

CANADA – Some Important Principles of its Legal System

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The single most dominant feature of Canada with respect to its legal system is that as a country its citizens have placed great faith in the concept of the rule of law to govern their affairs. An essential feature of the rule of law is the concept that the exercise of coercive power by the state through its numerous actors requires legitimacy and accountability. Legitimacy derives from an appropriate source of power be it legislative, common law, or customary convention. Accountability derives from the ability to challenge the exercise of power in an impartial forum. Canada's parliamentary democracy is constantly reviewing and renewing itself. Currently there is a lively debate over changes in provincial electoral systems moving from a first past the post to some form of proportional representation. Electoral boundaries are being restructured to account for changes in demographic and geographical shifts in the population. Election spending by third parties and state funding to political parties are all recent issues engaging parliamentary renewal.

In terms of accountability, Canada has a very developed notion of judicial review and standards of natural (fundamental) justice. Administrative action by a prime minister to a dog licensing officer can be subject to judicial review; not necessarily to question the policy direction that is taken but to ensure the legitimacy of constitutional and legislative authority. Supplementing the action for judicial review, aggrieved parties have made recourse to common law actions of negligence and now misfeasance in a public office. Beyond judicial actions aggrieved parties have found recourse in political action often leading to commissions of inquiry and royal commissions.

A challenge for Canada, as with many other nations, is that while it is fair to argue that restraint and control on governmental action is highly developed, it is perhaps less so on private actors. The role performed by corporations in allocating resources, and the emergence of global corporations whose power and wealth exceeds that of many governments challenges the nation state on many levels. Some argue that corporations are inherently psychopathic; singularly focused on profit and acting without any moral compass. Because the action of judicial review does not operate against private parties, curbing the excess of corporations is dependent upon the appropriate regulatory framework. However, the ability to create and enforce such a framework is inhibited by a corporation's threat of flight of capital and closure, and the consequent disruption to a community. In Canada this dilemma has led to a debate about corporate social responsibility and how, in effect, can the rule of law be applied to fashion similar restraint and accountability on corporations as those now applied to governments.

Perhaps the second most notable feature of Canada's legal system is its modern Charter of Rights and Freedoms; a constitutional document which just celebrated its twenty-fifth year since adoption. The Charter is a modern statement of rights in an entrenched federal structure. It encompasses the usual constitutional and human rights and freedoms subject only to a general interpretative provision that such rights and freedoms are subject to reasonable limits prescribed by law as can be demonstrably justified in a free and

democratic society. Another provision allows a legislature to specifically opt out of certain rights for a limited period of time.

The impact of the Charter on Canadian society is hotly contested. Some argue that it has weakened participatory democracy by strengthening individual rights claims through judicial challenges to legislation. The sometimes exorbitant cost of litigation has tended to favour the strong and powerful in mounting these challenges. Thus, corporate claims, which advance freedom of association, have been brought challenging unionization activities, and freedom of speech claims have been advanced concerning commercial speech (i.e. challenges to restrictions on tobacco advertising). Critics characterize the Charter as the adoption of a more American style model of government where corporate and individual rights are more likely to find currency over group and social rights. The lack of rights to health or relief from poverty is seen as notable lapses. Others argue that the Charter has legitimated another avenue in which societal shibboleths can be challenged resulting in greater civic space being accorded hitherto victimized and marginalized minorities (For example there have been remarkable successes for gay rights and same-sex couples, and rights to abortion). Protagonists of either stripe argue that the Charter has resulted in greater judicial activism for either good or bad. Canadian courts have chosen a purposive or 'living tree' approach to interpretation taking the Charter in directions that were not contemplated when it was enacted. Public opinion polls suggest that a majority of Canadians have embraced the Charter and are supportive of the role performed by courts when interpreting Charter rights and freedoms. Indeed, the role performed by courts has been seen as an important element in building a relatively harmonious multicultural society.

The settlement of Canada by two founding settler people, English and French, together with the indigenous Aboriginal peoples, created a distinctive bilingual (English and French) and bi-jural (Common Law and Civil Law) nation. The movement from a nation which essentially recognized only two founding groups, English and French, at the time of Confederation, to one that is now multi-cultural is very much a work in progress, although the role played by the Constitution and Charter have been instrumental. Relying upon these two constitutional documents, together with customary rights, the courts have given significant voice to Aboriginal peoples and particularly the recognition of treaty rights to land, fisheries and other resources. The recent demographic changes in Canada are dramatically reshaping its society. For example by the year 2017 Canada's visible minorities will represent 20% of the population nationally and 36% in Toronto and Vancouver. Already, over 53% of the population traces its ancestry to some other group besides English, French or Aboriginal. Whether to accede to demands for faith based public education, the incorporation of other legal systems (i.e. Shari law, Aboriginal customary law) into civil disputes between adherents of a particular faith (i.e. settlement of divorce and matrimonial property), the allowance of cultural factors in criminal defences and in compensation for personal injuries, are all matters that are coming before courts and legislatures as Canada redefines itself as a multicultural society govern by the rule of law.

A third notable feature of Canada's legal system is the quality of its actors primarily charged with administering justice. Senior appellate courts have generally attracted

talented judges who take pride in writing intelligible judgments. Trial court judges are concerned with administering justice and engage in regular training to improve their art. There is no hint of corruption among judicial officers. Legislatures have seen fit to properly assign difficult regulatory, economic and employment matters to specialist administrative tribunals staffed by knowledgeable professionals. Standards of ethical practice and legal competency are generally high amongst lawyers engaged in all facets of the administration of justice, although currently there is a lively debate in the legal community over the degree to which lawyers have forsaken ideals of ethical practice and the pursuit of justice in favour of money, power and prestige. Legal education is provided in publicly funded universities and is still largely accessible to those who wish to pursue a legal career. The heavy cost of litigation is a significant impediment to access to justice for citizens. While all Provinces have some form of legal aid to assist those accused of serious crimes to have legal representation, provincially funded representation for lesser crimes and in civil matters remains sporadic. Even for citizens who could be described as middle class, the prospect of engaging in litigation is a daunting prospect and the costs involved not lightly dismissed. Changes in civil procedure allowing for contingency fee and class action litigation, expansion of small claims courts and other specialist tribunals that do not require legal representation may go some way to alleviate the burden of costly litigation but accessibility remains a major concern for citizens.

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