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Constitutional Law

TABLE OF CONTENTS

1. Introduction

Section 52(1) of the *Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11, states that the Constitution of Canada is the supreme law of Canada and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

A court may:

1. invalidate any law that conflicts with the Constitution, making the law unconstitutional; or
2. restrict the effect of such law.

2. Functions of the Constitution

The Constitution aspires to the following functions:

1. to serve as an expression of the fundamental values and principles of our society,
2. to allocate political power among governments and public institutions,
3. to impose limits on state action and to preserve the rule of law, and
4. to establish an orderly system for the amendment of the foregoing functions.

Since the Constitution is the supreme law of Canada, to which all laws must conform, there are two parts of the Constitution which determine the validity of laws passed by the federal and provincial governments as well as of municipal by-laws. These are: division of powers and the *Canadian Charter of Rights and Freedoms*. Both are discussed in the sections below.

a. Division of Power

Political power in Canada is divided into three branches. The legislative branch (i.e., federal Parliament or provincial legislatures) has the power to create the law. The executive branch (i.e., government departments or police forces) has the power to administer and enforce the law. The judicial branch (i.e., courts) has the power to interpret and apply the law.

In the mid-19th century, a constitutional convention based on parliamentary sovereignty and responsible government emerged, making the executive branch of government responsible to the legislature. This politically (but not legally) binding convention requires that the executive branch of government be drawn from, and have, the democratic support of the majority of the elected legislative assembly and that the power of the governor general be in accordance with the direction of the prime minister (who, in Canada, is the head of both the executive and legislative branches of government). This political rule effectively subordinates the governor general's role to the Canadian legislature, notwithstanding the broad powers vested in the governor general under the Constitution.

The law-making powers of the federal and provincial governments are allocated by the Constitution based on subject matter. Therefore, if one level of government passes a law that is in the jurisdiction of another level of government, then that law is invalid. For example, if a provincial government passes a criminal law, which is in the area of the federal government, that law is invalid.

b. The Judiciary

On its proclamation in 1867, the *British North America Act* patriated all colonial laws and established a Canadian judicial system, which continues to evolve today. Sections 96-101 of the Constitution provide for the creation of courts and the appointment of Superior Court judges.

3. Structure of the Constitution

The Constitution provides a framework for dealing with four Canadian social and political issues:

1. **federalism** and the coordination of multiple levels of government;
2. **parliamentary democracy** as a governing political ideology;
3. **individual and group rights** for Canadian citizens and residents; and
4. **rights as between peoples**, as in the case of Indigenous peoples.

The Constitution is a multi-source instrument, with some elements contained in legislation and others flowing from common law jurisprudence and political convention. Section 52(2) of the *Constitution Act, 1982* states:

> The Constitution of Canada includes
>
> (a) the *Canada Act 1982*, including this Act;
> (b) the Acts and orders referred to in the schedule [to the *Constitution Act, 1982*]; and
> (c) any amendment to any Act or order referred to in paragraph (a) or (b).

a. The Constitution Act, 1867

Originally named the *British North America Act*, this statute created the country of Canada as a federation of provinces, vesting executive power in the Queen through her agent, the governor general (s 10). The same statute created the Senate and the federal legislature, established the structure of the House of Commons (ss 17-52), and defined the executive and legislative powers of the Queen and her federal agent (ss 53-57). Provincial agents (called lieutenant governors) were accorded provincial executive powers under sections 58-68, and the provincial legislatures were created under sections 69-70 (Quebec: see ss 71-80). Section 90 defines the power of the Queen's provincial agents in terms nearly identical to those in the federal context.

b. Division of Power Under the Constitution Act, 1867

The nature and structure of Canadian federalism and the division of government powers have been, and remain, important matters of contention in Canadian constitutional law. The division is prescribed in sections 91 and 92 of the *Constitution Act, 1867*, and it can best be understood by noting the powers reserved to the federal government in section 91 and the powers reserved exclusively to the provincial legislatures in section 92.

c. Section 91

This section reserves to the federal government all matters not coming under exclusive provincial authority, including the regulation of trade and commerce, unemployment insurance, the public debt and property, taxation, federal borrowing, the postal service, census and statistics, the military, maritime issues, navigation and shipping, currency and coinage, banking, weights and measures, bankruptcy and insolvency, patents and copyrights, Aboriginal rights, immigration, criminal law and penitentiaries, marriage, and divorce. Also, and importantly, the federal government can make laws for the preservation of "peace, order, and good government" in all areas not specifically assigned to the provinces.

d. Section 92

The provinces have exclusive jurisdiction over provincial taxation, provincial borrowing, provincial offences, provincial land, reformatory prisons, hospitals (other than marine), municipal institutions, provincial licences, intra-provincial transportation and communication systems, provincial incorporation, civil and property rights in the province, the administration of provincial justice, and all matters of local or private nature in the province. Section 92(a) grants provinces the right to manage natural resources and non-renewable sources of energy, including exportation abroad (except in situations of conflict with federal authority). The province also controls taxes that are related to non-renewable natural resources and/or energy.

e. Other Important Sections

Section 94 allows the federal Parliament to pass laws, notwithstanding the division of powers, to be adopted and enacted by the provincial legislatures in order to guarantee uniformity of legislation across the country (Quebec is exempt from this section).

Sections 96-101 govern the appointment of the judiciary and the creation of courts. The governor general has the power to appoint all superior, district, and county court judges (s 96). The reasons for the grant of this power to the federal government are unclear, but some commentators have speculated that the federal body was believed to be more capable of attracting highly skilled candidates and of ensuring judicial independence from local government. Finally, section 101 grants power to the federal legislature for the creation of new courts.

f. The Constitution Act, 1982

This Act is a schedule to the *Canada Act 1982* (UK), 1982, c 11, and includes the *Canadian Charter of Rights and Freedoms* (ss 1-34), and other sections dealing with constitutional amendment and other federalism issues. (To continue our discussion of federalism, we will review sections 35-52 first, returning to the Charter below.)

Section 35 deals with Aboriginal rights. It affirms existing treaties and decisions and provides a definition of an Indigenous person that guarantees equal status to both genders.

g. Amendments: Sections 38-49

Section 38 sets out the general amending formula for constitutional legislation. Amendments must be proclaimed by the governor general with the support of the Senate, the House of Commons, and two thirds of the provincial legislatures representing over 50 percent of the Canadian population. However, where an amendment will alter provincial powers or status, an absolute majority (i.e., over 50 percent of the total number of

seats) is needed for each resolution in each province. Each province may opt out of amendments altering provincial powers or rights by passing a resolution of dissent.

Section 39 requires the federal government to allow each province at least one year to pass a resolution of assent or dissent after a resolution of assent is passed in the Senate, House of Commons, or a provincial legislature. The federal government may not take more than three years to make the amendment after the first such resolution is made. Section 40 provides for "reasonable compensation" for provinces opting out of amendments transferring power over education or cultural matters to the federal government.

Section 41 prescribes the need for unanimous consent by the provinces in special situations, for example, amendments to the office of the governor general or to official language laws. Section 42 describes a list of amendments which may only be made in accordance with section 38(1), thereby stating that the province cannot opt out of amendments such as proportionate representation of the provinces in the House of Commons or changes to provincial boundaries.

Section 43 deals with amendments affecting some, but not all provinces.

Sections 44-45 deal with amendments to the Constitution or the constitution of a province by Parliament and provincial legislatures.

Sections 46-48 describe the amendment procedure—initiation, resolutions, withdrawal of resolutions, and proclamation by the governor general.

Finally, **section 52** affirms the supremacy of the Constitution and defines its constituent elements.

h. The Charter of Rights and Freedoms

The *Canadian Charter of Rights and Freedoms* provides all people in Canada with a body of rights, subject to certain limitations. Some rights are limited by the wording of their constituent sections, and all rights are subject to section 1, which allows for "only such limits as can be demonstrably justified in a free and democratic society."

Section 2 provides for the fundamental freedoms of religion and conscience, expression, peaceful assembly, and association. Section 3 guarantees the right to vote, and section 6 describes mobility rights within the federation.

i. Security of the Person and the Procedural Rights Cluster

An important (and frequently argued) section is section 7, which guarantees the right to life, liberty, and security of the person, subject to the limitation that people may be deprived of these rights only in accordance with the principles of fundamental justice. Section 8 protects the right against unreasonable search and seizure, section 9 protects the right not to be arbitrarily detained or imprisoned, and sections 10 and 11 prescribe positive rights of the detainee on arrest and on being charged with an offence. Section 12 guarantees protection against cruel or unusual punishment, and sections 13 and 14 protect an accused's right against self-incrimination and the right to an interpreter. Needless to say, sections 7 through 14 are often relied on in criminal cases.

j. Equality and Language Rights

Section 15 provides for equality among people, specifically recognizing race, national/ethnic origin, colour, religion, gender, age, and mental/physical disability as factors on which discrimination will not be tolerated. Section 15(2) protects government programs designed to assist members of the above groups. Sections 16-23 protect language rights and minority language education rights. Section 25 provides for the non-abrogation (by the Charter) of Aboriginal rights, and section 28 guarantees all rights equally to both genders.

k. Application and Remedies

Section 32 provides for the Charter's application to all matters within the authority of the Parliament of Canada and provincial legislatures. The scope of the Charter's application has been a matter of debate and litigation. While it is clear that the Charter applies to the content and effects of government legislation and to the nature and effects of government action, it has sometimes been difficult to characterize an impugned action as falling within the definition of government action. Unregulated private activity within a province is not intended to be subject to the Charter, and links between such activity and government activity can create interpretive dilemmas. Section 33, often called "the notwithstanding clause," provides the provinces with the power to override sections 2 and 7-15 of the Charter for a period of five years. This power to override can be exercised every five years.

l. Breach of Charter Rights

In the event of a perceived breach of a Charter right, an aggrieved party may choose between two routes to a remedy.

For breaches involving unconstitutional action, such as illegal search and seizure, litigants will usually make a claim for a remedy that "the court considers appropriate and just under the circumstances" under section 24 of the Charter. The discretion of the court determines the broad range of remedies available under this section, which includes the exclusion of evidence obtained in a manner infringing a Charter right (s 24(2)).

For complaints alleging unconstitutional law (including common law), appropriate remedies including amendment and declarations of "no force and effect" may be sought under section 52(1).

4. Federalism and Constitutional Interpretation

a. Federalism

Federalist theory is based on equal but independent levels of government with coordinated and defined spheres of authority (i.e., division of powers). Canadian federalism, as established by sections 91 and 92 of the Constitution, do not adhere perfectly to this model—a residual power is reserved to the federal government through the operation of the division of powers. Sections 91 and 92 of the Constitution provide a vehicle by which

the *vires*, or jurisdictional appropriateness of legislation, may be examined. Constitutional challenges on federalism grounds seek to establish that a piece of legislation is wholly or partly *ultra vires* (i.e., outside the authority) of the jurisdiction creating it. Any law judicially determined to be *ultra vires* of the government passing it will be struck down.

b. Principles of Constitutional Interpretation

When a law is reviewed on constitutional grounds (except under the Charter), a presumption of constitutionality applies to the analysis so that when there are competing but plausible interpretations, the court must find in favour of the validity of the law. The goals of this presumption are supported by a reduced standard of proof for constitutional facts and by the principle of "reading down," which allows the court to interpret the impugned law narrowly in order to avoid finding that the law was outside the of the jurisdiction and therefore invalid.

In deciding on the jurisdictional appropriateness of a law, the court's analysis comes in two steps;

1. The court determines the nature of the matter being dealt with by the law, or the law's "pith and substance."
2. The court decides which level of government the matter has been assigned to by sections 91 and 92.

Making these determinations often involves the resolution of complicated questions of fact, because Canadian government has grown substantially since the drafting of sections 91 and 92, and many current government functions were not specifically foreseen in 1867. If the matter being legislated falls outside the authority allocated to the legislating government, the law is *ultra vires* and invalid. Occasionally, the pith and substance of a law may fall well within the legislating jurisdiction, but the law may also touch on a matter falling outside the jurisdiction. The courts have been willing to uphold laws of "hybrid" jurisdiction when the legislating government can show that the impugned portion of the legislation is necessarily incidental to the law as a whole and infringes as little as possible on the other jurisdiction.

The doctrine of severance, applied most often in Charter cases, may be used to invalidate an offending portion of the challenged legislation, leaving the rest intact. Although some overlap in authority between the two levels of government will often be tolerated, serious conflicts are resolved by reference to the doctrine of paramountcy, which accords precedence to the federal government (s 95).

c. Peace, Order, and Good Government

The federal government's power to make laws for the preservation of peace, order, and good government (POGG) (s 91) has been interpreted as the authority to pass legislation not specifically provided for by the terms of the section. This power, greater in scope than the residual powers granted in other federations (such as the US), has been carefully circumscribed by the courts. The federal government has been allowed to rely on it in three types of situations:

1. in case of a national emergency requiring a national response;
2. when the subject of the legislation is a distinct one of national concern, such that the provinces would be unable to coordinate a legislative solution; and
3. on rare occasions, where there is a gap in the constitutional division of powers, so that the matter in question cannot be shown to fall within either jurisdiction.

d. Trade and Commerce

Under section 91, the federal government is granted power over the regulation of trade and commerce. This power falls into clear conflict with provincial authority over property and civil rights in the province, and a large body of jurisprudence has developed in an effort to resolve the conflict. In general, the federal power has been carefully restricted to matters of international trade, interprovincial trade, and the general regulation of trade and commerce on a national scale (i.e., not the regulation of a specific trade or of trade in specific provinces or groups of provinces). All other matters of (intra-provincial) trade come under the authority of the provincial governments.

5. Challenges Under the Charter of Rights and Freedoms

Charter challenges involve a multi-step process. A person seeking to assert a Charter violation must first establish a Charter right, which often requires proving that he or she is a person under the law or belongs to a particular group in society. Next, the challenger must establish a violation of his or her rights falling within the scope of the Charter by the operation of legislation or by government action.

Once proof of a violation has been established, the burden falls to the government to prove that the right may be limited in accordance with the law.

Pursuant to section 1 of the Charter, rights and freedoms guaranteed by the Charter are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Limits may be expressed within the Charter's right-granting sections themselves, in which case the Crown will first seek to demonstrate that circumstances exist to support the limitation of the right in the instant case. If the Crown fails in this, or if the right in question is not subject to an internal limitation, the Crown must try to prove that the limitation sought is "demonstrably justified in a free and democratic society," according to the wording of section 1.

There is no presumption of constitutionality with respect to the review of alleged violations of the Charter, and section 1 places a high burden on the Crown to justify the limitation of constitutionally guaranteed rights. The test that the court must apply in deciding whether the section 1 conditions have been met has developed through the case law, notably in the *Oakes* decision (*R v Oakes*, [1986] 1 SCR 103). That decision required that the Crown prove:

1. a "pressing and substantial objective,"
2. a rational connection between the objective and the means by which it is sought to be achieved,

3. minimal impairment of the right(s) sought to be limited, and
4. a proportionality between the effects of the limitation on rights and the importance of the government objective.

6. Interpretation of Charter Rights: Two Examples

a. Section 15: Equality Rights

Despite the general wording of this section, Canadian courts have taken a relatively narrow approach to the interpretation of equality rights, allowing only those claims based on specifically enumerated grounds or on analogous grounds.

Numerous legal tests for establishing discrimination have been developed. The "similarly situated" test introduced comparisons of personal circumstances for the identification of discrimination.

Courts applying the formal equality test have defined discrimination by reference to equality (and inequality) of opportunity.

The substantive equality test has been used to prescribe a finding of discrimination wherever there is an inequality of outcome. Approaches to equality issues will no doubt continue to evolve in tandem with changing social values.

b. Section 7: Life, Liberty, and Security of the Person

Despite the structure of this section, courts have interpreted the right to "life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice" as one right. To prove a violation, the claimant must show:

1. that he or she has been deprived of his or her right(s), and
2. that the deprivation has occurred in contravention of the principles of fundamental justice.

The second clause of this right acts as an internal limitation, such that the right to life, liberty and security of the person is limited not only by section 1, but also by the "principles of fundamental justice." It should also be noted that section 7 rights are guaranteed only to human beings—the courts have ruled that corporations are not entitled to life, liberty, and security of the person.

As might be expected, section 7 is often relied on in criminal matters when persons facing the loss of their liberty seek to ensure that they are accorded at least the protection of procedural fairness. An important debate has arisen about whether "fundamental justice" includes procedural or substantive fairness, or both (with substantive fairness being understood as requiring a more complex measure of justice).