



---

## Why Constitutional Law Is a Mandatory Subject

---

Constitutions address governmental structures, procedures and powers and the ways in which individual rights and responsibilities operate in the arena of the exercise of public power. Constitutional law is a set of rules and practices that define and balance the rights, privileges and responsibilities of individuals, groups, communities and governments. Each country has its own way of reconciling these competing interests.

For example, the US constitution, like many others, is found primarily in a single, comprehensive document. Others, the Canadian constitution among them, are created over time from an assortment of sources. In particular, much of Canada's constitution is not formally enacted but is to be found in historic practices/conventions, common law jurisprudence, and a number of un-entrenched pieces of legislation, all of which have been shaped by Canada's specific historic, cultural and political context and the particular content of the enacted and/or entrenched elements of the Canadian constitution.

In the Canadian constitution, each rule has a tri-fold function: to establish legally enforceable obligations; frame the area for the constitutional exercise of power; and express fundamental values and aspirations of our country. The Canadian constitution is a unique combination of six major characteristics: parliamentary democracy, the rule of law, judicial independence, federalism, respect for individual and group rights and respect for Aboriginal rights. While intended to operate in accord, as they often do, these six characteristics may on occasion conflict. Canadian constitutional law provides an authoritative framework within which such conflicts, when they arise may be resolved.

The core of our Constitution, parliamentary democracy, guarantees that general laws in Canada are enacted (or, in the case of common law rules, subject to override by elected legislatures). While legislatures also confer authority on the executive for the administration of the law, the executive is nevertheless accountable to the legislature. Courts and administrative tribunals also interpret and apply laws made by elected legislative representatives, and as such contribute to the functioning of Canada's parliamentary democratic system.

The Canadian constitution's second major characteristic, the rule of law, lies at the heart of the Canadian system of government. It embraces three principles. First, that the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power. Second, the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order. Third, it requires that the relationship between the state and the individual be regulated by law.

Judicial independence is a corollary of the rule of law that finds expression, for some courts, in the text of the Canadian constitution. The Supreme Court of Canada has gone beyond these textual guarantees, identifying judicial independence as a fundamental unwritten

principle that protects the security of tenure, the financial security and the administrative independence of all courts.

The fourth major characteristic, federalism, ensures that the federal Parliament retains power to enact laws over matters of national concern, while the provincial legislatures retain powers to enact laws relating to matters affecting each province. Each level of government is equal in status and autonomous within its areas of exclusive jurisdiction.

The Distinction between matters which fall within federal or provincial spheres of constitutional authority is often an ardently disputed issue in the Canadian political and legal landscape. The division of legislative powers in the Constitution Act, 1867, which governs such disputes is unique to Canada and does not necessarily mirror such divisions found in the constitutions of even other federal states. The division of legislative jurisdiction in Canada is further complicated by the emergence, through the development of Aboriginal and treaty rights recognized and affirmed by s. 35 of the *Constitution Act, 1982*, of Aboriginal governments as a third order of constitutionally-recognized government. Moreover, the doctrines that have been developed by the Canadian (and historically British) courts to guide interpretation/application of this unique division of legislative powers is itself unique to Canada.

Individual and group rights are obligations owed by the Canadian state to its citizens, both as individuals and as members of communities. These include the fundamental rights and freedoms that have been recognized internationally, but go further in many respects. For example, Canadian constitutional law and history are fundamentally influenced by the concept of dual linguistic and juridical systems co-existing in a single overarching polity; as such, specific minority language, religious, educational and other rights and guarantees are a fundamental and peculiar pillar of the Canadian constitution.

The particular structure of the *Canadian Charter of Rights and Freedoms* – a key element of the Canadian constitution – is also unique: while many or most of the fundamental rights and freedoms enumerated in the *Charter* receive similar protection internationally and in the constitutions of other jurisdictions, the details, as interpreted by the Canadian courts, are different; so too is the particular approach adopted by the Canadian courts to balancing individual rights against community or state interests.

Finally, the Aboriginal rights recognized and entrenched in the Canadian constitution reflect the presence of Aboriginal peoples in what is now Canada in organized societies for centuries before European contact. The particular position of Canada's Aboriginal peoples under the Canadian constitution is therefore unique to the Canadian historical and political context.

As Canadian constitutional law addresses such fundamental aspects of Canadian society, those seeking to practice law in Canada, - and thereby assume an important role in the functioning of our society - must adequately prepare for that responsibility by demonstrating familiarity with its unique elements.

