



CONSTITUTIONAL DIVISION OF POWERS

When unconstitutional legislation is introduced, and successfully challenged in court, the general public does not understand the jurisdictional nuances. Instead, they may see a system that is unfair and against their interests. This undermines the respect that Canadians should have for our democracy in which the levels of government maintain a necessary division and separation to ensure that the local and national interests of Canadians are properly maintained. When the judiciary's power in rejecting unconstitutional legislation comes under attack, our democratic system of government will be attacked as well.

CBA Alberta asks MLAs to create an educational backgrounder on both the division of powers and the separation of powers for their elected Members; to be advocates for our judicial system to maintain confidence and protect rule of law democracy; and to commit to the ongoing civic education of the public, emphasizing the importance of our Constitution to our democratic system.



DEMOCRACY IS FRAGILE AND REQUIRES NURTURING AND RESPECT TO ENDURE.

Our system is not perfect, but it is the job of elected representatives within our democratic system to respect and advance the rule of law by avoiding creating the perception that the state is the enemy of the people.

BACKGROUND

Canada is a federation – a collective group of provinces and territories that have come together to pursue the common good of a fair and just democratic society.

SECTION 91

Section 91 sets out the powers that fall under the exclusive jurisdiction of the federal government. They include the power to make decisions in areas and on issues that affect all Canadians in order to ensure consistency across jurisdictions.

Federal heads of power include the following:

- Bankruptcy;
- Divorce;
- Criminal law;
- Interprovincial and international transportation, including fisheries, shipping, navigation, ferries, railways, and air travel;
- Commerce and banking;
- National social programs such as Employment Insurance, Canadian Pension Plan, Canadian Economic Recovery Benefit;
- Telecommunications;
- National defense and security;
- Federal taxation;
- Copyright laws; and
- Matters related to Indigenous peoples and reserve lands.

SECTION 92

Section 92 sets out the provincial heads of power; matters in which each province has exclusive authority and responsibility to make laws.

These include financial and operative heads of power relating solely to each province, such as raising tax revenue for provincial purposes and developing provincial offices. They also include the following:

- Management and sale of lands belonging to the province;
- Prisons in and for the province
- Licensing of various businesses to raise revenue for local purposes;
- Local works and undertakings that do not already fall under the federal heads of power
- Incorporation of companies;
- Marriage;
- Property and civil rights within the province;
- The administration of justice within the province; and
- Laws respecting natural resources, forestry, and electrical energy.

The provinces may also make laws respecting matters that are merely local or private in nature, within each respective province.

Also within the province's jurisdiction is education, which authority is set out in Section 93.

“Canada’s superior courts hold a unique role as protectors of the Constitution and act as the “primary guardians of the rule of law.” They are the “centre of the judicial system” of Canada. The majority of the Supreme Court recently emphasized in the administrative law context the important role of the superior courts in safeguarding the rule of law.¹

¹ Paul Daly et al, *The Effect of Declarations of Unconstitutionality in Canada*, [Source not specified], 2021 CanLII Docs 2420, <<https://canlii.ca/t/tctn>>, retrieved on 2023-04-13

THE ISSUES

The Constitution is the backbone of a representative democracy. If we do not respect the valuable role it plays, or how it operates, democracy itself is threatened. Specifically, a failure to understand constitutional principles has the following negative consequences:

Erosion of Public Trust

The majority of the Supreme Court recently emphasized in the administrative law context the important role of the superior courts in safeguarding the rule of law.³

When legislation runs afoul of the constitution, it will inevitably be struck down. This can sow confusion and mistrust. It is important to understand what we can and cannot legislate at each level of government, and more importantly, why the division of powers makes certain areas of legislation outside the jurisdiction.

If legislators have respect for the process and understand the rationale behind the division of power set out in the Constitution, they will be able to explain this better to their constituents.

Without respect for the rule of law and our federal system, people may feel like the system is broken, and operates against their objectives.

As seen in many countries around the world, the erosion of public trust in the system of government is often one of the first steps towards the breakdown of the social contract.

Risk of “Second Order Elections”

In an article published by UCC Davis Law Review, Laura Bakst makes the argument that legislative activism, or knowingly passing unconstitutional legislation, can lead to a phenomenon titled “second-order elections”, whereby constituents conflate the political issues of one level of government with another.

Where parties focus on the wrong issues – i.e. matters of another level of government - this can lead to the development of legislation that will inevitably fail for lack of constitutional authority.

Although this article was based on an analysis of the US political system, the same risks exist in Canada. Albertans deserve to know what is within the control of their representatives at the Alberta Legislature, and make their choice for representation based on party platforms that align with that reality.

Wasting financial resources

Bakst also reviewed the financial consequences of unconstitutional legislation.

Where a law violates the constitution, it will almost certainly be challenged. Consequently, considerable tax revenue is expended with little chance of a satisfactory result. As the fight over unconstitutional legislation inevitably makes its way into the court system, tax dollars are spent both in retaining legal counsel to research and advocate, as well as the use of court resources.

Court challenges to unconstitutional legislation also has costs in terms of time, energy, and missed opportunities to liaise and effectively build influence with federal representatives who could bring Alberta's concerns to the table.

Influence and political capital are better spent building alliances with all those who can be champions for the issues that affect Alberta but are outside the scope of the province to legislate.

In some cases, whether or not legislation is constitutional is not clear, as the issues raised in the legislation may be novel or do not easily fall under one of the heads of power assigned to the province in the constitution.

In these instances, risking a constitutional challenge, and the outlay of financial and political capital associated with it, would be a rational choice.

However, in other cases where it is clear that the only way for the provincial law to be permissible is if the Constitution itself was amended, then other legal means of achieving the results Albertans want should be explored.



Decline of the rule of law

Where we disregard or are unaware of the division of power, this risks undermining the rule of law.

The rule of law is fundamental to western democracies. According to the Supreme Court in the Quebec Secession Reference, “the rule of law provides that the law is supreme over the acts of both government and private persons. There is, in short, one law for all.” The Court went on to state that:

The rule of law principle requires that all government action must comply with the law, including the Constitution. This Court has noted on several occasions that with the adoption of the Charter, the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy. The Constitution binds all governments, both federal and provincial, including the executive branch... They may not transgress its provisions: indeed, their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source.²

Where we disregard or are unaware of the division of power, this risks undermining the rule of law.

When unconstitutional legislation is introduced, and then subsequent court challenges are inevitably unsuccessful, elected representatives and their legal counsel may understand the nuances as to why the law was unsuccessful or failed.

However, the general public, most of whom know more about the U.S. Constitution than Canada’s Constitution, does not understand these nuances. Instead, they may see a system that is unfair and against their interests.

Most law-makers will not want to concede that they knowingly introduced legislation that was ultra vires the Constitution, and instead, the system and the laws themselves get blamed for the proposed legislation’s failure.

This undermines the respect that Canadians should have for the division and separation of powers, and our democratic system in which the levels of government – provincially and federally – maintain a necessary division to ensure that the local and national interests of Canadians are properly maintained.

When the judiciary’s power in rejecting legislation that is unconstitutional comes under attack, it is not long before our democratic system of government will be attacked as well.

³ Reference re Secession of Quebec, 1998 CanLII 793 (SCC), [1998] 2 SCR 217, para 72

RECOMMENDATIONS

CBA Alberta calls on all political parties to demonstrate their commitment to the principles of our constitutional democracy, and the continuance of the rule of law in the following ways:

1. **By establishing an educational backgrounder for their respective members**, to ensure that elected representatives have a foundational understanding of why division of powers and separation of powers matter, and how to operate efficiently and effectively within this system of government.

As part of their platform, each party should identify what their plan is for providing members with this education, and how and when it will be implemented for those that are elected to power.

2. **By including in their platform a concrete and actionable plan to be advocates for our system.** The current climate is deeply concerning for the legal community; we see attacks on the judicial system and our political systems in general that threaten the future of democracy.

We need to recognize that “democracy is fragile” (Yale historian, Timothy Snyder), and is unsustainable if our own politicians do not recognize how these attacks erode confidence in the entire system. Our political parties need to outline a clear plan for what they will do if elected to uphold these principles and help Albertans understand them better.

3. **By committing to the ongoing civic education of the public** by raising awareness and disseminating information to constituents about the division of powers provincially and federally, and emphasizing the importance of the Constitution in our society and democratic system.

