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# Introduction to the Legal Structure of Canada



## 1. Historical Background

Unlike the United States, Canada was not created by a unilateral declaration of independence from the colonial occupation of England. There was no “Canadian Revolution” or other similar act that dramatically gave birth to an autonomous and independent Canada. Rather, Canada gained independence from England through a gradual legislative and political process. As a result, there is no

singular document known as the Canadian Constitution.

Instead, there are several statutes of both the British and Canadian parliaments that collectively form the Canadian Constitution.

## 2. Federal and Provincial Jurisdiction

Canada is a federal state with a federal government based in the capital city of Ottawa, Ontario. There are 10 provinces and three territories, and, accordingly, 10 provincial governments and three territorial governments, each based in the various provincial and territorial capitals.

The powers of both levels of government are outlined in the *Constitution Act, 1867*. In summary, the federal government is empowered to deal with issues concerning the “peace, order and good government of Canada,” which, for the most part, means issues of national importance that transcend provincial borders. These matters include national defence, foreign affairs, criminal law, immigration, banking, the national currency, international trade and intellectual property.

The provinces are empowered to deal with issues that are more regional in nature, such as direct taxation within the province, natural resources, education, social programs (such as welfare and health care), and rights related to private property and commerce. There are also many areas of joint federal-provincial responsibility. While the territorial governments are subject to federal jurisdiction, they have authority over a range of local government programs and initiatives.

In keeping with the separation of federal and provincial jurisdiction, the *Criminal Code*, the *Bankruptcy and Insolvency Act*, the *Competition Act*, the *Bank Act* (Canada), the *Patent Act* and the *Trade-marks Act* are federal statutes having force and effect throughout the country. However, many of the laws that affect Canadians on a day-to-day basis are within provincial and terri-

torial jurisdiction. For instance, matters relating to personal property are within provincial jurisdiction, so each of the provinces has its own regime for personal property security. All of the provinces except Québec now have a personal property security regime that is similar, though not identical, to the corresponding provisions of the U.S. *Uniform Commercial Code*.

## 3. Branches of Government

The government’s power in Canada is separated into three branches: legislative, executive and judicial.

### a. Legislative Power

Federally, the legislative branch is the Parliament of Canada. Parliament consists of two houses: the House of Commons and the Senate. The Senate, like the British House of Lords, has effectively lost all legislative power. Senators in Canada are appointed by the prime minister rather than democratically elected. The result is that the House of Commons is the sole source of federal legislative authority in Canada. Members of the House of Commons (known as members of Parliament, or “MPs”) are elected for a maximum of five years.

The political party with a majority of seats in the House of Commons forms the Government of Canada, and the leader of this party is the prime minister of Canada. Each province and territory also has a legislature to which members are elected. The leader of a province is known as a provincial premier. The heads of territorial legislatures are known as leaders.

### b. Executive Power

The prime minister (or the provincial premier or the territorial leader, as the case may be) appoints a cabinet, which consists of selected members of the respective legislature. Each member of cabinet is known as a minister and is given a portfolio of governmental responsibility, which primarily involves directing the relevant bureaucracy. The cabinet and associated bureaucracies form the Canadian executive branch of government. It is in this sense that legislative and executive authority are combined in the offices of the prime minister and the cabinet.

### c. Judicial Power

The head of the Canadian judiciary is the Supreme Court of Canada. The Supreme Court of Canada is the final court of appeal for all lower courts in Canada. Appeal is available only by leave. There are two separate court systems that exist beneath the Supreme Court of Canada. The first, the Federal Court system, hears cases on issues that come solely under federal jurisdiction. The second is formed by the provincial court systems, which deal with civil and criminal matters within the province. The provincial court systems usually include trial and appellate divisions.

The *Canadian Charter of Rights and Freedoms* (the “*Charter*”) is the Canadian equivalent to the U.S. *Bill of Rights*. Although the *Charter* was not introduced into the Canadian Constitution until 1981, it has had a significant impact on the balance of power within Canada. Parliament is no longer the supreme power, as its actions have become subject to judicial scrutiny in a manner that did not exist prior to 1981.

Any court in Canada can review any Act of Parliament if there are grounds to believe the Act violates the *Charter*. If there is a violation, the court is empowered to declare the Act, or any of its constituent parts, beyond the power of the government and therefore of no legal force. No provision of any Act, even subsequent to the *Charter*, may derogate from the guarantees it affords.

However, in certain circumstances, some rights guaranteed by the *Charter* can be overridden by Parliament. All that is necessary is an express declaration that the law will operate notwithstanding the *Charter*. This is contained in Section 33 of the *Charter* and is known as the “notwithstanding clause.” The *Québec Charter of Human Rights and Freedoms* applies in Québec, not only to the parliament, but also to persons, corporations, partnerships and trusts.

## 4. Common Law and Civil Law Traditions

The Canadian legal system is based on the common law tradition of the United Kingdom. In this respect, common law principles in Canada, such as those found in the law of tort, contract or property (both real and personal), are quite similar to those of the United States and the United Kingdom. Québec stands as an exception, as its legal system evolved from the French civil law system. In Québec, as a general rule, the civil law system applies to private law matters while the common law system applies to public law situations. Thus, to the extent Québec is empowered by the Canadian Constitution to make laws, Québec uses a civil code (the *Civil Code of Québec*).

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