

The Role of Theory in Canadian Constitutional Law

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Abstract and Keywords

Canadian constitutional law has been shaped by tacit assumptions about the philosophical foundations of the Constitution, and also by the articulate theorizing of judges, legal scholars, and legal practitioners. We discuss the assumptions behind the country's choice in 1867 of a distinct form of federalism, a parliamentary form of government very different from American republicanism, and a role for judges (particularly in adjudicating the federal division of powers, and in their innovative reference jurisdiction) that judges had never had in the United Kingdom Constitution. The principles of parliamentary government and of federalism, while giving the Constitution a remarkably robust framework, developed in a changing context with the end of Imperial governance. We discuss those developments, and ways in which the judges' role as theorists of the Constitution—enhanced by the Constitution Act, 1982—has burgeoned in that changing context, through their approach to the principles of the Constitution.

Keywords: Canadian constitutional law, theory, principles, federalism, constitutional adjudication, context, patriation

1. Introduction

***** Canadian constitutional law has often been shaped by unstated theoretical assumptions. But deliberate theorising has also played a variety of crucial roles, as judges, politicians, lawyers, and law teachers have attempted to articulate the philosophical foundations of the Constitution. We share these complex features of our constitutional practice with many countries. But constitutional theory has been institutionalized in quite distinctive ways in Canada. The *Constitution Act, 1867* (formerly the *British North America Act, 1867*) created unique opportunities and imperatives for political leaders, advocates, judges, scholars, law students, and others to articulate their understanding of Confederation. And while the country chose a parliamentary form of government very different from American republicanism, Confederation generated a set of entrenched rules defining the powers of the federal and provincial governments, which would give judges a hand in the

law of the Constitution that judges had never had in the United Kingdom. Moreover, Canadian federalism generated an extraordinary statutory provision for references (i.e., requests for advisory opinions) to the Supreme Court of (p. 938) Canada on matters of law and fact, including (as it would turn out) matters of convention.¹ That arrangement has given a super-attorney-general role to judges, whose public reasons for decision involve them in the theoretical task of articulating the basis of the Constitution.² The *Constitution Act, 1982* further enhanced the judges' role as theorists of the Constitution, through their role in the interpretation and elaboration of the *Charter of Rights and Freedoms*, section 35 (on aboriginal rights) and Part V (on amendment).

In this chapter we aim to illustrate ways in which both express theorizing and inarticulate theoretical assumptions have shaped Canadian constitutional law. We argue that good theorizing is essential for the sound development of the law and practice of the Constitution.

2. Theoretical Questions and Theoretical Assumptions

Whether or not it is presented in overtly theoretical terms, Canadian law students quickly gain a sense of their professors' and the legal profession's approach to questions of legal theory, such as:

What counts as a good legal argument?

What counts as a source of law?

What happens when those sources do not provide clear answers to a question of constitutional law?

What is the relationship between what counts as law and what counts as a legal system?

What is the relation between the law and the moral reasoning that ought to guide the structure and conduct of government?

What is the form of that reasoning, and who ought to decide what it requires?

Canadian lawyers educated before the 1980s would have seen the Constitution as a set of rules for the making and for the administration of the rules of Canadian law. The law of (p. 939) the Constitution was seen as made up of constitutional statutes (most fundamentally the *British North America Act, 1867*) and judicial decisions and (to a limited extent) custom. The non-legal rules of the Constitution had their source in the conventions governing constitutional actors. Law students at that time could readily see that courts sometimes innovated, by changing doctrines that had been considered to be well settled, and by making law when the recognized sources provided no clear answer to a question of law. Those same lawyers, however, may not have anticipated the shifts regarding these questions that would take place in the 1980s and 1990s, notably with regard to the role in

judicial reasoning of abstract legal principles such as federalism, the rule of law, judicial independence, and separation of powers.³

After 1982, and most notably in the 1990s, arguments based in principle became central to Canadian constitutional law, and in particular to those controversial cases where the text of the Constitution and the existing case law did not point to clear answers. Traditional sources were still understood as sources in the 1990s, but the approach to sources was changing. Appeals to abstract principles offered new potential for innovative arguments, and the traditional sources of the Constitution came to be treated as potential support for arguments of principle. Able litigators were quick to alter their lines of attack in consequence.

In 1936, the brilliant Australian judge and jurist, Owen Dixon, pointed out the potent role that theoretical assumptions may play in the development of law and of government:

The fundamental conceptions, which a legal system embodies or expresses, are seldom grasped or understood in their entirety at the time when their actual influence is greatest. ... Sometimes indeed they are but instinctive assumptions of which at the time few or none were aware. But afterwards they may be seen as definite principles contained within the ideas which provided the ground of action. Further, when such conceptions have once taken root they seldom disappear. They persist long after the conditions in which they originate have gone. They enter into combinations with other conceptions and contribute to the construction of new systems of law and government.⁴

(p. 940) The Supreme Court of Canada has referred to what Dixon called ‘fundamental conceptions’ as ‘the vital unstated assumptions’ of the Constitution.⁵ These theoretical assumptions underpinning the study and practice of law come in many varieties. Some relate to the fundamental questions of jurisprudence identified above, regarding what counts as law, for example. Other assumptions relate to more particular questions that run deeply through Canadian constitutional law: for example, regarding particular understandings of parliamentary sovereignty or federalism, or different ways of approaching constitutional interpretation. Through all of these issues, the general and the particular, theory and context interact, and that interaction shapes the development of Canadian constitutional law.

We will briefly review the distinctively Canadian theoretical assumptions behind parliamentary government, parliamentary sovereignty, federalism, and constitutional interpretation, and outline the shift, after the 1982 patriation of the Constitution, toward a theoretical framework based to a greater extent on the articulation by judges of abstract principles of the Constitution. The Conclusion will discuss relations between the theory of the Constitution, and the evolving context in which the Constitution operates.

3. Early Theoretical Influences: 'A Constitution Similar in Principle to That of the United Kingdom'

The influence of theoretical assumptions may be difficult to perceive in the present but is often clearer in historical perspective. The preamble to the *British North America Act, 1867* stated that Canada's constitution was to be 'similar in Principle' to a constitution whose principles had never been fully theorized. This constitutional heritage did involve a long and complex history of theorizing about constitutional law and constitutional morality; however, the theorizing was always very incomplete and controversial, and the practical impact of theory was often rather unclear, because of the English knack (restored with the restoration of the monarchy after the Civil War) for pragmatic muddling through. The contrast with the development of American constitutionalism is striking: the new American polity was built on the swift and impressive practical success of highly sophisticated theoretical reflection and reconceptualization. The Canadian approach was to found a new nation on theoretical assumptions that engendered opportunities for theoretical work by the generations that inherited the Constitution, and made that work a necessity.

The theorizing was rather incomplete not only through the long history of British constitutionalism, but also in the deliberations over Confederation. We do not have a (p. 941) much more articulate account of the assumptions on which the delegates were acting than the Resolutions of the Quebec Conference in 1864: '[T]he 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.'⁶

What theoretical assumptions underlay the resulting union? The notion that the model would serve 'the best interests of the people of these Provinces' can be traced back to the 'Model Parliament' of Edward I in 1295—the first to involve representation of barons, clergy, and commons. Edward and his advisors were among the earliest theorists of the Constitution: the writ summoning members to the Parliament borrowed the maxim of Roman private law that 'what touches all should be approved by all', and applied it to the government of the kingdom.⁷ Herein lay the origins of representative government.

Parliament as a technique of responsible government sprang from the King's political need to secure support from the Lords and Commons for taxation; that technique would become constitutionally protected as the King was deprived by stages of the personal power of legislating: first in the *Case of Proclamations*,⁸ then in the Petition of Right 1628, and finally and conclusively after the Glorious Revolution, in the Bill of Rights 1689. The judicial power, meanwhile, was separated from the executive power first by the rule that the King could not decide judicial matters in person (*Prohibitions del Roy*⁹), and then after the Glorious Revolution, by the provision in the Act of Settlement 1701 that judges could only be removed from office by Parliament, and not at the pleasure of the King.

Arbitrary measures by tyrants such as King John and Henry VIII had always been susceptible to criticism as abuse of the royal power;¹⁰ the theory of monarchy never supported arbitrary rule until the Stuart kings theorized about the divine right that they began to claim in the seventeenth century.¹¹ After the failure of Oliver Cromwell's revolution against that absolutism, the restoration of the monarchy was not a mere traditionalist reaction; it was a deliberate and permanent rejection of presidential rule, in favour of a form of government in which power would in principle be centred in the Crown, and would in practice be controlled by a parliamentary assembly. The Glorious Revolution was a constitutional turning point, conclusively renouncing the Stuart claim of divine right. But the new constitutional settlement was not a rejection of monarchy; executive, judicial, and legislative power were united in the Crown, with the King legislating in (p. 942) Parliament, and delegating the judicial power to independent judges. The point of the new settlement was to give Parliament control over the monarchy.

By the time of Confederation, this new settlement had evolved, because of the King's need for a ministry that could raise taxes, so that the monarch exercised executive power on the advice of ministers who answered to Parliament. The result was executive government in Great Britain by a Cabinet accountable to the House of Commons, with ever-more-deeply entrenched conventions, providing, for example, that the monarch must assent to legislation and must not act contrary to her ministers' advice. So a ready model of responsible government was available to the nineteenth-century British North American colonists. It would develop into fully democratic government by sporadic steps involving the removal of property requirements for voting, the spread of the secret ballot, and votes for women, and completed only in 1960 when the federal franchise was extended to Indigenous men and women.

We will refer to this form of responsible government as 'parliamentary government'. The model was attractively different from the American model, and was attractive for reasons of Canadian politics that were similar to the reasons of the English politicians who procured the Glorious Revolution: parliamentary government would facilitate control of state power by an assembly of representatives of the very sort of people who were agreeing to Confederation.

The crux of Britain's eighteenth-century American disaster had been the radical Imperial failure to give the Thirteen Colonies either representation in Westminster, or their own effective responsible government. The British metropolis had been unresponsive to the need to adapt newly-developed theories of Westminster parliamentary sovereignty to a changing eighteenth-century colonial context. By the nineteenth century, British Imperial advisors had begun to learn their lesson. The British responded to the demand for responsible government in Upper and Lower Canada in the Act of Union, 1840. In the Confederation settlement of 1867, the Imperial Parliament willingly approved proposals from United Canada, New Brunswick, and Nova Scotia to establish responsible government on the British model. The highly-theorized republicanism of the American constitutional scheme was rejected in favour of parliamentary government, and the decentralized American model of states-rights federalism was rejected in favour of a stronger central govern-

ment. The agreed division of powers was highly detailed and yet rather loosely defined, and was a further under-theorised work in progress.¹²

The delegates at the London Conference of 1866–1867 wanted to call their new country the ‘Kingdom’ of Canada.¹³ That notion—given that their purpose was patently to (p. 943) secure not only union but also responsible government—presumably reflected a theoretical assumption of parliamentary government, founded in the Glorious Revolution. The leaders of the colonies saw responsible government as best secured through a Parliament to which ministers of the Queen would answer. The British rejection of the idea of a ‘Kingdom’ in favour of a ‘Dominion’ reflected the mid-nineteenth-century theory of the Imperial government, according to which the traditional, distinctive relationship between the Queen and her *British* ministers was essential for Imperial governance. The most dramatic changes to the context of Canadian constitutionalism since Confederation have been the evolution in Imperial governance in the early twentieth century, and its conclusive abandonment in the patriation of the Constitution in 1982.

The central theoretical assumptions of parliamentary government, embedded in the context of ongoing Imperial governance after 1867, yielded a brilliant constitutional innovation: the establishment for a new federal country of a bicameral Parliament with an executive administration led, as in the UK, by a Cabinet appointed on the advice of a Prime Minister who has the confidence of a House of Commons.¹⁴

In the Quebec Conference, the theoretically significant term ‘House of Commons’ was adopted for the lower house to which, as in the UK, the Government would be accountable. The undertheorized conception of the new Parliament failed to establish a rationale for the upper house, but Canada’s is not the only constitution that has failed to articulate the theory of an upper house. The interminable debates over more than a century about reform of the Canadian Senate are analogous to the interminable debates over more than a century about House of Lords reform in the UK. In both countries, current practice, and reforms actually made, reflect no coherent theoretical rationale for the existence, membership, and functions of the upper chamber, apart from the widely-held views in each country that there ought to be a house of sober second thought, that its composition and functions ought to differ from those of the lower house, and that the lower house ought to be predominant.

In setting out the rules for reform of the Senate in the 2014 *Reference re Senate Reform*,¹⁵ the Supreme Court of Canada referred to ‘the Senate’s fundamental nature and role as a complementary legislative body of sober second thought’, and as a representative of the regions that had joined Confederation, and also concluded that the Senate had provided ‘a forum for ethnic, gender, religious, linguistic, and Aboriginal groups that did not always have a meaningful opportunity to present their views through the popular democratic process’.¹⁶ But the Court was careful to restrict its own role to determining ‘the legal framework’ for Senate reform, and to leave the question of the desirability of reform—and therefore, the theoretical rationale for the Senate—to ‘Canadians and their legislatures’.¹⁷ The Canadian debates seem even more frustrating than the (p. 944) British de-

bates, because two huge advantages ought to facilitate intelligent reform of the Canadian Senate: it only has 105 seats (whereas the House of Lords, bloated by patronage, has more than 800 members in 2017), and Canadian federalism offers a potential basis for distinctive membership and functions (whereas the obvious potential for regional representation in the House of Lords has been lost in the noise of the debates over reform).

To summarise, the theoretical assumptions of Confederation were:

- 1) that parliamentary government was the best available technique of responsible self-government for those British North American colonies that were well enough developed to engage in self-government,
- 2) that parliamentary government was both an appropriate institutional framework for a federal union of colonies, and also compatible with exercise of substantial governmental responsibility by provinces through their own parliamentary systems, and
- 3) that the whole complex scheme was compatible with the status of the new country as a Dominion within the Empire.

4. Parliamentary Sovereignty and the Constitution

The Westminster Parliament could of course make law for the United Kingdom. The Crown had always had sovereign authority for the governance of its overseas territories. But as Parliament became sovereign, it likewise came to be presumed that Parliament was sovereign in its capacity to make law for those territories. The Westminster Parliament became an Imperial Parliament for the British Empire, and its power included the power to make constitutional laws such as the *British North America Act, 1867*.

The development of any form of colonial autonomy had to depend either on restraint in the exercise of the powers of the Westminster Parliament, or on the limitation of those powers. The debates regarding Irish Home Rule at the end of the nineteenth century highlighted a question regarding whether the Westminster Parliament could bind itself (that is, constrain the legislative freedom of future parliaments). The most influential constitutional lawyer of the time, Professor Albert Venn Dicey of the University of Oxford, argued that Home Rule legislation would be futile.¹⁸ Parliament could make (p. 945) any law whatsoever, but then a later Parliament could unmake any law whatsoever. On Dicey's account, this conception of parliamentary sovereignty had an appearance of logical necessity. Parliament was sovereign. Sovereignty is the ability to govern as one wishes. Any limit on Parliament would amount to an end to its sovereignty. Therefore Dicey understood parliamentary sovereignty to entail not only the rule that Parliament can enact any law whatever, but also the corollary that no parliament can bind a future parliament.¹⁹

From a Canadian perspective, the sovereignty of the Westminster Parliament was initially convenient. The *Constitution Act, 1867* was an exercise of that sovereignty, and in the absence of a domestic amending formula, the Westminster Parliament would have authority

to amend the 1867 Act. It was uncontroversial in legal circles that the Imperial Parliament was the proper authority for the ongoing regulation of the self-government of a colonial dominion within the Empire.

But as Canada, along with other Dominions and other parts of the Empire, began to contemplate a more complete autonomy from the United Kingdom, the doctrine of parliamentary sovereignty (or at least Dicey's dominant version of it) began to get in the way. For example, the Statute of Westminster, 1931 stated in its preamble that:

it is in accord with the established constitutional position that no law hereafter made by the Parliament of the United Kingdom shall extend to any of the said Dominions as part of the law of that Dominion otherwise than at the request and with the consent of that Dominion ...

But 'the established constitutional position' was undoubtedly understood to be a matter of convention, and the substantive provisions of the Statute were limited to empowering Dominions, and establishing interpretive (or at best procedural) rules regarding the Westminster Parliament's legislation for the Dominions. On Dicey's strict interpretation of parliamentary sovereignty, neither new Dominion powers, nor a constitutional convention, nor any legal provision purporting to regulate the Westminster Parliament could legally constrain that Parliament if ever it wished to legislate in any way for the Dominions.²⁰ And it was convenient, in Canada's case, for amendments to the *Constitution Act, 1867* (and other constitutional texts) to continue to be made by the Westminster Parliament even after 1931, Canada having failed in the lead-up to the Statute of Westminster to agree on a domestic amending formula.²¹

(p. 946) By 1931, a 'new view' of parliamentary sovereignty was emerging in Britain: that Parliament can exercise its sovereignty only according to a certain 'manner and form', which could itself be changed by Parliament. The resulting power to determine what is to count as legislation implies a power to determine what is to count as Parliament. Although Parliament could not limit a future parliament's substantive ability to enact any law whatever, it could provide that future parliaments can legislate regarding some specified subject matter only by conforming to manner and form requirements set out in legislation. A strong version of this new view would have interpreted section 4 of the Statute of Westminster as reconstituting 'Parliament', for the purposes of that section, as Westminster acting at the request and with the consent of the Parliament of the Dominion.²²

The sensible pragmatism of the new view initially shrouded its instability. A legislative requirement as to the manner and form of parliamentary legislation would work so long as Parliament resisted the temptation to test its sovereignty by repealing a requirement of manner and form, or simply by purporting to act through the manner and form that was in effect before such a requirement was enacted. But what if Parliament did not resist this temptation? Then Dicey's doctrine would remain intact if the courts respected the will of the originally constituted Parliament. If, however, the courts insisted that Parliament could only legislate effectively if it respected a legislative requirement as to manner and form, then Parliament would have succeeded in binding a future parliament and Dicey's

doctrine would have been no more. Parliament would be sovereign in a new sense of that term: able to legislate regarding any matter whatever, *including* the matter of limiting itself.

This second version of parliamentary sovereignty came to be known as 'self-embracing sovereignty', whereas Dicey's version came to be known as 'continuing sovereignty'.²³ However, theoretical discussions regarding the sovereignty of Parliament were largely confined to books on legal and constitutional theory. In constitutional practice, temporary (if unstable) pragmatic solutions were seen as preferable to digging new foundations. We will see in a moment that when countries such as Canada sought to complete their independence, it was necessary to consider foundational questions and to make choices between the different conceptions of parliamentary sovereignty that theory had revealed.

(p. 947) 5. Federalism

The preamble to Canada's 1867 Constitution spoke of the desire of the colonies to be 'federally united', with 'a Constitution similar in Principle to that of the United Kingdom'. Dicey viewed these two objectives as incompatible with each other, and he viewed the combination as 'official mendacity'.²⁴ A Constitution similar in Principle to that of the United Kingdom would include the doctrine of parliamentary sovereignty, and, in Dicey's view, parliamentary sovereignty was incompatible with the division of sovereign powers contemplated by federalism.²⁵ But Dicey only began to share such views in the 1880s, by which time Confederation was well into its second decade.

Furthermore, many Canadian politicians, most notably its first Prime Minister, John A. Macdonald, favoured a unitary rather than a federal form of government. Many of them looked on the civil war in the federal United States as a salutary lesson in what to avoid. But union would have been politically impossible without a federal division of powers. Colonies which would be greatly outnumbered in population in the new Dominion would not risk seeing their interests submerged or overtaken without the guarantee that a range of local matters would fall to the jurisdiction of local assemblies. Federalism was the only way forward, and the *Constitution Act, 1867* listed the respective powers of the federal Parliament and the provincial legislatures, as set out, for the most part, in sections 91 and 92.²⁶

From 1867 until 1931, the highest court of appeal for Canada in civil and criminal matters,²⁷ the Judicial Committee of the Privy Council, interpreted sections 91 and 92 and thereby put flesh on the bare bones that the constitutional division of powers had set up. The heads of power allowed considerable latitude for interpretation, but the framers had suggested a strong centralizing tilt: the opening words to section 91 gave authority to the federal Parliament 'to make Laws for the Peace, Order, and good Government of Canada' and seemed to make it clear that any powers not expressly allocated to the provinces would fall to the federal side. The federal Parliament was given the authority to claim jurisdiction over works declared to be for the general benefit of Canada, and had jurisdic-

tion over two of the most important heads of power, 'trade and commerce' and 'criminal law'.

The division of powers had implications for the Empire, because a strong central government was more likely to challenge Imperial policy. So the theoretical assumptions (p. 948) that shaped the development of Canadian federalism involved three levels of governance. The Privy Council, exercising the constitution-building task of filling in the sketch of federalism in the *British North America Act*, interpreted the division of powers in favour of greater provincial powers.²⁸ Of course, some cases went one way and others the other way, which might have prompted contemporary observers to see matters as nothing more than the normal evolution of court-made law. However, we can now see more clearly that division-of-powers jurisprudence in the early years was driven in large measure by a theory of federalism motivated by a conception of the Imperial interest.²⁹ Subsequent developments, directed by the Supreme Court of Canada, responded to the demands of an increasingly complex and interrelated North American and global economy.

6. Constitutional Interpretation

The *Statute of Westminster, 1931* placed new pressures on the interpretation of what was then called the *British North America Act, 1867*. The Act had been drafted with a continuing role in mind for the Westminster Parliament and the Judicial Committee of the Privy Council at the top of, respectively, the legislative and judicial hierarchies. It could not be said, for example, that the framers of the 1867 Act intended for the Parliament of Canada to legislate to end appeals to the Privy Council when it granted Parliament power over 'criminal law'. They must have assumed, if they thought about it at all, that changing the role of the Imperial Privy Council in the judicial hierarchy was beyond the powers of the new Canadian Parliament. However, when the *Statute of Westminster, 1931* gave Dominions the power to legislate extraterritorially and to amend or repeal UK legislation, the question arose whether the power to legislate in relation to 'criminal law' could embrace legislation ending Privy Council appeals in criminal matters.³⁰ A number of approaches to constitutional interpretation were possible.

On the one hand, the Constitution could be interpreted as conferring on the new institutions the powers that the British Parliament intended to confer in 1867. On this basis, ending appeals to the Privy Council in criminal matters would not have been (p. 949) within the power given to the federal Parliament, as such a power would have involved legislative amendment of Imperial statutes dealing with extraterritorial subject matter, i.e. the power of the British Privy Council. On the other hand, it was possible to assume that, as a document prepared with longevity in mind, the Constitution was designed to adapt to the changing circumstances in which it would be applied, so that the meaning of its terms could evolve in accordance with the evolution of the Canadian polity. On this basis, and given that the words 'criminal law' were broad enough to embrace an expansive interpretation of the Parliament of Canada's post-1931 powers, the legislation would be *intra vires*.

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These issues regarding constitutional interpretation were addressed shortly before the 1931 Statute of Westminster was enacted, in one of the most famous cases in Canadian constitutional law: the *Persons Case*.³¹ The issue in that case was whether women could be considered 'qualified persons' for appointment to the Senate of Canada, under the *British North America Act*. All the judges of the Supreme Court of Canada concluded that they could not, on the grounds that (1) such was not the 'intent' of the Westminster Parliament in passing the Act, and (2) the words of the Act 'bear to-day the same construction which the courts would, if then required to pass upon them, have given to them when they were first enacted'.³²

The Privy Council reversed that decision. Viscount Sankey considered both external and internal evidence. Regarding the former, he noted that 'the exclusion of women from all public offices is a relic of days more barbarous than ours'. He set out a reminder that the Act in question was not a fossil but rather 'a living tree capable of growth and expansion within its natural limits'.³³ He emphasized that courts should avoid 'a narrow and technical construction' and should instead favour 'a large and liberal interpretation' so as to allow the Dominion and the provinces respectively to be 'mistresses' in their own houses 'within certain fixed limits'.³⁴ Their Lordships were after all concerned with the interpretation of '... an Act which creates a Constitution for a new country'.³⁵ With regard to the meaning of the term 'persons', he noted that 'the word "person" may include members of both sexes', and that the burden of persuasion lay upon those who argued that it should not. By means of this combination of external and internal considerations, the Privy Council concluded that women were indeed 'qualified persons'.

Contemporary readers of the *Persons Case* seem to have had no doubt as to its meaning and importance. Chief Justice Anglin had written the lead judgment for the Supreme Court of Canada in the *Persons Case*. The Privy Council had renounced his view of the *British North America Act*—that its provisions 'bear to-day the same construction (p. 950) which the courts would, if then required to pass upon them, have given to them when they were first enacted'.³⁶ When, only a few years later, he came to consider whether the *Constitution Act, 1867* accorded jurisdiction over 'radio', Anglin CJ had no doubt as to what was now required:

if the Act is to be viewed, as recently suggested by their Lordships of the Privy Council in *Edwards v. Attorney-General of Canada* as a living tree, capable of growth and expansion within its natural limits, and if it should be on all occasions interpreted in a large, liberal and comprehensive spirit, considering the magnitude of the subjects with which it purports to deal in very few words, and bearing in mind that we are concerned with the interpretation of an Imperial Act, but an Imperial Act creating a Constitution for a new country, every effort should be made to find ... some head of legislative jurisdiction capable of including the subject matter of this reference ...³⁷

There is nothing in Anglin's words that limits the court's consideration to what the framers intended in 1867, or the meaning of the constitutional text of 1867. Rather, hav-

ing seen his essentially originalist interpretation overruled in the *Persons Case*, Anglin was now treating the *British North America Act* as having a legal effect that could change ('within its natural limits') in accordance with changes in circumstances, and in accordance with 'the reasonably broad construction of which [the words are] susceptible'.

Four years later, in the *British Coal Corporation* case, the Privy Council interpreted Parliament's power, including the 'criminal law' power, to allow Canadian legislation to end Privy Council appeals in criminal matters, despite the fact that such a measure could not have been contemplated in 1867 when, as already noted, Parliament had no power to legislate either in a manner repugnant to Imperial statutes or extraterritorially. Viscount Sankey cited the *Persons Case* as authority for favouring a 'large and liberal' interpretation over a 'narrow and technical' one: 'In interpreting a constituent or organic statute such as the Act, that construction most beneficial to the widest possible amplitude of its powers must be adopted'.³⁸ An interpretation frozen in 1867 would have made this conclusion impossible, but the living tree view (taking into account Canada's growth from colony to nation) allowed this further devolution of power to Canada without the need for constitutional amendment.

(p. 951) Twelve years later, in a challenge to the termination by the federal Parliament of all remaining appeals to the Privy Council, the Lord Chancellor, Lord Jowitt, once again favoured an interpretation that took into account Canada's social and political evolution: 'It is ... irrelevant that the question is one that might have seemed unreal at the date of the *British North America Act*. To such an organic statute the flexible interpretation must be given which changing circumstances require ...'.³⁹ Lord Jowitt approved his predecessor Viscount Sankey's approach to constitutional interpretation, in referring both to the 'living tree' approach ('flexible interpretation ... which changing circumstances require') and to the idea of an 'organic' statute.

The living tree approach is now very much the dominant theory of constitutional interpretation in Canada.⁴⁰ Viscount Sankey and his successors clearly treated the Constitution as a document that is to be interpreted, so far as possible, in ways that respond not only to the emergence of unforeseen technologies such as radio, but also to changes in Canadian society. And the judges' response to such changes may depart from the intention of the framers, and from the original meaning of the words they used.

A tree is a fairly rigid biological structure that regulates its own growth in a way that sustains its identity as the same tree from season to season. A theory of living tree constitutional interpretation allocates power to judges to change the Constitution, and the use of the power must be regulated. The constitutional amendment process may provide a way of checking that dynamic judicial function.⁴¹ But constitutional amendment ought to be (and certainly is, in the case of the Canadian Constitution) a very difficult way of regulating the judicial power. So a complete living tree theory needs an account of judicial self-regulation.

Wil Waluchow has argued that the living tree approach treats the content of a constitution as a matter of common law.⁴² The idea offers an attractive account of the practice of Canadian constitutional interpretation since the *Persons Case*. There is a difference, (p. 952) insofar as judges' decisions in the development of most of the common law can be revised by the legislature, whereas their interpretations of the Constitution can only be revised, if at all, by their own subsequent decisions or by constitutional amendment. But the common law approach gives the judges the opportunity to use their constitutive power responsibly. Waluchow writes that the rules of precedent 'combine respect for the (albeit limited) wisdom and authority of previous decision makers (legislative and judicial) with an awareness of the need to allow adaptation in the face of changing views, and new or unforeseen circumstances'.⁴³ The common law approach equips judges to do so in a way that is both creative and responsible. It also equips them to act irresponsibly, treating their whims as matters of principle, and their judgments of principle as the law of the Constitution. The common law process confers responsibility on the judges, from case to case, to distinguish responsible from irresponsible use of a constitutive power.

That distinction will never be completely theorized. The practice of living tree constitutional interpretation may proceed with no articulate doctrine specifying the distinction between sensitive and sensible interpretation of the Constitution, and 'unconstrained constitutional creation or construction masquerading as interpretation'.⁴⁴

7. Constitutional Theory at and after Patriation: Principles and Politics

Soon after Canada celebrated its centenary, Prime Minister Pierre Elliott Trudeau sought to put the country's constitutional affairs in order by patriating the Constitution and providing for a domestic general amending formula. He sought at the same time to change the structure of the Constitution by adopting a modern *Charter of Rights and Freedoms* and by recognizing Aboriginal rights. By 1980 it was clear to Trudeau and his government that the consent of all the provinces for these changes was not forthcoming, and that the Canadian Parliament would have to proceed unilaterally to patriate the Constitution and to adopt a domestic amending formula and *Charter*. Both Houses of the Canadian Parliament adopted a resolution which was then sent on to Westminster for enactment by the United Kingdom Parliament. Two provinces, Ontario and New Brunswick, supported the unilateral federal initiative, but eight provinces did not. Three of the eight referred the question of constitutionality to their Courts of Appeal, and eventually all three appeals came before the Supreme Court of Canada in what has come to be known as the *Patriation Reference*.⁴⁵

(p. 953) The questions were essentially as follows: (1) did the federal resolution to amend the Constitution affect the powers, rights, and privileges of the provinces? (2) was the consent of the provinces required by the law of the Constitution? and (3) was there a constitutional convention requiring the consent of the provinces?

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The Supreme Court of Canada's eventual judgment was that provincial powers, rights, and privileges were of course affected. Different majorities of the Court then concluded that although provincial consent was not legally required, at the very least a substantial degree of provincial consent was required by convention. The conclusion regarding constitutional convention made it politically impossible for the Trudeau government to proceed, and that decision led to the reconvening of first ministers in November 1981 and the agreement (with all provinces, other than the province of Quebec) on the new constitutional settlement which became the *Constitution Act, 1982*.

The part of the *Patriation Reference* that deals with constitutional law is particularly revealing regarding the theoretical assumptions that were prevalent at that time. It is notable, especially in light of Supreme Court of Canada decisions in later years, how restricted were the constitutional resources that the majority brought to bear on the legal question of the lawfulness of petitioning the British Parliament to amend the Constitution without consent of the provinces. That fundamental legal question had never before been presented to any court. And yet the majority refrained from appealing to the principles of the Constitution to fill this gap in Canadian constitutional law, as it might later have been expected to do. Counsel encouraged the Court to let constitutional principles such as federalism and the rule of law into Canadian constitutional law via the 1867 Act's preambular reference to 'a Constitution similar in Principle to that of the United Kingdom', but the Court turned down the invitation, emphasizing the non-binding nature of preambles.⁴⁶ This approach contrasts sharply with the Supreme Court of Canada's later treatment of the same preamble as an invitation to bring principle to bear on the development of Canadian constitutional law.⁴⁷

We should perhaps be careful not to overstate the resistance to arguments of principle in 1981. First of all, the majority did appeal to constitutional principle in exercising the Court's extraordinary authority to pronounce on the existence of a constitutional convention.⁴⁸ Second, Martland and Ritchie JJ, in their dissent on the question of law, argued that the courts had 'had occasion to develop legal principles based on the necessity of preserving the integrity of the federal structure', and concluded that 'the dominant principle of Canadian constitutional law is federalism'.⁴⁹ But it is fair to say that the theoretical (p. 954) assumptions of the majority in the *Patriation Reference* yielded a limited set of sources for interpretation of the law of the Constitution: essentially, the text of the Constitution, legislation, and prior case law on point. Where the judges found no guidance in these sources, they would be trammelled by their sense that they would, on their own terms, be creating law, rather than applying the existing law. Without orthodox legal signposts, judges were reluctant to fill gaps in constitutional law using abstract, open-textured principles. This reluctance had roots in a form of political constitutionalism which favoured democratic law-making via a sovereign parliament over judicial law-making.

Returning to the nature of the Westminster Parliament's sovereignty discussed earlier in this chapter, we have seen that the Supreme Court judges understood the power of the United Kingdom Parliament to legislate for Canada as unimpaired even as late as the *Patriation Reference*. How then could this unimpaired sovereign legislature limit itself as it

purported to do in 1982? And how could the Supreme Court of Canada claim in the 1982 *Quebec Veto Reference* that the United Kingdom Parliament had been ‘entirely replace[d]’ and that the legality of this process was ‘neither challenged nor assailable’?⁵⁰ The Supreme Court of Canada seemed to have opted for the self-embracing interpretation of parliamentary sovereignty identified above.⁵¹

Only three years after the 1982 patriation, a Supreme Court of Canada which had been reluctant to embrace constitutional principles in 1981 was very willing to do so in 1985, in *Reference re Manitoba Language Rights*.⁵² Even more so in the 1990s, notably in the famous *Secession Reference* of 1998, the Supreme Court based its conclusions as to the law of the Constitution on principles implicit in the nation’s constitutional documents, and more broadly in ‘an historical lineage stretching back through the ages’.⁵³

8. Principles Untrammelled

Almost one hundred years of Manitoba statutes had been enacted in English only, contrary to what the Supreme Court of Canada deemed, in the 1985 *Manitoba Language Reference*, to be a constitutional requirement of bilingual enactment. The Court recognized that striking down all of the Province’s statute law would cause legal chaos, a result antithetical to the principle of the rule of law.⁵⁴ Accordingly, the Court decided ‘to deem temporarily valid and effective the unilingual Acts of the Legislature of Manitoba’ for the (p. 955) period of time needed for the laws to be published in French.⁵⁵ The Court held very clearly that the *principle* of the rule of law had a legal effect that derived from the Constitution:

Additional to the inclusion of the rule of law in the preambles of the *Constitution Acts* of 1867 and 1982, the principle is clearly implicit in the very nature of a Constitution. The Constitution, as the Supreme Law, must be understood as a purposive ordering of social relations providing a basis upon which an actual order of positive laws can be brought into existence. ... While this is not set out in a specific provision, the principle of the rule of law is clearly a principle of our Constitution.⁵⁶

Before 1985, Canadian constitutional lawyers did not speak of ‘common law constitutionalism’. Nor would they have considered requesting that the courts recognize new constitutional law by way of deduction from unwritten constitutional principles. Yet such arguments have become a standard feature of constitutional practice, in a process that developed after the patriation of the Constitution and after the *Manitoba Language Reference*, and which is best illustrated by the *Secession Reference* 1998.⁵⁷

In the *Secession Reference*, the unanimous Court began by stating, ‘it is not possible to answer the questions that have been put to us without a consideration of a number of underlying principles’.⁵⁸ The constitutional question was whether the Quebec National Assembly or the government of Quebec could ‘effect the secession of Quebec from Canada unilaterally’.⁵⁹ Nothing in the Constitution of Canada accorded any legal significance to a

unilateral decision by a province to secede. The Supreme Court held that 'The secession of a province from Canada must be considered, in legal terms, to require an amendment to the Constitution, which perforce requires negotiation'.⁶⁰ Under the approach of the majority in the *Patriation Reference*, it might have seemed enough to assert that legal truism. It would seem that the other provinces and the federal government could have no legal obligation to cooperate with a decision by Quebec to secede. Given the paucity of Canadian secession precedents, constitutional conventions were not a promising avenue of argument. From the 1981 perspective, any other judicial directives on the issue would seem to involve extra-legal judicial fiat.

But the Supreme Court of Canada embarked on a systematic commentary on the unwritten principles that are to be found implicit in the Canadian Constitution, supporting an assertion of four principles: democracy, federalism, the rule of law and (p. 956) constitutionalism, and protection of minorities. The Court derived from these principles what many have viewed as a Solomon-like judgment. A clear democratic vote in a province on a clear question in a secession referendum could not simply be ignored by the federal government and the other Canadian provincial governments, for to do so would be to undervalue the *democratic* principle. However, that same vote could not justify the bypassing of the Canadian constitutional amending formula, for to do so would be to undervalue the *rule of law*. Accordingly, a clear vote on a clear question could give rise to a duty to negotiate secession; however, those negotiations could only lawfully result in the secession of Quebec through a constitutional amendment according to the terms of the Constitution.

The Court in 1998 found a way to articulate the fundamentals of the Constitution without in any way distinguishing the law from the principles of political morality on which the federal and provincial governments ought to act, if the people of Quebec were to vote to secede. On the ground of those principles, the unanimous Court held that the participants in Confederation had a duty 'to engage in Constitutional discussions in order to acknowledge and address democratic expressions of a desire for change in other provinces';⁶¹ the Court did not propose to enforce this duty, but simply declared its existence. We will call that the '*Secession Reference* approach'. In 1981 and 1982, the Court had felt inhibited from engaging in such an untrammelled articulation of constitutional principles. We will call that the '*Patriation Reference* approach'. In the twenty-first century, there is a clear, shared understanding among the judges that this theoretical task of articulating the principles of the Constitution—exercised in the *Secession Reference*—is inherent in the judges' constitutional role. It is unclear, however, whether the judges will strike down statutes purely on the ground of incompatibility with unwritten principles: 'in a Constitutional democracy such as ours, protection from legislation that some might view as unjust or unfair properly lies not in the amorphous underlying principles of our Constitution, but in its text and the ballot box'.⁶²

(p. 957) **9. The Living Tree, Principles and the Nature of Law**

When the Canadian judges interpret the Constitution, they treat it as a living tree. And they identify unwritten principles that ‘are to the Constitution what sap is to a tree’.⁶³ What answer does this approach imply to our theoretical question of the relation between the law and the moral principles that ought to guide the structure and conduct of government? The *Patriation Reference* approach may seem to reflect the ‘sources thesis’ that is commonly ascribed to legal positivism: the claim that the law can be identified by reference to its sources, without evaluative or moral reasoning.⁶⁴ And then it may seem attractive to distinguish the *Secession Reference* approach as anti-positivist.⁶⁵

Chief Justice McLachlin has taken the lead in theorizing the *Secession Reference* approach; she has said that ‘[t]he contemporary concept of unwritten constitutional principles can be seen as a modern reincarnation of the ancient doctrines of natural law’.⁶⁶ A natural law theory identifies principles of reason, and explains their relation to the law of a particular polity at a particular time, and explains how those principles of reason give moral force to that law.⁶⁷ Two features distinguish the Chief Justice’s theory from the ancient doctrines of natural law theory. First, she identifies three ‘sources’ of the unwritten principles of constitutional law: ‘customary usage; inferences from written constitutional principles; and the norms set out or implied in international legal (p. 958) instruments to which the state has adhered’.⁶⁸ These sources are evidently intended to play a different role from the authoritative role of sources in legal positivism; in McLachlin’s theory they serve to legitimize the role of the judges in articulating unwritten principles. But if judges appeal to *sources*, then they are not giving effect to natural principles of justice; they are finding support for their judgments in the facts of the community’s usage, and in the written Constitution, and in international commitments. That appeal to the community’s standards does imply a judicial claim to the authority to identify those standards, and authority to act on them. As argued above concerning the living tree approach to interpretation of the text of the Constitution, this model of the identification of unwritten principles might best be likened to a common law model of constitutional principles in general, which portrays judges as exercising a power to identify and to elaborate on the community’s standards.

Second, a natural law theory in the classic sense needs a theory of the allocation of power: specifically, a theory of the allocation of political authority, which is a form of legitimate normative power. The predicament of the state in natural law theory is that principles of reason depend for their implementation on the judgement and action of officials of the state, who may be reasonable or unreasonable. It is undoubtedly the case, as McLachlin says (and it is indeed a tenet of classical natural law theory), that ‘the legitimacy of the modern democratic state arguably depends on its adhesion to fundamental norms that transcend the law and executive action’;⁶⁹ it does not follow that judges must have authority to determine those norms, or that they should have the distinctively Canadian authority to advise government on the requirements of constitutional duty in general. There

can be no natural allocation of authority; any actual allocation is an artifact that meets the state's need for authoritative decision making. The proper allocation of *constitutive* authority depends on the particularities of the political structure and culture and circumstances of the community. Classical natural law theory never presumed that constitutive authority ought to be allocated to judges.

The *Secession Reference* approach is only compatible with a natural law theory if such a theory can be supplemented by a justification for the allocation of constitutive authority (that is, authority to establish the principles of the Constitution) to the judges. The *Secession Reference* approach, and Chief Justice McLachlin's account of the identification of unwritten principles, are also compatible with a legal positivist theory, with the proviso that the 'sources' that they use for the identification of the principles of the Constitution are diffuse and undefined, and the principles vague. So, to the extent that the Canadian judges follow McLachlin's approach, a positivist account of the *Secession Reference* approach will depict them as inventing new norms for the Constitution, through a precedent-based system of judicial identification and elaboration of the community's ethos.

(p. 959) The judges and other theorists who applaud the *Secession Reference* approach are rather more inclined to say that the judges are giving effect to the law, rather than that they are inventing it. For them, the 'interpretive' theory of Ronald Dworkin holds out an alternative. In Canadian law schools, that theory was gaining widespread influence (and attracting dissent, as well) just at the time of the shift from the *Patriation Reference* approach to the *Secession Reference* approach. In 1985, Dworkin set out his avowedly anti-positivist views in one of the most-read books of legal philosophy: *Law's Empire*.⁷⁰ The theory was that the law is an ensemble of unwritten principles. It cannot be identified by asking what legal authorities have laid down; judges must identify the law by asking which 'constructive interpretation' best fits the facts of their community's practice, and best justifies coercion by the state. Even the many lawyers in the 1980s who had not read *Law's Empire* were indirectly influenced by Dworkin's ideas, whether in the reconstruction of legal argumentation as taught in law faculties, or in novel legal arguments presented by creative advocates across the Canadian legal community.⁷¹

Dworkin's interpretive theory has seemed to many to defend bold judicial activism—and to paint it as giving effect to the law. But the theory gives no general account of how closely a judge's interpretation must 'fit' the facts of a community's practice, or of how free the judges are to impose a justification of state coercion that does not fit the facts very well. In fact, a legal positivist theory may actually offer a judge *more* freedom: on Dworkin's interpretive theory, the judge must always be seeking to fit her judgments to her community's practice. She may come up with a surprising interpretation, but she is always constrained by the facts of the practice. A legal positivist may see it as potentially legitimate (and even as morally obligatory) for a judge to depart from the law, where the practice is itself immoral. A natural law theorist may differ from a legal positivist, on this point, only by insisting on a working presumption that a judge ought not to depart from

the law of a constitution, except on stringent grounds of justice that undermine the claim to authority of the framers of the constitution.

Unlike a natural law theory (but in line with Chief Justice McLachlin's approach), Dworkin's theory appealed to the interpretation of the facts of the community's practice in identifying principles; like Chief Justice McLachlin (and unlike natural law theorists), he held a general theoretical tenet that the courts, as the 'forum of principle',⁷² are *the* body that has legitimacy to identify constitutional principles, and to impose its view of those principles on the representative institutions of the state.

The lure of Dworkin's theory, and its congruence with McLachlin's approach, lie mainly in its portrayal of the identification of unwritten principles by judges as the (p. 960) identification of the law itself. The subsidiary similarity is their approach to what McLachlin calls 'sources'. In her approach as in Dworkin's, the relevant facts about the practice of the community—including the fact of the enactment of the *Constitution Act, 1867*—are raw material on which the judge is to train his or her political-moral imagination, rather than authoritative, Constitution-making acts of political institutions separate from the judiciary.

10. Conclusion: Constitutional Law in Context

This discussion of the role of theory in Canadian constitutional law reminds us that theory can never remain entirely abstract. The sort of practical reasoning which theory calls on us to conduct inevitably involves general principles; yet it inevitably takes place in a particular context. Where legal matters are concerned, it is that context which generates both legal disputes and pressures for legal change, and it is that context in which new judgments and new laws will play out, successfully or unsuccessfully.

The most dramatic change to the context of Canadian constitutionalism has been the country's evolution from colony, to Dominion, to independent nation. These changes have made such new and unanticipated demands on the Constitution that it is worth reflecting that the basic structure has been remarkably robust. The form of parliamentary government chosen in 1867 has proved durable, for the same reasons that it appealed to the English bourgeoisie of the 1680s, in a strikingly different political context. In that context there was no political imperative for full democracy, but there was a very pressing demand for more accountable government, and the parliamentary form chosen in 1689 (as it developed into Cabinet government by the nineteenth century) has proved serviceable in Victorian Canada, and in the twenty-first century Canadian democracy.

The dogmas of Dicey's interpretation of the 'continuing' sovereignty of the Westminster Parliament encountered new facts and new contexts in the form of demands for independence. Although adherence to the traditional doctrine of 'continuing' sovereignty is still strong in the United Kingdom, it seems clear that many former colonies, including former Dominions such as Canada, have assumed without hesitation that the Westminster Parliament is capable of fully and finally limiting itself (the newer 'self-embracing' view) in in-

dependence legislation.⁷³ Neither the old nor the new, neither the more rigid nor the more flexible interpretation of sovereignty, is theoretically ordained for parliamentary government in all contexts; however, the Canadian (p. 961) context has appeared to demand a new approach. From the perspective of that new context, the Westminster Parliament acted on the basis of the theoretical assumption that it was competent to terminate its own powers to legislate for Canada, in the *Canada Act, 1982*.⁷⁴

We have seen that the Canadian encounters with shifting contexts produced other important constitutional moments which are relevant to the role of constitutional theory. Canada's version of federalism was affected, first, by the Judicial Committee of the Privy Council's attempts to regulate Canada's, and other Dominions', role in the political economy of the British Empire and Commonwealth; and later by the Supreme Court of Canada's development of an increasingly 'cooperative' federalism that could work in a world of ever-growing functional overlaps. A federal division of powers based on the older theory of 'watertight compartments' was no longer up to the task and was modified. A Constitution enacted in 1867 did not contemplate developments such as the equality of Dominions to the United Kingdom, extraterritorial legislation, and the end of appeals to the Judicial Committee of the Privy Council, for example, but the courts interpreted the 1867 Constitution as a 'living tree', intended by its framers to grow in ways unanticipated by them, but consistent with that Constitution's organic nature and limits, and adaptable to changing circumstances.⁷⁵

Wil Waluchow has explored how 'living tree' constitutionalism is much like the common law in the sense that the courts are called upon to consider the law's interaction with new factual contexts, while adhering to principles that can be seen at work in the history of the Constitution. The courts' role in developing the common law of the Constitution attracts certain sceptical responses because parliaments and legislatures cannot, by ordinary legislative means, assert or reassert their own decisions in the face of courts' interpretation of the Constitution. The case for sceptical assessments of the courts' constitutive power is at its strongest where the courts change the rules of the Constitution in the service of their assessments of the unwritten principles of the Constitution. But all lawyers know that the law, including or especially constitutional law, often throws up questions for which there is no clear answer. In those circumstances, the judges have a constitutive power that arises as a necessity from their responsibility for resolving disputes about the Constitution, and from their responsibility to give judgment on references. The question is what is the best approach for them to take to the exercise of that power, or, for our purposes and with a hope that they coincide, what do Canadians view as the best approach?

We have seen that since the 1980s Canadian courts have diversified the tools at their disposal. The *Secession Reference* approach introduces into the constitutional (p. 962) reasoning process dynamic principles such as democracy, federalism, constitutionalism and the rule of law, and protection of minorities, as well as judicial independence and perhaps others still to be identified. What should we make of this development?⁷⁶

Principles are basic, general ingredients for reasoning as to what is to be done. Any constitutional practice must be principled: that is an axiom of the ideal of constitutionalism. Reference by judges to constitutional principle seems preferable to the bald exercise of an unprincipled discretion. However, the discussion in this chapter points to a potential hazard regarding the appeal to constitutional principles. By virtue of their very abstraction, principles afford greater material for judicial creativity, greater room for discretion. Where the rules of the constitution do not provide guidance, and where, one presumes, an answer structured by venerable constitutional principles is preferable to untrammelled discretion, what is the best way to employ principles in judicial reasoning? On one view, better principled reasoning turns entirely on better theorizing. And no doubt, greater analytical and theoretical sophistication is a virtue. However, the view preferred here is that principled reasoning requires not just clear abstract thinking, but clear thinking in and regarding a specific context. As we have seen with 'living tree' constitutionalism, Canadian constitutional theory allows constitutional law to evolve in line with the nation's constitutional texts (with all their gaps and ambiguities) and with an awareness and sensitivity to the society which the Constitution sets out to govern, and under which all its citizens are intended to flourish.

Principles can be seen as abstract ideas from which conclusions are deduced. Or, more consistently with the 'living tree' approach, they, like rules, may be seen as legal standards which evolve, according to their own conceptual shape and structure, but also in response to the changing circumstances. Those circumstances will no doubt continue to evolve, in ways that will affect Canadian federalism, for example. The distinctively Canadian allocation of constituent power to judges will, doubtless, continue to evolve, in ways that will be influenced by popular opinion and by other political actors, but will be determined by the judges themselves. The developing field of Canadian constitutional theory will involve controversy, and the opportunity for participants in theoretical controversies to contribute to the shaping of the law and of practice.

Perhaps in the early days and years of the *Secession Reference* approach we were struck by the more frequent references to principles in Canadian constitutional adjudication in part because of their relative novelty and the seeming unpredictability of their new shape. However, as the years pass, it may be that principles come to be understood not so much as abstract and remote and subject to formal deductive logic, but as living and (p. 963) evolving, drawn out gradually⁷⁷ according to their own terms and according to changing circumstances in all parts of Canadian society.⁷⁸

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(1) Supreme and Exchequer Court Act, 1875; Supreme Court Act, 1985, s 53. See *Reference re Secession of Quebec* [1998] 2 SCR 217 [6]–[23] [hereinafter *Secession Reference*]. Regarding constitutional references and constitutional conventions see *Reference re Resolution to Amend the Constitution* [1981] 1 SCR 753 [hereinafter *Patriation Reference*], below Section 7, and P Oliver, ‘Reform of the Supreme Court of Canada from Within: To What Extent Should the Court Weigh In regarding Constitutional Conventions’ in Nadia Verrelli, ed, *The Democratic Dilemma: Reforming Canada’s Supreme Court* (McGill-Queen’s Press, 2013) 161.

(2) See Gerald Rubin, ‘The Nature, Use and Effect of Reference Cases in Canadian Constitutional Law’ 6 McGill LJ 168–190. C Mathen, ‘“The Question Calls for an Answer, and I Propose to Answer It”: The Patriation Reference as Constitutional Method’ (2011) 54 Sup Ct L Rev 143.

(3) Law students before the 1980s were familiar with the *Roncarelli v Duplessis* case and its significance for the rule of law. However, the case was famous in large part because Rand J’s engagement with constitutional principle was exceptional; and, furthermore, many at the time insisted on explaining the case in more conventional legal terms. For a reminder of the more conventional reading of *Roncarelli*, see Claude Armand Sheppard, ‘*Roncarelli v. Duplessis* Art. 1053 C.C.’ (1960) 6 McGill LJ 75, reprinted at (2010) 55 McGill LJ v; David Mullan, ‘*Roncarelli v. Duplessis* and Damages for Abuse of Power: For What Did It Stand in 1959 and for What Does It Stand in 2009’ (2010) 55 McGill LJ 587. Similarly, a theory of an ‘implied bill of rights’ emerged during the middle years of the twentieth century; however, it never attracted majority support. PW Hogg, *Constitutional Law of Canada* (5th ed.) (Thomson Carswell, 2011) §31–10.

(4) Owen Dixon, ‘The Law and the Constitution’ in Owen Dixon, *Jesting Pilate: And Other Papers and Addresses* (Law Book Company, 1965) 38, originally published in (1935) 51 LQR 590, 590–591.

(5) *Secession Reference* [49] above (n 1); see below Section 8.

(6) Canada, Library and Archives, *Quebec Resolutions, 1864*, Resolution 3: <https://www.collectionscanada.gc.ca/confederation/023001-7104-e.html>.

(7) See Gaines Post, *Studies in Medieval Legal Thought: Public Law and the State 1100–1322* (Princeton University Press 1964) 163–167.

(8) (1611) 77 ER 1352.

(9) (1607) 77 ER 1342.

(10) See John Fortescue, *The Difference between an Absolute and Limited Monarchy, as It More Particularly regards the English Constitution* (1471; published 1714, Aland, John Fortescue, ed).

(11) See, e.g., *Basilikon Doron* (Edinburgh, 1599), by King James VI of Scotland, who became James I of England.

(12) Many of the details had already been recited in the Quebec Conference Resolutions, which referred to the provincial governments as 'Local Governments' and to the federal government as 'the General Government': Canada, Library and Archives, *Quebec Resolutions, 1864*: <https://www.collectionscanada.gc.ca/confederation/023001-7104-e.html>.

(13) Canada, Library and Archives, *London Conference, 1866–7*, <https://www.collectionscanada.gc.ca/confederation/023001-2700-e.html>.

(14) See Canada, Library and Archives, *Quebec Resolutions, 1864*: <https://www.collectionscanada.gc.ca/confederation/023001-7104-e.html>.

(15) [2014] SCC 32.

(16) Ibid [52], [16].

(17) Ibid [4].

(18) See C. Harvie, 'Ideology and Home Rule: James Bryce, A.V. Dicey and Ireland, 1880–1887' (1976) 91 Eng Hist Rev 298. Dicey's friend and Oxford colleague, James Bryce, stated in Parliament that Westminster 'shall retain as a matter of pure right the power to legislate for Ireland, for all purposes whatever, for the simple reason that we cannot divest ourselves of it'. United Kingdom, Parliament, *Debates* (10 May 1886), quoted in G. Marshall, *Parliamentary Sovereignty and the Commonwealth* (Clarendon Press, 1957), 65–66. Bryce's Dicey-like statement was made one year after the publication of AV Dicey, *An Introduction to the Study of the Law of the Constitution* (1st ed. (Macmillan, 1885).

(19) Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed (Macmillan 1915) 21–24.

(20) The Supreme Court of Canada confirmed, as late as 1981, that the Westminster Parliament's powers even regarding Canada were, as a legal matter, 'untouched', or 'unimpaired'. *Patriation Reference*, above (n 1), 795, 799.

(21) For discussion, see P Oliver, 'Canada, Quebec and Constitutional Amendment' (1999) 49 UTLJ 519.

(22) S. 4 stated: 'No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof'. See G Marshall, 'What Is an Act of Parlia-

ment: *The Changing Concept of Parliamentary Sovereignty* (1954) 2 *Political Studies* 193, 199–200.

(23) See the discussion in HLA Hart, *The Concept of Law* (3rd ed.) (Oxford University Press 2012) 149–152.

(24) AV Dicey, 'Federal Government' (1885) 1 *LQR* 80, 93. For discussion see Peter C Oliver, *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada and New Zealand* (Oxford University Press, 2005) 119.

(25) *Ibid* 119.

(26) Canada's federal system is discussed in detail in Part IV of this *Handbook*.

(27) Canadian civil appeals to the Judicial Committee of the Privy Council were not abolished until 1949. David B. Swinfen, *Imperial Appeal: The Debate on the Appeal to the Privy Council, 1833–1986* (Manchester University Press, 1987), 143.

(28) For an account of the evolution of interpretation of the key heads of legislative power under sections 91 and 92 of the *Constitution Act, 1867*, see the chapter by Jean-François Gaudreault-Desbiens and Johanne Poirier in this *Handbook* and PW Hogg, *Constitutional Law of Canada* (5th ed., Carswell, 2007), section 5.3(c).

(29) See Frederick Vaughan, *Viscount Haldane: 'The Wicked Step-Father of the Canadian Constitution'* (University of Toronto Press, 2010).

(30) Those familiar with the Canadian division of powers may wonder why the residual 'peace, order and good government' power was not invoked as a full answer to the question. It must be remembered that at this moment in Canada's constitutional history, the Privy Council had reduced that power to an 'emergency' power, available only at times of war or other crisis. See *Reference Re Board of Commerce Act, 1919 (Canada)*, [1922] 1 A.C. 191 (P.C.); *Toronto Electric Commissioners v Snider*, [1925] A.C. 396 (P.C.).

(31) *Edwards v Attorney General of Canada* [1931] AC 124 (PC) [hereinafter *the Persons Case*]. For an excellent account of the background to *the Persons Case*, see Robert Sharpe and Patricia McMahon, *The Persons Case: The Origins and Legacy of the Fight for Legal Personhood* (University of Toronto Press, 2007).

(32) *Reference re meaning of the word "Persons"* [1928] SCR 276 Anglin CJ (285).

(33) *Ibid* (136).

(34) *Ibid*.

(35) *Ibid* (137).

(36) *Reference re meaning of the word "Persons" in s. 24 of British North America Act*, [1928] SCR 276, 282.

(37) *Reference re Regulation and Control of Radio Communication* [1931] SCR 541, 546.

(38) *British Coal Corporation and others v The King* [1935] UKPC 33, [1935] AC 500, 518. The Privy Council's focus in this case was on the removal of obstacles which had been deemed before 1931 (in the case of *Nadan v The King* [1926] AC 482) to prohibit such Canadian legislation. However, even with those obstacles removed, post-1931, Canadian legislation had to be anchored in a head of federal power in order to be considered valid. As noted by the Board in *British Coal Corporation*, *ibid*, the Privy Council in *Nadan* had already begun to ask questions regarding *vires* or competence: 'Under what authority, then, can a right [of Privy Council appeals] so established and confirmed be abrogated by the Parliament of Canada? The British North America Act, by section 91, empowered the Dominion Parliament ... ; and in particular it gave to the Canadian Parliament exclusive legislative authority in respect of "the criminal law ..." '. The Privy Council in *Nadan* had not had to answer the question whether the criminal law power was broad enough. That answer was provided in *British Coal Corporation*.

(39) *Attorney-General for Ontario v Attorney-General for Canada* [1947] AC 127, 154. In the 1947 case, the interpretation issue turned on the meaning of s. 101 of the *Constitution Act, 1867*.

(40) For more on the question of constitutional interpretation, see the chapters in this *Handbook* by respectively, Stéphane Beaulac and WJ Waluchow. For a sceptical view regarding the living tree, see, e.g., B Miller, 'Origin Myth: *The Persons Case*, the Living Tree, and the New Originalism' in G Huscroft and B Miller, eds. *The Challenge of Originalism* (Cambridge University Press, 2011) 120. The Canadian constitutional historian, Eric Adams, has written, convincingly it is argued here, that 'The living tree metaphor has been largely embraced as an approach to liberal and progressive constitutional interpretation, but in its own time and context, set against the backdrop of the Balfour Declaration, the politics of independence, and on the eve of the passage of the Statute of Westminster, 1931, the living tree was an expression and confirmation of Canada's constitutional distinctiveness and independence'. E Adams, 'Canadian Constitutional Identities' (2015) 38 *Dalhousie LJ* 311, footnote 78 and accompanying text.

(41) In respect of the *Charter of Rights and Freedoms*, the s 33 'notwithstanding' clause also provides a potential check on the judicial interpretive function, but that technique also is, for other reasons, difficult for the legislatures to use.

(42) WJ Waluchow, 'Constitutionalism', in E Zalta, ed, *The Stanford Encyclopedia of Philosophy* (Spring 2014 Edition), <http://plato.stanford.edu/archives/spr2014/entries/constitutionalism/>.

(43) *Ibid*.

(44) *Ibid*.

(45) *Patriation Reference*, above (n 1).

(46) Ibid 804–805.

(47) See, e.g., *Reference re Provincial Judges* [1997] 3 SCR 3 and *Secession Reference*, above (n 1).

(48) ‘... the phrases “Constitution of Canada” and “Canadian Constitution” ... embrace 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’. *Patriation Reference*, above (n 1) 874.

(49) Ibid 821. It is not surprising, therefore, that the Supreme Court of Canada later cited the views of Martland and Ritchie JJ in the *Patriation Reference* in support of a more creative use of principles in constitutional adjudications. See *Secession Reference*, above (n 1) [32].

(50) *Quebec Veto Reference* [1982] 2 SCR 793, 806.

(51) See above (n 23) and related text.

(52) *Reference re Manitoba Language Rights* [1985] 1 SCR 721, 750 [hereinafter *Manitoba Language Reference*]. Rand J had held in *Roncarelli v Duplessis*, [1959] SCR 121, 142, that the rule of law is ‘a fundamental postulate of our constitutional structure’.

(53) *Secession Reference*, above (n 1) [49].

(54) Ibid [59]–[66].

(55) Ibid [84], [150].

(56) Ibid [64]. The Court pointed out that existing doctrines such as the de facto doctrine, res judicata, and mistake of law could remedy the potential chaos to some extent, but it was clear that the general principle of the rule of law was doing the fundamental work. Interestingly, the Court cited the minority (law) in the *Patriation Reference* in support of its method.

(57) See the chapters in this Handbook by, respectively, Jean Leclair and Warren Newman.

(58) *Secession Reference* above (n 1) [1].

(59) Ibid [2].

(60) Ibid [84].

(61) Ibid [69].

(62) *British Columbia v Imperial Tobacco Canada Ltd* [2005] 2 SCR 473 [66]. Cf. ‘The unwritten principles must be balanced against the principle of Parliamentary sovereignty’: *Babcock v Canada* [2002] 3 SCR 3 [55]. And yet it was also said in *Babcock* that ‘the un-

written constitutional principles are capable of limiting government actions': *ibid* [54]. On whether unwritten principles can provide a ground for quashing statutes see G. Régimbald and D. Newman, *The Law of the Canadian Constitution* (LexisNexis, 2013) 114–122. It is noteworthy that *Charter* rights are subject to limitation under s 1, and to legislative override under s 33, neither of which purport to apply to unwritten principles; quashing statutes for incompatibility with unwritten constitutional principles would provide even greater entrenchment than under the *Charter* for standards that are potentially even more abstract and unspecific than the *Charter* rights. Rothstein J, dissenting, pointed out this issue in *Trial Lawyers Association of British Columbia v BC* [2014] 3 SCR 31.

(63) *Quebec v Canada* [2015] 1 SCR 693 [144].

(64) See Joseph Raz, *The Authority of Law* (2nd ed Oxford University Press, 2009) 47, 296. Leslie Green has identified legal positivism with the sources thesis: L Green, 'Legal Positivism', in EN Zalta ed, *The Stanford Encyclopedia of Philosophy* (Fall 2009 Edition) <http://plato.stanford.edu/archives/fall2009/entries/legal-positivism/>. For further linking of legal positivism and the sources thesis, see J. Gardner, 'Legal Positivism: 5 1/2 Myths' (2001) 46 *Am J Juris* 199.

(65) Some have considered a theory to be anti-positivist if it 'claims that the concept of law is not properly understood unless law is seen as having some essential, or internal, conceptual connection with human value' (Roger Shiner, *Norm and Nature* (Oxford University Press, 1992) 261. But various theories adopting the sources thesis, and widely understood as forms of 'legal positivism' (including those of Raz, Green, Gardner) have identified essential, conceptual connections between law and value. For present purposes we will count a theory as 'anti-positivist' if it argues in favour of a conceptual connection between law and morality that is incompatible with the sources thesis. The interpretive theory of Ronald Dworkin, discussed below, is an example; it is controversial whether classical natural law theory is an example.

(66) Beverley McLachlin, 'Unwritten Constitutional Principles: What Is Going On?' (2006) 4 *NZJPIL* 147; for a critique of McLachlin's approach see Grégoire Webber, 'Originalism's Constitution' in G Huscroft and B Miller, eds, *The Challenge of Originalism* (Cambridge University Press, 2011) 147, 168.

(67) Such a theory departs from 'legal positivism' in Leslie Green's sense, if it claims that any complete explanation of the existence and content of the law of (e.g.) Canada necessarily refers to the principles of reason that the theory identifies. The foremost articulation of such a theory is John Finnis, *Natural Law and Natural Rights* (2nd ed Oxford University Press, 2011).

(68) McLachlin, above (n 66), 16.

(69) *Ibid* 9.

(70) *Law's Empire* (Harvard University Press, 1986).

(71) Dworkin's approach has particular affinities for common law method. However, civil law Quebec has by no means been insulated from the influence of Dworkin's approach, notably in constitutional argument. See, e.g., F. G  linas, 'Les conventions, le droit et la Constitution du Canada dans le renvoi sur la "s  cession" du Qu  bec: le fant  me du rapatriement' (1997) 57 *Revue du Barreau du Qu  bec* 291, 323 and Luc Tremblay, 'La th  orie constitutionnelle et la primaut   de droit' (1994) 39 *McGill LJ* 101, 104.

(72) R Dworkin, 'The Forum of Principle' (1981) 56 *NYUL Rev* 469, reprinted as chapter 2 of *A Matter of Principle* (Oxford University Press, 1985).

(73) For further discussion, see P Oliver, 'Change in the Ultimate Rule of a Legal System: Uncertainty, Hard Cases, Commonwealth Precedents, and the Importance of Context' (2015) 26 *King's LJ* 367.

(74) s 2: 'No Act of the Parliament of the United Kingdom passed after the Constitution Act, 1982 comes into force shall extend to Canada as part of its law'.

(75) Other changes were deemed by the courts to be too significant to be considered organic growth and therefore either prohibited or deemed to require constitutional amendment. One thinks of the addition of unemployment insurance under federal jurisdiction, prohibited by the courts in the 1930s and achieved via constitutional amendment in 1940.

(76) For particularly insightful discussions of the role of principles in Canadian constitutional law, see J. Leclair, 'Canada's Unfathomable Unwritten Constitutional Principles,' (2000) 27 *Queen's Law Journal* 389 and Mark D. Walters, 'The Common Law Constitution in Canada: Return of the *Lex Non Scripta* as Fundamental Law' (2001) 51 *University of Toronto Law Journal* 91.

(77) This process shares affinities with common law, civil law, and Indigenous legal method: see J Borrows, *Drawing Out Law* (University of Toronto Press, 2010). For discussion of the potential for 'living tree' constitutionalism and its relevance to Indigenous law, see J Borrows, *Freedom and Indigenous Constitutionalism* (University of Toronto Press, 2016) ch 4. The idea of 'drawing out' principles over time sounds like the method of the common law, and the phrase 'common law constitutionalism' is often now employed in Canada to describe this phenomenon. Chief Justice McLachlin has recently explored the extent to which the common law in Canada is more 'top down' than is often acknowledged (given the role of principles), and the civil law is more 'bottom up' than is often thought. On the latter point, see N Kasirer, 'Keep Calm and Teach Gaius' (2016) 76 *Louisiana L Rev* 1109. See video of keynote address by Chief Justice Beverley McLachlin at the 'Supreme Courts and the Common Law Symposium', Universit   de Montr  al, 27 May 2016: <http://commonlaw.umontreal.ca/symposium2016/videos/>.

(78) There are many forms and aspects of Canadian constitutional theory which have not been discussed in this chapter. Some are discussed in other chapters in this and other Parts of this *Handbook*. It is important to note here that in order to work out the practical requirements of principles such as the rule of law or protection of minorities, a good part

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of Canadian constitutional writing must be devoted to the study of law and society. The rule of law means little if there is no access to justice in fact (see *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)* 2014 SCC 59 and *British Columbia (Attorney General) v Christie*, 2007 SCC 21), and protection of minorities means little if court orders are routinely ignored or only paid lip service (see *Doucet-Boudreau v Nova Scotia (Minister of Education)* 2003 SCC 62). In other words, good theorising requires good understandings of the context and facts at hand.

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