The “rule of law” is a principle of longstanding constitutional value. It is recognized in the preamble of the Constitution Act, 1982, and has been utilized by the courts as important constitutional rhetoric, and also as a doctrine that produced juridical effects in various contexts.

At a minimum, the inspiration behind the “rule of law” is a sense of order and hierarchy. The modern concept was developed in the nineteenth century writings of A.V. Dicey, and has since undergone several metamorphoses. In Roncarelli v. Duplessis, [1959] S.C.R. 121, the Supreme Court of Canada relied upon the doctrine to assert that all official acts must be authorized by law. In Reference Re Proposed Resolution Respecting the Constitution of Canada, [1981] 1 S.C.R. 753, 805, the Court explained that

The “rule of law” is a highly textured expression [...] conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority.

Mature development of the rule of law as the underpinning of the Canadian public law system means that the constitutional review jurisdiction vested in the courts must extend to ensuring that constitutional obligations are performed, in addition to checking illegal exercises of power. Failure of governments to discharge the few affirmative duties imposed on them by the Constitution, as, for example, failure to print and publish legislative records, journals and acts in both English and French (Manitoba Act, 1870, s. 23), gives rise to difficult and novel questions as to public law remedies. These issues were explored by the Supreme Court of Canada in Reference Re Manitoba Language Rights, [1985] 1 S.C.R. 721. In that case at p. 749, the Supreme Court established as a second branch of the rule of law doctrine that “the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order”. A third aspect of the rule of law doctrine was established in the Provincial Judges Reference, [1997] 2 S.C.R. 3 at para. 10 and the Secession Reference, [1998] 2 S.C.R. 217 at para. 71. In these cases the Supreme Court attributed to the rule of law doctrine the requirement that “ ‘the exercise of all public power must find its ultimate source in a legal rule’. Put another way, the relationship between the state and the individual must be regulated by law.” The Court went on to note that, taken together, the three branches of the rule of law doctrine “make up a principle of profound constitutional and political significance;” (Secession Reference, para. 71).

The theory of the rule of law is interesting. Some argue that the rule of law is a procedural concept. The rule of law implies a sense of order and hierarchy in the sense that each act of the authorities must be authorized by legal rules which are legitimate. The only way legal rules can be recognized as legitimate is if they are procedurally correct – i.e. the rule has been stipulated by the required legal procedure. Thus, for example, the police may only arrest if they are authorized to do so by some rule of statute or common law. The authorizing rule itself must

ultimately have its source in a grant of power in the Constitution. The rule of law is said to require procedural regularity in the sense that one can trace the source of all official acts ultimately to an authorizing grant of power in the Constitution. In this sense, the rule of law requires that each legal step, beginning with the exercise of constitutional power by the legislature, through to orders given to officials, to have been followed in legally and procedurally correct form. If there is any break in the chain of legality, the action is not in accordance with law, and may be controlled by the Courts.

Others would say that the rule of law concept goes beyond procedural regularity. In addition to commanding procedural correctness, the rule of law concept is said to require that the law obligate. Persons can only be obligated by laws that are fundamentally just. Even if all procedural steps required by the Constitution, statutes and regulations authorize the state to do something fundamentally unjust, such as torture, this would still be inconsistent with the rule of law because people would not feel obligated to comply. In this second sense it is said that the rule of law implies that the law must be consistent with at least certain minimal substantive norms, those norms which we recognize as fundamental tenets of justice.

The jurisprudence of the Supreme Court of Canada contains comments which indicate both a procedural and substantive approach to the rule of law. In the Manitoba Language Rights Reference, for example, the court referred to two senses of the rule of law:

1. the rule of law which precludes the influence of arbitrary power;
2. the rule of law which "preserves and embodies the more general principle of normative order […] which […] is linked with basic democratic notions".

In the Secession Reference, para. 95 the Court added a duty to negotiate the profound political proposal of separation if demanded by political action in Quebec. "Those who quite legitimately insist upon the importance of upholding the rule of law," the Court noted, cannot at the same time be oblivious to the need to act in conformity with constitutional principles and values, and so do their part to contribute to the maintenance and promotion of an environment in which the rule of law may flourish. Although undeveloped, these comments suggest that the Supreme Court may well utilize the rule of law as a doctrine that supplies normative principles, as a doctrine that requires compliance with at least certain minimal principles deemed fundamental to the legal system. This is what makes Vanguard Coatings and Chemicals v. M.N.R., [1986] 2 C.T.C. 431 (Fed. T.D.) so interesting. In that case, the Federal Court Trial Division was moved to find violation of the rule of law by a statute which offended both procedural and substantive norms in the sense that the statute created arbitrary unlimited power (a procedural violation), and also unfairly deprived a citizen of his property. Justice Muldoon stated: Thus it may be seen that section

34 of the Excise Tax Act is no paradigm of the rule of law. It is, indeed, so contrary to the rule of law that it can surely be declared to be unconstitutional. It accords arbitrary administrative discretion, without any guidelines or directives, to the Minister whose determination is not subject to any objective second opinion as is inherent in an appeal provision. Even if, in fact and theory, section 34 does not transgress the specific rights and freedoms proclaimed in the Charter, that constitutional document itself, in section 26, claims no monopoly in the promulgation of Canadians' other existing rights and freedoms. The rule of law is a central principle of our Constitution and it is transgressed by section 34....By levying his determination of "fair price" against Vanguard, the Minister at a stroke of the pen imposes a heavy burden of tax debt. Since the Minister did not agree with Vanguard's submissions, it and its shareholders and directors are left with the burdensome decree of the one-and-only, far-from-disinterested and uncontradictable authority whom section 34 recognizes in conjuring the "fair price on which the tax should be imposed". The "tax should be imposed" in the sole judgment of the Minister whose duty is to collect tax? Section 34 certainly makes a despot of the Minister. If this formulation be so decent and reasonable as the Minister's counsel say it is, why Parliament could provide that all Canadians should subject their lives and livelihoods to some chosen official who finds himself in as paramount a conflict of official interest as does the Minister of National Revenue when determining that taxpayers should really contribute more revenue to the Crown, pursuant to section 34 of the Excise Tax Act.

This novel and potent use of the doctrine was reversed on appeal on the narrow point that "the rule of law has never been taken to include a right of appeal." The decisions are helpful in reminding us of how prone are some Courts to reach for available doctrines to deal with perceptions of unfairness, and how circumspect are other Courts when confronted with openings for seemingly unlimited judicial discretion.

While there is much rhetoric about the rule of law in Canadian jurisprudence, the doctrine has been pressed into service as an operative principle only rarely. There are but few examples where the rule of law concept creates a Constitutional standard to which other legal rules must conform.