STRUCTURAL ANALYSIS AND THE CANADIAN CONSTITUTION

The Honourable Justice Malcolm Rowe and Manish Oza*

This article is about structural analysis in Canadian constitutional law. Structural analysis is a methodology for identifying unwritten components of the constitution and giving them effect. These unwritten components—Parliamentary privilege, Crown prerogative, constitutional conventions and underlying constitutional principles—pertain to the basic institutions of the state and the norms that govern their operations and relations. We explain how structural analysis operates and show that it is essential to discerning and applying the unwritten constitution.

Cet article porte sur l'analyse structurale du droit constitutionnel canadien. L'analyse structurale est une méthodologie qui sert à dégager les éléments non écrits de la Constitution et à leur donner effet. Ces éléments non écrits—privilège parlementaire, prérogative de la Couronne, conventions constitutionnelles et principes constitutionnels fondamentaux—touchent aux institutions fondamentales de l'État et aux normes qui régissent leurs activités et relations. Les auteurs expliquent les rouages de l'analyse structurale et démontrent que celle-ci est essentielle pour la compréhension et l'application de la constitution non écrite.

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1. Introduction

This article is about structural analysis as a methodology for identifying the unwritten components of the Canadian constitution and giving them effect.

A constitution should set out, in a coherent and comprehensive way, how sovereign authority is constituted, who can exercise such authority, for what purposes, by which means and with what limitations, notably for the protection of rights and liberties. All this was stated or implied in the *Reference re Secession of Quebec*:

> The "Constitution of Canada" … includes the constitutional texts enumerated in s. 52(2) of the Constitution Act, 1982. Although these texts have a primary place in determining constitutional rules, they are not exhaustive. The Constitution also "embraces unwritten, as well as written rules" … "[T]he Constitution of Canada includes the global system of rules and principles which govern the exercise of constitutional authority in the whole and in every part of the Canadian state." These supporting principles and rules, which include constitutional conventions and the workings of Parliament, are a necessary part of our Constitution because problems or situations may arise which are not expressly dealt with by the text of the Constitution. In order to endure over time, a constitution must contain a comprehensive set of rules and principles which are capable of providing an exhaustive legal framework for our system of government. Such principles and rules emerge from an understanding of the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning.[1]

Canada's constitution is partly written, partly unwritten. The written Constitution (capital-C) is defined in s. 52(2) of the *Constitution Act, 1982* to include the *Constitution Acts 1867 & 1982*, and the instruments listed in the Schedule to the 1982 *Act*. (There are other instruments relating to the institutions of the state, such as federal and provincial electoral statutes. We will not deal further here with these documents.)

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[1] *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 32, 161 DLR (4th) 385 [*Secession Reference*] [references omitted].

The unwritten constitution encompasses norms necessary for our system of governance to function.[2] Arrangements that were in place at the time of Confederation and that were not modified by constitutional documents remain largely in place and operative, though they evolve over time. As a result, the unwritten constitution is best understood when viewed in historical context.

The unwritten constitution is often said to comprise three main components: Parliamentary privilege, Crown prerogative and constitutional conventions.[3] To this list must be added underlying constitutional principles.[4] These are organizing concepts that undergird and overarch the operation of institutions of the state. Together, the written constitution, plus Crown prerogative, Parliamentary privilege and constitutional conventions, along with underlying constitutional principles, constitute in a coherent and comprehensive way our constitutional arrangements. (We make no reference here to Aboriginal and treaty rights. These, too, are constitutional in nature. They have both written aspects, for example in s. 35 of the *Constitution Act, 1982*, and unwritten aspects, for example in the principle of the honour of the Crown.[5] However, their framework of analysis is *sui generis*; as such, they warrant separate consideration.[6])

In two earlier articles, the senior author described the components of the constitution, both written and unwritten,[7] as well as the relationship between two key components of the unwritten constitution, conventions and underlying principles.[8] Those articles are background to this one.

The present article is about structural analysis. As we will explain, structural analysis is not an additional component of the constitution.

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2 By 'norms' we mean rules or standards.

3 See, for example, Peter W Hogg, *Constitutional Law of Canada*, 5th ed Supp loose-leaf (Scarborough: Thomson Carswell, 2007), who lists Parliamentary privilege (§ 1:7), Crown prerogative (§ 1:9), and conventions (§ 1:10) in his chapter on the sources of constitutional law, alongside textual sources.

4 *Ibid* at § 1:8; Hogg does mention unwritten constitutional principles, but includes it in a broader category of "Case Law", which encompasses, inter alia, judicial interpretation of the Constitution Acts. Our use of the term "underlying principles" rather than "unwritten principles" is explained below.

5 *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34 at para 62 [*Toronto City*].

6 *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 3, 153 DLR (4th) 193.

7 The Honourable Justice Malcolm Rowe & Michael Collins, "The Constitution of Canada" (2017) 49:1 Ottawa L Rev 93.

8 The Honourable Malcolm Rowe & Nicolas Déplanche, "Canada's Unwritten Constitutional Order: Conventions and Structural Analysis" (2020) 98:3 Can Bar Rev 431.

Rather it is a *methodology* by which, first, to identify those unwritten norms that have arisen by long practice and that complement the written Constitution and, second, to give effect to such norms in interpreting the constitution and filling gaps, where necessary.

The account we offer of structural analysis as a methodology is both more general and more detailed than those in the existing literature. We distinguish structural analysis from the unwritten components of the constitution, including underlying constitutional principles: in our view, structural analysis is a methodology applicable to the constitution as a whole, including all of its unwritten components, not only underlying constitutional principles. We offer a taxonomy of those unwritten components, in the case of Canada's constitution, and show how structural analysis pertains to them.

Our discussion proceeds in three parts. First, we explain why understanding structural analysis requires a historical perspective. Second, we set out the nature and functions of structural analysis. Finally, we use structural analysis to shed light on the unwritten components of the constitution.

2. History: a key perspective

What is structural analysis? The explanation arises from understanding history. Canada's constitution, more complex than is often thought, has been long in the making. To understand it, one must consider what the Westminster system is and how this system has been given effect in Canada. A historical perspective explains why the constitution is partly unwritten. As Peter W Hogg suggests, "[i]n the light of history it is perfectly understandable why Canada lacks a document which contains ringing declarations of national purpose and independence, and which is intended to state all of the most important constitutional rules."[9] This, in turn, explains why structural analysis is required for drawing out those rules.

The Westminster system evolved over centuries.[10] During the 17th century, the English Civil War (1642–49) and the Glorious Revolution (1688) established in broad terms the relationship between Parliament

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9 Hogg, *supra* note 3 at 1–4.

10 For historical background on the evolution of the Westminster system of government and the British constitution, see FW Maitland, *The Constitutional History of England: A Course of Lectures delivered by FW Maitland* (Cambridge, UK: Cambridge University Press, 1931); André Émond, *Constitution du Royaume-Uni: des origines à nos jours* (Montréal: Wilson & Lafleur, 2009); Elizabeth Wicks, *The Evolution of a Constitution: Eight Key Moments in British Constitutional History* (Oxford: Hart Publishing, 2006).

and the executive (then the monarch personally).[11] During the 18th century, executive authority shifted from the monarch to Cabinet.[12] By the mid-19th century, the system had evolved to the modern stage in which political parties compete in general elections and their leaders hold office as long as they have the confidence of Parliament.

In Canada, the earliest legislative assembly was in Nova Scotia in 1758.[13] Assemblies were established in other colonies, notably Upper & Lower Canada in 1791. Colonial governments were reformed after the rebellions of 1837, such that by 1855 the colonies of British North America each had constitutional arrangements patterned on those of the United Kingdom.[14] Thus, the Westminster system was not first established in Canada in 1867. Rather, it already existed in the governments of the colonies. When the Dominion of Canada was formed, this already established system of government was given effect in a federal structure.[15]

Countries with revolutionary origins, such as the French Republic or the United States, are compelled to set out all such arrangements in constitutional documents, as at their formation the slate was wiped clean. No such wiping clean of the slate occurs where countries carry forward historical arrangements, even where constitutional documents modify those arrangements in fundamental ways, such as in Norway or the Netherlands.[16]

Like many former British colonies, Canada did not have a founding constitutional moment when the slate was wiped clean and entirely new constitutional arrangements were adopted. Rather, from its creation in 1867, Canada advanced in a series of steps to full sovereignty, while internally its constitutional arrangements were reformed and evolved.

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11 See generally Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford: Clarendon Press, 1999); Wicks, *supra* note 10 at 11–30.

12 See Wicks, *supra* note 10 at 53–64.

13 For historical accounts of Canadian constitutional law, see George FG Stanley, *A Short History of the Canadian Constitution* (Toronto: The Ryerson Press, 1969); Han-Ru Zhou, ed, *Droit constitutionnel: Principes fondamentaux notes et jurisprudence*, 2nd ed (Montréal: Éditions Thémis, 2016).

14 See Guy Laforest et al, eds, *The Constitutions that Shaped Us: A Historical Anthology of Pre-1867 Canadian Constitutions*, (Montreal & Kingston: McGill-Queen's University Press, 2015); Stanley, *supra* note 13.

15 Zhou, *supra* note 13 at 10.

16 For a comparison between these different paths to constitutionalism, see Bruce Ackerman, *Revolutionary Constitutions: Charismatic Leadership and the Rule of Law* (Cambridge, MA: Harvard University Press, 2019) at 1–23.

The *Constitution Act, 1867* was the product of a desire for continuity; arrangements were adapted to a federation, rather than transformed. The *Act* is thus silent on essential aspects of the Westminster system; they were simply carried forward. The third Resolution of the 1864 Conference, which laid out the framework for the *Constitution Act, 1867*, made clear that a key objective of Confederation was to give effect to the Westminster system: "In framing a Constitution for the General Government, the Conference, with a view to the perpetuation of our connection with the Mother Country, and to the promotion of the best interests of the people of these Provinces, *desire to follow the model of the British Constitution*, so far as our circumstances will permit".[17]

In pre-Confederation debates, Sir John A. Macdonald expressed the view that this connection to Great Britain would be an "advantage" for our "younger country", since "our public men will be actuated by principles similar to those which actuate the statesmen at home", including "her free institutions, [] the high standard of the character of her statesmen and public men, [] the purity of her legislation, and the upright administration of her laws".[18] Accordingly, as Hogg explains, the *Constitution Act, 1867* "did no more than was necessary to accomplish confederation". He adds: "[a]part from the changes needed to establish the new federation, the British North Americans wanted the old rules to continue in both form and substance exactly as before."[19]

This desired continuity is reflected in the preamble to the *Constitution Act, 1867*; it refers to "a Constitution similar in Principle to that of the United Kingdom". Much has been written about this wording; on occasion, it has been treated as the source of the unwritten components of the Constitution.[20] Our view is that the preamble was confirmatory. For greater certainty, existing constitutional arrangements—the Westminster system—were carried forward, save as they were modified in the *Constitution Act, 1867* to provide for a federal state. Had the preamble not been included in the *Constitution Act, 1867*, it is difficult to imagine that the unwritten components of the Constitution would not have been

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17 "John A Macdonald Papers, Drafts of the Quebec Resolutions, Working Draft No 1 (26 October 1864)" (last visited 24 February 2023) at 18164, online (pdf): *Primarydocuments.ca* <primarydocuments.ca> [perma.cc/23W8-MPN4] [emphasis added].

18 British North American Provinces, *Parliamentary Debates on the Subject of the Confederation of the British North American Provinces*, 38, (6 February 1865) at 44, online: <www.canadiana.ca> [perma.cc/FD7V-Z6DR].

19 Hogg, *supra* note 3 at 1–2.

20 See *Re: Resolution to amend the Constitution*, [1981] 1 SCR 753 at 805, 125 DLR (3d) 1 [*Patriation Reference*]; *Reference re Remuneration of Judges of the Provincial Court (PEI)*, [1997] 3 SCR 3 at paras 94–104, 150 DLR (4th) 577 [*Provincial Judges Reference*].

incorporated in Canadian constitutional law, especially as they had been given effect in the British North American colonies prior to 1867.[21] Given that the preamble was included, it has often been referred to in support of structural reasoning.[22]

From Canada's birth, its constitutional arrangements have included constitutional conventions, Parliamentary privilege, Crown prerogative and underlying constitutional principles; all of these predated and continued to operate after Confederation. They remained unwritten as they were taken for granted by framers of the constitutional texts. This state of affairs is not unique to Canada; rather, it is shared among many colonial constitutions, as has been recognized by the Judicial Committee of the Privy Council. In holding that the provisions of a Jamaican statute transferring sentencing powers from the courts to an executive body were invalid on the basis of the separation of powers, the JCPC noted that much was left to necessary implication in colonial constitutions:

> All of [the colonial constitutions] were negotiated as well as drafted by persons nurtured in the tradition of that branch of the common law of England that is concerned with public law and familiar in particular with the basic concept of separation of legislative, executive and judicial power as it had been developed in the unwritten constitution of the United Kingdom. As to their subject matter, the peoples for whom new constitutions were being provided were already living under a system of public law in which the local institutions through which government was carried on, the legislature, the executive and the courts, reflected the same basic concept. The new constitutions, particularly in the case of unitary states, were evolutionary not revolutionary. … Because of this a great deal can be, and in drafting practice often is, left to necessary implication from the adoption in the new constitution of a governmental structure which makes provision for a legislature, an executive and judicature. It is taken for granted that the basic principle of separation of powers will apply to the exercise of their respective functions by these three organs of government. Thus the constitution does not normally contain any express prohibition upon the exercise of legislative powers by the executive or of judicial powers by either the executive or the legislature.[23]

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[21] See for more detail on the application of British constitutional principles prior to Confederation: Mark D Walters, "The Common Law Constitution in Canada: Return of *Lex Non Scripta* as Fundamental Law" (2001) 51:2 UTLJ 92 at 118–119.

[22] For a comprehensive discussion of jurisprudence on the preamble, 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.

[23] *Hinds v The Queen*, [1977] AC 195 (PC) at 212 [emphasis added]. For an discussion of the Privy Council case law examining the conformity of laws to implied constitutional principles in cases from Commonwealth countries which have adopted a Constitution based on the Westminster model, see Han-Ru Zhou, "La pertinence en

The *Constitution Act, 1982* did four main things: it made parliamentary sovereignty subject to the rights and freedoms in the *Charter* (subject in turn to ss. 1 and 33); it protected Aboriginal and treaty rights; it set out an amending formula; and it authorized courts to invalidate laws and grant other remedies to give effect to the foregoing. Other than its limitations on parliamentary sovereignty, the *Constitution Act, 1982* left largely intact the unwritten constitutional arrangements referred to above.

That said, the limitation of parliamentary sovereignty under the *Constitution Act, 1982* and the concomitant expansion of the courts' role as the "guardian of the constitution" did change the complexion of Canada's constitutional arrangements.[24] Just as these arrangements have evolved over time, one might expect them to continue to evolve in light of these developments. We make no comment here on what direction this evolution will or should take, but we would suggest that structural analysis will be crucial for making sense of it.

In short, a historical perspective explains why structural analysis is an essential method for understanding Canada's constitution. Much was taken for granted in Canada's constitutional arrangements; an understanding of those arrangements requires that we retrace their history and make explicit that which was left implicit.

3. What is structural analysis?

We turn now to a discussion of structural analysis. We begin with the nature of the methodology, including the role played in it by history, then set out its functions in constitutional reasoning.

A) The nature of structural analysis

Structural analysis is a methodology used to comprehend the purposes, institutions, functions and accepted practices of our constitutional order and to draw implications from these so as to address issues relating to that order. It has regard to the operation and interrelationships of the institutions of the state, informed by the historical context in which such arrangements came to exist. In this section, we briefly compare our view of structural analysis with those of other scholars and then explain how it operates.

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contexte canadien de la jurisprudence constitutionnelle du Conseil privé relative à l'indépendance judiciaire" (2015) 45:1–2 RDUS 235.

[24] *Hunter et al v Southam Inc*, [1984] 2 SCR 145 at 155, 11 DLR (4th) 641; see also *The Queen v Beauregard*, [1986] 2 SCR 56 at paras 27–28, 30 DLR (4th) 481 [*Beauregard*].

1) Structural analysis as a methodology

In his 1968 lectures *Structure and Relationship in Constitutional Law*, Charles L Black, a US law professor, described structural analysis as a "method of inference from the structures and relationships created by the [US] constitution in all its parts or in some principal parts".[25]

A similar mode of reasoning has been described by Canadian scholars. Robin Elliot describes structural analysis as "the drawing of implications from the structures of government created by our Constitution, and the application of the principles generated by those implications—which can be termed the foundational or organizing principles of the Constitution—to the particular constitutional issue at hand".[26] Kate Glover Berger explains that it "rests on the premise that we can draw inferences about the meaning of the Constitution from the structures of government and institutional relationships that are created by, and reflected in, the Constitution".[27] Alyn James Johnson describes a process of "reasoning from constitutional essentials" which involves, first, identifying the "basic principles" which "inhere in a given form of governance", by "reflection on the necessary interrelationships of the various components of constitutional architecture", and, second, "distilling the concrete legal rules that are required by the abstract principles in order to make the system work in a coherent fashion."[28]

While Elliot and Johnson refer to structural analysis and underlying constitutional principles somewhat interchangeably, there is value in distinguishing them. Structural analysis is a methodology of inferring norms from the structures created by the constitution and then using those norms in interpreting and applying the constitution; it is not itself a legal rule or principle.[29] By contrast, underlying constitutional principles

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[25] Charles L Black, *Structure and Relationship in Constitutional Law*, (Baton Rouge: Louisiana State University Press, 1969) at 7.

[26] Robin Elliot, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001) 80 Can Bar Rev 67 at 68.

[27] Kate Glover, "Structure, Substance and Spirit: Lessons in Constitutional Architecture from the *Senate Reform Reference*" (2014) 67 SCLR 221 at 230 [Glover, "Structure, Substance and Spirit"].

[28] 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 1089.

[29] For a discussion on modes of reasoning in constitutional law, see Phllip Bobbitt, *Constitutional Interpretation*, (Cambridge, Mass: B Blackwell, 1991), at 11–13, who identifies six modes of reasoning (what he calls "modalities of argument" in constitutional law: "[1] the historical (relying on the intentions of the framers and ratifiers of the Constitution); [2] textual (looking to the meaning of the words of the Constitution

are norms forming part of our constitutional arrangements. They are part of the unwritten constitution, alongside other unwritten components.

Distinguishing structural analysis from underlying constitutional principles allows for greater analytical clarity. It allows us to describe the constitutional structure more accurately—as including unwritten components other than underlying principles (Parliamentary privilege, Crown prerogative and conventions). And, given this understanding of constitutional structure, it allows us to see structural analysis as a unified methodology that addresses *all* components of the constitution which have a structural character, including but not limited to underlying principles.[30]

Some may be concerned that structural analysis, as we have described it, is so vague and indeterminate that it may describe all constitutional reasoning. Before responding to this concern, we would emphasize that structural analysis does not always determine a single outcome. Like other methodological approaches, there may be reasonable disagreement about its bearing on a given case. Just as judges may reasonably disagree about the proper interpretation of a statute, while agreeing on the approach to statutory interpretation, they may reasonably disagree about how best to give effect to constitutional structure in a given case. In the *Reference re Remuneration of Judges of the Provincial Court*, both the majority (per Chief Justice Lamer) and the dissent (per Justice La Forest) made structural arguments, appealing to different principles (judicial independence and parliamentary sovereignty). Still, we would maintain that not all modes of constitutional reasoning are structural. Had the court in *Provincial Judges Reference* looked solely to the meaning of the words in s. 96 of the *Constitution Act, 1867*, or to a natural law theory about which legal institutions are required, it would not have been reasoning structurally.

Structural analysis differs from other approaches in how it relates to history. On the one hand, it is broader than a solely historical perspective which focuses only on the original meaning of written Constitutional

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alone, as they would be interpreted by the average contemporary "man on the street"); [3] structural (inferring rules from the relationships that the Constitution mandates among the structures it sets up); [4] doctrinal (applying rules generated by precedent); [5] ethical (deriving rules from those moral commitments of the American ethos that are reflected in the Constitution); and [6] prudential (seeking to balance the costs and benefits of a particular rule)."

30 For authors distinguishing between constitutional structure and unwritten constitutional principles, see Glover, Structure, Substance and Spirit, *supra* note 27 at 230; Noura Karazivan, "De la structure constitutionnelle dans le Renvoi relatif au Sénat : vers une gestalt constitutionnelle?" (2015) 60:4 McGill LJ 793 at 800–806.

texts.[31] Structural analysis requires attention to the arrangements that are necessary for a functioning constitution; those arrangements may not be written down, and they may change over time. On the other hand, structural analysis is not opposed to historical approaches to constitutional interpretation (as some have suggested).[32] Rather, structural analysis and historical approaches are interdependent, particularly in colonial constitutions like Canada's. Many of the unwritten elements of the constitution can only be properly understood from a historical perspective, by looking to the sorts of constitutional arrangements that were contemplated, indeed taken for granted, as Canada came to be.

One example of this is in the history of federalism. The *Secession Reference* stated that underlying constitutional principles flow from "an historical lineage stretching back through the ages"[33], giving as an example the principle of federalism as having been shaped by the history of Confederation. On paper, under the *Constitution Act, 1867*, "the federal government retained sweeping powers which threatened to undermine the autonomy of the provinces."[34] But the *Constitution Act, 1867* was interpreted in light of historical context, including the desire of the colonies (then provinces) to preserve spheres of autonomy for regional majorities, consistent with the principle of federalism.[35] For instance, the Supreme Court emphasized that the scope of federal jurisdiction over "trade and commerce" had to be limited "in order to preserve from serious curtailment, if not from virtual extinction, the degree of autonomy which, as appears from the scheme of the Act as a whole, the provinces were intended to possess."[36]

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[31] See Grant Huscroft & Bradley W Miller, eds, *The Challenge of Originalism: Theories of Constitutional Interpretation*, (Cambridge University Press, 2011); Benjamin Oliphant & Léonid Sirota, "Has the Supreme Court of Canada Rejected 'Originalism'?" (2016) 42:1 Queen's LJ 107; Léonid Sirota & Benjamin Oliphant, "Originalist Reasoning in Canadian Constitutional Jurisprudence" (2017) 50:2 UBC L Rev 505.

[32] Philip Bobbitt, *Constitutional Fate: Theory of the Constitution*, (New York: Oxford University Press, 1982) at 74.

[33] *Secession Reference*, *supra* note 1 at para 49.

[34] *Secession Reference*, *supra* note 1 at para 55.

[35] *Secession Reference*, *supra* note 1 at para 55: "Here again, however, a review of the written provisions of the Constitution does not provide the entire picture. Our political and constitutional practice has adhered to an underlying principle of federalism, and has interpreted the written provisions of the Constitution in this light." See also Elliot, *supra* note 26 at 100–102.

[36] *Lawson v Interior Tree Fruit and Vegetable Committee of Direction*, [1931] SCR 357 at 366, 2 DLR 193; cited in *Reference re Securities Act*, 2011 SCC 66 at paras 72–74. Similarly, in the *Local Prohibition* case, the Judicial Committee of the Privy Council cautioned that an approach to the federal residual power ("peace, order and good government" or "POGG") that would be unconstrained and trench upon provincial jurisdiction would "not only be contrary to the intendment of the Act, but would practically

This autonomy was an essential condition for Confederation and "the foundation upon which the whole structure was subsequently erected", such that it would be improper to "dim or to whittle down the provisions of the original contract upon which the federation was founded" or to "impose a new and different contract upon the federating bodies" through interpretation.[37] However, this is not to say that federalism is historically immutable. In considering what is required for a federal state to function, the Supreme Court of Canada has, in recent cases, "preferred a flexible approach that in many instances allows both orders of government room to act instead of creating 'watertight compartments'", given that "it would often be impossible for one order of government to fulfill its constitutional mandates without affecting matters that fall within the other order's legislative authority".[38]

2) How structural analysis operates

Structural analysis has two broad stages. The first stage is to identify the constitutional structure and define its components. The Supreme Court has spoken of the existence of a constitutional structure. In the *Secession Reference*, the Court wrote that "[o]ur Constitution has an internal architecture, or what the majority of this Court in *OPSEU* … called a "basic constitutional structure". The individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole."[39] The constitution "should not be viewed as a mere collection of discrete textual provisions. It has an architecture, a basic structure."[40]

The second stage is to utilize the foregoing to resolve disputes in light of "the structure of government [the constitution] seeks to implement."[41]

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destroy the autonomy of the provinces": *Attorney-General for Ontario v Attorney-General for the Dominion*, [1896] AC 348 (PC) at 360–61 [*Local Prohibition*]; see also *Re: Anti-Inflation Act*, [1976] 2 SCR 373 at 445, 458, 68 DLR (3d) 452.

37 *Re Aerial Navigation*, [1932] AC 54 (PC) at 65, 1 DLR 58 [*Aeronautics Reference*]; see also *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, at para 463 (per Rowe J) [*Greenhouse Gas Reference*].

38 *Desgagnés Transport Inc v Wärtsilä Canada Inc*, 2019 SCC 58 at para 86, citing *Rogers Communications Inc v Châteauguay (City)*, 2016 SCC 23 at paras 37, 85; *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 36; *Reference re Employment Insurance Act (Can), ss 22 and 23*, 2005 SCC 56 at para 8; *Alberta (Attorney General) v Moloney*, 2015 SCC 51 at para 15; *Reference re Assisted Human Reproduction Act*, 2010 SCC 61 at para 139. For criticism of this approach, see the dissenting reasons of Deschamps J in *Quebec (Attorney General) v Lacombe*, 2010 SCC 38.

39 *Secession Reference*, *supra* note 1 at para 50.

40 *Reference re Senate Reform*, 2014 SCC 32 at para 27 [*Senate Reference*].

41 *Ibid* at para 26.

Constitutional structure can assist "in the interpretation of the text and the delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of our political institutions."[42] Canadian courts have used this structure in two main ways: to assist in interpreting the constitutional text and to fill gaps by answering questions not addressed in that text.

The *Re Manitoba Language Rights* case provides an example of this two-stage methodology. Faced with a potential "legal vacuum" resulting from declaring unilingual Acts of the Legislature of Manitoba to be of no force and effect, the Supreme Court solved this problem by using structural analysis. First, the Court identified the "rule of law" as a "fundamental postulate of our constitutional structure",[43] which "requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order."[44] This principle was "the very basis of the English Constitution characterising the political institutions of England from the time of the Norman Conquest" and was "clearly implicit in the very nature of a Constitution."[45] Second, the Court derived from this principle a remedy which was "necessary to preserve the rule of law": a suspended declaration of invalidity.[46]

Structural analysis (while not referred to as such) was the methodology used by the Court to draw inferences from our system of government, informed by history, to identify the rule of law as an essential component of the constitution and, then, to formulate the remedy of a suspended declaration of invalidity to give effect to that principle. This was both doctrinally cogent and practical—a good combination!

B) The functions of structural analysis

As noted, a constitution needs to be both coherent and comprehensive. Structural analysis contributes to these ends in two ways: the interpretive role and the gap-filling role.[47] The interpretive use of structural analysis typically aims at coherence in our constitutional arrangements, while the gap-filling role aims at comprehensiveness.

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42 *Secession Reference*, *supra* note 1 at para 52; see also *Senate Reference*, *supra* note 40 at para 26.

43 *Re Manitoba Language Rights*, [1985] 1 SCR 721 at 750, 19 DLR (4th) 1 [*Manitoba Language Rights*]; citing *Roncarelli v Duplessis*, [1959] SCR 121 at 142, 16 DLR (2d) 689 (per Rand J).

44 *Manitoba Language Rights*, *supra* note 43 at 749.

45 *Ibid* at 750.

46 *Ibid* at 761, 767.

47 *Provincial Judges Reference*, *supra* note 20 at para 95.

1) The interpretive role

In its interpretive role, structural analysis assists in interpreting the components of the constitution (both unwritten and, where they exist, written) purposively and as a coherent whole, rather than in isolation.[48] A few examples will illustrate this.

The interpretive role has aided courts in deciding how different parts of the constitution interact. In *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House Assembly)*, the Supreme Court considered whether individuals have a right to film proceedings of a provincial legislature. This depended on whether the exercise of Parliamentary privilege to prohibit such video recording was subject to the *Charter*. In determining whether the relevant privilege existed, the Court looked both to the history of Canada's constitutional arrangements and to the practical necessity for legislative bodies to have powers and privileges in addition to those conferred by the written Constitution. Legislative assemblies must possess "such historically recognized constitutional privileges as may be necessary to their efficient functioning."[49] The entrenchment of a written constitution did not negate the "fundamental constitutional tenets upon which British parliamentary democracy rested."[50] The Court held that both Parliamentary privilege and the *Charter* have constitutional status, neither being subordinate to the other: "one part of the Constitution cannot abrogate another part of the Constitution". Accordingly, the exercise of Parliamentary privilege is not subject to judicial review for *Charter* compliance. While not referred to as such, this was structural analysis.

A further example of this interpretive role is the extension of guarantees of judicial independence to provincial courts. This was

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48 *Secession Reference*, *supra* note 1 at para 53. In systems that lack a written constitution, structural analysis still aims at interpreting norms as part of a coherent whole, but that whole has no written components.

49 *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319 at 385, 100 DLR (4th) 212 [*New Brunswick Broadcasting Co*] per McLachlin J. That said, later cases have treated Parliamentary privilege in a more nuanced way. In *Harvey v New Brunswick (Attorney General)*, [1996] 2 SCR 876, 137 DLR (4th) 142, the majority reviewed provincial legislation codifying privileges and "assume[d]" that it was subject to the *Charter* because the issue was not raised by the parties. McLachlin J, in concurring reasons, said that privileges are not subject to the *Charter* but they must both be reconciled and that neither prevails over the other (at para 69). In *Chagnon v Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39 [*Chagnon*], Karakatsanis J for the majority adopted McLachlin J's view from *Harvey*, interpreting Parliamentary privilege narrowly to avoid undermining *Charter* rights.

50 *New Brunswick Broadcasting Co*, *supra* note 49 at 377.

grounded in an expansive interpretation of s. 96 of the *Constitution Act, 1867* "by reference to a deeper set of unwritten understandings which are not found on the face of the document itself."[51] The Supreme Court identified judicial independence as a key component of our constitutional arrangements in light both of history and of the interactions among the organs of the state. Courts have recognized that "the preservation of the basic [constitutional] structure … extends protection to the judicial institutions of our constitutional system."[52] Judicial independence "flows as a consequence of the separation of powers", which requires that the relationships between the judiciary and the other branches of the state should be depoliticized.[53] From this, the Court adopted a broad interpretation of s. 96 as the "institutional role demanded of the judiciary under our Constitution is a role which we now expect of provincial court judges."[54] In other words, given that provincial court judges had come to play a role similar to that of superior court judges, they had to have the independence necessarily associated with that role.

2) The gap-filling role

In its gap-filling role, structural analysis serves as a methodology to answer questions for which the (written) Constitution does not provide an answer. It does so by describing relationships among the institutions of the state within our constitutional order and by drawing implications from this, often in the form of underlying principles. Such principles are used as "the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text."[55]

The leading example is the *Secession Reference*, setting out the obligations that would follow a referendum in favour of the secession of a province.[56] But instances of such gap filling long predate the *Secession Reference*. A century before, in *Huson v South Norwich (Township)*, the doctrine of federal paramountcy was recognized as being "necessarily implied in our constitutional act"[57] and "inferred … despite the silence of the constitutional text" on the basis of "the desire of the confederating

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51 *Provincial Judges Reference*, *supra* note 20 at para 89.

52 *Provincial Judges Reference*, *supra* note 20 at para 108; see also *Beauregard*, *supra* note 24.

53 However, judicial independence is broader than the depoliticization of the relationship between the judiciary and other branches of the state, as it also "operates to insulate the courts from interference by parties to litigation and the public generally" (*Provincial Judges Reference*, *supra* note 20 at para 130)

54 *Provincial Judges Reference*, *supra* note 20 at para 126.

55 *Secession Reference*, *supra* note 1 at para 53.

56 *Secession Reference*, *supra* note 1 at paras 83–105.

57 *Huson v South Norwich (Township)*, (1895) 24 SCR 145 at 149.

provinces 'to be federally united into One Dominion'", and because it is "of fundamental importance in a legal system with more than one source of legislative authority."[58]

Various unwritten norms operate to fill gaps in the written constitution. As explained above, for historical reasons, the *Constitution Act, 1867* does not refer to the system of responsible government, as it already existed in the colonies and did not need to be "established" when Canada was formed. We need to have regard to unwritten rules relating to responsible government to ensure the constitution provides "an exhaustive legal framework for our system of government."[59] As Hogg has noted, the system of responsible government is a gap in the *Constitution Act, 1867*, filled by constitutional conventions:

> The system of responsible (or cabinet) government, which had been achieved before confederation by the uniting colonies, is another gap in the BNA Act. It was intended in 1867 that this system would apply to the new federal government, but it never seems to have occurred to anyone to write the rules of the system into the BNA Act, and so there is no mention of the Prime Minister, or of the cabinet, or of the dependence of the cabinet on the support of a majority in the House of Commons: the composition of the actual executive authority and its relationship to the legislative authority were left in the form of unwritten conventions—as in the United Kingdom. That is still their status today.[60]

This highlights the conceptual point of departure from certain authors, notably Elliott and Johnson, which we mentioned earlier. While we agree with them as to the use of structural analysis to identify underlying principles and, then, to use these in the interpretive and gap filling roles, we see the methodology as having broader application. Structural analysis informs our understanding of the interactions among *all* the components of our constitutional arrangements, including conventions, Parliamentary privilege and Crown prerogative, not only underlying principles. In this broader way, structural analysis helps to ensure that our system of government can function coherently, in light of the "assumptions that underlie the text".[61]

4. Structural analysis and the unwritten constitution

In this section, we provide a survey of the constitution's unwritten components, highlighting structural analysis as a methodology to analyze

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58 *Provincial Judges Reference*, *supra* note 20 at para 98.

59 *Secession Reference*, *supra* note 1 at para 32.

60 Hogg, *supra* note 3 at 1–2.

61 *Senate Reference*, *supra* note 40 at para 26.

these. But first, we deal with the general relationship between the written and the unwritten components of the constitution.

Courts have often recognized the primacy of the written text of the constitution over its unwritten elements.[62] In *New Brunswick Broadcasting Co*, the court expressed caution about importing unwritten concepts into a constitutional regime that culminated in a written constitution,[63] a regime which provides "certainty and predictability".[64]

In particular, an overly broad use of unwritten principles could "render many of our written constitutional rights redundant and, in doing so, undermine the delimitation of those rights chosen by our constitutional framers."[65] As the Supreme Court noted in *British Columbia v Imperial Tobacco Canada Ltd*, the rule of law—itself an underlying constitutional principle— "requires that courts give effect to the Constitution's text, and apply, by whatever its terms, legislation that conforms to that text."[66]

Authors like Jean Leclair have been similarly critical of an unconstrained use of underlying principles, principally on the grounds of indeterminacy, inconsistency, and dubious legitimacy.[67] Leclair notes that some underlying principles are "so abstract that, by themselves, they provide no clear answers."[68] He adds that conflicts among underlying principles are inevitable and, perhaps, "irreconcilable".[69] Finally, he argues that the potential for abuse is great, as it could give the judiciary the power to "reshape [the written constitution] in the name of unwritten

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62 *Secession Reference*, *supra* note 1 at para 53; *Toronto City, supra* note 5 at paras 54, 65.

63 *New Brunswick Broadcasting Co*, *supra* note 49 at 355 per Lamer CJ, 376 per McLachlin J.

64 *Secession Reference*, *supra* note 1 at para 53.

65 *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49 at para 65.

66 *Ibid* at para 67.

67 Jean Leclair, "Canada's Unfathomable Unwritten Constitutional Principles" (2002) 27:2 Queen's LJ 389. For other similar critiques, see Jeffrey Goldsworthy, "The Preamble, Judicial Independence and Judicial Integrity" (2000) 11:2 Const Forum Const 60; WH Hurlburt, "Fairy Tales and Living Trees: Observations on Recent Constitutional Decisions of the Supreme Court of Canada" (1999) 26 Man LJ 181; Warren J Newman, "'Grand Entrance Hall,' Back Door or Foundation Stone? The Role of Constitutional Principles in Construing and Applying the Constitution of Canada" (2001) 14 SCLR 197; Jamie Cameron, "The Written Word and the Constitution's 'Vital Unstated Assumptions'" in Thibault, Pelletier & Perret eds, *Essays in Honour of Gérald-A Beaudoin* (Cowansville: Éditions Yvon Blais, 2002) at 89 (many of which are cited by DJ Mullan, "Underlying Constitutional Principles: The Legacy of Justice Rand" (2010) 34 Man LJ 1 at fn 32).

68 Leclair, *supra* note 67 at 410.

69 *Ibid* at 418.

principles." Such judicial involvement, in turn, "might put in jeopardy the democratic process".[70]

The Supreme Court expressed somewhat similar concerns in *Toronto (City) v Ontario (Attorney General)*, when it held that while underlying constitutional principles can play interpretive and gap-filling roles, they cannot be the basis to invalidate legislation.[71] As stated in the *Secession Reference*, recognizing unwritten elements of the Constitution cannot be "taken as an invitation to dispense with the written text of the Constitution", which "provides a foundation and a touchstone for the exercise of constitutional judicial review."[72] Bearing these caveats in mind, we emphasize the interlocking nature of the written and the unwritten components of our overall constitutional arrangements. In Glover Berger's words, structural analysis "does not endorse stretching or ignoring the constitutional text; rather, it calls for interpreting the text in a way that is true to the theories on which the text is based."[73]

The structure of the constitution can be divided into two broad categories: (i) the basic institutions of the state (legislatures, the executive and the courts), including their essential features; and (ii) the norms that govern the operation and interrelations of these basic institutions. While the written Constitution refers to these institutions, it provides a far from complete description of their essential features and the norms that govern their operations and relations *inter se*.

A) The basic institutions and their essential features

As Noura Karazivan explains, "structural analysis … leads the Supreme Court to (1) identify an institution as part of the Canadian constitutional structure; (2) identify the characteristics that are essential to its proper functioning; and (3) conclude that it is impossible to unilaterally enact legislative changes that would impair its essential characteristics."[74] The examples of the Supreme Court, the Senate and Superior Courts illustrate this aspect of structural analysis.

The *Reference re Supreme Court Act, ss 5 and 6* dealt with essential features of the Supreme Court; the Court held that its composition is "constitutionally protected under Part V [the amending formulae] of the Constitution Act, 1982."[75] This flowed from "the Court's historical

70 *Ibid* at 441.

71 *Toronto City*, *supra* note 5 at paras 49–63.

72 *Secession Reference*, *supra* note 1 at para 53.

73 Glover, Structure, Substance and Spirit, *supra* note 27 at 236.

74 Karazivan, *supra* note 30 at 818 [authors' translation].

75 *Reference re Supreme Court Act , ss 5 and 6*, 2014 SCC 21 at para 74.

evolution into an institution whose continued existence and functioning engaged the interests of both Parliament and the provinces,"[76] in particular the abolition of appeals to the Privy Council and the patriation of the Constitution in 1982. The Court held that "[t]he need for a final, independent judicial arbiter of disputes over federal-provincial jurisdiction is implicit in a federal system".[77] After the abolition of appeals to the Privy Council, this role fell to the Supreme Court. At the same time, the Court also gained a role in "the development of a unified and coherent Canadian legal system" more broadly.[78] In addition, the patriation of the Constitution and the adoption of the *Constitution Act, 1982* brought with it the supremacy clause, s. 52(1). The Court held that "[t]he existence of an impartial and authoritative judicial arbiter is a necessary corollary of the enactment of the supremacy clause."[79] As a result, the Court had gained a position "within the architecture of the Constitution", becoming "a foundational premise of the Constitution."[80]

In the *Senate Reference*, the Supreme Court considered whether Parliament could make certain changes to the Senate or abolish it. The Court held that consultative elections for senate appointments would constitute an amendment to the constitution "by fundamentally altering its architecture", modifying "the Senate's role within our constitutional structure as a complementary legislative body of sober second thought" by giving senators democratic legitimacy.[81] Similarly, the abolition of the Senate would "alter the structure and functioning of Part V [of the *Constitution Act, 1982*, the amending formulae]" and thus requires the unanimous consent of Parliament and provincial legislatures.[82] The text of the Constitution provides an incomplete view of the Senate's role and constitutional protection. Although the Constitution confers legislative authority on the Senate similar to that of the House of Commons, the appointment of senators, rather than their election, implies a legislative role of a different nature. This "explains why the framers did not deem it necessary to textually specify how the powers of the Senate relate to those

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76 *Ibid* at para 76.

77 *Ibid* at para 83.

78 *Ibid* at para 85.

79 *Ibid* at para 89.

80 *Ibid* at paras 87, 89.

81 *Senate Reference*, *supra* note 40 at paras 54, 60. For discussion and criticism of the 'architecture' metaphor used by the Court in reasoning about Canada's constitutional arrangements, see Christa Scholz, "The Architectural Metaphor and the Decline of Political Conventions in the Supreme Court of Canada's *Senate Reform Reference*" (2018) 68 UTLJ 661.

82 *Senate Reference, supra* note 40 at para 106.

of the House of Commons or how to resolve a deadlock between the two chambers."[83]

We note that in both the *Senate* and the *Supreme Court References*, the Court cited pre-Confederation debates to identify the "historic political compromises" underlying the constitutional text and, in turn, the essential features of the basic institutions of the state.[84]

Along similar lines, s. 96 of the *Constitution Act, 1867* has been interpreted so as to protect the "core" jurisdiction of superior courts, being that which is "integral to their operations" or "part of their essence as superior courts."[85] This jurisdiction cannot be altered except by constitutional amendment. In determining whether a particular authority (such as that to try for contempt) is part of the essence of a superior court, we look to authority exercised historically by superior courts, the role of superior courts in our constitutional order, and to "the very concept of a court of law".[86]

The House of Commons, the provincial legislatures and the Crown (the executive federally and provincially) are also essential institutions.[87] They are part of the constitutional scheme that Canada inherited from the

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[83] *Ibid* at para 59; See also *Re: Authority of Parliament in relation to the Upper House*, [1980] 1 SCR 54, 102 DLR (3d) 1 where the Court held that the elimination of the Senate would "alter the structure of the federal Parliament to which the federal power to legislate is entrusted under s. 91 of the Act". The Senate has a "vital role as an institution forming part of the federal system created by the Act" (at 66). "[I]t is not open to Parliament to make alterations which would affect the fundamental features, or essential characteristics, given to the Senate" (at 78).

[84] See J Gareth Morley, "Dead Hands, Living Trees, Historic Compromises: The Senate Reform and Supreme Court Act References Bring the Originalism Debate to Canada" (2016) 53:3 Osgoode Hall LJ 745; Sébastien Grammond, "Compact is Back: The Supreme Court of Canada's Revival of the Compact Theory of Confederation" (2016) 53:3 Osgoode Hall LJ 3.

[85] *MacMillan Bloedel Ltd v Simpson*, [1995] 4 SCR 725 at paras 15, 36, 130 DLR (4th) 385 [*MacMillan Bloedel*]; *Reference re Code of Civil Procedure (Que), art 35,* 2021 SCC 27 at para 65.

[86] *Attorney General of Canada v Law Society of British Columbia*, [1982] 2 SCR 307, 137 DLR (3d) 1; *MacMillan Bloedel*, *supra* note 85 at para 39, quoting *Borrie and Lowe's Law of Contempt*, 2nd ed.

[87] The protection of the office of the Lieutenant Governor from unilateral modification by provincial legislatures may be another example of this form of structural analysis (*Re The Initiative and Referendum Act*, [1919] AC 935 (PC)); On the status of the administrative state, see Kate Glover Berger, "The Structural and Administrative Demands of Unwritten Constitutional Principles" (2019), 65:2 McGill LJ 305 at 308; Kate Glover Berger, "The Constitutional Status of the Administrative State" (2019), online (pdf), *Social Science Research Network*: <papers.ssrn> [perma.cc/Y6F2-ZTMN].

UK and that was given effect with a federal structure in the *Constitution Act, 1867*.

B) The norms that govern the basic institutions, their operation and interrelations

Constitutional norms govern the operation and interrelations of these basic institutions. As noted, these include: (a) Parliamentary privilege, (b) Crown prerogative, (c) conventions and (d) underlying constitutional principles. Together, they give effect to the Westminster system of government in Canada, federally and provincially. Of course, not every case involving these unwritten components of the constitution requires the use of structural analysis; in many cases, a court may simply apply binding precedent to the matter before it. However, when difficulties arise about the scope or effect of these unwritten norms, courts often address them using structural analysis. We offer some examples in what follows.

1) Parliamentary privilege

Legislatures in Canada were modelled on the British Parliament, and like that Parliament, they enjoy certain privileges. These privileges are held by the federal Senate and House of Commons and by the provincial legislative assemblies.[88] They flow from pragmatism and historical tradition, serving to protect freedoms that are necessary for the exercise of legislative authority.[89] In Britain, Parliamentary privilege "developed through the struggle of the House of Commons for independence from the other branches of government", i.e., the Crown and the courts.[90] For example, in 1629, Charles I had Sir John Eliot and two other Members imprisoned for sedition for words spoken in debate in the House.[91] The autonomy of our legislatures is protected from such intervention (and from less dramatic interventions) by Parliamentary privilege.

As explained in *Canada (House of Commons) v Vaid*, intervention by the executive or by the courts in the workings of legislatures "would inevitably create delays, disruption, uncertainties and costs which would hold up the nation's business and on that account would be unacceptable".[92] Protection from such interventions is reflected in the test for Parliamentary privilege, which asks whether the privilege which is asserted is necessary for the legislature to do its work. "The historical

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88 *Canada (House of Commons) v Vaid*, 2005 SCC 30 at para 29 [*Vaid*].

89 *New Brunswick Broadcasting Co*, *supra* note 49 at 378–390.

90 *Chagnon*, *supra* note 49 at para 22.

91 As noted by Lamer CJ in *New Brunswick Broadcasting Co*, *supra* note 49 at 344.

92 *Vaid*, *supra* note 88 at para 20.

foundation of every privilege of Parliament is necessity. If a sphere of the legislative body's activity could be left to be dealt with under the ordinary law of the land without interfering with the assembly's ability to fulfill its constitutional functions, then immunity would be unnecessary and the claimed privilege would not exist."[93] Structural reasoning is necessarily engaged in determining whether this test is met in a given case.[94] A court asks what is necessary for the functioning of the legislature, just as, in determining the core jurisdiction of superior courts, it asks what is essential to their operation. Here again, the court needs to look at the "historical roots of the claim" since "[t]he fact that this privilege has been upheld for many centuries … is some evidence that it is generally regarded as essential to the proper functioning of a legislature patterned on the British model".[95]

While the existence and limits of Parliamentary privilege are justiciable, their operation is not. Once a court finds that a privilege exists and describes its extent, the courts' role ends. It is for the legislature itself to determine whether the exercise of the privilege was proper; such matters are not reviewable by the courts. This limit on justiciability reflects the fact that Parliamentary privilege is "underpinned by the principle of the separation of powers", as the Supreme Court of the United Kingdom has recently highlighted.[96] This principle, "so far as relating to the courts and Parliament, requires each of them to abstain from interference with the functions of the other, and to treat each other's proceedings and decisions with respect. It follows that it is no part of the function of the courts under our constitution to exercise a supervisory jurisdiction over the internal procedures of Parliament."[97] The role of the judiciary as regards Parliamentary privilege is not set out in the written constitution, but follows from the underlying principle of the separation of powers, a principle that underpins the Westminster system in Canada as it does in

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93 *Ibid* at para 29, citing *New Brunswick Broadcasting Co*, *supra* note 49 at 343, 382.

94 *New Brunswick Broadcasting Co*, *supra* note 49 at 378–384 ("in ascertaining what constitutional powers our legislative assemblies have we should begin by looking at the powers which historically have been ascribed to the Parliament of the United Kingdom".) See Karazivan, *supra* note 30 at 813 who also views the test for Parliamentary privileges as an instance of structural analysis.

95 *Vaid*, *supra* note 88 at para 29, citing *New Brunswick Broadcasting*, *supra* note 49 at 387.

96 *R (on the application of SC, CB and 8 children) v Secretary of State for Work and Pensions and others*, [2021] UKSC 26 at para 165 (Lord Reed) [*Secretary of State for Work and Pensions*]; see also *Chagnon*, *supra* note 49 at para 26: the existence of Parliamentary privilege and the limits on their justiciability "preserve the separation of powers and promote the proper functioning of representative democracy".

97 *Secretary of State for Work and Pensions, supra* note 96 at para 165; see also *Chagnon, supra* note 49 at para 26.

Britain.[98] The preamble of the *Constitution Act, 1867* serves as a "reminder" that the purpose of Parliamentary privilege "was that the courts would not attempt to regulate the internal affairs of Parliament".[99]

2) Crown prerogative

Crown prerogative is the "residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown."[100] It is critical in a few areas, notably the choice of the First Minister, appointment of Ministers, judicial appointments, foreign relations and declaration of war.[101] Otherwise, it is largely superseded by authority delegated under statute. (Some authors categorize the Crown's "common law" powers, such as holding property, entering contracts and spending money, as part of the prerogative; others characterize these powers as stemming from a

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98 The status of the separation of powers in Canada's constitution has been doubted, given that "the Canadian Constitution does not insist on a strict separation of powers": *Secession Reference*, *supra* note 1 at para 15; see also Elliot, *supra* note 26 at 134. It is true that under our system of responsible government, Cabinet joins the legislative and executive parts of the state: *Reference re Canada Assistance Plan (BC)*, [1991] 2 SCR 525 at 559, 83 DLR (4th) 297 [*Canada Assistance Reference*], quoting W Bagehot, *The English Constitution* (1872), at 14. However, the Supreme Court has repeatedly described the separation of powers (albeit not a watertight separation) as a fundamental principle of the Canadian constitution: *Provincial Judges Reference*, *supra* note 20 at para 138; *Wells v Newfoundland*, [1999] 3 SCR 199 at paras 52, 54, 177 DLR (4th) 73 [*Wells*]; *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at para 107; *Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854 at paras 3, 10, 140 DLR (4th) 193, all cited by Côté J. in *Greenhouse Gas Reference, supra* note 37 at para 279.

99 Oliver, *supra* note 22 at 220.

100 *Canada (Prime Minister) v Khadr*, 2010 SCC 3 at para 34 [*Khadr*], citing *Reference as to the Effect of the Exercise of the Royal Prerogative of Mercy Upon Deportation Proceedings*, [1933] SCR 269 at 272, 2 DLR 348 per Duff CJ, quoting A V Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed (1915) at 420.

101 *Black v Canada (Prime Minister)*, [2001] 54 OR (3d) 215 at para 36, 199 DLR (4th) 228 (ON CA), citing *Council of Civil Service Unions v Minister for the Civil Service*, [1985] 1 AC374, at 418: "[T]he modern exercise of the prerogative includes "the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others …" It also plays a role in defining certain proprietary entitlements of the Crown, such as escheat and *bona vacantia*. See Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown; and the Relative Duties and Rights of the Subject*, (London: Butterworth and Son, 1820) at 199–242. On the status of these entitlements under the *Constitution Act, 1867*, see *Attorney-General of Ontario v Mercer* (1883) 8 App Cas 767 (JCPC); *Attorney General for British Columbia v The King*, [1922] 63 SCR 622; *Canada (Attorney General) v Alberta (Attorney General)*, [1928] AC 475 (JCPC).

separate source of authority.[102] We focus here on those powers that are unique to the Crown.)

Crown prerogative is governed by norms relating to its operation and its relation to other authorities exercised by the institutions of state. These are referred to somewhat generally in ss. 9 and 15 of the *Constitution Act, 1867*.[103] However, identifying specific prerogatives and understanding the authority of the legislature and the courts in relation to such prerogatives requires a historical perspective. Crown prerogative is referred to as a "residue" of authority as it has been greatly limited over time for reasons to do with the separation of powers, essentially so that the authority of the executive (once the monarch personally) cannot overbear the authority of the other principal institutions of the state, the legislature and the courts.[104]

While Crown prerogative has been narrowed, it remains an essential source of authority, one not granted by statute nor described in the text of the constitution. Crown prerogative is a component of our constitutional arrangements without which the executive (and sometimes the Governor General or the Lieutenant Governor personally) would be unable to carry out certain key functions.

One can see parallels with the Supreme Court's jurisprudence on the constitutional protection of essential features of the basic institutions of the state (such as the Senate, superior courts, and the Supreme Court itself). Drawing on this jurisprudence, some scholars have suggested that certain Crown prerogatives, such as the dissolution of the legislature triggering a general election, could be considered "essential to the offices of the Queen and her representatives" and could thus be abolished or altered only by means of a constitutional amendment.[105]

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[102] See Stephen Sedley, *Lions Under the Throne: Essays on the History of English Public Law,* (Cambridge, UK: Cambridge University Press, 2015) at 135; Peter Hogg, Wade Wright & Patrick Monahan, *Liability of the Crown*, 4th ed (Carswell, 2011) at 19–20; *Canadian Federation of Students v Ontario (Colleges and Universities)*, 2021 ONCA 553; BV Harris, "The 'Third Source' of Authority for Government Action" (1992) 108 Law Q Rev 626; Adam Perry, "The Crown's Administrative Powers" (2015) 131 Law Q Rev 652.

[103] For a more detailed account of the relationship between Crown prerogatives and the provisions of the Constitution, see Patrick F Baud, "The Crown's Prerogatives and the Constitution of Canada" (2021) 3 J Commonwealth L 219 at 231–237.

[104] See in particular *Prohibition del Roy*, [1607] 12 Co Rep 63, 77 ER at 1342; C*ase of Proclamations*, [1611] 12 Co Rep 74, 77 ER 1352 (KB).

[105] Baud, *supra* note 103 at 251; citing Adam Dodek, "Uncovering the Wall Surrounding the Castle of the Constitution: Judicial Interpretation of Part V of the Constitution Act, 1982" in Emmett Macfarlane, ed, *Constitutional Amendment in Canada* (Toronto: University of Toronto Press, 2016) 42 at 52–53; Philippe Lagassé & Patrick Baud,

Courts can determine what prerogative powers exist and whether a given exercise of these powers violates the *Charter* or other constitutional norms.[106] However, "[i]t is for the executive and not the courts to decide whether and how to exercise its powers."[107] Under the Westminster system, exercise of the Crown's prerogative powers is "regulated largely by conventions, not laws".[108] This feature of prerogative powers, and the relationship it reflects between the courts and the Crown, was left unwritten as it was assumed to be carried forward from the British constitutional tradition.

3) Constitutional conventions

Constitutional conventions are political rules related to the exercise of authority. They tend to apply within the executive and to the relationship between the executive and the legislature, though they may also apply to other basic institutions of the state. Conventions are often said to be non-legal rules, and therefore not directly enforceable by courts; however, as noted in the *Re Resolution to amend the Constitution*, "while they are not laws, some conventions may be more important than some laws."[109]

The British scholar Geoffrey Marshall defines conventions as "binding rules of constitutional behavior which are considered to be binding by and upon those who operate the Constitution, but which are not enforced by the law courts (although the courts may recognize their existence), nor

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"The Crown and Constitutional Amendment" in Emmett Macfarlane, ed, *Constitutional Amendment in Canada* (Toronto, 2016) 248.

[106] *Khadr*, *supra* note 100 at para 36, citing *Operation Dismantle v The Queen*, [1985] 1 SCR 441, 18 DLR (4th) 481; *Air Canada v British Columbia (Attorney General)*, [1986] 2 SCR 539, 32 DLR (4th) 1.

[107] *Khadr*, *supra* note 100 at para 36.

[108] Hogg, *supra* note 3 at 1–9.

[109] *Patriation Reference*, *supra* note 20 at 883 and *Osborne v Canada (Treasury Board)*, [1991] 2 SCR 69 at 87, 82 DLR (4th) 321: "while conventions form part of the Constitution of this country in the broader political sense, i.e., the democratic principles underlying our political system and the elements which constitute the relationships between the various levels and organs of government, they are not enforceable in a court of law unless they are incorporated into legislation". The view that conventions are and should be unenforceable non-legal rules has been challenged: see Farrah Ahmed, Richard Albert & Adam Perry, "Judging Constitutional Conventions" (2019) 17:3 *International Journal of Constitutional Law* 787. We express no view on this. See also Farrah Ahmed, Richard Albert & Adam Perry, "Enforcing Constitutional Conventions" (2020) 17:4 Intl J Constitutional L 787; *R (on the application of Miller and Another) v Secretary of State for Exiting the European Union,* [2017] UKSC 5; *R (on the application of Miller) v The Prime Minister*, [2019] UKSC 41; Scholz, *supra* note 81; Emmett MacFarlane, "The Place of Constitutional Conventions in the Constitutional Architecture, and in the Courts" (2022) 55 Can J Political Science 322.

by the presiding officers in the Houses of Parliament."[110] The Canadian scholar Andrew Heard describes conventions as "obligations upon political actors to act in a way other than what the formal law prescribes or allows."[111] While conventions are not enforced by courts, their existence and effect have been recognized by courts.[112]

Conventions are integral to coherent and comprehensive constitutional arrangements under the Westminster system. They are "the flesh which clothes the dry bones of the law".[113] They define how critical institutions like cabinet operate, and how it relates to the Governor, the First Minister and the legislature; they largely define our system of responsible government.[114] For example, how the First Minister is chosen and what authority they can exercise is described in conventions, rather than in the written constitution.

Constitutional conventions arise and take form over time. This is reflected in the three requirements for establishing the existence of a convention: (1) precedents, (2) whether actors in the past have treated the rule as binding, and (3) the "reason for the rule".[115] The leading example of this is the *Patriation Reference*, in which the Court identified a convention requiring substantial provincial consent to constitutional changes affecting provincial interests or authority. The Court referred to extrinsic evidence of this practice at different times in Canadian history and concluded that its purpose was to "protect the federal character of the Canadian Constitution and prevent the anomaly that the House of Commons and Senate could obtain by simple resolutions what they could not validly accomplish by statute".[116] To identify the convention, the Court had to comprehend the purpose of the accepted practices in our constitutional order—an instance of structural analysis. Historical perspective was necessary to identify those political rules that are essential for our system of governance to function.

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110 Geoffrey Marshall & Graeme C Moodie, *Some Problems of the Constitution*, (London: Hutchinson, 1971) at 23–24.

111 Andrew Heard, *Canadian Constitutional Conventions, The Marriage of Law and Politics*, 2nd ed (Toronto: Oxford University Press, 2013) at 5. See also Rowe & Déplanche, *supra* note 8 at 433 for a more detailed inquiry into the definition of constitutional conventions.

112 See for example *Canada Assistance Reference*, *supra* note 98 at 547; *Arseneau v The Queen*, [1979] 2 SCR 136, at 149, 95 DLR (3d) 1; *Attorney General of Quebec v Blaikie et al*, [1981] 1 SCR 312, at 320, 123 DLR (3d) 15; *Wells supra* note 98 at para 54.

113 Sir Ivor Jennings, *The Law of the Constitution*, 5th ed (London: University of London Press, 1964) at 81–82.

114 Heard, *supra* note 111 at 84; Hogg, *supra* note 3 at 1–2.

115 *Patriation Reference*, *supra* note 20 at 888, citing Jennings, *supra* note 113 at 136.

116 *Patriation Reference*, *supra* note 20 at 905–909.

Conventions often affect how legal authority is exercised in practice.[117] By means of conventions, much of the authority conferred on the Governor is exercised in accordance with "advice" given by the First Minister and cabinet, that is those who are elected. Conventions can even "negate clear legal duties" and other legal rules, sometimes doing so in ways that may bring practices more in line with underlying principles. For example, convention appears to have negated the duty on the Governor General under s. 56 of the *Constitution Act, 1867* to "send copies to the Queen of all federal legislation enacted into law", reflecting Canada's self-governing status.[118] A further example might be the federal cabinet's powers of reservation and disallowance of provincial legislation, set out in in ss. 55, 56 and 90 of the *Constitution Act, 1867*. While these powers subsist in law, some scholars argue that there is a convention against their exercise.[119] We express no view on this.

4) Underlying constitutional principles

We use here, as we have throughout, the term "underlying" principles, rather than "unwritten" principles as many authors do and, indeed, as the Supreme Court has done. This we do for clarity. Conventions, Crown prerogative and Parliamentary privilege are all unwritten in that they are not dealt with in the written constitution, nor are they described in a definitive way elsewhere. The underlying principles with which we deal in this section are not the foregoing. Rather, they are principles like "democracy", "federalism", "the separation of powers" and "the rule of law".

They are "basic principles inherent in a given form of governance" from which concrete rules can be derived "to make the system work in a coherent fashion."[120] In the *Secession Reference*, the Court stated that these principles "inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based."[121] Underlying principles follow from the architecture of our constitution; it would be

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117 Heard, *supra* note 111 at 53, 73; *Canada Assistance Reference*, *supra* note 98 at 546–547: "The Governor General's executive powers are of course exercised in accordance with constitutional conventions. For example, after an election he asks the appropriate party leader to form a government. Once a government is in place, democratic principles dictate that the bulk of the Governor General's powers be exercised in accordance with the wishes of the leadership of that government, namely the Cabinet".

118 Heard, *supra* note 111 at 24.

119 *Reference re The Power of the Governor General in Council to Disallow Provincial Legislation and the Power of Reservation of a Lieutenant-Governor of a Province*, [1938] SCR 71, 2 DLR 8; Hogg, *supra* note 3 at § 5:13 (arguing for convention).

120 Johnson, *supra* note 28 at 1089.

121 *Secession Reference*, *supra* note 1 at para 49.

"impossible to conceive of our constitutional structure without them" as they "dictate major elements of the architecture of the Constitution."[122] They provide a framework to understand how various constitutional arrangements work together, either by way of interpretation or by filling gaps in the constitutional text.

Such principles are at a high level of generality. In particular circumstances, more specific rules can be derived from them. As noted, Johnson refers to this as "reasoning from constitutional essentials", "a pragmatic analysis that moves from the abstract propositions that define a constitutional democracy to the concrete legal rules necessarily implicit in those propositions."[123] Similarly, Mark D Walters refers, in a discussion on "unwritten constitutionalism," to "identifying the practical legal implications" that can be drawn from the "forms of constitutionalism to which societies commit themselves."[124]

An example is comity, or the 'full faith and credit' doctrine, which is inferred from the principle of federalism, together with certain passages of constitutional text. As the Supreme Court wrote in *Hunt v T & N PLC*, "the 'integrating character of our constitutional arrangements as they apply to interprovincial mobility' calls for the courts in each province to give 'full faith and credit' to the judgments of the courts of sister provinces. This … is inherent in the structure of the Canadian federation, and, as such, is beyond the power of provincial legislatures to override."[125] The doctrine has been recognized on the basis of "the '[d]esire' of the founding provinces 'to be federally united into One Dominion', an organizing principle of the Constitution."[126]

We describe such underlying principles as being derived from the architecture of our constitutional arrangements. We would note that Chief Justice McLachlin, writing extra-judicially, has offered a different view, that underlying constitutional principles "can be seen as a modern reincarnation of the ancient doctrines of natural law."[127] With the greatest

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122 *Secession Reference*, *supra* note 1 at para 51.

123 Johnson, *supra* note 28 at 1093.

124 Mark D Walters, "Written Constitutions and Unwritten Constitutionalism," in Grant Huscroft, ed, *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge: Cambridge University Press, 2008) 245 at 261; cited by Johnson, *supra* note 28 at 1089.

125 *Hunt v T & N PLC*, [1993] 4 SCR 289 at 329, 109 DLR (4th) 16. For related discussion of interprovincial mobility, see the reasons of Rand J in *Winner v SMT (Eastern) Ltd*, [1951] SCR 887, 4 DLR 529.

126 *Provincial Judges Reference*, *supra* note 20 at para 97.

127 The Rt Hon Beverley McLachlin, "Unwritten Constitutional Principles: What is Going On?" (2006) 4:2 New Zealand J Public Intl L 147 at 149.

of respect, on our reading of the jurisprudence, such principles have not been derived from natural law, but rather from constitutional structure. The idea of natural law is that there are certain abiding truths relating to justice and society which, as a philosophical matter, substantive law must incorporate.[128] Those are legitimate and important questions, but they are not what has been dealt with in structural analysis and the underlying constitutional principles recognized to date. Are there underlying constitutional principles other than those identified through structural analysis, for example based on natural law? That is a question that has not been asked and answered and we offer no view.

The underlying principles to which we refer are all tethered to the structure of the constitution. This structure is historically contingent; unlike natural law, the constitutional structure could have been different than it is. These principles are basic to our system of governance and its institutions. Underlying principles both undergird constitutional arrangements, notably those set out in the *Constitution Acts 1867 & 1982*, and overarch such arrangements, providing a conceptual framework in which all such arrangements operate. This is distinct from the substantive content of the law. They are about who decides what and how they decide it, rather than what gets decided.

In the *Secession Reference*, the Court identified four such principles: federalism, democracy, the rule of law and the protection of minorities. In the *Provincial Judges Reference* the Court referred to judicial independence as another such principle.[129] Since the *Secession Reference*, scholars have considered whether other principles could be added. Elliot identified twelve principles: federalism, democracy, the rule of law, the protection of minorities, judicial independence, the role of the provincial superior courts, individual rights and freedoms, interprovincial comity, the separation of powers, economic union, the integrity of the nation state and the integrity of the Constitution.[130]

We will illustrate the value of a structural approach to underlying principles by reference to the proposed principle of individual rights and freedoms. Drawing on a number of cases often referred to as the implied

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[128] St. Thomas Aquinas, *Summa Theologica*, (London: R & T Washbourne Ltd, 1915); John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980).

[129] *Provincial Judges Reference*, *supra* note 20 at para 105; see also *Ell v. Alberta*, 2003 SCC 35.

[130] Elliot, *supra* note 26 at 98–139. See also Guy Régimbald & Dwight Newman, *The Law of the Canadian Constitution*, 2nd ed (Toronto: LexisNexis, 2017).

Bill of Rights cases,[131] Elliot and other commentators have included "individual rights and freedoms" in the list of underlying constitutional principles.[132] In *Reference Re Alberta Statutes, The Bank Taxation Act; The Credit of Alberta Regulation Act; and the Accurate News and Information Act*, some members of the Supreme Court implied into the constitution the existence of a "right of public discussion", which provincial legislatures could not curtail so as to "substantially … interfere with the working of the parliamentary institutions of Canada."[133] Similarly, in *Switzman v Elbling and Attorney General of Quebec*, Justice Rand reasoned that the preamble of the *Constitution Act, 1867* contemplated a system of parliamentary government "with all its social implications", including "government by free public opinion of an open society" and "access to and diffusion of ideas."[134] Thus, provincial legislatures could not prohibit the use of a house to propagate communism.[135] In a *dictum* in *Ontario (Attorney General) v OPSEU*, Justice Beetz wrote 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."[136]

It has sometimes been suggested that these cases establish a principle that corresponds to the natural rights and freedoms of human beings under natural law.[137] However, in the pre-Charter case of *Dupond v City of Montreal*, the appellants argued, relying on *Alberta Statutes*, that a municipal by-law was invalid because it was "in conflict with the fundamental freedoms of speech, of assembly and association, of the press and of religion".[138] Justice Beetz rejected this argument.[139] In the

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131 For commentary, see Dale Gibson, "Constitutional Amendment and the Implied Bill of Rights" (1967) 12:4 McGill LJ 497; Andrée Lajoie, "The Implied Bill of Rights, the Charter and the Role of the Judiciary" (1995) 44 UNBLJ 337.

132 Elliot, *supra* note 26 at 124–126; referring to *Reference Re Alberta Statutes, The Bank Taxation Act; The Credit of Alberta Regulation Act; and the Accurate News and Information Act*, [1938] SCR 100, 2 DLR 81 [*Alberta Statutes*]; *Switzman v. Elbling and Attorney General of Quebec*, [1957] SCR 285, 7 DLR (2d) 337 [*Switzman*].

133 *Alberta Statutes, supra* note 132 at 133–134.

134 *Switzman, supra* note 132 at 306.

135 See also *Saumur v City of Quebec*, [1953] 2 SCR 299 at 330, 4 DLR 641 [*Saumur*].

136 *Ontario (Attorney General) v OPSEU*, [1987] 2 SCR 2 at para 151, 41 DLR (4th) 1 [*OPSEU*]. In a separate opinion in *R v Demers*, 2004 SCC 46 at paras 79–86, LeBel J. also opined that "respect for human rights and freedoms" was a principle underlying our constitutional arrangement.

137 Eric Cline & Michael J Finley, "Whither the Implied Bill of Rights: *AG Canada and Dupond v. The City of Montreal*" (1980) 45:1 Sask LR 137 at 140.

138 *Dupond v City of Montreal*, [1978] 2 SCR 770 at 788, 84 DLR (3d) 420.

139 *Ibid* at 796–797; See also *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295, at 348, 18 DLR (4th) 321: "before the passage of the Canadian Bill of Rights and the entrenchment of

Secession Reference, the Court referred to these cases not as evidence of an underlying principle of individual rights and freedoms but rather as evidence of the principle of democracy, "the baseline against which the framers of our Constitution, and subsequently, our elected representatives under it, have always operated."[140]

The court in the *Secession Reference* took a structural approach, focusing on how legal rights and freedoms relate to the basic institutions of the state. Democratic institutions "requir[e] a continuous process of discussion" and "res[t] ultimately on public opinion reached by discussion and the interplay of ideas."[141] These cases draw implications from the democratic nature of our political institutions, in particular the requirement of freedom of political speech: "political institutions are fundamental to the 'basic structure of our Constitution' and for that reason governments cannot undermine the mechanisms of political accountability which give those institutions definition, direction and legitimacy."[142]

The jurisprudence to date seems to suggest a distinction between individual rights and freedoms generally, and those rights which are necessarily implied by the establishment of democratically elected parliamentary institutions. In *AG Can v Law Society of BC*, another pre-*Charter* case, the applicant argued that a ruling from the Law Society of British Columbia prohibiting him from informing the public about the type and cost of legal services he provided violated his right to freedom of speech. The Court rejected the argument and distinguished the case from *Alberta Statutes* because "[t]he freedom of expression with which the Court is here concerned of course has nothing to do with *the elective process and the operations of our democratic institutions*."[143] Whether such a distinction will be highlighted in future cases remains to be seen.

The idea of constitutional structure provides an anchor for identifying and giving effect to underlying principles. It explains why they are not "an invitation to dispense with the written text of the Constitution", which is

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the *Charter*, human rights and freedoms, no matter how fundamental, were constitutionally vulnerable to government encroachment."

140 *Secession Reference*, *supra* note 1 at para 62.

141 *Secession Reference*, *supra* note 1 at para 68, citing *Saumur*, *supra* note 135 at 330.

142 *Provincial Judges Reference*, *supra* note 20 at para 103; citing *OPSEU*, *supra* note 136 at 57, 102; where Lamer CJ notes that *Alberta Statutes, Saumur* and *Switzman* derived an "appreciation of the interdependence between democratic governance and freedom of political speech" from the "preamble's recognition of Parliamentary democracy".

143 *AG Can v Law Society of BC*, [1982] 2 SCR 307 at 364, 137 DLR (3d) 1 [emphasis added]. A related distinction has been drawn under s. 2(b) of the *Charter*: *Rocket v Royal College of Dental Surgeons of Ontario*, [1990] 2 SCR 232, 71 DLR (4th) 68.

the primary expression of our constitutional arrangements.[144] Moreover, because they are necessarily implied by the constitutional structure, the list of underlying constitutional principles is not infinitely expansible so as to accommodate any principle of public law. These underlying principles of our constitution are operational, not aspirational.

5. Conclusion

Major components of our constitution are found outside the *Constitution Acts 1867 & 1982*. A coherent and comprehensive set of constitutional arrangements comes into view only when we add Parliamentary privilege, Crown prerogative, conventions and underlying principles. These unwritten components pertain to the structure of the constitution, i.e. to the basic institutions of the state, and to the norms that govern their operations and their relations *inter se*. Structural analysis is an essential methodology for discerning and applying the unwritten constitution. It is only by considering what is necessarily implied in our constitutional arrangements, in light of their historical development, that the Canadian constitution can be fully understood.

144 *Secession Reference*, *supra* note 1 at para 53.