

CHAPTER 48

THE RULE OF LAW, THE SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE IN CANADA

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THE Constitution of Canada was modelled on the British tradition of unwritten principles and conventions governing the exercise of legal power to produce a constitutional monarchy, parliamentary democracy, and responsible government, as well as the American paradigm of constitutional supremacy embodied in written provisions, required in turn by the federal rather than unitary structure of the state. This hybrid model is reflected in the Canadian understanding of the rule of law, which is embodied implicitly in the preamble to the *Constitution Act, 1867*—Canada was to enjoy ‘a Constitution similar in Principle to that of the United Kingdom’—and explicitly in the preamble to the *Canadian Charter of Rights and Freedoms* (itself a part of the *Constitution Act, 1982*)—‘Whereas Canada is founded upon principles which recognize the supremacy of God and the rule of law’. The idea of the rule of law is also intrinsic to provisions such as section 7 of the *Charter*, guaranteeing the right to life, liberty, and security of the person and the right not to be deprived thereof ‘except in accordance with the principles of fundamental justice’; section 15, protecting and expanding upon Dicey’s¹ understanding

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¹ Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (London: MacMillan Press, 1959; reprinted 1975). For detailed commentary on Professor Dicey’s pre-eminent contribution, as well as those of his contemporaries, see WJ Newman, ‘The Principles of the Rule of Law and Parliamentary Sovereignty in Constitutional Theory and Litigation’ (2005) 16 *National Journal of Constitutional Law* 175–296; for more academic commentary and further reading, see the select bibliography appended to this chapter.

of the rule of law as equality before and under the law, and the equal protection and benefit of law; and section 52 of the *Constitution Act, 1982*, expressly declaring that the Constitution is ‘the supreme law of Canada’ and that any law that is ‘inconsistent with the provisions of the Constitution’ is ‘of no force or effect’.

In the course of its considered rulings in several leading cases, the Supreme Court of Canada has contributed much to the global jurisprudence on the rule of law. *Roncarelli v Duplessis*² applied the Diceyan notion of one law for all to limit the arbitrary discretionary power of a provincial Premier and Attorney General who had advised against the issuance of a liquor licence to a restaurant owner for capricious and irrelevant considerations. The *Manitoba Language Rights Reference*³ determined that the failure to respect a constitutional manner-and-form requirement in the enactment of legislation rendered the legislation invalid in light of the supremacy clause of the Constitution, and that failure to comply with the requirement over almost a century did not excuse the omission, although the principle of the rule of law did assist the Court in deeming the invalid legislation temporarily operative until the requirement could be met.

The *Quebec Secession Reference*⁴ emphasized the importance of respecting the principles of constitutionalism and the rule of law in a political process that might result in the secession of a province from Canada, if that process were to be undertaken and pursued by lawful means. The *Provincial Court Judges Reference*⁵ established that all government officials must ultimately trace the authority for their actions to a rule of law, whether under statute or the common law. The *Imperial Tobacco* decision⁶ held that the rule of law is not a bar to legislation enacted within the limits set out in the provisions of the Constitution; in other words, the rule of law includes rule by law, as enacted in accordance with the legislative authority conferred upon Parliament and the provincial legislatures by the Constitution, and in keeping with entrenched constitutional guarantees such as those protected by the *Canadian Charter of Rights and Freedoms*.

The Supreme Court has called the rule of law ‘a fundamental postulate of our constitutional structure’⁷ and a ‘highly textured expression, importing many things . . . but conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority’.⁸ In its landmark opinion in the *Quebec Secession Reference*, the Supreme Court stated that the elements of the rule of law are threefold. First, ‘the rule of law provides that the law is supreme over the acts of both government and private persons. There is, in short, one rule law for all.’ Second, ‘the rule of law requires the creation and maintenance of an actual order of positive laws which

² *Roncarelli v Duplessis*, [1959] SCR 121.

³ *Reference re Manitoba Language Rights*, [1985] 1 SCR 721.

⁴ *Reference re Secession of Quebec*, [1998] 2 SCR 217.

⁵ *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] 3 SCR 3.

⁶ *British Columbia v Imperial Tobacco Ltd.*, [2005] 2 SCR 473.

⁷ *Roncarelli v Duplessis*, [1959] S.C.R. 121, [142], per Rand J.

⁸ *Reference re Resolution to amend the Constitution*, [1981] 1 SCR 753, 805–806.

preserves and embodies the more general principle of normative order'. Third, 'the exercise of all public power must find its ultimate source in a legal rule'; in other words, 'the relationship between the state and the individual must be regulated by law'. Together, 'these three considerations make up a principle of profound constitutional and political significance'.⁹

At its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action.¹⁰

The Supreme Court has also articulated a distinct but related principle of constitutionalism. The essence of this principle, the Court stated, is reflected in the supremacy clause of section 52 of the *Constitution Act, 1982*.

Simply put, the constitutionalism principle requires that all government action comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the Constitution. This Court has noted on several occasions that with the adoption of the *Charter*, the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy. The Constitution binds all governments, both federal and provincial, including the executive branch . . . They may not transgress its provisions: indeed, their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source.¹¹

That statement remains an eloquent exposition of the supremacy of the law of the Constitution, as embodied in its provisions, which the courts will generally enforce. This *legal* constitutionalism may be contrasted with *political* constitutionalism, which is reflected in respect for constitutional conventions: that is to say, the informal, customary rules of conduct and behaviour developed by and acquiesced in by political actors, the breach of which entails political rather than legal sanctions.¹²

Given the Supreme Court's emphasis on the importance of underlying constitutional principles, it is not surprising that litigants have occasionally sought to imbue the principle of the rule of law itself with the same supreme legal force of a provision of the Constitution. Moreover, this has often been done in connection with applications to

⁹ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, *per curiam*, para. 72 (incorporating passages from *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, [747–752], and *Reference re Remuneration of Judges of the Provincial Court*, above (n 5) [1997] [10]).

¹⁰ *ibid.*, [70].

¹¹ *ibid.*, [72].

¹² See Warren J. Newman, 'Of Dissolution, Prorogation and Constitutional Law, Principle and Convention: Maintaining Fundamental Distinctions during a Parliamentary Crisis', 27 *National Journal of Constitutional Law* 217 at 226–229. On legal and political constitutionalism, see notably *Osborne v Canada (Treasury Board)*, [1991] 2 SCR 69 at 87 (Sopinka J, writing for the Court).

render statutes of no force or effect that are, in the eyes of those litigants or their counsel, unwise or unjust, whether or not those laws are unconstitutional in terms of their validity. As Justice Strayer of the Federal Court of Appeal presciently observed: ‘Advocates tend to read into the principle of the rule of law anything which supports their particular view of what the law should be.’¹³

However, after struggling with the issue, Canadian courts have clearly recognized that the rule of law must be read in conjunction with other constitutional principles, including constitutionalism, democracy, and parliamentary sovereignty, and with the supremacy accorded to the provisions of the Constitution, including those granting legislative authority to make enactments. In a challenge to the constitutional validity of a provision of the *Canada Evidence Act* preserving Cabinet documents from disclosure, on the basis that the provision offended the rule of law, the separation of powers, and the independence of the judiciary, Chief Justice McLachlin, writing for the Supreme Court, upheld the validity of the impugned provision. Although the constitutional principles invoked were capable of limiting government action, they did not do so in this case, she held, as they had to be balanced against the principle of parliamentary sovereignty:

It is well within the power of the legislature to enact laws, even laws which some would consider draconian, as long as it does not fundamentally alter or interfere with the relationship between the courts and the other branches of government.¹⁴

This refrain was repeated by the Supreme Court in the *Imperial Tobacco* case,¹⁵ in that the rule of law could not be invoked to invalidate a statute of the legislature of British Columbia that facilitated a civil action by the provincial government against tobacco companies for the recovery of health care expenditures in treating tobacco-related illnesses. Justice Major, writing for the Court, observed that ‘many of the requirements of the rule of law proposed by the appellants are simply broader versions of the rights contained in the *Charter*’.¹⁶

Thus, the appellants’ conception of the unwritten constitutional principle of the rule of law would render many of our written constitutional rights redundant and, in doing so, undermine the delimitation of those rights chosen by our constitutional framers. That is specifically what this Court cautioned against in *Reference re Secession of Quebec* . . .

Second, the appellants’ arguments overlook the fact that several constitutional principles other than the rule of law that have been recognized by this Court—most notably democracy and constitutionalism—very strongly favour upholding the validity of legislation that conforms to the express terms of the Constitution (and to the requirements, such as judicial independence, that flow by necessary implication

¹³ *Singh v Canada*, [2000] 3 FC 185.

¹⁴ *Babcock v Canada (A.G.)* [2002] 3 SCR 3 [57].

¹⁵ *British Columbia v Imperial Tobacco Ltd*, above (n 6) [66] and [67].

¹⁶ *ibid.*, [65].

from those terms). Put differently, the appellants' arguments fail to recognize that in a constitutional democracy such as ours, protection from legislation that some might view as unjust or unfair properly lies not in the amorphous underlying principles of our Constitution, but in its text and the ballot box . . .

*The rule of law is not an invitation to trivialize or supplant the Constitution's written terms. Nor is it a tool by which to avoid legislative initiatives of which one is not in favour. On the contrary, it requires that courts give effect to the Constitution's text, and apply, by whatever its terms, legislation that conforms to that text.*¹⁷

In *Imperial Tobacco*, the Supreme Court recognized that it had described the rule of law "as embracing three principles": the supremacy of law over government officials as well as private individuals, the maintenance of an order of positive laws, and the legal regulation of the relationship between the state and the individual.¹⁸ None of these principles could be employed to invalidate the substantive content (as opposed to the manner and form) of legislation.

That is because none of the principles that the rule of law embraces speak directly to the terms of legislation. The first principle requires that legislation be applied to all those, including government officials, to whom it, by its terms, applies. The second principle means that legislation must exist. And the third principle, which overlaps somewhat with the first and second, requires that state officials' actions be legally founded.¹⁹

This did not mean that the rule of law had no normative force, but that the constraints on government action would usually apply to the executive and judicial branches.²⁰ The Court acknowledged that there was considerable academic debate about 'what *additional* principles, if any, the rule of law might embrace', but rejected proposed requirements advocated by the defendants that statute law, to be valid and respect the rule of law, must '(1) be prospective; (2) be general in character; (3) not confer special privileges on the government, except where necessary for effective governance; and (4) ensure a fair civil trial'.²¹ None of these requirements, the Court emphasized, canvassing its own jurisprudence from the perspective of 'precedent and policy', had 'constitutional protection'.²²

The idea of access to justice has since moved the Supreme Court towards a somewhat more expansive view of the rule of law, without retreating from the *Imperial Tobacco*

¹⁷ *ibid.*, [65–67] [emphasis added].

¹⁸ *Ibid.*, [58], drawing on the Court's opinions in the *Manitoba Language Rights Reference* and the *Quebec Secession Reference*.

¹⁹ *ibid.*, [59].

²⁰ *ibid.*, [60]; 'Actions of the legislative branch are constrained too, but only in the sense that they must comply with legislated requirements as to manner and form (i.e., the procedures by which legislation is to be enacted, amended and repealed)'.

²¹ *ibid.*, [63].

²² *ibid.* [68]; see [69–77] for the Court's review of the relevant case law.

decision's essential finding that the rule of law as a constitutional principle cannot, in and of itself, invalidate otherwise constitutional legislation (that is, laws that have been enacted on matters within the legislative authority of the enacting legislature and that do not offend the provisions of the Constitution). Whereas in *Imperial Tobacco*, the rule of law had embraced 'three principles', in *Christie*,²³ another case arising out of British Columbia, the rule of law was now said to embrace 'at least three principles'.²⁴ The Court noted that 'general access to legal services is not a currently recognized aspect of the rule of law', but characterized its ruling in *Imperial Tobacco* two years earlier as having 'left open the possibility that the rule of law may include additional principles'.²⁵ Nevertheless, the Court upheld the validity of provincial legislation imposing a goods and services tax on legal services, even where it was argued that this tax restricted or discouraged access to lawyers and thus to justice. Whilst recognizing 'the important role that lawyers play in ensuring access to justice and upholding the rule of law',²⁶ which had given rise to a constitutional right to legal counsel in specific instances, the Court stated that the issue that had to be addressed in *Christie* was 'whether general access to legal services in relation to court and tribunal proceedings dealing with rights and obligations is a fundamental aspect of the rule of law'. The Court, in a per curiam decision, held that it was not.

Access to legal services is fundamentally important in any free and democratic society. In some cases, it has been found essential to due process and a fair trial. But a review of the constitutional text, the jurisprudence and the history of the concept does not support the respondent's contention that there is a broad general right to legal counsel as an aspect of, or precondition to, the rule of law.²⁷

More recently, in yet another case originating in British Columbia, the Supreme Court did declare certain rules imposing court hearing fees to be unconstitutional, but on the basis of a provision of the Constitution—section 96 of the *Constitution Act, 1867*—read in light of the principle of the rule of law. In the *BC Trial Lawyers Association* decision,²⁸ a majority of the Court held that the grant of legislative power accorded to provincial legislatures over the administration of justice by section 92(14) of the *Constitution Act, 1867* must be harmonized with section 96, which guarantees the core jurisdiction of provincial superior courts. The particular fees in question were held to infringe upon section 96 by effectively denying access to the courts for some people.

²³ *British Columbia (Attorney General) v Christie*, [2007] 1 SCR 873.

²⁴ *ibid.*, [20] [emphasis added].

²⁵ *ibid.*, [21].

²⁶ *ibid.*, [22].

²⁷ *ibid.*, 23.

²⁸ *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31, per McLachlin CJ and LeBel, Abella, Moldaver, and Karakatsanis JJ; Rothstein J. dissenting. Cromwell J would have resolved the case on administrative law grounds.

Chief Justice McLachlin, writing for the majority, added that the link between section 96's protection of the jurisdiction of superior courts and access to justice was buttressed by 'considerations relating to the rule of law'.²⁹ Access to justice—at least in terms of physical access to the courts themselves—had already been held as essential to the rule of law in an earlier case, *BCGEU v British Columbia*, which involved obstruction created by striking picketers.³⁰ In *MacMillan Bloedel*,³¹ provincial superior courts had been held to be foundational to the rule of law, and in the *Provincial Court Judges Reference*, it had been observed that the rationale for section 96 was 'the maintenance of the rule of law through the protection of the judicial role'.³² It was thus 'only natural', wrote McLachlin CJ, that section 96 of the *Constitution Act, 1867* should 'provide some degree of constitutional protection for access to justice'.³³ Concerns about maintaining the rule of law in this context were 'not abstract or theoretical':

If people cannot challenge government actions in court, individuals cannot hold the state to account—the government will be, or be seen to be, above the law. If people cannot bring legitimate issues to court, the creation and maintenance of positive laws will be hampered, as laws will not be given effect.³⁴

Nonetheless, with an eye to prudence and to dissenting views, the Chief Justice was careful to try to tailor and balance both the constitutional claim and the degree of compliance required, as well as the respective roles of the legislatures and courts.

The right of the province to impose hearing fees is limited by constitutional constraints. In defining those constraints, the Court does not impermissibly venture into territory that is the exclusive turf of the legislature. Rather, the Court is ensuring that the Constitution is respected. [. . .]

It is the role of the provincial legislatures to devise a constitutionally compliant hearing fee scheme. But as a general rule, hearing fees must be coupled with an exemption that allows judges to waive the fees for people who cannot, by reason of their financial situation, bring non-frivolous or non-vexatious litigation to court. A hearing fee scheme can include an exemption for the truly impoverished, but the hearing fees must be set at an amount such that anyone who is not impoverished can afford them. Higher fees must be coupled with enough judicial discretion to waive hearing fees in any case where they would effectively prevent access to the courts because they require litigants to forgo reasonable expenses in order to bring claims.³⁵

²⁹ *ibid.*, [38].

³⁰ *BCGEU v British Columbia (Attorney General)*, [1988] 2 S.C.R. 214, per Dickson CJ.

³¹ *MacMillan Bloedel Ltd v Simpson*, [1995] 4 SCR 725.

³² *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3, [88].

³³ *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, above (n 28) [39].

³⁴ *ibid.*, [40].

³⁵ *ibid.*, [42], [48].

Justice Rothstein, in a powerful dissent, wrote that '[c]ourts do not have free range to micromanage the policy choices of governments acting within the sphere of their constitutional powers'.³⁶ Rather, courts should be 'wary of subverting democracy and its accountability mechanisms'—legislatures are accountable to the electorate—'beneath an overly expansive vision of constitutionalism'.³⁷

In my respectful view, the British Columbia hearing fee scheme does not offend any constitutional right. The majority must base its finding on an overly broad reading of s. 96, with support from the unwritten constitutional principle of the rule of law, because there is no express constitutional right to access the civil courts without hearing fees.

In engaging, on professed constitutional grounds, the question of the affordability of government services to Canadians, the majority enters territory that is quintessentially that of the legislature. The majority looks at the question solely from the point of view of the party to litigation required to undertake to pay the hearing fee. It does not consider, and has no basis or evidence upon which to consider, the questions of the financing of court services or the impact of reduced revenues from reducing, abolishing, or expanding the exemption from paying hearing fees. Courts must respect the role and policy choices of democratically elected legislators. In the absence of a violation of a clear constitutional provision, the judiciary should defer to the policy choices of the government and legislature.³⁸

Justice Rothstein was also acutely critical of the extent to which the majority employed the principle of the rule of law to support a novel reading of the ambit of section 96 and the core jurisdiction of the superior courts. This, in his view, 'subverts the structure of the Constitution and jeopardizes the primacy of the written text'.³⁹ He noted that in *Imperial Tobacco*, the Court had 'clearly and persuasively cautioned against using the rule of law to strike down legislation';⁴⁰ in *BC Trial Lawyers Association*, to 'circumvent this caution',⁴¹ the majority had characterized the rule of law as a limitation on the authority of provincial legislatures under section 92(14) of the *Constitution Act, 1867*. This, in Rothstein J's view, was to ignore the manifold lessons of the Court's ruling in *Imperial Tobacco* on the limits of the rule of law's normative impact on the substance of legislation, notably in light of other constitutional principles such as democracy.

With respect, the rule of law does not demand that this Court invalidate the hearing fee scheme—if anything, it demands that we uphold it. [. . .] To rely on this nebulous principle to invalidate legislation based on its content introduces uncertainty into constitutional law and undermines our system of positive law.⁴²

³⁶ *ibid.*, [80].

³⁷ *ibid.*, [83].

³⁸ *ibid.*, [80], [81].

³⁹ *ibid.*, [93].

⁴⁰ *ibid.*, [97].

⁴¹ *ibid.*, [98].

⁴² *ibid.*, [99], [102].

2. THE SEPARATION OF POWERS

The recurrent theme of the respective roles of the legislatures and courts within Canada's constitutional framework, so prevalent in the debate over scope of the rule of law as a constitutional principle, brings us to a brief assessment of another and still-emerging principle, the separation of executive, legislative, and judicial powers.

Professor Peter Hogg has argued cogently and consistently since the first edition of his treatise in 1977 that there is no general separation of powers in the *Constitution Act, 1867*.⁴³ Nevertheless, in recent years, the Supreme Court of Canada has elevated the separation of powers to the level of a structural constitutional principle. However, the Court has yet to provide a comprehensive and persuasive account of the meaning, scope, and normative effect of this principle. Indeed, the path of the Court's jurisprudence has veered significantly on this issue. In the *Provincial Court Judges Reference*⁴⁴ in 1997, Chief Justice Lamer, writing for a majority of the Court, asserted that 'a fundamental principle of the Canadian Constitution, the separation of powers . . . requires, at the very least, that some functions must be exclusively reserved to particular bodies.'⁴⁵ A year later, in upholding its advisory jurisdiction in the *Quebec Secession Reference*,⁴⁶ the Court declared that '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 s. 96 courts.'⁴⁷ In *OceanPort Hotel*,⁴⁸ Chief Justice McLachlin held that the 'traditional division between the executive, the legislature and the judiciary' and the 'preservation of this tripartite constitutional structure' did not compel the extension of the constitutional guarantee of judicial independence to administrative tribunals.⁴⁹ In *Babcock*,⁵⁰ as noted earlier, the Chief Justice found

⁴³ Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Carswell), at ch. 7.3:

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 [the core jurisdiction of superior courts under s. 96]), may confer judicial functions on bodies that are not courts.

⁴⁴ *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, above (n 5).

⁴⁵ *ibid.*, [138] and [139].

⁴⁶ *Reference re Secession of Quebec*, above (n 4).

⁴⁷ *ibid.*, [15].

⁴⁸ *Ocean Port Hotel Ltd. v British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 SCR 781.

⁴⁹ *ibid.*, [32].

⁵⁰ *Babcock v Canada (Attorney General)*, above (n 14).

that the principles of the rule of law, judicial independence, and the separation of powers had to be balanced with the principle of parliamentary sovereignty: 'It is well within the power of the legislature to enact laws, even laws which some would consider draconian, as long as it does not fundamentally alter or interfere with the relationship between the courts and the other branches of government'.⁵¹ In *Vaid*,⁵² Justice Binnie, writing for the Court, affirmed that '[t]here are few issues as important to our constitutional equilibrium as the relationship between the legislature and the other branches of the State on which the Constitution has conferred powers, namely the executive and the courts'.⁵³ He went on to affirm that parliamentary privilege 'is one of the ways that the fundamental constitutional separation of powers is respected'.⁵⁴

The crux of the view that the separation of powers does not extend to the legislative and executive branches in Canada rests primarily upon the operation of the principle of responsible government in a parliamentary system and the conventions associated therewith, not on the law of the Constitution of Canada per se. It is also evident that any comparison with the Constitution of the United States is based not only on the provisions of that constitution but also upon certain assumptions as to how—or how completely—the principle of the separation of powers operates amongst the three branches of the American government. All of this may require greater scrutiny. However, the biggest problem is definitional and terminological: nowhere in Canadian constitutional jurisprudence is there a thorough analysis of the constitutional meaning animating the concept of the separation of powers, or the constitutional values (beyond judicial independence, which can stand alone as an autonomous principle of the first order) it is meant to protect and enhance.

Why is it that the separation of powers is nonetheless an emerging constitutional principle in the recent jurisprudence of our Supreme Court? What is the motive force and attraction behind this principle?

Canada, as the preamble to the *Constitution Act, 1867*, declares, is to have a Constitution 'similar in Principle' to that of the United Kingdom, which embraces the principle of responsible government within a framework of constitutional monarchy and parliamentary democracy. It is natural that the heretofore dominant position of many constitutional lawyers and most political scientists should echo, at least implicitly, that expressed by that great nineteenth century commentator, Walter Bagehot, in his seminal work, *The English Constitution*, who treated as 'erroneous' the description of that constitution as dividing the legislative, the executive, and the judicial powers and entrusting each power 'to a separate person or set of persons—that no one of these can interfere with the work of the other'.⁵⁵ Indeed, for Bagehot, the contrary was true: 'The

⁵¹ *ibid.*, [57].

⁵² *Canada (House of Commons) v Vaid*, [2005] 1 SCR 667.

⁵³ *ibid.*, [4].

⁵⁴ *ibid.*, [21].

⁵⁵ Walter Bagehot, *The English Constitution*, 1st ed 1867; cited to the American edition; New York: Appleton & Co., 1908, at 70. For more on the impact, on Canadian constitutional thinking, of Bagehot's

efficient secret of the English Constitution may be described as the close union, the nearly complete fusion, of the executive and legislative powers.' The link between these branches or powers, Bagehot asserted, was the Cabinet—the conventional and efficient portion of the formal Queen's Privy Council, composed of Ministers of the Crown. 'A cabinet', Bagehot declared, 'is a combining committee—a *hyphen* which joins, a *buckle* which fastens, the legislative part of the state to the executive part of the state.'⁵⁶

In the *Canada Assistance Plan Reference*, Justice Sopinka, writing for a unanimous Supreme Court, expressly cited Bagehot's hyphen-and-buckle metaphor to underscore 'the essential role of the executive in the legislative process of which it is an integral part'.⁵⁷ Yet two years earlier, in the *Auditor General's Case*, Chief Justice Dickson wrote: 'It is of no avail to point to the fusion of powers which characterizes the Westminster system of government. That the executive through its control of a House of Commons majority may in practice dictate the position the House of Commons takes . . . is not . . . constitutionally cognizable by the judiciary'.⁵⁸

It was Dickson CJ who was the first to observe, in *Fraser*, that '[t]here is in Canada a separation of powers among the three branches of government—the legislature, the executive and the judiciary'.⁵⁹ That proposition was taken up by Lamer CJ in *Cooper*,⁶⁰ wherein he characterized the separation of powers as '[o]ne of the defining features of the Canadian Constitution', and then in the *Provincial Court Judges Reference*, where the separation of powers was described by him as 'a fundamental principle' that commands, *inter alia*, 'that the different branches of government only interact, as much as possible, in particular ways'.⁶¹

For example, 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: see *Cooper*, *supra*, at paras. 23 and 24. In a system of responsible government, once legislatures have made political decisions and embodied those decisions in law, it is the constitutional duty of the executive to implement those choices.⁶²

imagery, see WJ Newman, 'Of Castles and Living Trees: The Metaphorical and Structural Constitution' (2015) 9 *Journal of Parliamentary and Political Law* 471 at 474–476.

⁵⁶ *ibid.*, at 82. By way of comparison, Bagehot added, at 84: 'The independence of the legislative and executive powers is the specific quality of Presidential Government, just as their fusion and combination is the precise principle of Cabinet Government'.

⁵⁷ *Reference Re Canada Assistance Plan (BC)*, [1991] 2 SCR 525, at 559.

⁵⁸ *Canada (Auditor General) v Canada (Minister of Energy, Mines and Resources)*, [1989] 2 SCR 49, at 103.

⁵⁹ *Fraser v Public Service Staff Relations Board*, [1985] 2 SCR 455, at 470: 'In broad terms, the role of the judiciary is, of course, to interpret and apply the law; the role of the legislature is to decide upon and enunciate policy; the role of the executive is to administer and implement that policy'.

⁶⁰ *Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854. See also *R v Power*, [1994] 1 SCR 601 at 620.

⁶¹ *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, above (n 5) [139].

⁶² *ibid.*

There is no sense in this statement that the principles of the separation of powers and responsible government sit somewhat uneasily with each other. Moreover, even if the concerns over responsible government might be dismissed as simply a preoccupation with the conventions of the Constitution, there are almost as many difficulties inherent in the legal structure of the Constitution, for those who would contend in favour of the separation of powers as a fundamental constitutional principle, as there are potential solutions.

For example, the *Constitution Act, 1867* expressly distinguishes, as the rubrics preceding sections 9, 17, and 96 demonstrate, between ‘Executive Power’, ‘Legislative Power’, and ‘Judicature’. However, what the Constitution giveth in relation to the separation of powers, it also taketh away: executive power is, by virtue of section 9, vested in the Queen. Under sections 17 and 91, the Queen is also an essential actor in the exercise of legislative power: Her Majesty is one of the three bodies composing the Parliament of Canada, and in strictness of law, it is the Queen, under section 91, who makes laws for the peace, order, and good government of Canada, albeit by and with the advice and consent of the Senate and House of Commons.

Another illustration is provided in the *Quebec Secession Reference*, wherein it was observed that the United States Supreme Court cannot render advisory opinions, in keeping with the strict separation of powers reflected in the limitations expressed in that country’s constitution, whereas in Canada there is ‘no constitutional bar’ to the conferral of what is traditionally an executive function (the rendering of legal opinions by the law officers of the Crown) upon the judicial branch.⁶³

If we return to the rhetorical questions posed above, why is it that the separation of powers remains an emerging constitutional principle in the recent jurisprudence of the Supreme Court? What is the force and attraction of this principle? Part of it may simply be a matter of osmosis; Canadian judges, particularly since the advent of a constitutionally-entrenched *Charter of Rights*, have become more fully versed in comparative constitutional law, and the separation of powers is omnipresent in American constitutional jurisprudence, thought, and discourse.

The kernel of a more substantive answer may be found in the words of McLachlin J (as she then was) in *New Brunswick Broadcasting*:

Our democratic government consists of several branches: the Crown, as represented by the Governor General and the provincial counterparts of that office; the legislative body; the executive; and the courts. It is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other.⁶⁴

⁶³ *Reference re Secession of Quebec*, above (n 4), [15].

⁶⁴ *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319.

Although this passage is somewhat marred by the suggestion that the Crown and the Executive are different branches of government—as a matter of constitutional law, the Crown *is* the executive branch—the essential idea here is that each branch of government must play its ‘proper role,’ not ‘overstep its bounds,’ and show ‘proper deference for the legitimate sphere of activity’ of the other branches. This demonstrates a deep concern with the necessity of maintaining a delicate balance in a constitutional democracy: of sustaining an appropriate constitutional equilibrium amongst the executive, legislative, and judicial branches, so that no branch may plausibly sustain a claim of absolute power, to the detriment of the other branches. That is the fundamental attraction of the principle of the separation of powers, and why it would be useful to elaborate a more coherent theory of the principle as it applies in the context and particularities of the Canadian constitutional framework, which itself is a hybrid of the UK and American models of constitutionalism.

Echoes of this concern for maintaining a constitutional balance amongst the executive, legislative, and judicial branches may be seen in a numerous cases, including those already mentioned in connection with the rule of law, judicial independence, parliamentary sovereignty and the democratic principle, and parliamentary privilege, as well as certain cases dealing with the Crown’s prerogatives. It is often a feature of the Supreme Court’s jurisprudence respecting questions of justiciability and concomitant judicial restraint. For example, in the *Canada Assistance Plan Reference*, the Court indicated that its ‘primary concern is to retain its proper role within the constitutional framework of our democratic form of government.’⁶⁵ Similarly, in the *Quebec Secession Reference*, even though the Court had rejected the view that the separation of powers would prevent the Court from exercising advisory functions, it reiterated the view that a reference question might not be answered where to do so would ‘take the Court beyond its own assessment of its proper role’ or where ‘the Court could not give an answer that lies within its area of expertise: the interpretation of law.’⁶⁶

In cases dealing with parliamentary privilege and the royal prerogative, respectively, the Supreme Court has adopted the position that it is within its proper role to determine the existence and scope of the asserted privilege or prerogative, but not necessarily to control the exercise of them once their existence and ambit are clearly established. Thus, in *Vaid*, with respect to parliamentary privilege, the Court drew a distinction between ‘defining the scope of a privilege, which is the function of the courts, and judging the appropriateness of its exercise, which is a matter for the legislative assembly.’⁶⁷ And in *Khadr*, the Court emphasized:

The limited power of the courts to review exercises of the prerogative power for constitutionality reflects the fact that in a constitutional democracy, all government

⁶⁵ *Reference re Canada Assistance Plan (BC)*, [1991] 2 SCR 525 at 545.

⁶⁶ *Reference re Secession of Quebec*, above (n 4), [26]; and [100] (‘The Court has no supervisory role over the political aspects of constitutional negotiations.’) See also *Canada (Auditor General) v Canada (Minister of Energy, Mines and Resources)*, [1989] 2 SCR 49 at 91.

⁶⁷ *Vaid*, above (n 52) [47]; see also WJ Newman, ‘Parliamentary Privilege, the Canadian Constitution and the Courts’, (2008) 39 *Ottawa Law Review* 573.

power must be exercised in accordance with the Constitution. This said, judicial review of the exercise of the prerogative power for constitutionality remains sensitive to the fact that the executive branch of government is responsible for decisions under this power, and that the executive is better placed to make such decisions within a range of constitutional options.⁶⁸

The separation of powers has also served, as noted above, to buttress judicial independence, and it is to that principle that this chapter now turns.

3. JUDICIAL INDEPENDENCE

The provisions of the *Constitution Act, 1867* dealing with “Judicature” (sections 96 to 101) and the legal rights of the *Constitution Act, 1982* (embodied in sections 7 to 14 of the *Canadian Charter of Rights and Freedoms*) provide much of the constitutional structure of Canada’s court system and with it, constitutionally-entrenched and protected guarantees of judicial independence. Nonetheless, Lamer CJ, writing for the majority of the Supreme Court in the *Provincial Court Judges Reference*, held that judicial independence is ‘at root an **unwritten** constitutional principle, in the sense that is exterior to the particular sections of the *Constitution Acts*’; ‘an unwritten norm, recognized and affirmed by the preamble to the *Constitution Act, 1867*’.⁶⁹

The Chief Justice, while recognizing that the recitals of a preamble—unlike the provisions which follow the enacting clause of a statute—have no legal force, nevertheless attributed indirect legal effects to the preamble of the *Constitution Act, 1867*, both as an aid to construing the provisions themselves and (more controversially) in filling ‘gaps’ in the constitutional text. This provoked widespread academic commentary and some pointed criticism, particularly as the principle of judicial independence had been slow to develop in the United Kingdom, whence the purported provenance of the principle (through the preamble’s mention of ‘a Constitution similar in principle to that of the United Kingdom’). It also produced a remarkable dissent by Justice LaForest, who argued cogently that the idea that by 1867 there were judicially-enforceable limitations on the legislative power of the United Kingdom Parliament to intrude on judicial independence was a ‘historical fallacy’ and that the preamble to the *Constitution Act, 1867* ‘did not give the courts the power to strike down legislation violating judicial independence.’⁷⁰

This brings us back to the central point: to the extent that courts in Canada have the power to enforce the principle of judicial independence, this power derives from

⁶⁸ *Canada (Prime Minister) v Khadr*, 2010 SCC 3, [2010] 1 SCR 44, [37].

⁶⁹ *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, above (n 5), [83] (underlining in original) and [109]; ‘In fact, it is in that preamble, which serves as the grand entrance hall to the castle of the Constitution, that the true source of our commitment to this foundational principle is located’.

⁷⁰ *ibid.*, [311], *per* LaForest J.

the structure of Canadian, and not British, constitutionalism. Our Constitution expressly contemplates both the power of judicial review (in s. 52 of the *Constitution Act, 1982*) and guarantees of judicial independence (in ss. 96–100 of the *Constitution Act, 1867* and s. 11(d) of the *Charter*). While these provisions have been interpreted to provide guarantees of independence that are not immediately manifest in their language, this has been accomplished through the usual mechanisms of constitutional interpretation, not through recourse to the preamble. The legitimacy of this interpretive exercise stems from its grounding in an expression of democratic will, not from a dubious theory of an implicit constitutional structure. The express provisions of the Constitution are not, as the Chief Justice contends, ‘elaborations of the underlying, unwritten, and organizing principles found in the preamble to the *Constitution Act, 1867*’ (para. 107). On the contrary, they are the Constitution. To assert otherwise is to subvert the democratic foundation of judicial review.⁷¹

This critique may have been one of the reasons that the Chief Justice’s majority opinion in the *Provincial Court Judges Reference*, although having invoked the preamble of the *Constitution Act, 1867* as the fount of judicial independence, was actually decided on the basis of a provision of the Constitution, section 11(d) of the *Charter*.⁷² It also explains why in a later case, *Mackin*,⁷³ Justice Gonthier prudently cited both the preamble of the Act of 1867 and section 11(d) of the *Charter* in the same breath before invalidating provincial legislation that was held to infringe the guarantee of judicial independence.

As to the content of the guarantee, judicial independence has been held to refer ‘essentially to the nature of the relationship between a court and others. This relationship must be marked by a form of intellectual separation that allows the judge to render decisions solely based on the requirements of the law and justice.’⁷⁴ As stated by Justice Gonthier in *Mackin*, ‘the expanded role of the judge as an adjudicator of disputes, interpreter of the law and guardian of the Constitution requires that he or she be completely independent of any other entity in the performance of his or her judicial functions.’⁷⁵ Similarly, Chief Justice Dickson, in *Beauregard v Canada*, summarized the principle of judicial independence in the following terms:

Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that

⁷¹ *ibid.*, [319] (underlining in original); for academic commentary, see notably Jean Leclair and Yves-Marie Morissette, “L’indépendance judiciaire et la Cour suprême: reconstruction historique douteuse et théorie constitutionnelle de complaisance” (1998) 36 *Osgoode Hall Law Journal* 485; WJ Newman, “‘Grand Entrance Hall,’ Back Door or Foundation Stone? The Role of Constitutional Principles in Construing and Applying the Constitution of Canada” (2001), 14 *Supreme Court Law Review* (2d) 197.

⁷² *ibid.*, [109], *per* Lamer CJ: ‘since the parties and interveners have grounded their arguments in s. 11(d), I will resolve these appeals by reference to that provision.’ Section 11(d) expressly guarantees to persons charged in criminal and penal matters the right ‘to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal’.

⁷³ *Mackin v New Brunswick (Minister of Finance)*; *Rice v New Brunswick* [2002] 1 SCR 405.

⁷⁴ *ibid.*, [37] *per* Gonthier J.

⁷⁵ *ibid.*, [35].

come before them; no outsider—be it government, pressure group, individual or even another judge—should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence. . . .

The ability of individual judges to make decisions in discrete cases free from external interference or influence continues to be an important and necessary component of the principle.⁷⁶

Judicial independence is said to possess individual and institutional dimensions.⁷⁷ Individual independence refers to the ‘fundamental duty’ that ‘all judges owe . . . to the community to render impartial decisions and to appear impartial.’⁷⁸ It ‘relates especially to the person of the judge and involves his or her independence from any other entity.’⁷⁹ It relates specifically to the purely adjudicative functions of judges—‘the independence of a court that is necessary for a given dispute to be decided in a manner that is just and equitable.’⁸⁰ Individual independence is an essential element of the adjudicative process, which ‘confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned argument for a decision in his favor.’⁸¹ The adjudicative process, ‘if it is to have the respect and confidence of its society, must ensure that trials are fair and that they appear to be fair to the informed and reasonable observer.’⁸² Institutional independence refers to the institutional autonomy that courts require from external institutions to perform their constitutional role properly. Institutional independence is ‘definitional to the Canadian understanding of constitutionalism.’⁸³ Institutional independence ‘historically developed as a bulwark against the abuse of executive power,’⁸⁴ but equally protects the judiciary from the legislative branch of government and ‘any other external force, such as business or corporate interests or other pressure groups.’⁸⁵

Judicial independence as a structural principle has been developed in Canadian jurisprudence principally in a series of cases over the past two decades dealing with the remuneration, benefits, and financial security accorded to judges by the executive and legislative branches, and the cases have often seen judges and their associations as active

⁷⁶ *Beauregard v Canada*, [1986] 2 S.C.R. 56 [69].

⁷⁷ *Valente v The Queen*, [1985] 2 SCR 673; *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, above (n 5).

⁷⁸ *R v RDS* [1997] 3 SCR 484 [120] per Cory and Iacobucci JJ.

⁷⁹ *Mackin*, above (n 73) [39].

⁸⁰ *ibid.*, [39].

⁸¹ Lon Fuller, “The Forms and Limits of Adjudication” [1978] *Harv L Rev* 352, 364.

⁸² *R v RDS* above (n 78) [91].

⁸³ *Cooper v Canada (Human Rights Commission)* [1996] 3 SCR 854 [11].

⁸⁴ *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, above (n 5) [125].

⁸⁵ *R v Généreux* [1992] 1 SCR 259 [37], per Lamer CJ.

parties to the litigation.⁸⁶ The Supreme Court has enunciated some general principles in this area: judicial salaries can be maintained or altered only by recourse to a judicial compensation commission that is independent, objective, and effective. Unless a legislature provides otherwise, a commission's report is advisory, not binding. The commission's recommendations must be given weight, but the Government retains the power to depart from the recommendations if it justifies its decision with 'rational reasons' in responding to the recommendations. Reasons that are complete and deal with the commission's recommendations 'in a meaningful way' will meet the standard of rationality. If it is required to justify its decision in litigation before the courts, the Government may not advance reasons other than those mentioned in its response, although it may provide more detailed information with respect to the factual foundation upon which it has relied.

The Government's response is subject to 'a limited form' of judicial review by the superior courts. The reviewing court is not to determine the adequacy of judicial remuneration but whether the Government's response is rational and whether the purpose of the commission process—preserving judicial independence and depoliticizing the setting of judicial remuneration—has been achieved. If the process has not been effective, the appropriate remedy for the reviewing court will generally be to remit the matter to the Government for reconsideration.⁸⁷

Legislatures have constitutional power over the creation, alteration, and abolition of judicial offices,⁸⁸ but they must exercise that power in accordance with the principle of judicial independence. Where a reform by the legislature of the court system leads to the establishing of a new judicial office, the remuneration of all the judges appointed to it (whether for the first time, or by way of transfer from another office) must be reviewed retroactively within a reasonable time after their appointment.⁸⁹

⁸⁶ Aside from the *Provincial Court Judges Reference* and the *Mackin* case, already mentioned above, and the cases next dealt with below, other significant cases include *Beauregard v Canada*, [1986] 2 SCR 56, in which a Quebec Superior Court judge challenged the constitutional validity of a newly enacted provision providing that Superior Court judges would be required to contribute to the cost of their pension plan; *R v Généreux* [1992] 1 SCR 259, concerned the remuneration of existing members of military tribunals. In *Ell v Alberta* [2003] 1 SCR 857, the issue was whether a reform to the Alberta justices of the peace regime infringed the tenure security of existing justices who lost their position as a result of the reform, but did not raise any issue with respect to financial security.

⁸⁷ *Provincial Court Judges' Assn. of New Brunswick v New Brunswick (Minister of Justice)*; *Ontario Judges' Assn. v Ontario (Management Board)*; *Bodner v Alberta*; *Conférence des juges du Québec v Québec (Attorney General)*; *Minc v Québec (Attorney General)*, [2005] 2 SCR 286.

⁸⁸ Section 92, head 14, of the *Constitution Act, 1867* confers upon provincial legislatures legislative authority in relation to the administration of justice within the province, including the constitution, maintenance, and organization of provincial courts of civil and criminal jurisdiction. The provincial superior courts pre-date Confederation and are courts of inherent jurisdiction, the core of which is constitutionally protected by s. 96. Section 101 confers upon Parliament legislative authority to establish and maintain a general court of appeal for Canada (the Supreme Court of Canada) and other courts for the better administration of the laws of Canada (the Federal Courts and the Tax Court of Canada). The provincial superior courts pre-date Confederation and are courts of inherent jurisdiction, the core of which is constitutionally protected from legislative interference by s. 96.

⁸⁹ *Conférence des juges de paix magistrats du Québec v Québec (Attorney General)*, 2016 SCC 39. (In this instance, a statutory provision that prevented review of remuneration for a period of at least three

The constitutional principle of judicial independence protects both superior and inferior courts,⁹⁰ but does not extend as such to administrative tribunals.⁹¹ Administrative tribunals may be required, in accordance with the common-law principles of natural justice, to act independently and impartially, but the precise degree of the standard to be met will depend on the tribunal's governing statute, and may be ousted by express statutory provision or necessary intendment. Chief Justice McLachlin, writing for the Supreme Court, stated:

It is not open to a court to apply a common law rule in the face of clear statutory direction. Courts engaged in judicial review of administrative decisions must defer to the legislator's intention in assessing the degree of independence required of the tribunal in question.⁹²

This was said to reflect the 'fundamental distinction' between courts and administrative tribunals. 'Superior courts, by virtue of their role as courts of inherent jurisdiction, are constitutionally required to possess objective guarantees of both individual and institutional independence'. The same 'constitutional imperative' had been extended to provincial courts by virtue of the Supreme Court's ruling in the *Provincial Court Judges Reference*. Judicial independence had developed historically 'to demarcate the fundamental division between the judiciary and executive'. Administrative tribunals, on the other hand, 'lack this constitutional distinction from the executive', notably because they are established 'precisely for the purpose of implementing government policy'. That policy-implementation function may require them to make quasi-judicial decisions, and in that sense, McLachlin C.J. observed, administrative tribunals 'may be seen as spanning the constitutional divide between the executive and the judicial branches of government'. However, in light of their 'primary policy-making function', it was 'properly the role and responsibility of Parliament and the legislatures'—the legislative branch—to determine the composition and structure required by a tribunal to discharge the responsibilities bestowed upon it.⁹³

The 'institutional independence of the judiciary', Lamer C.J. wrote in the *Provincial Court Judges Reference*, is 'definitional to the Canadian understanding of constitutionalism' and 'reflects a deeper commitment to the separation of powers between and amongst the legislative, executive and judicial organs of government'.⁹⁴ The implications of the principle of judicial independence, particularly in

years was held to be unreasonable and invalid, as contrary to s. 11(d) of the *Canadian Charter of Rights and Freedoms*, a constitutional provision, and the preamble to the *Constitution Act, 1867*, insofar as it imported the underlying constitutional principle.

⁹⁰ *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, above (n 5).

⁹¹ *Ocean Port Hotel Ltd. v British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 SCR 781.

⁹² *ibid.*, [22].

⁹³ *ibid.*, [23] and [24].

⁹⁴ *Reference re Remuneration of Judges of the Provincial Court (PEI)*, [1997] 3 SCR 3, above (n 5), [124–125].

the context of remuneration from the public purse, but also in terms of the dynamics and modalities of the institutional relationships between the judiciary on the one hand and the Executive and legislature on the other, are still in the process of being worked out. The interaction of judicial independence with not only the separation of powers but also other foundational principles, including parliamentary sovereignty, constitutionalism, and the rule of law, will bear continuing scrutiny and study in years to come.

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