CHAPTER ONE

PUBLIC LAW IN CANADA

Public law is complex, fast-moving, politically charged, and utterly fascinating. It involves the study of constitutional fundamentals, rights protection, and the rule of law. It also concerns the separation and balancing of institutional powers, multi-level governance, and democratic accountability. Through the study of legislation, public law introduces you to the importance of statutes and regulations both as forms of law and as political responses to pressing problems in Canadian society. By studying prerogative powers and delegated statutory authority, public law enables you to learn how the executive branch of government exercises its distinctive powers, and how those who exercise these powers may be held accountable to Canadians. And, in examining judicial decisions, you will see how the courts apply the law, which can involve engaging with questions of fundamental rights as well as statutes and administrative decisions that aim to serve the public interest. An introduction to the administrative state allows you a glimpse into the multi-faceted nature of the executive branch that administers law and policy through its many actors—ministers, bureaucratic officials, agencies, boards, commissions, and tribunals.

The image of law conveyed in this first paragraph may appear a bit overwhelming. This chapter reduces public law to several building blocks. First, this chapter introduces you to the idea of public law and distinguishes it from private law. It then outlines the basic institutional architecture of public law developed in more detail in subsequent chapters. Lastly, it

familiarizes you with several of the basic, recurring tensions that animate this large body of law. Many of your other courses are about the specific "trees" that comprise the legal "forest" in law school. This text provides a bird's-eye view of that forest, allowing you to comprehend public law's size, shape, scope, and contours. Here, we canvass the chief issues addressed in greater detail in chapters to come.

I. BASIC BUILDING BLOCKS

What is public law? Before addressing this question, we must first understand the legal setting in which Canada's laws arise.

A. SOURCES OF LAW

In Part I of this book, we address a number of preliminary issues, thereby setting the stage for our detailed discussion of public law. We begin with a chapter on legal theory—a treatment, in part, of the question "What is law?" In the balance of Part I, we then examine in detail how the Canadian legal system reflects the input of many different systems and sources. In this sense, the Canadian legal system is highly pluralist not only in terms of its basic structure, but also in its sources of law.

At the most general level, Canada's legal system comprises: (1) a common law system federally and in most provinces, derived from the English legal system; (2) a civil law system that codifies private law in Quebec, influenced by the French Napoleonic code; (3) international law, to the extent it is "received" into Canadian law by statutes and (with customary international law) as a source of common law; and (4) numerous Indigenous legal systems.

Canada is a federation with two different orders of government—federal and provincial. The Constitution creates a division of powers between the federal and provincial orders of government. In so doing, it facilitates Canada's legal pluralism by enabling distinct provincial political communities across the country to govern themselves according to their own local values and priorities, while at the same time providing for centralized federal decision-making on issues that transcend particular localities. Federalism also allows the common law to animate the private law of the provinces and territories other than Quebec, and the civil law to govern private relations in Quebec.

For its part, international law mostly stems from treaties. These are essentially law-making contracts agreed to by states in the international community. It also comes in the form of customary international law—basically, law that is not codified but flows from sufficiently universal practices by states undertaken with a sense of legal obligation. International law enters Canadian law through a sometimes complex process known as reception.

We discuss common, civil, and international law in Chapter 4.

Finally, Canada is currently involved in an ongoing and complex process of recognizing Indigenous orders of government, which may take many shapes. Indigenous legal orders predate the reception of the common law and civil law in the territory that became Canada. Despite a difficult history of Crown–Indigenous relations, including attempts to suppress distinctive Indigenous cultures, languages, and laws, these legal orders continue to exist and to evolve. Indigenous self-government today takes different forms in different contexts, including governance through an Indigenous-majority territorial government (i.e., Nunavut), governments established through modern treaties (e.g., the Nisga'a Nation in British Columbia) and self-government agreements (e.g., Westbank First Nation in British Columbia), and governments recognized through Indigenous custom and statutory frameworks. We include a comprehensive discussion of the relationship between Indigenous peoples and the law in Chapter 3, including the frameworks for recognizing collective Indigenous rights under Canadian law, as well as the laws applied by Indigenous communities themselves.

B. ORIGINS OF LAW

Legal pluralism in the Canadian context means more than just law from many different historical origins. It also means law stemming from different sources.

Law must come from some authoritative source in order for legal subjects to recognize the validity of the laws they are asked to obey. Without an authoritative source, a rule that presents itself as a law will not be recognized as law (see Raymond Wacks, *Law: A Very Short Introduction* (Oxford: Oxford University Press, 2008)). As discussed in Chapter 2, there are fundamental disagreements among legal scholars about what can qualify as an authoritative source of law, with legal positivists pointing to the need for laws to be recognized by the governing institutions of a society and natural law theorists emphasizing the moral foundations of law, which can supplement and underpin the laws promulgated by government institutions. Pluralism can exist with respect to both the positive sources of law (e.g., courts, legislatures, administrative bodies) and law's moral foundations, which may reflect a diversity of normative commitments among Canadians. The Canadian public law order is pluralist in its sources of law because it recognizes both written and unwritten sources of law. These sources roughly align with two institutions: legislatures that create written norms and courts that are the arbiter for the formal recognition of unwritten norms.

C. WHAT IS PRIVATE LAW?

Canadian law usually distinguishes between public law and private law. Private law is about relationships between legal persons in society. The phrase "legal persons" is used because it includes not just individuals—or "natural persons"—but also corporate bodies (or "artificial" or "juridical" persons). These legal relations establish the rights and duties that exist between these persons in their relations with one another. If, for example, private law establishes that people have a right to bodily integrity, you may owe them a duty of care to ensure that your everyday behaviour does not create harmful risks for them. To take a commonplace example, after a heavy snowfall, you may have an obligation (apart from municipal by-laws) to shovel your sidewalk so as not to create risky conditions that may cause a person to have an accidental and very harmful fall on the icy pavement. If you fail to observe that duty, you may be legally required to compensate the injured person for any resulting losses they faced because of the accident, such as lost wages from time off work.

Private law includes property law, tort law, and contract law, as well as other areas such as unjust enrichment, trust law, and intellectual property law. Private law rights and obligations can arise from voluntary agreements in contract law; from owning private property in property law, from unjust enrichment (also known as restitution); from the structure of a trust recognized by equity; and from principles found in tort law, as considered in the example above.

D. WHAT IS PUBLIC LAW?

Public law is different. It is not about the relationships between private persons. Instead, public law structures the legal relationships between individuals and the state and among different institutions within the state. Most students start law school with one particular conception of public law in their minds. Usually, it is criminal law because this is the most widespread depiction of the legal relationship between the individual and the state in Anglo-American popular culture. Constitutional law would be a close second. But neither of these areas exhausts the scope of public law. Public law also structures the legal relationships among and between the three branches of the state: the legislature, the judiciary, and the executive. This relationship is captured in the public law doctrine of the separation of powers. Public law also regulates the partitioning of power between the orders of government in our federal system—a phenomenon known as the division of powers.

Generally speaking, in common law countries, we tend to classify constitutional, administrative, criminal, and areas of regulatory law (such as environmental or tax law) as public law because these areas of law contain rules that define the scope of governmental authority and the ways it is exercised.

This is not to say that public law and private law are separate universes, completely sealed off from one another. The distinction between public and private law is largely functional rather than factual. Classifying an area of law as either private or public usefully delineates the activities, participants, and principal concerns that are subject to the rules of that particular area. Certainly, public law is mostly about the state (or at least the state in its relationship with persons). But it is important to recognize that the state can also have private law responsibilities and roles. The world does not divide neatly into "law for the state" and "law for everyone else." For example, when the state breaches a contract or acts negligently, it may be required to pay private law damages to the affected parties in contract or tort law. And in our system, government officials are not generally immunized from criminal culpability if they commit a crime in the course of their official duties.

Likewise, the institutions of the state have a role in relation to the actual implementation of private law relations existing between persons. Thus, statutes promulgated by legislatures may define the substantive rights and duties that individuals owe one another, courts are responsible for determining those rights, and the executive branch may be called upon to enforce private rights by coercive means.

II. DRILLING DOWN: THE WORKINGS OF PUBLIC LAW

A. PLURALISM IN PUBLIC LAW

With that brief backdrop, we focus now in further detail on some of the ingredients of public law. In this introduction, we begin by asking the question "Where does law (and specifically public law) come from?"

Another way of approaching this question is to ask, "Which came first: public law or the state?" This is not an easy question to answer, at least in relation to Canada (and its UK inheritance). It is very difficult to disaggregate the emergence of the modern institutions making up the state and the core doctrines of public law that we discuss below. Suffice it to say that public law is deeply organic—a product of history at least as much as premeditated design. Put another way, public law is often the product of political evolution, and not always (or indeed often) the end product of a rational design process. (For an examination of the evolution of public law in the United Kingdom, see Adam Tomkins, *Public Law* (Oxford: Oxford University Press, 2003).) The recurring constitutional principles that underpin Canadian public law are addressed in Chapter 5.

B. BRANCHES OF THE STATE

In response to the chicken-and-egg quandary of "which came first, public law or the state," we will begin by describing the basic architecture of the state. In doing so, we anticipate the subjects dealt with in Part II of this book. That section examines the key actors in public law: the legislature (in Chapters 6 and 7), the executive (in Chapter 8), and the judiciary (in Chapter 9).

As the structure of our chapters suggests, the historical evolution of Canada, as in many other liberal democratic states, produced a state that has three key branches (although as we shall see, more nuance can be added to this statement). Thus, the state comprises a legislative branch, an executive branch, and a judiciary. In a federalist state, such as Canada, this tripartite distinction is reflected within two distinct orders of government: federal and provincial.

As we explore in Chapter 8, the executive branch is the most complex branch of the state and is much bigger than simply the prime minister or premier and Cabinet. In Canada, it also encompasses other actors such as the Crown (the King and the governor general), the civil service, the military, the police, and many decision-makers in the administrative or regulatory state. In some instances, the executive branch will also include municipal governments and Indigenous governments. The executive branch in the modern Canadian state also engages in a wide variety of regulatory functions. These regulatory powers are delegated, through statutes, to thousands of administrative and regulatory tribunals at both the federal and provincial levels of government. The state as a regulator directly affects many people, and decisions made by administrative actors often have significant consequences for affected persons. The removal of a taxi licence, the decision to put a prisoner in segregation, the decision to approve a natural gas pipeline, or the denial of a municipal rezoning application are examples of this breadth in administrative decision-making.

But while most of us think of the executive and its functions when we think of government, it is important to recognize that, legally speaking, the executive is a largely subordinate entity in the Canadian state. In Canada, Parliament (and at the provincial level, the legislatures) is sovereign, or supreme. Except in limited instances where the executive enjoys some inherent legal authority, described as "prerogative" powers because they flow from the historic role of the monarchy in our system of government, these legislative bodies are the ultimate source of all constitutionally permissible state powers. While our legislatures may now appear politically weak in connection with the executive and the judiciary, they are in fact legally supreme. We discuss the structure and composition of the legislative branch in Chapter 6 and its functions in Chapter 7.

And, of course, we cannot forget the judiciary, the subject of Chapter 9. Indeed, it is fair to say that first-year law largely focuses on courts and how judges reason. Right at the outset, students of public law should appreciate that courts are unlike the other branches of the state—they are staffed differently and with an eye to quite different considerations than exist for the legislative and executive branches. And they exercise a very different set of powers. Speaking generally, courts do two things of importance for our purposes: they adjudicate disputes under either private or public law rules, and they review the actions of the other branches of the state to make sure that those branches act lawfully. Along the way, they often need to interpret statutes and regulations or constitutional texts.

Public law introduces students to the state as a whole and the functions of its component entities. Because public law is principally concerned with the exercise of governmental authority, public power is a recurring theme, and questions about how it is exercised and whether or not it is accountable are recurring concerns. This power is public because it is created and legitimated by legal institutions whose own authority, in turn, is sustained by adherence to the rules governing the exercise of their powers. Public power is intimately related to accountability. The discussion within the chapters that follow illustrates how governmental authority is qualified by legal rules and how the different legal institutions that are created are made accountable to one another and to the citizenry as a whole. In Part III of this book, we focus special attention on the public law relationship between the judiciary and the other branches, examining the role of judges as interpreters of statutory law (Chapter 10) and as reviewers of both legislative and executive action (Chapter 11).

C. LEGAL BASIS FOR THE STATE

In the balance of this chapter, we will add more detail to our public law discussion above, as a transition to the specialized chapters to come. It may be useful to reread this part as you proceed through the book because you will find its observations become clearer the more knowledge you acquire.

We return to the legal basis for the Canadian state structure. In keeping with our nod above to the importance of history, we must underscore that the system, structure, and organization of government in Canada were not created in a vacuum. In some large measure, they are the legacy of a process of colonization, first by the French and later by the British, followed by a transition to independence. The transition between colonial law and full legal independence took place over a period of almost 200 years. A very brief review of that history helps place the contemporary legal basis for public law in context.

There were many Indigenous political communities that predated the arrival of European settlers in the territory that became Canada. These Indigenous communities had their own laws and broader normative orders, as discussed in greater detail in Chapter 3. As the settlement project got under way, European sovereigns unilaterally asserted a right to govern the territory, initially based on "discovery" of the territory prior to other Christian nations. The settlement communities brought their home country's laws with them, providing for the "reception" of French and later English law, as discussed in Chapter 4. European law was held to have been received in the colonies despite the prior existence of Indigenous legal orders. That said, Indigenous law continued to be applied within Indigenous communities and in other contexts—for instance, in regulating commercial relations under the fur trade.

After the British conquered New France on the Plains of Abraham in 1759 (the Battle of Quebec), France ceded the land it controlled to Great Britain under the *Treaty of Paris, 1763*. The *Royal Proclamation*, 1763, RSC 1985, App II, No 1 provided for the imposition of English law on the new colony, which altered the common law rule that, in the case of conquest, the laws of the conquered state would continue to apply on most issues.

Just over ten years later, the British government recognized that it needed to address growing unrest over the imposition of British rule and laws. In 1774, therefore, the British Parliament enacted, as an imperial statute, the *Quebec Act, 1774*, RSC 1986, App II, No 2, which, among other provisions, partially restored civil law as the law of Quebec (a wide territory that included much of what is now Ontario). The law provided for the application of the civil law to matters of private law ("property and civil rights") but not to other matters, such as criminal law.

In subsequent decades and after agitation and rebellion in some jurisdictions, the British North American colonies moved gradually toward a system of "responsible government," meaning a government in which the executive branch is accountable to the elected legislative assembly. Rather than direct rule by Britain through an appointed governor insulated entirely from the local populace, the executive government became accountable to colonial legislatures competent to pass their own laws. Under responsible government, the Cabinet appointed by the governor to run the executive branch of the state must maintain the confidence of the elected assembly. If it loses that confidence, for instance, by losing a key vote, it must by convention resign.

However, even under responsible government, these local legislatures were still colonial, and imperial statutes continued to apply in the colonies. As the name suggests, imperial statutes were statutes that applied in the British colonies. Only the British Parliament could make and amend them. The reach of imperial statutes was clarified by the *Colonial Laws Validity Act, 1865* (UK), 28 & 29 Vict, c 63. Under this law, an imperial statute, defined as an act of the British Parliament, was deemed to extend to colonies only if the statute expressly or by necessary implication made that clear. The Act was intended to extend the powers of colonial legislatures by clarifying that only those of their laws "repugnant" to an imperial statute applicable to them would be void—all others would be allowed to stand. It also, however, left colonial legislatures unable to alter imperial statutes.

In 1867, four of the colonies of British North America (Nova Scotia; New Brunswick; and Upper and Lower Canada, now Ontario and Quebec) were joined in Confederation, and Canada became a partially self-ruling dominion. Canada added more provinces between 1870 (Manitoba) and 1949 (Newfoundland and Labrador). The *British North America Act, 1867* (UK), 30 & 31 Vict, c 3, another imperial statute, created many of the systems of government that exist today

(and is still one of Canada's main constitutional documents, renamed in 1982 the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5). However, after 1867, some vestiges of the colonial past remained: in particular, the nature of the *Constitution Act, 1867* as an imperial statute meant that Canada could not amend its own constituting document because s 129 of the *Constitution Act, 1867* maintained the requirement from the *Colonial Laws Validity Act* that imperial statutes applying to Canada could be altered only by Parliament in Westminster. This requirement was subsequently relaxed through the adoption of the *Statute of Westminster, 1931* (UK), c 4, which stated that no law made by the Parliament of the United Kingdom would apply to any of its dominions (including Canada) unless specifically requested and consented to by a dominion. It also repealed the *Colonial Laws Validity Act* and granted to each dominion the power to repeal or amend imperial statutes. One anomaly remained—the *Constitution Act, 1867* was exempt from this provision, mainly in order to ensure that the nature of Canada as a federal system, with coordinate powers granted to the federal Parliament and the provincial legislatures, remained intact. Finally, in 1982, with the "patriation" of the Constitution, through the *Canada Act 1982* (UK), 1982, c 11 and the *Constitution Act, 1982* (being Schedule B to the *Canada Act 1982* (UK), 1982, c 11), Canada's independence became complete. Now, the UK Parliament exercises no jurisdiction over Canadian affairs, and amending Canada's Constitution is the business of the Canadian federal and provincial legislatures.

As we will consider in more detail in Chapters 6 and 8, the one area in which the Canadian system of government retains an institutional connection with the government of the United Kingdom is in respect of the monarchy. King Charles III is currently the King of the United Kingdom, and because he holds that office, he is also King of Canada. You will notice that at various points in Canada's constitutional texts, the monarch is referred to as the "Queen" rather than the "King." This is because the monarch at the time those texts came into force was a queen rather than a king. When we refer to the "Queen" or the "King" in a public law context, that reference includes the lawful heirs and successors of the Queen or King, so authority resides in whatever person occupies the role of the monarch at the relevant time.

It is also worth noting that until 1949, Canadian judgments could be appealed to the Judicial Committee of the Privy Council, a court in London whose personnel typically overlapped with the judicial members of the House of Lords (then the highest UK court of appeal). This meant that for many years Canadian judges had to be especially cognizant of Privy Council and House of Lords decisions. Appeals from Canadian courts to the Privy Council were abolished in 1949 by an act of the Canadian Parliament.

As this discussion suggests, the key written sources for modern Canadian public law include the *Constitution Acts, 1867* and *1982*. But there are a number of other written instruments that, when taken together, make up the written Constitution. The *Constitution Act, 1982* includes a lengthy annex enumerating the instruments that are part of the written Constitution (many of them imperial instruments inherited from our colonial past), though the list is not necessarily exhaustive. That means that even the modern, written Constitution is not simply a single, self-contained document, but rather a mélange of imperial and Canadian legislative instruments.

But the Constitution does not end here because, in addition to the written texts, Canada's public law order continues to include "unwritten" principles or rules. Accordingly, public law principles come from a number of "unwritten" sources. For instance, "conventions" are the unwritten rules that govern Parliament and the provincial legislatures. Despite being constitutional rules and despite the fact that their existence may be disputed until a court decides the matter, conventions cannot be enforced by the judiciary. Courts can recognize conventions only by declaring that they exist and by articulating the current content of particular conventions. Conventions are enforced only politically and are therefore part of what we call the "political" rather than the "legal" Constitution. This means, with respect to conventions, that political actors are held accountable not through the courts, but rather through the political—and ultimately electoral—systems. Chapters 5 and 6 explore many of the key conventions in our constitutional order.

"Unwritten principles" is an even more opaque term used to describe some unwritten legal norms. Unlike conventions, courts can both recognize these principles and enforce them. To interpret principles and give them content, the judiciary usually draws upon Canadian history, morality, and politics. When you read the excerpts from the *Patriation* and *Quebec Secession References* in Chapter 5, look carefully at how these decisions make use of historical facts, Canadian politics, and other narrative frames. These frames are essential to legal argument, and you should think about who gets to frame both the historical debate (if one exists) as well as the competing legal narratives. In public law, unlike private law, more than two sides and multiple arguments are often in play in a particular case. This is another effect of pluralism in public law.

Unwritten principles can be given an authoritative written formulation for greater clarity and specificity. Modern judicial decisions do just that. But it is also important to remember that the legislature can shape judicial interpretation of legal principles by articulating the content of relevant principles in a statute. The preamble, purposes, and definitions sections communicate intent about the main legal norms and values that the legislature has embedded in the statute.

This section has briefly explained the transformation of Canada from a colony, then a dominion of the United Kingdom, to a fully independent and sovereign state. But the legacy of colonization continues to affect Indigenous peoples. In Canadian law, the unwritten constitutional principle of reconciliation—discussed further in Chapter 3—animates and structures the current public law relationship between the Canadian state and Indigenous peoples and is leading to the recognition of different forms of governance for those communities.

D. THE RULE OF LAW, VALIDITY, AND LEGAL AUTHORITY

We wish to pause here and focus special attention on two animating precepts of Canadian public law. Canadian public law contains many unwritten principles, but two of the most important are the rule of law and democracy. In the sometimes perplexing Canadian public law tradition, these norms—which are foundational—are often not expressly mentioned in the written constitutional documents discussed in the section above. The unwritten principle of the rule of law, for example, expressly appears only in the preamble to the *Constitution Act, 1982*: "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law."

If you read the written constitutional documents without understanding these important, underlying rules, you will easily obtain the wrong understanding of Canada's system of government. For instance, a read of those documents might lead you to imagine that a powerful monarch rules us, through an exercise of substantial personal authority over our government.

In fact, this is not the case, both because of specific constitutional conventions governing the King's relations with executive government and the legislature and because of undergirding concepts like "democracy."

In practice, public power in our system is never truly free and as unconstrained as it might be in other political systems that are ruled by authoritarian leaders, dictators, tyrants, or a small number of elites. In our system, governmental authority is sourced and structured by legal rules that ensure that our three branches are made accountable to each other and to the public at large.

As you will see in the following chapters, the unwritten principle of the "rule of law" is foundational for our legal system. The rule of law provides that society is to be governed by laws rather than the unconstrained desires of the powerful. It requires that laws be general in scope; be reasonably clear and ascertainable; and apply equally to all, including agents of the state. In a society governed by the rule of law, all state action must comply with the law, including, but not limited to, the Constitution. Put another way: no one is above the law, including the state. Historically, the rule of law is associated with several core meanings,

as we discuss in Chapter 5. But in its most basic form, it means that public power is to be exercised in keeping with the law, not according to the idiosyncratic likes and dislikes of the people who wield political authority.

In practice, discussion of rule of law often invokes discussions of legal validity and institutional legitimacy. Legal validity is a complex concept that cannot be fully unpacked here; but for lawyers, it means that we are ruled only by valid laws. Put in a somewhat more complex way, it means that certain identifiable and sufficient conditions have been met to permit the label "law" to be attached to a rule of conduct and that this "law" will be considered binding on legal subjects. Valid law can be produced (or definitively recognized only) by an institution with the legal authority to make that determination. Once that authority is properly exercised, Canadians have a general legal obligation to obey this law. Courts play a large role in helping to identify valid law and correct for invalid law on constitutional or other public law grounds.

The legal concept of validity stands apart from a second dimension of validity: morality. Legal norms exist alongside other norms that originate from the multiplicity of moral commitments found in contemporary Canada (i.e., personal, political, ethical, religious, etc.). In some cases, all or most Canadians may generally share content from these different moral commitments so that we can see that there may be a larger public morality. One example would be the moral imperative to treat others equally, with respect, and as ends-in-themselves. Historically, this moral imperative informed the legal arguments to end slavery because no one should have a moral or a legal right to own another person as property. It also animated legal requirements to treat women equally with men.

From a legal positivist perspective, public law is premised on a separation of law from morality. Those working in the natural law tradition, by contrast, would point to the role of morality in underpinning and helping to define the content of law, including public law. Even legal positivists, however, generally acknowledge that our legal system does possess features that invite moral considerations. In public law, statutes often contain imprecise language such as "in the public interest" or "fair and equitable treatment," language that permits decision-makers to include some form of non-legal public morality in their reasoning. Again, courts play a crucial role in overseeing the content and determining the scope of this kind of moral reasoning. This is discussed in more detail in Chapters 10 (concerning statutory interpretation) and 11 (concerning administrative law).

Finally, it is important to acknowledge that historical, customary practices have a bearing on popular discussions of legal validity. Constitutional conventions, discussed above, are an illustration of this kind of constraint. Constitutional conventions, including the principle of responsible government, are crucial to the democratic legitimacy of the Canadian state, despite the broad legal powers the Constitution accords to the monarch.

E. DEMOCRACY AND POPULAR AUTHORITY

Democracy means "rule by the people." Ancient Athens provided the original model. There, the democracy was based on a majoritarian and participatory model (excluding women and slaves) that cannot be duplicated in modern states. Historically, supporters of Athenian-style democracy suggested that it fundamentally meant a highly participatory and deliberative form of government, while its detractors labelled it "mob rule."

Many contemporary forms of democracy exist, including the republican form of government established under the United States Constitution. (For an overview of the concept and various models of democracy, see Amy Gutmann, "Democracy" in Robert E Goodin, Philip Pettit & Thomas Pogge, eds, *A Companion to Contemporary Political Philosophy*, 2nd ed, vol 2 (Malden, MA: Blackwell, 2007) at 521-31.) Our "Fathers of Confederation" intended our Constitution to differ quite radically from the American model. One chief difference was that our Constitution would not be derived from the people. (In the Canadian context, see

Alexander Galt, "'Not Derived from the People': Letter from the Fathers of Confederation to the British Colonial Secretary" in Peter Russell et al, eds, *Essential Readings in Canadian Government and Politics* (Toronto: Emond Montgomery, 2010) at 76. For the contrasting American experience, see Bruce Ackerman, *We the People: Foundations* (Cambridge, MA: Harvard University Press, 1993).) Today, most would characterize Canada's system of government as a liberal democracy because of the significant influence of liberalism as a political philosophy—that is, a view of society in which individuals enjoy substantial autonomy and that is hostile to an absolute state. Exactly what role the state should have in its relationship with its populace is a question always in flux, and Canadian democracy has therefore undergone significant change since the 18th and 19th centuries and continues to be a work in progress.

The *Quebec Secession Reference* provides an authoritative statement from the Supreme Court of Canada on the Canadian principle of democracy. In this extraordinary judgment, the Court declared that the principle of democracy includes the right to vote, the right to effective representation, and the right to participate in the political system. The principle of democracy, the Court stated, is also part of the concept of responsible government with its links to ideas of self-government, consent, and a "continuous process of discussion" in the political community (*Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 68, 1998 CanLII 793). Democracy is related to, but differs from, parliamentary supremacy because the institution of Parliament need not necessarily be democratic. (Indeed, as we will see in Chapter 6, one of the two houses of Parliament—the Senate—is appointed rather than elected.) And finally, the democratic principle interacts with the principle of the rule of law to provide legitimacy to our public law order.

III. TWO MODES OF ACCOUNTABILITY IN THE EXERCISE OF PUBLIC POWER

As this discussion suggests, public law provides the building blocks of the Canadian state. But it is more than simply a blueprint for the structure of power. In many of its facets (and especially constitutional and administrative law), public law is the law of state accountability. But in approaching this concept of "accountability," students of public law quickly need to come to grips with the pervasive interaction between the worlds of law and politics. This interplay may sometimes produce unsatisfactory results. American legal scholar Sanford Levinson provides a pithy definition of "democratic deficit": "A democratic deficit occurs when ostensibly democratic organizations or institutions in fact fall short of fulfilling what are believed to be the principles of democracy." (See Sanford Levinson, "How the United States Constitution Contributes to the Democratic Deficit in America" (2007) 55 Drake L Rev 859 at 860.)

While much admired around the world, Canada's system of government arguably has several democratic deficits. Depending on to whom you speak, these deficits originate in the dominance of the executive branch in our system of government, the relative weakness of our legislative branch, and growing citizen apathy, among other problems. Key deficit questions that may occur to you as you work through this book include:

- How can we strengthen our democracy and especially our legislative branch?
- How can the rule of law enhance the values of accountability, legitimacy, and transparency in government generally and in the executive branch in particular?
- What effective constraints does our judiciary face?
- Should our system be characterized by an institutional dialogue among the three branches?

This book is mostly an introductory text. It is not a normative rethink of Canadian public law. But we can review some themes that you may wish to keep in mind as you proceed, and as you wonder, "Is there a way to build a better system?"

A. POLITICAL ACCOUNTABILITY VERSUS LEGAL ACCOUNTABILITY

State actors exercise public power in a variety of ways: for example, the executive introduces bills in the legislature; following a complex process, the House of Commons debates and potentially passes the bill; the Senate scrutinizes this piece of legislation for flaws, and it too debates and potentially passes the bill; the Crown assents to the legislation, and enactment is finally procedurally complete and the bill becomes a statute. But the process doesn't really stop there. Administrative actors in agencies, boards, commissions, and tribunals interpret and apply statutes in their day-to-day decision-making. Courts review problems that arise under the statute or in the administrative decision-making that interprets and applies the particular statute. Each of these other state actors and processes needs to be held accountable in a system that is committed to realizing democratic and rule-of-law ideals. Canadian public law provides two routes to realize accountability: political and legal. (For further discussion of achieving accountability in the Canadian state, see Craig Forcese & Adam Freeman, *The Laws of Government: The Legal Foundations of Canadian Democracy* (Toronto: Irwin Law, 2011).)

1. Political Accountability

Canada inherited the Westminster system of parliamentary government from the United Kingdom. Historically, this system operated without a written constitution (or at least a constitution that consolidated its rules in one authoritative document). Indeed, to this day, the United Kingdom still does not have a unified written constitution. The lack of a written constitution matters because it means that any law—even one that concerns fundamental rights or foundational principles—can be changed or undone by subsequent laws enacted by Parliament. This is what we mean, in part, by parliamentary supremacy or sovereignty: Parliament may enact any law that it wishes—so long as it was enacted properly—and courts cannot override or strike down this legislation.

This parliamentary sovereignty model contrasts to the other great tradition in the common law world—that of the United States. In contrast to the United Kingdom, the United States embraced in 1789 a model of constitutional supremacy. The American Constitution includes a series of amendments that became a bill of rights constraining Congress and state legislatures from violating fundamental rights and freedoms such as freedom of speech, due process, and equality rights.

Canada, for its part, drew initial inspiration from the United Kingdom in almost every respect, except federalism. Recall that the *Constitution Act, 1867* divided power between the federal Parliament and provincial legislatures (i.e., federalism). Judicial review, at least on federalism grounds, ensured that the judiciary played a prominent role in preventing the federal and provincial orders of government from overstepping their jurisdictions and intruding into the subject matters given to the other level.

Following the enactment of the *Constitution Act, 1867*, Canadian public law continued the British traditions of so-called political constitutionalism and responsible government. Political constitutionalism relies on the "capacity of political considerations to prevent or at least dissuade those in authority from using their powers oppressively or abusively." (Catherine Barnard et al, eds, *What About Law?* (Oxford: Hart, 2011) at 176.) Elections, for example, are a method of ensuring accountability when the government of the day must face voter opinion and run on its political record.

We discuss all of this at regular intervals in this book. For our purposes here, it is important to recognize how important a culture of political constitutionalism can be to a successful democratic state. The United Kingdom continues to provide an example of where cultural and political norms and expectations mean that politicians do not regularly interfere with individual rights and freedoms despite the lack of a constitutionalized bill of rights. This is a useful

reminder that all branches of the state—not just courts—can and should protect and promote individual rights and that accountability is not something to be outsourced in full to courts.

2. Legal Accountability and the Constitution

Still, political constitutionalism may provide only imperfect accountability. A government with a majority can control Parliament and weaken that institution's accountability mechanisms (the operation of Question Period, for example, when MPs have the opportunity to ask questions of Cabinet ministers). Such a government can also use its power to advantage or disadvantage groups of people in society. This treatment—advantaging or disadvantaging groups—may constitute arbitrary rule or discrimination. This arbitrary treatment may be reflected in the content or effects of legislation. When a minority group is disadvantaged, and the majority of the population agrees with the government in power, the electoral system may not provide either accountability or a political remedy.

The perceived need for a counter-majoritarian check is one chief reason for the entrenchment of a bill of rights in a constitution. Such instruments contribute to the legalization of accountability and are key contributors to the growth of judicial power.

This is, in fact, the road that Canada has travelled in its more recent history. Before 1982, Canada had a federal statutory bill of rights (enacted in 1960) and a federal human rights (or anti-discrimination) code (enacted in 1977). Canada also had numerous provincial human rights codes (Ontario enacted the first provincial code in 1962). These early human rights documents are ordinary statutes that can be amended through the regular process or entirely repealed by their respective legislatures. But occasionally you will see lawyers and judges calling them "quasi-constitutional." Be warned: these laws are not, in fact, part of the entrenched Constitution. Accordingly, they can be amended by ordinary legislation, without the need for a constitutional amendment. However, because they often contain language that gives them priority over other, regular statutes in the event of a conflict, they have a trumping effect that is roughly analogous to what happens when a regular statute and the Constitution conflict.

With the "patriation" of the Constitution in 1982 (meaning that the Constitution could be amended without the need for legislation passed by the UK Parliament) and the entrenchment of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), c 11 (the Charter), the older principle of parliamentary supremacy was curtailed, and the "new" principle of constitutional supremacy became paramount in public law. Under the 1982 Constitution, courts were allocated more power to intervene by enabling the judiciary to strike down or invalidate legislation that offended the Constitution on grounds much broader than the 1867 concept of federalism. Now the Constitution codified individual and group rights. And, unlike with prior efforts to legislate rights protections, the Charter is not easily amended by Parliament. Any amendment of the Constitution requires adherence to constitutional amendment formulas. Depending on the amendment in question, this process may require substantial (and rarely achieved) levels of agreement between the federal and provincial orders of government, discussed in Chapter 5.

And yet, even as in 1982 Canada moved closer to the American model, its Constitution also maintained some distinguishing features. The Charter, for example, contains two distinctive provisions. The first is s 1. Under s 1, the rights and freedoms guaranteed in the Charter are not absolute. Rather, they are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Section 1, therefore, represents an attenuated continuation of the principle of legislative supremacy. Courts will require governments to provide demonstrable justifications under s 1 and, if the government is successful, that legislation may be "saved" because it both furthers a valid objective and affects a right or freedom no more than is necessary.

The second provision, s 33, is the notwithstanding clause. This provision permits Parliament or a provincial legislature to expressly override parts of the Charter by declaring that a

particular statute will operate notwithstanding a provision in the Charter concerning fundamental freedoms, or legal or equality rights. Canadian public law scholars remain divided on the desirability and necessity of this clause.

While many viewed these 1982 changes as a great advance in public law, Chapters 5 and 6 discuss how the flexibility inherent in the Westminster model is now lost and constitutional change is very difficult given the difficulty of successfully implementing many of the current amending procedures in Canada. In constitutional matters (at least if s 33 is not used for the Charter rights to which it applies), judges effectively now have the final word. In Chapter 11, we conclude this book with an examination of the judicial role in policing the political branches on both constitutional grounds (in the case of both the legislature and executive) and administrative law grounds (in the case of the executive).

B. OTHER FORMS OF LEGAL ACCOUNTABILITY

Judicial review on constitutional grounds is not the only—or even the main—form of the legal oversight of public power. All common law countries share a legal tradition grounded in judicial techniques of statutory interpretation, a concept discussed at length in Chapter 10. Through these various techniques, courts ascertain whether or not a statute authorizes particular actions and whether or not errors exist in a statute.

Statutory interpretation brings us back to the separation of powers. The separation of powers means that each branch of the state is entrusted to perform specific functions. Traditionally understood and much simplified, the legislature makes the law, the judiciary interprets and applies the law, and the executive implements and enforces laws and policies. Chapter 5 more fully elaborates on the separation of powers in Canadian public law and how it is not a set of bright-line demarcations. As a constitutional principle, the separation of powers ensures that each branch does not intrude on the powers and responsibilities allocated to the others. The doctrine also aims to prevent the concentration of public power in one branch by permitting each branch to check the others' powers. It is not only an adversarial principle, however, because it also encourages branches to cooperate as constitutional partners in good governance. The necessity of cooperation links the separation of powers to another key constitutional principle: the principle of deference. Each branch ought to exhibit deference to others when they are acting appropriately within their functions and constitutional bounds. When it comes to matters of statutory interpretation in judicial review, the principle of deference possesses significant implications for the role of the judiciary.

Statutory interpretation inevitably involves consideration of the institutional interaction among all three branches. It first implicates the legislature that enacted the statute and crafted a statutory mandate with specific purposes in order to remedy a perceived problem in society. Statutory interpretation often involves an executive actor—usually a statutory delegate like an adjudicator, an administrative official, a police officer, or a minister—who advances a particular interpretation of a power or purpose in that statute. And, lastly, the courts become involved when an interpretive dispute arises about the meaning of the legislative text and they are called on to resolve the textual ambiguity.

1. Judicial Interpretation of Statutes

In Part III of this text, we turn to a closer examination of the interrelation between the courts and the political branches of government—the executive and the legislature. In Chapter 10, we consider the role of the courts in applying the statutory law determined by the legislative branch. There, we discuss the doctrines of statutory interpretation, which are designed to inform judicial interpretation of legislative language.

For constitutional interpretation, courts employ an approach that considers the text, context, and purpose of the constitutional provision. This includes the historic, linguistic, social,

philosophical, and legal contexts that inform our understanding of the constitutional text. Canadian courts have endorsed what they call a "living tree" approach to constitutional interpretation, meaning that the interpretation of a constitutional provision is not necessarily fixed at the time of its enactment but may evolve over time.

When an interpretive dispute arises regarding a statute, reviewing courts will engage in what is now known as the "modern approach" to statutory interpretation. Judges use this approach to determine legislative intent in order to clarify the words or provision at issue. Most of Chapter 10 is devoted to explaining and exploring the modern approach to statutory interpretation through case law and exercises.

2. Judicial Oversight of Executive Action

The executive branch is not a single, unified body but, rather, an amalgam of institutions and actors. Despite this reality, in Canada we tend to refer to the executive branch as "the government," and by "the government," we mean the executive (accountable to the prime minister or premier and Cabinet). Since the Second World War, the scope and functions of the executive branch have grown. The largest component of the executive branch is the administrative state comprising officials, agencies, boards, commissions, and tribunals. All of these bodies look different and serve different functions. Many work like miniature governments because they combine legislative, executive, and adjudicative functions. Human rights commissions are a good example of this type of fusion. Institutions that are part of the administrative state vary widely in how much and what type of independence they possess from the Cabinet and the government departments that report to the Cabinet.

The public powers exercised by actors in the administrative state are constrained. Except in rare instances where they exercise something called "prerogative" power, an enabling statute is what gives them their jurisdiction—or scope of power. Administrative decision-makers have only the powers that are delegated to them in their enabling statutes. If these statutory delegates do not conform to the mandate, duties, powers, purposes, and constraints contained in their enabling statute, their actions may be struck down by a reviewing court. A reviewing court may determine that these actors exercised their power unfairly, unreasonably, or incorrectly. Public law lawyers and reviewing courts therefore play a fundamental role in supervising executive powers that often lie outside the purview of the regular political mechanisms of accountability and are largely hidden from the scrutinizing eyes of the general public.

Chapter 11 delves more deeply into these matters. In public law, however, it is important to emphasize again the significance of pluralism and deference. In granting authority to an administrative decision-maker, the legislature may have intended that the administrative actor should be the primary interpreter, not the courts, and this intention counts as part of the democratic mandate. Courts may therefore be required to show deference to the interpretations made by administrative actors and cannot treat these actors as they would inferior courts. Even if a reviewing court disagrees with an administrative actor's interpretation of its enabling statute, in some situations that decision can be upheld if it constitutes a reasonable interpretation of the relevant legislation.

Judicial review in administrative law is an upper-year course, but this textbook introduces you to the common law review of administrative actions and interpretations. The two main grounds of review are for fairness in the procedures used by administrative actors and for reasonableness or correctness in the substance of their decisions. Both grounds of review involve the interpretation of the enabling statute and may also involve interpretation of related statutes. The role of the courts in administrative law is twofold: (1) to ensure that the administrative actor acts within the scope of the authority given by the legislature, and (2) to fill statutory gaps by imposing common law constraints on the administrative actor in order to satisfy the demands of the rule of law.

IV. CONCLUSION

The materials that follow constitute an essential foundation for a fuller understanding of Canadian law, Canadian government, and the constitutional basis for Canadian democracy. We also hope that the issues you encounter in public law inspire you to imagine how you can contribute to, or even improve, good governance in Canada.

QUESTIONS

1. Explain the difference between political and legal accountability.
2. In what sense did the enactment of the *Constitution Act, 1982* shift Canada from a constitution based on parliamentary supremacy to one based on constitutional supremacy?
3. What distinguishes public law from private law?
4. How might the principle of the rule of law be understood to reinforce the principle of democracy? By contrast, how might the rule of law act to constrain democratically elected leaders?
5. What is meant by the term "responsible government"? Explain the significance of responsible government to democratic accountability in Canada.

FURTHER READING

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