

# UNDERLYING CONSTITUTIONAL PRINCIPLES: THE LEGACY OF JUSTICE RAND

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So is it with freedom of speech. *The Confederation Act* recites the desire of the three provinces to be federally united into one Dominion “with a constitution similar in principle to that of the United Kingdom.”<sup>2</sup> Under that constitution, government is by parliamentary institutions, including popular assemblies elected by the people at large in both provinces and Dominion; government resting ultimately on public opinion reached by discussion and the interplay of ideas. If that discussion is placed under license, its basic condition is destroyed; the government, as licensor, becomes disjoined from the citizenry. The only security is steadily advancing enlightenment, for which the widest range of controversy is the *sine qua non*.

Justice Rand in *Saumur v. City of Quebec*.<sup>1</sup>

## INTRODUCTION

Justice Ivan Cleveland Rand died in 1969, the year before I arrived in Canada from New Zealand as a graduate student. While his voice was influential among those who persuaded me to come to this country to undertake further studies, Justice Rand did not speak to me in person but rather through the power of his judgments. In particular, his seminal judgment in *Roncarelli v. Duplessis*<sup>2</sup> (“*Roncarelli*”) struck a particularly harmonious chord at a time when I was concerned about the absence from New Zealand case law of any developed theory or conception of the role of the courts when faced by the spectre of abuse of executive powers. If Canada had judges as articulate and reflective as this, it was obviously a place in which graduate legal studies could be a stimulating experience.

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<sup>1</sup> [1953] 2 S.C.R. 299, at 330.

<sup>2</sup> [1959] S.C.R. 121.

Within a few short weeks of my arrival in the Fall of 1970, the invocation of the *War Measures Act*<sup>3</sup> certainly led to second thoughts about whether I had made the right choice, at least in terms of a jurisdiction where placing constraints on unbridled executive power was a major priority. Indeed, the more I looked into Canadian jurisprudence on the subject, the more I learned that there was no judicial consensus as to the appropriate role of the courts in relation to exercises of executive power.<sup>4</sup> However, Justice Rand seldom if ever disappointed, especially as I read more of his judgments in the public law arena and, in particular, the other constitutional and administrative law cases<sup>5</sup> coming to the Supreme Court of Canada from Quebec during the Duplessis era.

At a time when there again is much interest in, indeed controversy about, the extent to which underlying and unwritten principles have a role to play in our constitutional law, it is timely to re-examine Justice Rand's position on the implicit premises of the Canadian constitution and the extent to which they impose constraints on both executive and legislative powers, both federal and provincial.<sup>6</sup>

## THE "IMPLIED BILL OF RIGHTS"

While Justice Rand never apparently used the term, the theory of underlying or "unwritten" principles of the constitution with which he is associated is that of "an implied Bill of Rights", said by many to find its justification in the Preamble to what is now the *Constitution Act, 1867*. One, and perhaps the dominant or most ambitious conception of this theory, is the following: given the expressed desire of the founding provinces to have "a constitution similar in principle to that of the United Kingdom", there were certain underlying principles incorporated into the Canadian constitution. These principles were inviolable in the sense that neither the provincial legislatures nor the Parliament of Canada could remove them.

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<sup>3</sup> R.S.C. 1970 c. W-2.

<sup>4</sup> I have explored this theme in "The Role of the Judiciary in the Review of Administrative Policy Decisions: Issues of Legality" in M. J. Mossman and G. Otis (eds.), *The Judiciary as Third Branch of Government: Manifestations and Challenges to Legitimacy* (Montréal: Les Éditions Thémis, 2000) at 313.

<sup>5</sup> I have previously dealt with the administrative law judgments of Justice Rand in a symposium in his memory at the University of Western Ontario: "Mr. Justice Rand: Defining the Limits of Court Control of the Administrative and Executive Process" (1979-80) 18 *University of Western Ontario Law Review* 65. In that symposium, his contributions to constitutional law were assessed by my late and distinguished colleague, Dr. W. R. Lederman: "Mr. Justice Rand and Canada's Federal Constitution" (1979-80) 18 *U.W.O. L. Rev.* 31.

<sup>6</sup> This theme has been explored by A. Lajoie, "The Implied Bill of Rights, the Charter and the Role of the Judiciary" (1995) 44 *University of New Brunswick Law Journal* 337.

The theory first surfaced in the judgments of Chief Justice Duff and Justice Cannon in *Re The Accurate News and Information Act of Alberta*<sup>7</sup> (“*Alberta Press*”) in 1938 in reference to provincial legislation compelling Alberta newspapers to print government news releases as to the objectives of legislation and the difficulties of achieving those objectives. It was then invoked by some of the judges in two cases coming out of Quebec in the 1950s, notably *Switzman v. Elbling*<sup>8</sup> (“*Switzman*”) and *Saumur v. City of Quebec*<sup>9</sup> (“*Saumur*”), both involving attempts by the Duplessis government to suppress the practice of their faith by Jehovah’s Witnesses.

Leaving aside for the moment the merits of the argument for such an implied Bill of Rights, it is important to record once again the limited nature of its acceptance in these three cases. First, in none of the three judgments or elsewhere (at least at that time) did it attract the support of a majority of the Supreme Court of Canada, even as a constraint on provincial legislative activity. Thus, only three<sup>10</sup> of the six justices based their judgments on that theory in the *Alberta Press* case, with the other three<sup>11</sup> expressly declining to pronounce on this question. Similarly, it was not possible to construct a majority in either *Switzman* or *Saumur* accepting its legitimacy as part of Canada’s constitutional order. Secondly, of the justices who accepted the validity of the theory, only one, Justice Abbott in *Switzman*, was prepared to go as far, in what even he described as *dicta*, as to see it as a limitation on the legislative jurisdiction of Parliament.<sup>12</sup> Even Justice Rand located his discussion of the theory clearly within the domain of challenges to provincial legislative action.<sup>13</sup> However, in *Switzman*, he made clear that he was not foreclosing the possibility that the principles might be deployed against federal legislation – a matter that “must await future consideration”.<sup>14</sup> Thirdly, the scope of the protections derived from the implied Bill of Rights appeared to have been limited in the sense that, in all three cases, the focal points were those of freedom of speech, political expression and the press, freedoms that the relevant justices saw as essential for the maintenance of parliamentary institutions.<sup>15</sup> Fourthly, while there were frequent references to the Preamble of the *Constitution Act, 1867*, the elaboration of the theory was more broadly-based. This was particularly clear from the judgment of Justice Rand in *Switzman*, where he described the argument as derived not just from the Preamble but the overall structure of the *Constitution Act, 1867*:

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<sup>7</sup> [1938] S.C.R. 100, at 133-34 and 145-46.

<sup>8</sup> [1957] S.C.R. 285, at 306

<sup>9</sup> *Supra* note 1.

<sup>10</sup> Justice Davis concurred with Chief Justice Duff.

<sup>11</sup> *Supra* note 7, Kerwin J. (Crockett J., concurring) at 162 and Hudson J. at 163.

<sup>12</sup> *Supra* note 8, at 328.

<sup>13</sup> *Supra* note 1, at 328-33 (*Saumur*) and *supra* note 8, at 306-07 (*Switzman*).

<sup>14</sup> *Supra* note 8, at 307.

<sup>15</sup> See also Rand J.’s judgment in *Boucher v. The King*, [1951] S.C.R. 265 at 285, 288 and 290. However, both here and in *Saumur*, he also attributed a fundamental status to freedom of religion: *ibid.*, at 285 and *Saumur*, *supra* note 1, at 329-30.

Indicated by the opening words of the preamble in the Act of 1867, reciting the desire of the four Provinces to be united in a federal union with a constitution “similar in principle to that of the United Kingdom”, the political theory which the Act embodies is that of parliamentary government, with all its social implications, and the provisions of the statute elaborate that principle in the institutional apparatus which they create or contemplate.<sup>16</sup>

In other words, the foundation on which at least this version of the theory is built is not only the Preamble but also, as Dale Gibson has argued,<sup>17</sup> those parts of the *Constitution Act, 1867* which deal with the legislative branch and constitutionalise the “Parliament of Canada” and the legislative assemblies of the provinces. It did not involve the Preamble as an independent, free-standing source of implicit constitutional rights or protections.

Judicial support was therefore equivocal at best and the seeming ambit of the doctrine’s operation limited. Indeed, any lingering weight that the theory had in Canadian constitutional law seemed to suffer a mortal blow from the Supreme Court of Canada in *Canada (Attorney General) v. Montreal (City)*<sup>18</sup> (“*Dupond*”), where the implied Bill of Rights was advanced as a basis for striking down a Montreal by-law regulating assembly as contrary to freedoms of “speech, of assembly and association, of the press and of religion”. However, according to Justice Beetz, for the majority:

None of the freedoms referred to is so enshrined in the Constitution as to be above the reach of competent legislation.<sup>19</sup>

This appeared to be the death-knell once and for all of the implied Bill of Rights theory!

Nonetheless, the Court and indeed Justice Beetz himself had second thoughts. In a 1995 article, Andrée Lajoie reported a private conversation with Justice Beetz in which he stated that, in the course of writing the judgment in *Dupond*, he felt himself becoming a conservative but not being able to help it!<sup>20</sup> Obviously, he must have reconsidered because in 1985 he concurred with Chief Justice Dickson in *Fraser v. Public Service Staff Relations Board*<sup>21</sup> in which the then Chief Justice gave new

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<sup>16</sup> *Supra* note 8, at 306.

<sup>17</sup> D. Gibson, “Constitutional Vibes: Reflections on the *Secession Reference* and the Unwritten Constitution” (1999-2000) 11 *National Journal of Constitutional Law* 49, at 51-52. [1978] 2 S.C.R. 770.

<sup>19</sup> *Ibid.*, at 796.

<sup>20</sup> *Supra* note 6, at 342, note 32.

<sup>21</sup> [1985] 2 S.C.R. 455.

credence to the implied Bill of Rights theory.<sup>22</sup> Even more significantly and without any reference to what he had said in *Dupond*, Justice Beetz's concurring judgment in *OPSEU v. Ontario*<sup>23</sup> went so far as to extol the version of the theory presented by Justice Abbott in *Switzman*:

There is no doubt in my mind that the basic structure of our Constitution, as established by the *Constitution Act, 1867*, contemplates the existence of certain political institutions, including freely elected legislative bodies at the federal and provincial levels.<sup>24</sup>

After references to both the *Alberta Press* case<sup>25</sup> and Justice Abbott's reasons for decision in *Switzman*,<sup>26</sup> he then continued:

Speaking more generally, I hold that neither Parliament nor the provincial legislatures may enact legislation the effect of which would be to substantially interfere with the operation of this basic constitutional structure.<sup>27</sup>

However, as Justice Beetz himself observed in the very next paragraph, to the extent the *Charter* gave even broader protections to political rights than could be comprehended within the scope of the basic structure of the *Constitution Act, 1867*, it was unlikely that such future claims would arise all that frequently!<sup>28</sup>

Indeed, this became even clearer when one considers the impact of the constitutional changes of 1982. There now seem to be very limited opportunities for invocation of an implied Bill of Rights argument, at least of a democratic, parliamentary institution-enhancing variety. It now takes a constitutional amendment to alter provisions of the *Constitution Act, 1867* with respect to parliamentary institutions. Not only that but there are also explicit protections for democratic rights enshrined in sections 3 to 5 of the *Charter*, sections which are not subject to the section 33(1) legislative override and may themselves be altered only by constitutional amendment.<sup>29</sup>

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<sup>22</sup> *Ibid.*, at 462-63.

<sup>23</sup> [1987] 2 S.C.R. 2.

<sup>24</sup> *Ibid.*, at 57.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*

<sup>29</sup> There is, of course, an interesting question as to whether provisions in the *Constitution Acts* which involve underlying constitutional principles are in fact subject to the process of constitutional amendment. In fact, at least one of the unsuccessful attacks based on underlying principles was on a constitutional amendment and another on an existing provision in the Constitution: *infra* note 81.

Nonetheless, section 2(b) of the *Charter* and its protection of the freedoms of “thought, opinion and expression, including freedom of the press and other media of communication” is subject to the section 33(1) override. This could conceivably give rise to a situation in which the implied Bill of Rights is available to challenge a legislated notwithstanding clause which so interfered with the freedoms enshrined in section 2(b) as to derogate from the proper functioning of our parliamentary system. In such a case, the courts would be confronted with the dilemma of whether such an argument could prevail over the clear authority provided by section 33(1) to engage in the override. Would the protections implied from the structure of the *Constitution Act, 1867* (and presumably now also sections 3 to 5 of the *Charter*) provide a basis for trumping the formal authority section 33(1) affords to Parliament and the legislatures?

That theoretical possibility aside, did the Court’s apparent recognition of the implied Bill of Rights come at the very moment when it had really ceased to be needed? In part, the answer to that question might well depend on the extent to which arguments based on the structure of the Canadian constitution and the promise of the Preamble to the *Constitution Act, 1867* might extend beyond protection of parliamentary institutions into other domains. At this point we enter the terrain of recent controversy.

The controversy centres primarily on two Supreme Court of Canada judgments: *Provincial Court Judges*<sup>30</sup> and *Reference re Secession of Quebec*<sup>31</sup> (“*Secession Reference*”). In the first, the majority of the Court, over a powerful but solitary dissent from Justice La Forest, relied on the Preamble to the *Constitution Act, 1867* for the proposition that provincial court judges enjoy constitutionally protected guarantees of impartiality, independence, and of financial security, the latter being of particular interest in the case. In the second, the Court identified four underlying principles of the Canadian constitution, capable of creating constitutional rights and entitlements over and above those enshrined specifically in the constitution itself. Those underlying constitutional principles are federalism, democracy, constitutionalism and the rule of law in the context of protection of minorities. As is well-known, the Court then deployed these principles for the purposes of determining both that secession is constitutionally possible and the conditions under which it could take place.

The Court’s assertion of these constitutional principles attracted harsh criticism, including assertions that the Court had arrogated to itself the power to rewrite the constitution or to expand its coverage by an illegitimate gap-filling process.<sup>32</sup> This

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<sup>30</sup> *Ref. re Remuneration of Judges of Provincial Court of Prince Edward Island; Manitoba Provincial Judges Assn. v. Manitoba (Minister of Justice)*, [1997] 3 S.C.R. 3.

<sup>31</sup> [1998] 2 S.C.R. 217.

<sup>32</sup> R. Elliot, “References, Structural Argumentation and the Organizing Principles of Canada’s Constitution” (2001) 80 *Canadian Bar Review* 67; W.H. Hurlburt, “Fairy Tales and Living Trees: Observations on Recent Constitutional Decisions of the Supreme Court of Canada”

role is criticized as being too vague, uncertain and open-textured, as having no basis or foundation in the text of the constitution (“the imaginary principles of constitutional law”, to borrow a phrase from a colleague), and, in the case of the guarantees of independence for provincial court judges, as involving historical revisionism and rejection of the explicit text and structure of the constitution itself.<sup>33</sup> More generally, what also concerns many of the critics is a sense of a further anti-democratic and anti-constitutional power grab by unelected and unaccountable courts.<sup>34</sup>

The validity of these criticisms will be the focus of the balance of this essay. More particularly, I want to tease out what the current debate tells us about the essential nature and components of our constitutional arrangements and the project of actually doing constitutional law. What sources should count and what modes of analysis, argumentation or interpretation are appropriate or valid? If we can at least begin to isolate in those terms what is at stake, we may be on the road to resolving the difficulties or at least understanding where the true causes of the controversy lie. I also want to suggest that the judgments and extra-curial writings of Justice Rand may help us see some of the problems or dilemmas.

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(1999) 26 *Manitoba Law Journal* 181; W. J. Newman, ““Grand Entrance Hall,” Back Door or Foundation Stone? The Role of Constitutional Principles in Construing and Applying the Constitution of Canada” (2001) 14 *Supreme Court Law Review* (2d) 197; J. Leclair, “Canada’s Unfathomable Unwritten Constitutional Principles” (2002) 27 *Queen’s Law Journal* 389; J. Cameron, “The Written Word and the Constitution’s ‘Vital Unstated Assumptions’” in P. Thibault, B. Pelletier and L. Perret (eds.), *Essays in Honour of Gérald-A. Beaudoin* (Cowansville: Éditions Yvon Blais, 2002) at 89. Qualified support for the application of underlying principles or norms can, however, be found in D. Gibson, “Constitutional Vibes: Reflections on the *Secession Reference* and the Unwritten Constitution” *supra* note 17; P. Monahan, “The Public Policy Role of the Supreme Court of Canada in the *Secession Reference*” (1999-2000) 11 *N.J.C.L.* 65; M. D. Walters, “The Common Law Constitution in Canada: Return of *Lex Non Scripta* as Fundamental Law” (2001) 51 *University of Toronto Law Journal* 92; S. Choudhry, “Unwritten Constitutionalism in Canada: Where Do Things Stand?” (2001) 35 *Canadian Business Law Journal* 113; and David Dyzenhaus, “Constituting the Rule of Law: Fundamental Values in Administrative Law” (2002) 27 *Queen’s L.J.* 445; and more generally, K. Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001) at 139 especially.

<sup>33</sup> S. M. Corbett, “Reading the Preamble to the *British North America Act, 1867*” (1998) 9 *Constitutional Forum* 42 and Walters, *supra* note 32, at 100-04 particularly.

<sup>34</sup> This is, of course, the central theme of the strongest opposition to the work of the Supreme Court of Canada in the era of the *Charter*: F. L. Morton and R. Knopff, *Charter Politics* (Peterborough: Broadview Press, 2000), endorsed almost without qualification by R. H. Bork in *Coercing Virtue: The Worldwide Rule of Judges* (Toronto: Vintage Canada, 2002) at chapter 3. See also C. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, 2<sup>nd</sup> ed. (Toronto: Oxford University Press, 2001).

## WHAT IS THE CANADIAN CONSTITUTION?

Warren Newman, in an article largely critical of the role of unwritten and underlying constitutional principles, at least as free-standing sources of constitutional law, defines the problem away when he describes the Canadian constitution as consisting of “the provisions of the written text” and “the conventions of the Constitution” with only the former giving rise to justiciable claims.<sup>35</sup> However, there is a very real sense in which this definition is incomplete. This becomes clear when we consider the state of Canadian constitutional law prior to 1982. The claim that our constitution was entirely text and convention-based at that time surely encounters serious objections.

This point was made with force by the Supreme Court of Canada in *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*<sup>36</sup> (“*New Brunswick Broadcasting*”). Justice McLachlin, for a majority of the Court, held that parliamentary privileges prevailed over media claims to televise the proceedings of the Nova Scotia House of Assembly, based on section 2(b) of the *Charter*. In upholding parliamentary privileges as constitutional norms and as capable of trumping express provisions of the *Charter*, Justice McLachlin made particular reference not just to the mixed origins of Canadian constitutional law but also to section 52(2) of the *Constitution Act, 1982* which defines the Constitution of Canada as including but not exclusively comprised of a list of statutory enactments.<sup>37</sup> In *New Brunswick Broadcasting*, Chief Justice Lamer concurred with the majority on different grounds but in *Provincial Court Judges*, he expressed his general agreement with the assertion that the Canadian constitution was not just a text-based set of rules and principles:

I agree with the general principle that the Constitution embraces unwritten as well as written rules, largely on the basis of s. 52(2). Indeed, given that ours is a Constitution that has emerged from a constitutional order whose fundamental rules are not authoritatively set down in a single document, it is of no surprise that our Constitution should retain some aspect of this legacy.<sup>38</sup>

Also suggestive of the existence of constitutional norms outside the text of the various statutory constitutional instruments is section 26 of the *Charter*, with its explicit statement that the recognition of certain rights and freedoms in the *Charter* does not prejudice “the existence of any other rights or freedoms that exist in Canada”.

Of course, it is possible to treat recognition of the constitutional guarantee of parliamentary privileges as a text-based ruling, to the extent the constitutional

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<sup>35</sup> *Supra* note 32, at 199.

<sup>36</sup> [1993] 1 S.C.R. 319.

<sup>37</sup> *Ibid.*, at 373-74.

<sup>38</sup> *Supra* note 30, at 68.



right asserted stems from or is an aspect of a status or institution provided for in the *Constitution Act, 1867*, i.e., Parliament or a Legislative Assembly. It is thin but there nonetheless. There are other examples. As my colleague, Mark Walters has noted,<sup>39</sup> probably the clearest instances of judicial recognition of constitutional rights not based on the terms of the various *Constitution Acts* and the other statutory instruments referred to in section 52(2) of the *Constitution Act, 1982*, lie in much of the constitutional law that has grown up around treaty and customary rights of Aboriginal peoples. More generally, we also find this phenomenon in the acceptance, as a matter of Canadian constitutional law, of those principles which formed part of the unwritten common law of the English constitution. Sometimes we attribute to them the force of text because, as in the case of parliamentary privileges, they can be related to institutions which form part of our explicit constitutional fabric. On other occasions, the *Constitution Act, 1867* does not help, save perhaps through the vehicle of the Preamble, as for example in relation to claims of executive power and privilege, and other continued manifestations of residual prerogative powers.<sup>40</sup>

To recognise the existence of a set of “constitutional rules” emanating not primarily from the text of the *Constitution Acts* but from common or customary law does not necessarily lead to recognition of their immutability, in the sense that they prevail over duly enacted legislative abrogations. To so hold would be to attribute to all such common law constitutional rules a priority over another feature of the United Kingdom constitution, the supremacy of Parliament. For such “common law” rules to survive legislative repeal, the immutability of the rules must be argued on some form of more fundamental or thick textual justification than would normally suffice. This is particularly so in situations such as *New Brunswick Broadcasting*, where the common law rule was asserted to prevail over or render entirely inapplicable an express constitutional guarantee.<sup>41</sup>

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<sup>39</sup> Mark D. Walters, *supra* note 32, at 141.

<sup>40</sup> For example, *Babcock v. Canada (Attorney General)*, [2002] 3 S.C.R. 3 in which the Court considered the validity of the executive privilege provisions of the *Canada Evidence Act*, R.S.C. 1985, c. C-5. In response to a claim that these provisions trespassed upon the independence of the judiciary as guaranteed by both the Preamble to and section 96 of the *Constitution Act, 1867*, the Court wrote (at para. 60) of the “long common law tradition of protecting Cabinet confidences” and the fact that “superior courts operated since pre-Confederation without the power to compel Cabinet confidences”. Also in *Krieger v. Law Society of Alberta* [2002] 3 S.C.R. 372, at para. 3, Iacobucci and Major JJ. asserted that there “is a constitutional principle that Attorneys General of this country must act independently of partisan concerns when exercising their delegated sovereign authority to initiate, continue or terminate prosecutions.”

<sup>41</sup> What is left over is the fascinating question whether a legislature could legislate to reduce or eliminate its privileges. In the judgment, the issue is decided by reference to competing claims of the common law rule and the *Charter* (e.g., *supra* note 36, at 373). McLachlin J. also refers to such privileges as an “inherent constitutional right” possessed by the legislature. However, to the extent that any such privilege is a matter of provincial constitutional law, section 45 of the *Constitution Act, 1982* would seem to allow change by an ordinary Act of

This notion of constitutional norms with varying degrees of legal force was not a novel concept. Indeed, it achieved explicit recognition in the *Constitution Act, 1982*, including the *Charter*. Some provisions of the *Charter* are subject to legislative override; others are not. Section 1 provides justification for what would otherwise be violations of the *Charter*; but such justification analysis cannot be deployed with respect to violations of sections 3 to 5 of the *Charter* or of the provisions of the *Constitution Act, 1867* or of other statutory enactments which are expressly made part of our constitutional framework by virtue of section 52(2). Also claiming attention is the *Canadian Bill of Rights*<sup>42</sup> and other legislation such as human rights codes which have been described by the courts as having *quasi-constitutional* status.<sup>43</sup> The *Bill of Rights* prevails over prior and subsequent legislation<sup>44</sup> but, like most provisions of the *Charter*, its protections are also subject to a form of legislative override.<sup>45</sup>

In short, what counts as constitutional law in Canada comes from a wide variety of sources and varies greatly in the intensity of the level of guarantee provided. In such a regime, it is hardly surprising that appeals to underlying principles, extra-textual norms, and common law rules with slight textual support are frequent and sometimes judicially recognised.

Indeed, even in countries where the written constitution is a single document intended at its inception to be the exclusive source of constitutional rights and freedoms, there may nonetheless be room for development of other than text-based constitutional norms. Thus, in his monograph, *Designing Democracy - What Constitutions Do?*,<sup>46</sup> Cass Sunstein, speaking principally but not exclusively about the United States Constitution, expresses the following point of view:

Where do constitutional rights come from? Once a constitution is in place, the usual answer is: the words of the constitution. The answer is right so far as it goes, but it is ludicrously incomplete. The rights-conferring provisions of most constitutions are vague and apparently open-ended; they are hardly self-interpreting....

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the legislature.

<sup>42</sup> S.C. 1960, c. 44.

<sup>43</sup> *E.g.*, in the case of Human Rights Codes, *Canada (Attorney General) v. Mossop* [1993] 1 S.C.R. 554; also, *Béliveau St.-Jacques v. Fédération des employés et employés de service public* [1996] 2 S.C.R. 345 (Quebec's *Charter of Human Rights and Freedoms*, R.S.Q. 1977, c. C-12); *Lavigne v. Canada (Office of Commissioner of Official Languages)*, [2002] 2 S.C.R. 773 (*Privacy Act*, R.S.C. 1985, c. P-21 and the *Official Languages Act*, R.S.C. 1985, c. 31 (4<sup>th</sup> Supp.)).

<sup>44</sup> *Supra* note 42, sections 1 and 2.

<sup>45</sup> *Ibid.*, section 2 requires an express declaration that a statute operate notwithstanding the *Canadian Bill of Rights*.

<sup>46</sup> (New York: Oxford University Press, 2001).

The conventional lawyer's tools include not just text but also constitutional structure and history....

Sometimes, however, these conventional sources of interpretation run out, in the sense that they leave large gaps and ambiguities.<sup>47</sup>

He then goes on to consider how the courts should respond to situations where the text has “run out”,<sup>48</sup> a matter to which I will turn towards the end of this essay. However, for present purposes, suffice it to say that he rejects the view that the courts have no role to play where the problems of gaps and ambiguities cannot be resolved simply by appeals to structure and history.

What also needs to be kept in mind in assessing the legitimacy of the use by courts of underlying constitutional principles is the extent to which terminology matters in the description of judgments and in setting the terms for debate. Put bluntly, “underlying” and “unwritten” are not synonymous in this domain, despite the fact that even the Supreme Court of Canada seems to treat them as such and that this essay has not yet really distinguished between them. In fact, it is not without significance that those opposed to the use of underlying principles commonly speak of them as being also “unwritten principles”. That to some extent gives critics an immediate and unjustified advantage.

Thus, if we take the four underlying principles of the Canadian constitution identified in the *Secession Reference*, one at least is actually explicitly recognized as an underlying principle in the constitution itself. The Preamble to the *Constitution Act, 1982* proclaims that “Canada is founded on principles that recognize...the Rule of Law”. Nor are the other underlying constitutional principles (federalism, democracy and the protection of minorities) unwritten, given that each can be justified by clear references to the structure and text of the *Constitution Acts, 1867-1982*, including the *Charter*. What for the most part are unwritten are not the principles but the more particular rules derived from the principles. Once you leave aside those few aspects of the common law constitution, such as executive privilege and Crown immunity, that lack a textual base, the real issue is the extent to which the courts should be able to create explicit constitutional rules not found in the text.

Moreover, even in the performance of that task, text is by no means irrelevant. On occasion, as seen already, the relevant underlying principle notwithstanding, text may simply indicate that adoption of a particular rule will do unnecessary violence to a particular provision in the text of the constitution or to its structure. Beyond that, however, text also counts to the extent it provides a basis for arguing by analogy from

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<sup>47</sup> *Ibid.*, at 69.

<sup>48</sup> *Ibid.*, see generally chapter 3, “Against Tradition”.

that which is there already. Thus, one strong, if not the strongest, basis for asserting a principle-based claim for recognition of an “unwritten” constitutional rule arises in situations where it can be seen as a natural offshoot from other explicit constitutional protections. Conversely, there will be considerable need for caution in most instances where the textual support for creation of the rule in question is lacking or very thin, albeit that the claim is principle-based. In short, by describing the Court’s project as that of the promotion of “unwritten principles”, critics are not only mis-speaking but also covering up the fact that “written” and “unwritten” are not in reality sharply differentiated concepts but are points on a spectrum.

In light of this analysis, I now turn to the two controversial appeals to unwritten or underlying constitutional principles, those emanating from the Supreme Court of Canada in the *Provincial Court Judges* case and the *Secession Reference*.

## THE INDEPENDENCE OF THE JUDICIARY

Many points about the Canadian constitution can be elucidated usefully from the evolution of the role and nature of the Canadian judiciary. For these purposes, I will concentrate on four critical aspects in that evolution: the role of the courts in adjudicating the constitutionality of legislation; the protection of the superior, district and county courts from provincial reduction of their jurisdiction; the protection of superior, district and county courts from federal trenching upon their jurisdiction; and the guarantees of independence and impartiality possessed by all courts.

While Canada never had the equivalent of *Marbury v. Madison*,<sup>49</sup> Canadian courts eventually came to accept that they had the capacity to strike down legislation found to violate provisions of the *Constitution Act, 1867*. There have been useful and informative historical analyses of this issue in Canadian law and varying explanations of how the assertion or, perhaps more accurately, assumption of this role came about.<sup>50</sup> Indeed, it may well be that the best account is that based on the notion of the Judicial Committee of the Privy Council policing subordinate legislatures in the exercise of authority conferred on them by an imperial statute.<sup>51</sup> Whatever the explanation, it is clear that the authority of Canadian courts to engage in this kind of constitutional

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<sup>49</sup> (1803), 5 U.S. (Cranch) 137.

<sup>50</sup> W. R. Lederman, “The Independence of the Judiciary” (1956) 34 *Can. Bar Rev.* 769 and 1139; B. L. Strayer, *The Canadian Constitution and the Courts*, 3<sup>rd</sup> ed. (Toronto: Butterworths, 1988); J. Smith, “The Origins of Judicial Review in Canada” (1983) 16 *Canadian Journal of Political Science* 16; and M. D. Walters, “The Common Law Constitution”, *supra* note 32, at 117-36 particularly.

<sup>51</sup> Gordon Bale, *Chief Justice William Johnstone Ritchie: Responsible Government and Judicial Review* (Ottawa: Carleton University Press, 1991) at chapter 10 (“Judicial Review and Confederation”), writing particularly of *R. v. Chandler* (1869) 12 N.B.R. 556.

policing was not text-based, save in the loosest of senses; in other words, it is necessarily inferred from the existence of a written constitution (as in *Marbury v. Madison*) that some mechanism must exist for policing its limits and, given the inclusion in the *Constitution Act, 1867* of a series of provisions under the heading “Judicature”, the section 96 courts are the most obvious candidates for this role. Whether that authority is derived from that form of logical gymnastics or from the role of the common law courts as scrutinizers of subordinate legislation, the character of the claim is more in the nature of a common law assertion of power than as one based on a reading of the text of the Constitution.

Text did play a much clearer role in the next two characteristics identified above. The argument in favour of guarantees for the superior, district and county courts against incursions by provincial legislatures was based in large measure on the assertion that, if the federal appointing power found in section 96 of the *Constitution Act, 1867* was to continue to have meaning, these courts had to continue to have something to do. To allow provinces to diminish incrementally their jurisdiction would be to countenance the possibility that they could eventually be denuded of all jurisdiction. It would also diminish the role of superior courts as part of a national, unitary court system for the kinds of disputes that they handled. This then led to the further implication that they must have a guaranteed core of jurisdiction – defined largely in terms of the powers being exercised by those courts at the time of Confederation – which cannot be transferred directly to other provincially established courts or tribunals.<sup>52</sup> Here, the connection with text is closer, in that the conclusions are derived from a specific provision in the *Constitution Act, 1867*, the federal appointing power.

Whether, of course, it is a good reading of text is another question. Thus, John Willis was critical of this line of jurisprudence in his seminal 1939 article in the *Harvard Law Review*,<sup>53</sup> seeing the federal appointing power as far too thin a textual argument on which to base such a far-reaching inference of constitutionally-protected jurisdiction. For him, there was little or nothing in the pre-legislative history to indicate an intention to imbue the federal appointment power with such constitutional force. He also viewed the section 96 jurisprudence as partly enshrining an American-style separation of powers in the Canadian constitution, something that had certainly not been part of the intention of the parents of Confederation.<sup>54</sup>

Subsequently, the role of section 96 courts received a further fillip with application of the principles just identified to federal legislation.<sup>55</sup> Here, the federal

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<sup>52</sup> For a good summary, see Patrick Monahan, *Constitutional Law*, 2<sup>nd</sup> ed. (Toronto: Irwin Law, 2002) at 138-44.

<sup>53</sup> “Administrative Law and the British North America Act” (1939) 53 *Harvard Law Review* 251 at 261-71.

<sup>54</sup> *Ibid.*, at 270-71.

appointing power would not in itself suffice. A different form of justification had to be provided, and this time the inferences were drawn from the protections of security of tenure and financial security that are found in the other provisions of the “Judicature” part of the *Constitution Act, 1867*. According to the Court, these point to the existence of an independent superior court judiciary, with independence defined to include not only the specific guarantees in sections 96-101 but also an irreducible core of jurisdiction based on the roles played by such courts at the time of Confederation.<sup>56</sup> In one sense, this too is textual but its links with the text are certainly much more attenuated than those used to justify the protection of section 96 courts from provincial legislatures. In other words, the justifications are much more outside the formal text and structure of the written constitution and based increasingly on a sense of underlying values.

As Justice La Forest made only too clear in his dissent in the *Provincial Court Judges* case,<sup>57</sup> the links with explicit text and indeed with history had arguably disappeared almost entirely when it came to the next extension: the recognition of general guarantees of impartiality and independence in the case of provincially appointed judges. Indeed, exclusion of such judges from the “Judicature” provisions of the *Constitution Act* could well be read as indicating exactly the opposite conclusion – that independence for such judges is entirely up to the provinces, with the only historical discipline being the appellate powers possessed by section 96 courts over judgments of provincially-appointed judges. Aside from the legitimacy of using the Preamble alone to justify such a constitutional protection for provincial court judges, the constitution of the United Kingdom, which in principle the four founding provinces were endorsing, was a constitution which itself did not recognise any guarantees of independence for inferior court judges at that time (1867). The *Act of Settlement, 1701* only applied to superior court judges.

The question then arises whether any of these four evolutions represents “bad” constitutional law. That is an extremely difficult question and is, in large measure, contingent on the legitimacy of demands for clear authority in the text. How thick do the textual justifications have to be? When do single words (“Parliament”) or phrases (a federal appointing power) justify the recognition of substantive constitutional protections? To what extent, if at all, can the Preamble count as text

<sup>55</sup> *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725.

<sup>56</sup> *Ibid.*, at para. 15 (per Lamer C.J.). Technically, this part of Lamer C.J.’s judgment might be regarded as mere *obiter dicta* since the protection for provincially-appointed judges was founded principally on section 11(d) of the *Charter* and its guarantee of an “independent and impartial tribunal” for those charged with an offence, this being the core of provincially-appointed judges’ workloads. However, the Court has subsequently reaffirmed the Preamble-based nature of the guarantee in *Mackin v. New Brunswick (Minister of Finance)* [2002] 1 S.C.R. 405.

<sup>57</sup> *Supra* note 30, at 181 and, more generally, at 175-86. Subsequently, these criticisms and others formed part of the dissenting judgment of Marshall J.A. in *Newfoundland Association of Provincial Court Judges v. Newfoundland* (2000), 192 Nfld. & P.E.I.R. 183 (Nfld. C.A.).

for these purposes? What role does overall structure have to play in this task? How is history to be treated? To what extent does a reading of the text, or even the structure of the Constitution, depend on accurate reference to the state of affairs prevailing at 1867, both as an imperative and to the exclusion of other visions of the Constitution? From this perspective, it is informative to review how Chief Justice Lamer explained or justified the majority position in *Provincial Court Judges*, a position arguably the most extreme to that point as to what the courts can do in the name of constitutional law and interpretation.

First, Chief Justice Lamer was attuned to the contrary arguments and, in particular, the following:

- that the text indicated an intention to exclude general independence protections for provincially-appointed judges, largely on an *expressio unius exclusio alterius* basis;<sup>58</sup>
- that the Preamble could not be a free-standing source of constitutional claims;<sup>59</sup> and
- that such protections did not extend to inferior court judges in the United Kingdom in 1867.<sup>60</sup>

Chief Justice Lamer did not see these as compelling and among his responses were the following:

- given that section 11(d) of the *Charter* has extended the protection of independence to provincially-appointed judges exercising criminal jurisdiction and to the evolution in Canadian conceptions of judicial independence, the totality of the legislative indicators bespeak commitment to a more general application of principles of judicial independence;<sup>61</sup>
- the Preamble, while not generally supporting free-standing claims to constitutional rights, provides an important reference point by which to consider filling in gaps in the Constitution in a way that is consistent with a general underlying principle – this is especially the case in a constitutional regime where it is clear that the text has

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<sup>58</sup> *Ibid.*, at 64.

<sup>59</sup> *Ibid.*, at 69.

<sup>60</sup> *Ibid.*, at 106.

<sup>61</sup> *Ibid.*, at 65-67.

never been the sole source of constitutional law and of constitutional rights and entitlements;<sup>62</sup> and

- in an evolving constitution, the actual state of affairs in the United Kingdom in 1867 is not decisive. Rather, what count for more are the principles behind that state of affairs as reflected in both the modern jurisdiction of provincially-appointed courts and a growing expectation or sense of the application of principles of independence to these forms of adjudication.<sup>63</sup>

This latter conclusion is underscored by a situation where entitlements to independent adjudication depend not on the nature of the dispute but on the status of the court exercising jurisdiction, as exemplified by the overlapping jurisdiction of provincially and federally-appointed judges in the adjudication of matrimonial disputes.

Whether this is enough to establish the claim may be a close call but the same is true of many constitutional cases. To the extent that any assessment depends on the legitimacy of Lamer C.J.'s mode of reasoning, there are points that can be made in favour of the judgment. First, it is self-conscious of its transformative effect. Second, it attempts to locate itself within the text of the constitution and not just the Preamble. Third, in so far as the Preamble is a critical analytical feature, it is used to establish the general principle reflected in the *Act of Settlement, 1701* model of protection for superior court judges. Fourth, treatment of the constitution as a necessarily evolving and not static set of norms is framed by the constraints of text, structure and principle. It does not represent in any sense an at-large claim to update the constitution by imposing new rules in accord with current conditions.

Within that framework, the doubts and questions that arise are more about whether the reading of text, structure and Preamble has paid adequate regard to potentially countervailing factors and, in particular, the pull of the role of provinces within federalism generally and as reflected by the *Constitution Act, 1867*'s implicit conferral on the provinces of the appointing power for inferior courts and tribunals.<sup>64</sup> Does it go too far in constraining the exercise of that power to insist that appointments made by the provinces carry with them a sufficient guarantee of impartiality and independence?

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<sup>62</sup> *Ibid.*, at 69-70.

<sup>63</sup> *Ibid.*, at 76-77.

<sup>64</sup> For these purposes, I refrain from textual comment on the actual directions that the Supreme Court of Canada gave the provinces as to how financial security was to be achieved for provincially-appointed judges. On this matter, I in fact harbour many of the reservations expressed by critics of the decision.



Questions about the methodology used also arise at another level. Justice Rand and other judges who espoused the notion of an implied Bill of Rights had, as their primary objective, the enhancement or preservation of democratic values and parliamentary institutions. Similarly, Sunstein condemns total reliance in constitutional interpretation on originalism and tradition and accepts the need under constrained circumstances for courts to engage in gap-filling. Nonetheless, Sunstein's condemnation is largely premised on the objective of enhancing "deliberative democracy",<sup>65</sup> and the question must be asked: does enhancement of the independence of the judiciary have similar claims on this methodology?

In fact, this inquiry calls into question not just the judgment in *Provincial Court Judges* but also the assumption by Canadian courts of the power to review the constitutionality of legislation and the ultimate reading of sections 96-101 as guaranteeing to superior courts a core of jurisdiction immune from both Parliament and a provincial legislature. To what extent should the general rejection of an American-style separation of powers, and the thin textual support for the guaranteed existence of an independent judiciary in the *Constitution Act, 1867*, constrain the courts from the essentially self-interested exercise of divining such a principle from the combination of Preamble and slight textual support? My sense is that the key to this question lies in the realisation that the effectuation of democratic principles is but one of the underlying principles of Canadian constitutional law, a point made clear subsequently in the *Secession Reference* (to which I will turn shortly). Chief Justice Lamer also emphasised this in linkages he made between the existence of an independent and impartial judiciary and the maintenance of the rule of law.

Critics of *Provincial Court Judges* and its methodology also put in issue the uncertainty produced by the judgment. How much more room does it create for judicial interference with provincial control over the administration of justice, as conferred by section 92(14) of the *Constitution Act, 1867*? In particular, Justice La Forest, in dissent, raised the question of whether this would bring within the ambit of the protection "all sorts of administrative tribunals, some of which are of far greater importance than ordinary civil courts".<sup>66</sup> Indeed, that is a question raised by the majority judgment. Moreover, subsequently in *Ocean Port Hotel Ltd. v. British Columbia (Liquor Control and Licensing Branch, General Manager)*<sup>67</sup> ("*Ocean Port*"), the Court apparently provided a negative answer by reference to the Preamble does not mean that that concern or possibility was an over-reaction to the possible ramifications of Chief Justice Lamer's position. Indeed, in my view, for the reasons articulated by Justice La Forest, there are indeed powerful bases in the logic of Chief Justice Lamer's reasons for the assertion of similar protections for certain administrative tribunals. To that extent, all that *Ocean Port* teaches is that the Court possesses the capacity for constraint in

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<sup>65</sup> *Supra* note 46, in particular, chapter 1, "Deliberative Trouble".

<sup>66</sup> *Supra* note 30, at 185.

<sup>67</sup> [2001] 2 S.C.R. 781.

pushing the boundaries of judicial independence further. However, even assuming the Court, in that case, had recognised a constitutional status for the independence of some administrative tribunals, it would not necessarily mean that the Court had employed or relied upon “bad” methodology or principles of constitutional adjudication.<sup>68</sup>

In this regard, it is worthwhile to contrast the claims for provincial court and even tribunal independence with two other expansive constitutional claims advanced in recent years. The first is the contention that, through the underlying principle of democracy, municipalities must now be taken to have achieved a measure of constitutional status in the Canadian constitutional order, a contention adjudicated and rejected in both Ontario<sup>69</sup> and Quebec.<sup>70</sup> While it may be that the time has come for a constitutional amendment to recognise this status, the difficulty with judicial recognition of even limited constitutional guarantees for municipalities is that it has no basis whatsoever in the text of the *Constitution Acts* or other statutory instruments comprising the Canadian constitution. Nor is it supported by any constitutional common law. To accept such a contention, even in the name of such a hallowed concept as democracy, would indeed amount to conferring a power of constitutional amendment on the courts.

My second example involves the challenge to federal legislation cancelling contracts for the expansion to Pearson International Airport without making provision for compensation. In an article written in support of that challenge, Patrick Monahan argued that the principle of no expropriation without compensation could be read into the Canadian constitution.<sup>71</sup> Here again there is an absence of textual support, both in the *Constitution Act, 1867* and in the rights and freedoms found in the *Charter*. Certainly, there is a common law rule that might be invoked in favour of the principle; however, that rule is only one of statutory interpretation.<sup>72</sup> Not only that, it is a rule of interpretation that in its expression conceded the right of the legislature to do exactly the opposite: absent express legislative provision, there is a presumption that the legislature does not intend expropriation without compensation.<sup>73</sup>

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<sup>68</sup> I deal in greater detail with this issue in “*Ocean Port Hotel* and Statutory Compromises of Tribunal Independence” (2002) 9 *Canadian Labour and Employment Law Journal* 193. See also *Bell Canada v. Canadian Telephone Employees Assn.* [2003] 1 S.C.R. 884 at para. 29, where McLachlin C.J. (for the Court) continued to appear skeptical about such a claim.

<sup>69</sup> *East York (Borough) v. Ontario (Attorney General)* (1997), 34 O.R. (3d) 789 (O.C., G.D.), aff’d. (1997), 36 O.R. (3d) 733 (C.A.), leave to appeal denied [1997] S.C.C.A. No. 647 (Q.L.).

<sup>70</sup> *Baie d’Urfé (Ville) c. Québec (Procureur Général)*, [2001] R.J.Q. 2520 (C.A.), leave to appeal denied [2001] C.S.C.R. no. 525 (Q.L.).

<sup>71</sup> “Is the Pearson Legislation Constitutional?: The Rule of Law as a Limitation on Contract Repudiation by Government” (1995) 33 *Osgoode Hall Law Journal* 411.

<sup>72</sup> *Manitoba Fisheries v. Canada* [1979] 1 S.C.R. 101.

<sup>73</sup> *Ibid.*, applying the classic statement of Lord Atkinson in *Attorney-General v. De Keyser’s Royal Hotel Ltd.* [1920] A.C. 508 (H.L., Eng.) at 542.

Moreover, while even Justice Rand in his extra-judicial writings and at points in his judgment in *Roncarelli* was of the view that the “exercise of ...economic rights”<sup>74</sup> is part of the essential freedoms of Canadians, by which positive law and the exercise of executive power were to be evaluated normatively, there is no whiff of protection for such rights in the *Constitution Act, 1867*. Indeed, as far as the *Charter* is concerned, there is a clear intention, evident from both text and legislative history, to exclude protection for property and economic rights from section 7. The fear of *Lochner*-isation was palpable. Indeed, notwithstanding Jamie Cameron’s raising of this spectre in her criticism of the overuse of unwritten and underlying constitutional principles,<sup>75</sup> the clarity of that fear as manifest in text and structure makes it highly unlikely that we will ever witness the insinuation of that specific form of political and economic philosophy or policy into Canada’s constitution in the name of unwritten or underlying principles.<sup>76</sup>

In short, I contend that these two examples demonstrate that the methodology deployed by the Supreme Court in *Provincial Court Judges* does not open the door to unconstrained assertion of claims based on constitutional principle divorced totally from text and structure. The analysis, while perhaps more expansive and expansionary than in previous Canadian constitutional law jurisprudence, is nonetheless conducted within limits. It does not amount to an at-large power to engage in constitutional amendment or readjustment. It now remains to be seen whether the same can be said of the subsequent reasons for decision in the *Secession Reference*.

### **THE SECESSION REFERENCE**

As pointed out on many occasions,<sup>77</sup> the Supreme Court of Canada’s identification of four underlying principles of the Canadian constitution in the *Secession Reference* was scarcely controversial, as a statement of at least some of those understandings or pillars on which our formal constitutional arrangements are built. It was both good political science and constitutional history. At least since the *Constitution Act, 1982*

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<sup>74</sup> “The Role of an Independent Judiciary in Preserving Freedom” (1951) 9 *U.T.L.J.* 1 at 5. Subsequently, in that paper (at 10), he also made the following assertion: “The vested interests in property are whimpering apologetics compared with the vested interests claimed in mind”.

<sup>75</sup> *Supra* note 32.

<sup>76</sup> However, I do concede that, for these purposes, the terms of section 1(a) of the *Canadian Bill of Rights* with its protections for property rights and the use of the term “due process”, did leave open the possibility of a *Lochner*-based argument in relation to federal legislation. Such an argument would, however, at least have the claim to be based on text. However, see *Authorson v. Canada (Attorney General)* [2003] 2 S.C.R. 40, rejecting both substantive and procedural due process attacks on legislation expropriating property rights in the form of a civil claim over an interest in pension money.

<sup>77</sup> Monahan, *supra* note 32, at 74.

(including the *Charter*), federalism, democracy, constitutionalism and the Rule of Law, and the protection of minorities represent a nice encapsulation of the principles behind both our written constitutional texts and many common law constitutional rules. As such, they also uncontroversially provide bases upon which text can be understood, interpreted and applied.

What is obviously more controversial is the Court's acceptance that, independent of text, the four principles can give rise to "substantive legal obligations" as well as place limitations on governmental action.<sup>78</sup> After in effect assuming that the road to secession did not pass through any of the various amending formulae found in the *Constitution Act, 1982*, the Court not only answered in the affirmative the question of whether secession is legally possible but also prescribed conditions on which such a fracture of the overall constitutional fabric could take place. More particularly, in obliging the federal government and perhaps also the provinces to a duty to negotiate in the wake of a clear majority vote on a clear question, the Court relied extensively on these four underlying and unwritten principles.

Much has been written about the judgment, including such prior questions as: whether the issues posed in the *Reference* were indeed justiciable? Whether the answer to the question posed on the legality of secession was in fact provided by the amending formulae of the *Constitution Act, 1982*? And, whether the Court had any warrant going beyond the questions actually posed by the federal government on the *Reference* and simply holding that there is a right to secede, without specifying the conditions on which that right could be exercised?

I do not wish to revisit those questions but rather to pose another: assuming the Court is correct (and I am inclined to think it is) in holding that the issue of secession transcended the various amending formulae, how should the Court have dealt with the issue of the legislative gap on one of the most fundamental issues bearing upon the constitution of a federal country? The issue called for resolution. Declining to answer the question on the basis that it was purely political or non-justiciable would almost certainly have attracted considerable criticism of a Court which had proclaimed its superior competence and authority over constitutional questions.<sup>79</sup> To have refused to respond to one of the most fundamental of all constitutional questions would have

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<sup>78</sup> *Supra* note 31, at 249.

<sup>79</sup> The proposition is well-put by Sir Kenneth Keith of the New Zealand Court of Appeal in writing about the advisory jurisdiction of the International Court of Justice: "The Court, in these cases, is being approached as part of a broader process which will generally and properly be characterized as 'political'. There is nothing remarkable in that. Indeed, the very idea of giving advice to the organs of the U.N. and to the specialized agencies will almost always carry that implication with it." K. J. Keith, "The Advisory Jurisdiction of the International Court of Justice: Some Comparative Reflections" (1996) 17 *Australian Yearbook of International Law* 39 at 54.

been to default on what is arguably a constitutional obligation. Moreover, having determined by reference to underlying principles that there could be a legal secession, it then begged the question of what the law required. If the process had not been outlined, the response of the parties to the litigation would understandably have been: "Okay, it can be legal but now tell us how it can happen legally".

Basically, when the written text does not deal with a transcendent question of constitutional law, normal constraints on gap-filling in the absence of textual support become attenuated to the point of disappearance; and the Court loses credibility if it shirks in its duty to provide an answer to a question that is larger than the text.<sup>80</sup> In a sense, it is the same sort of situation that exists when courts are asked to deal with an apparent revolution and their written constitution says nothing about the law of revolutions. The courts default in their obligations by not dealing with the issues raised and, where feasible, they must do their best by reference where feasible to the underlying principles on which the text itself is constructed.

In fact, my principal purpose in making these arguments is not to advance the claim that the Supreme Court of Canada was correct in determining that there is a legal right to secede, and delineating the conditions under which secession could be achieved. Rather, the main point is that either way, in the face of one of the ultimate legal gaps on a matter which strikes at the entire fabric of the constitution, there *may* be no place to go other than unwritten or underlying principles for the determination of this question. Indeed, I introduce the qualifier "may" only because of the possibility, despite textual silence, that the pre-constitutional deliberations could in some instances be of utility in determining the original intention of the framers as to the availability of a right of secession. The Court's willingness to appeal to unwritten or underlying principles in an extraordinary case such as this may tell us very little about judicial willingness to see these same principles as independent, free-standing bases for constitutional challenges, if there is no threat to the entire underpinnings of the country's constitutional arrangements. The literal meaning of some of the language in the judgment notwithstanding, the occasions for this kind of invocation of underlying principles may be few indeed. Though that is not to say that they will not have a significant impact as instruments of constitutional argument when there is at least some, albeit thin, textual support for the assertions being advanced.

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<sup>80</sup> Sunstein (*supra* note 46, at 95-114) argued against including a right to secede in constitutions but then acknowledged (at 113-14) that if such a right was included it should be a justiciable right. That at least suggested that he considered it appropriate for a court to ask the question whether a constitution contains such a right. So far as I know, Justice Rand never wrote about the possibility of provinces seceding. However, he was of the view that the power to amend the *British North America Act, 1867* conferred on the Parliament of Canada was sufficient to authorise legislation seceding from Britain in the sense of abandoning the monarchy: I. C. Rand, "Some Aspects of Canadian Constitutionalism" (1960) 38 *Can. Bar Rev.* 135 at 150.

Indeed to this point, while there have been numerous attempts to use the unwritten or underlying constitutional principles identified in the *Secession Reference* as a springboard to challenge legislation and executive actions of various kinds, the successes have been few.<sup>81</sup> In Ontario, there has been one prominent and controversial application of the fourth principle: the protection of minorities. In *Lalonde v. Commission de restructuration des services de santé*,<sup>82</sup> both the Divisional Court and the Court of Appeal upheld a challenge to an order of the Commission that the Montfort Hospital in Ottawa be reorganized and downsized significantly as part of the Commission's overall mandate for restructuring the health care system in the province.

Among arguments made by those seeking judicial review of this decision was that the Commission's order was unconstitutional, to the extent that it failed to take account of the unique status of the hospital as a francophone health care facility serving the Ottawa region. The respondent objected to this use of the underlying principle of respect for minorities, arguing that to do so would violate the constitutional text by adding to the language rights found in the *Constitution Act, 1867* and the *Charter*. However, the courts rejected this text-based *expressio unius, exclusio alterius* argument. This was not a case simply about language rights. It was more broadly-based than that. It was also about respect for and protection of francophone minority communities in Ontario. The fact that the applicants could not make their claim by reference to specific provisions in the Constitution on linguistic rights did not preempt reliance by the applicants on the broader concept of community implicit in the principle of respect for minorities.

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<sup>81</sup> Among the failures were attempts referred to above (*supra* notes 69-70 and accompanying text) to use the principle of democracy to secure a constitutional basis for the protection of municipalities. See also *Hogan v. Newfoundland (Attorney General)* (2000) 183 D.L.R. (4<sup>th</sup>) 225 (Nfld. C.A.) challenging, on the basis of the rule of law, protection of minorities, and the duty to negotiate, a constitutional modification to the Terms of Union between Newfoundland and Canada with respect to guarantees for denominational schools; *Brown v. Alberta* (1999) 177 D.L.R. (4<sup>th</sup>) 349 (Alta. C.A.) relying on democracy to attack the appointment of senators by the Governor in Council as provided for in the *Constitution Act, 1867*; *Bacon v. Saskatchewan Crop Insurance Corporation* (1999) 180 Sask. R. 20 (C.A.), involving a provision retroactively removing a right of action, legislation that allegedly infringed the principle of the rule of law; and *Singh v. Canada (Attorney General)* (*sub nom. Westergard-Thorpe*) v. Canada [2000] 3 F.C. 185 (C.A.), involving a challenge to the executive privilege provisions of the *Canada Evidence Act*, R.S.C. 1985 c. C-5, on the basis that they infringed the independence of the judiciary and the rule of law, all of which are discussed by Newman, *supra* note 32, at 220-23 and LeClair, *supra* note 32, *seriatim*. While the Court denied leave to appeal in *Singh*, subsequently in *Babcock v. Canada (Attorney General)*, *supra* note 40, the Court upheld the relevant provisions rejecting attacks based on the rule of law, the independence of the judiciary, and the separation of powers, and the core jurisdiction of the courts. In relation to the first three of these arguments, McLachlin C.J. (at para. 55) emphasised the need to balance any claims based on "unwritten constitutional principles... against the principle of parliamentary sovereignty".

<sup>82</sup> (1999) 181 D.L.R. (4<sup>th</sup>) 263 (Ont. Div. Ct.), *aff'd* (2001) 208 D.L.R. (4<sup>th</sup>) 577 (Ont. C.A.).

What was also significant about the use by the Court of the underlying principle in *Lalonde* was that it did not lead to the striking down of legislation. Indeed, the Court of Appeal made abundantly clear that it was not ruling on whether a legislated closing of the hospital would be unconstitutional.<sup>83</sup> Rather, the Court deployed the principle in aid of the interpretation of two statutes, the *French Language Services Act*<sup>84</sup> and the legislation establishing the Health Services Re-structuring Commission.<sup>85</sup> Moreover, the outcome was a quashing of the Commission's ruling and remission of the matter to the Minister for reconsideration, in accordance with principles identified in the judgment and, in particular, the way in which the Commission's discretion should have been exercised consistent with an interpretation of the *French Language Services Act*, which took account of the underlying principle of protection of minority rights. This was far removed from sterilisation (let alone striking down) of the express terms of otherwise valid provincial legislation. Indeed, from the perspective of the principles of judicial review of administrative action, as the Court itself pointed out,<sup>86</sup> it was no more nor less than what the courts had done on prior occasions (including famously *Rand in Roncarelli*): measuring the exercise of executive discretion by reference to underlying values, with the normal methodology of abuse of discretion review changing to the extent that, where constitutional values are at stake, less deference is paid to the judgment of the responsible executive agent. The standard of review tends to be that of correctness, rather than patent unreasonableness or irrationality.

Viewed from this perspective, it is difficult to find any reason to quarrel with the approach of the Ontario Courts. The text of the Constitution itself provided clear support for the aspiration of protecting French language, culture and identity.<sup>87</sup> The extent of the emphasis on those objectives in the text, as well as the background to the pacts which produced both the *Constitution Acts* of 1867 and 1982 (and indeed some of the *Constitution Acts* in between), certainly justified the characterisation of protection of minority groups as an underlying principle of the Constitution. To confine executive discretion, exercised under an ordinary statute and by reference to the terms of another ordinary statute which bespeaks a similar purpose of protection of minorities, is not just permissible but long-accepted as the only proper way to analyse the exercise of delegated executive power that undercuts constitutional principles. Under this rubric, clearly established constitutional principles should always trump the seemingly open-ended nature of delegated discretionary powers, at least absent explicit legislative indicators to the contrary.

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<sup>83</sup> *Ibid.*, 208 D.L.R. (4<sup>th</sup>) at 629 and 181 D.L.R. (4<sup>th</sup>) at 283.

<sup>84</sup> R.S.O. 1990, c. F.32.

<sup>85</sup> *Ministry of Health Act*, R.S.O. 1990, c. M.26 (as amended by *Savings and Restructuring Act*, S.O. 1996 c. 1, Schedule 5).

<sup>86</sup> *Supra* note 83, 208 D.L.R. (4<sup>th</sup>) at 641-46.

<sup>87</sup> For example, section 133 of the *Constitution Act, 1867* and sections 16-23 of the *Charter*.

What did become difficult is the extent to which this reasoning would have been permissible had the hospital been closed by legislative fiat, or if the Minister or the Commission had been given express power to act notwithstanding the language and objectives of the *French Language Services Act*. Absent some form of direct textual support, in the sense of a constitutional provision which, as a matter of interpretation, could carry the case against the legislative provision, could courts justify intervention by appealing to the underlying principle of protection of minorities? In the age of the *Charter*, is there room for a new and potentially more extensive implied Bill of Rights by which courts can add to express provisions that guarantee rights and freedoms in this country?

As a matter of positive law, this question stands unanswered. From a normative perspective, my hunch is that the field of fundamental human rights and freedoms (such as the protection of minorities) has been largely occupied; and the opportunities and justifications for judicial supplementation by appeals to underlying constitutional values will be few indeed. The same may not be so in the case of other underlying constitutional principles, particularly where the potential field of application is diffuse and not nearly so obviously dealt with in a seemingly comprehensive or code format in a constitutional text. Here, I think particularly of the Rule of Law. On this, there may well be more room and legitimacy for making such arguments.<sup>88</sup>

As long as it is conceded that the Canadian constitution is not found exclusively in an explicit constitutional text, there is reason for caution in condemning outright the capacity of underlying principles to produce legitimate and free-standing challenges to the constitutionality of legislative action. As Chief Justice Lamer made clear in *Provincial Court Judges*, “there are many important reasons for the preference for a written constitution over an unwritten one”.<sup>89</sup> However, even in post-1982 Canada, it is difficult to maintain that the combination of all the explicit constitutional texts represents, or was ever intended to represent, an exhaustive statement of the constitutional law of Canada. Where that combination of texts leaves gaps, and where there is no good reason for an assumption that the omission has been deliberate, our courts do well not to foreclose the possibility of a principled filling of any such gap, even if it means calling into question primary legislation.

An important footnote to this discussion is that further dimensions to this whole debate will almost certainly grow in significance over coming years. Among those dimensions are changing conceptions of the nature of parliamentary sovereignty

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<sup>88</sup> For a more restricted view of the role of this underlying principle, see P. W. Hogg and C. F. Zwibel, “The Rule of Law in the Supreme Court of Canada” (2005), 55 *U.T.L.J.* 715, a paper delivered at a conference in honour of John Willis: “Administrative Law Today: Culture, Ideal Institutions, Process as Values”, held at the University of Toronto Faculty of Law, 18-19 September 2004.

<sup>89</sup> *Supra* note 30, at 68 (and reiterated in the *Secession Reference: supra* note 31, at 249).



or, stated more broadly, the nature of sovereignty within the nation state.<sup>90</sup> Much though not all of this theoretical re-conceptualisation may be the product of increasing globalisation, the breaking down for so many purposes of traditional national jurisdictional boundaries and, perhaps most importantly in legal culture to this point, the growing weight of international or global norms particularly in the domain of human rights.<sup>91</sup> Within countries with which we share some heritage, there has also been much interest in a re-evaluation of the commitment to that particular species of sovereignty that many attribute to the work of A. V. Dicey, rather than any accurate or appropriate account of the evolution of the legal incidents of sovereignty in the United Kingdom and ultimately in its liberated colonies. One by-product of this re-evaluation has been a re-emergence of arguments for recognition of a species of sovereignty constrained by fundamental or transcendental norms, the source and content of which have obviously spawned much debate. When the possibilities evident in this debate are coupled with the theoretical differences over the very nature of constitutional law in Canada, as highlighted by reactions to the recent case law discussed in this essay, manifested earlier in debates about claims for an implied Bill of Rights, the world of constitutional law and theory remains very much fluid and ongoing.

## LETTING JUSTICE RAND HAVE THE LAST WORD

What might Justice Rand have made of all this? In his implied Bill of Rights judgments, he was cautious, at least to the extent of not pushing the theory beyond what was needed to decide the particular case. Though admitting it was an intriguing question, he never ruled on whether the implied Bill of Rights could act as a fetter on the federal Parliament.

He did see and worry about the broader possibilities for such a theory, not only in his leaving the federal question acknowledged but unanswered, but also in his extra-judicial writing. At the University of Toronto in 1951, he posed a question which went beyond the implied Bill of Rights and raised fundamental questions about the nature of sovereignty and the role of the courts in policing fundamental challenges to the established order:

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<sup>90</sup> This re-conceptualisation of the predominance of the principle of parliamentary sovereignty comes in many forms. One of the foremost exponents is the English academic, T. R. S. Allan. His most recent and fullest work in this area is *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2001). See also the review article of this monograph by M. D. Walters, "Common Law, Reason and Sovereign Will" (2003) 53 *U.T. L.J.* 65.

<sup>91</sup> Thus, for example, Walters, *supra* note 32, at 140-41 sees underlying principles as having their most significant role to play in the protection of human rights, though he would not necessarily justify that argument on the basis of the emergence of generally accepted international law norms. See also A. Brudner, "The Domestic Enforcement of International Conventions on Human Rights: A Theoretical Framework" (1985) 35 *U.T.L.J.* 219.

Let me take it further. The Parliament of Great Britain, consisting of king, lords, and commons, is accepted as being endowed with the sovereign power of the kingdom. Let us suppose that, observing constitutional procedure, Parliament should solemnly purport by statute to abolish the House of Commons, or to set up a permanent dictatorship of the nature of that of Russia in displacement of the present structure; would either be a constitutional act?<sup>92</sup>

His apparent answer to that question came many lines later:

As I have already observed, the common law acknowledges no limitations to legal sovereignty nor any outside juridical order which can impinge upon it. In a practical sense, it does not contemplate action by the legislature which is nugatory by reason of its contradiction of the natural environment. But, however independent courts may be, they are bound by the declared law; and the accountability of the legislature is to the electorate.<sup>93</sup>

This seemed to answer the question that he left unanswered in *Switzman*. However, can we be sure? The question posed and answered was not within the Canadian constitutional context but by reference to the common law of the United Kingdom. Moreover, *Saumur*, *Switzman* and *Roncarelli* were still in the future. Perhaps those experiences led him to a different conception of the nature of Canadian sovereignty and the role of the courts, in the articulation and enforcement of the unwritten as well as the written constitution.

Similar uncertainties arise as to his position on the scope of the implied Bill of Rights. As expressed in the two key judgments, the content seemingly was confined to the use of implied principles effecting freedoms that contributed to the health and functioning of parliamentary institutions and democracy in general. This was a not uncommon position for advocates of limited judicial articulation of unwritten or underlying constitutional norms. Any court authority was thus confined to preservation of essential elements of democratic institutions and to conditions that contributed to its flourishing. Thus, for example, Cass Sunstein in *Designing Democracy* theoretically worried about an activist judiciary filling constitutional gaps and using thin text as a basis for broad constitutional claims. At the same time, he put aside those worries when the project was one of protecting “deliberative democracy”.<sup>94</sup>

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<sup>92</sup> *Supra* note 74, at 3.

<sup>93</sup> *Ibid.*, at 5.

<sup>94</sup> *Supra* note 46. This is one of the underlying themes of the whole book but it is captured well in the Introduction and at 6-9 particularly.

In *Saumur*, Justice Rand also emphasized the foundational nature of freedom of religion.<sup>95</sup> Similarly, in his 1951 address at the University of Toronto, he brought within his conception of bedrock freedoms those of “belief, speech, worship, of the person, and of the exercise of political and [as noted earlier] economic rights”.<sup>96</sup> Therefore, once again an open question remained whether Justice Rand might have been willing, had the occasion demanded it, to expand his conception of the implied Bill of Rights to protection of other foundational freedoms. Indeed, he might not have been out of sympathy with the Court’s list of unwritten or underlying principles of the constitution, not only for the interpretation of text but as a basis for independent or free-standing constitutional claims.

Of all the matters discussed in this essay, the one domain where Justice Rand seemed to have little sympathy for assertions of a constitutionally protected status was that of an independent judiciary. While obviously a strong supporter of the concept, the focus of his 1951 address (entitled “The Role of an Independent Judiciary in Protecting Freedom”) was on integrity brought to the bench by sound appointments and assured by fidelity to law and the setting of appropriate administrative barriers to baleful influences, with nary a whiff of the existence of re-enforcing constitutional protections.<sup>97</sup>

Much of the criticism of *Provincial Court Judges* and *Reference re Secession of Quebec* has stemmed from a concern that they will lead to uncertainty and indeterminacy in the existence and scope of constitutional norms. The assumption is that general adherence to, or exclusive focus on, text both assures greater certainty and indeed a satisfactory theory of constitutional law in itself. Once again in his 1951 address, Justice Rand spoke of the extent to which “we seem to crave for rational theoretical completeness and legitimacy to support action”.<sup>98</sup>

It is an open question whether that craving can ever be satisfied in general or by a reduction of the realm of inquiry in constitutional law to exclusively text-based arguments. Indeed, while not meaning in any way to diminish the value in most situations of relative certainty in constitutional law, I conclude by again referencing Cass Sunstein. So varied are the competing visions of what is the appropriate theory of constitutional law and interpretation, and so deeply divided are the advocates of the various competing theories, that there may ultimately be dangers to the constitutional order in recognising the predominance of one theory over another. Not only will such a choice have the potential to polarise even further, and lessen overall respect for the judiciary and the constitution, but also it will ultimately lay bare the illusion that

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<sup>95</sup> *Supra* note 1, at 329-30.

<sup>96</sup> *Supra* note 74, at 5.

<sup>97</sup> *Ibid.*, at 13-14.

<sup>98</sup> *Ibid.*, at 3.

certainty cannot be found in absolute adherence to one conception or interpretive view over another.<sup>99</sup>

Thus, for Sunstein, an essential ingredient in good constitutional law is the achievement of “incompletely theorized agreements”<sup>100</sup> about constitutional norms, along with reliance on “soft originalism... analogical reasoning, a general posture of humility, and concern for a goal of ensuring a well-functioning system of deliberative democracy”.<sup>101</sup> I suggest that Justice Rand might find much in that statement with which to sympathize.

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<sup>99</sup> *Supra* note 46, at 49-51.

<sup>100</sup> Sunstein’s discussion of this concept, *ibid.*, at 56-66.

<sup>101</sup> *Ibid.*, at 90.