

# REFERENCES, STRUCTURAL ARGUMENTATION AND THE ORGANIZING PRINCIPLES OF CANADA'S CONSTITUTION

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*Structural argumentation is a form of constitutional argument that proceeds by way of drawing implications from the structures of government created by our Constitution and then applying the principles generated by those implications - which can be termed the foundational or organizing principles of the Constitution - to the particular constitutional issue at hand. It is a form of constitutional argumentation that has featured prominently in a number of important reference cases over the course of our history, and that has recently taken on added significance as a result of its extensive use by the Supreme Court of Canada in both the Provincial Court Judges Cases (1997) and the Québec Secession Reference (1998). In this paper, Professor Elliot examines several issues of both theoretical and practical importance relating to this form of argumentation and the principles to which it has given rise.*

*Un argument structurel est une forme d'argument de droit constitutionnel qui procède en déduisant certaines implications des structures gouvernementales créées par notre Constitution, et qui applique ensuite les principes dégagés de ces implications - qu'on peut désigner comme les principes fondamentaux de la Constitution - à la question constitutionnelle particulière qui est en litige. C'est une forme d'argument constitutionnel qui figure en bonne place dans de nombreux renvois au cours de notre histoire, et qui récemment a pris encore plus de signification en raison de sa grande utilisation par la Cour suprême du Canada dans les affaires des juges provinciaux (1997) et le renvoi sur la sécession du Québec (1998). Dans cet article, le professeur Elliot examine plusieurs questions, importantes tant en pratique qu'en théorie, relatives au statut juridique et au rôle de ces principes.*

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## I. Introduction

When I was invited by Madame Justice McLachlin (as she then was) to participate in this Symposium, and was advised that the topic on which it was hoped I would be prepared to speak was that of constitutional references, my reaction was, I must confess, somewhat mixed. I was of course delighted to have been asked to speak at such an important event, and particularly so because I had spent two very enjoyable and rewarding years working at the Supreme Court of Canada as its Executive Legal Officer. But I was not particularly enamoured of the proposed topic. While obviously well aware, as any teacher of Canadian constitutional law would be, of the important contribution that the reference power has made both to our ability to resolve difficult constitutional questions and to the development of constitutional doctrine, neither the reference power itself nor the large and still growing number of judicial opinions rendered in response to its use by our federal and provincial governments had sufficiently piqued my interest to become the object of scholarly research on my part.

I was on the verge of exploring with Madame Justice McLachlin the possibility of my being assigned a different topic when inspiration struck. Prompted by the recent decisions of the Supreme Court of Canada in the *Provincial Court Judges Cases*<sup>1</sup> and the *Québec Secession Reference*,<sup>2</sup> I had been doing some preliminary research into a particular form of constitutional argumentation that featured very prominently in those cases. That form of argumentation, which I will refer to as structural argumentation, is argumentation that proceeds by way of the drawing of implications from the structures of government created by our Constitution, and the application of the principles generated by those implications – which can be termed the foundational or organizing principles of the Constitution – to the particular constitutional issue at hand.<sup>2a</sup> It occurred to me that, while this form of

<sup>1</sup> *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3.

<sup>2</sup> *Reference re Secession of Québec*, [1998] 2 S.C.R. 217.

<sup>2a</sup> See Patricia Hughes, *Recognizing Substantive Equality as a Foundational Constitutional Principle* (1999) 22 Dal.L.J. 5.

argumentation was by no means unknown in the days of the Judicial Committee of the Privy Council and in the initial decades following the ascendancy of the Supreme Court of Canada as our court of last resort, it was being used by the Court with much greater frequency now than ever before. More importantly, it seemed to me that it was being used to much greater effect than ever before, in the sense that many if not all of the principles that the Court was generating on the basis of this form of argumentation now appeared, not simply to be aids to the interpretation of provisions in the text of our Constitution, or otherwise to provide assistance in the resolution of difficult constitutional issues, but to be taking on a legal status equivalent to that enjoyed by provisions found in the text of our Constitution. The time seemed ripe, therefore, for a careful look at the use of structural argumentation.

And there were a number of questions that, it seemed to me, on careful look required asking. Some of these questions were of the “taking stock of where we are” character: How many organizing constitutional principles has this form of argumentation generated to this point, and what are they? What does the jurisprudence tell us about the precise scope and meaning of each of them? On what constitutional basis has each of them been said to rest? What does the jurisprudence tell us about the precise legal status or force of these principles? In particular, is it really the case – as some of the recent judgments would appear to suggest – that they can be used as free-standing, independent bases upon which to impugn the validity of legislation? If so, is that true of all of them or only some, and, if only some, on what basis is the distinction drawn between those in respect of which it is true and those in respect of which it is not? If some or all of these principles can be used as free-standing, independent bases upon which to impugn the validity of legislation, have any limits been imposed on the extent to which they can be so used? If so, what are those limits? Other questions – of a more theoretical character – included: Wherein lies the appeal of this form of argumentation? Are there potential pitfalls to its (over-)use? If so, what are they? What are the implications of the increased use of the principles generated by structural argumentation, not only for the way in which we think about our Constitution, but also for the role of the courts as ultimate arbiters of disputes arising under it? And, perhaps most importantly of all, what use *should* the courts in Canada be making of the principles generated by this form of argumentation?

One of the conclusions that I had quickly drawn on the basis of my preliminary research was that, in relative terms, structural argumentation is used more often in the reasoning of the Privy Council and Supreme Court of Canada in reference cases than in cases that have come to those bodies through the ordinary processes of civil and criminal litigation. Put slightly differently, if one is looking for examples of structural argumentation in Canadian constitutional law, one is more likely to find them in reference cases. There was, therefore, a way to connect the research I was already doing to the topic of references. I pointed this connection out to Madame

Justice McLachlin, and asked whether, for the purposes of this Symposium, I might be able to approach the topic of references from the perspective of the contribution that they have made to the use of this important form of argumentation in Canadian constitutional law. Being the accommodating person that she is, she agreed to let me do this. The end result is, of course, that this paper will deal with only one aspect of the reference power. That said, that one aspect is, I think, an important one, particularly as the use of structural argumentation has become more frequent.

The main body of the paper that follows is divided into five parts. In Part One, I identify some of the different forms of legal argumentation that are or can be used in constitutional law, and give examples of each. In Part Two, I note that structural argumentation has been used in both the United States and Australia in the interpretation of their Constitutions, and briefly discuss some of the commentary on its use in both of those countries. I also suggest that there may be some useful insights into the use of structural argumentation to be gleaned from the experience of those countries with this form of argumentation, and, on the basis of some of these insights, I suggest an approach to the use of the principles generated by this form of argumentation in Canada and explain why I believe that approach should be used by our courts. In Part Three, I examine the recent general pronouncements of the Supreme Court of Canada regarding the legal status and role of the organizing principles of our Constitution, with particular reference to the question of whether such principles can be used as independent bases upon which to challenge the validity of legislation. I also measure what the Court has said in respect of this question against the approach to the use of these principles recommended in Part Two. In Part Four, the longest part of the paper, I attempt to identify the organizing constitutional principles to which recognition has thus far been given in our jurisprudence. I also discuss, at least in a preliminary manner, the constitutional basis and scope and meaning of each of these principles, as well as their legal status *qua* individual principles. In Part Five, I make the connection between references and the use of structural argumentation, as well as proffer an explanation for this connection. It is important to note that I do not purport in this paper to provide final answers to any of the questions I have raised about the use of this form of argumentation in Canada. My primary objective here is simply to raise and stimulate some careful thinking about them.

I should note before proceeding further that most if not all of these questions are of far more than mere academic interest. That is because a number of these principles – including the rule of law, democracy, the protection of minorities, the separation of powers and judicial independence – have been invoked in a number of recent cases in support of attacks upon both federal and provincial legislation.<sup>3</sup> The precise scope and meaning of these principles are now therefore very much before the courts, as is the question of whether or not

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<sup>3</sup> The citations for these cases will be given *infra* at the point in the text at which they

these principles, or at least some of them, can be used on their own to impugn the validity of legislation. Reference will be made to at least some of these cases in the course of examining the principles that have been invoked in them.

## II. *Forms of Constitutional Argumentation*

In 1982, in a book entitled *Constitutional Fate: Theory of the Constitution*,<sup>4</sup> Professor Philip Bobbitt addressed what he referred to as “the central issue in the constitutional debate of the past twenty-five years”<sup>5</sup> in the United States – the legitimacy of judicial review – from a novel and intriguing perspective. His thesis was that the legitimacy of judicial review could be grounded in the particular kinds or forms of constitutional argumentation that had come to be employed by lawyers, constitutional scholars and judges in that country. In other words, it was the fact that the participants in debates about the meaning to be given to the provisions of the American Constitution, as well as debates about the propriety of leaving it to the courts to resolve those debates, agreed upon the terms in which those debates were to be conducted, that gave legitimacy to the entire enterprise. As he put it, “when one argues that a court’s experience with parsing documents, or its time for reflection, or its relative insulation from political pressure, and so forth, fit it as an institution for the task of assessing the constitutionality of legislation, one is already committed to the view that enforcing rules derived from the constitutional text is the legitimate task at hand”.<sup>6</sup>

It is unnecessary for present purposes for me to express a view on the merits or lack thereof of Professor Bobbitt’s approach to the issue of the legitimacy of judicial review. My reason for bringing his book to your attention is the fact that it provides a very useful overview – or, as he refers to it, typology – of a number of different forms of constitutional argumentation, most if not all of which can be found here in Canada as well as in the United States. One of those forms of argumentation is, of course, structural argumentation. However, before discussing that particular form of argumentation, I think it useful to identify and briefly describe the others that Professor Bobbitt discusses.<sup>7</sup>

are mentioned.

<sup>4</sup> Bobbitt, P., *Constitutional Fate: Theory of the Constitution* (1982, Oxford Univ. Press).

<sup>5</sup> *Ibid.* at 3.

<sup>6</sup> *Ibid.* at 5.

<sup>7</sup> It should be noted that Professor Bobbitt is quick to acknowledge that it is not always easy to know precisely which type of argument a particular example of constitutional argument is. As he puts it (at 5), “As will become clear, these [types of argument] are really archetypes, since many arguments take on aspects of more than one type”. It is also the case that the dividing lines between these different types of argument are not always clear; hence, Bobbitt says, it will sometimes be the case that particular constitutional arguments

The first of these other forms of argumentation is labelled *historical*. By historical argumentation, Professor Bobbitt means "argument that marshals the intent of the draftsmen of the Constitution and the people who adopted the Constitution".<sup>8</sup> This form of argumentation has been a good deal less popular in Canada than in the United States, where it forms the basis of a theory of judicial review, known as "originalism", to which a number of American constitutional scholars and at least one current member of the Supreme Court of the United States, Justice Scalia, subscribe.<sup>9</sup> However, it is clearly a legitimate form of argumentation in this country as well, in relation to both the *Constitution Act, 1867* and the *Constitution Act, 1982*. And while it generally is viewed as having little persuasive force, it can on occasion play quite a significant role in the resolution of disputes about the proper meaning to be given to a provision of the Constitution. For example, in *R. v. Prosper*,<sup>10</sup> the Supreme Court placed considerable weight on the fact that the drafters of the Charter chose not to constitutionalize a right to state-funded counsel under section 10 when it decided not to read such a right into section 10(b).

*Textual* argument comes next. This, says Professor Bobbitt, is "argument that is drawn from a consideration of the present sense of the words of the provision [in question]".<sup>11</sup> Examples of its use in Canada are not difficult to find. One that comes quickly to mind is the interpretation given by the Privy Council in both the *Radio Reference*<sup>12</sup> and the *Labour Conventions Reference*<sup>13</sup> to section 132 of the *Constitution Act, 1867*, relating to the power of Parliament to implement treaty obligations. Because section 132 had been formulated in terms of the power to implement obligations towards foreign countries arising under treaties between the Empire and such foreign countries, the Privy Council was quick to hold that it had no application in relation to obligations undertaken towards foreign countries in treaties that Canada itself had entered into with those countries. Another more recent example is provided by *Société des Acadiens v. Association of Parents*,<sup>14</sup> in which Beetz J. for the majority of the Supreme Court held that the right in section 19(2) of the *Charter* to use either English or French in the courts of New Brunswick did not include the right to be understood in the language chosen.

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"fit under one heading as well as another" (p. 8).

<sup>8</sup> *Ibid.* at 7.

<sup>9</sup> For a discussion of originalism and its place in constitutional theory in both the United States and Canada, see Hogg, P.W., *Constitutional Law of Canada* (4<sup>th</sup> ed., Carswell, 1997) at 1390-2.

<sup>10</sup> [1994] 3 S.C.R. 236, at 266-7. For a counter-example, see *Reference re B.C. Motor Vehicle Act*, s. 94(2), [1985] 2 S.C.R. 486, at 504-7.

<sup>11</sup> *Supra* note 4 at 7.

<sup>12</sup> *Reference re Regulation and Control of Radio Communication in Canada*, [1932] A.C. 304.

<sup>13</sup> *A.G. Canada v. A.G. Ontario*, [1937] A.C. 326.

Third comes *doctrinal* argument, or argument from previously decided cases, which is also clearly accepted in Canada. In fact, it is probably fair to say that it is the predominant form of argumentation here. Examples of it abound – there's the definition of section 91(2) of the *Constitution Act, 1867* in *Citizens Insurance v. Parsons*,<sup>15</sup> there's the analytical framework for freedom of expression cases under the *Charter* prescribed by *Irwin Toy v. Québec*,<sup>16</sup> and there's the analytical framework for section 1 of the *Charter* established in *R. v. Oakes*,<sup>17</sup> to name but three.

Next on the list comes *prudential* argument, or “argument about costs and benefits”, or simply “practical argument”.<sup>18</sup> This is the form of argumentation that is used in the context of the final component of the proportionality test under section 1 of the *Charter* prescribed by *Oakes*, in which the question is in effect whether or not society loses more than it gains as a result of the impugned governmental action. But this form of argumentation can also be found in the federalism context, for example, in the tests devised in *General Motors v. City National Leasing*<sup>19</sup> and *R. v. Crown Zellerbach*<sup>20</sup> respectively for the second branch of section 91(2) of the *Constitution Act, 1867* and the national concern branch of Parliament's residual power. In both of these tests, explicit consideration is given to the question of whether or not the legislative initiative is one that can effectively be pursued at the provincial level, or whether, by contrast, the initiative is one that can only be effectively undertaken at the national level. In other words, the court is concerned about how best the governmental task in question can be performed – the very stuff of practical or prudential argument.

The last of these other forms of argumentation discussed by Professor Bobbitt is *ethical* argumentation, by which he means “constitutional argument whose force relies on a characterization of American institutions and the role within them of the American people”;<sup>21</sup> elsewhere he describes it as “an appeal to the American ethos: not necessarily what we are, but perhaps what we think we are, and thus how we think about ourselves and our society ...”.<sup>22</sup> This form of argumentation may be peculiarly American. But it is possible that it too finds at least some resonance within our jurisprudence. For example, the concern underlying the admonition in

<sup>14</sup> [1986] 1 S.C.R. 549

<sup>15</sup> (1881), 7 A.C. 96.

<sup>16</sup> [1989] 1 S.C.R. 927.

<sup>17</sup> [1986] 1 S.C.R. 103.

<sup>18</sup> Bobbitt, P., “Methods of Constitutional Argument”, (1989), 23 U.B.C. Law Rev. 449, at 453-4.

<sup>19</sup> [1989] 1 S.C.R. 641.

<sup>20</sup> [1988] 1 S.C.R. 401.

<sup>21</sup> *Supra* note 4 at 94.

Chief Justice Dickson's reasons for judgment in *Edwards Books*<sup>23</sup> that, "in interpreting and applying the *Charter* I believe that the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons",<sup>24</sup> can be said to reflect what we might like to think of as an important part of the Canadian ethos. This admonition has, of course, now been formalized in the principle that the courts in exercising their power of judicial review under the *Charter* should show considerable deference to Parliament and the provincial legislatures when they impugn governmental action that can be said to further the interests of vulnerable groups within Canadian society.<sup>25</sup>

That brings us to *structural* argumentation. This form of argumentation, Bobbitt says, is based on "inferences from the existence of constitutional structures and the relationships which the Constitution ordains among these structures".<sup>26</sup> "Structural arguments", he goes on to say, "are largely factless and depend on deceptively simple logical moves from the entire Constitutional text rather than from one of its parts."<sup>27</sup> We will be exploring in some detail the use of this form of argumentation in Canada later in this paper. Suffice it to say here that it is clearly accepted as a legitimate form of argumentation in this country.

### III. *Structural Argumentation in the United States and Australia*

Before we begin an examination of structural argumentation in the context of Canada's Constitution, it is useful, I think, to say a few words about its use in two other countries – the United States and Australia – that share with Canada a number of the same constitutional traditions, including the practice of judicial review. The purpose of this extra-jurisdictional digression is to see if there is anything that we might usefully learn about the use of this form of argumentation from its use in these two countries. I begin with the United States.

The most frequently cited examples of structural argumentation in American constitutional law are the cases of *McCulloch v. Maryland*<sup>28</sup> and *Crandall v. Nevada*.<sup>29</sup> One of the issues in the former case, which was decided very early in the history of the United States, was whether or not a state legislature could constitutionally tax the Bank of the United States, a corporation created by Congress. That question was answered in the

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<sup>22</sup> *Supra* note 18 at 455.

<sup>23</sup> *Edwards Books & Art Ltd. v. The Queen*, [1986] 2 S.C.R. 713.

<sup>24</sup> *Ibid.*, at p. 779.

<sup>25</sup> See e.g., *Irwin Toy Ltd. v. Québec*, *supra* note 16.

<sup>26</sup> *Supra* note 4 at 74.

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



negative, and the reasoning of Chief Justice Marshall, while drawing some textual support from the supremacy clause of Article VI of the American Constitution, was based essentially on the nature of the relationship created by the Constitution between the state and federal governments – what one scholar termed “the warranted relational proprieties between the national government and the government of the states, with the structural corollaries of national supremacy ....”<sup>30</sup> In the latter case, which was decided in 1868 and involved the constitutionality of a state-imposed head tax on persons leaving the state, the Supreme Court’s analysis, pursuant to which it found the tax to be unconstitutional, was based on the nature of the relationship between the citizens of the United States and their national government. That relationship, the Court held, was such that those citizens had to have the right – the constitutional right – to be able to travel freely both within and through the various states to such places as the offices of the national government might be located.

Structural argumentation in the American context is closely associated with constitutional scholar Charles Black, who in 1969 in his book *Structure and Relationship in Constitutional Law*,<sup>31</sup> bemoaned the fact that this particular form of argumentation had not been used as frequently as it might have been in American constitutional jurisprudence. The reason for that, according to Professor Black, was that American lawyers and judges had a strong preference for textual and doctrinal forms of argumentation. For him, this preference was unfortunate. While acknowledging that, when the text was clear, it prevailed over structural implications, there was much to be said for the latter form of argumentation because, “to succeed, it has to make sense”.<sup>32</sup> Moreover, he said, “clarity about what we are doing, about the true or truly acceptable grounds of judgment, is both a good in itself, and a means to a sounder decision”.<sup>33</sup> In his view, “where a fairly available method of legal reasoning, by its very nature, leads directly to the discussion of practical rightness, that method should be used whenever possible”.<sup>34</sup> And, for him, that method was structural argumentation.

Much of Professor Black’s book is devoted to the development of structural arguments in favour of a range of constitutional principles that, in his view, should form part of Americans’ understanding of their Constitution. These principles include an implied right to free speech enforceable against state governments (derived from the connection between

<sup>28</sup> 17 U.S. (4 Wheat.) 316 (1819).

<sup>29</sup> 73 U.S. (6 Wall.) 35 (1868).

<sup>30</sup> C. Black, *Structure and Relationship in Constitutional Law* (Louisiana State Univ. Press, 1969), at 15.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.* at 22.

<sup>33</sup> *Ibid.* at 32.

the latter and the workings of the national government),<sup>35</sup> and the right to full equality on the part of black Americans (derivable from the notion of citizenship and the privileges and immunities clause of the 14<sup>th</sup> Amendment).<sup>36</sup> He also demonstrated how, on the basis of structural argumentation, one could develop a coherent framework for the exercise of judicial review, and for thinking about the legitimacy of judicial review, depending upon the particular source of the impugned governmental action. For example, he argued that, for structural reasons, courts were entitled to exercise the power of judicial review with greater vigour, and hence less concern about its legitimacy, when the impugned governmental action was that of a state legislature, a subordinate federal agency, or a component of Congress, rather than of Congress itself.<sup>37</sup>

Although he clearly accepts the legitimacy of this form of argumentation in the context of the American Constitution, and appreciates some of its appeal, Professor Bobbitt notes that it has been criticized on two main grounds. The first of these is its indeterminacy. As he puts it, "structural arguments are sometimes accused of being indeterminate because while we can all agree on the presence of the various structures, we fall to bickering when called upon to decide whether a particular result is necessarily inferred from their relationships".<sup>38</sup> Professor Bobbitt is not entirely persuaded by this objection. He notes that, in fact, the structural arguments employed by Professor Black generally yield the same answers to the questions to which they are addressed as the more accepted forms of argumentation employed by the courts charged with the responsibility of actually responding to those questions. It could therefore be said, he suggests, that "those courts, without saying so, were aiming at results that were structurally satisfying".<sup>39</sup> But he clearly sees some merit in this criticism, not only because extensive use of structural argumentation would mean that there would be "a battery of district judges across the country trying to use an unfamiliar and unwieldy analytical tool", but also, and more importantly, because "we [Americans] would also sacrifice the plain understanding that is the Constitution's greatest asset in retaining the devotion of our people...."<sup>40</sup>

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<sup>34</sup> *Ibid.* at 23.

<sup>35</sup> *Ibid.* at 39-51. Professor Black thought this to provide a sounder basis for this right than the due process clause of the Fourteenth Amendment, which is the basis used by American courts.

<sup>36</sup> *Ibid.* at 53-60. Professor Black was of the view that, if this were used as the basis for this right rather than the equal protection clause of the Fourteenth Amendment, some of the problems associated with the state action requirement applicable to the latter could be avoided.

<sup>37</sup> *Ibid.* at 67-98.

<sup>38</sup> *Supra* note 4 at 84.

<sup>39</sup> *Ibid.* at 85.

<sup>40</sup> *Ibid.*

The second of the main objections to structural argumentation, according to Bobbitt, is that it fails to provide a firm basis for the protection of the individual rights that were of such importance to Professor Black. That objection, he notes, is grounded in the fact that those rights, as noted above, are derived at least in part from the institution of citizenship. Not only does that mean that entitlement to those rights is dependent upon the national government recognizing someone as a citizen, it also means that aliens are entitled to no rights whatsoever. This is an objection that carries more weight with Professor Bobbitt. But it does not lead him to reject structural argumentation altogether. On the contrary, it simply means that structural argumentation is inadequate "to the task of protecting human rights".<sup>41</sup> Its potential as a useful form of argumentation in other contexts, particularly in the resolution of what Bobbitt refers to as "intergovernmental issues",<sup>42</sup> remains for him very much intact.

Vincent Blasi, in his review of Professor Black's book,<sup>43</sup> expressed doubts about the need for structural argumentation in American constitutional law because, he noted, it led, at least in the hands of Professor Black, to the same results as the other more accepted forms of argumentation. He was also far from convinced that it would make judicial review more "principled" and "neutral" than it is under the more traditional forms of argumentation. As such, he was concerned that it served to undercut rather than enhance the legitimacy of judicial review. In that regard, he was particularly concerned about the relationship between structural argumentation and the original intent of the framers of the American Constitution. In his view, the existence of such a relationship – that is, some reason to believe that the framers would have accepted if not welcomed structural argumentation – was important to the legitimacy of judicial review. But he was not convinced that no such relationship could be found. On the contrary, he suggested,

Black's structural approach may represent a beginning probe in the quest for a theory of legitimacy that can enable the Court to hand down bold, catalytic (and, hopefully, politically discrete) decisions without either having to abandon the symbolic and real advantages that come from having roots in the past, or else having to engage in a more or less conscious process of distortion in discussing the original understanding. The structural approach suggests, quite plausibly, that there was a meaningful original intent – a "sovereign act of will" – that went into the creation of the Constitution's structures and relationships as well as into the creation of its grants and prohibitions. If the structures and relationships embody general values whose meaning and context evolve over time, then dramatic judicial intervention is appropriate in order to harmonize modern

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<sup>41</sup> *Ibid.* at 89.

<sup>42</sup> *Ibid.*

<sup>43</sup> V. Blasi, "Creativity and Legitimacy in Constitutional Law", 80 Yale Law J. 176 (1970-71).

developments with the general values rooted in the original structure. This intervention can take the form of creating particular rights, powers, and affirmative duties that may act as counterweights to structural mutations, or it may even take the form of direct efforts to change the primary structures. In any event, the endeavour can be justified as an attempt to restore (more accurately, to approximate in the modern setting) the political power equilibrium envisioned by the framers.<sup>44</sup>

Structural argumentation does not appear to be a term that is commonly used in Australia. However, this form of argumentation is by no means unknown in that country.<sup>45</sup> In recent years, the judges of the High Court of Australia have been using it to develop something of an implied bill of rights on the basis of various provisions of that country's Constitution (although the High Court has preferred to characterize these rights, not as rights *per se*, but rather as limitations or restrictions on legislative power).<sup>46</sup> The members of that Court are not in agreement as to the number of such rights that can properly be implied out of the Australian Constitution. For example, only two members of the Court, Justices Deane and Toohey, have thus far been prepared to recognize a constitutional right to equality.<sup>47</sup> However, there is a clear consensus that, because it creates a system of "representative government", that country's Constitution protects such freedom of communication between the people concerning political or government matters as is necessary to enable the people to exercise a free and informed choice as electors.<sup>48</sup> And there also now appears to be majority support for the existence of additional rights to freedom of movement and association for political purposes; these rights are seen to be derivative of, and hence dependent upon, the right to freedom of public discussion.<sup>49</sup>

While structural argumentation is therefore clearly an accepted form of argumentation in Australia, it is equally clear that its use causes some members of the High Court considerable unease. That unease is evident in two recent cases in which this form of argumentation was employed unsuccessfully by counsel in support of creating new implied rights,<sup>50</sup> and

<sup>44</sup> *Ibid.* at 192-3.

<sup>45</sup> The separation of powers doctrine that applies at the federal level in Australia is viewed by some scholars as the product of structural argumentation (see *R. v. Kirby; Ex parte Boilermakers' Society of Australia* (1957), 95 C.L.R. 529 (P.C.)).

<sup>46</sup> See e.g., *Lange v. Australian Broadcasting Corporation* (1997), 189 C.L.R. 520, at 560.

<sup>47</sup> See e.g., *Kruger v. The Commonwealth* (1997), 190 C.L.R. 1.

<sup>48</sup> See *Lange*, *supra* note 46, in which this proposition is accepted in a judgment authored by "The Court". The previous judgments of the High Court in which this proposition was asserted are cited and discussed in that case.

<sup>49</sup> See *Kruger v. The Commonwealth*, *supra* note 47.

<sup>50</sup> *McGinty v. Western Australia* (1996), 186 C.L.R. 140 and *Kruger v. The Commonwealth*, *supra* note 47 (except for the derivative rights to freedom of movement and association for political purposes – see text accompanying footnote 49 *supra*).

is based on a deeply felt concern about the grounding of constitutional decisions – especially decisions holding legislation to be invalid – in considerations lying outside the strict text of the Constitution. A good example of it is found in the following passage in the reasons for judgment of Dawson J. in *McGinty v. Western Australia*, a case in which a majority of the High Court rejected a claim that the system of “representative government” created by the Australian Constitution gave rise to an implied right of voter parity in state elections:

Whilst implications can be and have been drawn from the Constitution, it is clear beyond question that implications may only properly be drawn where they are necessary or obvious. As Windeyer J. observed in *Victoria v. The Commonwealth* “our avowed task is simply the revealing or uncovering of implications that are already there”. That is to say, if implications are to be drawn, they must appear from the terms of the instrument itself and not from extrinsic circumstances. The distinction has been drawn between textual and structural implications, but I am not sure that the distinction is helpful. Whether or not an implication is categorized as structural or not, its existence must ultimately be drawn from the text. One is brought back to the text in the end and the danger in speaking of structural implications is, it seems to me, that there is a temptation to include by implication as part of the relevant structure those values which the structure is capable of accommodating, but does not necessarily accommodate.<sup>51</sup>

That unease is also apparent in the carefully worded approach to the freedom of political communication found in *Lange v. Australian Broadcasting Corporation*, in which the reasons for judgment were authored by the Court:

Since *McGinty* it has been clear, if it was not clear before, that the Constitution gives effect to the institution of “representative government” only to the extent that the text and structure of the Constitution establish it. In other words, to say that the Constitution gives effect to representative government is a shorthand way of saying that the Constitution provides for that form of representative government which is to be found in the relevant sections. Under the Constitution, the relevant question is not, “what is required by representative and responsible government?” It is, “what do the terms and structure of the Constitution prohibit, authorize or require?” ....

To the extent that the requirement of freedom of communication is an implication drawn from sections 7, 24, 64, 128 and related sections of the Constitution, the implication can validly extend only so far as is necessary to give effect to these sections. Although some statements in the earlier cases might be thought to suggest otherwise, when they are properly understood, they should be seen as purporting to give effect only to what is inherent in the text and structure of the Constitution.<sup>52</sup>

The recent decisions of the High Court in which the theory of implied constitutional rights has been the subject of discussion have generated a

<sup>51</sup> *Supra* note 50 at 184-5.

<sup>52</sup> *Supra* note 46 at 566-7.

good deal of academic commentary in Australia.<sup>53</sup> That commentary is, as would be expected, wide ranging and touches on many different features of these decisions. One of those features is the fact that, in the first few of these decisions, it is possible to discern two rather different approaches to the development of the theory of implied rights on the part of the members of the High Court. These two approaches, according to Laurence Claus, suggest “two quite different conceptions of the character of written constitutions and what it means to interpret them”.<sup>54</sup> Those two conceptions he termed the “illustrative-document” conception and the “definitive-document” conception. The former conception, which he associated with Justices Deane, Toohey and Gaudron, “treats the constitutional document’s express provisions as illustrative of underlying principles which are regarded as legally enforceable imperatives to the full extent of their judicially perceived content, not merely to the extent of their textual illustration”.<sup>55</sup> By contrast, the latter conception, which he associated with Justices Brennan (as he then was), Dawson and McHugh and which, it is important to note, can be said to have won out in the later cases of *McGinty*, *Lange* and *Kruger*, “[treats] the constitutional text as a definitive document in relation to the scope of government powers – as in its terms exhaustively prescribing the manner in which, and the extent to which basic principles concerning desirable relations between government and the individual, both *qua* individual (liberty) and relative to other individuals (equality) and desirable relations between levels of government (federalism) operate as legally enforceable imperatives to shape and curtail the powers of governments.”<sup>56</sup>

<sup>53</sup> For a sampling of that commentary, see: J. Goldsworthy, “Implications in Language, Law and the Constitution”, in G. Lindell (ed), *Future Directions in Australian Constitutional Law* (1994); C. Parker, “Protection of Judicial Process”, (1994) 16 *Adelaide L. Rev.* 341; Symposium, “Constitutional Rights for Australia”, (1994) 16 *Sydney L. Rev.* 145; G. Winterton, “The Separation of Judicial Power as an Implied Bill of Rights” in G. Lindell (ed), *Future Directions in Australian Constitutional Law*, *supra*; N. Aroney, “A Seductive Possibility: Freedom of Speech in the Constitution”, (1995) 18 *University of Queensland L.J.* 249; L. Claus, “Implications and the Concept of a Constitution”, (1995) 69 *Australian Law Journal* 887; J. Kirk, “Constitutional Implications from Representative Democracy”, (1995) 23 *Federal L.Rev.* 37; G. Williams, “Sounding the Core of Representative Democracy: Implied Freedoms and Electoral Reform”, (1996) 20 *Melbourne University Law Review* 848; J. Goldsworthy, “Constitutional Implications and Freedom of Political Speech: A Reply to Stephen Donaghue”, (1997) 23 *Monash University Law Review* 362; L. Zines, *The High Court and the Constitution*, (4th ed., 1997) Chs. 15 and 16; G. Lindell, “Expansion or Contraction? Some Reflections About the Recent Developments on Representative Democracy”, (1998) 20 *Adelaide L. Rev.* 111; A. Stone, “Freedom of Political Communication, the Constitution and the Common Law”, (1998) 26 *Federal L. Rev.* 219; A. Stone, “The Freedom of Political Communication since *Lange*” in A. Stone and G. Williams (eds), *The High Court at the Crossroads* (2000 forthcoming publication of Federation Press).

<sup>54</sup> L. Claus, *supra* note 53 at 887.

<sup>55</sup> *Ibid.* at 888.

<sup>56</sup> *Ibid.* at 887-8.

The contrast between these two different conceptions is nicely captured in the following passage from the Claus article: "Whilst under a 'definitive-document' conception the Constitution expresses a concept and the judges just decide what that concept involves, under illustrative-document reasoning the judges select the concept. One can appreciate that the concept so selected may animate specific sections of constitutional text – the issue is whether a court can go beyond what those sections can reasonably be held to imply, ascend the tree of abstract principle and then climb out on other branches and declare that the government cannot pick the fruit from them either."<sup>57</sup>

Claus then proceeds to link these two different conceptions with the issue of the legitimacy of judicial review. This he does in the following passage:

Admission of reasoning from an illustrative-document conception has quite spectacular implications for the scope and character of judicial power under a written constitution. For any constitution which does not in terms establish a totalitarian or despotic regime ... will contain provisions which can be viewed as illustrating abstract ideals like liberty and equality – the generality of such principles ensures that they will somehow be illustrated, but also that treating them as sufficient criteria for judicial imposition of limits on government power will require judges to make pure value judgments across wide open fields – as to what human freedoms really matter (in the case of liberty), as to what discriminations really matter (in the case of equality) and, in the case of a principle of "federalism" illustrated by federal structure, as to what unwritten features of the federal-State intergovernmental relationship really matter.

Yet the illustrative-document conception is no stranger to constitutional interpretation, albeit that it is also no stranger to controversy. It, and the definitive-document conception with which it contrasts, are in truth the two sides of a debate as old as judicial review pursuant to written constitutions itself, as to what is the rationale which renders judicial review legitimate....

A rationale for judicial review under a definitive-document conception is that a written constitution which was adopted and can be amended through processes designed to distil the popular will is the highest and best expression of that will .... Enforcement of its terms is therefore positively pro-democratic.

A rationale for judicial review under an illustrative-document conception is that certain human values are fundamental and of themselves generate authority for their enforcement by those who hold judicial power. It is an argument which has its origins in theories of natural law when coupled with Coke's claims for the primacy for judge-made common law .... Judicial review under an illustrative-document conception cannot draw support from a "popular will" rationale, for one cannot attribute to the popular will more than it actually approved, however much what it did approve illustrates broader principles that are thought to be important.<sup>58</sup>

Is there anything that we as Canadians can usefully learn about the use of structural argumentation from this brief look at its use in the United States and Australia? I believe there is. On the positive side of the ledger, the simple fact that it is used in both of these countries can be said to lend at least some support to its use here. So too, I think, does the fact that, as Professors Black and Bobbitt point out, structural argumentation has much to commend it as a method for

<sup>57</sup> *Ibid.* at 888.

<sup>58</sup> *Ibid.* at 888-9.

resolving difficult questions of constitutional interpretation. Questions of constitutional interpretation – or more generally, questions of constitutional law – are all, at bottom, questions of constitutional principle. There is much therefore to be said for an approach to resolving them that is grounded, as structural argumentation is, in those principles that can fairly be said to underlie the provisions of the Constitution in question. Moreover, if one is prepared to accept that, in most instances, difficult questions of constitutional interpretation are in fact going to be resolved on the basis of the court's sense of what the relevant underlying constitutional principles or values can be said to require, it is far better for everyone if those principles and values are openly acknowledged and subjected to careful consideration and analysis rather than hidden from view. For, as Professor Black has argued, "clarity about what we are doing, about the true or truly acceptable grounds of judgment, is both a good in itself, and a means to a sounder decision". And, finally, there is Professor Blasi's suggestion that structural argumentation might provide the basis for "dramatic judicial intervention ... in order to harmonize modern developments with the general values rooted in the original structure", a suggestion that is bound to have at least some appeal in a country in which the metaphor of the Constitution as a "living tree"<sup>59</sup> has taken such firm hold as it has here in Canada.

All of that said, there is much in what this brief review of the American and Australian experience with structural argumentation has uncovered that suggests that our courts should use this form of argumentation with some care. The mere fact that it appears to be seldom used in the former jurisdiction and used with considerable caution in the latter is significant in this regard. So too is the fact that, as Professor Bobbitt's analysis of Professor Black's use of structural argumentation to create implied rights under the American Constitution points out, this form of argumentation may work less well in some areas than in others. Equally if not more significant are the concerns that have been raised in both of these jurisdictions about the implications of the use of structural argumentation for the legitimacy of judicial review. It is abundantly clear that it is those concerns that have discouraged the High Court of Australia from using this form of argumentation more extensively than it has. The majority view within that Court now appears strongly to favour the definitive-document conception of the Australian Constitution over the illustrative-document conception. That conception does not, of course, preclude the use of structural argumentation; it simply limits its use to those circumstances in which, to borrow from Justice Dawson, the desired implications are ones which can be drawn "from the terms of the instrument itself and not from extrinsic circumstances", and moreover, are implications that the instrument is not simply "capable of accommodating" but can in some sense be said to be "necessary or obvious". It is the text of the Constitution, in other words, not the general principles that can plausibly be said

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<sup>59</sup> See generally in this regard, P.W. Hogg, *Constitutional Law of Canada*, *supra* note 9 at 419-21.



to underlie it, that must govern.<sup>60</sup> It is this same fidelity to text (and to doctrine) that, according to Professors Black and Bobbitt, underlies the reluctance on the part of American courts to use structural argumentation more extensively.

It is important at this point to note that, in the American and Australian cases discussed above, the principles generated by the use of structural argumentation were used as free-standing bases upon which to impugn the validity of legislation. These principles were not, in other words, used simply as aids to the interpretation of provisions of the text of the Constitution, or otherwise to assist in the resolution of difficult constitutional issues.<sup>61</sup> It is precisely because they were used as independent bases upon which to impugn the validity of legislation that their use has been seen to pose such problems for the legitimacy of judicial review.

But it is also important to note that the principles generated by structural argumentation do not have to be used in this strong sense. They can be used in the weaker sense just noted – that is, as aids to interpretation or otherwise to assist in the resolution of constitutional issues. I say that because, in my view, these principles can be understood – should in fact be understood – to fall into two different categories. And the distinction between these two sets of principles is one that is reflected in both the Australian decisions in which structural argumentation has been the subject of discussion and the commentary thereon. The principles in the first category are those that *can fairly be said to be generated by necessary implication from the text of the Constitution*. These are the principles that can be derived from the Constitution conceived of in

<sup>60</sup> It is worth noting here that an emphasis on text has been an important feature of constitutional interpretation in Australia for a very long time. The most noteworthy advocate of this approach to constitutional interpretation was Chief Justice Owen Dixon, who sat on the High Court from 1929 to 1964, and served as its Chief Justice from 1952–1964. Perhaps his best known pronouncement on the subject of constitutional interpretation was the one made in the address he gave upon taking the oath of office as Chief Justice: “It may be”, he said, “that the court is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism.” Sir Owen Dixon, “Address upon taking the oath of office in Sydney as Chief Justice of the High Court of Australia on 21 April 1952”, in *Jesting Pilate and Other Papers and Addresses*, (Melbourne, 1965), at 247.

<sup>61</sup> I use the phrase “or otherwise to assist in the resolution of difficult constitutional issues” to capture the fact that there are uses to which such principles can be put apart from having them function as free-standing bases upon which to attack the validity of legislation and using them as aids to interpretation; those other uses include assisting in the resolution of difficult remedial issues (see e.g., *Reference Re Manitoba Language Rights*, [1985] 1 S.C.R. 721 (the rule of law)) and helping to delimit the scope of judicial review (see e.g., *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker)*, [1993] 1 S.C.R. 319 (democracy)). All of these other potential uses share with the aid-to-interpretation use the fact that they do not entail using the principles as independent bases upon which to impugn the validity of legislation. While, in the body of the text of this paper, I usually refer only to the aid-to-interpretation and independent-basis uses when discussing the legal status or role of these principles, the former of these two uses – the aid-to-interpretation use – should be taken to include all of these other possible non-independent-basis uses as well.

definitive-document terms. The principles in the second category are those that, while they cannot be said to be generated by necessary implication from the text of the Constitution, *can nevertheless fairly be said to underlie – in the sense of helping to explain the inclusion of – provisions of the text of the Constitution*. These are the principles that Laurence Claus describes in the context of his discussion of the illustrative-document conceptions as “[animating] specific sections of constitutional text”.<sup>61a</sup>

And because these principles are of a different character, the uses to which they can be appropriately put also differ. Those in the first category – those that arise by necessary implication from the text – have, in law, the same status as the text, and hence the status of free-standing, independent bases upon which to impugn the validity of legislation. Those in the second category, by contrast, cannot be appropriately so used. They do not have the same legal status as the text. As such, they can at best serve as aids to the interpretation of provisions of the text. In effect, they can serve as the basis of a “purposive” approach to the interpretation of the provisions of the Constitution in question; those provisions would be understood to have as their purpose the furtherance of the broader constitutional principles underlying them.<sup>62</sup>

Use of the principles derived from structural argumentation in this weaker sense does not, it must be said, eliminate concerns about the implications for the legitimacy of judicial review of using this form of argumentation. Those concerns generally stem from the nature of the reasoning used by courts to invalidate governmental action on the basis of its having been found to be inconsistent with the Constitution. If that reasoning can fairly be said to be firmly grounded in the text of the Constitution, those concerns are unlikely to be raised. If that reasoning is grounded in other considerations, however, including principles said to underlie the provisions of the Constitution at issue,

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<sup>61a</sup> Determining the appropriate category in which to place a particular principle will not necessarily be an easy task. In fact, it might often prove to be a difficult one. An important consideration will no doubt be the extent to which the drafters of the Constitution can be said to have incorporated the principle in the text of the Constitution, and thereby textually delimited its scope. A principle to which expression has been given in the Constitutional text, but in a limited form only, should, I would think, generally be assigned to the second category; otherwise the courts run the risk of engaging in the process of rewriting the Constitution so that it reflects their conception of the proper scope of the principle rather than respecting and giving effect to the drafters’ conception of its proper scope.

<sup>62</sup> See generally in this regard, Hogg, P.W., *Constitutional Law of Canada*, *supra* note 9 at 819-20. It is interesting to note that Justice Bastarache, writing for the majority in *Blencoe v. B.C. (Human Rights Commission)*, [2000] S.C.J. No. 43, refused to elevate the dignity of the individual human being to the status of an independent right for the purposes of s. 7 of the *Charter*, even though he readily acknowledged that individual human dignity was one of the values underlying s. 7, and could therefore appropriately be used as an aid to its interpretation. It is precisely this distinction in uses for which I am arguing in the approach to the use of our underlying constitutional principles advanced in this paragraph.

those concerns might well be raised, and for understandable reasons. It will not always be clear – in fact, it will often be a matter of considerable debate – what general principles “[animated] specific sections of Constitutional text”. Nor will it be clear just how such principles should be understood – what their precise scope and meaning should be. Nor, finally, will it be clear just how such principles play themselves out in the context of the particular textual provisions in question – what interpretation of those provisions they require or support. As Phillip Bobbitt says, “structural arguments are sometimes accused of being indeterminate because while we can all agree on the presence of various structures, we fall to bickering when called upon to decide whether a particular result is necessarily inferred from their relationships”.<sup>63</sup>

These concerns about the implications for the legitimacy of judicial review of the use of structural argumentation are, on the face of it, no less valid in the context of the Canadian Constitution than of its American and Australian counterparts. It is certainly difficult to see why those concerns should be given any less weight in Canada than in the United States and Australia when the principles generated by this form of argumentation are used in the strong sense – that is, as independent bases upon which to impugn the validity of legislation. A case can, however, perhaps be made for attaching somewhat less weight to those concerns when at least some of the principles generated by this form of argumentation are used in the weaker sense identified above.

It will be recalled that Professor Blasi suggested that the use of structural argumentation would be legitimate in the context of the American Constitution if support could be found – as he thought it might be – for the proposition that the framers of that Constitution had intended such argumentation to be used in giving effect to its provisions. In the context of the Canadian Constitution, support for such a proposition is not, I think, difficult to find. That support comes from the inclusion in the preamble to the *Constitution Act, 1867* of the reference to the desire on the part of the four founding provinces to “a Constitution similar in Principle to that of the United Kingdom”. Those words seem clearly to anticipate, if they do not require, the use by the courts in their interpretation of that instrument of the principles that underlay the constitution of the United Kingdom in 1867. Such a characterization of those words is made all the more plausible when it is remembered that the *Constitution Act, 1867* was not intended to be, nor on any fair reading of its provisions could it be said to be, a comprehensive blueprint for the governance of the new country it created. It is therefore certainly open to argue that it is entirely legitimate for Canadian courts to use at least the principles that were acknowledged to underlie the constitution of the United Kingdom in the resolution of constitutional issues. However, because those principles are derived from the preamble rather than articulated in the text of the Constitution, the use to which they can legitimately be put should, if that preamble is to function as preambles are

<sup>63</sup> *Supra* note 4 at 84.

generally understood to function, be limited to serving as aids to the interpretation of the textual provisions of our Constitution.<sup>63a</sup>

In summary, then, what emerges from this analysis is an approach to the use of structural argumentation that can be formulated as follows: (1) those principles that are generated by necessary implication from provisions in the text of the Constitution can legitimately function as independent bases upon which to attack the validity of legislation; while (2) those principles that merely serve to explain the presence of certain provisions within the text of the Constitution – including the principles derived from the preamble to the *Constitution Act, 1867* – can only be used as aids to interpretation. Not only does this approach comport with the generally accepted rules governing the interpretation of statutory and constitutional instruments, it also minimizes the risks inherent in this form of argumentation to the legitimacy of judicial review.<sup>64</sup>

I turn now to the use of structural argumentation in Canada, beginning with a look at two recent pronouncements from the Supreme Court of Canada on the legal status and role of the organizing principles of Canada's Constitution. One of the questions to bear in mind as these pronouncements are examined is the extent to which the approach to the use of these principles that they reflect departs from the suggested approach set forth above.

#### IV. *Legal Status and Role of the Organizing Constitutional Principles*

The question of what legal status or role the organizing principles of our Constitution have is obviously one of critical theoretical as well as practical importance. That question will be examined in the context of particular principles in Part Four of this paper. However, both in the *Provincial Court Judges Cases*<sup>65</sup> and the *Québec Secession Reference*<sup>66</sup>, Chief Justice Lamer

<sup>63a</sup> This assumes that these principles can *only* be derived from the preamble. If they can also be said to be generated by necessary implications from one or more provisions of the text of the Constitution, then they can (also) be used as a free-standing basis upon which to impugn the validity of legislation. See in this regard the reasserting of Duff C.J. in *Reference v Alberta Artworks*, [1938] S.C.R. 100 and of Rand J. in *Switzman v. Elbluy*, [1957] S.C.R. 285, in relation to the principle of democracy.

<sup>64</sup> This approach can also be said to be consistent with s. 52(1) of the *Constitution Act*, 1982, which provides that "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the *provisions of the Constitution* is, to the extent of the inconsistency, of no force or effect". (emphasis added) The wording of this subsection provides implicit textual support for the proposition that it is only "provisions of the Constitution" – and presumably necessary implications drawn therefrom – that are "supreme" and that can be used as bases upon which to impugn the validity of legislation.

<sup>65</sup> *Supra* note 1.

<sup>66</sup> *Supra* note 2. One can also find commentary on the status and role of these principles in the *Patriation Reference*, [1981] 1 S.C.R. 753, at 841-5 (per Martland and Ritchie JJ., dissenting); *Manitoba Language Rights Reference*, *supra* note 61 at 751-2; and *N.B. Broadcasting Co. v. N.S. (Speaker)*, *supra* note 61, at 375-6. The commentary found

and the Court respectively saw fit to discuss in general terms the legal status or role of these principles and it is useful, I think, to take note of what was said in that regard in these two cases before we proceed to examine the legal status of each of the individual principles separately. Our primary interest at this point is in knowing whether, on the basis of these general discussions, the Court is of the view that these principles can be used in the strong sense discussed above, that is, as independent bases upon which the constitutionality of legislation can be impugned.

The source of the underlying constitutional principles identified by Chief Justice Lamer in the *Provincial Court Judges Cases*, including the principle of judicial independence, was said by him to be the preamble to the *Constitution Act, 1867*, and in particular, that part of the preamble in which reference is made to the desire of the four founding provinces "to be federally united into One Dominion ... with a Constitution similar in Principle to that of the United Kingdom". The legal status of those principles, he said, was therefore dependent upon the legal status of the preamble. That status, which, he noted, had "never been fully explained"<sup>67</sup> by the Court, he described in the following terms:

On the one hand, *although the preamble is clearly part of the Constitution, it is equally clear that it "has no enacting force" .... In other words, strictly speaking, it is not a source of positive law, in contrast to the provisions which follow it.* But the preamble does have important legal effect. Under normal circumstances, preambles can be used to identify the purpose of a statute, and also as an aid to construing ambiguous statutory language .... The preamble to the *Constitution Act, 1867*, certainly operates in this fashion. However, in my view, it goes even further. In the words of Rand J, the preamble articulates "the political theory which the Act embodies" .... It recognizes and affirms the basic principles which are the very source of the substantive provisions of the *Constitution Act, 1867*. As I've said above, those provisions merely elaborate those organizing principles in the institutional apparatus they create or contemplate. *As such, the preamble is not only a key to construing the express provisions of the Constitution Act, 1867, but also invites the use of those organizing principles to fill out gaps in the express terms of the constitutional scheme. It is the means by which the underlying logic of the Act can be given the force of law.*<sup>68</sup>

It would appear from the last two sentences of this passage that, in spite of what he says in the first two sentences, Chief Justice Lamer considers the preamble and the constitutional principles that he finds to be embodied in it to have independent legal force, at least to the extent of filling out what he calls "gaps in the express terms of the constitutional scheme". These are principles that, in other words, *can* at least in some circumstances be used as independent bases

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in the first of these cases relates solely to the federal principle and that found in the latter two of these cases is very brief. In any event, it is presumably safe to assume that these earlier pronouncements have now been overtaken by the judgments in the *Provincial Court Judges Cases* and the *Québec Secession Reference*.

<sup>67</sup> *Supra* note 1 at 69.

<sup>68</sup> *Ibid.* (emphasis added).

upon which to impugn the validity of legislation. That interpretation is supported, at least implicitly, by his analysis of some of the principles that he goes on to attribute to the preamble.<sup>69</sup> For example, he says that under “the doctrine of full faith and credit” articulated in *Hunt v. T & N PLC*,<sup>70</sup> “the courts of one province are under a constitutional obligation to recognize the decisions of the courts of another province”.<sup>71</sup> If, as he asserts, that “doctrine” can be attributed to the preamble, then it is presumably the preamble that imposes that “constitutional obligation”. Another example is provided by his discussion of the implied right to freedom of political expression recognized in cases like *Reference re Alberta Statutes*,<sup>72</sup> *Switzman v. Elbling*<sup>73</sup> and *OPSEU v. Ontario*,<sup>74</sup> and which he also attributes to the preamble. After noting that, in its earlier articulations, this right had been enforceable only against provincial legislatures, Chief Justice Lamer says that, in the later cases in which it had been discussed, several judges “have suggested that Parliament itself is incompetent to ‘abrogate this right of discussion and debate’”.<sup>75</sup> Whatever its reach, it is clear that, if the notion of “incompetence to abrogate” means what it appears to say, the right functions as an independent constraint on legislative power.

Still another example can be found in his discussion of the principle of judicial independence, the principle at issue in the *Provincial Court Judges Cases*. Noting that our Constitution has evolved over time, he says that, “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 this country”.<sup>76</sup> And, he adds, “section 11(d) [of the *Charter*], far from indicating that judicial independence is constitutionally enshrined for provincial courts only when

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<sup>69</sup> I should note here that, in my view, several of the principles that Chief Justice Lamer attributes to the preamble, including the three discussed in this and the next paragraph of the text, should not in fact be attributed to the preamble, but rather to provisions in the text of the Constitution, or perhaps to a combination of the preamble and provisions of the text (with the preamble serving as an aid to the interpretation of those provisions). It follows, therefore, that in my view, if it is the case that these principles can serve as independent bases upon which to attack the validity of legislation, their capacity so to function is due to the grounding they have in the text of the Constitution.

<sup>70</sup> [1993] 4 S.C.R. 289.

<sup>71</sup> *Supra* note 1, at p. 70. It should be noted that, while Chief Justice Lamer speaks of this obligation as one that the *courts* must respect, Justice La Forest in *Hunt* made it clear that this obligation extends to *provincial legislatures* as well (see *Hunt*, *supra* note 70 at 324).

<sup>72</sup> *Supra*, note 63a.

<sup>73</sup> *Supra*, note 63a.

<sup>74</sup> [1987] 2 S.C.R. 2.

<sup>75</sup> *Supra* note 1 at 75.

<sup>76</sup> *Ibid.* at 76.

those courts exercise jurisdiction over offences, is proof of the existence of a general principle of judicial independence that applies to all courts no matter what kind of cases they hear".<sup>77</sup> The clear implication seems to be that that "general principle", which he derives ultimately from the preamble, functions as a constraint on legislative power.

It must be said, however, that there are a number of passages in Chief Justice Lamer's discussion of the preamble that cause one to wonder whether his commitment to the notion that the principles derived therefrom can have independent legal force is as strong as it might first appear. The first is the passage in which he notes that, "there are many important reasons for the preference of a written constitution over an unwritten one, not the least of which is the promotion of legal certainty and through it the legitimacy of constitutional judicial review ....", concerns which, he says, "go to the heart of the project of constitutionalism".<sup>78</sup> Next, one finds him saying of the interpretation given over the course of the country's history to sections 96 and 100 of the *Constitution Act, 1867* that,

This jurisprudential evolution undermines the force of the argument that the written text of the Constitution is comprehensive and definitive in its protection of judicial independence. *The only way to explain the interpretation of sections 99 and 100, in fact, is by reference to a deeper set of unwritten understandings which are not found on the face of the document itself.*<sup>79</sup>

The implication of this passage seems to be that a finding that the text of the Constitution is not "comprehensive and definitive" in protecting a particular constitutional principle does not mean that it is necessary, in order to enhance the protection of that principle, to give it independent legal force. On the contrary, that extension is to be achieved by relying on that principle in the interpretation of the less than comprehensive and definitive text.

The third such passage is found in the paragraph in which Chief Justice Lamer summarizes his discussion of the various principles that, in his view, can be said to have their origins in the preamble to the *Constitution Act, 1867*. The concluding sentence of that paragraph reads as follows: "The preamble identifies the organizing principles of the *Constitution Act, 1867*, and invites the courts to *turn those principles into the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text.*"<sup>80</sup> One can plausibly assert, I think, that there is an important difference between using the principles derived from the preamble *themselves* to fill in gaps in the Constitution, and using those principles as *the premises of a constitutional argument that culminates in the filling of those*

<sup>77</sup> *Ibid.* at 76-7.

<sup>78</sup> *Ibid.* at 68.

<sup>79</sup> *Ibid.* at 67 (emphasis added).

<sup>80</sup> *Ibid.* at 75 (emphasis added).

gaps. The former necessarily entails giving the principles the independent force of law, but the latter does not. It is at least possible under the latter formulation that the force of law ultimately comes not from those principles but from a provision of the text of the Constitution. The principles perform their role by providing a basis upon which to argue that that provision should be interpreted in such a way as to fill the gap in question.

The last and arguably most important of these passages comes very near the end of his discussion of the principle of judicial independence and the role played by the preamble in extending the reach of that principle to cover provincial court judges in the performance of their judicial functions in the non-criminal context. In it, and by way of summarizing his analysis, Chief Justice Lamer says, "By implication, the jurisdiction of the provinces over 'courts', as that term is used in section 92(14) of the *Constitution Act, 1867*, contains within it an implied limitation that the independence of those courts cannot be undermined".<sup>81</sup> The clear implication seems to be that the principle of judicial independence that he has derived from the preamble ultimately functions, *not as a principle with independent legal force, but as a guide to the interpretation of a provision in the text of the Constitution, in this instance, the word "courts" in section 92(14).*<sup>82</sup>

Given the presence of these latter passages in his reasons for judgment in the *Provincial Court Judges Cases*, I think it is plausible to contend that, contrary to the impression given by the first set of passages we examined, Chief Justice Lamer did not in fact hold in that case that the preamble, and the principles derivable therefrom, could function as independent bases upon which to impugn the validity of governmental action. On the contrary, what he ultimately held in that case was simply that one of those principles – judicial independence – could be used – as, it must be said, the preamble suggests it can and should be used – as an aid to the interpretation of textual provisions of the Constitution.

However, if, in spite of these latter passages, Chief Justice Lamer is to be taken to have held that principles derived from the preamble can have independent legal force,<sup>83</sup> it is important to note that the language of his reasoning on this issue suggests that these principles only have such force in

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<sup>81</sup> *Ibid.* at 77. Section 92(14) gives to the provincial legislatures jurisdiction over "the Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and Criminal Jurisdiction, ...".

<sup>82</sup> I acknowledge that there may not be a great deal of difference in substance between using judicial independence as a free-standing basis upon which to impugn the validity of legislation and infusing it into the word "courts" in s. 92(14) so that it serves to constrain legislative power over those courts. However, there is nevertheless an important difference in theoretical terms between these two uses of the principle. And the question here is, ultimately, one of constitutional theory.

<sup>83</sup> As will soon become apparent, Justice La Forest in that same case understood Chief Justice Lamer to have so held; see text accompanying note 86, *infra*.



a limited range of circumstances. They are to have such force, he says, "to fill out gaps in the express terms of the constitutional scheme". How significant a constraint this is on their being so used depends, of course, on one's understanding of the term "gaps". It is clearly possible to construe that term broadly. However, it is also possible to construe it narrowly. Certainly in the *Provincial Court Judges Cases* itself, the "gap" in question was an exceedingly narrow one – the Constitution either expressly or impliedly guaranteed the independence of the judiciary at all levels of the court system; it did not, however, guarantee this principle insofar as the provincial courts were concerned when they were performing judicial functions in a non-criminal context. This could fairly be described, therefore, not simply as a "gap", but as a minor and, it must be said, an anomalous gap, one that made little or no sense in terms of what Chief Justice Lamer referred to as "the underlying logic of the Act".<sup>84</sup>

Chief Justice Lamer wrote for six members of a seven member panel in the *Provincial Court Judges Cases*. Justice La Forest wrote separately, concurring in some of Chief Justice Lamer's holdings and dissenting from others. An important feature of his reasons for judgment is the critique they contain of both Chief Justice Lamer's willingness to enter upon a discussion of the relevance of the preamble to the resolution of the issues raised by those cases, and to the legal effect that he appeared to give to the preamble. Insofar as the first branch of that critique is concerned, it was the position of Justice La Forest that these were not appropriate cases in which to consider the effect of the preamble, either generally or in relation specifically to the principle of judicial independence, both because the preamble was irrelevant to the resolution of the issues raised in those cases, and because the matter had received minimal attention from counsel.<sup>85</sup>

Insofar as the second and more important branch of the critique is concerned, Justice La Forest advanced a number of arguments against the proposition, which he clearly took to have been advanced by Chief Justice Lamer, that the preamble to the *Constitution Act, 1867* was, as he put it, "a source of constitutional limitations on the power of legislatures to interfere with judicial independence".<sup>86</sup> Some of these arguments were based on the nature and scope of the principle of judicial independence in the United Kingdom in 1867, and on the absence of judicial review of legislation in that country.<sup>87</sup> But for our purposes, the more significant of these arguments are those based on his analysis of the legitimacy of judicial review of legislation in Canada. In his view,

<sup>84</sup> *Supra* note 1 at 69. The gap would not be so minor, and might not be anomalous, if the word "courts" were to be understood as including all adjudicative tribunals. See in this regard the reasons for judgment of La Forest J. in this same case, *supra* note 1 at 184.

<sup>85</sup> *Ibid.* at 172-5.

<sup>86</sup> *Ibid.* at 176.

<sup>87</sup> *Ibid.* at 176-80.

The ability [of Canadian courts] to nullify the laws of democratically elected representatives derives its legitimacy from a superlegislative source: the text of the Constitution .... This legitimacy is imperiled, however, when courts attempt to limit the power of legislatures without recourse to express textual authority.<sup>88</sup>

While acknowledging that “members of this Court have suggested that our Constitution comprehends implied rights that circumscribe legislative competence”,<sup>89</sup> Justice La Forest noted that the theory of implied rights had been criticized by a number of jurists and scholars. More importantly, he also categorically rejected the notion that these rights were derived from the preamble, asserting that, “the better view is that if these guarantees exist, they are implicit in section 17 of the *Constitution Act, 1867*, which provides for the establishment of Parliament....”<sup>90</sup> Justice La Forest also rejected the notion, which Chief Justice Lamer had endorsed, that the express provisions of the Constitution are simply “elaborations of the underlying, unwritten, and organizing principles found in the preamble to the *Constitution Act, 1867*”.<sup>91</sup> “On the contrary,” said Justice La Forest, “they *are* the Constitution. To assert otherwise is to subvert the democratic foundation of judicial review.”<sup>92</sup>

Justice La Forest then proceeded to assert that, in his view, “the approach adopted by the Chief Justice ... misapprehends the nature of the *Constitution Act, 1867*.”<sup>93</sup> The true nature of that instrument he described in the following terms:

The *Act* was not intended as an abstract document on the nature of government. The philosophical underpinnings of government in a British colony were a given, and find expression in the preamble. The *Act* was intended to create governmental and judicial structures for the maintenance of a British system of government in a federation of former British colonies. Insofar as there were limits to legislative power in Canada, they flowed from the terms of the *Act* (being a British statute) that created them and *vis-à-vis* Great Britain the condition of dependency that prevailed in 1867. In considering the nature of the structures created, it was relevant to look at the principles underlying their British counterparts as the preamble invites the courts to do.<sup>94</sup>

Interestingly, Justice La Forest’s discussion of this question ends with a suggestion that it might be possible to extend the reach of the principle of judicial independence beyond that provided for by sections 99 and 100 of the *Constitution Act, 1867* and section 11(d) of the *Charter* by relying on inferences drawn from section 24(1) of the *Charter* and section 52 of the *Constitution Act, 1982*, at least insofar as courts charged with determining the constitutionality of governmental action are concerned. As he put it,

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<sup>88</sup> *Ibid.* at 180-1.

<sup>89</sup> *Ibid.* at 181.

<sup>90</sup> *Ibid.* at 183.

<sup>91</sup> *Ibid.* at 76.

<sup>92</sup> *Ibid.* at 183-4.

<sup>93</sup> *Ibid.* at 184.

<sup>94</sup> *Ibid.*

It could be argued that the efficacy of those provisions, which empower courts to grant remedies for *Charter* violations and strike down unconstitutional laws, respectively, depends upon the existence of an independent and impartial adjudicator. The same may possibly be said in certain cases involving the applicability of the guarantees of liberty and security of the person arising in a non-penal setting. I add that these various possibilities may be seen to be abetted by the commitment to the rule of law expressed in the preamble to the *Charter*.<sup>95</sup>

It is clear from this latter suggestion that Justice La Forest's objection is not to the use of structural argumentation *per se*, nor to the use of the preamble in the development of structural arguments. His objection is to the use of the preamble to generate principles that, of their own force, are to have the status of free-standing bases upon which to impugn the validity of legislation.

I turn now to the discussion by the Court of this issue in the *Québec Secession Reference*.<sup>96</sup> That discussion is not a lengthy one, but it contains numerous assertions about the nature and legal status of the underlying principles of the Constitution. It is said variously that, "these principles inform and sustain the Constitutional text: they are the vital unstated assumptions upon which the text is based ....",<sup>97</sup> these principles "dictate major elements of the architecture of the Constitution itself and are as such its lifeblood ...";<sup>98</sup> "the principles assist in the interpretation of the text and the delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of our political institutions";<sup>99</sup> "equally important, observance of and respect for these principles is essential to the ongoing process of constitutional development and evolution of our Constitution as a 'living tree' ....";<sup>100</sup> "the recognition of these constitutional principles ... [can] not be taken as an invitation to dispense with the written text of the Constitution. On the contrary, ... there are compelling reasons to insist on the primacy of our written Constitution";<sup>101</sup> "the preamble [to the *Constitution Act, 1867*] 'invites the courts to turn those principles [incorporated into it by reference] into the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text'";<sup>102</sup> "underlying constitutional principles may in certain circumstances give rise to substantive legal obligations (have 'full legal force' ...)...., which constitute substantive limitations upon government action";<sup>103</sup>

<sup>95</sup> *Ibid.* at 186.

<sup>96</sup> *Supra* note 2.

<sup>97</sup> *Ibid.* at 247.

<sup>98</sup> *Ibid.* at 248.

<sup>99</sup> *Ibid.*

<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid.* at 249.

<sup>102</sup> *Ibid.*

<sup>103</sup> *Ibid.* It is interesting to note that the Court attributes the proposition that these principles have "full legal force" to the Court in the *Patriation Reference*, *supra*, note 66 (it uses the term "we"), when in fact that proposition was advanced only by Justices Martland and Ritchie in their dissent (on the *legal* issue).

“these principles may give rise to very abstract and general obligations, or they may be more specific and precise in nature”,<sup>104</sup> “the principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments.”<sup>105</sup>

What do these various pronouncements tell us about the Court’s position on the legal status of these organizing principles of our Constitution? They make it abundantly clear that, at the very least, these principles can in the Court’s view be used to assist in the interpretation of provisions in the text of the Constitution. But it also seems clear, particularly from some of the latter passages, that the Court is of the view that they can be used for other purposes as well, and that at least some of these principles can constitute independent bases upon which to impugn the validity of governmental action. And the Court appears to affirm that within this latter group of principles will be some that have their origins in, and are derived from, the preamble to the *Constitution Act, 1867*. Again, however, the Court appears to suggest that these principles can only be used to fill in “gaps in the express terms of the constitutional text”.

Following its general discussion of the legal status of the organizing principles of the Constitution, the Court proceeded to identify and discuss four such principles that, in its view, were of particular importance in dealing with the questions posed in the *Reference*. On the basis of those principles – federalism, democracy, the rule of law and the protection of minorities – it then proceeded to fashion a set of rules to govern the secession of a province from Canada. Those rules were to the effect that (1) in the event that there is a “clear repudiation of the existing constitutional order and [a] clear expression of the desire to pursue secession by the population of a province”, there is “a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire,”<sup>106</sup> and (2) those negotiations would have to be conducted on the basis of “the same constitutional principles which give rise to the duty to negotiate: federalism, democracy, constitutionalism and the rule of law, and the protection of minorities”.<sup>107</sup>

But those rules, it must be said, have a somewhat ambiguous legal status. On the one hand, they were clearly considered by the Court to be binding on the provincial and federal governments. On the other hand, the Court made it clear that it would not enforce those rules. In other words, if someone wished to claim that one or more of the governments to which those rules applied was conducting itself in a manner inconsistent with them, that claim could only be pursued in a political as distinct from judicial forum.<sup>108</sup> Hence, in spite of the Court’s general pronouncements about the legal status of the organizing

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<sup>104</sup> *Ibid.*

<sup>105</sup> *Ibid.*

<sup>106</sup> *Ibid.* at 265.

<sup>107</sup> *Ibid.* at 266.

<sup>108</sup> *Ibid.* at 270-2.

principles of the Constitution, neither the principles invoked in that case, nor the rules that were fashioned on the basis of them, could, it would seem, in fact be used as the basis upon which to impugn the validity of legislation relating to the secession of a province.

The ambiguous status of the rules governing secession that were fashioned by the Court in the *Québec Secession Reference*, coupled with the passages that cause one to wonder about Chief Justice Lamer's commitment in the *Provincial Court Judges Cases* to the proposition that principles grounded in the preamble to the *Constitution Act, 1867* can have the force of law, complicate the task of formulating with precision and confidence the Court's position on the legal status of the organizing principles of Canada's Constitution. It would not be unreasonable, however, to conclude on the basis of these two cases that that position is that such principles, including those grounded in the preamble to the *Constitution Act, 1867*, can, at least in some circumstances, function, not simply as aids to interpretation, but as independent bases upon which the validity of legislation can be impugned. The circumstances in which they can so function are those in which there are "gaps in the express terms of the constitutional text" that require filling in order that the "underlying logic of the *Act* can be given the force of law".

The proposition that at least some of the organizing principles of Canada's Constitution can function as independent bases upon which to attack the validity of legislation is not, in my view, one that should either surprise or concern us. For the reasons developed earlier, principles that can fairly be said to arise by necessary implication from provisions of the text of the Constitution should properly function in this manner, since they have the same legal status as the text. However, the further proposition that the principles that can be so used should include those derived from the preamble to the *Constitution Act, 1867* is, it must be said, both a surprise and a cause for concern. It is a surprise because it conflicts with the well-established and clearly understood legal rule that preambles do not have the independent force of law.<sup>109</sup> It is a cause for concern because, for the reasons outlined in the concluding paragraphs of our examination of the use of structural argumentation in the United States and Australia, and clearly articulated by Justice La Forest in his reasons for judgment in the *Provincial Court Judges Cases*, it poses serious problems for the legitimacy of judicial review. It suggests, in short, that our Constitution is to be conceived of to some degree at least in illustrative-document rather than definitive-document terms, and leaves the courts of this country, in particular the Supreme Court of Canada, with potentially broad powers to add what amount to new provisions to it.

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<sup>109</sup>The validity of this rule in the context of the preamble to the *Constitution Act, 1867* was affirmed by the seven-person majority on the legal question in the *Patriation Reference*, *supra* note 66 at 805. See text accompanying note 161, *infra*.

Just how broad those powers turn out to be will depend, one presumes, on the interpretation that the Court ultimately gives to the notion of “gaps in the express terms of the constitutional text”. I have already noted that the *Provincial Court Judges Cases* can be read in such a way as to support a very narrow interpretation of the term “gaps”. However, it is difficult if not impossible to see how such a narrow interpretation of the term can survive the *Québec Secession Reference*. The “gap” that the Court filled with the rules it fashioned on the basis of federalism, democracy, the rule of law and the protection of minorities to deal with the possible secession of a province could hardly be said to be either minor or anomalous; this was simply an area for which the drafters of our Constitution had, for whatever reason, chosen not to make any provision. The understanding of “gap” to be derived from that case would seem therefore to be an exceedingly broad one – it potentially means anything relating to the governance of the country for which no provision is made in the Constitution.<sup>110</sup>

The other important consideration in this regard is the nature of the reasoning used by the courts in the filling of the “gaps” that they find to exist. Patrick Monahan suggests that this reasoning could be of two different kinds:

The first, which might be termed the “judicial balancing” theory, suggests that where the courts find a gap, they should conceive of their role as akin to constitutional drafters. On this view, the court should fill in the gap by relying upon its own conception as to the best or most appropriate set of constitutional norms that should be added to the existing text. The second, which might be termed the “interpretive” theory, suggests that the court should attempt to fill in that gap by adopting an interpretation that is most consistent with the underlying logic of the existing text, and then to rely upon that logic in order to “complete” the constitutional text.<sup>111</sup>

Professor Monahan goes on to contend – in fact, he says that “it is immediately apparent” – that “only the interpretive theory is compatible with the judicial role”.<sup>112</sup> The “judicial balancing” theory, he says, “which asks the judiciary to balance *for themselves* underlying constitutional values and to choose the balance that they believe most appropriate, fails to distinguish the interpretation of the text from its creation”.<sup>113</sup> He then goes on to note that the approach that the Court took in the *Québec Secession Reference* to the filling of the “gap” that it there found to exist constituted an example of “judicial balancing” rather than “interpretive” reasoning, primarily because, as he points out, the Court in that case made much of the fact that the four principles with which it was there concerned had to be read together, with none of them therefore able to “trump” the others.<sup>114</sup>

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<sup>110</sup> See, in this regard, P. Monahan, “The Public Policy Role of the Supreme Court of Canada in the Secession Reference” (1999) 11 Nat. J. of Const. Law 65, at 75-7 and 89.

<sup>111</sup> *Ibid.* at 77.

<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid.* at 78-9.

Of the two cases that we have examined, therefore, there is reason to believe that it is the *Québec Secession Reference* rather than the *Provincial Court Judges Cases* that poses the greater challenge to the legitimacy of judicial review in Canada.<sup>115</sup> Not only does it suggest that the term “gap” can be understood very broadly, it also suggests that the reasoning process to be used by the courts in the filling of “gaps” can be such as to leave the courts with a relatively free hand to devise such rules as in their view best reflect the underlying or organizing principles of the Constitution. Unless and until the Court is able to find a way to avoid these implications of its judgment in that case, that judgment not only has the potential to inspire creative counsel to launch constitutional challenges of a kind heretofore largely unknown in Canada – a potential that is already in the process of being realized – but also to alter in a fundamental way the manner in which we as Canadians think about our Constitution and the roles played in determining the content of our Constitution by the courts and legislatures respectively.

The irony is that the approach taken to the use of our Constitution’s organizing principles in the *Québec Secession Reference* is vulnerable to the criticism that it is inconsistent with three of the very principles it relied on in that case to fashion the new constitutional rules governing secession. It is inconsistent with the rule of law because it allows what amount to amendments to be made to the Constitution of Canada otherwise than in accordance with section 52(2) of the *Constitution Act, 1982*, which stipulates that such amendments can only be made on the basis of the rules prescribed by Part V of that same instrument. It is inconsistent with the federal principle because it denies a role to the federal and provincial orders of government in the amendment process (a role, it should be noted, guaranteed by those same rules). And it is inconsistent with the principle of democracy because it allows for constitutional amendments to be made without any participation on the part of the elected representatives of the people (who, in fact, according to those same rules, are given exclusive authority over that process).

<sup>115</sup> I recognize that the Court had been placed in an exceedingly awkward position by the federal government’s decision to refer to it the three questions posed in the *Québec Secession Reference*. If it answered those questions in the manner in which most constitutional observers predicted it would answer them, the Court would be perceived by many in Québec as simply doing the federal government’s bidding and add fuel to the separatist fires in that province. In a very real sense, the Court’s independence from the executive branch of the federal government was at risk. I recognize as well that the Court’s balanced handling of the questions on the basis of the four organizing principles was very likely attributable to its sensitivity to the awkward position in which it found itself. In fact, from the perspective of constitutional *politics*, the Court’s reasons for judgment can fairly be said to be a remarkable act of judicial statecraft, not least because those reasons seemed to find favour with both sides to the dispute. However, from the standpoint of constitutional *theory*, the Court’s response was, for the reasons given, problematic.

In closing, let me add that it is evident that the approach to the organizing principles of our Constitution reflected in the *Provincial Court Judges Cases* and the *Québec Secession Reference* differs in important respects from the approach that emerged from our analysis of the American and Australian experience with structural argumentation. Perhaps the most important difference is the fact that under the former no distinction is made between principles that arise by necessary implication from the text of the Constitution and principles that merely serve to explain the presence of textual provisions. These two different kinds of principles are, in effect, lumped together. That is particularly true in the *Québec Secession Reference*, where, I would argue, the Court drew no distinction between the democracy principle (which in my view is one that can fairly be said to arise by necessary implication from the text of the Constitution) and the protection of minorities principle (which in my view performs an explanatory role only). The failure to draw this distinction contributes, I believe, to the Court's willingness to give independent legal force to principles grounded in the preamble to the *Constitution Act, 1867*, principles which, as I have already noted, would seem clearly to fall into the second of our two categories.

I now turn to an examination of the organizing principles themselves. An examination of these principles is important, I think, for two reasons. It is important first because there is value in knowing what these principles are, as well as something about what the courts have said about their origins in the Constitution, their scope and meaning and their legal status *qua* individual principles. It is also important because the number of such principles has a significant bearing on the scope of the challenge posed to traditional ways of thinking about our Constitution by the judgments rendered in the *Provincial Court Judges Cases* and the *Québec Secession Reference*.

### V. The Organizing Principles of Canada's Constitution

The task of identifying the foundational or organizing principles that have been recognized by the Judicial Committee of the Privy Council and the Supreme Court of Canada is made a good deal easier than it would otherwise be by the recent judgments in the *Québec Secession Reference* and the *Provincial Court Judges Cases*, in both of which reference was made to a number of such principles. In fact, in the former, as we have seen, the reasoning used by the Court in its response to the first of the three questions referred to it – whether or not Québec has the authority under Canada's Constitution to secede unilaterally – is based entirely on the set of four such principles it considered to be relevant in the circumstances. In the latter, the principles identified are relied upon by the Court to support its finding that another principle – judicial independence – should be recognized as having the same status.

However, the principles identified by the Court in these two cases do not, in my view, constitute a complete list of such principles. There are, I think, several other such principles that warrant inclusion in this category, either



because they have been described by one or more members of the Court as “foundational” or “organizing” principles of our Constitution, or because there is support in the jurisprudence for so labelling them. I suggest some of these other principles in what follows; it is certainly possible that still others could be added.

In addition to listing the principles, I have attempted in what follows to define what seems to me, based on my reading of the relevant jurisprudence, to be the scope or content of each of them. In some instances, that scope or content is discussed in considerable detail, reflecting the fact that the Privy Council and Supreme Court of Canada have shed more light on that issue in relation to some of the principles than others; in many instances, however, that scope or content remains unclear, reflecting the fact that the courts have yet to define it with any precision. The constitutional basis of each of the principles is also discussed, and there is at least some discussion of the legal status of each of them.

It is important to note at the outset that this part of the paper is essentially descriptive in character. It constitutes an attempt simply to “take stock of where we are” in relation to these principles, not to critique the courts’ treatment of them. Such commentary as is proffered is generally limited to the lack of clarity in the jurisprudence in relation to some of the issues examined.

Here, then, beginning with those identified and discussed by the Supreme Court in the *Québec Secession Reference*, is a list of these principles:

### 1. *Federalism*

The “principle of federalism” is said by the Court in the *Québec Secession Reference* to be “a central organizational theme of our Constitution”.<sup>116</sup> No indication is given of the particular provisions of the Constitution that reflect or embody this principle; presumably the Court considered the existence of the principle to be beyond question and that there was therefore no need to identify those provisions. Instead, the Court simply said that the principle reflects the fact that, in our system of government, “political power is shared by two orders of government: the federal government on the one hand, and the provinces on the other”, with responsibility for “[controlling] the limits of the respective sovereignties” resting with the courts.<sup>117</sup> Federalism is also said by the Court to be a “political and legal response to underlying social and political realities”,<sup>118</sup> and to be “the political mechanism by which diversity [can] be reconciled with unity”.<sup>119</sup>

<sup>116</sup> *Supra* note 2 at 251.

<sup>117</sup> *Ibid.* at 250.

<sup>118</sup> *Ibid.* at 251.

<sup>119</sup> *Ibid.* at 245.

While the Court does not attempt in the *Québec Secession Reference* to devise a precise definition of the principle of federalism, its discussion of that principle clearly emphasizes the theme of diversity at the expense of the theme of unity. That discussion begins with an acknowledgement that the federal system created by the actual text of the *Constitution Act, 1867* has been described as “only partial”, because, “on paper, the federal government retained sweeping powers which threatened to undermine the autonomy of the provinces”.<sup>120</sup> However, the Court quickly notes, “our political and constitutional practice has adhered to an underlying principle of federalism, and has interpreted the written provisions of the *Constitution* in this light”.<sup>121</sup> The implication of this seems clearly to be that “the principle of federalism” is about protecting the autonomy of the provinces and the diversity that necessarily entails. That emphasis on the value of diversity becomes explicit in a later passage:

The principle of federalism recognizes the diversity of the component parts of Confederation and the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction. The federal structure of our country also facilitates democratic participation by distributing power to the government thought to be most suited to achieving the particular societal objective having regard to this diversity.<sup>122</sup>

Support for this emphasis on diversity at the expense of unity is found by the Court in the oft quoted passage from the judgment of the Privy Council in *Re the Initiative and Referendum Act* to the effect that:

The scheme of the Act passed in 1867 was thus, not to weld the Provinces into one, nor to subordinate Provincial Governments to a central authority, but to establish a central government in which these Provinces should be represented, and trusted with exclusive authority only in affairs in which they had a common interest. Subject to this each Province was to retain its independence and autonomy and to be directly under the Crown as its head.”<sup>123</sup>

Additional support is found in a couple of the Court’s own recent decisions dealing with – and accepting the constitutional propriety of – what it refers to as “the differential application of federal law in individual provinces....”<sup>124</sup>

This theme of diversity is further developed by noting that “the principle of federalism facilitates the pursuit of collective goals by cultural and linguistic minorities which form the majority within a particular province”.<sup>125</sup> In particular, the Court notes, “the federal structure adopted at Confederation

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<sup>120</sup>*Ibid.* at 250.

<sup>121</sup>*Ibid.*

<sup>122</sup>*Ibid.* at 251.

<sup>123</sup>[1919] A.C. 935 (JCPC), at 942.

<sup>124</sup>*Supra* note 2 at 252. The two cases are *Haig v. Canada*, [1993] 2 S.C.R. 995 and *R. v. S. (S.)*, [1990] 2 S.C.R. 254.

<sup>125</sup>*Ibid.* at 252.

enabled French-speaking Canadians to form a numerical majority in the Province of Québec, and so exercise the considerable provincial powers conferred by the *Constitution Act, 1867* in such a way as to promote their language and culture".<sup>126</sup> This benefit of federalism also accrued, the Court says, to Nova Scotia and New Brunswick, as well as all of the provinces that later became part of Canada.

That the Court should have come to understand and articulate the federal principle primarily in terms of the need to protect provincial autonomy can hardly be said to be surprising. The need to protect provincial autonomy has long been an important consideration for both the Judicial Committee of the Privy Council and the Supreme Court of Canada in the resolution of disputes between the federal and provincial orders of government. It was a significant and recurring theme in the jurisprudence of both Lord Watson and Viscount Haldane in the latter part of the 19<sup>th</sup> and the early part of the 20<sup>th</sup> century.<sup>127</sup> One of its clearest articulations during that period came in the reasons for judgment of Lord Watson on behalf of the Privy Council in the *Local Prohibition Reference* in 1896.<sup>128</sup> It was in that reference, it will be recalled, that the national concern branch of Parliament's peace, order, and good government power was initially developed. Of critical importance to Lord Watson was the need to ensure that this federal general power was "strictly confined to such matters as are unquestionably of Canadian interest and importance, and ... not ... trench upon provincial legislation with respect to any of the classes of subjects enumerated in section 92".<sup>129</sup> For, as he put it, "to attach any other construction to the general power which, in supplement of its enumerated powers, is conferred upon the Parliament of Canada by section 91, would, in their Lordships' opinion, not only be contrary to the intendment of the Act, but would practically destroy the autonomy of the provinces".<sup>130</sup>

The attenuated scope of section 91(2), Parliament's power over "the regulation of trade and commerce", can also be attributed to a perceived need to protect provincial autonomy. While no explicit mention was made of that

<sup>126</sup> *Ibid.*

<sup>127</sup> For some interesting insights into the views of these two important members of the Judicial Committee of the Privy Council on Canadian federalism, see Haldane, Lord R.B., "Lord Watson", (1899), 11 *Judicial Review* 278.

<sup>128</sup> [1896] A.C. 348. For another early example, see Lord Watson's reasons for judgment in *Liquidators of the Maritime Bank of Canada v. Receiver-General of N.B.*, [1892] A.C. 437, in which he spoke of "the object of the [British North America] Act [being] neither to weld the provinces into one, nor to subordinate provincial governments to a central authority; but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy" (at 441-2).

<sup>129</sup> *Ibid.* at 360.

<sup>130</sup> *Ibid.* at 361.

<sup>131</sup> (1881), 7 A.C. 96 (P.C.).

<sup>132</sup> [1931] S.C.R. 357.

value in the seminal case of *Citizens Insurance v. Parsons*,<sup>131</sup> decided in 1881, it was the view of Duff J., writing a half century later in *Lawson v. Interior Tree Fruit and Vegetable Committee*,<sup>132</sup> that that value had in fact been the critical factor in defining the scope of that potentially sweeping head of power in that and the other cases in which it had been considered. As he put it, "The scope which might be ascribed to head 2, s. 91 ... has necessarily been limited, in order to preserve from serious curtailment, if not from virtual extinction, the degree of autonomy which, as appears from the scheme of the Act as a whole, the provinces were intended to possess."<sup>133</sup>

This same explicit commitment to the need to protect provincial autonomy is also found in Lord Atkin's famous judgment several years later in the *Labour Conventions* case.<sup>134</sup> The main reason given by him for rejecting the proposition that federal legislation dealing with a subject matter that in ordinary circumstances would be seen to fall within exclusive provincial legislative jurisdiction could be upheld as constitutionally valid on the basis that it had been enacted in implementation of obligations undertaken in a treaty – characterized as, as it were, "treaty legislation" – was that "such a result would appear to undermine the constitutional safeguards of Provincial constitutional autonomy".<sup>135</sup>

Precisely this same concern about the implications for provincial autonomy of an unconstrained characterization process can be found in the reasons for judgment of Justice Beetz in the *Anti-Inflation Act Reference*,<sup>136</sup> decided in 1976. The federal government in that case had attempted to characterize the *Anti-Inflation Act* as having been enacted in relation to "the containment and reduction of inflation". That characterization, which had been proffered in support of the federal government's argument that the *Act* was sustainable on the basis of the national concern branch of the federal residual power, was rejected by Justice Beetz. It was his view that, if such an argument were to succeed,

...then it could also be said that the promotion of economic growth or the limits to growth or the protection of the environment have become global problems and now constitute subject-matters of national concern going beyond local provincial concern or interest and coming within the exclusive legislative authority of Parliament. .... It is not difficult to speculate as to where this line of reasoning would lead: a fundamental feature of the *Constitution*, its federal nature, the distribution of powers between Parliament and the provincial Legislatures, would disappear not gradually but rapidly.<sup>137</sup>

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<sup>133</sup> *Ibid.* at 366.

<sup>134</sup> *Supra*, note 13.

<sup>135</sup> *Ibid.* at 352.

<sup>136</sup> [1976] 2 S.C.R. 373.

<sup>137</sup> *Ibid.* at 445.

Justice Beetz then proceeded to incorporate into his doctrinal framework for the national concern branch a requirement that, before a proposed new "matter" could be accepted by the courts in cases in which the federal government was relying on this branch, the courts consider and be prepared to accept "the scale upon which these new matters enabled Parliament to touch on provincial matters".<sup>138</sup>

The "federal principle" has also been used by the Supreme Court of Canada to protect provincial interests in the context of attempts by the federal order of government either to enact or to initiate a constitutional amendment adversely affecting such interests. In the *Senate Reference*<sup>139</sup> the Court relied on several different kinds of legal argumentation in support of its holding that it was not within Parliament's power under the then section 91(1) of what was still the *British North America Act* to abolish the Senate. One of those arguments was explicitly structural in character. The Court said that the proposed federal legislation "would alter the structure of the federal Parliament to which the federal power to legislate is entrusted...."<sup>140</sup> The importance of retaining the Senate as part of that structure lay, in the Court's view, in the role implicitly assigned to the Senate by the Constitution of protecting sectional and provincial interests within the federal order of government.<sup>141</sup> Although no reference was made to the "federal principle" as such, this line of reasoning clearly reflects that principle. Moreover, it indicates that the division of legislative jurisdiction between Parliament and the provincial legislatures is not the only manifestation of the federal character of Canada's Constitution and hence of the "federal principle". Guaranteed representation of the provinces within the federal institutions of government also reflects that character.

The "federal principle" also played an important role the following year in the *Patriation Reference*.<sup>142</sup> It was heavily relied upon by the six person majority that held that, as a matter of constitutional *convention*, it was not open to the federal order of government to request that the Parliament of the United Kingdom enact the *Canada Act, 1982* and the schedules thereto (including, of course, the *Constitution Act, 1982*) with the consent of only two provinces. As that majority put it,

The federal principle cannot be reconciled with a state of affairs where the modification of provincial legislative powers could be obtained by the unilateral action of the federal authorities. It would indeed offend the federal principle that "a radical change to [the] constitution [be] taken at the request of a bare majority of the members of the Canadian House of Commons and Senate"....

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<sup>138</sup> *Ibid.* at 458.

<sup>139</sup> [1980] 1 S.C.R. 54.

<sup>140</sup> *Ibid.* at 66.

<sup>141</sup> *Ibid.* at 67.

<sup>142</sup> *Supra* note 66.

The purpose of this conventional rule [requiring a substantial degree of provincial consent] is to protect the federal character of the Canadian Constitution and prevent the anomaly that the House of Commons and Senate could obtain by simple resolutions what they could not validly accomplish by statute.<sup>143</sup>

Helpful as all of these cases are in explaining the Supreme Court of Canada's emphasis on diversity in its interpretation of the "federal principle" in the *Québec Secession Reference*, it is important, I think, to note that in all of them the Privy Council and Supreme Court of Canada saw themselves as defending provincial autonomy from an attack of major proportions. These were all cases, in other words, in which, at least in the minds of the judges adjudicating them, provincial autonomy was at stake in some core or fundamental sense. Hence, Lord Watson in the *Local Prohibition Reference* feared that a broad interpretation of Parliament's general power "would practically destroy the autonomy of the provinces",<sup>144</sup> while Justice Beetz in the *Anti-Inflation Act Reference* said that if the Court were to accept the federal government's characterization of the *Anti-Inflation Act*, "the distribution of powers between Parliament and the provincial legislatures ... would disappear not gradually but rapidly."<sup>145</sup> To the extent that the Court's understanding of the "federal principle" is based on cases such as these, therefore, the preference for diversity which they reflect should arguably be understood not to be a general one, but rather *one that operates only or at least primarily in circumstances in which the value of diversity can be said to be placed seriously at risk*.<sup>146</sup>

Even this more nuanced understanding of the "federal principle" may overstate the case in favour of a preference for diversity over unity, however. That is because there are, of course, a number of important federalism cases in which the Privy Council and Supreme Court of Canada have opted to protect unity at the expense of diversity. The doctrine of federal paramountcy, which gives priority to federal over provincial legislation in the event of conflict, and which, while its origins remain somewhat murky, had clearly been accepted by the Privy Council by the time that the *Local Prohibition Reference* was decided, provides one example of this. It is interesting to note that in *Huson v. Township of South Norwich*,<sup>147</sup> this doctrine was said to be "necessarily implied in our constitutional act",<sup>148</sup> suggesting that it is a product of structural argumentation. Another example is the existence of the emergency branch of Parliament's peace, order and good government power, pursuant to which it is

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<sup>143</sup> *Ibid.* at 905-6.

<sup>144</sup> *Supra* note 128 at 360.

<sup>145</sup> *Supra* note 136 at 445.

<sup>146</sup> This understanding of the federal principle is consistent with – and arguably serves to explain – the fact that the principle (or its surrogate, provincial autonomy) is seldom if ever referred to in division of powers cases in which the value of diversity is not considered by the courts to be seriously at risk.

<sup>147</sup> (1895), 24 S.C.R. 145.

<sup>148</sup> *Ibid.* at 149.

open to Parliament to legislate in areas of provincial as well as federal jurisdiction in times of national emergency. As explained by Viscount Haldane in *Fort Frances Pulp and Paper Co. v. Manitoba Free Press Co*<sup>149</sup>, in one of the clearest and more intriguing examples of structural argumentation that we have, this interpretation of the federal general power was implicit in the very notion, reflected in the *British North America Act*, of Canada as a nation state:

That the basic instrument on which the character of the entire constitution depends should be construed as providing for such centralized power in an emergency situation follows from the manifestation in the language of the Act of the principle that the instrument has among its purposes to provide for the State regarded as a whole, and for the expression and influence of its public opinion as such. This principle of a power so implied has received effect also in countries with a written and apparently rigid constitution such as the United States, where the strictly federal character of the national basic agreement has retained the residuary powers not expressly conferred on the Federal Government for the component States. The operation of the scheme of interpretation is all the more to be looked for in a constitution such as that established by the British North America Act, where the residuary powers are given to the Dominion Central Government, and the preamble of the statute declares the intention to be that the Dominion should have a constitution similar in principle to that of the United Kingdom.<sup>150</sup>

Yet another important example of this preference for unity over diversity is the decision of the Privy Council in the *Privy Council Appeals Reference*, decided in 1947.<sup>151</sup> The question in that case was whether or not it was open to Parliament to abolish all appeals from Canadian courts, including the provincial courts of appeal, to the Privy Council. We are inclined now to think that the affirmative answer given by the Privy Council was the only plausible answer that could be given. However, those who argued in support of a negative answer had, I believe, a very strong case. If, as it clearly did, the *British North America Act* gave to the provincial legislatures exclusive jurisdiction over matters coming within the classes of subjects enumerated in section 92, it was entirely reasonable to contend that it should be open to the provincial legislatures to determine which court or tribunal should have the final say in respect of disputes relating to those same matters. That general line of argument, it should be noted, had been accepted by Justice Davis in the Supreme Court of Canada.<sup>152</sup> However, it was not accepted by the Privy Council, which saw the *Reference* as raising an important question about the nature and scope of Canadian sovereignty. In the words of Lord Jowitt, L.C., "It is, in fact, a prime element in the self-government of the Dominion that it should be able to secure through its own courts of justice that the law should be one and the same for all its citizens. This result is attainable only if section 101 now authorizes the

<sup>149</sup> [1923] A.C. 695.

<sup>150</sup> *Ibid.* at 704-5.

<sup>151</sup> [1947] A.C. 127.

<sup>152</sup> [1940] S.C.R. 49, at 101-3.

establishment of a court with final and exclusive appellate jurisdiction".<sup>153</sup> It is interesting to note that this generous reading of section 101 is described by Lord Jowitt as "a truer interpretation of the *British North America Act* in the light of the *Statute of Westminster*".<sup>154</sup>

The final case worth noting here is the *Patriation Reference*,<sup>155</sup> now in relation to the question of whether it was open to the federal government as a matter of law to request the enactment by the Parliament of the United Kingdom of the "Patriation Package" without the consent of the provinces. The dissenting provinces advanced a number of arguments in support of their position that this question should be answered in the negative. One of those arguments, which was accepted by Justices Martland and Ritchie in their dissent on this issue, was based on "the nature and character of Canadian federalism, ... as reflected in historical antecedents, in the pronouncements of leading political figures and in the preamble of the *British North America Act, 1867*".<sup>156</sup> That argument was not, however, accepted by the seven person majority. In their view, "the arguments from history do not lead to any consistent view or any single view of the nature of the *British North America Act, 1867* ...".<sup>157</sup> Moreover, they said: "History cannot alter the fact that in law there is a British statute to construe and apply in relation to a matter, fundamental as it is, that is not provided for by the statute".<sup>158</sup> Theoretical constructs of Canadian federalism (in particular, what were described as the "full compact theory" and "a modified compact theory") were said "not [to] engage the law, save as they might have some peripheral relevance to actual provisions of the *British North America Act, 1867* and its interpretation and application".<sup>159</sup> These theories, the majority said, "operate in the political realm, in political science studies".<sup>160</sup> The pronouncements of political figures were also found to be of no assistance in this particular instance. Finally, insofar as the preamble was concerned, the majority said that, "a preamble, needless to say, has no enacting force but, certainly, it can be called in aid to illuminate provisions of the statute in which it appears".<sup>161</sup> However, because the preamble does nothing more than refer to the desire of the founding provinces "to be federally united", and "there is not and cannot be any standardized federal system from which particular conclusions must necessarily be drawn",<sup>162</sup> the preamble, too, was found to be of no assistance.

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<sup>153</sup> *Supra* note 151 at 154.

<sup>154</sup> *Ibid.*

<sup>155</sup> *Supra* note 66.

<sup>156</sup> *Ibid.* at 803.

<sup>157</sup> *Ibid.*

<sup>158</sup> *Ibid.*

<sup>159</sup> *Ibid.*

<sup>160</sup> *Ibid.*

<sup>161</sup> *Ibid.* at 805.

<sup>162</sup> *Ibid.* at 806.



The decisions in these cases do more, I think, than make clear that diversity will not always be preferred by our courts to unity. They also serve to explain *when* unity will win out. And what they tell us in that regard – or at least suggest to us – is that unity will win out in circumstances in which the courts can be persuaded that in some meaningful sense *the integrity of Canada as a fully sovereign and independent nation state is at stake*.

An understanding of the “federal principle” that fails to take account of these cases and the commitments underlying them would be a partial understanding at best. There is, therefore, a need to accommodate them. That accommodation can be achieved in either one of two ways. The integrity of Canada as a fully sovereign and independent nation state can be seen as a principle in its own right – a counter-principle in a sense to the “federal principle”. Or it can be incorporated within the latter principle as one of two distinct component parts, both of which are formulated in similar terms but each of which points in a very different direction. These component parts might be expressed as follows: (1) in circumstances in which provincial autonomy is threatened in some core or fundamental sense, diversity is to be preferred over unity; and (2) in circumstances in which the integrity of Canada as a nation state is at stake, unity is to be preferred over diversity.

Neither of these two ways of accommodating the thinking reflected in these latter cases is necessarily the right way. There is, however, much to be said, I think, in favour of leaving it as a separate principle. There is something distinctly anomalous about a constitutional principle that points in two different directions (albeit perhaps in different circumstances). Moreover, the “federal principle” understood in terms of either a general (based on the Court’s articulation of it in the *Québec Secession Reference*), or more narrowly defined (when the supporting jurisprudence is taken into account), preference is an important principle in the context of Canadian constitutional law, and one that itself deserves separate recognition.

So much for the content of the “federal principle”. What can we say about its source within the Constitution? It is interesting in this regard to note that, in opting for an interpretation of the “federal principle” that implies a general preference for diversity over unity, the Court in the *Québec Secession Reference* makes no attempt to derive support for that interpretation from the text of the Constitution. That is presumably because that text, as the Court itself recognized, seems clearly to prefer unity at the expense of diversity; in the Court’s words, “on paper, the federal government retains sweeping powers which threaten to undermine the autonomy of the provinces”.<sup>163</sup> Unable to rely on the text for support, the Court relies instead on what it terms “our political and constitutional practice”<sup>164</sup> of ensuring that diversity is protected, a practice that is reflected

<sup>163</sup> *Supra* note 2 at 250.

<sup>164</sup> *Ibid.*

in part in the constitutional doctrine fashioned by the courts. What this means is that, while the federal principle when understood in terms of its bare essentials – the division of legislative authority between two distinct orders of government, with that division being policed by the courts – might be said to be at least in part a product of structural argumentation,<sup>165</sup> when that principle is understood to entail a general preference for diversity over unity, it is not, in the Court's view, a product of that form of argumentation. Its justification lies elsewhere.<sup>166</sup>

Before leaving the federal principle, I want to say a word or two about its legal status. It is clear from some of the authorities that I have discussed that this principle has been employed as an aid to the interpretation of provisions in the text of the Constitution. Hence, in the *Local Prohibition Reference*, it was used as an aid to the interpretation of Parliament's peace, order and good government power, and in *Lawson* it was said to have featured prominently as an aid to the interpretation of section 91(2), the regulation of trade and commerce. In both the *Labour Conventions Reference* and the *Anti-Inflation Act Reference*, it was used in effect as an aid to the interpretation of the term "matters" on which the characterization process for the purposes of sections 91 and 92 of the *Constitution Act, 1867* depends. Similarly, in the *Senate Reference*, the "federal principle" was used as an aid to the interpretation of section 91(1) of the *British North America Act, 1867*. In the *Patriation Reference* the principle was held by the majority to have independent normative content, but only in the *political* context. While Justices Martland and Ritchie were prepared to go further, in the sense of giving the principle normative force in the *legal* context, the implications of their doing so did not extend to the point

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<sup>165</sup> The division of powers element is found in the text itself – it is therefore textual rather than structural in character. The courts' supervisory role might (prior, of course, to the enactment of s. 52(1) of the *Constitution Act, 1982*) be said to be structural in character, however.

<sup>166</sup> Given the terse rejection by the majority in the *Patriation Reference*, *supra* note 66 of the argument that the preamble to the *Constitution Act, 1867* supported a finding that the federal government's initiative was contrary to law, it is difficult to see how the federal principle (again understood in terms of a general preference for diversity over unity) could be said to be based on it (see text accompanying note 62, *supra*). It is an interesting question whether the more narrowly defined version of the federal principle (according to which the principle only operates in favour of diversity when provincial autonomy is seriously threatened) could be said to be derivable from the text of the Constitution. Were it not for the federal powers of reservation and disallowance, I think a compelling case could be made that it could be derived from the text. The fact that those powers exist, however, severely weakens that case, in my view, because, unlike the other provisions in the text favouring the federal order of government (e.g., the declaratory power in s. 92(10)(c) and the supervisory role over denominational school rights in s. 93), those powers could clearly be used to undercut provincial autonomy to a very significant degree. It is worth noting at this juncture that John Whyte has lamented the fact that the courts have not made as much use as he thinks they should have of the "underlying structure and themes" of the Constitution in their interpretation of it, particularly insofar as the division of powers in ss. 91 and 92 of the *Constitution Act, 1867* is concerned. See J.D. Whyte, "Constitutional Aspects of Economic Development Policy" in R. Simeon, ed., *Division of Powers and Public Policy* (U. of T. Press, 1985), 29 at 29-33.

of using the principle to invalidate legislation. The impugned governmental action in that case was not legislation, but a joint resolution of the House of Commons and the Senate. In none of these cases, therefore, can it be said that the federal principle was relied upon as an independent basis upon which to invalidate either federal or provincial legislation. And the *Québec Secession Reference*, while obviously lending some support to the view that it can be so used, cannot in my view be said completely to resolve the matter. I say that in part because the federal principle was used in that case as one of several bases upon which the new rules relating to secession were fashioned, and in part because those rules were said by the Court not to be judicially enforceable. It therefore remains an open question, in my view, as to whether or not the federal principle can be used as an independent basis upon which legislation can be invalidated.

Even if it can be so used, it would have to give way to the text of the Constitution if that text was clearly inconsistent with it. For example, one would expect that a challenge to the exercise by the Government of Canada of its powers of reservation and disallowance,<sup>167</sup> based on the obvious inconsistency between the existence of those powers and the federal principle, would fail.<sup>168</sup> Even the strongest proponents of structural argumentation like Professor Black accept that the principles generated by this form of argumentation cannot prevail over Constitutional text.

## 2. *Democracy*

Since 1982, with the advent of the *Charter*, democracy has been expressly recognized in the text of the Constitution of Canada as one of our important constitutional values. The *Charter* incorporates a special category of rights called "Democratic Rights" in sections 3-5, and also employs the concept of a "free and democratic society" as part of the standard against which infringements of *Charter* rights are to be measured for purposes of determining whether they are justifiable. However, it is clear, as the Supreme Court of Canada recognized in the *Québec Secession Reference*, that democracy had been one of the organizing principles of Canada's constitution from its inception in 1867.<sup>169</sup> The *Charter* simply made explicit what had always been implicit.

The case for including democracy as one of our Constitution's organizing principles has, the Court noted, been made in a number of decisions of the

<sup>167</sup>These are spelled out in ss. 55-7 and 90 of the *Constitution Act, 1867*.

<sup>168</sup>It should be noted that the continuing viability in law of these powers was tested in *Reference re Powers of Reservation and Disallowance*, [1938] S.C.R. 71, with one of the arguments against them remaining legally viable being based on something akin to the federal principle. The Supreme Court held that, because these powers were provided for in the text of the Constitution, they remained legally viable.

<sup>169</sup>*Supra* note 2 at 253.

Supreme Court of Canada, including *Reference re Alberta Statutes*,<sup>170</sup> where Chief Justice Duff, in an excellent example of structural argumentation, said as follows:

Under the constitution established by the *British North America Act* legislative power for Canada is vested in one Parliament consisting of the Sovereign, an upper house styled the Senate, and the House of Commons. Without entering in detail upon an examination of the enactments of the *Act* relating to the House of Commons, *it can be said that these provisions manifestly contemplate a House of Commons which is to be, as the name itself implies, a representative body; constituted, that is to say, by members elected by such of the population of the united provinces as may be qualified to vote.*<sup>171</sup>

More recently, in *OPSEU v. Ontario*,<sup>172</sup> Justice Beetz asserted 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>173</sup>

It is easy enough to assert that democracy is one of the organizing principles of our Constitution. It is not so easy to explain what precisely that means in legal terms. Like federal systems of government, democracies can come in a great many different forms, and the normative contour of the principle can therefore vary from country to country. The *Québec Secession Reference* represents the most comprehensive attempt yet undertaken by the Supreme Court of Canada to explain the precise nature of Canadian democracy, and hence to offer some insights into the normative implications flowing therefrom. That explanation begins with the drawing of a distinction between the “institutional” and “individual” dimensions of democracy.<sup>174</sup> Insofar as the former dimension is concerned, the Court identifies the following related features – representative government, popular franchise, responsible government, majority rule, the ascertainment and implementation of the “sovereign will”, self-government, accountability, consent of the governed, “compromise, negotiation and deliberation”, and the accommodation of dissenting voices.<sup>175</sup> Insofar as the individual dimension is concerned, reference is made to the rights to vote and stand for election guaranteed by section 3 of the *Charter*.<sup>176</sup>

The Court has also shed light on its understanding of democracy in several of its *Charter* decisions, including a number in which it has addressed either or both of the application of section 1 and the issue of the proper scope of judicial

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<sup>170</sup>*Supra* note 63a.

<sup>171</sup>*Ibid.* at 132-3 (emphasis added).

<sup>172</sup>*Supra* note 74.

<sup>173</sup>*Ibid.* at 57.

<sup>174</sup>*Supra* note 2 at 252-3.

<sup>175</sup>*Ibid.* at 253-7.

<sup>176</sup>*Ibid.* at 255.

review under that instrument.<sup>177</sup> It is apparent from these cases that the Court's understanding of democracy is a broad one, and that it includes both procedural and substantive components. Of special note in this regard is the response by Justice Iacobucci in *Vriend v. Alberta*<sup>178</sup> to the claim that the remedy of reading in (in the context of that case, reading in the term "sexual orientation" in the list of prohibited grounds of discrimination in Alberta's *Individual Rights Protection Act*), amounted to an improper interference on the part of the Court in the role of the legislative branch of government. One of the themes of that response was that, properly understood, the role of the courts under the *Charter* promoted rather than hindered democratic values. One way in which it did this, he said, was by "[giving] rise to a more dynamic interaction among the branches of governance",<sup>179</sup> which in turn resulted in enhanced "dialogue between and accountability of each of the branches [of government]".<sup>180</sup> Another was through the articulation and enforcement by the courts of what Chief Justice Dickson had referred to in *R. v. Oakes* as "the values and principles essential to a free and democratic society", some of which were said to be "respect for the inherent dignity for the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhanced the participation of individuals and groups in society".<sup>181</sup> If the legislative and executive branches of government fail to take these values and principles into account, "courts should stand ready to intervene to protect [them] as appropriate".<sup>182</sup> Hence, he noted, "judges are not acting undemocratically by intervening when there are indications that a legislative or executive decision was not reached in accordance with the democratic principles mandated by the *Charter*...."<sup>183</sup> The concept of democracy upon which the Court is relying here is, as Justice Iacobucci explicitly acknowledged, "broader than the notion of majority rule, fundamental as that may be".<sup>184</sup>

The Court also considered the principle of democracy in the *Provincial Court Judges Cases*.<sup>185</sup> There, the focus was less on the content of the principle than on one of its implications. That implication, which had already been at least implicitly acknowledged in *New Brunswick Broadcasting v. Nova Scotia*,<sup>186</sup> was said to be:

<sup>177</sup> See e.g., *R. v. Oakes*, *supra*, note 17; *Irwin Toy Ltd. v. Québec*, *Supra*, note 16; *RJR MacDonald Inc. v. Canada*, [1985] 3 S.C.R. 199; *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *R. v. Mills*, [1999] 3 S.C.R. 668.

<sup>178</sup> *Ibid.*

<sup>179</sup> *Ibid.* at 565.

<sup>180</sup> *Ibid.* at 566.

<sup>181</sup> *Supra* note 177 at 136.

<sup>182</sup> *Supra* note 178 at 566-7.

<sup>183</sup> *Ibid.* at 567.

<sup>184</sup> *Ibid.* at 566.

<sup>185</sup> *Supra* note 1.

<sup>186</sup> *Supra* note 61.

... the constitutionalization of legislative privileges for provincial legislatures, and most likely, for Parliament as well. These privileges are necessary to ensure that legislatures can perform their functions, free from interference by the Crown and the courts. Given that legislatures are representative and deliberative institutions, those privileges ultimately serve to protect the democratic nature of those bodies.<sup>187</sup>

Another of those implications was said to be the need to afford constitutional protection to political speech, with such protection being provided not only in relation to the actions of provincial legislatures but of Parliament as well. This implication was said by Chief Justice Lamer to flow from the proposition that "Governments cannot undermine the mechanisms of political accountability which give those institutions definition, direction and legitimacy".<sup>188</sup>

What is the legal status of the principle of democracy? Again, it is clear that the principle can be used as an aid to the interpretation of provisions in the text of the Constitution. A good example of its being used in this manner is provided in the Supreme Court's judgment in *Reference re Electoral Boundaries Commission Act* (Sask.),<sup>189</sup> in which McLachlin J. (as she then was) for the majority relied heavily on her understanding of Canada's democratic tradition in support of an interpretation of the section 3 right to vote that emphasized the right to effective representation over absolute voter parity. The principle can also serve, as the first of the implications noted above makes clear, to support a holding that action taken in pursuance of legislative or parliamentary privileges should not be subject to attack on the basis of the *Charter*. Implicit in the proposition derived from the second of those implications, that relating to the need to protect political speech, appears to be the recognition that the democracy principle can be used as an independent basis upon which to impugn the validity of legislation. In *OPSEU v. Ontario*,<sup>190</sup> Beetz J. appears to have no doubt whatsoever that it can be so used. In the course of his discussion of the principle in that case, he says, "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 [democratic] constitutional structure."<sup>191</sup> This is, in other words, a principle that the Supreme Court has clearly told us can be used in the strong sense.

If in fact it can be so used, then the Court is almost certainly going to have to provide much greater clarity in terms of the precise meaning to be given to this principle. As noted above, the Court in the *Québec Secession Reference* included in the lengthy list of features associated with the "institutional" dimension of democracy in Canada such things as "compromise, negotiation and deliberation" and the accommodation of dissenting voices. It has also said in *Oakes* – and reaffirmed in *Vriend* – that the principles of a free and

<sup>187</sup> *Supra* note 1 at 72-3.

<sup>188</sup> *Ibid.* at 75.

<sup>189</sup> [1991] 2 S.C.R. 158.

<sup>190</sup> *Supra* note 74.

<sup>191</sup> *Ibid.* at 57.

democratic society include a “commitment to social justice and equality”. Does that mean that it is open to members of the electorate concerned about the absence in the formulation of public policy of “compromise, negotiation and deliberation” or the failure to accommodate dissenting voices, or about the failure of the government to live up to this commitment to social justice and equality, to challenge the constitutionality of the legislative product of that policy on the basis of the principle of democracy? One suspects not. And yet, if those features are truly part of the content of that principle, it is difficult to see why challenges of that character should not be permitted. I think it fair to say that there is a good deal more work to be done in this area.

The Court is also going to have to clarify the scope of this principle’s application. In the form in which it was originally articulated in *Reference re Alberta Statutes*,<sup>192</sup> it was applicable only to provincial legislation; that is, it was only provincial legislation that could be attacked on the basis of the democracy principle. In *Switzman v. Elbling*,<sup>193</sup> Abbott J. suggested that its scope should be extended to the federal sphere as well, and when Beetz J. discussed the principle in *OPSEU v. Ontario*,<sup>194</sup> his formulation of it clearly assumed that it should be so extended. But what of the municipal order of government? Is it possible, for example, that the democracy principle could be used to extend the reach of the *Charter* right to vote – limited by its terms to the federal and provincial orders of government – to guarantee citizens of Canada the right to vote in municipal elections? Would this be seen as the filling of another gap in the express terms of the Constitution? Similar kinds of questions can, of course, be posed in relation to the territorial order of government.

It is worth noting that the Court has already considered a case in which a version of the democracy principle was relied upon in support of an attack upon the constitutionality of legislation. That case is *Public School Boards’ Association (Alberta) v. Alberta*<sup>195</sup> and the legislation in question was provincial legislation that both reduced some of the autonomy of school boards in the areas of personnel, program development and expenditure of funds, and eliminated independent access on the part of school boards to local tax revenues. One of several grounds on which this legislation was challenged was that the terms “municipal institutions” in section 92(8) of the *Constitution Act, 1867* and “education” in section 93 should be interpreted in such a way that provincial legislative authority under these two heads of power is subject to an implied constitutional requirement that democratically elected school boards and other municipal institutions must retain a reasonable measure of autonomy, which requirement this legislation, it was contended, failed to respect. That line

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<sup>192</sup> *Supra* note 63a.

<sup>193</sup> *Supra* note 63a.

<sup>194</sup> *Supra* note 74.

<sup>195</sup> [2000] S.C.J. No. 45.

of argument was summarily rejected by the Court, partly on the basis that evidence to support the notion that school boards in Alberta in 1905 had the measure of autonomy claimed was said to be lacking, and partly on the basis of the grant of plenary authority over education to the provincial legislatures in section 93. No reference was made by the Court to either its reasons for judgment in the *Québec Secession Reference* or the notion of organizing constitutional principles.

### 3. *The Rule of Law*

The rule of law is described by the Court in the *Québec Secession Reference* as “[l]ying] at the root of our system of government”.<sup>196</sup> No attempt is made to identify the constitutional basis for this assertion. The Court simply notes that the rule of law had been described by Justice Rand in 1959 in *Roncarelli v. Duplessis* as “a fundamental postulate of our constitutional structure”.<sup>197</sup> That constitutional basis is, however, discussed at some length in the *Manitoba Language Rights Reference*.<sup>198</sup> There the Court noted that the rule of law is explicitly recognized and affirmed as a foundational principle of our Constitution in the preamble to the *Constitution Act, 1982*. The Court also said that it became “a postulate of our ... constitutional order”<sup>199</sup> by virtue of the reference in the preamble to the *Constitution Act, 1867* to the notion of “a Constitution similar in principle to that of the United Kingdom”. And finally, in yet another good example of structural argumentation, the Court said that

[t]he principle is clearly implicit in the very nature of a Constitution. The Constitution, as the Supreme Law, must be understood as a purposive ordering of social relations providing a basis upon which an actual order of positive laws can be brought into existence. The founders of this nation must have intended, as one of the basic principles of nation building, that Canada be a society of legal order and normative structure: one governed by rule of law.<sup>200</sup>

Although the Court in the *Québec Secession Reference* noted that the rule of law was described in the *Patriation Reference* as “a highly textured expression”,<sup>201</sup> it did provide an outline of what it referred to as “the elements of the rule of law”.<sup>202</sup> Those elements, which are presumably to be taken to define the content of the rule of law in Canada, can be summarized in the following terms: (1) a requirement “that the law [be] supreme over the acts of both government and private persons”,<sup>203</sup> (2) a guarantee “to the citizens and

<sup>196</sup> *Supra* note 2 at 257.

<sup>197</sup> [1959] S.C.R. 121, at 142.

<sup>198</sup> *Supra* note 61.

<sup>199</sup> *Ibid.* at 750.

<sup>200</sup> *Ibid.* at 750-1.

<sup>201</sup> *Supra* note 66 at 805.

<sup>202</sup> *Supra* note 2 at 257.

<sup>203</sup> *Ibid.* at 258.



residents of the country [of] a stable, predictable and ordered society in which to conduct their affairs",<sup>204</sup> reflecting what in the *Manitoba Language Rights Reference* the Court referred to as "the more general principle of normative order",<sup>205</sup> and (3) the need for a basis in law for any action on the part of the state or its officials which limits individual liberty, or the requirement that "the relationship between the state and the individual must be regulated by law".<sup>206</sup>

The question of whether the rule of law can function on its own as the basis upon which the validity of legislation can be challenged was not addressed in the *Québec Secession Reference*. It must be said, however, that if the rule of law is understood in terms of the three elements identified above, there is reason to doubt that the Court would have intended that it could so function. The first of those elements almost certainly has its origins in the second or "legal equality" branch of Professor A.V. Dicey's formulation of the rule of law in his famous text, *Introduction to the Study of the Law of the Constitution*,<sup>207</sup> which would not have been understood by him to have provided the basis upon which the validity of legislation could be challenged. The "legal equality" of which Dicey was speaking is that embodied in the proposition that the law must be applied equally to all those – including government officials – to whom the law by its terms applies. The "normative order" element of the rule of law, which was critical to the resolution of the issue in the *Manitoba Language Rights Reference*, was used there, not as a basis upon which to invalidate legislation, but rather as a basis upon which to leave temporarily intact and operative legislation that had already been held to be unconstitutional. And the third element, which imposes the requirement of a legal basis for governmental action that impinges upon individual liberty, seems clearly to be directed at, and to provide a basis for challenging the legality of, the actions of government officials – in other words, representatives of the executive branch of government – rather than legislation.<sup>208</sup> In a sense, it provides the basis for requiring rather than rejecting legislation.

It should be noted that attempts have been made in a number of recent cases both to add new meanings to the rule of law and to employ it as a distinct basis upon which to impugn the validity of legislation.<sup>209</sup> The first, and arguably still most important of these cases, is *Bacon v. Saskatchewan Crop Insurance*

<sup>204</sup> *Ibid.* at 257.

<sup>205</sup> *Supra* note 66 at 749.

<sup>206</sup> *Supra* note 2 at 257.

<sup>207</sup> MacMillan & Co., 1959 (10<sup>th</sup> ed.), at 187-96, especially 193-5. See, in this regard, the reasons for judgment of Ritchie J. in *A.-G. Canada v. Lavell*, [1974] S.C.R. 1349, at 1365-7.

<sup>208</sup> See e.g., *Roncarelli v. Duplessis*, *supra* note 197.

<sup>209</sup> See e.g., *Bacon v. Saskatchewan Crop Insurance Corp.*, [1999] 11 W.W.R. 51 (Sask. C.A.) (leave to appeal to S.C.C. dismissed June 1, 2000); *Westergard-Thorpe v. Canada (A.G.)* (2000), 183 D.L.R. (4<sup>th</sup>) 458 (F.C.A.D.); *JTI-MacDonald Corp. v. B.C. (A.G.)* (2000), 184 D.L.R. (4<sup>th</sup>) 335 (B.C.S.C.).

*Corporation*.<sup>210</sup> The legislation at issue in that case altered in several significant respects the rules and regulations governing crop insurance in the province of Saskatchewan. Unable to find any basis in the textual provisions of the Constitution upon which to attack the constitutionality of the statute, opponents of it argued that it was of no force or effect because it violated the rule of law, understood as a prohibition against all arbitrary governmental action, which the statute was alleged to be.<sup>211</sup> At trial, the challengers were successful at the level of constitutional principle; the trial judge, in other words, accepted their contention that the rule of law could be so understood.<sup>212</sup> However, they failed when it came to the application of the principle; the trial judge held that the statute did not amount to arbitrary governmental action. On appeal to the Saskatchewan Court of Appeal, the challengers failed at the first level. On behalf of that court, Justice Wakeling held that the rule of law could not function as a basis upon which to impugn the validity of legislation. That holding has now been applied in two other recent cases in which the lower courts have been asked to strike legislation down on the basis of its alleged inconsistency with the rule of law.<sup>213</sup>

The principle of constitutionalism, which the Court in the *Québec Secession Reference* discussed alongside the principle of the rule of law, reflects the requirement "that all government action [must] comply with the Constitution".<sup>214</sup> This requirement is, as the Court noted, embodied in section 52(1) of the *Constitution Act, 1982*, which provides that "the Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect". Like the rule of law, the Court said, the principle of constitutionalism has been an important feature of our Constitution since 1867. Even in the absence of a provision like section 52(1), our courts accepted the proposition that it was open to them to invalidate governmental action, including legislation emanating from the two orders of government, if it found such action to contravene one or more textual provisions of our Constitution.<sup>215</sup>

Given the presence now of section 52(1) of the *Constitution Act, 1982*, there seems no reason to characterize the principle of constitutionalism as the product of structural argumentation, as one might have characterized it prior to 1982. It is no longer, in other words, the product of reasoning by implication; it is explicitly recognized in the text of the Constitution. It remains, of course,

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<sup>210</sup> *Ibid.*

<sup>211</sup> This argument was largely based on an article by Patrick Monahan entitled "Is the Pearson Airport Legislation Unconstitutional?: The Rule of Law as a Limitation on Contract Repudiation by Government" (1995), 33 Osg. H.L.J. 411.

<sup>212</sup> [1997] 9 W.W.R. 258, at 288-93.

<sup>213</sup> See the other cases cited *supra* in note 209.

<sup>214</sup> *Supra* note 2 at 258.

<sup>215</sup> For a very early case in which this proposition was accepted, see *R. v. Chandler* (1868), 1 Hannay 556, 12 NBR 556.

a foundational principle, and one that, by its very nature, can be used as a basis for striking down legislation.

#### 4. *Protection of Minorities*

This is the fourth and last of the underlying constitutional principles identified and examined in the *Québec Secession Reference*. The original source of this principle is said by the Court to lie in the protection granted to minority religious groups in section 93 of the *Constitution Act, 1867*.<sup>216</sup> Reference is also made to the provisions of the *Charter* protecting both minority language rights and minority language educational rights.<sup>217</sup> The *Charter* generally is seen to be reflective of this principle, the Court suggesting that, "one of the key considerations motivating the enactment of the *Charter* and the process of constitutional judicial review that it entails, is the protection of minorities."<sup>218</sup> Finally, mention is made of sections 25 and 35 of the *Constitution Act, 1982* relating to the rights of aboriginal persons. "The protection of these rights, so recently and arduously achieved," the Court says, "whether looked at in their own right or as part of the larger concern with minorities, reflects an important underlying constitutional value".<sup>219</sup>

No attempt is made in the *Québec Secession Reference* to define the precise nature and scope of the protection that is to be afforded to minority rights by this principle above and beyond that afforded by the specific provisions of the Constitution upon which the principle is said to be based. In particular, no indication is given as to whether or not protection is to be afforded by this principle to minority groups other than those that receive protection under these provisions. Nor is any indication given as to whether those minority groups that are entitled to protection under these provisions can use this principle to extend the scope of that protection.

In the context of the *Québec Secession Reference* itself, it should be noted, the role played by this principle was both limited in scope and nebulous in content. The Court said that, along with the principles of federalism, democracy and the rule of law, the parties to any negotiations that might take place in relation to the possible secession of a province would have to be mindful of the protection of minorities. What precisely that would mean is not spelled out, except for an oblique reference to the fact that, "there are linguistic and cultural minorities, including aboriginal peoples, unevenly distributed across the country who look to the Constitution of Canada for the protection of their rights".<sup>220</sup> And, it must be noted, the Court made it clear that the obligation to

<sup>216</sup> *Supra* note 2 at 261.

<sup>217</sup> *Ibid.* at 261-2.

<sup>218</sup> *Ibid.* at 262.

<sup>219</sup> *Ibid.* at 262-3.

<sup>220</sup> *Ibid.* at 269.

conduct such negotiations in accordance with those principles was not one that would be judicially enforced. Further elaboration or elucidation of the role of the protection of minorities in this particular context is therefore very unlikely to be forthcoming.

That said, attempts are already being made by creative and imaginative lawyers to have the courts extend the reach of this principle beyond that prescribed by the various provisions in the text of the Constitution which can be said to speak directly to it, and upon which the Court in the *Québec Secession Reference* relied in including it as one of our foundational constitutional principles. Such extension, it is being argued, is required in order to “fill out gaps in the express terms of the constitutional scheme”, in the same way in which the principle of judicial independence was extended in the *Provincial Court Judges Cases* to fill a “gap” in the text relating to it. *Lalonde v. Ontario*,<sup>221</sup> an attack upon the decision of the Ontario government to scale down significantly the operations of Montfort Hospital in Ottawa, the only francophone hospital in the province, provides a good example of such attempts. The essence of the claim in that case is that that decision is unconstitutional because it offends the protection of minorities principle, with the relevant minority here, of course, being the French-speaking linguistic minority. That claim was successful at trial; the case is currently on appeal to the Ontario Court of Appeal.

Whether or not the Supreme Court of Canada will be willing to extend the principle in the manner claimed in such cases remains to be seen. However, it is worth noting that, as the *Bill 30 Reference*<sup>222</sup> and *Adler*<sup>223</sup> case make abundantly clear, the Court itself has refused to extend to other religious minorities the protections afforded to the dissentient Catholic and Protestant minorities by section 93 of the *Constitution Act, 1867*. And in *Mahe v. Alberta*,<sup>224</sup> the Court viewed the minority language educational rights for which section 23 of the *Charter* provides as very much a self-contained set of rights, unaffected by either section 15 of the *Charter* (protecting the right to equality) or section 27 (entrenching the principle of multiculturalism). There is therefore at least some reason to believe that the Court will reject claims of the kind made in *Lalonde*.

## 5. *Judicial Independence*

Judicial independence is given explicit recognition in the Constitution in section 11(d) of the *Charter*, which guarantees every person charged with an offense the right to be tried by an independent and impartial

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<sup>221</sup>(1999), 181 D.L.R. (4th) 263 (Ont. Div. Ct.). Another example is *Hogan v. Newfoundland and Canada*, [2000] N.J. No. 54 (Feb. 28, 2000) (Nfld C.A.).

<sup>222</sup>[1987] 1 S.C.R. 1148.

<sup>223</sup>*Adler v. Ontario*, [1996] 3 S.C.R. 609.

<sup>224</sup>[1990] 1 S.C.R. 342.

tribunal. Judicial independence has also been given recognition in sections 99 and 100 of the *Constitution Act, 1867*, which make provision for security of tenure and financial security respectively in respect of superior court judges.<sup>225</sup> However, as Chief Justice Lamer in the *Provincial Court Judges Cases* pointed out, both section 11(d) of the *Charter* and sections 99 and 100 of the *Constitution Act, 1867* are limited in the scope of the protection they afford to this principle. Section 11(d) only protects the principle in the context of criminal prosecutions, and sections 99 and 100 only protect it insofar as superior court judges are concerned. None of these provisions protects the principle in the context of provincial courts performing non-criminal adjudicative functions.

It was primarily in order to deal with the failure of these provisions to protect the principle of judicial independence in the context of provincial courts performing non-criminal adjudicative functions that Chief Justice Lamer in the *Provincial Court Judges Cases* included in his reasons for judgment on the issue of financial security an introductory section in which he asserted that "judicial independence is at root an *unwritten* constitutional principle, in the sense that it is exterior to the particular sections of the *Constitution Acts*".<sup>226</sup> It was his view that, "the existence of that principle, whose origins can be traced to the *Act of Settlement* of 1701, is recognized and affirmed by the preamble to the *Constitution Act, 1867*".<sup>227</sup> The particular component of the preamble to which he was referring was, of course, its reference to "a Constitution similar in Principle to that of the United Kingdom".

Support for this position was derived from a number of sources. One was the decision in *Beauregard* in which this component of the preamble had been described as "textual recognition"<sup>228</sup> of the principle of judicial independence. Another was the decision in *Valente*, in which LeDain J. had referred to the *Act of Settlement* of 1701 as the "historical inspiration for sections 96 to 100 of the *Constitution Act, 1867*."<sup>229</sup> Those provisions, as well as section 11(d) of the *Charter*, were, Chief Justice Lamer went on to say, "proof of the existence of a general principle of judicial independence that applies to all courts no matter what kind of cases they hear".<sup>230</sup> Finally, he relied on "the central place that courts hold within the unique Canadian system of government".<sup>231</sup> Courts were, he said, part of the "basic structure"

<sup>225</sup> Section 99 provides for security of tenure for superior court judges only. Section 100 provides for financial security for superior, district and county courts, but we no longer have any district or county courts.

<sup>226</sup> *Supra* note 1 at 63-4.

<sup>227</sup> *Ibid.* at 64.

<sup>228</sup> *Beauregard v. Canada*, [1986] 2 S.C.R. 56, at 72.

<sup>229</sup> *Valente v. The Queen*, [1985] 2 S.C.R. 673, at 693.

<sup>230</sup> *Supra* note 1 at 77.

<sup>231</sup> *Ibid.*

of that system,<sup>232</sup> and, as such, must, along with the principle of judicial independence, be preserved intact. Hence, he concluded, “by implication, the jurisdiction of the provinces over courts, as that term is used in section 92(14) of the *Constitution Act, 1867*, contains within it an implied limitation that the independence of those courts cannot be undermined.”<sup>233</sup>

The striking feature of this reasoning is not that the principle of judicial independence is held to be a foundational principle of our Constitution. Even without the explicit recognition given to the principle now in section 11(d) of the *Charter*, that proposition could have been sustained on the basis of sections 99 and 100 of the *Constitution Act, 1867*, particularly when those provisions are read in light of, and with the aid of, the reference in the preamble to “a Constitution similar in Principle to that of the United Kingdom”. Nor is it surprising that the origins of the principle, at least in historical terms, are said to lie in the preamble. What is striking about this reasoning is the fact that it appears to use the preamble as the basis upon which to extend the reach of the principle of judicial independence beyond that prescribed by the text of the Constitution, an extension that, Chief Justice Lamer says, is required in order to fill in a “gap” in that Constitution.<sup>234</sup> And it is striking for two reasons. The first is that the Court is willing to extend the scope of the principle beyond that for which the text of the Constitution provides. The second is that that extension is based upon the preamble.

In the result, this discussion of the true source and scope of the principle of judicial independence was unnecessary to the resolution of the constitutional questions that had been raised in the *Provincial Court Judges Cases*, all of which had been argued – and therefore fell to be resolved – on the basis of section 11(d) of the *Charter*. However, that discussion has formed the basis of arguments advanced by counsel in a number of recent cases in which challenges have been brought to the validity of legislation said to be inconsistent with the principle of judicial independence, and to which none of section 11(d) of the *Charter* nor sections 99 or 100 of the *Constitution Act, 1867* is directly applicable. A good example of that kind of argument is the challenge by the tobacco manufacturers to the legislation in British Columbia permitting the provincial government to seek recovery from those manufacturers for health care costs incurred in the treatment of tobacco-related disease. Counsel for the manufacturers in that case contend that the procedural and evidentiary regime for which the legislation provides

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<sup>232</sup>*Ibid.*

<sup>233</sup>*Ibid.*

<sup>234</sup>I have suggested above (see text accompanying notes 78-82, *supra*) that Chief Justice Lamer’s reasoning on this point is open to a different interpretation, one that has the preamble playing the more limited role of an aid to textual interpretation. However, the interpretation given here seems to be the preferred one, and was the one adopted by Justice La Forest in that case. (See text accompanying note 86, *supra*.)

so tilts the balance in favour of the government that it offends the principle of judicial independence. That argument was unsuccessful at trial,<sup>235</sup> but it is sure to be repeated when the manufacturers launch their anticipated challenge to the new statute that the legislature in British Columbia has enacted.<sup>236</sup> And it is important to note that the argument was rejected, not because the independence of the judiciary – in this instance, it bears emphasizing, of the superior court judiciary – could not serve as a distinct basis upon which to attack the constitutionality of legislation, but because, in the circumstances of that particular case, the principle was not being infringed.<sup>237</sup>

The *Provincial Court Judges Cases* are also important, of course, for what they tell us about the content of the principle of judicial independence, in particular about the process by which judicial remuneration must be determined if the financial security component of the principle is to be respected. That process, which is the product of yet another example of structural argumentation in the Canadian context, entails the use by both the federal and provincial governments of “independent, effective and objective” commissions to make recommendations on a periodic basis relating to the appropriate level of remuneration for the judiciary; these recommendations need not be accepted by government, but they can be rejected only if adequate reasons for doing so are provided.<sup>238</sup> The feature of the reasoning that led to the establishment of this process as a constitutional requirement that gives to it its structural character is the fact that integral to it was the heavy reliance placed by Chief Justice Lamer on the special role played by the courts within the system of government mandated by our Constitution. That special role was said by Chief Justice Lamer to inhere in the separation of powers principle, which is discussed later in this paper.

## 6. *The Role of Provincial Superior Courts*

The institution of the superior trial court of general or inherent jurisdiction is one of many institutions that Canada inherited from the United Kingdom. Its special role within our system of government has

<sup>235</sup> *JTI - MacDonald Corp. v. A.-G. (B.C.)*, *supra* note 209 at 347-62. I should disclose the fact that I assisted the Government of British Columbia in its defence to this action.

<sup>236</sup> Although the Government prevailed on the judicial independence issue (as well as on several other issues raised by the tobacco manufacturers), the legislation was struck down on federalism grounds. Rather than appeal that part of the trial judge's ruling, the Government enacted a new statute which, while it lacks most if not all of the features that the trial judge held took the first one outside provincial legislative jurisdiction, retains many features of the one struck down. The name of the new statute is the *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c. 30.

<sup>237</sup> *Supra* note 235 at 362.

<sup>238</sup> *Supra* note 1 at 102-11.

come to be constitutionally protected in two different ways, both of which are dependent upon the use of structural argumentation in the strong sense noted earlier – that is, by the application of principles implied from provisions of the Constitution that have the independent force of law. The first is through the prohibition against both Parliament and the provincial legislatures assigning to bodies other than provincial superior courts certain kinds of adjudicative functions. The precise nature and scope of this prohibition, which is derived primarily from section 96 of the *Constitution Act, 1867*, has varied somewhat over time.<sup>239</sup> The test currently applied for determining on which side of the line a particular adjudicative function falls was prescribed by Chief Justice Dickson in *Reference re Residential Tenancies Act* in 1981.<sup>240</sup> That test places a great deal of weight on history – in particular, on the jurisdiction of the various courts and tribunals in existence in the four founding provinces in 1867<sup>241</sup> – and on the particular manner and context in which the adjudicative function in question is to be performed by the non-section 96 body to which the impugned legislation seeks to assign it. The prohibition itself has been implied out of the grant to the federal order of government of the power to appoint the judges of provincial superior courts.<sup>242</sup> In essence, what the courts have done is to interpret that grant of power in functional rather than strictly institutional terms. In other words, the appointing power has been interpreted to extend to all persons *who function as* judges of provincial superior courts. Until fairly recently, the rationale for this prohibition – apart from its superficial logical appeal – was said to lie in the fact that the Constitution of Canada created a unitary judicial system which would be placed at risk if, in the words of Chief Justice Dickson, “a province could pass legislation creating a tribunal, appoint members thereto, and then confer on the tribunal the jurisdiction of superior courts”.<sup>243</sup> That rationale has now been said by Chief Justice Lamer in the *Provincial Court Judges Cases* to lie in “the maintenance of the rule of law through the protection of the judicial role”.<sup>244</sup>

The second way in which the role of superior courts has been given constitutional protection is through the notion of superior court core jurisdiction, a notion first recognized in 1995 in *MacMillan Bloedel Ltd. v. Simpson*.<sup>245</sup> This notion, too, has been derived primarily from section 96

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<sup>239</sup> See generally, Hogg, P.W., *Constitutional Law of Canada*, *supra* note 9 at 190-210.

<sup>240</sup> [1981] 1 S.C.R. 714.

<sup>241</sup> See *Sobeys Stores Ltd. v. Yeomans*, [1989] 1 S.C.R. 238.

<sup>242</sup> Section 96 provides that “The Governor General shall appoint the judges of the Superior, District, and County Courts in each Province, except those of the Court of Probate in Nova Scotia and New Brunswick”.

<sup>243</sup> *Supra* note 240 at 728.

<sup>244</sup> *Supra* note 1 at 66.

<sup>245</sup> [1995] 4 S.C.R. 725.



of the *Constitution Act, 1867*. In essence, it amounts to the proposition that, while it may be possible under the *Reference re Residential Tenancies Act* test for Parliament and the provincial legislatures to assign to non-section 96 courts and tribunals functions that form part of the core jurisdiction of provincial superior courts, those functions cannot be removed from the latter courts. Chief Justice Lamer, the author of the majority opinion in *MacMillan Bloedel*, made no attempt to provide an exhaustive list of those functions that, in his view, formed part of the core jurisdiction of provincial superior courts; nor did he purport to prescribe a definitive test for determining whether a particular function fell within that core. However, he did give some examples of core jurisdiction functions. One is the power of superior courts to make final decisions on questions relating to the jurisdiction of inferior courts and tribunals.<sup>246</sup> Another is the power of those courts to pronounce on the constitutionality of federal legislation.<sup>247</sup> And, of course, he held in that case that the power to punish for contempt *ex facie* forms part of that core jurisdiction. And he does offer some general guidance as to the basis upon which the core versus non-core distinction is to be drawn. Hence, he says that "the core jurisdiction of the provincial Superior Courts comprises those powers which are essential to the administration of justice and the maintenance of the rule of law".<sup>248</sup>

The rationale for recognizing the principle of superior court core jurisdiction is said to lie primarily in that same principle of the rule of law. That rationale is articulated in the following terms by Chief Justice Lamer:

In the constitutional arrangements passed on to us by the British and recognized by the preamble to the *Constitution Act, 1867*, the provincial Superior Courts are the foundation of the rule of law itself. Governance by rule of law requires a judicial system that can ensure its orders are enforced and its process respected. In Canada, the provincial Superior Court is the only court of general jurisdiction and as such is the centre of the judicial system. None of our statutory courts has the same core jurisdiction as the Superior Court and therefore none is as crucial to the rule of law.<sup>249</sup>

I am not aware of any cases in which the principle of superior court core jurisdiction has yet been invoked in precisely the terms in which that principle is articulated in *MacMillan Bloedel*. However, in the case to which reference was made a short while ago, the tobacco manufacturers have relied upon that principle in support of an argument that legislation that interferes with the fact finding function of a provincial superior court is unconstitutional. That line of argument, like that based upon the principle of judicial independence, was unsuccessful at trial.<sup>250</sup> However, there is

<sup>246</sup> *Crevier v. A.-G. Québec*, [1981] 2 S.C.R. 220.

<sup>247</sup> See *A.-G. Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307.

<sup>248</sup> *Supra* note 245 at 754.

<sup>249</sup> *Ibid.* at 753.

<sup>250</sup> *Supra* note 235 at 354-5.

every reason to believe that it will be advanced again when the tobacco manufacturers challenge the provincial government's new statute.

### 7. *Individual Rights and Freedoms*

One of the earliest examples of structural argumentation in Canadian constitutional law is the following passage from the reasons for judgment of Chief Justice Duff in *Reference re Alberta Statutes*, the first portion of which was reproduced above in the context of the principle of democracy:

Under the constitution established by the *British North America Act* legislative power for Canada is vested in one Parliament consisting of the sovereign, an upper house styled the Senate, and the House of Commons. Without entering in detail upon an examination of the enactments of the *Act* relating to the House of Commons, it can be said that these provisions manifestly contemplate a House of Commons which is to be, as the name itself implies, a representative body; constituted, that is to say, by members elected by such of the population of the united provinces as may be qualified to vote. The preamble of the Statute, moreover, shows plainly enough that the constitution of the Dominion is to be similar in principle to that of the United Kingdom. The statute contemplates a parliament working under the influence of public opinion and public discussion. There can be no controversy that such institutions derive their efficacy from the free public discussion of affairs, from criticism and answer and counter-criticism, from attack upon policy and administration and defence and counter-attack; from the freest and fullest analysis and examination from every point of view of political proposals. This is signally true in respect of the discharge by Ministers of the Crown of their responsibility to Parliament, by members of Parliament of their duty to the electors, and by the electors themselves of their responsibilities in the election of their representatives.<sup>251</sup>

On the basis of this line of reasoning, Chief Justice Duff implied the existence of what he referred to as "the right of public discussion",<sup>252</sup> a right very similar to that recently implied out of the Australian Constitution by the High Court. That right, he said, could not be curtailed by provincial legislation if such curtailment "substantially [interfered] with the working of the parliamentary institutions of Canada as contemplated by the provisions of the *British North America Act* and the statutes of the Dominion of Canada".<sup>253</sup> It was a right, in other words, that could be used as the basis of an attack upon the validity of legislation.

Some twenty years later, Justice Rand adopted a very similar line of reasoning in *Switzman v. Elbling*:

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

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<sup>251</sup> *Supra* note 63a at 133.

<sup>252</sup> *Ibid.*

<sup>253</sup> *Ibid.* at 134-5.

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, whatever the deficiencies in its workings. Canadian government is in substance the will of the majority expressed directly or indirectly through popular assemblies. This means ultimately government by the free public opinion of an open society, the effectiveness of which, as events have not infrequently demonstrated, is undoubted.

But public opinion, in order to meet such a responsibility, demands the condition of a virtually unobstructed access to and diffusion of ideas. Parliamentary government postulates a capacity in men, acting freely and under self-restraints to govern themselves; and that advance is best served in the degree achieved of individual liberation from subjective as well as objective shackles.<sup>254</sup>

The "right of public discussion" of such concern to Chief Justice Duff and Justice Rand was not the only right to which the *Constitution Act, 1867* was seen to be capable of giving rise. In *Winner v. SMT (Eastern Ltd.)*,<sup>255</sup> Justice Rand derived a form of mobility right from the notion of Canadian citizenship, and support for the notion of an implied right to freedom of association can be found in the opinion of Abbott J. in *Oil, Chemical and Atomic Workers v. Imperial Oil*.<sup>256</sup> It was clearly possible on the basis of these various pronouncements to speak of the Constitution having given rise to an implied bill of rights of at least modest scope.

However, in 1978 the notion of implied constitutional rights appeared to be rejected as constitutionally unsound by Justice Beetz, speaking for the majority in *Dupond v. City of Montreal*.<sup>257</sup> It was contended that the municipal legislation there at issue was unconstitutional because it was "in conflict with the fundamental freedoms of speech, of assembly and association, of the press and of religion",<sup>258</sup> with particular reliance being placed on the decision in *Reference re Alberta Statutes*. The response given to this argument by Justice Beetz was simple and to the point. After noting that it was "exceedingly difficult to deal with a submission couched in such general terms" and that "modern parlance has fostered loose language upon lawyers", he stated that "none of the freedoms referred to is so enshrined in the Constitution as to be above the reach of competent legislation".<sup>259</sup> No supporting reasons for this proposition were advanced and none of the cases in which the notion of implied rights had been discussed was mentioned.

Surprisingly, less than a decade later, in *OPSEU v. A.G. Ontario* the same Justice Beetz responded to an argument based on the implied bill of rights theory by saying the following:

<sup>254</sup> *Supra* note 63a at 306.

<sup>255</sup> [1951] S.C.R. 887, at 919-20.

<sup>256</sup> [1963] S.C.R. 584, at 599-600.

<sup>257</sup> [1978] 2 S.C.R. 770, at 796-8.

<sup>258</sup> *Ibid.* at 796.

<sup>259</sup> *Ibid.*

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. In the words of Duff CJC in *Reference re Alberta Legislation* .... "such institutions derive their efficacy from the free public discussion of affairs ..." and, in those of Abbott J in *Switzman v. Elbling* .... neither a provincial legislature nor Parliament itself can "abrogate this right of discussion and debate". 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>260</sup>

No explanation was given for this change of heart on Justice Beetz's part. Whatever the reason for it, the result was that the theory of implied rights was again alive and well. Confirmation of this, at least insofar as the implied right of public discussion is concerned, was provided in the *Provincial Court Judges Cases*, in which Chief Justice Lamer cited with approval the cases in which this right had been given constitutional recognition, and in which he clearly endorsed the reasoning underlying those cases.<sup>261</sup>

Now that we have the *Charter*, which makes provision for all of the rights for which support can be found in these cases, this theory of implied rights is unlikely to be of much practical importance to us. However, it could potentially prove useful in circumstances in which legislation clearly infringing on one of these rights is protected by a section 33 override clause from attack under the *Charter*. It cannot therefore be said to be of merely theoretical or academic interest.

## 8. *Interprovincial Comity*

The principle of interprovincial comity was described by Chief Justice Lamer in the *Provincial Court Judges Cases* as "a fundamental constitutional rule which is not found in express terms in the Constitution".<sup>262</sup> That rule, he went on to point out, has its origins in the decision of the Supreme Court of Canada in *Morguard Investments Ltd. v. De Savoye*.<sup>263</sup> The question in that case was whether or not the courts of British Columbia should recognize and give effect to the judgment of the courts of Alberta in a personal action brought in Alberta when the defendant, a former resident of that province, now lived in British Columbia. The Court answered that question in the affirmative, on the basis that, in the words of Justice La Forest, "the courts in one province should give full faith and credit ... to the judgments given by a court in another province or a territory, so long as that

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<sup>260</sup> *Supra* note 74 at 57.

<sup>261</sup> *Supra* note 1 at 74-5.

<sup>262</sup> *Ibid.* at 70.

<sup>263</sup> [1990] 3 S.C.R. 1077.

court has properly, or appropriately, exercised jurisdiction in the action".<sup>264</sup> In support of the latter proposition, La Forest J noted that the restrictive English rules that had governed such matters in Canada prior to that case seemed:

... to fly in the face of the obvious intention of the Constitution to create a single country. This presupposes a basic goal of stability and unity where many aspects of life are not confined to one jurisdiction. A common citizenship ensured the mobility of Canadians across provincial lines, a position reinforced today by section 6 of the *Charter* .... In particular, significant steps were taken to foster economic integration. One of the central features of the Constitutional arrangements incorporated in the *Constitution Act, 1867* was the creation of a common market. Barriers to interprovincial trade were removed by section 121. Generally trade and commerce between the provinces was seen to be a matter of concern to the country as a whole .... The Peace, Order and Good Government clause gives the federal Parliament powers to deal with interprovincial activities .... And the combined effect of section 91(29) and section 92(10) does the same for interprovincial works and undertakings.

These arrangements themselves speak to the strong need for the enforcement throughout the country of judgments given in one province. But that is not all. The Canadian judicial structure is so arranged that any concerns about differential quality of justice among the provinces can have no real foundation. All Superior Court judges – who also have superintending control over other provincial courts and tribunals – are appointed and paid by the federal authorities. And all are subject to final review by the Supreme Court of Canada, which can determine when the courts of one province have appropriately exercised jurisdiction in an action and the circumstances under which the courts of another province should recognize such judgments.<sup>265</sup>

Subsequently, in *Hunt v. T & N PLC*,<sup>266</sup> Justice La Forest described these various features of our Constitution as "the structural requirements" of the Constitution.<sup>267</sup> In that case, it was noted that no constitutional issue as such had been raised in *Morguard*, and that it was therefore "sufficient there to infuse the constitutional considerations into the rules that might otherwise have governed issues of enforcement and recognition of judgment".<sup>268</sup> However, in *Hunt* itself, a constitutional question was raised and La Forest J now characterized these "constitutional considerations" as "constitutional imperatives", which established "minimum standards of order and fairness"<sup>269</sup> which provincial legislatures were compelled to respect. Provincial legislation – and presumably federal legislation as well – that failed to respect these standards would therefore be held to be unconstitutional.<sup>270</sup>

<sup>264</sup> *Ibid.* at 1102.

<sup>265</sup> *Ibid.* at 1099-1100.

<sup>266</sup> [1993] 4 S.C.R. 289.

<sup>267</sup> *Ibid.* at 323.

<sup>268</sup> *Ibid.* at 324.

<sup>269</sup> *Ibid.*

<sup>270</sup> Another important case in this area is *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, relating to the impact of Canada's Constitution on the choice of law rules to be applied in the courts here.

## 9. *Separation of Powers*

The separation of powers principle is treated in the following manner by Professor Hogg in his textbook, *Constitutional Law of Canada*:

There is no general "separation of powers" in the *Constitution Act, 1867*. The *Act* does not separate the legislative, executive and judicial functions and insist that each branch of government exercise only "its own" function. As between the legislative and executive branches, any separation of powers would make little sense in a system of responsible government; and it is clearly established that the *Act* does not call for any such separation. As between the judicial and the two political branches, there is likewise no general separation of powers. Either the Parliament, or the Legislatures may by appropriate legislation confer non-judicial functions on the courts and (with one important exception, to be discussed) may confer judicial functions on bodies that are not courts.<sup>271</sup>

The one exception is, of course, the prohibition that has been read into section 96 of the *Constitution Act, 1867*, against Parliament and the provincial legislatures assigning certain kinds of adjudicative functions to non-section 96 bodies.<sup>272</sup>

There have, however, been a number of recent decisions of the Supreme Court of Canada in which one or more members of the Court have either described the notion of separation of powers as a feature of Canada's constitution or invoked the notion in support of the position they took on the constitutional issue raised. Hence, one finds Justice Wilson in *Operation Dismantle Inc. v. The Queen*<sup>273</sup> asserting in the context of a discussion about the need for a political questions doctrine in Canada that "[section 1] embodies through its reference to a free and democratic society the essential features of our constitution, including the separation of powers, responsible government and the rule of law".<sup>274</sup> In *Fraser v. PSSRD*,<sup>275</sup> a case in which the Court had been asked to review the decision of a labour arbitrator who upheld the termination of a federal civil servant, Chief Justice Dickson says that "[t]here is in Canada a separation of powers among the three branches of government – the legislature – the executive and the judiciary",<sup>276</sup> and he assigns to each of these branches a different role. That of the judiciary, he says, is "to interpret and apply the law"; that of the legislature is "to decide upon and enunciate policy"; and that of the executive is "to administer and implement that policy".<sup>277</sup> In *R. v. Power*,<sup>278</sup> Justice L'Heureux-Dubé, while acknowledging that there is "no general

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<sup>271</sup> *Supra* note 9 at 190-1.

<sup>272</sup> See text accompanying notes 239-44.

<sup>273</sup> [1985] 1 S.C.R. 441.

<sup>274</sup> *Ibid.* at 491. It should be noted that Justice Wilson was speaking only for herself.

<sup>275</sup> [1985] 2 S.C.R. 455.

<sup>276</sup> *Ibid.* at 469. Chief Justice Dickson was speaking for the full Court in this case.

<sup>277</sup> *Ibid.* at 470.

<sup>278</sup> [1994] 1 S.C.R. 601.

'separation of powers' doctrine" spelled out in the *Constitution Act, 1867*, nevertheless relies on that notion, which she says "does in fact exist",<sup>279</sup> in support of her position that the courts should not interfere in the exercise of prosecutorial discretion. And in *Harvey v. New Brunswick (A.G.)*,<sup>280</sup> Justice McLachlin (as she then was) invoked the separation of powers in support of her holding that the *Charter* should not be applied to provincial legislation disqualifying persons convicted of certain offenses from holding public office or seeking to obtain it: "The preamble [to the *Constitution Act, 1867*] also incorporates the notion of the separation of powers, inherent in British parliamentary democracy, which precludes the courts from trenching on the internal affairs of the other branches of government".<sup>281</sup>

The most extended discussion in these recent cases of the separation of powers principle is found in Chief Justice Lamer's reasons for judgment in *Cooper and Bell v. Canada*,<sup>282</sup> a case in which the Court was required to rule on the jurisdiction of two administrative bodies – the Canadian Human Rights Commission and the tribunals to which the Commission was empowered to send cases for hearing – to rule on the constitutionality of the *Canadian Human Rights Act*. The majority of the Court, applying the rule that had been established in previous cases in which similar jurisdictional issues had arisen, answered that question in the negative. Chief Justice Lamer agreed that, if that rule – according to which the appropriate question to ask was whether or not Parliament could be said to have intended to have conferred on the bodies in question the power to decide general questions of law – were to be applied in this case, that was the appropriate answer to give. However, it was his opinion that that rule was unsound. In his view, courts, and only courts, should have the authority to make pronouncements on the constitutionality of legislation.

Support for that position, he said, could be found in two of the "first principles of the Constitution"<sup>283</sup> – the separation of powers and parliamentary democracy. Of the former principle he said that it was "one of the defining features of the Canadian Constitution".<sup>284</sup> While acknowledging that "this Court has held that the separation of powers under the Canadian Constitution is not *strict*",<sup>285</sup> he said that "the absence of a strict separation of powers does not mean that Canadian constitutional law does not recognize and sustain some notion of the separation of powers".<sup>286</sup>

<sup>279</sup> *Ibid.* at 620. Justice L'Heureux-Dubé was speaking for the majority in this case.

<sup>280</sup> [1996] 2 S.C.R. 876.

<sup>281</sup> *Ibid.* at 916-7. Justice McLachlin was speaking only for herself and L'Heureux-Dubé J.

<sup>282</sup> [1996] 3 S.C.R. 854.

<sup>283</sup> *Ibid.* at 870.

<sup>284</sup> *Ibid.* at 871.

<sup>285</sup> *Ibid.*

<sup>286</sup> *Ibid.*

He then went on to note that, as a result of the decision in *MacMillan Bloedel*, "section 96 has come to guarantee the core jurisdiction of the Superior Courts against legislative encroachment".<sup>287</sup> "The existence of courts is definitional to the Canadian understanding of constitutionalism",<sup>288</sup> he noted, adding that "the central concern of [section 96] is with the preservation of the judicial role".<sup>289</sup> He then went on to assert that the "constitutional commitment to judicial independence" that the Court in *Beauregard* had said was implied by the preamble to the *Constitution Act, 1867*, "must entail a more fundamental constitutional commitment to the *existence* of a judiciary".<sup>290</sup> Moreover, he said, "The constitutional status of the judiciary, flowing as it does from the separation of powers, requires that certain functions be exclusively exercised by judicial bodies".<sup>291</sup> And one of those functions, in his view, was that of determining the validity of legislation under the Constitution of Canada. Only the courts, he said, "have the requisite *independence* to be entrusted with the constitutional scrutiny of legislation when that scrutiny leads a court to declare invalid an enactment of the legislature".<sup>292</sup> Chief Justice Lamer went so far as to suggest that, on the basis of this line of reasoning, legislation that purported expressly to give jurisdiction to an administrative tribunal to rule on the constitutionality of its enabling statute should be held unconstitutional.<sup>293</sup>

Chief Justice Lamer revisited the separation of powers principle in the *Provincial Court Judges Cases*, now speaking for six members of a seven member panel. After noting that there are "a number of sources for judicial independence which are constitutional in nature", including "the logic of federalism", "adjudication under the *Charter*", as well as the preamble and sections 96-100 of the *Constitution Act, 1867*,<sup>294</sup> he said that "the institutional independence of the judiciary reflects a deeper commitment to the separation of powers between and amongst the legislative, executive, and judicial organs of government ...."<sup>295</sup> The separation of powers is again described as "a fundamental principle of the Canadian Constitution".<sup>296</sup> He then went on to say that "the separation of powers requires, at the very least, that some functions must be exclusively reserved to particular bodies",<sup>297</sup> citing his earlier judgment in *Cooper and Bell*.

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<sup>287</sup> *Ibid.*

<sup>288</sup> *Ibid.* at 872.

<sup>289</sup> *Ibid.*

<sup>290</sup> *Ibid.* at 873.

<sup>291</sup> *Ibid.*

<sup>292</sup> *Ibid.*

<sup>293</sup> *Ibid.* at 876.

<sup>294</sup> *Supra* note 1 at 84.

<sup>295</sup> *Ibid.* at 85.

<sup>296</sup> *Ibid.* at 90.

<sup>297</sup> *Ibid.*



"However," he said, "there is also another aspect of the separation of powers – the notion that the principle requires that the different branches of government only interact, as much as possible, in particular ways. In other words, the relationships between the different branches of government should have a particular *character*."<sup>298</sup> As an example of what he meant by this, he noted that "there is a hierarchical relationship between the executive and the legislature, whereby the executive must execute and implement the policies which have been enacted by the legislature in statutory form",<sup>299</sup> again citing his reasons for judgment in *Cooper and Bell*. The critical relationship in the *Provincial Court Judges Cases*, of course, was that between the judicial branch of government on the one hand and the legislative and executive branches on the other. That relationship, he held, "should be *de-politicized*".<sup>300</sup> And that de-politicization, he said, "is so fundamental to the separation of powers, and hence to the Canadian Constitution, that the provisions of the Constitution, such as section 11(d) of the *Charter*, must be interpreted in such a manner as to protect this principle".<sup>301</sup>

The separation of powers was also the subject of discussion in the *Québec Secession Reference*. One of the preliminary issues raised in that case by the *amicus curiae* was whether it was constitutional for the Supreme Court of Canada to give advisory opinions. In support of a negative answer to that question, the *amicus* relied upon the American position on the constitutional propriety of federal courts in that country rendering such opinions. In response, the Court pointed out that that position was based on the "case or controversy" limitation in Article III, §2 of the United States Constitution, which provision, it noted, "reflects the strict separation of powers in the American federal constitutional arrangement".<sup>302</sup> The Court then went on to point out that it is not necessary in a number of the European countries in which the institution of judicial review exists to have concrete cases before the constitutionality of legislation can be considered; from this it implied that "there is no plausible basis on which to conclude that a court is, by its nature, inherently precluded from undertaking another legal function in tandem with its judicial duties".<sup>303</sup> Finally, and more importantly for our purposes, the Court noted that, "moreover, the Canadian Constitution does not insist on a strict separation of powers. Parliament and the provincial legislatures may properly confer other legal functions on the courts, and may confer certain judicial functions on bodies that are not courts. The exception to this rule relates only to section 96 courts".<sup>304</sup>

<sup>298</sup> *Ibid.* at 90-1.

<sup>299</sup> *Ibid.* at 91.

<sup>300</sup> *Ibid.*

<sup>301</sup> *Ibid.*

<sup>302</sup> *Supra* note 2 at 232.

<sup>303</sup> *Ibid.* at 232-3.

<sup>304</sup> *Ibid.* at 233.

It would be difficult on the basis of these various pronouncements from the Supreme Court of Canada to assert that, the section 96 exception to one side, the separation of powers principle has no place in Canadian constitutional law. That said, it is also difficult to define the precise nature and scope of that principle. It clearly does not extend to a strict or formal separation of powers between the legislative, executive and judicial branches of government of the kind found in the United States and Australia. That means that there is no constitutional bar to Parliament and the provincial legislatures assigning governmental functions other than judicial functions to the courts. It also means that, apart from the exception arising out of s. 96 of the *Constitution Act, 1867*, there is no constitutional bar to Parliament and the provincial legislatures assigning judicial functions to bodies other than courts. However, the principle does appear to preclude – or perhaps, more accurately, it provides a rationale for precluding – Parliament and the provincial legislatures from removing from the provincial superior courts of general jurisdiction their core judicial functions, including the review of governmental action under the Constitution, judicial review of administrative action on questions going to jurisdiction, jurisdiction over contempt *ex facie*, and perhaps other functions as well. In the minds of some members of the Supreme Court of Canada, it also provides a rationale for the courts staying their hand when asked to review the propriety or constitutionality of at least some of the activities of the executive and legislative branches of government, including the exercise of prosecutorial discretion and the disqualification of persons convicted of certain criminal offences from representing the public in the legislative institution in question. And in the mind of one member of the Court – and only one – it provides a partial rationale for denying to administrative bodies the power to rule on the constitutionality of their enabling statutes.

It must also be said that the constitutional source of the separation of powers principle in Canada remains unclear. Neither Justice Wilson in *Operation Dismantle* nor Chief Justice Dickson in *Fraser* cites any authority in support of their respective invocations of the principle. Justice L-Heureux-Dubé in *Power* cites Professor Hogg's text, the relevant passage from Chief Justice Dickson's reasons for judgment in *Fraser*, two other scholarly works,<sup>305</sup> and, by name only, three Supreme Court of Canada decisions,<sup>306</sup> none of which, it must be noted, turned on any separation of powers notion, let alone provides any insights into its constitutional source. Chief Justice Lamer in *Cooper and Bell*, in reference specifically and only to the notion of the guarantee of superior

<sup>305</sup>These are P. Garant, *Droit Administratif*, vol. 2 (3<sup>rd</sup> ed. 1991), and G. Pepin, "La Compétence des tribunaux administratifs de décider de la constitutionnalité d'une loi, notamment de sa compatibilité avec la Charte canadienne des droits et libertés", in CBA – Continuing Legal Education Seminar on Administrative law, *Administrative Law: Past, Present and Future Where We've Been* (Ottawa 1989).

<sup>306</sup>The cases were *Sobeys Stores Ltd v. Yeomans*, *supra*, note 241; *Beauregard v. Canada*, *supra* note 228; and *Douglas/Kwantlan Faculty Assoc. v. Douglas College*, [1990] 3 S.C.R. 570.

court core jurisdiction, attributes that guarantee to both section 96 of the *Constitution Act, 1867* and the principle of constitutionalism. However, in the *Provincial Court Judges Cases*, no reference is made to any constitutional source for the separation of powers principle; he simply cites his own reasons for judgment in *Cooper and Bell*. Justice McLachlin in *Harvey* attributes her limited notion of the separation of powers, which "precludes the courts from trenching on the internal affairs of the other branches of government",<sup>307</sup> to the preamble to the *Constitution Act, 1867* and the notion of parliamentary privilege embodied therein.

That brings us to the question of the legal status of the separation of powers principle. In *Operation Dismantle*, it is used in support of Canadian courts rejecting the use of the American political questions doctrine in the context of the *Charter*. In *Fraser*, it constitutes a preliminary step in a multi-step reasoning process that leads eventually to a refusal by the Supreme Court of Canada to overturn a decision of a federal administrative tribunal that upheld the discharge of a federal public servant who publicly expressed views that were highly critical of the federal government. In *Power*, it is used as one of several reasons for the courts not interfering in the exercise of prosecutorial discretion. And in *Harvey*, it is relied on in support of the view that the courts should not interfere in the internal affairs of the legislative and executive branches of government. In none of these cases is there any suggestion that the principle can serve as a distinct basis upon which to impugn the validity of legislation.

Even Chief Justice Lamer, who seemed to attach a good deal of importance to the separation of powers principle, cannot be said to have clearly elevated the principle to the status of an independent basis upon which to impugn the constitutionality of legislation. In *Cooper and Bell*, which, it must be remembered, is a case in which he wrote only for himself, the separation of powers principle is relied upon, together with the principle of parliamentary democracy, in the fashioning of a rule that only courts have the constitutional authority to determine the validity of legislation. It is that rule, and not the separation of powers principle *per se*, that for him would serve as a basis upon which to impugn the constitutionality of legislation. And in the *Provincial Court Judges Cases*, it is clear that Chief Justice Lamer uses the separation of powers principle simply as an aid to the interpretation of the term "independent tribunal" in section 11(d) of the *Charter*.

It is interesting to note that an unsuccessful attempt was made in a recent case to rely on the separation of powers principle as a distinct and independent basis upon which to impugn the validity of legislation.<sup>308</sup> In that case, which went to the Appeal Division of the Federal Court, Justice Strayer, speaking for the panel, said the following:

<sup>307</sup> *Supra* note 280 at 917.

<sup>308</sup> *Westergard-Thorpe v. A.G. Canada*, *supra* note 209.

... it seems difficult to treat the so-called doctrine of separation of powers as prescriptive rather than (loosely) descriptive. If indeed it has its origins in the preamble [to the *Constitution Act, 1867*] it is difficult to reconcile the doctrine with the principles of the Constitution of the United Kingdom where, for example, the Lord Chancellor is head of the judiciary, a member of Cabinet, and Speaker of the upper house of Parliament; and where, (similarly to Canada) the Executive is subject to control by the legislature and where members of the Executive are required by convention to be members of the legislative branch of government as well.<sup>309</sup>

It seems clear that, in Justice Strayer's view, the separation of powers principle should *not* be counted amongst the organizing principles of Canada's Constitution – the same view, in essence, as that expressed by Professor Hogg in his text.

There is much, in my view, that remains unclear about the separation of powers principle in Canada. The precise source of the principle has yet to be definitively determined. The same can be said of its meaning and content as well as its legal status. Even its place in the list of organizing principles might be said to be in doubt.

## 10. *Economic Union*

The principle that Canada is to be treated as an economic union or common market cannot be said to be one that has deep roots within our jurisprudence. However, such a principle was articulated by Justice La Forest in his majority reasons in *Black and Co. v. Law Society of Alberta*,<sup>310</sup> in the context of his discussion of section 6(2)(b) of the *Charter*.<sup>311</sup> As he put it:

A dominant intention of the drafters of the *British North America Act, 1867* ... was to establish "a new political nationality" and, as the counterpart to national unity, the creation of a national economy .... The attainment of economic integration occupied a place of central importance in the scheme. "It was an enterprise which was consciously adopted and deliberately put into execution" .... The creation of a central government, the trade and commerce power, section 121 and the building of a transcontinental railway were expected to help forge this economic union. The concept of Canada as a single country comprising what one would now call a common market was basic to the Confederation arrangements and the drafters of the *British North America Act, 1867* attempted to pull down the existing internal barriers that restricted movement within the country.<sup>312</sup>

Justice La Forest went on to describe section 121 of the *Constitution Act, 1867* as "one of the pillars of the Confederation scheme for achieving the economic

<sup>309</sup> *Ibid.* at 476.

<sup>310</sup> 1989] 1 S.C.R. 591.

<sup>311</sup> Section 6(2)(b) guarantees the right of "every citizen and every person who has the status of a permanent resident of Canada ... to pursue the gaining of a livelihood in any province." It is subject to limitations provided for in ss. 6(3) and (4), as well as the general s. 1 limitation clause.

<sup>312</sup> *Supra* note 310 at 608-9.

union sought by the Fathers of Confederation".<sup>313</sup> He also drew doctrinal support for this principle from prior judicial pronouncements, particularly on the part of Justice Rand in *Murphy v. CPR Co.* (in which he said that "apart from matters of purely local and private concern, this country is one economic unit")<sup>314</sup> and *Winner v. SMT (Eastern Ltd.)* (in which he derived from the notion of Canadian citizenship the aforementioned implied mobility right).<sup>315</sup> And finally, he noted that:

During the constitutional exercise culminating in the enactment of the *Charter* there was a wave of political and academic concern regarding the construction of numerous barriers to interprovincial economic activity. There was also a strong feeling that the integration of a Canadian economy, which had been only partially successful under the *British North America Act, 1867*, should be completed.<sup>316</sup>

It is important to note that Justice La Forest's discussion in *Black* of the notion of Canada as an economic union was very much a precursor to, and designed to be an aid to, the interpretation of section 6(2)(b) of the *Charter*. In particular, that discussion formed the basis of his assertion that that provision "must be interpreted generously to achieve its purpose to secure to all Canadians and permanent residents the rights that flow from membership or permanent residency in a united country".<sup>317</sup> The role assigned to this principle was, therefore, of limited scope. There is nothing to suggest that La Forest J. considered it to be a free standing principle on the basis of which the validity of legislation could be impugned. It was simply to be a guide to the interpretation of section 6(2)(b), as well, possibly, of other provisions of the Constitution the meaning of which it might be thought to affect. It was, in other words, a principle that serves to explain, rather than arises by necessary implication from, the presence of certain provisions in the text of our Constitution

That said, it is not impossible that this principle might some day be invoked by creative counsel as a free standing principle in support of an attack upon the constitutionality of legislation. If it were to be invoked in this manner, the courts would have to decide whether, and if so to what extent, the principle can function to extend the reach of provisions like section 121 of the *Constitution Act, 1867* and section 6(2)(b) of the *Charter*. And they would also have to decide the related question of what precise content or meaning to give the principle.

This is another principle in respect of which it can fairly be said that a good deal remains unclear.

<sup>313</sup> *Ibid.* at 609. Section 121 provides that "All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the Provinces".

<sup>314</sup> [1958] S.C.R. 626 at 638.

<sup>315</sup> *Supra*, note 255.

<sup>316</sup> *Supra* note 310 at 611-2.

<sup>317</sup> *Ibid.* at 612.

### 11. *Integrity of the Nation State*

In the course of our look at the principle of federalism, mention was made of a number of federalism cases in which unity had been preferred to diversity. I suggested that the decisions in those cases could be said to reflect a distinct constitutional principle – the need to protect the integrity of Canada as a fully sovereign and independent nation state. There is no need to repeat here the extended discussion of those cases found in that earlier part of the paper. It is, however, useful to recall the features of those cases that can be said to reflect this principle.

In *Fort Frances Pulp and Paper Co. v. Manitoba Free Press*,<sup>318</sup> this principle can, I think, be said to be clearly embodied in the justification that Viscount Haldane provides for the existence of the emergency branch of Parliament's peace, order and good government power. That justification he formulated in terms of the Constitution "[having] among its purposes to provide for the State regarded as a whole ....",<sup>319</sup> a purpose that he clearly assumed could only be achieved in times of national emergency by the central order of government. And in the *Privy Council Appeals Case*<sup>320</sup> and the *Patriation Reference*,<sup>321</sup> it seems clear that the Privy Council and Supreme Court respectively sided with the federal government because they interpreted the cause for which that government was fighting as being, in essence, that same principle – the integrity of Canada as a fully sovereign, fully independent nation state. Note has already been made of the fact that in the former case, Lord Jowitt, L.C. considered it to be "a prime element in the self-government of the Dominion that it should be able to secure through its own courts of justice that the law should be one and the same for all its citizens".<sup>322</sup> In the latter case, one finds the majority (on the legal question) saying that "the process in question here concerns not the amendment of a complete constitution but rather the completion of an incomplete constitution",<sup>323</sup> and further that "We are involved here with a finishing operation, with fitting a piece into the constitutional edifice."<sup>324</sup>

On what provisions of the Constitution can this principle be said to be based? The answer to that question remains somewhat unclear. Viscount Haldane's reasoning in *Fort Frances* suggests that it is derived from the very notion of the nation state for which our Constitution provides. In the *Privy Council Appeals Case*, it is grounded in an interpretation of section 101 of the

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<sup>318</sup> *Supra* note 149.

<sup>319</sup> *Ibid.* at 704.

<sup>320</sup> *Supra* note 151.

<sup>321</sup> *Supra* note 66.

<sup>322</sup> *Supra* note 151 at 154.

<sup>323</sup> *Supra* note 66 at 799.

<sup>324</sup> *Ibid.*

*Constitution Act, 1867*, "in light of the *Statute of Westminster*".<sup>325</sup> No basis is proffered by the reasoning in the *Patriation Reference*, but, given the nature of the issue raised by that case, the impetus towards full Canadian sovereignty provided by the *Statute of Westminster* suggests that it might have been relied upon in that case too.

Could this principle be used to strike down legislation? In none of these cases was it so used. In the first two, it was used as an aid in the interpretation of federal heads of power; in the third, it was used as a reason for validating a constitutional amendment initiative of the federal government. The question presumably remains open.

## 12. *Integrity of the Constitution*

Support can also be found, I think, for the inclusion in this list of fundamental constitutional principles of the notion of the integrity of the Constitution itself. That notion was explicitly endorsed by Chief Justice Duff in his reasons for judgment in *Reference re Alberta Statutes*, in which he spoke of "the principle that the powers requisite for the protection of the constitution itself arise by necessary implication from the *British North America Act* as a whole...."<sup>326</sup> It is also clearly reflected in the refusal of the Supreme Court of Canada in both *B.C. Power Corp. v. B.C. Electric Co.*<sup>327</sup> and *Amax Potash Ltd. v. Government of Saskatchewan*<sup>328</sup> to permit the respective provincial Crowns to rely on the principle of Crown immunity in circumstances in which permitting it to do so would risk undermining the division of powers between Parliament and the provincial legislatures. In the former case, which involved an application for a receivership order to preserve assets pending the outcome of a constitutional challenge to legislation that purported to grant ownership of those assets to the provincial government, Chief Justice Kerwin said that to permit the Crown to claim immunity "would be to enable it, by the assertion of rights claimed under legislation beyond its powers, to achieve the same results as if the legislation were valid. In a federal system it appears to me that, in such circumstances, the Court has the same jurisdiction to preserve assets whose title is dependent on the validity of the legislation as it has to determine the validity of the legislation itself."<sup>329</sup> In *Amax Potash*, which involved a claim for the recovery of monies paid to a provincial Crown by way of a mineral tax the validity of which was being challenged on constitutional grounds, Dickson J. (as he then was) noted that, "to allow monies collected under compulsion, pursuant to an *ultra vires* statute, to be retained would be tantamount to

<sup>325</sup> *Supra* note 151 at 154.

<sup>326</sup> *Supra* note 63a at 133-4.

<sup>327</sup> [1962] S.C.R. 642.

<sup>328</sup> [1977] 2 S.C.R. 576.

<sup>329</sup> *Supra* note 327 at 644-5.

allowing the provincial Legislature to do indirectly what it could not do directly, and by covert means to impose illegal burdens".<sup>330</sup> He also said, in relation to both of these cases, that "the concern is with the preservation of the Constitution which is paramount."<sup>331</sup>

This principle can also arguably be said to be implicit in the refusal of the Supreme Court of Canada to recognize the constitutionality of the interdelegation of legislative powers between Parliament and the provincial legislatures in the *Nova Scotia Interdelegation Reference*.<sup>332</sup> Of particular importance in this regard is the following passage from the reasons for judgment in that case of Chief Justice Rinfret, in which structural argumentation, it should be noted, again features prominently:

The constitution of Canada does not belong either to Parliament or to the Legislatures; it belongs to the country and it is there that the citizens of the country will find the protection of the rights to which they are entitled. It is part of that protection that Parliament can legislate only on the subject matters referred to it by section 91 and that each Province can legislate exclusively on the subject matters referred to it by section 92. The country is entitled to insist that legislation adopted under section 91 should be passed exclusively by the Parliament of Canada in the same way as the people of each Province are entitled to insist that legislation concerning the matters enumerated in section 92 should come exclusively from their respective Legislatures. In each case the Members elected to Parliament or to the Legislatures are the only ones entrusted with the power and the duty to legislate concerning the subjects exclusively distributed by the constitutional Act to each of them.<sup>333</sup>

Finally, the importance of protecting the integrity of the Constitution can also be said to be reflected in the proposition that one cannot employ one part of the Constitution – in particular, the *Charter* – to attack, or render ineffective, another part. That proposition was first articulated in the *Bill 30 Reference*<sup>334</sup> and has since been affirmed in *New Brunswick Broadcasting Co. v. Nova Scotia*,<sup>335</sup> in which it was formulated in terms of the "basic rule ... that one part of the Constitution cannot be abrogated or diminished by another part of the Constitution".<sup>336</sup>

If such a principle can be said to exist, it is clear that it can function in appropriate circumstances as an independent basis for attacking the constitutionality of legislation. Its capacity so to function is implicit in the principle itself; it is also recognized, at least by implication, in some of the cases I have called in aid to substantiate its existence.

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<sup>330</sup> *Supra* note 328 at 590.

<sup>331</sup> *Ibid.* at 591.

<sup>332</sup> [1951] S.C.R. 31.

<sup>333</sup> *Ibid.* at 34.

<sup>334</sup> *Supra* note 222.

<sup>335</sup> *Supra* note 186.

<sup>336</sup> *Ibid.* at 373.



## VI. References and Structural Argumentation

I have not done a comprehensive statistical study of the relative frequency with which the Judicial Committee of the Privy Council and the Supreme Court of Canada have used structural argumentation in reference cases and "ordinary" cases. However, it should, I think, have become apparent from my discussion in the previous part of this paper of the foundational principles to which this form of argumentation has given rise that a disproportionate number of these principles can fairly be said to have their origins in, and to feature prominently in the reasons for judgments in, reference cases. This is true not only of the use of structural argumentation in the last couple of decades, in which this form of argumentation has taken on a new order of importance; it is also true, although perhaps to a somewhat lesser degree, of the use of structural argumentation in the previous decades.

Accepting that to be the case, the main purpose of this brief section of the paper is to proffer an explanation as to why structural argumentation has tended to feature more prominently in the judgments rendered in references than in judgments rendered in ordinary cases. As I see it, one could plausibly posit three reasons for this correlation. The first is a function of the very nature of the reference power. References entail the posing by the executive branch of government to the judicial branch of questions that the former wish the latter to answer. More often than not, these questions ask the courts to pronounce on the constitutionality of a particular piece of proposed or existing legislation. However, in some references, the questions are of a less precise nature, typically in the form of, does Parliament (or a provincial legislature) have the power to do X? In these references, not only do the courts suffer from the lack common to all references of a factual underpinning of the kind that ordinary cases will have, the issue posed is likely to be one that requires the courts to think more broadly about the Constitution than might normally be the case. And it is precisely when a court thinks more broadly about the Constitution that, presumably, it will be inclined to think in terms of underlying constitutional principles.

The problem with this explanation is that it is not really borne out by the evidence. With the possible exception of the *Québec Secession Reference*,<sup>337</sup> the reference cases in which structural argumentation is most clearly in evidence are cases in which the courts have been asked questions of quite a precise nature. That was certainly true, for example, of the *Patriation Reference*,<sup>338</sup> the *Manitoba Language Rights Reference*,<sup>339</sup> and the *Provincial Court Judges Cases*,<sup>340</sup> in all of which, as we have seen, structural argumentation features prominently.

<sup>337</sup> *Supra* note 2.

<sup>338</sup> *Supra* note 66.

<sup>339</sup> *Supra* note 61.

<sup>340</sup> *Supra* note 1.

The other two possible explanations are, I think, much more promising. The first of these is that many of the questions that come to the courts in references raise constitutional issues of fundamental importance. They are not, in other words, just any questions; they are questions that go to the heart of federal-provincial relations, for example, or the relations between one branch of government and the other. As such, these questions will often require the courts – and counsel appearing before the courts – to think in first principle terms. And thinking in first principle terms is what structural argumentation is all about.

Support for this hypothesis is easily found. In fact, it is fair to say that all of the major recent references in which structural argumentation is heavily relied upon – the *Patriation Reference*, the *Manitoba Language Rights Reference*, the *Provincial Court Judges Cases* and the *Québec Secession Reference* – as well as some of the older cases in which it featured – *Reference re Alberta Statutes*<sup>341</sup> and the *Privy Council Appeals Case*,<sup>342</sup> for example – were cases in which constitutional issues of fundamental importance were raised.

The other more promising explanation turns on the fact that many of the questions referred to the courts are referred precisely because there is nothing in the text of the Constitution that speaks directly to them. They are questions, in other words, on which the drafters of the Constitution provided no clear textual guidance, no doubt because, in most instances, they were questions that the drafters did not anticipate might ever arise. This was obviously true, for example, of the questions put to the Court in the *Québec Secession Reference*. It was also true of the questions put to the Court in the *Patriation Reference*, the *Privy Council Appeals case*, the *Manitoba Language Rights Reference*, and, arguably, the *Senate Reference*.<sup>343</sup> The absence of any clear guidance in the text of the Constitution in respect of the questions posed in such references means, of course, that the court is compelled to look elsewhere – including the principles underlying the Constitution that are the product of structural argumentation – for answers.

## VII. Conclusion

Constitutional references have made an important contribution to the evolution of Canada's Constitution, and to our understanding of that Constitution, on a number of different levels. They have provided the executive branch of government with a mechanism for resolving – or more accurately, for having the courts resolve – more expeditiously than would otherwise have been possible a great many difficult issues of constitutional law. They have served to defuse if not to eliminate highly contentious issues of constitutional policy

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<sup>341</sup> *Supra* note 63a.

<sup>342</sup> *Supra* note 151.

<sup>343</sup> *Supra* note 139.

and politics. They have generated important bodies of constitutional doctrine that continue to govern the resolution of many questions of constitutional interpretation today. And they have also, as I hope this paper has made clear, played a very significant role in not only legitimating, but also bringing to the fore, a particular form of constitutional argumentation in Canada – structural argumentation.

As valuable as the last of these contributions has been, both to our ability to resolve difficult issues of constitutional law on which the text of our Constitution sheds little if any direct light, and to our willingness to think about our Constitution in terms, not simply of a string of disconnected or minimally connected textual provisions, but rather of an attempt to express in words certain fundamental principles of constitutional policy, the time has come, I think, to pause and reflect on the appropriate role of this form of argumentation under our Constitution. Not only is structural argumentation being used with much greater frequency now than ever before, with established principles being applied in a range of new contexts and a number of new principles being developed, it is being used in ways that have the potential to call into question the very legitimacy of judicial review. If these principles, including those grounded in the preamble to the *Constitution Act, 1867*, can be used to fill in gaps in the text of the Constitution, as the Supreme Court has apparently now twice told us they can, and if, as the *Québec Secession Reference* arguably implies, a gap can be any constitutional issue for which the Constitution fails to make provision, and the courts can fill that gap by fashioning rules that in their view strike the most appropriate balance between and amongst the various relevant principles, then, as Patrick Monahan has pointed out, the important distinction between the making and the interpreting of a Constitution disappears.

I for one very much doubt that the Supreme Court of Canada intended in either the *Provincial Court Judges Cases* or the *Québec Secession Reference* to collapse this distinction and assume for itself the role of Constitution-maker as well as Constitution-interpreter. Its *Charter* jurisprudence exhibits a good deal of sensitivity to the concerns about the legitimacy of judicial review raised by its role in relation to that instrument, and there is every reason to believe that it will be equally mindful of the concerns about the legitimacy of judicial review raised by the judgments it rendered in these two cases. In my view, the best way of addressing those concerns would be for the Court to adopt – or at least move in the direction of adopting – the approach to structural argumentation, and to the principles to which it can fairly be said to give rise, set forth in the concluding paragraphs of Part Two of this paper.

That approach, which is based on a distinction being drawn between the kinds of principles that can be said to qualify as the organizing principles of our Constitution, can be summarized as follows: (1) those principles that are generated by necessary implication from provisions in the text of the Constitution can legitimately function as independent bases upon which to attack the validity of legislation; (2) those principles that merely serve to explain the presence within the text of the Constitution of certain provisions – including the

principles derived from the preamble to the *Constitution Act, 1867*<sup>344</sup> – can only be used as aids to interpretation. That approach not only comports with the generally accepted rules governing the interpretation of statutory and constitutional instruments, it ensures that the task of Constitution-making in Canada remains where, in a society committed to the very principles to which the Court has attached such importance in those two cases – federalism, democracy, the rule of law and others – it should remain – with the democratically elected representatives of the people.

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<sup>344</sup> Unless, of course, such principles can be said also to fall within the first category, as would be the case, for example, with the principle of democracy (based on the reasoning of Duff C.J. in *Reference re Alberta Statutes*, *supra* note 63a and Rand J. in *Switzman v. Elbling*, *supra* note 63a).