Fairy Tales and Living Trees: Observations on Some Recent Constitutional Decisions of the Supreme Court of Canada

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I. INTRODUCTION

IN RECENT DECISIONS, the Supreme Court of Canada has found in the Constitution of Canada a number of propositions which are neither stated in the texts of the constitutional instruments nor, in my submission, implied by those texts. One proposition is that, under certain circumstances, if a province wishes to secede from Canada, that province and the rest of Canada come under non-justiciable obligations to negotiate secession, or to negotiate about secession, though there is neither a right to secede nor a right to deny secession.[1] Another is that the independence of the Provincial Courts is a term of the Constitution which is based on the preamble to the *Constitution Act, 1867*[2] or has come about by evolution.[3] Another is that the right under the *Canadian Charter of Rights and Freedoms*[4] of accused persons to a trial before an independent and impartial tribunal can be satisfied only by the establishment of independent, objective and effective salary commissions to make recommendations for tribunal salaries, to which the respective governments must respond.[5] Yet another is that the Supreme Court of Canada has power to suspend the *Charter* right of accused per-

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

2 *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3 reprinted in R.S.C. 1985, App. II, No. 5 [hereinafter *Constitution Act, 1867*].

3 *Reference re: Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 [hereinafter *Provincial Judges Reference*].

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

5 *Provincial Judges Reference*, *supra* note 3.

sons to a trial before an independent and impartial tribunal.[6] The final one is that the Supreme Court can, by suspending a declaration of illegality, authorise a government to exact illegal taxes, on the simple grounds that the government needs the money.[7]

This paper will give reasons for arguing that these propositions are not found in the Constitution. The thesis of the paper is that, as LaForest J. said in a powerful dissent in the *Provincial Judges Reference*:

> Judicial review, therefore is politically legitimate only insofar as it involves the interpretation of an authoritative constitutional instrument. In this sense, it is akin to statutory interpretation. In each case, the court's role is to divine the intent or purpose of the text as it has been expressed by the people through the mechanism of the democratic process.[8]

And later:

> The express provisions of the Constitution are not... "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.[9]

A quarter of a century ago, Lord Reid made an insightful comment about the judge as lawmaker. His remarks are as apposite to the judge's role under the Constitution of Canada as they are to the judge's role under the Common Law. What he said was this:

> There was a time when it was thought almost indecent to suggest that judges make law—they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin's cave there is hidden the Common Law in all its splendour and that on a judge's appointment there descends on him knowledge of the magic words Open Sesame. Bad decisions are given when the judge has muddled the pass word and the wrong door opens. But we do not believe in fairy tales any more.[10]

Or do we?

Judges must make law. That is because they must decide the cases that are put before them. If the applicable law is clear they do not have to make law. But if there is no law which clearly determines the issue, no inexorable legal logic which dictates the answer to the issue, they must fashion law for the litigants before them. Such a decision, if it is authoritative or persuasive, makes new law. A court which makes new law, whether it is made on the basis of concrete fact situations or in preparing advice on constitutional references, should, in the

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6 *Provincial Judges Reference, supra* note 3.

7 *Eurig Estate (Re)*, [1998] 2 S.C.R. 565 [hereinafter *Eurig Estate*].

8 *Provincial Judges Reference, supra* note 3 at para. 315.

9 *Ibid.* at para. 319.

10 Lord Reid, *The Judge as Lawmaker*, (1972) 12 Journal of the SPTL.

words of Chief Justice Brian Dickson, "proceed in the discharge of its adjudicative function in a reasoned way from principled decisions and established concepts."[11] Courts that make new law should also recognise that they are doing so and should make it clear that they are doing so.

In the light of these propositions I turn to an examination of the decisions I have mentioned, in which I think that the Court has been misled by a latter-day version of Lord Reid's fairy tale.

II. Some Recent Decisions of the Supreme Court

A. The Quebec Secession Reference

First, the *Quebec Reference* case.[12] What the Supreme Court found in the *Constitution* about the possible secession of a province, and all that it found, is as follows:

i) A province cannot secede without prior principled negotiations with the other participants in Confederation.[13]

ii) If the population of a province, by a clear majority in answer to a clear question, should decide to secede, the other provinces and the federal government would be under an obligation to enter into negotiations with the secessionist province and conduct the negotiations in accordance with the principles of democracy, federalism, constitutionalism and the rule of law.[14]

iii) The question whether a majority is a "clear majority" and the question whether a question is a "clear question" are non-justiciable.[15] It follows from this that the Constitution and the courts cannot answer these questions. The Constitution and the courts therefore have no way of telling whether or when the rest of Canada's obligation to negotiate arises. Only a disparate group of politicians with disparate interests and disparate agendas can give answers, and neither the Constitution nor the courts can reconcile divergent answers.

iv) Nor can the Constitution or the courts tell whether the secessionist province or the other provinces and the federal government are carrying out, or have carried out, their respective obligations to negotiate.[16] These questions are also non-justiciable.

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11 B. Dickson, "*The Judiciary—Law Interpreters or Law Makers*" (1982) 12 Man. L.J. 1.

12 *Quebec Reference*, *supra* note 1.

13 *Ibid.* at paras. 104,151.

14 *Ibid.* at paras. 88,151.

15 *Ibid.* at para. 100.

16 *Ibid.*

> *v)* The secessionist province does not have an absolute right to secede and the other provinces and the federal government do not have an absolute right to deny secession.[17]

In summary, the Constitution imposes on a secessionist province and the rest of Canada legal obligations to negotiate, but it does not give the legal system any way of determining when the obligation of the rest of Canada arises, what the contents of the obligations on both sides are, whether or not the participants are performing or have performed their obligations, or whether or not a province can secede of its own motion if the negotiations are not successful.

Whence come these propositions?

The Court held that, "The secession of a province from Canada must be considered, in legal terms, to require an amendment to the Constitution ... ." In the same paragraph, it rejected the suggestion "that secession could be a change of such a magnitude that it could not be considered to be merely an amendment to the Constitution."[18]

Part V of the *Constitution Act, 1982* provides for amendments to the constitution of Canada. Amendments under s. 38, a non-exhaustive list of which is contained in s. 42, require the authority of resolutions of the two federal Houses and of legislative assemblies of at least two-thirds of the provinces having at least 50 percent of the population of all the provinces. Section 41, which applies to a small number of especially entrenched provisions, requires the authority of resolutions of the two federal Houses and the legislative assembly of each province, that is to say, it requires unanimous consent of the federal and provincial legislative bodies. Section 43, which applies to amendments which affect one or more, but not all provinces, requires the consent of the two federal Houses and of the legislative assembly of each province to which the amendment applies. As sections 44 and 45 deal with amendments which affect only "the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons" or "the constitution of the province" they do not apply to a secession amendment. These are the only provisions of either of the two *Constitution Acts* which authorise amendments to the Constitution.

Section 52(3) of the *Constitution Act, 1982* provides that "amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada." It looks very much as if the sections I have recited are the only "authority contained in the Constitution of Canada," so that a secession amendment, if it is authorised at all, would have to be authorized by s. 38 or 43, presumably the former, though it is not one of the types of amendments listed in s. 42. The only other possibility is that there is

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[17] *Quebec Reference*, *supra* note 1 at paras. 91–93.

[18] *Ibid.* at para. 84.

somewhere in an unwritten and as yet unidentified part of the Constitution of Canada, authority for an amendment under some as yet unidentified procedure.

As I have said above, the Supreme Court said that amendments would be needed for secession. But it did not say that any of the amendment provisions in Part V of the *1982 Act* apply. Nor did it say that the amendment provisions do not apply. Nor did it say that principles of democracy, federalism, and constitutionalism provide another procedure for a secession amendment. Nor did it say that there is no provision for a secession amendment. While the Court agreed that the written provisions of the Constitution have primacy,[19] it dealt with the written provisions for amendments by ignoring them. The Supreme Court did say, as I have noted, that there is neither an absolute right to secession nor an absolute right to deny secession. It is consistent with the *Constitution Act, 1982* to say that a seceding province does not have an absolute right to secession, as none of the amendment provisions confers such a right. On the face of it, it seems inconsistent with the *Constitution Act, 1982* to say that the two federal houses and the provinces do not have an absolute right to deny secession, unless there is a way of effecting secession which is contained in unwritten provisions of the Constitution, or unless those unwritten provisions impose an obligation upon the two federal houses and the other legislatures to deliver the necessary authority.

The Court did refer to s. 46(1) of the *Constitution Act, 1982* saying,

> The Constitution Act, 1982 gives expression to [the democratic] principle, by conferring a right to initiate constitutional change on each participant in Confederation. In our view, the existence of this right imposes a corresponding duty on the participants in Confederation to engage in constitutional discussions in order to acknowledge and address democratic expressions of a desire for change in other provinces. This duty is inherent in the democratic principle which is a fundamental predicate of our system of government.[20]

Section 46(1) is the only provision in the *Constitution Act, 1982* which confers a right to initiate constitutional change so that it must be the source of the right to initiate which is referred to by the Court in the passage just quoted. But what sec. 46(1) says is this:

> The procedures for amendment under sections 38, 41, 42 and 43 may be initiated either by the Senate or the House of Commons or by the legislative assembly of a province.

It will be seen that the right which s. 46(1) confers is a right to initiate a procedure under ss. 38, 41, 42 or 43. That is, it is a right to initiate a procedure which can end with a positive result only with the authority of a group of legislative bodies that includes legislative bodies other than those of a province

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[19] *Quebec Reference, supra* note 1 at para. 53.

[20] *Ibid.* at para. 69.

seeking secession. But a right to initiate cannot of itself impose an obligation to exercise a power to grant an authority. To say that it does would completely subvert the written text. As the inaction of the other legislative bodies cannot authorise an amendment under ss. 38, 41, 42, and 43, and as there is no compulsion on the two federal Houses and other provincial legislatures to act, it is not possible, in my submission, to say that a sufficient combination of the two federal Houses and other provincial legislatures does not have an absolute right to refuse secession *under the amendment sections procedures* by not adopting the resolutions which trigger any of the amendment sections. The Supreme Court did not give any such interpretation. As noted above, it did not refer to ss. 38, 41, 42, and 43.

What the Court did discuss were certain "underlying constitutional principles" or "unwritten postulates which form the very foundation of the Constitution of Canada."[21] These cannot, the Court said, be taken to be

> an invitation to dispense with the written text of the Constitution. On the contrary we affirmed [in the *Provincial Judges Reference*] that there are compelling reasons to insist upon the primacy of our written constitution.[22]

However, the Court went on to say that,

> Underlying principles may in certain circumstances give rise to substantive legal obligations (have "full legal force", as we described it in the *Patriation Reference* ...) which constitute substantive limitations upon government action.... The principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments.[23]

That is to say, the underlying principles of the Constitution are not merely aids to the interpretation of the written texts of the legal instruments which have been formally adopted as being parts of the Constitution: they are separate parts of the Constitution which give rise to independent rights and obligations not required by the written texts.

The principal underlying principles of the Constitution, in the Supreme Court's view,[24] are democracy, federalism, constitutionalism and the rule of law, and respect for the rights of minorities. Although, as noted above, the Supreme Court referred to s. 46(1) as the source of an obligation on the rest of Canada to negotiate with a seceding province, it seems that the principles of federalism and democracy would do the job by themselves:

> The federalism principle, in conjunction with the democratic principle, dictates that the clear repudiation of the existing constitutional order and the clear expression of

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21 *Quebec Reference*, *supra* note 1 at para. 54.

22 *Ibid.* at para. 53.

23 *Ibid.*

24 *Ibid.* at paras. 34, 50.

> the desire to pursue secession by the population of a province would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire ... . The clear repudiation by the people of Quebec of the existing constitutional order would confer legitimacy on demands for secession, and place an obligation on the other provinces and the federal government to acknowledge and respect that expression of democratic will by entering into negotiations and conducting them in accordance with the underlying constitutional principles already discussed.[25]

This is certainly a statement of what civilised parties to an apparently fundamental disagreement should do. It is also, in my view, a statement of a course of action that parties to a fundamental disagreement should follow in their own enlightened self-interest, and, indeed, would be compelled to follow by practical considerations. But, in my submission, the Court, in these passages, has added to the Constitution's primary material that was not put there by a constitutional procedure. This is made clear by the following passage:

> Although these underlying principles are not explicitly made part of the Constitution by any written provision, other than in some respects by the oblique reference in the Preamble to the *Constitution Act, 1867*, it would be impossible to conceive of our constitutional structure without them. The principles dictate major elements of the architecture of the Constitution itself and are as such its lifeblood.[26]

If this only meant that the framers of the Constitution had in mind the principles enunciated by the Supreme Court, and that those principles should therefore be borne in mind when interpreting the text of the legal instruments which are included in the Constitution of Canada, it would be unexceptionable; the context in which words are used is often an invaluable guide to the meaning which the words were meant to convey. But the Court held that the content of the Constitution of Canada includes materials which are not stated or implied in the text of the formally-adopted constitutional instruments; which materials "in certain circumstances give rise to substantive legal obligations" which have "full legal force" which "are invested with a powerful normative force" and which "are binding upon both courts and governments."

In my submission, the Court has itself added materials to the Constitution that were not adopted by the elected representatives of the people. It is true that s. 52(2) of *the Constitution Act, 1982* says only that the Constitution *includes* the listed constitutional instruments, leaving open the possibility that it also includes other things, but that is not to say that principles not referred to in a constitutional instrument should be added as separate parts of the Constitution with their own authority. As Chief Justice Lamer said in the *Provincial Judges Reference*, referring back to his judgment in *Harvey* v. *New Brunswick (Attorney General) et. al.*,[27] "[t]he constitutional history of Canada can be un-

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[25] *Quebec Reference, supra* note 1 at para. 88.

[26] *Ibid.* at para. 51.

[27] [1996] 2 S.C.R. 876.

derstood, in part, as a process of evolution which [has] culminated in the supremacy of a definitive written constitution."[28]

In my submission, adopting the words of La Forest J., which I have already quoted above, "Judicial review ... is politically legitimate only insofar as it involves the interpretation of an authoritative constitutional instrument."[29]

I will summarise. One possible source of the duty to negotiate is s. 46(1) of the *Constitution Act, 1982*. It would be within the bounds of interpretation to hold that s. 46(1), by conferring a right upon a legislature to initiate a procedure for constitutional amendment, imposes a correlative obligation on the other provinces and the federal Houses to negotiate. But s. 46(1) applies only in procedures under ss. 38, 41, 42, and 43, which are very precise, which give the two federal Houses and the other provincial legislatures power to deny a secession amendment sought under any of those sections by the simple expedient of doing nothing, and which do nothing to detract from the absolute nature of their right to do nothing. If the source of the duty to negotiate is found in principles that the elected representatives of the people have never seen fit to include in the formally adopted Constitution of Canada, it follows that the Court has added to the Constitution.

B. Evolution of the Principle of Independence of the Courts

In the *Provincial Judges Reference*[30] the majority of the Supreme Court found in the Constitution a constitutional guarantee of the independence of the Provincial Courts, though neither the Provincial Courts or any courts other than "superior, district, and county courts" are referred to in any relevant way by either of the *Constitution Acts*.[31] The Court arrived at this conclusion by way of dictum, as the majority judgment said that, because of the way the reference had been argued, it would decide the reference on the basis of the *Charter*. However, a dictum developed over 22 law report pages with all the earmarks of careful consideration and deep conviction by six of the seven members of the Court can be ignored only at peril.[32]

The majority, in effect, said this:

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28 *Provincial Judges Reference, supra* note 3 at para. 93.

29 *Ibid.* at para. 315.

30 *Ibid.*

31 S. 100 of the *Constitution Act, 1867*, which has to do with judicial salaries, excepts the Probate Courts of Nova Scotia and New Brunswick and Admiralty Courts with salaried judges. This is not relevant to the discussion. Section 11(d) of the *Charter* gives accused persons a right to trial by an "independent" tribunal, and this is in a sense a constitutional guarantee, but it is not the kind of guarantee under discussion at this point.

32 I hasten to say that I am not troubled by the notion of independence of the courts, only by the way it has made its extended appearance in the Constitution of Canada.

i) Under the preamble of the *Constitution Act 1867*, Canada is to have a Constitution similar in principle to that of the United Kingdom.

ii) In 1867, the U.K. Constitution included the *Act of Settlement* of 1701.[33]

iii) The *Act of Settlement* established the principle of judicial independence.

iv) That principle is reflected in ss. 96–100 of the *Constitution Act 1867*.

Specifically, the Chief Justice said this:

> Judicial independence is an unwritten norm, recognized and affirmed by the preamble to the Constitution Act, 1867. In fact, it is in that preamble, which serves as the grand entrance hall to the castle of the Constitution, that the true source of our commitment to this foundational principle is located.[34]

But there are difficulties with finding a place for the Provincial Courts in the grand entrance hall. Assuming that the *Act of Settlement*, despite being in the form of a simple Act of Parliament, had by 1867 become part of the constitution of the United Kingdom, it applied only to the superior courts at Westminster. It did not apply to the County Courts or the magistracy and therefore did not provide for the independence of either. Similarly, ss. 96–100 of the *Constitution Act 1867*, which include provisions similar to those of the *Act of Settlement*, apply only to the superior, district, and county courts. Therefore, neither the *Act of Settlement* nor the corresponding provisions of the *Constitution Act 1867* established a principle of judicial independence for any but the superior courts.

The majority grappled with these difficulties. It overcame them in this passage:

> [o]ur Constitution has evolved over time. In the same way that our understanding of rights and freedoms has grown, such that they have now been expressly entrenched through the enactment of the Constitution Act, 1982, so too has judicial independence grown into a principle that now extends to all courts, not just the superior courts of the country.[35]

The notion of constitutional evolution is, I think, the same notion as the notion of the "living tree" that the Supreme Court mentioned in the *Quebec Reference*,

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[33] (U.K.) 12 & 13 Will. 3, c. 2.

[34] *Provincial Judges Reference*, *supra* note 3 at para. 106.

[35] *Ibid.*

> [o]bservance of these principles [36] 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 at p. 136.[37]

This imagery leads to the notion that the *Constitution* is off somewhere—"in some Aladdin's cave," to adopt Lord Reid's metaphor—evolving provisions which were not there before, or growing branches which were not there before; and that this is happening without human intervention. Then, every so often, a court will examine the *Constitution* and discover in it the newly-evolved provisions, or the new branches. This is Lord Reid's fairy tale.

The imagery of evolution and living trees is, in my submission, dangerous and misleading. The Constitution of Canada is a human construct. It does not have an internal life force that causes it to evolve or grow new limbs independently. It can be changed only by human action. It is, of course, possible to look at words today and say that yesterday's interpretation was wrong, but that is different from saying that the words have changed their meaning and include provisions that were not previously there. If the U.K. constitution did not include a principle of independence other than in relation to the superior courts at Westminster; and if the words of the *Constitution Act 1867* did not provide for the independence of courts other than the superior, district, and county courts; and if constitutional amendments since 1867 have not added provisions that provide for the independence of the Provincial Courts, then the Supreme Court, to the extent that it could do so by obiter dictum in a reference, has changed the Constitution by adding to it a provision that the Provincial Courts have a constitutional guarantee of independence.

It is true, as the second-last quoted passage says, that our understanding of rights and freedoms has grown, or at least changed. But, as the passage also notes, our changed understanding of rights and freedoms has resulted in amendments to the formal constitutional instruments. That is, specific formal action has been taken to change the Constitution by the addition of the *Charter*. The quoted passage equates the growth of the principle of judicial independence with the growth of our understanding of rights and freedoms. But, apart from s. 11(d) of the *Charter*, no formal change has been made to the *Constitution* to recognise the principle of judicial independence, and s. 11(d) does not extend the principle to courts generally—what it does is to give accused persons a right to be tried by an independent and impartial tribunal. The principle of judicial independence, except to the extent that it is reflected in the *Constitution Act 1867* and the *Charter*, has been added by the Supreme Court. Needless to say, it is, on its merits, a good addition. But judicial interpretation is

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[36] The principles referred to in the discussion of the *Quebec Reference*, above.

[37] *Supra* note 1 at para. 52.

not an appropriate way of adding to the *Constitution* of Canada on the grounds that an addition would be useful.[38]

There is no doubt that constitutional rigidity is an evil: some means of reshaping parts of the Constitution from time to time would be highly desirable, but that should be done by constitutional means; as La Forest J. said in the passage I have quoted, judicial review is politically legitimate only when it interprets.

C. Determination of Provincial Court Judges' Salaries

My third point also comes from the *Provincial Judges Reference*. The Supreme Court held that

> ... the imperative of protecting the courts from political interference through economic manipulation requires that an independent body—a judicial compensation commission—be interposed between the judiciary and the other branches of government.[39]

And later:

> Provinces are under a constitutional obligation to establish bodies which are independent, effective, and objective, according to the criteria that I have laid down in these reasons. Any changes to or freezes in judicial remuneration require prior recourse to the independent body, which will review the proposed reduction or increase to, or freeze in, judicial remuneration. Any changes to or freezes in judicial remuneration made without prior recourse to the independent body are unconstitutional.[40]

The point arose because s. 11(d) of the *Charter* gives a person charged with an offence a right to a fair and public hearing by an "independent and impartial tribunal." "Independence," in the Court's view, includes financial independence, and financial independence requires that both individually and institutionally a tribunal must be protected from political interference through financial manipulation. That is reasonable enough. But it is a great leap from that proposition to the further proposition that the *Charter* includes a requirement that one device and only one device be adopted to provide the necessary financial independence, and the Court did not give any reason for making that leap. It merely laid down the magisterial proposition that the *Charter* includes a requirement of an independent, objective and effective salary commission.

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[38] The Supreme Court held in the *Patriation Reference* that constitutional practices can evolve into constitutional conventions, but it is not the constitution which evolves constitutional conventions; it is human conduct that does so. And the resulting conventions are not enforceable as law. Even fundamental requirements of parliamentary democracy, such as the obligation of a ministry to resign when defeated in a legislature, while constitutionalised, are merely conventions: *Reference re Resolution to Amend the Constitution* [1981] 1 SCR 753 [hereinafter *Patriation Reference*].

[39] *Provincial Judges Reference*, *supra* note 3 at para. 147.

[40] *Ibid.* at para. 287.

It is not immediately obvious to me why, for example, a legislated provision that Provincial Court judges' salaries are to be the same as, or 90percent of, or 110 percent of, the salaries of superior court judges from time to time would be insufficient. It is highly unlikely that a Province could engage in financial manipulation of Provincial Court judges under such an arrangement. Or a statutory provision that Provincial Judges' salaries bear some relationship to deputy ministers' salaries, so long as the provision works without the possibility of intervention by the Executive or by the Legislature. Or salaries fixed by a court. Or salaries that bear a certain relation to the average of annual wages in Canada. Or salaries determined by any other benchmark that is not under the control of the Executive or the Legislature of the province in question. It may be that there is some fatal flaw in each such suggestion, but there is nothing in the Supreme Court's decision to tell us what it is.

It is true that Lamer C.J. said that he did not intend to lay down a particular institutional framework in constitutional stone,[41] and that new institutional arrangements may be created to serve the same purpose. However, any institutional arrangement, if it is to meet the Supreme Court's criteria, will require an institutional sieve that meets the requirements of independence, objectivity, and objectiveness as defined, so that about all that can be changed is the label; that is to say, a different institutional arrangement will be permissible, but only if it has the same characteristics as the one prescribed by the Court.

The *Provincial Judges Reference* was about the financial arrangements for Provincial Courts. However, the constitutional requirement of independent, objective, and effective commissions in the determination of judicial salaries is not, it appears, restricted to the Provincial Courts. It applies as well to the federally-appointed courts—the superior courts of original jurisdiction in the provinces, the provincial courts of appeal, the Federal Court, and the Supreme Court of Canada itself. The Court said this in the Provincial Judges Reference:

> [Section] 100 [of the Constitution Act 1867] also requires that Parliament must provide salaries that are adequate, and that changes or freezes to judicial remuneration be made only after recourse to a constitutionally mandated procedure.[42]

Later the Attorney General of Canada applied to the Court for an extension of the year's suspension of the constitutional imperative which will be discussed below, and the Court granted an extension of two months or until the enact-

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[41] *Provincial Judges Reference*, *supra* note 3 at para. 185.

[42] *Ibid.* at para. 87. I interpret this passage to mean that it is not enough that the salaries of the judges of the superior courts be fixed by Parliament. The "constitutionally mandated procedure" appears to be the independent-commission procedure required by the *Constitution* as laid down by the Court. What s. 100 of the *Constitution Act 1867* says, before judicial interpretation, is that "[t]he Salaries, Allowances and Pensions of the Judges of the Superior, District, and County Courts ... shall be fixed and provided by the Parliament of Canada."

ment of Bill C–37[43], which became S.C. 1998, c. 30. That Act amends the salary provisions of the *Judges Act*[44] and provides for the establishment of a Judicial Compensation and Benefits Commission, which is required to make quadrennial investigations and reports, which must be referred to the judiciary committees of each House, who must report to their respective Houses. Then, the Minister of Justice must respond to the reports. The Judicial Compensation and Benefits Commission appears to be an independent, objective and effective salary commission of the kind which is constitutionally mandated for the Provincial Courts by the Supreme Court's decision in the *Provincial Judges Reference*.

None of the references or appeals before the Court referred to federally-appointed judges, and the Attorney General of Canada was only an intervenor in the references and appeals and was not a party to them; nor did the Court's answers to the questions posed on the references refer to federally-appointed judges. Nevertheless, the Court and the Attorney General of Canada must be taken to have agreed that the decision in the *Provincial Judges Reference* established that none of the s. 96 courts, the Federal Court, and the Supreme Court, have had the degree of independence that is required by the *Constitution Act 1867* or the degree of independence that is required by s. 11(d) of the *Charter*.

It may be that we are obliged to conclude that s. 96 courts have never been independent until now, and, indeed, that there has never been an independent court in Canada until the establishment of independent salary commissions.[45] I have trouble accepting that proposition. It does not seem to me that a reasonably well-informed observer would conclude that s. 96 courts were never independent until S.C. 1998, c. 30 was enacted. That doubt leaves me in further doubt about the constitutional imperative of an independent salary commission.

In summary, while I think that the word "independent" in s. 11(d) of the *Charter* is properly interpreted as requiring that tribunals which can convict people of charges be free from financial manipulation by governments, I do not see how one can leap from that proposition to the conclusions that the word "independent" mandates a salary commission which meets the Court's criteria of independence, objectivity, and effectiveness and that no other safeguard against financial manipulation will do.

D. Suspension of Constitutional Provisions

In the *Provincial Judges Reference*, the Supreme Court exercised a power to suspend a requirement of the *Constitution*. In *Re: Eurig*, the Court exercised a

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[43] *Judges Act Amendments*, 1st Sess., 36th Parl., 1998, (assented to 18 November 1998, S.C. 1998, c.30).

[44] R.S. 1985, c. J–1

[45] Nor would the English superior courts be independent as the salary provisions of the *Act of Settlement* are to the same effect as s. 100 of the *Constitution Act, 1867* and there have been no English salary commissions which meet the Supreme Court's criteria.

power to allow the Executive to continue to exact an illegal tax. Presumably the Court considered that the Constitution confers those powers on the Court, though it did not point to the constitutional source from which the powers spring.

I will start this discussion with a reference to the *Manitoba Language Reference*, *infra*, which I think is the progenitor of a power to suspend the Constitution in Canada.

1. The Manitoba Language Rights Reference[46]

The Supreme Court held in the *Manitoba Reference* that the entire statutory law of Manitoba after 1890 or thereabouts was invalid because all of the statutes had been enacted only in English, and not in both official languages as required by the Manitoba Constitution. That is, the Court dropped the legal counterpart of an atomic bomb which, if it had exploded, would not only have invalidated virtually the entire statute law of the province but would also have rendered illegitimate all the provincial institutions that depend on the statute law, including the courts and the Legislature itself; and it was apparent that it would simply not be possible to rectify the situation for a lengthy period of time, if ever. Having dropped its bomb, however, the Court went on to stop the bomb from going off. It did so by holding that the principle of the rule of law, which appears in the preamble to the *Constitution Act, 1982*, coupled with a doctrine of necessity, allowed it to declare the unlawful statutes binding until the Government of Manitoba could provide French versions.

In such an extreme case, there was a strong argument for adopting whatever expedient would avoid the legal and governmental chaos which the invalidation of the statute law would have created. The importance of the end in the Manitoba case, given the prospect of legal and governmental chaos, may have justified the means, even though it is richly ironic that the rule of law was maintained by the device of imposing unlawful law. Given that the legal bomb had been dropped, I do not have the same difficulties with adopting any available means to stop it from going off and destroying the whole legislative, legal, and governmental systems, as I do with the later and almost casual exercise of powers to override specific provisions of the Constitution where the consequences of applying constitutional logic would not be as extreme. I now turn to those cases.

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[46] [1985] 1 SCR 721 [hereinafter *Manitoba Reference*].

2. The Provincial Court Judges Reference[47]

In the Provincial Court Judges Reference, the Supreme Court was thought to have held that certain Provincial Courts were not independent for the purposes of sec. 11(d) of the *Charter*, thus undermining the ability of those courts under the *Charter* to hear and dispose of charges of offences. It was thought that if remedial steps were not taken, this decision would mean that there would be a lengthy hiatus in the administration of criminal justice at the Provincial Court level.

The Provinces involved therefore returned to the Court for interim relief so that the Provincial Courts could function until they could be made financially independent by the establishment of independent salary commissions and the processing of the recommendations of the commissions, as required by the Constitution as interpreted by the Supreme Court. In response to their applications, the Court said this in an order dated 10 February 1998:

> Therefore, to allow governments time to comply with the constitutional requirements mandated by our September 18, 1997 decision, and to ensure that the orderly administration of justice is not disrupted in the interim, the court has decided to suspend all aspects of the requirement for an independent, objective and effective process for setting judicial remuneration, including any reimbursement for past salary reductions, for one year from the date of the original judgment. That is, there will be a transition period of one year before that requirement takes effect.[48]

The statement that the suspension was "to ensure that the orderly administration of justice is not disrupted in the interim," must be based on the assumption that, following the Court's 17 September 1997 judgment, the Provincial Courts in the affected provinces were not "independent" tribunals under s. 11(d) of the *Charter* because they did not have the constitutionally-required financial independence. But a person accused of an offence has a right under s. 11(d) to a trial before an independent tribunal. The effect of the suspension, if the Provincial Courts were not independent during the year provided for in the 10 February 1998 order, was that accused persons must submit to trial before a tribunal that was not independent, that is, the *Charter* said there is a right to a trial before an independent tribunal and the Supreme Court said that, to the extent that the Provincial Courts were not independent, there would not be such a right during the year's suspension. This amounts to a suspension of s. 11(d), that is, a suspension of part of the Constitution of Canada.

The Court did not point to any source of its power to suspend the *Charter* nor did it give any reasoning that supports the existence of a suspension power

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[47] *Provincial Judges Reference*, *supra* note 3. This was an application after the Court issued its judgment finding some Provincial Courts to lack the independence required by s. 11(d) of the *Charter*.

[48] *Ibid.* at para. 18.

under the Constitution.[49] It seems to me that courts should not suspend part of the Constitution, which transcends mere parliamentary laws, at least unless suspension is a last resort which is clearly necessary to preserve the vital interests of the body politic as it was in the *Manitoba Reference*.

The evil to be avoided by the suspension was that Provincial Court judges, not being independent tribunals, would be unable to hear criminal and quasi-criminal charges. If in fact the Provincial Courts had not been able to function on the criminal side for a significant period of time that would indeed have created a serious problem in the administration of justice. That problem, however, would have been a much lesser evil than the vacuum in the statute law and the destruction of the judicial and governmental institutions which was faced in the *Manitoba Reference* for the extended time that would have been needed to enact all the statute law in French, if, indeed, the Manitoba Legislature, in view of the invalidity of the statute law under which it had been elected, could lawfully enact anything.

What was needed to rectify the situation after the Supreme Court's 17 September 1997 decision in the *Provincial Judges Reference* was much less difficult and time-consuming than re-enacting all current Manitoba statute law in French. All that an affected province had to do was to appoint a commission and validate the appointment by primary or secondary legislation. It may be *difficult* for a government to act speedily in such a case, but there is nothing *impossible* about speedily appointing committees, speedily passing regulations, and, if necessary, speedily convening a legislature to enact necessary legislation. If the preservation of a constitutional imperative was at risk, it seems that it would be appropriate to require governments to act speedily to protect constitutional rights rather than to take away constitutional rights. It is not clear why, if the affected governments had given priority to the establishment of the required commissions, they could not have established them even during the five months between the 17 September 1997, the date of the Supreme Court's principal decision, and 10 February 1998, the date of the suspension order (during which period the Provincial Courts presumably functioned); indeed, it appears that some governments had found it possible to establish such commissions, because the Court, in its 10 February 1998, order commended "those [provinces] that acted promptly to correct any deficiencies revealed by this Court's clarification of the content of the s. 11(d) guarantee...."[50]

But let us assume that it was impossible for other provinces to establish independent salary commissions within a period of several months, so that there was a strong case for some corrective action in the meantime. Then, in my

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[49] The Court held that the doctrine of necessity precluded any attack on decisions rendered by the Provincial Courts before the *Provincial Judges Reference* was decided. It did not, however, say that the doctrine applied to future decisions.

[50] *Provincial Judges Reference*, *supra* note 3 at para. 19.

submission, all possible alternatives should have been canvassed before a part of the Constitution was suspended. However, the possibility of an alternative was not canvassed.

In my submission, there were interim steps that could have been taken to guarantee the independence of the Provincial Courts, both in fact and in appearance, and thus to *preserve* rather than *subvert* the *Charter* rights of persons charged with offences to trials before independent tribunals. The Court could, for example, have said that it would accept and supervise undertakings by the appropriate Attorney General or Lieutenant Governor in Council:

> *i)* that the Government of the province would move with all deliberate speed, and in all events within one year, to establish the independent, objective and effective salary commission required by the Constitution as interpreted by the Court, and
>
> *ii)* that, until that was done, the Government would not to take any steps to reduce or freeze the salaries or benefits of the judges of the Provincial Court in that province.

It seems to me that this would have been a guarantee in fact and in appearance that the Provincial Court would have the financial security element of the independence required by s. 11(d) as interpreted by the Court. First, it is inconceivable that a provincial Attorney General or Lieutenant Governor in Council would attempt to tamper with Provincial Court salaries in breach of such a formal undertaking given to the Supreme Court of Canada, particularly as the tampering would, by its very nature, be known to the Provincial Court judges and would inevitably become public knowledge. Second, there would be no incentive for provincial governments to try to tamper with Provincial Court salaries, because they would know in advance that any tampering done without going through the independent-commission procedures would be struck down by the courts as unconstitutional. All this would, in my submission, be perfectly apparent to the reasonably well-informed observer whose views determine whether or not a court is sufficiently independent to satisfy s. 11(c) of the *Charter*.

It may well be that the effective suspension of the *Charter* right was not thought to be particularly significant, because the Provincial Courts would *in fact* act independently. I would agree that they would in fact act independently. Indeed, I am doubtful that they lacked independence in the first place. But the suspension of a *Charter* right is a precedent which it seems to me ought not to be set, with the possible and dubious exception of a desperate situation, such as that in the *Manitoba Reference*, in which legal and institutional chaos would otherwise ensue. The suspension in the *Provincial Judges Reference* seems to me to be for a purpose that was not sufficient to justify it on a policy basis and to

have been made without canvassing alternatives which would not require a suspension. The real difficulty is that once an authoritative precedent has been established it is easy to follow it without going back to the fundamental legal and constitutional realities underlying it.

In this discussion, I have so far assumed, as everyone appears to have assumed, that, after the 17 September 1997 decision, Provincial Courts did not have the financial independence required by s. 11(d). I am, however, puzzled by this assumption.

In a passage I have previously quoted from the 17 September 1997 decision, the Supreme Court said that, "Any changes to or freezes in judicial remuneration made without prior recourse to the independent body are unconstitutional."[51]

This was a statement of general application. It applied to previous changes in remuneration in Alberta, Manitoba, and Prince Edward Island which the Supreme Court struck down on the ground that the changes were unconstitutional either because there was no independent-commission process established or because an established independent-commission process had been ignored.[52]

It would apply to any changes made after the September decision. That is to say, changes in Provincial Judges' salaries which were made before the Supreme Court spoke were unconstitutional for lack of the independent-commission process and any changes made afterwards in the absence of an independent-commission process would also be unconstitutional.

The clear result of the Court's 17 September 1997 decision, therefore, was that the governments and legislatures could not, after that date, change Provincial Court judges' salaries without going through an independent-commission procedure. That is to say, the Supreme Court decision constitutionally guaranteed the financial independence of the Provincial Court, because any change that did not involve a constitutionally-satisfactory independent-commission procedure would be constitutionally invalid and of no effect. It is difficult to see how a more powerful protection of financial independence could be devised than a constitutional bar against change of salaries, and the constitutional bar meant that governments could not manipulate Provincial Courts by threatening decreases in remuneration or by promising increases. The existence of this constitutional protection was clear to the world on 18 September 1997. It would also have been clear to the hypothetical reasonably well-informed observer whose perceptions are the standard of independence. Therefore, the Provincial Courts were financially independent on 18 September 1997. If so, there was no need for a suspension of rights under the *Charter*.

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[51] *Provincial Judges Reference*, *supra* note 3 at para. 287.

[52] *Ibid.* at paras. 200, 217, and 224.

It is true that in the course of time, salaries in fixed dollar amounts might fall below the "minimum acceptable level" which, under the September 1997 decision, is mandated by the Constitution.[53] However, as the Court noted,[54]it was not suggested in the Provincial Court Judges Reference that any of the judicial salaries involved were close to that minimum, so it may be inferred that for at least the year from 18 September 1997 to 17 September 1998, which is the period of the suspension under the 10 February 1998 order, the independence of the Provincial Court judges would not be affected by below-minimum salaries.

So it seems to me that the constitutional bar was enough to provide complete protection during that period. If this was the *true* constitutional position, it does not affect the discussion as to whether or not the suspension of s. 11(d), on the basis of the *assumed* constitutional position, was appropriate, but the possibility that it was the true constitutional position does suggest that a more thorough analysis of the situation could have been made before the operation of part of the Constitution was suspended.

3. *Eurig Estate*

This is the probate fees case. In its judgment, the Supreme Court, by a majority, held that Ontario probate fees were not fees but taxes which were not authorised by the enabling statute, and which, indeed, were unconstitutional because they were imposed by what amounted to a money bill that, under s. 53 and s. 90 of the *Constitution Act 1867*, could only be put forward by a government bill in the Legislature. So far, so good.

However, Major J., speaking for the majority, went on to *suspend* the Court's declaration of invalidity of the tax for six months.

His reasons for the suspension, in their entirety, are as follows:

> An immediate declaration of invalidity would deprive the province of the revenue derived from probate fees, with no opportunity to remedy the legislation or find alternative sources of funding. Probate fees have a lengthy history in Ontario, and the revenue derived therefrom is substantial. For example, the evidence presented to this Court indicated that in 1993 and 1994, probate fees collected in Ontario totalled $51.8 million and $52.6 million, respectively. This revenue is used to defray the costs of court administration in the province. An immediate deprivation of this source of revenue would likely have harmful consequences for the administration of justice in the province. The declaration of invalidity is therefore suspended for a period of six months to enable the province to address the issue.[55]

The Court thus purported to authorise the Province to continue to use state power (the power to deny probates) to exact a tax which, according to the

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[53] *Provincial Judges Reference*, *supra* note 3at para. 193.

[54] *Ibid.* at para. 192.

[55] *Eurig Estate*, *supra* note 5 at para.44.

Court's own judgment, was illegal and would continue to be illegal unless Ontario were to validate it by statute. The only reason for authorising the Province to continue to collect the illegal taxes was that stopping the Province from doing so would deprive the Province of a great deal of money. Whether there was any evidence before the Court that the Province would not fund the administration of justice properly without the probate fees money is not apparent from the judgment, but even the proper funding of the administration of justice is not, in my submission, an end which justifies the exaction of illegal taxes. Even if the Province or the administration of justice had greater need of the money than the widows, widowers, and orphans from whose pockets most of the illegal taxes would be extracted—about which the judgment does not cite any evidence other than the huge sums that the Province had been collecting illegally—that greater need did not, in my submission, justify authorising the continuation of the illegal exactions.

While I do not think that the end of keeping the fisc supplied with money could justify the continued illegal exactions, it should be noticed that the judgment does not consider the alternative courses of action that the Province could have followed. All that the Province would have had to do, if it wanted to continue the exaction, would have been to convene a special meeting of the Legislature to enact taxing legislation, which could be made retroactive. Admittedly, the substitution of an identical lawful statutory tax for an unlawful tax would not help those who pay probate fees, but it would have meant, first, that the basis of the exaction would be publicly canvassed in the Legislature, and, second, that if it was confirmed by statute, it would be properly authorised by the proper lawgiver. Or, if the Province would be content with true fees which were not disguised taxes, it could immediately rescind the offending regulation and promulgate a proper one with some cost nexus.[56]

I do not think that the needs of the fisc, or the funding needs of the administration of justice, are any more of an excuse for illegal exactions today than they were in Stuart times. Even if they are, I do not think that the avoidance of the inconvenience involved in fixing up the legal situation quickly was sufficient reason to justify allowing the Province to continue to collect an illegal tax by dint of suspending a basic Constitutional safeguard. It seems to me that this decision is a precedent for allowing the continuation of illegality, and for allowing it without even a justification based on its necessity in order to preserve rule of law, as in the *Manitoba Reference*, or to preserve the orderly administration of justice, as in the Provincial Judges Reference. The suspension power appears to be broadening down from precedent to precedent.

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[56] In the event, the Province moved quickly by enacting the *Estates Administration Tax* Act S.O. 1998 c. 20, which validated all past and future probate tax collections, with the single exception of the tax paid by the Eurig estate. The text describes the situation that was in contemplation at the time of the *Eurig* decision.

The Supreme Court itself said in the *Quebec Reference*, "[t]he exercise of all public power must find its ultimate source in a legal rule."[57]

I cannot see any legal rule, inside or outside the Constitution, that permits the Supreme Court to exercise a public power to allow a Province to make illegal exactions with impunity, and, more particularly to allow it do so simply to protect the fisc.

III. CONCLUSION

THE SUPREME COURT SAID in the *Quebec Reference* case that the Constitution is not a straitjacket. It said that "a superficial reading of selected provisions of the written constitutional enactment, without more, may be misleading."[58] The Court has also said, in the *Provincial Judges Reference*, that the Constitution has evolved over time, and in the *Quebec Reference* it adopted the simile of the living, and therefore growing, tree. But I think that a court, when interpreting a Constitution, should refrain from finding that something is there merely because it would be a good thing if it were, no matter how admirable the reasons. As I have indicated, I do not see which part of the Constitution mandates reciprocal obligations to negotiate about the secession of a province, or which part of the Constitution requires the establishment of independent salary commissions with the precise characteristics stipulated by the Supreme Court of Canada.

Nor do I see in the Constitution any foundation for a court power to suspend any part of it, or a court power to authorise the Executive, even temporarily, to exact taxes contrary to law. If the suspension of the Constitution is necessary to preserve the essential interests of the body politic in democratic government and the rule of law, and if nothing else can do so, it may be permissible to suspend the Constitution, but, in my submission, nothing but the avoidance of a desperate and otherwise irreparable situation does so.

There is a further point. The preamble to the *Constitution Act 1867* provided, as the Supreme Court has noted, that Canada was to have a constitution similar in principle to that of the United Kingdom. If there is one English document which is close to being entrenched in the Constitution of the United Kingdom, it is the *Bill of Rights of 1689*,[59] which embodied what was really a compact between Parliament and the King and Queen. Here are two of its provisions:

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[57] *Quebec Reference*, *supra* note 1 at 418.

[58] *Provincial Judges Reference*, *supra* note 3 at paras. 148, 150.

[59] (U.K.) 1 Will. 3, c. 2.

i) That the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of parliament, is illegal.

ii) That levying money for or to the use of the Crown, by pretence of prerogative, without grant of parliament, for longer time, or in other manner than the same is or shall be granted, is illegal.

These provisions, literally interpreted, refer only to suspensions and illegal exactions by the Crown. They do, however, in my submission, enact general prohibitions against suspensions of law and the continuance of illegal exactions generally, the exercise of Crown powers being the only specific threat at the time. No doubt, as has been said, the courts are "the least dangerous branch of government."[60] But that is not to say that the courts should assume powers which are not provided for in the written Constitution and do not flow inevitably from it, and which no other branch of government has exercised in England or Canada since 1689.

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60 Per Alexander Hamilton, The Federalist, No. 78, p. 398, cited by La Forest J. in the *Provincial Judges Reference*, *supra* note 3 at para. 300.