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CANADA'S UNWRITTEN CONSTITUTIONAL ORDER: CONVENTIONS AND STRUCTURAL ANALYSIS

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This article describes constitutional conventions, and the underlying principles of the Constitution assessed through structural analysis, as two interrelated components of Canada's unwritten constitution. Whereas conventions and structural analysis differ in their relationship with the text of constitutional instruments, and in regard with their normative power, they perform similar functions in our constitutional order as they both seek to give effect to broad and enduring principles undergirding the organization of the state.

Les auteurs décrivent les conventions constitutionnelles et les principes sous-jacents à la constitution, évalués sous l'angle d'une analyse structurelle, comme deux composantes interdépendantes de la constitution non écrite du Canada. Bien que les conventions et l'analyse structurelle diffèrent dans leur relation avec le texte des instruments constitutionnels et à l'égard de leur pouvoir normatif, elles remplissent des fonctions similaires dans notre ordre constitutionnel, cherchant toutes deux à mettre en vigueur les vastes principes clés qui étayent l'organisation de l'État.

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1. Introduction

Does Canada, like the United States, have a written constitution? Or, is Canada like the United Kingdom, which has an unwritten constitution? The answer to both questions is yes. Our written constitution consists mainly of the *Constitution Act, 1867* and the *Constitution Act, 1982*. But, in addition, there is the unwritten constitution, similar to that in the UK, by which our version of Westminster-style parliamentary government operates. This unwritten constitution consists of conventions—rules by which authority conferred by the Constitution is exercised in practice. Although conventions are not law, they play a fundamental role in defining who can make which decisions, especially within the executive branch. For instance, in Canada, both the choice as to who will become Prime Minister and the authority exercised by the person holding that office is not defined in constitutional documents, but rather through conventions. Hence the statement by the Supreme Court of Canada in 1981 that "constitutional conventions plus constitutional law equal the total constitution of the country."[1]

Conventions have played an important role in Canadian constitutional law in past decades. In the early 1980s, the existence and content of certain conventions became the object of controversy between the provinces and the federal government in the course of the "patriation" of the Constitution; this led to two references to the Supreme Court, followed by the adoption of the *Constitution Act, 1982*.[2] In 2008, while the courts were not involved,

[1] *Reference Re Resolution to amend the Constitution*, [1981] 1 SCR 753 at 883–84, 125 DLR (3d) 1 [*Re: Resolution to amend the Constitution*].

[2] *Ibid*; *Reference Re Objection by Quebec to a Resolution to amend the Constitution*, [1982] 2 SCR 793, 140 DLR (3d) 385 [*Re: Objection by Quebec* cited to SCR].

constitutional conventions played a critical role in the controversy relating to the prorogation of Parliament when the (minority) administration of the day faced the prospect of defeat on a motion of non-confidence in the Commons. But by the late 1990s, another type of constitutional argument based on unwritten elements had become increasingly significant: these are the "underlying principles" that describe constitutional arrangements that are a necessary and implied complement to those set out in the written constitution.[3] In the 1998 Reference on the secession of Quebec ("*Secession Reference*"), the Supreme Court relied on these "underlying principles" to answer a delicate question unforeseen by the drafters of the *Constitution Act, 1867*, the possibility of provincial secession.[4]

Hence, a further part of our Constitution arises from courts applying 'structural analysis' of 'underlying principles' to resolve questions not addressed in the written constitution. These two features of the unwritten Canadian Constitution—conventional rules and underlying constitutional principles—have been studied in depth by constitutionalists, but in isolation from one another. The most complete examination of conventional rules in Canada is Andrew Heard's *Canadian Constitutional Conventions*, which analyses numerous conventions relating to each branch of state authority: the executive, the legislature and the courts.[5] In our view, the leading work on underlying constitutional principles remains Robin Elliott's article, "References, structural argumentation and the organizing principles of the Canada's constitution," which traces the evolution of this concept through a review of the jurisprudence of the Supreme Court up to the Reference of 1998.[6]

In this paper we describe constitutional conventions and the underlying principles of the Constitution in relation with one another and with the written constitution. We explain how they differ, as well as how they interact, and conclude that they serve complementary purposes in our constitutional order, as they both give effect to broad and enduring principles undergirding the organization of the state. These are matters of on-going significance, but rarely considered and poorly understood.

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3 The origins of this form of argumentation are discussed at note 31, below.

4 *Reference Re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385 [*Reference re Secession* cited to SCR].

5 Andrew Heard, *Canadian Constitutional Conventions, The Marriage of Law and Politics*, 2nd ed (Toronto: Oxford University Press, 2013) [Heard].

6 Robin Elliot, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001) 80:1–2 Can Bar Rev 67 [Elliot].

2. What are constitutional conventions?

In Peter Hogg's words, constitutional conventions are simply, "rules of the constitution that are not enforced by the law courts."[7] Although accurate, this definition requires additional comment. A British scholar, Geoffrey Marshall, proposed a more complete definition: conventions are "binding rules of constitutional behavior which are considered to be binding by and upon those who operate the Constitution, but which are not enforced by the law courts (although the courts may recognize their existence), nor by the presiding officers in the Houses of Parliament."[8] Andrew Heard wrote that conventions are defined in relation to the written law; they are "obligations upon political actors to act in a way other than what the formal law prescribes or allows."[9]

In our view, these definitions highlight three fundamental characteristics of constitutional conventions. The first one relates to their normative nature. Conventions are binding rules of political behaviour, not mere usages from which political actors are free to derogate. The second characteristic relates to the source of this normative power: conventions are obligatory because they have been recognized as such by those to whom they apply. Third is the way they are sanctioned. Being political in nature, conventions are not enforceable by courts. A breach of a constitutional convention creates a deficit in legitimacy, not legality, which is sanctioned ultimately in the political arena.

In Canada, most constitutional conventions relate to the exercise of authority within the executive, as well as the relationship between the legislature and the executive. Perhaps the most important conventions deal with how the Governors exercise their powers. Although the *Constitution Act, 1867* recognizes the executive authority of the Queen as exercised by the Governor General, federally, and the Lieutenant Governors in the provinces, by convention these powers are exercised by the Cabinet and, in certain instances, by the First Minister—the Prime Minister, federally, the Premier, provincially. In this regard, four constitutional conventions are central to the exercise of executive authority. First, the Governor appoints as First Minister whomever can command the support of a parliamentary majority; the Governor then calls on the First Minister to form an administration to direct the operation of government (it being a permanent institution of state). Second, the Governor appoints (and

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7 Peter Hogg, *Constitutional Law of Canada*, 5th ed (Scarborough: Thomson/Carswell, 2007) (loose-leaf 2007) at 1–22.1 [Hogg].

8 Geoffrey Marshall & Graeme C Moodie, *Some Problems of the Constitution* (London: Hutchinson, 1959) at 23–24.

9 Heard, *supra* note 5 at 5.

dismisses) Ministers on the "advice" of the First Minister; thus, a Ministry (or Cabinet) is formed to direct the actions of government. Third, it is the members of Cabinet, rather than the entire Privy Council, that provide the "advice" on which the Governor exercises his or her formal authority. Fourth, the Governor will act only upon the "advice" of Cabinet (or the First Minister) in almost every circumstance.

Conventions also shape the relationship between the executive and legislative authority. The most obvious example is the principle of responsible government: the First Minister and Cabinet hold office only as long as they enjoy the confidence of the legislature. Should a legislature indicate its loss of confidence in the Ministry, the Governor will usually accede to a request to hold an election, but on occasion may call on another person to form an administration and seek to obtain the confidence of the legislature. This cornerstone of our system does not operate through enforceable legal rules, but rather by convention. Perhaps the earliest example in Canada was a vote of non-confidence in the legislature of Nova Scotia in 1848 that led to the resignation of the Executive Council (the formal name for a provincial Cabinet).[10]

It has been argued that (at least in the UK) the actions of the legislature are also constrained by convention. As Geoffrey Marshall remarked, the seemingly unlimited power of Parliament to legislate based on parliamentary sovereignty must in practice be "exercised in accordance with broad principles described in such terms as constitutionalism, the rule of law and toleration of minority rights. It is a good example of a convention that is both general in its formulation and founded on principle rather than precedent."[11] In Canada, the scope of federal and provincial legislative power is limited by the *Constitution Act, 1867* and by the *Constitution Act, 1982*, which contains, *inter alia*, the *Canadian Charter of Rights and Freedoms* ("*Charter*"). Based on either the federal-provincial division of powers or infringement of rights protected under the *Charter*, the courts can invalidate laws duly adopted by the legislature. Parenthetically, we would note the close correspondence between what Geoffrey Marshall identified as principles (effectively) limiting the supremacy of Parliament in the UK with the principles underlying Canada's written constitution. This is not a coincidence. Rather, it is an illustration of what in some contexts is expressed as constitutional convention, and in other contexts as the Constitution's underlying principles.

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10 *Ibid* at 113.

11 Geoffrey Marshall, *Constitutional Conventions* (Oxford: Clarendon Press, 1984) at 201 [Marshall].

Because conventions are not written, their existence can be questioned, on occasion in court. In the early 1980s, the Supreme Court of Canada, in two closely related references, determined those circumstances in which a court can declare the existence of a conventional rule.[12] These cases, known as the patriation references, were heard in the context of a controversy regarding the right of the Canadian Parliament to proceed without the consent of the provinces to "patriate" the Canadian Constitution, in effect ending the requirement to seek the adoption by the British Parliament of modifications to our constitutional law. As eight provinces opposed the federal proposal for patriation, a question arose whether a convention or a legal rule required provincial consent to modify the Constitution in a way that affected the rights of the provinces. In order to obtain a definitive answer, the governments of Manitoba, Quebec, and Newfoundland each referred this question to their Courts of Appeal.[13] The appeals from all three Courts of Appeal were subsequently heard by the Supreme Court of Canada in the first patriation reference. A majority of the Court concluded that although the agreement of the provinces was not required as a matter of law, such a change to the constitution would be in breach of a convention if the provinces opposed it. The following year, a similar question was raised again by the province of Quebec in the second patriation reference. As Quebec was the only province still opposing patriation, the Court had to determine whether, as a matter of convention, it had a veto over a constitutional amendment that affected its rights as a province. Drawing on the analysis set out in the first patriation reference, the Court concluded that no such convention existed.

Taken together, the two references marked a significant evolution in the Court's position towards conventional rules. For the first time, the Court described in detail the role of conventions in the Canadian constitutional order and adopted a test to determine whether a convention existed. This test relied on three criteria set out by Sir Ivor Jennings: there must be precedents, the actors must believe that they are bound by the rule, and there must be a rationale for the rule.[14]

With respect to the existence of precedents, the Court acknowledged that this condition is not difficult to meet. A single precedent can

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12 *Re: Resolution to amend the Constitution*, *supra* note 1; *Re: Objection by Quebec*, *supra* note 2.

13 *Reference Re Amendment of the Constitution of Canada*, (1981) 117 DLR (3d) 1, 2 WWR 193 (Man CA); *Reference Re Amendment of the Constitution of Canada (No 2)*, 29 Nfld & PEIR 503, (1981) 118 DLR (3d) 1 (CA); *Avis sur le projet de résolution concernant la Constitution du Canada*, 120 DLR (3d) 385, [1981] CA 80 (QC CA).

14 *Re: Resolution to amend the Constitution*, *supra* note 1 at 888; Ivor Jennings, *The Law and the Constitution* (London: University of London Press, 1959) at 136.

be sufficient and negative precedents will be considered.[15] Of all the constitutional amendments enacted since 1867, the Court identified five that affected provincial powers: 1) the *British North America Act, 1930*, which granted western provinces control over natural resources within their borders; 2) the *Statute of Westminster, 1931*, which *inter alia* recognized the authority of Parliament and provincial legislatures to repeal domestic laws enacted by the Imperial Parliament; 3) the *British North America Act, 1940*, which granted exclusive jurisdiction to Parliament in relation to unemployment insurance; 4) the *British North America Act, 1951*, which granted concurrent jurisdiction to Parliament in relation to old age pensions; and 5) the *British North America Act, 1964*, which amended the authority of Parliament granted in the 1951 *Act*. After reviewing the debates leading up to the enactment of these five amendments, a majority of the Court found, in the first patriation reference, that provincial consent had been consistently obtained by the federal government before seeking amendment by the British Parliament of what was then referred to as the *British North America Act*.[16] The Court also found negative precedents to be significant, notably the fact that Ontario and Quebec (the two most populous provinces) had opposed an amendment to the 1951 *Act* and that amendment was not proceeded with.

The acceptance by political actors that they are bound by the rule is the most important condition for a convention to exist. In the second patriation reference, the Supreme Court applied this criterion for the existence of a constitutional convention somewhat strictly, concluding that the normative character of a convention—the acceptance by political actors that they are bound by the rule—could not remain wholly unarticulated. In order to exist, the Court held, a constitutional convention must be recognized explicitly, either through written or oral statements by relevant political actors.[17] The Court held that no convention existed relevant to Quebec's consent, in part because there was no evidence that either the federal government or the other provinces ever considered themselves bound by a Quebec veto with respect to constitutional amendments.[18] Certain authors have criticized this requirement as being formalistic and difficult to meet. As Andrew Heard remarked, "a statement about the rules [that] a political actor believes she or he is bound to follow is a rare

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15 *Re: Resolution to amend the Constitution*, *supra* note 1 at 888–91.

16 *Ibid* at 891–94.

17 *Re: Objection by Quebec*, *supra* note 2 at 817.

18 *Ibid* at 814–17. See also Henri Brun, Guy Tremblay & Eugénie Brouillet, *Droit constitutionnel*, 6e éd (Cowansville, QC: Éditions Yvons Blais, 2014) at 44 [Brun, Tremblay & Brouillet].

gem indeed."[19] As he points out, those holding key offices of state, like the Governor General, often do not comment when they act.[20]

The third condition for a convention to exist is that there is a rationale for the rule. This usually involves a broad principle underlying the structure of the state. In the first patriation reference, the Court found that federalism was the rationale for the conventional rule of provincial consent to constitutional amendments.[21] For other conventions, such as those limiting the exercise of the Governor General's power, the democratic principle constitutes the rationale for the rule.[22] Hence, in order to fully understand the nature and function of conventions, it is necessary to examine another type of unwritten constitutional norm that has become increasingly important in Canadian jurisprudence: the underlying principles of the Constitution.

3. The underlying principles of the Constitution

In Canada, on several important occasions, courts have had regard to foundational principles that underlie the Constitution either to guide the interpretation of constitutional texts or to answer questions not addressed in the written constitution. Robin Elliott describes this type of legal reasoning as, "structural argumentation," a term he borrows from the work of American constitutionalists who reflected on constitutional methodologies employed in the United States.[23] For Elliott, structural argumentation is one "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."[24] More recently, James Johnson referred to the same methodology as, "reasoning from constitutional essentials," which he described as, "grounded in the premise that basic principles inhere in a given form of governance."[25] In certain circumstances, argues Johnson, these general principles will lead to

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19 Heard, *supra* note 5 at 15.

20 *Ibid* at 16.

21 *Re: Resolution to amend the Constitution*, *supra* note 1 at 905–06.

22 Brun, Tremblay & Brouillet, *supra* note 18 at 45.

23 Elliot, *supra* note 6 at 71–77 for his discussion of constitutional methodology and structural argumentation in the American context. See Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (Oxford: Oxford University Press, 1982) at 74; Charles L Black, *Structure and Relationship in Constitutional Law* (Baton Rouge: Louisiana State University Press, 1969).

24 Elliot, *supra* note 6 at 68.

25 James Johnson, "The Judges Reference and the Secession Reference at Twenty: Reassessing the Supreme Court of Canada's Unfinished Unwritten Constitutional

more specific constitutional rules. Thus, for Johnson, such methodology is a "pragmatic analysis that moves from the abstract propositions that define a constitutional democracy to the concrete legal rules necessarily implicit in those propositions."[26] Although Elliott and Johnson employ a different terminology, they both describe the same type of constitutional argumentation, one that relies on what the Supreme Court recognized as underlying principles of the Constitution in the *Secession Reference* of 1998.[27]

Critics of this methodology question how such broad unwritten principles can constitute a legitimate basis for courts to derive specific legal rules.[28] But as David Mullan points out, these underlying principles are never entirely detached from the text of constitutional documents. Indeed, one of them, the rule of law, is explicitly recognized as a foundational principle in the Preamble to the *Constitution Act, 1982*.[29] Otherwise, as the Supreme Court remarked in the *Secession Reference*: "[T]hese underlying principles are not explicitly made part of the Constitution by any written provision, other than in some respects by the oblique reference in the preamble to the *Constitution Act, 1867*."[30] Thus, like constitutional conventions, the underlying principles of the Constitution are largely extra-textual in nature. Of course, no one should express surprise that many rules relating to the operation of the institutions of the state are unwritten, bearing in mind that is how the Westminster system of government developed and continues to operate.

The *Secession Reference* of 1998 marked an important step in the Supreme Court's views on the role of these foundational principles in our constitutional law. For the first time, the Court laid out a comprehensive explanation on the source of these principles and their legal effects. As Johnson argues, this development was the result of the evolution of the Court's jurisprudence in the preceding decade, more specifically in four cases where such principles were applied in the resolution of a constitutional matter.[31] In 1997, the Court went a step further in the

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Principles Project" (2019) 56:4 Alta L Rev 1077 at 1089 [Johnson]. See at 1093 for Johnson's justification for using his own terminology rather than structural argumentation.

26 *Ibid* at 1093.

27 *Reference re Secession,* supra note 4.

28 David J Mullan, "Underlying Constitutional Principles: The Legacy of Justice Rand" (2010) 34 Man LJ 73 at 83 [Mullan]. See for critical positions on structural argumentation following the secession reference, see Johnson, *supra* note 25 at 1102.

29 Mullan, *supra* note 28 at 83.

30 *Reference re Secession*, supra note 4 at 248.

31 See Johnson, *supra* note 25 at 1079–88. The author argues persuasively that the methodology laid out by the Supreme Court in *Reference re Secession* was at play in at least four earlier cases: *Reference Re Manitoba Language Rights*, [1985] 1 SCR 721, 19 DLR (4th) 1;

Reference Re Remuneration of Judges of the Provincial Court (PEI), in which Chief Justice Lamer discussed at length the foundational principle of judicial independence and explained its legal effect by reference to the Preamble of the *Constitution Act, 1867*.[32] When the Supreme Court was confronted the following year with the constitutional issues raised by provincial secession, it stated more clearly its constitutional methodology based on the underlying principles of the Constitution.

In the *Secession Reference*, the Supreme Court had to determine whether, under the Constitution, Quebec could secede unilaterally from the federation. Since the constitutional documents were silent on the question of secession, the Court relied on the underlying principles that structured the Constitution in order to answer the question. In so doing, the Court explained that these principles, not unlike certain conventions, informed the text of the Constitution and allowed for its proper interpretation:

> What are those underlying principles? Our Constitution is primarily a written one, the product of 131 years of evolution. Behind the written word is an historical lineage stretching back through the ages, which aids in the consideration of the underlying constitutional principles. These principles inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based.[33]

The Court set out a basis to explain the nature and functions of the underlying constitutional principles within a coherent framework; this can be summarized in the following five propositions. First, the Constitution has an architecture, a basic structure that implies a coherence when interpreting elements of the Constitution,[34] an idea that would be familiar to members of the Court within the civilist tradition. Second, this architecture is founded on principles not referred to in the Constitution (save for the wording in the 1867 Preamble to being "similar in principle to that of the United Kingdom" and the reference to the rule of law in

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Ontario (AG) v OPSEU, [1987] 2 SCR 2, 41 DLR (4th) 1; *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319, 100 DLR (4th) 212 (albeit this relates to parliamentary privilege) [*New Brunswick Broadcasting* cited to SCR]; *MacMillan Bloedel Ltd v Simpson*, [1995] 4 SCR 725, 130 DLR (4th) 385. These decisions can be traced in turn to *Reference Re Alberta Legislation*, [1938] SCR 100, [1938] 2 DLR 81 & *Switzman v Elbling*, [1957] SCR 285, 7 DLR (2d) 337 which recognized a principle protecting public discussion, albeit these two cases were decided based on the division of powers between the federal and provincial governments.

32 *Reference Re Remuneration of Judges of the Provincial Court (PEI)*, [1997] 3 SCR 3, 150 DLR (4th) 577 [*Reference re Remuneration of Judges* cited to SCR].

33 *Reference re Secession*, supra note 4 at 247.

34 *Ibid* at 248.

the 1982 Preamble), but that are nonetheless essential.[35] Third, the role of these principles is to assist in the interpretation of the constitutional text and to allow for the proper development and evolution of our Constitution as a "living tree."[36] Fourth, although these principles cannot supersede the text of the Constitution, they can constitute the premise of a constitutional argument that fills gaps left by the constitutional text.[37] Fifth, these principles can, in certain circumstances, give rise to substantive legal obligations.[38]

Turning to the questions raised by this reference, the Court then relied on four underlying principles of the Constitution to determine whether, and under what conditions, a province might secede from the federation: federalism, democracy, constitutionalism and the rule of law, and the protection of minorities. The interplay among these principles led the Court to the conclusion that while Quebec could not secede unilaterally, the federal government and other provinces could not ignore a clear expression by a clear majority in favor of independence.[39]

This list of underlying principles enumerated in this case was said not to be closed. In fact, other organizing principles, from time to time, have also been relied upon by courts utilizing structural argumentation, notably judicial independence, the role of provincial Superior Courts, interprovincial comity, the separation of powers, and economic union.[40] For the most part, these principles are used to define the proper relationship between the institutions of the state. This point was illustrated in the *Reference Re Pan-Canadian Securities Regulation*.[41] The Court had to determine whether it was constitutionally permissible to implement pan-Canadian securities regulation under the authority of a single regulator. According to the Court of Appeal of Quebec, the proposed model was unconstitutional, in part because it implied that provincial legislatures would need the consent of the Council of Ministers (a forum for provincial governments) to amend their securities legislations. Based on the principle of parliamentary sovereignty, the Supreme Court held to the contrary on the basis that the arrangement set out in the Memorandum of Agreement between the federal government and the participating provincial and territorial governments could never have the effect of binding provincial legislatures. This is the case because our Constitution rests on the principle

35 *Ibid*.
36 *Ibid*.
37 *Ibid* at 249.
38 *Ibid*.
39 *Ibid* at 267.
40 See Elliot, *supra* note 6 at 118–38.
41 *Reference Re Pan-Canadian Securities Regulation*, 2018 SCC 48.

of parliamentary sovereignty, which would prevail over the terms of any such Memorandum or inter-governmental agreement:

> [61] Returning to the case at hand, the Majority of the Quebec Court of Appeal took issue with ss. 4.2 and 5.5 of the Memorandum, concluding that the combined effect of these sections is to fetter the sovereignty of the legislatures of the participating provinces (at para. 62). Not only does this represent a misunderstanding of the terms of the Memorandum themselves, but it also rests on the flawed premise that the executive signatories are *actually capable* of binding the legislatures of their respective jurisdictions to implement any amendments dictated by the Council of Ministers, and of precluding those legislatures from amending their own securities laws without the approval of the Council of Ministers. In light of the principle of parliamentary sovereignty, this cannot in fact be the case.
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> [62] When an action of the executive branch appears to clash with the legislature's law-making powers, parliamentary sovereignty can be invoked for the purpose of determining the legal *effect* of the impugned executive action, but not its underlying *validity* … In other words, because the legislature's law-making powers are supreme over the executive, the latter cannot bind the former. The result is that any executive agreement that purports to fetter the legislature is not inherently unconstitutional, but will quite simply not have the desired effect.[42]

It is also worth mentioning that structural argumentation (which we have also referred to as structural analysis) does not necessarily require the operation of an underlying principle such as federalism or democracy in order to apply to a constitutional dispute. In the *Reference Re Senate Reform*,[43] the Supreme Court was called upon to determine whether Parliament had the constitutional authority to implement various reforms of the Senate, and under what amending procedure the Senate could be abolished. The Court concluded that the proposed reforms would alter the role and the nature of the Senate in a fundamental way, turning a "complementary legislative body of sober second thought"[44] into an institution with "the democratic legitimacy to systematically block the House of Commons, contrary to its constitutional design."[45] Because this change "would fundamentally alter the architecture of the constitution,"[46] the Court concluded that it amounted to a constitutional amendment governed by the general amending procedure of section 38 of the *Constitution Act, 1982*. This reasoning was not explicitly based on the underlying principles of the Constitution. Yet, we would suggest that

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42 *Ibid* at paras 61–62 [emphasis in original].

43 *Reference Re Senate Reform*, 2014 SCC 32.

44 *Ibid* at para 54.

45 *Ibid* at para 60.

46 *Ibid* at para 53.

it can be understood as applying a variant of the methodology laid out in the *Secession Reference* by considering the structural effect of the Senate's reform on the architecture of the Constitution.

4. Conventions and underlying principles: Two key conceptual differences

As noted, we suggest that constitutional conventions and the underlying principles of the Constitution are better understood when studied in a comparative manner. In our view, a comparative approach highlights (initially) two fundamental differences between these unwritten constitutional elements: a) their relationship with the text of the Constitution; and b) their normative power.

A) Relationship with the constitutional text

Conventions have a complex relationship with constitutional instruments, as they can interact with the text of the Constitution in three ways.[47] First, they can render certain provisions of the written constitution inoperative in practice. An example may be the powers of reservation and disallowance provided for in sections 55–57 and section 90 of the *Constitution Act, 1867*. Pursuant to section 56 and section 90, the Governor General (in effect, the federal Cabinet) has authority to disallow a law assented to by a Lieutenant Governor. As per sections 55, 57 and 90, the Lieutenant Governor can also withhold his or her assent, thereby reserving the bill—either to be assented to or not—by the Governor General (effectively, to be approved or vetoed by the federal Cabinet). These provisions empower the federal government to veto any law adopted by a provincial legislature. Since 1867, this power of disallowance has been exercised 112 times; the power of reservation has been used 70 times, which on 56 occasions has led to a refusal by the Governor General to assent to the bill in question. In recent times, reservation and disallowance have been abandoned in practice. Disallowance was last used in 1943. Reservation was last used in 1961, but apparently mistakenly so, as the federal Cabinet quickly instructed the Governor General to assent to the bill.[48] In the first patriation reference, the Supreme Court suggested that a convention may now limit these powers expressly conferred by the *Constitution Act, 1867*.[49] Leading constitutionalists share this view.[50]

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47 Brun, Tremblay & Brouillet, *supra* note 18 at 49–50.

48 *Ibid* at 422.

49 *Re: Resolution to amend the Constitution*, *supra* note 1 at 802, 879.

50 Brun, Tremblay & Brouillet, *supra* note 18 at 423; Hogg, *supra* note 7 at 5–19.

Second, conventions can vary the operation of provisions of the written constitution. For example, section 11 of the *Constitution Act, 1867* provides that the Queen's Privy Council "will advise and aid in the Government of Canada." The composition of the Privy Council, whose members are appointed by the Governor General, *per* section 11, is somewhat diverse and includes all former and current federal ministers, certain provincial Premiers, and a variety of other distinguished persons. By convention, however, it is only a committee of the Privy Council (the Cabinet) that exercises the function described in section 11.[51]

Third, conventions can operate independently of the rules set out in constitutional instruments. The best example is the role of the Prime Minister. While the Prime Minister is the head of the national government, this office is not even referred to in the written constitution (save incidentally and in passing).[52] Rather, it is through convention that the very considerable powers of the Prime Minister operate.

Hence, conventions are independent from the constitutional text and, in many cases, they prescribe a course of action that operates differently than what the constitutional text indicates. The underlying constitutional principles relied on in structural argumentation do not share this relationship with the written constitution. As noted earlier, these unwritten principles are to be understood as the expression of the text's architecture. In the *Reference re Remuneration of Judges*, a majority of the Supreme Court affirmed that while our Constitution "embraces unwritten, as well as written rules," our constitutional history had "culminated in the supremacy of a definitive written constitution."[53] Thus, the Court cautioned the following year that relying on unwritten organizing principles "could not be taken as an invitation to dispense with the written text of the Constitution."[54] It follows that a structural argument, one based on the underlying principles of the Constitution, will not vary what is set out in the text of the Constitution or render the text inoperative. In our view, this marks a first fundamental difference between conventions and underlying constitutional principles, as the effect of the former is to vary how authority conferred by the written text is exercised in practice.

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51 Brun, Tremblay & Brouillet, *supra* note 18 at 49; Heard, *supra* note 5 at 84–86.

52 See *Constitution Act, 1982*, ss 35.1, 49, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

53 *Reference re Remuneration of Judges*, *supra* note 32 at 68. The Court's remark on the supremacy of the written Constitution was a quote from Chief Justice Lamer's reasons in *New Brunswick Broadcasting*, *supra* note 31 at 355.

54 *Reference re Secession*, supra note 4 at 249.

B) The normative power of conventions and underlying constitutional principles

By definition, conventions cannot be enforced by a court of law. It does not follow, however, that courts have no role as to whether a convention exists and whether a convention has been breached. It is well established by the two patriation References that conventions are justiciable, even if not enforceable:

> Question 2 is not confined to an issue of pure legality but it has to do with a fundamental issue of constitutionality and legitimacy. Given the broad statutory basis upon which the Governments of Manitoba, Newfoundland and Quebec are empowered to put questions to their three respective courts of appeal, they are in our view entitled to an answer to a question of this type.
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> […]
>
> In so recognizing conventional rules, the courts have described them, sometimes commented upon them and given them such precision as is derived from the written form of a judgment. They did not shrink from doing so on account of the political aspects of conventions, nor because of their supposed vagueness, uncertainty or flexibility. In our view, we should not, in a constitutional reference, decline to accomplish a type of exercise that courts have been doing of their own motion for years.[55]

Hence, although they cannot order political actors to follow a constitutional convention, courts can declare whether a convention exists and whether it has been breached. In so doing, the court would not be not speaking as to the legality of a political decision; rather, it would be speaking as to what we would call constitutional legitimacy. As a matter of historical record, the Court's judgment in the first patriation reference focused and reshaped negotiations between the federal and provincial governments. While there were unforeseen consequences—notably, tensions in national unity—the discipline of the structure offered by the Court's decision helped make possible a decisive moment in Canadian history: the adoption of the *Constitution Act, 1982*, including the *Charter*. Though a declaration of the existence of a convention has no coercive effect, its statement can be powerful. One wonders how the British Parliament would have decided had the federal government of Canada ignored the declaratory decision of the Court and proceeded without the consent of most provinces. It might simply have declined to enact the resolution of the Canadian Parliament (to amend the Constitution) that had been found by the Supreme Court

55 *Re: Resolution to amend the Constitution*, *supra* note 1 at 884–86.

to be in breach of a constitutional convention, in the absence of consent by most provinces.

By contrast to conventions, there is a livelier debate as to whether underlying constitutional principles can give rise to substantive legal obligations enforceable by courts. On the one hand, it is fairly clear that when such principles are used in the interpretation of the constitutional text then, at least indirectly, these principles give rise to enforceable obligations. In such an instance, however, the source of the principle's normative authority resides in the constitutional text itself. A good example is the Supreme Court's jurisprudence on the division of powers, which places the underlying principle of federalism at the heart of interpretation of sections 91 and 92 of the *Constitutional Act, 1867*.[56] By giving effect to the principle of federalism in the development of constitutional doctrines on the division of power, the Court gives normative authority to an unwritten constitutional principle, albeit through the interpretation of constitutional provisions.

On the other hand, when underlying principles are referred to on an independent basis, for example when they are relied upon to fill gaps in the written constitution, it is unclear whether they can create enforceable obligations. In the *Reference re Remuneration of Judges,* the Court signaled the importance of relying on constitutional texts in order to "promot[e] legal certainty and through it the legitimacy of constitutional judicial review."[57] After concluding that the source of these organizing constitutional principles is in the Preamble of the *Constitution Act, 1867*, the Court noted that the Preamble had "no enacting force" and that "strictly speaking, it is not a source of positive law."[58] Nonetheless, the Court concluded in the following paragraph that the Preamble had "important legal effects" and that it "invites the use of those organizing principles to fill out gaps in the express terms of the constitutional scheme."[59] As Elliott remarked, the scope of the normative power ascribed to such unwritten principles is dependent on what is seen to constitute a "gap" in the written constitution.[60] In the *Secession Reference,* the Court clarified its position on the normative power of underlying constitutional principles, stating that the "underlying constitutional principles may in certain circumstances give rise to substantive legal obligations … which constitute substantive limitations upon government action" and that "the principles are not merely descriptive, but are also invested with a powerful

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56 See in particular *Canadian Western Bank v Alberta*, 2007 SCC 22 at paras 21–24.

57 *Reference re Remuneration of Judges*, *supra* note 32 at 68.

58 *Ibid* at 69.

59 *Ibid*.

60 Elliot, *supra* note 6 at 91.

normative force, and are binding upon both courts and governments."[61] However, in the *Secession Reference*, the Court took the position that although the obligations it identified based on the underlying principles were "binding obligations under the Constitution of Canada,"[62] the operation and enforcement of such obligations in this particular case—not unlike constitutional conventions—belonged to the political arena rather than the judiciary.[63]

It follows from this comparative analysis that conventions and underlying constitutional principles function in some ways as opposites. Conventions are constitutional norms that are independent from the text of the constitution, but not enforceable by a court of law. By contrast, underlying constitutional principles can have a normative power, although any such legal status is closely tied to the text of the Constitution. In the following section, we suggest that despite such conceptual differences, these two unwritten components of our constitutional law are in fact complementary.

5. Where conventions and underlying principles meet

Constitutional conventions are born out of practice. But, as noted earlier, these rules of political behaviour also need a rationale in order to exist, some basic principle guiding political action. As Geoffrey Marshall wrote, some conventions are based on broad principles rather than recurrent practices.[64] This suggests that there is a link between some (if not all) constitutional conventions and the underlying principles of the Constitution. This link is crucial to a proper understanding of the unwritten constitution.

Although conventions and underlying constitutional principles function differently, they both serve purposes—in some ways similar, in other ways complementary—in our constitutional order. As we have seen, constitutional conventions are more than mere guidelines that political actors are free to adhere to or depart from as they see fit. Rather, conventions are rules that are essential to the structure of Westminster systems. Conventions ensure that constitutional law is given effect in a way that is consistent with the broad principles undergirding the organization of the state. In the first patriation reference, a majority of the Supreme Court explained the purpose of conventions as follows:

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61 *Reference re Secession*, *supra* note 4 at 249.

62 *Ibid* at 294.

63 *Ibid* at 270–73.

64 Marshall, *supra* note 11 at 201.

> The main purpose of constitutional conventions is to ensure that the legal framework of the constitution will be operated in accordance with the prevailing constitutional values or principles of the period. For example, the constitutional value which is the pivot of the conventions stated above and relating to responsible government is the democratic principle: the powers of the state must be exercised in accordance with the wishes of the electorate; and the constitutional value or principle which anchors the conventions regulating the relationship between the members of the Commonwealth is the independence of the former British colonies.[65]

The purpose of the underlying or organizing principles of the Constitution was described in similar terms by the Supreme Court in the *Secession Reference*. In order to introduce the four organizing principles that were central to its decision, the Court went back to the idea that our constitutional order was structured by unwritten as well as written rules, including constitutional conventions. The purpose of these unwritten rules, the Court stated, was to ensure that the constitutional text would endure over time, despite changing social and political circumstances:

> The Constitution also "embraces unwritten, as well as written rules", as we recently observed in the *Provincial Judges Reference*, *supra*, at para. 92. Finally, as was said in the Patriation Reference […] the Constitution of Canada includes the global system of rules and principles which govern the exercise of constitutional authority in the whole and in every part of the Canadian state.
>
> These supporting principles and rules, which include constitutional conventions and the workings of Parliament, are a necessary part of our Constitution because problems or situations may arise which are not expressly dealt with by the text of the Constitution. In order to endure over time, a constitution must contain a comprehensive set of rules and principles which are capable of providing an exhaustive legal framework for our system of government. Such principles and rules emerge from an understanding of the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning.[66]

Hence, conventions and underlying constitutional principles have been described in the jurisprudence as two mechanisms for adaptation, means to ensure that our constitutional order can withstand political and social changes. Whereas conventions are practical adaptations engendered by political actors, underlying constitutional principles reflect the judiciary's efforts to adapt the meaning of the constitutional text so as to give practical effect, where circumstances require, to core principles—such as democracy and the rule of law—that are recognized as foundational and

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65 *Re: Resolution to amend the Constitution*, *supra* note 1 at 880.

66 *Reference re Secession*, *supra* note 4 at 239–40.

inherent to our model of government. Our constitutional order can adapt to changing historical circumstances by relying on these two different mechanisms by virtue of Canada's dual political and legal culture, as beneficiaries of Cartesian logic and Anglo-Saxon pragmatism.

6. Conclusion

The interaction of the written constitution and constitutional conventions is constant and, ordinarily, seamless. It is rarely the subject of public comment. On only a few occasions has it been the subject of jurisprudential pronouncement. Structural analysis of underlying principles to answer constitutional questions is rare. Yet, an understanding of constitutional conventions and of structural analysis is a necessary complement to a knowledge of the written Canadian Constitution. In this paper we have sought to explain how these various sources of constitutional rules interact. They do so in a dynamic and evolving way.