

5 The Rule of Law and the Courts

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Responsible government and federalism are two cornerstones of our system of government. There is a third, without which neither of the first two would be safe: the rule of law.

5.1 What does the rule of law mean?

It means that everyone is subject to the law; that no one, no matter how important or powerful, is above the law — not the government; not the prime minister, or any other minister; not the Queen or the Governor General or any lieutenant-governor; not the most powerful bureaucrat; not the armed forces; not Parliament itself, or any provincial legislature. None of these has any powers except those given to it by law: by the *Constitution Act, 1867*, or its amendments; by a law passed by Parliament or a provincial legislature; or by the Common Law of England, which we inherited, and which, though enormously modified by our own Parliament or provincial legislatures, remains the basis of our constitutional law and our criminal law, and the civil law (property and civil rights) of the whole country except Quebec (which has its own civil code).

If anyone were above the law, none of our liberties would be safe.

What keeps the various authorities from getting above the law, doing things the law forbids, exercising powers the law has not given them?

The courts. If they try anything of the sort, they will be brought up short by the courts.

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5.2 But what's to prevent them from bending the courts to their will?

The great principle of the independence of the judiciary, which is even older than responsible government. Responsible government goes back only about 200 years. The independence of the judiciary goes back over 300 years to the English *Act of Settlement, 1701*, which resulted from the English Revolution of 1688. That Act provided that the judges, though appointed by the King (nowadays, of course, on the advice of a responsible cabinet), could be removed only if both houses of Parliament,

by a formal address to the Crown, asked for their removal. If a judge gave a decision the government disliked, it could not touch him or her, unless both houses agreed. In the three centuries that have followed, only one judge in the United Kingdom has been so removed, and none since 1830.

The Constitution provides that almost all our courts shall be provincial, that is, created by the provincial legislatures. But it also provides that the judges of all these courts from county courts up (except courts of probate in Nova Scotia and New Brunswick) shall be appointed by the federal government. What is more, it provides that judges of the provincial superior courts, which have various names, and of the provincial courts of appeal shall be removable only on address to the Governor General by both houses of Parliament. The acts setting up the [Supreme Court of Canada](#), the Federal Court of Appeal, the Federal Court and the Tax Court of Canada have the same provision. No judge of any Canadian superior court has ever been so removed. All of them are perfectly safe in their positions, no matter how much the government may dislike any of their decisions. The independence of the judiciary is even more important in Canada than in Britain, because in Canada the Supreme Court interprets the written Constitution, and so defines the limits of federal and provincial powers.

With the inclusion of the *Canadian Charter of Rights and Freedoms*, the role of the courts has become even more important, since they have the tasks of enforcing the rights and of making the freedoms effective.

Judges of the county courts can be removed only if one or more judges of the Supreme Court of Canada, or the Federal Court, or any provincial superior court, report after inquiry that they have been guilty of misbehaviour, or have shown inability or incapacity to perform their duties.

The [Supreme Court of Canada](#), established by an Act of the national Parliament in 1875, consists of nine judges, three of whom must come from the Quebec Bar. The judges are appointed by the Governor General on the advice of the national cabinet, and hold office until they reach age 75. The Supreme Court has the final decision not only on constitutional questions but also on defined classes of important cases of civil and criminal law. It deals also with appeals from decisions of the provincial courts of appeal.

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