Legal Proceedings available to Individuals before the Highest Courts: A Comparative Law Perspective

Canada
LEGAL PROCEEDINGS AVAILABLE TO INDIVIDUALS BEFORE THE HIGHEST COURTS: A COMPARATIVE LAW PERSPECTIVE

Canada

STUDY
October 2017

Abstract
This study is part of a wider project seeking to investigate, from a comparative law perspective, judicial proceedings available to individuals before the highest courts of different states, and before certain international courts.

The aim of this study is to examine the various judicial proceedings available to individuals in Canadian law, and in particular before the Supreme Court of Canada.

To this end, the text is divided into five parts. The introduction provides an overview of Canadian constitutional history, which explains the coexistence of rights derived from several legal traditions. It then introduces the federal system, the origins of constitutional review, as well as the court structure (I). As Canada practices a ‘diffuse’ (or ‘decentralized’) constitutional review process, the second part deals with the different types of proceedings available to individuals in matters of constitutional justice before both administrative and judicial courts, while highlighting proceedings available before the Supreme Court of Canada (II). This is followed by an examination of the constitutional and legal sources of individual — and in some cases collective — rights (III), as well as the means developed by the judiciary, the legislative, and the executive branches to ensure the effective judicial protection of rights (IV). The conclusion assesses the effectiveness of proceedings available to individuals in matters of ‘constitutional justice’.

Essentially, while Canadian citizens benefit from a wide range of rights and proceedings, access to the country’s Supreme Court is restricted due to the limited number of cases the Court chooses to hear every year. More generally, access to justice continues to pose real challenges in Canada. This is not due to judicial failings or a lack of sources of rights per se, but rather to lengthy judicial delays and the often enormous costs of proceedings.
AUTHOR
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ADMINISTRATOR
Ignacio Diez Parra, Head of the Comparative Law Library Unit
To contact the unit, please write to the following email address: EPRS-ComparativeLaw@europarl.europa.eu

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Table of Contents

List of Abbreviations ........................................................................................................ VI

Summary ............................................................................................................................. VIII

I. Introduction ......................................................................................................................... 1
   I.1. A (Very) Brief Overview of Canadian Constitutional History ...................................... 2
   I.2. The Federal System ....................................................................................................... 2
   I.3. The Origins of Constitutional Review and of the Protection of Individual Rights .................................................................................................................. 4

II. Forms and Types of Judicial Proceedings in Cases of Violation of Fundamental and Collective Rights ............................................................................................................. 10
   II.1. Legal Proceedings Available to Individuals in Constitutional Matters ...................... 10
       II.1.1. The Protection of ‘Classic’ Fundamental Rights .................................................. 10
       II.1.2. The Protection of Language Rights ..................................................................... 11
       II.1.3. The Protection of Indigenous Rights .................................................................. 12
       II.1.4. Individual Proceedings in Other Areas of Constitutional Justice ....................... 13
   II.2. Legal Proceedings Before Administrative Bodies and Tribunals ................................ 14
       II.2.1. Individual Challenges to Public Administrative Action .................................... 14
       II.2.2. The Protection of Individuals’ Rights Before Administrative Tribunals ............ 16
           II.2.2.1 Administrative Proceedings by Individuals in ‘Federal’ Matters .................. 16
           II.2.2.2 Administrative Proceedings by Individuals in ‘Provincial’ Matters ................ 16
       II.2.3. Administrative Tribunals and Constitutional Issues ........................................... 18
   II.3. Legal Proceeding by Individuals Before Courts Other Than Administrative Tribunals and the Supreme Court of Canada ................................................................. 21
       II.3.1. Judicial Proceedings in Constitutional Matters .................................................. 21
           II.3.1.1 The ‘Exception of Unconstitutionality’ ......................................................... 21
           II.3.1.2 Declaratory Judgments of Unconstitutionality ........................................... 23
           II.3.1.3 The Reference Procedure (Abstract Review) ............................................... 24
       II.3.2. Time Limits for Bringing Remedies .................................................................... 25
       II.3.3. Notification to Attorneys General ...................................................................... 25
       II.3.4. Remedies Available to Individuals in Constitutional Matters ............................ 25
   II.4. Proceedings Before the Supreme Court of Canada ....................................................... 28
       II.4.1. The Supreme Court ............................................................................................ 28
       II.4.2. Proceedings in Constitutional Matters Before the Supreme Court ................... 30
       II.4.3. Appeal ................................................................................................................ 31
       II.4.4. Available Remedies ........................................................................................... 31
       II.4.5. Final Decisions ................................................................................................. 32

III
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>III.1</td>
<td>Legal Sources of Individual (and Collective) Rights</td>
</tr>
<tr>
<td>III.1.1</td>
<td>The Constitution Act, 1867</td>
</tr>
<tr>
<td>III.1.2</td>
<td>The Constitution Act, 1982</td>
</tr>
<tr>
<td>III.1.2.1</td>
<td>The Canadian Charter of Rights and Freedoms</td>
</tr>
<tr>
<td>III.1.2.2</td>
<td>Indigenous Rights</td>
</tr>
<tr>
<td>III.1.3</td>
<td>Quasi-Constitutional Sources</td>
</tr>
<tr>
<td>III.1.3.1</td>
<td>Federal Human Rights Legislation</td>
</tr>
<tr>
<td>III.1.3.2</td>
<td>Provincial Human Rights Legislation</td>
</tr>
<tr>
<td>III.1.3.3</td>
<td>Quasi-Constitutional Statutes</td>
</tr>
<tr>
<td>III.1.4</td>
<td>Legislative Sources</td>
</tr>
<tr>
<td>III.2</td>
<td>Unwritten Constitutional Sources</td>
</tr>
<tr>
<td>III.2.1</td>
<td>Underlying Constitutional Principles</td>
</tr>
<tr>
<td>III.2.2</td>
<td>Constitutional Conventions</td>
</tr>
<tr>
<td>III.2.3</td>
<td>The Structure/Architecture of the Constitution</td>
</tr>
<tr>
<td>III.3</td>
<td>Sources with an Essentially Interpretative Status</td>
</tr>
<tr>
<td>III.3.1</td>
<td>International Law</td>
</tr>
<tr>
<td>III.3.2</td>
<td>Intergovernmental Agreements</td>
</tr>
<tr>
<td>IV.1.1</td>
<td>Access to Justice by Individuals in Constitutional Matters: Challenges and Obstacles</td>
</tr>
<tr>
<td>IV.1.2</td>
<td>Costs</td>
</tr>
<tr>
<td>IV.1.3</td>
<td>Delays</td>
</tr>
<tr>
<td>IV.1.4</td>
<td>‘Leave’ to Appeal to the Supreme Court of Canada</td>
</tr>
<tr>
<td>IV.2</td>
<td>Access to Justice by Individuals in Constitutional Matters: Some Solutions</td>
</tr>
<tr>
<td>IV.2.1</td>
<td>Legal Aid</td>
</tr>
<tr>
<td>IV.2.2</td>
<td>Human Rights Commissions</td>
</tr>
<tr>
<td>IV.2.3</td>
<td>The Court Challenges Program</td>
</tr>
<tr>
<td>IV.2.4</td>
<td>Public Interest Standing</td>
</tr>
<tr>
<td>IV.2.5</td>
<td>Class Actions</td>
</tr>
</tbody>
</table>
IV.2.6 .................................................................................................................... Intervenors ................................................................. 58
IV.2.7... Laws against ‘Strategic Lawsuits Against Public Participation’ (SLAPP) ........................................................................................................... 58

IV.3. Other Aspects Affecting the Effectiveness of Judicial Remedies for Individuals in Constitutional Matters ................................................................................................................................. 59
IV.3.1. The Publication of Judicial Reasoning ................................................................................................................................. 59
IV.3.2. Enforcement of Court Decisions ......................................................................................................................................... 60

V. Conclusions ................................................................................................................................. 62

Bibliography ........................................................................................................................................ 64
List of Judgments .................................................................................................................................. 73
Main Websites Consulted .................................................................................................................. 79
# List of Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>AG</td>
<td>Attorney General</td>
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<tr>
<td>BNAA</td>
<td>British North America Act</td>
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<tr>
<td>C de D</td>
<td>Cahiers de droit</td>
</tr>
<tr>
<td>CA</td>
<td>Quebec Court Reports: Court of Appeal (1970—1985)</td>
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<tr>
<td>Can J Law Soc</td>
<td>Canadian Journal of Law and Society</td>
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<tr>
<td>Can J Pol Sci</td>
<td>Canadian Journal of Political Science</td>
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<tr>
<td>CCQ</td>
<td>Civil Code of Québec</td>
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<tr>
<td>CHRT</td>
<td>Canadian Human Rights Tribunal</td>
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<tr>
<td>CCP</td>
<td>Code of Civil Procedure (Québec)</td>
</tr>
<tr>
<td>CCSM</td>
<td>Continuing Consolidation of the Statutes of Manitoba</td>
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<tr>
<td>DLR</td>
<td>Dominion Law Reports</td>
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<tr>
<td>JCPC</td>
<td>Judicial Committee of the Privy Council</td>
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<tr>
<td>LRC</td>
<td>Law Reform Commission of Canada</td>
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<tr>
<td>McGill LJ</td>
<td>McGill Law Journal</td>
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<tr>
<td>MNR</td>
<td>Ministry of Natural Resources</td>
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<tr>
<td>NJCL</td>
<td>National Journal of Constitutional Law</td>
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<tr>
<td>ONCA</td>
<td>Ontario Court of Appeal</td>
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<tr>
<td>OR</td>
<td>Ontario Reports</td>
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<tr>
<td>QCCA</td>
<td>Quebec Court of Appeal</td>
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<tr>
<td>QCR</td>
<td>Quebec Court Reports (1975 to today)</td>
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<tr>
<td>QCSC</td>
<td>Quebec Superior Court</td>
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<tr>
<td>QSRR</td>
<td>Quebec Statutes and Regulations Report</td>
</tr>
<tr>
<td>RDUS</td>
<td>Revue de droit de l’Université de Sherbrooke</td>
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<tr>
<td>RGD</td>
<td>Revue générale de droit</td>
</tr>
<tr>
<td>RQDC</td>
<td>Revue québécoise de droit constitutionnel</td>
</tr>
<tr>
<td>RQDI</td>
<td>Revue québécoise de droit international</td>
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<tr>
<td>SCC</td>
<td>Supreme Court of Canada</td>
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<tr>
<td>SCR</td>
<td>Supreme Court Reports</td>
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<tr>
<td>SORS</td>
<td>Statutory Orders and Regulations (Canada)</td>
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<tr>
<td>UK</td>
<td>United Kingdom</td>
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<tr>
<td><strong>UKPC</strong></td>
<td>UK Privy Council</td>
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Summary

This study is part of a wider project investigating, from a comparative law perspective, the judicial proceedings available to individuals before the highest jurisdictions of different states, and before certain international courts.

This study aims to examine the various judicial proceedings and remedies available in Canadian law to individuals, particularly before the country’s highest court, the Supreme Court of Canada.

The text is divided into five parts, and follows the general outline developed within the framework of the collective project. The introduction provides an overview of Canadian constitutional history, which explains the coexistence of several legal traditions. It then surveys the federal system, the origins of constitutional review, and the basic organization of the judiciary (I). As Canada’s constitutional review process is of a ‘decentralized’ nature, the second part deals with the different types of legal proceedings available to individuals in matters of constitutional justice before both administrative and judicial courts, while highlighting those proceedings available before the Supreme Court of Canada. In particular, the discussion focuses on ‘remedies’ that may be awarded by courts in this context (II). This is followed by an examination of the constitutional and legislative sources which guarantee individual — and in some cases, collective — rights (III), as well as a number of mechanisms designed by the judicial, legislative, and executive branches to bolster the effective judicial protection of rights (IV). The conclusion summarizes the judicial proceedings open to individuals seeking ‘constitutional justice’ (V).

Canada is a relatively decentralized, plurinational, and ‘bijural’ federation, whose constitutional architecture contains a range of instruments that provide for the protection of individual and collective rights (including the rights of Indigenous peoples and linguistic minorities). The main source of protection, the Canadian Charter of Rights and Freedoms adopted in 1982, is supplemented by other constitutional, quasi-constitutional, legislative, and even unwritten sources.

With a few exceptions, all administrative tribunals and courts of justice in Canada have jurisdiction to decide constitutional matters. Individuals may obtain ‘remedies’ to correct any administrative action that is deemed to have breached their rights. They may also challenge the constitutionality of regulatory and legislative provisions, whether in ‘defence’ through the exception of unconstitutionality, or more proactively by a declaratory action. Individuals may not only raise the violation of their own rights, but

1 In Canadian law, the term ‘remedies’ corresponds more closely to ‘reparations’ than to the proceedings themselves. See e.g. the text of section 24 of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (UK), 1982, c 11 [Constitution Act, 1982].

2 Public law is largely founded on British common law. Private law is drawn from the same tradition, except in Quebec, where it is strongly grounded in the Romano-Germanic (‘civil law’) tradition. Increasingly, the term ‘bijural’ being replaced by ‘multijural’ or ‘legal pluralism’ in that it seeks to recognize the Indigenous legal systems that exist in parallel, and interact with, the law of European origin, which remains indisputably dominant.
may also invoke a wide number of other constitutional issues, such as the division of legislative powers between federal partners.

The Supreme Court of Canada, sitting at the apex of the judicial hierarchy, is not a ‘specialized constitutional court’. It is rather the final court of appeal with jurisdiction over all areas of the law. In principle, individuals can access the Supreme Court at the end of a long legal process. However, only a limited number of cases will reach it: essentially, those that are of precedential value. Thus, citizens benefit from a wide range of constitutional rights and remedies in constitutional matters, but their access to the country’s highest court is limited.

Canada ranks 12th worldwide (out of 113 states) on the Rule of Law Index. Decentralized constitutional review, the multiplicity of sources of rights, and a (relatively strong) respect for the rule of law should, in principle, contribute to a robust system of constitutional justice. Yet, access to justice continues to pose real challenges in Canada: the costs of constitutional justice can be enormous, and the long delays in obtaining this justice are often criticized.

Legislators and tribunals have developed various solutions to counter these problems: legal aid; the modulation of legal costs; a ‘court challenges’ programme that provides public funding for important cases (‘test cases’) involving constitutional issues; class actions; an expanded recognition of public interest standing, etc. Despite this creativity, access to justice — and therefore the effective protection of individual rights — remains fragile for financial and organizational reasons, but not due to judicial failures or a lack of sources of rights.

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3 The Supreme Court may also issue advisory opinions – relatively frequent in constitutional matters – at the request of the federal executive branch, or on “appeal” 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 sections II.3.1.3 and II.4.2 of this report.

I. Introduction

This report examines the types of judicial proceedings accessible to individuals seeking constitutional justice in Canada. In this regard, four preliminary remarks are warranted.

First, the French term ‘recours’—translated as ‘remedies’ in the English version of this project—refers to both the procedures available to individuals, and the results to which these individuals may aspire to.\(^5\)

Second, Canada practices a ‘diffuse’ (or ‘decentralized’) process of constitutional review. This means that the proceedings available to individuals with constitutional issues may be brought before virtually any judicial court, as well as before many administrative bodies. While we pay particular attention to the ability of individuals to bring cases before the Supreme Court of Canada, we must emphasize from the outset that these proceedings can, and indeed must, be brought before lower courts before reaching the apex of Canada’s judicial structure.

Third, since the Comparative Research Project (in which this national report partakes) is essentially concerned with proceedings by individuals before constitutional courts, we have focused our analysis on ‘constitutional justice’ in the broad sense of the term. Accordingly, we examine legal proceedings and remedies aimed at the protection of fundamental rights (whether or not these rights have been constitutionalized), those that may relate to division of powers issues (and therefore to Canadian federalism), as well as those dealing with other fundamental issues such as the constitutionality of proposed acts of secession.

Fourth, and finally, Canadian constitutional law recognizes not only the rights of individuals but also certain collective rights. Those include Aboriginal and those arising from treaties concluded between Indigenous peoples and the state, as well as language rights, which are situated at the juncture between individual and collective rights. Despite this collective dimension, judicial proceedings are frequently instituted by individuals on behalf of their communities. These proceedings will therefore be included in this report.

In order to better understand the specifics of legal proceedings available to individuals in matters of constitutional justice, this first part of the Report provides an overview of Canada’s constitutional history (I.1); the impact of the federal system on judicial proceedings (I.2); the history of constitutional review (I.3); and, lastly, the structure of the court system, which determines which courts individuals must turn to in order to seek ‘constitutional justice’ (I.4).

In Canadian law, the term ‘remedies’ corresponds more closely to ‘reparations’ than to ‘proceedings’: See e.g. the text of section 24 of the Constitution Act, 1982. In this report, I use the term ‘remedies’ to refer to the solutions provided by courts, and the expressions ‘legal recourse’ and ‘legal proceedings’ to refer procedural aspects related to access to constitutional justice.
I.1. A (Very) Brief Overview of Canadian Constitutional History

Canada is a constitutional monarchy with a parliamentary system of government, and is the result of two successive processes of colonization. The French colonial system, spanning from the 17th century to 1760, was eventually conquered by the British Crown. These two regimes overlapped— and in many cases, attempted to obliterate— Indigenous political and legal systems. With the exception of the province of Quebec, private law in Canada is generally drawn from the common law legal tradition. With respect to private law, Quebec has been able to maintain a system based on the Romano-Germanic tradition, known in Canada as the ‘civil law system’. In contrast, since the British Conquest in 1760, Canadian public law has been modelled, throughout the country, on the common law tradition, and still bears the strong stamp of the British constitutional tradition.

For their part, Indigenous legal systems have — in certain cases — endured, but in parallel (and often in tension) with the legal systems originating in Europe. We are currently seeing a remarkable resurgence of interest in Indigenous issues—including Indigenous constitutionalism. This report, however, will only address formal Canadian law, including the recognition of ‘Indigenous difference’ and the protection of certain ‘Aboriginal’ rights and rights deriving from treaties. It does not address the ‘internal’ or ‘traditional’ law of Indigenous peoples.

I.2. The Federal System

In 1867, Canada adopted a federative form of government through the union of four British colonies. Six other provinces and three territories have gradually joined the original four provinces. The British North America Act (BNAA), now renamed the Constitution Act, 1867, is still in force. This founding constitutional legislation established much of Canada’s institutional architecture (the role of institutions and the federal distribution of legislative powers, for instance). The law of 1867 is ‘outdated’ in style, but not legally obsolete. This 19th-century document is difficult to read and betrays vestiges of colonialism. Nonetheless, it remains the backbone of the Canadian federation.

The Constitution Act, 1867 is supplemented (and not superseded) by the Constitution Act, 1982 (which incorporates the Charter of Rights and Freedoms), as well as by a plethora

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6 With reference to the Civil Code (Civil Code of Quebec, c CCQ-1991 [CCQ]) based on the Napoleonic Code.
7 One of these colonies (United Canada) was split into the provinces of Ontario and Quebec at the time of the 1867 Confederation.
8 Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 [Constitution Act, 1867 or BNAA].
of specific constitutional laws, unwritten principles, and constitutional conventions.\textsuperscript{10} In other words, the sources of Canadian constitutional law are fragmented and complex.

This constitutional complexity is reinforced by the federal nature of the political system. There are 14 distinct legal orders in Canada:\textsuperscript{11} a federal order, ten provincial orders, and three territorial ones. For the purposes of the present report, the three northern territories may be considered very similar to ‘provinces’. Each of these federated entities is endowed with legislative, executive, and — to a large extent — judicial institutions. Canadian federalism is essentially ‘dualistic’, to the extent that provincial and federal orders are largely autonomous from each other.\textsuperscript{12} The provinces and the federal government maintain ‘intergovernmental’ relations of a ‘diplomatic’ nature. Despite the existence of numerous collaborative mechanisms, cooperation within the federation is significantly different from the cooperative federalism of the German, Swiss, or European Union systems.\textsuperscript{13}

For instance, provinces do not participate in the adoption of federal legislation, notably since the Canadian Senate is woefully inadequate as a forum for the defence of provincial and territorial interests. In addition, each order of government has its own administration that implements its own laws and programmes. In other words, provinces do not implement federal law.\textsuperscript{14} This federal architecture has an impact on legal proceedings available to individuals. The location and legislative sources of rights (in addition to existing constitutional norms) will determine which administrative and judicial institutions have jurisdiction to deliver justice, including in constitutional matters.

The division of legislative (and by extension, executive) powers is set out in sections 91 to 95 of the \textit{Constitution Act, 1867}, and constitutes ‘a genuine legislative decentralization and not a simple delegation of central powers to the provinces’.\textsuperscript{15} Section 91 lists the federal legislative powers, which apply mainly to areas of general and economic interest. Sections 92 and 93 grant powers to the provinces that are of a more local, social, and

\textsuperscript{10} For more details, please see \textit{infra} Part III of this report.

\textsuperscript{11} If we exclude distinct Indigenous legal systems whose legal status remains somewhat imprecise in Canadian law.


\textsuperscript{15} Henri Brun, Guy Tremblay and Eugénie Brouillet, \textit{Droit constitutionnel}, 6th ed, (Cowansville, Qc, Yvon Blais: 2014) at 418 (our translation) [Brun, Tremblay and Brouillet, 2014].
cultural nature, but also those that have an economic dimension or are linked to labour relations. There are very few officially concurrent powers, but the practice of cooperative federalism has generated a great deal of de facto, if not de jure, concurrency.

Legislative powers are often set out in very general terms, in accordance with 19th century drafting customs. This ‘generality and the antiquity of the rules of federalism contained in the Constitution’ have resulted in judges playing a fundamental role in constitutional interpretation and in the overall orientation of the federal system.

I.3. The Origins of Constitutional Review and of the Protection of Individual Rights

In Canada, constitutional review is ‘decentralized’ (or diffuse) in the sense that it is not within the exclusive purview of a specialized institution, as is generally the case in Europe. This ‘diffuse’ mode of control gives most administrative tribunals, as well as both lower and superior courts, the power to rule on constitutional issues and to grant appropriate remedies in the event of constitutional violations.

Experts disagree on the origins of constitutional review in Canada. While some suggest that it was inspired by the American experience, the dominant theory is that constitutional review is grounded in the country’s British origins. The practice of judicial review (analogous to constitutional review) already existed in Canada before Confederation in 1867. Although they already possessed a certain degree of legislative autonomy, British colonies were subject to a judicial review designed to assess the conformity of their laws with certain imperial statutes. This model persisted after Canada became independent, with the Canadian constitution becoming the yardstick of review.

The adoption of a federal system and of a written Constitution and a federal system in 1867 required ‘a form of constitutional arbitration between the provinces and the federal government’. The role of the judiciary in constitutional review was thus rapidly

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16 Ibid at 433.
18 Brun, Tremblay and Brouillet, 2014, supra note 15 at 430 (our translation).
20 See in particular Marbury v Madison 5 US 137 (1803).
23 Louis LeBel, ‘Reconnaissance et effectivité des droits fondamentaux: la fonction démocratique des
Judicial remedies for individuals before the highest jurisdictions

Canada

‘understood to flow from the nature of things’. 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 the BNAA shall ensure that the law in question was rendered “absolutely null and ineffective.”’

The issue of constitutional review was not, however, extensively discussed during the drafting and adoption of the Constitution Act, 1867. The power to arbitrate constitutional matters between the federal and provincial orders was granted, almost implicitly, to existing tribunals and courts, with the possibility of a final appeal to the Judicial Committee of the Privy Council (JCPC), a judicial section of the House of Lords in London. Indeed, until 1949—when the Supreme Court of Canada became the final court of appeal for Canada—the JCPC was the court of last resort for all matters, including constitutional issues, even though Canada had become largely independent of the United Kingdom in 1867.

Until the incorporation of the Canadian Charter into the Constitution in 1982, individuals frequently invoked violations of the division of powers as an ‘indirect’ means of protecting their rights. With greater or lesser degrees of success depending on the era, they did so to contest laws infringing freedom of association or freedom of thought, as well as laws instituting racist practices against people of Asian origin.

The adoption of the Constitution Act, 1982 undeniably, and explicitly, reinforced the role of the judiciary in constitutional review. Paragraph 52(1) of this Act 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

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24 See Brun, Tremblay and Brouillet, 2014, supra note 15 at 180.
26 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).
28 We write ‘largely’ because even after Confederation, the United Kingdom continued to exercise jurisdiction over international relations for Canada until 1931 (when the Statute of Westminster was adopted (Statute of Westminster, 1931 (UK), 22 & 23 Geo V, c 4, s 2). Moreover, Canada did not ‘patriate’ the power to amend its own constitution until 1982. Prior to that date, almost all amendments of the BNAA 1867 (now the Constitution Act, 1982) required the intervention of the Westminster Parliament. By constitutional convention, however, it was understood that these amendments would only proceed at the request of Canada, with a ‘substantial’ degree of provincial consent (Reference re Resolution to amend the Constitution, [1981] 1 SCR 753 [Re Patriation]).
29 See Switzman v Elbling and AG of Quebec, [1957] SCR 285 [Switzman].
30 See British Columbia (AG) v Tomey Homma, [1902] UKPC 6; Quong-Wing v The King, [1914] 49 SCR 440.
invalidity of laws adopted by the federal Parliament or the provincial legislatures that exceed the powers conferred on them by the Constitution. 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. The adoption of the Constitution Act, 1982 therefore constitutes, for many, the start of the constitutionalist era in Canada. 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 ‘extended the scope of constitutional decisions and entrusted the courts with these new and heavy responsibilities.’

While the Constitution now explicitly recognizes the principle of constitutional review, it still 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. With regards to non-Charter constitutional matters, remedies may depend on whether or not the court hearing the case has ‘inherent’ or ‘statutory’ jurisdiction—in other words, jurisdiction based on legislation. This question is addressed in the following subsection.

I.4. Canadian Judicial Structure and Constitutional Justice

With a few exceptions, all courts—whether superior, lower, administrative, federal, or provincial—may hear cases involving constitutional matters, whether these are brought by individuals, organizations, or public authorities. Considering the ‘decentralized’ nature of constitutional review, the distinction between ‘constitutional jurisdiction’ and ‘non-constitutional jurisdiction’ does not, in practice, apply in Canada.

Moreover, with the exception of certain specialized tribunals, all courts may deal with matters arising from both private and public law, whether these are matters involving the civil liability of individuals or the state, constitutional law, criminal law, administrative law, or contract law. Otherwise stated, the distinction between ‘judicial’, ‘administrative’, and ‘constitutional’ that is widespread in European judicial systems is not applicable in Canada.

31 See Re Manitoba Language Rights, supra note 25 at para 51.
32 Ibid at para 51.
34 Reference re Motor Vehicle Act (C-B), [1985] 2 SCR 486 at para 16. See also Beaudoin, 2003, supra note 27 at 335.
35 This question will be addressed infra in part II of this Report.
In contrast, Canadian federalism has had an impact on the bodies before which individuals may institute proceedings. This is where a separation in jurisdiction occurs and where the Canadian judicial system becomes particularly complex.

In each province, there is a ‘superior court’ with general jurisdiction, as well as a court of appeal. Both are competent to hear civil, criminal, administrative, and constitutional matters. Courts can review the constitutionality of both provincial and federal law and regulations, and review the legality of the provincial administrative action. So-called ‘provincial courts’ (also known as ‘lower courts’) have jurisdiction over a wide range of areas such as municipal law, important aspects of criminal justice, and some aspects of civil litigation. In all of these contexts, they can also deal with constitutional issues.

In parallel to the foregoing, Parliament instituted a trial level Federal Court as well as the Federal Court of Appeal with jurisdiction over matters that falls within the exclusive purview of the federal order. This includes maritime law, immigration law, and patent law. These two courts have jurisdiction to review the legality of federal administrative actions. In addition, they both have the authority to assess the constitutionality of any legislation that they are called upon to apply.

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36 However, this attribution of powers does not remove the inherent (complete) jurisdiction of the provincial Superior Courts to review the federal administration (in case of lacunae); see Crevier v AG (Quebec) et al, [1981] 2 SCR 220 [Crevier]; Strickland v Canada (Attorney General), 2015 SCC 37 at para 33, [2015] 2 SCR 713, where the Supreme Court stated that ‘the provincial superior courts, in the context of proceedings properly brought before them, can address the legality of the conduct of federal boards, commissions and tribunals, where doing so is a necessary step in resolving the claims asserted in those proceedings’. See also Ordon Estate v Grail, [1998] 3 SCR 437 at para 46.

The provincial ‘superior courts’, including the courts of appeal, enjoy constitutional protection under the written Constitution. The 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 architecture, and that its composition cannot, therefore, be unilaterally amended by Parliament. The remaining courts and tribunals—including the Federal Court and the Federal Court of Appeal—have no constitutional status and could therefore be repealed by statute.

In summary, there are 14 distinct and largely parallel legal and judicial systems in Canada, each with lower, superior, and administrative courts. The structure is pyramidal, with the Supreme Court of Canada at its apex. All of the ‘superior’ courts (in each province)—including the courts of appeal—as well as the Supreme Court have inherent jurisdiction. This enables them to hear disputes in all areas of law, including constitutional law and the protection of individual rights. The ‘lower’ courts (created by statute) can also exercise constitutional review. As for specialized administrative tribunals, their jurisdiction in this area depends in part on their specialization and their enabling statutes.

38 See Department of Justice Canada, Canada’s Court System, Ottawa, 2015, at 4.
40 This is despite the fact that this structure is provided for by federal law (which acquires, as a result of this decision, a status that is partly constitutionalized). See Reference re Supreme Court Act, sections 5 and 6, 2014 SCC 21, [2014] 1 SCR 433 [Supreme Court Act].
With this overview of Canadian constitutional history and the foundations of constitutional review, federal architecture, and court system, we may now discuss legal proceedings and remedies available to individuals in constitutional matters.
II. Forms and Types of Judicial Proceedings in Cases of Violation of Fundamental and Collective Rights

The first part of this report describes the ‘diffuse’ nature of constitutional review in Canada. It explores legal proceedings and remedies available to individuals in constitutional matters used to assert their rights before administrative bodies or administrative tribunals (II.2), courts of justice other than the Supreme Court (II.3), and the Supreme Court (II.4). In each of these cases, we will discuss the types of proceedings available to individuals, the ‘reparations’ that may be obtained, as well as the appeal process.

The first subsection introduces the main areas of constitutional law subject to constitutional review (II.1). As they apply across the board, rules governing the ‘legal standing’ to raise constitutional issues, as well as the question of judicial delays, will be analyzed in part IV of this report.

II.1. Legal Proceedings Available to Individuals in Constitutional Matters

Individuals may institute judicial proceedings to protect their ‘fundamental’ rights, whether or not these rights are constitutionalized (II.1.1). They can also request that courts shield certain collective rights (II.1.2 and II.1.3). Finally, individuals may also call upon judges to protect other aspects of Canadian constitutional law (II.1.4).

II.1.1. The Protection of ‘Classic’ Fundamental Rights

In the Canadian federal system, no legal order has exclusive jurisdiction to protect fundamental rights, which include language rights and Aboriginal and treaty rights. Protecting these rights is ‘a requirement for both federal and provincial level in the exercise of their respective powers’.41 In addition, provinces, territories, and the federal government can all legislate to provide additional protections to individuals, or to guarantee additional rights that are not constitutionalized.

Provinces, territories, and the federal order all have instruments for the protection of rights. There are thus 14 fundamental human rights regimes in Canada, all of which are subject to the Canadian Charter of Rights and Freedoms. However, the Charter applies only to state action and to legislative and regulatory provisions (‘vertical effect’). Consequently, laws concerning the protection of rights — particularly the rights to equality and non-discrimination — in the private sphere (‘horizontal effect’) have been adopted by the provinces, territories, and the federal order to supplement this constitutional protection. Individuals thus benefit from numerous forms of legal avenues.

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to assert their rights before both the (provincial and federal) administrative and judicial bodies, all the way to the Supreme Court.

II.1.2. The Protection of Language Rights

There are two official languages in Canada: English and French. Canada has 36 million inhabitants, approximately 23% of whom speak French as their mother tongue. The Canadian constitution guarantees a number of language rights, which frequently give rise to litigation instituted by individuals.

The Canadian Charter states that English and French ‘have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada’. The Constitution also recognizes the equal status of French and English in New Brunswick (the only officially bilingual province), while the Constitution Act, 1867 had already imposed parliamentary and judicial bilingualism in Quebec and a Constitution Act from 1870 confirmed legislative bilingualism in Manitoba.

The Charter provides for public schooling in (official) minority languages, subject to a number of conditions. Given the legislative powers of the provinces with respect to education, the implementation of the corresponding obligation rests with the provincial governments. Nevertheless, the federal government contributes financially via various agreements with either the provinces and territories, or directly with community groups.

Language rights can also be protected through a number of other Charter provisions. This is particularly the case for the right to the assistance of an interpreter for parties and witnesses to judicial proceedings or to proceedings regarding freedom of expression.

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43 See section 16–21, Canadian Charter.

44 See section 16.1, Canadian Charter.


46 See section 23, Canadian Charter. This right is reserved to ‘[those] (a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or (b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province’. See also Mark C. Power, ‘Les droits linguistiques en matière d’éducation’ in Michel Bastarache and Michel Doucet, eds, Les droits linguistiques au Canada, 3rd ed (Cowansville, Qc, Yvon Blais: 2014) 657.


48 See section 14, Canadian Charter; MacDonald v City of Montreal, [1986] 1 SCR 460.

In addition to ‘constitutionalized’ rights, the English-speaking minority in Quebec and certain French-speaking minorities elsewhere in Canada enjoy statutory, and sometimes regulatory, rights that vary greatly from province to province.\textsuperscript{50} At the federal level, these are implemented through the *Official Languages Act*.\textsuperscript{51} Since 2005, courts have been granted jurisdiction to assess whether federal authorities have adopted measures to enhance the ‘vitality’ of both official languages minority communities.\textsuperscript{52}

Language rights differ from the classic fundamental rights protected in Canadian constitutional law. On the one hand, they are at the juncture between collective and individual rights. On the other hand, they are essentially positive rights that require implementation by federal and/or provincial governments. In this context, courts have inherited an enhanced monitoring role.\textsuperscript{53}

By contrast, Indigenous languages do not enjoy official status in provinces or federal institutions, although section 22 of the *Canadian Charter* provides that nothing in the constitutionalization of bilingualism (French/English) ‘abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language or custom that is not English or French’. However, throughout its governmental administration, the Northwest Territories recognize eleven (11) official languages,\textsuperscript{54} and Inuktitut is one of the official languages of the Nunavut Territory.\textsuperscript{55}

**II.1.3. The Protection of Indigenous Rights**

The territory that is now Canada was already inhabited when Europeans settled there. Today, there are approximately 200 Indigenous nations, including the ‘First Nations’ (formerly known as ‘American Indians’, ‘Native Americans’, or ‘Indians’), Inuit, and Métis peoples.\textsuperscript{56} These nations are spread out across the country, with certain groups living on ‘reserves’, and others in territories recognized by treaty or by agreements with the federal or provincial governments. A large proportion of this population (approximately 50%) now lives in urban areas, while often maintaining close links with their communities and their ancestral territories.

Rights that existed prior to 1982 now constitute Aboriginal rights protected by section 35 of the *Constitution Act, 1982*. The purpose of this section is the ‘reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown’\textsuperscript{57} and it represents

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\textsuperscript{50} On this ‘mosaic’ of language rights, see Poirier, 2017, ‘Fédéralisme coopératif’ supra note 45.

\textsuperscript{51} *Official Languages Act*, LRC (1985), c 31 (4th supp) [*Official Languages Act*].

\textsuperscript{52} See *Official Languages Act*, part VII.

\textsuperscript{53} For example, if evidence of a sufficient number of children is provided, courts may require provincial governments to ‘establish the (educational) institutions and services guaranteed by the Constitution’; See *Mahe v Alberta*, [1990] 1 SCR 342 [*Mahe*] and *Reference re Public Schools Act (Man)*, section 79(3), (4) and (7), [1993] 1 SCR 839.

\textsuperscript{54} See *Official Languages Act*, LRTN-O 1988, c O-1, section 4.

\textsuperscript{55} See *Official Languages Act*, LNun 2008, c 10, section 3.


\textsuperscript{57} *R v Van der Peet*, [1996] 2 SCR 507 at para 31 [*Van der Peet*].
the primary source of constitutional obligations with respect to Indigenous rights. Prior to 1982, Aboriginal rights primarily derived from custom, common law, and the Royal Proclamation (1763). It was once possible for these right to be amended or repealed by federal Parliament, which had legislative jurisdiction over ‘Indians and lands reserved for Indians’ under section 91(24) of the Constitution Act, 1867. But since 1982, these rights have been ‘constitutionalized’ and constitutional litigation in this area is particularly prolific.

Although they are ‘collective’ rights, legal proceedings with respect to the rights of Indigenous peoples take place before the same courts — and follow the same procedures — as other constitutional litigation.

II.1.4. Individual Proceedings in Other Areas of Constitutional Justice

Individuals may seek the constitutional review of legislation, regulations, and administrative acts. In other words, individuals may invoke not only a violation of their rights, but also a breach of the division of legislative powers between federal partners, the violation of the principle of separation of powers between the three branches of each order of government, or another fundamental rule of public law.

For instance, in a landmark ruling in 1930, a citizen successfully contested the historic interpretation that women did not constitute 'persons' qualified to sit in the Canadian Senate. The case dealt with rules governing the composition of the Senate and not specifically with gender equality, which was unimaginable at the time. Similarly, before the federal executive sought a legal opinion from the Supreme Court on the constitutionality of an eventual unilateral declaration of succession by Quebec, a citizen had brought a case before the Superior Court to do so. More recently, an individual challenged the constitutionality of a Quebec law affirming the Quebec people's right to self-determination. Another example lies in a decision regarding the constitutionality of federal provisions making it impossible to provide a supervised location for the injection of hard drugs. Individuals (and an association for the defence of persons with addictions) argued that the matter came under provincial jurisdiction over health and not under federal criminal law. A final example concerns two law professors who are

58 The legal sources of these proceedings are discussed infra Part III of this Report.
59 They must, in all cases, demonstrate that they have sufficient interest to act in the matter. This question is examined infra in part IV. At this stage, it is sufficient to note that this demonstration is more demanding when the person is not directly affected (in contrast to a situation where they have been charged in a criminal matter, for example).
61 For a discussion of abstract reviews, see infra, subsection III.3.1.3; Reference re Secession of Quebec, [1998] 2 SCR 217 [Re Secession of Quebec].
63 See Act Respecting the Exercise of the Fundamental Rights and Prerogatives of the Quebec People and the Quebec State, QSRR c E-20.2; Henderson v Attorney General of Quebec, 500-05-065031-013, currently before the Superior Court of Quebec.
64 See Canada (Attorney General) v PHS Community Services Society, 2011 SCC 44, [2011] 3 SCR 134 [PHS]. That argument was rejected. However, as we will see further on in this part of the Report, the argument
currently challenging the application of the rules of succession to the throne of the British monarchy in Canada.65

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Having briefly described the variety of infringements to constitutional law that individuals may bring before courts, we now turn to the types of legal proceedings open to individuals in the Canadian court system.

II.2. Legal Proceedings Before Administrative Bodies and Tribunals

The first administrative proceeding generally consists in an application for the judicial review of an administrative decision by the administration itself (II.2.1). In some cases, these decisions can be directly challenged before administrative tribunals. More frequently, however, administrative tribunals may only be petitioned after an unsuccessful request for a revision of the administrative act or decision. In Canadian law, this process is called judicial ‘review’ of the administration. It includes a review of both the legality and the constitutionality of the decision (II.2.2).66 For the purposes of this report, we focus on administrative law proceedings introduced by individuals — by ‘citizens’ — and which raise constitutional issues (II.2.3).

Decisions rendered by administrative tribunals in the exercise of the ‘judicial review’ of administrative action may be appealed before superior courts, and may go up to the Supreme Court. This is possible for any question of law — and a fortiori of constitutional law (II.2.4). Procedural aspects (standing, time limits, etc.) vary enormously depending on the bodies involved, the subject matter and, in certain cases, the legal systems (federal or provincial). These issues will therefore only be discussed briefly (II.2.5).

II.2.1. Individual Challenges to Public Administrative Action

As noted above, the Canadian federation includes 14 distinct public administrations (to which must be added the municipal, local, and Indigenous administrations, paragovernmental bodies, disciplinary committees, educational institutions, hospitals, etc.). These different incarnations of executive power can affect the rights of individuals through administrative decisions and acts made in the performance of their duties.67
All administrative bodies derive their authority from statute. Some administrative power is considered to be ‘tied’, because the standards to be applied by the administrative body are pre-established in the constitutive statute. In other cases, the administration enjoys a degree of discretion. Discretionary power gives the administrative bodies more flexibility. However, this power is not absolute. Moreover, both tied and discretionary powers are subject to judicial review (of distinct levels of intensity).\textsuperscript{68}

The principles of administrative law deriving from the common law, and in particular those falling within what is characterized in the British legal tradition as ‘natural justice’, establish limits to administrative power. Procedural obligations arising from natural justice depend on context, the factual situation of the litigant, and the nature of the dispute.\textsuperscript{69} These principles notably include the right to be heard,\textsuperscript{70} the right to an impartial hearing, and the right to be represented by a lawyer.\textsuperscript{71} An individual may apply for the revision or the judicial review of a decision violating ‘natural justice’. Administrative officials and bodies cannot, in the exercise of their tied or discretionary powers, breach the fundamental rights guaranteed by the Canadian Charter.\textsuperscript{72} Should they do so, a tribunal or court of competent jurisdiction can grant the injured individual a remedy that is ‘appropriate and just in the circumstances’, under section 24(1) of the Canadian Charter.\textsuperscript{73} Administrative tribunals may grant the same type of remedies as judicial tribunals pursuant to this section.\textsuperscript{74}

\textsuperscript{68} See Roncarelli v Duplessis, [1959] SCR 121.

\textsuperscript{69} See Dunsmuir v New Brunswick, 2008 SCC 9 at para 79, [2008] 1 SCR 190 [Dunsmuir], Baker v Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817 at para 21 [Baker], Knight v Indian Head School Division No 19, [1990] 1 SCR 653 at 682 [Knight]. It should be noted that in administrative law, decision makers are often masters of their internal procedures. They can, therefore, limit the scope of the demands of natural justice by demonstrating, using a cost-benefit analysis, that these requirements would excessively delay the administrative process, see Attorney General v Mavi, [2011] 2 SCR 504 at para 40, [Mavi].

\textsuperscript{70} See Singh v Minister of Employment and Immigration, [1985] 1 SCR 177 at 233 [Singh], in which the Supreme Court held that the federal government’s refusal to hear the arguments of refugees infringed section 7 of the Canadian Charter and section 2 of the Canadian Bill of Rights, SC 1960, c 44 [Canadian Bill of Rights].


\textsuperscript{72} See Baker, supra note 69 at para 65; Slainte Communications Inc v Davidson, [1989] 1 SCR 1038 at 1049 [Slainte]; Air Canada v British Columbia, [1989] 1 SCR 1161; Lake v Canada (Minister of Justice), 2008 SCC 23 at paras 22 and 27, [2008] 1 SCR 761; PHS, supra note 64 at para 117; Doré v Quebec Bar, 2012 SCC 12 at para 24, [2012] 1 SCR 395 [Doré].

\textsuperscript{73} ‘Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.’

\textsuperscript{74} See infra sections II.3 and II.4 of this Report. The only exception is that administrative tribunals cannot award costs. See Canada (Canadian Human Rights Commission) v Canada (Attorney General), 2011 SCC 53, [2011] 3 SCR 471 [Mowat]; R v 974649 Ontario Inc, 2001 SCC 81, [2001] 3 SCR 575.
II.2.2. The Protection of Individuals’ Rights Before Administrative Tribunals

The legality and constitutionality of administrative decisions are subject to review by administrative tribunals, whose decisions are themselves subject to review by superior courts, including courts of appeal and the Supreme Court. Administrative tribunals charged with applying specific laws can be created either by the federal or provincial orders for matters falling within the scope of their respective powers. If no administrative tribunal has the explicit authority — as set out in a law — to review the acts of an administrative body, this role reverts to provincial superior courts. Pursuant to the principle of the rule of law, Canadian public administration is subject to the supervisory power of superior courts.

II.2.2.1 Administrative Proceedings by Individuals in ‘Federal’ Matters

To reiterate, there are 14 legal orders in Canada, and therefore 14 ‘administrations’. As we have seen, judicial review of administrative decisions is exercised by courts within the legal order of the administration in question. To illustrate this, let us take the example of an order to leave the territory issued to an applicant for refugee status. In Canadian law, immigration is one of the few explicitly concurrent legislative powers. However, refugee status is exclusively under federal jurisdiction. Thus, proceedings to deport an applicant for refugee status takes place before the federal administration, and under the authority of the Department of Citizenship and Immigration.

Individuals who are subject to a deportation order may challenge it if it is likely to infringe their constitutional right to life and security of the person if there is a serious risk that deportation would place their life in danger or expose them to torture. The Immigration and Refugee Board, a federal administrative tribunal, has jurisdiction to hear these challenges. Its decisions can be appealed to the Federal Court, then to the Federal Court of Appeal, and finally to the Supreme Court.

II.2.2.2 Administrative Proceedings by Individuals in ‘Provincial’ Matters

Provincial administrative bodies issue decisions that can potentially interfere with constitutional rights, particularly with respect to health, education, labour relations, and social security. Provinces also have legislative jurisdiction with regards to business law, employment law, and professional regulation. Two examples illustrate the way in which

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76 See Immeubles Port Louis ltée v Lafontaine (Village), [1991] 1 SCR 326 at 360.
77 See section 95, Constitution Act, 1867.
78 See section 91(25), Constitution Act, 1867.
79 See section 7, Canadian Charter.
administrative remedies brought by individuals can raise constitutional issues: the first from Quebec, and the second from Ontario.

In *Doré*, a lawyer challenged the constitutionality of a reprimand issued by the Disciplinary Committee of the Quebec Bar, his professional association. The lawyer had sent an acerbic letter to the judge who presided over a hearing in which the judge had severely criticized him. The disciplinary body ruled that sending the letter contravened the lawyer’s Code of Conduct. Mr. Doré petitioned the Professions Tribunal for a review of the administrative decision on the grounds that it violated his right to freedom of expression. The administrative tribunal upheld the Bar’s decision, a decision subsequently confirmed by the Quebec Superior Court and the Quebec Court of Appeal.

The Supreme Court recognized that the Code and the reprimand did limit the lawyer’s freedom of expression, but that, in these circumstances, the Bar had adequately taken into account the fundamental values at issue—freedom of expression, on the one hand, and the necessity to foster civility before tribunals, etc., on the other. The Court thus concluded that the decision to penalize the lawyer was reasonable and therefore justified.

The Montfort Hospital decision offers another example of legal proceedings brought by individuals against the administrative decision of a provincial entity in order to assert their rights. In this case, a provincial commission adopted administrative guidelines to rationalize healthcare services across Ontario. However, it did not take into account the specific situation of the French-speaking minority. Its decision resulted in the closure of the Montfort Hospital, the only hospital in Ontario offering healthcare services and training for healthcare professionals in French, and which played a fundamental role for the French-speaking community. On behalf of a group of French-speaking Ontario citizens, Madame Lalonde contested the decision.

The trial court and the Ontario Court of Appeal found on behalf of the plaintiff, on the grounds that the decision did not take into account the unwritten constitutional principle of the protection of minorities, and that it contravened the rules of administrative law. The directives issued by the administrative body were annulled and the case was referred back to it, so that it could deliver a decision in accordance with constitutional law. In the meantime, the Ontario government reversed its decision to close the hospital.

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81 See *Doré*, supra note 72 at para 71. The judge himself was reprimanded for his remarks.
82 See *Lalonde v Ontario (Health Services Restructuring Commission)*, [1999] 48 OR (3d) 50.
83 Madame Lalonde was the former mayor of an Ottawa district (Vanier) and an activist in the French-speaking Ontario community. This case is therefore a good illustration of the role that individuals play in defending collective rights in Canada.
84 It should be noted that in this case, the proceedings were directly instituted before a judicial court of first instance because, unlike the decisions of the Department of Citizenship and Immigration examined in the previous subsection, no administrative tribunal had the mandate to exercise judicial review of the Commission’s decisions. Nevertheless, at issue was the legality and constitutionality of an administrative decision, in particular with regard to the language rights protected by the *Canadian Charter*.
II.2.2.3 Tribunals Specializing in Human Rights

In addition to the Canadian Charter, the federal, provincial, and territorial orders all have human rights legislation. These statutes have ‘horizontal’ application (between private parties) in addition to a vertical one. Several of these statutes establish administrative tribunals that assess allegations of rights violations.

In Quebec, for example, the Human Rights and Youth Rights Commission handles discrimination complaints against the provincial government, its entities, or non-governmental actors, including individuals. Similarly, the Canadian Human Rights Tribunal hears applications alleging violations of the Canadian Human Rights Act. It applies to actions of federal authorities and to private parties acting in areas which fall within federal constitutional jurisdiction. The decisions of these specialized tribunals may be appealed before the Quebec Court of Appeal in the first instance, and before the Federal Court in the second.

II.2.3. Administrative Tribunals and Constitutional Issues

It follows from the foregoing that administrative tribunals called upon to review administrative actions and decisions can at times rule on constitutional issues. The applicable standards of judicial review are among the most contested, fluid, and even elusive aspects of Canadian public law. Relevant case law is constantly evolving, 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.

In general terms, when constitutional issues are raised, two standards of review may be applied: the ‘correctness’ standard which does not allow for error, while the ‘reasonableness’ standard offers a certain margin of appreciation. In principle, these ‘standards of review’ apply both to the review of administrative action by an administrative tribunal (or failing that, by a superior court that performs this function), and to an appeal of this review before a superior court or a court of appeal (and eventually to the Supreme Court).

On the one hand, when an administrative decision infringes a citizen’s fundamental rights — but where the constitutionality of a legislative or regulatory standard is not being challenged — the ‘reasonableness’ standard applies. It is, however, a narrowly defined
form of ‘reasonableness’. The administrative tribunal (or the court sitting in appeal) will verify whether the decision or the administrative measure ‘falls within a range of reasonable alternatives’. This will be the case if it constitutes ‘the result of a proportional balancing of the rights in question protected by the Charter’. This standard of review gives the administrative decision maker — and the specialized administrative tribunal charged with reviewing the decisions made by the decision maker — some flexibility.

This reflects the presumption that specialized bodies are better equipped to deal with conflicting rights and values in their area of expertise than judicial bodies. An administrative decision taken without due regard for the potentially contradictory values at stake may be referred back to the administrative decision maker (or in certain cases to an administrative tribunal) so that a new decision may be rendered in accordance with the law. In some cases, the administrative tribunal (or the court of justice hearing the case on appeal) may directly substitute its own decision.

On the other hand, when an administrative tribunal rules on the constitutionality of the laws and regulations it is called upon to apply, as well as that of its own constitutive statute, the ‘correctness’ standard of review applies. In most cases, such questions of constitutionality are raised by individuals (or ‘citizens’ in the broad sense of the term) within the context of an application for judicial review of administrative action.

Administrative tribunals may issue ‘declarations of unenforceability’ (sometimes called ‘inoperability’) affecting the parties involved (inter partes). However, they do not have the power to issue general declarations of invalidity (erga omnes) pursuant to section 52 of the Constitution Act, 1982: only judicial courts have jurisdiction to do so.

### II.2.4. Appeals of Administrative Tribunal Decisions Before Judicial Courts

Individuals may appeal decisions rendered by administrative tribunals before judicial courts. As mentioned earlier, in the absence of a statutory right to challenge a decision before an administrative tribunal, ‘judicial review’ will be carried out by a superior court.

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91 Doré, supra note 72 at para 56; Loyola High School v Quebec (Attorney General), 2015 SCC 12 at para 37, [2015] 1 SCR 613 [Loyola].

92 Doré, supra note 72 at para 57. Note that in Doré, the Supreme Court challenged its own application of a more demanding review standard – one not in accordance with administrative law – in Multani v Commission Scolaire Marguerite Bourgeois, 2006 SCC 6 at para 82, [2006] 1 SCR 256 [Multani].


96 See e.g. Loyola, supra note 91, and PHS, supra note 64.
The ambiguity that often characterizes the standard of review applied by administrative tribunals also exists in the case of interventions by judicial courts. In constitutional matters, the ‘reasonableness’ and ‘correctness’ standards also apply.

Thus, the review of the administrative tribunals’ decisions with respect to constitutional guarantees arising from the Canadian Charter is also based on the ‘reasonable decision’ standard.\(^{97}\) An unreasonable decision will generally be returned to the decision maker,\(^{98}\) although in certain cases a judicial court may substitute its decision \textit{in lieu} of the challenged one. We will see later that a court can also issue an order that is halfway between these two options. Thus, in PHS, the Supreme Court ordered a federal minister to issue a constitutional exemption to end the violation of a fundamental right.\(^{99}\) Even though the remedy in this case came from the Supreme Court, all courts competent to rule on the violation of a Charter right may craft remedies that are ‘just and appropriate’ in the circumstances.

In contrast to cases based on the Charter, decisions by administrative tribunals that raise other constitutional issues — such as the division of legislative powers — will be subject to the stricter standard of ‘correctness’. This standard does not impose any restraint on the judicial court which proceeds with the review and it may substitute its own analysis for that of the administrative tribunal.\(^{100}\)

\subsection*{II.2.5. Procedural Issues}

Given the plethora of federal and provincial administrative tribunals responsible for reviewing decisions made by public administrations, procedural aspects vary significantly, particularly with respect to the time limits for instituting action.\(^{101}\)

Issues of standing (right to sue) are examined in part IV of this report. At this stage, it is sufficient to emphasize that individuals affected by an administrative act or decision must demonstrate that they have a sufficient interest in bringing the matter before either administrative tribunals or judicial courts. When a decision or an action affects such a person directly, their interest is recognized quasi-automatically.

In addition, both an administrative body that has rendered a decision whose constitutionality has been challenged, and the administrative tribunal that has carried out a judicial review of that decision may — on a discretionary basis — be granted standing in an appeal before a judicial court, in order to make representations.\(^{102}\) Finally, all federal and provincial Attorneys General must be notified of legal proceedings involving

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\item Loyola, supra note 91 at para 37. See also Doré, supra note 72 at para 57.
\item See Loyola, supra note 91; Nguyen, supra note 93 at para 47.
\item See PHS, supra note 64.
\item See Dunsmuir, supra note 69 at para 47.
\item It should be noted, however, that time limits are not of public order: under exceptional circumstances, a tribunal may accept a request beyond the time limit.
\end{enumerate}
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constitutional review before judicial courts so as to enable them to make representations.¹⁰³

**II.3. Legal Proceeding by Individuals Before Courts Other Than Administrative Tribunals and the Supreme Court of Canada**

This section examines the legal proceedings that individuals may bring before courts of justice, excluding administrative tribunals, which we have just discussed, and the Supreme Court, which will be covered in the following section. These are judicial institutions, whether they have constitutional status (provincial superior courts and courts of appeal) or a statutory one (other provincial courts and the Federal Courts).

We have created this division between administrative tribunals, judicial courts other than the Supreme Court, and the Supreme Court itself in order to match the analytical grid created for this research project. It should be remembered, however, that with a few exceptions, individuals may raise constitutional issues before any court and that, with very few exceptions, all courts can grant similar remedies.

We will examine, in turn, the different types of legal proceedings available to individuals in constitutional matters (II.3.1); the time limits for action (II.3.2); the required notice to attorneys general (II.3.3); and the remedies that individuals may obtain (II.3.4).

**II.3.1. Judicial Proceedings in Constitutional Matters**

Outside the administrative context discussed above, individuals essentially have two main routes for raising constitutional issues: the exception of unconstitutionality (II.3.1.1) and the declaratory action or judgment (II.3.1.2). Use of the reference question procedure is reserved for the executive branch of the various orders of government. It is, therefore, not available to individuals. We nevertheless discuss it briefly because of its importance in constitutional matters (II.3.1.3).

While the Supreme Court is formally the country’s court of final appeal, it is common for appellate court decisions not to be appealed. Moreover, as we shall see, the Supreme Court is parsimonious in granting leaves to appeal as it chooses its cases. In practice, courts of appeal are therefore often the final courts to rule on constitutional matters.¹⁰⁴

**II.3.1.1 The ‘Exception of Unconstitutionality’**

Any party to a dispute—such as the accused in criminal proceedings—may raise, in defence, the unconstitutionality of a legislative or regulatory standard to which they are subject. Effectively, ‘an invalid legal provision is null and cannot in consequence be applicable to an individual’.¹⁰⁵ The constitutional issue will be therefore be addressed in the context of the main proceedings.

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¹⁰³ In Quebec, see section 76(4) CCP.
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Morgentaler, a criminal law case, offers an illustrious example of the exception of unconstitutionality.\(^\text{106}\) A doctor was prosecuted for having announced that he would perform therapeutic abortions in violation of extremely strict procedural rules. In his defence, he raised the principle of necessity and argued, in particular, that sections of the Canadian Criminal Code were in breach of a woman’s right to life, liberty, and security of the person when faced with an unwanted pregnancy. A majority of the Supreme Court agreed, holding that the impugnent provisions effectively contravened section 7 of the Canadian Charter. In so doing, the jury’s acquittal was confirmed.

Individuals who have been charged with a crime may also refer to other public law rules, including the violation of the division of legislative powers. An infamous case from the 1950s concerned the constitutionality of a Quebec law that allowed the administration to close (or ‘padlock’) any building used to disseminate communist propaganda, or to terminate a lease for the same reason.\(^\text{107}\) A tenant evicted in application of this law challenged its constitutionality, arguing that the province did not have the legislative authority to adopt it. The decision, which took place before the advent of the Canadian Charter in 1982, turned on the division of legislative powers: did the provincial law relate to municipal and local matters (within the jurisdiction of the province), or to criminal law (and thus, under federal jurisdiction)? The majority of the Supreme Court found that the provincial law was unconstitutional (without clearly ruling on whether the federal Parliament could have adopted a similar law).

Landmark judgments concerning language rights often use the “exception of unconstitutionality”. For instance, an individual was charged with violating a provincial traffic law that had been enacted exclusively in English. In his defence, he challenged the constitutionality of the law on the grounds that it breached language rights guaranteed by the Canadian Charter, and by other constitutional or quasi-constitutional legal texts.\(^\text{108}\)

Similarly, this type of legal proceeding has given rise to groundbreaking cases concerning Aboriginal rights and rights set out in treaties concluded between Indigenous peoples and the Crown. For example, in the Sparrow case, an Indigenous individual was accused of using nets exceeding the size permitted under the federal Fisheries Act for his subsistence fishing.\(^\text{109}\) In his defence, he argued that his ancestral right (and that of his community) to fish was protected under section 35 of the Constitution Act, 1982. The Supreme Court ruled that an Aboriginal right did indeed exist in these circumstances, and that while some legislative limitations on exercising this right are permitted in Canadian law, they were not justified in this instance.\(^\text{110}\)

In each of these cases, the stay of proceedings or acquittal in favour of the individual had an *erga omnes* effect: the law held to be unconstitutional became inoperative in the legal


\(^{107}\) See Switzman, *supra* note 29.

\(^{108}\) See *Bilodeau v AG (Man)*, [1986] 1 SCR 449; *Caron v Alberta*, 2015 SCC 56, [2015] 3 SCR 511 [Caron].

Regarding these sources, see part III of this report.

\(^{109}\) See *R v Sparrow*, [1990] 1 SCR 1075 [Sparrow].

\(^{110}\) See also *Van der Peet*, *supra* note 57.
order in which the judgment was pronounced. However, unless it emanates from the Supreme Court (or the Federal Court), a decision will not have an immediate effect in every jurisdiction in Canada. Hence, under the rules governing precedent, the decision of a lower court, or of a Court of Appeal, does not directly apply outside the borders of the provinces in which it is issued. This can generate a form of inconsistency and asymmetry with regard to fundamental rights, which can only be resolved by a final decision of the Supreme Court.

II.3.1.2 Declaratory Judgments of Unconstitutionality

Individuals may also directly challenge the constitutionality of a legal text that is already in force.\(^{111}\) This is done through an application for a ‘declaratory judgment’ before a superior court.\(^{112}\)

Like the exception of unconstitutionality, this is an *a posteriori* review. The action may be the equivalent to what is known in European law as an ‘abstract review’ (not involving specific litigation), although it may also occur within the framework of a more complex case, involving a solid factual framework. This would be the case, for example, when the question of law is considered to be very important, but where it is no longer necessary in order to resolve the dispute.\(^{113}\) In this context, judges would issue a declaratory judgment in order to ‘state the law’ and even to develop it.

The distinction between the declaratory judgment and the exception of unconstitutionality is not a radical one in Canadian law. The differences do not affect an individual’s right to bring a case before the court, but rather the remedies that may be granted, as well as the standing of an individual who wants the court to ‘state the law’ rather than to resolve a dispute. While the ‘standing’ of an individual is quasi-automatic in the case of the exception of unconstitutionality (because the person is directly affected by the challenged law), this standing must be demonstrated, and confirmed by the Court, before litigation may proceed in a declaratory action. We explore this aspect in greater detail in part IV of this report.

Declaratory judgments contribute significantly to the protection of rights because it enables individuals to act in a proactive, and not solely defensive, way to challenge an unconstitutional legal rule.

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\(^{111}\) We write ‘essentially’ because such an action can be brought by a company, an association, or even by the federal or provincial government who wishes to contest the constitutional validity of a law established by another order of government.

\(^{112}\) See Danielle Grenier and Marie Paré, *La requête en jugement déclaratoire en droit public québécois* (Cowansville, QC, Yvon Blais: 1995). In Québec, see s 142 CCP.

\(^{113}\) For example, in *Multani*, the Supreme Court ‘declared’ null the decision of a school board to prohibit a Sikh student from wearing a ceremonial knife (kirpan) to school. At the time the decision was rendered, the student had completed his studies (*Multani*, supra note 92 at para 82). The court issued a declaratory judgment rather than refuse to rule on an issue related to freedom of religion that could have useful precedential value in other contexts.
II.3.1.3 **The Reference Procedure (Abstract Review)**

There is a third way of seeking judicial review: the ‘reference’ procedure. This is a request for an abstract review (advisory opinion) from the executive branch of a province to its own court of appeal. (We will see that the federal government may submit a similar request directly to the Supreme Court.)\(^{114}\) Canadian constitutional law is full of landmark rulings delivered within the framework of an abstract review.

This remedy is primarily distinguished from the exception of unconstitutionality and declaratory judgments in that, in the vast majority of cases, it takes place *prior* to a law’s coming into force, and sometimes even when the legislative text is still in draft form. It is thus a kind of *a priori* constitutional review.\(^{115}\) Procedures are outlined in specific legislation.\(^{116}\)

Requesting an abstract review is entirely optional: the executive is under no obligation to have the constitutionality of its draft laws evaluated by the judiciary. Judges who receive a request for an abstract review may — in theory — refuse to respond to some or more constitutional issues, or to reply only in part.\(^{117}\) They may also refuse to answer if the issue is considered too ‘political’ (a response that is surprisingly rare).\(^{118}\)

Formally, a reference is not binding on the government, as it is not a judgment *per se*. However, the opinions are invariably respected. Therefore, in reality,

> their effect is the same as that of an actual judgment. Effectively, if the court has expressed the opinion that the provision of a law is unconstitutional, it is very unlikely that it would change its opinion if, in the context of an appeal that is brought before it, a citizen invokes the unconstitutionality of the same provision.\(^{119}\)

Moreover, within the federal judicial system, there is a procedure similar to the ‘preliminary ruling’ in the European system, which is highly unusual in Canadian law. Questions are not, however, raised by judges, but again by the federal executive branch. Pursuant to section 18.3 of the *Federal Courts Act*, a federal office may ‘at any stage of its proceedings refer any question or issue of law, of jurisdiction or of practice and procedure to the Federal Court for hearing and determination.’ A ‘federal office’ is essentially an administrative body or agency.

\(^{114}\) Section 36 *Supreme Court Act*, LRC 1985, c S-26 [*Supreme Court Act*]; see section II.4, infra.

\(^{115}\) We write ‘in the vast majority of cases’ because rules governing the reference procedures do not specify that the opinion may only relate to an ‘emerging’ law and not to one that is already in force.

\(^{116}\) In Quebec, the remedy is governed by the *Court of Appeal Reference Act*, QSRR c R-23 (Quebec).


\(^{118}\) See the discussion in this regard in *Re Secession of Quebec*, *supra* note 61 at para 24 and ss.

\(^{119}\) Duplé, 2014, *supra* note 33 at 294 (our translation). See also Beaudouin, 2003, *supra* note 27 at 328. In practice, legal practitioners and academics hardly draw any distinction between a pronouncement delivered via a reference or via a judgment. As these are questions of principle, which the courts must consider ‘important’ in their order of priority, references have an extremely high degree of ‘normative weight’ even if they are not, *per se*, binding.
II.3.2. Time Limits for Bringing Remedies

There are no time limits for introducing constitutional review proceedings. Accordingly, in the Switzman case discussed above, the Quebec law was invalidated by the Supreme Court twenty years after its entry into force. In the 1979 Forest judgment, the Court declared a Manitoba law that came into force in 1890 to be unconstitutional. The most famous example is undoubtedly the 1985 Reference re Manitoba Language Rights, in which the Supreme Court declared all Manitoban laws not adopted in both official languages since 1870 to be invalid. The Court nevertheless suspended the declaration of invalidity for a period of three years to allow for the translation of all the affected legislation. This creative remedy sought to avoid chaos — and thus the breakdown of the rule of law — that would have resulted from the immediate invalidation of all Manitoban laws.

In contrast, there are specific time limits for appealing decisions rendered by an administration or a court. For example, appeals to the Quebec Court of Appeal must be filed ‘within 30 days after the date of the notice of judgment or after the date of the judgment if it was rendered at the hearing’, except in exceptional cases. The Federal Court of Appeal also provides for a time limit of 30 days ‘after the pronouncement of the judgment’.

II.3.3. 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. 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 gives various governments the option 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.

II.3.4. Remedies Available to Individuals in Constitutional Matters

Constitutional litigation may give rise to different types of ‘reparations’ (‘remedies’). A legislative or regulatory provision, or even an act taken pursuant to the ‘royal

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121 See Attorney General of Manitoba v Forest, [1979] 2 SCR 1032.
122 See Re Manitoba Language Rights, supra note 25. This reference was followed by another case, brought by an individual, who convinced the Court that two Manitoba traffic laws were invalid because of their unilingualism: Bilodeau, supra note 108.
123 See section 360 CCP.
124 See section 363 CCP.
125 See sections 27(1.2), (1.3) and (2) of the Federal Courts Act.
126 For Quebec, see sections 76 to 78 CCP. Similar rules exist for courts of appeal in other provinces. For notices to Attorneys General in proceedings before the Supreme Court, see section 57 of the Supreme Court Act.
prerogative’, may be declared unconstitutional under section 52(1) of the Constitutional Act, 1982. In some cases, only certain problematic sections will be invalidated. Unlike decisions taken by administrative tribunals, decisions rendered by judicial courts apply erga omnes, and not only inter partes.

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. 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.

Solutions that are less radical than the invalidation of a law or a regulation are also available. First, pursuant to the ‘presumption of constitutionality’, when two interpretations are possible, the one that is consistent with the constitution will be preferred. 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.

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 government to amend its legislation in a manner that better reflected the rights of patients and doctors. In addition, as we have seen, 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 to avoid a legal vacuum in the province.

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 Charter, which provides for ‘such remedy as the court considers appropriate and just in the circumstances’. This allows judicial

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127 See in particular Canada (Attorney General) v Hislop, 2007 SCC 10 at para 81 and ss, [2001] 1 SCR 429, in which the Supreme Court stated that it should not result in a ‘fundamental change in law’.


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


courts, as in the administrative law context, to grant an individual remedy adapted to the case.

The choice of a 'just and appropriate' remedy follows a flexible and contextual analysis. Various forms of remedies, restitutive and compensatory, have been granted on the basis of this constitutional provision.

Thus, a court may award damages intended to compensate the plaintiff, while discouraging practices that violate fundamental rights. In the event of a deliberate violation of a right, punitive damages may also be awarded. An injunction or order may also be appropriate in certain circumstances. 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.

A court may even conclude that a declaratory judgment constitutes an appropriate remedy despite the fact that an application was 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. However, at the time of the judgment, the student was no longer attending the school 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.

In criminal matters, a stay of proceedings, a new trial, a new hearing, and a sentence reduction 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


[139] See PHS, supra note 64 at para 150.

[140] An original remedy upheld by the Supreme Court: see Doucet-Boudreau, supra note 135.

[141] See Multani, supra note 92.


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.

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.\textsuperscript{146} 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 Charter.\textsuperscript{147}

\section*{II.4. Proceedings Before the Supreme Court of Canada}

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.\textsuperscript{148} The Court may ‘declare null the decisions of all other courts in all areas of law’,\textsuperscript{149} including those dealing with the most controversial legal (and social) issues in Canada.\textsuperscript{150} The Supreme Court itself has repeatedly recognized the importance of its role as the ‘guardian of the Constitution’.\textsuperscript{151}

\subsection*{II.4.1. The Supreme Court}

The Supreme Court’s existence and composition have now (partly) been constitutionalized through sections 41 and 42 of the Constitution Act, 1982 and judicial

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\item \textsuperscript{146} See PHS, supra note 64.
\item \textsuperscript{147} Ibid at para 144.
\item \textsuperscript{148} See Bora Laskin, ‘The Role and Functions of Final Appellate Courts: The Supreme Court of Canada’ (1975) 53 Can Bar Rev 469 at 479.
\item \textsuperscript{149} Deschamps, 2013, supra note 75.
\item \textsuperscript{150} 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 435.
\item \textsuperscript{151} See e.g. Re Manitoba Language Rights, supra note 25 at para 68: ‘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.’; Re Supreme Court Act, supra note 40 at para 89: ‘The existence of an impartial and authoritative judicial arbiterator 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’.
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Judicial remedies for individuals before the highest jurisdictions

Canada

The Court was created by an Act of Parliament in 1875 and enjoyed no explicit constitutional protection before 1982. As mentioned previously, the Supreme Court only became the country’s final court of appeal in 1949. Prior to that date, its decisions could be appealed before the Judicial Committee of the Privy Council (as could decisions of provincial Courts of Appeal).

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 civil law system could not be adequately enforced and sustained by judges who had not received training for in this legal tradition. Others saw the institution as an unnecessary expense.

Today, 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’. 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.’

It is currently composed of nine judges — one Chief Justice and eight ‘puisne’ judges. The Act guarantees that three judges come from Quebec (to ensure knowledge of the civil law tradition). By convention, three judges come from the most populous province of Canada (Ontario), while two places are reserved for the Western provinces, and one for a judge from the Atlantic provinces. In obvious contradiction with the federal nature of the country, all the judges are appointed by the federal government.

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152 The Court itself recently held that it is an integral part of the Canadian constitutional architecture and that, as such, changes to its composition or its mandate cannot be made unilaterally by the Federal Parliament: Ibid.

153 Legislation authorised by section 101 of the Constitution Act, 1867.


155 See Cavarzan, supra note 152 at 432.

156 Section 3 Supreme Court Act.

157 Section 52 ibid.

158 Section 4(1) ibid. It was initially composed of six judges. This number was raised to seven in 1927. Its current composition was established in 1949, during the abrogation of appeals to the Judicial Committee of the Privy Council: Cavarzan, supra note 152 at 433.

159 For the most recent appointment (fall 2017), the federal government announced that judges from the three Northern territories would also be considered: 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-fr.html (accessed on 17 July 2017).

160 Sections 96 and 101 of the Constitution Act, 1867 and para 4(1) of the Supreme Court Act. A procedure without a legislative (and a fortiori constitutional) basis permits the Prime Minister to be advised before making this appointment (which formally falls unto the Governor General who acts under advice of … the Prime Minister!). Office of the Commissioner for Federal Judicial Affairs, ‘Supreme Court of Canada
Unlike certain constitutional courts, the Supreme Court is not divided into specialized chambers. The panels are composed of seven or nine judges (or, more rarely, five) and are formed by the chief justice. The sole constraint is that Quebec judges sit on civil law cases.\textsuperscript{161}

\textbf{II.4.2. Proceedings in Constitutional Matters Before the Supreme Court}

Legal proceedings available to individuals before the Supreme Court are similar to those before administrative and judicial courts. 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.

In addition, the Court frequently receives requests for abstract reviews (‘\textit{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:

\begin{quote}
any important legal issue or fact relating to: a) the interpretation of \textit{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\textsuperscript{162}.
\end{quote}

To reiterate, these legal proceedings are \textit{not} accessible to individuals. They consist almost exclusively of \textit{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 Court, which may nevertheless refuse to answer if it deems it inappropriate, as was explained earlier.\textsuperscript{163} References are a fundamental part of constitutional case law in Canada. As is the case of opinions

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\textsuperscript{162} \textit{Section 53 Supreme Court Act}.

\textsuperscript{163} \textit{Section 53(3), ibid.}
Judicial remedies for individuals before the highest jurisdictions

Canada

delivered by provincial courts of appeal, Supreme Court references are not binding per se, but are invariably respected.

II.4.3. Appeal

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 (called ‘leave to appeal’) are granted on a case-by-case basis by three (and in rare cases, five) of the nine judges. Leave to appeal is granted on average four months after an application has been filed. The Court accepts approximately 10% of the appeal applications it receives.

The Court grants permission to appeal if the case involves a question of public importance or 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.

Nearly a quarter of the Court’s docket relates to constitutional law. A vast majority of those cases deals with fundamental rights protected by the Canadian Charter.

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 will see in part IV of this report, the Court has expanded the ability of individuals to intervene in the public interest with respect to constitutional issues.

II.4.4. Available Remedies

The Supreme Court may grant similar remedies to those that can be granted by lower courts: 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) 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.

164 Section 43 ibid.


Court. In certain circumstances, the Court may substitute its own final decision for the one rendered by the administrative body or tribunal.

II.4.5. Final Decisions

By contrast with decisions of lower courts, those rendered by the Supreme Court are definitive and not subject to appeal.\textsuperscript{168} Given the \textit{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.\textsuperscript{169}

In \textit{Ontario v. Fraser}, the Court noted that:

‘[f]undamentally, 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?’.\textsuperscript{170}

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 \textit{Canadian Charter}) had changed over time. Second, it noted that the development of Canadian society was such that ‘physician-assisted dying’ had become a fundamental right.\textsuperscript{171} The Court thus invalidated provisions of the \textit{Criminal Code} whose constitutionality it had confirmed a little more than 20 years earlier. It is worth emphasizing that these two cases were brought by individuals, namely two women suffering from the same degenerative disease.

II.4.6. The Override Clause and the Metaphor of ‘Dialogue’ Between the Legislature and the Supreme Court

While Supreme Court decisions cannot be appealed, some may be called into question by elected officials. Indeed, under section 33 of the \textit{Canadian Charter},

Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

\textsuperscript{168} Section 52 \textit{Supreme Court Act}.  
Legislators can shield a law from ‘Charter review’ provided they do so explicitly in the text of the law concerned. This ‘override’ is valid for a maximum period of five years, which is renewable.

Legislators may thus exempt legislation from constitutional review — or adopt it despite a prior judicial ruling that its content is (or would be) unconstitutional. This ‘shield’ may be invoked with regards to freedom of expression, religion, conscience, or association (section 2), the right to life, liberty, and security of the person (section 7), protection from arbitrary search and seizure and from arrest and detention, the right to an attorney, the right to a fair trial, the right to the assistance of an interpreter, and even protection from ‘cruel and unusual punishment’, (sections 8 to 14) as well as the right to equality (section 15).

This possibility could suggest that Canada is a totalitarian country, where the tyranny of the (parliamentary) majority reigns. Yet, while section 33 was invoked by certain provinces when the Constitution Act, 1982 was first adopted, its usage has been very limited and has become extremely controversial.

The possibility of invoking the ‘notwithstanding clause’ (as section 33 is called) is sometimes described as a means of encouraging ‘dialogue’ between the legislature and the judiciary. This dialogue emerges primarily through the legislative responses of Parliament (or provincial legislatures) following a declaration of unconstitutionality by the Supreme Court. With respect to fundamental rights, the Canadian Charter would thus create a ‘mitigated’ model of constitutional review.

This ‘dialogue’ is theoretically strengthened through the application of section 1 of the Canadian Charter, which shifts the onus of justifying a breach of fundamental rights to the state. Faced with a finding that a right has been violated, federal or provincial authorities must demonstrate that the infringement is justified in a ‘free and democratic society’.

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172 See Ford, supra note 49.
174 As we will see infra in part IV of this Report, some analysts have suggested the use of the ‘notwithstanding clause’ to counteract the effect of two Supreme Court decisions on unacceptable delays in the conduct of trials. These decisions have led to stays of proceedings against (and to the release of) people accused of violent crimes, generating anguish and confusion for some victims. See Guillaume Rousseau and Daniel Turp, ‘La disposition de dérogatoire serait légitime’ Le Devoir, 5 December 2016, online: http://www.ledevoir.com/politique/quebec/486330/crise-des-delaids-en-justice-criminelle-la-disposition-de-derogation-serait-legitime (accessed 15 July 2017) [Rousseau and Turp].
176 Tushnet, 2008, supra note 19 at 23.
177 For more details, see Part III of this report.
For some, this Canadian ‘attenuated dialogue’ may be compared to other ‘attenuated’ systems of constitutional review where courts have more limited power, such as that of New Zealand, where judges only have an interpretative mandate, or the United Kingdom, where courts may issue a non-binding declaration of incompatibility with the Human Rights Act. Mark Tushnet distinguished the Canadian system of dialogue from ‘robust’ systems of constitutional review that, according to him, result in final and binding judicial decisions, such as that of the United States.

In fact, a similarly ‘robust’ system also prevails in Canada with respect to the constitutional review of rights not covered by sections 2 and 7 to 15 of the Canadian Charter, which are not subject to the ‘notwithstanding clause’. Moreover, given that resorting to section 33 of the Charter is becoming less and less likely, it seems to us that constitutional review in Canada is also, essentially, ‘robust’.

II.4.7. The Supreme Court: A Centralizing Force in the Canadian Federation?
The role of the Supreme Court as the final constitutional arbiter in the plurinational Canadian context has been the subject of numerous analyses, some rather critical.

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. A former Premier of Quebec derisively said: ‘The Supreme Court is like the Tower of Pisa: it always leans to the same side.’ This assessment is 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.

That being said, 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.

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179 Contra Tushnet, 2008, supra note 19 at 33.

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

181 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.


183 See Deschamps, 2013, supra note 75, citing Peter W. Hogg.
III. Legal Sources of Individual (and Collective) Rights

This section of the report identifies the most significant sources of Canadian constitutional law which individuals may rely upon in their quest for 'constitutional justice'. We address formal and written sources (III.1) as well as important unwritten ones. Among written sources, we refer not only to the constitution (composed of 'constitutional laws'), but also to various quasi-constitutional or ordinary statutes that are intended to protect the rights of individuals. This will be followed by a brief overview of interpretative sources, including public international law, in particular the legal status of international treaties in domestic law (III.3). All of these sources may be invoked by individuals before any administrative or judicial court, including, of course, the Supreme Court of Canada.

This part of the report follows the analytical grid provided for the overall comparative research project. It thus occasionally reiterates issues already covered in Parts I and II (or that will be covered in Part IV). We strive to avoid repetitions, but some are necessary.184

III.1. Formal and Written Sources

As we highlighted in Part I of this report, sources of Canadian constitutional law are fragmented and complex. The ranking of some of these sources in the hierarchy of legal norms is sometimes nebulous: an observation that frequently astonishes comparativists, especially those from the continental civil law tradition. That being said, certain elements are indisputable.

The formal constitutional texts, including the Constitution Act, 1867 and the complementary Constitution Act, 1982, are located at the summit of the 'pyramid' of legal norms (III.1.1 and III.1.2). These laws are supplemented by more than thirty laws with constitutional status, which need not be examined in the present context.185 Just below these laws on the 'pyramid' are quasi-constitutional laws (III.1.3) and ordinary statutes (III.1.4).

III.1.1. The Constitution Act, 1867

As we saw in Part I, the Constitution Act, 1867 is the founding text of the Canadian federation and it lays the foundation of its political system. Its provisions set out rules relating to legislative, executive, and judicial institutions, federalism, the taxation system, a limited number of protections for Catholic and Protestant religious minorities, as well as protections for language rights. Provisions relating to federalism are the most frequently invoked in constitutional proceedings, including those initiated by individuals.

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184 This part should be read in conjunction with Parts I and II.1 of the Report.
185 These are in essence the texts set out in section 52(2)(b) of the Constitution Act, 1982 and its Schedule. However, this list is, unfortunately, not exhaustive. For example, the Supreme Court Act has now been 'constitutionalized' by a Supreme Court of Canada decision, which gives it supra-legislative status. See section III.2.3, infra.
However, as mentioned earlier, a significant portion of constitutional litigation does not arise from cases brought by individuals, but from applications for abstract reviews filed by federal and provincial executives before the provincial courts of appeal or the Supreme Court.\(^\text{186}\)

**III.1.2. The Constitution Act, 1982**

The *Constitution Act, 1982*, which complements—and does not replace—the *Constitution Act, 1867*, contains a *Charter of Rights*, incorporates Indigenous rights, constitutionalizes a commitment to ‘equalization’ (redistribution) between constitutive units of the federation, and sets out the rules pertaining to constitutional amendments. We will address only the two initial points here. It should be emphasized that no part of the written constitution takes precedence over another. For example, the recognition of certain rights in favour of Catholic and Protestant minorities (which do not extend to other religions) in the *Constitution Act, 1867*\(^\text{187}\) cannot be challenged under equality provision of the *Constitution Act, 1982*\(^\text{188}\).

**III.1.2.1 The Canadian Charter of Rights and Freedoms**

As the ultimate human rights instrument in Canada, the *Canadian Charter* is generally highly regarded by Canadians.\(^\text{189}\) This partly flows from the role it has played in the country’s history. Its incorporation into the Canadian constitution took place at a pivotal moment, when the link with the Westminster Parliament was finally severed in 1982. The *Charter* has changed the country’s constitutional landscape.\(^\text{190}\) According to the Right Honourable Justice McLachlin, former Chief Justice of the Supreme Court of Canada,\(^\text{191}\) the *Charter* is an ‘expression of who we are’ as a people, and reflects a unique concept of rights true to the Canadian values of tolerance, pluralism, and the public interest as a legitimate limit on rights.\(^\text{192}\)

The *Canadian Charter* protects fundamental freedoms such as the freedom of religion and of expression, procedural rights, a ‘right to life, liberty and the security of the person’, rights to equality, and language rights. With the exception of the latter, this constitutional instrument thus protects a wide range of traditional civil and political rights. The *Charter* does not constitutionalize third generation (economic and social) rights, although some may gradually be recognized through the application of other provisions such as the

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\(^{186}\) See part II.3.1.3 of this Report.

\(^{187}\) Section 93, *Constitution Act, 1867*.

\(^{188}\) Sections 2(b) and 15 of the *Constitution Act, 1982*.

\(^{189}\) This is the case even in Quebec, which refused to officially adhere to the *Constitution Act, 1982*. Indeed, even though it applies to the province, the National Assembly of Quebec unanimously refused to give its consent to its adoption for fear, in particular, of the impact that it would have on Quebec’s ability to protect its language and its culture.


\(^{191}\) At the time of writing, the Chief Justice, who has held this position since 2000, announced her imminent resignation at the end of 2017.

\(^{192}\) McLachlin, 2013, *supra* note 190 at 26 and 29.
right to life, liberty, and security of the person guaranteed by section 7. Section 26 provides that ‘[t]he guarantees in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada’. In other words, the Charter does not render other sources of rights obsolete: it adds to them, reinforces them, and establishes a minimum threshold of protection than can be enhanced, for example, by the various legislators (federal or provincial).

As mentioned earlier, the Charter introduces a flexible model of constitutional review, sometimes described as ‘dialogic’, because of sections 1 and 33. Indeed, section 1 of the Charter:

‘guarantees the rights and liberties set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society’.

In other words, the rights set out in the Charter are not absolute. However, the very same section allows a broad, generous, and teleological interpretation. When a violation of a right or a freedom guaranteed by the Canadian Charter is recognized by an administrative or judicial tribunal, the burden of proof is reversed. It is then incumbent upon state authorities (federal, provincial, or territorial) to demonstrate that this violation can be justified in a ‘free and democratic society’. The source of such a limitation can only be a formal legal rule: a law, a regulation, or another generally applicable legal rule.

In addition, section 33 of the Charter allows state authorities to undertake a form of ‘dialogue’ with the courts. Parliament or a provincial legislature may pass a law without risking its potential invalidation by court, by explicitly “immunising” it from the application of certain rights. This must be clearly stated in the wording of the law, and is subject to certain formal requirements. Fearing a ‘government of judges’, this ‘notwithstanding clause’ was originally intended to preserve ‘parliamentary sovereignty’.

Since 1982, few legislatures have made use of this override power. The federal Parliament itself has never used it. Its most famous use was the adoption, when the Charter came into force in 1982, of a statute stating that all Quebec laws were exempted from sections 2 and sections 7 to 15 of the Canadian Charter. This act was adopted after the patriation of the Constitution and the incorporation of the Canadian Charter into the constitution without Quebec’s consent. It was thus largely an act of protest, and an attempt to protect Quebec’s language laws. To the extent that the formal requirements

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193 See supra part II.4.6.
194 Section 1, Constitution Act, 1982.
196 For a more in-depth discussion, see part II.4, supra.
197 These conditions arise from the wording of section 33: (1) the derogation can only apply to sections 2 and 7 to 15 of the Canadian Charter, which means that any derogation of electoral rights, legal guarantees or language guarantees will be considered invalid; (2) it must be apparent from the explicit wording of the law that it applies notwithstanding the guaranteed rights; (3) finally, as the derogation is only valid for a period of five years – the maximum period between two elections – it will have to be re-adopted after this period in order to remain valid.
were met, the Supreme Court ruled that this use of the ‘notwithstanding clause’ was valid.198

Today, it is politically risky to employ the notwithstanding clause. For many citizens and analysts, it seems inconceivable that fundamental rights could be ‘suspended’ by legislation, especially if their content has been confirmed by a court. However, the legitimacy of the notwithstanding clause is occasionally defended, given the sometimes dramatic consequences of certain judicial decisions.199

In summary, fundamental rights of first and second generations, as well as language rights constitutionalized by the Canadian Charter, have constitutional status and are strongly supported by the population. A rich body of jurisprudence frames the way in which these rights — which are interpreted broadly and teleologically — can be limited in ‘a free and democratic society’.

### III.1.2.2 Indigenous Rights

Section 35 of the Constitution Act, 1982 provides that ‘[t]he existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed’. Another paragraph specifies that both historical and future treaties also benefit from constitutional protection. The purpose of this key section of the Canadian constitution is the ‘reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown’.200 This remarkably succinct section thus holds powerful potential for the recognition of the Indigenous reality in Canada and for the protection of rights, and confers an instrumental role on the courts of justice. Numerous disputes have been brought by individuals to protect Indigenous rights.201

Section 35 guarantees ‘Aboriginal rights’ as well as ‘treaty rights’. Aboriginal rights are collective, but can be exercised on an individual basis, e.g. hunting rights. The elements of ‘custom, practice or tradition forming an integral part of the distinctive culture’ of an Indigenous group prior to the assertion of sovereignty by the British Crown (or Canada) over a particular territory are considered to be ‘ancestral rights’ with constitutional status.202 ‘Aboriginal rights’ also include ‘Aboriginal title’ which is, for an Indigenous people or nation, a form of collective property rights over a specific territory. But to benefit from the protection of section 35, Aboriginal rights must not have been ‘extinguished’ prior to the entry into force of the Constitution Act, 1982.203

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198 See Ford, supra note 49.

199 This was notably the case in the judgment R v Jordan, 2016 SCC 27, [2016] 1 SCR 631 [Jordan], which will be addressed in part IV.1.3. The decision sets maximum time limits for holding criminal trials. This led to a number of “stay of proceedings”, including for certain for violent crimes. Pending a reform to reduce these delays, some lawyers argued in favour of evoking the ‘notwithstanding clause’, see Rousseau and Turp, supra note 174.

200 Brun, Tremblay and Brouillet, 2014, supra note 15 at 134; Van der Peet, supra note 57.

201 See supra part II.1.3 of this report.


203 Van der Peet, supra note 57. Prior to 1982, rights could be extinguished by treaty or by federal legislation.
Furthermore, to date, the Supreme Court has refrained from ruling on the existence of an inherent right of ‘self-governance’ for Indigenous peoples. Nevertheless, a growing number of multiparty agreements between the federal government, provincial and territorial governments, and Indigenous peoples recognize a substantial degree of political and administrative autonomy.

It should be noted that Indigenous peoples can, through ‘treaties’, ‘cede’ their inherent rights to the State (the Crown), in return for financial compensation and the recognition of various land use rights—even full-property rights. Rarely fair, numerous treaties were concluded during the colonial era and in the early years of the Confederation. After a long hiatus, various actors renewed this tradition by signing the James Bay Agreement in 1976. This agreement followed an injunction obtained by the associations of the Cree and Inuit peoples, whose lands were to be flooded by an enormous electric dam. In other words, legal proceedings initiated by a group of individuals succeeded in blocking an immense infrastructure project, and forced the federal and the Quebec provincial governments to negotiate with the Cree and Inuit peoples. This outcome was achieved before their rights were formally recognized in a constitutional text. Even in the absence of ‘fully fledged’ territorial rights, or until such rights are recognized, courts have held that state authorities have a constitutional obligation to negotiate with affected Indigenous groups.

Section 35 is incorporated in the Constitution Act, 1982, but is not part of the Canadian Charter (which includes sections 1 to 34 of the Constitution Act, 1982). Indigenous rights are therefore not subject to the reasonable limits clause of section 1 or to the notwithstanding clause of section 33. In the event that a (federal or provincial) law infringes upon a right protected under section 35, legislators may nevertheless attempt to justify this violation by invoking a specific and ‘compelling’ legislative objective and demonstrating that authorities have respected their ‘fiduciary’ obligations arising from the constitutional principle of ‘the honour of the Crown’. These limits require, at a

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This second possibility—the result of a colonial mindset—obviously raises serious issues of historical injustice that continue to have a contemporary impact.

204 In a case which held that the organization of gambling activities on an Indigenous ‘reserve’ (territory) does not constitute an Aboriginal right within the meaning of section 35 of the Constitution Act, 1982, the Court refused to rule more broadly on the existence of a ‘right to self-governance’: R v Pamajewon, [1996] 2 SCR 821.

205 Moreover, from an Indigenous perspective, this autonomy is not in doubt: it is Canadian law, imposed on Indigenous peoples, that prevaricate in this regard.

206 James Bay and Northern Quebec Native Claims Settlement Act, SC 1976-77, s 32.


208 Although Justice Malouf’s decision was reversed in Kanatewat et al v James Bay Development Corp et al, [1975] CA 166, the obligation to negotiate remains, see e.g. Haida Nation v British Columbia (Minister of Forests), 2004 SCC 73, [2004] 3 SCR 511.

minimum, that Indigenous peoples are consulted when state measures affect their interests. This obligation is subject to judicial review: failure to respect it may give rise to judicial proceedings, notably some introduced by individuals.

III.1.3. Quasi-Constitutional Sources

While they are formally ‘ordinary’ laws — which can therefore be amended or repealed through the regular legislative process — quasi-constitutional statutes take precedence over other laws in either provincial or federal legal orders. In other words, they are near the summit of the pyramid of legal norms in each of the 14 Canadian governments (just below the Constitution). Individuals may thus institute proceedings for the violation of a right protected under such a ‘quasi-constitutional’ source. This partial supra-legislative status can be explicitly attributed by the legislation in question through a clause stating that other statutes must be consistent with it, unless a legislature explicitly wishes to derogate from it, or by courts.

Hence, most Canadian federal and provincial human rights legislation takes precedence over other laws.210 Courts have also granted the same type of supra-legislative primacy to particularly important laws, such as the Official Languages Act.

III.1.3.1 Federal Human Rights Legislation

Two federal human rights laws supplement the Canadian Charter: the Canadian Bill of Rights and the Canadian Human Rights Act.

The first, adopted in 1960, is in some ways the ancestor of the Charter. However, it was not repealed when the Charter was adopted. The Bill of Rights states that all federal laws must be interpreted and applied in a manner consistent with the rights set out therein. The courts would thus have received a clear mandate from Parliament to protect civil liberties in the federal sphere, without going so far as to explicitly permit them to invalidate the laws that contravene them.211 Until 1970, courts were, however, reluctant to give real normative force to the Bill of Rights, presumably fearing they lacked the legitimacy to do so.212

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210 Section 2 of both the Canadian Bill of Rights and of the Canadian Human Rights Act, for example, grant this quasi-constitutional status. Section 52 of the Quebec Charter similarly supercedes other Quebec legislation, stating that ‘no provision of any Act, even subsequent to the Charter, may derogate from sections 1 to 38, except so far as provided by those sections, unless such Act expressly states that it applies despite the Charter’. Similarly, section 82(1) of the Official Languages Act states that the provisions of its Parts I to V prevail over ‘any inconsistency’ with ‘any other act of Parliament or regulation thereunder’. It is arguable that, given their rights protection objective, federal and provincial human rights legislation would benefit from judge-made quasi-constitutional status, even in the absence of such express wording See Winnipeg School Division No 1 v Craton, [1985] 2 SCR 150; Béliveau St-Jacques v Fédération des employés et employées de services publics inc, [1996] 2 SCR 345 at para 116.

211 WS Tarnopolsky, ‘The Supreme Court and Civil Liberties’ (1976) 14 Alta L Rev 58 at 82. In addition, section 2 of the Bill of Rights allows Parliament to exempt a law from its requirements, comparable to the provisions of section 33 of the Canadian Charter.

212 Brun, Tremblay and Brouillet, 2014, supra note 15. Yet, courts had been invalidating laws that contravened the division of legislative powers for over 100 years… The issues of democratic legitimacy were clearly not of the same type in these two cases.
This trend was partially reversed in 1970, with the invalidation of a section of the *Indian Act*, which a majority of the Supreme Court declared ‘inoperative’ on the ground that it was discriminatory and contravened the *Bill of Rights*. Nevertheless, the *Bill of Rights* never really took off as a robust rights protection instrument. The scope of the *Bill of Rights* coincides with that of the *Canadian Charter*, and the rights it protects are very similar. It is thus rarely invoked before Canadian courts today.

The second important human rights legislation is the *Canadian Human Rights Act*, largely intended to strengthen the right to equality in areas under federal legislative jurisdiction. It is binding on the federal administration, but also applies in a ‘horizontal’ manner to individuals and companies operating in federal policy domains. For instance, it prohibits employment discrimination in banks, which come under federal jurisdiction. The Canadian Human Rights Commission, established by this Act, investigates complaints and can issue orders to redress violations.

### III.1.3.2 Provincial Human Rights Legislation

All provinces have similar human rights acts. These laws apply only to individuals, associations, and companies in areas that are under provincial jurisdiction. As the federal Human Rights Act, and in contrast to the *Canadian Charter*, provincial human rights laws apply equally to activities in the public and private spheres. Again, in parallel with the federal Human Rights Act, provincial laws establish commissions charged with reviewing complaints, as well as specialized administrative tribunals charged with settling disputes in the first instance.

Given their ‘superior’ status of the *Canadian Charter* relative to the provincial (and federal) human rights acts, the latter are interpreted in light of the *Canadian Charter*. For example, the Supreme Court held that a provincial human rights law that excluded sexual orientation as a prohibited ground of discrimination violated section 15 of the *Canadian Charter*. Rather than invalidating the provincial anti-discrimination provision, the Court ‘read in’ sexual orientation by adding it to the act’s list of prohibited grounds of discrimination—which was likely deliberately omitted by the provincial legislature.

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214 The only noteworthy distinction: section 1(a) of the *Bill of Rights* guarantees every individual has the right to ‘enjoyment of property’ (the right to property has been deliberately excluded from the Charter).


216 See *infra* part II.2.2.3.


218 Quebec (*Human and Youth Rights Commission*) v Montreal (City); Quebec (*Human and Youth Rights Commission*) v Boisbriand (City), 2000 SCC 27 at para 42–43, [2000] 1 SCR 665; Vriend, supra note 132.

219 *Ibid*. Ironically, this ground for discrimination is not explicitly included in the *Canadian Charter* either. However, in the Charter, the list of prohibited grounds of discrimination starts with the expression ‘in
III.1.3.3 Quasi-Constitutional Statutes

In addition to laws protecting rights, certain legislative texts protect fundamental Canadian values — such as the protection of minorities — and take precedence over other Canadian laws.\textsuperscript{220} A subsequent law may only derogate from it if does so expressly.\textsuperscript{221} For instance, in \textit{Beaulac}, the Supreme Court ruled that the \textit{Official Languages Act} was quasi-constitutional in status:

The 1988 Official Languages Act is not an ordinary statute. It reflects both the Constitution of the country and the social and political compromise out of which it arose. To the extent that it is the exact reflection of the recognition of the official languages contained in subsections 16(1) and 16(3) of the Canadian Charter of Rights and Freedoms, it follows the rules of interpretation of that Charter as they have been defined by the Supreme Court of Canada. \textit{To the extent also that it is an extension of the rights and guarantees recognized in the Charter [...]}, it belongs to that privileged category of quasi-constitutional legislation which reflects ‘certain basic goals of our society’ and must be interpreted ‘as to advance the broad policy considerations underlying it.’\textsuperscript{222}

III.1.4. Legislative Sources

Although less powerful than constitutional, quasi-constitutional, or unwritten sources, ‘ordinary’ laws still have constitutional effects and can be an important source of rights that individuals draw upon in legal proceedings.

For example, at the federal level, the \textit{Canada Labour Code} guarantees certain freedoms, including membership in trade unions and employers’ associations, and the right to participate in their respective activities.\textsuperscript{223}

In a provincial context, Quebec’s \textit{Act Respecting Health Services and Social Services} guarantees a number of rights to users, including rights of access to healthcare, to voluntary termination of pregnancy services, and to medical records. The \textit{Act} includes a complaint mechanism for violations of the rights it protects and the review of certain administrative decisions taken pursuant to it.\textsuperscript{224}

Similarly, the \textit{Act Respecting Occupational Health and Safety (Quebec)} guarantees a number of labour-related rights, including a worker’s right ‘to working conditions that

\begin{itemize}
\item \textit{particular}, which allowed the Supreme Court to judicially \textit{include} sexual orientation to the list, and then to use it to declare unconstitutional the \textit{omission} of this same ground in the provincial law.
\end{itemize}


\textsuperscript{221} Ibid.

\textsuperscript{222} \textit{R v Beaulac}, [1999] 1 SCR 768 at 788 (our emphasis).


\textsuperscript{224} \textit{Act Respecting Health Services and Social Services}, QSRR c S-4.2.
have proper regard for his health, safety and physical well-being’ and ‘to refuse to perform particular work if he has reasonable grounds to believe that the performance of that work would expose him to danger.’ Inspectors are responsible for ensuring compliance with these working conditions, and their decisions may be reviewed by the Administrative Labour Tribunal.

Finally, the Civil Code of Québec states that ‘every person’ has ‘the right to life, the right to the inviolability and integrity of his person, and the right to the respect of his name, reputation and privacy,’ rights that are particularly relevant in the context of consent to treatment, institutional care, and the rights of children. In addition, as with rules applicable in criminal law (under federal jurisdiction), any evidence obtained in violation of rights in ways that would bring the administration of civil (and constitutional) justice into disrepute must be excluded ex officio.

### III.2. Unwritten Constitutional Sources

Canadian constitutional law rests on an extensive network of unwritten rules, derived from the common law and the British constitutional tradition, but also from typically Canadian ‘structural’ principles.

#### III.2.1. Underlying Constitutional Principles

The underlying principles of the Constitution — also known as “unwritten constitutional principles”— ‘have been interpreted by the Supreme Court as derived from its text, including the preamble of the Constitution Act, 1867, which states that the Canadian provinces ‘have expressed their desire to be federally united into one dominion ... with a constitution similar in principle to that of the United Kingdom.’ These unwritten constitutional principles thus transpose into Canadian law certain aspects of the constitutional structure of the United Kingdom.

In the Reference re Secession of Quebec, the Supreme Court also identified four underlying ‘structural’ principles of Canada’s constitutional architecture: constitutionalism and the rule of law, democracy, federalism, and the protection of minorities. Other principles, such as judicial independence and parliamentary sovereignty, have been identified in other contexts. With some exceptions, it appears that these principles may not be directly invoked to invalidate legislative provisions; they mostly have an interpretative value.

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225 Sections 9 and 12 of the Act Respecting Occupational Health and Safety, QSRR c S-2.1 (Quebec).
226 Section 3 CCQ.
227 Bellefeuille v Morisset, 2007 QCCA 535; Mascouche (City) v Houle, [1999] QCR 1894, 179 DLR (4th) 90 (QCCA).
228 Reference re Independence and Impartiality of Judges of the Provincial Court of PEI, [1997] 3 SCR 3 at para 95: ‘the preamble is not only a key to interpreting the express provisions of the Constitution Act, 1867, but also an invitation to use these structural principles to fill the gaps in the express terms of the constitutional text. It is the means that enables us to give the force of law to the logic that underlies the law’.
This said, the ‘protection of minorities’ principle has been invoked in a number of cases brought by individuals, seeking the protection of their language rights.230

III.2.2. Constitutional Conventions

Constitutional conventions, which are fundamental in Canadian law, arose as a result of political events, through long-term usage or — more rarely — through consensus.231 Three cumulative conditions have been identified by the Supreme Court for the recognition of a constitutional convention: relevant precedents must exist; the actors must believe themselves to be bound by the rule; and there must a (constitutional) reason for the rule to exist.232 In fact, virtually the entire parliamentary regime — including the very idea of a responsible government — is based on conventions. The written constitution is silent on the matter. The same applies to the rule that the Prime Minister is the leader of the party that has won the most seats in Parliament: it is grounded in a convention.

Courts may declare the existence of a convention, as well as any violation of it. They cannot, however, legally sanction the failure to comply with a convention. This is the main difference between these rules and other constitutional rules.233 Despite this legally tenuous status, conventions have acquired a very strong normative force: political actors are aware that the stability of the Canadian system depends on the respect of these conventions. They are thus an integral part of ‘constitutional law’ in the broader sense, and they could, in theory, be evoked by individuals in constitutional proceedings.

III.2.3. The Structure/Architecture of the Constitution

Recently, the Supreme Court used the ‘structure’ (sometimes described as the ‘architecture’) of the Constitution to prevent the federal Parliament from modifying the way in which the Senate functions. No clear constitutional rule precluded the federal Parliament’s initiatives in this case.234 The Court also used this concept of ‘structure’ to prevent a legislative amendment that would have altered the conditions of admissibility for Supreme Court judges, conditions which are defined in a federal statute.235 In other words, the Court seems to have constitutionalized parts of a federal statute that deals with a fundamental institution for the constitutional order: the Supreme Court. However, the place of this ‘structure’ in the hierarchy of legal norms is unclear. At a minimum, it forms an important interpretative background to Canadian constitutional law.236

230 See Lalonde, supra note 85 (for a public administration context).
231 Brun, Tremblay and Brouillet, 2014, supra note 15 at 44.
232 Re Patriation, supra note 28 at 888 and ss.
233 Brun, Tremblay and Brouillet, 2014, supra note 15 at 46; Re Patriation, supra note 28.
234 Reference re Senate Reform, 2014 SCC 32, [2014] 1 SCR 704
235 Re Supreme Court Act, supra note 40.
III.3. Sources with an Essentially Interpretative Status

Lastly, we briefly touch on sources whose status in Canadian law is sometimes ambiguous, but which may nevertheless play an important role in constitutional litigation.

III.3.1. International Law

Following the ‘dualist’ tradition characterizing the relationship between domestic law and international law, Canada does not give priority to public international law in its domestic system. In other words, international treaty law and domestic law are two distinct legal orders. The negotiation, conclusion, and ratification of international treaties are the exclusive responsibility of the federal executive branch. To be enforceable under domestic law, treaties must be explicitly adopted by a law of incorporation. This law will then be the formal source of rights for individuals, rather than the treaty itself.

In addition, a special feature of the Canadian federal system should be highlighted. While the federal executive may bind Canada on the international stage (including through the ratification of treaties), implementation of these treaties in domestic law operates in accordance with the division of legislative powers. Thus, if a treaty relates to a federal matter, Parliament must adopt an implementation statute (or otherwise ensure that its existing law is consistent with its international obligations). If the treaty concerns a provincial matter, its implementation is the responsibility of the provincial legislatures. If the matter relates both to provincial and federal areas of competence, each government must enact legislation to incorporate the international law into their ‘own’ domestic law.

This ‘division of labour’ between an international commitment, on the one hand, and its implementation in domestic law, on the other, requires intense ‘diplomacy’ between federal partners before Canada can accede to the treaty. These negotiations are often invisible to lawyers, but they are critical to the stability of both international relations and the federation. They will have an impact both on the provincial or federal ‘source of the right’ that individuals will be able to invoke, and on the courts that may hear potential disputes.


Nevertheless, with respect to fundamental rights, Canada favours an implementation process that is distinct from explicit legislative incorporation. After a secret review of the domestic legislation and any legislative amendments, the federal government may conclude that the rights and obligations set out in the international treaty in question are already adequately protected by national law, specifically by the Canadian Charter and other federal and provincial legislation relating to fundamental rights. The ratification of the treaty can then proceed without the adoption of specific implementation measures.\(^{241}\)

Canada is a party to most of the major international human rights treaties.\(^{242}\) Although they are binding on Canada at the international level, they do not constitute formal and binding sources of rights in Canadian law that can be directly invoked by individuals.\(^{243}\) The Supreme Court nevertheless refers to — and analyses — these treaties to frame its analyses and to assess the scope of the rights at stake. In some cases, the Court does so even before Canada has ratified a treaty. For instance, courts have referred to the *UN Declaration on the Rights of Indigenous Peoples* in disputes involving the recognition of ‘Aboriginal rights’, even though the Declaration is not binding in public international law and is even less so in domestic law.\(^{244}\)


The Supreme Court has adopted an interpretative method intended to partly mitigate the absence of legislative implementation of certain international human rights treaties and to avoid putting Canada in violation of its international obligations. It attempts to ensure consistency between these treaties and Canadian legislation through the interpretative principle of presumption of conformity with international law. Faced with an ambiguous domestic statute, the Court will opt for an interpretation that complies with international law.

However, even if in the end 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. Fortunately, this type of contradiction seems rare.

In short, individuals cannot directly invoke international treaties to which Canada is a signatory before domestic courts. However, courts will attempt, as far as possible, to interpret domestic law — and above all Canada’s fundamental rights — in a way that also complies with international law.

### III.3.2. Intergovernmental Agreements

The practice of Canadian federalism has led to a plethora of agreements between various government systems. These agreements, which bear a variety of different names (agreements, protocols, etc.) may be multilateral, bilateral, vertical (between the federal authority and the provinces), or horizontal (between the provinces). Some agreements may also include other parties, such as municipalities or Indigenous communities. Despite their large numbers, and the essential role they play in the functioning of the federal system, the legal status of these agreements in Canadian law is extremely vague and imprecise.

245 As soon as international treaties are ratified, Canada is bound at the international level and has a duty to execute them in good faith, in compliance with the customary principle of international law *pacta sunt servanda* (‘agreements must kept’), codified in section 26 of the *Vienna Convention on the Law of Treaties*, 23 May 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.


247 While Canada’s international liability is held at the international level.

These agreements constitute substantive sources of law, as they can assist in the interpretation and application of constitutional rules, without, however, inviting direct legal obligations. As for international treaties, in principle, the agreements must be ‘transposed’ by legislation into the parties’ respective legal systems. In the absence of such parliamentary action (which is surprisingly rare), third parties, including individuals, cannot directly demand implementation or compliance with them. The agreements nonetheless constitute an extremely important — and even decisive — background in numerous constitutional disputes.

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*Intergovernmental Agreements with Special Reference to Belgium and Canada*, doctoral thesis-in-law, University of Cambridge, Faculty of Law, 2003 [unpublished].


This fourth section looks at Canadian law, and more specifically the jurisprudence relating to ‘effective judicial protection’. It should be noted at the outset that this expression is not used in Canada. Access to courts and the effective enforcement of the law are robustly supported in Canadian constitutional case law, although the general right of individuals to access a court to assert their rights is not considered to be ‘absolute’.

Overall, and in accordance with international standards, the Canadian judicial system functions relatively well, although some failures, problematic delays, and exorbitant costs of proceedings can sometimes make access to justice illusory (IV.1). A series of measures—some of them relatively original—have been put in place to facilitate the efficiency of proceedings for individuals, in particular with the aim of protecting their individual and, in some cases, collective rights (IV.2). Finally, a number of other factors affect the effectiveness of the proceedings (IV.3).

IV.1. Access to Justice by Individuals in Constitutional Matters: Challenges and Obstacles

According to Supreme Court Justice Karakatsanis: ‘Guaranteeing access to justice is the greatest challenge to ensuring the rule of law in Canada today’. The following subsections identify certain issues related to access to justice, as well as a number of solutions elaborated by both courts and legislators.

IV.1.1. Access to Justice: Canada’s Place in the World

In 2016, Canada ranked 12th worldwide out of 113 states on the Rule of Law Index, which evaluates the implementation of the rule of law. It is ranked 13th in terms of enforcement. Judicial independence, assessed in particular by the absence of corruption in the judicial branch, is robust. However, Canada ranked 19th in the area of civil justice, which includes an analysis of accessibility, the cost of access to justice, and delays.

251 On the right of access to the courts, see BCGEU v British Columbia (Attorney General), [1988] 2 SCR 214 where the Supreme Court recognized the existence of a constitutional right guaranteeing access to the courts.

252 See British Columbia (Attorney General) v Christie, 2007 SCC 21 at para 10, [2007] 1 SCR 873 [Christie]: ‘The respondent’s claim is for effective access to the courts which, he states, necessitates legal services. This is asserted not on a case-by-case basis, but as a general right’. The Supreme Court concluded, unanimously, that the right to access the courts is not an absolute right: Ibid at para 17.


Overall, according to this index, the Canadian legal system appears to offer its citizens effective judicial protection, but it faces serious challenges in terms of costs of proceedings and procedural delays.

IV.1.2. Costs

The cost of legal services and access to courts constitutes the most significant barriers for individuals seeking effective protection of their constitutional rights. The large sums required to institute legal proceedings are regularly criticized by the judiciary, bar associations and civil society. These sums include lawyers’ fees, but also court fees: administrative fees related to accessing the judicial system. A study conducted on behalf of the Canadian Department of Justice estimated that the average cost of taking a constitutional Charter case to the Supreme Court was more than one million Canadian dollars, an amount that is clearly out of reach for the average citizen. Accordingly, Supreme Court cases often become ‘test cases’, which reach the summit of the hierarchy in a context of ‘strategic litigation’ to challenge existing law. Individuals serve as plaintiffs in this strategic approach, with their proceedings financed by activist organizations.

The high costs of judicial proceedings are not restricted to major constitutional cases, since basically every type of litigation may raise constitutional questions. For example, issues related to services for the disabled, discrimination, police violence, or threat of legal action can endanger individual rights. It is estimated that in 95% of cases, citizens attempt to resolve their legal problems ‘out of court’. Legal costs are one of the main reasons for the relatively limited number of legal issues reaching the courts. These costs also contribute to the rise of self-representing litigants, a phenomenon that negatively affects the quality of their rights protection.

The existence and impact of different procedural costs for accessing justice have been examined by the Supreme Court, which considers these taxes to be constitutional to the extent that they are not disproportionate to the litigant’s ability to pay. It thus endorsed a partially subjective criterion. Hence, in Trial Lawyers Association, the Supreme

257 Ibid; Christie, supra note 252 at para 10.
262 Ibid.
Court ruled unconstitutional a tax charged to a litigant—a middle-class mother—which increased depending on the number of days which a hearing before a Superior court took.\footnote{Ibid.}

In Canada, ‘legal costs’ awarded to a ‘winning party’ include costs related to court proceedings, but exclude lawyers’ fees (each party having to cover their own). The general rule provides that the ‘losing’ party in judicial proceedings must pay its own ‘legal costs’ as well as those of the successful party. However, judges have a degree of discretion regarding the award of costs.\footnote{This discretionary power is subject to review on appeal: \textit{British Columbia (Minister of Forests) v Okanagan Indian Band}, 2003 SCC 71 at para 43, [2003] 3 SCR 371 [\textit{Okanagan Indian Band}].} Courts may use this power to ‘encourage settlement, deter frivolous actions and defences, and to discourage unnecessary steps in the litigation’.\footnote{\textit{Ibid} at para 23.}

For instance, in \textit{Carter}, a case involving physician-assisted dying, the Supreme Court stated that courts may, in exceptional circumstances and in the public interest, exceed the maximum amounts normally imposed on an adverse party, in this case the federal government, in order to support a litigant.\footnote{\textit{Carter, supra} note 133 at paras 140, 144, where the Supreme Court insisted that ‘it is unusual for courts to award costs against an Attorney General who intervenes in constitutional litigation as of right. However, as the jurisprudence reveals, there is no rule against it.}} The Supreme Court also stressed that, in rare situations, it would be conceivable for the losing party in a major constitutional dispute to be relieved of the obligation to assume the opposing party’s costs.\footnote{\textit{Ibid}, at para 134, where the Supreme Court upheld the conclusion of the trial judge, according to whom, \textit{in this case}, ‘the unsuccessful parties have a superior capacity to bear the costs of the proceedings’.} The Court thus wished to facilitate effective rights protection, as well as the evolution of constitutional interpretation, despite the high costs associated with litigation.

Judges may exceptionally derogate from traditional rules governing legal costs and related expenses. In 2003, the Supreme Court recognized the legal possibility of suspending the obligation of Indigenous litigants to pay the preliminary costs of proceedings given their incapacity to cover them. Such a suspension will, however, only be granted in exceptional circumstances and only when it is in the public interest to do so.\footnote{\textit{Okanagan Indian Band, supra} note 266.} This principle was renewed in the 2011 \textit{Caron} case, in which the litigant sought to assert his minority language rights in Alberta. Lacking funds to do so, he was successful in obtaining ‘interim costs’, that is provisional funding for his legal proceeding.\footnote{See \textit{R v Caron}, 2011 SCC 5, [2011] 1 SCR 78 at para 55 [\textit{Caron 2011}]. It should be noted that Mr. Caron initially benefited from coverage under the \textit{Court Challenges Program}, described below. See Jennifer Koshan, ‘Interim Costs and Access to Justice at the Supreme Court of Canada’ (16 February 2011), online: ABLawg: The University of Calgary Faculty of Law Blog \url{https://ablawg.ca/2011/02/16/interim-costs-and-access-to-justice-at-the-supreme-court-of-canada/} (accessed on 13 July 2017).}
At the same time, access to legal aid services is often restricted by eligibility criteria based on the applicants’ financial capacity, but also by insufficient public funding.\textsuperscript{271} For example, the federal government has not increased funding to support legal aid services in immigration and refugee rights matters, despite a 145% increase in applications over the last three years.\textsuperscript{272} As a result, litigants may be denied legal aid simply because agencies cannot accept new cases.\textsuperscript{273} This obviously negatively impacts the access to and quality of rights protection for vulnerable individuals.

In summary, while Canadian courts want to limit the risks of the justice system being inundated with frivolous or unfounded claims,\textsuperscript{274} they also show concern for citizens’ access to justice. Their capacity to address financial obstacles, however, is limited.

**IV.1.3. Delays**

In principle, judicial proceedings must take place with a certain degree of expediency. In criminal matters, section 11(b) of the Canadian Charter provides that ‘[a]ny person charged with an offence has the right [...] to be tried within a reasonable time’. Similar principles tend to apply in civil and administrative cases, although not through an explicit constitutional provision. However, while the Quebec Code of Civil Procedure provides that ‘an application for judicial review must be made within a reasonable time after the act or fact giving rise to it’,\textsuperscript{275} nothing specifies when the actual hearing must take place.

The slowness of legal proceedings in Canada is a major problem.\textsuperscript{276} Excessive legal delays may be, but are not always, sanctioned.\textsuperscript{277} Recently, the former Supreme Court’s Chief Justice deplored how an an insufficient number of judges, particularly at the superior court level, was slowing down the entire judicial process.\textsuperscript{278}

Recent court decisions have sought to reduce delays, in particular for criminal trials. For example, in the landmark Jordan decision, the Supreme Court relied on section 11(b) of
the *Canadian Charter* to impose a maximum of 18 months for criminal trials before provincial courts, and 30 months before superior courts, starting from the date at which charges are filed against the accused.\(^{279}\) This decision, which has since been confirmed, has already led to stays of proceedings, including the cancellation of trials for violent crimes. However, it has also provoked some restructuring that has been welcomed by members of the judiciary.\(^{280}\)

**IV.1.4. ‘Leave’ to Appeal to the Supreme Court of Canada**

At *common law*, access to appellate courts is not automatic: it is an exceptional proceeding, which normally requires some legislative basis.\(^{281}\) In practice, access to appellate jurisdictions is available to individuals, although proceedings can clearly be extremely costly. In principle, an appeal can only be heard if a petitioner has exhausted all other remedies.\(^{282}\) However, with the exception of appeals to the Supreme Court, parties to a dispute do not have to obtain permission to appeal an administrative or a judicial decision.

By contrast, with a few exceptions, all appeals to the SCC require explicit permission.\(^{283}\) Only an average of eight to twelve per cent of ‘leaves-to-appeal’ are granted each year.\(^{284}\) 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.

**IV.2. Access to Justice by Individuals in Constitutional Matters: Some Solutions**

For individuals, access to constitutional justice is facilitated by a number of institutions, governmental programs, and legal mechanisms designed to reduce both social and institutional obstacles.

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\(^{279}\) See *Jordan*, supra note 199 at para 105.


\(^{282}\) *Ernst v Alberta Energy Regulator*, 2017 SCC 1 at 8, 14. On private methods for settling disputes, see 1(3) CCP.

\(^{283}\) In criminal matters, an appeal is brought as of right where 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: Supreme Court of Canada, ‘Role of the Court’ online: http://www.scc-csc.ca/court-cour/sys-fra.aspx (accessed on 13 July 2017).

IV.2.1. Legal Aid

‘Legal aid’ services are available across Canada. Legal aid organizations offer legal services to eligible individuals either free of charge or for a small fee, depending on the individual’s income, familial and professional circumstances, etc. In Quebec, the Act Respecting Legal Aid and the Provision of Certain Other Legal Services and the Regulation Respecting Legal Aid govern the operation of the program.285 The eligible annual income threshold for obtaining these services is, however, below the average income in Quebec.286

Legal aid can be used in the majority of criminal cases, in situations involving the right to liberty and security of the person (section 7 of the Canadian Charter), and in some administrative situations that raise constitutional matters. However, it is not available for proceedings such as those relative to freedom of expression (such as defamatory libel) or democratic rights (elections and consultations). The situation is similar in Ontario. However, Legal Aid Ontario also explicitly covers refugee claims and offers special assistance for Indigenous, Inuit, and Métis persons.287

IV.2.2. Human Rights Commissions

All of the federal and provincial human rights laws create commissions to investigate rights violations complaints, with a particular focus on discrimination.288 If a Human Rights Commission considers the allegation justified, the complainant can receive assistance to file a proceeding and appear before a Human Rights Tribunal (or other courts). In Quebec, the law favours amicable settlement and the Commission only proceeds with an investigation if parties cannot find a solution.289 If the Commission finds the complaint justified, and neither arbitration nor mediation has been successful, it can bring the case before the Human Rights Tribunal on behalf of the victim. If the Commission refuses to do so, the complainant may file an application to the tribunal himself or herself.290

IV.2.3. The Court Challenges Program

There are also government programs intended to support certain types of constitutional litigation.

The best known is the Court Challenges Program (CCP), introduced by the federal government in 1977.291 It gained considerable momentum after the adoption of the

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285 See generally the Quebec Act Respecting Legal Aid and the Regulation Respecting Legal Aid.
286 See section 20 Regulation Respecting Legal Aid.
287 See generally the Legal Aid Ontario website, online: http://www.legalaid.on.ca/en/getting/default.asp (accessed on 13 July 2017). The Ontario Legal Aid Services Act refers to these services in sections 14 and 66(6).
288 See e.g. Quebec Charter section 57 and ss. (on the Human and Youth Rights Commission).
289 Ibid; see also part II.2.2.3, supra.
290 Quebec Charter at sections 80 and 84.
**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**. In other words, the state (in this case, the federal government) finances individuals and groups that wish to challenge the constitutionality of federal and provincial laws 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.

In its current form, the system is overseen by a body independent from the government, and funding 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. In 2006–2007, 14 out of 45 requests received CCP funding. While this number may seem low, the cases selected by the CCP generally have a major influence on jurisprudence. However, the defence of Indigenous rights are not currently covered by this program, which consequently suffers from obvious deficiencies.

### IV.2.4. Public Interest Standing

Constitutional disputes provide 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, although it is codified in Quebec.

Sufficient interest to bring a matter to court is not presumed. This creates the first hurdle for litigants, who bear the burden of proving their interest, which must generally be direct and personal. The sufficient interest criterion is sometimes given a broader

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292 Ibid.


295 See infra section IV.2.6.


297 Ibid. See, for instance, the following decisions: Little Sisters, supra note 274, Beaulac, supra note 222, Mahe, supra note 53

298 See section 85 CCP: ‘Whoever brings an action at law [...] must have a sufficient interest therein’.

299 Ibid.

and more generous interpretation when an individual files a public law remedy (including judicial review) than in the context of private law proceedings. It is satisfied as soon as the litigant obtains an ‘improvement of their legal position’.

The issue of sufficient interest does not arise in the context of a proceeding for an exception of unconstitutionality. The party to a dispute is subject to the provisions being challenged, and thus clearly has a direct interest. Therefore, in criminal cases, 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’.

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.

However, in addition to the recognition of sufficient interest on one’s own behalf, Canadian law gives access to courts via the recognition of standing ‘in the public interest’. This mechanism allows an actor, 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. According to the Supreme Court, public interest standing prevents the State from shielding itself from diverse forms of challenge. Judicial recognition of public interest standing is discretionary.

Rules governing public interest standing have given rise to a significant body of jurisprudence that has evolved over time. A trilogy predating the adoption of the Canadian Charter recognised the need to ensure effective judicial review of state action through public interest remedies. The 2012 Downtown Eastside decision is the most recent iteration of the eligibility conditions. 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 (in this case, constitutional) issue, but it must be a reasonable means of doing so.

302 Downtown Eastside, supra note 274 at para 69.
303 See the Quebec codification in section 97 CCP. See also Menétrey, 2004, supra note 300.
304 See e.g. the facts in Downtown Eastside, ibid (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).
305 Ibid, at 252.
307 Downtown Eastside, supra note 274 at paras 39–52.
308 See Lemieux, 2016, ‘La nature et la portée du contrôle judiciaire’ supra note 89. This principle is codified in section 85 CCP, 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
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 and to obtain effective protection for the rights of others.

In *Downtown Eastside*, an advocacy group for prostitutes, together with a former sex worker who had since become a violence prevention coordinator in a Vancouver neighbourhood, sought to challenge the constitutionality of *Criminal Code* provisions that prohibited certain forms of prostitution. They argued that these prohibitions violated prostitutes’ rights to liberty and security of the person. 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 directly affected (by being charged, for example) raised an exception of unconstitutionality in her defence. The Court took into account 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 brought by individuals who are directly affected, but that have the same objective of protecting fundamental rights.

### IV.2.5. Class Actions

A class action or a ‘collective action’ is a procedural mechanism used primarily in the context of civil or contractual liability. It has also been used, more rarely, to assert constitutional rights. For example, an application for a class action was filed by prisoners—several of whom suffering from mental illness—who had been placed in solitary confinement for extended periods and deprived of adequate healthcare. Their application, based on sections 7, 9, and 12 of the *Canadian Charter*, was filed against the Attorney General of Canada. In another case, repression and detention of demonstrators by the Canadian police also led to applications for class actions, based on alleged infringements of the rights to freedom of expression and to peaceful assembly. A mass arrest is currently being challenged by demonstrators in Quebec City.

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309 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.


312 See the website of Trudel Johnston & Lespérance, which represents prisoners: http://tjl.quebec/recours-collectifs/isolement-des-detenus/ (accessed on 13 July 2017).


314 See Sophie Noël’s website, the lawyer representing the demonstrators: http://sophienoelavocate.com/ (accessed on 13 July 2017); see also Baptiste Ricard-Châtelin, ‘Manifestations étudiantes: une autre action
cases, one or more individuals will initiate proceedings that could potentially benefit a large number of people whose rights have been breached.

**IV.2.6. Intervenors**

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

In certain disputes pertaining to very sensitive social issues, particularly before the Supreme Court, the number of intervenors can be impressive: 26 in a recent case on physician-assisted dying and 8 in a case on parliamentary bilingualism obligations in the province of Alberta.

**IV.2.7. Laws against ‘Strategic Lawsuits Against Public Participation’ (SLAPP)**

The Canadian procedural system provides litigants who are targeted by SLAPP, or Strategic Lawsuits Against Public Participation, with defensive mechanisms. The aim of a SLAPP is to silence critics by suing them for defamation, libel, or other civil claims in order to intimidate them and exhaust their financial resources, thereby limiting the defedants’ access to justice. This is particularly common in the field of environmental protection. Various Canadian legislative assemblies have enacted statutes to counter this phenomenon, which is on the rise in the United States and, to a lesser degree, in

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315 ‘Intervenors’ are the Canadian law equivalent of ‘amicus curiae’ in American law, or before the ECHR, see Menetrey supra note 300 at 731. In Canada, the expression ‘amicus curiae’ is reserved for parties specifically mandated by the court to shed light on a legal issue: they do not themselves solicit their participation, ibid. The intervention by third parties before the Supreme Court is explicitly provided for in sections 53(7) of the Supreme Court Act and in sections 18 and 32 of the Rules of the Supreme Court of Canada, SORS/2002-156.

316 See generally the website of the Canadian Civil Liberties Association, online: https://ccla.org/?lang=fr (accessed on 13 July 2017).

317 Carter, supra note 133.

318 Caron, supra note 108.

319 See generally Roderick A MacDonald, Pierre Noreau and Daniel Jutras, Strategic Lawsuits Against Public Participation (SLAPP): Report by the Committee of the Minister of Justice, Quebec, Quebec Minister of Justice, 2007, 98.
Canada. They enable courts to reject SLAPP-type lawsuits. They are intended to prevent abusive lawsuits whose purpose and effect is to prevent individuals from asserting their rights before courts.

### IV.3. Other Aspects Affecting the Effectiveness of Judicial Remedies for Individuals in Constitutional Matters

In addition to the partial solutions that courts and legislators have put in place to address — often imperfectly — the challenges posed by costs and delays associated with constitutional litigation, two other aspects can affect the effectiveness of legal proceedings by individuals: the obligation to provide reasons, and the enforcement (execution) of court decisions.

#### IV.3.1. The Publication of Judicial Reasoning

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

In administrative law, the obligation to publish reasons is variable and is assessed contextually. The obligation may have a legislative source, or may derive from the nature of the body in question, the purpose of its creation, the existence of a right of appeal, etc. Detailed reasons are not required: it is sufficient that the criteria of justification, transparency, and intelligibility be met. Thus, in *Baker*, a case involving immigration and refugee law, a staff member’s note was found to be sufficient to satisfy this procedural requirement. The violation of an obligation to provide reasons may lead to the striking down of the administrative tribunal’s decision, so that the matter is

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321 Unfounded lawsuits were also sanctioned in the decisions *Constructions Infrabac v Drapeau*, 2010 QCCS 1734, 2332–4197 *Quebec Inc. v Galipeau*, 2010 QCCS 3427, 3834310 *Canada Inc. v Pétroli*, 2011 QCCS 4014, and *Savoie v Thériault-Martel*, 2013 QCCS 4280.

322 See *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 122, [2002] 1 SCR 3 *[Suresh]*: in this case, ‘the material on which the Minister is basing her decision must be provided to the individual, including memoranda’, and at para 126: ‘The Minister must provide written reasons for her decision. These reasons must articulate and rationally sustain a finding.’

323 See *Baker*, supra note 69 at 849. See also *Newfoundland and Labrador Nurses’ Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708 *[Newfoundland and Labrador Nurses]*.


325 See *Dunsmuir*, supra note 69 at para 47; *Newfoundland and Labrador Nurses*, supra note 323 at para 1.

326 *Baker*, supra note 69 at para 35–44.
either referred back for a new decision to be rendered, or at least for reasons for the previous one to be provided.\textsuperscript{327}

In summary, in Canadian law, the publication of reasons contributes to the effective protection of rights by facilitating understanding of the reasons underlying the courts’ decisions, and providing grounds for eventual future appeals.

\textbf{IV.3.2. 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.\textsuperscript{328}

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 \textit{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.\textsuperscript{329} 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 materialized: at the time of writing, the Tribunal has issued three non-compliance orders citing the federal government, and the government is challenging their validity in a judicial review proceeding.\textsuperscript{330}

A similar situation was experienced by Omar Khadr, a Canadian citizen and child soldier who was detained and tortured at Guantanamo for 10 years. The ‘Khadr Case’ came before the Supreme Court three times.\textsuperscript{331} 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

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\textsuperscript{327} See \textit{Suresh}, supra note 322.

\textsuperscript{328} Section 94 and ss of the \textit{Supreme Court Act} provides for means of enforcing the decision.


\textsuperscript{330} Case T-918-17, Federal Court, filed on 23 June 2017: \url{https://fnccaringsociety.com/tribunal-timeline-and-documents}. In other words, the Attorney General of Canada does not appear to contradict the substantive finding (the existence of discrimination) but is instead challenging the orders issued by the Human Rights Tribunal to remedy it.

authorities organise his repatriation.\textsuperscript{332} 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.’\textsuperscript{333} Kadhr was ultimately repatriated to Canada and recently obtained 10 million Canadian dollars in compensation from the federal government, which clearly wanted to avoid prolonging this legal saga.\textsuperscript{334}

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\textsuperscript{332} Ibid, at para 6.
\textsuperscript{333} Ibid at para 39.
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V. Conclusions

This report examined the range of legal proceedings raising constitutional issues that individuals may institute in Canada, as well as the remedies (reparations) they may obtain. It is part of a comparative study prepared by the Comparative Law Unit of the Library of the European Parliament. We have attempted to match the analytical framework developed for this project to facilitate comparisons.

Canada is a plurinational federation that recognizes legal pluralism. There is a wide range of instruments within the Canadian legal system 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 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 (headed by the Supreme Court). Thus, in Canada there are 14 parallel, and sometimes intersecting, legal orders. This multiplies both the sources of rights and the courts and tribunals to which individuals may apply to enforce them.

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 disputes. In this sense, all Canadian judges are also ‘constitutional judges’.

Individuals have access to various proceedings intended to protect their individual and collective rights before both administrative tribunals and judicial courts. But they may also raise constitutional issues, including, for example, the constitutionality of federal or provincial legislation adopted in violation of the division of powers that forms the backbone of the Canadian federation.

A number of findings emerge from this study on judicial proceedings available to individuals in Canada in constitutional matters, notably in relation to the ‘effective judicial protection of rights’:

- Civil and political rights, language rights for the French-speaking minorities (outside of Quebec) and English-speaking minority (in Quebec), as well as the rights of ‘Indigenous peoples’, enjoy a significant degree of judicial protection. In contrast, constitutional guarantees of economic and social rights are much more tenuous;

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335 This number obviously does not take into account the Indigenous legal orders, whose importance Canadian law is just beginning to measure.

336 To reiterate, this term – and the concept that it covers – is not used in Canadian law.
There are numerous types of legal proceedings available to individuals in their quest for ‘constitutional justice’. They can argue that the acts and decisions made by public authorities (other than laws or regulations) contravene constitutionalized rights, quasi-constitutional rights, and even sources of rights that are unwritten or legislated. Judges can then develop a ‘remedy’ that is appropriate to the circumstances. In many cases, they do so with a degree of creativity;

- Individuals can always challenge the constitutionality of a legal norm to which they object or under which they are being prosecuted (exception of unconstitutionality). They can also ask the superior courts, appellate courts, and ultimately the Supreme Court, to declare such a law to be invalid, in the context of a dispute in which they are not the defendant, or even in a relatively ‘abstract’ context in the absence of a specific lawsuit (declaratory judgment). Obviously, the less a person is directly affected by a constitutional issue, the higher the requirement that they demonstrate their interest or standing. But the judicial recognition of public interest standing is intended to prevent legal norms and state action from being immune from constitutional review;

- Diffuse (decentralized) constitutional review, the multiplicity of sources of rights, and a (relatively strong) respect for the rule of law should, in principle, facilitate access to constitutional justice. With a few exceptions, the obstacles are not really normative or procedural: they are essentially material. The costs of justice can be enormous, especially for a case of ‘going all the way to the Supreme Court’. In addition, the slow pace of judicial proceedings is regularly criticized;

- Legislators and tribunals have developed various solutions to counteract these barriers: legal aid, the modulation of legal costs, a ‘legal challenge’ program that provides public funding for major cases (‘test cases’) in constitutional matters, class actions, an expanded recognition of public interest standing for individuals and social groups (with the aim of protecting the rights of others), etc.

Canada ranks 12th worldwide (out of 113 states) on the Rule of Law Index. 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. The judicial structure, the instruments for the protection of rights, and the types of proceedings available do not appear to pose major problems. However, access to justice continues to pose real challenges caused by institutional hurdles and underfunding.

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337 The main exception is the obligation to obtain permission to apply to the Supreme Court. The Court grants this permission sparingly.


339 Note, however, that this report does not constitute a thorough impact analysis or in-depth assessment. Nor does it address the (in)adequacy of existing judicial proceedings with respect to the rights of Indigenous peoples.
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Study


This study is part of a wider project seeking to investigate, from a comparative law perspective, judicial proceedings available to individuals before the highest courts of different states, and before certain international courts. The aim of this study is to examine the various judicial proceedings available to individuals in Canadian law, and in particular before the Supreme Court of Canada.

To this end, the text is divided into five parts. The introduction provides an overview of Canadian constitutional history, which explains the coexistence of rights derived from several legal traditions. It then introduces the federal system, the origins of constitutional review, as well as the court structure (I). As Canada practises a ‘diffuse’ (or ‘decentralized’) constitutional review process, the second part deals with the different types of proceedings available to individuals in matters of constitutional justice before both administrative and judicial courts, while highlighting proceedings available before the Supreme Court of Canada (II). This is followed by an examination of the constitutional and legal sources of individual — and in some cases collective — rights (III), as well as the means developed by the judiciary, the legislative, and the executive branches to ensure the effective judicial protection of rights (IV). The conclusion assesses the effectiveness of proceedings available to individuals in matters of ‘constitutional justice’.

Essentially, while Canadian citizens benefit from a wide range of rights and proceedings, access to the country’s Supreme Court is restricted due to the limited number of cases the Court chooses to hear every year. More generally, access to justice continues to pose real challenges in Canada. This is not due to judicial failings or a lack of sources of rights per se, but rather to lengthy judicial delays and the often enormous costs of proceedings.