

2009

The Constitutional Status of the Supreme Court of Canada

Warren J. Newman

Follow this and additional works at: <https://digitalcommons.osgoode.yorku.ca/sclr>



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](#).

Citation Information

Newman, Warren J.. "The Constitutional Status of the Supreme Court of Canada." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 47. (2009).

DOI: <https://doi.org/10.60082/2563-8505.1183>

<https://digitalcommons.osgoode.yorku.ca/sclr/vol47/iss1/15>

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference by an authorized editor of Osgoode Digital Commons.

The Constitutional Status of the Supreme Court of Canada

Warren J. Newman*

I. INTRODUCTION

The Supreme Court of Canada stands at the apex of the judicial system in this country.¹ The Supreme Court is the head of the judicial branch of government and the final arbiter of legal disputes. Its authority is paramount in the interpretation of law, and particularly, the supreme law, the Constitution of Canada. It is, as Professor Stephen Scott has emphasized, “an institution of inestimable significance. So too, therefore, is the law dealing with the Court’s constitution, organization and jurisdiction”.²

However, unlike the Parliament of Canada, which was established by the *Constitution Act, 1867*,³ the Supreme Court was not created by the Constitution of Canada; only its eventual existence was contemplated by that Act. Section 101 of the *Constitution Act, 1867* granted to Parliament the power to provide for the “Constitution, Maintenance, and Organization” of what was termed “a General Court of Appeal for Canada”, as well as for the establishment of additional courts “for the better Administration

* Dip.C.S., B.A., B.C.L., LL.B. (McGill), LL.M. (Osgoode); Ad. E.; of the Bars of Quebec and Ontario; Senior General Counsel, Constitutional and Administrative Law Section, Department of Justice of Canada. The views expressed in this paper are meant to stimulate reflection and debate, in the context of an academic conference. They do not necessarily represent the position of the Department of Justice or the Government of Canada.

¹ For discussion, see “The Supreme Court of Canada and the Canadian Court System”, in W.J. Newman, “Adjudicating Divisions of Powers Issues: a Canadian Perspective”, in Andrew Le Sueur, ed., *Building the UK’s New Supreme Court — National and Comparative Perspectives* (Oxford: Oxford University Press, 2004), at 115-44; an earlier version of that chapter was published as a paper in (2003) 21 S.C.L.R. (2d) at 139-79.

² S.A. Scott, “The Supreme Court of Canada and the 1987 Constitutional Accord”, in Réal-A. Forest, ed., *L’adhésion du Québec à l’Accord du Lac Meech — Points de vue juridiques et politiques* (Montreal: Les Éditions Thémis, 1987), at 131.

³ (U.K.), 30 & 31 Vict., c. 3; see s. 17 *et seq.* of Part IV of the *Constitution Act, 1867*, under the rubric, “Legislative Power”.

of the Laws of Canada”. In 1875, Parliament proceeded by statute to establish the Supreme Court.⁴

What, if any, is the constitutional status of the Supreme Court of Canada? Professor Peter W. Hogg, in his oft-cited treatise, *Constitutional Law of Canada*, states that Canadians did not write into the *British North America Act*⁵ “a new supreme court on the model of the Supreme Court of the United States. The B.N.A. Act, by section 101, gave authority for such a court to be established, but did not actually establish it.”⁶

Yet is the position of the United States Supreme Court so entirely different? Section 101 of the *Constitution Act, 1867* may be compared and contrasted with Article 1, section 1 of the Constitution of the United States, which provides that “[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” The Supreme Court of the United States was effectively established by Congress through the *Judiciary Act* of 1789,⁷ and the composition of the Court was varied by Congress in 1807, 1837, 1863 and 1869.⁸

The comparison with the U.S. Supreme Court, although not a perfect analogy,⁹ is a useful one because it opens the door to a way of thinking about the Supreme Court of Canada that may assist us in reconciling Parliament’s ongoing power to enact laws — most notably the *Supreme Court Act*¹⁰ itself and amendments thereto — in relation to the Court, while at the same time acknowledging the Court’s pre-eminent role and position in our judicial system and constitutional framework.

⁴ *Supreme and Exchequer Courts Act*, S.C. 1875, c. 11.

⁵ Now styled the *Constitution Act, 1867*, by the schedule to the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11.

⁶ P.W. Hogg, *Constitutional Law of Canada*, 5th ed. (Scarborough: Thomson Carswell, 2007), ch. 1.2, at 5 [hereinafter “Hogg, *Constitutional Law*”].

⁷ *An Act to establish the Judicial Courts of the United States*, 1 Stat. 73 (enacted by Congress on September 24, 1789), provided in s. 1 that “the supreme court of the United States shall consist of a chief justice and five associate justices, any four of whom shall be a quorum, and shall hold annually at the seat of government two sessions, the one commencing the first Monday of February, and the other the first Monday of August. ...”

⁸ The number of Justices was increased from six to seven, then nine, ten, and back to nine; the latter by the *Judiciary Act* of 1869.

⁹ More of the U.S. Supreme Court’s elements, such as the nomination and appointments process and judicial tenure are formally entrenched in the Constitution. Another analogy (also imperfect) is that of the High Court of Australia, in which the judicial power of the Commonwealth of Australia was vested by the Constitution of 1901, but which was actually established by the *Judiciary Act 1903* enacted by the Parliament of Australia.

¹⁰ R.S.C. 1985, c. S-26.

II. THE *SUPREME COURT ACT* AND THE CONUNDRUM OF THE AMENDING PROCEDURES

The *Supreme Court Act* is not one of the Acts listed in the schedule to the *Constitution Act, 1982* and thereby defined, through section 52 of the latter Act, as forming part of the Constitution of Canada. The *Supreme Court Act* was amended in 1987 by an ordinary statute of Parliament despite the fact, as Professor Hogg points out, that “the Supreme Court of Canada” is one of the matters expressly listed in section 42 of the *Constitution Act, 1982* as being subject to the general amending procedure of section 38 (requiring authorizing resolutions of the Senate, the House of Commons, and the legislative assemblies of two-thirds of the provinces representing 50 per cent of the population of the provinces).¹¹ This is because, as Hogg underlines, unlike the other matters dealt with in section 42, the Supreme Court is “nowhere provided for in the Constitution of Canada”.¹² Section 42 only applies to amendments to the Constitution of Canada, and since the *Supreme Court Act* is not one of the instruments forming part of the Constitution, it follows that the Act is still open to ordinary amendment by Parliament under section 101 of the *Constitution Act, 1867*. So too, section 41 of the *Constitution Act, 1982* subjects amendments to the Constitution of Canada in relation to “the composition of the Supreme Court of Canada” to the unanimity procedure (the approval of the federal Houses and all 10 legislative assemblies), but since amendments to the *Supreme Court Act* are not amendments to the Constitution of Canada, it is open to Parliament to alter the current composition of the Court, as it has done from time to time in the past:

The amending Act of 1987 did not change the number of judges on the Court or the requirement that three judges must be appointed from Quebec, but these are matters provided in the Supreme Court Act, not the Constitution of Canada, so they too are open to amendment by the ordinary legislative process, despite the fact that “the composition of the Supreme Court of Canada” is one of the topics listed in s. 41 as requiring the unanimity procedure.¹³

Later in his treatise, Professor Hogg reiterates that the Court was established by Parliament and that thus “[t]he Supreme Court’s existence,

¹¹ Hogg, *Constitutional Law*, *supra*, note 6, ch. 4.2(c), at 78.

¹² *Id.*, 4.3(g), at 85.

¹³ *Id.*, at 4.2(c).

and therefore the details of its composition and jurisdiction, depend upon an ordinary federal statute.”¹⁴ He adds: “In theory, the Court could be abolished by the unilateral action of the federal Parliament.”¹⁵

As for the procedures for constitutional amendment set out in Part V of the *Constitution Act, 1982*, they appear on their face to do no more and no less than to provide the means by which the composition (paragraph 41(d)) and other elements (paragraph 42(1)(d)) of the Supreme Court may be dealt with in the Constitution of Canada, and this was certainly the premise of the 1987 Meech Lake and the 1992 Charlottetown Constitutional Accords. Professor Hogg has emphasized that because of the difficulty of reaching agreement on aspects such as a provincial role in judicial appointments, “the entrenchment of the Court was not included in the constitutional proposals that were placed before the federal Parliament by Prime Minister Trudeau in October 1980 and the entrenchment of the Court was not included in the settlement that was approved by all first ministers except for the Premier of Quebec in November 1981”; the result being that the *Constitution Act, 1982* did not entrench the Supreme Court in the Constitution.¹⁶ However, noted Professor Scott, writing in 1982, “[t]o argue that *none* of the federal statute law dealing with the Supreme Court of Canada forms part of the ‘Constitution of Canada’ is to say, in effect, that Parliament may continue to legislate on the subject exactly as it pleases, and its power under section 101 to do so cannot be taken away save by the elaborate methods” set out in Part V of the *Constitution Act, 1982*. “This”, he continued, “can scarcely have been what the eight ‘opposing’ premiers had in mind when they signed their ‘April Accord’ from which sections 41(d) and 42(1)(d) were taken.”¹⁷ Writing five years later, Professor Hogg declared:

The references to the Supreme Court of Canada in ss. 41(d) and 42(1)(d) of the Constitution Act, 1982 have created an intolerably

¹⁴ *Id.*, ch. 8.1, at 240.

¹⁵ *Id.*; that statement is tempered in two respects: in a footnote, Professor Hogg adverts to the possibility that “references to the Supreme Court of Canada in ss. 41(d) and 42[1](d) of the Constitution Act, 1982 have now placed the Court beyond the power of the federal Parliament” (but this eventuality is discussed and dismissed in his text in Chapter 4) and he continues in the body of his treatise: “In practice, of course, the Court has won a highly respected place in the scheme of Canadian government, and no federal government would ever contemplate the abolition or diminution of the Court.”

¹⁶ P.W. Hogg, *Meech Lake Constitutional Accord Annotated* (Scarborough: Carswell, 1987), at 29-30 [hereinafter “Hogg, *Meech Lake*”].

¹⁷ S.A. Scott, “The Canadian Constitutional Amendment Processes” (1982) 45 *Law & Contemp. Probs.* 249, at 261 [hereinafter “Scott, *Constitutional Amendment*”].

confusing situation. While it is probable that these references are ineffective as long as the Court is not provided for in the Constitution of Canada, this is by no means clear; and it is possible that the Supreme Court Act, or some as yet identified parts of the Supreme Court Act, cannot now be amended by the ordinary legislative process. The situation cries out for clarification, and clarification has now been provided by the Meech Lake Constitutional Accord.¹⁸

Professor Patrick Monahan, in his own textbook, *Constitutional Law*,¹⁹ takes exception to the view expressed by Professor Hogg, arguing that it would render paragraph 42(1)(d) of the *Constitution Act, 1982* “completely ineffective in terms of protecting provincial interests” in relation to the Supreme Court.²⁰ Monahan argues that a contextual and purposive interpretation would “support the conclusion that section 42(1)(d) must operate so as to limit, in some fashion, the ability of the federal Parliament to effect changes to the Supreme Court of Canada without the consent of the provinces”.²¹ In attempting to determine the nature and scope of such limits, he adverts to Professor Stephen Scott’s observation that the *Supreme Court Act* and the Rules adopted pursuant to it deal with such minutiae as the colour of the covers of the parties’ factums.²² Monahan suggests a “middle ground” between rendering paragraph 42(1)(d) “nugatory”, and construing that provision as having constitutionally entrenched every minor detail and measure set out in the *Supreme Court Act* and Rules. Invoking the Supreme Court’s own analysis in protecting the “fundamental features and key characteristics” of the Senate from alteration by Parliament in the *Upper House Reference*,²³ Monahan would see paragraph 42(1)(d) as having entrenched

¹⁸ Hogg, *Meech Lake*, *supra*, note 16, at 30.

¹⁹ P.J. Monahan, *Constitutional Law*, 3d ed. (Toronto: Irwin Law, 2006) [hereinafter “Monahan”].

²⁰ *Id.*, at 193. He continues: “Indeed, the result of Hogg’s analysis is that Parliament’s unilateral power to make fundamental changes to the Court’s powers or composition cannot be constrained in the future unless at least seven, and perhaps all ten, provinces agree.”

²¹ *Id.*, at 194.

²² S.A. Scott, “Pussycat, Pussycat or Patriation and the New Constitutional Amendment Processes” (1982) 20 U.W.O. L. Rev. 247, at 272; see also Scott, “Constitutional Amendment”, *supra*, note 17, at 262: Professor Scott argued that

The Supreme Court of Canada will likely be disposed to adopt an intermediate position, attributing to some of the federal statutory provisions a ‘constitutional’ character, and to others not. This would give an entrenched status to the essential elements of the court’s character, without involving the inconvenience which an implied repeal of the pertinent portion of section 101 would entail.

²³ *Re Authority of Parliament in relation to the Upper House*, [1979] S.C.J. No. 94, [1980] 1 S.C.R. 54 (S.C.C.).

“only those key characteristics of the Court that implicate fundamental provincial interests”.²⁴

Such key characteristics would include the status of the Court as a general court of appeal for Canada and a superior court of record; the number of judges of the Court; the requirement that three members of the Court be appointed from the bar of Quebec; and the mode of appointment, tenure, and removal of its judges.²⁵

Professor Monahan provides further criticism of the anomalies produced by the view expressed by Professor Hogg that the list of instruments entrenched as part of the Constitution of Canada through subsection 52(2) of the *Constitution Act, 1982* (and the schedule thereto) is a closed one. Treating subsection 52(2) as exhaustive of the meaning of the term, “[t]he Constitution of Canada”, for the purposes of that section (supremacy and entrenchment) also means that the *Supreme Court Act* does not come within the definition of the Constitution of Canada and therefore, paragraph 41(d) of the *Constitution Act, 1982* leaves unprotected from further legislative change the provisions of the *Supreme Court Act* that currently provide that three of the nine judges of the Court must come from the Bar of Quebec.

For example, Quebec’s guaranteed representation on the Supreme Court could be eliminated without its consent, through an ordinary statute passed by the Parliament of Canada. Moreover, the only way that Quebec could obtain constitutional protection against this kind of unilateral federal change in its Supreme Court representation would be to obtain the agreement of all the other provinces.²⁶

Professor Monahan calls this result “doubly anomalous” when analyzed in light of the protections afforded by the Part V amending procedures taken as a whole, and what he sees as the basic purpose of the procedures:

The underlying purpose of the amending procedure, in other words, is to protect the provinces from having their rights or privileges negatively affected without their consent. This includes provincial interests in the design and operation of key national institutions such as the Senate and the House of Commons. Yet, by treating section 41(d) as ineffective, the provinces are granted absolutely no protection when it comes to the Supreme Court, a key institution of the federation. In

²⁴ Monahan, *supra*, note 19, at 194.

²⁵ *Id.*

²⁶ *Id.*, at 181.

my view, this interpretation is inconsistent with the underlying purpose of Part V.²⁷

Professors Henri Brun, Guy Tremblay and Eugénie Brouillet invoke a similar construction of the Part V amending procedures when it comes to the meaning to be attributed to paragraph 41(d):

Il est possible d'imaginer que l'article 41d) n'ait voulu imposer l'unanimité qu'à d'éventuels ajouts à la Constitution du Canada portant sur la composition de la Cour suprême, sans prétendre régir sa composition actuelle résultant de la *Loi sur la Cour suprême*. Cette vision des choses nous semble toutefois pas celle qu'il faille privilégier, pour la raison essentielle qu'elle équivaut à protéger la compétence fédérale exclusive de régir à sa guise la composition de la Cour suprême. Le Québec, en particulier, n'a pas pu vouloir cela lorsqu'il a consenti à la formule en question en avril 1981; la présence de trois juges civilistes sur neuf à la Cour suprême lui est trop importante. Plus généralement, il semble certain que l'intention des divers acteurs politiques à l'époque du rapatriement ne se situait pas à un deuxième degré d'abstraction et qu'elle consistait bien à enchâsser la composition de la Cour suprême.²⁸

This view of the purpose of paragraph 41(d) (and 42(1)(d)) of the *Constitution Act, 1982* — a view informed (if not coloured) by considerations of appropriate policy outcomes (*i.e.*, achieving constitutional protection for the judges from Quebec) — must be balanced with the fact that both before and after 1982, attempts to entrench substantively the composition and essential characteristics of the Supreme Court in the Constitution of Canada were proposed and failed to be ratified. Indeed, one of the government of Quebec's five basic constitutional demands after 1982 was the entrenchment of the

²⁷ *Id.*

²⁸ H. Brun, G. Tremblay & E. Brouillet, *Droit constitutionnel*, 5th ed. (Cowansville: Éditions Yvon Blais, 2008), at 233-34. Professor Benoît Pelletier, in his major study of the amending procedures, *La modification constitutionnelle au Canada* (Scarborough: Carswell, 1996), at 74, sides with Hogg: "nous partageons l'opinion du professeur Hogg [...] et estimons que le terme « Constitution du Canada » à l'article 52 de la Loi de 1982 ne doit couvrir que les textes figurant à l'annexe de cette loi." Statutes that are not listed in the schedule, such as the *Supreme Court Act*, R.S.C. 1985, c. S-26 and the *Official Languages Act*, S.C. 1985, c. 31 (4th Supp.), "ne doivent pas être considérés comme faisant partie de la Constitution du Canada pour les fins de la procédure de modification constitutionnelle établie dans la Partie V de la Loi de 1982, et ce, ni en totalité ni en partie". He adds (in fn. 229, at 75): "Nous ne partageons donc pas l'opinion des auteurs Brun et Tremblay, [...] voulant que certaines des dispositions de la Loi sur la Cour suprême soient soumises à la Partie V de la Loi de 1982 alors que d'autres ne le seraient pas. Une telle position, en effet, ajoute inutilement de l'incertitude à la question de savoir comment cette loi pourra être modifiée dans l'avenir."

Court's composition as respects the judges from Quebec. The 1987 Meech Lake Constitutional Accord would have amended the *Constitution Act, 1867* to provide, immediately after section 101 thereof, new sections 101A to 101E. Section 101A would have expressly continued and constituted the Court; section 101B would have determined the qualifications of persons who may be appointed judges, and would have required that at least three judges come from Quebec; section 101C would have provided for the appointment process; section 101D would have applied sections 99 and 100 (dealing with tenure and salaries, *etc.*) of the *Constitution Act, 1867* to the judges of the Supreme Court; and section 101E would have preserved the power of Parliament to make laws under section 101, subject to the provisions of sections 101A to 101D.

In light of the failure of the ratification of the Meech Lake Accord's constitutional amendments under section 41 of the *Constitution Act, 1982* and other attempts to amend the Constitution to provide expressly for the Supreme Court's composition, organization and maintenance,²⁹ it is difficult to believe that the Court would, under the guise of judicial interpretation, be prepared to read these types of provisions directly into the text of the Constitution.

III. FOCUSING UPON THE COURT RATHER THAN THE *SUPREME COURT ACT* OR THE AMENDING PROCEDURES

That said, it is unnecessary, in the context of the present paper, to come to a definitive view on whether the *Supreme Court Act*, the Supreme Court and its composition or other basic characteristics of the Court have been entrenched through sections 41 and 42 of the *Constitution Act, 1982*. There has been no formal judicial consideration of the effect of paragraphs 41(d) and 42(1)(d) of the *Constitution Act, 1982* in any case law to date, so purportedly definitive pronouncements in this unsettled area should be treated with caution. It may well be that, whatever the differences of scholars as to details and approach in terms of the extent to which (if at all) the *Supreme Court Act* or its basic principles and provisions have been entrenched, the Supreme Court itself is now beyond the reach of abolition by Parliament under section 101 of the *Constitution Act, 1867*. The fact that there is no longer a higher (or

²⁹ See also the provisions of the 1992 Charlottetown Accord, which would have made similar amendments in relation to s. 101 of the *Constitution Act, 1867*.

alternative) court of appeal in the Judicial Committee of the Privy Council; the emerging doctrine of the separation of powers as a fundamental constitutional principle, even in a parliamentary system of government; the central, structural role played by the Court as the general court of appeal for Canada; its pivotal place in the judicial hierarchy; and the very mention of the Court in sections 41 and 42 of the *Constitution Act, 1982*, all argue for its continued constitutional existence despite the plenary character of the legislative power conferred upon Parliament under section 101 of the Act of 1867.

The views exemplified by Professors Hogg and Monahan, respectively, each have some merit. However, in their focus on the status of the *Supreme Court Act*, on the one hand, and the constitutional amending procedures on the other, they also tend to lead to unwanted consequences. The view that it is open to Parliament, as a matter of law, to repeal the *Supreme Court Act* and thereby to abolish the Court, begs a legal response asserting that the Constitution cannot permit the legislature to interfere so drastically in the judicial sphere.³⁰ On the other hand, the view that the constitutional amending procedures are nugatory in their effect if they have not entrenched either the *Supreme Court Act*, or else the principal characteristics of the Court, belies the use (or contemplation) of those procedures in the Meech Lake and Charlottetown Constitutional Accords, and may also constrain the flexibility of Parliament's power to modernize and improve the *Supreme Court Act* and the characteristics of the Court without resorting to complex constitutional amendments.

Most constitutional scholars would now concede the point that the *Supreme Court Act* — albeit in many respects an organic instrument and “constitutional” in the broad sense described by Beetz J. in the *O.P.S.E.U.* case (*i.e.*, bearing upon an organ or principle of government) — is not itself part of the “Constitution of Canada” as that term is defined in section 52 of the *Constitution Act, 1982*.³¹ Professor Hogg's point on this score is well taken. Furthermore, most scholars (with some

³⁰ “It is well within the power of the legislature to enact laws, even laws which some would consider draconian, as long as it does not fundamentally alter or interfere with the relationship between the courts and the other branches of government”: *Babcock v. Canada (Attorney General)*, [2002] S.C.J. No. 58, [2002] 3 S.C.R. 3, at para. 57 (S.C.C.), *per* McLachlin C.J.C.

³¹ *O.P.S.E.U. v. Ontario (Attorney General)*, [1987] S.C.J. No. 48, [1987] 2 S.C.R. 2 (S.C.C.); see also W.J. Newman, “Defining the Constitution of Canada Since 1982” (2003) 22 S.C.L.R. (2d) 423.

notable exceptions³²) would also be reluctant to recommend that the courts read the *Supreme Court Act* into the apparently closed list of Acts and instruments scheduled to the *Constitution Act, 1982* — the term “includes” in subsection 52(2) being unlikely to overcome, in this regard, the stricture against unauthorized constitutional amendment by (*inter alia*) robust judicial construction embodied in subsection 52(3): “Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.”³³

However, if it may be difficult to deny the proposition that the *Supreme Court Act* is not itself part of the Constitution of Canada in the formal sense and is therefore neither supreme law nor constitutionally entrenched, there would seem to be something inherently unsatisfactory, from the standpoint of the rule of law and other fundamental constitutional principles, with the corollary advanced earlier by Professor Hogg: that if the *Supreme Court Act* is itself not part of the Constitution of Canada, then in the fullness of legal theory, the Parliament of Canada has the legislative competence to abolish the Supreme Court — and thereby, to eliminate the central organ exercising supreme judicial power.

³² Incorporating the *Supreme Court Act* (or parts thereof) into the Constitution by analytical construction or judicial interpretation has been contemplated by S.A. Scott (see *supra*, note 22) but also by R.I. Cheffins, in “The Constitution Act, 1982 and the Amending Formula: Political and Legal Implications” (1982) 4 S.C.L.R. 43, at 53-54; see also W.R. Lederman, “Constitutional Procedure and the Return of the Supreme Court of Canada” (1985) 26 *Cahiers de droit*. These early writings pre-date the Supreme Court’s consideration of the meaning of s. 52(2) of the *Constitution Act, 1982* in *New Brunswick Broadcasting*, *infra*, note 33.

³³ In *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] S.C.J. No. 2, [1993] 1 S.C.R. 319 (S.C.C.), a majority of the Court refused to treat article 9 of the English *Bill of Rights* of 1689 as itself part of the Constitution of Canada, but did accept that the principle of parliamentary privilege embodied in that provision became part of the Constitution via the preamble to the *Constitution Act, 1867* and its reference to Canada possessing “a Constitution similar in Principle to that of the United Kingdom”. Stated McLachlin J. (as she then was), at 378:

I accept the spirit of the remarks of Hogg that additions to the 30 instruments set out in the Schedule to s. 52(2) of the *Constitution Act, 1982* might have grave consequences given the supremacy and entrenchment that is provided for the “Constitution of Canada” in ss. 52(1) and 52(3). However, as Hogg himself concedes, s. 52(2) is not clearly meant to be exhaustive. That established, I would be unwilling to restrict the interpretation of that section in such a way as to preclude giving effect to the intention behind the preamble to the *Constitution Act, 1867*, thereby denying recognition to the minimal, but long recognized and essential, inherent privileges of Canadian legislative bodies.

A similar result was achieved by Lamer C.J.C. in relation to the *Act of Settlement* of 1701 in *Reference re Provincial Court Judges*, [1997] S.C.J. No. 75, [1997] 3 S.C.R. 3 (S.C.C.); the principle of judicial independence (rather than the provisions of the *Act of Settlement*) was part of the Constitution of Canada, through the preamble to the *Constitution Act, 1867*.

It is true that Canada got along without a Supreme Court for almost a decade after Confederation, and that the Court did not truly become supreme until after the abolition, by Parliament, of appeals to the Judicial Committee of the Privy Council of the United Kingdom.³⁴ However, the obvious point is precisely that: the supreme appellate function of the Judicial Committee of the Privy Council was an integral part of the Canadian judicial system until it was ultimately displaced by the Parliament of Canada in favour of the Supreme Court. Canadians could do without a general court of appeal for Canada as long as the Judicial Committee continued to play that role. With the abolition of appeals to the Privy Council, the appellate jurisdiction of the Supreme Court of Canada became essential.

Structural constitutional principles militate in favour of that conclusion. Canada's constitution is primarily a written one, as is typical of a federal state, where legislative (and executive) powers must be allocated among the central and local governments. It is generally conceded that the resolution of legal disputes between governments in respect of the division of powers requires an impartial and authoritative judicial arbiter.³⁵ That judicial role has been enhanced since 1982 by the entrenchment of a constitutional bill of rights and by the express (in the judicial remedies clause of section 24 of the *Canadian Charter of Rights and Freedoms*)³⁶ and implied (in the supremacy clause in section 52 of the *Constitution Act, 1982*) responsibilities imposed thereby on the courts as guarantors of constitutional interests and protections.

Moreover, the development of the Supreme Court's own understanding of the basic tenets underlying the written provisions of the Constitution: — first principles such as federalism; the separation of powers among

³⁴ Appeals in criminal cases were abolished by the Parliament of Canada in 1933 and in civil cases in 1949. For the jurisprudence relating to the validity of the abolition statutes, see *R. v. Nadan*, [1926] A.C. 482 (P.C.); *R. v. British Coal Corp.*, [1935] A.C. 500 (P.C.); *Ontario (Attorney General) v. Canada (Attorney General)*, [1947] A.C. 127 (P.C.).

³⁵ No less eminent a legal scholar than A.V. Dicey observed, in his *Introduction to the Study of the Law of the Constitution* (London: Macmillan & Co., 1889), at 157: "For the essential characteristics of federalism — the supremacy of the constitution — the distribution of powers — the authority of the judiciary — reappear, though no doubt with modifications, in every true federal state." Calling the Judicial Committee of the Privy Council "the true Supreme Court of the Dominion", Dicey continued: "In Canada, as in the United States, the Courts inevitably become the interpreters of the Constitution." For contemporary scholarship, consider Donna Greschner, "The Supreme Court, Federalism, and Metaphors of Moderation" (2001) 79 Can. Bar Rev. 47; A. Wayne MacKay, "The Supreme Court of Canada and Federalism: Does / Should Anyone Care Anymore?" (2001) 80 Can. Bar Rev. 241; and Bruce Ryder, "The End of Umpire? Federalism and Judicial Restraint" (2006) 34 S.C.L.R. (2d) 345.

³⁶ Part I of the *Constitution Act, 1982*, *supra*, note 5.

the legislative, executive and judicial branches of government; judicial independence; and constitutionalism itself — lend further support to the idea that a supreme court is necessary to ensure respect for, and the fulfilment of, core constitutional values and ideals.

IV. CONSTRUING SECTION 101 OF THE *CONSTITUTION ACT, 1867* AND THE STATUS OF THE COURT

How do these principles relate, in the context of the question of the constitutional status of the Supreme Court, to another basic constitutional principle: parliamentary sovereignty? Principles such as the rule of law cannot normally negate the validity of statutes enacted by Parliament or a provincial legislature, respectively, pursuant to a constitutional grant of legislative power under sections 91 and 92 of the *Constitution Act, 1867*.³⁷ Section 101 of the *Constitution Act, 1867* is itself a plenary and continuing grant of legislative power: the Parliament of Canada “may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada”, as well as for the establishment of additional courts for the “better Administration of the Laws of Canada”. Section 101 clearly provides (“notwithstanding anything in this Act”) for an ongoing legislative role (Parliament may legislate “from Time to Time”) in relation to the Supreme Court, just as the Congress of the United States has made provision, from time to time, for matters relating to the Supreme Court of the United States — but it may be argued plausibly that the thrust of section 101 is to grant Parliament the power to establish, and thereafter to maintain, a general appellate court for Canada. In other words, section 101 — on its own terms (“Constitution, Maintenance, and Organization”) and read in light of structural constitutional principles (federalism, constitutionalism, the separation of powers and an independent judiciary) as well as recent constitutional history (the entrenchment of a Charter of Rights, an express supremacy clause, and comprehensive amending procedures) — does not give rise to a legislative power on the part of Parliament to abolish the Supreme Court or to diminish its status as a general court of appeal for Canada or — in light of the express mention of the term, “Supreme Court of

³⁷ See W.J. Newman, “The Principles of the Rule of Law and Parliamentary Sovereignty in Constitutional Theory and Litigation” (2005) 16 N.J.C.L. 175; P.W. Hogg & C.R. Zwibel, “The Rule of Law in the Supreme Court of Canada” (2005) 55 U.T.L.J. 715.

Canada” in Part V of the *Constitution Act, 1982*, its status and core attributes as the supreme court of the country.

A progressive and purposive construction of section 101 of the *Constitution Act, 1867* in relation to the essential role played by the Supreme Court as the pre-eminent judicial institution in our constitutional system of government, would avoid many of the problems encountered by focusing the debate about the status of the Court on whether the *Supreme Court Act* is itself part of the Constitution of Canada and whether paragraphs 41(d) and 42(1)(d) of the *Constitution Act, 1982* have themselves entrenched the Court and its composition. It would permit the Parliament of Canada to continue to exercise an important and practical legislative function in modernizing and protecting elements of the Court by statute from time to time, while leaving to the amending procedures further express and entrenched constitutional enhancements and protections.

On this theory, the baseline of what a “General Court of Appeal for Canada” consists of will have been crystallized by the express mention of “the Supreme Court of Canada” in the Part V amending procedures of the *Constitution Act, 1982*: in other words, the essential attributes of the Supreme Court as they existed in 1982. On the delicate question of the composition of the Court, this view would include among those essential characteristics the continuing presence of three judges drawn from the bench and bar of Quebec, given their significance to the recognition of the civil law tradition in Canada and, more broadly, to Canadian federalism and diversity. A further statutory enhancement by Parliament — such as, for instance, a recognition in law of what is now the practice: that three of the other nine judges are appointed from the bench and bar of Ontario, one from the Atlantic provinces and two from the Western provinces — might also be permissible, as might (although this could be argued either way) an increase in the total number of judges.³⁸

Construing section 101 of the *Constitution Act, 1867* as protecting the constitution, maintenance and organization of the Supreme Court as a

³⁸ *Quaere* whether a Private Member’s Bill currently under study before the House of Commons Standing Committee on Justice and Human Rights, Bill C-232, *An Act to amend the Supreme Court Act (understanding the official languages)* relates indirectly to the composition of the Court, or simply imposes a further condition precedent on potential nominees to the bench. The Bill would amend s. 5 of the *Supreme Court Act*, R.S.C. 1985, c. S-26 so as to provide, in addition to the current requirement that “[a]ny person may be appointed a judge who is or has been a judge of a superior court of a province or a barrister or advocate of at least ten years standing at the bar of a province” (which would become s. 5(1)), “any person referred to in subsection (1) may be appointed a judge who understands French or English without the assistance of an interpreter.”

general and supreme appellate court for Canada, while permitting Parliament to continue to enact amendments to the *Supreme Court Act* from time to time to modernize and enhance the functions, attributes and administration of the Court, in keeping with its essential role and status, would respect the principle of the separation of powers and would also leave the amending procedures of paragraphs 41(d) and 42(1)(d) of the *Constitution Act, 1982* to the task of formal and express constitutional amendment of the type contemplated by the Meech Lake and Charlottetown Accords. This would also maintain the integrity of those formal processes of constitutional amendment, which impose strict requirements for ratification by the federal legislative houses and the provincial legislative assemblies.³⁹

On a liberal application of this theory, it might still be open to an aggressively minded Parliament to abrogate the provisions of the *Supreme Court Act*; however, such repeal would be not only ill considered but a vexatious exercise in futility, because it would be ineffective to abolish the Court itself. On a stricter view, Parliament's legislative power under section 101 of the *Constitution Act, 1867* is limited to establishing and maintaining a general court of appeal for Canada, and, at least since 1982, is to be exercised in a manner consistent with the basic attributes of the Supreme Court of Canada as that institution stood then constituted, although it remains within the competence of Parliament to adjust the framework legislation and the administrative and regulatory details governing the organization of the Court from time to time.

It is well to note that even the Mother of Parliaments, the Parliament of the United Kingdom, has, through the enactment of the *Constitutional Reform Act 2005*, provided for the establishment of a Supreme Court of the United Kingdom.⁴⁰ It joins, in this respect, the Supreme Court of New Zealand established by the Parliament of that dominion in 2004.⁴¹ There is good reason to believe that modern constitutionalism — particularly in a federal state with a largely written constitution, such as

³⁹ The amending procedures serve a dual purpose: to *permit* constitutional amendments where the legal requirements of the formulae have been met, through the authorizing resolutions of the relevant federal legislative chambers and provincial assemblies; (2) to *protect* constitutional guarantees and entrenched provisions from change where the requisite conditions of Part V have not been met: W.J. Newman, "Living with the Amending Procedures: Prospects for Future Constitutional Reform in Canada" (2007) 37 S.C.L.R. (2d) 383, at 385-86.

⁴⁰ 2005, c. 4 (U.K.); see esp. Part 3 of the Act. The U.K. Supreme Court will become operational in October 2009.

⁴¹ *Supreme Court Act 2003* (N.Z.), which came into force on January 1, 2004.

Canada and the United States — contemplates the continued existence and vitality of a supreme judicial institution and appellate court. Interpreting section 101 of the *Constitution Act, 1867* in keeping with that end is one means of ensuring that objective.

