⁴

¹¹⁴ The intervention by third parties before the Supreme Court is explicitly provided for in sections 55 to 59 *Rules of the Supreme Court*.

¹¹⁵ See generally the website of the Canadian Civil Liberties Association, online: <https://ccla.org/?lang=fr> (accessed on 26 January 2019).

¹¹⁶ *Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331.

¹¹⁷ *Caron v Alberta*, 2015 SCC 56, [2015] 3 SCR 511 [*Caron*].

¹¹⁸ See *infra* section VI.2.

¹¹⁹ Section 92 *Rules of the Supreme Court*. See also Lynne Watt et al, *Supreme Court of Canada Practice* (Toronto: Thomson Reuters, 2018) at 434 [Watt, 2018].

¹²⁰ See Menétrey, 2004, *supra* note 102 at 731.

¹²¹ See Watt, 2018, *supra* note 119 at 434.

¹²² Section 53(7) *Supreme Court Act*. See also *supra* section IV.2.

¹²³ *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 SCR 704.

¹²⁴ An *amicus curiae* was also appointed by the Court in the *Reference re Secession of Quebec*, [1998] 2 SCR 217 to argue for Quebec’s right to unilaterally separate from Canada, in the absence of the AG of Quebec who refused

V.4. Assisting Applicants: The Court Challenges Program

Apart from its role in providing advisory opinions to the executive branch, the Supreme Court only intervenes in final appeal. As we saw, with limited exceptions in criminal law, it also selects the cases it hears. 'Bringing a case to the Supreme Court' can thus be very time-consuming and very costly. To facilitate access to constitutional justice, government programs intended to support certain types of constitutional litigation have been created.¹²⁵

The best known is the *Court Challenges Program* (CCP), introduced by the federal government in 1977.¹²⁶ It gained considerable momentum after the adoption of the *Canadian Charter of Rights and Freedoms* in 1982. This program is designed to facilitate the effective protection of language rights, equality rights, and human rights protected more broadly by the *Canadian Charter*.¹²⁷ In other words, the state (in this case, the federal government) finances individuals and groups that wish to challenge the constitutionality of the federal and provincial laws, in order to ensure an effective guarantee of these rights.

The programme has had a fairly tumultuous fate in recent years. It was abolished in 2006 by a conservative government, which partially re-established it in 2008, but only with respect to language rights. The CCP was formally reinstated in 2017 by the liberal government.¹²⁸

In its current form, the system is overseen by a body that is independent from the government, and the granting of funds is determined by committees of experts. Through the CCP, individuals can develop and file *test cases* more easily and carry out 'legal interventions' in the constitutional arena.¹²⁹ In 2006–2007, 14 requests out of 45 received CCP funding.¹³⁰ While this number may seem low, the cases selected by the CCP generally have a major influence on jurisprudence.¹³¹ However, the defence of Indigenous rights are not – for the moment – covered by this program, which consequently suffers from obvious deficiencies.

to participate in the reference on grounds that the issue was one of political legitimacy, one which the Court should refuse to address. See Menétrey, 2004, *supra* note 102 at 737; Watt, 2018, *supra* note 119 at 437.

¹²⁵ For other programmes aimed at improving access to justice, including legal aid, Human Rights Tribunals, class/collective actions, see section IV.2. in Poirier, 2017, *supra* note 14.

¹²⁶ Ian Brodie, 'Interest Group Litigation and the Embedded State: Canada's Court Challenges Program' (2001) 34:2 *Can J Pol Sci* 357 at 358.

¹²⁷ *Ibid.*

¹²⁸ Report of the Standing Committee on Justice and Human Rights, 'Access to Justice – Part 1: Court Challenge Program' (2016), online: <https://www.ourcommons.ca/Content/Committee/421/JUST/Reports/RP8377632/justrp04/justrp04-e.pdf> (accessed on January 26 2019).

¹²⁹ See *supra* section V.3.

¹³⁰ See section IV.2.3. in Poirier, 2017, *supra* note 14.

¹³¹ *Ibid.* See, for instance, the following decisions: *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 SCR 38; *R v Beaulac*, [1999] 1 SCR 768; *Mahe v Alberta*, [1990] 1 SCR 342.

VI. Procedures before the Supreme Court of Canada

Individuals must work their way up through the judicial hierarchy before they may appear before the Supreme Court. As part of its general jurisdiction, the Supreme Court hears appeals from decisions of the provincial appellate courts and the Federal Court of Appeal, which will themselves have rendered decisions on appeal from lower courts. As with lower courts, constitutional matters reach the Supreme Court either through an 'exception of unconstitutionality' or through a constitutional declaratory action.¹³²

The *Supreme Court Act* and the *Rules of the Supreme Court* outline the relevant procedures for an appeal or a reference before the Supreme Court, from the leave to appeal to the publication of the final decision.

VI.1. Leave to Appeal

By contrast with the situation in lower courts, including the various courts of appeal, all appeals to the Supreme Court require explicit permission (called 'leave to appeal'). There is, however, an exception in criminal matters where an appeal can be brought as of right if an acquittal has been set aside by a provincial court of appeal or where one judge in the court of appeal has dissented on a point of law.¹³³

When the Court's permission is required, the appellant must file an application for leave to appeal within 60 days of the date of the judgment of the appellate court.¹³⁴ Once the application is served on all other parties to the case and the file is 'opened' by the Registrar of the Court, the respondent, or an intervener, have 30 days to respond to the application.¹³⁵ A panel of three judges then decides whether leave to appeal should be granted.¹³⁶

The Court grants permission to appeal if the case involves a question of public importance, if it raises an important issue of law or of mixed law and fact, or if, for any other reason, the nature or significance of the dispute warrants the consideration of the Court.¹³⁷ Nearly a quarter of the Court's docket relates to constitutional law. A majority of those cases deals with fundamental rights protected by the *Canadian Charter*.¹³⁸

Individuals who file for leave to appeal before the Supreme Court would already have established their standing before the lower courts. That said, the Court may also review this issue. As we saw earlier, the Court has significantly expanded the ability of individuals to intervene in the public interest with respect to constitutional issues.¹³⁹

¹³² For a more detailed discussion on how individuals can bring constitutional matters to the Supreme Court, see section II.3.1. in Poirier, 2017, *supra* note 14.

¹³³ See Supreme Court of Canada, 'Role of the Court', online: <https://www.scc-csc.ca/court-cour/role-eng.aspx> (accessed on January 26 2019).

¹³⁴ Section 58(1) *Supreme Court Act*.

¹³⁵ Section 27(1) *Rules of the Supreme Court*.

¹³⁶ Section 43(3) *Supreme Court Act*.

¹³⁷ See Supreme Court of Canada, 'The Canadian Judicial System', online: <https://www.scc-csc.ca/court-cour/sys-eng.aspx> (accessed on January 26 2019).

¹³⁸ See Supreme Court of Canada 'Statistics 2006 to 2016' (2017), online: <https://www.scc-csc.ca/case-dossier/stat/pdf/2006-2016-eng.pdf> (accessed on January 26 2019) [Supreme Court of Canada, 'Statistics 2006 to 2016'].

¹³⁹ See *supra* section V.

The Supreme Court generally hears between 50 and 80 cases per year. In 1975, an amendment to the *Supreme Court Act* introduced a very demanding selection process that allowed the Court to 'choose' the key appeals it hears. Permissions are granted on a case-by-case basis by three (and in rare cases, five) of the nine judges.¹⁴⁰ Leave to appeal is granted on average four months after an application has been filed.¹⁴¹

Only an average of eight to twelve per cent of 'leaves-to-appeal' are granted each year.¹⁴² For instance, in 2015, only 43 of the 483 applications submitted were accepted, confirming the exceptional nature of Supreme Court appeals, and the significance of the cases heard. Virtually all of these decisions, especially those raising constitutional law issues, are 'landmark cases' which clarify or alter the law. The collateral effect of this understanding of the Court's function is that very few individuals actually have access to the country's highest court.

VI.2. Notification to Attorneys General

Any proceeding that raises a constitutional question must be notified to all the attorneys general (who are often also Ministers of Justice) of the country.¹⁴³ This obligation applies regardless of the type of proceeding used to raise the issue of constitutionality, and regardless of the party (individual or state body) who instituted the proceedings.

This procedural imperative enables various governments, if they wish, to appear before the court, to defend the constitutionality of the impugned law, or to support the position according to which the law of another government infringes the Constitution. The presence of 'governmental' interveners is often highly useful for the Court, when private parties incidentally raise some constitutional issue (in the context of a contractual dispute, for instance), but may not have the expertise to defend a more principled constitutional position. It is not unusual for the attorneys general to only intervene at the Supreme Court stage, which makes their position all the more crucial in the Court's consideration of the issue.¹⁴⁴

VI.3. Written and Oral Proceedings

Once the appeal is granted, the appellant and the respondent have to file a 40-page factum which sets out the relevant facts and the questions of law or fact under appeal.¹⁴⁵ Unless the Court orders otherwise, the parties are not allowed to file a reply factum.¹⁴⁶ The interveners, if any, can also file a factum presenting their position with respect to the appellant's questions, but they cannot make any statement with respect to the outcome of the appeal.¹⁴⁷

In addition to their written argument, both parties have the right to appear before the Court to present oral argument. The appellant is allowed one hour for main argument and five

¹⁴⁰ Section 43 *Supreme Court Act*.

¹⁴¹ See Supreme Court of Canada, 'Statistics 2006 to 2016', *supra* note 138.

¹⁴² *Ibid.*

¹⁴³ Section 33(3) *Rules of the Supreme Court*.

¹⁴⁴ For instance, in the appeal of *Wärtsilä Canada inc v Transport Desgagnés inc*, 2017 QCCA 1471, the AG of Quebec and the AG of Ontario both intervened only at the Supreme Court stage to defend the applicability of the CCQ in a matter that was deemed to be related to maritime law – and therefore subject to the *common law* – by the Court of Appeal of Quebec.

¹⁴⁵ Section 38(1) *Rules of the Supreme Court*.

¹⁴⁶ See Watt, 2018, *supra* note 119 at 326.

¹⁴⁷ Section 42(3) *Rules of the Supreme Court*.

minutes for reply, whereas the respondent is allowed up to one hour only.¹⁴⁸ Time for oral argument may be reduced to 30 minutes in as of right appeals.¹⁴⁹ The Court can also authorize interveners to argue orally, in which case they generally have between 5 and 30 minutes. Most appeals are now broadcast live on television and on the Court's website, with simultaneous translation in French and English, and are being archived for public viewing.¹⁵⁰

VI.4. Procedure Pertaining to Advisory Opinions

The federal government can initiate a reference seeking the advisory opinion of the Supreme Court by filling a notice of reference, which must be served on the attorney general of each province and on the minister of Justice of each territory.¹⁵¹

Once such notice is filed, any province or territory, as well as any interested person, may ask the Court to intervene.¹⁵² Where the question asked by the federal government relates to the constitutional validity of provincial legislation or where the province has any special interest in the reference, the attorney general of the province can intervene as of right.¹⁵³ The Court can also choose to appoint a counsel acting as an *amicus curiae* to shed light on the questions submitted by the federal government.¹⁵⁴ When a reference involves the giving of an opinion as to a case already disposed of by a court of appeal, the Court may require further evidence in respect of any relevant question.¹⁵⁵

The federal government, as well as the interveners and the *amicus curiae*, if any, each have to file a factum setting out their position with respect to the questions at issue.¹⁵⁶ The length of the factums as well as the time allowed for oral argument during the hearing are fixed by the Court.

VI.5. Publication of Judicial Reasoning

In Canada, the publication of judicial decisions is quasi-systematic. The obligation to publish flows from the principles of fundamental justice and is notably guaranteed by section 7 of the *Canadian Charter*. Judicial courts, like the Supreme Court, publish their reasons. Dissenting opinions are also published, something that, for many, contributes to the quality of the reasoning provided.

Decisions of the Court are made available online, both in French and English, the same day they are issued.¹⁵⁷ After a decision is released electronically, it is edited in order to be officially published in both languages in the *Canada Supreme Court Reports*. All written and oral

¹⁴⁸ Section 71(5) *ibid.*

¹⁴⁹ Section 71(5.1.) *ibid.*

¹⁵⁰ See the Supreme Court's website: <https://www.scc-csc.ca/case-dossier/info/webcasts-webdiffusions-eng.aspx> (accessed on January 26 2019). See also Watt, 2018, *supra* note 119 at 397.

¹⁵¹ Section 53 *Supreme Court Act* and sections 46(1) and 46(5) *Rules of the Supreme Court*.

¹⁵² Sections 46(6) and 46(10) *Rules of the Supreme Court*.

¹⁵³ Section 53(5) *Supreme Court Act*. See also Watt, 2018, *supra* note 119 at 147.

¹⁵⁴ Section 92 *Rules of the Supreme Court* and section 53(7) *Supreme Court Act*. See also *supra* section V.3.

¹⁵⁵ Section 46(2) *Rules of the Supreme Court*.

¹⁵⁶ Sections 46(7) and 46(9) *ibid.*

¹⁵⁷ The decisions are available on the Supreme Court's website: https://scc-csc.lexum.com/scc-csc/scc-csc/en/nav_date.do (accessed 26 January 2019). Pursuant to section 20(1) of the *Official Languages Act*, RSC 1985, c 31 (4th Supp), judgments issued by the Court must be made available simultaneously in French and English.

judgments and reasons for judgment are printed in their entirety along with a summary (called a 'headnote') of the reasons.¹⁵⁸

¹⁵⁸ See Supreme Court of Canada, 'Administration of the Court', *supra* note 46.

VII. Effect and Execution of the Supreme Court's Rulings

Acting as the ultimate arbiter of the Constitution since 1949, the Supreme Court has the final word with respect to constitutional interpretation (VII.1). The Court may grant a wide range of remedies (VII.2) and its decision are immediately executory and enforceable (VII.3).

VII.1. Final Decisions and *Stare Decisis*

By contrast with decisions of lower courts, those rendered by the Supreme Court are definitive and not subject to appeal.¹⁵⁹ They are thus immediately executory, except, as the next subsection notes, when the Court itself suspends for a certain period, a declaration of invalidity, to give time to the legislative branch to craft a new – constitutional – Act or provision, for instance. Unlike decisions taken by administrative tribunals, decisions rendered by judicial courts apply *erga omnes*, and not only *inter partes*. As was discussed above, advisory opinions ('references') are not *per se* binding although they are invariably respected.¹⁶⁰ *In practice*, the Court's reasoning in a 'reference' is thus as executory as a judgment.

Given the *stare decisis* principle (central to *common law*), the Court does not readily question its own jurisprudence. Exceptionally, however, it may do so if an earlier decision is not (or is no longer) in accordance with the law, if it is unenforceable in practice, unnecessarily complex and formalistic, inequitable, or if social circumstances have evolved in such a way that a new interpretation of the law is necessary.¹⁶¹ In *Ontario v Fraser*, the Court noted that:

Fundamentally, the question in every case involves a balancing: do the reasons in favour of following a precedent – such as certainty, consistency, predictability and institutional legitimacy – outweigh the need to overturn a precedent that is sufficiently wrong that it should not be upheld or perpetuated?¹⁶²

In 2015, the Court overturned a key decision on medically-assisted suicide that it had rendered in 1993. It did so for two main reasons. First, it found that the *interpretation* of the right to life, liberty, and the security of the person (protected by section 7 of the *Canadian Charter*) had evolved over that period. Second, it noted that the development of Canadian society was such that the criminalisation of 'physician-assisted dying' violated the *Charter*.¹⁶³ The Court thus invalidated provisions of the *Criminal Code* whose constitutionality it had confirmed a little more than 20 years earlier.

More recently, the Court overturned a trial judge decision that departed from precedents of the Court regarding the interpretation of section 121 of the *Constitution Act, 1867* which prohibits laws impeding interprovincial trade. Relying on new historical evidence adduced at trial with respect to the intentions of the drafters of section 121, the court of first instance had concluded that the Court's previous decisions were wrongly decided and should not be applied. In its decision, the Supreme Court stressed that the threshold for departing from vertical *stare decisis* on the basis of new evidence is very high. Clearly concerned with legal certainty, notably in matters which affect the economy, the Supreme Court held that its own

¹⁵⁹ Section 52 *Supreme Court Act*.

¹⁶⁰ See *supra* section IV.2.

¹⁶¹ See *R v Henry*, 2005 SCC 76, [2005] 3 SCR 609.

¹⁶² *Ontario (Attorney General) v Fraser*, 2011 SCC 20 at para 139, [2011] 2 SCR 3.

¹⁶³ See *Carter*, *supra* note 116, overturning *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519.

binding precedent from can be cast aside by new evidence only if such evidence 'fundamentally shift[s] how jurists understand the legal question at issue'.¹⁶⁴

VII.2. Remedies

The Supreme Court may grant a number of remedies when issuing a judgment or a reference. In constitutional matters, these include declaration of total or partial invalidity, temporary suspension of a declaration of unconstitutionality, 'narrowing' the interpretation of a problematic provision (*reading down*), incorporating a missing term in a legal text (*reading in*), or constitutional exemption. It may recognize or confirm the existence of Indigenous rights (Aboriginal or treaty-based)¹⁶⁵ and language rights. It may rule on the existence of a constitutional convention or clarify the scope of an unwritten constitutional principle.

With respect to fundamental rights, it may also design specific remedies that are 'appropriate and just' in the circumstances, pursuant to section 24 of the *Canadian Charter*. This could include ordering a minister to grant a constitutional exemption. If the nature of the original decision is administrative, the case may be returned to the decision maker to deliver a new decision consistent with the law, now clarified by the Supreme Court. In certain circumstances, the Court may substitute its own final decision to that rendered by the administrative body or tribunal. A legislative or regulatory provision, or even an act taken pursuant to the 'royal prerogative', may be declared unconstitutional under section 52(1) of the *Constitutional Act, 1982*. In some cases, only certain problematic sections will be invalidated.

As a general rule, a law deemed to be null and void is considered to have been so since its adoption, and it may thus be possible to obtain retroactive remedies.¹⁶⁶ Certain remedies – such as the reimbursement of a tax imposed by a government in violation of the federal division of legislative powers – are nevertheless subject to statutes of limitation.¹⁶⁷

Solutions that are less radical than the invalidation of a law or a regulation are also available. First, pursuant to the 'presumption of constitutionality',¹⁶⁸ when two interpretations are possible, the one that is consistent with the constitution will be preferred.¹⁶⁹ Second, a court may proceed with a '*reading down*' of certain provisions in order to craft an interpretation that renders them constitutional. Third, in some cases, a court may proceed with a '*reading in*' by inserting a missing term into a law in order to avoid invalidating it.¹⁷⁰

Fourth, the effect of a declaration of invalidity may also be temporarily suspended in order to give the legislator an opportunity to adopt a new (this time, constitutional) law, avoiding a legal vacuum in the *interim*. For example, in the *Carter* case, the Supreme Court held that the provisions of the *Criminal Code* prohibiting medically assisted suicide contravened the *Canadian Charter*. It then suspended the declaration of invalidity for a period of 12 months to enable the federal order to amend its legislation in a manner that better reflected the rights of

¹⁶⁴ *R v Comeau*, 2018 SCC 15 at para 23–34, [2018] 1 SCR 342.

¹⁶⁵ For the protection of Aboriginal rights in Canadian law, see section II.1.3. in Poirier, 2017, *supra* note 14.

¹⁶⁶ See *Canada (Attorney General) v Hislop*, 2007 SCC 10 at para 81 and ss, [2007] 1 SCR 429. See also *Re Manitoba Language Rights*, *supra* note 10 and *Air Canada v Ontario (Liquor Control Board)*, [1997] 2 SCR 581 at 612–13.

¹⁶⁷ See *Kingstreet Investments Ltd v New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 SCR 3.

¹⁶⁸ Hogg, 2018, *supra* note 1 at 15–23. In this regard, see *Ontario v Canadian Pacific Ltd*, [1995] 2 SCR 1031 at 1051; *R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606 at 660.

¹⁶⁹ See in particular *R v Grant*, [1993] 3 SCR 22; *Schachter v Canada*, [1992] 2 SCR 679.

¹⁷⁰ See *Vriend v Alberta*, [1998] 1 SCR 493.

patients and doctors.¹⁷¹ Similarly, in *Re Manitoba Language Rights*, having declared invalid nearly a hundred years' worth of Manitoba legislation adopted exclusively in English, the Supreme Court suspended the effect of this declaration for a three-year period to enable their translation into French and their re-enactment in order to avoid a legal vacuum in the province.¹⁷²

Remedies take a different form if the issue is not that of a law's constitutionality, but rather a governmental act or decision. If such an action contravenes a *Charter* right, the remedy will be based on section 24(1) of the *Canadian Charter*, which provides for 'such remedy as the court considers appropriate and just in the circumstances'.¹⁷³ This allows judicial courts, as in the administrative law context, to craft an individual remedy adapted to the case. The choice of a 'just and appropriate' remedy follows a flexible and contextual analysis.¹⁷⁴ Various forms of remedies, restitutive and compensatory, have been granted on the basis of this constitutional provision.¹⁷⁵

Thus, a court may award damages intended to compensate the plaintiff, while discouraging practices that violate fundamental rights.¹⁷⁶ In the event of a deliberate violation of a right, punitive damages may also be awarded.¹⁷⁷ An injunction or order may also be appropriate in certain circumstances.¹⁷⁸ In *Doucet-Boudreau*, after holding that the province of Nova Scotia had breached its constitutional obligation to provide instruction in the minority official language, a trial judge retained a right of scrutiny of the government's response.¹⁷⁹

A court may even conclude that a 'declaratory judgment' (which simply states the law, rather than order a particular legal solution of a legal issue) constitutes an appropriate remedy despite the fact that an application is moot. Hence, in *Multani*, the Court held that a school board's decision to prohibit a young Sikh student from wearing a kirpan (a ceremonial knife in a protective sheath) at school was unconstitutional.¹⁸⁰ However, at the time of the judgment, the student was no longer attending the institution where this question arose. The student's 'problem' had therefore been resolved by his departure from the school, but the legal issue required a judicial declaration. Clarifying the law in this case could have an impact on similar situations.

¹⁷¹ See *Carter*, *supra* note 116 at para 132.

¹⁷² See *Re Manitoba Language Rights*, *supra* note 10.

¹⁷³ On the meaning of a just and appropriate remedy, see *Vancouver (City) v Ward*, 2010 SCC 27, [2010] 2 SCR 28 [*Ward*].

¹⁷⁴ *R v Bjelland*, 2009 SCC 38 at para 18, [2009] 2 SCR 651; *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at para 52 and ss, [2003] 3 SCR 3.

¹⁷⁵ See André Morel, 'Le droit d'obtenir réparation en cas de violation des droits constitutionnels' (1984) 18 RJT 253.

¹⁷⁶ See *Ward*, *supra* note 173 at para 25, 32; *Henry v British-Columbia (Attorney General)*, 2015 SCC 2 at para 36–37, [2015] 2 SCR 214.

¹⁷⁷ See *Quebec (Attorney General) v Boisclair*, [2001] QCR 2449.

¹⁷⁸ See *PHS*, *supra* note 86 at para 150.

¹⁷⁹ An original remedy upheld by the Supreme Court: see *Doucet-Boudreau*, *supra* note 174.

¹⁸⁰ See *Multani v Commission Scolaire Marguerite Bourgeoise*, 2006 SCC 6, [2006] 1 SCR 256.

In criminal matters, a stay of proceedings,¹⁸¹ a new trial,¹⁸² a new hearing,¹⁸³ and a sentence reduction¹⁸⁴ have been considered ‘appropriate and just’ remedies. In addition, pursuant to section 24(2) of the *Canadian Charter*, evidence obtained in violation of fundamental rights must be excluded from judicial proceedings ‘if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute’. This would be the case of documents seized illegally, or of confessions obtained in violation of the right to an attorney, for example.

In exceptional cases, courts may also issue a ‘constitutional exemption’. A person (or a group) alleging that the impact of a particular legal text – in their specific situation – constitutes a violation of their constitutional rights, may apply to be exempted from the law’s application. However, the latter remains constitutionally valid and applicable to all those who do not benefit from such an exemption.

Hence, the Supreme Court has ruled that a federal minister must exempt a supervised injection site from the application of the provisions of the *Canadian Criminal Code* prohibiting the possession and trafficking of hard drugs. This exemption was deemed ‘appropriate and just’ so as to guarantee the right to life, liberty, and security of drug users.¹⁸⁵ The invalidation of the criminal provisions was not warranted, as they were still justified in general terms. However, their application to the injection site, in the specific circumstances of the case, violated the rights of vulnerable persons. The ‘appropriate remedy’ was therefore the issuance of an exemption based on section 24(1) of the *Canadian Charter*.¹⁸⁶

VII.3. Enforcement of Court Decisions

As a general rule, in Canada, court decisions are honoured by public authorities, particularly in constitutional matters. Accordingly, an individual who prevails in a dispute that raised constitutional issues should expect to see the judges’ ruling implemented.¹⁸⁷ In some cases, however, a litigant may have to return to court to force the state (the federal, provincial, or territorial government) to comply with the court’s orders. The dispute between the *First Nations Child and Family Caring Society* and the federal government illustrates this quest.

The organization was granted standing on behalf of Indigenous children. It convinced the Canadian Human Rights Tribunal that the social services provided to Indigenous children received systematically less funding than what was available to non-Indigenous children. The Tribunal ruled that Indigenous children were therefore victims of racial discrimination.¹⁸⁸ The federal government (whose political orientation had changed in the intervening period) announced that it would not appeal the decision. However, practical actions have not

¹⁸¹ See *R v Bellusci*, 2012 SCC 44, [2012] 2 SCR 509; *R v Regan*, 2002 SCC 12, [2002] 1 SCR 297.

¹⁸² See *R v Illes*, 2008 SCC 57, [2008] 3 SCR 134.

¹⁸³ See *R v Tran*, [1994] 2 SCR 951.

¹⁸⁴ See *R v Nasogaluak*, 2010 SCC 6, [2010] 1 SCR 2.

¹⁸⁵ See *PHS*, *supra* note 86.

¹⁸⁶ *Ibid* at para 144.

¹⁸⁷ Section 94 and ss of the *Supreme Court Act* provide for means of enforcing the decision.

¹⁸⁸ See *First Nations Child and Family Caring Society of Canada v Attorney General of Canada*, 2017 CHRT 14; *First Nations Child and Family Caring Society of Canada v Attorney General of Canada*, 2017 CHRT 7; *First Nations Child and Family Caring Society of Canada v Attorney General of Canada*, 2016 CHRT 16. See also the summary of the *First Nations Child and Family Caring Society*, online: https://fncaringsociety.com/i-am-witness-tribunal-timeline-and-documents?f%5B0%5D=field_year%3A2017 (accessed on 26 January 2019).

materialized: at the time of writing, the Tribunal has issued four non-compliance orders against the federal government.¹⁸⁹

A similar situation was experienced by Omar Khadr, a Canadian citizen and child soldier who was detained at Guantanamo for 10 years and tortured. The 'Khadr Case' came before the Supreme Court three times.¹⁹⁰ In 2010, the Supreme Court issued a declaratory judgment ruling that the plaintiff's fundamental rights to liberty and security of the person had been violated by Canadian officials who participated in interrogations. However, it did not grant his request for reparation, that is, an order that Canadian authorities organise his repatriation.¹⁹¹ Invoking the federal government's royal prerogative in matters of foreign affairs, the Court left it 'to the government to decide how best to respond in light of current information, its responsibility over foreign affairs, and the Charter.'¹⁹² Khadr was ultimately repatriated to Canada and obtained CAD 10 million in compensation from the federal government, which clearly wanted to avoid prolonging this legal saga.¹⁹³

¹⁸⁹ See First Nations Child and Family Caring Society, 'Summary of Orders from the Canadian Human Rights' (2018), online: https://fncaringsociety.com/sites/default/files/info_sheet_summary_of_orders_2018_chrt_4_0.pdf (accessed on 26 January 2019).

¹⁹⁰ See *Canada (Justice) v Khadr*, 2008 SCC 28, [2008] 2 SCR 125; *Canada (Justice) v Khadr*, 2008 SCC 29, [2008] 2 SCR 143], *Canada (Prime Minister) v Khadr*, 2010 SCC 3, [2010] 1 SCR 44 [*Khadr*].

¹⁹¹ *Khadr*, *supra* note 189 at para 6.

¹⁹² *Ibid* at para 39.

¹⁹³ 'La demande de gel de l'indemnité versée à Omar Khadr est rejetée' (13 July 2017), Radio-Canada, online: <http://ici.radio-canada.ca/nouvelle/1045012/cour-superieure-ontario-cause-contre-omar-khadr-gel-indemnisation-gouvernement-federal-10-millions> (accessed on 26 January 2019).

VIII. Conclusions: The Central Role of the Supreme Court of Canada in the Canadian Legal and Political Order

This report explored the central role of the Supreme Court of Canada in Canada's federal democracy.

Canada is a plurinational federation that recognizes legal pluralism. A wide range of instruments within the Canadian legal system are designed to protect both individual and collective rights. The primary source of this protection is the *Canadian Charter of Rights and Freedoms*, but it is supplemented by other constitutional, quasi-constitutional, legislative, and unwritten sources: constitutional conventions, implicit 'structural' principles, and rules derived from the *common law*.

The Canadian federation is relatively decentralized: the thirteen provinces and territories have extensive legislative and administrative autonomy, as well as their own institutions, including, to a large degree, their own tribunals and courts of justice. Thus, in Canada there are 14 parallel, and sometimes intersecting, legal orders.¹⁹⁴ This multiplies both the sources of rights and the courts and tribunals to which individuals may apply to enforce them. The Supreme Court is at the helm of the entire structure.

Canada practises a form of 'decentralized' constitutional review. The Supreme Court, which sits at the apex of the judicial hierarchy, is not a specialized jurisdiction. It is the final court of appeal, which can rule on disputes in all areas of law. In practice, virtually all administrative tribunals and courts of justice can rule on constitutional issues. In this sense, all Canadian judges are also 'constitutional judges'.

While the Court – and its judges – enjoy a very high degree of legitimacy and respect, observers have deplored the centralising and uniformizing impact of some of its case law, the ambivalence of its approach to certain collective rights, notably the rights of Indigenous peoples. While it has been rather audacious in the protection of some dimensions of human rights, it has been quite reluctant to bolster social and economic rights.

Canada ranks 9th worldwide (out of 113 states) on the *Rule of Law Index*.¹⁹⁵ At first glance, the rule of law is respected in the country. Individuals can assert their rights before a wide variety of courts and tribunals who have jurisdiction to issue remedies in constitutional disputes. Components of the federation respect the Court's rulings on the limits to their respective competencies, even when rendered in an advisory opinion. The judicial structure, the instruments for the protection of rights, and the types of proceedings available are not, in themselves, the source of major difficulties.¹⁹⁶ However, access to justice continues to pose real challenges caused by institutional hurdles and underfunding. Despite some original institutional programmes to facilitate access to the Supreme Court in certain constitutional cases, 'bringing a case to the Court' is very costly. Moreover, given that the Court selects the vast majority of cases which it will hear, applicants are never certain they will actually have their 'day in the Supreme Court'.

The Court does not 'only' resolve disputes between parties. It can resolve controversies between courts of appeal. It also provides advisory opinions to the executive branches of the

¹⁹⁴ This number obviously does not take into account the vast number of distinct Indigenous legal orders, the significance of which are just beginning to be acknowledged.

¹⁹⁵ *Rule of Law Index*, 2017-2018, online: <http://data.worldjusticeproject.org/#>; (accessed on 26 January 2019).

¹⁹⁶ This report does not constitute a thorough impact analysis or in-depth assessment of access to justice. Nor does it address the (in)adequacy of existing judicial proceedings with respect to the rights of Indigenous peoples.

various members of the federation particularly in constitutional law matters (advise which, in practice, has the same status as the Court's judgments). In both its appellate and advisory functions, the Supreme Court of Canada plays a crucial role in the evolution of Canadian law, as well as the political order.

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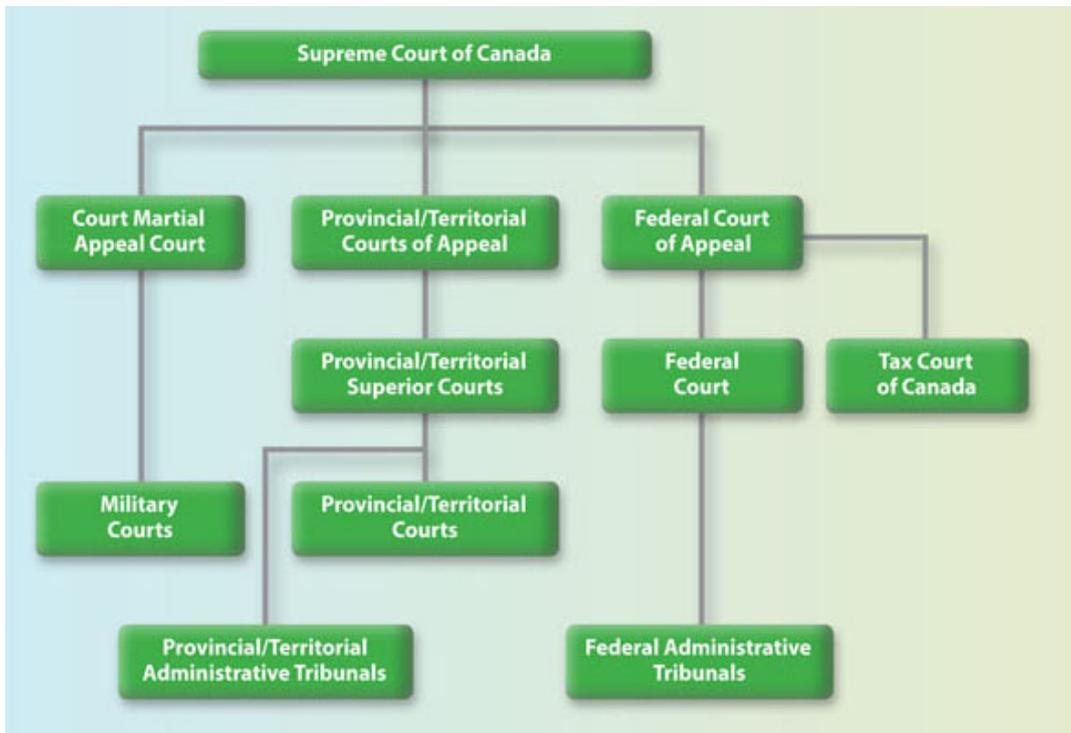
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Annex: Canada's Court System



Source: Department of Justice Canada, 'Canada's Court System' (2015) at 21, online: <https://www.justice.gc.ca/eng/csj-sjc/just/img/courten.pdf> (accessed on 26 January 2019).

This study is part of a wider project investigating, from a comparative law perspective, the role of constitutional courts of different states.

Following a brief historical introduction to the jurisdiction of the state in question, the various reports examine the composition, internal organization, functioning, jurisdiction of the various highest courts, as well as the right of access to its courtroom, its procedural rules, and the effects and the execution of its judgments.

The present study examines Canada's highest court, the Supreme Court. While all judicial courts may rule on constitutional matters, the Supreme Court of Canada enjoys a privileged status in the Canadian legal landscape. As the ultimate arbiter of the Constitution, it has the final word with respect to constitutional interpretation, notably in constitutional matters. It thus plays a central role in Canada's federal democracy.

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