




## History

1867: Under the *BNA Act*, Canadian Parliament is permitted to create a court of appeal for all of Canada. Appeals from this court could still be made to the Judicial Committee of the Privy Council in England.

1875: A bill is finally passed in Canada that creates the Supreme Court.

1949: Appeals to the Judicial Committee of the Privy Council in England are abolished.

1982: The Canada Act gave it jurisdiction over interpretation of the Constitution (Especially the Charter of Rights and Freedoms).






### Sidebar: The Privy Council of England

Much of the day-to-day work of the Privy Council Office is concerned with the affairs of Chartered Bodies, the 400 or so institutions, charities and companies who are incorporated by Royal Charter. The Privy Council also has an important part to play in respect of certain statutory regulatory bodies covering a number of professions and in the world of higher education.



### The Judicial Committee of the Privy Council of England

Serves as the final Court of Appeal for a number of Commonwealth countries who have chosen to retain it. (Also serves as a Court of Appeal for medical bodies in England.)

## Functions

- 1 The Supreme Court is the final general court of appeal for all of Canada.
- 2 The Supreme Court is the final advisor to the federal government regarding the Constitution (particularly the Charter of Rights and Freedoms).

## Appeals



The Supreme Court of Canada is a general court of appeal and it has jurisdiction to entertain appeals in all areas of law.

Most cases come to the Supreme Court on appeal from:

- the provincial courts of appeal and,
- the Federal Court of Appeal

Usually, the Court must give its permission (called "granting leave to appeal") before an appeal can be brought, although there are exceptions to this rule (i.e.. criminal appeals where there is a dissenting opinion).

Due to the rule of stare decisis, all courts in Canada must follow precedents established in the Supreme Court of Canada.



### Reference Power of the Supreme Court

Provincial and federal governments may "refer" questions for decision directly to the Supreme Court, bypassing the usual appeals process.

The federal government has gone this route 76 times since 1892. Some of the most recent references include The Clarity Act (on Quebec secession) in 1998, the David Milgaard Conviction Reference (1991), and the Anti-Inflation Act Reference (1976).


Supreme Court references aren't limited to the federal government. The high court has also heard many references filed by provincial governments in the wake of rulings from their courts of appeal.

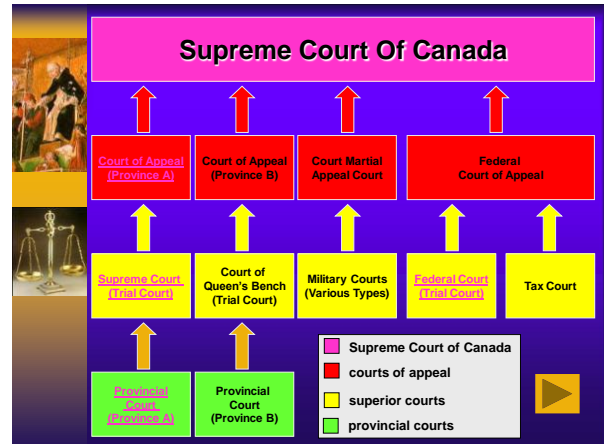
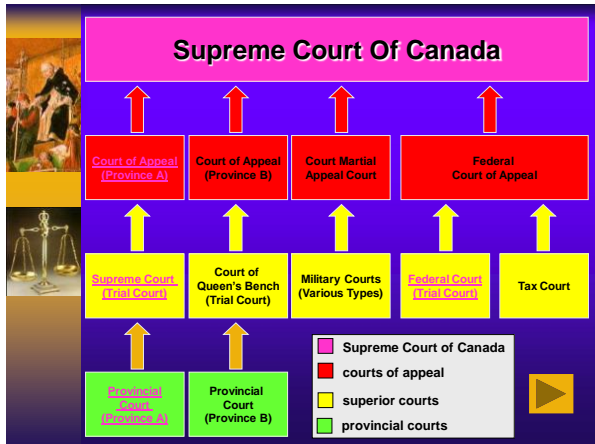
**A Case in Point**

### The courts in Canada are organized in a four-tiered structure:

4. The Supreme Court of Canada sits at the top of the structure and hears appeals from both the federal court system and the provincial court systems.
3. The next tier down from the Supreme Court of Canada consists of the Appeal Division of the Federal Court of Canada and the various provincial courts of appeal.
2. The second tier consists of the Trial Division of the Federal Court of Canada and the provincial and territorial superior courts of general jurisdiction.
1. At the bottom of the hierarchy are the courts typically described as provincial courts. These include a traffic division, a small claims division, a family division and a criminal division.





### THE FEDERAL COURT OF CANADA

The Federal Court of Canada (FCC) is essentially a superior court with civil jurisdiction. As it was created by an Act of Parliament, it can only deal with matters specified in federal statutes.

In contrast, provincial and territorial superior courts have jurisdiction in all matters except those specifically excluded by a statute. The FCC is organized into a Trial Division and an Appeal Division.

Its jurisdiction includes inter-provincial and federal-provincial disputes, intellectual property proceedings (e.g. copyright), citizenship appeals, *Competition Act* cases, and cases involving Crown corporations or departments of the Government of Canada.

As well, only the FCC can review decisions, orders and other administrative actions of federal boards, commissions and tribunals; these bodies may refer any question of law, jurisdiction or practice to the FCC at any stage of a proceeding.

### PROVINCIAL COURTS

Each province and territory has a provincial court. These courts hear cases involving either federal or provincial laws.

*Note: The names and divisions of these courts may vary from place to place, but their role is the same.*

Provincial courts deal with most criminal offences, family law matters (except divorce), young offenders (from 12 to 17 years old), traffic violations, provincial regulatory offences, and claims involving money, up to a certain amount (set by the province in question).

Private disputes involving limited sums of money may also be dealt with at this level in Small Claims courts. In addition, all preliminary inquiries – hearings to determine whether there is enough evidence to justify a full trial in serious criminal cases – take place within the provincial courts.

### PROVINCIAL/TERRITORIAL SUPERIOR COURTS

Each province and territory has superior courts. These courts are known by various names, including Superior Court of Justice, Supreme Court, High Court of Justice, and Court of Queen's Bench.

The superior courts have "inherent jurisdiction," which means that they can hear cases in any area except those that are specifically limited to a lower court.

The superior courts try the most serious criminal and civil cases, including divorce cases and cases that involve large amounts of money (the minimum is set by the province in question).

The superior courts also act as a court of first appeal for the underlying court system that provinces and territories maintain.

### COURTS OF APPEAL

Each province and territory has a court of appeal or appellate division that hears appeals from decisions of the superior courts AND provincial courts.

The number of judges on these courts may vary from one province to another, but a court of appeal usually sits as a panel of three.

The courts of appeal also hear constitutional questions that may be raised in appeals involving individual litigants, or governments or governmental agencies.

Justices (Judges)

- There are nine Justices appointed by the Governor in Council.
- There is one Chief Justice of Canada.
- there are eight other Justices.
- Justices cease to hold office at 75 years of age.
- Justices are chosen from superior court judges or from barristers of at least ten years' standing at the Bar of a province or territory.




The current Chief Justice of Canada, the Right Honourable Beverley McLachlin, P.C. (Meaning "Privy Council.")

Selection

- All justices are appointed by the federal government.
  - 3 Justices must be from Quebec;
  - Traditionally...*
  - 3 other Justices are from Ontario,
  - 2 are from western provinces,
  - and one is from the Maritimes
- A quorum of 5 Justices can rule on a case. (Odd number because a majority decision must be made).
- All 9 Justices will sit to hear constitutional cases.

Selection

- New Justices appointed in 2004...



The Honourable Madam Justice Rosalie Silberman Abella appointed August 30, 2004



The Honourable Madam Justice Louise Charron appointed August 30, 2004

Power



The Charter of Rights and Freedoms, or any aspect of the constitution, will be applied to Canadian society in the manner determined by the Supreme Court. Only a constitutional amendment may alter a Supreme Court decision.

The independence of the judiciary in Canada is guaranteed both explicitly and implicitly by different parts of the Constitution of Canada. This independence is understood to consist in security of tenure, security of financial remuneration and institutional administrative independence.

Criticisms


Typical criticisms of the Supreme Court:

1. It transfers final legislative authority away from our elected representatives.
2. It places too much emphasis on individual rights.
3. It challenges authority of the courts and at times allows guilty parties to go unpunished.

**A Case in Point: Same-Sex marriage**

In 2004, the Supreme Court was asked four questions by the Paul Martin Liberal government:

1. Is the annexed Proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes within the exclusive legislative authority of the Parliament of Canada? If not, in what particular or particulars, and to what extent?
2. If the answer to question 1 is yes, is section 1 of the proposal, which extends capacity to marry to persons of the same sex, consistent with the Canadian Charter of Rights and Freedoms? If not, in what particular or particulars, and to what extent?
3. Does the freedom of religion guaranteed by paragraph 2(a) of the Canadian Charter of Rights and Freedoms protect religious officials from being compelled to perform a marriage between two persons of the same sex that is contrary to their religious beliefs?
4. Is the opposite-sex requirement for marriage for civil purposes, as established by the common law and set out for Quebec in section 5 of the Federal Law-Civil Law Harmonization Act, No. 1, consistent with the Canadian Charter of Rights and Freedoms? If not, in what particular or particulars and to what extent?




Held: Question 1 is answered in the affirmative with respect to s. 1 of the proposed legislation and in the negative with respect to s. 2. Questions 2 and 3 are both answered in the affirmative. The Court declined to answer Question 4.

**Question 1**


Section 1 of the proposed legislation is *intra vires* Parliament. In pith and substance, s. 1 pertains to the legal capacity for civil marriage and falls within the subject matter of s. 91(26) of the Constitution Act, 1867. Section 91(26) did not entrench the common law definition of "marriage" as it stood in 1867. The "frozen concepts" reasoning runs contrary to one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life. Read expansively, the word "marriage" in s. 91(26) does not exclude same-sex marriage. The scope accorded to s. 91(26) does not trench on provincial competence. While federal recognition of same-sex marriage would have an impact in the provincial sphere, the effects are incidental and do not relate to the core of the power in respect of "solemnization of marriage" under s. 92(12) of the Constitution Act, 1867 or that in respect of "property and civil rights" under s. 92(13).

Section 2 of the proposed legislation is *ultra vires* Parliament. In pith and substance, s. 2 relates to those who may (or must) perform marriages and falls within the subject matter allocated to the provinces under s. 92(12).



**Question 2**

Section 1 of the proposed legislation is consistent with the Charter. The purpose of s. 1 is to extend the right to civil marriage to same-sex couples and, in substance, the provision embodies the government's policy stance in relation to the s. 15(1) equality concerns of same-sex couples. This, combined with the circumstances giving rise to the proposed legislation and with the preamble thereto, points unequivocally to a purpose which, far from violating the Charter, flows from it. With respect to the effect of s. 1, the mere recognition of the equality rights of one group cannot, in itself, constitute a violation of the s. 15(1) rights of another. The promotion of Charter rights and values enriches our society as a whole and the furtherance of those rights cannot undermine the very principles the Charter was meant to foster. Although the right to same-sex marriage conferred by the proposed legislation may potentially conflict with the right to freedom of religion if the legislation becomes law, conflicts of rights do not imply conflict with the Charter; rather, the resolution of such conflicts generally occurs within the ambit of the Charter itself by way of internal balancing and delineation. It has not been demonstrated in this reference that impermissible conflicts -- conflicts incapable of resolution under s. 2(a) -- will arise.



**Question 3**

Absent unique circumstances with respect to which the Court will not speculate, the guarantee of religious freedom in s. 2(a) of the Charter is broad enough to protect religious officials from being compelled by the state to perform civil or religious same-sex marriages that are contrary to their religious beliefs.

**Question 4**

In the unique circumstances of this reference, the Court should exercise its discretion not to answer Question 4. First, the federal government has stated its intention to address the issue of same-sex marriage legislatively regardless of the Court's opinion on this question. As a result of decisions by lower courts, the common law definition of marriage in five provinces and one territory no longer imports an opposite-sex requirement and the same is true of s. 5 of the Federal Law-Civil Law Harmonisation Act, No. 1. The government has clearly accepted these decisions and adopted this position as its own. Second, the parties in the previous litigation, and other same-sex couples, have relied upon the finality of the decisions and have acquired rights which are entitled to protection. Finally, an answer to Question 4 has the potential to undermine the government's stated goal of achieving uniformity in respect of civil marriage across Canada. While uniformity would be achieved if the answer were "no", a "yes" answer would, by contrast, throw the law into confusion. The lower courts' decisions in the matters giving rise to this reference are binding in their respective provinces. They would be cast into doubt by an advisory opinion which expressed a contrary view, even though it could not overturn them. These circumstances, weighed against the hypothetical benefit Parliament might derive from an answer, indicate that the Court should decline to answer Question 4.