

## UNWRITTEN CONSTITUTIONALISM IN CANADA: WHERE DO THINGS STAND?

I am afraid that I am the wrong person to offer any criticisms of Elizabeth Edinger's insightful comment, because her dissection of the British Columbia Supreme Court's judgment in *JTI-Macdonald v. British Columbia (Attorney General)*<sup>1</sup> has left me convinced that the case was wrongly decided. Indeed, I echo her regret that the decision was not appealed on the narrow issue of extraterritoriality. The one question I do have is what implication the absence of the so-called enterprise liability provisions in the new statute will have on the ability of British Columbia to recover smoking-related health care costs from tobacco manufacturers.

What I want to focus on is an issue raised by those parts of the reasons that Edinger agrees with — that is, the court's holdings that the legislation was not unconstitutional because it allegedly contravened particular conceptions of the separation of powers and the rule of law. What interests me is the way those claims were framed. The normal way of framing this argument would have been to rely on provisions of the text of the Constitution Acts that are thought to implement or incorporate those principles into positive law. The leading candidate for this sort of role is s. 96 of the Constitution Act, 1867. This appointing power for the provincial superior courts has been transformed through several decades of constitutional doctrine into the protector of the inherent jurisdiction of the superior courts (both by prohibiting the assignment of certain adjudicative functions to non-section 96 courts and tribunals, and by prohibiting the removal of certain core functions from superior courts), and also of independence and impartiality of those courts.<sup>2</sup> Instead, the defendants in the principal action impugned the constitutionality of the legislative scheme by reference to unwritten, but apparently justiciable principles of the Canadian Constitution. To put *JTI-Macdonald* in context, I want to say something about the origins of this style of constitutional argumentation, the extent to

1. (2000), 184 D.L.R. (4th) 335, [2000] 6 W.W.R. 227 (B.C.S.C.).

2. Some of the key cases here are *Reference re Residential Tenancies*, [1981] 1 S.C.R. 714, 123 D.L.R. (3d) 554; *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, 130 D.L.R. (4th) 385; *Canada v. Beauregard*, [1986] 2 S.C.R. 56, 30 D.L.R. (4th) 481; *Reference re: Public Sector Pay Reduction Act (P.E.I.)*, s. 10 (1997), 150 D.L.R. (4th) 577, [1997] 3 S.C.R. 3 (hereafter *Remuneration Reference*).

which lower courts have relied on it, and where I think the courts should go on this issue.

Readers of the law reports will know that constitutional argument based on unwritten norms is much in vogue these days, in large part because of the decision of the Supreme Court of Canada in the *Secession Reference*.<sup>3</sup> Quite aside from the substance of that decision, the judgment is fascinating from a methodological viewpoint because it departs in several important respects from the normal way in which constitutional cases in this country are adjudicated. In a recent article, Robert Howse and I argue that Canadian constitutional argument can be best understood through what we call the positivist account.<sup>4</sup> The positivist account has a number of dimensions to it. Of principal relevance for our purposes is the positivist account's take on sources and interpretive style. According to that account, the sources of constitutional norms in Canada are limited to the express provisions of the Constitution Acts. The textual basis of the positivist account is s. 52(2) of the Constitution Act, 1982, which lists the legal documents that together make up the Constitution of Canada. With respect to interpretive style, the account takes the view that legal interpretation is delimited by the text of the Constitution, so that the beginning and ending points of constitutional interpretation are the express terms of individual constitutional provisions. This is not to say that principles of substantive political morality should not play a role in constitutional interpretation. Some constitutional provisions, particularly those in the Charter, appear to incorporate principles of political morality by reference and invite courts to engage in the type of normative reasoning characteristic of political philosophy. But other provisions, by contrast, are surrounded by interpretive frames that are narrow enough to create a strong presumption against the recourse to openly normative reasoning. Ultimately, then, it is the text that determines the appropriate interpretive approach.

The truly unusual aspect of the *Secession Reference* is that it departed from both of these aspects of the positivist account. Thus, with respect to sources, the court stated that the Constitution consisted of both written and unwritten legal rules or principles. These rules or principles are familiar to most readers: federalism,

3. *Reference re: Secession of Quebec*, [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385 (hereafter *Secession Reference*).

4. S. Choudhry and R. Howse, "Constitutional Theory and the *Quebec Secession Reference*" (2000), 13 *Can. J.L. & Juris.* 143.

constitutionalism and the rule of law, minority rights, and democracy. Moreover, the court went on to argue that those unwritten rules were fundamental or foundational, inasmuch as the text merely implemented them or actualized them, and in cases where a situation was not expressly dealt with by the written text — so-called “gaps” — those principles could be used to fill those gaps through a process of amendment-like interpretation. Likewise, with respect to interpretive style, instead of beginning with the text of the Constitution Acts, of which the most relevant portions were the amending formulas contained in Part V of the Constitution Act, 1982, the court first turned to these unwritten rules, discussed them in some detail, and then crafted out of them the legal principles governing secession: a clear majority on a clear question, and the rest of it.

The *Secession Reference* has spawned a cascade of constitutional cases across the country. This is not because various parts of Canada are attempting to secede from the federation, but rather because creative litigators have started to invoke the *Secession Reference* for the proposition that unwritten principles of the Canadian constitution can serve as free-standing grounds for challenging the validity of government decisions independent of any textual basis in the Constitution Acts. To the extent that unwritten principles have been used to control executive action, they function in a manner similar to the common law grounds of judicial review of administrative action. However, counsel have argued that the *Secession Reference* went even further and held that legislation can be attacked for non-compliance with the unwritten constitution. Indeed, as Robin Elliot puts it, in these cases, the unwritten principles of the Canadian Constitution are assumed to have “tak[en] on a legal status equivalent to that enjoyed by the provisions found in the text of our Constitution”.<sup>5</sup> In other words, *JTI-Macdonald* is far from an unusual case, and should be analyzed in this context.

As it turns out, the cases are quite varied. By far the largest number, like *JTI-Macdonald*, have involved constitutional challenges on the basis of the rule of law. The interesting thing about these cases, though, is that, with some exceptions, they lack the subtext to the arguments in *JTI-Macdonald* — a deep-seated, Lord

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5. R. Elliot, “References, Structural Argumentation and the Organizing Principles of Canada’s Constitution”, *Can. Bar Rev.* (forthcoming, 2001).

Hewart-like hostility to the regulatory state,<sup>6</sup> and the attempt to redesign adjudicative institutions to deal with complex theories of liability that lie outside the intellectual space of traditional conceptions of tort. Thus, there have been constitutional challenges to: (a) provisions of the federal statute implementing the WTO Agreement that bar persons from commencing legal actions under that Act or WTO Agreement without the consent of the Attorney-General of Canada;<sup>7</sup> (b) legislation that had the effect of abrogating a collective agreement negotiated between the federal government and a public sector employees' union;<sup>8</sup> (c) a provision of the Canada Evidence Act shielding from judicial review the executive's characterization of certain documents as containing Cabinet confidences, the effect of that characterization being to prevent those documents from being disclosed in the context of litigation;<sup>9</sup> and (d) legislation with the effect of abrogating Crown contracts and immunizing the Crown from proceedings for breach of contract.<sup>10</sup>

The other principles in *Secession Reference* have been invoked somewhat less often. Thus, in Newfoundland, Roman Catholics have (unsuccessfully) challenged the constitutionality of an amendment eliminating denominational schools in Newfoundland on the grounds that it violated the principle of minority rights.<sup>11</sup> The principle of democracy was invoked in a case where the relief sought was a declaration that the failure of the Governor General in

6. Rt. Hon. Lord Gordon Hewart, *The New Despotism* (London, E. Benn, 1929).

7. *Pfizer Inc. v. Canada*, [1999] 4 F.C. 441, 171 F.T.R. 211 (T.D.), affd 250 N.R. 66, 172 F.T.R. 160n (C.A.).

8. *Public Service Alliance of Canada v. Canada*, [2000] F.C.J. No. 754 (QL) (T.D.).

9. *Singh v. Canada (Attorney General)*, [1999] 4 F.C. 583, 170 F.T.R. 215 (T.D.), affd [2000] 3 F.C. 185, 20 Admin. L.R. (3d) 168 (C.A.), leave to appeal to S.C.C. refused [2000] S.C.C.A. No. 92 (QL), 188 D.L.R. (4th) vi.

10. *Bacon v. Saskatchewan Crop Insurance Corp.*, [1999] 11 W.W.R. 51, [1999] S.J. No. 302 (QL) (C.A.), leave to appeal to S.C.C. refused [1999] S.C.C.A. No. 437 (QL), 257 N.R. 396n. Arguments on the unwritten constitution were also raised at trial, well before the handing down of the *Secession Reference*: (1997), 157 Sask. R. 199, [1997] 9 W.W.R. 258 (Q.B.).

11. *Hogan v. Newfoundland (Attorney General)* (1999), 173 Nfld. & P.E.I.R. 148, [1999] N.J. No. 5 (QL) (S.C.), affd 183 D.L.R. (4th) 225, [2000] N.J. No. 5 (QL) (C.A.), leave to appeal to S.C.C. denied [2000] S.C.C.A. No. 191 (QL). The principle of minority rights was applied in another case concerning the constitutionality of the Nisga'a Treaty to hold that the enactment of the division of powers in ss. 91 and 92 did not have the effect of extinguishing the pre-existing and inherent right of aboriginal peoples to self-government. Here, though, the principle was used not to challenge the constitutionality of any legislation, but rather as a guide to the interpretation and legal effect of the Constitution Act, 1867 (*Campbell v. British Columbia (Attorney General)* (2000), 79 B.C.L.R. (3d) 122, 189 D.L.R. (4th) 333 (S.C.)).

Council to fill a vacancy in the Senate for Alberta by appointing an individual selected pursuant to a province-wide election in Alberta would be "undemocratic".<sup>12</sup> In other cases, counsel have invited the court to craft new unwritten principles and to then give them the force of law. The most interesting example here is *Wilder v. Ontario Securities Commission*,<sup>13</sup> in which counsel argued that the Ontario Securities Commission lacked jurisdiction to prosecute a securities lawyer for statements made in the course of a prospectus review because the principle of the rule of law entails an independent bar, a hallmark of which is the self-regulation of lawyers when acting in their professional capacity.

The most successful case spawned by the *Secession Reference* is *Lalonde v. Ontario (Commission de Restructuration des Services de Sante)*,<sup>14</sup> which struck down a decision by the Ontario Health Services Restructuring Commission to close Ontario's only Franco-phone hospital. That decision is notable because the court canvassed both the equality and language rights provisions of the Charter but held that it could not invoke them to strike down the legislation. Faced with this gap in the constitutional text, the court invoked the principle of minority rights to hold that institutions, such as hospitals, were integral to the survival of the language and culture of the Francophone community in Ontario, and further that the failure of the commission to take that fact into account rendered its decision unconstitutional.

However, it would be a mistake to conclude, as have many commentators, that the *Secession Reference* is the sole cause of the sort of constitutional claims we see in *JTI-Macdonald*. Indeed, there are several lines of cases that precede that case in their use of unwritten constitutional rules to both impugn the constitutionality of governmental action in constitutional adjudication and to interpret constitutional provisions. For example, there is a set of challenges centring on the protection of judicial independence afforded by the preamble to the Constitution Act, 1867, creating a constitution similar in principle to that of the United Kingdom. The key case here is the *Remuneration Reference*<sup>15</sup> — a decision

12. *Brown v. Alberta* (1999), 177 D.L.R. (4th) 349, [1999] 12 W.W.R. 330 (Alta. C.A.).

13. (2000), 47 O.R. (3d) 361, 184 D.L.R. (4th) 165 (Div. Ct.). Application for leave to appeal in *Wilder* has been sought from the Ontario Court of Appeal (Court File No. M25658).

14. (1999), 48 O.R. (3d) 50, 181 D.L.R. (4th) 263 (Div. Ct.).

15. *Supra*, footnote 2.

that predates the *Secession Reference*, but that in many ways laid the doctrinal groundwork for it. The holding there is twofold: (a) that notwithstanding that the express terms of the Constitution Acts only guarantee the independence of superior courts and that of the provincial courts that hear criminal cases, the unwritten rules of the Canadian Constitution also protect the independence of the provincial courts in non-criminal cases, and (b) that the principle of judicial independence requires that any increases or decreases to judicial remuneration be made on the basis of a report issued by an impartial, effective and objective body whose sole purpose is to examine judicial salaries and benefits.

The *Remuneration Reference* has given rise to cases involving remuneration of provincial court judges in Alberta, British Columbia, Newfoundland and Quebec, and the remuneration of the justices of the peace in Ontario and British Columbia.<sup>16</sup> Moreover, the *Remuneration Reference* referred to three earlier sets of cases. The first body of cases concerns the extent to which decisions taken pursuant to parliamentary or legislative privileges are immune from Charter scrutiny. This line of cases traces its origin to the decision handed down in *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*,<sup>17</sup> which held that the decision of the Nova Scotia legislative assembly to ban the televising of its proceedings was exempt from Charter scrutiny. That decision was recently invoked to immunize from constitutional scrutiny a decision by the Speaker of the House of Commons to bar Ernst Zundel from the precinct of the House of Commons.<sup>18</sup> Granted, this line of cases has not involved, to date, constitutional challenges to legislation that interferes with parliamentary privileges, but rather the

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16. *Alberta Provincial Judges' Assn. v. Alberta*, [1999] A.J. No. 863 (QL), 177 D.L.R. (4th) 418 (C.A.), leave to appeal to S.C.C. refused [1999] S.C.C.A. No. 470 (QL), 186 D.L.R. (4th) vii; *British Columbia Legislative Assembly Resolution on Judicial Compensation (Re)*, [1998] B.C.J. No. 1230 (QL), 160 D.L.R. (4th) 477 (C.A.), leave to appeal to S.C.C. refused [1998] S.C.C.A. No. 401 (QL), 167 D.L.R. (4th) vi; *Newfoundland Assn. of Provincial Court Judges v. Newfoundland*, [2000] N.J. No. 258 (QL), 191 D.L.R. (4th) 225 (C.A.); *Conférence des juges de Québec c. Québec (Procureur générale)*, [2000] J.Q. No 3772 (QL) (C.A.); *Ontario Federation of Justices of the Peace Association v. Ontario* (1999), 43 O.R. (3d) 541, 171 D.L.R. (4th) 337 (Div. Ct.); *Independence of the Provincial Court Judges of British Columbia Justices of the Peace (Re)*, [2000] B.C.J. No. 2003 (QL), [2000] 11 W.W.R. 157 (S.C.). It is important to note that the litigation surrounding the British Columbia Provincial Court was initiated prior to the handing down of the *Remuneration Reference*, *supra*, footnote 2.

17. [1993] 1 S.C.R. 319, 100 D.L.R. (4th) 212.

18. *Zundel v. Liberal Party of Canada* (1999), 46 O.R. (3d) 410, [1999] O.J. No. 4244 (QL) (C.A.), leave to appeal to S.C.C. denied [1999] S.C.C.A. No. 593, 187 D.L.R. (4th) vii.

scope of judicial review under the Charter, in particular the interpretation of s. 32. However, the justiciability and enforceability of unwritten constitutional rules remains. The second set of cases concerns the constitutionalization of what Elliot aptly terms the principle of "interprovincial comity".<sup>19</sup> For example, in *Hunt v. T & N plc*,<sup>20</sup> the Supreme Court held that the courts of a province are under a constitutional obligation to recognize the decisions of the courts of another province, and that provincial legislation that prevents courts from meeting that obligation is *ultra vires*. Finally, there are the "implied bill of rights" cases, in which the Supreme Court held that the right to public discussion operated as a constraint on provincial legislative authority<sup>21</sup> and perhaps even federal legislative authority.<sup>22</sup> It had been thought that the Charter had superseded this last line of cases, but the *Remuneration Reference* breathed new life into them.<sup>23</sup>

So what do we make of the rise of unwritten constitutionalism in the Canadian courts? I have three points. The first is one I think Edinger would agree with — that it is easy to exaggerate both the volume and significance of these cases. To be sure, they have attracted a lot of attention and concern, but the numbers of cases involved are still rather small in comparison with the constitutional claims brought everyday on the basis of the written constitution. *JTI-Macdonald*, then, is exceptional. But *JTI-Macdonald* is quite representative in another sense — arguments of the sort advanced

19. Elliot, *supra*, footnote 5.

20. [1993] 4 S.C.R. 289, 109 D.L.R. (4th) 16.

21. *Reference re: Alberta Statutes*, [1938] S.C.R. 100 at pp. 134 (*per Duff C.J.C.*) and 146 (*per Cannon J.*); *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299 at pp. 330-31 (*per Rand J.*), and 354-56 (Kellock J.); *Switzman v. Elbling*, [1957] S.C.R. 285 at pp. 307 (*per Rand J.*) and 328 (*per Abbott J.*).

22. *Switzman, ibid.*, at pp. 307 (*per Rand J.*) and 328 (*per Abbott J.*); *Saumur, ibid.*, at p. 354 (*per Kellock J.*); *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2 at p. 57, 41 D.L.R. (4th) 1 (*per Beetz J.*).

23. However, even before the *Remuneration Reference* there were signs that at least some members of the court were of the view that the implied bill of rights cases were of ongoing significance. For example, in *OPSEU v. Ontario (Attorney General)*, *ibid.*, Beetz J. stated (at p. 40) that "neither Parliament nor the provincial legislatures may enact legislation the effect of which would be to substantially interfere with the operation of [the] basic constitutional structure". Earlier in that same paragraph, Beetz J. explained (quoting Abbott J. in *Switzman, supra*, footnote 21, at p. 328) that the "right of discussion and debate" was part of that basic structure. The clear implication of Beetz J.'s judgment is that, as he himself says at the end of this portion of his reasons (at p. 40), "quite apart from Charter considerations, the legislative bodies in this country must conform to these basic structural imperatives and can in no way override them". These include, at the very least, the right to freedom of expression.

by the defendants in *JTI-Macdonald* have, for the most part, been spectacularly unsuccessful. Canadian courts seem unwilling to engage in the imaginative approach to constitutional interpretation that characterizes the *Secession Reference*. Significantly, the Supreme Court has denied leave to appeal in several of these cases.<sup>24</sup> Moreover, my strong suspicion is that *Lalonde* will either be overruled by the Ontario Court of Appeal or resolved on strictly administrative law grounds. In this connection, it is worth recalling that the Supreme Court has twice declined to fill the gaps in s. 93's limited guarantee of educational rights to religious minorities, and it is not clear that it would treat linguistic minorities any differently.<sup>25</sup> Even the obvious exception to this general trend — the judicial remuneration cases — can be made sense of because the lower courts are largely working out a legal framework that was created by the Supreme Court.

Why the general reluctance on the part of lower courts, such as the court in *JTI-Macdonald*? Here, we must return to the positivist account of constitutional interpretation, which I have argued articulates the intuitions held by many actors in our constitutional scheme, but in a systematic way. The impetus toward legal textualism that lies at the centre of the positivist account is based upon a certain conception of the basis of the legitimacy of judicial review. In the liberal political imagination, it is often argued that written constitutions serve both an enabling and a disabling function. They serve an enabling function by establishing a framework for government, but they also realize that power gives rise to tyranny and they erect roadblocks in the way of the exercise of that power. This sort of ambiguity runs throughout that great source of insight into constitutional design, the *Federalist Papers*.<sup>26</sup> Judicial review has typically been understood as a disabling mechanism that checks public power for compliance with a written constitutional text.

But I would also argue that written constitutions also restrain courts and prevent judicial review from becoming government by the judiciary. To be sure, written constitutions are not a complete

24. *E.g.*, *Singh*, *supra*, footnote 9; *Bacon*, *supra*, footnote 10; *Hogan*, *supra*, footnote 11.

25. *Reference re: Act to Amend the Education Act (Ontario)*, [1987] 1 S.C.R. 1148, 40 D.L.R. (4th) 18; *Adler v. Ontario*, [1996] 3 S.C.R. 609, 140 D.L.R. (4th) 385. On this point, also see *Elliot*, *supra*, footnote 5.

26. Alexander Hamilton *et al.*, *The Federalist Papers*, Clinton Rossiter, ed. (New York, NAL Penguin, 1961) See especially *Federalist* Nos. 20, 22, 28, 27, 29, 53, and 85.



guarantee that courts will not overstep their bounds. A textually oriented style of interpretation, at best, will reduce, but not eliminate, the probability of judicial overreaching. Even with this caveat, unwritten constitutionalism is potentially very dangerous. Ironically, this point was made by Lamer C.J.C. himself in the *Remuneration Reference*.<sup>27</sup> To be sure, unwritten constitutionalism *does* have its place; indeed, elsewhere I have defended the judgment in the *Secession Reference*.<sup>28</sup> However, the convergence of circumstances in that case was highly extraordinary, and demanded an extraordinary response by the court.

But is there something good about unwritten constitutionalism? Let me bring the discussion full circle here, by talking a bit about extraterritoriality. The rule against extraterritorial provincial legislation in Canadian constitutional law has a firm textual basis — in the context of *JTI-Macdonald*, the words “in the province” contained in s. 92(13). But why should provincial legislation not have extraterritorial effects? To the best of my knowledge the Supreme Court has not articulated a theory of why limits of this sort on provincial jurisdiction are a good thing. The answer, I think, can be found in a political theory of federalism which holds that the purpose of federalism is to promote democratic self-government by provincial political communities, and that the hallmark of democracy is that those affected by decisions should have a say in determining them. Socio-economic policies that impose costs on extra-provincial actors, then, are in an important sense undemocratic, because the persons who bear those costs have not consented to them, or so suggested Marshall C.J. in *M’Culloch v. State of Maryland*.<sup>29</sup>

To be sure, there are many problems with this theory, but I put it on the table to make the following point. In the face of open-textured or ambiguous constitutional provisions in constitutional texts, which require courts to make difficult choices, the best we can expect them to do is to openly and transparently interpret constitutional texts in accordance with theories of this sort. John Whyte’s well-known indictment of the Supreme Court of Canada’s interpretation of the division of powers was that the Supreme

27. *Supra*, footnote 2, at p. 621.

28. Choudhry and Howse, *supra*, footnote 4.

29. 17 U.S. 316, 4 L. Ed. 579 (1819).

Court had largely failed to meet this responsibility.<sup>30</sup> Perhaps the rise of unwritten constitutionalism will help the Supreme Court to undertake this task — such that unwritten constitutionalism will reinvigorate the interpretation of the written constitution. Thus, when the Supreme Court of Canada reins in unwritten constitutionalism in the Canadian courts, as I suspect it will, it should make sure that it does not throw out the baby with the bath-water.

Sujit Choudhry\*

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30. J.D. Whyte, "Constitutional Aspects of Economic Development Policy", in R. Simeon, *Division of Powers and Public Policy* (Toronto, University of Toronto Press, 1985), p. 29 at pp. 29-33.

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