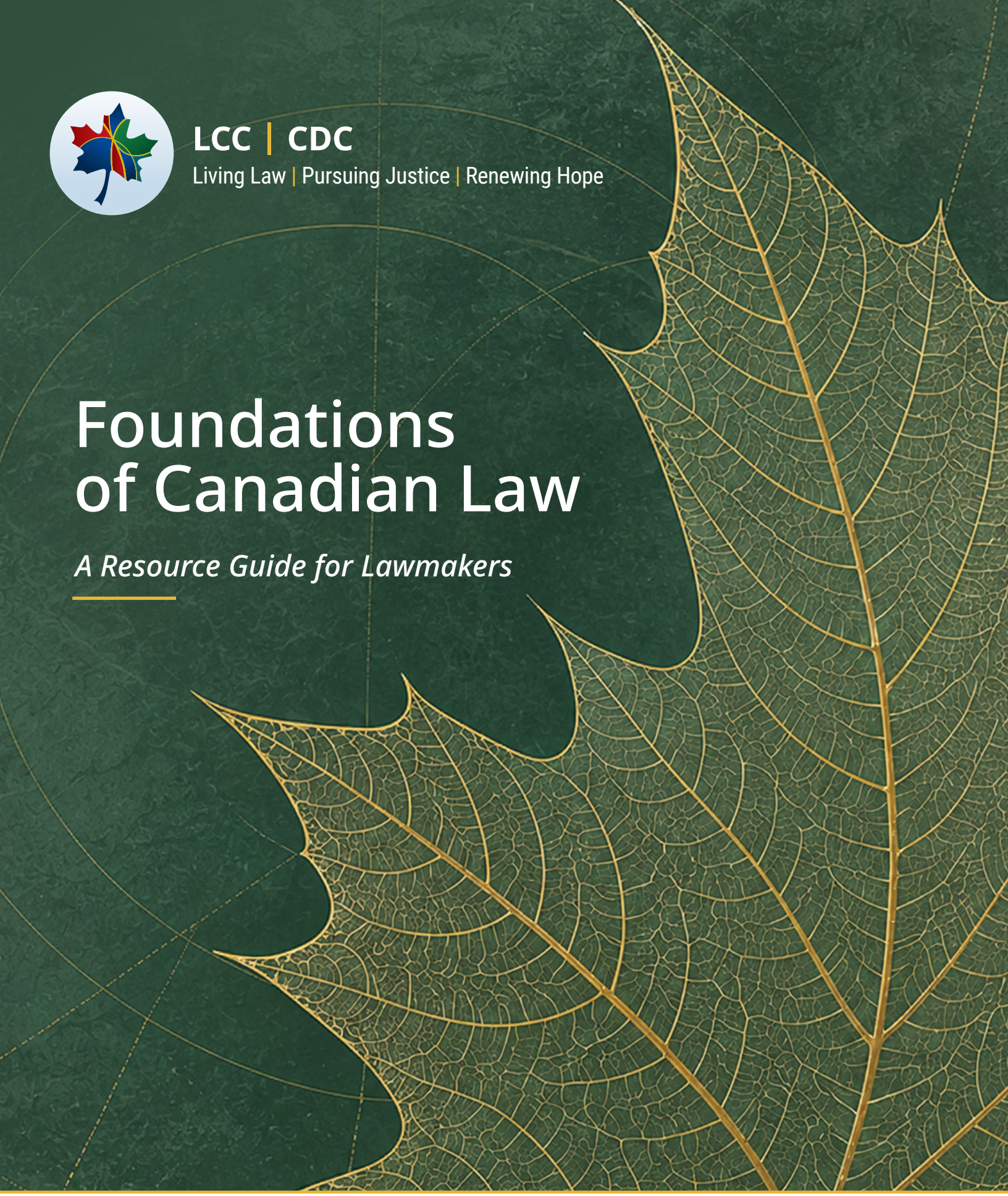


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Foundations of Canadian Law

A Resource Guide for Lawmakers

Law Commission of Canada
Commission du droit du Canada

Canada

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Foundations of Canadian Law

A Resource Guide for Lawmakers

Prepared by the Law Commission of Canada in 2026

Foundations of Canadian Law forms part of the LCC's Rule of Law Commitment.

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Vision

The Law Commission of Canada is an independent agency providing innovative leadership and guidance for the responsive evolution of law in the lives of Canadians.

Mission

The Law Commission connects law and justice actors with expert research to identify pathways and possibilities for Canada's future.

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I Introduction

The Law Commission of Canada is honoured to present the inaugural edition of *Foundations of Canadian Law*, a legal resource for lawmakers. This guide offers an overview of the foundational legal structures, principles and vocabulary that lawmakers in Canada encounter as they carry out their duties and responsibilities, through the many ways in which law emerges, exists and evolves over time.

Foundations of Canadian Law represents a pillar of the LCC's Rule of Law Commitment, launched to foster knowledge, exploration, reflection, and participation in the promotion of the rule of law in Canada. Successive generations of Canadians have upheld and defended, and worked to ensure the continued vitality of the rule of law within our social fabric.

A central tenet of this foundational principle is that individuals and government authorities are both bound by and entitled to the benefit of the law. From this principle flow others, including equality before the law, the prohibition of arbitrary exercises of power, access to independent and impartial justice, legal stability and consistency, transparency, and democratic accountability, and the protection of fundamental rights. Sustaining the rule of law as both a foundation and a guiding framework for our lives continues to be a shared undertaking, one that calls for a renewed collective commitment expressed through our daily interactions.

Legislators play a particularly important role in upholding the rule of law. Remaining vigilant by taking threats to the rule of law seriously requires lawmakers to carry out their responsibilities with a robust understanding of the Canadian legal system. This includes a clear grasp of the constitutional rules and principles that define and limit their authority, as well as the institutional roles and relationships that structure governance in Canada.

Such understanding enables legislators to scrutinize legislation with care, to meaningfully hold the executive to account, and to ensure that enacted laws are consistent with constitutional norms and democratic values. It also equips them to recognize and respond to emerging challenges to the rule of law, whether subtle or overt. In this way, informed and attentive lawmaking serves not only to maintain legal order, but also to reinforce public confidence in the fairness, integrity, and legitimacy of Canada's political institutions.

This guide opens with an introduction to Canada's legal traditions and an overview of constitutional law, which governs the organization of the state and its relationships with individuals and its constituent parts. It then leads readers through basic structures of criminal and private law. This is followed by reference to international law and its role in regulating interactions among states and shaping Canada's engagement with the broader global legal order.

Foundations of Canadian Law seeks to provide an accessible and useful introductory guide to Canada's foundational legal structures and principles. Complex and intricate concepts at the heart of every issue are thus necessarily presented at a high level of generality and simplicity. Readers interested in exploring its concepts more deeply and broadly will find at the conclusion of each section several *Selected Sources and Resources*. Items on these curated lists are handpicked to offer some of the country's principal sources from leading Canadian scholars and jurists.

II Coexisting Legal Traditions in Canada

Legal traditions refer to sets of principles, practices, and institutions that shape how law is understood, created and sustained over time. All legal traditions are characterized by their unique history, their distinctive mechanisms for change and development, their principal sources and actors, and their particular mix of formal and informal, written and unwritten rules. Legal traditions may operate simultaneously and may interact with each other in various ways.

The coexistence in Canada of **common law**, **civil law**, and **Indigenous legal traditions** means that the Canadian legal system can be described as **multi-juridical** in nature.

i. Legal traditions in a multi-juridical Canada

Indigenous legal orders have existed in what is now Canada for as long as Indigenous peoples have lived on this land. Suppressed or ignored for long periods of Canada's history, these traditions and systems have continued to evolve. Processes of revitalization and renewed recognition are ongoing.

Canada's principal Western legal traditions of common law and civil law trace their ancestry to the legal orders of England and France. Canada received the laws of these two colonial powers in distinct ways. At the time of its initial colonization of what is now Canadian territory, France had no unified legal tradition; eventually, the *Coutume de Paris* was declared applicable in New France, supplemented by Roman law, Canon law, and various Royal edicts. English common law principles governing the colonization of settled and conquered territories informed how laws were implemented in British colonies. In addition, colonies could incorporate laws through voluntary adoption of foreign law. The British Parliament could also enact laws directly for its colonies through Imperial statutes.

When Britain created a colony through settlement, the rule was that the settlers brought all of English law with them, including statutes and common law. English statutes passed before the official date of settlement applied fully in the colony, while laws passed after that date did not automatically apply. However, colonies continued to receive new developments in English common law as English courts created them. Most Canadian provinces were treated as settled colonies, except Quebec and Ontario.

When Britain gained a colony through conquest, the rule was different. The existing laws of the "conquered" people stayed in place, except for public law, which was replaced by English law. The British monarch could make laws directly for the colony until it was given its own legislature.

For example, after Britain took control of New France, the King issued the *Royal Proclamation of 1763*, which created the government of "Quebec" and imposed English law on the colony, replacing French civil law. A later statute, the *Quebec Act, 1774*, restored civil law throughout Quebec for matters dealing with property and civil rights, while English common law remained in place for criminal matters.

Even later, the *Constitutional Act, 1791* divided Quebec into Upper Canada (now Ontario) and Lower Canada (now Quebec). The Act provided that the previous laws of Quebec

would continue until colonial legislatures changed them. This meant that civil law originally applied to property and civil rights in Upper Canada as well. This did not last long. The first law passed by Upper Canada replaced civil law and adopted the English common law favoured by United Empire Loyalists fleeing the newly established United States of America.

Canada, in its current form, was founded in 1867 through the *Constitution Act, 1867* (formerly the *British North America Act*) as a confederation of Quebec, Ontario, Nova Scotia, and New Brunswick. The other provinces and territories joined Canada gradually over the course of the 19th and 20th centuries.

ii. Features of Canada's Legal Traditions

As noted above, any legal tradition is marked by its history, mechanisms for change, sources and actors, and particular mix of rules or guiding principles. Substantive notions or resolution of disputes might be similar across traditions in some instances, but the approach, reference points and modes of decision-making associated with each tradition are importantly distinctive.

The common law tradition developed in response to specific kinds of complaints or disagreements. The resolution of what became known as **cases** was organized historically in a way that resulted in a full map of the scope and substance of common law. Through this centuries-long process, decision-making authority on the part of judges and exercised in the form of judgments became a central feature of English common law. While common law judges are empowered and expected to make or develop law as they respond to disputes, stability and continuity are ensured through the doctrine of **precedent**. That is, judges are required to follow rules established in previous cases with similar factual scenarios; when the facts of a new case can be distinguished, judges may revise or replace an existing rule. Legislation can modify or override common law rules.

The civil law tradition, originating in Roman law, developed over time through scholarly discourse and exchange, articulation of general principles, and deductive interpretation and application of those principles. The French *Code Napoléon* of 1804 provides a leading example of **codification** as a characteristic process used by civil law jurisdictions to offer comprehensive guidance and governance. "**Doctrine**" – the term used to refer to legal academic writing and interpretive commentary – provides highly persuasive authority for the process of giving meaning to the provisions of a civil law code. The task of applying those provisions to situations of dispute and, in some cases, filling in perceived gaps in the formal law, is entrusted to judicial decision-makers. In Canada, the *Civil Code of Lower Canada* was adopted in 1866, replaced by the *Civil Code of Québec* in 1994.

Indigenous legal orders, sustained by diverse Indigenous ethno-linguistic communities, have developed through complex political, social, and spiritual systems. As part of the process of colonization, these legal orders were neither recognized nor supported, and indeed were imagined to be displaced or disappeared. Today, Indigenous law revitalization efforts continue to evolve and mechanisms of dispute resolution and decision-making are adapting to contemporary realities and needs. Canada has begun the work of responding to and recognizing Indigenous legal orders, and there is growing interest, for example, in restorative and transformative justice approaches. Given the diversity of Indigenous communities in Canada – from the Atlantic to the Pacific to the Arctic – a comprehensive account of Indigenous legal traditions does not exist.

Reference to these traditions in this guide is intended to encourage readers to recognize and engage with ongoing revitalization projects and possibilities for constructive interactions.

In Canada's multi-juridical context, the exercise of comparing legal traditions can be fruitful and generative, but must nonetheless be conducted cautiously and in a manner attendant to the methodological particularities and distinct structural features of each system. For instance, literal translations of legal terms, or simple transplantations of concepts across legal traditions, can sometimes yield inaccurate or unhelpful results. In other cases, while resources such as comparative charts or graphics may serve as a productive starting point for understanding differences and similarities between legal systems, it is crucial that such comparisons remain context-specific and conscious of how law is developed and delivered in each system. Whether law is elaborated by judges, scholars, or elders, and which concepts, methods and institutions shape its incremental development in each system, are considerations that are just as important as substantive rules and principles when undertaking an exercise in comparative law.

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III Constitutional Law: A Blueprint for the State's Legal Relationships

The Constitution is the supreme law of Canada. It defines the structure, powers, and obligations of state institutions. In many ways, the Constitution can be understood as establishing the rules and principles that govern the state's relationships. These include **intragovernmental relationships** among the branches of government; **intergovernmental relationships** among different orders of government; and **individual-state relationships** governing how public power is exercised in relation to those subject to it.

The Canadian Constitution consists of both **written** and **unwritten** sources.

Written sources of the Canadian Constitution include:

- *Constitution Act, 1867* – Created Canada as a federal dominion of the United Kingdom, defining its constitutional architecture, including the powers of each branch of government and the division of legislative powers between the federal Parliament and provincial legislatures.
- *Statute of Westminster, 1931* – Enacted by the UK Parliament, the Statute recognized the equality of the United Kingdom and its dominions, including Canada. It provided that no Act of the UK Parliament would extend to Canada without consent. It also empowered the federal Canadian Parliament and provincial legislatures to repeal or amend Imperial statutes that remained in force (as noted in s. 129 of the *Constitution Act, 1867*).
- *Constitution Act, 1982* – Enacted the *Canadian Charter of Rights and Freedoms*, protections for Aboriginal rights, and a new constitutional amendment procedure.

Unwritten sources of the Canadian Constitution include:

- Principles: Unwritten constitutional principles, such as judicial independence, constitutionalism and the rule of law, federalism, democracy, and respect for minorities, assist in interpreting constitutional text and can independently give rise to substantive legal obligations.
- Conventions: Unwritten rules that, while not legally enforceable, dictate the manner power must be exercised by government actors. For example, constitutional convention dictates that the Governor General shall never refuse royal assent, despite the *Constitution Act, 1867* expressly conferring the power to do so. Constitutional conventions play a central role in converting a formally monarchical system into a system of responsible (democratic) government. Courts may recognize the existence of such conventions, but they do not go so far as to enforce them.

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i. Intragovernmental Relations: The Three Branches of Government

Three Branches of Government

Legislative Branch

Primary responsibility for the passage of laws lies with the legislative branch.

The legislative branch of the federal government consists of the House of Commons, the Senate, and the Crown acting together (see s. 17 of the *Constitution Act, 1867*). The legislative role of the Crown is to assent to, refuse to assent to, or reserve parliamentary bills (*Constitution Act, 1867*, ss. 17, 55 and 91). Constitutional convention requires the Monarch or their representative to grant royal assent to any bill passed by the House of Commons and Senate.

Unlike some parliamentary democracies, such as the United Kingdom and New Zealand, the Canadian Constitution does not embrace the principle of parliamentary supremacy in its traditional form. The traditional principle of parliamentary supremacy holds that the legislative branch has the exclusive and final authority to create, amend, or repeal any law without substantive limits imposed by a constitution. Under such a system, the judiciary is not empowered to invalidate legislation for being unconstitutional.

By contrast, in Canada, the Constitution is supreme. Courts are empowered to invalidate legislation when it fails to comply with constitutional requirements, such as those imposed by federalism and the *Charter*. Legislatures in Canada are only permitted to enact laws that respect the limits of their constitutional authority. Canadians still speak of parliamentary sovereignty in referring to the vital role played by Parliament and the legislatures, but judicial review is also a vital part of our constitutional architecture.

Executive Branch

The executive branch is responsible for overseeing the implementation of laws passed by the legislative branch. According to constitutional convention, the executive is accountable to the legislature for its decisions and actions.

The executive branch is composed of the Crown (represented by the Governor General), the Prime Minister, and Cabinet. The executive branch is also supported by an impartial public service that is responsible for administering and implementing policy.

The executive also has a residual authority called the Crown prerogative. These powers do not come from statute. They are the remainder of powers that by custom were held by the Monarch and which have not been assumed by the legislature. Over time, the common law has identified the existence of various prerogative powers and has defined their scope. The legislature can displace a Crown prerogative power by passing a statute.

- The *Letters Patent, 1947* empowers the Governor General (as representative of the Monarch) to exercise prerogative powers. Constitutional conventions require that these powers be executed through the advice of the Prime Minister or Cabinet.

Common examples of Crown prerogative powers include the conduct of foreign affairs and the ratification of treaties. These powers of the executive branch are exercised without the involvement of the legislature.

Judicial Branch

The primary responsibility for interpreting and applying the law lies with the judicial branch.

The Canadian judiciary is understood to include three types of decision-making bodies: federal and provincial courts of general subject-matter jurisdiction, administrative tribunals, and military courts. The structure and features of courts and tribunals in Canada are elaborated below.

Organizing Principles

Responsible government and the **separation of powers** are unwritten constitutional principles that assist in structuring the relationship among the three branches of government.

Responsible Government

Responsible government is an unwritten constitutional principle that requires that the executive remain accountable to, and maintain the confidence of, the legislature rather than the Monarch. This ensures that representatives of the people have ultimate control over whether a government retains power, thus preserving the democratic character of the Canadian state.

The principle of responsible government gives rise to various constitutional conventions. Many of these conventions relate to ministerial responsibility. Ministers are individually responsible to Parliament for their decisions and the performance of their departments, and collectively responsible for government policy and action. This designation of responsibility assists in facilitating legislative oversight of the executive when ministers are questioned on their department's work or the government's overall performance during question period.

- Collective responsibility gives rise to the conventions of **Cabinet secrecy** and **Cabinet solidarity**. Cabinet secrecy requires that ministers not reveal the content of Cabinet deliberations. This confidentiality ensures that, when debating policy issues during Cabinet meetings, ministers can speak freely without fear of public scrutiny and self-censorship. This confidentiality also enables Cabinet solidarity, which requires that ministers publicly support government decisions and vote with the government in the legislature.

Responsible government also gives rise to the convention that the Monarch, or their representative Governor General, must exercise executive authority, including the Crown prerogative, solely through the advice of responsible ministers.

Finally, responsible government has led to the convention that a government only retains power as long as it maintains the confidence of a majority of members of the House of Commons. Votes on budgets or the Speech from the Throne are traditionally treated as votes of confidence. Governments can also designate other votes as ones of confidence. When the government loses confidence, the Cabinet must resign or the Prime Minister must request that the Governor General call an election.

Separation of Powers

The separation of powers is a constitutional principle that recognizes that the three branches of government have different and distinct functions, institutional capacities, and areas of expertise. Each must refrain from undue interference with the others to ensure that all three serve as checks and balances within Canada's constitutional democracy.

Owing to the influence of the United Kingdom's constitutional structure, Canada's approach to the separation of powers has been flexible, accepting that the branches of government inevitably overlap. For example, members of the executive (Cabinet) sit in the legislature and often exercise significant control over its functioning. Drawing from the common law tradition, the judiciary also plays an important but circumscribed role in making law through the development of rules and principles in its decisions.

As a result, the separation of powers in Canada has often focused less on strict separation and more on preventing undue interference among the branches of government. Various doctrines, referred to below, help preserve this balance.

Parliamentary Privilege

To preserve a sphere of autonomy for the legislative branch, certain decisions or actions of legislators cannot be reviewed by courts. This immunity is called parliamentary privilege. It is a constitutional requirement that arises from the preamble of the *Constitution Act, 1867* and s. 18 of the *Constitution Act, 1867*.

Recognized categories of parliamentary privilege include:

- Immunity of members of the legislative assembly for their speech insofar as it relates to their mandate
- Control over debates or proceedings
- The right to exclude non-members from proceedings
- The discipline of members

It is worth noting that employment-related decisions made by Parliament are not all encompassed by parliamentary privilege.

Judicial Independence

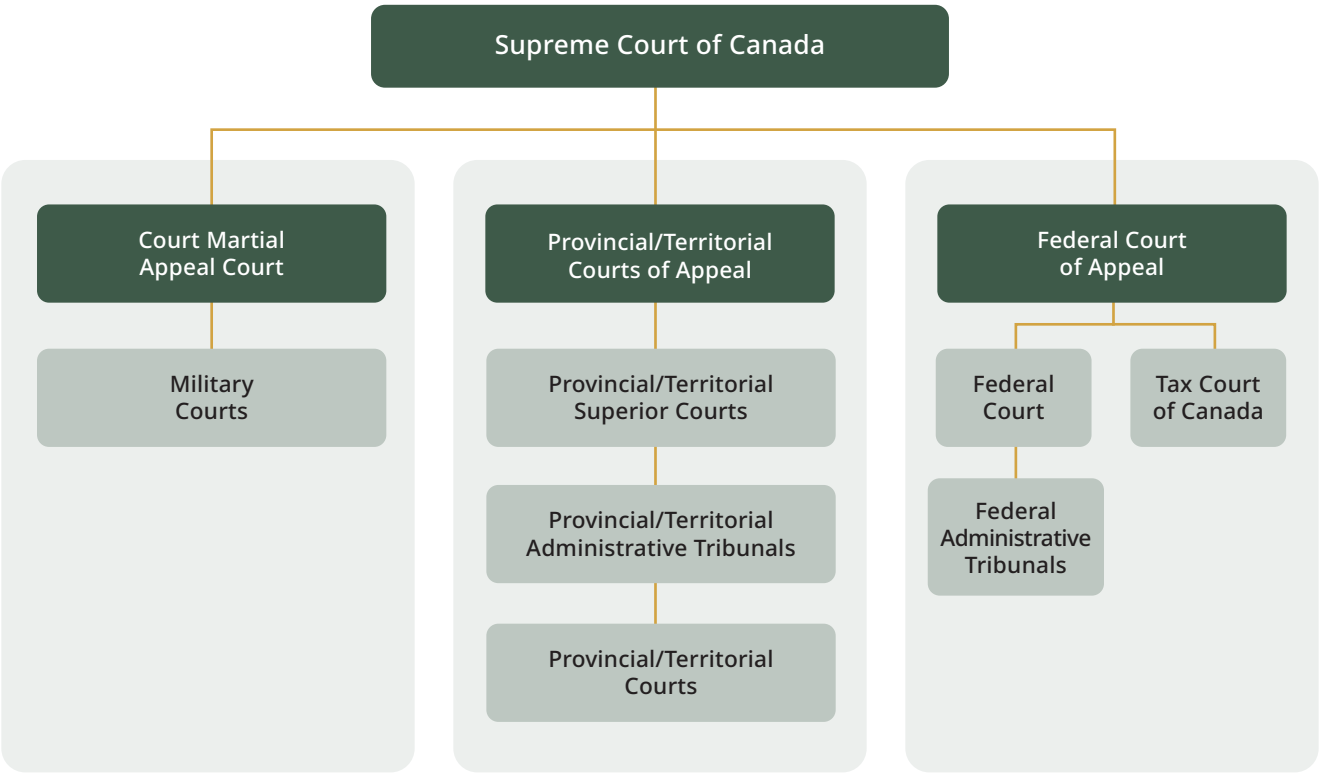
Judicial independence has both individual and institutional dimensions. Individual independence means that individual judges decide cases without external interference. Institutional independence means that courts are independent from other branches of government.

Judicial independence has three core characteristics: security of tenure, financial security, and administrative independence.

- **Security of tenure** means that judges cannot be removed without good cause. Judges are appointed until retirement unless they cannot perform their duties.
- **Financial security** means that judges' salaries are set by law, and the executive cannot change them. Changes to the salaries of judges must stem from the recommendations of independent commissions in Canada.
- **Administrative independence** means that courts have control over their own judicial administration. This includes assigning judges to cases, court sittings, and direction over administrative staff.

The principle of judicial independence stems from both written and unwritten constitutional sources. Section 99 of the *Constitution Act, 1867* guarantees superior court judges security of tenure. Section 11(d) of the *Charter* requires all judges who sit in criminal proceedings to be independent and impartial. The preamble of the *Constitution Act, 1867* also imports the unwritten constitutional principle of judicial independence, extending these protections to all courts, as confirmed by the Supreme Court of Canada in the *Provincial Judges Reference* and related cases.

Canadian Court System



The Canadian judiciary is generally understood to include three systems: the **provincial court system**, the **federal court system**, and the **military court system.**

Each of the three territories has a court system sharing a similar structure with those established in the ten provinces.

Provincial Court System

Under s. 92(14) of the *Constitution Act, 1867*, each province has the power to make laws in relation to the "administration of justice in the province". As such, each province has the power to regulate the organization of its court systems and court procedure in non-criminal matters. Criminal procedure is exclusively regulated by the federal government per s. 91(27) of the *Constitution Act, 1867*.

While the organization of the court systems in each province has evolved over time, every province now shares a similar structure. There are **provincial administrative tribunals**, **provincial courts**, **superior courts**, and a **court of appeal.**

Superior courts are not created by statute. They are mandated by the Constitution and have inherent jurisdiction over the adjudication of all civil and criminal matters under both federal and provincial law. This jurisdiction can in some cases be allocated to what is referred to as an inferior provincial court or to an administrative tribunal.

Courts have interpreted s. 96 of the *Constitution Act, 1867* as preserving a sphere of jurisdiction that cannot be allocated to inferior provincial courts or tribunals. This sphere protects against significant intrusions into the historical jurisdiction of superior courts at the time of Confederation and its core jurisdiction over certain subject matters, such as general private law jurisdiction and contempt powers.

Section 96 of the *Constitution Act*, *1867* requires that judges of superior courts be appointed federally. The Governor General appoints provincial superior court judges on the advice of Cabinet. Recommendations to Cabinet are made by the Minister of Justice for most judges. The Prime Minister issues recommendations for the appointment of the Chief Justice and Justices of the Supreme Court of Canada.

Each province has created a court of appeal to review the decisions of superior courts. These courts are considered a branch of the superior court, meaning that court of appeal judges must also be federally appointed.

Below the superior courts are provincial courts created by statutes. They deal with the majority of criminal offences (other than the most serious) and other matters, such as some family law disputes and the adjudication of provincial offences. The judges of provincial courts are appointed by provincial governments. Decisions of a provincial court are reviewable by the superior court.

Provinces can establish administrative tribunals with expertise and responsibilities in areas such as human rights, housing, or social assistance eligibility. While administrative tribunals are not considered part of the formal court system, their decisions can be judicially reviewed by the superior courts, as discussed below.

Federal Court System

The federal government, under s. 101 of the *Constitution Act, 1867,* may establish "additional courts for the better administration of the laws of Canada". Under this authority, Parliament has created the **Federal Court**, the **Tax Court**, and the **Federal Court of Appeal**. Judges of these courts are appointed by the federal government.

The Federal Court has concurrent jurisdiction with superior courts in all cases where relief is claimed against the federal Crown. It also has exclusive jurisdiction to issue various administrative law remedies against federal agencies or tribunals, such as the Canadian Human Rights Tribunal. Accordingly, much of the Federal Court's workload involves the judicial review of federal administrative decision-makers.

The Tax Court has specialized expertise in tax-related matters; it hears all disputes arising between taxpayers and the Minister of National Revenue.

The Federal Court of Appeal hears appeals from both the Federal Court and Tax Court.

Military Court System

Section 91(7) of the *Constitution Act, 1867* grants the federal government exclusive authority over the "militia, military and naval service, and defence". Under this jurisdiction, Parliament passed the *National Defence Act*, which created a separate military justice system to try service members for breaches of the *Code of Service Discipline*. The *Code* includes military-specific offences and offences under other federal statutes, such as the *Criminal Code*.

There are two types of tribunals in the military justice system: summary hearings and courts martial. Summary hearings are reserved for "service infractions" and are not considered offences under the *National Defence Act*. Courts martial are formal courts with independent military judges that adjudicate serious offences. Decisions of a court martial may be appealed to the **Court Martial Appeal Court of Canada**.

Supreme Court of Canada

Section 101 of the *Constitution Act, 1867* authorizes federal Parliament to establish a "general court of appeal for Canada". It did so in 1875 to create the **Supreme Court of Canada**, granting it criminal and civil jurisdiction throughout the country. The Supreme Court sits on top of the judicial hierarchy and therefore has the last word on any question of law before it. Its broad jurisdiction allows it to hear appeals from the provincial, federal, and military court systems; any legal dispute in Canada has the potential to be heard by the Court. In this way, the Supreme Court serves a significant unifying function across Canada.

Cases reach the Supreme Court in one of two ways. As outlined in the *Supreme Court Act*, cases that raise a question of public importance may be granted "leave" (i.e. permission) to be heard by the court. These cases typically involve novel constitutional questions, the resolution of conflicting decisions of the courts of appeal, or new issues of law.

The Supreme Court also hears several "as of right" criminal appeals every year. These are cases that require no permission to be granted. The *Criminal Code* specifies the circumstances where a party has a right to appeal to the Supreme Court. Often this involves circumstances where a judge of a court of appeal has dissented on a question of law.

The *Constitution Act, 1982* provides constitutional protection to the Supreme Court by constraining how the federal government can amend the *Supreme Court Act*. For example, changes to the composition of the Supreme Court, governed by ss. 4-6.1 of the Act, require the approval of Parliament and every provincial legislature (see s. 41(d) of the *Constitution Act, 1982*). Likewise, changes to the "essential features" of the Supreme Court, such as its role as the final general court of appeal, require the consent of Parliament and seven provincial legislatures representing 50% of the population (see s. 42(d) of the *Constitution Act, 1982*).

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ii. Intergovernmental Relations: Division of Powers

Overview of Federal and Provincial Powers

Canada is a federal state where power is shared between a central order of government (i.e. the federal Parliament and government) and regional orders of government (i.e. provincial legislatures and governments). This division of power seeks to respect regional diversity in Canada by providing provincial orders of government with autonomy to develop their societies within their spheres of jurisdiction.

Sections 91, 92, and 93 of the *Constitution Act, 1867* list the subject matters, typically referred to as "heads of power", over which each order of government is exclusively permitted to legislate. In the modern era, there is often overlap between the subject matters over which the federal and provincial orders of government have jurisdiction.

Federal powers

Federal powers enumerated under **s. 91** of the *Constitution Act, 1867* include:

- **Criminal Law and Procedure:** The federal criminal law power is broad. It permits Parliament to pass a law that 1) consists of a ban on certain conduct, 2) attaches a penalty to such conduct, and 3) furthers a criminal law purpose, such as protecting public peace, order, security, health, and morality. While the most obvious form of this power consists of the *Criminal Code of Canada*, this authority has been relied on by the federal Parliament to regulate a range of matters (e.g., firearms, tobacco, environmental pollution, genetic discrimination, and assisted human reproduction).

- **Peace, Order and Good Government:** The opening words of s. 91 of the *Constitution Act, 1867* confer on Parliament the power to make "laws for peace, order and good government." This power has three components:
  - *Gap* branch: Parliament is allowed to legislate on any subject matter that is not explicitly allocated to the provinces. Gaps are rare given the breadth of the provinces' power under "property and civil rights."
  - *National Concern* Branch: Parliament is permitted to legislate on matters of national concern. Identifying matters of national concern is a three-step process.
    - First, the federal government must prove that the matter affects the country as a whole.
    - Second, the matter must have a "singleness, distinctiveness, and indivisibility". This requires that the matter be qualitatively distinct from matters of provincial concern, which is often the case if the matter is predominantly extra-provincial or international in its nature or its effects. It likewise requires that the provinces be incapable of dealing with the matter independently.
    - Third, the matter must have a scale of impact on provincial jurisdiction that is reconcilable with the distribution of legislative power under the Constitution.
    - Examples of matters of national concern include aeronautics, marine pollution, the national capital region, and minimum national standards of greenhouse gas price stringency.
  - *Emergency* Branch: Parliament is permitted to regulate matters on an emergency basis when there is a rational basis for doing so and the legislation is of a temporary nature.
- **Trade and Commerce:** The federal trade and commerce power permits Parliament to legislate regarding (i) international and interprovincial trade; and (ii) the general regulation of trade affecting the entirety of Canada. This second category of the power permits Parliament to enact a regulatory scheme, overseen by a regulatory agency, over an aspect of trade as a whole rather than a specific industry. Provinces must be incapable of enacting such a scheme themselves, and it must also be clear that the failure to include all provinces would jeopardize the successful operation of the scheme. In exercising this power, Parliament has passed legislation on competition law, trademarks, and a national regulator of securities.
- **"Spending" Power:** It is generally accepted that Parliament is permitted to spend federal funds in areas of provincial responsibility, such as healthcare and education, and to attach conditions to the provinces for such funding, provided that it stops short of trying to regulate these areas. The basis for this spending power arises from the power to levy taxes (s. 91(3)), to legislate in relation to public property (s. 91(1A)), and to appropriate federal funds (s. 106).
- **Other Notable Federal Heads of Power:** Indigenous Affairs, the Military, Marriage and Divorce, Fisheries, Navigation and Shipping, Banking, Copyrights & Patents, Penitentiaries, Cross-border Transportation and Communication

Provincial powers

Provincial powers enumerated under **ss. 92–93** of the *Constitution Act, 1867* include:

- **Property and Civil Rights:** This source of jurisdiction permits provincial governments to regulate most legal relationships between persons, including those labeled contract, tort, and property. Provinces are therefore largely responsible for subject matters such as consumer protection, insurance, professional regulation, and employment standards.

- **Local or Private Matters:** Provinces have power over all matters of a "local or private nature." Because of the breadth of the property and civil rights power, resort to this power has often been unnecessary. However, courts have held that issues such as highway traffic regulation are authorized by both heads of power.
- **Health:** Provinces have broad powers over the regulation of health, which arise from their powers over property and civil rights, local or private matters, and the "establishment, maintenance, and management of hospitals."
- **Education:** Provinces have the power under s. 93 to make laws in relation to education.
- **Other Notable Heads of Power:** Municipal Institutions, Administration of Justice.

Pursuant to **s. 92(15)**, provinces are permitted to impose fines, penalties, and imprisonment for enforcing any law relating to matters of provincial jurisdiction.

As mentioned earlier, Canada's territories have court systems similar to those of the provinces, as provided for by the federal Parliament.

Under **s. 95** of the *Constitution Act, 1867*, the federal and provincial governments share jurisdiction over **immigration** and **agriculture**, but federal law on these matters is paramount.

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Principles of Federalism

Laws can be challenged for failing to respect the principles of federalism that have been developed by the courts when interpreting the *Constitution Act, 1867*. Typically, there are three ways a law can be challenged for federalism-related reasons.

Invalidity: A law is unconstitutional if its "pith and substance" falls within the jurisdiction of another level of government. A court will look to the purpose and effects of a law with a view to characterizing its subject matter. The subject matter is then classified in reference to the relevant federal and provincial heads of power. If the subject matter falls outside of the government's competence, the law is considered invalid and has no force or effect.

The principle of **cooperative federalism** privileges an approach to federalism that assumes that the heads of power, while exclusive, often allow both orders of government to regulate an increasingly complex and dynamic Canadian society. Accordingly, rather than act as a referee protecting a watertight view of the division of powers, courts have developed doctrines that assume cooperation or mutual awareness between both levels of government.

- The **double aspect doctrine** is an example of how courts give effect to this principle. Courts have held that Parliament and a provincial legislature can pass valid legislation on the same subject as long as that legislation addresses an aspect of the subject falling under their respective heads of power. For example, provinces enact highway traffic offences under a combination of their powers (property and civil rights, local and private matters), while Parliament has enacted similar driving offences pursuant to its criminal law power.

Inoperability: In circumstances where validly enacted federal and provincial provisions conflict, the federal provisions are considered **paramount**, and the provincial provisions are deemed inoperative. Conflict can appear in two situations, each of which can lead to inoperability. The

first is when the laws in question contradict one another; compliance with one is defiance of the other. The second way is when, although compliance with both laws is possible, the effect of a provincial law frustrates the purpose of a federal law. This second basis has been applied with great restraint by the courts.

Inapplicability: If a law impairs the "core" of a head of power exclusively allocated to another level of government, it will be treated as inapplicable to the specific circumstances of interference. This is referred to as the doctrine of **interjurisdictional immunity**. So far, courts have only recognized federal heads of power with a "core" protected from provincial statutes of general application (e.g., banking, cross-border transportation and communication). For example, provincial employment laws do not apply to federally regulated businesses in these domains because labour relations is considered a vital part of their management and operation.

iii. Individual-State Relations: Constitutional Rights and Administrative Law

Constitutional Rights and Features

Canadian Charter of Rights and Freedoms

The *Charter of Rights and Freedoms* entrenches protection for fundamental rights and freedoms in the Canadian Constitution. These rights and freedoms are grouped as follows:

- **Fundamental Freedoms:** Section 2 of the *Charter* guarantees protection for fundamental freedoms, including:
  - Freedom of religion and conscience
  - Freedom of expression
  - Freedom of peaceful assembly
  - Freedom of association (protecting the right to collective bargaining and the right to strike)
- **Democratic Rights:** Sections 3-5 of the *Charter* seek to protect the proper functioning of Canadian democratic institutions. For example, s. 3 guarantees all citizens the right to vote and run for office in federal and provincial elections, as well as the right to meaningfully participate in the electoral process.
- **Legal Rights:** Sections 7-14 of the *Charter* guarantee a series of rights, most of which relate to the criminal process. Many are canvassed below in the criminal law section of this guide.
  - Section 7 guarantees the right not to be deprived of life, liberty, or security of the person except in accordance with the principles of fundamental justice.
  - Three principles of fundamental justice are particularly central:
    - **Arbitrariness:** A law cannot be arbitrary. Arbitrariness is found when there is no connection between the law's purpose and its effects on a person's life, liberty, or security of the person.
    - **Overbreadth:** A law cannot be overbroad. A law is deemed overbroad when there is *some* connection between the law's purpose and its effects on a person's life, liberty, or security, but it goes too far and creates effects that are disconnected from the law's purpose.
    - **Gross Disproportionality:** A law cannot deprive someone of life, liberty, or security of the person if the severity of those effects is grossly disproportionate to the objectives of the law.
- **Equality Rights:** Section 15 of the *Charter* guarantees the right to equal protection and equal benefit of the law without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or

physical disability. Section 28 of the *Charter* provides that its rights and freedoms are guaranteed equally to male and female persons, notwithstanding anything in the *Charter*.

- **Language Rights:** Sections 16-23 of the *Charter* provide protection for the English and French languages. These protections complement those found in s. 133 of the *Constitution Act, 1867* and s. 23 of the *Manitoba Act*.
    - Section 16 ensures equal status and rights for both languages at the federal level and in New Brunswick.
    - Section 18 guarantees that government institutions at the federal level and in New Brunswick operate in both languages, and s. 20 ensures federal services are offered in both languages in areas with significant populations of either language group.
    - Section 23 guarantees that members of linguistic minority communities (e.g., French speakers outside Quebec and English speakers in Quebec) have the right to primary and secondary education in their own language where there is sufficient demand.

Justification: When an individual has proven that the state has violated a *Charter* right, section 1 of the *Charter* affords the government the opportunity to show that the violation is justified in a "free and democratic society".

- To be justified, the law must pass the *Oakes* test (named after the Supreme Court decision that created the test), which requires: (a) a pressing and substantial objective; (b) a rational connection between the law and its purpose; (c) minimal impairment of the right; and (d) proportionality between the law's positive and negative effects.

Scope: The *Charter* applies to the legislative and executive branches of both provincial and federal governments. It also applies to other entities that are government-controlled or that perform truly governmental functions.

Notwithstanding Clause: Section 33 of the *Charter* allows Parliament or a provincial legislature to enact legislation that operates notwithstanding breach of rights guaranteed by sections 2 and 7-15 of the *Charter*. A declaration under section 33 remains in force for five years, but may be renewed through re-enactment. While the declaration is in effect, courts cannot invalidate the law on the basis that it unjustifiably infringes the *Charter* rights enumerated in the sections above.

Indigenous Rights

Section 35 of the *Constitution Act, 1982* provides constitutional protection for "Aboriginal and treaty rights." Treaty rights are those set out in historic or modern treaty agreements. Aboriginal rights are collective rights of distinct Indigenous societies, arising from their status as the original peoples of Canada. These rights vary from nation to nation depending on the customs, practices, and traditions that form part of their distinctive cultures. They include:

- Aboriginal title (ownership rights to land)
- Rights to occupy and use lands and resources, such as hunting and fishing rights
- Self-government rights
- Cultural and social rights

Constitutional Amendment

The *Constitution Act, 1982* sets out several procedures for amending the Constitution, with the required level of agreement depending on the subject matter of the proposed change. Some amendments require unanimous consent from Parliament and all provinces, such as changes affecting the monarchy, the Supreme Court's composition, or the amending formulas themselves. Others fall under

the general "7/50" formula, requiring Parliament plus at least seven provinces representing at least 50% of the population. More targeted changes may use narrower procedures, including amendments affecting only one or more provinces, or unilateral amendments by Parliament or a provincial legislature in limited circumstances.

This framework champions a high threshold for constitutional amendment to ensure consistency and democratic legitimacy. While major reform attempts like the Meech Lake and Charlottetown Accords failed, more limited amendments have succeeded through flexible procedures. For instance, New Brunswick's linguistic equality was constitutionally recognized in 1993, Newfoundland's denominational school system was replaced in 1997, and Saskatchewan removed a historic railway tax exemption in 2022. Hence, the Constitution remains capable of gradual adaptation through focused reforms.

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Administrative Law

Basics of Judicial Review

All actions taken by the executive branch can be reviewed by the courts to ensure they are lawful. Courts have interpreted s. 96 of the *Constitution Act, 1867* as entrenching and reinforcing the jurisdiction of superior courts to engage in judicial review. Where a court finds that the executive has acted unlawfully, it will typically quash the decision or action and order reconsideration.

There are two dimensions to how courts assess the legality of executive action:

The first dimension relates to **substantive review**. In most cases, courts offer deference to the executive in assessing whether the action in question was "reasonable", rather than asking what the court would have done in the circumstances. To assess reasonableness, courts generally look to the reasons behind the executive action and determine whether they provide defensible justification.

- An action will be unreasonable if the reasons for it (a) demonstrate a failure of rationality internal to the reasoning process; or (b) are untenable in light of the relevant factual and legal constraints that bear on the decision.

Courts will not offer this level of deference to executive action where the action under review raises an important legal question, such as a constitutional question or a question of central importance to the legal system.

The second dimension relates to matters of **procedural fairness**. In certain circumstances, the executive has a duty to provide affected parties with a fair process. The requirements of this duty depend on the nature of the decision, with decisions that have more severe consequences entitling individuals to greater procedural protection. In most cases, procedural fairness at least requires notice of the case to be met and a meaningful opportunity to respond.

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IV Criminal Law and Private Law

Our legal system plays an integral role in structuring and governing how we interact with one another. While criminal law governs the responsibilities of individuals to society, private law addresses relationships between individuals.

Canadian law relies on different mechanisms to enforce these norms. The criminal law addresses "public" wrongdoing, where an individual's conduct is sufficiently blameworthy to be considered harmful to society as a whole, entitling the state to intervene and impose punishment. By contrast, private law addresses actions and structures that concern the rights and interests of individuals vis-à-vis each other. Individuals may bring legal claims against other individuals for harm suffered, seeking redress generally through compensation rather than punishment.

i. Criminal Law

Criminal law defines and penalizes conduct prohibited by the state, in furtherance of purposes such as the promotion of public safety, welfare, health, and morality. For an individual to be found guilty of a crime, the Crown (government) must prove beyond a reasonable doubt both the ***actus reus*** and ***mens rea*** of an offence.

The *actus reus* refers to a criminal offence's prohibited act or omission that is voluntarily committed, plus any required circumstances and consequences. For example, the *actus reus* for murder is the killing of another person.

The *mens rea* refers to the mental or "fault" element of a crime. *Mens rea* is typically categorized as subjective or objective. A crime will have a subjective *mens rea* when the Crown must prove that the accused actually had certain intentions or knowledge about the circumstances or consequences of the crime. For example, murder has a subjective *mens rea* requiring the intent to kill or the intent to cause bodily harm that the accused knows is likely to cause death.

A crime will have an objective *mens rea* when the Crown must prove that a reasonable person in the accused's position would have had certain knowledge and acted differently in the circumstances. For example, the unlawful act of manslaughter has an objective *mens rea*, requiring the Crown to prove that a reasonable person in the position of the accused would have foreseen the risk of non-trivial bodily harm.

The Supreme Court has recognized, under s. 7 of the *Charter*, a principle of fundamental justice according to which a person cannot be convicted of a criminal offence unless the Crown proves a fault element commensurate with the gravity of the offence. For offences that carry significant social stigma, such as murder, a subjective *mens rea* is constitutionally required. In other contexts, the Court has held that an objective standard of fault may suffice. When there is a threat of imprisonment, a legislature may not enact an absolute liability offence that permits a conviction in the absence of any *mens rea*.

Criminal Procedure

Investigation and Arrest

The *Charter* includes a series of rights that limit the powers of the police and permits courts to exclude evidence when the police violate these rights.

- Section 8 of the *Charter* protects against **unreasonable search and seizure**. Whenever the police search something over which an individual has a reasonable expectation of privacy, such as their home, computers, or person, courts will ask three questions. First, was the search allowed under the law? Second, is the law that allows the search reasonable? Third, was the search conducted in a reasonable manner? Searches conducted without a judge-authorized warrant are presumed to be unreasonable and violate s. 8 of the *Charter*.
- Section 9 of the *Charter* protects against **arbitrary detention.** A person is detained when the police give a direction that may result in legal consequences or when the person reasonably believes they had to comply with the police. To decide whether the detention was arbitrary, courts will ask three questions. First, was the detention allowed under the law? Second, is the law that allows the detention reasonable? Third, was the detention carried out in a reasonable manner?
- Section 10 of the *Charter* provides a number of rights to detained individuals. For example, individuals have the **right to be informed** of the reasons for their detention. Individuals also have the **right to retain counsel** upon detention without delay. Police have a duty to inform detainees about their right to call a lawyer and the availability of legal aid. They must then provide the detainee a reasonable opportunity to call a lawyer. The police must cease questioning the detainee to obtain incriminating evidence until after the detainee speaks with their lawyer.

Trial Fairness

Section 11 of the *Charter* guarantees certain rights to an accused person during their trial.

- **The right to be tried within a reasonable time** is guaranteed by s. 11(b) of the *Charter*. This right protects the accused from prolonged criminal proceedings and the associated stigmatization and psychological stress. It also protects society's interest in having laws enforced in a timely fashion. To give effect to this right, courts have established timelines for when delay is considered presumptively unreasonable. When unreasonable delay is established, courts are required to enter a "stay," which stops the proceedings from continuing.
- **The right not to be compelled as a witness in one's own trial** is guaranteed by s. 11(c) of the *Charter*. This right reflects respect for the accused's dignity and autonomy by ensuring they are not forced to participate in building the case against themselves.
- **The right to be presumed innocent until proven guilty** is guaranteed by s. 11(d) of the *Charter*. The presumption of innocence requires the Crown to prove every essential element of a crime beyond a reasonable doubt.
- **The right to a fair trial before an independent and impartial tribunal** is also guaranteed by s. 11(d) of the *Charter*. The fair trial guarantee includes a range of rights for the accused, including the right to make full answer and defence. This right guarantees, among other things, the right to disclosure of evidence from the Crown and the right to admit evidence that is not irrelevant or unduly prejudicial. The right to an independent and impartial tribunal requires that a judge overseeing a criminal trial is protected by security of tenure, financial security, and administrative independence.

- **The right not to be deprived of reasonable bail without just cause** is guaranteed by s. 11(e) of the *Charter*. This right ensures that the state cannot impose overly onerous conditions when bail is granted. It also constrains the types of restrictions on accessing bail that can be imposed.
- **The right to a jury trial** is guaranteed by s. 11(f) of the *Charter* when the accused is being tried for an offence with a maximum punishment of five years of imprisonment or greater.

Sentencing

When a person is found guilty of a crime, a hearing will follow to determine the sentence imposed by the judge. Section 12 of the *Charter* protects individuals from **cruel and unusual punishment.** There are some forms of punishment, such as torture, that are always forbidden. There are other types of punishment, such as sentences of imprisonment, which may be prohibited in circumstances where their duration is extremely excessive or "grossly disproportionate" in light of the crime and the offender in question.

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ii. Private Law

Private law, in both common law and civil law traditions, encompasses three principal categories: contractual obligations, extracontractual obligations (civil wrongs, torts), and property law. Each governs and organises relationships, rights, and responsibilities. Private law relations are underpinned by the concept of legal personhood. Legal persons (including individuals and corporations) are rights-bearing entities with the capacity to incur duties and obligations, own property, enter into contracts, participate in civil life, sue, and be sued.

- **Contract law** governs obligations that arise from voluntary agreement. It is concerned with enforcing the promises that parties choose to undertake, ensuring that each receives the benefit of the bargain and that agreed exchanges are respected. Remedies for breach of contract include damages and specific performance.
- The law of **extracontractual obligations**, or **tort law**, addresses civil wrongs that occur outside the context of a voluntary agreement. Duties of conduct owed to others are imposed; remedies, typically in the form of damages, are provided where one person's wrongful actions cause harm to another.
- **Property law** concerns the allocation and protection of rights in things. It defines how individuals acquire, use, and transfer interests in land and personal property.

In some instances, individuals and entities owe **fiduciary obligations** to others. Such duties are present when there is a relationship of trust and confidence legally binding the fiduciary to act in the best interests of the beneficiary. For example, executives of a corporation must act in the best interests of the corporation, lawyers must act in the best interests of their clients, and trustees must manage property for the benefit of beneficiaries.

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V International Law: Structuring Relationships among Nations

Public international law consists of the rules, norms, and principles that govern the relationships among states, and between states and other actors, including international organizations and, in certain contexts, private individuals and corporations. In contemporary times, it seeks to facilitate peace and order among states, address global issues that require collective action (e.g., climate change), and establish minimum standards of conduct that states must uphold toward individuals within their jurisdiction (e.g., human rights obligations).

i. Sources of International Law

Customary international law consists of practices and rules that have evolved over time and are accepted as binding on states, even if they are not written down in a formal treaty. It emerges from the consistent and general practice of states, combined with a belief that such practices are legally obligatory. Customary international law is automatically incorporated into domestic Canadian law and is enforceable by courts.

- *Jus cogens* norms are a subset of customary international law that are recognized by the international community as norms that cannot be derogated from because they are fundamental to the international legal order. These norms are binding on all states, even where some object to their existence or fail to comply with them.
- Examples of *jus cogens* norms include the prohibition on genocide, slavery, and torture, the prohibition on the aggressive use of force, and the right of peoples to self-determination.

Conventional international law refers to the body of law that arises from formal agreements (treaties) between or among states or international organizations. These treaties are written, negotiated, and signed by parties, and they create legal obligations that are explicitly defined in the text of the agreement.

- The federal executive is authorized to ratify treaties, but, in order for conventional international law to become binding in Canadian law, it must be incorporated via domestic legislation. Implementation can be done by either the federal or provincial orders of government depending on the nature of the treaty obligation.

ii. Overview of Key Principles

Sovereign Equality of States: This principle asserts that all states, regardless of size, power, or wealth, are legally equal in the eyes of international law. Each state has equal rights and duties under international law.

Non-Intervention: The principle of non-intervention prohibits foreign interference in the domestic affairs of sovereign states.

Territorial Integrity: The principle of territorial integrity prohibits the use of force or threats of force to alter the borders of a sovereign state. States have the right to maintain their territorial boundaries without external aggression.

iii. United Nations Architecture

The United Nations (UN) is an international organization founded in 1945 and governed by its *Charter*, a treaty ratified by nearly every country in the world. Its purposes are to maintain international peace and security, develop friendly relations among states, achieve international cooperation in addressing collective problems, and promote respect for human rights. Its principal organs include the General Assembly, the Security Council, and the International Court of Justice.

United Nations General Assembly (UNGA)

- Role: The main deliberative and policymaking body of the UN.
- Members: Composed of all 193 member states, each with one vote.
- Functions:
  - Adopts recommendations on international issues, including those relating to international conflict and human rights.
  - Approves the UN budget.
  - Elects members of the Security Council, Economic and Social Council (ECOSOC), and other UN bodies.

United Nations Security Council (UNSC)

- Role: The primary body responsible for maintaining international peace and security.
- Members: 15 members. 5 permanent members (China, France, Russia, UK, USA) each with veto power, and 10 elected non-permanent members for two-year terms.
- Functions:
  - Can impose sanctions, authorize military action, or take other measures to address threats to international peace.
  - Determines when and where peacekeeping operations should take place.

International Court of Justice (ICJ)

- Role: The principal judicial body of the UN, based in The Hague, Netherlands.
- Members: Composed of 15 judges elected for 9-year terms by the General Assembly and Security Council.
- Functions:
  - Resolves legal disputes based on international law among states, including Canada, that have accepted its jurisdiction.
  - Provides advisory opinions on legal questions referred to it by the UN organs or specialized agencies.

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