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"Untethered": How the majority decision in *Toronto (City) v Ontario* tries (but fails) to break away from the Supreme Court of Canada's unwritten constitutional principle jurisprudence

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Résumé de l'article

Les motifs de la décision majoritaire de la Cour suprême du Canada dans l'affaire *Toronto (Cité) c Ontario* semblent indiquer que les principes constitutionnels non écrits ne peuvent être utilisés à titre de fondements indépendants pour invalider des mesures législatives. En effet, il est possible d'argumenter que les motifs majoritaires définissent de manière catégorique plusieurs autres limites en ce qui concerne l'application des principes constitutionnels non écrits. Cet article soutient que les affirmations catégoriques citées ne sont pas soutenues par la jurisprudence existante.

Plus particulièrement, le présent article avance que les réclamations catégoriques citées dans les motifs des juges majoritaires dans l'affaire *Toronto (Cité)* sont fondées sur des concepts ayant été mal interprétés de la jurisprudence existante, ce qui par la suite, favorise une mauvaise interprétation de la façon dont les principes constitutionnels non écrits peuvent être reconnus et appliqués. Lorsque ces mauvaises interprétations et malentendus sont reconnus et dissipés, il est possible de s'apercevoir que l'arrêt *Toronto (Cité)* peut être mieux compris comme étant une réponse à l'utilisation des principes constitutionnels non écrits comme protection pour les revendications de droits de grande portée, plus tôt que comme une limite plus générale et catégorique de leur puissance normative. De plus, il devient rapidement évident que la question, à savoir si les principes constitutionnels non écrits peuvent être utilisés comme fondements indépendants dans les mesures législatives, est peut-être mal posée, et qu'une approche fondée sur l'acceptation ou le rejet catégorique d'un rôle particulier pour les principes non écrits devrait être évitée en faveur d'une approche plus équilibrée, comme une « échelle mobile » pour l'application de ces principes, qui tient compte des types de preuves pour (ou contre) l'application d'un principe quelconque pour soutenir un nouveau droit constitutionnel ou une nouvelle obligation. Une approche telle que « l'échelle mobile » s'inscrit facilement dans la jurisprudence de la Cour suprême en matière de principes constitutionnels non écrits.

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“Untethered”: How the majority decision in *Toronto (City) v Ontario* tries (but fails) to break away from the Supreme Court of Canada’s unwritten constitutional principle jurisprudence

Vincent Kazmierski

THE MAJORITY REASONS in the Supreme Court of Canada’s decision in *Toronto (City) v Ontario* appear to suggest that unwritten constitutional principles may not be applied as “independent” means to invalidate legislation. Indeed, some may argue that the majority reasons identify additional, categorical limitations on the application of unwritten constitutional principles. This article argues that that these categorical claims are not supported by the existing jurisprudence.

In particular, the article argues that the categorical claims in the majority reasons in *Toronto (City)* are based on misinterpretations of the existing jurisprudence that, in turn, promote misconceptions about the ways unwritten constitutional principles may be recognized and applied. When these misinterpretations and misconceptions are identified, and dispelled, it is possible to see that the decision in *Toronto (City)* may be best understood as a response to the use of unwritten constitutional principles to protect overly broad rights claims, rather than a more general, categorical restriction of their normative power. It also becomes apparent that the question of whether unwritten constitutional principles may serve as “independent” limitations on legislation may be misplaced and that an approach based on categorical acceptance or rejection of particular

LES MOTIFS DE la décision majoritaire de la Cour suprême du Canada dans l’affaire *Toronto (Cité) c Ontario* semblent indiquer que les principes constitutionnels non écrits ne peuvent être utilisés à titre de fondements indépendants pour invalider des mesures législatives. En effet, il est possible d’argumenter que les motifs majoritaires définissent de manière catégorique plusieurs autres limites en ce qui concerne l’application des principes constitutionnels non écrits. Cet article soutient que les affirmations catégoriques citées ne sont pas soutenues par la jurisprudence existante.

Plus particulièrement, le présent article avance que les réclamations catégoriques citées dans les motifs des juges majoritaires dans l’affaire *Toronto (Cité)* sont fondées sur des concepts ayant été mal interprétés de la jurisprudence existante, ce qui par la suite, favorise une mauvaise interprétation de la façon dont les principes constitutionnels non écrits peuvent être reconnus et appliqués. Lorsque ces mauvaises interprétations et malentendus sont reconnus et dissipés, il est possible de s’apercevoir que l’arrêt *Toronto (Cité)* peut être mieux compris comme étant une réponse à l’utilisation des principes constitutionnels non écrits comme protection pour les revendications de droits de grande portée, plus tôt que comme une limite plus générale et catégorique de leur puissance normative. De plus,

roles for unwritten principles should be eschewed in favour of a more balanced, "sliding-scale" approach to the application of these principles, that weighs different categories of evidence in favour (or against) the application of a particular principle to support a new constitutional right or obligation. Such a sliding scale approach fits well within the Court's existing jurisprudence.

il devient rapidement évident que la question, à savoir si les principes constitutionnels non écrits peuvent être utilisés comme fondements indépendants dans les mesures législatives, est peut-être mal posée, et qu'une approche fondée sur l'acceptation ou le rejet catégorique d'un rôle particulier pour les principes non écrits devrait être évitée en faveur d'une approche plus équilibrée, comme une « échelle mobile » pour l'application de ces principes, qui tient compte des types de preuves pour (ou contre) l'application d'un principe quelconque pour soutenir un nouveau droit constitutionnel ou une nouvelle obligation. Une approche telle que « l'échelle mobile » s'inscrit facilement dans la jurisprudence de la Cour suprême en matière de principes constitutionnels non écrits.

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“Untethered”: How the majority decision in *Toronto (City) v Ontario* tries (but fails) to break away from the Supreme Court of Canada’s unwritten constitutional principle jurisprudence

Vincent Kazmierski[1]

> “[O]nce ‘constitutional structure’ is properly understood, it becomes clear that, when our colleague invokes ‘constitutional structure’, she is in substance inviting judicial invalidation of legislation in a manner that is wholly untethered from that structure.”
>
> —Chief Justice Wagner and Justice Brown, *Toronto (City) v Ontario (Attorney General)*[2]

I. INTRODUCTION

Can unwritten constitutional principles be used to invalidate legislation? A superficial reading of the Supreme Court of Canada’s recent decision in *Toronto (City) v Ontario (Attorney General)*[3] might suggest that the answer to this question is, categorically, no. Indeed, some may argue that the majority decision written by Chief Justice Wagner and Justice Brown imposes a number of new, categorical limitations on the application of unwritten constitutional principles to which lower courts will need to adhere. To the contrary, I argue that reading the *Toronto (City)* decision in the context

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1 Vincent Kazmierski is an associate professor in the Department of Law and Legal Studies at Carleton University. I would like to thank Professor Yan Campagnolo, Professor Rueban Balasubramaniam, and the anonymous reviewers from the *OLR* for their extremely helpful comments on drafts of this article. My thanks also to the editorial team at the *OLR*. All remaining errors remain my own.

2 2021 SCC 34 at para 53 [*Toronto (City)*].

3 *Ibid*.

of the Court's previous unwritten constitutional principles jurisprudence demonstrates that the categorical claims made in the majority reasons are not supported by the existing jurisprudence. In other words, while the Chief Justice and Justice Brown claim that the dissenting decision of Justice Abella attempts to justify the invalidation of legislation "wholly untethered" from the structure of the Constitution, they themselves attempt to "untether" the Court's approach to unwritten principles from its previous jurisprudence. Analyzing the *Toronto* (*City*) decision within the context of this broader jurisprudence helps to identify the limits of the categorical claims made by the majority reasons, providing justification for future decisions to distinguish the case as the Court's jurisprudence continues to evolve.

I start by providing a brief summary of the *Toronto* (*City*) decision. Section III then examines the treatment of unwritten constitutional principles by the majority decision in greater depth. The closer analysis provided in section III demonstrates the ways in which the categorical claims in the majority reasons in *Toronto* (*City*) are based on a number of misinterpretations of the existing jurisprudence that, in turn, promote misconceptions about the ways unwritten constitutional principles may be recognized and applied. When these misconceptions are identified and dispelled, it is possible to see that the decision in *Toronto* (*City*) may be best understood as a response to the use of unwritten constitutional principles to protect overly broad rights claims, rather than a more general, categorical restriction of their normative power. It also becomes apparent that the question of whether unwritten constitutional principles may serve as "independent" limitations on legislation may be misplaced and that an approach based on categorical acceptance or rejection of particular roles for unwritten principles should be eschewed in favour of a more balanced, "sliding-scale" approach to the application of these principles. Such a sliding-scale approach would weigh different types of evidence in favour of (or against) the application of a particular principle to support a new constitutional right or obligation. Section IV outlines the elements of this sliding-scale approach and how the approach fits within the Supreme Court of Canada's existing unwritten constitutional principles jurisprudence.

II. SUMMARY OF THE *TORONTO (CITY)* DECISION

The *Toronto* (*City*) case involved a constitutional challenge to the *Better Local Government Act, 2018*,[4] enacted by the Ontario legislature. The legislation reduced the number of wards in the City of Toronto from 47 to 25. This was particularly concerning as the legislation came into force on August 14, 2018, more than two months after the opening of the municipal election in Toronto on May 1 and more than half-way through the election campaign, scheduled to end on election day on October 22, 2018. The City of Toronto and two other groups challenged the legislation in court, claiming it violated section 2(b) of the *Canadian Charter of Rights and Freedoms*[5] as well as the unwritten constitutional principle of democracy. The application judge struck down the *Act* as an unjustifiable infringement of section 2(b) of the *Charter*.[6] The Ontario Court of Appeal granted a stay of the judgment pending an appeal and the election proceeded notwithstanding the judgment.[7] On appeal, the majority of the Ontario Court of Appeal overturned the decision of the application judge, finding there was no constitutional infringement.[8] The case was further appealed to the Supreme Court of Canada.

4 SO 2018, c 11 [*Act*].

5 *Canadian Charter of Rights and Freedoms,* s 2(b), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

6 See *Toronto* (*City*) *v Ontario* (*Attorney General*), 2018 ONSC 5151.

7 See *Toronto* (*City*) *v Ontario* (*Attorney General*), 2018 ONCA 761.

8 See *Toronto* (*City*) *v Ontario* (*Attorney General*), 2019 ONCA 732. Scholars were largely critical of the Court of Appeal decision. See e.g. Yasmin Dawood, "The Right to Vote and Freedom of Expression in Political Process Cases Under the Charter" (2021) 100 SCLR (2d) 105 at 139 (where the author argues that the impugned legislation should be struck down under section 2(b) of the *Charter* using a "contextual" rather than "formal" approach to considering freedom of expression cases). Interestingly, Dawood states (at para 74) that the legislation should not be invalidated through the application of either the democracy principle or the rule of law principle. By contrast, while also critiquing the Court of Appeal's decision in *Toronto* (*City*), both Michael Pal and Colin Feasby have argued that the unwritten principle of democracy could support the extension of existing *Charter* rights to protect fair municipal elections. In particular, Pal argues that the unwritten principle of democracy "can and should fill in the gaps in the exiting constitutional text to ensure fair municipal elections. It should also be the principled foundation upon which the doctrines under the applicable provisions of the *Charter* can evolve." See Michael Pal, "The Unwritten Principle of Democracy" (2019) 65:2 McGill LJ 269 at 295. Similarly, Feasby argued that the unwritten principle of democracy would support a judicial extension of section 3 of the *Charter* to apply where a federal or provincial government as "delegates a legislative role to a democratically chosen body." See Colin Feasby, "City of Toronto v Ontario and Fixing the Problem with Section 3 of the Charter" (28 September 2018), online (pdf): <ablawg.ca>. Interestingly, while critiquing the legislative changes

The Supreme Court of Canada upheld the decision of the Ontario Court of Appeal and confirmed the constitutionality of the *Act* in a five to four split decision. The majority decision was penned by Chief Justice Wagner and Justice Brown and supported by Justices Moldaver, Coté, and Rowe. Justice Abella dissented, with the support of Justices Karakatsanis, Martin, and Kasirer. The majority found that there was no violation of section 2(b) of the *Charter*. They concluded that the reliance on section 2(b) to challenge the legislation amounted to a claim to impose a positive obligation on the government to provide voters with access to a specific platform for expression, in this case a municipal election.[9] As such, the majority applied the *Baier* test for the application of section 2(b) as opposed to the *Irwin Toy* test.[10]

The majority determined that the *Baier* threshold for triggering a section 2(b) claim was not met in this case because the applicants could not demonstrate that the legislation "substantially interfered" with their freedom of expression, as their right to expression was not "radically frustrated" or, put otherwise, the effectiveness of their expression was not "extinguished" by the reduction of wards and resulting impacts on the candidates in the election.[11] The majority also determined that the principle of democracy could not be used to invalidate the legislation because, in its view, unwritten constitutional principles cannot be used as an independent basis to invalidate legislation. Further, the unwritten constitutional principle of democracy could not be used to expand the scope of section 3 of the *Charter* to protect municipal elections, as municipal elections were omitted from the ambit of section 3 by the constitutional framers. I provide a more detailed analysis of the majority's discussion of unwritten constitutional principles below.

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to the electoral process at issue in the case, Thomas McMorrow suggests that the final outcome of the *Toronto (City)* case may be less important than attempts to foster more active social and political engagement among citizens. See Thomas McMorrow, "Denying & Reckoning with Implicit Law: The Case of the *City of Toronto v Ontario (AG)*" (2021) 25:2 Rev Const Stud 205.

9 *Toronto (City)*, *supra* note 2 at paras 29–35.

10 *Ibid*. See *Baier v Alberta*, 2007 SCC 31 [*Baier*]; *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at 969–972, 58 DLR (4th) 577 [*Irwin Toy*] (under this test, to establish a violation of section 2(b) of the Charter, the applicant must demonstrate: (1) that the impugned activity conveys or attempts to convey a meaning so as to be protected expression; (2) that the expressive activity is not excluded from protection due to the method or location of the expression; and (3) that purpose or effect of the impugned legislation or government activity limits the expressive activity).

11 *Toronto (City)*, *supra* note 2 at paras 36–40.

In dissent, Justice Abella found that the legislation both violated section 2(b) of the *Charter* without justification and violated the unwritten constitutional principle of democracy. Justice Abella found that the *Irwin Toy* test, not the *Baier* test, should have been applied in this case because the claim related to an electoral process, not to an underinclusive statutory regime. She concluded that the legislation violated section 2(b) because it interfered with the ability of all participants in the election to engage in "meaningful reciprocal political discourse" in the middle of an election campaign.[12] In particular, Justice Abella found that the limitation of section 2(b) was rooted in the timing of the changes to the election process imposed through the legislation. She found that the government offered no pressing and substantial objective to justify the timing of the implementation of the legislative changes in the middle of an active election and that, as a result, the infringement of section 2(b) could not be justified.

While Justice Abella would have decided the appeal based on the section 2(b) claim, she also determined that it was necessary to respond to the majority's comments about the scope of the normative power of unwritten constitutional principles. Contrary to the majority, Justice Abella found that fundamental principles derived from the basic structure of the Constitution have full legal force and may serve as independent bases to limit legislation. She thus argued that the majority's contention that unwritten constitutional principles could not be used as independent means to invalidate legislation was contrary to the Court's unwritten principles jurisprudence. In the following section, I move beyond the critique by Justice Abella to demonstrate in more detail the ways in which the majority decision in *Toronto* (*City*) misinterpreted a number of Supreme Court of Canada decisions in support of its categorical claim that unwritten constitutional principles may not be used as an independent means to invalidate legislation.

III. DISCUSSION OF UNWRITTEN CONSTITUTIONAL PRINCIPLES IN *TORONTO (CITY)*

With this basic outline of the reasons for the decision in mind, we can proceed to examine the majority's treatment of unwritten constitutional principles in more detail. Its discussion of unwritten principles proceeded in three basic stages. The majority started by claiming that the Court had never before supported the application of unwritten principles to

12 *Ibid* at para 157.

invalidate legislation. It then identified the acceptable uses of unwritten constitutional principles, before proceeding to provide several reasons why unwritten constitutional principles should not be applied as independent means to invalidate legislation. In my view, the majority's treatment of unwritten constitutional principles in all three stages is based on a series of misinterpretations of previous Supreme Court of Canada decisions that support the propagation of seven potential misconceptions about the roles of unwritten constitutional principles. In this section, I briefly identify these misinterpretations and misconceptions before proceeding to critique them in the sections that follow.

At a number of different points, the majority in *Toronto (City)* alleged that the Supreme Court of Canada had never before supported the possibility that unwritten constitutional principles can be applied to invalidate legislation. In particular, the majority claimed that previous references by members of the Court to the "full legal force" of unwritten constitutional principles did not mean that unwritten constitutional principles can be used to strike down legislation (Misconception 1).[13] In my view, this misconception is based on misinterpretations concerning the use of the term "full legal force" in previous decisions by the Supreme Court of Canada. The majority also claimed that the decision by Justice Major in *British Columbia v Imperial Tobacco Canada Ltd*[14] clearly established that unwritten principles cannot be used to invalidate legislation (Misconception 2).[15] I suggest that this argument is based on a very limited, and incorrect, reading of *Imperial Tobacco*.

It is important to note that the majority took issue with the use of unwritten constitutional principles as an "independent" means to strike down legislation; by "independent," it appears that they are concerned with arguments "in substance inviting judicial invalidation of legislation in a manner that is wholly untethered from that [Constitutional] structure."[16] In order to support this opposition to the application of unwritten constitutional principles as "independent" limits on legislation, the majority attempted to create a clear dividing line between three possible roles for unwritten constitutional principles: assisting interpretation of written provisions, filling gaps in the text of the Constitution, and invalidation of legislation (Misconception 3). The majority declared that only the first

13 *Ibid* at para 54.

14 2005 SCC 49 [*Imperial Tobacco*].

15 *Toronto (City)*, *supra* note 2 at paras 71–72.

16 *Ibid* at para 53.

two roles are legitimate roles for unwritten constitutional principles. However, I suggest that, in doing so, the majority relied upon cases where the distinction among interpretation, gap-filling, and invalidation are much less clear than Chief Justice Wagner and Justice Brown may wish to admit.

Chief Justice Wagner and Justice Brown offered two rationales for limiting the application of unwritten principles, which they related to two purported deficiencies in the application of unwritten principles as independent bases to invalidate legislation. First, the majority noted the "normative" deficiency that the application of unwritten principles to limit legislation would be akin to allowing the judiciary to amend the Constitution and would raise "fundamental concerns about the legitimacy of judicial review and distorting the separation of powers."[17] Second, the "practical" deficiency identified by the majority was that unwritten principles are "highly abstract," and the "nebulous nature" of these principles "makes them susceptible to be interpreted so as to 'render many of our written constitutional rights redundant and, in doing so, undermine the delimitation of those rights chosen by our constitutional framers.'"[18] In essence, the majority argued that unwritten constitutional principles cannot be applied to support rights that overlap with rights that are already protected through the written provisions of the Constitution (Misconception 4). This contention, I argue, contradicts the application of unwritten constitutional principles in at least two previous decisions of the Supreme Court of Canada.

The majority also contended that unwritten constitutional principles cannot be applied to protect rights that were deliberately excluded from protection by the framers of the Constitution (Misconception 5). For this reason, the majority concluded that the deliberate exclusion of municipal elections from the ambit of section 3 of the *Charter* bars the possibility that the principle of democracy could be applied to extend the scope of section 3 to include municipal elections. While there are sensible reasons to accept this conclusion, I argue that the assumption upon which it is based contradicts previous judgments of the Court.

Chief Justice Wagner and Justice Brown raised a further concern that applying unwritten principles to invalidate legislation would eliminate the ability of the government to rely on section 1 of the *Charter* to justify an infringement of the unwritten principle, or to use section 33 to allow

17 *Ibid* at para 58.

18 *Ibid* at para 59, citing *Imperial Tobacco*, *supra* note 14 at para 65.

the legislation to remain in force notwithstanding an infringement of the unwritten principle.[19] This gives rise to another potential misconception in the *Toronto (City)* decision: that applying unwritten constitutional principles to secure rights not explicitly enumerated in the *Charter* is illegitimate because it circumvents the application of sections 1 and 33 of the *Charter* (Misconception 6). The articulation of this concern in the current case lacks legitimacy when viewed in the context of previous decisions of the Court.

Finally, Chief Justice Wagner and Justice Brown suggested that the remedies for unfair laws are to be found in either the written terms of the Constitution or "the ballot box."[20] This suggestion that citizens can always vote against legislators who pass unfair laws (Misconception 7) both elides the purpose of constitutional protection and conflates the function of different constitutional principles, while failing to recognize the unique purpose and context for the principle of democracy.

In the sub-sections below, I consider these seven misconceptions in more detail and demonstrate more specifically the ways in which they are founded on misinterpretations of previous Supreme Court of Canada decisions. My analysis suggests that these misconceptions should thus be dispelled along with the conclusions based upon them.

A. Misconception 1: Previous References by Members of the Supreme Court of Canada to the "full legal force" of Unwritten Constitutional Principles Did Not Mean that Unwritten Constitutional Principles Can Be Used to Strike Down Legislation

Chief Justice Wagner and Justice Brown started their consideration of the normative force of unwritten constitutional principles in the *Toronto (City)* decision by trying to minimize the Supreme Court of Canada's affirmation in the *Reference re Secession of Quebec* that unwritten principles have "full legal force," "which constitute substantive limitations upon government action."[21] The Chief Justice and Justice Brown made two arguments in this regard. First, they claimed that the passage in which the term "full legal force" was first ascribed to unwritten principles, the dissenting judgment of Justices Martland and Ritchie in *Reference re Resolution to Amend the*

19 *Toronto (City)*, *ibid* at para 60.

20 *Ibid* at para 59.

21 *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 54, 161 DLR (4th) 385 [*Quebec Secession Reference*].

Constitution,[22] was part of a larger discussion of the constitutional imperatives linked to the federal nature of Canada's Constitution and was not specifically referring to the capacity of an unwritten principle to invalidate legislation. Second, they claimed that the term "full legal force" must be understood within a particular context that limits the scope of its meaning.

The first claim is debunked when one reviews the passage from Justices Martland and Ritchie in more detail; upon doing so, it becomes clear that the judges were indeed ascribing the power to strike down legislation to unwritten principles. The discussion of Justices Martland and Ritchie in the *Patriation Reference* started by referring to the practice of how the Supreme Court of Canada considers the "basic principles of the Constitution":

> This Court, since its inception, has been active in reviewing the constitutionality of both federal and provincial legislation. This role has generally been concerned with the interpretation of the express terms of the *BNA Act*. However, on occasions, this Court has had to consider issues for which the *BNA Act* offered no answer. In each case, this Court has denied the assertion of any power which would offend against the basic principles of the Constitution.[23]

They went on to consider a number of specific examples of the Court's consideration of the "basic principles" of the Constitution. While it is true that each of the examples discussed by Justices Martland and Ritchie involved the federal structure of the Canadian Constitution and, particularly, the division of powers among the federal and provincial legislatures, all but one of the passages to which they refer averted to the preclusion of *both* levels of government from exercising their powers in a way that violated a basic principle of the Constitution.

It is worth considering each of the examples Justices Martland and Ritchie referred to in the *Patriation Reference*.

a) In *Amax Potash Ltd v Government of Saskatchewan*,[24] the Court considered the assertion that a provincial government could invoke legislation that immunized it from proceedings to recover funds paid pursuant to an *ultra vires* statute. Justice Dickson (as he then was), writing for the Court, stated:

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22 [1981] 1 SCR 753, 125 DLR (3d) 1 [*Patriation Reference* cited to SCR].
23 *Ibid* at 841.
24 [1977] 2 SCR 576, 71 DLR (3d) 1 [*Amax Potash* cited to SCR].

> Section 5(7) of *The Proceedings against the Crown Act*, in my opinion, has much broader implications than mere Crown immunity. In the present context, it directly concerns the right to tax. It affects, therefore, the division of powers under *The British North America Act, 1867. It also brings into question the right of a Province, or the federal Parliament for that matter, to act in violation of the Canadian Constitution.* Since it is manifest that *if either the federal Parliament or a provincial Legislature* can tax beyond the limit of its powers, and by prior or *ex post facto* legislation give itself immunity from such illegal act, *it could readily place itself in the same position as if the act had been done within proper constitutional limits.* To allow moneys collected under compulsion, pursuant to an *ultra vires* statute, to be retained would be tantamount to allowing the provincial Legislature to do indirectly what it could not do directly, and by covert means to impose illegal burdens.[25]

Thus, while the *Amax Potash* case concerned the actions of a provincial legislature, Justice Dickson clearly found that either provincial or federal legislation that violated the principles of the Constitution could be found to be invalid.

b) In *British Columbia Power Corp v British Columbia Electric Co*,[26] the Court considered whether the provincial government could use Crown immunity to prevent the establishment of a receivership that would preserve assets pending determination of the constitutional validity of certain legislation. Chief Justice Kerwin, writing for the Court, stated:

> In a federal system, where legislative authority is divided, as are also the prerogatives of the Crown, as between the Dominion and the Provinces, it is my view that *it is not open to the Crown, either in right of Canada or of a Province, to claim a Crown immunity based upon an interest in certain property*, where its very interest in that property depends completely and solely on the validity of the legislation which it has itself passed, if there is a reasonable doubt as to whether such legislation is constitutionally valid. To permit it to do so would be to enable it, by the assertion of rights claimed under legislation which is beyond its powers, to achieve the same results as if the legislation were valid. In a federal system it appears to me that, in such circumstances, the Court has the same jurisdiction to preserve assets whose title is dependent

25 *Ibid* at 590, cited in *Patriation Reference*, *supra* note 22 at 842 [emphasis added].

26 [1962] SCR 642, 34 DLR (2d) 196 [*BC Power* cited to SCR].

> on the validity of the legislation as it has to determine the validity of the legislation itself.[27]

Thus, while the *BC Power* case focused on the power of a provincial government to assert Crown immunity in order to resist a judicial order to preserve property, Chief Justice Kerwin clearly noted that assertions of Crown immunity by both provincial and federal governments could be limited by the Court.

c) In *Attorney General of Nova Scotia v Attorney General of Canada*,[28] the Court considered whether the provincial and federal legislatures could delegate powers to one another. Chief Justice Rinfret stated:

> The constitution of Canada does not belong either to Parliament, or to the Legislatures; it belongs to the country and it is there that the citizens of the country will find the protection of the rights to which they are entitled …
>
> *Neither legislative bodies*, federal or provincial, possess any portion of the powers respectively vested in the other and they cannot receive it by delegation. In that connection the word "exclusively" used both in section 91 and in section 92 indicates a settled line of demarcation and *it does not belong to either Parliament, or the Legislatures, to confer powers upon the other*.[29]

In *Attorney General of Nova Scotia*, then, Chief Justice Rinfret concluded that neither level of legislature could delegate powers to the other.

d) Finally, in *Reference re Alberta Statutes*,[30] the Court considered the constitutionality of a series of bills passed by the Alberta legislature, including Bill 9, *An Act to Ensure the Publication of Accurate News and Information*.[31] In particular, the Court considered whether restrictions could be imposed on newspapers that may result in restrictions on public discussion of political matters. In his reasons, Chief Justice Duff identified that "the principle that the powers requisite for the protection of the constitution itself arise by necessary implication from *The British North America Act* as a whole …"[32] However, in this case, Justice Duff reasoned,

27 *Ibid* at 644–45, cited in *Patriation Reference*, *supra* note 22 at 843 [emphasis added].
28 [1951] SCR 31, [1950] 4 DLR 369 [*Attorney General of Nova Scotia* cited to SCR].
29 *Ibid* at 34–35, cited in *Patriation Reference*, *supra* note 22 at 843–44 [emphasis added].
30 [1938] SCR 100, [1938] 2 DLR 81 [*Alberta Press* cited to SCR].
31 Bill 9, *An Act to Ensure the Publication of Accurate News and Information,* 5th Sess, 8th Leg, Alberta, 1937 (as passed by the Alberta legislature).
32 *Alberta Press*, *supra* note 30 at 133–34, cited in *Patriation Reference*, *supra* note 22 at 844.

in *obiter*, that the restrictions on public discussion were *ultra vires* the Alberta provincial legislature, without addressing whether any limitations existed upon the rights of Parliament to impose such restrictions.[33] This is unlike the other three cases identified by Justices Martland and Ritchie in so far as Justice Duff did not expressly consider the impact of unwritten principles on Parliament.

Justices Martland and Ritchie followed their discussion of the four above decisions by confirming that the basic principles that members of the Supreme Court of Canada relied upon in those decisions are not found in the express provisions of the Constitution and are, in fact, endowed with the full legal force to strike down legislative enactments.

> It may be noted that the above instances of judicially developed legal principles and doctrines share several characteristics. First, none is to be found in express provisions of the *British North America Act* or other constitutional enactments. Second, all have been perceived to represent constitutional requirements that are derived from the federal character of Canada›s Constitution *Third, they have been accorded full legal force in the sense of being employed to strike down legislative enactments.* Fourth, each was judicially developed in response to a particular legislative initiative in respect of which it might have been observed, as it was by Dickson J. in the *Amax* (*supra*) case at p. 591, that: "There are no Canadian constitutional law precedents addressed directly to the present issue…"[34]

Contrary to the claim by the Chief Justice and Justice Brown, then, the reasons of Justices Martland and Ritchie in the *Patriation Reference* specifically addressed the capacity of (unwritten) basic principles of the Constitution to limit both federal and provincial legislatures by striking down legislation. Indeed, and again contrary to the interpretation offered by the Chief Justice and Justice Brown in *Toronto* (*City*), this point was acknowledged by the Supreme Court of Canada in the *Quebec Secession Reference* when it stated:

> Underlying constitutional principles may in certain circumstances give rise to *substantive legal obligations* (have "full legal force", as we described it in the *Patriation Reference*, *supra*, at p. 845), *which constitute substantive limitations upon government action*. These principles may give rise to very abstract

33 *Alberta Press, supra* note 30 at 134.

34 *Patriation Reference*, *supra* note 22 at 844–45 [emphasis added].

> and general obligations, or they may be more specific and precise in nature. The principles are not merely descriptive, but are also *invested with a powerful normative force*, and are binding upon both courts and governments.[35]

The term "full legal force" in the passage above is directly linked to the capacity of unwritten constitutional principles to give rise to "substantive *legal* obligations," that "constitute *substantive limitations* upon government action."

The second strategy of Chief Justice Wagner and Justice Brown to attempt to distinguish and diminish the Supreme Court of Canada's affirmation of the "full legal force" of unwritten principles was to claim that the term "full legal force" must be understood within a particular context. This, they suggested, means that the term "full legal force" cannot be applied to unwritten principles without asking the question, "what is the full legal force of unwritten constitutional principles?"

> Ultimately, what "full legal force" means is dependent on the particular context. Any legal instrument or device, such as a contract or a will or a rule, has "full legal force" within its proper ambit. Our colleague's position—that because unwritten constitutional principles have "full legal force", they must necessarily be capable of invalidating legislation—assumes the answer to the preliminary but essential question: what *is* the "full legal force" of *unwritten constitutional principles*?[36]

The Chief Justice and Justice Brown thus attempted to suggest that a different question may be substituted for the original question asked by the Court. It must be remembered that the response that unwritten principles have "full legal force" was provided to a very specific question posed by the Court in the *Quebec Secession Reference*, namely: "[g]iven the existence of these underlying constitutional principles, what use may the Court make of them?"[37] Faced with an answer that they do not like, Chief Justice Wagner and Justice Brown attempted to ask a different question. But there is no reason to ask a "preliminary question" as suggested by the Chief Justice and Justice Brown, since the original question was quite clearly stated. The flaw in the logic applied by Chief Justice Wagner and Justice Brown is further illustrated by their claim that the application of unwritten principles to aid in the interpretation of constitutional provisions "is the 'full legal force'

35 *Quebec Secession Reference*, *supra* note 21 at para 54 [emphasis added].
36 *Toronto (City)*, *supra* note 2 at para 54 [emphasis in original].
37 *Quebec Secession Reference*, *supra* note 21 at para 53.

that this Court described in the [*Quebec*] *Secession Reference*."[38] This seems dubious, at best, given that other interpretive aids, such as preambles, marginal notes, or legislative debates have never been described as having "full legal force" and certainly would not be described as creating "substantive legal obligations" or "substantive limitations on government action."

A closer review of the Supreme Court of Canada decisions where the term "full legal force" has been used to describe the normative force of unwritten constitutional principles thus demonstrates that the term means that unwritten constitutional principles may be used to limit legislative action, including invalidating legislation as unconstitutional. This is certainly how Justices Martland and Ritchie applied the term in the *Patriation Reference*. It was also within the contemplation of the Court in the *Quebec Secession Reference* when it used the term to respond to the question: "what use may the Court make of [unwritten principles]?"

B. Misconception 2: *Imperial Tobacco* "put to rest" the Notion that Unwritten Constitutional Principles May Invalidate Legislation

In addition to claiming the Supreme Court of Canada has not previously linked the full legal force of unwritten constitutional principles to the possibility of invalidating legislation, Chief Justice Wagner and Justice Brown claimed that the decision of Justice Major in the *Imperial Tobacco* case firmly rejected the notion that any unwritten constitutional principles could be applied as an independent source to invalidate legislation.[39] However, contrary to the assertion of Chief Justice Wagner and Justice Brown, the reasons of Justice Major in *Imperial Tobacco* actually acknowledged that the principle of judicial independence could serve as a limitation on legislation in certain circumstances.

Imperial Tobacco was concerned about constitutional challenges to provincial legislation enacted in British Columbia to facilitate legal actions by the provincial government to recover health care expenses for the treatment of tobacco-related illnesses from tobacco manufacturers.[40] The claimants argued that the legislation was unconstitutional because of extraterritoriality and because procedural rules implemented by the legislation violated both the principle of judicial independence and the

38 *Toronto (City)*, *supra* note 2 at para 55.

39 *Ibid* at para 50.

40 *Imperial Tobacco*, *supra* note 14.

rule of law principle. Justice Major, writing for the Court, upheld the legislation as constitutional and started his reasons by considering whether the content of the legislation at issue in the case violated the principle of judicial independence. More specifically, he assessed whether the procedural rules imposed by the legislation interfered with the adjudicative role of the courts, which he confirmed is protected under the principle of judicial independence. According to Justice Major: "[t]he critical question is whether the court is free, and reasonably seen to be free, to perform its adjudicative role without interference, including interference from the executive and legislative branches of government."[41]

Having determined that the procedural rules did not interfere with the adjudicative role of the courts, Justice Major concluded that there was no violation of the principle of judicial independence in that case.[42] Interestingly, Justice Major also specifically noted that legislation could be found to interfere with judicial independence in certain circumstances, specifically: "[t]he legislation must interfere, or be reasonably seen to interfere, with the courts' adjudicative role, or with the essential conditions of judicial independence."[43] Thus, while Justice Major expressed doubt about whether the rule of law principle might be used to invalidate legislation, he left open the possibility that other principles might be applied in such a way.[44] Indeed, in *British Columbia (Attorney General) v Christie*,[45] decided only two years after *Imperial Tobacco*, the unanimous decision of the Court acknowledged that the decision of Justice Major in *Imperial Tobacco* left open the possibility that the rule of law principle might extend to rights not yet recognized by the Court.

Christie involved an attempt to invalidate provincial legislation that authorized a provincial tax on the purchase of legal fees. The claimants in *Christie* argued that the rule of law incorporated a broad right to legal counsel in all court and tribunal proceedings and that the provincial tax in question violated this right by rendering the cost of hiring a lawyer unaffordable

41 *Ibid* at para 47.

42 *Ibid* at para 55; *Toronto (City)*, *supra* note 2 at para 184 (Justice Abella similarly notes in the dissenting reasons in *Toronto (City)* that "[t]he Court did not constrain the reach of judicial independence, the other unwritten constitutional principle raised in [*Imperial* Tobacco]").

43 *Imperial Tobacco*, *supra* note 14 at para 54.

44 For an excellent critique of the reasons of Justice Major in *Imperial Tobacco*, see (Alyn) James Johnson, "*Imperial Tobacco* and *Trial Lawyers*: An Unsuccessful and Unstable Retreat" (2019) 57:1 Alta L Rev 29 [Johnson, "Imperial Tobacco"].

45 2007 SCC 21 [*Christie*].

for many litigants. This, it was argued, would undermine the access to the courts that is required to operationalize the rule of law.

In the *Christie* decision, the Court expressly considered whether the rule of law principle might be applied to invalidate legislation. Rather than rejecting this possibility out of hand, which one would have expected if Chief Justice Wagner and Justice Brown were correct in asserting that *Imperial Tobacco* had settled this question, the Court simply decided that the unwritten constitutional principle could not be applied to invalidate the legislation at issue in the particular circumstances of the *Christie* case. More specifically, the Court found that "general access to legal services is not a currently recognized aspect of the rule of law."[46] However, the Court also recognized that "in *Imperial Tobacco*, this Court left open the possibility that the rule of law may include additional principles."[47] It thus proceeded to perform a "review of the constitutional text, the jurisprudence and the history of the concept…" in order to consider whether the rule of law could support the claimed right of access to a lawyer in all court or tribunal proceedings.[48] In the course of its review, the Court highlighted the broad scope of the right being claimed:

> This general right to be represented by a lawyer in a court or tribunal proceedings where legal rights or obligations are at stake is a broad right. It would cover almost all—if not all—cases that come before courts or tribunals where individuals are involved.…Although the respondent attempted to argue otherwise, the logical result would be a constitutionally mandated legal aid scheme *for virtually all legal proceedings*, except where the state could show this is not necessary for effective access to justice.[49]

The Court ultimately rejected the argument that such a right to legal representation could be anchored in the rule of law principle. As part of its reasoning, the Court noted that the broad right of legal representation that was postulated by the claimants would undermine the specific right to counsel provided for under section 10(b) of the *Charter*:

> Section 10(*b*) of the *Charter* provides that everyone has the right to retain and instruct counsel, and to be informed of that right "on arrest or detention". If the reference to the rule of law implied the right to counsel in

46 *Ibid* at para 21.

47 *Ibid*.

48 *Ibid* at para 23.

49 *Ibid* at para 13 [emphasis added].

> relation to all proceedings where rights and obligations are at stake, s. 10(*b*) would be redundant.[50]

The Court's approach in *Imperial Tobacco* and *Christie* was similar to the approach that Chief Justice McLachlin had adopted in the *Babcock v Canada (Attorney General)*[51] case, where she expressly acknowledged that unwritten constitutional principles "are capable of limiting government actions," but that they could not be applied to invalidate the legislation at issue in that particular case.[52] *Babcock* involved a constitutional challenge to section 39 of the *Canada Evidence Act*.[53] Section 39 allows the federal government to shield information that contains cabinet confidences from disclosure during legal proceedings. The constitutional challenge was brought in the context of a legal claim by lawyers employed by the federal Department of Justice in Vancouver who claimed that they should be entitled to the same pay rates as enjoyed by their colleagues working in Toronto. The claimants sought disclosure of internal government documents explaining the government's rationale for the pay discrepancy, but the Clerk of the Privy Council designated the documents as containing cabinet confidences and thus protected from disclosure pursuant to section 39 of the *Canada Evidence Act*.

The claimants in the case argued, in part, that section 39 limited the right of courts to review the decision of the Clerk of the Privy Council to assert that certain information should be exempt from disclosure as containing cabinet confidences, so it violated section 96 of the *Constitution Act, 1867* and the unwritten principles of the rule of law, judicial independence, and the separation of powers. The majority judgment was authored by Chief Justice McLachlin.[54] As noted above, Chief Justice McLachlin expressly acknowledged that "unwritten constitutional principles are capable of limiting government actions," but found that they did not do so in the case before her.[55] More specifically, the operation of the unwritten constitutional

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50 *Ibid* at para 24.

51 2002 SCC 57 [*Babcock*].

52 *Ibid* at para 54.

53 RSC 1985, c C-5.

54 Justice L'Heureux-Dubé wrote a separate judgment that largely concurred with the Chief Justice, but disagreed with the finding of the Chief Justice that the Clerk of the Privy Council is required to balance the competing public interests in disclosure or protection (non-disclosure) of the information when considering whether to certify information as a cabinet secret.

55 *Babcock*, *supra* note 51 at para 54. Chief Justice McLachlin also considered whether the limits on the power of superior courts to review documents subject to section 39 invades

principles of judicial independence, the rule of law, and the separation of powers must be balanced against the principle of parliamentary sovereignty.[56] In effect, Chief Justice McLachlin concluded that the principle of parliamentary sovereignty outweighed the other unwritten principles in this particular case as the circumstances did not warrant that parliamentary sovereignty should be curtailed. Chief Justice McLachlin highlighted the power afforded legislatures through the principle of parliamentary sovereignty, stating: "[i]t 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."[57]

In my view, rather than limiting the scope of application of unwritten constitutional principles in her decision in *Babcock*, Chief Justice McLachlin simply affirmed that these principles must be balanced against the operation of other principles, including the principle of parliamentary sovereignty.[58] Chief Justice McLachlin also implicitly noted that the principle of parliamentary sovereignty (which afforded the legislature the power to enact draconian laws) could be limited were it to "fundamentally alter or interfere with the relationship between the courts and the other branches of government."[59]

A close reading of the reasons for the decision in the *Patriation Reference*, *Babcock*, *Imperial Tobacco*, and *Christie* demonstrates that the claims that the Supreme Court of Canada has never before acknowledged the power of unwritten principles to limit legislation or, indeed, that the Court has expressly denied this possibility, are not in accordance with the jurisprudence cited in support of these propositions. To the contrary, the Court

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the core jurisdiction of superior courts in violation of section 96 of the *Constitution Act, 1867*. Chief Justice McLachlin concluded there was no violation of the core jurisdiction as section 39 "does not entirely exclude judicial review of the determination by the clerk that the information is a Cabinet confidence" at para 60.

56 *Ibid* at para 55.

57 *Ibid* at para 57.

58 For a more detailed discussion of this case, see Vincent Kazmierski, "Draconian but not Despotic: The 'Unwritten' Limits of Parliamentary Sovereignty in Canada" (2010) 41:2 Ottawa L Rev 245 at 273–277 [Kazmierski, "Draconian but not Despotic"]. For another comprehensive critique of the Supreme Court of Canada's decision in *Babcock*, *supra* note 51, see Yan Campagnolo, "Cabinet Immunity in Canada: The Legal Black Hole" (2017) 63:2 McGill LJ 315 at 353–371 [Campagnolo, "Cabinet Immunity"]. See also Yan Campagnolo, *Behind Closed Doors: The Law and Politics of Cabinet Secrecy* (Vancouver: UBC Press, 2021) at 203–218.

59 *Babcock*, *supra* note 51 at para 57.

has repeatedly acknowledged that unwritten constitutional principles may be applied to invalidate legislation in specific circumstances.

Having rejected the misconception that the Supreme Court of Canada has previously concluded that unwritten principles may not be used to limit legislation, it is appropriate to move on to consider the circumstances under which these principles may be applied more generally.

C. Misconception 3: The Application of Unwritten Constitutional Principles to Either Aid in Constitutional Interpretation, Fill Gaps in the Text of the Constitution, or Serve as Independent Limits on Legislative Action May be Clearly Distinguished From One Another

The next misconception that may be reinforced through the majority reasons in *Toronto (City)* is the claim that the potential roles of constitutional principles in aiding in the interpretation of the constitutional text, filling gaps in the Constitution, and invalidating legislation are always distinct roles with definable attributes. Chief Justice Wagner and Justice Brown identify only two legitimate roles for unwritten constitutional principles in *Toronto (City)*: (1) to aid in the interpretation of the written provisions of the Constitution; and (2) "to develop structural doctrines" that "[flow] by implication from" the architecture of the Constitution to assist in filling in gaps in the written provisions of the Constitution.[60] According to the majority, neither of these roles support the third potential role for unwritten constitutional principles, namely "the proposition…that the force of unwritten principles extends to invalidating legislation."[61]

The argument that the application of unwritten constitutional principles to invalidate legislation can be clearly distinguished from the application of principles to aid in the interpretation of written provisions of the Constitution or to assist in filling gaps in the written terms of the Constitution is not reflected in the way in which unwritten constitutional principles have been used to extend constitutional protection in a number of cases, most notably cases dealing with constitutional protection of judges, judicial proceedings, and courts. Perhaps the best example of the way in which constitutional principles have been applied to expand the scope of constitutional protection of judges and judicial proceedings is the

60 *Toronto (City)*, *supra* note 2 at paras 55–56.

61 *Ibid* at para 57.

Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island.[62] According to the majority in *Toronto (City)*, the decision of Chief Justice Lamer in the *Provincial Court Judges Reference* "applied the unwritten constitutional principle of judicial independence to *guide his interpretation* of the scope of provincial authority under s. 92(14) of the *Constitution Act, 1867* and to *fill a gap* where provincial courts dealing with noncriminal matters were concerned."[63] While Chief Justice Wagner and Justice Brown attempted to characterize the decision in the *Provincial Court Judges Reference* as an interpretive and gap-filling exercise, the fact remains that the unwritten principle of judicial independence was used in that case to limit the legislative authority of provincial governments and any legislation that contravened these new limits would be found to be constitutionally invalid.[64] The written provisions of the Constitution did not provide for limitations on the provincial legislation in question.

It should be remembered that section 11(d) of the *Charter* guarantees a right to appear before an independent and impartial tribunal to "[a]ny person charged with an offence."[65] The right belongs to the person, not to the judge, tribunal, or court. Nor does it apply where the person is not charged with an offence. Yet, Chief Justice Lamer found that application of the unwritten principle of judicial independence would impose a limitation. Not surprisingly, Justice Abella, in her dissenting reasons in *Toronto (City)*, described the decision in the *Provincial Court Judges Reference* as an application of an unwritten principle:

> In the *Provincial Judges Reference*, this Court relied, in part, on the unwritten constitutional principle of judicial independence to strike down legislative provisions in various provincial statutes. The issue was whether the principle of judicial independence restricts the manner and extent to

62 [1997] 3 SCR 3 at paras 107–08, 150 DLR (4th) 577 [*Provincial Court Judges Reference*].

63 *Toronto (City)*, *supra* note 2 at para 66, citing *ibid* [emphasis added].

64 Legislation that applied only to provincial judges exercising their non-criminal jurisdiction would certainly have been struck down pursuant to the application by Chief Justice Lamer of the unwritten principle of judicial independence. For a similar argument that the decision of Chief Justice Lamer in the *Provincial Court Judges Reference*, *supra* note 62, should not be viewed as simply using unwritten principles to interpret the scope of section 11(d) of the *Charter*, see (Alyn) James Johnson, "The *Judges Reference* and the *Secession Reference* at Twenty: Reassessing the Supreme Court of Canada's Unfinished Unwritten Constitutional Principles Project" (2019) 56:4 Alta L Rev 1077 at 1094–102 [Johnson, "The *Judges Reference* and the *Secession Reference* at Twenty"].

65 *Charter*, *supra* note 5, s 11(d).

> which provincial legislatures can reduce the salaries of provincial court judges. While the principle of judicial independence finds expression in s. 11(d) of the *Charter*, which guarantees the right of an accused to an independent tribunal, and ss. 96 to 100 of the *Constitution Act, 1867*, which govern superior courts in the province, *the unwritten principle of judicial independence was used to fill a gap in the written text to cover provincial courts in circumstances not covered by the express provisions.*[66]

It is particularly notable that Chief Justice Wagner and Justice Brown upheld the *Provincial Court Judges Reference* as an appropriate application of unwritten constitutional principles, despite their professed concern for the "highly abstract" and "nebulous" nature of those principles, when one considers the extent to which judicial interpretation has expanded the scope of sections 96 to 100 of the *Constitution Act, 1867*. Recall that section 96 merely states that "[t]he Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick."[67] On its face, section 96 confirms the federal government's control (through the Governor General) over the appointment of superior court judges. In turn, section 97 establishes that judges from Ontario, Nova Scotia, and New Brunswick shall be selected from the bars of those provinces; section 98 mandates that judges from Quebec shall be selected from the Quebec bar; section 99 establishes that judges of the superior courts shall hold office during good behaviour subject to a power of removal of the Governor General or the judge reaching the age of 75; and section 100 confirms that the salaries of superior court judges shall be fixed and paid by Parliament.[68] There are very few restrictions concerning how superior court judges may be appointed, disciplined (short of removal), or paid on the face of these constitutional provisions. Yet judicial interpretation, fueled by the unwritten principles of judicial independence and the rule of law, has dramatically expanded the scope of sections 96 through 100 to include a plethora of limitations on how federal governments and legislatures may deal with superior court judges.

Two additional cases that reflect this expansion of the constitutional protection of judges and courts are the *Reference re Supreme Court Act, ss 5 and 6* and *Trial Lawyers Association of British Columbia v British Columbia*

66 *Toronto (City)*, *supra* note 2 at para 174 [emphasis added].
67 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 96, reprinted in RSC 1985, Appendix II, No 5.
68 *Ibid*, ss 96–100.

decisions.[69] The *SCA Reference* arose out of the attempt by Prime Minister Stephen Harper to appoint Justice Nadon, a supernumerary judge of the Federal Court of Appeal, to a vacant seat on the Supreme Court of Canada reserved for appointees from the province of Quebec.[70] The case concerned whether the federal government could fill a vacancy in one of the three positions reserved for Quebec judges on the Court with an appointee from Quebec who was a judge of the Federal Court but was no longer a member of the Quebec bar. The Court was asked two questions: (1) whether sections 5 and 6 of the *Supreme Court Act*[71] allowed a person who has ever been an advocate with a ten-year standing of the Barreau du Québec to be appointed to the Supreme Court of Canada as a Quebec appointee; and (2) whether Parliament could enact a new law that would allow a person who has ever been an advocate with a ten-year standing of the Barreau du Québec to be appointed to the Supreme Court of Canada as a Quebec appointee.[72]

The majority decision, co-authored by Chief Justice McLachlin with Justices LeBel, Abella, Cromwell, Karakatsanis, and Wagner, determined that section 6 of the *Supreme Court Act* prohibited the appointment of a candidate who was neither currently a member of the Quebec bar nor a current or retired judge of the Quebec Courts.[73] This effectively precluded the appointment of Justice Nadon to the Court. The majority further concluded that Parliament could not amend the *Supreme Court Ac*t to change the eligibility requirements for Quebec appointees without a formal constitutional amendment as changes to the "composition" of the Supreme Court of Canada are now protected by the amendment rules under section 41(d) of the *Constitution Act, 1982*.[74]

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69 *Reference re Supreme Court Act, ss 5 and 6*, 2014 SCC 21 [*SCA Reference*]; *Trial Lawyers Association of British Columbia v British Columbia*, 2014 SCC 59 [*BC Trial Lawyers Association*].

70 *SCA Reference*, *supra* note 69 at paras 1–3.

71 RSC 1985, c S-26, ss 5–6.

72 *SCA Reference*, *supra* note 69 at para 7.

73 *Ibid* at para 4. Justice Moldaver dissented, finding that the legislation could be interpreted to allow the appointment of a judge who was a past advocate of at least 10 years standing at the Quebec bar. He did not consider whether the legislation could be changed without a constitutional amendment at para 111.

74 *Ibid* at para 5. The determination that the term "composition" of the Supreme Court of Canada includes not just the fact that Quebec is entitled to three of the nine justices appointed to the Court, but also the eligibility criteria for those three Quebec appointees may be subject to debate. If they wanted to include eligibility criteria within section 41(d), the drafters of the *Constitution Act, 1982* could arguably have included the term "qualification" in the section given the use of the term in section 23 of the *Constitution Act, 1867*

Interestingly, the majority also suggested that the constitutional protection of the Supreme Court of Canada pre-dated the addition of sections 41 and 42 of the *Constitution Act, 1982*. The majority noted that "[t]he Supreme Court's constitutional status *initially* arose from the Court's historical evolution into an institution whose continued existence and functioning engaged the interests of both Parliament and the provinces."[75] This constitutional status was "then *confirmed* by the *Constitution Act, 1982*."[76] This confirmation of the constitutional status of the Court "*reflected* the understanding that the Court's essential features formed part of the Constitution of Canada."[77] Thus, according to the majority reasons in the *SCA Reference*, rather than *establishing* the constitutional status and protection of the Supreme Court of Canada, the entrenchment of sections 41 and 42 of the *Constitution Act, 1982* simply *confirmed* a pre-existing constitutional status, which arose initially from the Court's role as the final arbiter of jurisdictional disputes between Parliament and provincial legislatures.[78] In particular, the majority noted that the elevation of the Supreme Court to the highest court in Canada, after the abolition of appeals to the Privy Council in 1949, "had a profound effect on the constitutional architecture of Canada."[79]

Within this new constitutional architecture, the Supreme Court of Canada "played a central role in this country's constitutional structure, by, among other things, delineating the contours of federal and provincial jurisdiction through a number of landmark cases that continue to inform our understanding of the division of powers to this day."[80] This evolution in the role of the Supreme Court of Canada transformed it into a "constitutionally essential institution" that enjoyed constitutional status and protection prior to 1982 as part of the "architecture of the Constitution."[81]

The *SCA Reference* signalled a wholehearted embrace of the "structural" approach to understanding the Canadian Constitution that had been referred to in earlier decisions such as *OPSEU v Ontario (Attorney*

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to outline the eligibility requirements for appointment to the Senate. Nonetheless, it is uncontroversial that constitutional protection for various elements of the Supreme Court were explicitly included through sections 41(d) and 42(1)(d) of the *Constitution Act, 1982*.

75 *SCA Reference*, *supra* note 69 at para 76 [emphasis added].

76 *Ibid* [emphasis added].

77 *Ibid* [emphasis added].

78 This mirrored the way in which Chief Justice Lamer described the relationship between the principle of judicial independence and the written provisions of the Constitution in the *Provincial Court Judges Reference*.

79 *SCA Reference*, *supra* note 69 at para 82.

80 *Ibid*.

81 *Ibid* at para 87.

General)[82] and the *Quebec Secession Reference*.[83] While there is no explicit mention of unwritten constitutional principles in the *SCA Reference*, the role of unwritten principles in supporting the "structure" or "architecture" of the Constitution was confirmed in the *Senate Reference*, decided shortly after the *SCA Reference*. In *Reference re Senate Reform*, the Court emphasized the importance of "foundational principles of the Constitution," including democracy, constitutionalism, and the rule of law, in constitutional interpretation.[84] The Court further noted the importance of unwritten principles (referred to as "underlying constitutional principles" in the *Quebec Secession Reference*) in discerning and protecting the basic structure of the Constitution, stating: "the Constitution must be interpreted with a view to discerning the structure of government that it seeks to implement. The assumptions that underlie the text and the manner in which the constitutional provisions are intended to interact with one another must inform our interpretation, understanding, and application of the text."[85] In this structural approach, the Constitution must be understood as providing a comprehensive framework for governing the state. To the extent that gaps exist within the written provisions of the Constitution, they must be filled by reference to the overall structure of government that is to be achieved. This requires that constitutionally essential institutions receive constitutional protection, even where that protection may not be found explicitly in the written provisions of the Constitution.

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82 *OPSEU v Ontario* (*Attorney General*), [1987] 2 SCR 2 at 40, 41 DLR (4th) 1 [*OPSEU*].

83 *Quebec Secession Reference*, *supra* note 21 at para 50. For a critique of this structural approach and of the way in which it diminishes the role of constitutional conventions, see Christa Scholtz, "The Architectural Metaphor and the Decline of Political Conventions in the Supreme Court of Canada's Senate Reform Reference" (2018) 68:4 UTLJ 661. For an argument that the structural approach is preferable to an approach that bases the existence of unwritten constitutional principles in the preamble to the Constitution, see Peter C Oliver, "A Constitution Similar in Principle to that of the United Kingdom: The Preamble, Constitutional Principles and a Sustainable Jurisprudence" (2019) 65:2 McGill LJ 207. For an appreciation of the strengths of the structural approach, see Johnson, "The *Judges Reference* and the *Secession Reference* at Twenty", *supra* note 64.

84 2014 SCC 32 at para 25 [*Senate Reference*].

85 *Ibid* at para 26. The notion that unwritten constitutional principles "underlie" and support the text of the Constitution has often been observed by the Court. See e.g. *Provincial Court Judges Reference*, *supra* note 62 (the majority decision of Justice Lamer referred to unwritten constitutional principles as "organizing principles" at para 107). See also *Quebec Secession Reference*, *supra* note 21 at paras 49, 51 (The Court used the term "underlying constitutional principles," noting that "[t]hese principles inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based." The Court also noted that unwritten constitutional principles "dictate major elements of the architecture of the Constitution itself and are as such its lifeblood").

The practice of applying unwritten constitutional principles to expand constitutional protection of judges and judicial institutions was also evidenced in the *BC Trial Lawyers Association* case.[86] *BC Trial Lawyers Association* concerned the constitutionality of hearing fees included in rules of court established by regulation in British Columbia in so far as these rules of court failed to provide relief for litigants for whom the hearing fees may impose undue hardship.[87] The Supreme Court of Canada found the hearing fees established under the regulation to be unconstitutional. The Court determined that section 96 of the *Constitution Act, 1867*, as informed by the unwritten principle of the rule of law, includes protection for the "core jurisdiction" of superior courts that limits the power of provincial governments to impose court fees pursuant to section 92(14) of the *Constitution Act, 1867*, in so far as those fees may restrict access to the superior courts. In her majority reasons, Chief Justice McLachlin noted that section 92(14) provides provinces with the jurisdiction to impose hearing fees, however, "[i]ts power to impose hearing fees must be consistent with s. 96 of the *Constitution Act, 1867* and the requirements that flow by necessary implication from s. 96."[88] Chief Justice McLachlin went on to quote from the Court's decision in the *Senate Reference* to highlight that interpreting the scope of section 96 required consideration of unwritten constitutional principles and how they informed the structure of the Constitution:

> As this Court has recently stated, "the Constitution must be interpreted with a view to discerning the structure of government that it seeks to implement. *The assumptions that underlie the text and the manner in which the constitutional provisions are intended to interact with one another* must inform our interpretation, understanding, and application of the text": *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 S.C.R. 704, at para. 26 (emphasis added).
>
> It follows that in determining the power conferred on the province over the administration of justice, including the imposition of hearing fees, by s. 92(14), the Court must consider not only the written words of that provision, but how a particular interpretation fits with other constitutional powers *and the assumptions that underlie the text*.[89]

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86 *BC Trial Lawyers Association*, *supra* note 69.

87 It is worth noting that this case thus considers the constitutionality of delegated legislation as opposed to primary legislation.

88 *BC Trial Lawyers Association*, *supra* note 69 at para 24.

89 *Ibid* at paras 26–27 [emphasis added].

Chief Justice McLachlin relied upon *MacMillan Bloedel Ltd v Simpson*[90] and *Provincial Court Judges Reference*[91] for the principle that, "[a]lthough the bare words of s. 96 refer to the appointment of judges, its broader import is to guarantee the core jurisdiction of provincial superior courts" against limitations by either federal or provincial legislatures.[92] She determined that legislation that prevents people from accessing the superior courts in order to have their disputes resolved by those courts "strikes at the core jurisdiction of the superior courts protected by s. 96 of the *Constitution Act, 1867*."[93]

Chief Justice McLachlin reasoned that her expansion of the scope of section 96 was consistent with the judgment of Justice Major in *Imperial Tobacco* because "[t]he right of Canadians to access the superior courts flows by necessary implication from the express terms of s. 96 of the *Constitution Act, 1867* as we have seen."[94] However, she also proceeded to demonstrate that "the connection between s. 96 and access to justice is further supported by considerations relating to the rule of law."[95] While Chief Justice McLachlin at first appeared to portray the rule of law principle as a secondary aspect of her analysis, her discussion of the principle confirmed that it is, in fact, a key part of the interpretation of the scope of section 96. She stated that "[t]he s. 96 judicial function and the rule of law are *inextricably intertwined*," noting that the "very rationale" for section 96 is linked to the protection of the rule of law.[96] Chief Justice McLachlin continued: "[a]s access to justice is fundamental to the rule of law, and the rule of law is fostered by the continued existence of the s. 96 courts, it is only natural that s. 96 provide some degree of constitutional protection for access to justice."[97] These passages suggest that the rule of law principle provides the rationale for how protection of access to superior courts may flow by "necessary implication" from section 96.[98] More accurately, the protection of the core jurisdiction of courts that Chief Justice McLachlin

90 *MacMillan Bloedel Ltd v Simpson*, [1995] 4 SCR 725, 130 DLR (4th) 385 [*MacMillan Bloedel*].

91 *Provincial Court Judges Reference*, *supra* note 62.

92 *BC Trial Lawyers Association*, *supra* note 69 at para 29.

93 *Ibid* at para 32.

94 *Ibid* at para 37.

95 *Ibid* at para 38.

96 *Ibid* at para 39 [emphasis added].

97 *Ibid*.

98 Incidentally, this is also how Justice Rothstein, in dissent, interpreted the reasons of Chief Justice McLachlin in *BC Trial Lawyers Association*, *supra* note 69, noting that "the majority uses the rule of law to support reading a general constitutional right to access the superior courts into s. 96" at para 93.

suggested is provided by section 96 flows by necessary implication from the application of the rule of law and the necessity of access to justice to ensure its protection.[99]

Justice Rothstein dissented, finding that the interpretation of section 96 offered by the majority was "overly broad."[100] While Justice Rothstein accepted that section 96 protects the core jurisdiction of superior courts, he did not accept the interpretation of Chief Justice McLachlin that the "core jurisdiction" includes the concept of access to the courts, in part because access to the courts was not part of the Court's established test for determining the scope of the core jurisdiction for superior courts.[101] Justice Rothstein also rejected the reliance of Chief Justice McLachlin on the unwritten principle of the rule of law in the case as, in his view, there was no constitutional gap to be filled.[102] In the view of Justice Rothstein, sections 11(d) and 24(1) of the *Charter* establish the scope of a constitutional right of access to the courts to challenge constitutional infringements.[103] Justice Rothstein worried that the majority's reasoning "subverts the structure of the Constitution and jeopardizes the primacy of the written text."[104] He also worried that by anchoring the right of access in its interpretation of section 96 of the *Constitution Act, 1867*, the reasons of Chief Justice McLachlin immunized consideration of this new right of access from consideration under sections 1 and 33 of the *Charter*.[105] As we see below, the concerns raised by Justice Rothstein in his dissenting reasons in *BC Trial Lawyers Association* were echoed by Chief Justice Wagner and Justice Brown in their majority reasons in *Toronto (City)*.

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99 It is interesting to note that, in *BC Trial Lawyers Association*, *supra* note 69, the Supreme Court of Canada found that the imposition of court fees may affect the core jurisdiction of superior courts when it had rejected the claim that the imposition of a tax on legal fees would affect access to justice in *Christie*. The different results may be explained, in part, by the fact that the claimants in *Christie* sought approval of a general right to legal representation before all courts and tribunals, which the Court found too broad to accommodate. The distinct results may also be attributable, in part, to the fact that the *Christie* case concerned access to lawyers as an intermediary for access to the courts, while the *BC Trial Lawyers Association* case concerned access to courts regardless of intermediaries such as lawyers.

100 *BC Trial Lawyers Association*, *supra* note 69 at para 81.

101 *Ibid* at para 89.

102 *Ibid* at para 91. Justice Rothstein stated: "[b]ut there are no such gaps in the text of s. 92(14). With respect, gaps do not exist simply because the courts believe that the text should say something that it does not."

103 *Ibid* at para 92.

104 *Ibid* at para 93.

105 *Ibid* at para 94.

The decisions of the Supreme Court of Canada in the *Provincial Court Judges Reference*, the *SCA Reference*, and the *BC Trial Lawyers Association* have vastly extended the scope of constitutional protection afforded to Canadian judges and the Supreme Court of Canada. Constitutional protection has been accorded to the independence of superior court judges through a series of constitutional provisions (sections 96–100 of the *Constitution Act, 1867*) that, on their face, deal with the appointment, tenure, and payment of superior court judges. That constitutional protection has also been extended to all judges, including provincially appointed judges hearing non-criminal matters, despite the fact they were deliberately excluded from protection in the only written provision of the Constitution that expressly guarantees judicial independence, section 11(d) of the *Charter*. Similarly, constitutional protection has been accorded to the Supreme Court of Canada itself, *in addition* to the protection accorded through Part V of the *Constitution Act, 1982* and, finally, the Supreme Court of Canada has extended constitutional protection of access to the superior courts as part of the "core jurisdiction" of those courts.

At a minimum, each of these cases involved the use of unwritten constitutional principles to fill in gaps in the written provisions of the Constitution as opposed to simply interpreting the scope of existing provisions. The unwritten principles of judicial independence and the rule of law were used to fill these gaps. Suggestions that these cases simply deduced elements that arose by "necessary implication" from the existing written provisions of the Constitution ignore the fact that the scope of the protection offered by these written provisions has been exponentially expanded through interpretation fuelled by these unwritten principles. As such, it is much more accurate to state that the limitations imposed through these decisions arise "by necessary implication" from the applied unwritten principles as opposed to by necessary implication from the terms of the written provisions that had already been determined to be insufficient to deal with the issues before the courts.[106]

More importantly, these cases demonstrate that the line between interpretation, gap-filling, and invalidation is not as clearly demarcated as some may suggest. While some may claim that the decisions in the *Provincial*

106 See also Johnson, "Imperial Tobacco", *supra* note 44 at 37–41. Johnson argues that "necessary implications" in cases such as *Provincial Court Judges Reference*, *supra* note 62, and then *Reference re Manitoba Language Rights* were "drawn from the structure of the Constitution as a whole" as opposed to specific provisions of the text of the Constitution. *Reference re Manitoba Language Rights*, [1985] 1 SCR 721, 19 DLR (4th) 1.

Court Judges Reference and the *BC Trial Lawyers Association* involved the application of the principles of judicial independence and the rule of law to expand the scope of section 11(d) of the *Charter* and section 96 of the *Constitution Act, 1867*, respectively, it is arguably more accurate to state that these cases involved the application of unwritten principles to invalidate legislation that threatened judicial independence in the absence of directly applicable written provisions of the Constitution. While reference to written provisions of the Constitution were relied upon to justify the invalidation of legislation, the invalidation was not possible through the application of the written provisions alone. In other words, reference to the unwritten principles was necessary to justify the invalidation of the legislation in these cases.

Some academics suggest, as do Chief Justice Wagner and Justice Brown in *Toronto* (*City*), that unwritten principles should only be applied to develop doctrines or rules that flow by "necessary implication" from the text of the Constitution.[107] Yet, interestingly, none of the unwritten principles identified to date by the Court could be viewed as existing as completely free-standing or "independent" principles without any direct linkages to written provisions of the Constitution. Indeed, the unwritten constitutional principles already identified by the Court have direct links to written provisions of the Constitution. For example, key aspects of federalism are set out in Part VI of the *Constitution Act, 1867*, most importantly sections 91 and 92, and section 36 of the *Constitution Act, 1982*; key institutions of our democracy and democratic process are set out or protected by Part IV of the *Constitution Act, 1867* and sections 2–5 of the *Charter*; judicial independence is protected through sections 96–100 of the *Constitution Act, 1867* and section 11(d) of the *Charter*; the rule of law is both implicitly and explicitly identified in the preamble to the Constitution and elements of it are protected through the legal rights enshrined in sections 7–14 of the *Charter*; and the protection of minorities is advanced through section 93 of the *Constitution Act, 1867* and sections 15–16, 23, 27–28, and 35 of the *Constitution Act, 1982*.

In light of the above, I suggest it is time to stop speaking of whether unwritten constitutional principles may serve as "independent" limits on legislative action. Instead, I suggest that it is more appropriate to consider, using a more balanced "sliding-scale" approach, that the argument in

107 See e.g. Robin Elliot, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001) 80 Can Bar Rev 67; Patrick J Monahan, "The Public Policy Role of the Supreme Court of Canada in the Secession Reference" (1999) 11 NJCL 64.

favour of the application of unwritten principles to promote the protection of a particular constitutional right (or obligation) may be stronger where the right claimed is more closely aligned to the written provisions of the Constitution that are connected to the unwritten principle supporting that right. Similarly, the argument in favour of the constitutional right claimed would be bolstered by evidence of the importance accorded to the right historically and of the pragmatic importance of the right in supporting the structure of the Constitution and, specifically, the nature of the democracy that the Constitution has been designed to protect. I outline the elements of such a sliding-scale approach in more detail in section IV.

D. Misconception 4: Unwritten Principles Cannot be Applied Where Their Application Will Overlap with the Scope of Written Provisions of the Constitution

Another argument that is sometimes employed to constrain the application of unwritten constitutional principles is that application of these principles may render redundant certain written provisions of the Constitution. In *Toronto (City)*, the majority relied upon this rationale, referring to the Supreme Court of Canada's judgment in *Imperial Tobacco*:

> Unlike the written text of the Constitution, then, which "promotes legal certainty and predictability" in the exercise of judicial review (*Secession Reference*, at para. 53), the nebulous nature of the unwritten principles makes them susceptible to be interpreted so as to "render many of our written constitutional rights redundant and, in doing so, undermine the delimitation of those rights chosen by our constitutional framers" (*Imperial Tobacco*, at para. 65).[108]

As explained above, in *Imperial Tobacco,* Justice Major noted that many of the rights that were being linked to the rule of law principle by the claimants in the case were "simply broader versions of the rights contained in the *Charter*."[109] In particular, Justice Major noted the concern that applying the rule of law principle in the case would undermine section 11(d) of the *Charter*, which might otherwise apply.[110] A similar concern was voiced by the Court when it rejected the argument that rule of law principle could be used to invalidate legislation that authorized a provincial tax on the

108 *Toronto (City)*, *supra* note 2 at para 59.
109 *Imperial Tobacco*, *supra* note 14 at para 65.
110 *Ibid*.

purchase of legal fees in *Christie*. In its reasons, the Court noted that the broad right of legal representation that was advanced by the claimants in the case would render redundant the specific right to counsel provided for under section 10(b) of the *Charter*.[111]

It is important to note that *Imperial Tobacco* and *Christie* both dealt with arguments for application of the rule of law principle that the Court perceived would support very broad scopes of the rights at issue in the cases. The wide scope of the rights argued for by the claimants in those cases triggered the concern that written provisions of the Constitution may be rendered redundant by such broadly construed rights emerging from unwritten constitutional principles. Nonetheless, in both cases, the Court accepted that there remained a role for unwritten constitutional principles to support claims limiting the scope of legislation. This acknowledgment was necessary, in part, to reconcile the concern expressed in *Imperial Tobacco* and *Christie* about the broad scope of rights argued to be rooted in the rule of law principle in those cases with the way in which the unwritten principle of judicial independence was applied to expand the independence guaranteed to provincial court judges hearing non-criminal matters in the *Provincial Court Judges Reference*.

As noted above, the independence of superior court judges is protected through sections 96 to 100 of the *Constitution Act, 1867* and the independence of provincial court judges hearing criminal matters is protected under section 11(d) of the *Charter*. As such, if one were to apply the logic of Justice Major in *Imperial Tobacco* and of the Court in *Christie* without exception, the extension of constitutional protection for the independence of all judges would render redundant the guarantee under section 11(d) of the *Charter* of a fair and impartial tribunal for hearings of accused charged with an offence. In light of this, it seems more reasonable to suggest that unwritten principles may support appropriately circumscribed rights that extend or supplement the scope of rights already identified in written provisions of the Constitution, such as section 11(d) of the *Charter* (as the Supreme Court of Canada concluded in the *Provincial Court Judges Reference*) and section 10(b) of the *Charter* (as the Court concluded in *Christie*).

Thus, contrary to the assertion of Chief Justice Wagner and Justice Brown in *Toronto (City)*, unwritten principles in and of themselves are not inherently "nebulous" and thus incapable of imposing limitations of legislation. Rather, overly broad interpretations of the rights that may be

111 *Christie*, *supra* note 44 at para 24.

linked to unwritten principles, such as (arguably) the broad rights alleged by the claimants to be rooted in the rule of law principle in *Imperial Tobacco* and *Christie*, are to be avoided.[112] By contrast, more appropriately tailored rights, such as a right to access superior courts, supported by the rule of law principle, or a right to a trial before an independent provincial court judge, supported by the principle of judicial independence, may be constitutionally protected as in *BC Trial Lawyers* and the *Provincial Court Judges Reference*, respectively. As such, it is possible to dispel the misconception that unwritten constitutional principles may not be used to support rights that have even the smallest overlap with written provisions of the Constitution. Indeed, in section IV, I demonstrate how a more balanced, sliding-scale approach to the application of unwritten constitutional principles would consider whether the proposed right rooted in a particular unwritten constitutional principle is suitably tailored to fit together with the existing written provisions of the Constitution without causing those written provisions to be rendered redundant.

E. Misconception 5: Unwritten Constitutional Principles Cannot be Used to Expand the Scope of Constitutional Rights to Include Rights that Were Deliberately Omitted by the Framers of the Constitution

A fifth misconception that may emerge from an uncritical reading of the reasons of Chief Justice Wagner and Justice Brown in *Toronto* (*City*) is that unwritten constitutional principles cannot be used to expand the scope of constitutional rights to include rights that were deliberately omitted by the framers of the Constitution. In their consideration of whether section 3 of the *Charter* might be applied to invalidate the *Act*, the Chief Justice and Justice Brown noted that the deliberate omission of municipal elections from the ambit of section 3 by the framers of the *Constitution Act, 1982*

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112 I agree with James Johnson that it is important to distinguish between unwritten constitutional *principles* and the *rights* or *obligations* that may flow from the application of those principles. The principles themselves may be broadly construed, however the rights and obligations they may generate must be precise in order to ensure they fit together with the other rights protected by the Constitution. See Johnson, "The *Judges Reference* and the *Secession Reference* at Twenty", *supra* note 64 at 1084–85. I note that some scholars argue that the scope of the rule of law principle advanced by the claimants in *Imperial Tobacco* was not particularly broad or controversial despite the fact it did not fit with the Supreme Court of Canada's prevailing (thin) conception of the rule of law. See e.g. Johnson, "Imperial Tobacco", *supra* note 44; Campagnolo, "Cabinet Immunity", *supra* note 58 at 323.

suggests that the unwritten principle of democracy cannot be applied to retroactively extend the scope of section 3 to now protect those elections.[113]

> To repeat: the withholding of constitutional status for municipalities, and their absence from the text of s. 3, was the product of a deliberate omission, not a gap. The City's submissions ignore that application of the democratic principle is properly applied to *interpreting* constitutional text, and not *amending* it or *subverting* its limits by ignoring "the primordial significance assigned by this Court's jurisprudence to constitutional text in undertaking purposive interpretation" (*Quebec (Attorney General)*, at para. 4). It is not for the Court to do by "interpretation" what the framers of our Constitution chose not to do by enshrinement, or their successors by amendment.[114]

While I am sympathetic to the argument that the deliberate omission by the constitutional framers of a body or process from constitutional protection should be an important consideration when determining the scope of constitutional protection that may be accorded through the application of unwritten constitutional principles. However, it would be incorrect to suggest that the Supreme Court of Canada has not applied unwritten constitutional principles to extend constitutional protection to an institution or process that was deliberately omitted from protection by the constitutional framers. Such an assertion would ignore the application of the principles of judicial independence and the rule of law to expand the scope of protection offered by the written provisions of the Constitution (including both section 96 of the *Constitution Act, 1867* and section 11(d) of the *Charter*) to include judges and courts other than superior courts.

Well before 1867, justice systems across the colonies included magistrates, justices of the peace, and the operation of inferior courts (or magistrates' courts), not enjoying inherent jurisdiction.[115] Thus, the drafters of the *Constitution Act, 1867* certainly did not intend to include those inferior courts under the ambit of section 96, particularly given that section 96 expressly grants the Governor General (not provincial Lieutenants Governor) the power to appoint "Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in

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113 *Toronto (City)*, *supra* note 2 at paras 81–82.

114 *Ibid* at para 82.

115 See "History" (last visited 4 April 2023), online: <www.provincialcourt.bc.ca/about-the-court/history>; Manitoba Law Reform Commission, *Report on the Independence of Justices of the Peace and Magistrates* (Manitoba: Queen's Printer, 1991). See also *Provincial Court Judges Reference*, *supra* note 62 at paras 305–23, La Forest J, dissenting.

Nova Scotia and New Brunswick."[116] It is also worth noting that there was no expectation of independence of magistrates at the time of Confederation, as these offices were typically filled by well-positioned members of the merchant or upper classes who often administered rules that directly impacted their own wealth and status, resulting in a "paternalistic" form of justice.[117] Similarly, the drafters of the *Constitution Act, 1982* declined to include protection for courts hearing civil matters under the *Charter* and limited themselves to protecting the right of "any person charged with an offence" to a "fair and public hearing before an independent and impartial tribunal."[118]

In light of the omission of provincial court judges from constitutional protection in 1867 and the omission of civil matters from the protection of judicial independence guaranteed by the *Charter* in 1982, the extension of constitutional protection to provincial court judges in the *Provincial Court Judges Reference* and the extension of a guarantee of access to superior courts in civil cases that was one of the outcomes of the *BC Trial Lawyers* decision both represent occasions where the Supreme Court of Canada has applied unwritten constitutional principles to extend constitutional protection to institutions or processes that were previously deliberately omitted from constitutional protection by framers of the Canadian constitution. To be blunt, then, contrary to the claim of Chief Justice Wagner and Justice Brown, the Supreme Court of Canada has, indeed, "[done] by 'interpretation' what the framers of our Constitution chose not to do by enshrinement, or their successors by amendment."[119] As such, the notion that this cannot be done, should be dispelled as a misconception.

That being said, the application of unwritten constitutional principles to extend a right that was deliberately omitted by the constitutional drafters should occur only in exceptional circumstances. I discuss this further in my elaboration of the sliding-scale approach to the application of unwritten constitutional principles in section IV.

116 *Constitution Act, 1867*, *supra* note 67, s 96.

117 Greg Marquis, "The Contours of Canadian Urban Justice, 1830-1875" (1987) 15:3 Urban History Rev 269 at 270.

118 *Charter*, *supra* note 5, s 11.

119 *Toronto (City)*, *supra* note 2 at para 82.

F. Misconception 6: Relying on Unwritten Principles to Limit Legislation is Illegitimate Because it Insulates Judicial Decisions from Sections 1 and 33 of the *Charter*

Chief Justice Wagner and Justice Brown further suggested in *Toronto (City)* that using unwritten principles to invalidate legislation would unjustifiably eliminate the possibility that the government could rely on section 1 of the *Charter* to justify an infringement of the unwritten principle, or that it could use section 33 to allow the impugned legislation to remain in force notwithstanding an infringement of the unwritten principle.[120] Significantly, however, members of the Supreme Court of Canada have not raised this concern when using the unwritten principles of judicial independence and the rule of law to expand the scope of constitutional protection accorded to courts and judges, despite the fact that judicial independence is explicitly protected under section 11(d) of the *Charter*. For example, in the majority reasons in the *BC Trial Lawyers Association* case, Chief Justice McLachlin did not consider any concerns that using the unwritten principle of the rule of law to expand protection to the core jurisdiction of superior courts might insulate this from any application of section 1 or section 33, despite the fact that the protection of the section 11(d) right to have access to a fair and impartial tribunal—which encompasses the most vital jurisdiction of all courts—would be subject to limitation under section 1 or suspension under section 33 of the *Charter*.[121]

Additionally, Chief Justice Wagner and Justice Brown did not acknowledge that sections 3–5 of the *Charter*, which include the core protections for voting rights in the written provisions of the Constitution, are not subject to section 33 of the *Charter* in any case. Furthermore, the protection afforded to the "legislative power" under Part IV of the *Constitution Act, 1867* is subject to neither section 1 nor section 33 of the *Charter*. As such, the only written provision of the Canadian Constitution that directly protects aspects of the democratic process while also being subject to both section 1 and section 33 of the *Charter* is section 2 of the *Charter*. Thus, in cases where the principle of democracy is relied upon as a foundation for securing additional constitutional protections, the exclusion of those protections from limitations imposed through section 1 and section 33 has

120 *Ibid* at para 60.

121 This was certainly an issue before the Court given that Justice Rothstein, writing in dissent in the *BC Trial Lawyers Association* case, specifically critiqued the fact that the expanded scope of section 96 relied upon by the majority was not subject to either section 1 or section 33 of the *Charter*. See *BC Trial Lawyers Association*, *supra* note 69 at para 94.

much less impact than in cases involving the application of other unwritten constitutional principles. One might similarly argue that the application of the unwritten principle of federalism would typically not overlap with the application of a *Charter* right and, thus, the absence of a section 1 justification or recourse to a section 33 override would be non-consequential.

I conclude that the notion that unwritten principles lack legitimacy because they insulate constitutional rights protection from the ambit of section 1 justification requirements or the section 33 override provision found in the *Charter* is overstated at best. That being said, the Court's approach to the application of unwritten constitutional principles highlights the imperative to consider the way in which both written and unwritten elements of the Constitution must act together to create a comprehensive structure that supports the proper functioning of Canadian democracy. For this reason, the sliding-scale approach to the application of unwritten constitutional principles elaborated in section IV also considers whether the evidence supports that the constitutional structure is best safeguarded by limiting protection of a particular right to the scope established by an existing *Charter* provision.

G. Misconception 7: Cures for Assaults on the Democratic Process can Always be Found in the Ballot Box

Chief Justice Wagner and Justice Brown concluded that the proper recourse for concerns regarding "unjust or unfair" action by legislators is to replace the legislators through elections, rather than relying on unwritten constitutional principles.

> Accordingly, there is good reason to insist that "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" (para. 66). In our view, this statement should be understood as covering all possible bases for claims of right (i.e., "unjust or unfair" *or otherwise normatively deficient*).[122]

The contention that the cure for "'unjust or unfair' *or otherwise normatively deficient*" laws should be found either in the written provisions of the Constitution or in the ballot box is understandable within a hybrid constitutional system, such as Canada's, that embraces both written and unwritten

122 *Toronto (City)*, *supra* note 2 at para 59 [emphasis in original].

elements of its Constitution and in which the unwritten constitutional principle of parliamentary sovereignty continues to play a role. Indeed, recognition of the ongoing role of the principle of parliamentary sovereignty within the Canadian constitutional framework motivated Chief Justice McLachlin to admonish, in *Babcock*, that unwritten principles could not be relied upon to remedy every unfair law. However, as noted above, it is important to remember that in *Babcock*, Chief Justice McLachlin expressly recognized that unwritten principles may be used to limit laws that "fundamentally alter or interfere with the relationship between the courts and the other branches of the government."[123] This was similar to the finding of Justice Major in *Imperial Tobacco* that the principle of judicial independence may limit legislation where it may "interfere with the courts' adjudicative role, and thus judicial independence."[124] Thus, while the Supreme Court of Canada concluded in both *Babcock* and *Imperial Tobacco* that it was not necessary to rely upon unwritten constitutional principles to protect the "adjudicative role" of the courts in the specific circumstances of those cases, the Court acknowledged that unwritten constitutional principles could be relied upon to do so in certain circumstances.

This acknowledgement fits well with the Court's structural approach to constitutional interpretation, which has been relied upon to ensure the protection of the fundamental nature and role of constitutionally essential institutions such as the Supreme Court of Canada and the Senate. One must assume that the House of Commons and provincial legislative assemblies would also be considered as constitutionally essential institutions, subject to constitutional protection of their essential nature and roles beyond the scope of the written provisions of the Constitution.[125] Thus, for example, legislation that threatened the representative nature of federal or provincial legislatures, or the election of their members, would be subject to constitutional review beyond the strict scope of sections 3 to 5 of the *Charter* and the provisions of Part IV of the *Constitution Act, 1867*.[126] If such constitutional protection was deemed to exceed the protection strictly

123 *Babcock*, *supra* note 51 at para 57.

124 *Imperial Tobacco*, *supra* note 14 at para 49.

125 Indeed, Justice Beetz acknowledged as much in his majority reasons in *OPSEU*, *supra* note 82 at 57, where he stated: "[t]here is no doubt in my mind that the basic structure of our Constitution, as established by the *Constitution Act, 1867*, contemplates the existence of certain political institutions, including freely elected legislative bodies at the federal and provincial levels."

126 Justice Abella, quoting the reasons of Justice Beetz in *OPSEU*, also raises this point in her dissenting reasons in *Toronto (City)*, *supra* note 2 at paras 169–70.

afforded by these constitutional provisions, but still necessary to protect the representative nature of the legislature, then it would be insufficient to claim that an adequate remedy could be found in either the text of the Constitution or the ballot box.[127] As I have previously argued, it would be folly to rely on the ballot box to remedy unfair legislation if the legislation itself has tampered with the integrity of the ballot box or its results.[128]

Following the guidelines that have been outlined by the Supreme Court of Canada in a number of cases, including most recently the *SCA Reference* and the *Senate Reference*, the application of unwritten constitutional principles in such situations would be triggered where the fundamental nature or role of a constitutionally essential institution may be substantially compromised. More importantly, the decisions of the Court in the *SCA Reference*, the *Senate Reference*, and the *BC Trial Lawyers Association* certainly indicate that the Supreme Court of Canada is willing to go beyond the text of the Constitution to invalidate legislation that would substantially interfere with the fundamental role of a constitutionally essential institution, rather than rely on rectification through the ballot box. The decisions in these cases thus dispel the misconception that either the text of the Constitution or the ballot box alone can be, or need be, exclusively relied upon to address such legislative threats.

The application of unwritten constitutional principles in these types of circumstances has also been supported by a number of academics. For example, Choudhry and Howse proposed a "dualist" theory of constitutional interpretation that includes a category of "extraordinary interpretation" that justifies the application of unwritten constitutional principles when the legitimacy of the constitutional order is in peril.[129] Peter Oliver has suggested that a "sustainable jurisprudence" regarding the application of unwritten constitutional principles must take into account "the social scientific context (including a sense of what that future context may well entail)."[130] For his part, James Johnson has argued that the Supreme Court of Canada has developed an approach of "reasoning from constitutional

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127 For a consideration of some of the protection that might be provided through the principle of democracy, see Pal, *supra* note 8 at 274. Pal argues that the principle of democracy should be interpreted as "embodying a 'thin' or procedural account of democracy tide to meaningful participation, rather than a 'thick' version imposing specific outcomes or broader obligations."

128 Kazmierski, "Draconian but not Despotic", *supra* note 58 at 275–77.

129 Sujit Choudhry and Robert Howse, "Constitutional Theory and The Quebec Secession Reference" (2000) 13 Can JL & Jur 143 at 156.

130 Oliver, *supra* note 83 at 265.

essentials" that justifies application of unwritten constitutional principles as limits on both constitutional provisions and legislation when necessary to counteract "threats to the 'static' framework of democratic government, and in particular when there are threats to the distribution of power between government institutions or to the process by which law is generated, interpreted, or applied...."[131] This is similar to the argument that I have previously advanced that resorting to unwritten constitutional principles as limits on legislation may be justifiable where the legislation poses threats to democratic institutions or to the democratic process the legislature relies upon for its legitimacy.[132]

IV. A SLIDING-SCALE APPROACH TO APPLYING UNWRITTEN CONSTITUTIONAL PRINCIPLES

In section III, I identified and dispelled seven misconceptions about the identification and application of unwritten constitutional principles that are promoted by the majority reasons in the *Toronto* (*City*) decision. These misconceptions include three categorical restrictions on the application of unwritten principles: (1) that they cannot be used as an independent means to invalidate legislation; (2) that they cannot be applied where they will overlap with written provisions of the Constitution; and (3) that they cannot be applied to protect rights that were deliberately excluded by the framers of the Constitution. In this section, I provide additional details concerning the sliding-scale approach to the identification and application of unwritten constitutional principles that I have proposed as an alternative to the more categorical approach adopted by Chief Justice Wagner and Justice Brown. Rather than categorically excluding certain roles or instances of the application for unwritten constitutional principles, this approach balances the strength of evidence across a variety of types of evidence available to support the identification and application of an unwritten constitutional principle. These types of evidence were relied upon in the majority decision of Justice McLachlin in *New Brunswick Broadcasting Co v Nova Scotia* (*Speaker of the House of Assembly*).[133] In that case, Justice

131 Johnson, "The *Judges Reference* and the *Secession Reference* at Twenty", *supra* note 64 at para 1092–93.

132 See Vincent Kazmierski, "Something to Talk About: Is There a Charter Right to Access Government Information?" (2008) 31:2 Dal LJ 351 at 370–71 [Kazmierski, "Is There a Charter Right"]; Kazmierski, "Draconian but not Despotic", *supra* note 58 at 275–76, 281–85.

133 [1993] 1 SCR 319, 100 DLR (4th) 212 [*New Brunswick Broadcasting*].

McLachlin relied upon structural, historical, and pragmatic evidence to recognize the constitutional status of the legislative privileges used to control the proceedings of the legislature.[134]

Applying a sliding-scale approach to these three types of evidence, the argument in favour of the identification of a new unwritten constitutional principle, or the application of an unwritten principle to promote the protection of a particular constitutional right (or obligation), will be stronger where all three types of evidence support the claim. For example, the claim for the application of a particular unwritten principle to support a right will be stronger where the right claimed is more closely aligned with the written provisions of the Constitution that are connected to the unwritten principle supporting that right. Similarly, the argument in favour of the constitutional right claimed would be bolstered by evidence of the importance accorded the right historically and of the pragmatic importance of the right in supporting the structure of the Constitution and specifically the nature of the democracy the Constitution has been designed to protect. At the same time, weaker evidence in any one of these categories would not necessarily be fatal to the rights claim being asserted. Rather, the evidence in all three categories would need to be balanced.

Such a sliding-scale approach not only reflects the approach of considering structural, historical, and pragmatic evidence articulated by the Supreme Court in *New Brunswick Broadcasting*,[135] it also respects the Court's confirmation in the *Quebec Secession Reference* and other cases that the recognition of unwritten constitutional principles "emerge from an understanding of the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning."[136] Additionally, the sliding-scale approach respects the Court's more recently emphasized "structural approach," which recognizes that the application of unwritten constitutional principles should respond to the pragmatic requirements of fulfilling the type of democratic government invoked by the Canadian

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134 Justice McLachlin relied on the preamble of the *Constitution Act, 1867* as an indicator that protection of legislative privileges fit within the existing structure of the Canadian Constitution. Justice McLachlin also considered the historical evolution of protection of legislative privileges in the common law as evidence that constitutional protection of the privileges could be justified before finally considering the pragmatic necessity of legislative privileges to the proper functioning of Canadian legislatures, both historically and in the modern context.

135 *New Brunswick Broadcasting*, *supra* note 133.

136 *Quebec Secession Reference*, *supra* note 21 at para 32.

constitutional project.[137] Finally, such a sliding-scale approach[138] is also compatible with the approach of "reasoning from constitutional essentials" suggested by James Johnson[139] or the notion of a "sustainable jurisprudence" of unwritten constitutional principles suggested by Peter Oliver as briefly discussed above.[140]

This sliding-scale approach addresses many of the concerns raised by scholarly and judicial critics of unwritten constitutional principles. For example, while avoiding the categorical exclusion of rights that are not directly linked to written provisions in the Constitution, the sliding-scale approach recognizes that it will be easier to recognize rights or obligations rooted in unwritten principles where those rights or obligations are supported by structural evidence that shows they emerge by "necessary implication" from the text (as noted in *Babcock* and *BC Trial Lawyers Association*) or other unwritten constitutional principles.[141] Unwritten principles may be broad in scope, but the rights or obligations they generate must be tailored to operate in concert with written provisions of the Constitution (as suggested in *Imperial Tobacco* and *Christie*) and with other unwritten constitutional principles (as noted in *Babcock*), while supporting

137 *Senate Reference*, *supra* note 84 at para 26.

138 For additional thoughts on this "sliding-scale" approach, see Vincent Kazmierski, *Something to Talk About: Applying the Unwritten Principle of Democracy to Secure a Constitutional Right to Access Government Information in Canada* (SJD Thesis, University of Toronto Faculty of Law, 2008) [unpublished] at 157–59, online (pdf): <tspace.library.utoronto.ca/handle/1807/11217>.

139 Johnson, "The *Judges Reference* and the *Secession Reference* at Twenty", *supra* note 64. While Johnson argues that the pragmatic analysis is the most important aspect of the analysis, I argue that all three aspects of the analysis must be considered and weighed together. In some circumstances, evidence of the pragmatic importance of the recognition of a new rule rooted in an unwritten constitutional principle may outweigh the lack of connection to other written constitutional provisions or a lack of historical support for the unwritten rule, however, the primacy of pragmatic considerations should not be simply assumed, in my view.

140 Oliver, *supra* note 83. Unfortunately, space constraints do not allow for a fuller discussion of either Johnson or Oliver's approaches in this paper.

141 In addition to accommodating the approaches adopted by the Supreme Court of Canada in *Babcock*, *supra* note 51, and *BC Trial Lawyers Association*, *supra* note 69, giving greater weight to evidence of a link between an unwritten constitutional principle (or associated right or obligation) and written provisions of the Constitution addresses concerns raised by scholars such as Monahan and Elliot noted earlier. It also fits well with the "common-law constitutionalism" approach advocated by Mark Walters and his suggestion that it should be easier to justify "text-emergent" unwritten principles rather than "free-standing" principles. See Mark Walters, "The Common Law Constitution in Canada: Return of *Lex Non Scripta* as Fundamental Law" (2001) 51 UTLJ 91 at 140.

the structure and goals of the Constitution. Thus, the application of an unwritten constitutional principle to support a previously unrecognized constitutional right or obligation may be supported by stronger or weaker evidence of fit within the structure of the Constitution. For example, while it would not categorically prohibit any overlap with textual provisions of the Constitution, a more balanced sliding-scale approach to the application of unwritten constitutional principles would consider whether the proposed right rooted in a particular unwritten constitutional principle is suitably tailored to fit together with the existing written provisions of the Constitution.

This does not mean, however, that there cannot be any overlap between the rights or obligations generated by unwritten principles and existing written provisions of the Constitution. Unwritten principles should not protect rights that render written provisions completely redundant (*Christie*), but they may assist in extending the scope of protection offered by these written provisions (*BC Trial Lawyers Association*). This means there is likely less scope for some principles to serve as the foundation for the recognition of new rights. For example, as asserted by Justice Major in *Imperial Tobacco*, the rule of law principle, which has informed the genesis of many provisions of the *Charter*, may be less likely to generate the recognition of new rights or rules than the principle of judicial independence, which received less explicit protection in the written provisions of the Constitution.

A consideration of historical evidence in support of a particular unwritten constitutional principle or of the application of an unwritten principle to support a constitutional right or obligation would also require a balancing exercise. Thus, for example, the deliberate omission of a particular right or obligation from the text of the Constitution would not lead to a categorical exclusion of protection of that right or obligation through the application of unwritten constitutional principles. Rather, following a balancing of evidence for and against the application of a constitutional principle, it may serve as the foundation for a right or rule that was previously omitted by the constitutional framers (as demonstrated by the decisions in the *Provincial Court Judges Reference* and *BC Trial Lawyers Association*). However, in recognition of the importance of respecting the choices of constitutional framers, this should only occur in exceptional circumstances.

In this regard, it may be easier to justify applying unwritten constitutional principles to protect rights that were not recognized or not yet considered worthy of constitutional protection at the time of the framing

of the Constitution as opposed to those that were excluded from the Constitution on principled grounds, such as the exclusion of property rights in the *Charter*.[142] To this end, it is worth noting that in *Ontario (Public Safety and Security) v Criminal Lawyers' Association*,[143] the Supreme Court recognized that section 2(b) of the *Charter* protects a derivative right to access government information despite the fact that protection of access to information was deliberately not included by the framers in the text of the *Charter*.[144]

Finally, while considering pragmatic evidence concerning the importance of extending constitutional protection of an institution or process through the application of unwritten constitutional principles, the trigger for the application of unwritten constitutional principles to invalidate legislation will most often require a "substantial interference" (*OPSEU*, *Babcock*, and *Imperial Tobacco*) with the "fundamental nature and role" of a "constitutionally essential institution" (*SCA Reference* and *Senate Reference*).

V. CONCLUSION

The majority reasons in *Toronto (City)* rely on a number of misinterpretations of previous Supreme Court of Canada decisions in order to advance a series of misconceptions about the application of unwritten constitutional principles. In so doing, they attempt to "untether" the decision in *Toronto (City)* from the Court's previous jurisprudence in order to justify a narrowing of the roles for unwritten principles. As demonstrated above, the misconceptions advanced in the majority reasons are readily dispelled by reference to the previous jurisprudence. More importantly, while the Court's decision in *Toronto (City)* concludes that the unwritten principle of democracy cannot be applied to expand constitutional protection to municipal elections, the majority's broader, categorical musings about the inability of unwritten constitutional principles to invalidate legislation under any circumstances are not necessary for the determination of the legal issues in the case and must be considered as *obiter*. In dissent, Justice Abella states that, "with respect, the majority's decision to foreclose

142 For further discussion of this point, see Kazmierski, "Is There a *Charter* Right", *supra* note 132 at 365–68.

143 2010 SCC 23.

144 For a more detailed discussion of this case, see Vincent Kazmierski, "Taking One Step Forward, Preventing Two Steps Back: Applying *Criminal Lawyers' Association* to invalidate Extreme Legislative Restrictions on Access to Government Information" (2018) 38:2 NJCL 209.

the possibility that unwritten principles be used to invalidate legislation in all circumstances, when the issue on appeal does not require them to make such a sweeping statement, is imprudent."[145] I would go a step further to suggest that these categorical, sweeping statements concerning limits on the normative power of unwritten constitutional principles are not binding precisely because they are not necessary to determine the legal issues on appeal. As such, judges in future cases will have the opportunity to consider these *obiter* statements in the context of the Court's overall unwritten principles jurisprudence and to reject the misinterpretations and misconceptions identified in this article as they continue to develop the Court's approach to defining the role of unwritten constitutional principles within the structure of the Canadian Constitution.

As an alternative to the majority's approach in *Toronto* (*City*), I have advocated for the application of a balanced sliding-scale approach to the recognition and application of unwritten constitutional principles that avoids categorical statements about the limits of unwritten principles in favour of consideration of a balancing of three types of evidence that supports a given application of an unwritten principle in any particular case. In my view, courts should avoid categorical assumptions that unwritten constitutional principles can never be applied as "independent" means to invalidate legislation or that unwritten principles can never be applied to protect rights that overlap in any way with existing rights protected by written provisions of the Constitution or that unwritten principles can never be applied to protect rights that were deliberately excluded from the Constitution by the constitutional framers.

Rather, courts should consider whether there is sufficient evidence to support the argument that a particular unwritten principle may generate a right leading to the invalidation of the statutory provision at issue in a particular case based on the evidence of: (1) the relationship between the proposed right/obligation and the written provisions of the Constitution, other unwritten constitutional principles, and constitutional conventions; (2) the historical context, including the evolution of the unwritten principle and of the right or obligation proposed to be recognized; and (3) the pragmatic impact of applying the unwritten principle in support of the proposed constitutional right or obligation. Such a consideration may lead to a rejection of the proposed application of the unwritten principle based on an insufficient relationship to other parts of the Constitution or, alternatively,

145 *Toronto* (*City*), *supra* note 2 at para 170.

as a result of too great an overlap with existing written provisions of the Constitution such as to render those provisions redundant. Similarly, the application of a particular principle in support of a previously unrecognized right may be rejected due to an insufficient justification for the reliance on the unwritten principle in light of previous determinations of the framers to exclude the right or obligation under consideration. The key, however, is that the determination would be based on a consideration of the evidence available to support or deny the sought-after application of the unwritten constitutional principle rather than a categorical exclusion of the application based on strict rules that cannot survive a rigorous consideration of the Supreme Court of Canada's unwritten principles jurisprudence. In this way, considerations of the application of unwritten constitutional principles would remain tethered to both the overall structure of the Constitution and to the Court's previous unwritten principles jurisprudence.