

Researching Canadian Law: Part II

Legislative Process,
Statutes and Regulations

October 18, 2007
NE2007, Toronto

Legal Framework



Legal Framework

- **CANADA'S CONSTITUTIONAL HISTORY**
 - Provides the framework to better understand Canada's legislative process
 - Canada's Constitution sets out:
 - Who can make laws (legislative power);
 - Who will enforce the laws (executive power); and
 - Who interprets the laws (judicial power)

Legal Framework

■ CORE CONSTITUTIONAL DOCUMENTS

- *British North America Act, 1867* (BNA Act)
 - Establishes division of powers
- *Constitution Act, 1982*
 - Patriates the Constitution of Canada
- *Charter of Rights and Freedoms*
 - Guarantees basic legal and human rights

British North America Act, 1867

■ **PARLIAMENTARY SYSTEM**

- Drafters of the Act envisaged a “*Constitution similar in Principle to that of the United Kingdom*”
- Central concept of the British constitutional tradition is *Parliamentary Supremacy*
- Elected representatives of the people, assembled in Parliament, have unlimited power to make the law, not the courts

British North America Act, 1867

■ **FEDERALISM**

- BNA Act spelled out how power would be distributed between the federal and provincial governments
- A federal state was adopted to provide a measure of self-government for French Canadians who were a majority in the province of Quebec

British North America Act, 1867

FEDERAL POWERS

- Regulation of trade & commerce
- Unemployment insurance
- Postal service
- Defence
- Navigation and shipping
- Banking
- Patents & copyright
- Marriage and divorce
- Criminal law and procedure
- Taxation
- Currency

PROVINCIAL POWERS

- Direct taxation within the province
- The incorporation of companies with provincial objects
- Solemnization of marriage in the province
- Property and civil rights in the province
- Municipal institutions
- All matters of a local or private nature in the province

British North America Act, 1867

■ **IN THE BEGINNING...**

- Federal centralization of power
- Could disallow any provincial law within 2 yrs
- Power to appoint the lieutenant governors of the provinces, who could “*reserve*” any bill for the approval by federal government
- A bill not receiving federal approval within two years, would have no effect

British North America Act, 1867

■ **OVER TIME...**

- Canadian federalism has evolved in manner different from United Kingdom
- Centralized features remain part of the formal constitution, but have fallen into disuse
- US, which by its constitution has a relatively decentralized federal system, is today much more centralized than Canada

Constitution Act, 1982



Constitution Act, 1982

■ **PATRIATION**

- Introduced amendments to the *BNA Act, 1867*
- Act renamed: *Constitutional Act, 1867*
- Included an amending formula
- Terminated the legal authority of the Westminster parliament to legislate for Canada
- Enacted the *Charter of Rights and Freedoms*

Charter of Rights and Freedoms

■ **PRE 1982**

- Fundamental rights and freedoms a part of our British parliamentary heritage
- 1867 Act included certain guarantees designed to protect minority rights
- Courts had authority take these principles into action...**BUT**
- Parliament had ultimate responsibility to balance individual rights and general public interest

Charter of Rights and Freedoms

■ **POST 1982**

- Charter imposes stricter limits on government activity in relation to fundamental rights and liberties
- Charter has had a major impact on public law litigation
- Charter has significantly added to the judiciary's powers

Judicial Review



Judicial Review

■ UK TRADITION

- In the UK tradition of parliamentary supremacy, there are no constraints upon the Parliament's actions
- Tradition of parliamentary supremacy remained strong - Canada's *Constitution Act, 1867* was silent on the power of judicial review

Judicial Review

- **DEPARTURE FROM THE UK TRADITION**
 - Parliamentary supremacy was qualified in Canada by the courts on federalism grounds
 - Even before 1982, courts have acted as referees
 - Courts have invalidated laws enacted without a proper constitutional basis for over 100 years

Judicial Review

■ CHARTER'S IMPACT ON THE COURTS

- Charter of Rights and Freedoms significantly increases the judiciary's power
- Judges are now posed questions about value and moral choice

Judicial Review

■ **NOTWITHSTANDING CLAUSE**

- Significant qualification on the power of judicial review
- Permits Parliament or a provincial legislature to adopt legislation to override sections of the Charter
- Rarely used but a fundamental feature of the Charter



Role of the Queen

■ CONSTITUTIONAL MONARCHY

- To this day, Queen Elizabeth is Canada's formal head of state
- Canada still enact laws in the name of the Queen
- Merely a symbolic gesture with the Queen having no real judicial power

Statutes

■ TYPES OF BILLS

- *Government bills* are introduced by Ministers and implement government policies
- *Private member bills* are introduced by members of Parliament other than Ministers
- *Private bills* apply only to specific organizations or individuals

Statutes

■ **PROCESS OF ENACTMENT**

■ **First Reading**

- No debate
- Bill printed and assigned a bill number (e.g. C-2 or S-12)

■ **Second Reading**

- Debate on principle of bill
- Referral to committee

Statutes

■ **PROCESS OF ENACTMENT**

■ **Committee**

- Clause by clause study
- Reports back with or without amendments
- If amendments accepted, bill is reprinted (“As Amended” version)

■ **Third Reading**

- Final review
- Federal bills sent to 2nd chamber

Statutes

■ **PROCESS OF ENACTMENT**

■ **Royal Assent**

- Bill approved by Queen's representative, Governor-General (federal) or Lieutenant-Governor (provincial)
- Bill becomes an act and is assigned a chapter number

Heads of Government and State



Prime Minister Stephen Harper



Governor-General Michaëlle Jean

Statutes

■ **COMING INTO FORCE**

- Never assume legislation is in force
- Read commencement section of the act
 - Royal Assent
 - Specified Day
 - By Proclamation
- Different sections of an act may be brought into force on different dates

Statutes

■ OFFICIAL PUBLICATIONS

- Newly enacted federal statutes published in *Canada Gazette Part III*
- Bound volumes of statutes passed published annually, e.g. *Statutes of Canada, 2005*
- Statute revisions published periodically, e.g. *Revised Statutes of Canada 1985*

Statutes

■ REVISION

- Acts retain original title and form
- By title
- Revisions published approx. every 10 years
- Revisions being replaced by online consolidations

■ CODIFICATION

- Acts divided and inserted into Code
- By subject
- Codification almost immediate

- Codification continues

Regulations

■ **LEGAL FRAMEWORK**

- Delegated or subordinate legislation
- Regulations are considered a form of legislation
- They regulate the conduct of people and have impact of law

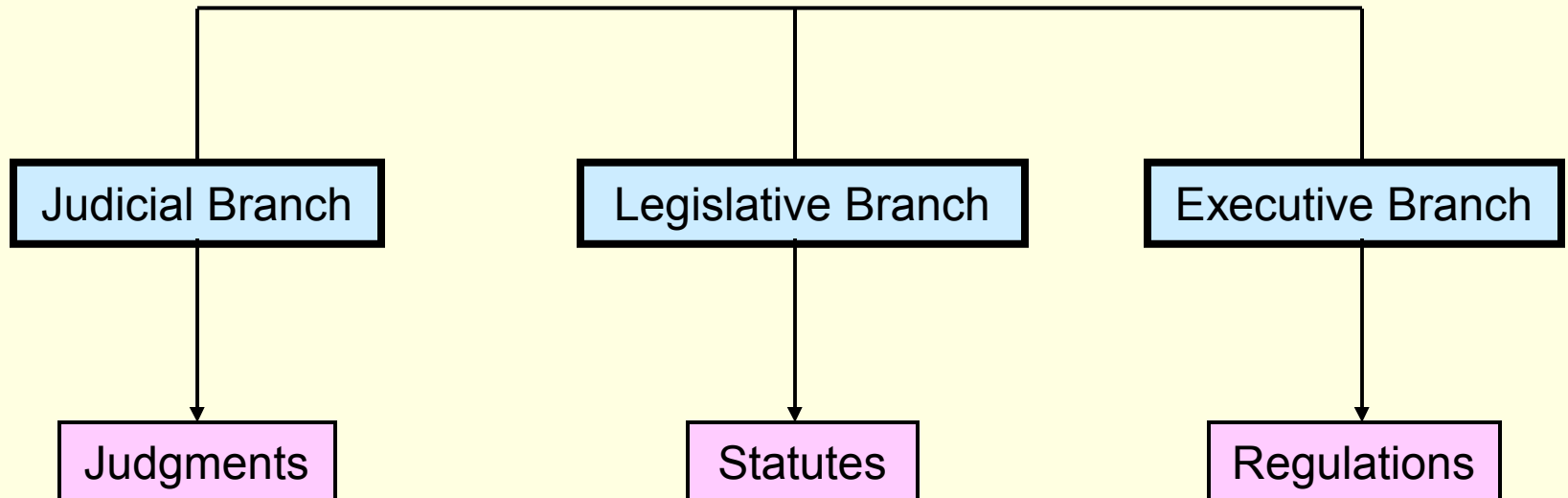
Regulations

■ LEGAL FRAMEWORK

STATUTES	vs.	REGULATIONS
<ul style="list-style-type: none">■ State broad principles■ Enacted by Parliament or Legislative Assembly■ Prescribe the content of regulations■ Difficult to challenge		<ul style="list-style-type: none">■ Explain these broad principles■ Enacted by those who Parliament or Legislatures have authorized■ Must stay within the scope of the enabling Act■ Easily amended

Regulations

BRANCHES OF GOVERNMENT



Regulations

■ REGULATORY HISTORY

- United Kingdom:
 - Regulation making unregulated until 1932
- Canada
 - *Statutory Orders and Regulations Order, 1947*
 - *Regulation Act, 1950*
 - MacGuign Report led to *Statutory Instruments Act, 1972*
 - Significant reforms enacted in 1986

Regulations

■ **THE CAST**

- Governor in Council
- Sponsoring Department
- Regulations Section
- Privy Council Office
- Canada Gazette
- Standing Joint Committee for the Scrutiny of Regulations

Regulations

■ **FEDERAL REGULATORY PROCESS**

- Sponsoring Department
 1. Policy Development
 2. Policy Approval

- Justice Department
 3. Drafting and Examination
 4. Blue-Stamping

Regulations

- **FEDERAL REGULATORY PROCESS**
 - Sponsoring Department
 5. Ministerial Sign-Off for Pre-publication
 - Privy Council Office
 6. Review for Pre-publication
 - Treasury Board
 7. Approval for Pre-publication

Regulations

■ **FEDERAL REGULATORY PROCESS**

■ Canada Gazette

8. Publication in Part I

■ Sponsoring Department

9. Pre-publication Period

■ Justice Department

10. Final Review (few changes)

Regulations

- **FEDERAL REGULATORY PROCESS**
 - Sponsoring Department
 11. Ministerial Sign-off of Final Draft
 - Privy Council Office
 12. Review of the Final Package
 - Treasury Board
 13. Making Regulations

Regulations

■ **FEDERAL REGULATORY PROCESS**

■ Privy Council Office

14. Registration of the Regulation

■ Canada Gazette

15. Publication in Part II

■ Standing Joint Committee for the Scrutiny of Regulations

16. Reviews Published Regulations

Odds and Ends

- **Bilingualism in Canadian Legislation**
 - Federal statutes and regulations published in both official languages
 - Majority of provinces and territories provide all or some legislation in English and French

Legislative Assembly of Nunavut



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NUNAVUT MALIGALIURVIA
LEGISLATIVE ASSEMBLY OF NUNAVUT
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Odds and Ends

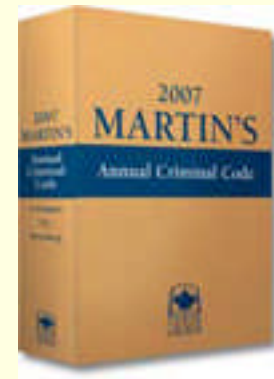
- **Quebec Legislation**

- Combination of
 - Civil Code
 - Revised Statutes of Quebec
 - Federal laws

Odds and Ends

■ Criminal Law

- Federal jurisdiction
- Criminal Code of Canada applies to all provinces and territories
- Annotated Criminal Codes
e.g. *Martin's Criminal Code*



Odds and Ends

■ Short Title

- *Competition Act*,
R.S.C 1985, c. C-34

■ Popular Name

- Hart-Scott-Rodino
Act
P.L. 94-435,
90 Stat. 1383,
15 U.S.C. §12

Odds and Ends

■ **Annotated Codes**

- No equivalent to U.S.C.A. for Canadian statutes
- Annotated publications available for selected individual acts, e.g. *Charter of Rights Annotated*

Odds and Ends

■ **Judicial Consideration of Statutes**

- Individual annotated acts published by legal publishers
- Statute citators in print (*Canadian Statute Citations*) and online (KeyCite on WestlaweCARSWELL)

Odds and Ends

■ **Legislative Histories**

- Canadian courts less receptive to use of legislative histories
- Very few compiled legislative histories
- Research done from scratch

Researching Canadian Law: Part II – Legislative Process, Statutes and Regulations

Soojin Kim, *Bora Laskin Law Library, University of Toronto*
Jeanette Bosschart, *Great Library, Law Society of Upper Canada*