Canada's Unfathomable Unwritten Constitutional Principles

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Since the advent of the Canadian Charter of Rights and Freedoms *in 1982, Canadian courts have become bolder in the law-making enterprise, and have recently resorted to unwritten constitutional principles in an unprecedented fashion. In 1997, in* Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, *the Supreme Court of Canada found constitutional justification for the independence of provincially appointed judges in the underlying, unwritten principles of the Canadian Constitution. In 1998, in* Reference re Secession of Quebec, *the Court went even further in articulating those principles, and held that they have a substantive content which imposes significant limitations on government action. The author considers what the courts' recourse to unwritten principles means for the administrative process. More specifically, he looks at two important areas of uncertainty relating to those principles: their ambiguous normative force and their interrelatedness. He goes on to question the legitimacy of judicial review based on unwritten constitutional principles, and to criticize the courts' recourse to such principles in decisions applying the principle of judicial independence to the issue of the remuneration of judges.*

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L'on ne peut juger un parti que par la doctrine qu'il professe quand il est le plus fort.[1]

Introduction

In the celebrated *Reference re Manitoba Language Rights*[2] ruling, the Supreme Court of Canada declared all Manitoba statutes enacted since the end of the 19th century unconstitutional, as they had been adopted in English only and were in violation of the written provisions of the *Constitution Act, 1867* and the *Manitoba Act, 1870*.[3] The Court invoked the principle of the rule of law to prevent the chaotic results that would flow from a declaration of invalidity. The Court declared that this principle of British constitutional law, albeit unwritten, had been incorporated into Canadian law through the preamble to the *Constitution Act, 1867*, which states that Canada is to have "a constitution similar in principle to that of the United Kingdom".[4] The Court also determined that the rule of law principle inheres in the very nature of a Constitution.[5] Since "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

1. G. de Staël, *Considérations sur la révolution française* (1818) [reprinted: Paris: Tallandier, 2000] at 331.
2. [1985] 1 S.C.R. 721 [hereinafter *Manitoba Language Rights*].
3. *Constitution Act, 1867* (U.K.), 30 & 31 Vict. c. 3, s. 133; *Manitoba Act, 1870*, R.S.C. 1970, App. II, s. 23.
4. *Constitution Act, 1867, ibid.*, Preamble.
5. *Manitoba Language Rights, supra* note 2 at 750.

normative order",[6] the Court ordered that the declaration of invalidity be suspended for a fixed period of time, to enable the Manitoba Legislature to remedy the problem.

The Supreme Court's recourse to unwritten principles having substantive normative force was novel.[7] Previously, such principles were never held capable of counteracting the explicit provisions of the Constitution. In the words of Dale Gibson, "the notion of forthrightly employing unwritten constitutional norms, lifted from British history via the Preamble . . . remained for years a mere curiosity, kept alive by law schools for pedagogical purposes, but unsound in the eyes of most Canadian lawyers and judges."[8] This is no longer the case. In 1997, for the first time in Canadian history, the Supreme Court of Canada concluded that a statute could be successfully challenged by reason of its incompatibility with an unwritten constitutional principle.[9] It also availed itself of these principles to modulate application of the constitutional rules in response to an attempt at unilateral secession.[10] In other words, these unwritten constitutional

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6. *Ibid.* at 749.

7. In the words of Lamer C.J. in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 at para. 83 [hereinafter *Remuneration*], these principles are unwritten "in the sense that [they are] exterior to the particular sections of the Constitution Acts."

8. D. Gibson, "Constitutional Vibes: Reflections on the *Secession Reference* and the Unwritten Constitution" (1999) 11 Nat'l. J. of Const. Law 49 at 52. The famous opinions of Duff J. (*Reference re Alberta Statutes*, [1938] S.C.R. 100 at 132-135), Cannon J. (*ibid.* at 142-146); Rand J. (*Saumur* v. *City of Québec*, [1953] 2 S.C.R. 299 at 330-332, *Switzman* v. *Elbling*, [1957] S.C.R. 285 at 306-307 [hereinafter *Switzman*]); and Abbott J. (*Switzman*, *ibid.* at 326-328) that formed the basis of the "Implied Bill of Rights" theory were mere *dicta* that were never approved by a majority of the Supreme Court of Canada. For an extensive study of the preamble of the *Constitution Act, 1867*, and more particularly of the "Implied Bill of Rights" theory, see L. Sormany, *La portée constitutionnelle du préambule de l'Acte de l'Amérique du Nord britannique* (LL.M. Thesis, Laval University, 1976 [unpublished]). For developments after 1976, see P.W. Hogg, *Constitutional Law of Canada*, loose-leaf (Toronto: Carswell, 1997) at s. 31.4(c).

9. *Remuneration*, *supra* note 7.

10. *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 [hereinafter *Secession*].

principles are now part and parcel of the Canadian constitutional order.

Since the advent of the *Canadian Charter of Rights and Freedoms*[11] in 1982, the importance of courts in the Canadian political environment has grown dramatically. Not surprisingly, this increased importance has had some repercussions on how courts see themselves and their constitutional role within the Canadian political structure.[12] This increase in power has made the courts bolder in their law-creating enterprise. It is no coincidence therefore that the invocation of unwritten principles having substantive normative force is a recent phenomenon, at once concomitant with a weakening of parliamentary supremacy and an enhancement of constitutional supremacy greater than what existed prior to 1982.

In the first part of this essay, attention will be directed to two of the most important uncertainties generated by these principles: their ambiguous normative force and the difficult issue of their interrelatedness. The second part will deal with the legitimacy of judicial review based on such unfathomable constitutional norms.[13]

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11. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, (U.K.), 1982, c. 11 [hereinafter *Charter*].

12. See, for instance, *MacMillan Bloedel Ltd.* v. *Simpson*, [1995] 4 S.C.R. 725, and *Remuneration*, *supra* note 7.

13. Others have dealt in detail with the issue of the principles' identification, and so this issue will not be addressed: P.J. Monahan, "The Public Policy Role of the Supreme Court of Canada in the *Secession Reference*" (1999) 11 Nat'l. J. of Const. Law 65; R. Elliot, "References, Structural Argumentation and the Organising Principles of Canada's Constitution" (2001) 80 Can. Bar. Rev. 67; W.J. Newman, "'Grand Entrance Hall', Back Door or Foundation Stone? The Role of Constitutional Principles in Construing and Applying the Constitution of Canada", Panel Discussion on Federalism and Unwritten Constitutional Principles, Osgoode Hall Law School 2000 Constitutional Cases Conference, Toronto, April 6, 2001 [unpublished] and P. Hughes "Recognizing Substantive Equality as a Fundamental Constitutional Principle" (1999) 22 Dal. L.J. 5. For a fascinating analysis of these principles in a historical perspective, see M. Walters, "The Common Law Constitution in Canada: Return of *Lex non Scripta* as Fundamental Law" (2001) 51 U.T.L.J 91. Until now, the following have been said

Challenges to the constitutional validity or applicability of a statute on the basis of an unwritten principle have systematically failed, except in cases involving the principle of judicial independence, and more particularly, issues of judicial remuneration. The purpose of this essay will be to criticize the courts' recourse to unwritten principles in such instances.

I. Unwritten Constitutional Principles in Canadian Constitutional Law: The *Remuneration* and *Secession* References

A study of the uncertainties generated by the recognition of unwritten constitutional principles must begin with an analysis of the Supreme Court's two most important cases on this issue, the *Remuneration* and *Secession* references.

In *Remuneration*, the Court was asked whether the reduction of the salaries of provincial court judges constituted a violation of section 11(d) of the *Charter*, which provides that a person "charged with an offence" has the right to an "independent and impartial tribunal". The constitutional validity of provincial legislation purporting to impose such reductions in salaries was questioned. Other explicit constitutional provisions (section 96-100 of the *Constitution Act, 1867*) enshrine the principle of judicial

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to constitute unwritten principles of the Canadian constitutional order: judicial independence, respect for minorities, federalism, rule of law and constitutionalism, democracy, separation of powers, and parliamentary sovereignty. In *Remuneration*, Lamer C.J. also mentioned the doctrine of full faith and credit, federal paramountcy, freedom of political speech, parliamentary government and parliamentary privileges. This is not an exhaustive list because, as was underlined by the Court in *Secession* (at para. 32), more principles may be identified as the need arises. For a list of potential principles, see D. Gibson, *supra* note 8, at 50-51; R. Elliot, *ibid.*; M. Cousineau, "*Le renvoi sur la sécession du Québec*: La résurrection des droits linguistiques au Canada" (1999) 11 Nat'l J. of Const. Law 147 at 156-157. It should not be forgotten that the greater the uncertainty as to their exact number, the more numerous will be the lawsuits launched on their basis.

independence. Notwithstanding that fact, the majority[14] was of the opinion that there were "large gaps"[15] in the protection conferred by those provisions and that the protection they guaranteed to the judiciary was at best indirect.[16] Having so concluded, Lamer C.J. then went beyond the written text of the Constitution to locate the source of judicial independence. He did so by resorting to unwritten constitutional principles, "unwritten in the sense that [they are] exterior to the particular sections"[17] of the Constitution. Our constitutional order, he said, is based on a number of "basic principles which are the very source of the substantive provisions, of the *Constitution Act, 1867*."[18] These principles are affirmed and recognized in the preamble of the *Constitution Act, 1867*,[19] which, although "not a source of positive law" because it has "no enacting force,"[20] was said to articulate "the political theory which the Act embodies."[21] The preamble, stated the Chief Justice, "is the means by which the underlying logic of the Act can be given the force of law."[22] The explicit sections merely elaborate those organizing principles.[23] Finally, he concludes that the written provisions of the Constitution are "not an exhaustive written code for the protection of judicial independence in Canada . . . [I]t is in the preamble, which serves

14. Lamer C.J., L'Heureux-Dubé, Sopinka, Gonthier, Cory and Iacobucci JJ.; La Forest J. dissented.

15. *Supra* note 7 at para. 85.

16. *Ibid.* at para. 87.

17. *Ibid.* at para. 83.

18. *Supra* note 7 at para. 95.

19. Lamer C.J. only quotes the first paragraph of the preamble (at para. 94). It reads as follows: "WHEREAS the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom".

20. *Supra* note 7 at para. 94, quoting *Manitoba (A.G.)* v. *Canada (A.G.)* [1981] 1 S.C.R. 753 at 805 (joint majority reasons).

21. This quote is taken from Rand J.'s reasons in *Switzman*, *supra* note 8 at 306.

22. *Supra* note 7 at para. 95.

23. *Ibid.* at paras. 83, 95, 107, 109.

as the grand entrance hall to the castle of the Constitution, that the true source of our commitment to this foundational principle is located."[24] Having reached such a conclusion, the Chief Justice nevertheless indicated that he would resolve the appeals on the basis of section 11(d) of the *Charter*.

Lamer C.J. went on to say that the principle of judicial independence requires that the relationship between the legislature (and the executive) on the one hand and the judiciary on the other should be depoliticized. He thus concluded that section 11(d) gives rise to a constitutional obligation on the part of the provinces who intend to reduce the salaries of judges, to submit any proposed changes to an independent, objective and effective body that will depoliticize the process.[25] He came to this conclusion even though such commissions were unanimously held to be unnecessary in *Valente* v. *The Queen*.[26] The traditional approach simply requiring that judges be reasonably perceived as independent was also abandoned without any explanation. Finally, the Chief Justice further specified that a government which refused to implement the recommendation of a judicial compensation commission must justify its decision on a standard of simple rationality.[27]

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24. *Ibid.* at para. 109.

25. *Ibid.* at para. 287.

26. [1985] 2 S.C.R. 673 at 706.

27. Ironically, Lamer C.J.'s reasoning, as is acknowledged by two of his staunchest supporters, Green J. and Cameron J. of the Newfoundland Court of Appeal in *Newfoundland Assn. of Provincial Court Judges* v. *Newfoundland* (2000), 192 Nfld. & P.E.I.R. 183 at para. 141 (C.A.) [hereinafter *NPCJ*], instead of depoliticizing the role of courts actually accentuates it:

> ... courts now do have a greater potential of becoming involved in the resolution of differences between judges and the executive over compensation matters. The constitutional principles described in [*Renumeration, supra* note 7] require judges to adjudicate, amongst other things, challenges by other judges to decisions of the executive or the legislature refusing to implement recommendations of a judicial compensation commission. As well, there is the possibility of the courts being asked to make mandatory orders requiring compliance with the process where it is alleged by the judiciary that the

Lamer C.J.'s decision in *Remuneration* was the subject of severe criticism, not the least of which came from La Forest J.'s lone but sobering dissent.[28] For our immediate purposes, there is no need to go into the detail of these criticisms, which have been reviewed elsewhere.[29]

Although, in strict legal terms Lamer C.J.'s opinion was only obiter dicta and thus not binding,[30] it has not been considered so by Canadian courts, probably because of the scope of his comments and the rhetoric he employed.[31] In other words courts

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executive has not followed proper constitutional or statutory procedural standards for dealing with financial matters affecting the judiciary.

On the issue of (de)politicization, see R. G. Richards, "*Provincial Court Judges Decision* – Case Comment" (1998) 61 Sask. L. Rev. 575 at 586-587.

28. La Forest J. admits that there are unwritten constitutional rules, certain of which "find expression in the preamble of the *Constitution Act, 1867*" (*Remuneration, supra* note 7 at para. 303) but, according to him, "[they] really find their origin in specific provisions of the Constitution viewed in light of our constitutional heritage" (*ibid.*). La Forest J. strongly disapproves of Lamer C.J.'s use of the preamble stating that "[t]he express provisions of the Constitution are not, as the Chief Justice contends, 'elaborations of the underlying, unwritten, and organizing principles found in the preamble to the *Constitution Act, 1867*' . . . On the contrary, they *are* the Constitution. To assert otherwise is to subvert the democratic foundation of judicial review" (at para. 319, emphasis in original).

29. J. Leclair & Y.-M. Morissette, "L'indépendence judiciaire et la cour suprême: reconstruction historique douteuse et théorie constitutionnelle de complaisance" (1998) 36 Osgoode Hall L.J. 485.

30. This is debatable. First of all, as the following pages of this article will make clear, La Forest J.'s prediction that "importance . . . will necessarily be attached to [the Chief Justice's] lengthy and sustained exegesis" (*Remuneration, supra* note 7 at para. 302) has proven to be right. The powerful symbolic nature of statements appealing to foundational principles must not be disregarded. Furthermore, since, according to Lamer C.J., s. 11(d) of the *Charter* is simply a manifestation of the unwritten principle of judicial independence, it follows that the real source of the power lies elsewhere than in the written provision (*ibid.* at para. 109). Finally, Lamer C.J.'s lengthy opinion certainly qualifies as a "binding" *dicta*: *Sellars* v. *The Queen*, [1980] 1 S.C.R. 527.

31. *Alberta Provincial Judges' Assn.* v. *Alberta* (1999), 237 A.R. 276 (C.A.), leave to appeal to S.C.C. dismissed June 8, 2000, [1999] S.C.C.A. No. 470, online: QL (SCCA) [hereinafter *Alberta Provincial Judges' Assn.*]; *Ontario Federation of Justices of the Peace Assns.* v. *Ontario (A.G.)* (1999), 43 O.R. (3d) 541 (Gen. Div.)

have held that the unwritten judicial independence principle was a substantive legal norm that could be judicially enforced. In fact, a recent Supreme Court case was argued on the sole basis of such an unwritten principle.[32] Laws have been declared *ultra vires* or inoperative on the basis of this principle.[33]

A year after the *Remuneration* decision was delivered, the Court again addressed the issue of unwritten principles in the *Secession* reference.[34] At issue was whether, under the Canadian Constitution, Quebec's National Assembly, legislature or

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[hereinafter *Ontario Federation of Justices of the Peace Assns.*]; *Re British Columbia Legislative Assembly Resolution on Judicial Compensation* (1998), 160 D.L.R. (4th) 477 (B.C.C.A.), leave to appeal to S.C.C. dismissed January 21, 1999, [1998] S.C.C.A. No. 401, online: QL (SCCA) [hereinafter *British Columbia*]; *Bodner* v. *Alberta*, [2001] A.J. No. 1033 (Q.B.), online: QL (AJ) [hereinafter *Bodner*]; *Conférence des juges du Québec* c. *Québec (Procureure générale)*, [2000] R.J.Q. 2803 (C.A.) [hereinafter *Conférence des juges du Québec*]; *Rice* v. *New Brunswick* (1999), 181 D.L.R. (4th) 643 (N.B.C.A.), rev'd, [2002] S.C.J. No. 13, online: QL (SCJ) [hereinafter *Rice*]; *NPCJ*, *supra* note 27 and *Manitoba Provincial Judges Assn.* v. *Manitoba (Minister of Justice)* (2001), 202 D.L.R. (4th) 698 (Man. Q.B.) [hereinafter *MPJA*]. All these decisions are clearly based on the unwritten constitutional principle of judicial independence rather than on s. 11(d) of the *Charter*. Admitting for a moment that the Chief Justice's peroration is only *dicta* (but see previous footnote), s. 11(d) could not have justified the decisions in *NPCJ*, *Rice* and *MPJA* because these were civil actions brought by inferior court judges challenging the validity of provincial legislation purporting to regulate their remuneration; it goes without saying that no accused whatsoever were involved. Clearly, those decisions are based on the following presumption: since s. 11(d) and ss. 96-100 are said not to be an exhaustive codification of the unwritten principle of judicial independence, then the latter must provide a protection that goes beyond these provisions; if so, then the only possible beneficiaries of such protection have to be the judges. It follows that the real basis of those decisions is the unwritten principle of judicial independence. In *Conseil de la magistrature du Québec* c. *Commission d'accès à l'information*, [2000] R.J.Q. 638 (C.A.) [hereinafter *Conseil de la magistrature*], the Quebec Court of appeal explicitly admitted that no express provisions of the Constitution were applicable to the case at hand but that nevertheless, judicial independence was guaranteed by the preamble (at para. 66).

32. *Re Therrien*, [2001] 2 S.C.R. 3 [hereinafter *Therrien*].

33. See cases enumerated *supra* in note 31.

34. *Supra* note 10.

government could effect the unilateral secession of Quebec. Most commentators and the lawyers who argued the case had considered the amending formula established by Part V of the *Constitution Act, 1982* to be applicable to secession. Nonetheless, the Court was of the opinion that the reference question did not ask "how secession could be achieved in a constitutional manner, but addresse[d] one form of secession only, namely unilateral secession" — that is, "secession without prior negotiations."[35] Although the applicability of various procedures to achieve lawful secession had been raised in argument, the Court considered that it would have been required under each option to assume the existence of facts that were unknown at the time of the hearing.[36] The question then became whether there were any constitutional norms regulating an attempt at unilateral secession.[37]

The Court came to the conclusion that such principles did exist. In accord on that issue with the dissent of La Forest J. in *Remuneration*, the Court downplayed the importance of the preamble,[38] stressing nonetheless the need to recognize unwritten principles that provide "an exhaustive legal framework for our system of government."[39] The "basic constitutional structure"[40] they provide is essential to the viability of our constitution in that it will enable it to change and adapt to situations unforeseen by

35. *Ibid.* at para. 86.

36. *Ibid.* at para. 105.

37. Interestingly, no one had ever asserted that Quebec would attempt to secede without prior negotiations: Monahan, *supra* note 13 at 82, n. 33.

38. Some courts have lately been under the impression that *Secession* has somewhat attenuated the role of the preamble (see *Secession, supra* note 10 at para. 51): *Singh* v. *Canada (A.G.)*, [1999] 4 F.C. 5839 at paras. 36-38 (T.D.) and *JTI-MacDonald Corp.* v. *British Columbia (A.G.)* (2000), 184 D.L.R. (4th) 335 at para. 148 (B.C.S.C.) [hereinafter *JTI-MacDonald Corp.*]. Dale Gibson, *supra* note 8 at 58, is of the opinion that downplaying the importance of the preamble reinforces the importance of the unwritten principles: "[T]he principles exist independently, and possess greater legal force than the merely interpretive preambles."

39. *Supra* note 10 at para. 32.

40. *Ibid.* at para 50, quoting *Ontario Public Service Employee's Union* v. *Ontario (Attorney General)*, [1987] 2 S.C.R. 2 at 57.

the explicit provisions.[41] The Court went on to say that "[s]uch principles and rules emerge from an understanding of the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning."[42] These principles are not mere abstraction, as is evident from a reading of the Court's opinion, they are historically contextualized.[43] Again, this perspective is in tune with La Forest J.'s. Finally, and most importantly, the Court gave this admonition: the principles cannot be defined in isolation from one another as they are symbiotic; one cannot trump the other.[44]

The Court relied on four such unwritten principles[45] to answer the question asked in the reference: federalism, democracy, constitutionalism and the rule of law, and respect for minority rights.[46] It must be remembered that in *Secession*, no laws were challenged; the Court was called upon to identify the constitutional rules applicable to the issue of a unilateral secession. On the basis of these four principles, the Court reached the following conclusions. In the event of the expression by the population of a province of a clear desire to pursue secession, the principles of democracy and federalism would impose an obligation to negotiate on all parties to Confederation.[47] However, the democratic principle could not be invoked by Quebec so as "to trump the principles of federalism and rule of law, the rights of individuals and minorities, or the operation of

41. *Supra* note 10 at para. 32.

42. *Ibid.*

43. "Behind the written word is an historical lineage stretching back through the ages, which aids in the consideration of the underlying constitutional principles. These principles inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based" (*ibid.* at para. 49). See also the description given to the four constitutional principles invoked by the Court (*ibid.* at paras. 34-48).

44. *Supra* note 10 at para. 49.

45. However, it specified that this "enumeration [was] by no means exhaustive" (*ibid.* at para. 32).

46. *Supra* note 10 at para. 50.

47. *Ibid.* at para. 88.

democracy in the other provinces or in Canada as a whole."[48] An attempt to secede without prior negotiations would therefore violate those underlying constitutional principles. Being itself governed by the same underlying principles,[49] the obligation to negotiate imposed on all the political actors could not be used by them to formulate extremist arguments.[50]

Interestingly, the Court was of the opinion that the obligation to negotiate stemming from the underlying democratic and federal principles was not enforceable in a court of law. It did not operate as a limit on the power of the legislatures. Rather the implementation of this obligation was left to the workings of the political process.[51] The sanction would be left to the foreign states called upon to assess the legitimacy of the actions of both the seceding province and the rest of Canada. Its impact would be felt in the international, as opposed to the internal, legal order.

This brief description of the *Remuneration* and *Secession* references demonstrates that the Court's opinion has evolved very rapidly on the issue of the source of the unwritten constitutional principles and that it has started to grapple with the issue of their interrelatedness. The next section will be devoted to a closer examination of some of the pitfalls associated with the recourse to unwritten principles.

II. Uncertainties Generated by Unwritten Principles

If law requires certainty, unwritten principles are bound to create problems. Such principles exist in a space virtually unconfined by any textual limit, since their very purpose is to go

48. *Ibid.* at para. 91.
49. *Ibid.* at para. 90.
50. *Ibid.* at paras. 90-94.
51. *Ibid.* at para. 102.

beyond the text itself.[52] The Supreme Court, in *Secession*, underscored the fact that unwritten principles and rules "emerge from an understanding of the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning."[53] Nevertheless, these principles remain inherently obscure. Their unwritten nature creates particular problems.

Before addressing the contentious question of their interconnectedness, the next few pages will focus on the equivocal normative force of these unwritten principles.

A. Ambiguous Normative Force of Unwritten Principles

Upon closer examination of the case law concerning unwritten constitutional principles, one must come to the conclusion that the normative force of those principles is unclear. Three questions come to mind. First, is the court referring to broad sets of standards that generate specific rules, or is it referring to enshrined pre-Confederation common law? Second, are those principles judicially enforceable? Finally, in what context and circumstances should those principles be resorted to?

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52. For example, after studying both references, M. Cousineau, *supra* note 13 at 160, claims that even though ss. 16-20 of the *Constitution Act, 1982* only apply to Québec, New Brunswick and the Federal Government, "les minorités linguistiques des autres provinces pourraient . . . invoquer le principe non écrit de la protection des minorités linguistiques pour protéger ou même faire progresser leurs droits." Such an argument is made possible since, as he puts it (at 165): "cette protection doit s'étendre au-delà de la protection garantie par les textes constitutionnels . . . *il serait absurde de prétendre que la Cour suprême aurait dévoué (sic) tant de temps à la reconnaisance du principe si ce dernier n'ajoutait rien à la protection déjà en place depuis au moins 1982*" (emphasis added). A similar argument was made in *Hogan* v. *Newfoundland (A.G.)* (2000), 189 Nfld. & P.E.I.R. 183 at para. 121 (Nfld. C.A), application for leave to appeal dismissed without reasons, [2000] S.C.C.A. No. 191, online: QL (SCCA) [hereinafter *Hogan*].

53. *Supra* note 10 at para. 32.

(i) Constitutional Principles or Enshrined Pre-Confederation Common Law?

The first difficulty created by the Supreme Court's approach to unwritten principles is the manner in which they operate. Are they broad and unspecific sets of standards that provide the rationale for more specific rules, or are they more akin to the detailed common law rules? Some of the legal norms referred to by the Court to illustrate its understanding of unwritten principles are indeed principles that generate rules of variable binding force. However, others do not appear to qualify as such because they are constitutionally enshrined common law rules that have not been held subject to judicial review under the *Charter*.

For instance, in *Secession* and *Remuneration*, the principles invoked acted as rules of recognition — that is, rules which "specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied".[54] Thus, in *Secession*, the principles of democracy and federalism imposed an obligation to negotiate on all parties to confederation; in *Remuneration*, the obligation to submit any proposed changes to the remuneration of judges to an independent, objective and effective body was based on the principle of judicial independence.

However, some of the unwritten "principles" mentioned by the Court do not seem to qualify as principles at all. Rather, they are common law rules, already recognized by pre-Confederation public law, that the Court chose to raise to the level of constitutional norm so as to exempt them from judicial review. For example, in *New Brunswick Broadcasting Co.* v. *Nova Scotia (Speaker of the House of Assembly)*,[55] the Court had to determine whether the rule of parliamentary privilege allowing a legislature the absolute right to exclude strangers infringed section 2(b) of the

54. H.L.A. Hart, *The Concept of Law*, 2d ed. (Oxford: Clarendon Press, 1994) at 94.

55. [1993] 1 S.C.R. 319 [hereinafter *New Brunswick Broadcasting*].

Charter. Speaking for a majority of the Court on this issue, McLachlin J. expressed the opinion that these privileges, defined as they are by British common law, were incorporated in the *Constitution Act, 1867* by way of the preamble, which asserts that we are endowed with "a constitution similar in principles to that of the United Kingdom". Thus, according to McLachlin J., having been raised to a constitutional status through such incorporation, these principles were removed from the reach of the *Charter*. It is well known that one part of the Constitution cannot trump another,[56] but in this case, the preamble incorporated into the Constitution rules that had already been recognized by the common law before 1867. In the words of the dissent of La Forest J. in *Remuneration*: "The effect of the preamble, ... is to recognize and confirm that this long-standing principle of British constitutional law [Parliament's power to exclude strangers] was continued or established in post-Confederation Canada."[57]

A similar analysis can be made of a recent British Columbia case involving a challenge to the constitutionality of the legislation enacting the *Nisga'a Treaty*.[58] The applicants claimed that the legislation violated the *Constitution Act, 1867* because the implemented Treaty gave the Nisga'a Government the power to enact laws that would prevail over federal and provincial laws. The thrust of their argument was that such a power could not be reconciled with the principle of an exhaustive distribution of legislative powers. Since the *Constitution Act, 1867* divides all legislative powers between the two levels of government, any right of aboriginal self-government was extinguished as of 1867.

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56. *Ibid.* at 390. This rule must not be read too literally. For instance, the sovereign powers of both levels of government, limited as they were by ss. 91 and 92 of the *Constitution Act, 1867*, have been substantially curtailed — trumped — with the advent of the *Charter*. Before 1982, one inquired as to which level of government was allowed to infringe human rights, whereas now, the question becomes whether either one of them can enact legislation having such effect.

57. *Supra* note 7 at para. 304.

58. *Campbell.* v. *British Columbia (A.G.)* (2000), 189 D.L.R. (4th) 333 (B.C.S.C.) [hereinafter *Campbell*].

Although a delegation of powers would not be unconstitutional, the applicants claimed that the implementing legislation amounted to an abdication of the province's legislative power. At trial, Williamson J. rejected their argument, stating that not all legislative powers were allocated by section 91 and 92, but only those that "until June 30, 1867, had belonged to the colonies."[59] According to him, "[a]nything outside of the powers enjoyed by the colonies was not encompassed by sections 91 and 92 and remained outside of the power of Parliament and the legislative assemblies, just as it had been beyond the powers of the colonies."[60] British imperial policy reflected in the instructions given to colonial authorities,[61] and more specifically in the common law,[62] recognized the existence, after the assertion of sovereignty, of a limited aboriginal right to self-government. According to Williamson J., those common law aboriginal rights, including "in particular a right to self-government akin to a legislative power to make laws, survived as one of the unwritten 'underlying values' of the Constitution outside of the powers distributed to Parliament and the legislatures in 1867".[63] The federal-provincial division of powers in 1867 did not impair those rights, since it "was aimed at a different issue and was a division 'internal' to the Crown."[64] Despite the questionable aspects of this reasoning, it is interesting to note that the Court referred to common law rules rather than to principles. It may be argued just as convincingly that the British imperial policy itself operated as a principle which generated the common law rules.[65]

This distinction between rules and principles is not purely academic. In fact, the distinction underscores the greater or lesser legitimacy of the Court's decisions. To state that common law

59. *Ibid.* at para. 76.
60. *Ibid.*
61 *Ibid.* at para. 68.
62. *Ibid.* at paras. 68, 70, 86-104.
63. *Ibid.* at para. 81. See also para. 70.
64. *Ibid.* at para. 81.
65. *Ibid.* at para. 68.

rules that have been repeatedly applied by courts should now enjoy a constitutional status is one thing. It is quite another to claim, as Lamer C.J. does in *Remuneration*, that from such precedents, one can extract abstract principles which allow for the creation of novel obligations.

(ii) Judicially or Politically Enforceable?

The second difficulty with the Supreme Court's reasoning in the *Remuneration* and the *Secession* references has to do with whether or not unwritten constitutional principles can be enforced in a court of law. *Remuneration* was interpreted as infusing the underlying principle of judicial independence with substantive legal force, whereas *Secession* has clearly established that a principle's legal force will vary according to the circumstances of the case.

In *Remuneration*, as mentioned above, the principle of judicial independence was interpreted as being capable of generating binding rules, on the basis of which the constitutional validity of legislation could be challenged. *Secession* introduced a much more subtle yet obscure test with regard to the normative force of the underlying principles. The Court stated that the principles were not merely descriptive, but that they gave rise to "substantive legal obligations" which were binding upon courts and governments.[66] However, the remedies for their enforcement

66. The Court further stated:

> Underlying constitutional principles may in certain circumstances give rise to substantive legal obligations (have 'full legal force', as we described it in the *Patriation Reference*, [*Re Resolution to amend the Constitution*, [1981] 1 S.C.R. 753] at 845), which constitute substantive limitations upon government action. These principles may give rise to very abstract and general obligations, or they may be more specific and precise in nature. The principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments (*Secession, supra* note 10 at para. 54).

might not all be found in a court of law.[67] In other words, the principles might engender obligations of variable normative force.

The varying normative force of the principles is a consequence of "the Court's appreciation of its proper role in the constitutional scheme."[68] In some instances, it is not for the courts to intervene. Some issues are best left to the political process This would explain why such principles are said to be part of the law of the Constitution, although they are not all enforceable in a court of law.[69] In *Secession*, the Court declared that the obligation to negotiate was binding in the sense that it provided the legal framework within which the political forces would deploy themselves,[70] but it also recognized that courts could exercise, "no supervisory role over the political aspects of constitutional negotiations. . . . Having established the legal framework, it would be for the democratically elected leadership of the various participants to resolve their differences."[71]

The Court nevertheless refused to concede that the obligation to negotiate could be breached without incurring serious legal repercussions.[72] As mentioned earlier, the Court held that the violation of that obligation would be sanctioned by the international legal order, such infringement tainting the offending party's action with illegitimacy and thus undermining its chances (in the case of Québec) of obtaining international recognition or (in the case of Canada) of preventing such recognition.[73]

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67. *Supra* note 10 at para. 102.

68. *Ibid.* at para. 98.

69. *Ibid.* As underlined by D. Greschner, "The Quebec *Secession* Reference: Goodbye to Part V?" (1998) 10 *Constitutional Forum* 19 at 21, n. 12: "For the Court, the non-justiciability of the parties' conduct is grounded in an appreciation of its proper role, not any purported non-legal nature of the duty".

70. *Supra* note 10 at paras. 102 and 153.

71. *Ibid.* at paras. 100-101.

72. *Ibid.* at para. 102.

73. *Ibid.* at para. 103. Patrick Monahan is of the opinion that the Court is wrong in claiming that the obligation is of a legal rather than purely political nature. According to him, violation of the obligation to negotiate has no legal repercussions in the international order since the Court itself admits that

The Court's approach in *Secession* is both more subtle and less transparent than Lamer C.J.'s reasoning in *Remuneration*. Since these decisions were rendered, unwritten principles have been invoked in Canadian courts, and judges have had to assess their normative force in very different contexts.

(iii) Resorting to Unwritten Principles: Context and Circumstances

In *Secession*, the Court does not clearly indicate the context or the circumstances in which these principles should be resorted to.[74] When the recent case law is examined closely, it appears that the unwritten principles have been invoked in three different contexts. The first is in cases involving the reconciliation of opposing components of the constitutional order. In such instances, no legislation has been challenged on the basis of unwritten principles. On the contrary, in all these cases the recourse to unwritten principles or rules enhanced rather than limited the power of the democratically elected institutions. Second, the underlying principles were resorted to in cases where the constitutional validity of a statute was challenged. Finally, they were invoked to shed light on the interpretation to be given to the explicit provisions of the Constitution. Interestingly, only one principle – judicial independence – has enabled the courts to strike down legislation. The other exception is the principle of

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international law does not recognize any right of secession. Why would states sanction Canada's conduct if Quebec's action fails to conform to international law? (Monahan, *supra* note 13 at 86-87).

74. In *Secession*, *supra* note 10 at para. 52, the Court said:

> "The principles assist in the interpretation of the text and the delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of our political institutions. Equally important, observance of and respect for these principles is essential to the ongoing process of constitutional development and evolution of our Constitution as a 'living tree', to invoke the famous description in *Edwards* v. *Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at 136."

respect for minorities relied upon once in quashing an administrative decision.

Unwritten principles are generally used if the explicit provisions of the Constitution are thought to be incomplete. In *Remuneration*, the dissenting judge disputed this claim and offered a rather persuasive demonstration that the text of the Constitution could hardly be said to be incomplete. In *Secession*, most commentators had not foreseen that the Court would go beyond what is provided for in Part V of the *Constitution Act, 1982*. The imprecise nature of the Court's arguments are felt in the case law in which those principles are now invoked. Judges have tried, unconvincingly, to demonstrate that the reasoning adopted in *Remuneration* and *Secession* should not be extended to other cases;[75] it was difficult for them to establish that there were no gaps in the Constitution. If a referendum on sovereignty can generate an obligation to negotiate, what legal effect should be given to referenda on subjects other than secession, i.e., the appointment of senators, municipal reform, or the abolition of the monarchy? As Patrick Monahan puts it, "we are left to wonder how there could be any principled distinction between those referendums that can create legal duties and those that cannot".[76] Identifying a gap in the Constitution is an extremely

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75. For instance, see *Bacon.* v. *Saskatchewan Crop Insurance Corp.* (1999), 180 Sask. R. 20 (C.A.), application for leave to appeal dismissed without reasons, [1999] S.C.C.A. No. 437, online: QL (SCCA) [hereinafter *Bacon*]; *Singh* v. *Canada (A.G)*, [2000] 3 F.C. 185 (C.A.), application for leave to appeal dismissed without reasons, [2000] S.C.C.A. No. 92, online: QL (SCCA) [hereinafter *Singh*] and *Hogan supra* note. 52. The facts of these cases will be described further on.

76. Monahan, *supra* note 13 at 90. In *Brown* v. *Canada (A.G)* (1999), 244 A.R. 86 (C.A.), the appellant commenced proceedings by originating notice seeking an order declaring that the provisions of the *Constitution Act, 1867* providing for the appointment of senators by the Governor General in Council were contrary to the democratic principle. The Court dismissed the case on the basis that there was no legal issue to be debated. In *Baie d'Urfé (Ville)* c. *Québec (A.G.)*, application for leave to appeal dismissed without reasons, [2001] C.S.C.R. no. 524, online: QL (SCCA), the constitutionality of a provincial statute amalgamating a number of municipalities was challenged. Some municipalities argued (among other

hard and subjective task made all the more difficult by the fact that a court cannot use an unwritten principle to create a right which has been excluded or expressly limited by another part of the Constitution.[77]

Finally, since some of the substantive provisions of the *Constitution Act, 1867* and the *Charter* already provide partial recognition of some of these unwritten principles (for example, judicial independence, federalism and respect for minorities), the extent of the protection conferred by these unwritten principles is difficult to delineate. It could be argued that such partial recognition is proof that the constitution-makers intended "to give effect to those principles only by particular means and to a limited extent".[78] Furthermore, even when identified, some of

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things) that the legislation contravened the democratic principle since the government had refused to submit its decision to adopt it to a referendum. Lagacé J. said that the government was under no such obligation to consult the population. Moreover, according to him, the democratic principle had been more than satisfied because the municipalities and their residents had had many occasions to make their point of view known to the government [2001] J.Q. No 2954, online: QL (JQ) [hereinafter *Baie d'Urfé T.D.*], aff'd *Baie d'Urfé (Ville)* c. *Québec (A.G.)*, [2001] J.Q. No 4821, online: QL (JQ) [hereinafter *Baie d'Urfé C.A.*] (at paras. 227-233).

77. For instance, in *Bacon*, *supra* note 75, Wakeling J.A., speaking for the Court, underlined that since the right to property was deliberately left out of the protection granted by s. 7 of the *Charter*, the unwritten principle of the rule of law should not be interpreted as providing such protection. In that case, the constitutionality of a provincial statute that retroactively removed a civil right of action was challenged before the Court of Appeal of Saskatchewan. The appellant company was claiming that the unwritten principle of the rule of law superseded that of parliamentary sovereignty. In other words, the rule of law could allow the scrutiny of the acts of the executive *and* of the legislature. Wakeling J.A., speaking for the court, dismissed the argument by stressing the need to leave something to the ballot box: "To say that since the courts do a good job in providing protection in one area against the arbitrary use of power by officials they must also do it in relation to the passage of arbitrary legislation is to misunderstand the democratic process by downgrading the importance of holding a government responsible to the will of the electors" (at para. 36).

78. J. Goldsworthy, "The Preamble, Judicial Independence and Judicial Integrity" (2000) 11 Constitutional Forum 60 at 63.

these principles are so abstract that, by themselves, they provide no clear answers. Democracy and federalism, for instance, can both be understood in many ways.[79]

The three situations in which unwritten principles have been invoked are as follows. The first category comprises cases involving the reconciliation of opposing components of the constitutional order. In *New Brunswick Broadcasting*,[80] no legislation was challenged. Rather, the respondent had applied to the Nova Scotia Supreme Court for an order allowing it to film the proceedings of the House of Assembly with its own cameras. The application was based on section 2(b) of the *Charter*. The Court determined that the power of the Assembly to exclude strangers was an unwritten rule (a common law rule) enshrined in the *Constitution Act, 1867* by way of the preamble. It was thus immune from a challenge based on the *Charter*, since one part of the Constitution cannot abrogate another. It must be emphasized that in this instance the unwritten rules were called upon to sustain rather than limit the autonomy of the legislative body.[81]

In *Secession*, the unwritten principles once again came face to face with the explicit provisions of the Constitution — this time, with the amending formula established by Part V of the *Constitution Act, 1982*. Having asserted that the explicit provisions of the Constitution were not applicable in the circumstances, the Court turned to the unwritten principles to elaborate an obligation to negotiate, the purpose of which was to promote rather than impair democracy. In fact, the Court reminded all parties that democracy entails the pursuit of substantive goals which must themselves be reconciled with other underlying principles, such as the rule of law and federalism. This did not amount to a usurpation of the democratic will, since the

79. On this subject, see R. Elliot, *supra* note 13.

80. *Supra* note 55.

81. *Ibid.* at 387 (McLachlin J).

Court only dealt with the "aspects of the legal framework in which [the] democratic decision is to be taken."[82]

Finally, although *Manitoba Language Rights* has been rightly described by Lamer C.J. as a case where the unwritten principle of the rule of law was in opposition to the written text of the Constitution,[83] it must be underlined that its application allowed for the temporary implementation of Manitoba's otherwise unconstitutional positive legal order. Manitoba's legislation was successfully challenged because it infringed the explicit provisions of the Constitution and so had to be declared *ultra vires* under section 52 of the *Constitution Act, 1982*. Nonetheless, to prevent chaos, the Court allowed for the suspension of the declaration of invalidity on the basis of the unwritten principle of the rule of law, which presupposes "the creation, and maintenance of an actual order of positive laws".[84] It is important to note that, once again, the unwritten principle was not employed to limit the power of the legislature.

In some cases, the courts have refused to acknowledge that there was a gap in the constitutional text. For instance, in *Hogan*[85], the appellants were challenging the validity of a constitutional amendment which had modified denominational school rights in Newfoundland prescribed by the Constitution.[86] The amendment had been made under section 43 of the *Constitution Act, 1982*. It had also been authorized by a province-wide referendum. The appellants argued that there was an obligation on the part of the province to negotiate with the Catholic minority, stemming from the principle of respect for minorities recognized in *Secession*. Term 17 of the *Terms of Union between Newfoundland and Canada* explicitly bestowed a right on the Catholic minority. Consequently, the appellants argued that before any amendment

82. *Supra* note 10 at para. 27.
83. *Remuneration, supra* note 7 at para. 99.
84. *Manitoba Language Rights, supra* note 2 at 749.
85. *Supra* note 52.
86. Term 17 of the *Terms of Union between Newfoundland and Canada*.

could take place, the province had an obligation to negotiate with those whose rights were being interfered with.

The Court of Appeal refused unanimously "to read in requirements" into the Constitution.[87] Term 17 was, according to the Court, a complete statement of denominational education rights.[88] It distinguished *Remuneration*, *Secession* and *New Brunswick Broadcasting*, saying that these were exceptional cases and that the situation at hand was not one in which the Court was asked ". . . to confirm some long accepted unwritten principle of the Constitution but [rather] to limit the application of the amending provisions to a right that was granted by the written Constitution."[89] Finally, the Court added that the appellants' position ignored the fact that the Constitution "entrusts minority rights to the majority. The structure is designed not to prevent constitutional amendment but to ensure, by making the process more difficult than the passage of an amendment to any other bill, that the rights are given 'due regard and protection'".[90] Again, the majoritarian principle came out triumphant.

The second category in which unwritten constitutional principles have been invoked includes cases in which the constitutional validity of a statute, or of a decision thereunder, had been challenged on the basis of an unwritten principle. In such instances, the constitutional text or the interpretive common law provided no basis for a constitutional challenge. As a result, the principles served as a means to reach beyond the boundaries established by the written constitutional law. The issue in those cases involved the validity of laws or administrative decisions. Opposed to these arguments were the written provisions of the Constitution and other conflicting principles.

With one exception, unwritten principles, when invoked on their own and not as an aid to an argument based on the explicit

87. *Hogan, supra* note 52 at para. 125.
88. *Ibid.*
89. *Ibid.* at para. 34
90. *Ibid.* at para. 125.

provisions of the Constitution, have systematically been held incapable of authorizing the striking down of legislation. Those principles have suffered the same fate as the "implied bill of rights" even though, as underlined by La Forest J. in *Remuneration*, "the justification for implied political freedoms is that they are supportive, and not subversive, of legislative supremacy".[91] Since the *Remuneration* reference, the following principles have been found to be insufficient grounds to challenge the validity of legislation: the rule of law,[92] the separation of powers,[93] the principle of respect for minorities[94] and the democratic principle.[95] Only the principle of judicial independence has been considered to be a sufficient basis to strike down legislation (or to render it inapplicable to judges).[96] The decisions dealing with judicial independence will be examined in greater detail in Section II(B).

As for the principle of respect for minorities, it was relied upon by the Ontario Divisional Court to quash the decision of an administrative body (the Hospital Restructuring Commission) which had issued directives that, according to the Court, imperiled the existence of the only francophone hospital in Ontario.[97] After concluding that the directives did not violate the equality provision of the *Charter*, and that they were not patently unreasonable, the court nevertheless decided that they should be set aside because they violated the fundamental principle of respect for minorities. On the authority of *Secession*, the Court emphasized that unwritten principles are not just descriptive, but

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91. *Supra* note 7 at para. 318.

92. *Bacon*, *supra* note 75 at paras. 30, 36; *Singh*, *supra* note 75 at para. 36 and *JTI-MacDonald Corp.*, *supra* note 38 at para. 150: the rule of law cannot be used in a "sword-like fashion".

93. *Singh*, *supra* note 75 and *JTI-MacDonald Corp.*, *supra* note 38.

94. *Baie d'Urfé T.D.*, *supra* note 76.

95. *Bacon*, *supra* note 75; *Baie d'Urfé T.D.*, *supra* note 76.

96. See cases enumerated in *supra* note 31.

97. *Lalonde* v. *Ontario (Commission de restructuration des services de santé)* (1999), 48 O.R. (3d) 50 (S.C.J.) [hereinafter *Montfort Hospital T.D.*].

can impose substantive limitations.[98] The Court underlined that no statute was being challenged. Rather, the issue was "whether certain conduct of a government agency [fell] within the parameters of what is permitted by the Constitution".[99] The Province argued that minority rights were expressly guaranteed by section 133 of the *Constitution Act, 1867* and ss. 16-23 of the *Constitution Act, 1982*, and that, consequently, the Court should not extend these rights to French language health services and French language post-secondary medical education. The Court responded that what was at stake was more than "simply a minority language issue or a minority education issue"; at stake was "a minority culture issue",[100] "a broader principle - of which the minority language and education questions [were] certainly an integral part - namely, that of the protection of minority rights generally".[101] The Court then concluded that the Commission had infringed the respect for minorities principle by failing to take into account "the importance of francophone institutions (including hospitals), as opposed to bilingual institutions, for the preservation of the language and culture of Franco-Ontarians".[102] It went on to remit the question to the Commission.

The Ontario Court of Appeal recently upheld this decision.[103] The Court laid great emphasis on the fact that no statute was being challenged as to its validity.[104] More precisely, the case was concerned with the "application of the unwritten principles to the exercise and review of discretionary decisions of statutory bodies with a statutory mandate to act in the public interest."[105] What was at stake therefore was the interpretation of a statute and not

98. *Ibid.* at 65.
99. *Ibid.* at 68.
100. *Ibid.* at 72.
101. *Ibid.* at 73.
102. *Ibid.* at 82.
103. *Lalonde* v. *Ontario (Commission de restructuration des services de santé)*, [2001] O.J. No 4767, online: QL (OJ) [hereinafter *Montfort Hospital C.A.*].
104. *Ibid.* at paras. 123 and 126.
105. *Ibid.* at paras. 126.

its constitutional validity. The Court concluded that the unwritten principle of protection of minorities required that the *French Language Services Act*[106] be given a liberal and generous interpretation.[107] Consequently, Ontario was bound to provide the services offered at Montfort Hospital as they existed at the time of its designation under the Act, unless it was reasonable and necessary to limit them.[108] The directives of the Commission did not comply with the "reasonable and necessary" test. Furthermore, in the exercise of its discretion, the Commission was required to conform to the unwritten principle of respect and protection of minorities.[109] This meant that it had to give serious weight and consideration to the importance of Montfort Hospital as an institution central to the survival of the Franco-Ontarian minority.[110]

Unwritten common law rules have long served as a means to control administrative action.[111] In consequence, appealing to unwritten constitutional principles in a similar fashion to delineate the discretion conferred by statute to an administrative agency does fit within the boundaries of legitimate judicial action. Nevertheless, identifying a matter as worthy of protection under the principle of respect for minorities will be a politically explosive exercise. Such cases raise substantive issues rather than merely procedural ones. Courts will be called upon to distinguish matters of cultural identity that are deserving of protection from those that are not. In *Montfort Hospital*, the Court's task was significantly aided by the fact that Ontario had enacted the *French Language Services Act*, which sought to protect the province's francophone minority and to promote the advancement of the

106. R.S.O. 1990, c. F-32.

107. *Supra* note 103 at paras. 130-139.

108. *Ibid.* at paras. 160-169.

109. *Ibid.* at paras. 174-180.

110. *Ibid.* at para. 187.

111. As is convincingly demonstrated by the Court of Appeal in *Montfort Hospital, supra* note 103 at paras. 170-187.

French language.[112] When confronted with much more complicated factual situations, courts might find, in retrospect, that it was an easy case to decide.

Grushman v. *Ottawa (City)*[113] is a good example of such a situation. In that case, the Ontario Divisional Court had to determine if leave should be granted to appeal a decision of the Ontario Municipal Board (OMB), which had dismissed the appellants' challenge of a by-law authorizing the construction of a funeral home in a residential area. Twenty per cent of the residents in that area were of Asian origin. The appellant's sole argument was that the placement of a funeral home close to the

112. It could even be argued that resorting to the unwritten principles of the Constitution was unnecessary.

113. (2000), 29 Admin. L.R. (3d) 41 (Ont. Div. Ct.) [hereinafter *Grushman*]. In *Baie d'Urfé*, *supra* note 76, some municipalities argued that a provincial amalgamating statute contravened the unwritten constitutional principle of the protection of minorities because the abolition of existing municipalities would jeopardize the linguistic rights of the Anglophone minority. Lagacé J. rejected this argument, stating that the linguistic rights of the Anglophone minority were specifically prescribed by the Constitution and that they conferred no right to bilingual municipal institutions (at para. 148). He added that unwritten principles of the Constitution could not abrogate the province's unquestionable constitutional right to create, amalgamate, reorganize or abolish municipalities (at paras. 104 and 186-187). Lagacé J. distinguished *Montfort Hospital* for the following reasons: (1) that case involved the validity of an administrative decision and not that of an Act of the Legislature (at para. 188); (2) at variance with *Montfort Hospital*, which involved an institution considered essential to the preservation of the culture of the Franco-Ontarian minority, municipal structures in Quebec could not be said to be of such critical import to the "Angloquébécois" culture (at para. 189); (3) in *Montfort Hospital*, the Montfort Hospital was the only medical institution offering French medical services in Ontario, whereas the Anglophone minority residing in the applicant's and the interveners' territory could get access to bilingual services in other municipalities of the province. Although the Court of Appeal deliberately chose not to make any comments about *Montfort Hospital*, it agreed entirely with the reasoning of Lagacé J.: *Baie d'Urfé C.A.*, *supra* note 76. At para. 94, the Court of Appeal underlined that "le principe de protection des minorités na pas pour effet de conférer un droit à des institutions pour la protection des minorités, lorsque ce droit n'est pas protégé, par ailleurs, dans la Constitution".

residence of these members of the community would be contrary to their cultural and religious beliefs. Being of the opinion that a point of law of sufficient importance was in question, Aitken J. granted leave. Among other arguments, she referred to the fact that it was "arguable that conduct of the OMB must be measured against the 'minority protection' benchmark". According to Aitken J., it "would be appropriate for the court to intervene when necessary to protect against government action which fails to recognize this principle".[114] Is the situation here akin to that in *Montfort Hospital*?

In the third category are cases where unwritten principles were invoked to shed light on the interpretation to be given to the substantive[115] and remedial[116] provisions of the Constitution. More will be said about this category of cases in the last section.[117]

All in all, unwritten principles have generally been used to enhance the democratic process rather than to limit it. Furthermore, challenges to legislation have only been successful when based on the principle of judicial independence.

This brings us to the most problematic feature of the use of unwritten principles, namely how they interact with one another.

B. Conflicting Principles: Problems of Weight and Priority

Determining a law's validity sometimes depends on resolving the conflict between a number of unwritten constitutional principles. Some of these principles, if given their full extension,

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114. *Grushman, supra* note 113 at para. 23.

115. Section 53 of the *Constitution Act, 1867* in *Re Eurig Estate*, [1998] 2 S.C.R. 565.

116. Section 24 of the *Charter* in *Corbiere* v. *Canada*, [1999] 2 S.C.R. 203 [hereinafter *Corbiere*] and *R.* v. *Mills*, [1999] 3 S.C.R. 668 [hereinafter *Mills*].

117. No special category was created for situations in which the unwritten principles were used to uphold the validity of a particular statute for there was only one such case: *Campbell, supra* note 58.

may be irreconcilable; for example, democracy and the rule of law.

In *Secession*, the Court was well aware of the problem. This is why it emphasized that these principles do not exist in the abstract, but must be put into historical context.[118] The Court also insisted that there is no hierarchy among them: "These defining principles function in symbiosis. No single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other."[119] In *Secession*, this admonition was translated in the following way. The principles of democracy and federalism were said to generate an obligation to negotiate on all parties to Confederation, while the democratic principle could not be invoked by Quebec so as to trump the other principles, such as the rights of individuals and minorities, or the operation of democracy in the other provinces or in Canada as a whole.[120]

This obligation to reconcile stems from the fact that putting unjustified emphasis on any one of these principles might unduly benefit one class of persons to the detriment of another. This should not be understood as though it meant that, in a particular situation, no one principle could take precedence over another. Such precedence, however, must be justified.

As was mentioned earlier, challenges to the constitutional validity or applicability of a statute on the basis of an unwritten principle have systematically failed except in one instance involving the principle of the independence of the judiciary.[121] In addition, cases where the principle of judicial independence was successfully invoked were confined to issues of judicial remuneration.[122] Except for that one application, the unwritten

118. *Supra* note 10 at paras. 32, 34-48.

119. *Ibid.* at para. 49.

120. *Ibid.* at para. 91.

121. See cases enumerated in *supra* footnote 31.

122. In all other instances, except one that will be discussed later, the unwritten principle of judicial independence was rejected as a basis to invalidate legislation. In *JTI-MacDonald Corp.*, *supra* note 38, for instance, the applicants challenged the

constitutional validity of a provincial statute authorizing "aggregate actions" which, unlike traditional action for damages at common law, dispense with proof of individual causation and damages. The applicants argued, *inter alia*, that the legislation infringed the judicial independence principle because it interfered with the right of a court to hear from relevant witnesses and receive the evidence necessary and appropriate to a determination of the issues. The British Columbia Supreme Court concluded that any infringement to judicial independence had to be evaluated in light of the reasonable person's test (at paras. 44-45) and that such a person would not believe that an aggregate action would amount to a violation of the principle of judicial independence (at para. 108). Daigle C.J., in *Rice*, *supra* note 31 at para. 76, stated that, although the process imposed by Lamer C.J. in *Remuneration* applied to issues of institutional financial security, the reasonable person's test remained applicable to "other core characteristics of judicial independence". In *Singh*, *supra* note 75, the applicants questioned the constitutionality of s. 39 of the *Canada Evidence Act*, R.S.C., 1985, c. C-1 that enables the government to make *ex parte* submissions in favour of non-disclosure of information claimed to be injurious to international relations or national defence or security. Agreeing with the trial judge, the Court of Appeal concluded that a limitation of the jurisdiction of judicial bodies, precluding them from engaging, in some instances, in the review of governmental decisions, is not tantamount to a violation of the independence of the judiciary. In *Baie d'Urfé T.D.*, *supra* note 76, it was argued that a provincial amalgamating statute providing for the abolition and replacement of the existing municipal courts infringed the principle of judicial independence. Lagacé J. stated that the said principle was no obstacle to the province's power to abolish provincial and municipal courts (at para. 291) and that, in any case, a reasonable person would certainly come to the conclusion that the government's intent was to restructure municipal institutions and not to reach a disguised objective, that is the revocation of all municipal judges (at paras. 295-303). The Court of Appeal adopted the very same reasoning: *Baie d'Urfé C.A.*, *supra* note 76. Finally, in *Therrien*, *supra* note 32, the Supreme Court had to determine whether or not a provincial statute providing for the removal of judges of provincial court without prior adoption of an address by the legislature satisfied the requirements of judicial independence. The Court unanimously concluded that the independence of provincial court judges hearing non-criminal cases was guaranteed by the preamble of the *Constitution Act, 1867* (at para. 68), but that this principle did not require a removal procedure similar to that extended to superior court judges by s. 99 of the *Constitution Act, 1867* (at para. 67). In view of the diversity of Canadian courts, the Court concluded that "there should be no uniform standard imposed or specific legislative formula dictated as supposedly prevailing" (at para. 65). In that case, the Court concluded that s. 95 of the *Courts of Justice Act*,

constitutional principle of parliamentary sovereignty has been held to be an insurmountable obstacle to any allegation of invalidity if no contravention to the Constitutional text could be established.[123]

Why did such a challenge succeed with respect to judicial independence? It succeeded because the courts referred to the principle of judicial independence as an absolute concept, rather than as a notion whose existence is closely intertwined with other principles such as the separation of powers. The absence of even the mere mention of the sovereignty of parliament in these cases is quite striking. For instance, in *Remuneration*, Lamer C.J.'s approach is based in part on British history, but, however lyrical he may be on the unwritten principle of judicial independence, he says nothing about the most important principle of British constitutional law: parliamentary supremacy.[124] His silence is all the more intriguing because, despite the supremacy of the Constitution, sections 1 and 33 of the *Charter* constitute a partial recognition of parliamentary supremacy in Canadian law.[125] And

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R.S.Q., c. T-16, which states that the Government can remove a judge only upon a report of the Court of Appeal made after inquiry at the request of the Minister of Justice, provides sufficient protection. In consequence, the Court refused to invalidate the law. Interestingly, the diversity of the Canadian courts was not taken into consideration in cases involving the remuneration of judges.

123. For example, see *Bacon*, *supra* note 75; *Singh*, *supra* note 75 and *JTI-MacDonald Corp.*, *supra* note 38.

124. *R.* v. *Lord Chancellor, ex parte Witham*, [1997] No. 189 online: QL (NLOR) at para. 11 (High Ct. of Justice; Divisional Ct.): "In the unwritten legal order of the British State, . . . the common law continues to accord a legislative supremacy to Parliament". See also *R.* v. *Secretary of State for the Home Department*, [2000] 2 A.C. 115 at 131 (Lord Hoffman).

125. In *Canada (Auditor General)* v. Canada *(Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49 at 91 and 103, Dickson C.J. stated that "in the residual area [left unaffected by the *Charter*] reserved for the principle of Parliamentary sovereignty in Canadian constitutional law, it is Parliament and the legislatures, not the courts, that have ultimate constitutional authority to draw the boundaries. It is the prerogative of a sovereign Parliament to make its intention known as to the role the courts are to play in interpreting, applying and

since Lamer C.J.'s approach authorized the invalidation of laws on the basis of an unwritten principle, it is pertinent to recall, as La Forest J. did, that legislative supremacy in Britain still means (though in a somewhat modified way) that "judicial review of legislation is not possible."[126]

Interestingly, all of the cases where the constitutional invalidity or inapplicability of a statute was successfully argued on the basis of the unwritten principle of judicial independence were decided after *Secession* (with the obvious exception of *Remuneration*), but none seem to have taken into account the Court's advice that no principle should be allowed to trump another.

The danger of resorting to an unwritten principle as if it operated in a vacuum was underscored by Marshall J.A. of the Newfoundland Court of Appeal in his articulate and lengthy dissent in the *Newfoundland Provincial Court Judges* case, one of the many cases dealing with judicial remuneration. At issue here was whether the obligation imposed in *Remuneration* to set up an independent commission to examine salary reductions also applied to salary freezes.[127] The majority said it did.[128]

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enforcing its statutes. . . . [t]he *grundnorm* . . . [of the Canadian constitution is] . . . the sovereignty of Parliament."

126. *Supra* note 7 at para. 309.

127. The action was brought by the judges association less than two months after the judgment in *Remuneration* was handed down (*NPCJ*, *supra* note 27 at paras. 58-59).

128. Technically, the issue in that case was whether or not the Court of Appeal was bound by Lamer C.J.'s *dicta* in which he stated that the independent commission scheme should apply to "any changes to or freezes in judicial remuneration" (*Remuneration*, *supra* note 7 at para. 133). The majority concluded that it was so bound (*NPCJ*, *supra* note 27 at para. 87). Marshall J.A. dissented in part. He concluded that Lamer C.J.'s statement did not qualify as a binding *dicta* as it was decided *per incuriam* for the reasons we are about to disclose. Although dissenting, Marshall J.A. agreed with the majority that members of the judicial compensation commission did not have to be paid, that the judge's representation costs did not have to be funded by the government and that there was no absolute right to solicitor-and-client costs in this type of litigation.

According to Marshall J.A., Lamer C.J.'s approach was based on a misunderstanding of the function of judicial independence[129] and that more importantly, it constituted a direct attack on the separation of powers principle[130] — one recognized by Lamer C.J. himself as a foundational principle of Canadian law.[131] The separation of powers principle is flexible in view of our parliamentary heritage,[132] but at its core are two irreducible elements which must be reconciled with one another: the principle of judicial independence and "the power reserved to the political branches of government of ultimate decision respecting budgetary measures."[133] Such reconciliation is required by the democratic principle.[134]

According to Marshall J.A., Lamer C.J.'s interpretation violates the separation of powers principle because it establishes "a process whose end result endows the judiciary with ultimate budgetary power with respect to the level of judicial *Remuneration*."[135] The

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129. Although the main part of Marshall J.A.'s dissent is aimed at limiting the process established in *Remuneration* to reduction of judicial remuneration, the underlying thrust of his argument is a denunciation of the process itself. Although he initially tries to make us believe the contrary, by the end of his judgment Marshall J.A. finally admits that, according to him, Lamer C.J.'s decision is simply wrong (*NPCJ, supra* note 27 at paras. 742, 746):

> Although these misgivings were raised in the context of its application to freezes in judicial salaries, it will be evident from this dissent's reasoning that the reservations are unqualified and extend to the entire process. ... It is sufficient to observe that the founding of the process that disrupts the separation of powers, which is acknowledged as 'a fundamental principle of the Canadian Constitution', on necessary implication from an unwritten principle of the Constitution, appears to transcend the boundary of judicial activism.

130. See *NPCJ, supra* note 27 paras. 322, 328, 339, 364, 372, 743, 746-747.

131. *Remuneration, supra* note 7 at para. 138. Marshall J.A. repeatedly asserts that it is a fundamental principle (*NPCJ, supra* note 27 at paras. 396, 430, 744, 747).

132. *NPCJ, supra* note 27 at para. 375.

133. *Ibid.* at para. 376.

134. *Ibid.*

135. *Ibid.* at para. 322.

conferral of budgetary powers on the judiciary is, according to Marshall J.A., an unprecedented event in the annals of democratic government.[136] Lamer C.J.'s interpretation also fails to recognize that "judicial independence functions as a constitutional precept within the ambit of the separation of powers"[137] and does not exist in isolation from other components of the constitutional order.[138] The principle of separation of powers is the cornerstone of democracy,[139] and its erosion might lead to the undermining of the people's confidence in the basic institutions of the state and in the judiciary if the latter is perceived as promoting its own self-interest.[140]

Marshall J.A. recognizes that Lamer C.J. had indeed taken the principle of separation of powers into account in *Remuneration*.[141] Nonetheless, as he rightly observes, so much emphasis was put on the dimension of independence of the judiciary,[142] that the courts have been allowed to appropriate to themselves what legitimately belongs to the legislative authorities.[143] Judicial independence, as Marshall J.A. repeatedly stresses, does not function as an absolute concept.[144]

From this Marshall J.A. concludes that the principle of judicial independence "must be rationalized with the separation of powers doctrine within which the judicial independence precept plays an integral role."[145] Such reconciliation entails the preservation of

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136. *Ibid.* at para. 747.

137. *Ibid.* at para. 396.

138. *Ibid.* at para. 400.

139. *Ibid.* at paras. 373, 376, 430.

140. *Ibid.* at paras. 745, 747. "Like justice itself, judicial independence must not only exist, but be perceived to exist" (at para. 418).

141. *Ibid.* at para. 379.

142. *Ibid.* at paras. 380, 431, 743.

143. *Ibid.* at paras. 382, 431.

144. *Ibid.* at paras. 400-401, 430-431.

145. *Ibid.* at para. 398. Such a need for reconciliation has already been advocated by the Supreme Court itself in *McKeigan* v. *Hickman*, [1989] 2 S.C.R. 796 at 799: "The fundamental principle of judicial independence ... must [in some cases] leave scope for the principle of Parliamentary supremacy".

ultimate decisions concerning budgetary measures to the legislative branch.[146]

Marshall J.A. went so far as to conclude that this arrogation of power by the unelected branch of government was unconstitutional "because such judicial power is inimical to the separation of powers upon the observance of which democratic government rests."[147] Such a change would require a constitutional amendment.[148]

Marshall J.A. brings to light the potential danger associated with the recourse to unwritten principles. When such principles are invoked, it is extremely difficult to assign relative weights to the competing principles. Judges might be tempted to assign undue importance to one principle to the detriment of others, and more importantly, to the detriment of the democratic structure of the constitutional order.

Judicial independence is an essential component of democracy but it must be reconciled with other fundamental constitutional principles. This reconciliation is made more difficult because one of the primary characteristics of unwritten constitutional principles is a claim to go beyond what is provided by the written text.[149] What can be invoked can also be ignored.

There is one case in which, at first glance, it might be claimed that resort to the unwritten principle of judicial independence was justifiable. In *Conseil de la Magistrature,*[150] a judicial council had rejected a complaint of unethical conduct formulated against a judge. The dissatisfied complainants then requested of the Conseil that they be allowed to consult the documents it used during its secret deliberations. Unsuccessful in that attempt, they solicited the help of the Access to Information Commission. Faced with the demands of the Commission, the Conseil contended that it could not be subjected to the *Act Respecting Access to Documents*

146. *Supra* note 27 at para. 401.
147. *Ibid.* at para. 433.
148. *Ibid.* at para. 749.
149. *Remuneration, supra* note 7 at para 83.
150 *Supra* note 31.

Held by Public Bodies and the Protection of Personal Information,[151] because it infringed the principle of judicial independence. According to the Conseil, to conclude otherwise would enable the Commission, for instance, to call on the Chief Justice of the Cour du Québec to testify as to his refusal to communicate information about a matter having to do with the exercise of judicial functions.

Baudouin J.A., speaking for a unanimous Quebec Court of Appeal, recognized that the situation at hand opposed two fundamental principles: the democratic right of all citizens (exceptional cases aside) to gain access to documents detained by a public authority, and the principle of judicial independence that guarantees to all citizens the right to be tried by an impartial judge, who will not be swayed by external pressures and whose decision will be based solely on law. Baudouin J. relied on the unwritten principle of judicial independence rather than on explicit constitutional provisions, because sections 96-100 of the *Constitution Act, 1867* and sections 7 and 11(d) of the *Charter* could not be called in aid. As he rightly stressed, the Conseil de la Magistrature is not a Superior Court, no accused were involved and no one's right to life, security and liberty was in jeopardy.[152] Having so decided, he then concluded that the power exercised by the Conseil was of a judicial rather than an administrative nature, and thus enjoyed the protection of the principle of judicial independence. Finally, in Baudouin J.A.'s opinion, the supervision that could be exercised by the Commission over the Conseil could not be reconciled with the principle of judicial independence.[153]

In *Conseil de la Magistrature*, it could be argued that this approach was justified. Baudouin J.A. took the time to demonstrate how, in the particular instance, the violation of the protection of the principle of judicial independence would

151. R.S.Q., c. A-2.1.

152. *Couseil de la Magistrature, supra* note 31 at para. 63.

153. *Ibid.* at paras. 99-108.

endanger our understanding of democracy.[154] Justice requires that judges determine issues without being submitted to pressures other than that of their own conscience and sense of duty.[155] If such independence did not exist, a well-informed and reasonable person's confidence in the judicial system would be undermined. As a result, the legitimacy of the very institution would be in jeopardy.[156] The issue in *Conseil de la Magistrature*, as well as the reasoning, are quite different from what *Remuneration* or *NPCJ* had to offer.

Nevertheless, instead of relying on an unwritten constitutional principle, the Court could simply have stated that the task of removing the Conseil de la Magistrature from the reach of the Access to Information Commisssion was one that had to be left to the legislature, a solution adopted by Ottawa and seven provinces. The Court could also have extended the partial protection provided by the common law to the secrecy of an administrative tribunal's deliberations;[157] it could then have used the familiar argument that legislation that infringes upon rights recognized by the common law should be interpreted restrictively. Although Baudouin J.A.'s reasoning appears convincing, allowing the constitutional invalidation of laws on the basis of unwritten constitutional principles raises grave problems, not the least important being that such principles are only amenable to a constitutional amendment. What remains to be discussed in further detail is the question of the legitimacy of judicial review of legislation when unwritten principles are concerned.

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154. *Ibid.* at paras. 57-59.

155. *Ibid.* at para. 71.

156. *Ibid.* at paras. 57-58.

157. For more on the protection recognized by the common law, see Y. Ouellette, *Les tribunaux administratifs au Canada–Procédure et preuve* (Montreal: Thémis, 1997) at 214-218.

III. Legitimacy of the Recourse to Unwritten Principles

A. Legitimacy of Judicial Review: Preliminary Comments

Our expectations as to what judges can accomplish in the field of constitutional interpretation should be suitably modest. In the words of Lon L. Fuller, "[w]ith respect to the demands of legality other than promulgation, ... the most we can expect of constitutions and courts is that they save us from the abyss; they cannot be expected to lay out very many compulsory steps toward truly significant accomplishment".[158]

Bearing that in mind, there are some basic limits which must not be transgressed if judicial review is to be considered a legitimate exercise of power. Four conditions, most of them borrowed from the *Secession* reference, can be seen as prerequisites to legitimacy.

First, the judge's reasoning must be reconcilable with prior decisions on similar issues. Principles must be used in a coherent fashion. Second, the judge's reasoning must take into account that principles and rules emerge from a particular historical context. The moral underpinnings of our constitution can be understood as appeals to improve ourselves, but in a fashion which agrees with the basic historical thread of our nation. As the Supreme Court intimated in *Secession*, the rules and principles must "emerge from an understanding of the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning."[159] Although there is not one but many

158. L.L. Fuller, *The Morality of Law* (New Haven and London: Yale University Press, 1964) at 44.

159. *Supra* note 10 at para. 32.

Canadian histories, this consideration should at the very least guard us against basing decisions on "historical fallac[ies]".[160]

Third, in interpreting the law, a judge must bear in mind that, even though law is forever subject to change, judicial interpretation itself involves "methods that ... ensur[e] continuity, stability and legal order."[161]

Fourth, the process will be legitimate if the methods employed by the judiciary are respectful of some very basic rules of propriety in the handling of cases and also if judicial interpretive activity is aimed at reinforcing rather than enfeebling the democratic fibre of the Canadian constitutional order. This does not necessarily mean that court decisions must reflect the aspirations of the majority. Democracy is not confined to simple majority rule;[162] it also presupposes the pursuit of substantive goals,[163] which might justify going against the will of the majority. In the words of the Court in *Secession*, "[o]ur law's claim to legitimacy also rests on an appeal to moral values, many of which are imbedded in our constitutional structure. It would be a grave mistake to equate legitimacy with the 'sovereign will' or majority rule alone, to the exclusion of other constitutional values."[164] Respect for the dialogical dimension of law-making intervenes in the assessment of whether this criterion has been met.

Indeed, judges are not akin to Roman pontiffs having sole access to magic legal formulae. Other actors have a say in the production of constitutional meaning. The Constitution does not belong to the judiciary alone. It must not be forgotten that, in our fragmented world, the Constitution constitutes one (if not the last) common place of reference to which all citizens may resort

160. In *Remuneration*, *supra* note 7 at para. 311, La Forest J. rejected part of Lamer C.J.'s historical argument in the following terms: "The idea that there were enforceable limits on the power of the British Parliament to interfere with the judiciary at the time of Confederation ... is an historical fallacy."

161. *Secession*, *supra* note 10 at para. 33.

162. *Ibid.* at para. 150.

163. *Ibid.* at para. 64.

164. *Ibid.* at para. 67.

to justify and explain their own beliefs or actions and criticize those of others.[165]

Thus, even though constitutional norms are vague concepts devoid of objective meaning, such meaning can be constructed through a process which admits the participation of a plurality of actors. When a court is called upon to decide an issue, and to decide it finally as the Supreme Court does, it must first listen to the parties involved. It must then determine the meaning of a concept; not forever, but as it understands it at that particular time. Its decision will generate a new debate, but in a climate of relative stability provided by the decision. The legitimacy of judicial review depends partly on a production of meaning which is as open as possible.[166] Again, there are limits to this dialogical approach, as there is a limited number of interlocutors who can participate in the judicial process, and because ultimately it is the judge who decides.

A number of things must also be kept in mind when assessing whether unwritten constitutional principles can legitimately be resorted to by courts to challenge the validity of a statute. First, unwritten constitutional principles are only amenable to a constitutional amendment. Second, these principles are not subject to either sections 1 or 33 of the *Charter*, because they are "exterior to the particular sections"[167] of the constitutional text. Section 1 provides that reasonable limits can be imposed to the rights guaranteed by the *Charter*. Section 33 allows a legislature to enact laws that will apply "notwithstanding a provision included in section 2 or sections 7 to 15" of the *Charter*. In *Rice*[168], Ryan J.A. of the New Brunswick Court of Appeal said that section 1 could not be called in aid by the province to justify a statute infringing the unwritten principle of judicial independence: "The origin of the independence of the judiciary and the prohibition of

165. D. Rousseau, "Questions de constitution" (2000) 19 Politiques et Sociétés 9 at 25-26.

166. *Ibid.* at 24-30.

167. *Remuneration*, *supra* note 7 at para. 83.

168. *Supra* note 31 at 42.

interference with it predates the *Constitution Act, 1982* and *Canadian Charter of Rights and Freedoms*. Section 1, logically, cannot be used to protect the invalid legislation which attempts to subvert a protected institution of our constitutional system".[169] In other words, sections 1 and 33 seek to enable a sort of dialogue between courts and legislatures, and cannot be used to limit the normative force given to unwritten principles.[170] *Remuneration* and similar cases bear witness to the fact that unwritten principles may serve as the courts' instrument to impose their will on the legislatures, in minute details and in a manner which deprives the elected representatives of the people of any means of response. No dialogue is possible.[171] In such cases, courts have forgotten that unsatisfactory laws can and should be sanctioned by the ballot box.

Third, unlike written constitutional provisions, unwritten constitutional principles are liable to operate in an absolute

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169. *Ibid.* at para. 42. In *NPCJ*, *supra* note 27 at para. 744, Marshall J.A., in his dissent, underlined that the unwritten principle of separation of powers was also not subject to s. 1.

170. On the notion of "dialogue", see P.W. Hogg & A.A. Bushell, "The *Charter* Dialogue Between Courts and Legislatures (or Perhaps the *Charter* Isn't Such a Bad Thing After All)" (1997) 35 Osgoode Hall L.J. 75; C.P. Manfredi & J.B. Kelly, "Six Degrees of Dialogue: A Response to Hogg and Bushell" (1999) 37 Osgoode Hall L.J. 513; P.W. Hogg & A.A. Thornton, "Reply to 'Six Degrees of Dialogue'" (1999) 37 Osgoode Hall L.J. 529; C.P. Manfredi & J.B. Kelly, "Dialogue, Deference and Restraint: Judicial Independence and Trial Procedures" (2001) 64 Sask. L. Rev. 323.

171. Many written constitutional provisions also fall outside ss. 1 and 33 of the *Charter*, including, for example, the entire *Constitutional Act, 1867* and also parts of the *Constitution Act, 1982*, such as s. 35(1), which entrenches aboriginal and treaty rights. However, in all these cases, the elected representatives of the people, not the courts, deliberately chose to remove these provisions from the limiting force of ss. 1 and 33. It could also be argued that judges could read into the unwritten principles a limitation analogous to s. 1. This is precisely what they did with s. 35(1) of the *Constitution Act, 1982*. Although this would certainly make the recourse to unwritten principles more legitimate, up until now, courts have not followed that path. As we have seen, some judges have even explicitly stated that unwritten principles are not subject to s. 1.

fashion, unless judges decide to invoke a counteracting principle. Ignoring counteracting rules is hardly possible when explicit provisions are concerned. Section 91 of the *Constitution Act, 1867* could not be invoked without any mention being made of section 92.

Fourth, in resorting to unwritten constitutional principles, courts are led to assess these principles in the abstract. They therefore unhinge the unwritten norms from the constitutional structure imposed by the text. It therefore becomes much more difficult to give a structural interpretation to these norms. What are the limits of judicial independence if it is no longer confined to section 96 of *Constitution Act, 1867* and section 11(d) of the *Charter*? Written constitutional norms might be vague, but one has to admit that words "do provide a limit to what must otherwise be, in the nature of the case, unlimited".[172] Furthermore, these words, as indeterminate as they are, are not the sole invention of the judiciary.

Finally, the wording of the *Constitution Act, 1867* may be flawed; one might regret our constitution's colonial underpinning or the absence of a Canadian founding moment. However, although our Constitution is a living tree, it still grows from the same soil. The seed could have been sowed in a different field, but it was not. Courts have latitude in the interpretation of a constitution, but they must not appeal to unwritten constitutional principles with the intent of rewriting it.[173]

Before examining the case law on judicial remuneration, one broad conclusion can be reached: the legitimacy of invoking unwritten principles will depend on the purpose they serve and on how the courts use them. For instance, if courts resort to such principles to reinforce our understanding of democracy (as in *Secession* or *Manitoba Language Rights*) or to delineate the discretion recognized by statute to an administrative agency (*Montfort Hospital*), it will be harder to argue that such action is

172. R. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1978) at 109.
173. *Montfort Hospital C.A.*, *supra* note 103 at para. 121.

illegitimate. However, in view of the difficulties described in the preceding pages, it is hard to see how these judicially created principles, on their own, could legitimately be used to invalidate legislation. That is especially true when less drastic solutions exist (*Conseil de la Magistrature*), and even more so when judges have a personal interest in the outcome of the case (*Remuneration* and the ensuing case law).

In the last section, we will scrutinize how some Canadian courts have used the unwritten principle of judicial independence, and will try to assess whether these decisions comply with, among other things, the four criteria enumerated in this section.

B. Legitimacy's Imperilment

An analysis of the case law demonstrates that when Canadian courts have relied on the unwritten principle of judicial independence to impugn legislation, they have not done so in a way that might have rendered such action legitimate. In addition, in some cases, while the unwritten principle of judicial independence was praised, others, such as the principle of democracy or the rule of law, were clearly neglected. Finally, the reasoning in those cases goes against the grain of the institutional dialogic approach recently promoted by the Supreme Court. These questions will be examined successively.

Decisions in which legislation was impugned on the basis of the unwritten principle of judicial independence have all had to do with judicial remuneration,[174] and were all initiated by judges.[175] This is more than problematic. The credibility of the judiciary requires that judges not initiate recourse to the law,[176] particularly in situations where they are personally and financially interested.

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174. For a list of the cases, see note 31, *supra*. Even though *Conseil de la Magistrature*, *supra* note 31 was not concerned with the issue of judicial remuneration, it also failed to satisfy the basic standards I have enumerated, since other less intrusive solutions could have been adopted.

175. See cases enumerated in *supra* note. 31.

176. *Remuneration*, *supra* note 7 at para. 300 (La Forest J. in dissent).

This precaution should apply with even greater stringency in cases where a statute is challenged on the basis of a judicially created principle.[177]

Additionally, these decisions do not satisfy the coherence test. As we have seen earlier, all unwritten principles have systematically been held not to allow the invalidation of statutes.[178] This is so because these unwritten principles were kept in check by another similar principle: parliamentary sovereignty. In cases involving judicial remuneration, courts have put coherence aside and have invoked the principle of judicial independence as if it operated in an absolute fashion. Not a word was said about the existence of counteracting principles.[179]

A particularly disturbing feature of the case law, especially in a context where judges are financially interested, is the cavalier manner in which some of them have reached their decisions. The *Rice* case[180] provides a persuasive example. It shows how the recognition of one principle can sometimes lead to the violation of other principles of equal importance.

At issue in the *Rice* case was the abolition of supernumerary judges in New Brunswick. A supernumerary judge's duties amounted to about 40 per cent of those of a regular full-time judge, but he or she received full salary. The province saw this as a costly and ineffective system, incapable of providing the

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177. It should be recalled that Lamer C.J.'s long *dicta* about the unwritten nature of the principle of judicial independence was all the more surprising in view of the fact that no one had seriously argued the point before the Court or any of the courts below.

178. Even the principle of judicial independence, when invoked in a context other than that of judicial remuneration, was held as not allowing the invalidation of legislation: see discussion in *supra* note 122.

179. It could also be said that the judges' reasoning does not take into account the historically contextualized nature of the principle of judicial independence. Lamer C.J.'s historical argument, for example, is devoid of any basis in either British or Canadian constitutional law. His understanding of the locus of judicial independence has no resonance in our constitutional past. For a criticism of Lamer C.J.'s opinion, see La Forest J.'s dissenting opinion in *Remuneration.*

180. *Supra* note 31.

flexibility needed to meet the linguistic and caseload needs of certain regions of the province. The affected judges had to choose between returning to full duty or retiring. A judge filed suit alleging that the statute was unconstitutional because the decision to abolish supernumerary judges had not been submitted to the scrutiny of an independent body. The suit found favour in the eyes of the Court of Appeal.

Claiming that the independence of the judiciary was an unwritten principle of such importance that it was not subject to section 1 of the *Charter*,[181] Ryan J.A., with whom Drapeau J. concurred,[182] strongly criticized the actions of the province. Being of the opinion that the abolition of supernumerary judges was tantamount to a removal from office,[183] he declared the statute unconstitutional. He stated - incorrectly[184] - that "there [had been] an arbitrary interference with financial security because the right to a full income among other benefits, [had] disappeared with the abolition of the office of supernumerary judge[s]."[185] However, the judge refused to order a suspension of invalidity so that an independent body could examine the issue, thus refusing a right of response to the Legislature. In this part of the reasoning no mention is made of the principle of democracy.

Ryan J.A. then addressed the question of damages in a manner that clearly violated the principle of the rule of law. Although no

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181. *Ibid.* at para. 42 (Ryan J.A.).

182. As for Daigle C.J., he concluded that the provincial statute violated s. 11(d) of the *Charter*, since, contrary to *Remuneration*, no compensation commission had been put in place by the legislature. Nevertheless, he disagreed with his colleagues' rejection of the trial judge's decision to suspend the declaration of invalidity of the impugned legislation in relation to the judges' supernumerary status to allow sufficient time for its consideration by the Judicial Remuneration Commission. He also disagreed with their reasons for awarding damages, and their award of costs on a solicitor and client basis.

183. *Rice, supra* note 31 at para. 41 (Ryan J.A.).

184. The right to full income did not disappear with the abolition of the office of supernumerary judge. A judge could still earn his full income if he or she chose to return to full duty.

185. *Rice, supra* note 31 at para. 46 (Ryan J.A.).

damages are available in tort for actions based on legislation subsequently declared unconstitutional, Ryan J.A. said that the situation here was "unique" in that the "legislation impinge[d] on and fail[ed] to respect the third branch of government."[186] Therefore, he concluded, not only could damages be claimed, but "neither negligence nor intention [was] requisite to found liability for damages."[187] It was also argued before the Court that section 24, the remedial provision of the *Charter*, did not authorize the award of damages in similar circumstances.[188] Ryan J.A. stated peremptorily that section 24 could be resorted to and to claim that section 24 would not provide recourse "defie[d] logic."[189] Unfortunately, as is emphasized by Daigle C.J., section 24 could not be resorted to because it only provides a remedy to those whose *Charter* rights are being infringed, i.e., it only applies to rights "guaranteed by this *Charter.*" Section 11(d) provides a remedy to the accused and not to judges.[190] As for the unwritten principle of judicial independence, because it is unwritten in the sense that it is exterior to the particular sections of the Constitution (including the *Charter*), section 24 cannot be invoked to provide a remedy in the event of its violation. Ryan J.A. was not persuaded, since he went so far as to state that "damages flow from section 24 of the *Charter*, if indeed, section 24 need be invoked at all because of the uniqueness of this case."[191]

In discussing the issue of damages, Ryan J.A. also addressed the question of whether there had been any economic manipulation on the part of the government. Though the plaintiff had neither alleged such manipulation nor had led any evidence in that

186. *Ibid.* at para. 54.

187. *Ibid.* at para. 55.

188. A fact acknowledged by Daigle C.J. (at para. 103).

189. *Supra* note 31 at para. 56 (Ryan J.A.).

190 *Ibid.* at para. 109 (Daigle C.J.N.B.).

191. *Ibid.* at para. 58 (Ryan J.A.). It must be remembered that, although Ryan J.A. held the *Charter* to be inapplicable when s. 1 was concerned, he comes to a contrary opinion when s. 24 is at issue.

respect,[192] Ryan J.A. concluded nonetheless that such manipulation had occurred. Daigle C.J. reminded his colleagues that the plaintiff should have pleaded the material facts pursuant to the rules of the court. He added that the allegation of manipulation was so insubstantial that he failed "to fathom how it could ever ground a claim for damages."[193] This time the rebuttal came from Drapeau J., who concurred with Ryan J.A. According to him, the appeal did not turn on questions such as the state of the pleadings or their compliance with the rules of the court, since the "issues raised by this case [were] of such importance that they transcend[ed] such pedestrian concerns". [194] To paraphrase Ryan J., such reasoning defies logic. According to Drapeau J. then, violations of the rule of law, one of the foundational unwritten principles of our constitution, are justified where a judge's remuneration is in question.

At issue in *NPCJ* was whether a public sector restraint statute which froze the salaries of both public servants and provincial court judges was applicable to the latter. The provincial court judges' association alleged that it violated the principle of judicial independence. An independent body had made recommendations with respect to the salary of judges and had mandated pay increases. The legislature initially refused to implement the recommendations. Nonetheless, after the judges filed suit, the government adopted most of the recommendations. The judges were still not satisfied. The majority of the Court of Appeal concluded that Lamer C.J.'s reasoning, although expressed in the context of a reduction of salary, was equally applicable to a freeze.

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192. As underlined by Daigle C.J. (at paras. 77-78).

193. *Ibid.* at para. 106.

194. *Baie d'Urfé T.D.*, *supra* note 76 and *Baie d'Urfé C.A.*, *supra* note 76 dealt with a situation that bore some similarities with the issue in *Rice*. It was argued that a provincial amalgamating statute providing for the abolition and replacement of the existing municipal courts infringed the principle of judicial independence. Both the Superior Court and the Court of Appeal rejected this argument. In the words of the latter: "Le pouvoir d'abolir une cour n'a jamais été considéré comme un obstacle à l'indépendance judiciaire" (at para. 239).

The Court stated that the Legislature had failed to meet the "simple rationality" test in refusing to implement the recommendations. The Court declared the statute unconstitutional as it related to the provincial court judges.[195] Instead of remitting the report to the Legislature, the Court ordered the implementation of the recommendations,[196] as was done in Alberta in a similar situation.[197] Such an attitude certainly does not encourage dialogue between courts and legislatures.

The above description demonstrates, I believe, that the methods employed by some members of the judiciary in the handling of cases concerning their own remuneration are not respectful of the most basic rules of propriety. In truth, they are not respectful of the rule of law, which provides that there is "one law for all."[198] They show disrespect for the principle which justifies the courts' very existence. It must be emphasized that by allowing courts to impose the implementation of an independent commission's recommendations if the legislature fails the test of "simple rationality," the test developed in *Remuneration* is incompatible with the democracy principle proposed in *Secession*.[199] That case stresses participation, negotiation and deliberation and is premised on the fact that no one has the monopoly on truth.[200]

Although the majority reasoning in both *Rice* and *NPCJ* could be discarded as simply wrong, what is unsettling about the reasoning in all of the decisions on judicial remuneration is that it flatly contradicts the dialogical stance adopted by the courts in other contexts. In recent decisions, the Supreme Court has refused to unilaterally impose solutions (as it did in *Remuneration* and the ensuing case law), claiming that such an attitude would fail to meet the requirements of the principle of democracy. The Court came to that conclusion even though these decisions were based

195. *Ibid.* at para. 316.
196. *Ibid.* at paras. 104, 197, 317.
197. *Alberta Provincial Judges' Assn.*, *supra* note 31.
198. *Secession, supra* note 10 at para. 71.
199. *Ibid.* at para. 64.
200. *Ibid.* at para. 68.

on written provisions of the Constitution. Although the basis of its intervention was the constitutional text and not a judicially created principle, the Court still felt the need to encourage dialogue.

In *R.* v. *Mills*,[201] the Court had to reconsider the issue of disclosure of third party records in sexual assault proceedings, an issue on which it had already ruled in *R.* v. *O'Connor*.[202] In *O'Connor*, the Court had enunciated a procedure reconciling the right to full answer and defence of the accused guaranteed under section 7 of the *Charter* with the right to privacy of the complainant. In response to this decision, Parliament adopted Bill C-46. The proposed legislation was not an exact replica of the solution proposed by the Court in *O'Connor*. The Supreme Court[203] nevertheless concluded that the bill did not infringe the interpretation of the Constitution it had developed in *O'Connor*.

Adopting a stance diametrically opposed to the reasoning in *Remuneration*, the Court stated that "the law develops through a dialogue between courts and legislatures . . . [and that,] [a]gainst the backdrop of *O'Connor*, Parliament was free to craft its own solution to the problem consistent with the *Charter*."[204] The Court then quoted[205] a passage from *Vriend* v. *Alberta*[206], another recent case:

> To my mind, a great value of judicial review and this dialogue among the branches is that each of the branches is made somewhat accountable to the other. The work of the legislature is reviewed by the courts and the work of the court in its decisions can be reacted to by the legislature in the passing of new legislation (or even overarching laws under section 33 of the *Charter*). This dialogue between

201. *Supra* note 116.
202. [1995] 4 S.C.R. 411 [hereinafter *O'Connor*].
203. L'Heureux-Dubé, Gonthier, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ. for the majority. (Lamer C.J. dissenting in part).
204. *Mills*, *supra* note 116 at para. 20.
205. *Ibid.* at para. 57.
206. [1998] 1 S.C.R. 493 at para. 139 (Iacobucci J.).

and accountability of each of the branches have the effect of enhancing the democratic process, not denying it.[207]

Even though there were differences between the solutions proposed by the Court and those provided by Bill C-46, the differences were not held to be fatal. Why was this need for dialogue ignored when the unwritten principle of judicial independence was involved?

In *Corbiere* v. *Canada*,[208] the Court concluded that section 77(1) of the *Indian Act*,[209] which provides that only band members "ordinarily resident on the reserve" are entitled to vote in band elections, contravened section 15 of the *Charter*. Having so determined, the Court had to decide whether to suspend the declaration of invalidity for a specific period of time. A unanimous Court decided that a suspension of 18 months should be granted, four out of the nine justices insisting that this solution was consonant with the democratic principle referred to in *Secession*.[210] L'Heureux-Dubé J., writing the concurring opinion, noted that the suspension would give time to Parliament to

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207. McLachlin and Iacobucci JJ., speaking for the majority, also stated that: "If the common law were to be taken as establishing the only possible constitutional regime, then we could not speak of a dialogue with the legislature. Such a situation could only undermine rather than enhance democracy. . . . Courts do not hold a monopoly on the protection and promotion of rights and freedoms; Parliament also plays a role in this regard and is often able to act as a significant ally for vulnerable groups. . . . Parliament has enacted this legislation after a long consultation process that included a consideration of the constitutional standards outlined by this Court in *O'Connor*. While it is the role of the courts to specify such standards, there may be a range of permissible regimes that can meet these standards. It goes without saying that this range is not confined to the specific rule adopted by the Court pursuant to its competence in the common law." (*Mills*, *supra* note 116 at paras. 57-59).

208. *Corbiere*, *supra* note 116.

209. R.S.C. 1985, c. I-5.

210. *Corbiere*, *supra* note 116 at para. 116. Although the reasoning of the five other judges does not refer explicitly to the democratic principle (at para. 23), it is perfectly compatible with the opinion of their colleagues.

consult, listen and discuss with the Aboriginal peoples governed by the Act. She added the following:

> The principle of democracy underlies the Constitution and the *Charter*, and is one of the important factors guiding the exercise of a court's remedial discretion. It encourages remedies that allow the democratic process of consultation and dialogue to occur.... In determining the appropriate remedy, a court should consider the effect of its order on the democratic process, understood in a broad way, and encourage that process.[211]

It should be noted that the Court was interpreting an explicit provision of the Constitution (section 52 of the *Charter*). The Court nonetheless insisted that judges heed the autonomy of political and legislative authorities. In cases dealing with judicial remuneration, "on necessary implication from an unwritten principle of the Constitution,"[212] judges dictated to the legislatures a solution having important budgetary consequences. How can courts not damage their credibility when they render such dissonant decisions? In view of the context and the manner in which the Courts have appealed to the unwritten principle of judicial independence, they have crossed the line between legitimate and illegitimate action.[213]

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211. *Ibid.* at para. 116.

212. *NPCJ*, *supra* note 27 at para. 746 (Marshall J.A., dissenting).

213. Some might argue that part of my criticism is biased because I fail to mention that the grounds for decision in *Secession*, as in *Remuneration*, had nothing to do with the arguments brought before the Court (see Monahan, *supra* note 13 at 103). Should this not be considered a violation of the Court's duty to listen? I believe that there is a capital distinction to be made between *Secession* and *Remuneration*. Whereas the former reinforces our understanding of democracy, the latter undermines it by violating the separation-of-powers principle. Further, *Secession* constitutes an exceptional case concerning the very existence of the Canadian State; this was certainly not the case with *Remuneration*. It is also exceptional in the sense that it succeeded in engendering its own legitimacy. For instance, both sovereignists' and federalists' leaders were satisfied with the decision and went so far as to both claim victory (Monahan, *ibid.* at 66). For a discussion of the public's perception of the Supreme Court's ruling in *Secession*,

Conclusion

Appealing to unwritten principles which are said to be "the very source of the substantive provisions of the *Constitution Act 1867*"[214] indirectly cedes to the judiciary the power to redefine both our constitutional past and future. Not only can the judiciary creatively interpret our written constitution, it will also have the power to reshape it in the name of unwritten principles. The potential for abuse is great; commensurate caution is therefore required in the handling of these principles if they are to be considered as part of our constitutional architecture. Courts should be wary of invoking them in too facile a manner, especially in cases where judges are directly and financially interested. In the words of Wakeling JA., too great an involvement on the part of courts might put in jeopardy the democratic process, "by downgrading the importance of holding a government responsible to the will of the electors."[215]

Postscript

As this manuscript was about to be sent to the printer, the Supreme Court delivered its reasons for judgment in the *Rice* case.[216] This decision is in line with the case law that has been the object of my criticism in the preceding pages. Although the respondent's claim for damages was dismissed, the Court[217]

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see J.F. Fletcher and P. Howe, "Supreme Court Cases and Court Support: The State of Canadian Public Opinion" (2000) 6 Choices 4 at 42-48.

214. *Remuneration*, *supra* note 7 at para. 95.

215. *Bacon*, *supra* note 75 at para. 36.

216. *Mackin* v. *New Brunswick (Minister of Finance)*; *Rice* v. *New Brunswick*, [2002] SCC 13 online: QL SCJ [hereinafter *Rice SCC*].

217. Justice Gonthier wrote the majority opinion, L'Heureux-Dubé, Iacobucci, Major, Arbour JJ. concurring. Although agreeing with the majority's "statement of the broad principles of judicial independence" (*ibid.* at para. 91), Binnie and Lebel JJ. strongly disapproved of its conclusion that supernumerary status, as

nevertheless upheld the Court of Appeal's conclusion that the New Brunswick legislation abolishing the system of supernumerary judges violated section 11(d) of the *Charter* and the unwritten principle of judicial independence affirmed and recognized in the preamble of the *Constitution Act, 1867*. The system of supernumerary judges was said to constitute an economic benefit for judges of the Provincial Court appointed before the enactment of the challenged legislation. Accordingly, the legislature should have referred the question of the elimination of the office of supernumerary judge to an independent, effective and objective body. Having concluded that the statute was unconstitutional, the majority suspended the declaration of invalidity for a period of six months to allow the government of New Brunswick to provide a solution to meet its constitutional obligations.

This decision is unsettling for many reasons. Only two will be addressed here. First, although *Remuneration* was severely criticized, the Court did not address the issue of the incompatibility of Lamer C.J.'s understanding of judicial independence with the separation of powers principle. Second, even though the Court agreed to suspend the declaration of invalidity for a six-month period, the reasons for its decision makes an institutional dialogue nearly impossible. According to the Court, judicial independence is based on section 11(d) of the *Charter*, but it is also an unwritten principle incorporated in Canadian law through the preamble of the *Constitution Act, 1867*.[218] Consequently, the Court came to the conclusion that "the standard application of section 1 of the *Charter* could not alone justify an infringement of that independence. A more demanding onus lies on the government".[219] In other words, unwritten

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defined in the challenged legislation, constituted an economic benefit protected by the Constitution.

218. Thus, "not only is it a right enjoyed by a party subject to the threat of criminal proceedings but it is also a fundamental element underlying the very operations of the administration of justice." (*Rice SCC*, *supra* note 216 at para. 71).

219. *Rice SCC*, *supra* note 216 at para. 72.

principles will be afforded greater protection than the written provisions of the *Charter*. As examples of situations where the elements of the institutional dimension of financial security would not have to be followed, the Court referred to cases of "dire and exceptional financial emergencies caused by extraordinary circumstances such as the outbreak of war or imminent bankruptcy".[220] The Court concluded that such was not the case here. Finally, one must remember that this stringent test must be added to the obligation of a government to justify its decision on a standard of simple rationality when it refuses to implement the recommendations of a judicial compensation commission. This obligation was reaffirmed by the Court in *Rice SCC*.[221] What latitude do these stringent tests leave to legislatures; and how are they compatible with the separation of powers principle?

220. *Ibid.*
221. *Ibid.* at para 57.