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## Aspects of Constitutional Judicial Review in Canada

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# Aspects of Constitutional Judicial Review in Canada

*T.A. Cromwell\**

## I. INTRODUCTION

I have been asked to provide an overview of the Canadian approach to constitutional judicial review. In what follows, I have selected issues in which Canadian practices may be different, in some cases markedly so, from those followed in Australia or the United States. This Paper will not attempt to cover the subject of constitutional judicial review comprehensively, and within each issue, I touch on the main tendencies but do not attempt exhaustive treatment.

My central thesis is straightforward. The Canadian approach to constitutional judicial review has four main characteristics. First, judicial review is the particular domain of the provincial superior courts; other courts, including the Federal Court, engage in constitutional judicial review in certain situations, but the provincial superior courts are the backbone of the system. Second, there is liberal access to constitutional judicial review as a result of a liberal standing doctrine and the ability of governments to refer constitutional questions to the courts. Third, there is a reluctance to develop a priori preclusive doctrines; prudential, discretionary limits are preferred. Fourth, there is continuing adherence to the distinction between a law's legality, which is the courts' concern, and the law's wisdom, which is not the courts' concern. I propose now to provide some context to my discussion and then turn to each of these four points.

### *A. Context*

The essential context for this discussion is the nature of Canada's constitution and judicial system. The constitution of Canada is composed of written documents and constitutional customs or conventions. Of the written documents, two are of particular importance. The first is what was formerly (and in loose talk still is) referred to as the British North America Act of 1867.<sup>1</sup> This imperial statute brought about the confederation of three British Colonies.<sup>2</sup> It is mostly concerned with the division of legislative power in the

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1. 30 & 31 Vict., ch. 3 (U.K.) (now referred to as the Constitution Act, 1867).

2. For further discussion, see Richard C. Risk, *The Puzzle of Jurisdiction*, 46 S.C. L. REV.

new federal system, although there also are important guarantees of linguistic and religious rights. The second document, as recent as 1982, is the Canadian Charter of Rights and Freedoms,<sup>3</sup> which entrenched a number of rights and freedoms and gave the courts the responsibility to enforce them.

These written documents do not and were never intended to provide a comprehensive statement of the fundamental rules of government. The preamble to the 1867 Act simply notes the desire of the uniting provinces to come together “into One Dominion . . . with a Constitution similar in Principle to that of the United Kingdom.”<sup>4</sup> There are many obvious gaps in the Act’s provisions. There is nothing providing for the appointment of the Governor General, effectively the head of state, nothing establishing responsible (cabinet) government, and nothing setting up a Supreme Court for the new Dominion.<sup>5</sup>

### *B. The Courts*

Three key decisions have defined the structure of the Canadian court system. The first decision was taken at the time of Confederation to retain, or more precisely, to assume the continuation of, the courts already existing in the provinces would continue to operate. The second and third decisions came much later, in the form of judicial decisions. The Constitution’s judicature provisions were interpreted to confer on the provincial superior courts a core jurisdiction that could not be taken away by either federal or provincial legislation. Finally, the judicature provisions were further interpreted to restrict significantly the jurisdiction of purely federal courts, whose creation was provided for in the Constitution.

From the beginning, constitutional judicial review was the province of the ordinary courts. Prior to the Canadian Charter of Rights and Freedoms (or Charter), in 1982, the courts were the referees of the division of powers between the federal and provincial governments. But since the Charter, the courts have taken up the broader role of policing governments’ compliance with fundamental rights and freedoms.

Just as the Canadian Constitution superimposes British parliamentary government on a federal system, it contemplates (but does not create) a largely unitary court system operating within that federal system. In general, the jurisdiction of courts does not depend upon whether the law to be applied emanates from the federal or the provincial governments. For example, while

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703 (1995).

3. CAN. CONST. (Constitution Act, 1982, ch. 11 (U.K.)).

4. CAN. CONST. (Constitution Act, 1867) pmb1.

5. For a detailed discussion see PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA (3d ed. 1992) 1-6; G. RÉMILLARD, LE FÉDÉRALISME CANADIEN (1980) 11. ff.

criminal law is a matter for the federal parliament and contract law is largely a matter for the provincial legislatures, courts presided over by federally appointed judges handle most contract litigation, and courts with provincially appointed judges handle most criminal cases.

The judicature provisions of the Constitution do not establish courts, but they authorize, explicitly or implicitly, the exercise of legislative power to do so.<sup>6</sup> The continuation of the existing court structures within the uniting provinces was assumed. The provinces are given legislative authority with respect to the “Administration of Justice in the Province”<sup>7</sup> while the federal government is given authority to appoint and pay the judges of the superior courts as well as to constitute “a General Court of Appeal for *Canada* and . . . any additional Courts for the better Administration of the Laws of *Canada*.”<sup>8</sup> The practical result is that the federal government appoints and pays the judges of the provincial superior courts. The courts themselves are creatures of provincial legislation, with facilities and staff provided and paid for by the province.

The Constitution did not establish a Supreme Court. This omission is more understandable when it is remembered that there was, at Confederation, an appeal from the final courts of each province to the Judicial Committee of the Privy Council in London. However, the Constitution did permit the Federal Parliament to create a general court of appeal for Canada,<sup>9</sup> which it did in 1875.<sup>10</sup> The court was supreme in name only until well into the twentieth century when appeals to the Privy Council were abolished.

The Supreme Court of Canada was and is a general court of appeal for Canada, having jurisdiction in all areas of law, regardless of whether that law is within the legislative competence of the federal or the provincial legislatures. Thus, it is a national, not a federal court, sitting at the apex of a mainly unitary court system.

To complete the picture of the Canadian court system, one needs mention the Federal Court of Canada, the Tax Court of Canada and the provincial courts.

The Federal Court was created by the federal government<sup>11</sup> under the constitutional authority to create courts for the better administration of the laws of Canada.<sup>12</sup> The Federal Court consists of a trial and an appellate division.<sup>13</sup> It has jurisdiction in administrative judicial review of federal boards

6. See CAN. CONST. The Constitution Act, 1867 §§ 96, 101.

7. *Id.* § 92(14).

8. *Id.* §§ 96, 100-01.

9. *Id.* § 101.

10. The Supreme and Exchequer Court Act, 1875, Can. Stat. ch. 11 (1875) (Can.).

11. Federal Court Act, R.S.C., ch. F-7 (1985) (Can.).

12. *Id.* § 4.

13. *Id.*

commissions and tribunals,<sup>14</sup> in certain areas of federal law (such as copyright and admiralty),<sup>15</sup> and in actions by and against the federal Crown.<sup>16</sup> Although this court is seemingly a step in the direction of an American-style federal court, there is in fact little departure from the basic unitary principle given that the constitutional limits of the court have been strictly defined, that the court does not have “ancillary” or “pendent” jurisdiction, and that its jurisdiction is largely concurrent with the provincial superior courts.<sup>17</sup>

The Tax Court replaces what was formerly an administrative tribunal to deal with revenue appeals.<sup>18</sup>

The provincial courts, which are created by provincial legislation and presided over by provincially appointed judges, deal with criminal law, family law, and certain civil cases. The provincial criminal courts derive their criminal law jurisdiction from the Federal Criminal Code and other federal penal statutes, once again underlining the unitary nature of the court structure.

The provincial superior courts and the purely provincial courts share large areas of concurrent jurisdiction, particularly in criminal law. While considerably less significant, there also is a good deal of overlap in the civil jurisdiction of the provincial superior courts and the Federal Court. In almost all cases, the choice of the court in these areas of concurrence belongs to the parties. Although I can point to no systematic Canadian study of this subject, such as that by Dr. Flango in the United States,<sup>19</sup> Canada has not experienced the sort of “federalizing” of the legal system apparently being experienced in the United States.<sup>20</sup>

With this context established, I propose to support my central thesis by looking briefly at selected features of constitutional judicial review in Canada: the role of the superior courts of the provinces, liberality of access to judicial review, the limits of judicial review, and constitutional remedies.

## II. THE SUPERIOR COURTS OF THE PROVINCES

At the center of the Canadian conception of constitutional judicial review is the notion of the general jurisdiction superior courts of the provinces, which

14. *Id.* at §§ 18, 28.

15. *Id.* at §§ 20, 22.

16. *Id.* at § 17.

17. It has been held that the court may only exercise jurisdiction under “applicable and existing federal law.” *See, e.g.,* Québec N. Shore Paper Co. v. Canadian Pac., Ltd., [1977] 2 S.C.R. 1054, 1065-66 (1976).

18. Tax Court of Canada Act, R.S.C. ch. T-2, § 3 (1985) (Can.).

19. *See* Victor E. Flango, *Litigant Choice Between State and Federal Courts*, 46 S.C. L. REV. 959 (1995).

20. *See id.* at n.6 and accompanying text.

are the direct descendants of the English superior courts. The importance of these tribunals has been emphasized and reinforced in a variety of contexts. For example, the superior courts are said to possess “inherent jurisdiction” and to have original jurisdiction in any matter unless jurisdiction is clearly taken away by statute.<sup>21</sup>

The centrality of the provincial superior courts is well illustrated by these remarks of the Supreme Court of Canada in *Attorney General Canada v. Law Society*:

The provincial superior courts have always occupied a position of prime importance in the constitutional pattern of this country. They are the descendants of the Royal Courts of Justice as courts of general jurisdiction. They cross the dividing line, as it were, in the federal-provincial scheme of division of jurisdiction, being organized by the provinces under s. 92(14) of the *Constitution Act* and are presided over by judges appointed and paid by the federal government.<sup>22</sup>

The centrality of these so-called Section 96 courts has been reinforced by decisions that they have a constitutionally guaranteed core of jurisdiction that cannot be removed by either provincial or, more controversially, federal legislation.<sup>23</sup> The Court also has held that a province may not confer on a non-Section 96 tribunal the final authority to determine its own jurisdiction.<sup>24</sup>

As mentioned, the judicial interpretation of the powers of purely federal courts has also reinforced the central role of the provincial superior courts. For example, the Federal Court was created pursuant to Section 101 of the Constitution, which permits the Federal Parliament to create courts “for the better Administration of the Laws of *Canada*.”<sup>25</sup> This Section has been interpreted as requiring all matters before the Federal Court to arise out of existing and applicable federal laws.<sup>26</sup> The Court also has held that the Federal Court’s empowering statute cannot be applied to deprive the provincial

21. See, e.g., *Dominion Cannery Ltd. v. Costanza*, [1923] S.C.R. 46, 61 (1922); *In re Sproule*, [1886] 12 S.C.R. 140 (1886).

22. [1982] 2 S.C.R. 307, 327.

23. See also *McEvoy v. Attorney Gen. for New Brunswick*, [1983] 1 S.C.R. 704 (federal); *In re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714 (provincial); *In re O.T.M. v. Attorney Gen. of Prince Edward Island (Reference Re Young Offenders Act)*, [1991] 1 S.C.R. 252; *Yeomans v. Sobey's Store Ltd.*, [1989] 1 S.C.R. 238; *Attorney Gen. of Quebec v. Brandin*, [1983] 2 S.C.R. 364; Robin Elliot, case comment, *Is Section 96 Binding on Parliament? — Reference Re Establishment of Unified Criminal Court of New Brunswick*, 16 U. BRIT. COLUM. L. REV. 313 (1982); W.R. Lederman, *The Independence of the Judiciary*, 34 CAN. B. REV. 769 (1956).

24. *Crevier v. Attorney Gen. of Quebec*, [1981] 2 S.C.R. 220.

25. CAN. CONST. (Constitution Act, 1867) § 101.

26. See *supra* note 11.

superior courts of jurisdiction to determine the constitutionality or constitutional applicability of federal legislation.<sup>27</sup> It also has found that the provincial superior courts keep their jurisdiction to entertain a declaratory action alleging an act's unconstitutionality even though substantially the same issues could have been litigated in earlier proceedings before the Federal Court.<sup>28</sup>

Thus, through generous interpretation of the constitutional provisions governing appointment and independence of provincial superior court judges and a restrictive reading of the constitutional limits of jurisdiction on the Federal Court, the primacy of the provincial superior courts in constitutional judicial review has been maintained. The basic proposition is that the Canadian conception of constitutional judicial review is deeply committed to the supervisory role of the provincial superior courts, that is, the general jurisdiction trial courts in each province.

### III. LIBERALITY OF ACCESS TO JUDICIAL REVIEW

There are good reasons to think that the Fathers of Confederation did not have a comprehensive vision of the role courts would play in the new federation.<sup>29</sup> They certainly did not see judicial review as the only, and perhaps not even the primary, vehicle for refereeing disputes about the division of powers. The federal power of reservation and disallowance of provincial legislation was thought to be an important vehicle for keeping the provincial legislatures in check.<sup>30</sup> In the early days of confederation, the power was used frequently; one of the main grounds for its exercise was the alleged unconstitutionality of provincial laws.<sup>31</sup>

Predictably, the political cost of exercising this power soon outweighed its value. The provinces, at an early federal-provincial conference, demanded that the courts be called upon to rule on the constitutionality of legislation in preference to the exercise of the power of disallowance.<sup>32</sup>

This political enthusiasm for judicial review is reflected in legislation authorizing the provincial and federal governments to refer questions to the

27. See *Attorney Gen. of Canada v. Law Society*, [1982] 2 S.C.R. 307, n.16, and *Canada Labour Relations Bd. v. Paul L'Anglais Inc.*, [1983] 1 S.C.R. 147.

28. *Reza v. Canada*, [1994] 2 S.C.R. 394.

29. For historical discussion, see GORDON BALE, CHIEF JUSTICE WILLIAM JOHNSTONE RITCHIE (1991); Norman Siebrasse, *The Doctrinal Origin of Judicial Review and the Colonial Laws Validity Act* 1 Rev. Const. Stud. 75; Jennifer Smith, *The Origins of Judicial Review in Canada*, 16 CAN. J. POL. SCI. 115.

30. CAN. CONST. (Constitution Act, 1867) § 90.

31. See GERARD V. LA FOREST, *DISALLOWANCE AND RESERVATION OF PROVINCIAL LEGISLATION* (1955).

32. See *Minutes of the Proceedings in Conference of the Representatives of the Provinces in the Years 1887-1902*, 27 (1926).

courts for their opinions. For example, the federal “reference” power to state questions for the Supreme Court of Canada is found in Section 53 of its constituting statute.<sup>33</sup> This assignment of what are, strictly speaking, non-judicial duties to the Court, an assignment that is constitutionally impermissible in the United States and Australia, has been an integral part of the Canadian tradition of constitutional judicial review.<sup>34</sup>

Canadian courts also have made constitutional judicial review highly accessible through the development of liberal standing doctrine in constitutional matters.<sup>35</sup> The premise of the law in this area is that there must be a means available to a citizen to take the issue of constitutionality before a court. In the absence of some better alternative or some more suitable plaintiff, an interested citizen may bring a declaratory action challenging the constitutionality of the law. This does not mean that all plaintiffs will be granted standing, but it does mean that the grounds upon which the decision to grant or withhold standing will be based are generous.

The Canadian approach is succinctly summarized in the following passage from the majority judgment in the Supreme Court’s most recent pronouncement on the subject, *Hy and Zel’s Inc. v. Attorney General for Ontario*.<sup>36</sup>

This Court recently reviewed the discretion to grant standing in *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236. After outlining the development and rationale behind public interest standing, Cory J. warned against its abuse and against expanding its availability at pp. 252-53:

The increasing recognition of the importance of public rights in our society confirms the need to extend the right to standing from the private law tradition which limited party status to those who possessed a private interest. In addition some extension of standing beyond the traditional parties accords with the provisions of the *Constitution Act, 1982*. However, I would stress that the recognition of the need to grant public interest standing in some circumstances does not amount to a blanket approval to grant standing to all who wish to litigate an issue. It is essential that a balance be struck between ensuring access to the courts and preserving judicial resources. It would be disastrous if

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33. Supreme Court Act, R.S.C., ch. S-26 (1985) (Can.).

34. See, e.g., B.L. STRAYER, *THE CANADIAN CONSTITUTION AND THE COURTS: THE FUNCTION AND SCOPE OF JUDICIAL REVIEW* 311 (3d ed. 1988); James L. Huffmann and Mardilyn Saathoff, *Advisory Opinions and Canadian Constitutional Development: The Supreme Court’s Reference Jurisdiction*, 74 MINN. L. REV. 1251 (1990).

35. See THOMAS A. CROMWELL, *LOCUS STANDI: A COMMENTARY ON THE LAW OF STANDING IN CANADA* (1986).

36. [1993] 3 S.C.R. 675.



the courts were allowed to become hopelessly overburdened as a result of the unnecessary proliferation of marginal or redundant suits brought by a [*sic*] well-meaning organizations pursuing their own particular cases certain in the knowledge that their cause is all important. It would be detrimental, if not devastating, to our system of justice and unfair to private litigants.

The whole purpose of granting status is to prevent the immunization of legislation or public acts from any challenge. The granting of public interest standing is not required when, on a balance of probabilities, it can be shown that the measure will be subject to attack by a private litigant. The principles for granting public standing set forth by this Court need not and should not be expanded. The decision whether to grant status is a discretionary one with all that [that] designation implies. Thus undeserving applications may be refused. Nonetheless, when exercising the discretion the applicable principles should be interpreted in a liberal and generous manner.

See also *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138; *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265; *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575; and *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607.

Following this Court's earlier decisions, in order that the Court may exercise its discretion to grant standing in a civil case, where, as in the present case, the party does not claim a breach of its own rights under the *Charter* but those of others, (1) there must be a serious issue as to the Act's validity, (2) the appellants must be directly affected by the Act or have a genuine interest in its validity, and (3) there must be no other reasonable and effective way to bring the Act's validity before the court.<sup>37</sup>

#### IV. LIMITS OF JUDICIAL REVIEW

Canadian courts have been slow to develop rules precluding judicial review. While there is law relating to moot and hypothetical questions, the cases are relatively few and render these highly discretionary grounds for refusing to adjudicate.<sup>38</sup> There is no true "political questions" doctrine known to Canadian constitutional law. While there is a small body of law relating to justiciability, Canadian courts have been slow to find questions posed to them to be inherently non-justiciable.

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37. *Id.* at 689-90 (first alteration in original).

38. See, e.g., R.J. Sharpe, *Mootness, Abstract Questions and Alternative Grounds: Deciding Whether to Decide*, in *CHARTER LITIGATION* 327-56 (R.J. Sharpe ed., 1986).

The two main limits on constitutional judicial review are first, persistent adherence to the principle that the courts review the legality and not the wisdom of legislation, and second, constitutional entrenchment of the balancing of rights with other social objectives in the public interest under the Charter. As for the first limit, there is a long tradition of the courts drawing a line between a law's legality and its wisdom,<sup>39</sup> that has persisted with the expanded role of the courts under the Charter. Even in the first case to uphold substantive review under the guarantee of fundamental justice in the Charter, the Supreme Court repeated in detail the proposition that it was not for the courts to decide upon the appropriateness of the policies underlying legislation. For example, Justice Lamer said:

The novel feature of the *Constitution Act, 1982*, however, is not that it has suddenly empowered courts to consider the content of legislation. This the courts have done for a good many years when adjudicating upon the *vires* of legislation. The initial process in such adjudication has been characterized as "a distillation of the constitutional value represented by the challenged legislation" (Laskin, *Canadian Constitutional Law* (3rd ed. rev. 1969), p. 85), and as identifying "the true meaning of the challenged law" (Lederman (ed.), *The Courts and the Canadian Constitution* (1964), p. 186), and "an abstract of the statute's content" (Professor A.S. Abel, "The Neglected Logic of 91 and 92" (1969), 19 *U. of T. L.J.* 487, p. 490). This process has of necessity involved a measurement of the content of legislation against the requirements of the Constitution, albeit within the more limited sphere of values related to the distribution of powers.

The truly novel features of the *Constitution Act, 1982* are that it has sanctioned the process of constitutional adjudication and has extended its scope so as to encompass a broader range of values. Content of legislation has always been considered in constitutional adjudication. Content is now to be equally considered as regards new constitutional issues. Indeed, the values subject to constitutional adjudication now pertain to the rights of individuals as well as the distribution of governmental powers. In short, it is the scope of constitutional adjudication which has been altered rather than its nature, at least, as regards the right to consider the content of legislation.

In neither case, be it before or after the *Charter*, have the courts been enabled to decide upon the appropriateness of policies underlying legislative enactments. In both instances, however, the courts are empowered, indeed required, to measure the content of legislation against the guarantees of the Constitution. The words of Dickson J. (as he then was) in *Amax Potash Ltd. v. Government of Saskatchewan*, [1977] 2 S.C.R. 576, at p. 590, continue to govern:

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39. See STRAYER, *supra* note 34, at 219-20.

The Courts will not question the wisdom of enactments ... but it is the high duty of this Court to insure that the Legislatures do not transgress the limits of their constitutional mandate and engage in the illegal exercise of power.<sup>40</sup>

The second limitation is no less nebulous and has spawned a large and complex body of case law. Under the Charter, the guaranteed rights and freedoms are “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”<sup>41</sup> What is most interesting about this provision is that while, on the surface considerably limiting the scope of the guaranteed rights, it significantly expands the realm of judicial debate. The task, for example, of determining whether an accused has been afforded the right to retain and instruct counsel without delay (as guaranteed by section 10(b) of the Charter) is an important but comfortably familiar judicial task. On the other hand, the task of deciding whether a limit, prescribed by law, on that right is “demonstrably justified in a free and democratic society”<sup>42</sup> is completely different because courts are required to review legislative choices and to assess whether other, less intrusive options could have been pursued.

The courts appear to be moving toward different approaches to the application of this limitation depending on the nature of the right limited. Where government action limits the legal rights of the accused in the context of a criminal prosecution, the Section 1 analysis has been conducted according to exacting standards.<sup>43</sup> However, where broader social and economic issues have been implicated, greater deference has been shown to governmental policy choices.

This tendency can be illustrated by looking at two important Section 1 cases, *The Queen v. Oakes*<sup>44</sup> and *Rodriguez v. Attorney General of Canada*.<sup>45</sup> The *Oakes* case is the leading authority on the application of Section 1 where the Charter rights of a criminal defendant have been limited by law. The Court established a two part test for determining whether a limitation of the rights guaranteed by the Charter constitutes a reasonable limit in a free and democratic society. The first consideration is whether the objective to be served is sufficiently important to warrant limitation of Charter rights. The

40. *In re Constitutional Question Act (B.C. Motor Vehicle Act)*, [1985] 2 S.C.R. 486, 496-97.

41. CAN. CONST. (Constitution Act, 1982) pt. I, Canadian Charter of Rights and Freedoms, § 1.

42. *Id.*

43. *See The Queen v. Oakes*, [1986] 1 S.C.R. 103.

44. *Id.*

45. [1993] 3 S.C.R. 519.

objective must relate to a concern that is “pressing and substantial.”<sup>46</sup> Second, the measure must be proportional to the objective and the limit of Charter rights. This turns on three issues. The measures must be fair, not arbitrary, and carefully designed to achieve their objective. The means chosen should impair the right as little as possible. Finally, the effects of the measures and the objective must be proportional. The burden of satisfying the test is upon the government on the balance of probabilities.

The approach to Section 1 in *Oakes* may be contrasted with that in *Rodriguez*. *Rodriguez* was a constitutional challenge to Canada’s criminalization of counselling, aiding or abetting suicide. This challenge was brought by a terminally ill person who would require the assistance of another to end her own life should she wish to do so. The majority of the Court assumed, without deciding, that the criminalization of assisting suicide when suicide itself is legal (as it is in Canada) constitutes a denial of equality before the law to those who wish to commit suicide but are unable to do so unassisted by virtue of disability. The same judges also found the assumed infringement justified under Section 1, but in the course of doing so were much more deferential to Parliament than the approach in *Oakes* would suggest. The majority, and indeed all considering the issue, agreed that in this sort of case Parliament must be allowed some flexibility, and that the question is whether it has been shown that there is a reasonable basis for concluding that the minimal impairment requirement has been met. As Justice Sopinka for the majority put it:

In light of the significant support for the type of legislation under attack in this case and the contentious and complex nature of the issues, I find that the government had a reasonable basis for concluding that it had complied with the requirement of minimum impairment. This satisfied this branch of the proportionality test and it is not the proper function of this Court to speculate as to whether other alternatives available to Parliament might have been preferable.<sup>47</sup>

Section 1 has been used to give the courts a nuanced and flexible way to define the limits of their intervention in the realm of governmental policy choices, while at the same time not surrendering judicial authority to rule in particular issues or types of cases. As Justice Wilson said in *Operation Dismantle v. The Queen*:<sup>48</sup>

Section 1, in my opinion, is the uniquely Canadian mechanism through which the courts are to determine the justiciability of particular issues that

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46. *Oakes*, [1986] 1 S.C.R. at 138-39.

47. *Rodriguez*, [1993] 3 S.C.R. at 614-15.

48. [1985] 1 S.C.R. 441.

come before it. It embodies through its reference to a free and democratic society the essential features of our constitution including the separation of powers, responsible government and the rule of law. It obviates the need for a "political questions" doctrine and permits the Court to deal with what might be termed "prudential" considerations in a principled way without renouncing its constitutional and mandated responsibility for judicial review.<sup>49</sup>

The Canadian approach has been to eschew a priori exclusion of constitutional judicial review. This general willingness to undertake the constitutional inquiry, however, has been accompanied by careful attention to the practical limits of the judicial function and a general unwillingness to second guess difficult and apparently rational government policy decisions.

#### V. REMEDIES IN CONSTITUTIONAL JUDICIAL REVIEW

The reluctance to foreclose judicial action, but the exercise of great circumspection as to when it will be taken, may also be seen in the emerging doctrine relating to constitutional remedies. When a court is asked before final judgment to suspend the operation of legislation, to suspend a declaration of invalidity, or to read new provisions into an otherwise invalid law, the difference between the role of the court and the legislature becomes one of degree rather than type. While not closing the door to any of these remedial choices, Canadian courts generally have exercised restraint, recognizing how intrusive of the legislative function or how potentially derogatory of the judicial function these remedies may be.

Canada's written constitution has two remedial provisions. The first provision is found in Section 24(1) of the Charter and provides that anyone whose rights and freedoms as guaranteed by the Charter have been infringed may apply to a court of competent jurisdiction for an "appropriate and just" remedy. The second provision is found in Section 52 of the Constitution Act, and provides that "any law [of Canada] that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." The result of these two provisions is that the standard outcome of a successful constitutional challenge is a declaration of invalidity under Section 52, but a wider range of remedies is available under Section 24 if a court finds a breach of the Charter.

In constitutional litigation, three remedial devices exist. The first device is the use of interlocutory stays of proceedings to suspend the application of a law pending a final ruling on its constitutionality. The second device is the use of a period of suspension of the operation of a declaration of invalidity in

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49. *Id.* at 491.

order to avoid a vacuum while, at the same time, giving the government an opportunity to cure the constitutional problem. The third device is the Court's "reading in" provisions in order to make legislation constitutional.

#### A. *Stays*

The Supreme Court has held that it has jurisdiction to grant a stay of proceedings even if the order suspends the law or exempts one from compliance.<sup>50</sup> Therefore, where an action for declaratory relief challenges the constitutionality of legislation the Court, through a stay of proceedings, may "enjoin conduct on the part of a party in reliance on the judgment which, if carried out, would tend to negate or diminish the effect of the judgment of this Court."<sup>51</sup>

In deciding whether it should grant such a stay of proceedings, the Court has acknowledged that special considerations come into play. For example, in *RJR-MacDonald*, the Court said,

[O]n one hand, courts must be sensitive to and cautious of making rulings which deprive legislation enacted by elected officials of its effect.

On the other hand, the *Charter* charges the courts with the responsibility of safeguarding fundamental rights. For the courts to insist rigidly that all legislation be enforced to the letter until the moment that it is struck down as unconstitutional might in some instances be to condone the most blatant violation of *Charter* rights.<sup>52</sup>

The basic test is that used by most Canadian courts in considering whether to grant interlocutory injunctions. First, the applicant must show that there is a serious question raised in the proceedings. Second, the court must determine if the applicant would suffer irreparable harm if the application were refused. Third, there must be an assessment of the balance of inconvenience, which, in large part, is concerned with assessing which party would suffer greater harm from the granting or refusal of the order.<sup>53</sup>

It is primarily at the third stage of the analysis that the special character of stays in constitutional cases is assessed. The public interest must be considered in the balance struck at that stage of the analysis. While public interest considerations carry less weight where the effect of the stay is an exemption from compliance as opposed to a suspension of the legislation's effect, "[w]hen the nature and declared purpose of legislation is to promote the

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50. *RJR-MacDonald Inc. v. Attorney Gen. of Canada*, [1994] 1 S.C.R. 311.

51. *Id.* at 329.

52. *Id.* at 333.

53. *Id.* at 322-33.

public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so."<sup>54</sup>

The Court has laid down important principles of self-restraint in this area by holding that the onus upon public authorities to demonstrate irreparable harm to the public interest is almost always satisfied simply upon proof that the protection of the public interest is in the mandate of the authority and that the challenged legislation pursues that mandate. In *RJR-MacDonald*, the Court stated that

[O]nce these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest . . . The *Charter* does not give the courts a license to evaluate the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights.<sup>55</sup>

### *B. Suspending Declarations of Invalidity*

Where legislation is found to be unconstitutional, Section 52 of the *Constitution Act* states that the legislation is "of no force or effect." In some situations, an immediate declaration of invalidity might be contrary to the public interest, but at the same time allowing unconstitutional laws to operate is subversive of the principle of legality. In balancing these competing concerns, Canadian courts have been persuaded in a variety of situations to suspend the general operation of the declaration of invalidity to afford the legislature time to address the problem, while giving the party challenging the law the benefit of the judgment. Situations in which courts have taken this approach include a case in which virtually all of the laws of a province were found to be unconstitutional because they were not enacted in French and English,<sup>56</sup> a case in which aspects of the Criminal Code provisions relating to jury selection were found to be invalid,<sup>57</sup> and a case in which the scheme for automatic detention of those found not guilty by reason of insanity was struck down.<sup>58</sup>

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54. *Id.* at 348-49.

55. [1994] 1 S.C.R. at 348-49.

56. *In re* Section 55 of the Supreme Court Act (*Re Manitoba Language Rights*), [1985] 1 S.C.R. 721.

57. *Bain v. The Queen*, [1992] 1 S.C.R. 91.

58. *Swain v. The Queen*, [1991] 1 S.C.R. 933.

Delayed declarations have been found appropriate where immediate invalidity would threaten public safety, undermine the rule of law, or deny benefits to deserving persons where legislation failed for being underinclusive.

This superficially simple device in fact raises fundamental questions about the role of the courts as constitutional arbiters. The delayed declaration is not simply a practical expedient to preserve order and prevent injustice. It also implicitly encourages a constitutional dialogue with the legislative branch and shifts the onus of finding constitutional solutions to the legislature. This in turn reinforces the traditional division between the role of the courts to determine a law's legality and the role of the legislature to determine what constitutes good government.

### C. *Reading In*

When legislation is unconstitutional because it is underinclusive, the reviewing court confronts a remedial dilemma. Should the court declare the offending legislation inoperative in its entirety, thereby depriving the included persons of benefits or should the court read in an extension of the benefit so as to cure its underinclusivity? This choice acutely raises the question of what is the appropriate relationship between the judicial and the legislative power because the court must choose between remedial impotence and undisguised legislating. The Supreme Court of Canada has shown itself willing to resort to reading in, but under conditions that maintain considerable deference to legislative policy-making. In the leading case of *The Queen v. Schachter*<sup>59</sup> the Court discussed the circumstances in which it is appropriate for a court to read in an extension of an unconstitutionally underinclusive provision. The factors identified include remedial precision, consistency with legislative objectives, and the size of the group to be included. While not shying away from using this remedy where it has budgetary implications, the Court confined it to clear cases and those in which the budgetary implications are not so substantial as "to change the nature of the legislative scheme in question."<sup>60</sup>

In each of these remedial areas, the approach adopted is marked by reluctance to erect a priori exclusions of innovative and effective remedies, but also by great sensitivity to the appropriate roles of the legislature and the courts.

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59. [1992] 2 S.C.R. 679.

60. *Id.* at 718.



## VI. CONCLUSION

The provincial superior courts, which are the backbone of Canada's system of constitutional judicial review, are quintessential examples of cooperative federalism. The presiding judges are appointed and paid by the federal government, but the courts in which they sit, both jurisdictionally and physically, are a provincial responsibility. The centrality of their role, coupled with their ambiguous but necessarily cooperative parentage, have, perhaps, contributed to results that seem remarkable only when viewed from outside the country. The legitimacy of constitutional judicial review has never been more than a theoretical question in Canada; at a practical level, it has been viewed as the inevitable and often politically expedient byproduct of a federal system. The same may be said of the place of the provincial superior courts in the process.

Other characteristics of Canadian constitutional judicial review flow from the same premise. There must be liberal access to legitimate means for the resolution of constitutional disputes. There should be few a priori bars to practical remedies. But at the same time, the legitimacy of the process depends on its distinctive role; this, in turn, underlines the need to keep separate the judicial and legislative roles and to preserve the distinction between the legality of action and wisdom of choice.

The division of jurisdiction between the provincial superior courts and the Federal Court has had virtually no impact on the development of constitutional judicial review aside, perhaps, from providing a setting in which to underline the fundamental commitment to constitutional judicial review in the provincial superior courts. While a federal creation, the Supreme Court's place at the apex of a mainly unitary court system has resulted in its being identified as a national, not a federal court. The unitary court system, coupled with a pragmatic yet restrained approach, is perhaps the essence of the Canadian experience with constitutional judicial review.