The Constitution of Canada

The Honourable Justice Mr. Malcolm Rowe & Michael Collins

THE CONSTITUTION OF CANADA is the body of rules deciding what decisions can be made by whom. It consists of the written constitution, Aboriginal and treaty rights, Indigenous self-governments, the conventions of the Westminster system of government, the laws and customs of Parliament, quasi-constitutional statutes, and constitutional jurisprudence. This article (originally given as a speech on February 15, 2017 at the University of Ottawa Faculty of Law) focuses on constitutional conventions, the privileges of the legislature, and jurisprudence referred to as "structural argumentation." These are key parts of Canada's constitutional arrangements, but they are often overlooked and they are infrequently dealt with in the jurisprudence.

LA CONSTITUTION DU CANADA est l'ensemble des règles qui dictent quelles décisions peuvent être prises et par qui. Ce corpus de textes comprend la constitution écrite, les droits ancestraux et issus de traités, la reconnaissance des peuples autochtones autonomes, les conventions du système de gouvernement de Westminster, les lois et coutumes du Parlement, les lois quasi-constitutionnelles, et la jurisprudence constitutionnelle. Cet article (qui, à l'origine, fut un discours donné le 15 février 2017 à la Faculté de droit de l'Université d'Ottawa) se concentre sur les conventions constitutionnelles, les privilèges de la législature, et la jurisprudence à laquelle on réfère en tant qu'« argumentation structurelle ». Il s'agit là d'aspects essentiels qui font partie intégrante des arrangements constitutionnels du Canada, mais qui sont souvent négligés et rarement traités par la jurisprudence.

CONTENTS

The Constitution of Canada
The Honourable Justice Mr. Malcolm Rowe[*] *& Michael Collins*[**]

Introduction **95**

I. The Unwritten Constitution **97**

II. The Laws and Customs of Parliament **100**

III. Quasi-Constitutional Statutes **101**

IV. Selected Jurisprudence **102**
- A. Conventions **102**
- B. Legislatures **103**
- C. Structural Argumentation **105**

The Constitution of Canada

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INTRODUCTION

What is "The Constitution of Canada?" It is that body of rules defining what decisions can be made by whom. One can describe this in various ways. I will do so by reference to seven main parts.

First, there is the written constitution. The *Constitution Act, 1982* provides, in subsection 52(1), that "[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."[1] Subsection 52(2) defines the "Constitution of Canada" to include the Constitution Acts of 1982 and 1867 (formerly the *British North America Act*), as well as 29 other statutes and orders (some Canadian, some Imperial) set out in a schedule.[2] Examples include amendments to the *Constitution Act, 1867*,[3] the instruments whereby provinces entered Confederation after 1867,

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1 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 52(1) [*Constitution Act, 1982*].

2 *Ibid*, s 52(2).

3 *Constitution Act, 1867*, 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act, 1867*].

and the Imperial order transferring the Arctic Islands to Canada in 1880.[4] Yet, the Constitution of Canada consists of far more than what is referred to in section 52.

A second part is Aboriginal and treaty rights. But, you may ask, is this not part of the written Constitution, under section 35(1) of the *Constitution Act, 1982*? However, section 35(1) does not create Aboriginal and treaty rights; rather, it "recognizes and affirms" those rights, in effect giving them constitutional protection. The rights themselves are defined by two things: first, the treaties with Indigenous peoples, and second, by the common law. Thus, decisions dealing with Aboriginal rights are properly seen as decisions at common law, albeit with section 35(1) protection.

A third part is made up of constitutional arrangements for Indigenous self-government. These are set out in modern treaties, *e.g.* the 2005 Nunatsiavut self-government agreement for Inuit in northern Labrador.[5] In arriving at self-government arrangements, I expect that decisions by Indigenous peoples will be informed by Indigenous law. By this I mean that body of customs, practices, and rules by which Indigenous peoples governed themselves historically and which increasingly is being given modern expression.[6]

A fourth part, indeed the largest part of the Constitution, is unwritten, being the Westminster model of government that we received from the United Kingdom. The preamble to the *Constitution Act, 1867* states that the colonies desire "to be federally united into One Dominion…with a Constitution similar in Principle to that of the United Kingdom."[7] This model of government has evolved in Canada since 1867 and will continue to do so. The model is essentially consistent as among the federal government, the governments of the provinces, and the government of Yukon. (Things operate somewhat differently in the Northwest Territories and Nunavut.) The unwritten Constitution is comprised of conventions, being practices that have been adhered to so consistently and for such an extended period that they have become accepted rules. For example, a First Minister can

4 *Adjacent Territories Order*, Order in Council (UK), 31 July 1880, reprinted in RSC 1985, Appendix II, No 14.

5 *Land Claims Agreement between the Inuit of Labrador and Her Majesty the Queen in Right of Newfoundland and Labrador and Her Majesty the Queen in Right of Canada*, 22 January 2005, online: <www.aadnc-aandc.gc.ca/eng/1293647179208/1293647660333>; *Labrador Inuit Land Claims Agreement Act*, SC 2005, c 27.

6 See generally John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010).

7 *Constitution Act, 1867*, *supra* note 3, Preamble.

hold office only so long as his or her ministry has the confidence of the legislature.

A fifth part relates to the operation of legislatures, what is often referred to as "the laws and customs of Parliament," about which I will say more presently.

A sixth part consists of statutes that are quasi-constitutional, *e.g.* statutes governing elections. These vary from jurisdiction to jurisdiction, but in their broad content they do so relatively little. For example, all legislatures in Canada have single-member constituencies and a first-past-the-post electoral system. But, Quebec stands out by virtue of its provincial *Charter of rights*.[8]

A seventh part consists of constitutional jurisprudence. This consists primarily of decisions interpreting and applying the written Constitution and quasi-constitutional statutes. Far fewer cases have dealt with conventions and parliamentary privilege. And, in a very few cases, courts have undertaken the most esoteric task, "structural argumentation."

It is not my intention to deal with the written Constitution. Thus, I will not speak about the division of powers or the *Charter*. Nor will I speak about Aboriginal and treaty rights, or Indigenous self-government. Rather, I will speak about the unwritten Constitution, the operation of legislatures, quasi-constitutional statutes, and jurisprudence on conventions.

I. THE UNWRITTEN CONSTITUTION

Most of the Constitution is unwritten. This need not be so. It is open to the federal government or the government of any province to establish a new framework for the operation of government, provided that it does not run afoul of the written Constitution or the "organizing principles" discussed below as "structural argumentation."[9] In 2002, the Quebec government issued a consultation document, *Citizen Empowerment*, which posed the possibility of abandoning the Westminster model and moving to an American style system, within the Canadian federation.[10] This would have necessitated a written constitution unique to Quebec.

The unwritten Constitution is comprised of conventions. No definitive statement of constitutional conventions exists, nor is it possible to make

8 *Charter of human rights and freedoms*, CQLR c C-12 [Quebec *Charter*].

9 See Part IV(c), "Structural Argumentation," below.

10 Jean-Pierre Charbonneau, *Citizen Empowerment: A Paper to Open Public Debate* (Québec City: Secréteriat à la réforme des institutions démocratiques, 2002).

one. What can be done is to describe what occurs in practice. The seminal work was in *An Introduction to the Study of the Law of the Constitution* by A.V. Dicey, first published in 1885.[11] The leading modern work is Geoffrey Marshall's *Constitutional Conventions: The Rules and Forms of Political Accountability*, published in 1984.[12] These are British authors. Useful Canadian sources include Andrew Heard's 1991 book *Canadian Constitutional Conventions*[13] and Peter Hogg's *Constitutional Law of Canada*.[14]

Conventions deal with who exercises what authority in practice. Many conventions relate to the authority of the Governor General or the Lieutenant Governor. (For simplicity, I will say the Governor to mean both.) On paper, the Governor possesses extensive powers and wide discretion. However, in almost all circumstances, this authority is closely circumscribed by the convention that the Governor acts on the "advice" of Cabinet or, for certain matters, the First Minister. Thus, the authority is effectively exercised by the Cabinet and, for a few key purposes, by the First Minister. For example, the First Minister provides the "advice" upon which the Governor exercises his or her authority to appoint or dismiss Ministers.

All this being said, it is not merely proper, but necessary that the Governor refuse to act on "advice" from the Cabinet or First Minister where such "advice" itself is contrary to convention. An example would be as follows: on the "advice" of the First Minister, the Governor dissolves the legislature and issues the writs for a general election. In the election, no party achieves a majority of seats in the legislature. The First Minister then "advises" the Governor to hold another election; this "advice" is contrary to the convention that before another election can be called, it must be demonstrated that no party leader can command the confidence of the legislature. If no one can, then government cannot operate (*e.g.* no budget could be approved) and, thus, another election is necessary. This illustrates that conventions, however anomalous they appear, are essentially time-honored rules to deal with practical problems. It also highlights the role of the Governor as a guardian of the Constitution, as only he or she can dismiss a First Minister and call on someone else to form a ministry.

11 AV Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (London, UK: Macmillan and Co, 1885).

12 Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford, UK: Clarendon Press, 1984).

13 Andrew Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics* (Toronto: Oxford University Press Canada, 1991).

14 Peter W Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 2007) (loose-leaf 5th ed supplement).

You will note my example has some parallels with the "King-Byng affair" of 1926.[15]

A second group of conventions deals with the operation of Cabinet. The three best known are confidentiality, solidarity, and collective responsibility. Discussions in Cabinet are held in confidence by its members; this promotes full and frank consideration. While Ministers may vigorously oppose a proposal in the Cabinet room, once it is adopted, all Ministers must publicly support the decision; they must maintain solidarity or leave Cabinet. And Cabinet is collectively responsible for all its decisions, to the legislature and, ultimately, to the electorate.

I would note other conventions (or *perhaps* merely common practices that have not attained the status of conventions) that relate to the operation of Cabinet. The sponsoring Minister (*i.e.* the one who brings forward a proposal) must be the responsible Minister (*i.e.* the one whose department or agency has responsibility for the subject matter of the proposal). The exception is the First Minister, who can bring forward any measure he or she wishes. As well, the First Minister sets the agenda for Cabinet; while proposals come from responsible Ministers, it is the First Minister's decision as to when (or even whether) they appear on the Cabinet agenda. Also, the First Minister chairs Cabinet, but not in the way that the Speaker does in the legislature. Rather, the First Minister guides the discussion and takes the decision; this is done by "finding the consensus," a euphemism. There are no votes in Cabinet, thus the First Minister can never "lose." Finally, the First Minister can establish such committees of Cabinet (standing or *ad hoc*) from time to time, as he or she sees fit, with such mandate as he or she sees fit. An important exception is a standing committee usually called the Treasury Board, established under the *Financial Administration Act*,[16] and chaired by the President of the Treasury Board (who, in the provinces, may also be the Minister of Finance).

A third group of conventions deals with the relationship between Cabinet and the legislature. Most fundamental is whether the Ministry has the "confidence" of the legislature. The most critical test of confidence is the budget. If the legislature does not approve budgetary measures, the Ministry must seek a mandate through an election or it must resign. Similarly, the Ministry falls if the legislature adopts a resolution expressing a want of confidence. Defeat on "ordinary" legislation may or may not constitute a

15 See generally Roger Graham, *The King-Byng Affair, 1926: A Question of Responsible Government* (Toronto: Copp Clark, 1967).

16 RSC 1985, c F-11.

vote of non-confidence, depending on the circumstances. Again, convention operates to achieve practical ends; if the Ministry cannot get "money bills" approved, then it cannot govern. If the legislature has lost confidence, then further defeats are sure to follow, such that the Ministry cannot advance its program.

Finally, while parliamentary supremacy is now limited by the *Charter of Rights and Freedoms*, arguably it is also limited by convention. As Geoffrey Marshall wrote in *Constitutional Conventions*:

> Though it is rarely formulated as a conventional rule the most obvious and undisputed convention of the British constitutional system is that Parliament does not use its unlimited sovereign power of legislation in an oppressive or tyrannical way. That is a vague but clearly accepted conventional rule resting on the principle of constitutionalism and the rule of law.[17]

As we shall see in a moment, "constitutionalism" and the "rule of law" have been accorded considerable importance by the courts through "structural argumentation."

II. THE LAWS AND CUSTOMS OF PARLIAMENT

A further set of rules, "the laws and customs of Parliament," deals with the operation of legislatures. Across Canada, the operation of legislatures is broadly similar. The Speaker presides over but does not participate in debate; he or she decides questions of "order" (*i.e.* procedure) and "privilege" (*i.e.* rights and responsibilities). Many Speakers' decisions are based on precedent (as described in semi-authoritative books, for example "Beauchesne").[18] All this operates within the context of written rules (often called the "Standing Orders"). The Ministry is accountable to the legislature in a variety of ways, notably through questions to Ministers.

Legislation is considered in stages: First Reading, Second Reading, Committee, Report from Committee, and Third Reading. Royal Assent is necessary for legislation to become law; the Governor is required by convention to give such assent. However, under section 90 of the *Constitution Act, 1867*, the powers of reservation and disallowance remain. Reservation involves the Governor withholding assent (thus, a bill will not become

17 Marshall, *supra* note 12 at 9.

18 The most recent edition is Audrey O'Brien and Marc Bosc, eds, *House of Commons Procedure and Practice*, 2nd ed (Ottawa: House of Commons, 2009).

law) until the federal Cabinet instructs the Governor to grant assent.[19] Disallowance permits the federal Cabinet to annul provincial statutes that have received assent within the previous two years.[20] Both powers have fallen into disuse.[21] Consideration of legislation in stages allows its careful examination and thorough debate; measures such as omnibus bills undermine this. The legislature also approves the raising of revenue (by Ways and Means motions)[22] and authorizes the expenditure of public funds (by granting "supply" and approval of the "estimates").[23] Public scrutiny by the legislature, especially of expenditures, is fundamental to holding the executive to account for its exercise of authority.

III. QUASI-CONSTITUTIONAL STATUTES

I will deal briefly with quasi-constitutional statutes. First, I note Human Rights Codes. In this regard, Quebec stands alone. Quebec's *Charter of human rights and freedoms*, adopted in 1975, deals with both civil liberties and human rights. Unlike the Canadian *Charter*, the Quebec *Charter* also includes economic and social rights, *e.g.* free public education.[24] This can lead to some complicated legal situations when both Charters are applied, as in the 2005 *Chaoulli* case.[25]

All jurisdictions have statutes concerning their legislature and elections. All jurisdictions have a legislature elected on a single-member-constituency, first-past-the-post system. Several attempts to amend this at the provincial level have failed, and a recent initiative at the federal level has been put aside.[26]

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19 *Constitution Act, 1867*, *supra* note 3, ss 55, 57, 90.

20 *Ibid*, s 56, 90.

21 Reservation has not been used since 1937, with one anomalous exception in 1961. Disallowance has not been used since 1943. However, both continue to exist at law (see *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, [1938] 2 DLR 8).

22 O'Brien & Bosc, *supra* note 18 at 887.

23 *Ibid* at 839.

24 Quebec *Charter*, *supra* note 8, s 40.

25 *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 SCR 791 (three judges found that a statutory prohibition on private health insurance violated the Canadian *Charter* and three found that it did not; the tie-breaking vote, Deschamps J, found that the prohibition violated the Quebec *Charter*, and so she did not need to examine the Canadian *Charter*).

26 See Aaron Wherry, "Trudeau's Promise of Electoral Reform: From 'We Can do Better' to Accusations of Betrayal", *CBC News* (5 February 2017), online: <www.cbc.ca>.

While legislatures are established by instruments that are part of the written Constitution, each jurisdiction has a quasi-constitutional statute—at the provincial level usually called the Legislative Assembly Acts[27]—which deals with aspects of the operation of the legislature not dealt with in the "laws and customs of Parliament" or the Standing Orders, previously referred to.

IV. SELECTED JURISPRUDENCE

While there has been much litigation regarding the Constitution Acts of 1867 and 1982 (notably the division of powers and the *Canadian Charter of Rights and Freedoms*), Aboriginal and treaty rights, and quasi-constitutional statutes, the conventions of the unwritten constitution and the operation of legislatures have been considered infrequently by the courts.

A. Conventions

The role of the courts regarding constitutional conventions was extensively considered in the patriation reference cases.[28] Constitutional conventions are not enforceable at law.[29] Nonetheless, they are justiciable and can be "recognized" in a declaration. Thus, when needed, a court can decide what constitutes the convention and what it requires of parties.

I see this as a critical protection for constitutionality. I say this because there are circumstances where a definitive statement concerning a constitutional convention is needed in order to provide clarity and certainty, the absence of which would be harmful to the country. Such cases rarely arise. The most important dealt with the "patriation" package of constitutional amendments. The Supreme Court of Canada decided that, by convention,

27 See e.g. *Legislative Assembly Act*, RSA 2000, c L-9; *Legislative Assembly Act*, RSO 1990, c L.10.

28 *Reference re Resolution to Amend the Constitution*, [1981] 1 SCR 753, 125 DLR (3d) [*Patriation Reference* cited to SCR]; *Reference re Objection to a Resolution to Amend the Constitution*, [1982] 2 SCR 793, 140 DLR (3d) 385 [*Quebec Veto Reference* cited to SCR].

29 Courts will declare the existence of constitutional conventions, but most authorities agree that conventions are not enforceable at law (see e.g. *Patriation Reference*, *supra* note 28 at 773–84; *Ontario English Catholic Teachers' Assn v Ontario* (*Attorney General*), 2001 SCC 15 at paras 63–64, [2001] 1 SCR 470). In the United Kingdom, some judges have expressed a contrary view (see Lord Steyn's reasons in *Regina* (*Jackson and Others*) *v Attorney General*, [2005] UKHL 56 at paras 71–103, [2006] 1 AC 262) [*Jackson*] (suggesting that the courts could review whether a bill had been approved by Parliament in accordance with relevant conventions)). Other authorities suggest that conventions should not be justiciable (see Adam Dodek, "Courting Constitutional Danger" (2011) 54 SCLR (2nd) 117).

the federal government needed "significant" provincial support to request a constitutional amendment from the British Parliament, but that it did not need unanimous support and that Quebec did not have a veto.[30] These decisions helped shape the circumstances wherein the federal government and the governments of all the provinces, save Quebec, agreed on the "patriation" package in 1982.

What if some future, rogue administration in Canada were to assert alternative constitutional conventions? What if a compliant legislature granted broad powers to the executive to approve new laws, raise revenues, and authorize expenditures, essentially to rule by decree? In such circumstances, might not government collapse into the executive, operating by fiat? I see nothing in the *Constitution Acts* or the *Charter* to prevent this. Why is this so? It is because those written parts of the Constitution are premised on the continued operation of the constitutional conventions. The written Constitution assumes the unwritten part. If it did not, then it would have been necessary to augment the written Constitution to deal with those matters dealt with in the unwritten part.

In the circumstances of such a rogue administration, what should be the role of the courts? One response is that conventions are essentially political arrangements and, therefore, the courts have no role. I disagree. While conventions do describe arrangements among political actors, they do not speak to political issues. Rather, they are a critical part of an overall set of constitutional arrangements. In this sense, conventions *are* the Constitution as much as are the *Constitution Acts* of 1867 and 1982. To undermine the conventions of the Constitution would be to undermine the Constitution itself. If the courts do not, in the end, defend the Constitution, then who will? If the courts are not the ultimate guardians of constitutionalism, then who is?

B. Legislatures

As noted above, the courts have been consistent in not encroaching on the "powers and privileges" of the legislature. However, questions do arise about whether a matter comes within "parliamentary privilege." If so, then the courts have no jurisdiction (or, perhaps, do not exercise their jurisdiction); if not, then the courts *do* exercise jurisdiction. Thus, questions as to the extent of the "powers and privileges" of the legislature are justiciable,

30 *Patriation Reference*, *supra* note 28; *Quebec Veto Reference*, *supra* note 28.

while questions relating to the use by the legislature of its "powers and privileges" are not.

Such a question arose in *Fielding v Thomas* in 1896.[31] The Nova Scotia House of Assembly voted to imprison Fielding for insulting a member of the House and refusing to apologize. Fielding sought to be tried in a court of law. The legislature refused, relying on a provincial statute giving it powers and privileges similar to those of the House of Commons in London, whose powers included punishing persons for contempt.[32] Fielding took the matter to court. On appeal, the Judicial Committee of the Privy Council held that the legislature had acted within its powers.[33]

A different kind of question (relating to the written Constitution) arose in 1916 when the Manitoba legislature adopted an experiment in direct democracy under *The Initiative and Referendum Act*.[34] This legislation provided that eight percent of the electorate, by petition in favour of a proposed law, could submit it directly to the Legislative Assembly.[35] If the legislature did not approve the proposed law, it would be placed on the ballot in the next provincial election.[36] If approved by the electorate, the proposal would become law as if it had been enacted by the Legislative Assembly. The Judicial Committee of the Privy Council struck down the law on the basis that the referendum would bypass the Governor, whose assent was necessary to enact a statute.[37] As a related matter, the referendum would sidestep the federal powers of "reservation" and "disallowance." Thus, the *Initiative and Referendum Act* ran afoul of the *Constitution Act, 1867*. Subsequent referendum legislation has avoided these pitfalls.

31 [1896] UKPC 33, [1896] AC 600 [cited to AC].

32 *Ibid* at 609.

33 *Ibid*.

34 SM 1916, c 59. Several other provinces experimented with direct democracy statutes: see *Direct Legislation Act*, SS 1912–13, c 2; *An Act to submit to the Electors the Question of the Adoption of the Direct Legislation Act*, SS 1912–13, c 3; *Direct Legislation Act*, SA 1913 (1st Sess), c 3; and the *Direct Legislation Act*, SBC 1919, c 21. Each was repealed by the legislature before any court challenge.

35 *The Initiative and Referendum Act*, *supra* note 34, s 3(1).

36 *Ibid*, s 4.

37 *In the matter of "The Initiative and Referendum Act," being Chapter 59 of the Acts of Legislative Assembly of Manitoba, 6 George V*, [1919] UKPC 60, [1919] AC 935.

C. Structural Argumentation

When the Constitution is silent on a fundamental issue, the Supreme Court of Canada has, on occasion, filled the gap using "structural argumentation." In doing so, the Court has relied on "inferences from the existence of constitutional structures and the relationships which the Constitution ordains among these structures," [38] in the words of the American scholar Philip Bobbit. In particular, the Supreme Court of Canada has relied on "organizing principles" that it draws from basic features of the Constitution. The Court has stated that these "organizing principles" are interpretive aids, not a standalone basis for resolving constitutional questions.[39] Nonetheless, the Court has used the "organizing principles" that it has identified dynamically and with authority.

Two recent examples illustrate this. The Court relied on the principle of "judicial independence" to hold that legislatures must provide financial security to judges.[40] It relied on the principles of "federalism," "democracy," the "rule of law," and the "protection of minorities" to hold that if, and only if, a "clear majority" of voters in Quebec, voting on a "clear question," supported separation, then the federal government would be required to negotiate with Quebec on terms of secession.[41]

It is unclear how many organizing principles there are. In his 2001 article "References, Structural Argumentation and the Organizing Principles of Canada's Constitution," Professor Robin Elliott 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." Perhaps some of these are

38 Robin Elliot, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001) 80:1–2 Can Bar Rev 67 at 74 citing Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (Oxford, UK: University Press, 1982) at 74.

39 Elliot, *supra* note 38 at 141–42. See e.g. *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49 at paras 57–68, [2005] 2 SCR 473 (the Court restricts the scope of the rule of law, essentially applies Mr. Elliott's recommendations from pages 140–42).

40 *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3, 156 Nfld & PEIR 1 [*Re Provincial Court Judges*].

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

not distinct;[42] perhaps there are more.[43] However they may be described, these "organizing principles" seem to mark boundaries within which, but not beyond which, a government may act.

I would conclude on structural argumentation with a quote from Lord Steyn in *Jackson*:

> [T]he supremacy of Parliament is still the *general* principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the [UK Supreme Court] may have to consider whether this is a constitutional fundamental which even a sovereign Parliament…cannot abolish.[44]

Others, notably Lord Bingham, expressed a more traditional view in favour of the supremacy of Parliament. Clearly, these are matters on which reasonable persons may differ.

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42 For example, the separation of powers might be an aspect of the federal principle (see e.g. *Reference re Securities Act*, 2011 SCC 66 at para 71, [2011] 3 SCR 837).

43 For example, "individual rights and freedoms" may be protected by distinct principles (aside from the *Charter*). Several decisions have referred specifically to a right of public discussion (Elliot, *supra* note 38 at 124–25 citing *Reference re Alberta Statutes*, [1938] SCR 100 at 133, [1938] 2 DLR 81, *Switzman v Elbling and Attorney General of Quebec*, [1957] SCR 285 at 306, 7 DLR (2d) 337; *Re Provincial Court Judges* , *supra* note 38 at 74–75). A series of more recent decisions have referred to the principle against self-incrimination as an organizing principle (*R v Jones*, [1994] 2 SCR 229, 114 DLR (4th) 645; *R v S (RJ)*, [1995] 1 SCR 451, 21 OR (3d) 797; *R v Fitzpatrick*, [1995] 4 SCR 154, 129 DLR (4th); *R v White*, [1999] 2 SCR 417, 174 DLR (4th) 111; *R v Singh*, 2007 SCC 48 at para 21, [2007] 3 SCR 405).

44 *Jackson*, *supra* note 29 at para 102.