IMPLIED CONSTITUTIONAL PRINCIPLES

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ABSTRACT

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This thesis challenges some of the current limits to the grounds for judicial review of legislation accepted by most Canadian jurists. More specifically, it makes a common law-based argument in favour of the priority over legislation of principles which are implied from the Imperial Constitution Acts 1867-1982 and which originally derive from the English constitution – namely implied constitutional principles. The argument faces two main interrelated legal objections: Parliamentary sovereignty and the Framers' intentions. The first objection is rebutted by arguing that Parliamentary sovereignty possesses an ability to change in a way that can incorporate substantive legal limitations. The most prevalent common law-based theories of change to Parliamentary sovereignty suggest that the courts can authoritatively determine if implied constitutional principles can check legislation. The second objection is rebutted by reference to the notion of progressive interpretation as conceived under Hartian and Dworkinian theories of law and adjudication. Under these theories, progressive interpretation is an aspect of the courts' best overall interpretation of the constitution, which includes implied constitutional principles. Such progressive interpretation can result in these principles constraining legislative authority.

Justification of the progressive interpretation of implied constitutional principles can be based on the rule of law from which derive a number of these principles. One plausible conception of the Canadian rule of law is that it rejects the view that implied constitutional principles can prevail when in conflict with legislation. However, the better conception is that, as an attempt to adapt implied constitutional principles to relevant changes in society and to protect their underlying values, the judiciary should interpret these principles as capable of checking legislation to the extent that they form part of the core content of the rule of law. Such a conception and an operation of implied constitutional principles can properly be explained by Hartian or Dworkinian common law-based progressive interpretation of these principles and by their relationship with legislative authority.

thesis length: 85,000 words

Table of Contents

Table of Abbreviations

R Dworkin, *Law's Empire*, 1986	*LE*
R Dworkin, *Justice in Robes*, 2006	*JR*
R Dworkin, *A Matter of Principle*, 1985	*MP*
R Dworkin, *Taking Rights Seriously*, 1977	*TRS*
HLA Hart, *The Concept of Law*, 2nd edn, 1994	*CL*
HLA Hart, *Essays in Jurisprudence and Philosophy*, 1983	*EJP*

Table of Cases

Canada

United Kingdom

Other Jurisdictions

Table of Statutes

CHAPTER 1 – SETTING OUT THE FRAMEWORK

1. Preface

It is often said that most legal systems have a 'partly written, partly unwritten' constitution. The written part typically refers to the 'Constitution', a foundational document (or set of documents) sitting at the apex of a country's hierarchy of legal norms. However, these national constitutional documents are often considered as incomplete in the sense that their Framers did not and could not conceivably foresee all the situations for which each section may apply, nor how it should apply. Moreover, the Framers themselves probably intended to address only a limited number of matters. For instance, the Canadian and US Constitutions provide a scheme generally limited to the establishment and role of the government, the division of legislative powers between the federal and provincial or state governments, a bill of rights and a constitutional amendment process. It follows that (the interpretation of) these constitutional documents would need to be complemented with law that many judges and constitutional scholars characterise as 'unwritten'.

The notions of an 'unwritten constitution' and of 'unwritten constitutional principles' can be notoriously vague and mean different things in different countries. For instance, in England, the term 'unwritten constitution' is often used as a shorthand reference to the nature of the country's constitutional system and to highlight the contrast with countries which have a 'written' constitution. In the US, a country with a written constitution, many constitutional scholars have nonetheless asserted the existence in their legal system of unwritten constitutional principles sometimes defined as legal norms 'not derived by normal processes of textual

interpretation from the written Constitution'.[1] Classic (but still contentious) examples of such unwritten norms are the right of privacy or the Ninth Amendment's 'unenumerated rights'.

In Canada, which has a partially written Constitution, namely the Imperial Constitution Acts 1867-1982, the 'unwritten' part of the constitution could refer to those common law rules and principles considered to be of a constitutional nature and to constitutional conventions.[2] However, the case law and literature acknowledges and discusses another type of constitutional principle (and rule) sometimes labelled 'unwritten'. Borrowing from the corresponding US definition, Peter Hogg, author of the most influential treatise in Canadian constitutional law,[3] suggested that the word 'unwritten' was 'a frank acknowledgment that the "principles" are not to be found in the written constitutional text and cannot be derived by normal processes of interpretation from the text'.[4] These principles give rise to norms which 'do not reasonably fit the express terms of the Constitution.'[5] Delivering the majority judgment of the Supreme Court of Canada in *Re Prov. Court Judges*, Lamer CJC cited a list of such principles ranging from democracy and the rule of law to more specific principles such as judicial independence and freedom of political expression. In this list, most of these principles have varying degrees of connection with the 1867-1982 Acts and originally derive from the English constitution, principally via

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1 TC Grey, 'Do We Have an Unwritten Constitution?' (1974-1975) 27 Stan L Rev 703, 703-04. See also RH Fallon, 'Judicial Legitimacy and the Unwritten Constitution: A Comment on Miranda and Dickerson' (2001) 45 NYL Sch L Rev 119, 135; J Rubenfeld, 'The New Unwritten Constitution' (2001) 51 Duke LJ 289, 289.

2 See *Re: Resolution to Amend the Constitution* [1981] 1 SCR 753, 876-84.

3 See PC Oliver, *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand* (OUP, Oxford 2005) 259.

4 PW Hogg, *Constitutional Law of Canada* (5th edn Carswell, Scarborough 2007) 15-52 (loose-leaf edn).

5 LB Tremblay, 'Marbury v. Madison and Canadian Constitutionalism: Rhetoric and Practice' (2004) 36 Geo Wash Int'l L Rev 515, 534.

the preamble to the Constitution Act 1867 by virtue of its mention that Canada has 'a Constitution similar in Principle to that of the United Kingdom'.

Two examples can illustrate the use of these principles. In *R v Hess (No. 2)*, the appellant – a resident of British Columbia – challenged the validity of s. 1025A of the Criminal Code, a federal statute, which stated that a person acquitted shall remain in custody until the expiration of the time allowed for an appeal by the Crown or until the determination of such appeal, unless a judge of the court to which the appeal is taken – in their case, the Supreme Court of Canada, situated more than 4,600 km from the appellant's place of residence – allows the person bail. At British Columbia Court of Appeal level, O'Halloran JA (hearing the case as a single judge) concluded that the appellant was illegally detained on at least two grounds, both referring to English legal sources. First, under 'the common law of England[,] Parliament shall respect the decisions of the Courts.'[6] If Parliament could freely ignore or interfere with judgments, it would 'break down the independence of the judiciary and destroy the judicial system Canada and its common law provinces have inherited.'[7] Second, O'Halloran JA held that s. 1025A, which denies an acquitted person his freedom, is 'contrary to the *written* constitution of the United Kingdom, as reflected in *Magna Carta* (1215), the *Petition of Right* (1628), the *Bill of Rights* (1689) and the *Act of Settlement* (1701).'[8] According to him, the principles in these English constitutional instruments became part of the Canadian constitution through the preamble to the 1867 Act which refers to the English constitution. As a result, 's. 1025A is contrary to

6 *R v Hess (No. 2)* [1949] 4 DLR 199 (BCCA) 205.

7 ibid 206.

8 ibid 208.

the Canadian constitution[] and beyond the competence of Parliament or any provincial Legislature'.[9]

In *Macmillan Bloedel Ltd v Simpson*, the appellant appealed his conviction for *ex facie* contempt of court initially pronounced by the British Columbia Supreme Court – a 'Superior Court' under the 1867 Act – on the basis that, under s. 47(2) of the federal Young Offenders Act, that Court had no jurisdiction to try him on that charge. S. 47(2) states that: '[t]he youth court has exclusive jurisdiction in respect of every contempt of court […] committed by a young person against any other court otherwise than in the face of that court.' At Supreme Court of Canada level, the only question was whether s. 47(2) was constitutionally valid. Delivering the majority judgment, Lamer CJC struck down the impugned section. His analysis centred on the notion of 'core or inherent jurisdiction of the superior courts'. In the Canadian case law, the main source of this notion has been broadly inferred from ss. 96-100 of the 1867 Act which create and establish the provincial superior courts.[10] Lamer CJC's inquiry turned to the question of what the content of the core jurisdiction is and, more specifically, whether the power to declare contempt of court was within that core.

Lamer CJC's definition of the core or inherent jurisdiction of the superior courts was largely based on his interpretation of the corresponding English notion, in particular on what he considered to be the seminal article in the field by the English legal scholar (and later Senior Master of the High Court) Jack Jacob.[11] While Jacob's article focused on the English High Court, Lamer CJC justified its usefulness in the Canadian context as follows:

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9 ibid 208-09.

10 See *Re Residential Tenancies Act* [1981] 1 SCR 714; *Sobeys Stores Ltd v Yeomans and Labour Standards Tribunal (NS)* [1989] 1 SCR 238; *Reference Re Young Offenders Act (PEI)* [1991] 1 SCR 252.

11 IH Jacob, 'The Inherent Jurisdiction of the Court' (1970) 23 CLP 23.

> the English judicial system is the historic basis of our system and is explicitly imported into the Canadian context by the preamble of the *Constitution Act, 1867*. The superior courts of general jurisdiction are as much the cornerstone of our judicial system as they are of the system which is Jacob's specific referent.[12]

Lamer CJC essentially adopted Jacob's definition of the notion of inherent jurisdiction of the superior court, which involved the power to control its process and enforce its orders through punishment for contempt.[13] Lamer CJC then explained that the criterion for determining the content of the inherent jurisdiction, the reason why the superior courts must have inherent jurisdiction, and the reason why their inherent jurisdiction cannot be legislatively removed, were ultimately based on the rule of law:

> In the constitutional arrangements passed on to us by the British and recognized by the preamble to the *Constitution Act, 1867*, the provincial superior courts are the foundation of the rule of law itself. Governance by rule of law [sic] requires a judicial system that can ensure its orders are enforced and its process respected. In Canada, the provincial superior court is the only court of general jurisdiction and as such is the centre of the judicial system. […] To remove the power to punish contempt *ex facie* by youths would maim the institution which is at the heart of our judicial system. Destroying part of the core jurisdiction would be tantamount to abolishing the superior courts of general jurisdiction, which is impermissible without constitutional amendment.
>
> The core jurisdiction of the provincial superior courts comprises those powers which are essential to the administration of justice and the maintenance of the rule of law.[14]

Therefore, while ss. 96-100 of the 1867 Act created and established the superior courts, their attributes and the extent to which the latter are protected from undue legislative interference are ultimately dependent on the rule of law. Lamer CJC concluded that, because the core jurisdiction is essential to the maintenance of the rule of law and protects judicial independence, it cannot be removed from the

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12 *Macmillan Bloedel Ltd v Simpson* [1995] 4 SCR 725 [29].

13 ibid [30], [33] citing Jacob (n 11) 27.

14 *Macmillan Bloedel* (n 12) [37].

superior courts by Parliament or the provincial legislatures without a constitutional amendment.[15]

This thesis makes a common law-based set of arguments that one category of 'unwritten' Canadian constitutional principles – ie *those which are implied from the 1867-1982 Acts but originally derive from the English constitution* – can in theory check federal and provincial legislation, that the judiciary has used these principles as a basis of constraint of legislative authority, and that the rule of law can be the constitutional ground justifying why legislative authority should be constrained by these principles. This issue remains highly controversial in the literature and regularly reappears before the courts. More often than not, the resolution of the most important Canadian constitutional cases has depended on the interpretation of relevant constitutional principles, whether the matter concerned a legal challenge to the validity of *all* the provincial statutes in three provinces,[16] or, even more dramatically, the validity of a possible unilateral declaration of secession by a province from the rest of the country.[17] The Supreme Court's analysis in these cases has sparked a plethora of further cases[18] and contributed to develop a vigorous academic debate.[19]

These constitutional principles have also been described as 'implied'. For instance, the Supreme Court has repeatedly stated that the rule of law was *implicitly*

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15 ibid [13], [15].

16 See *Re Manitoba Language Rights* [1985] 1 SCR 721; *Bilodeau v AG (Man)* [1986] 1 SCR 449; *R v Mercure* [1988] 1 SCR 234; *R v Paquette* [1990] 2 SCR 1103.

17 *Reference Re Secession of Quebec* [1998] 2 SCR 217.

18 See for instance V Kazmierski, 'Draconian but Not Despotic: The "Unwritten" Limits of Parliamentary Sovereignty in Canada' (2010) 41 Ottawa LR 245, fn 6-8 (citing 25 lower court cases on the topic).

19 See for instance S Choudhry and R Howse, 'Constitutional Theory and The Quebec *Secession Reference*' (2000) 13 CanJL& Juris 143, fn 1; Kazmierski (n 18) fn 4.

included in the preamble to the 1867 Act.[20] In his Oliver Wendell Holmes Lecture, Ivan Rand (a former Justice of the Supreme Court of Canada) stated that '[t]he principle of the rule of law [is] an *implication* of a constitution "similar in principle to that of the United Kingdom", as the Act of 1867 puts it'.[21] In *Re Prov. Court Judges*, Lamer CJC observed that '[a]nother *implication* of the preamble's recognition of Parliamentary democracy has been an appreciation of the interdependence between democratic governance and freedom of political speech.'[22] Then, a few paragraphs later, he stated that, '[b]y *implication*, the jurisdiction of the provinces over "courts", as that term is used in s. 92(14) of the *Constitution Act, 1867*, contains within it an *implied* limitation that the independence of those courts cannot be undermined.'[23] The term 'implied' is also used by respected constitutional scholars in referring to these constitutional principles.[24] Given the vagueness surrounding the term 'unwritten', in this thesis, I will henceforward refer to the principles implied from the 1867-1982 Acts (and originally deriving from English law) as 'implied constitutional principles'.

Despite the implied constitutional principles' central role in shaping the Canadian constitutional landscape, the case law and literature have generally been characterised by a lack of a proper theoretical basis upon which a coherent argument concerning the legal effects of these principles can be deployed. For some authors,

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20 *Re Manitoba Language Rights* 750. See also *Re Provincial Court Judges* [1997] 3 SCR 3 [107]; *British Columbia v Imperial Tobacco Canada Ltd* [2005] 2 SCR 473 [57].

21 IC Rand, 'Some Aspects of Canadian Constitutionalism' (1960) 38 CBR 135, 156 (my emphasis).

22 *Re Provincial Court Judges* (n 20) [102] (my emphasis).

23 ibid [108] (my emphasis).

24 See for instance RM Elliot, 'References, Structural Argumentation and the Organizing Principles of Canada's Constitution' (2001) 80 CBR 67, 83-84, 86; Hogg (n 4) 15-21; WR Lederman, 'The Independence of the Judiciary' in AM Linden (ed) *The Canadian Judiciary* (Osgoode Hall Law School, York University, Toronto 1976) 1, 4; PJ Monahan, 'Is the Pearson Airport Legislation Unconstitutional? The Rule of Law as a Limit on Contract Repudiation by Government' (1995) 33 Osgoode Hall LJ 411, 420-24; P Monahan, 'The Public Policy Role of the Supreme Court of Canada in the *Secession Reference*' (1999) 11 NJCL 65, 77.

this has been a general problem in Canadian constitutional theory. Luc Tremblay observed that 'Canadian lawyers, judges, constitutional law professors and other scholars do not, in general, express and rigorously state their own theoretical framework'.[25] More severely, Noel Lyon believed that there was an 'absence of a properly constructed model for constitutional interpretation',[26] whereas Sujit Choudhry and Robert Howse even opined that there was 'a traditional poverty of theory in Canadian constitutional law'.[27] While many Canadian constitutional scholars would view Choudhry and Howse's position as an over-generalization, it tends to ring true in certain specific areas of constitutional law, especially implied constitutional principles. Mark Walters aptly observed that their lawful development within the Canadian constitutional framework requires a 'defensible grounding in existing constitutional law and theory.'[28] David Mullan deplored the fact that 'the Canadian courts have yet to provide a comprehensive and coherent account of the theory and scope of underlying [i.e. implied] constitutional principles', with the result 'that the absence of such a developed theory places strains on the legitimacy of the whole concept.'[29]

This thesis seeks to address Mullan's (and others') criticism by developing a coherent common law-based account of the legal effects of implied constitutional principles. As Walters wrote, '[t]he obvious place to look for a theory of unwritten

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25 L Tremblay, *The Rule of Law, Justice and Interpretation* (McGill-Queen's University Press, Montreal 1997) 15.

26 JN Lyon, 'Constitutional Theory and the Martland - Ritchie Dissent' (1981-1982) 7 Queen's LJ 135, 137-38.

27 Choudhry and Howse (n 19) 144-45. Also Tremblay, 'Marbury v. Madison and Canadian Constitutionalism' 537-40.

28 MD Walters, 'The Common Law Constitution in Canada: Return of *Lex Non Scripta* as Fundamental Law' (2001) 51 UTLJ 91, 94-95.

29 D Mullan, 'The Role for Underlying Constitutional Principles in a Bill of Rights World' [2004] NZLRev 9, 23.

law capable of supporting a theory of unwritten constitutionalism in common law jurisdictions is, of course, the common law itself.'[30] While the notion of implied constitutional principles has largely been developed by the courts, Walters suggested that such principles were 'perhaps not common law in the pure sense'. [31] In fact, before their translation into some legal form, those implied constitutional principles were first recognised as values (in the sense of principles or standards of behaviour) desirable in themselves and necessary to the existence of other values in society. Mullan justly observed that: 'the origin of or justifications for any set of underlying principles may well be varied or multifaceted. To that extent, there may not be a single unified theory of their place in the constitutional firmament. They may have to be understood in differing ways.'[32] Therefore, my theoretical framework must be sensitive to the particular nature of implied constitutional principles. Once the framework set out, it must properly connect with specific implied constitutional principles. A survey of the case law and literature suggests that the most frequently discussed implied constitutional principles derive from the rule of law. Their close interconnection thus further justifies their examination in this thesis.

While my thesis argument focuses on the Canadian context, the idea that some general principles not formally enacted in a constitutional instrument could check legislation is also shared or discussed in other common law systems. I have already alluded to these principles in the US legal system. Ever since that nation's founding, Americans have been deeply concerned with the 'unwritten Constitution'. Over time,

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30 MD Walters, 'Written Constitutions and Unwritten Constitutionalism' in G Huscroft (ed) *Expounding the Constitution: Essays in Constitutional Theory* (CUP, Cambridge 2008) 245, 248.

31 MD Walters, 'Nationalism and the Pathology of Legal Systems: Considering the Quebec Secession Reference and Its Lessons for the United Kingdom' (1999) 62 MLR 371, 383.

32 Mullan (n 29) 20-21.

the concern unfolded into an impassioned debate, generating a wealth of opinions ranging from the denial of any unwritten constitution in American law[33] to claims that some inferential/structural/relational reasoning were adequate bases for allowing American judges to conduct judicial review of legislation.[34] Jed Rubenfeld opined that, '[o]verwhelmingly, the voluminous debate on this subject [of unwritten constitutional law] has concerned the existence and legitimacy of unwritten constitutional rights, with the paradigm case being, say, *Roe v. Wade*'.[35] In this case, the US Supreme Court famously struck down a Texas statute criminalising the procurement of an abortion on the basis of a constitutional right of privacy which the Court admitted was not explicitly mentioned anywhere in the Constitution, although the majority Justices 'felt' that it was founded in the Fourteenth Amendment's concept of liberty or, alternatively, in the Ninth Amendment.[36]

In England, a growing number of respected judges and scholars have suggested (in different ways) that Parliamentary sovereignty could be constrained by certain basic constitutional principles, especially the rule of law (including principles deriving from the rule of law).[37] In Australia, the notion of implied constitutional

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33 See for instance MS Moore, 'Do We Have an Unwritten Constitution?' (1989-1990) 63 S Cal L Rev 107; M Moore, 'The Written Constitution and Interpretivism' (1989) 12 Harv JL & Pub Pol'y 3. Cf TC Grey, 'The Constitution as Scripture' (1984-1985) 37 Stan L Rev 1, 2, fn 2 (identifying Ronald Dworkin, Owen Fiss, Michael Perry, David Richards and Harry Wellington among those scholars who reject the distinction between the written and the unwritten constitution).

34 See for instance CL Black, *Structure and Relationship in Constitutional Law* (Louisiana State University Press, Baton Rouge 1969); DA Strauss, *The Living Constitution* (OUP, New York 2010).

35 Rubenfeld (n 1) 291.

36 *Roe v Wade* (1973) 410 US 113, 153.

37 See for instance *R (Jackson) v AG* [2006] 1 AC 262 (HL) [102] (Lord Steyn), [107], [120], [127] (Lord Hope), [159] (Baroness Hale); TRS Allan, 'Parliamentary Sovereignty: Law, Politics, and Revolution' (1997) 113 LQR 443; T Allan, 'Questions of Legality and Legitimacy: Form and Substance in British Constitutionalism' (2011) 9 ICON 155; TRS Allan, 'The Limits of Parliamentary Sovereignty' [1985] PL 614; Sir Robin Cooke, 'Fundamentals' [1988] NZLJ 158; Lord Hope, 'Sovereignty in Question' (WG Hart Legal Workshop 2011) 15; J Jowell, 'Parliamentary Sovereignty under the New Constitutional

rights (partly inspired by the early Canadian case law on the 'implied bill of rights') has given rise to a large amount of case law and literature.[38] There are also cases from other Commonwealth countries where the courts have implied from the relevant national Constitutions a number of rules and principles used to strike down legislation, in particular the principles of the separation of powers and of judicial independence. One line of cases seems to arise from the fact that many of these Commonwealth countries have a Constitution based on the 'Westminster model'. According to the Judicial Committee of the Privy Council, one of the characteristics of the Constitutions under this model (including the Canadian Constitution) is that:

> all of them were negotiated as well as drafted by persons nurtured in the tradition of that branch of the common law of England that is concerned with public law and familiar in particular with the basic concept of separation of legislative, executive and judicial power as it had been developed in the unwritten constitution of the United Kingdom.[39]

These Constitutions were enacted in former Imperial colonies which 'were already living under a system of public law [reflecting that] same basic concept.'[40] For the Judicial Committee, it follows that 'a great deal can be, and in drafting practice often is, left to *necessary implication* from the adoption in the new constitution of a governmental structure which makes provision for a legislature, an executive and judicature.'[41] For instance:

> it is *implicit* in the very structure of a Constitution on the Westminster model […] that judicial power, however it be distributed from time to

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Hypothesis' [2006] PL 562; J Laws, 'Law and Democracy' [1995] PL 72; Lord Steyn, 'Democracy, the Rule of Law and the Role of Judges' [2006] EHRLR 243, 252; Lord Woolf, 'Droit Public - English Style' [1995] PL 57.

38 For a recent survey of the debate, see 'The Implied Rights Cases: Twenty Years On' (2011) 30 UQLJ (special issue).

39 *Hinds v The Queen* [1977] AC 195 (PC) 212.

40 ibid 212.

41 ibid 212 (emphasis added).

> time between various courts, is to continue to be vested in persons appointed to hold judicial office in the manner and on the terms laid down in the Chapter dealing with the judicature, even though this is not expressly stated in the Constitution.[42]

On the basis of this reasoning involving the implication of principles from a constitutional statute, the Judicial Committee struck down or set aside a number of legislative measures held to be unduly interfering with these principles (as opposed to some specific section of the Constitution), for instance a Jamaican statute transferring jurisdiction over firearm-related offences to a new court with a lower degree of judicial independence than the original court, and imposing for some of these offences a mandatory sentence of detention at hard labour from which the detainee can only be discharged by the Governor-General;[43] a Mauritian statutory provision creating an alternative procedure under which the mandatory sentence for persons found guilty of a drug-trafficking offence is the death penalty;[44] a Jamaican statutory provision and a similar provision enacted by the legislature of Saint Christopher and Nevis stating that a person under 18 years old convicted of capital murder shall be sentenced to be detained at the Governor General's pleasure.[45]

Within the broad topic of implied constitutional principles, the major underlying themes in this thesis should therefore have a familiar ring to jurists from other common law-based systems, which I will highlight as they appear throughout the thesis. My general discussion of these separate themes should thus be of direct interest in those legal systems as well.

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42 ibid 213 (emphasis added).

43 See ibid.

44 See *Ali v The Queen* [1992] 2 AC 93 (PC).

45 See *Browne v The Queen* [2000] 1 AC 45 (PC); *DPP of Jamaica v Mollison* [2003] 2 AC 411 (PC).

Having summarised the subject of this thesis, I will present a general overview of the thesis argument in which I will outline its legal significance, the main legal objections to it and how I intend to deal with them in developing my proposed theory of interpretation of implied constitutional principles. I will then introduce and justify the three legal methodologies used in the thesis. The relevance of one of them, comparative analysis, requires more detailed explanation; therefore, it will be the subject of a separate section. I will conclude this introductory chapter by presenting a summary of each subsequent chapter.

2. Thesis Overview

Since my thesis argument is concerned with the limits of legislative authority, it must address the legal principle of Parliamentary sovereignty. According to the account of orthodox Canadian Parliamentary sovereignty which has been accepted by most Canadian jurists since Confederation (1867), the legislative branch could in theory pass *any* law as long as it does not contravene a *section* of the Constitution Act 1867 as amended (as opposed to the preamble to the Act which, under the orthodox theory, has 'no enacting force').[46] Adapting AV Dicey's classic formulation of English Parliamentary sovereignty, Luc Tremblay described orthodox Canadian Parliamentary sovereignty in the following terms:

[46] *Patriation Reference* (n 2) 805; *Re Provincial Court Judges* (n 20) [94].

> 1 Parliament and the provincial legislatures have, under the Canadian constitution, the right to make or unmake any law whatever in relation to their own classes of subjects determined by the constitution, and
> 2 No person or body is recognized by the law of Canada as having the right to override or set aside the legislation of Parliament or the legislation of the provincial legislatures enacted in relation to their own classes of subjects determined by the constitution.[47]

Consequently, in the words of Peter Hogg, 'judicial review of legislation must be based exclusively on the words of the constitution'.[48] Along with orthodox Canadian Parliamentary sovereignty, Hogg's account of judicial review of legislation would represent orthodox Canadian constitutional theory. This thesis suggests that the nature and structure of the Canadian constitution better accord with the view that implied constitutional principles can also limit legislative authority (than the competing position that these principles cannot limit legislative authority). I develop this argument through a distinct theory of Parliamentary sovereignty and progressive interpretation which I will then test against my interpretation of the selected implied constitutional principles and of their relationship with legislation.

The significance of my inquiry is twofold. First, it revisits and challenges the upper echelons of the commonly accepted hierarchy of legal norms in Canada, which identifies legislation as having supremacy over any type of norm other than the sections of the Constitution Acts 1867-1982. Second, such a reordering within the hierarchy of norms will also entail revisiting the extent of the respective powers of the legislatures and the courts. At a more general level, my thesis argument is part of the broader legal, theoretical and jurisprudential debate on the scope of judicial review

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47 Tremblay, *The Rule of Law, Justice and Interpretation* (n 25) 59. Compare with AV Dicey and ECS Wade, *Introduction to the Study of the Law of the Constitution* (10th edn Macmillan, London 1959) 39-40. On orthodox Canadian Parliamentary sovereignty, see Ch 2, '2. The Traditional Theory of Parliamentary Sovereignty'.

48 PW Hogg, 'The Charter of Rights and American Theories of Interpretation' (1987) 25 Osgoode Hall LJ 87, 102, 113. Also Hogg, *Constitutional Law of Canada* (n 4) 15-52 (stating that Canadian lawyers normally assume 'that only the text of the Constitution […] creates enforceable rights and obligations').

(of legislation and executive action) and revisits the place of traditional constitutional fundamentals in a common law system governed by a (partially) written constitution.

As frequently raised in the case law and literature, there are two main interrelated legal objections to my thesis argument. Dale Gibson neatly summarised the objection from Parliamentary sovereignty as follows:

> It is said that if our constitution is really similar in principle to that of Great Britain, it must include the concept of legislative supremacy, which is the root principle of British constitutional law. Therefore, it is argued, no subject can be beyond the legislative competence of both Parliament and the provincial legislatures.[49]

For Mullan, 'not surprisingly, the principal source of concern was the extent to which the governing principle of the UK constitution, both in 1867 and [later on], was that of parliamentary supremacy.'[50] The tension between implied constitutional principles and Parliamentary sovereignty is also recognised in the case law. For instance, as the Supreme Court of Canada observed in *Babcock v Canada (A-G),* '[t]he unwritten principles must be balanced against the principle of Parliamentary sovereignty.'[51]

According to Gibson, the second main objection is that the Framers almost certainly had no intention of including in the constitution the idea that implied constitutional principles could check legislative excesses.[52] From his historical analysis of the notion of *lex non scripta* in the Canadian constitutional context, Mark Walters made a similar observation:

> It simply cannot be maintained seriously that the framers of the BNA Act [ie the 1867 Act] intended the preamble's reference to the UK

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49 D Gibson, 'Constitutional Amendment and the Implied Bill of Rights' (1967) 12 McGill LJ 497, 498.

50 Mullan (n 29) 21.

51 *Babcock v Canada (AG)* [2002] 3 SCR 3 [55].

52 D Gibson, 'Constitutional Amendment and the Implied Bill of Rights' (1966-1967) 12 McGill LJ 497, 499.

> constitution to mean that judges thereafter were to regard certain unwritten British constitutional norms as justiciable constraints upon Canadian legislative authority.[53]

Among those who have added their voices to this objection is Jeffrey Goldsworthy, who severely criticised the Supreme Court's departure from the Framers' intentions in its interpretation of implied constitutional principles:

> The idea that the meaning of constitutional provisions can spontaneously "evolve," so that the content of those provisions can change without constitutionally prescribed methods of amendment being employed, is extremely dubious at the best of times. Applied to unwritten "underlying" principles, it confers on judges an unbounded authority to find whatever they like in a constitution. […] They can be held to expand or mutate according to the judges' confidence in their ability to divine "contemporary values" - which in practice means their own values.[54]

For Goldsworthy, these two objections are not just specific to the Canadian context as he extended them to other common law-based systems:

> [Claims on behalf of unwritten constitutional principles] are refuted once we take into account the doctrine of parliamentary sovereignty. […] The doctrine's predominance within Britain's actual constitutional tradition (as opposed to mythical ones concocted by wishful thinking) – inherited by countries such as Canada and Australia – is inconsistent both with the proffered analysis of our concept of law, and with the pretensions of common law constitutionalism. Claims [that they are implied or presupposed by particular, written constitutions] may in some cases be persuasive, but that depends on there being sufficient evidence that the constitution's founders had the requisite law-making intentions.[55]

I will challenge the objection from Parliamentary sovereignty through an examination of how Parliamentary sovereignty can develop in theory and has developed in the case law. While there is no consensus about which constitutional

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53 Walters, 'The Common Law Constitution in Canada' (n 28) 137.

54 J Goldsworthy, 'The Preamble, Judicial Independence and Judicial Integrity' (1999-2001) 11 Constit Forum 60, 62.

55 J Goldsworthy, 'Unwritten Constitutional Principles' in G Huscroft (ed) *Expounding the Constitution - Essays in Constitutional Theory* (CUP, Cambridge 2008) 277, 312.

theory best explains Parliamentary sovereignty, the most prevalent Anglo-Canadian theories of Parliamentary sovereignty can adequately account for changes to it, including limitations from implied constitutional principles. Moreover, these theories display the common feature that the courts have a central role in determining the content of Parliamentary sovereignty. In particular, the judicial authority to resolve questions concerning the scope of Parliamentary sovereignty can be based on a Hartian theory of change in the rule of recognition or a common law-based theory of constitutional interpretation. If Parliamentary sovereignty was once consistent with the orthodox account, it has the ability to adapt to relevant socio-political changes even if the adaptation requires the courts to depart from orthodoxy.

I will challenge the objection from the Framers' intentions with the notion of progressive interpretation, a mode of constitutional interpretation according to which the meaning of a constitutional document is not permanently frozen at the time of enactment but gradually develops over time in order to adapt to relevant changes in society. While Canadian jurists have generally accepted (judicial) progressive interpretation of the 1867-1982 Acts in preference to non-progressive or 'originalist' approaches, it seems that they have accorded much more weight to the latter approaches in respect of implied constitutional principles. I contend that, contrary to the views of Goldsworthy (and others), implied constitutional principles can (and should) be progressively interpreted. While the Framers' intentions, which would have been formulated more than a century ago remain a relevant factor in constitutional interpretation, they cannot be the decisive factor. A later interpretation of implied constitutional principles may validly depart from earlier interpretations and the development of the implied principles examined in this thesis should be viewed as illustrations of such a departure.

Therefore, while my discussion in this thesis begins as a response to the two objections from the orthodox theory, it gradually shifts to the development of a proposed common law-based theory of progressive interpretation of implied constitutional principles. Under this proposed theory, the courts have a much clearer path to interpret the legal effects of implied constitutional principles using a greater array of considerations (principles, standards, interests, values) in addition to Parliamentary omnicompetence and constitutional history. These diverse considerations, legal, extra-legal (on a positivist account) or moral and political (on a non-positivist account), form an integral part of a common law-based process of adjudication. Some of the considerations which I will examine in this thesis are the efficient working of a Parliamentary democracy, the fast-developing justice system which saw the expansion of statutory courts and the 'Administrative State', individual protection from arbitrary government decisions, and the principle of access to justice. It will be argued that this proposed approach to the interpretation of implied constitutional principles is based on HLA Hart's and Ronald Dworkin's theories of law and adjudication and is consistent with the Canadian law and practice. My proposed approach permeates the case law and it is accordingly up to the courts to continue in that direction.

In the end, constitutional interpretation remains an evaluation of the various elements or parts of the constitution often involving some balancing exercise. As the Supreme Court stated in *Reference Re Secession of Quebec*, foundational constitutional principles 'function in symbiosis. No single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other.'[56] Through an analysis of the legal effects of implied constitutional

[56] *Quebec Secession Reference* (n 17) [49].

principles, my evaluation may well entail readjusting the balance between the respective powers of the legislative and executive branches on the one hand, and of the judicial branch on the other hand. Implied constitutional principles serve to preserve the Canadian system of government. Therefore, it appears contradictory and even self-destructive that any branch of government could validly contravene them.

3. Overview of the Thesis's Methodologies

In this section, I introduce and justify the three methodologies used to develop my thesis argument. Each methodology reflects a distinct facet of the constitutional principles examined in this thesis. The first two methods, the case law and theoretical analyses, are probably the most widely used in constitutional law scholarship. While the third method, comparative analysis, is also frequently used, its justification requires a more elaborate explanation so that its role in this thesis can be properly understood.

Given my focus on the legal effects of implied constitutional principles, it is often said that courts are the best authorities to turn to as the authoritative interpreters of the constitution.[57] The case law analysis is well suited for the Canadian context as it is the 'predominant form' of legal argumentation in Canada.[58] Therefore, a case law

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57 See *Cooper v Canada (Human Rights Commission)* [1996] 3 SCR 854 [13] (Lamer CJC); *Crevier v Québec (AG)* [1981] 2 SCR 220, 237-38; *Felipa v. Canada (Citizenship and Immigration)* [2012] 1 FCR 3 (CA) [159] (Stratas JA, diss); H Brun, G Tremblay and E Brouillet, *Droit constitutionnel* (5th edn Editions Y. Blais, Cowansville, Quebec 2008) 209-10; Hogg, *Constitutional Law of Canada* (n 4) 60-10; J Leclair, 'Judicial Review in Canadian Constitutional Law: A Brief Overview' (2004) 36 Geo Wash Int'l L Rev 543, 551; JN Lyon, 'Constitutional Validity of Sections 3 and 4 of the Public Order Regulations, 1970' (1972) 18 McGill LJ 136, 136-37; E McWhinney, *Judicial Review* (4th edn University of Toronto Press, Toronto 1969) 73. Cf *Marbury v Madison* (1803) 5 US (1 Cranch) 137; *Cooper v Aaron* (1954) 358 US 1, 17-18; W Wade and CF Forsyth, *Administrative Law* (9th edn OUP, Oxford 2004) 30; R Dworkin, 'Unenumerated Rights: Whether and How *Roe* Should Be Overruled' (1992) 59 U Chi L Rev 381, 383; IR Kaufman, 'The Essence of Judicial Independence' (1980) 80 Colum L Rev 671, 671; PA Freund, 'A Supreme Court in a Federation: Some Lessons from Legal History' (1953) 53 Colum L Rev 597, 607.

58 Elliot (n 24) 73.

analysis will be conducted in order to seek any existing general statement of law in respect of the legal effects of implied constitutional principles. While it is anticipated that the case law alone cannot provide a complete answer to my inquiry, it should narrow down the range of realistically available interpretations as some interpretations fit the relevant case law so poorly that they should be dismissed outright.[59] Moreover, the case law analysis serves a second purpose given its inherent tie with theory. As Nicholas Bamforth wrote, '[t]he degree to which any theory of judicial review can ultimately be considered plausible will depend to an extent on how well it fits the case law as a whole.'[60] Therefore, the case law can provide a degree of verification of the associated theoretical claims in my thesis.

If constitutional theory cannot dispense with constitutional practice, the converse appears true as well. According to Richard Fallon, '[f]or a judge as much as for anyone else, it is impossible to engage in constitutional argument without making at least implicit assumptions about appropriate methodology [and theory].'[61] Fallon cited Ronald Dworkin for whom jurisprudence or general theories of law are 'silent prologue to any decision at law.'[62]

Apart from its role as an assumption underlying practice, the purpose of legal theory is to justify and influence law and practice, but also, as Dworkin suggested, to justify state or official coercion.[63] In trying to achieve this purpose, constitutional theorists seek to provide satisfactory explanations of the central features of law and practice and 'to bring constitutional practice more fully into accord with […] the

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59 *LE* 230-31, 255.

60 N Bamforth, 'Ultra Vires and Institutional Independence' in CF Forsyth (ed) *Judicial Review and the Constitution* (Hart, Oxford 2000) 111, 116.

61 RH Fallon, 'How to Choose a Constitutional Theory' (1999) 87 Cal L Rev 535, 575.

62 *LE* 90.

63 *LE* 190-92.

deepest fundamental values of the written Constitution or of surrounding practices.'[64] Legal theory is especially important when dealing with a highly contentious issue such as my thesis argument.

Naturally, there are different types of legal theories. For instance, Fallon suggested that one could distinguish between substantive theories, which 'seek to identify substantive values that constitutional adjudication ought to advance', and formal theories, which 'prescribe methodologies that should be used in constitutional decision making, but do not purport to identify substantive values by which outcomes should be tested.'[65] Fallon also distinguished between text-based and practice-based theories, which assert their superiority because they respectively better fit or explain the content of the constitutional document(s) or constitutional practice. Fallon finally mentioned one last distinction between descriptive or positive theories and normative or prescriptive theories. According to Luc Tremblay, a descriptive constitutional theory 'aims to provide a representation of the body of constitutional law as it exists or is accepted in fact' whereas 'a normative constitutional theory is concerned with an ideal constitution derived from a more fundamental moral or political theory'.[66] For Fallon, these sets of distinctions are useful but far from absolute. For instance, while text-based theories must acknowledge the significance of practice, practice-based theories must also acknowledge that constitutional practice has a constitutional instrument at its centre.[67] Moreover, according to Fallon (with whom David Strauss agreed with), few theories are purely normative or descriptive: '[m]ost if not all,

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64 Fallon, 'How to Choose a Constitutional Theory' (n 61) 541. See also Choudhry and Howse (n 19) 146; K Mason, 'What Is Wrong with Top-Down Reasoning?' (2004) 78 ALJ 574, 582.

65 Fallon, 'How to Choose a Constitutional Theory' (n 61) 538.

66 Tremblay, *The Rule of Law, Justice and Interpretation* (n 25) 13. See also RH Fallon, 'A Constructivist Coherence Theory of Constitutional Interpretation' (1986-1987) 100 Harv L Rev 1189, 1232.

67 Fallon, 'How to Choose a Constitutional Theory' (n 61) 544.

claim to fit or explain what they characterize as the most fundamental features of the constitutional order' and 'seek to influence practice, typically by offering prescriptions for reform.'[68]

The blurring of these classificatory lines and the simultaneous use of more than one type of theory is visible in this thesis as it discusses a number of multifaceted notions and combines them into one theory of constitutional interpretation according to which implied constitutional principles can (and should) check legislation. Indeed, my discussion of implied constitutional principles is mainly based on practice but within the framework set out by the constitutional instruments; in this respect, it could also be considered as descriptive. With regard to the form-substance divide, one could say that (progressive) interpretation of implied constitutional principles has a significant formal aspect as it is not, strictly speaking, concerned with specific substantive outcomes. However, it could also be said that the theory of constitutional interpretation proposed in this thesis is clearly more than descriptive given that the proposed theory would fit both Hartian and Dworkinian theories of law and adjudication. Moreover, to the extent that implied constitutional principles also encompass a set of goals and values ultimately linked to the rule of law, then a theory of constitutional interpretation relying on these principles is partly substantive and, ultimately, embodies the rule of law's underlying normative propositions.

Finally, the third methodology is comparative. As my thesis focuses on a set of Canadian constitutional principles which originally derive from the English constitution, an analysis of the relevant English principles and theories forms a

[68] ibid 540-41. See also Fallon, 'A Constructivist Coherence Theory of Constitutional Interpretation' (n 66) 1233; DA Strauss, 'What Is Constitutional Theory?' (1999) 87 Cal L Rev 581, 586.

necessary part of the analysis. Contrary to the two preceding methods which are interconnected, comparative analysis is not inherently interconnected with case law and theoretical analysis. Also, it has a variable degree of relevance or usefulness depending on the origins and nature of the constitutional systems which are compared. Therefore, the next section addresses the legal relevance of comparative analysis for my thesis.

4. Considerations Related to the Use of Comparative Analysis

In this section, I will explain why and how a comparative analysis of English constitutional law and theory is relevant to some aspects of my thesis argument. I will first present the main uses of comparative law in order to help identify which ones I intend to employ in my comparative analysis. I will then explain why this thesis properly calls for the relevant comparative analysis.

4.1. General Uses of Comparative Analysis

In the literature on comparative legal methodology, there is a distinction between using comparative law (and legal theory) in a 'normative' fashion and using it in a 'non-normative' fashion. In the context of case law, the use of comparative law can also be defined by reference to the notion of persuasive authority. When no normative weight is attached to its use, comparative law is a generally accepted source of practical wisdom to help gain a better understanding of national legal issues and eventually to help find better solutions to those issues. Alternatively, comparative law may be used in a normative fashion by playing a role in justifying a court decision.[69] One type of such use is when foreign experience is looked to as an illustration of how

[69] JM Smits, 'Comparative Law and Its Influence on National Legal Systems' in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP, Oxford 2006) 513, 526.

a certain rule is applied in practice. Another type of normative use is when foreign law contributes directly to a court decision: it is because a particular solution has been adopted elsewhere that the court wants to do same.[70] In practice, the distinction between a normative use and a non-normative use of comparative law is not always easy to make. Indeed, one author observed that:

> [o]ften the method of reasoning is far more subtle because it is not the foreign decision or statute as such that is used as the basis for the reasoning, but rather the *argument* used in it which is taken over by the national court or legislature. Adopting the underlying reasoning may, however, be characterized as [using foreign material] as a source of inspiration. […] But as soon as legislatures or courts use foreign law to *control* an outcome on the basis of 'national' argument, they use foreign law in the normative sense.[71]

Besides the normative/non-normative distinction, a number of legal scholars have discussed the weight of comparative case law by reference to the notion of persuasive authority. According to Christopher McCrudden, persuasive authority exists when 'other material is regarded as relevant to the decision which has to be made by the judge, but is not binding on the judge under the hierarchical rules of the national system determining authoritative sources.' [72] The notion of persuasive authority could be further refined. McCrudden borrowed Robert Summers' distinction between an 'authority reason', which takes the form: 'legal conclusion X is correct because Court Y so decided', and a 'substantive reason', which takes the form: 'legal conclusion X is correct because of the following substantive reason… (and Court Y thinks so too…)'.[73] Like the normative/non-normative distinction, the distinction between an authority reason and a substantive reason is not always clear-cut. Indeed,

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70 ibid 526, 537.

71 ibid 526-27.

72 C McCrudden, 'A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights' (2000) 20 OJLS 499, 502-03.

73 ibid 516 citing RS Summers, 'Two Types of Substantive Reasons: The Core of a Theory of Common-Law Justification' (1977-1978) 63 Cornell L Rev 707.

Summers observed that the distinction 'is misleading, for the usual authority reason cannot be launched without resort to its underlying substantive reasons.'[74]

The extensive use of comparative law as a normative or persuasive argument has been criticised. Sir Otto Kahn-Freund warned of the dangers of taking for granted that rules or institutions are transplantable: '[a]ny attempt to use a pattern of law outside the environment of its origin continues to entail the risk of rejection.'[75] Kahn-Freund's view has been shared by many jurists, especially in the US where the judicial use of comparative law is much more contentious than in Canada.[76] Mark Tushnet seemed to express a widely held related view when he argued that 'constitutional law is deeply embedded in the institutional, doctrinal, social, and cultural contexts of each nation, and […] we are likely to go wrong if we try to think about any specific doctrine or institution without appreciating the way it is tightly linked to all the contexts within which it exists.'[77] For Tushnet, the use of comparative law must be sensitive to the different contexts of each nation. Tushnet's and Kahn-Freund's views represent prudent propositions of comparative legal methodology.

In Canada, the notion of persuasive authority in comparative law is well-known. WR Lederman opined that: 'between separate systems of courts in different Common Law jurisdictions, all precedents are at the persuasive level, and may suffer rather critical appraisal before acceptance across jurisdictional boundaries,

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74 Summers (n 73) 730.

75 O Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 MLR 1, 27.

76 See for instance *Atkins v Virginia* (2002) 536 US 304; *Lawrence v Texas* (2004) 539 US 558; *Roper v Simmons* (2005) 543 US 551.

77 M Tushnet, 'Some Reflections on Method in Comparative Constitutional Law' in S Chaudhry (ed) *The Migration of Constitutional Ideas* (CUP, Cambridge and New York 2006) 76.

particularly if these are national boundaries.'[78] Lederman then specified that, after Canada abolished all Canadian appeals to the Judicial Committee of the Privy Council in 1949, '*all* English decisions since that date are now at the persuasive level.' [79] Patrick Glenn explained part of the development of Canadian law by reference to the use of comparative law and concluded that '[p]ersuasive authority from abroad is always to be welcomed'.[80]

In sum, comparative analysis can be used in various ways. Lawyers can refer to comparative authorities (and works) in a non-normative way as a source of practical wisdom and inspiration. Comparative law becomes a normative argument when it is used to control the result in a national court. Similarly, foreign cases can be considered as persuasive authority in the sense of authority reasons where they are used to control the result in a national court. An authority reason is contrasted with a substantive reason where it is the reasoning underlying the relevant foreign cases which influences the result in the national court. These distinctions are not watertight but remain useful to help understand how lawyers use comparative law. In principle, the weight of comparative law and legal theory will depend on the context in which the legal rules and principles that are compared have arisen. Among the common law systems, the law of a foreign jurisdiction can be legally relevant or persuasive, but the real issue is its degree of legal relevance or persuasiveness on a given matter. Sometimes, the contexts in the two legal systems that are compared are so different that the relevance or usefulness of comparative law (and legal theory) would be close to non-existent, but at other times, two legal regimes are sufficiently similar, or even

78 WR Lederman, 'The Common Law System in Canada' in E McWhinney (ed) *Canadian Jurisprudence: The Civil Law and Common Law in Canada* (Stevens & sons, London 1959) 34, 37.

79 ibid 37.

80 HP Glenn, 'Persuasive Authority' (1987) 32 McGill LJ 261, 297.

related, that specific foreign legal principles can have a higher degree of persuasiveness in the national courts. The next part of this section will explain how comparative English constitutional law and theory, and, occasionally, the constitutional law of other Commonwealth legal systems, have been used in Canada. Along with my present discussion of the general uses of comparative law and legal theory, that explanation will then allow me to clarify accordingly the relevance or usefulness of comparative constitutional law and theory for my thesis.

4.2. Relevance of Comparative English Constitutional Law and Theory

In this thesis, the specific issue related to the use of comparative analysis is the propriety of choosing England as the main jurisdiction for comparison. The propriety can be established by reference to the initial and continuing reception of English constitutional law in Canada and the established Canadian practice of referring to English constitutional law and theory with respect to the main substantive themes of my thesis, notably Parliamentary sovereignty, legal interpretation and the rule of law with its associated implied constitutional principles.

Sir Ivor Jennings once wrote that all of the independent Commonwealth countries:

> share the general principles of English constitutional law, modified to meet local conditions and their former dependent status by Act of Parliament or Orders in Council. Their modern constitutions have been founded upon those principles. [T]hey have without exception adopted or adapted the British system of government.[81]

According to Jennings, all that matters 'from a constitutional point of view is that the "common law" of the colony is English law.'[82] Historically, English constitutional

81 I Jennings, *Constitutional Laws of the Commonwealth* (OUP, Oxford 1957) 43.

82 ibid 45.

law was initially extended to the British North American colonies pursuant to common law principles of reception and by Imperial and colonial statutory instruments.[83] The enactment of the Constitution Act 1867 implicitly confirmed English law as one of the main sources or original foundations of Canadian constitutional law. Peter Hogg (and others) observed that, because the new Dominion was to retain its existing constitutional framework, the 1867 Act 'did nothing more than was necessary to accomplish confederation. […] Apart from the changes made to establish the new Federation, the British North Americans wanted the old rules to continue in both form and substance exactly as before.'[84]

One could challenge the extent of the influence of English constitutional law in Canada by arguing that, if the Framers intended the 1867 Act to confirm the reception of English law in Canada, they must have only referred to English law as it stood in 1867. It would follow that post-1867 English legal developments would lose the bulk of their legal relevance in Canada because the 1867 Act severed (a large section of) the political ties between the United Kingdom and the former British North American colonies. Moreover, the decline of English constitutional law's relevance in Canada would be almost complete following the adoption of the Statute of Westminster 1931, which generally ended the subordination of Canadian legislatures to the Imperial Parliament, and the abolition of Canadian appeals to the Judicial Committee of the Privy Council in 1949. However, there is an alternative

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83 See in general *Calvin's Case* (1608) 7 Co Rep 1a, 77 ER 377, Jenk 306, 2 St Tr 559; *Campbell v Hall* (1774) 1 Cowp 204, 98 ER 1045, Lofft 655, 98 ER 848, 20 St Tr 239; W Blackstone, *Commentaries on the Laws of England. In Four Books* (8th edn Clarendon Press, Oxford 1778) 104-05; JE Cote, 'The Reception of English Law' (1977) 15 Alta L Rev 29; Hogg, *Constitutional Law of Canada* (n 4) ch. 2.

84 Hogg, *Constitutional Law of Canada* (n 4) 1-3-1-4. Also H Arthurs, 'Constitutional Courage' (2004) 49 McGill LJ 1, 11; JEC Brierley, 'Reception of English Law in Quebec' in M Doucet and J Vanderlinden (eds), *La réception des systèmes juridiques: implantation et destin* (Bruylant, Brussels 1994) 112; PH Russell, *The Judiciary in Canada: The Third Branch of Government* (McGraw-Hill Ryerson, Toronto; London 1987) 47; WS Tarnopolsky, *The Canadian Bill of Rights* (2d rev edn McClelland and Stewart, Toronto 1975) 29-30.

view which supports instead a continuing post-1867 reception of relevant English law.

Glenn and Lederman explained the ongoing persuasive authority of English common law in Canada after 1867 by reference to a version of a 'declaratory theory' of the common law. Lederman recognised that, if one conceives the common law as being 'progressively discovered by the judges as its various pre-existing parts were needed', then one simply does not date it for the purpose of reception 'or any other purpose'.[85] Glenn suggested a slightly different version of the declaratory theory which also appears to be compatible with non-positivist theories of law. For Glenn, the theory did not mean that common law judges would only declare law and not make it, but rather that the 'common law is a developing system in the sense that there is a continuing process of development and exposition of rules […] in which the most persuasive authority is sought, *regardless of its origin*, for the resolution of a given case.'[86] Applying that theory to the Canadian context, Glenn argued that:

> In common law Canada, adherence to a declaratory theory of law produced a continuing reception of English and Commonwealth case law, and the decline of scientific positivism in the second half of the twentieth century has seen a reopening towards other foreign sources. The commitment to English law has been so strong as to be expressed in terms of obligation, though it is evident, as in the process of reception, that there is a constant process of screening and evaluation.[87]

The strong continuing influence of English law can also be inferred from judicial practice. For instance, a sample analysis of a single 1985 Supreme Court of Canada law report volume revealed the following ranking of the most frequently cited cases

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85 Lederman, 'The Common Law System in Canada' (n 78) 35.

86 Glenn (n 80) 293 (emphasis added); HP Glenn, *On Common Laws* (OUP, Oxford 2005) 69.

87 Glenn, 'Persuasive Authority' (n 80) 295. Also Glenn, *On Common Laws* (n 86) 69.

and doctrinal writings by country of origin: Canadian cases (367), UK cases (110), US cases (45), Canadian authors (63), UK authors (29), US authors (24).[88]

Some commentators denounced what they perceived as Canadians' 'uncritical adherence to English authorities'. For one author, 'this dependence has led some Canadian judges to make uncritical and overly mechanical applications of English precedents'.[89] Similarly, in the constitutional context, Noel Lyon criticised the 'common assumption […] that Canadian constitutional law coincides with English constitutional law.'[90] In particular, he disagreed with the 'dominant conception shared by Canadian lawyers' (and endorsed by the Judicial Committee) 'that subject to the federal division of powers the Parliament of Canada and the provincial legislatures are replicas of the Parliament of the United Kingdom.'[91] However, by the same token, these critiques acknowledged the significant influence of English constitutional law (and theory) in the development of Canadian law, including Canadian constitutional law. Moreover, at no time it was suggested that it was appropriate to cease referring to English law. Indeed, '[n]o one would reasonably suggest that the great heritage of English-made law should be jettisoned'.[92] What these authors were against was the automatic use of English law 'when the comparative circumstances were not really sufficiently similar to necessitate this',[93] which brings us back to the importance of giving due consideration to the relevant contexts.

The influence of English and Commonwealth constitutional law and theory is abundantly recognised with respect to the main themes examined in this thesis. The

88 Glenn, 'Persuasive Authority' (n 80) 296.

89 HE Read, 'The Judicial Process in Common Law Canada' (1959) 37 CBR 265, 266.

90 JN Lyon, 'The Central Fallacy of Canadian Constitutional Law' (1976) 22 McGill LJ 40, 44.

91 ibid 43-45.

92 Read (n 89) 280.

93 Lederman, 'The Common Law System in Canada' (n 78) 37.

preamble to the 1867 Act often serves as a convenient formula to support the relevance of such a comparative inquiry. For instance, Tremblay correctly wrote that '[b]y 1982 it was axiomatic that the preamble […] had incorporated into Canadian law the principle of parliamentary sovereignty.'[94] In *R v Mercure*, the Supreme Court was asked whether a provincial statute was invalid because it had not been enacted in both English and French as required by an earlier statute. Delivering the majority judgment of the Court, La Forest J struck down the impugned statute for failing to comply with the linguistic 'manner and form' condition. Much of his discussion on this point relies on foreign authorities. He began by stating that '[t]he law on this point was clearly stated by the Privy Council in *Bribery Commr. v. Ranasinghe*' before citing a significant portion of Lord Pearce's judgment in that case.[95] La Forest J then noted that 'Sir Ivor Jennings, one of the great constitutional lawyers of this century, thought [that *Ranasinghe*] applied even to the United Kingdom Parliament.'[96] He concluded his comparative analysis by citing *A-G for New South Wales v Trethowan* and *Harris v Minister of the Interior* in support of the proposition that legislatures must respect manner and form conditions, before adding that '[t]hat has always been the law in this country and in the Commonwealth generally.'[97]

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94 Tremblay, *The Rule of Law, Justice and Interpretation* (n 25) 58. See also *Edwards v Canada (AG)* [1928] SCR 276 (Duff J); HM Clokie, 'Basic Problems of the Canadian Constitution' (1942) 8 CanJEcon & PolSc 1, 2; Lyon, 'Central Fallacy of Canadian Constitutional Law' (n 90) 40, 48; WN Newman, 'The Principles of the Rule of Law and Parliamentary Sovereignty in Constitutional Theory and Litigation' (2004-2005) 16 NJCL 175, 206; FR Scott, *Civil Liberties & Canadian Federalism* (University of Toronto Press, Toronto 1959) 19; BL Strayer, *The Canadian Constitution and the Courts: The Function and Scope of Judicial Review* (3d edn Butterworths, Toronto 1988) 35, 38; Tarnopolsky (n 84) 92.

95 *Mercure* (n 16) 277.

96 ibid 278.

97 ibid 279. Cf *A-G for New South Wales v Trethowan* [1932] AC 526 (PC); *Harris v Minister of the Interior* [1952] SA 428 (AD).

On the rule of law, Gonthier J, delivering the judgment of the Supreme Court in *Immeubles Port Louis Ltée v Lafontaine (Village),* interpreted Dicey's view and its relevance to the Canadian context as follows:

> The principle that public authorities are subordinate to the supervisory power of the superior Courts is the cornerstone of the Canadian and Quebec system of administrative law. Such judicial review is a necessary consequence of the rule of law as identified by Albert Venn Dicey in 1885 in his work *Introduction to the Study of the Law of the Constitution*[.] This principle is firmly rooted in the common law and is the source of the very foundations of the British system, on which our own is based.[98]

In *Re Manitoba Language Rights*, the Supreme Court stated that the preamble to the 1867 Act implicitly made the notion of the rule of law, which originated from England, a 'fundamental postulate of the Canadian constitutional order'.[99] The influence of English authorities was directly observable in the Court's definition of the rule of law:

> Second, the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order. Law and order are indispensable elements of civilized life. "The rule of law in this sense implies ... simply the existence of public order." (W.I. Jennings, *The Law and the Constitution*[)]. As John Locke once said, "A government without laws is, I suppose, a mystery in politics, inconceivable to human capacity and inconsistent with human society" (quoted by Lord Wilberforce in *Carl-Zeiss-Stiftung v. Rayner and Keeler Ltd. (No. 2)*[.] According to Wade and Phillips, *Constitutional and Administrative Law*[: "]the rule of law expresses a preference for law and order within a community rather than anarchy, warfare and constant strife. In this sense, the rule of law is a philosophical view of society which in the Western tradition is linked with basic democratic notions".[100]

A similar connection to English law has been made in respect of judicial independence. Lederman wrote that '[t]he judicial provisions of the 1867 Act make it

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98 *Immeubles Port Louis Ltée v Lafontaine (Village)* [1991] 1 SCR 326 [80].

99 *Re Manitoba Language Rights* (n 16) 750.

100 ibid 749.

clear that the federating provinces and the new nation were to continue to follow the model afforded by the English judicature.'[101] Some years later, Dickson CJC, in his extrajudicial writings, referred again to the preamble to state that Canada received from England its 'long history of judicial independence.'[102] Finally, on freedom of expression, Dickson CJC, delivering the judgment of the Court in *Fraser v PSSRB*, stated that that freedom 'is a principle of our common law constitution, inherited from the United Kingdom by virtue of the preamble to the *Constitution Act, 1867*.'[103] In 1982, François Chevrette and Herbert Marx (later Marx J) suggested that the most important source of Canadian civil liberties was the country's heritage of British institutions and public law.[104]

The above overview of the use of comparative constitutional law and theory should help better understand how Canadian judges and legal scholars use it and how in turn it will be used in this thesis. However, identifying precisely which type of use is involved every time a foreign legal source is invoked can be a difficult task for two reasons. First, as already mentioned, the normative/non-normative and authority/substantive distinctions tend to blur. Second, when moving from one constitutional topic to another, the relevant contexts within which the legal rules and principles of two legal systems are compared can change and thus influence the degree to which comparisons are relevant. For instance, with respect to the legal effects of the 'implied bill of rights', an examination of the governing English and Canadian legal principles suggests that the Canadian courts and commentators have

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101 WR Lederman, 'The Independence of the Judiciary [2]' (1956) 34 CBR 1139, 1158, 1160.

102 B Dickson, 'The Rule of Law: Judicial Independence and the Separation of Powers' (1985) 9 ProvJJ 4, 5.

103 *Fraser v PSSRB* [1985] 2 SCR 455, 462-63.

104 F Chevrette and H Marx, *Droit constitutionnel: notes et jurisprudence* (Presses de l'Université de Montréal, Montréal 1982) 1201.

referred to English law as a source of inspiration, as the relevant English law cannot serve as direct and full support of the implied bill of rights theory. By contrast, on important aspects of the rule of law and Parliamentary sovereignty, the works of leading English commentators such as Dicey and Jennings have been adopted as statements also compatible with Canadian law. Here, the English classical works seem to have been used in a normative way.

As a result, the comparative analysis in this thesis will alternate between authority reasons and substantive reasons and between normative and non-normative arguments depending on the topic discussed and the degree of relevance of the corresponding English legal principles, and, sometimes, legal principles from other Commonwealth legal systems. Evidently, there is always a point where the limits of comparative analysis are reached as Canada charts its own legal course. However, as a general proposition, my comparative analysis should help explain the origins and development of the relevant Canadian legal principles. A proper understanding of modern Canadian constitutional law cannot be divorced from its past developments and historical heritage. As the Supreme Court stated in *Quebec Secession Reference*, '[o]ur Constitution is primarily a written one, the product of 131 years of evolution. Behind the written word is an historical lineage stretching back through the ages, which aids in the consideration of the underlying constitutional principles.'[105]

5. Summary of Chapters

Since my thesis argument requires that I come to grips with Parliamentary sovereignty, it is appropriate to begin my analysis by challenging the objection from Parliamentary sovereignty. My argument in Chapter 2 is that Parliamentary

[105] *Quebec Secession Reference* (n 17) [49].

sovereignty can incorporate new substantive legal limitations such as implied constitutional principles. This argument is based on an examination on what are probably the most prevalent common law-based theories of change to Parliamentary sovereignty. My examination will reveal that these theories all possess a mechanism to account for changes to Parliamentary sovereignty, including the contemplated development of implied constitutional principles. Moreover, it is suggested that a central feature of the process of change to Parliamentary sovereignty is that the courts can authoritatively resolve questions concerning its scope and limits.

Having set out the theoretical framework of Parliamentary sovereignty will allow me in Chapter 3 to examine the place of Parliamentary sovereignty in Canadian law, and explain how its development fits underlying theory. Probably because it originally derives from England, Canadian Parliamentary sovereignty has been deeply influenced by some of the major English theories of Parliamentary sovereignty. Throughout (at least) almost all of Canada's history since Confederation in 1867 (and even before), orthodox Canadian Parliamentary sovereignty has adhered to the general idea of legislative omnicompetence subject only to the constraints from applicable Imperial law. However, later Canadian legal developments, in particular at the turn of the 21st century, suggest that Canadian lawmaking bodies have now become further limited by implied constitutional principles. I will argue that these developments fit well with my theoretical analysis from Chapter 2.

In Chapter 4, I challenge the objection from the Framers' intentions by arguing that the courts can progressively interpret implied constitutional principles and rule on their legal effects vis-à-vis legislation. My argument rests on a demonstration that both Hartian and Dworkinian theories of law and adjudication fit with my proposed common law-based approach to progressive interpretation. I have

chosen these two theories because of their recognised influence among many Canadian jurists and in order to achieve wider acceptance of my thesis argument. Under a Hartian theory, progressive interpretation can be based on related notions of penumbral or unregulated cases or legal gaps which the courts have the authority to resolve. Alternatively, for Ronald Dworkin, progressive interpretation would consist in the best constructive interpretation of the community's relevant law and practice. I then argue that the common law coherently explains progressive interpretation of implied constitutional principles in such a way that they can check legislation, and thus fit my proposed theory of constitutional interpretation.

Chapter 5 examines the rule of law as an aggregate implied constitutional principle, which translates into legal form a number of underlying constitutional values. My examination of the rule of law uses the distinction between formal conceptions of the rule of law, which do not seek to pass judgment on the content of the law, and substantive conceptions, which do. In trying to escape the criticisms associated with these conceptions, I suggest a 'thin' substantive conception of the rule of law according to which the content of the Canadian rule of law would generally follow the prevailing theoretical consensus – which can be defined as the *core* content of the rule of law – save that a statute or an act of the executive branch which unduly threatens that content can be invalidated or set aside. After explaining and justifying the thin substantive conception, I examine its fit with Canadian law. I will argue that, when laws unduly interfere with the core content of the rule of law, for instance judicial independence, the courts can intervene and have intervened to prevent such interference. Conversely, when there was no undue interference with the core content of the rule of law, the courts have declined to invalidate or set aside the impugned

statutes. It follows that Canadian law fits the thin substantive conception better than formal or purely substantive conceptions.

Chapter 6 examines the implied bill of rights theory, according to which there has been in Canadian law an implied constitutional right to freedom of expression. The purpose of this chapter is to further illustrate the existence of implied constitutional principles and their potential ability to check legislation as a result of judicial progressive interpretation. It is submitted that the Canadian courts used the English common law as a source of inspiration, especially with regard to the view that freedom of expression is a fundamental aspect of the English tradition of civil liberties and that the courts should act as its guardian. In light of the influence of English constitutional law and theory in the development of freedom of expression in Canadian law, I examine the two main competing theories concerning its constitutional nature (outside the boundaries of the Canadian Charter of Rights and Freedoms 1982) and then argue that Canadian law has accepted the implied bill of rights theory.

In my conclusion, I suggest that an interpretation of Canadian constitutional law mainly based on the sections of the Constitution Acts 1867-1982 as the sole legal limitations on legislative omnicompetence is too narrow. Such an interpretation overlooks the essential role of other aspects and parts of the constitution. The sections of the 1867-1982 Acts are closely connected with deeper principles, interests and values, some which are embodied in implied constitutional principles. These principles are the product of a long historical and contextual development, with their roots extending all the way to the Middle Ages in England.[106] Therefore, Canadian

[106] See W Jacket, 'Foundations of Canadian Law in History and Theory' in OE Lang (ed) *Contemporary Problems of Public Law in Canada: Essays in Honour of Dean F C Cronkite* (University of Toronto Press, Toronto 1968) 3.

constitutional interpretation involves a holistic analysis of all the various but interconnected parts of the constitution. While Parliamentary sovereignty and the Framers' intentions are essential parts of the constitution, they do not systematically 'trump or exclude the operation' of other parts or principles of the constitution (and vice-versa). Sometimes, inroads upon the scope of legislative authority can be necessary in order to achieve the best interpretation of the constitution, even if they were not envisaged at the time of Confederation.

* * *

CHAPTER 2 – THEORIES OF PARLIAMENTARY SOVEREIGNTY

1. Introduction

Parliamentary sovereignty has been generally regarded as the most basic, central, fundamental principle of the British constitution.[1] When extended to the British colonies, the sovereignty of the Imperial Parliament (as distinct from the local parliaments' or legislatures' authority) became a fundamental of their constitutions too (in the sense that those colonies were subject to the will of the Imperial Parliament). After the colonies eventually gained their legal independence, typically through the enactment of an Imperial statute, many of them chose to keep their system of Parliamentary government. In 2004, Andrew Harding identified that 29 of the 54 member countries of the Commonwealth, mainly spread through the Caribbean, Asia-Pacific and North America, were still governed by a Parliamentary system, usually embodying a more or less modified principle of Parliamentary or legislative sovereignty tailored to each country's needs.[2] For instance, New Zealand functions under a principle of Parliamentary sovereignty not subject to a written constitution. Other countries have adopted a principle of legislative sovereignty with certain legal constraints and differing degrees of similarity to the English principle.

To state the obvious, Parliamentary sovereignty is a complex notion fraught with persisting questions concerning its nature and content. Presumably, the

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1 See for instance C Forsyth, 'The Definition of Parliament after Jackson: Can the Life of Parliament Be Extended under the Parliament Acts 1911 and 1949?' (2011) 9 ICON 132, 132-33, 143; JD Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (OUP, Oxford 1999); 'Report of the Select Committee on a Bill of Rights', HL (1977-78) 176 [14]; L Scarman, 'Fundamental Rights: The British Scene' (1978) 78 Colum L Rev 1575, 1586.

2 A Harding, 'The "Westminster Model" Constitution Overseas: Transplantation, Adaptation and Development in Commonwealth States' (2004) 4 OUCLJ 143, 165-66.

complexity will only be greater when the notion's Diceyan-based version is used to explain the exercise of legislative authority, not in a unitary state like England or New Zealand, but in a federal system like Canada where, until 1982, as many as three levels of legislative authority have concurrently been enacting (primary) legislation. Over the years, constitutional jurists from England, but also from many parts of the Commonwealth, have developed a remarkable variety of theories to address relevant questions, some of which have resulted from or been influenced by the different common law-based systems outside of England. First there was the 'traditional view', whereby, according to one of its opponents, Sir Ivor Jennings, '[i]f Parliament enacts that smoking in the streets of Paris is an offence then, in the eyes of the English courts it is an offence'.[3] Secondly, a number of commentators such as RFV Heuston and RTE Latham proposed the 'new view' (or similar variations), which incorporated 'manner and form' conditions, i.e. certain formal or procedural legislative requirements that must be fulfilled before a purported statute concerned by such requirements could be recognised as a statute or be enforceable.[4] These views were roughly captured by HLA Hart's distinction between 'continuing' and 'self-embracing' sovereignty. Different theorists have successively characterised Parliamentary sovereignty as a 'legal fact',[5] an 'ultimate legal principle',[6] a 'rule of

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3 I Jennings, *The Law and the Constitution* (3rd edn University of London Press, London 1943) 149.

4 See in general W Friedmann, 'Trethowan's Case, Parliamentary Sovereignty, and the Limits of Legal Change' (1950) 24 ALJ 103; RFV Heuston, *Essays in Constitutional Law* (2nd edn Stevens, London 1964); I Jennings, *The Law and the Constitution* (5th edn University of London Press, London 1959); RTE Latham, 'What Is an Act of Parliament?' (1939) 3 King's Counsel 152; G Marshall, *Constitutional Theory* (OUP, Oxford 1971) ch III.

5 See mainly AV Dicey and ECS Wade, *Introduction to the Study of the Law of the Constitution* (10th edn Macmillan, London 1959) 39, 68.

6 See in general HWR Wade, 'The Basis of Legal Sovereignty' [1955] CLJ 172; HWR Wade, 'Sovereignty – Revolution or Evolution?' (1996) 112 LQR 568.

recognition'[7] and a '*grundnorm*'.[8] More recently, Jeffrey Goldsworthy observed that a number of judges and legal academics from England and New Zealand have developed 'a new constitutional framework' seemingly at variance with the earlier accounts, described 'as "common law constitutionalism", "dual" or "bi-polar" sovereignty or as a "collaborative enterprise"'.[9]

The general character of the theories of Parliamentary sovereignty makes them easily adaptable to different legal systems, especially those that have historically adopted the English system of Parliamentary government. For example, in *The Constitution of Independence*, Peter Oliver used his theoretical analysis of English Parliamentary sovereignty to examine how Australia, Canada and New Zealand gradually gained their independence and, by the same token, how legislative authority developed. Over time, the scope and development of Parliamentary sovereignty has continued to be an intensely discussed subject among judges and constitutional scholars throughout many parts of the Commonwealth.[10] While my thesis ultimately

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7 See in general *CL* 148-52; Goldsworthy (n 1) ch 2; PC Oliver, *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand* (OUP, Oxford 2005); Wade, 'Sovereignty – Revolution or Evolution?' (n 6) 574; AL Young, *Parliamentary Sovereignty and the Human Rights Act* (Hart, Oxford 2009).

8 See for instance PC Oliver, 'Abdicating and Limiting Parliament's Sovereignty-Reply to Goldsworthy' (2006) 17 KCLJ 281, 282; BL Strayer, *The Canadian Constitution and the Courts: The Function and Scope of Judicial Review* (3d edn Butterworths, Toronto 1988) 36, 42-43; MD Walters, 'The Common Law Constitution in Canada: Return of *Lex Non Scripta* as Fundamental Law' (2001) 51 UTLJ 91, 98-99.

9 J Goldsworthy, 'Is Parliament Sovereign? Recent Challenges to the Doctrine of Parliamentary Sovereignty' (2005) 3 NZJPIL 7, 8.

10 For recent discussions, see for instance P Butler, 'Human Rights and Parliamentary Sovereignty in New Zealand' (2004) 35 VUWLR 341; J Debeljak, 'Parliamentary Sovereignty and Dialogue under the Victorian Charter of Human Rights and Responsibilities: Drawing the Line between Judicial Interpretation and Judicial Law-Making' (2007) 33 Mon LR 9; S Elias, 'Sovereignty in the 21st Century: Another Spin on the Merry-Go-Round' (2003) 14 PLR 148; Goldsworthy, 'Is Parliament Sovereign?' (n 9); G Huscroft, 'Protecting Rights and Parliamentary Sovereignty: New Zealand's Experience with a Charter-Inspired, Statutory Bill of Rights' (2002) Windsor YB Access Just 111; G Little, 'Scotland and Parliamentary Sovereignty' (2004) 24 LS 540; JL-C Neo and YC Lee, 'Constitutional Supremacy: Still a Little Dicey?' in K Tan and L-a Thio (eds), *Evolution of a Revolution: Forty Years of the Singapore Constitution* (Routledge-Cavendish, London; New York 2009) 153; WN Newman, 'The Principles of the Rule of Law and Parliamentary Sovereignty in

focuses on the Canadian context, the theoretical analysis of how Parliamentary sovereignty changes should be of interest to other legal systems which have adopted a more or less complete version of it.

In Chapter 1, I explained the deep influence of English constitutional law and theory in Canada. This influence is present in respect of Parliamentary sovereignty. Delivering the majority judgment of the Supreme Court of Canada in *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, McLachlin J stated that 'the Canadian Parliament and provincial legislatures were modelled, down to the smallest details, on the Parliament of the United Kingdom.'[11] Consequently, it is not surprising, as Douglas Schmeiser observed, that '[t]he English constitutional theory of the supremacy of Parliament was generally accepted by most Canadians.'[12] Over the years, (Canadian) Parliamentary sovereignty has been preserved even after the last formal legal ties with the United Kingdom were severed with the adoption of the Constitution Act 1982. This close connection of the Canadian law and theory of Parliamentary sovereignty with English constitutional law and theory makes comparative analysis of the two legal systems a highly useful inquiry in seeking a better understanding of Canadian Parliamentary sovereignty.

Constitutional Theory and Litigation' (2004-2005) 16 NJCL 175; JEW Thomas, 'The Relationship of Parliament and the Courts: A Tentative Thought or Two for the New Millennium' (2000) 31 VUWLR 5; R Weill, 'Reconciling Parliamentary Sovereignty and Judicial Review: On the Theoretical and Historical Origins of the Israeli Legislative Override Power' (2012) 39 Hastings Const LQ 457.

11 *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)* [1993] 1 SCR 319 [111].

12 DA Schmeiser, *Civil Liberties in Canada* (OUP, London 1964) 7. See also AF Bayefsky, 'Parliamentary Sovereignty and Human Rights in Canada: The Promise of the Canadian Charter of Rights and Freedoms' (1983) 31 PolSt 239, 239, 263; AW Bradley, 'The "Indestructible" Sovereignty of the Westminster Parliament' in NE Eastham and B Krivy (eds), *The Cambridge Lectures 1981* (Butterworths, Toronto 1982) 217, 217-18; WS Tarnopolsky, *The Canadian Bill of Rights* (2d rev edn McClelland and Stewart, Toronto 1975) 111.

At a deeper theoretical level, more than one general theory of law has been influential in the Canadian constitutional system. One such theory is Hartian positivism. Luc Tremblay opined that '[HLA] Hart's theory provides us with the best articulation of the basic assumptions of Canadian orthodox constitutional law theory, and one may safely assert that by 1982 it was the most influential theoretical framework.' [13] The most in-depth analysis of the development of Canadian sovereignty, Oliver's '*The Constitution of Independence*', relies extensively on the Hartian rule of recognition. According to Mark Walters, '[t]he "grundnorm," or rule of recognition, in Canada has long been considered one of Diceyan parliamentary sovereignty as modified by the presence of a written and entrenched constitution'.[14] Similarly, Strayer J stated (extrajudicially) that the Colonial Laws Validity Act 1865 'provided a "rule of recognition," our *grundnorm*: namely, that laws passed by any Canadian legislative body would be invalid if they were inconsistent with an imperial law or order in council extending to Canada.'[15] By contrast, other authors believe that Ronald Dworkin's theory of law and adjudication fairly explains the development of the Canadian constitutional system. For instance, Wilson J noted (extrajudicially) that:

> while the constitutional document is static, the Constitution is dynamic and is progressively shaped as judges apply deeply contestable conceptions of rights to particular, and sometimes peculiar, facts. Thus, the Constitution is always unfinished and is always evolving. Ronald Dworkin likens constitutional interpretation to the writing of a "chain novel" where each successive judge produces a chapter. Each

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13 L Tremblay, *The Rule of Law, Justice and Interpretation* (McGill-Queen's University Press, Montreal 1997) 17.

14 Walters (n 8) 98-99.

15 BL Strayer, 'Life under the Canadian Charter: Adjusting the Balance between Legislatures and Courts' [1988] PL 347, 349.

> judge is constrained to a degree by what has gone on before, but at the same time is obliged to make the novel the best that it can be.[16]

I will discuss the role attributed to the judiciary in the development of Parliamentary sovereignty under both Hartian and Dworkinian theories later in this chapter and with greater detail in Chapter 4. However, at this stage, it is worth observing that many jurists have also adopted common law-based conceptions of Canadian Parliamentary sovereignty.[17] While (English and Canadian) Parliamentary sovereignty can be examined from a multiplicity of theoretical perspectives, it is submitted that the rule of recognition theories and, more generally, common law theories, which I will examine in this chapter, are applicable to my analysis of Canadian implied constitutional principles.

In this chapter, I challenge the objection from Parliamentary sovereignty[18] by arguing that, as a matter of theory, Canadian Parliamentary sovereignty can incorporate new substantive limitations. As such, the chapter lays the theoretical foundations for the discussion in Chapter 3 where it will be argued that Canadian law has moved away from orthodox constitutional theory as the courts have come to use implied constitutional principles to strike down or set aside legislation. In my discussion, it will not be necessary that I expressly commit to one specific theory or model of Parliamentary sovereignty as the purpose is to focus on the relevant

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16 B Wilson, 'The Making of a Constitution: Approaches to Judicial Interpretation' [1988] PL 370, 373. See also Ch 4, '1. Introduction'.

17 See for instance F Chevrette and H Marx, *Droit constitutionnel: notes et Jurisprudence* (Presses de l'Université de Montréal, Montréal 1982) 83; RGB Dickson, 'Keynote Address' in FE McArdle (ed) *The Cambridge Lectures 1985* (Éditions Yvon Blais, Montréal 1987) 3; V Kazmierski, 'Draconian but Not Despotic: The "Unwritten" Limits of Parliamentary Sovereignty in Canada' (2010) 41 Ottawa LR 245; RH Leigh, 'The Indian Act, the Supremacy of Parliament, and the Equal Protection of the Laws' (1970) 16 McGill LJ 389, 393; RA Macdonald, 'The New Zealand Bill of Rights Act: How Far Does It or Should It Stretch?' (The Law and Politics - Proceedings of the 1993 New Zealand Law Conference 1993) 94, 107; B Slattery, 'The Independence of Canada' (1983) 5 SCLR 369, 385.

18 See Ch 1, '2. Thesis Overview'.

common ground between them. I will conclude that, despite their differences and the criticism directed at the various theories discussed in this chapter, each of them recognises in principle the courts' authority to resolve questions concerning Parliamentary sovereignty and its limits. I believe that this analytical approach offers the best prospects for achieving the broadest acceptance of my thesis argument.[19] If Parliamentary sovereignty is indeed changing, one would presume that it must be moving away from legislative omnicompetence. As Adam Tomkins observed, 'after all, the doctrine [of legislative supremacy] could hardly be further expanded!'[20] To be sure, the argument in this chapter (and in the thesis) moves away from the idea of Parliamentary omnicompetence, although it relies to a large extent on theories of Parliamentary sovereignty initially developed in the English context.

My discussion will begin with a brief overview of the traditional view of Parliamentary sovereignty. Because the purpose of this chapter is to examine how Parliamentary sovereignty can in theory accommodate legal limitations, the overview will focus on the notion of change to Parliamentary sovereignty. My examination of what are probably the most common theories of change to Parliamentary sovereignty should identify that, despite their differences and potential problems, they share in common recognition of the courts' authority to rule that a change to Parliamentary sovereignty has occurred. These theories view Parliamentary sovereignty as a rule of recognition or a product of the common law or both. My analysis will identify the differences between them and some of their problems but, more importantly, will build on their common features and similarities in order to suggest that the notion of change to Parliamentary sovereignty is captured through a common law-based

19 See RH Fallon, 'How to Choose a Constitutional Theory' (1999) 87 Cal L Rev 535, 562.

20 A Tomkins, *Public Law* (OUP, Oxford 2003) 105.

account. I thus submit that the courts are the main institution through which changes such as the contemplated development of implied constitutional principles can be authoritatively established.

2. The Traditional Theory of Parliamentary Sovereignty

The purpose of this section is to summarily state the traditional theory of Parliamentary sovereignty as presented by AV Dicey and Sir William Wade and to discuss a selection of the most common notions of change to Parliamentary sovereignty. Probably the three most prevalent notions of change emerge from Wade's notion of 'technical revolution', the Hartian notion of penumbras in the rule of recognition and Jeffrey Goldsworthy's notion of consensus theory. Part if not most of my theoretical discussion in this chapter focuses on the notion of change in order to determine the extent of the judicial role in the development of legal changes to Parliamentary sovereignty. It is necessary to determine this extent since one component of my thesis argument is that judges can use implied constitutional principles to strike down or set aside legislation. More broadly, my discussion in this section lays the theoretical foundations of both my analysis of Canadian Parliamentary sovereignty in Chapter 3 and my explanation of its changes, most notably changes involving implied constitutional principles.

Any modern discussion of Parliamentary sovereignty inevitably returns to Dicey's classic exposition of the principle.[21] Dicey referred to Parliamentary sovereignty as a legal fact which he fitted into a two-pronged statement: first, that Parliament has the right to make or unmake any law whatever, including fundamental and so-called constitutional laws; and second, that under the English constitution, no

[21] Dicey and Wade (n 5) ch 1.

person or body, including the courts, could override or set aside an Act of Parliament. Dicey's conception of Parliamentary sovereignty also had limits, but they were strictly moral and political, thus legally unenforceable. Although Dicey never discussed his views vis-à-vis the manner and form theory as it only became influential after his death, his conception of Parliamentary sovereignty has been interpreted as making manner and form conditions legally unenforceable.[22]

Dicey's view of Parliamentary sovereignty was revisited some years later by Wade in his seminal 1955 article.[23] Like Dicey, Wade subscribed to the notion that Parliament can enact any law and 'that no Act of [Parliament] could be invalid in the eyes of the courts'.[24] In retracing the source and nature of this rule of judicial obedience to statutes, Wade qualified it as the ultimate political fact or ultimate legal principle upon which the whole system of legislation hangs and for which no purely legal explanation can be given. It is beyond the reach of Parliament and, consequently, Parliament cannot alter or abolish it. For Wade, the ultimate legal principle, which he later equated with Hart's rule of recognition,[25] lies in the keeping of the courts: it is always for the courts, in the last resort, to say what a valid Act of

22 See for instance JD Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (CUP, Cambridge 2010) 181-82; M Gordon, 'The Conceptual Foundations of Parliamentary Sovereignty: Reconsidering Jennings and Wade' [2009] PL 519, 522-23; M Gordon and M Dougan, 'The United Kingdom's European Union Act 2011: "Who Won the Bloody War Anyway?"' (2012) 37 ELRev 3, 23; P Mirfield, 'Can the House of Lords Lawfully Be Abolished?' (1979) 95 LQR 36, 45; Oliver, *The Constitution of Independence* (n 7) 92-95; ECS Wade, 'Introduction' in AV Dicey and ECS Wade, *Introduction to the Study of the Law of the Constitution* (Macmillan, London 1959) xlii-xliii; Wade, 'The Basis of Legal Sovereignty' (n 6) *passim* 174, 184, 190; R Weill, 'Centennial to the Parliament Act 1911: The Manner and Form Fallacy' [2012] PL 105, 107, 111.

23 Wade, 'The Basis of Legal Sovereignty' (n 6).

24 ibid 174.

25 Wade, 'Sovereignty – Revolution or Evolution?' (n 6) 574.

Parliament is. Wade did conceive that the ultimate legal principle could be altered. However, if that occurred, a legal revolution would then have taken place.[26]

For Wade, a revolution is a change of the legal system's ultimate legal principle or rule of recognition. In the English legal system, a revolution would occur if the courts 'abandoned their loyalty to the legislature as now constituted', in other words, if they ceased obeying Acts of Parliament enacted by the Queen, Lords and Commons.[27] More generally, TRS Allan stated that '[a] revolution occurs only when judicial decisions are not justified by the existing order, from which, for reasons quite extraneous to ordinary legal analysis, the courts have entirely withdrawn their former allegiance.' [28] Examples of such revolutions would be South Africa's legal independence from the British Empire, the English Parliament being able to bind itself in manner and form, and (in Wade's view) the European Communities Act 1972 legally prevailing over a later statute. In the Canadian context, both Peter Oliver and Brian Slattery opined that Canada's independence would have been attained through revolution if viewed under a theory of continuing Parliamentary sovereignty [29] (according to which 'at every moment of its existence Parliament should be free from legal limitations including even those imposed by itself'). [30] Also, if Canadian Parliamentary sovereignty was initially consistent with the continuing view as Luc Tremblay suggested (and as Oliver appeared to suggest),[31] then one could reasonably argue that the subsequent acceptance of the manner and form theory would also have

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26 Wade, 'The Basis of Legal Sovereignty' (n 6) 190-92.

27 ibid, 174, 187-88, 190-91.

28 TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP, Oxford 2001) 230.

29 See Oliver, *The Constitution of Independence* (n 7) 314; Oliver, 'Abdicating and Limiting Parliament's Sovereignty-Reply to Goldsworthy' (n 8) 288; Slattery (n 17) 390.

30 *CL* 149.

31 See Tremblay (n 13) 85-86; Oliver, *The Constitution of Independence* (n 7) ch 5-7.

amounted to a revolution, in other words, a change of the Canadian rule of recognition.

The characterisation of some constitutional developments as a revolution is contentious: for instance, many commentators believe that Wade's interpretation of *R v Transport Secretary, ex p Factortame Ltd (No. 2)* as a revolution is exaggerated or even inaccurate.[32] In *Factortame (No. 2)*, a number of fishing companies challenged the legality of the Merchant Shipping Act 1988 on the ground that it contravened provisions of the EC Treaty. The Act purported to strengthen vessel registration requirements in order to prevent foreigners from fishing in British territorial waters. For the majority of the House of Lords, Lord Goff issued an injunction ordering the Transport Secretary to maintain the applicants' registration. What is peculiar in Lord Goff's reasons is that, by issuing the order, he gave priority to an earlier set of statutory rules – Community law as internalised into English law by virtue of the European Communities Act 1972 – over a later statute – the 1988 Act. This situation would seem to run contrary to a cornerstone of the traditional view of Parliamentary sovereignty, the doctrine of implied repeal. Pursuant to that doctrine, a later statute in conflict with an earlier statute is deemed to have repealed the latter one to the extent of the conflict. One way of explaining *Factortame (No. 2)* in non-revolutionary terms has been by reference to Lord Bridge's *dictum* that the European Court of Justice's position about the supremacy of Community law over national law

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[32] See for instance TRS Allan, 'Parliamentary Sovereignty: Law, Politics, and Revolution' (1997) 113 LQR 443; Allan, *Constitutional Justice* (n 28) 228-30; EM Barendt, *An Introduction to Constitutional Law* (OUP, Oxford 1998) 99; P Craig, 'Sovereignty of the United Kingdom Parliament after *Factortame*' (1991) 11 YEL 221, 221, 250-52; European Scrutiny Committee, 'The EU Bill and Parliamentary Sovereignty' HC (2010-11) 633-II Ev 3 (A Tomkins); N MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (OUP, Oxford 1999) ch 6; CR Munro, *Studies in Constitutional Law* (2nd edn OUP, Oxford 2005) 171; J Eekelaar, 'The Death of Parliamentary Sovereignty - a Comment' (1997) 113 LQR 185; J Laws, 'Law and Democracy' [1995] PL 72, 89; A Tucker, 'Uncertainty in the Rule of Recognition and in the Doctrine of Parliamentary Sovereignty' (2011) 31 OJLS 61, 74-77.

was 'well established' at the time the United Kingdom decided to join the Treaty.[33] Therefore, it must entail that Parliament *voluntarily* accepted that new legal order. This argument of principle was described by Paul Craig as a 'contractarian' approach in which the 'superiority of Community law should be achieved by way of statutory construction.'[34]

More generally, Wade's notion of revolution does not sit comfortably with the organic character of the English constitution and of those Constitutions based on the Westminster model. As mentioned in Chapter 1, Westminster-type Constitutions have been drafted 'in the tradition of that branch of the common law of England that is concerned with public law'.[35] For the Judicial Committee of the Privy Council, these Constitutions are 'evolutionary, not revolutionary'.[36] The characterisation of the Westminster-type constitutions as evolutionary makes sense to the extent that 'the unwritten constitution of the United Kingdom',[37] the original inspiration for the content of the Westminster-type constitutions, 'is the product of evolution';[38] it 'has evolved over the centuries with but few sudden or dramatic changes, and a high degree of historical continuity has been maintained as the constitution has been brought up to date.'[39] Indeed, the fact that lawyers continue debating whether Parliamentary sovereignty should still be understood as it had been centuries ago testifies to the very gradual character of that evolution. In *Reference Re Secession of*

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33 *R v Transport Secretary, ex p Factortame Ltd (No 2)* [1991] AC 603 (HL) 658-59.

34 Craig (n 32) 249.

35 *Hinds v The Queen* [1977] AC 195 (PC) 212.

36 ibid 212, 235. Also *Surratt v AG of Trinidad and Tobago* [2008] 1 AC 655 (PC) [18].

37 *Hinds v The Queen* (n 35) 212.

38 Lord Irvine of Lairg, 'Sovereignty in Comparative Perspective: Constitutionalism in Britain and America' (2001) 76 NYU L Rev 1, 15.

39 SA de Smith and R Brazier, *Constitutional and Administrative Law* (8th edn Penguin, London 1998) 14. See also Ch 4, '4. Common Law Progressive Interpretation'.

Quebec, the Supreme Court of Canada stated 'that the evolution of our constitutional arrangements has been characterized by adherence to the rule of law, respect for democratic institutions, the accommodation of minorities, insistence that governments adhere to constitutional conduct and a desire for continuity and stability.'[40] Chapter 4 will examine the nature and scope of the 'living tree' metaphor in Canadian constitutional interpretation. The metaphor has come to symbolise the evolutionary character of the Canadian constitution, which has a Westminster-type Constitution. Finally, a more normative difficulty with Wade's notion of revolution is whether the judges are acting in a legitimate way when they 'abandon their loyalty to the legislature as now constituted'.[41]

One way to resolve these difficulties arising from Wade's notion of revolution begins with the fact that he equated the ultimate legal principle with the Hartian rule of recognition. As such, it is worth returning to Hart's discussion concerning the rule of recognition as it offers another interpretation of Parliamentary sovereignty, including an alternative to the notion of revolution.

Hart's discussion of change in the rule of recognition emerges from his distinction between determinate points within the core of the rule of recognition and penumbras at its periphery.[42] In the penumbral areas, the answer to the question: 'what is the rule of recognition on this point' is uncertain. For instance, Hart (and others) suggested that an example of a penumbral question could be whether the manner and form theory or the self-embracing view of Parliamentary sovereignty was

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40 *Reference Re Secession of Quebec* [1998] 2 SCR 217 [48].

41 Wade, 'The Basis of Legal Sovereignty' (n 6) 190-91.

42 See *CL* 123; *EJP* 63, 361.

part of the rule of recognition.[43] Penumbral questions would evidently be settled 'by someone to whose choices in this matter authority is eventually accorded.'[44] According to Alison Young, this 'someone' is the judiciary.[45] Young went as far as to suggest that even if Parliament wanted to resolve a penumbral issue through legislation, the judiciary, as the inherent authority to resolve these issues, could reach an alternative authoritative resolution.[46]

In his discussion of the continuing and self-embracing views of Parliamentary sovereignty (an issue which he seemed to identify as a penumbral question), Hart made a number of comments suggesting that the courts have or can have the authority to settle it,[47] thus supporting Young's position. However, Hart later seemed to moderate this suggestion:

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43 *CL* 150-51. See also Oliver, 'Abdicating and Limiting Parliament's Sovereignty-Reply to Goldsworthy' (n 8) 286; Young (n 7) 87-88.

44 *CL* 150.

45 Young (n 7) 85-88.

46 ibid 87.

47 See for instance at 147: 'When the area of open texture is reached, very often all we can profitably offer in answer to the question: "What is the law on this matter?" is a guarded prediction of *what the courts will do*.' At 152: 'It is quite possible that some of the questionable propositions [concerning the self-embracing view] will one day be endorsed or rejected *by a court called on to decide the matter*. Then we shall have an answer to the questions which they raise, and that answer […] will have a *unique authoritative status* among the answers which might be given. *The courts will have made determinate at this point the ultimate rule* […] *The possibility of courts having authority* at any given time to decide these limiting questions concerning the ultimate criteria of validity' (my emphasis). See also *EJP* 69, 168-69, 360.

> The truth may be that, when courts settle previously unenvisaged questions concerning the most fundamental constitutional rules, they *get* their authority to decide them accepted after the questions have arisen and the decision has been given. Here all that succeeds is success. It is conceivable that the constitutional question at issue may divide society too fundamentally to permit of its disposition by a judicial decision.[48]

If we try to reconcile Hart's various statements concerning the courts' authority to resolve penumbral questions, we could say that, in his view, the courts generally have such an authority, except in the case of the 'most fundamental' penumbral issues where their authority is uncertain and can only be determined *a posteriori* by the degree of success of the judicial attempts to settle them.

If the penumbral question is too 'fundamental' for the courts to act unilaterally, then its resolution would additionally necessitate acceptance by other legal officials. Because the question of the content of the rule of recognition is 'an empirical, though complex, question of fact',[49] it would follow that the more accurately one seeks to characterise a particular penumbral question (as a fundamental or less fundamental question), in other words to situate it inside the penumbral area, the more complex the empirical inquiry will be. Unless one can accomplish this inquiry, then one must settle for Hart's proposition that the 'only evidence' of the courts' authority to do what they have done 'is the success of what has been done'.[50] Consequently, it can be difficult to predict whether a judicial decision resolving a penumbral question is a successful resolution of it until non-judicial officials have expressed their view. This would affect the usefulness of the distinction between the core and penumbras of the rule of recognition to the extent that one cannot be absolutely sure whether any attempted change to the rule of

48 *CL* 153.

49 *CL* 292 fn 1.

50 *CL* 153.

recognition is an actual change until the views of all the relevant officials are ascertained.

Another interpretation of the notion of change in the rule of recognition is Goldsworthy's consensus theory. In *The Concept of Law*, Hart repeatedly emphasised that the rule of recognition depends upon common acceptance by the legal officials.[51] In a later essay, he stated that the existence of the rule of recognition 'is manifested in the acknowledgement and use of the same set of criteria of legal validity by the law-making, law-applying, and law-enforcing officials and in the general conformity to law so identified.' [52] From Hart's works, Goldsworthy developed a theory of Parliamentary sovereignty pursuant to which a necessary condition for the existence of Parliament's authority 'is a consensus among the most senior officials of the legal system, in all three branches of government.'[53] Goldsworthy's idea of consensus has been relatively popular in the literature, including in Canada.[54] For Goldsworthy, the consensus requirement follows from the proper identification of the source of Parliamentary sovereignty. That source could not be statute because Parliament could not have conferred sovereign power on itself: '[a]ny Parliament that enacted a statute purporting to confer sovereign power on itself would be begging the question, since

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51 See for instance at 110 ('the rule of recognition exists only as a complex, but normally concordant, practice of the courts, officials, and private persons'), at 115 ('there should be a unified or shared official acceptance of the rule of recognition'), at 115-16 (the rule of recognition 'must be effectively accepted as common public standards of official behaviour by its officials.').

52 *EJP* 359.

53 Goldsworthy, *The Sovereignty of Parliament* (n 1) 5-6, 236, 240, 245-46; Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (n 22) 2.III, 5.III.

54 See for instance J Allan, 'The Paradox of Sovereignty: *Jackson* and the Hunt for a New Rule of Recognition?' (2007) 18 KCLJ 1, 18; TH Bingham, *The Rule of Law* (Allen Lane, London 2010) 162-67; R Ekins, 'Acts of Parliament and the Parliament Acts' (2007) 123 LQR 91; PW Hogg, *Constitutional Law of Canada* (5th edn Carswell, Scarborough 2007) 12-1; Munro (n 32) 171; Oliver, 'Abdicating and Limiting Parliament's Sovereignty-Reply to Goldsworthy' (n 8) 282-84; C Turpin and A Tomkins, *British Government and the Constitution: Text and Materials* (6th edn CUP, Cambridge 2007) 74.

the validity of that statute would depend on the very power it purported to confer.'[55] Correspondingly, the source cannot be the common law for a similar reason: judges cannot have conferred power on themselves unless one believes that the source of the judges' powers is the judges themselves. The conundrum is resolved if Parliamentary sovereignty is grounded 'in a kind of law that was not made either by Parliament or by the judges.'[56] On the basis of his extensive examination of the historical development of Parliamentary sovereignty, Goldsworthy suggested that it can be better described as *sui generis* common law, that is, in the sense not of judge-made law but of customary law gradually discovered by judges. Consequently, because neither judges nor Parliament alone created Parliamentary sovereignty, neither of them may unilaterally change it. Any branch of the government including the judiciary may attempt to initiate a change to the official consensus, but that change will be successful only if a new official consensus is reached.

Compared to the core/penumbra model of the rule of recognition, the application of the consensus theory seems simpler since Goldsworthy does not distinguish between the core and penumbras: *any* change to the rule of recognition requires a consensus among the senior legal officials. However, that consensus requirement begs the questions of who these senior legal officials are and what degree of consensus is required for a change in the rule of recognition to occur.

Young opined that a modification of the rule of recognition 'is only achieved where *at least some* of the officials in the legal system accept a change in its content.'[57] She then acknowledged the difficulty of quantifying the degree of

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55 Goldsworthy, *The Sovereignty of Parliament* (n 1) 238.

56 Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (n 22) 51. Also Goldsworthy, *The Sovereignty of Parliament* (n 1) 243.

57 Young (n 7) 84 (my emphasis).

consensus needed, but observed that '[t]he precise number may depend on the circumstances surrounding a purported modification to the rule of recognition.'[58] Oliver warned that the focus should not be exclusively on the senior legal officials:

> Officials and prominent academic writers are not authoritative sources of legal power in most legal systems. The behaviour of senior officials may be the factual test of recognition, but it is not usually the most important engine and cause of changes in that recognition.
> In the United Kingdom (and formerly in the Empire and Commonwealth), the law regarding Parliamentary sovereignty is worked out between Parliament itself and the courts. [W]hatever officials or academics might say, the issue of Parliament's self-embracing powers remained open until Parliament enacted independence legislation, and until courts in the Commonwealth and in the United Kingdom were called upon to judge its legal effectiveness.[59]

At times, Goldsworthy also suggested that the agreement between Parliament and the courts was sufficient to operate a change in the rule of recognition.[60] In the end, official consensus seems to be a somewhat flexible requirement which focuses mainly on Parliament and the courts. To some extent, the focus on these two institutions is also echoed in Janet Hiebert's 'relational approach',[61] which she developed in a bill of rights context. Hiebert argued that the legislative and judicial branches share a joint responsibility for determining how constitutional conflicts should be resolved as they both have 'valid insights into how legislative objectives should reflect and respect normative values', and possess relevant (but largely different) expertise in analysing conflicts over fundamental rights.

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58 ibid 84 fn 45, 168.

59 Oliver, 'Abdicating and Limiting Parliament's Sovereignty-Reply to Goldsworthy' (n 8) 288-89.

60 See for instance Goldsworthy, *The Sovereignty of Parliament* (n 1) 244-45.

61 J Hiebert, *Charter Conflicts: What Is Parliament's Role?* (McGill-Queen's University Press, Montreal and London 2002) xii-xiii, 52-55.

Finally, it should be mentioned that Parliamentary sovereignty can also be conceived in Dworkinian terms, namely as 'a set of principles that require the courts to pay a qualified deference to the acts of the legislature.'[62] This deference is qualified in the sense that, as an aggregate legal principle, Parliamentary sovereignty inclines towards interpreting the constitution or an aspect of it in line with orthodox constitutional theory, but does not require such an interpretation.[63] Therefore, the courts may perfectly well decide that, in a given case, orthodox Parliamentary sovereignty does not prevail in the face of one or more other competing principles, but it survives intact and may become the decisive consideration in another case.[64] In Chapter 4, I will examine in greater detail how Ronald Dworkin's theory of law and adjudication can further help explain my thesis argument.

My analysis in this section has shown that the development of legal limitations to Parliamentary sovereignty can fit under any of the above theories. More generally, to paraphrase Sir Neil MacCormick, nothing in the general theory of law should exclude the possibility of a change to Parliamentary sovereignty to the extent that it is a central feature of the constitution and constitutions can and do change.[65] If a static, (near) absolute model of Parliamentary sovereignty is dismissed, one following question would be which of those theoretical models discussed so far in this chapter is preferable to the others. However, since the purpose of this chapter is to argue that the courts can rule on the existence of changes to Parliamentary sovereignty, it may not be necessary to choose among the different rule of recognition (or common law-based) models. Rather, in the next section, I will furthermore argue

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62 *TRS* 37.

63 See *TRS* 37-38.

64 *TRS* 35.

65 MacCormick (n 32) 86.

that there can be a way to reconcile the part of these various theoretical models which concerns the judiciary as the authority for ruling on the existence of a change to Parliamentary sovereignty.

3. The Role of the Common Law

My argument in this section is that the theoretical models discussed so far in this chapter all share one common feature which is the crucial role of the courts in the development of Parliamentary sovereignty. I will examine this role and attempt to partially reconcile those theoretical models under a common law-based approach to the issue of change to Parliamentary sovereignty. By focusing on commonalities, my analysis of the notion of change and of the authority (or authorities) which can identify such a change seeks to attract wider acceptance than each of the theoretical models examined in the previous sections. Establishing that the courts can identify changes – more specifically, limits – to Parliamentary sovereignty will open the door to the further claim that the courts can invoke implied constitutional principles to constrain legislative authority, which is the more descriptive theoretical portion of my thesis argument. This theoretical discussion will also provide the foundations of my examination in the next chapter of the legal development of Canadian Parliamentary sovereignty.

Returning to the discussion of penumbras, we can recall that HLA Hart suggested that, in principle, it is the courts which have the authority to resolve them. In his 'Postscript', Hart seemed to narrow down the group of officials with the authority to identify the rule of recognition from the officials of the legal system to the judicial officials. For instance, he stated that the rule of recognition 'is in effect a form of *judicial* customary rule'; it 'rest[s] on a conventional form of *judicial*

consensus'; its 'existence and authority depend on its acceptance by the *courts*.'[66] Alison Young argued that the courts could even 'reach an alternative authoritative resolution' in the face of a contrary legislative attempt to settle a penumbral question.[67] Stephen Perry opined that Hart ended up adopting a '"judicial supremacy" understanding of the recognitional community'.[68] Similarly, Matthew Adler interpreted Hart's 'Postscript' to suggest 'that every legal system […] is ultimately grounded in judicial practice [and] that a legal argument which appeals to *nonjudicial* practice in the teeth of the *judicial* rule of recognition must necessarily fail.'[69] Some authors have found this interpretation of Hart's terminological shift to be contentious. Jeffrey Goldsworthy summarily dismissed it as a misrepresentation of Hart's position from the first edition of *The Concept of Law*.[70] However, as Oliver suggested, Goldsworthy's interpretation of Hart 'that only officials can make, and that therefore, only they can alter fundamental rules' is 'a questionable understanding of Hart'.[71]

The role of the courts is also apparent in Wade's description of the ultimate legal principle and of the revolution model, and, to a lesser extent, in the consensus theory. Goldsworthy suggested that the legal source of Parliamentary sovereignty was the common law in the pre-judge-made law sense, namely in the sense of 'customary law, which judges discovered and enunciated but did not make'.[72] In apparent agreement with Wade, Goldsworthy stated that that customary law was a unique

66 *CL*, 256, 266-67 (my emphasis).

67 Young (n 7) 87.

68 S Perry, 'Where Have All the Powers Gone?' in MD Adler and KE Himma (eds), *The Rule of Recognition and the US Constitution* (OUP, New York & Oxford 2009) 303.

69 MD Adler, 'Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?' (2006) 100 Nw U L Rev 719, 723.

70 Goldsworthy, *The Sovereignty of Parliament* (n 1) 241 at fn 18.

71 PC Oliver, 'Sovereignty in the Twenty-First Century' (2003) 14 KCLJ 137, 152.

72 Goldsworthy, *The Sovereignty of Parliament* (n 1) 243; Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (n 22) 55-56.

hybrid of political fact and 'fundamental' common law. However, Wade's account of Parliamentary sovereignty seemed closer to a judge-made law model. According to him, the ultimate legal principle 'lies in the keeping of the courts, and no Act of Parliament can take it from them. This is only another way of saying that it is always for the courts, in the last resort, to say what is a valid Act of Parliament'.[73] Sir John Laws even interpreted the preceding statement to imply 'that the legal source of the doctrine of sovereignty is in the judges'.[74] In a subsequent article, Wade actually opined that '*only the judges* can [and are able to] change' the ultimate legal principle or rule of recognition.[75]

Some authors such as Laws believe that the legal *source* of Parliamentary sovereignty is the common law (as distinguished from the legal *mechanism* through which changes to Parliamentary sovereignty are identified). It appears that the underlying reasoning comes from the following classic syllogism: the English legal system only recognises two different sources of law, namely common law and statutory law; Parliament could not have conferred on itself the power to enact legislation; therefore, the legal source of such power must have been the common law. One expression of the common law-based approach to Parliamentary sovereignty can be found in the context of the discussion of the manner and form theory. Sir Ivor Jennings posited that the source of Parliament's powers derived from the law by which it is established, being the common law of the United Kingdom.[76] Similarly, RFV Heuston suggested that the great advantage of the 'new view' of Parliamentary sovereignty, which embraces the notion of manner and form conditions, was that it

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73 Wade, 'The Basis of Legal Sovereignty' (n 6) 189.

74 Laws (n 32) 86 (my emphasis).

75 Wade, 'Sovereignty – Revolution or Evolution?' (n 6) 574 (my emphasis).

76 Jennings, *The Law and the Constitution* (n 4) 156.

allows issues to be decided according 'to the ordinary law in the ordinary courts' within the 'four corners of the common law'.[77] Most British and Canadian jurists would broadly agree that Parliamentary sovereignty finds its source in, or derives from, the common law.[78]

The important implication of identifying the common law as the source of Parliamentary sovereignty is that, from a logical perspective, it greatly facilitates the ensuing claim that the courts can rule on changes to the content of Parliamentary sovereignty as they deem it necessary. As Tomkins stated:

> The doctrine of legislative supremacy is a doctrine of the common law. Like any other rule of the common law it may be developed, refined, re-interpreted, or even changed by the judges. Thus, the doctrine of legislative supremacy […] is no more entrenched or unchangeable than any other rule of English law.
> [U]nderpinning the strictly legal doctrine of legislative supremacy is the courts' recognition of a political reality. [I]f the political reality changes once again, there is nothing to stop the common law from changing with it.[79]

One interpretation of the differences between this latter version of a common law-based theory of Parliamentary sovereignty and the rule of recognition theories is

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77 Heuston (n 4) 31.

78 See for instance *R v Lord Chancellor, ex p Witham* [1998] QB 575 (QB) 581; *Thoburn v Sunderland CC* [2002] 23 QB 151 (QB); *R (Jackson) v AG* [2006] 1 AC 262 (HL) [102] (Lord Steyn), [126] (Lord Hope), [168] (Lord Carswell); Allan, 'Parliamentary Sovereignty: Law, Politics, and Revolution' (n 32) 445, 449; T Allan, 'Questions of Legality and Legitimacy: Form and Substance in British Constitutionalism' (2011) 9 ICON 155, 157; WR Anson, *The Law and Custom of the Constitution*, vol 1, (4th edn Clarendon Press, Oxford; New York 1911) 8; Barendt (n 32) 86-88; JB Bryce, *Studies in History and Jurisprudence*, vol 1, (Clarendon Press, Oxford 1901) 206-07; de Smith and Brazier (n 39) 87; O Dixon, 'The Common Law as an Ultimate Constitutional Foundation' (1957) 31 ALJ 240, 242; European Scrutiny Committee, 'The EU Bill and Parliamentary Sovereignty' HC (2010-11) 633-II Ev (FCO), 51 (P Craig); Hansard (HL) 31 March 2004, col WA 160 (Lord Goldsmith); 'Minutes of Evidence Taken Before the Select Committee on a Bill of Rights' HL (1977-78) 81, 8; Lord Hope, 'Sovereignty in Question' (WG Hart Legal Workshop 2011); Jennings, *The Law and the Constitution* (n 4) 156; Laws (n 32) 86; A Lester, 'Beyond the Powers of Parliament' (2004) 9 JR 95; MacCormick (n 32) 85-86; JDB Mitchell, 'What Happened to the Constitution on 1st January 1973?' (1980) 11 Cambrian LR 69, 71; Munro (n 32) 160-61; Oliver, 'Sovereignty in the Twenty-First Century' (n 71) 151; Tomkins (n 20) 103-04. In Canada see (n 17).

79 Tomkins (n 20) 103-04.

that they are mutually exclusive. According to Peter Oliver, one important reason why he and Goldsworthy adhered to a rule of recognition model of Parliamentary sovereignty was to counter the claim that 'the evolution of the rule of recognition […] is the prerogative of the judiciary.'[80] Goldsworthy warned that:

> Any attempt by the judiciary unilaterally to change the fundamental rules of a legal system is fraught with danger. Other officials might be persuaded, inveigled, bamboozled, or bluffed into acquiescing in the change. But on the other hand, they might not. They might resent and resist the judicial attempt to change the rules[,] and take strong action to defeat it, possibly including the impeachment of "over-mighty judges". That might be regrettable, but the point is that if the judges tear up the consensus that constitutes the fundamental rules of the system, they are hardly well placed to complain if it is replaced by a power struggle they are ill-equipped to win.[81]

If such a struggle would materialise, the legislative branch might consider resisting the judicial pronouncement and enact what some legal scholars have labelled 'in-your-face' legislation, that is, a statute attempting to legislatively overrule a judicial decision.[82]

There are various possible answers to Oliver and Goldsworthy's objections. First, assuming that Goldsworthy is right, it could still be argued that there would be relatively few real instances where the non-judicial officials will cease going along with the judiciary's interpretation of an aspect of Parliamentary sovereignty or of 'previously unenvisaged questions concerning the most fundamental constitutional rules'.[83] Hart opined that: 'where less vital social issues are concerned, a very

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80 Oliver, 'Abdicating and Limiting Parliament's Sovereignty-Reply to Goldsworthy' (n 8) 283-84.

81 Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (n 22) 55. Also Goldsworthy, *The Sovereignty of Parliament* (n 1) 245-46.

82 The term 'in-your-face' legislation has been generally attributed to Kent Roach. See K Roach, 'The Attorney General and the Charter Revisited' (2000) 50 UTLJ 1, 34-36; K Roach, 'Constitutional and Common Law Dialogues between the Supreme Court and Canadian Legislatures' (2001) 80 CBR 481; K Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Irwin Law, Toronto 2001) 264-65, 273-82.

83 *CL* 153.

surprising piece of judicial law-making concerning the very sources of law may be calmly "swallowed".' [84] In the Canadian context, Luc Tremblay described the country's post-1982 constitutional practice as follows:

> The elected representatives of the Canadian people would have supreme and absolute authority with respect to constitutional commands, but their commands would order judges to do what they wish to do anyway. The Canadian courts should thus act in accordance with the constitutional commands of the sovereign people, but the commands would then reflect what judges prefer or think appropriate in particular contexts.[85]

Second, few authors actually claim that the evolution of the rule of recognition is the *prerogative* of the judiciary. In general, the proponents of the common law as the source or basis of Parliamentary sovereignty, or as the mechanism through which Parliamentary sovereignty develops, also accept the idea that non-judicial officials have or can have a role in the determination of Parliamentary sovereignty. For instance, citing the European Communities Act 1972 and the Parliament Acts 1911-1949, Eric Barendt opined that 'the common law principle of parliamentary supremacy may constitutionally be modified by Parliament itself'.[86] Colin Munro – who suggested that Parliamentary sovereignty 'must be part of the common law' – prudently observed that the courts 'may feel more empowered to alter the rules of ultimate authority when they seem to have the blessing of the elected branch'.[87] By hinting at the role of Parliament, Munro's statement actually does not seem too far from Goldsworthy's consensus theory under which the courts could initiate a change in the rule of recognition 'but are well advised to make sure that the

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84 *CL* 153.

85 LB Tremblay, 'Marbury v. Madison and Canadian Constitutionalism: Rhetoric and Practice' (2004) 36 Geo Wash Int'l L Rev 515, 539-40.

86 Barendt (n 32) 99.

87 Munro (n 32) 170-71.

other branches of government are likely to acquiesce.'[88] In this respect, the difference concerning the role of the judiciary and of other legal officials between the consensus theory and the other more common law-based theories boils down to a question of degree.

And third, one must consider the possibility that, if one group of legal officials too frequently appears to fail in exercising their role when there is a proposed change to Parliamentary sovereignty, then the consensus theory becomes a less accurate explanation of how Parliamentary sovereignty develops (especially if the proposed change subsequently appears to find its way into the law). This scenario is more than just hypothetical. Tomkins has observed that since the early 1970s, '[t]he constitution is up for grabs and it is the judges who are grabbing it.'[89] More recently, Goldsworthy himself opined that '[t]oday, a number of judges and legal academics in Britain and New Zealand are attempting a peaceful revolution, by incremental steps aimed at dismantling Parliamentary sovereignty, and replacing it with a new constitutional framework in which Parliament shares ultimate authority with the courts.'[90] In both Canada and England, Janet Hiebert also noted the expanding role of the judiciary since the adoption of the Canadian Charter of Rights and Freedoms 1982 and the Human Rights Act 1998, which have seemingly triggered or accelerated the development of a culture centred on the predominant role of the judiciary over the interpretation of individual rights and freedoms, 'by which is meant the project of anticipating litigation and amending or removing those aspects of a bill that could lead to successful constitutional challenges.'[91] Hiebert added that 'a consequence of

88 Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (n 22) 55, 113-14.

89 Tomkins (n 20) 23.

90 Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (n 22) 2.

91 JL Hiebert, 'Parliamentary Bills of Rights: An Alternative Model?' (2006) 69 MLR 7, 27.

this approach is the incorporation of legal perspectives about rights-compliance into the policy process and the dismissal of political judgment about how rights should constrain legislative choices.'[92]

According to Sir Neil MacCormick, 'it cannot be true that only the judges can change the rule of recognition though certainly they have the last word on the question whether and how any change that Parliament may purport to make should have effect.'[93] Given this established pattern of judicial involvement contemplated and explained by the rule of recognition and common law-based models examined in this chapter, the rejection by non-judicial officials of a particular judicial interpretation of Parliamentary sovereignty appears to be more the exception and the non-judicial officials' acceptance or acquiescence of the judicial pronouncements concerning Parliamentary sovereignty, the principle. Which judicial interpretations would be rejected by non-judicial officials is a difficult question which probably depends, according to Hart, on whether the interpretation concerns a less vital social issue or a more divisive and fundamental question.[94]

Proponents of all the above theories seem to agree that the courts are the principal or primary interpreters of the content and scope of Parliamentary sovereignty. In principle, the courts' interpretation on a given question should authoritatively settle that question. However, as an exception to the principle, it remains possible that the court's interpretation could not be authoritative if 'enough of the right' other legal officials[95] reject its interpretation.

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92 ibid 27-28.

93 MacCormick (n 32) 86.

94 See *CL* 153.

95 See Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (n 22) 5.

In the end, all the various theories of Parliamentary sovereignty examined in this chapter recognise that it is normally through the case law that the contours of Parliamentary sovereignty are authoritatively set out with the non-judicial officials' (often implicit) acceptance or acquiescence. Strictly speaking, this fine-tuning of the existing models of change to Parliamentary sovereignty would still remain compatible with Goldsworthy's statement under the consensus theory that judges will have authoritatively resolved 'disputed questions of fundamental constitutional law, even concerning uncertainties in the rule of recognition itself', provided that the non-judicial officials at least did not 'disagree too strongly with the judges' decision'.[96] If the official practice has become a pattern of deferring to the judiciary, then the judiciary ends up as the principal authoritative expounder of questions concerning Parliamentary sovereignty under the rule of recognition (or other common law-based models).

4. Conclusion

In this chapter, I developed the first part of my proposed theoretical explanation of the contemplated development of implied constitutional principles by elaborating a notion of change to Parliamentary sovereignty based on the relevant common features of various theories. If the notion of change to Parliamentary sovereignty logically entails moving away from legislative omnicompetence, then the contemplated change (at least initially) points towards the development of limitations to Parliamentary sovereignty. I demonstrated this claim using a selection of the most prevalent theoretical accounts of change to Parliamentary sovereignty.

[96] Goldsworthy, *The Sovereignty of Parliament* (n 1) 241-42.

Under Sir William Wade's view of Parliamentary sovereignty, my argument concerning the development of implied constitutional principles would probably amount to a revolutionary change on the basis that, at Confederation (1867), the only recognised substantive legal limitations to Canadian Parliamentary sovereignty were the sections of the Constitution Act 1867. The contemplated development of implied constitutional principles can also be explained as the judicial resolution of a penumbral issue or through the consensus among the relevant legal officials across all three branches of the government. Finally, I suggested that, if Parliamentary sovereignty is a pure construct of the common law and thus controlled by the common law, then changes to Parliamentary sovereignty could be made through authoritative judicial pronouncements.

Parliamentary sovereignty is never immutable under any of these theoretical accounts, which all include a mechanism to explain how it changes. Moreover, the main common feature of these models is the central role of the courts in determining the content of Parliamentary sovereignty. Such a role derives from the courts' more general role as the primary expounders of the constitution and from a pattern in recent history of non-judicial official acceptance of, or acquiescence in, the judiciary's decisions concerning Parliamentary sovereignty or the 'most fundamental constitutional rules'. Therefore, changes to Parliamentary sovereignty are better captured by a formula which reconciles the courts' primary role under the existing rule of recognition and common law-based theories or models. Accordingly, the courts are the institutional body which, in principle, are empowered to authoritatively rule on questions concerning Parliamentary sovereignty and its limits. Under this formula, the acceptance of the courts' rulings on these matters by non-judicial officials of the legal system is presumed. Therefore, it is still formally compatible

with Jeffrey Goldsworthy's consensus theory which is the least judicial-centric model of change to Parliamentary sovereignty that I have examined in this chapter. If, one day, non-judicial officials decide to cease going along with the judicial officials on matters concerning Parliamentary sovereignty, then the outcome of the disagreement will dictate which model of change to Parliamentary sovereignty best fits the new reality.

Having presented what are arguably the most prevalent views concerning the theoretical foundations of Parliamentary sovereignty and argued that, in accordance with these views, the judiciary is the main authority to identify changes to Parliamentary sovereignty, I can now turn to the Canadian context and examine how well this theoretical analysis explains and fits the development of Canadian Parliamentary sovereignty, in particular regarding the role of implied constitutional principles.

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CHAPTER 3 – CANADIAN PARLIAMENTARY SOVEREIGNTY

1. Introduction

The purpose of this chapter is to present an overall account of the content of Canadian Parliamentary sovereignty, in particular according to the orthodox version (previously defined as that account which has been accepted by most Canadian jurists),[1] and to explain from a theoretical perspective the recent case law on implied constitutional principles. The purpose for setting out the orthodox account is to challenge one of its main aspects, namely that judicial review of legislation must be based on one or more sections of the Constitution Acts 1867-1982.

In Canada, the few academic attempts to present a more canonical account of Parliamentary sovereignty never attained the same influence within the legal community as the influence in England (and in many Commonwealth countries including Canada) of the different accounts by English commentators such as AV Dicey, Sir Ivor Jennings and Sir William Wade. One who wishes to seek the essential features of Canadian Parliamentary sovereignty needs preferably to turn to the case law and even the statute books, mainly the Colonial Laws Validity Act 1865, the Statute of Westminster 1931 and the Constitution Acts 1867-1982. Consequently, my examination of Canadian orthodox Parliamentary sovereignty will be mainly based on primary sources.

This chapter begins with an overview of the essential features of Canadian Parliamentary sovereignty – most of which derive from English law and theories of Parliamentary sovereignty. These features are: the legal supremacy of Imperial Acts

[1] See Ch 1, '2. Thesis Overview'.

in Canada and the legal supremacy of Canadian legislative authorities within the boundaries set out by the Imperial Parliament. I will then examine the recent case law involving implied constitutional principles, in which the courts have arguably used these principles as a basis for striking down or setting aside legislation. Having provided this overall picture of the development of Canadian Parliamentary sovereignty, I will explain its development using my underlying theoretical discussion from Chapter 2, and conclude that the judicial use of implied constitutional principles to strike down or set aside legislation can be properly grounded in theory.

2. Orthodox Canadian Parliamentary Sovereignty

In Canada, the principle of Parliamentary sovereignty has been operating on two levels. First, it concerns the legislative authority of the Imperial Parliament. Second, it concerns the legislative authority of Canadian lawmaking bodies created by the Constitution Act 1867 as amended. In this section, I will describe each of these two levels of legislative authority and their operation. The purpose of this overview of Canadian Parliamentary sovereignty is to assess the extent to which my thesis argument differs from the orthodox view, to provide the factual basis against which my proposed theoretical explanation of these differences can be tested, and, later in this thesis, to evaluate their merits on the basis of the rule of law.

2.1. Sovereignty of the Imperial Parliament in Canada

'[W]hen a colony is acquired or annexed, following on conquest or settlement, the Sovereignty of the United Kingdom Parliament extends to that colony, and its powers over that colony are the same as its powers in the United Kingdom.'[2] Such were the words of Lord Reid writing for the majority of the Judicial Committee of the Privy

[2] *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645 (PC) 722.

Council in *Madzimbamuto v Ladner-Burke*. Although this case was concerned with Southern Rhodesia, Lord Reid's description of Imperial Parliamentary sovereignty can be extended to all Crown colonies and territories including those in British North America.[3] Indeed, AV Dicey wrote as follows:

> the courts in the Dominion of New Zealand, as also in the rest of the British Empire, may be called upon to adjudicate upon the validity or constitutionality of any Act of the Dominion Parliament. For if a [Dominion] law really contradicts the provisions of an Act of Parliament extending to [that Dominion], no court throughout the British dominions could legally, it is clear, give effect to the enactment of the Dominion Parliament. [T]he order of the Imperial Parliament is the one which must be obeyed. This is the very meaning of Parliamentary sovereignty.[4]

This position had earlier been crystallised in ss. 2-3 of the Colonial Laws Validity Act 1865 ('CLVA'), an Imperial statute, which set out what Stephen Scott referred to as the 'authoritative statement of Imperial legislative supremacy' in Canada:[5]

> 2. Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.
> 3. No colonial law shall be or be deemed to have been void or inoperative on the ground of repugnancy to the law of England, unless the same shall be repugnant to the provisions of some such Act of Parliament, order, or regulation as aforesaid.

It is therefore pursuant to the Imperial Parliament's legislative supremacy in the British North American colonies that the Imperial Parliament passed the 1867 Act,

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3 In Canada, see for instance *Re: Resolution to Amend the Constitution* [1981] 1 SCR 753, 775-76; *Singh v Canada (AG)* [2000] 3 FC 185 (CA) [15]; LB Tremblay, 'Marbury v. Madison and Canadian Constitutionalism: Rhetoric and Practice' (2004) 36 Geo Wash Int'l L Rev 515, 523.

4 AV Dicey and ECS Wade, *Introduction to the Study of the Law of the Constitution* (10th edn Macmillan, London 1959) 109, cited in Tremblay (n 3) 524.

5 S Scott, 'Opinion Submitted to the Foreign Affairs Committee of the House of Commons of the United Kingdom on the Role of the United Kingdom Parliament in Relation to the British North America Acts' (1980-1981) 26 McGill LJ 614, 616.

creating the Dominion of Canada, as well as its subsequent Imperial amendments. One notable aspect of the Act is that it did not include any formula dealing with its amendment. For Peter Hogg and Peter Oliver, this was clearly not an oversight: the Framers intentionally 'left control over the 1867 Act with the Imperial Parliament.'[6]

The next constitutional landmark which reaffirmed Imperial Parliamentary sovereignty over Canada was the Statute of Westminster 1931. Paradoxically, the purpose of the statute was to formally recognise the principle of equality in status between Great Britain and the Dominions.[7] S. 2 of the Statute stated that the CLVA would cease to apply to the relevant Dominions, thus allowing them to pass laws contrary to Imperial legislation. In particular, s. 2(2) provides that:

> 2(2) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion.

Moreover, s. 3 of the Statute states that a 'Parliament of a Dominion has full power to make laws having extra-territorial operation' and s. 4 requires the Imperial Parliament to declare in any Act extending to a Dominion that that Dominion requested the enactment and consented to it. On the basis of these sections, one could be led to believe that the Statute, if not legally then at least politically, terminated Imperial Parliamentary sovereignty over the Dominions. Irrespective of whether the Imperial

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6 PW Hogg, *Constitutional Law of Canada* (5th edn Carswell, Scarborough 2007) 1-4. See also PC Oliver, *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand* (OUP, Oxford 2005) 111-12, 117-18, 157.

7 See 'Imperial Conference, 1926. Summary of Proceedings' (Cmd 2768, 1926); Hansard HC vol 259 col 1173 (20 Nov 1931); H ver Loren van Themaat, 'The Equality of Status of the Dominions and the Sovereignty of the British Parliament' (1933) 15 JCompLeg 47, 50; O Dixon, 'The Statute of Westminster 1931' (1936) 10 ALJ 96 (suppl) 98.

Parliament could legally terminate its authority under English law over one of its Dominions or colonies, s. 7(1) of the Statute provides that the power to amend the Constitution Acts was to remain exclusively with the Imperial Parliament, thus preserving Imperial Parliamentary sovereignty over Canadian constitutional matters and, in this instance, the continuance of the CLVA with respect to the 1867 Act and its Imperial amendments:

> 7(1) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts [ie Constitution Acts] 1867 to 1930 or any order, rule or regulation made thereunder.

After 1931, the Imperial Parliament enacted 10 more amendments to the 1867 Act.[8] It was only in 1982 that Canada decided to seek what it considered to be the Imperial Parliament's final enactment extending to Canada, in which the Imperial Parliament provided that '[n]o 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.'

This short overview of the Imperial legislative landmarks extending to Canada establishes that Canadian constitutional law and practice has consistently abided by the principle of Imperial Parliamentary sovereignty. While Imperial Parliamentary sovereignty was initially imposed upon the British North American colonies, obedience evolved over time into continued voluntary acceptance by Canadians. According to Brian Slattery, a strong case can be made that Canadian independence was achieved in the period between Canada's signature of the 1919 International Peace Treaty and the enactment of the 1931 Statute.[9] With the 1931 Statute, Canada could also have gained – and the Imperial Parliament was ready to grant the country –

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8 See *Patriation Reference* (n 3) 859-62, 888-91.

9 See B Slattery, 'The Independence of Canada' (1983) 5 SCLR 369, 390.

complete independence as it did for the other Dominions who wanted independence, but s. 7(1) was added at the request of Canada to preserve exclusive Imperial Parliamentary control over modifications of the 1867 Act.[10] Therefore, well before 1982, Canada could have ceased accepting Imperial Parliamentary sovereignty over its constitutional matters and started to unilaterally amend its Constitution Acts, but it never did so. On the contrary, Canada kept seeking constitutional amendments from the Imperial Parliament (where these amendments could not otherwise be achieved). In sum, the Imperial Acts surveyed in this section and the Canadian continuing acceptance of their overriding legal authority support Scott's and others' proposition that '[a]s a matter of *strict law*, the legislative authority of the Parliament of the United Kingdom to enact [legislation amending the Constitution Acts] is absolute and without qualification of any kind.'[11]

Concurrently with the Imperial Parliament, the legislative functions in Canada were shared with the federal Parliament and the provincial legislatures. How this arrangement worked out for the Canadian legislative authorities will now be examined.

2.2. Sovereignty of the Canadian Parliament and the Provincial Legislatures

Shortly after Confederation (1867), the Judicial Committee was asked to rule on the nature and extent of the powers of the Canadian (and other colonial and former colonial) legislative authorities. In its case law beginning from that period, the Judicial Committee established for these Dominions and colonies a relatively uniform

10 See Oliver (n 6) 48-49, 71-72.

11 Scott (n 5) 615, 621. See also *Patriation Reference* (n 3) 807; WS Livingston, *Federalism and Constitutional Change* (OUP, Oxford 1956) 74; Oliver (n 6) 294, 313.

set of principles governing the issue of legislative authority, which would come to have a lasting influence in Canadian constitutional law.

In *Hodge v The Queen*, the accused appealed his conviction for allowing a game of billiards to be played in his tavern on a Saturday evening, in contravention of a resolution of the License Commissioners adopted pursuant to a provincial statute. The accused challenged the validity of both the resolution and the statute. One of the grounds for challenge was that, in enacting s. 92 of the 1867 Act, which enumerates the areas of provincial legislative competence, the Imperial Parliament had given no authority to the provincial legislatures to delegate their powers to other bodies or persons such as the License Commissioners. For the Judicial Committee, Lord Fitzgerald dismissed the argument. He stated that the 1867 Act conferred:

> authority as plenary and as ample within the limits prescribed by sect. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have had under like circumstances.[12]

In *Re the Initiative and Referendum Act*, Viscount Haldane, for the Judicial Committee, similarly held that a Canadian 'local legislature, so long as the Imperial Parliament did not repeal its own Act conferring this status, was to be supreme, and had such powers as the Imperial Parliament possessed in the plenitude of its own freedom before it handed them over to the Dominion and the Provinces, in accordance with the scheme of distribution which it enacted in 1867.'[13] Viscount Haldane's and, in particular, Lord Fitzgerald's description of the powers of Canadian legislative authorities by reference to the English Parliament were frequently cited

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12 *Hodge v The Queen* (1883-1884) 9 App Cas 117 (PC) 132.

13 *In Re the Initiative and Referendum Act* [1919] AC 935 (PC) 942.

with approval in later cases from Canada and a number of other Dominions and colonies.[14] Almost a century later, Noel Lyon acknowledged that Lord Fitzgerald's description still represented 'the dominant conception of the Canadian Constitution shared by Canadian lawyers.'[15]

In paraphrasing the wording of the preamble to the 1867 Act, FR Scott recognised that it was '[t]rue, the doctrine of parliamentary sovereignty was a basic principle of English law, and to be "similar" to this concept our legislatures, even though limited in the area of their jurisdiction, had to possess the same kind of sovereignty within their spheres.'[16] Other commentators have opined that it was through the preamble that '[t]he British theory of the sovereignty of Parliament was rapidly adapted to the context of the application of the Canadian constitution.'[17] Perhaps the best statement of orthodox Canadian Parliamentary sovereignty is that made by DA Schmeiser, who wrote that:

> Generally speaking, the traditional theory has been that the Canadian Parliament and the provincial legislatures are absolutely supreme in their respective spheres, and that there is no restriction on the type of legislation which each may enact. [O]nce it is determined that authority to legislate on a particular matter has been granted by the B.N.A. Act to Parliament [or a provincial Legislature], then it may

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14 See for instance *Liquidators of the Maritime Bank of Canada v Receiver-General of New Brunswick* [1892] AC 437 (PC) 442; *A-G for Canada v Cain* [1906] AC 542 (PC) 547; *Canadian Pacific Ry Co v Ottawa Fire Insurance Co* (1907) 39 SCR 405, 444 (Idington J); *Re George Edwin Gray* [1918] SCR 150, 176 (Anglin J); *Honsberger v Weyburn Townsite Co* (1919) 59 SCR 281, 292 (Duff J); *Ferguson v Maclean* [1930] SCR 630, 658 (Duff J); *Croft v Dunphy* [1933] AC 156 (PC) 164; *British Coal Corp v The King* [1935] AC 500 (PC) 517-18; *R v Carroll* [1948] SCR 126, 129; *Patriation Reference* (n 3) 818 (Martland and Ritchie JJ, diss). Outside Canada, see for instance *Powell v Apollo Candle Cy* (1884-85) LR 10 App Cas 282 (PC); *Cobb & Co Ltd v Kropp* [1967] 1 AC 141 (PC); *R (Bancoult) v Foreign Secretary (No 2)* [2009] 1 AC 453 (HL) [108] (Lord Rodger). Cf *R v Burah* (1877-78) LR 3 App Cas 889 (PC).

15 JN Lyon, 'The Central Fallacy of Canadian Constitutional Law' (1976) 22 McGill LJ 40, 43-44.

16 FR Scott, *Civil Liberties & Canadian Federalism* (University of Toronto Press, Toronto 1959) 19.

17 WN Newman, 'The Principles of the Rule of Law and Parliamentary Sovereignty in Constitutional Theory and Litigation' (2004-2005) 16 NJCL 175, 206.

> enact any legislation which it deems appropriate. This concept of legislative power is, of course, based on the English theory of the supremacy of Parliament.[18]

In sum, the sovereignty of the Canadian Parliament and of the provincial legislatures (both established by Imperial legislation) remained defined by a version of Parliamentary sovereignty closely replicating English (or Imperial) Parliamentary sovereignty, even though some adjustments were necessary in order to make it compatible with the Canadian constitutional context. The Canadian constitutional context was different to the English constitutional context in one important aspect: the Canadian legislative bodies' authority was limited by the 1867 Act and its amendments as a manifestation of Imperial Parliamentary sovereignty. In practice, the only notable pre-1982 limitations, as the Judicial Committee identified in *Hodge* and *Re the Initiative and Referendum Act*, are those deriving from the division of powers. As Brian Dickson (former Chief Justice of Canada) once observed, Canada's independence 'did not involve an effort to reject the concept of parliamentary supremacy, although the parliamentary model was adapted to address the needs of our federation.' [19] In this sense, the Judicial Committee formalised the prevailing constitutional arrangements whereby the federal Parliament and provincial legislatures would both have the same authority to pass legislation as the Imperial Parliament in Canada subject only to the few constraints imposed by the 1867 Act (as amended). It was this formula which became associated with the Canadian notion of Parliamentary sovereignty. In the following section, I will examine the extent to which the enactment of the 1982 Act affected the orthodox view.

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18 DA Schmeiser, *Civil Liberties in Canada* (OUP, London 1964) 11.

19 B Dickson, 'The Canadian Charter of Rights and Freedoms: Dawn of a New Era?' (1994-1995) 2 RevConstit Studies 1, 15.

2.3. Continuance of the English Model of Parliamentary Sovereignty After 1982

To date, the 1982 Act remains the last formal constitutional development of major significance in Canada. It was mainly concerned with three issues: the termination of Imperial legislative authority, the enactment of a charter of rights and freedoms and the enactment of a constitutional amendment process. However, except in relation to the three issues, the Canadian constitution remained generally unaffected. One could argue, as Strayer J has (extrajudicially), that 'the Charter has only extended the scope of th[e] qualification [of Parliamentary sovereignty]: it has not introduced a new concept.'[20] Tremblay defended a similar position:

> the Charter should be seen as formally coming within the pre-existing legal order. It has not abolished nor replaced it. It has merely incorporated a set of norms into it. […] The most basic principles of the law, as it stood in 1982, should constrain and guide the process of Charter adjudication.[21]

Moreover, the qualification has itself been qualified by s. 33 of the Canadian Charter of Rights and Freedoms 1982 which allows the Canadian Parliament and the provincial legislatures to pass a statute otherwise contrary to ss. 2 and 7 to 15 of the Charter by inserting a 'notwithstanding clause' in that statute. Therefore, while the 1982 Act has no doubt changed the legal landscape, the 'fidelity to the concept of Parliamentary sovereignty', as a feature of Canadian constitutionalism, persisted to a large degree after 1982.[22]

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20 BL Strayer, *The Canadian Constitution and the Courts: The Function and Scope of Judicial Review* (3d edn Butterworths, Toronto 1988) 49.

21 L Tremblay, *The Rule of Law, Justice and Interpretation* (McGill-Queen's University Press, Montreal 1997) 235-36.

22 RA Macdonald, 'The New Zealand Bill of Rights Act: How Far Does It or Should It Stretch?' (The Law and Politics - Proceedings of the 1993 New Zealand Law Conference 1993) 94, 106.

A good restatement of the continuing strength of Parliamentary sovereignty in the Canadian legal system is found in *Singh v Canada (AG)* where the appellants challenged the constitutionality of a federal statute empowering the Cabinet to prevent disclosure of confidential information to the courts. The issue in this case was whether the impugned statute contravened the 'fundamental, unwritten principles of the Canadian Constitution [which] include the independence of the judiciary, the rule of law and the separation of powers'.[23] Delivering the judgment of the Federal Court of Appeal, Strayer JA upheld the statute on the basis of Parliamentary sovereignty. In his review of the development of the principle in the Canadian context, he wrote that:

> the supremacy of the Constitution was established well before 1982 and even before Confederation in 1867. Canada recognized the British Parliament as the proper authority for enactment of our Constitution down to and including 1982[.] It was a legal doctrine of the British Empire that imperial laws (that is, enactments of Westminster) applying to a colony were supreme over colonial laws. This position was codified by statute, the Colonial Laws Validity Act, 1865[.] The British North America Act, 1867 was an imperial law extending to the colony of Canada and its supremacy was thus assured as long as Westminster was the recognized legislative authority for Canada in constitutional matters. While ordinary Canadian laws were freed from the application of the Colonial Laws Validity Act, 1865, and thus from the paramountcy of British laws, by the Statute of Westminster, 1931, the latter statute preserved the supremacy in Canada of the B.N.A. Acts over local laws.[24]

Strayer JA then turned to the 1982 Act and stated that: '*[b]oth before and after 1982 our system was and is one of parliamentary sovereignty* exercisable within the limits of a written constitution.'[25] The Supreme Court of Canada later characterised

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23 *Singh v Canada (AG)* (n 3) [10].

24 ibid [15].

25 ibid [16] (my emphasis).

Strayer JA's analysis in *Singh* as 'a thorough and compelling review of the principle of parliamentary sovereignty in the context of unwritten constitutional principles'.[26]

Other post-1982 cases also recognise the continued importance of Parliamentary sovereignty in the Canadian legal landscape. For instance, in *R v Melford Developments Inc.*, the Supreme Court stated that: '[t]here is, of course, no room for debate on the proposition that Parliament is supreme and can neither bind itself nor any successor of Parliament [sic] when acting within its constitutionally-assigned sovereign jurisdiction.'[27] In *Canada (Auditor General) v Canada (Minister of Energy, Mines and Resources)*, Dickson CJC, delivering the judgment of the Court, stated that: '[t]he grundnorm with which the courts must work in this context is that of the sovereignty of Parliament.'[28] In a later statement remindful of *British Railways Board v Pickin*, the Court stated in *Authorson v Canada (AG)* that: '[l]ong-standing parliamentary tradition makes it clear that the only procedure due any citizen of Canada is that proposed legislation receive three readings in the Senate and House of Commons and that it receive Royal Assent. Once that process is completed, legislation within Parliament's competence is unassailable.'[29]

In sum, early on after Confederation, the Judicial Committee firmly established the general principles governing Canadian legislative authority by adopting the theory that, within the boundaries of the 1867 Act as amended, Canadian lawmaking bodies would have the same legislative powers as the Imperial Parliament. The Judicial Committee's position was generally accepted by Canadians. One can

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26 *Babcock v Canada (AG)* [2002] 3 SCR 3 [56].

27 *R v Melford Developments Inc.* [1982] 2 SCR 504, 513.

28 *Canada (Auditor General) v Canada (Minister of Energy, Mines and Resources)* [1989] 2 SCR 49, 103.

29 *Authorson v Canada (AG)* [2003] 2 SCR 40 [37]. Cf *British Railways Board v Pickin* [1974] AC 765 (HL).

reasonably say that, for most of Canadian history since Confederation, orthodox Canadian Parliamentary sovereignty was not only shared by most Canadian jurists, it was 'undisputed'.[30] In his extrajudicial writings, Lamer CJC described the pre-Charter judicial practice as follows:

> All of us who were judges in 1982 had been trained and practised law in the tradition of Parliamentary supremacy. Provided that the legislation was properly enacted with regard to the division of legislative power in our Canadian federal system, the only task of the courts was to apply it. […] The Legislature made the law and the courts applied it.[31]

Therefore, it would follow that the enactment of the 1982 Act did not formally alter the essential character of the orthodox account according to which Canadian lawmaking bodies have plenary legislative authority within the boundaries set out by relevant sections of the 1867-1982 Acts.[32]

Having set out my account of orthodox Canadian Parliamentary sovereignty, I can now return to my thesis argument concerning implied constitutional principles with a clearer view of where it is situated vis-à-vis the orthodox account. In Chapter 1, I suggested that, because of the hybrid nature of implied constitutional principles, including their tenuous connection to relevant sections of the 1867-1982 Acts, the proposition that they can check legislation conflicts with the orthodox account. Nonetheless, I also argued in Chapter 2 that there could be a way out of orthodoxy 'from within' based on the changing nature of Parliamentary sovereignty

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30 See for instance *Canada (Auditor General) v Canada (Minister of Energy, Mines and Resources)* (n 28); *Singh v Canada (AG)* (n 3); Schmeiser (n 18) 36; C-A Sheppard, 'Is Parliament Still Sovereign?' (1964) 7 CBJ 39; BL Strayer, 'Life under the Canadian Charter: Adjusting the Balance between Legislatures and Courts' [1988] PL 347, 349; MD Walters, 'The Common Law Constitution in Canada: Return of *Lex Non Scripta* as Fundamental Law' (2001) 51 UTLJ 91, 98-99.

31 A Lamer, 'Canada's Legal Revolution: Judging in the Age of the Charter of Rights' (1994) 28 IsLR 579, 580.

32 Subject to my later analysis of the emergence of implied constitutional principles in Ch 4-6.

and, more generally, of the Canadian constitution. One illustration of such a possibility may well have been the development of implied constitutional principles. This idea of constitutional change forms the basis upon which rests my thesis argument that legislation cannot unduly interfere with implied constitutional principles. The next section examines the judicial application of these principles, in order to determine how far they depart from the orthodox account.

3. Qualifications and Challenges: Implied Constitutional Principles

In the previous section, my account of orthodox Canadian Parliamentary sovereignty described its strong and lasting hold over the whole legal system. Another sign of the strength of the orthodox view throughout Canadian legal history is the difficulty, especially within the first 100 years after Confederation (1867), of finding precedents which qualify or deviate from it. Indeed, not more than a handful of cases could be considered as not fully falling within the orthodox theory. Of these cases, some may well have constituted an odd but largely inconsequential precedent.[33] It is really after the enactment of the Canadian Charter of Rights and Freedoms 1982 that an increasing number of cases and commentaries questioned the orthodox theory. For instance, some cases suggest that the manner and form theory has gradually come to be accepted in Canadian law without major debate.[34] While an analysis of these cases involving manner and form conditions would further illustrate my argument from Chapter 2 that Parliamentary sovereignty can change, the discussion here will focus

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33 See for instance *Beauharnois Light, Heat and Power Co Ltd v Hydro-Electric Power Commission of Ontario* [1937] OR 796 (CA); *Chabot v Commissaires d'écoles de Lamorandière* [1957] BR 707.

34 See for instance *R v Drybones* [1970] SCR 282; *R v Mercure* [1988] 1 SCR 234; *Ford v Quebec (AG)* [1988] 2 SCR 712; *Devine v Québec (AG)* [1988] 2 SCR 790; *R v Paquette* [1990] 2 SCR 1103; *Reference Re Canada Assistance Plan (B.C.)* [1991] 2 SCR 525; *British Columbia v Imperial Tobacco Canada Ltd* [2005] 2 SCR 473 [60].

on the subject of the present thesis, which is the relationship between implied constitutional principles and legislation.

In this section, I will present some of the main pressure points exerted on the orthodox theory by implied constitutional principles. It could be said that all of the cases in this section remain controversial or have unveiled new uncertainties concerning the content and scope of legislative authority. As important questions in this regard have been raised over the years, the courts have tried to resolve them, aided in part by comparative constitutional law and theory. In the context of implied constitutional principles, I will argue that the pressure on the orthodox theory has reached such a degree that it should be revised in order to recognise these principles' constraining power over legislative authority. Moreover, the cases in this section will also serve to illustrate my theoretical discussion in the next section and in Chapter 4 of how Parliamentary sovereignty can change.

Perhaps the most frequent implied constitutional principle invoked by the courts when conducting judicial review of legislation and executive action is judicial independence, with *Re Prov. Court Judges* as the clearest illustration. In *Re Prov. Court Judges*, the Supreme Court of Canada heard together appeals from three provinces. One group of appeals arose from accused persons' claims that, as a result of provincial legislation in Prince Edward Island and Alberta reducing the judges' salary and benefits, the provincial (statutory) courts had ceased to be independent. In the last appeal decided in *Re Prov. Court Judges*, the Manitoba Provincial Judges Association challenged its judges' salary reduction passed by provincial legislation on the same basis. The main difficulty with these appeals was that the level of judicial independence provided by the relevant sections of the Constitution Acts 1867-1982 was limited in scope and did not fully extend to the appeals in this case. Indeed,

pursuant to s. 11(d) of the Charter, the right to 'a fair and public hearing by an independent and impartial tribunal' is limited to '[a]ny person charged with an offence'. Nonetheless, Lamer CJC, delivering the majority judgment of the Court, invoked the 'unwritten constitutional principle' of judicial independence as the principal basis of his ruling that the Prince Edward Island legislature could not pass a law modifying the judges' remuneration, 'as part of an overall public economic measure', without prior consultation with a judicial compensation committee. In the Alberta and Manitoba appeals, he struck down the legislation relating to the judges' remuneration for failing to resort to such a committee. Lamer CJC also struck down – on the same constitutional basis – the Alberta legislative provisions authorising the Justice Minister to designate the court's sitting days and the judges' place of residence and a Manitoba legislative provision authorising the government to withdraw court staff and personnel on unpaid days of leave. *Re Prov. Court Judges* was generally interpreted to mean that the constitutional principles inferred from the preamble to the Constitution Act 1867 were a source of constitutional limitations on legislative authority.[35]

While *Re Prov. Court Judges* attracted a wide array of commentaries, it was not the first important Canadian case on judicial independence. Both before and since *Re Prov. Court Judges*, a number of cases have extensively discussed various aspects

[35] See *Mackin v New Brunswick (Minister of Finance)* [2002] 1 SCR 405 [34]-[37], [70]-[71]; J Cameron, 'The Written Word and the Constitution's Vital Unstated Assumptions' in P Thibault, B Pelletier and L Perret (eds), *Essays in Honour of Gérald-A Beaudoin: The Challenges of Constitutionalism - Les mélanges Gérald-A Beaudoin: les défis du constitutionnalisme* (Éditions Yvon Blais, Cowansville 2002) 89, 93, 99; RM Elliot, 'References, Structural Argumentation and the Organizing Principles of Canada's Constitution' (2001) 80 CBR 67, 87-95, 141; J Leclair, 'Canada's Unfathomable Unwritten Constitutional Principles' (2002) 27 Queen's LJ 389, 391, 405, 413, 417-18; J Leclair and Y-M Morissette, 'L'indépendance judiciaire et la Cour suprême: reconstruction historique douteuse et théorie constitutionnelle de complaisance' (1998) 36 Osgoode Hall LJ 485, 487, 489; P Patenaude, 'The Provincial Court Judges Case and Extended Judicial Control' in P Howe and P Russell (eds), *Judicial Power and Canadian Democracy* (McGill-Queen's University Press, Montreal & Kingston 2001) 99, 101; RG Richards, 'Provincial Court Judges Decision-Case Comment' (1998) 61 SaskLRev 575, 581; Walters (n 30) 91-93.

of judicial independence including its legal effects vis-à-vis legislation. It is submitted that this case law is generally consistent with Lamer CJC's view of judicial independence as an implied constitutional principle.

In *R v Beauregard*, the respondent, a federally appointed Québec Superior Court judge, challenged the constitutional validity of a then newly passed federal statute which required all federally appointed judges to contribute 7% of their salary towards the cost of their pensions. The respondent argued that the statute violated s. 100 of the 1867 Act which provides that '[t]he Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts […] shall be fixed and provided by the Parliament of Canada.' Delivering the judgment of the Court, Dickson CJC recognised the existence of a Canadian principle of judicial independence as he stated that 'judicial independence must also be maintained against all other potential intrusions, *including any from the legislative branch.*'[36] However, Dickson CJC then proceeded to consider the specific facts of the case and concluded that the impugned statute did not violate s. 100.

In *R v Lippé,* Lamer CJC (Sopinka and Cory JJ concurring) opined that judicial independence is limited to independence from 'government', which he defined as '[not limited] to simply the executive or legislative branches. By "government", in this context, I am referring to any person or body, which can exert pressure on the judiciary through authority under the state.'[37] Delivering the majority judgment of the Court, Gonthier J went further, holding that judicial independence 'includes both independence from government [as defined in Lamer CJC's judgment]

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36 *R v Beauregard* [1986] 2 SCR 56 [31] (my emphasis).

37 *R v Lippé* [1991] 2 SCR 114, 138.

and independence from the parties to the litigation'.[38] However, when applying the requirements of judicial independence to the impugned legislation, Gonthier J held that it did not infringe s. 11(d) of the Charter. By focusing the debate on whether judicial independence extends beyond interference from the legislative or executive branch, both Lamer CJC and Gonthier J accepted that it bars impermissible legislative and executive interference. *Lippé* foreshadowed the Court's later expansive interpretation of s. 11(d) and judicial independence. Indeed, at the outset, Lamer CJC noted that '[t]he municipal courts in Quebec have jurisdiction in both civil and penal matters.' Curiously, this fact did not attract any discussion by the Court concerning the scope of application of s. 11(d), which is formally limited to criminal proceedings. Nevertheless, the Court did not consider this to be a bar from inquiring whether statutes concerning statutory courts with non-criminal jurisdiction also complied with the requirements of judicial independence.

In *Mackeigan v Hickman*, five appellate judges applied in Superior Court for a declaration quashing an order to attend issued by a Royal Commission in order to answer questions about a particular judgment they rendered. Writing for the plurality of the Supreme Court, McLachlin J began her legal analysis by setting out the relevant principles of judicial independence applicable to the case. Citing with approval Dickson CJC's judgment in *Beauregard*, McLachlin J stated that: '[t]he critical requirement for the maintenance of judicial independence is that the relation between the judiciary and other branches of government not impinge on the essential "authority and function"' of the court.[39] For McLachlin J, it followed that 'Parliament and the Legislatures cannot act so as to trammel the authority and function of the

38 ibid 154.

39 *Mackeigan v Hickman* [1989] 2 SCR 796, 827-28 (my emphasis).

courts.'[40] McLachlin J's comments were not based on any section of the 1867-1982 Acts but derived from an examination of 'judicial independence as a constitutional principle fundamental to the Canadian system of government'.[41] Having set out the applicable principles, McLachlin J then interpreted the Commission's statutory powers of inquiry so as not to affect the judges' right to refuse to testify concerning the grounds for their decisions.

In *Mackin v New Brunswick (Minister of Finance)*, two provincial court judges challenged the validity of a provincial Act replacing the position of supernumerary judges with a panel of retired judges paid on a per diem basis on the ground that the Act violated judicial independence. Under the preceding regime, provincial judges who had reached a certain age and accumulated a set number of years of service could elect to sit as supernumerary judges, thus allowing them to continue receiving a full salary while taking only a reduced workload. Gonthier J, delivering the majority judgment, stated that 'the Preamble to the *Constitution Act, 1867* and s. 11(d) of the *Charter* give [the legal standards governing judicial independence] a fundamental status by placing them at the highest level of the legal hierarchy.'[42] He then added that the provincial legislatures' jurisdiction must 'be exercised in accordance with the structural principles of the Canadian Constitution, including the independence of the judiciary.'[43] The two dissenting judges did not object to the majority's statements concerning judicial independence. On the contrary, they agreed with Gonthier J's 'statement of the broad principles of judicial

40 ibid 832.

41 ibid 828.

42 *Mackin v New Brunswick (Minister of Finance)* (n 35) [37].

43 ibid [70].

independence'.[44] However, they disagreed with his interpretation of the impugned legislation. For the dissenting judges, the provincial judges' supernumerary status was not constitutionally protected. The Supreme Court allowed the provincial judges' argument and struck down the impugned statutory provisions, thus acknowledging that the implied constitutional principle of judicial independence can check legislation.

The cases from this section illustrate the fact that, while the implied constitutional principle of judicial independence can check legislation (otherwise the Court would not have tested the impugned law against the accepted constitutional requirements of judicial independence), the former does not always prevail over legislative authority. Implied constitutional principles could have different weights depending on the nature of the legal question and the relevant circumstances at issue. A coherent theory concerning these principles must account for this 'non-conclusive' aspect of principles which I will address in the next section before my more complete theoretical discussion is set out in Chapter 4.

The case law on implied constitutional principles is not limited to judicial independence. Another area where the courts have invoked these principles in conducting judicial review of legislation is in the interpretation of privative or ouster clauses. These clauses aim at giving public officials a level of protection from judicial review. In Chapter 5, I will argue that this power derives from the rule of law. In *Crevier v Québec (AG)*, the Supreme Court was asked for the first time to directly rule on the constitutionality of a privative clause in a provincial statute purporting to insulate a tribunal from judicial review of its decisions rendered in excess of jurisdiction. Delivering the judgment of the Court, Laskin CJC declined to apply the

[44] ibid [91].

impugned privative clause which 'purport[ed] to insulate one of its statutory tribunals from any curial review of its adjudicative functions'.[45] Laskin CJC ruled 'that a provincially-constituted statutory tribunal cannot constitutionally be immunized from review of decisions on questions of jurisdiction'[46] and declared the privative clause unconstitutional. *Crevier* and later cases dealing with privative clauses suggest[47] that the courts are willing to set aside or even strike down those privative clauses where they unduly interfere with the superior courts' inherent power of supervision and control of lower statutory court decisions and administrative actions.

Finally, as I will argue in Chapter 6, it is conceivable that judicial review of legislation based on implied constitutional principles could involve certain individual rights and freedoms beyond the scope of the Charter. The best example is *Ontario (AG) v OPSEU* where the appellants challenged the validity of a provincial statute prohibiting civil servants from getting involved in federal political activities without a leave of absence. Because all the facts of the case arose before the enactment of the Charter, the case was decided on the basis of the division of powers and 'a fundamental rights and freedoms argument'.[48] After holding that the impugned statute did not violate the division of powers, Beetz J, delivering the majority judgment of the Court, considered the appellants' alternative argument that 'Canadian constitutional jurisprudence recognizes the existence of certain fundamental political rights and freedoms in the citizens of this country to participate in federal political activities[, which no] province has the power to reduce or to derogate from'.[49] Beetz J

45 *Crevier v Québec (AG)* [1981] 2 SCR 220, 234.

46 ibid 236.

47 See Ch 5, '4.1. Privative Clauses'.

48 *Ontario (AG) v OPSEU* [1987] 2 SCR 2, 33.

49 ibid [143].

opined that this argument was 'tantamount to one based on the *Charter* […] without the help of the *Charter*.'[50] He then acknowledged that, in principle, the appellants' argument could be successful:

> There is no doubt in my mind that the basic structure of our Constitution, as established by the Constitution Act, 1867, contemplates the existence of certain political institutions, including freely elected legislative bodies at the federal and provincial levels. In the words of Duff C.J. in *Reference re Alberta Statutes*[,] "such institutions derive their efficacy from the free public discussion of affairs...." and, in those of Abbott J. in *Switzman v. Elbling*[,] neither a provincial legislature nor Parliament itself can "abrogate this right of discussion and debate". *Speaking more generally, I hold that neither Parliament nor the provincial legislatures may enact legislation the effect of which would be to substantially interfere with the operation of this basic constitutional structure.*[51]

Moreover, Beetz J specified that the constitutional status of these individual rights and freedoms was not dependent on the Charter as he added that 'quite apart from *Charter* considerations, the legislative bodies in this country must conform to these basic structural imperatives and can in no way override them.'[52] However, he concluded that the impugned statute passed constitutional muster.

From this review of the case law on implied constitutional principles, it seems that the courts have adopted the view that these principles can check legislation. Supreme Court dicta to this effect can be found in *Alliance*, *Beauregard*, *Dunsmuir*, *Lippé*, *Mackeigan* and *OPSEU*. In *Re Prov. Court Judges* and *Mackin*, the Court struck down legislation on the basis that it violated the implied constitutional principle of judicial independence. The Court extended judicial independence beyond its original boundaries expressed in the sections of the 1867-1982 Acts to reach non-superior courts at large and Justices of the Peace. Moreover, I argued that *Crevier*

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50 ibid [148].

51 ibid [151] (my emphasis).

52 ibid [152].

stands for the proposition that the courts will not uphold privative clauses which unduly interfere with the rule of law. Finally, *OPSEU* suggests that the idea of implied constitutional principles checking legislation extends to the area of individual rights and freedoms (outside the purview of the Charter).

One can reasonably conclude that the case law examined in this section has revealed a change in Canadian legal discourse or, at the least, some serious uncertainty about the scope of legislative authority in Canadian law. Indeed, it raises a number of fundamental questions which go to the heart of the Canadian constitutional system. What is the source or foundation of the judicial authority to decide the cases involving implied constitutional principles the way the courts have? Has there been a departure (or how far have the courts departed) from orthodox constitutional theory? More generally, have the judges acted within the boundaries of the legal system? Here we may have reached the limits of case law analysis in trying to make sense of what the judges said or did, and how it can be explained within orthodox understandings of the legal system. For a fuller understanding of these legal developments involving implied constitutional principles, one must engage in argument rooted in legal theory. In this vein, the theoretical analysis undertaken in Chapter 2 can help try to explain and to make sense of the legal developments concerning Canadian Parliamentary sovereignty. As mentioned in Chapter 1, the degree to which my proposed theoretical explanation is plausible and useful will depend in turn on how well it fits with the case law and legal developments discussed so far in this Chapter. The case law should also serve this same role of verification of my later theoretical discussion in the remaining of the present thesis.

4. Explaining the Development of Canadian Parliamentary Sovereignty

This section analyses the extent to which the judicial interpretation of implied constitutional principles fits with or has departed from orthodox Parliamentary sovereignty. One possible view is that Canadian Parliamentary sovereignty still adheres to the orthodox view. In support of this view, one could invoke the post-1982 case law discussed in section 2. Even in some of the cases applying implied constitutional principles, the Supreme Court of Canada attempted to remain within orthodox constitutional theory. For instance, in *Re Prov. Court Judges*, Lamer CJC acknowledged that the constitutional history of Canada has 'culminated in the supremacy of a definitive written constitution', thus establishing 'the preference for a written constitution over an unwritten one.' [53] Turning to the preamble to the Constitution Act 1867, which was going to become a major aspect of his analysis, Lamer CJC recognised that, even though the preamble is part of the 1867 Act, it clearly 'has no enacting force' and therefore is not a source of positive law like the sections of the 1867-1982 Acts are.[54] Unless such kind of judicial statement in line with the orthodox view is completely ignored, the interpretation of the recent case law on implied constitutional principles as a clear break from the orthodox view cannot be the only interpretation because the evidence supporting such a departure is not fully conclusive. One could also argue that a constitutional change of the magnitude of a novel limitation to 'the supremacy of Parliament by subjecting it to the scrutiny of superior court judges' would surely require a much clearer judicial statement to this effect. This was essentially Wakeling JA's argument in *Bacon v Saskatchewan Crop*

53 *Re Provincial Court Judges* [1997] 3 SCR 3 [93].

54 ibid [95] citing *Patriation Reference* (n 3) 805.

Insurance Corp. Delivering the judgment of the Court of Appeal for Saskatchewan, Wakeling JA opined that:

> If the Supreme Court of Canada meant to embrace such a doctrine, I would expect it would see the need to say so very clearly in a case where that was the issue before them. This is particularly so when they are not only cognizant of the many cases in various jurisdictions acknowledging the supremacy of Parliament, but must also be aware of their own previous judgments which have endorsed that principle [references omitted].[55]

In this section, I will argue that there has been a departure from the orthodox view as a result of the judicial interpretation of implied constitutional principles and that such a departure can be properly explained within the limits of the legal system on the basis of my theoretical analysis in Chapter 2. This explanation corresponds to the more descriptive part of my thesis argument that such principles can in theory check legislation.

In Chapter 1, I defined Canadian orthodox Parliamentary sovereignty to mean that Parliament and the provincial legislatures can pass any law whatever subject to the sections of the Constitution Acts 1867-1982. In section 2 (of the present chapter), I explained that the limitations created by the 1867-1982 Acts were the result of the exercise of Imperial legislative authority over Canada and of Canada's acceptance of the supreme authority of the 1867-1982 Acts. However, within these limits, the federal Parliament and the provincial legislatures enjoyed complete legislative freedom as their functioning is generally modelled on that of the English Parliament. With a judicial system also generally modelled on the English judicial system, reference can be made to AV Dicey for the ensuing proposition that the Canadian courts, as any 'court throughout the British Dominions',[56] enforced all applicable

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55 *Bacon v Saskatchewan Crop Insurance Corp* [1999] 11 WWR 51 (Sask CA) [29].

56 Dicey and Wade (n 4) 109.

Imperial legislation and ensured that Canadian legislative authorities were exercising their legislative powers within their constitutional boundaries. As a result, orthodox Canadian constitutional theory incorporated a practice of judicial review of federal and provincial legislation: the Canadian courts are empowered to strike down or set aside such legislation as long as their decision is founded on the relevant sections of the 1867-1982 Acts.

In Chapter 1, implied constitutional principles were defined as not derived by 'normal processes' of interpretation of the 1867-1982 Acts given that they could not be directly founded on specific sections of the Acts. For instance, in my analysis of the case law on judicial independence, it was suggested that the courts invoked judicial independence to strike down legislation dealing in part with non-criminal statutory courts even though the only sections of the 1867-1982 Acts concerning judicial independence were referring to superior courts and criminal courts. Similarly, the Supreme Court's view in *Ontario (AG) v OPSEU* that, (leaving aside Charter considerations) both federal and provincial laws must not unduly interfere with a right to freedom of political expression, derives from no particular section of the 1867 Act. Because *only* the sections of the Acts have priority over legislation under orthodox constitutional theory, the idea of implied constitutional principles having priority over legislation is therefore in tension with the orthodox view of Canadian Parliamentary sovereignty. Dale Gibson even suggested that:

> the notion of forthrightly employing unwritten constitutional norms, lifted from British history via the Preamble, to assist in determining contemporary legal disputes, remained for many years a mere curiosity, kept alive by law schools for pedagogical purposes, but unsound in the eyes of most Canadian lawyers and judges.[57]

To the extent that the courts have invoked these principles in a number of cases to strike down or set aside legislation, their judgments are at variance with orthodox Canadian Parliamentary sovereignty.

The underlying theoretical question is how the Canadian courts' interpretation of implied constitutional principles can be explained within the existing legal order. In the remainder of this section, I will argue that the judicial interpretation of implied constitutional principles can indeed be explained under the various theories examined in Chapter 2 which taken together recognise the courts' authority to identify changes to Parliamentary sovereignty.

Under the Hartian framework of the rule of recognition, the development of implied constitutional principles as a legal limitation on legislative authority can be explained in one of two general ways. It could be argued that that development took place without affecting the rule of recognition. This scenario supposes that part of the rule of recognition in Canada was that the 1867 Act and its future amendments would not remain the only constitutional constraints imposed on legislative authority, thus lawfully allowing the subsequent development of implied constitutional principles. However, this scenario seems to be at odds with the orthodox theory. In particular, the legal notion of implied constitutional principles (as we know them today) was unheard of until implicitly first dealt with in a 1938 case.[58] The more plausible view, which I presented in this chapter, is that, in 1867, Canadian Parliamentary

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57 D Gibson, 'Constitutional Vibes: Reflections on the Secession Reference and the Unwritten Constitution' (1999-2000) 11 NJCL 49, 52.

58 See *Re Alberta Statutes* [1938] SCR 100.

sovereignty was directly modelled on English Parliamentary sovereignty subject only to applicable Imperial legislation. The development of legal constraints on legislative authority could then be explained through the notion of a change to the rule of recognition. However, such a change can be conceptualised in more than one way. To paraphrase Sir Neil MacCormick, there can be no all-purpose theoretical answer to the question whether the officials in a legal system can amend the rule of recognition.[59]

The recognition that implied constitutional principles possess a constraining role on legislative authority could amount to a revolution. On its face, the degree of constitutional change involved in this situation seems comparable to the scenario of an acceptance of a manner and form theory in England or South Africa, which Sir William Wade characterised as an instance of revolution.[60] Larry Alexander argued that departure from the Framers' intentions (since they did not foresee the rise of implied constitutional principles) would amount to a revolution: 'if "living tree" justices depart from the authorially intended meanings, and the people accept these new judicial amendments as fundamental law, then we will have had several constitutional revolutions.'[61] For Walters, however, characterising the constitutionalisation of implied constitutional principles as a revolution 'is largely unwarranted',[62] suggesting instead that the notion of *lex non scripta* as fundamental law could form the basis of a theory of lawful development of Canadian constitutional law.

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59 See N MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (OUP, Oxford 1999) 86.

60 HWR Wade, 'The Basis of Legal Sovereignty' [1955] CLJ 172, 173, 190.

61 L Alexander, 'Of Living Trees and Dead Hands: The Interpretation of Constitutions and Constitutional Rights' (2009) 22 CanJL& Juris 227, 235-36.

62 Walters (n 30) 93-94.

The revolution model leaves us with two possibilities. Either Alexander is right, in which case the courts would initiate a revolution when they depart from the Framers' intentions or at least when they adopt an interpretative approach in conflict with those intentions. Alternatively, the development of implied constitutional principles could fit within the courts' interpretative mandate under the existing constitutional order, so there would be no revolution. The latter possibility is based on the premise that it is the courts' role to decide whether an impugned statute conforms to the (higher-order) law of the constitution which includes implied constitutional principles. The issue concerning implied constitutional principles and constitutional interpretation illustrates one difficulty with the revolution model, which is how to determine with relative certainty whether a given constitutional development is a revolution. Jeffrey Goldsworthy may well have been right when he opined that Wade's notion of revolution is 'incurably vague'.[63] Other ways to account for a change in the rule of recognition should thus be considered, in order to find an alternative theoretical explanation of how the rule of recognition can explain the development of implied constitutional principles.

Applying the second theoretical model discussed in Chapter 2, one can also argue that the contemplated development of implied constitutional principles is a penumbral question in the sense that there is no unified or shared official acceptance (or rejection) of that contemplated development and it does not affect the core of the Canadian rule of recognition, which could be captured by the notion of legislative omnicompetence except as limited by relevant sections of the 1867-1982 Acts.[64] In

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63 JD Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (CUP, Cambridge 2010) 126.

64 See for instance *Canada (Auditor General) v Canada (Minister of Energy, Mines and Resources)* (n 28) 103-04; RGB Dickson, 'Keynote Address' in FE McArdle (ed) *The Cambridge Lectures 1985* (Éditions Yvon Blais, Montréal 1987) 3-4; Schmeiser (n 18) 13-15;

other words, one could invoke a number of cases, including those cases concerning implied constitutional principles examined earlier, in order to suggest that there is some degree of official acceptance short of a unified or shared acceptance of the proposition that implied constitutional principles can check legislation. If the courts can, in principle, settle penumbral questions, then, in principle, the courts can rule whether implied constitutional principles constrain legislative authority.

To the extent that Goldsworthy would consider the resolution of a penumbral question to be a change to the rule of recognition, then such a change must be effected via a consensus among the relevant Canadian legal officials. The courts can attempt to initiate such a change, but it would only become part of the core of the rule of recognition when the non-judicial officials also accept it (or acquiesce to it), whoever they may be. Here, the responses from the relevant legislatures and governments following the courts' decisions striking down the laws held to contravene the relevant implied constitutional principles, can provide some valuable insights in the non-judicial officials' response to the judicial pronouncements. In particular, *Provincial Court Judges' Assn of New Brunswick v New Brunswick (Minister of Justice)* contains interesting details on the legal and political aftermath of *Re Prov. Court Judges* (1997) rendered eight years earlier. In *Provincial Court Judges' Assn. of New Brunswick*, judges' associations from three provinces and a group of Alberta Justices of the Peace challenged the constitutionality of their respective provincial governments' refusal to implement recommendations from judicial compensation commissions. In its judgment, the Supreme Court reviewed each province's response to *Re Prov. Court Judges*. The establishment of these

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Sheppard (n 30) 42; Strayer, 'Life under the Canadian Charter' (n 30) 349; WS Tarnopolsky, *The Canadian Bill of Rights* (2d rev edn McClelland and Stewart, Toronto 1975) 111; Walters (n 30) 98-99.

compensation commissions was part of the solution crafted by the Court in *Re Prov. Court Judges* in order to make the governments meet the requirements of judicial independence. In New Brunswick, the Court noted that, following *Re Prov. Court Judges*, the government ceased negotiating directly with its provincial judges and amended its legislation 'in order to establish the process recommended by our Court'.[65] In Alberta, the Judicature Act was amended in 1998 in order to create an independent compensation commission for Justices of the Peace. In Québec, the Courts of Justice Act was amended in 1997 in order to 'put in place the legal framework for setting up judicial compensation committees.'[66] Ontario was the only province among the respondents which had its judicial compensation commissions set up before 1997. Today all Canadian provincial legislatures have created a judicial compensation commission or tribunal with the responsibility of making recommendations to their government concerning judicial compensation.[67]

It is worth mentioning that these legal developments regarding judicial compensation did take place amid a significant amount of controversy. In *Provincial Court Judges' Assn of New Brunswick*, the Court itself admitted that *Re Prov. Court Judges* 'has not provided the anticipated solution'.[68] One author even argued that the judicial compensation commissions 'have given rise to a more conflict-ridden and a more litigious relationship between the executive and the judiciary'.[69] However, it is submitted that the debate over the best process for determining judicial compensation

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65 *Provincial Court Judges' Assn of New Brunswick v New Brunswick (Minister of Justice)* [2005] 2 SCR 286 [46].

66 ibid [137].

67 See L Sossin, 'Between the Judiciary and the Executive: The Elusive Search for a Credible and Effective Dispute-Resolution Mechanism' in A Dodek and L Sossin (eds), *Judicial Independence in Context* (Irwin Law, Toronto 2010) 63, 67-80.

68 *Prov. Court Judges' Assn* (n 65) [3].

69 Sossin (n 67) 67.

– a separate issue not involving the relationship between implied constitutional principles and Parliamentary sovereignty – does not affect the importance of the unanimous legislative response to *Re Prov. Court Judges* whereby all the provinces with legislation interfering (or potentially interfering) with judicial independence changed their laws to conform to that judgment. One could even add that, despite the controversial nature of the Supreme Court ruling in *Re Prov. Court Judges*, the Canadian legislatures accepted or acquiesced in the judicial interpretation of judicial independence, thus meeting Goldsworthy's consensus requirement. These legal developments following *Re Prov. Court Judges* further illustrate the leading role of the courts as the interpreters of the content and scope of legislative authority.

In the English context, Peter Oliver cited TRS Allan, Baron Cooke, Sir John Laws and Lord Woolf in support of the existence of another penumbral issue, namely 'that certain imaginary and as yet unenacted legislation by Parliament is beyond the pale, ie beyond what the courts should or would recognise.'[70] If Oliver is correct, then *a fortiori* the question in the Canadian context whether implied constitutional principles can supersede legislative authority should also be considered a penumbral question. Besides the similarities of the question in both the English and Canadian contexts, the view favouring its penumbral nature in the Canadian context is further supported by the fact that, contrary to England, substantive legal limitations on legislative authority are already part of the Canadian constitutional landscape in the form of the 1867-1982 Acts. In this sense, the scale of the change (from no limitations by implied constitutional principles to their subsequent acceptance) is smaller in Canada than what it would have been in England.

[70] Oliver (n 6) 10; PC Oliver, 'Abdicating and Limiting Parliament's Sovereignty-Reply to Goldsworthy' (2006) 17 KCLJ 281, 289.

Finally, another approach is to conceive of Parliamentary sovereignty in Dworkinian terms, namely as 'a set of principles that require the courts to pay a qualified deference to the acts of the legislature.'[71] This deference is qualified in the sense that Parliamentary sovereignty inclines towards interpreting other legal principles such as implied constitutional principles in line with constitutional theory, but does not require such an interpretation.[72] Therefore, the courts may perfectly well decide that, in a given case, Parliamentary sovereignty does not prevail against implied constitutional principles, but it survives intact and may prevail in another case.[73] Such a Dworkinian analysis can readily fit the case law examined in section 3. Looking at cases such as *Re Prov. Court Judges* and *Mackin*, one can argue that the Court considered the respective weights of relevant implied constitutional principles and of Parliamentary sovereignty and ended up giving priority to the former. However, these cases did not mean the death of Canadian Parliamentary sovereignty as the Court expressly or implicitly gave more weight to it in other cases. For instance, *OPSEU* involved a conflict between civil servants' right to freedom of expression and legislation prohibiting them from engaging in political activities without taking an unpaid leave. In the end, the majority Justices were of the view that '[t]he present legislation *does not go so far* as to infringe upon the essential structure of free Parliamentary institutions.'[74] In *Babcock v Canada (AG)*, the respondents unsuccessfully challenged the constitutional validity of a federal statute on the basis 'of the unwritten principles of the Canadian Constitution: the rule of law, the

71 *TRS* 37.

72 See *TRS* 37-38.

73 *TRS* 35.

74 *OPSEU* (n 48) 57.

independence of the judiciary, and the separation of powers.'[75] The Supreme Court dismissed the argument finding that 'unwritten principles must be balanced against the principle of Parliamentary sovereignty.'[76] Similarly, in *Mackeigan v Hickman*, one of the unsuccessful grounds for challenging the validity of a statute was 'that it infringes the fundamental constitutional principle of judicial independence.'[77] Delivering the plurality judgment of the Court, McLachlin J stated that 'the fundamental principle of judicial independence must leave scope for another cardinal doctrine -- the principle of Parliamentary supremacy.'[78] In the next chapter, my discussion of how implied constitutional principles can have priority over legislation will examine in greater detail how Ronald Dworkin's theory of law and adjudication can help explain the theoretical foundations of my thesis argument.

In sum, as the case law examined in this chapter confirmed, the courts can interpret and have interpreted the scope of Canadian Parliamentary sovereignty to include the proposition that implied constitutional principles have developed in a way that they can supersede legislation. I have argued that their judgments on this issue can be explained within the boundaries of the legal system (unless one believes that these judgments amounted to a revolution). First, the contemplated development of implied constitutional principles can be explained as the judicial resolution of a penumbral issue. Second, it could result from a new consensus among the relevant legal officials across all three branches of the government. The subsequent legal developments suggest that the legislative branch has usually accepted or acquiesced in the judicial interpretation of implied constitutional principles, thus acknowledging

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75 *Babcock v Canada (AG)* (n 26) [54].

76 ibid [55].

77 *Mackeigan* (n 39) 824.

78 ibid 832.

(at least insofar as implied constitutional principles are concerned) that the judiciary has been the principal interpreter of changes to Parliamentary sovereignty. Finally, I suggested that implied constitutional principles and Parliamentary sovereignty could be regarded as Dworkinian principles, thus allowing one or more different principles to prevail from one case to another. In *The Concept of Law*, Hart interpreted Dworkin's notion of principles as 'non-conclusive' principles, which, in Hart's view, were perfectly recognised by the rule of recognition.[79] If Parliamentary sovereignty is a product of the common law and thus controlled by the common law, then changes to it could be made or recognised through authoritative judicial pronouncements.

Thus, each of those theoretical approaches can coherently explain the legal developments regarding implied constitutional principles. As argued in Chapter 2, the reason is because those theoretical approaches share in common a common law-based component or character according to which the responsibility to interpret the content and scope of Parliamentary sovereignty falls mainly upon the shoulders of the courts. It is this common law-based feature which explains the authority of the judicial pronouncements regarding the implied constitutional principles' potential priority over legislation, thus operating a shift from orthodox constitutional theory.

5. Conclusion

Following this overview of Canadian Parliamentary sovereignty, it is now possible to summarise the essential features of the orthodox account. First, most of its content derives from the corresponding English principle and theories (and so Canadian judges and legal commentators have often referred to English materials in discussing Parliamentary sovereignty). Second, throughout their history and up until 1982,

[79] See *CL* 263-65.

Canadians have accepted Imperial Parliamentary sovereignty over their constitution: all formal constitutional amendments have been enacted by the Imperial Parliament or in accordance with Imperial law, and any law inconsistent with applicable Imperial Acts was and continues to be declared invalid. Third, subject only to the sections of the Constitution Acts 1867-1982, Canadian lawmaking bodies have the same legislative authority as that of the English Parliament. Presumably, the different outcome between the English and Canadian contexts was influenced by some of the distinct features in each of the two countries' constitutional systems, notably the existence of judicial review of Canadian legislation at least since Confederation (1867).

This orthodox account of Canadian Parliamentary sovereignty had come to be challenged or qualified by the rise of implied constitutional principles. My case law analysis has shown that the courts have invoked these principles to strike down or set aside legislation. I argued that this method of constraining legislative authority departs from the orthodox theory to the extent that implied constitutional principles do not normally derive from the sections of the 1867-1982 Acts, which are the only limits to legislative authority under the orthodox theory. Using my theoretical analysis from Chapter 2, I suggested that this departure from the orthodox theory could be explained using Hartian and Dworkinian theories which, as I argued at the beginning of Chapter 2, have generally been influential in Canadian law. Thus, the judicial use of implied constitutional principles could be explained as the resolution of a penumbra or as the judicial identification of a change in the rule of recognition. It could also be conceived as the judicial resolution of a conflict between implied constitutional principles and Parliamentary sovereignty. My application of Hartian and Dworkinian theories in analysing the case law concerning implied constitutional

principles suggests that the courts have reached their decisions in these cases within the limits of the legal order.

As the second and last part of my proposed theoretical explanation that the courts can use implied constitutional principles to strike down or set aside legislation, I suggest in the next chapter that such a departure from the orthodox theory can take place through (judicial) progressive interpretation, one of the staples of Canadian constitutional law and theory. Through progressive interpretation, the nature and scope of implied constitutional principles can change over time within the existing constitutional framework. Not only can progressive interpretation coherently explain the development of Canadian Parliamentary sovereignty, it also counters the second main objection to my thesis argument that the use of implied constitutional principles as legal constraints on legislative authority was never part of the Canadian constitution in 1867. Finally, in Chapter 5, I will argue that my theoretical argument concerning implied constitutional principles is justified by the rule of law as accepted and applied in the Canadian context.

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CHAPTER 4 – PROGRESSIVE INTERPRETATION

1. Introduction

In this chapter, I will explain that the departure from orthodox Canadian Parliamentary sovereignty in the form of the inclusion of implied constitutional principles as a new basis of judicial review of legislation (and executive action), can be explained through the notion of progressive interpretation, often conveyed through the 'living tree' metaphor. In particular, progressive interpretation can counter the second objection to my thesis argument, namely that the Framers never intended that implied constitutional principles could one day be invoked to check legislation. Progressive interpretation seeks to interpret the constitution as an organic instrument whose meaning develops over time to reflect the changing realities in modern society.[1]

The living tree metaphor is famously associated with Lord Sankey LC's landmark judgment in *Edwards v A-G for Canada*, also referred to as the *Persons Case*. The *Persons Case* concerned the question whether a woman was a 'qualified person' to become a Member of the Canadian Senate under s. 24 of the Constitution Act 1867. Lord Sankey LC, for the Judicial Committee of the Privy Council, acknowledged that, in England, women had been under a legal incapacity to serve in either House of Parliament[2] (until 1918), and that, in the history of the British North American legislatures, no woman had served or claimed to serve in a public office until 1916. However, Lord Sankey LC disagreed with the Supreme Court of Canada

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1 See *Hunter v Southam Inc* [1984] 2 SCR 145, 155; *Re BC Motor Vehicle Act* [1985] 2 SCR 486, 509; *Reference Re Same-Sex Marriage* [2004] 3 SCR 698 [22].

2 *Edwards v A-G for Canada* [1930] AC 124 (PC) 128.

that these considerations were conclusive of the matter. In his opinion, '[t]he communities included within the Britannic system embrace countries and peoples in every stage of social, political and economic development and undergoing a continuous process of evolution.'[3] Lord Sankey LC then integrated this idea of evolution in his famous enunciation of the living tree metaphor:

> The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada. "Like all written constitutions it has been subject to development through usage and convention"[.]
> Their Lordships do not conceive it to be the duty of this Board – it is certainly not their desire – to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the Provinces to a great extent, but within certain fixed limits, are mistresses in theirs.[4]

After the *Persons Case*, progressive interpretation eventually developed into a general interpretative approach to the Constitution Acts 1867-1982. Notable instances of progressive interpretation of the 1867 Act include: an interpretation of s. 91(27) which grants Parliament exclusive jurisdiction over criminal law, and of s. 101 which authorises Parliament to establish general courts of appeal as not preventing the adoption of a statute abolishing Canadian appeals to the Judicial Committee even though that 'question is one that might have seemed unreal' in 1867;[5] an interpretation of s. 133 which requires that a person may use either English or French in proceedings in 'all or any of the Courts of Quebec' as extending to 'adjudicative tribunals and agencies' even though there is no reference to these bodies in s. 133, given 'the rudimentary state of administrative law in 1867';[6] an interpretation of

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3 ibid 135.

4 ibid 136.

5 *Ontario (AG) v Canada (AG)* [1947] AC 127 (PC) 154.

6 *Quebec (AG) v Blaikie* [1979] 2 SCR 1016, 1027-30.

s. 100 which requires that the 'Pensions of the Judges […] shall be fixed and provided by the Parliament of Canada' as allowing Parliament to require judges to contribute to their own pensions even though s. 100 was 'admittedly understood' before and at Confederation (1867) to refer to 'non-contributory pensions';[7] and an interpretation of s. 91(2A) which establishes exclusive federal legislative authority over 'unemployment insurance' to include maternity and parental benefits even though s. 91(2A) has originally been enacted to provide 'for the payment of benefits to unemployed persons who were capable of and available for work, but unable to find employment.'[8]

The courts also progressively interpreted the Canadian Charter of Rights and Freedoms 1982 in conducting judicial review of legislation and administrative action. For instance, in *Hunter v Southam*, Dickson J, delivering the judgment of the Supreme Court of Canada, stated that:

7 *R v Beauregard* [1986] 2 SCR 56, 81.

8 *Reference Re Employment Insurance Act (Can.)* [2005] 2 SCR 669.

> A constitution […] is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power[.] Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind. Professor Paul Freund expressed this idea aptly when he admonished the American courts "not to read the provisions of the Constitution like a last will and testament lest it become one".
>
> The need for a broad perspective in approaching constitutional documents is a familiar theme in Canadian constitutional jurisprudence. It is contained in Viscount Sankey's classic formulation in *Edwards* v. *Attorney-General for Canada*[,] cited and applied in countless Canadian cases.[9]

Dickson J went on to progressively interpret s. 8 of the Charter and, in applying its meaning to the impugned Act, found that it failed to pass constitutional muster. In *Re BC Motor Vehicle Act*, Lamer J, delivering the majority judgment of the Supreme Court, dismissed what he considered as a 'frozen' interpretation of s. 7 of the Charter, opining that: '[i]f the newly planted "living tree" which is the Charter is to have the possibility of growth and adjustment over time, care must be taken to ensure that historical materials, such as the Minutes of Proceedings and Evidence of the Special Joint Committee, do not stunt its growth.' [10] He then applied his progressive interpretation of s. 7 to test the constitutional validity of the impugned statute and held that it failed to pass constitutional muster. Dickson and Lamer JJ's progressive interpretation of the Charter were cited with approval in many cases.[11]

The living tree metaphor also gained considerable interest and influence not only in Canada but in many other common law-based systems as a point of reference

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9 *Hunter v Southam Inc* (n 1) 155.

10 *Re BC Motor Vehicle Act* n 1.

11 See for instance *Manitoba (A.G.) v. Metropolitan Stores Ltd.* [1987] 1 SCR 110, 124; *Canada (AG) v Mossop* [1993] 1 SCR 554, 612-13; *Ontario Hydro v. Ontario (Labour Relations Board)* [1993] 3 SCR 327, 409 (Iacobucci J, diss); *R v Van Der Peet* [1996] 2 SCR 507, 536; *R v Demers* [2004] 2 SCR 489 [78] (LeBel J).

for the application of various forms of progressive interpretation. For instance, the Judicial Committee of the Privy Council has consistently cited and applied the metaphor in its interpretation of the Constitutions of several Caribbean countries.[12] UK judges have also referred to the metaphor in their interpretation of the European Convention on Human Rights (within the boundaries set out by the Strasbourg jurisprudence). In *Brown v Stott*, Lord Bingham (Lord Steyn agreeing) stated that: '[a]s an important constitutional instrument the Convention is to be seen as a "living tree capable of growth and expansion within its natural limits" (*Edwards v Attorney General for Canada*[)], but those limits will often call for very careful consideration.'[13] In *N v Home Secretary,* Lord Hope (Lord Walker agreeing) adopted the Strasbourg Court's characterisation of the Convention as a 'living instrument' before associating it with the living tree metaphor.[14] Noting the similarity between the 'living tree' and the 'living instrument', Baroness Hale suggested (extrajudicially) that the latter notion was an 'echo' and 'reminiscent' of Lord Sankey LC's metaphor.[15] Judges and commentators from other countries have also favourably referred to the metaphor in the interpretation of their national Constitutions.[16]

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12 See *Hinds v AG of Barbados* [2002] 1 AC 854 (PC); *Khan v Trinidad and Tobago* [2005] 1 AC 374 (PC); *Boyce v The Queen* [2005] 1 AC 400 (PC); *Matthew v Trinidad and Tobago* [2005] 1 AC 433 (PC) [42], [70]-[71] (Lord Bingham, Lord Nichools, Lord Steyn and Lord Walker, diss); *Watson v The Queen* [2005] 1 AC 472 (PC) [60]; *Bowe v The Queen* [2006] 1 WLR 1623 (PC) [28].

13 *Brown v Stott* [2003] 1 AC 681 (PC) 703.

14 *N v Home Secretary* [2005] 2 AC 296 (HL) [21]-[22].

15 Baroness Hale, 'Beanstalk or Living Instrument? How Tall Can the ECHR Grow?' (Barnard's Inn Reading 2011) 2-3; Baroness Hale, 'Common Law and Convention Law: The Limits to Interpretation' [2011] EHRLR 534, 534-35.

16 See for instance *AG v Chiu Tat-Cheong* [1992] 2 HKLR 84 (CA) 96; *A-G v Dow* [1992] BLR 119 (BwCA) 194-95 (Puckrin JA, diss); *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 (Starke J); *Cadia Holdings Pty Ltd v State of New South Wales* (2010) 242 CLR 195 [52] (French CJ); *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan Informant* (1931) 46 CLR 73, 115 (Evatt J); *Whitfield v A-G* (1989) 44 WIR 1 (BahSC) 20 conf'd (1989) 44 WIR 27 (BahCA); A Barak, 'Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy' (2002-2003) 16 Harv L Rev 19, 72; PA Freund, 'A Supreme Court in a Federation: Some Lessons from Legal History' (1953) 53 Colum L Rev 597; J

Despite the international success of the metaphor, there has been surprisingly little explanation about the origins, foundations and operating mechanism of the various types of progressive interpretation, thus leaving their development and application mainly to those in charge of interpreting the constitution. As a result, many jurists would argue that the paucity of analysis has made progressive interpretation a notion hard to define and its applications largely unpredictable. This shroud of mystery has contributed to the considerable opposition to progressive interpretation, especially in the US where the related image of the 'living Constitution' is continually pitted against originalism: 'the dead but legitimate hand of the past' versus 'the distinctly illicit charm of progress'.[17] For originalists, constitutional interpretation seeks to discern the original meaning of the words in the constitutional instrument, namely the meaning which is revealed in the intentions of its authors.[18] Originalists trace a crisp line between the act of judging and the act of legislating: '[u]nless judges are bound to original intent, they are freed from the restraint of the law and become, in effect, lawmakers themselves.'[19]

For the purposes of my thesis, it is unnecessary to engage in the complex debate between originalists and anti-originalists because Canadian law – my principal jurisdictional focus – has widely supported progressive interpretation. Indeed, the living tree metaphor has developed into what the Supreme Court characterised as 'one

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Greene, 'On the Origins of Originalism' (2009-2010) 88 Tex L Rev 1; VC Jackson, 'Constitutions as "Living Trees"? Comparative Constitutional Law and Living Metaphors' (2006-2007) 75 Fordham L Rev 921; JM Kirby, 'Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?' (2000) 24 MULR 1, 6; J Kirk, 'Constitutional Interpretation and a Theory of Evolutionary Originalism' (1999) 27 FL Rev 323; HE Yntema, 'Constitutional Principles and Jurisprudence' (1936-1937) 25 Geo LJ 577; L Zines, 'Dead Hands or Living Tree? Stability and Change in Constitutional Law' (2004) 25 Adel L Rev 3.

17 *LE* 348.

18 GL McDowell, 'Original Intent' in JW Ely, JB Grossman and K Hall (eds), *The Oxford Companion to the Supreme Court of the United States* (2nd edn, OUP, New York & Oxford 2005) . *Oxford Reference Online*, OUP, University of Oxford. September 2012.

19 ibid.

of the most fundamental principles of Canadian constitutional interpretation'.[20] A number of commentators have recognised that most contemporary legal academics also adhere to progressive interpretation.[21] Peter Hogg stated that it applies to all constitutional provisions, including the Charter.[22] In a recent public lecture, Binnie J confirmed that 'an original meaning or a frozen rights theory has never been accepted in Canada.' [23] Nonetheless, the adoption of a progressive interpretation of the Constitution does not mean that constitutional history is irrelevant. On the contrary, history is an important dimension of constitutional interpretation. For Hogg, '[a]ll that progressive interpretation insists is that the original understanding is not binding forever.'[24]

Given the near unanimous endorsement of progressive interpretation of the 1867-1982 Acts, it may appear paradoxical that one of the main objections to my thesis argument, as I pointed out in Chapter 1, is from the Framers' intentions.[25] The opposition to judicial progressive interpretation of implied constitutional principles may have to do with the fact that, to a large extent, their interpretation is not based on a constitutional document but on broad principles (apparently) unconstrained by

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20 *Re Same-Sex Marriage* (n 1) [22].

21 See DM Brown, 'Tradition and Change in Constitutional Interpretation: Do Living Trees Have Roots?' (2006) 19 NJCL 33, 82; RN Graham, 'A Unified Theory of Statutory Interpretation' (2002) 23 StatLR 91, 107; Greene (n 16) 33. See also RM Elliot, 'References, Structural Argumentation and the Organizing Principles of Canada's Constitution' (2001) 80 CBR 67, 72; G Huscroft, 'A Constitutional "Work in Progress"? The Charter and the Limits of Progressive Interpretation' (2004) 23 SCLR(2d) 413, 415.

22 PW Hogg, *Constitutional Law of Canada* (5th edn Carswell, Scarborough 2007) 36-25, 36-27 (loose-leaf edn).

23 I Binnie, 'Interpreting the Constitution: The Living Tree vs Original Meaning' (2007) 28 Pol'y Options 104, 104. See also *Ontario Hydro v. Ontario (Labour Relations Board)* (n 11) 408-09 (Iacobucci J, diss); Greene (n 16) 3, 33, 40; J Leclair, 'Judicial Review in Canadian Constitutional Law: A Brief Overview' (2004) 36 Geo Wash Int'l L Rev 543, 545; LB Tremblay, 'Marbury v. Madison and Canadian Constitutionalism: Rhetoric and Practice' (2004) 36 Geo Wash Int'l L Rev 515, 526, 531.

24 Hogg (n 22) 15-50.

25 See Ch 1.

written constitutional language. This concern is sometimes translated into charges of a 'free-wheeling judicial body which usurps the legislative function',[26] or of judges having 'unbounded authority to find whatever they like in a constitution'[27] or getting an 'open-ended license to rewrite the constitution at will'.[28] Since part of my thesis argument is that implied constitutional principles can (and should) be progressively interpreted in a way that they can check legislation, I need to present a proper defence against such charges. Together with Chapter 2, the present chapter suggests that HLA Hart and Ronald Dworkin provide a coherent theoretical structure underlying judicial progressive interpretation of implied constitutional principles, which constrains this form of interpretation, while Chapter 5 will focus on the more normative part of the thesis argument. As one constitutional scholar aptly put it, the real choice (in Canada and probably in many other legal systems) is not between originalism and progressive interpretation, *but how much* 'evolution' progressive interpretation allows for.[29] This question is at the heart of my argument in this chapter.

The need to engage in theoretical analysis when discussing progressive interpretation can be justified in several ways. Besides the general role and purpose of legal theory,[30] it has been said that Canadian progressive interpretation is in fact 'an explicit excursion into constitutional theory'.[31] More generally, US legal scholar Morton Horwitz stated that 'one of the central issues of constitutional theory' has been to reconcile the ideas of fundamental law and of a 'living Constitution' so as to

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26 A Kavanagh, 'The Idea of a Living Constitution' (2003) 16 CanJL& Juris 55, 69.

27 J Goldsworthy, 'The Preamble, Judicial Independence and Judicial Integrity' (1999-2001) 11 Constit Forum 60, 62.

28 P Monahan, 'The Public Policy Role of the Supreme Court of Canada in the *Secession Reference*' (1999) 11 NJCL 65, 76.

29 G Huscroft, 'The Trouble with Living Tree Interpretation' (2006) 25 UQLJ 3, 5, 10 (my emphasis).

30 See Ch 1, '3. Overview of the Thesis's Methodologies'.

31 Greene (n 16) 36.

prevent constitutional law from becoming frozen and sliding into originalism.[32] Therefore, the present theoretical discussion seeks to establish that progressive interpretation is grounded in coherent legal theory which can properly respond to critics and to explain how implied constitutional principles can be progressively interpreted in a way that can check legislation.

Hartian and Dworkinian theories of law and adjudication are logical and suitable frameworks for examining progressive interpretation. At the outset, this choice is consistent with Chapters 2-3 where it was suggested that those theories properly explained the legal developments concerning the relationship between Parliamentary sovereignty and the implied constitutional principles. As a matter of logic and coherence, it is submitted that my discussion in this chapter concerning progressive interpretation of implied constitutional principles can also be properly grounded in the same Hartian and Dworkinian theories as that discussion is the continuation of my more general theoretical explanation that these principles can have priority over legislation. Moreover, the choice of using again the Hartian and Dworkinian theories in this chapter also reflects their influence in the Canadian constitutional landscape. In Chapter 2, I referred to a number of Canadian constitutional scholars who recognised the influence of Hartian positivism in the Canadian context, including Luc Tremblay who suggested that, by 1982, it was the most influential theoretical framework in Canada.[33] I also cited Wilson J who opined that the Canadian Constitution is dynamic and is progressively shaped by judges in a way akin to Ronald Dworkin's 'chain novel' image.[34] When considering in addition

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32 MJ Horwitz, 'Foreword: The Constitution of Change - Legal Fundamental without Fundamentalism' (1993-1994) 107 Harv L Rev 30, 116.

33 See Ch 2, '1. Introduction'.

34 B Wilson, 'The Making of a Constitution: Approaches to Judicial Interpretation' [1988] PL 370, 373. See also Greene (n 16) 40.

the recent growth of implied constitutional principles in Canada, it may well be that Canadian constitutional law has been developing along Dworkinian lines.[35]

Despite their significant grounds of disagreement, it is submitted that both the Hartian and Dworkinian theories can serve as a basis for judicial progressive interpretation. Since the focus of my chapter is on progressive interpretation, I can sidestep the 'Hart-Dworkin debate', more specifically each side's critique of the other's competing theory. On the one hand, one could argue that, in his 'Postscript', HLA Hart restated or clarified some of his positions in a way that brought them closer to Dworkin's positions. For instance, Hart agreed with Dworkin that a legal system possesses 'non-conclusive' principles, that is, principles which may not prevail in one case but survive to determine the outcome in another case.[36] According to Hart, these principles can be identified by the rule of recognition and be used to resolve cases when the explicit law is indeterminate or silent.[37] For Hart, such a use of legal principles corresponds to Dworkin's 'constructive interpretation'.[38] In any event, the Hart-Dworkin debate has been comprehensively examined over the years, so that little new contribution can be made without a deep inquiry which would necessarily go beyond the scope of this thesis. On the other hand, my objective for this chapter is achieved if I can establish a sound theoretical explanation for judicial progressive interpretation of implied constitutional principles. While there are evidently many theories of constitutional interpretation and adjudication, I accept the claim made by

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35 See for instance S Choudhry and R Howse, 'Constitutional Theory and The Quebec *Secession Reference*' (2000) 13 CanJL& Juris 143; Goldsworthy (n 27) 63; L Tremblay, *The Rule of Law, Justice and Interpretation* (McGill-Queen's University Press, Montreal 1997); MD Walters, 'Written Constitutions and Unwritten Constitutionalism' in G Huscroft (ed) *Expounding the Constitution: Essays in Constitutional Theory* (CUP, Cambridge 2008) 245.

36 *CL* 260-62.

37 *CL* 263-65, 274.

38 *CL* 275.

those Canadian legal scholars who believe that the Hartian and Dworkinian theories – with Ronald Dworkin probably being Hart's most famous opponent – can satisfactorily explain the Canadian law and practice.

The argument in this chapter unfolds as follows. It begins with a review of those aspects of the Hartian and Dworkinian theories which serve to explain the judicial use of progressive interpretation and to argue that either theory can explain the contemplated legal effects of implied constitutional principles. As with my approach in Chapters 2-3 of concurrently examining and using more than one theoretical framework, I am adopting the same strategy in the present chapter in order to seek a wider degree of acceptance of my thesis argument. My examination of these theories will lead me to suggest that progressive interpretation of implied constitutional principles can properly be articulated and applied through the common law. This common law aspect of my theoretical discussion should combine with my argument in Chapters 2-3 (that the courts can resolve, and have resolved, questions concerning the content and scope of Parliamentary sovereignty) in order to further build on my more general argument that the judiciary can progressively interpret implied constitutional principles in a way that they can check legislation. My discussion concerning the common law as a proper mechanism through which implied constitutional principles can be progressively interpreted will highlight its inherently organic but self-constrained approach, as evidenced in the case law concerning these principles in which the courts have asserted their authority over progressive interpretation. This discussion should bring me to conclude that the Canadian courts can progressively interpret, and have progressively interpreted, implied constitutional principles in a way that can check legislation, and that my theoretical discussion fits with the recent Canadian practice and legal discourse.

2. Hartian Progressive Interpretation

My argument in this section is that HLA Hart's theory of law and adjudication can properly explain progressive interpretation of implied constitutional principles. My explanation is based on the Hartian notions of 'open texture' and indeterminacy of the law, which entail the existence of 'incomplete' cases. These incomplete cases can be resolved by the courts using their lawmaking powers. I will argue that this judicial function of resolving incomplete cases involves progressive interpretation, including progressive interpretation of implied constitutional principles. In this respect, my proposed Hartian approach to progressive interpretation combines with my discussion in Chapter 2 of the Hartian models of change to the rule of recognition.

For Hart, any device chosen for the communication of standards of behaviour will at some point prove indeterminate or incomplete. Such indeterminacy or incompleteness arises from language's inherent 'open texture' and human legislators' ultimate inability to anticipate 'all the possible combinations of circumstances which the future may bring.'[39] This reality has been the starting point of the Canadian justification for progressive interpretation. In a statement generally adhered to by the Canadian proponents of progressive interpretation, Peter Hogg observed that: '[i]t goes without saying that the framers of the Constitution could not foresee every kind of law which has subsequently been enacted; nor could they foresee social, economic and technological developments which have required novel forms of regulation.'[40] Similarly, in her extrajudicial writings, McLachlin CJC opined that:

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39 *CL* 126-31, 252.

40 Hogg (n 22) 15-46, 36-26. Also, *Hunter v Southam Inc* (n 1) 155; *Re BC Motor Vehicle Act* (n 1) 509; AC Cairns, *Constitution, Government and Society in Canada* (McClelland and Stewart, Toronto 1988) 28, 38; Huscroft, 'The Trouble with Living Tree Interpretation' (n 29) 10; AB Keith, 'Notes on Imperial Constitutional Law' (1937) 19 JCompLeg 264, 275.

> even when the legislature takes the trouble to write down laws, the result is almost always incomplete. […] Law-makers cannot conceivably foresee all the situations to which a legal provision may apply, nor how it should do so. […] The result is that even where laws are written down, it is often impossible to predict precisely how the law will apply in a particular situation in advance of a judicial ruling on the matter. […] In this sense, much of the law is never "on the books".
> This is also true of constitutions.[41]

According to Hart, indeterminacy or incompleteness can also be intended when legislators and the courts choose to use less rather than more determinate expressions in their lawmaking formulations, leaving the indeterminate areas to be later resolved in due course.[42] In these cases, Hart explained that the law is incomplete as it fails to dictate an answer and we are then in presence of a penumbral or an unregulated case (or a gap[43]):

> legal rules and principles identified [by the rule of recognition] often have what I call frequently 'open texture' so that when the question is whether a given rule applies to a particular case the law fails to determine an answer either way and so proves partially indeterminate. [T]he law in such cases is fundamentally *incomplete*: it provides no answer to the question at issue in such cases. They are legally unregulated.[44]

In the Canadian constitutional context, at least three types of incomplete cases can arise. One possibility is that the Framers of the Constitution Acts 1867-1982 themselves intended to cover only a limited number of areas. The non-covered areas can be interpreted as 'intentional' incomplete cases which the Framers left to be eventually developed presumably by the courts as the authoritative expounders of the constitution. Another related possibility is that, even within the areas covered by the

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41 B McLachlin, 'Unwritten Constitutional Principles: What Is Going On?' (2006) NZJPIL 147, 155-56.

42 *CL* 131-33.

43 See *CL* 252; *EJP* 7-8.

44 *CL* 252, 272, 274. Also *EJP* 69, 71.

Framers, they have deliberately used general language intended to allow sufficient room for future progressive interpretation. A third possibility concerns the Framers' failure to foresee all the situations to which the Acts may apply: as society changes over time, (unforeseen) incomplete cases would appear in respect of issues that everyone including the Framers initially thought was covered by the 1867-1982 Acts.

In this section, I will examine how the Hartian notions of incomplete cases relate to cases involving the use of implied constitutional principles as a basis for judicial review of legislation.

What can be (and has been) done about these incomplete cases? One way of dealing with them could be through 'formalism'. According to Hart, formalism seeks to minimize the need to choose between competing interests when resolving a legal question by 'freezing the meaning of a rule so that its general terms must have the same meaning in every case where its application is in question.' [45] For Hart, formalism is a mistaken approach. While it secures a measure of certainty and predictability, formalism does so 'at the cost of blindly prejudging what is to be done in a range of future cases, about whose composition we are ignorant.'[46] Formalism thus forces us to include in the scope of a rule cases which we would later wish to exclude and could exclude under language's open texture. Alternatively, we could accept the fact that language's open texture inevitably leaves incomplete cases and try to find the best ways to resolve them when they arise.

For Hart, the courts can resolve incomplete cases by using their discretion and making law.[47] The courts would proceed by analogy in this task, referring to 'some

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45 *CL* 129. Also *EJP* 64.

46 *CL* 130. Also *EJP* 66.

47 *CL* 135, 272-73. Also *EJP* 69; A Kavanagh, *Constitutional Review under the UK Human Rights Act* (CUP, Cambridge 2009) 32, 36.

general principle or some general aim or purpose which some considerable relevant area of the existing law can be understood as exemplifying or advancing and which points towards a determinate answer'.[48] Such a general principle, aim or purpose is not necessarily 'dictated by the law' although it likely has a 'footing in the existing law'.[49] In these situations, a judge will rely 'on his sense of what is best and not on any already established order or priorities prescribed for him by law.'[50]

It is when one examines how the courts can resolve incomplete cases that progressive interpretation comes into play. Indeed, the Hartian process of resolving incomplete cases seems to fit better with progressive interpretation than with originalism. It can provide a blue-print for progressive interpretation within the Hartian boundaries of judicial lawmaking. First, the proponents of progressive interpretation in Canada share the Hartian premise that human legislators are unable to anticipate all the possible application of their laws. Second, formalism, which entails that laws must have a pre-identifiable, limited set of meanings, must be rejected. On these criteria, originalism would be a form of formalism to the extent that it seeks to limit the possible meanings of a constitutional document to those meanings which are compatible with relevant historical evidence of the Framers' intentions. And third, what the courts do in resolving incomplete cases is supplementing the Framers' ultimately limited foresight by making law which is adapted to relevant social changes: in other words, by using progressive interpretation.

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48 *CL* 274. See also *EJP* 612, 614; DJ Mullan, 'Underlying Constitutional Principles: The Legacy of Justice Rand' (2010) 34 ManLJ 73, 83-84.

49 *CL* 273-74; *EJP* 7.

50 *CL* 275; *EJP* 7.

Once progressive interpretation is accepted, the next question is whether or how Hartian positivism can also explain progressive interpretation of implied constitutional principles. A few different scenarios can be envisaged. It could be said that the question of how implied constitutional principles should be interpreted concerns an incomplete case per se, which the courts would eventually resolve by progressively interpreting the principles. By contrast, one could borrow from Kent Greenawalt's suggestion made in the US context that 'standards of interpretation' used by the courts to determine what the constitution means are a component of the rule of recognition.[51] Applying this idea to progressive interpretation, one could argue that it is part of the rule of recognition. Hart could have regarded implied constitutional principles as falling under his definition of 'principles'. Implied constitutional principles are broad, general principles which exemplify or instantiate a number of distinct rules. They also refer to some desirable purpose or value which contributes to their justification.[52] Given that Hart considered that principles can also be identified by the rule of recognition,[53] it is possible to argue that, as a result, progressive interpretation of implied constitutional principles is also part of the rule of recognition.

Notwithstanding these differing scenarios, the last question, which underlies my argument in this chapter, is whether implied constitutional principles can be progressively interpreted *so that they can check legislation*, in other words, whether they can offset Parliamentary sovereignty. This question gets us back to my discussion in the preceding chapters of orthodox Canadian Parliamentary sovereignty

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51 K Greenawalt, 'The Rule of Recognition and the Constitution' (1986-1987) Mich L Rev 621, 659-60.

52 *CL* 260.

53 *CL* 263-65.

(as part of the Canadian rule of recognition) and how the rule of recognition can change. In Chapters 1-3, I argued that the proposition that implied constitutional principles can check legislation is not part of orthodox Canadian Parliamentary sovereignty. More specifically, in Chapter 2, I suggested that, under the Hartian framework, this proposition could nevertheless be a penumbra in the Canadian rule of recognition. My discussion in the present section suggests that whether the proposition is part of Canadian law can also be considered in terms of an incomplete case. This overlap (between my discussion in this chapter and in Chapter 2) is probably because my inquiry concerning the legal effects of implied constitutional principles intersects with Parliamentary sovereignty, thus bringing back the discussion of the rule of recognition, and because all the types of incomplete cases such as penumbral and unregulated cases and gaps result from law's open texture and legal indeterminacy. Evidently, a proponent of orthodox Parliamentary sovereignty will argue that the question of the legal effects of implied constitutional principles is not an incomplete case: they simply cannot check legislation. However orthodox Parliamentary sovereignty ultimately does not challenge my Hartian analysis to the extent that, according to my discussion in Chapters 2-3, Parliamentary sovereignty can eventually change, and when it does, the change or development could happen through the resolution of an incomplete case. Whatever the scenario, its resolution would normally depend on what the courts would decide (and, arguably, on the acceptance by, or acquiescence, of the other senior officials of the legal system). Therefore, the Hartian positivist analysis suggests that the courts can authoritatively resolve the question whether implied constitutional principles can be progressively interpreted so that they can check legislation. Returning to *Re Prov. Court Judges*, the Court filled the 'constitutional gaps' it previously identified by progressively

interpreting judicial independence so that it would extend to all Canadian courts which would thus benefit from the same degree of constitutional protection from legislative and executive interference as the superior courts and the criminal courts.[54]

Incomplete cases could evidently be resolved through constitutional amendment. However, a constitutional amendment is notoriously difficult to achieve. By way of comparison, in the more than 200 years since the adoption of their Bill of Rights, Americans only passed 17 constitutional amendments. Since Canada adopted its own constitutional amendment process in 1982, not a single amendment has been passed (using the procedure set out in s. 38 of the Constitution Act 1982) to amend a section of the 1867-1982 Acts. For some judges and constitutional scholars, the notorious difficulty of passing such a formal constitutional amendment can actually be interpreted as a further argument in favour of progressive interpretation.[55] However, for others, this difficulty suggests that the courts should be circumspect in considering whether their interpretation ought to deviate from the Framers' intentions or the words of the constitutional instrument.[56]

To be sure, there have been various views about the Hartian theory. For instance, in the context of common law disputes, Melvin Eisenberg criticised the distinction between regulated and unregulated cases for its failure to consider the 'standards of social congruence and systematic consistency' of the potentially applicable rules to the particular dispute. In other words, whether a court should apply

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54 On *Re Provincial Court Judges* [1997] 3 SCR 3, see Ch 3, '3. Qualifications and Challenges: Implied Constitutional Principles' and on judicial independence in general, see Ch 5.

55 *Hunter v Southam Inc* 155; *McCulloch v Maryland* (1819) 17 US (4 Wheat) 316, 415; H Brun, G Tremblay and E Brouillet, *Droit constitutionnel* (5th edn Editions Y. Blais, Cowansville, Quebec 2008) 199-200; Hogg (n 22) 15-51, 36-25.

56 See Graham (n 21) 125; Huscroft, 'A Constitutional "Work in Progress"?' (n 21) 417, 421-25; Huscroft, 'The Trouble with Living Tree Interpretation' (n 29) 8. Cf A Scalia and A Gutmann, *A Matter of Interpretation* (Princeton University Press, Princeton, NJ 1998) 40.

a common law rule must at least depend in part on its justifiability. Therefore, no common law cases are 'regulated' in the Hartian sense.[57] Hans Kelsen also disagreed with the view that there are gaps in the legal order and that courts would be obliged to fill the gaps by making law.[58] According to Kelsen, 'a positive legal order can always be applied by a court to a concrete case, even if the legal order does not contain a general norm positively regulating the behaviour of the defendant or accused'.[59] However, the most famous alternative to Hartian positivism is probably Dworkin's theory of 'law as integrity', which I will now examine in order to show how it can also explain progressive interpretation of implied constitutional principles.

3. Dworkinian Progressive Interpretation

In this section, I argue that Ronald Dworkin's theory of law and adjudication entails the view that law is progressively interpreted. This argument is developed through an examination of the essential features of Dworkin's theory of 'law as integrity' which states that judges must seek the 'best constructive interpretation' of the constitution. It is submitted that this interpretative approach should extend to implied constitutional principles.

'Law as integrity' instructs judges to identify legal rights and duties through their best overall constructive interpretation of the community's legal practice and most basic political arrangements.[60] The best interpretation is the one which 'proposes the most value for the practice' and 'shows it in the better light, all things

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57 MA Eisenberg, *The Nature of the Common Law* (Harvard University Press, Cambridge, Mass 1988) 151-54.

58 H Kelsen, *Pure Theory of Law* (University of California Press, Berkeley 1967) 246.

59 ibid 245.

60 *LE* 225-26, 255, 380; *JR* 14-16, 118-23.

considered.'[61] By value, Dworkin referred to 'some scheme of interests or goals or principles the practice can be taken to serve or express or exemplify.'[62] Judges should make that interpretation using all available relevant sources: constitutional documents, statutes, precedents, judicial practice, historical documents and events, traditions, etc. For Dworkin, legal interpretation is inherently holistic.[63] When applying his theory of legal interpretation to statutes, Dworkin discussed the importance of legislative history, which helps us understand why judges can and should progressively interpret the constitution.

Dworkin first examined the implications of the 'speaker's meaning view', 'which stares at convictions present and expressed when a statute was passed and ignores later changes. On this view, only "original" intentions can be pertinent to discovering a statute's meaning'.[64] The speaker's meaning view assumes that the moment the statute is born is when its meaning is formally adopted and thus fixed once and for all.[65] Dworkin criticised the impossibility of satisfactorily ascertaining the speaker's meaning. Who are the legislators? How do their opinions combine into some composite group intention? What is the legislators' intention? A judge who accepts law as integrity would not have sought to recapture the ideals or practical purposes of the politicians who first created the law.[66] He would reject 'the assumption of a canonical moment at which a statute is born and has all and only the

61 *LE* 52-53, 231; *MP* 160.

62 *LE* 52.

63 R Dworkin, 'Unenumerated Rights: Whether and How *Roe* Should Be Overruled' (1992) 59 U Chi L Rev 381, 391.

64 *LE* 349. See also *MP* 44-45.

65 *LE* 316, 348.

66 *LE* 227-28.

meaning it will ever have.'[67] 'He does not identify particular people as the exclusive "framers" of a statute and then attend only to their hopes or expectations or concrete convictions or statements or reactions.'[68] In sum, he does not limit his interpretation to some historical inquiry because history alone does not provide 'the best constructive interpretation of the community's legal practice'. However, this is not to say that history must be disregarded. For Dworkin, '[h]istory matters in law as integrity: very much but only in a certain way.'[69] It is never the automatic decisive factor but rather one set of political acts among others that a judge must fit and justify as part of his best interpretation of the relevant legal practice.[70]

Dworkin's theory of constitutional interpretation is developed along the same lines as his theory of statutory interpretation. As a result, the speaker's meaning view is rejected in the constitutional context for the same reasons Dworkin rejected it in the context of statutory interpretation. Lawyers and judges must seek integrity by 'try[ing] to construct a coherent, principled, and persuasive interpretation of the text, the structure of the Constitution as a whole, and our history under the Constitution.'[71] The process of constructive interpretation begins 'by asking what, on the best evidence available, the Framers intended to say.'[72] However, there is less reason to rely on history as the Constitution ages; judges must interpret 'history in motion'.[73] Likewise, fidelity to the words of the Constitution also does not exhaust constitutional interpretation, since they are only another part, albeit an essential part, of law as

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67 *LE* 348.

68 *LE* 348.

69 *LE* 227.

70 *LE* 316, 405; *JR* 118-23.

71 *JR* 118.

72 *JR* 120.

73 *LE* 350.

integrity's broader interpretative scheme.[74] As a result, over time, even the words of the Constitution may be displaced by precedent and practice 'when no way of reconciling both text and practice in an overall constructive interpretation can be found.'[75]

Dworkin's endorsement of progressive interpretation should be reasonably clear from this short overview of his theory, which contains the essential features of progressive interpretation: the rejection of originalism and, correlatively, the possibility that a given interpretation of the constitution changes over time in light of the evolving community's precedent and practice. Will Waluchow squarely characterised Dworkin's theory as a 'living tree theory'.[76]

Where do implied constitutional principles fit in Dworkin's theory? In *Reference Re Secession of Quebec*, the Supreme Court of Canada defined implied constitutional principles as 'emerg[ing] from an understanding of the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning.'[77] One could reasonably think that Dworkin would see them falling under his definition of legal principles. He could say that implied constitutional principles appeal to 'an amalgam of practice and other principles in which the implications of legislative and judicial history figure along with appeals to community practices and understandings.'[78] On the notion of principles, Hart seemed to end up substantially agreeing with Dworkin.[79] The existence of an implied constitutional principle would

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74 *JR* 118.

75 *JR* 118, 128-29.

76 WJ Waluchow, *A Common Law Theory of Judicial Review: The Living Tree* (CUP, Cambridge 2007) 65, 68.

77 *Reference Re Secession of Quebec* [1998] 2 SCR 217 [32].

78 R Dworkin, *Taking Rights Seriously* (Duckworth, London 1977) 36.

79 See *CL* 260-61.

be established by invoking 'institutional support such as any prior cases in which that principle was cited or figured in the argument, any statute that seemed to exemplify that principle (even better if the principle was cited in the *preamble* of the statute).'[80] Dworkin's reference to the preamble further supports the Canadian judges' and legal scholars' reliance on the preambles to the 1867 Act and the Charter in interpreting implied constitutional principles.

The inherently progressive character of Dworkinian constructive interpretation should further extend to the interpretation of implied constitutional principles. A priori, once it is accepted that progressive interpretation generally applies to the entire 1867-1982 Acts,[81] we are only one small step from extending it to the interpretation of principles implied from the Acts. Indeed, one could argue that progressive interpretation must apply by necessary implication to the interpretation of implied constitutional principles. The other scenario whereby the sections of the Acts would be progressively interpreted but the principles implied from the Acts would not be progressively interpreted seems too incoherent to be considered as a reasonable option. Dworkin himself wrote that '[w]e argue for a particular principle by grappling with a whole set of *shifting, developing and interacting* standards (themselves principles rather than rules)'.[82] These legal principles' origin and continued power lie 'in a sense of appropriateness *developed* in the profession and the public over time.'[83]

One could then ask how and why this sense of appropriateness would develop in such a way that the best holistic interpretation of an implied constitutional principle is that it can check legislation. In a sense, the answer lies in the question itself: this

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80 *TRS* 40-41 (my emphasis).

81 See '1. Introduction'.

82 *TRS* 40 (my emphasis).

83 *TRS*.

interpretation would best fit and justify the community's legal practice, expose the greatest value of that practice, and show it in the better light, all things considered.[84] As one author argued, the Supreme Court's constitutionalisation of a general principle (in his example, judicial independence) surely implies a 'favourable value judgment' vis-à-vis judicial independence, 'otherwise [the Court] would not have made it a higher-order norm.'[85] In other words, in such a case where principles intersect, the Court resolved the conflict by deciding that judicial independence outweighed Parliamentary sovereignty.[86] However, this does not mean that judicial independence will always outweigh Parliamentary sovereignty: as both 'non-conclusive' principles, 'they survive intact when they do not prevail'[87] and await the next case when the evaluative exercise starts anew.

So far, my discussion in this chapter has suggested an important role for the courts vis-à-vis progressive interpretation. Under a Hartian account, the courts would use progressive interpretation to resolve incomplete cases. For Dworkin, the primary role of the courts in fashioning and applying progressive interpretation naturally follows from his theory of adjudication. His discussion regularly comes back to what judges are expected to do: '[g]eneral theories of law […] are general interpretations of our own judicial practice.'[88] In the world of law as integrity, the judges have the last word on the proper interpretation of the Constitution.[89] Therefore, under a Dworkinian account as under a Hartian account, progressive interpretation would rest

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84 See *LE* 52-53.

85 P Carignan, 'De l'exégèse et de la création dans l'interprétation judiciaire des lois constitutionnelles' (1986) 20 RJT 27, 44-45 (tr).

86 Cf *TRS* 26.

87 *TRS* 35. Also *CL* 260-62.

88 *LE* 410.

89 *LE* 413; Dworkin, 'Unenumerated Rights' (n 63) 383.

within the hands of the judges. Since the courts are the primary interpreters of the constitution, it would follow that they are entrusted with the power to decide which interpretative method(s) should be used in a particular case.

This role of the common law in the context of progressive interpretation needs to be clarified. Indeed, given my argument in this chapter that implied constitutional principles can be progressively interpreted, a key question is the extent of the courts' authority over progressive interpretation. This question is important to my thesis argument because whether implied constitutional principles can check legislation via judicial progressive interpretation hinges on the extent of that authority. Therefore, the next section further examines the common law as a proper mechanism through which implied constitutional principles can be or are progressively interpreted.

4. Common Law Progressive Interpretation

So far in this chapter, I have argued that progressive interpretation can be understood as fitting either within a Hartian or a Dworkinian theory. I have also argued that it follows from these two theories that the courts can authoritatively decide whether and when implied constitutional principles should be progressively interpreted. In this section, I defend such a common law-based approach to progressive interpretation. The defence appeals to the inherent structural and voluntary self-constraints of judicial lawmaking and to the organic nature of the English common law constitution as the historical source or inspiration of the present implied constitutional principles. The purpose of the discussion is to deny the claim that judicial progressive interpretation is necessarily illegitimate and to set out those features of the common law-based approach to progressive interpretation of implied constitutional principles.

The notion of a common law-based living constitution, that is, a constitution which is judicially expounded through some kind of progressive interpretation, seems to be widely shared in the common law world.[90] Aileen Kavanagh wrote that the notion of the living Constitution 'refers to the growth, development and/or change in constitutional law which occurs through the decisions of the constitutional court interpreting the text of the Constitution. It thus concerns *judicial* development of constitutional law'[91] and emphasises the idea that 'constitutional law is also contained and created in the decisions of the constitutional court.'[92] In the US context, Harry Wellington once opined that:

> [t]he common-law method of constitutional adjudication […] better explains the Supreme Court's role in American government[.] Normatively it has the advantage of building change into law, change that takes into account contemporary substantive values as well as participational values.[93]

For centuries, English jurists have described the development of their constitution using 'organic' comparisons. In *Stockdale v Hansard*, Lord Denman CJ stated that 'there cannot be a doubt that [the Constitution of this country] adapted itself to the exigencies of the several occasions that arose, and gradually grew into

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90 See for instance *Boucher v The King* [1951] SCR 265, 286; *R v Therens* [1985] 1 SCR 613, 638; JE Cote, 'The Reception of English Law' (1977) 15 Alta L Rev 29, 57; SA de Smith and R Brazier, *Constitutional and Administrative Law* (8th edn Penguin, London 1998) 8; RH Fallon, 'A Constructivist Coherence Theory of Constitutional Interpretation' (1986-1987) 100 Harv L Rev 1189, 1213-14; TC Grey, 'Do We Have an Unwritten Constitution?' (1974-1975) 27 Stan L Rev 703; TC Grey, 'The Uses of an Unwritten Constitution' (1988) 64 Chi-Kent L Rev ; Hogg (n 22) ch. 60; AC Hutchinson, *Evolution and the Common Law* (CUP, Cambridge 2005); Lord Irvine of Lairg, 'The Development of Human Rights in Britain under an Incorporated Convention on Human Rights' [1998] PL 221, 232; *LE* ch 7, 10; WR Lederman, 'The Common Law System in Canada' in E McWhinney (ed) *Canadian Jurisprudence: The Civil Law and Common Law in Canada* (Stevens & sons, London 1959) 34; WS Livingston, *Federalism and Constitutional Change* (OUP, Oxford 1956) 13, 18; DA Strauss, 'Common Law Constitutional Interpretation' (1996) 63 U Chi L Rev 877; DA Strauss, *The Living Constitution* (OUP, New York 2010); Walters (n 35); Waluchow (n 76); Wilson (n 34) 373, 380.

91 Kavanagh, 'The Idea of a Living Constitution' (n 26) 55-56.

92 ibid 87.

93 HH Wellington, *Interpreting the Constitution: The Supreme Court and the Process of Adjudication* (Yale University Press, New Haven; London 1990) 127.

that form which the ends of good government require.'[94] Viscount Haldane observed extrajudicially that 'with a growing Constitution things are always changing and developing, and that you cannot be sure that what was right ten years ago will be right to-day.'[95] More recently, in *R (Jackson) v AG*, Lord Carswell wrote that '[o]ur constitution has for the last 200 years developed by evolution rather than revolution. […] An unwritten constitution, even more than a written one, is a living organism and develops with changing times'.[96] A similar discourse is also found in discussions of the fundamentals of the English constitution. For instance, Lord Bingham suggested extrajudicially that 'it is left to the judges to rule on what the rule of law means so that it would be possible for it to evolve over time in response to new views and situations.'[97] Lord Irvine wrote that: '[a]t the beginning of the twenty-first century, the British doctrine of parliamentary sovereignty rests on rather different foundations. In common with most British constitutional developments, the change was evolutionary rather than revolutionary.'[98] Therefore, a central characteristic of the English constitution is its ability to develop over time and to adapt to the relevant changes in society.

In Chapter 1, I sought to establish the structural and substantive influence of English constitutional law and theory in the development of Canadian law.[99] As a result, when Canadian law adopted the English constitutional model and its relevant constitutional principles, it is submitted that it also adopted their organic character.

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94 *Stockdale v Hansard* (1839) 9 A&E 1, 112 ER 1112, 1155.

95 Viscount Haldane, 'The Work for the Empire of the Judicial Committee of the Privy Council' [1921-1923] CLJ 143, 148.

96 *R (Jackson) v AG* [2006] 1 AC 262 (HL) [176].

97 TH Bingham, *The Rule of Law* (Allen Lane, London 2010) 7-8.

98 Lord Irvine of Lairg, 'Sovereignty in Comparative Perspective: Constitutionalism in Britain and America' (2001) 76 NYU L Rev 1, 12.

99 See Ch 1, '4. Considerations Related to the Use of Comparative Analysis'.

Indeed, Canadian statements of the same type as those found in the English context abound. In Chapter 2, I already cited Wilson J's characterisation of an evolving, dynamic Constitution progressively shaped by judges.[100] Allan Hutchinson referred to Canadian constitutional law as 'an organic work-in-progress whose lifeblood is the continuity of change.'[101] In *R v Beauregard*, Dickson CJC, delivering the majority judgment of the Supreme Court, confirmed that '[t]he Canadian Constitution is not locked forever in an 119-year old casket. It lives and breathes and is capable of growing to keep pace with the growth of the country and its people.'[102]

As mentioned in the introduction, there are some notable critics of common law-based approaches to constitutional interpretation, including some anti-originalists. One common criticism is that progressive interpretation amounts to a judicial fiat for unrestrained constitutional amendment. This criticism is based in part on the more normative ground of democratic legitimacy (of judicial review). Bruce Ackerman has criticised the US common law version of the living constitution theory for keeping the judges 'in the driver's seat' because it fails to adequately address 'the crucial importance of popular sovereignty in constitutional development.'[103] By 'popular sovereignty', Ackerman referred to the role of the people through the political process, which contributed to a series of dramatic reforms such as the New Deal and the Civil Rights Movement.

There are various ways one can reply to these types of challenge. In respect of the 'judicial fiat' claim, one could start by referring to the original formulation of the living tree metaphor in the *Persons Case* where Lord Sankey LC specified that the

100 See Ch 2, '1. Introduction'.

101 Hutchinson (n 90) 200.

102 *Beauregard* (n 7) 81. See also *AG of BC v Canada Trust Co* [1980] 2 SCR 466, 479.

103 B Ackerman, 'The Living Constitution' (2007) 120 Harv L Rev 1737, 1801.

growth and expansion of the 1867 Act had to remain 'within its natural limits'. The most obvious limit is probably the language of the 1867-1982 Acts. Any choice of words will necessarily eliminate a range of possible meanings. As the Supreme Court of Canada mentioned in *Re Employment Insurance Act*, the evolution of society cannot justify a 'distortion' or 'travesty' of the nature of the 1867-1982 Acts.[104] Ronald Dworkin (and others) also recognised the importance of the words in a constitutional document: it is 'an essential part of any broader program of constitutional interpretation because what those who made the Constitution actually said is always at least an important ingredient in any genuinely interpretive constitutional argument.'[105] However, according to both Hartian and Dworkinian theories, language provides incomplete legal guidance to the judge. HLA Hart would say that laws are 'irreducibly open textured'.[106] My above overview of Dworkin's theory underscored the point that constitutional interpretation does not necessarily equate with 'the best interpretation of the constitutional text considered apart from the history of its enforcement'.[107] Sometimes, precedent and practice can end up superseding the words in a constitutional document 'when no way of reconciling both text and practice in an overall constructive interpretation can be found.'[108]

The structure of the common law can serve as a more potent source of constraints on progressive interpretation than the words in the constitutional

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104 *Re Employment Insurance Act* (n 8) [45]. See also Mullan (n 48) 83-84.

105 *JR* 118. See also P-B Mignault, 'Quelques aperçus sur le développement du principe de l'autonomie au Canada avant et depuis le Statut de Westminster, 1931' (1932-1933) 11 RD 74; F Schauer, 'An Essay on Constitutional Language' (1981-1982) 29 UCLA L Rev 797, 801-02, 821-22; Strauss, 'Common Law Constitutional Interpretation' (n 90) 911-12 citing RH Fallon Jr, 'A Constructivist Coherence Theory of Constitutional Interpretation' (1986-1987) 100 Harv L Rev 1189, 1196.

106 *CL* 128. Also Kavanagh, *Constitutional Review under the UK Human Rights Act* (n 47) 31.

107 *JR* 118.

108 *JR* 128-29.

instrument. One such constraint is 'the pre-existing legal frameworks and standards'[109] that judges are bound to respect. These include the body of case law and the historical context and development of the constitution. Of course, national supreme courts are usually allowed to depart from their own precedents: in a 1967 case, the Supreme Court followed the example of the House of Lords by stating that the Court has the power to depart from its previous judgments but 'for compelling reasons' only.[110] A court can even craft a judgment that radically reshapes a substantial area of the law. However, by nature, the common law makes judicial intervention a case-by-case process which is often characterized as 'piecemeal', 'incremental' or 'interstitial'.[111] Moreover, the rule of precedent requires judges to seriously consider the relevant precedents before deciding to deviate from them lest their judgments become more vulnerable to distinguishing or overruling. According to Joseph Raz, the power of distinguishing also entails that 'the wider the principle enunciated by a court the easier it is to distinguish it, to whittle it down.'[112] The existence of these constraints can be found in the law reports. In *Watkins v Olafson*, the Supreme Court stated that 'the process of change is a slow and incremental one, based largely on the mechanism of extending an existing principle to new circumstances.'[113] In a later case, the Court reiterated that 'there are significant constraints on the power of the judiciary to change the law. […] The judiciary should

109 *CL* 273-74; Kavanagh, *Constitutional Review under the UK Human Rights Act* (n 47) 36; J Raz, *The Authority of Law: Essays on Law and Morality* (2nd edn OUP, Oxford 2009) 195-97.

110 *Binus v The Queen* [1967] SCR 594, 601.

111 Kavanagh, *Constitutional Review under the UK Human Rights Act* (n 47) 69-73. Also *CL* 273-74.

112 Raz (n 109) 196.

113 *Watkins v Olafson* [1989] 2 SCR 750, 760.

confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.'[114]

In the US context, David Strauss argued that, for centuries, the common law has restrained judges in an effective manner and, certainly, more effectively than originalism has done. Strauss explained:

> In any well-functioning legal system, most potential cases do not even get to court, because the law is so clear that people do not dispute it, and that is true of common law systems too. Even in the small minority of cases in which the law is disputed, the correct answer will sometimes be clear. And – perhaps the most important point – even when the outcome is not clear, and arguments about fairness or good policy come into play, the precedents will usually limit the possible outcomes that a judge can reach.[115]

Strauss further argued that it is the constitutional system itself which allows judicial review (of legislation and executive action). As for the common law, it 'is not intrinsically democratic or undemocratic; it is a way of resolving issues.'[116] Strauss even ventured to claim that the common law method was as democratic as its competitors. Indeed, citing an extensive list of topics in US constitutional law, he suggested that the (relatively settled) common law principles developed in these areas 'are not likely to stay out of line for long with views that are widely and durably held in the society.'[117]

Critiques of the (more normative) type developed by Ackerman can be interpreted as bringing the debate on to the Dworkinian terrain by arguing that common law theories of judicial review (of legislation and executive action) often do

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114 *R v Salituro* [1991] 3 SCR 654, 670.

115 Strauss, *The Living Constitution* (n 90) 39.

116 ibid 47-48. See also Strauss, 'Common Law Constitutional Interpretation' (n 90) 931-32.

117 Strauss, 'Common Law Constitutional Interpretation' (n 90) 929.

not provide 'the best constructive interpretation of the community's legal practice.'[118] How these more evaluative critiques challenge Hart's 'descriptive' theory[119] is less clear. The critics could argue that the judiciary is not the best authority to resolve questions arising from law's open texture, but such a critique would involve an excessive limitation on the judiciary's role and a significant alteration of our institutional structures and practices. Moreover, Ackerman's argument would presumably hold less sway in the Canadian context. In *Reference Re Secession of Quebec*, the Supreme Court disagreed with the argument that 'the notion of popular sovereignty underlies the legitimacy of our existing constitutional arrangements'. In the Court's view, the Canadian principle of democracy is a more complex idea which has to be considered 'in conjunction with other constitutional principles' – notably implied constitutional principles – and harmonized with a 'belief in constitutionalism'. The Court added that constitutionalism 'makes possible[] a democratic political system by creating an orderly framework within which people may make political decisions.'[120] As mentioned in the previous section, the Court's reasoning in *Quebec Secession Reference* seems more along Dworkinian lines as it suggests that the democratic argument is not the decisive element in every exercise of constitutional interpretation but rather one relevant element among others.

Evidently, much more can be said about what degree of judicial review is desirable in our societies. My narrower argument in this section is that the judicial flexibility allowed through progressive interpretation is significantly checked at

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118 *LE* 225.

119 See *CL* 239-44.

120 *Quebec Secession Reference* (n 77) [75]-[76]. See also 'A Dialogue on Rights' [1999] NZLRev 547, 550-51 (Binnie J).

several levels. These checks include a variety of internal constraints on the judiciary, which regulate the use of progressive interpretation and establish its boundaries.

Ultimately, every theory of law bears some level of contentiousness. Richard Fallon once observed that 'it may be a mistake to assume that there is one best constitutional theory for all time. […] As changes occur, the constitutional theory that would work best to satisfy the relevant criteria in one era may not work best in another.' [121] As I suggested in Chapter 1, one defensible way of choosing a theory is by assessing whether it is otherwise coherent and sufficiently fits with relevant constitutional practice. For instance, at the beginning of *Law's Empire*, Dworkin noted that legal positivists deal with questions such as 'what should judges do in the absence of law?' and 'how should they fill gaps in the law?' [122] According to Dworkin, these questions do not reflect 'the accounts thoughtful lawyers and judges give of their work.' [123] They are a distortion of legal practice, [124] a statement Dworkin sought to illustrate through a selective review of cases. Interestingly, in his 'Postscript', Hart mounted a very similar critique of Dworkin's position. Citing prominent US and English judges and referring to 'a host of other lawyers, both academic and practising,' Hart argued that 'there are cases left incompletely regulated by the law where the judge has an inescapable though "interstitial" law-making task'. [125] As with Dworkin and Hart, I seek to determine to what extent my theoretical discussion of progressive interpretation fits with the Canadian legal discourse.

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121 RH Fallon, 'How to Choose a Constitutional Theory' (1999) 87 Cal L Rev 535, 569-71.

122 *LE* 9.

123 *LE* 10.

124 *LE* 15.

125 *CL* 274.

5. Applications

The important role of the common law can be inferred from the three dozen Supreme Court of Canada cases which applied or referred to the living tree metaphor. For instance, in *AG BC v Canada Trust Co,* Dickson J, delivering the judgment of the Court, wrote that '[i]t has been stated repeatedly on high authority that a constitutional document must remain flexible and elastic, in the words of Lord Sankey LC in *Edwards v. AG of Canada*[,] "a living tree capable of growth and expansion within its natural limits".'[126] In *R v Therens*, Le Dain J remarked that: '[b]y its very nature a constitutional charter of rights and freedoms must use general language which is capable of *development and adaptation by the courts*.'[127] More recently, Binnie J (extrajudicially) reaffirmed the role of the judiciary in applying the living tree metaphor by crediting the courts for closing or at least considerably narrowing down 'an unacceptable gap […] between the original meaning of the Constitution and what people in Canada were prepared to live with.'[128] While acknowledging the role of the people, Binnie J nevertheless emphasized that '*the agents of change* […] *were the judges.'*[129]

It is submitted that the courts have on occasion used progressive interpretation to develop the scope and legal effects of implied constitutional principles. In the context of the rule of law, one evolutionary factor would have been the development of judicial review of administrative tribunals' decisions. In *National Corn Growers Assn v Canada (Canadian Import Tribunal),* Wilson J (Dickson CJC and Lamer CJC concurring) stated that the prevailing view in early Anglo-Canadian administrative

126 *Canada Trust* (n 102) 478.

127 *Therens* (n 90) 638 (my emphasis).

128 Binnie (n 23) 107.

129 ibid 107 (my emphasis).

law was that the courts would exercise strict judicial scrutiny over decisions of administrative tribunals. However, Wilson J observed that, over time, the courts have moved 'toward a more sophisticated understanding of the role of administrative tribunals in the modern Canadian state', a view currently shared by the Court.[130] The main reasons explaining this change of view would be the recognition of the administrative tribunals' expertise and a judicial reappraisal of the relationship between the courts and administrative tribunals. However, it is submitted that, at the root of this change is a reality: the development of the 'Administrative State', with its multiplication of administrative tribunals and other decision-making authorities. In explaining the departure from a strict Diceyan rule of law in Canadian law, McLachlin J wrote (extrajudicially) that:

> as a purely practical matter, the twentieth century has seen great growth in the executive arm of government. No longer can a handful of civil servants in daily touch with the Minister administer the complex processes of the laws Parliaments and the Legislatures have created. It has been necessary to create special bodies to deal with the literally millions of decisions that must be taken each year concerning the rights and responsibilities of individuals subject to various laws and legal regimes.[131]

Another principle deriving from the rule of law which has been progressively interpreted is judicial independence. In *Provincial Court Judges' Assn of New Brunswick v New Brunswick (Minister of Justice)*, the Court stated as follows:

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130 *National Corn Growers Assn v Canada (Canadian Import Tribunal)* [1990] 2 SCR 1324 1136. Dickson CJC was Chief Justice at the time of hearing and Lamer CJC became Chief Justice at the time of judgment. See also *Dunsmuir v New Brunswick* [2008] 1 SCR 190 [32].

131 B McLachlin, 'The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law' (1998-1999) 12 CJALP 171, 176.

> The concept of judicial independence has evolved over time. Indeed, "[c]onceptions have changed over the years as to what ideally may be required in the way of substance and procedure for securing judicial independence.... Opinions differ on what is necessary or desirable, or feasible": *Valente v. The Queen*[.]
> This evolution is evident in the context of judicial remuneration. In *Valente*[,] Le Dain J. held that what was essential was not that judges' remuneration be established by an independent committee, but that a provincial court judge's right to a salary be established by law. By 1997 this statement had proved to be incomplete and inadequate. In [*Re Prov. Court Judges*], this Court held that independent commissions were required to improve the process designed to ensure judicial independence but that the commissions' recommendations need not be binding.[132]

That the judiciary can progressively interpret implied constitutional principles in a way that they can check legislation is illustrated in *Re Prov. Court Judges*, which was discussed in Chapter 3.[133] Delivering the majority judgment of the Court, Lamer CJC observed that, under the 1867-1982 Acts, judicial independence would only be constitutionally guaranteed in proceedings before the superior courts and courts exercising criminal jurisdiction. In the face of this reality, Lamer CJC reasoned that the various sections of the 1867-1982 Acts concerning the judiciary 'are not an exhaustive written code for the protection of judicial independence in Canada';[134] they were rather 'expressions' of the general principle of judicial independence.[135] Borrowing consciously or unconsciously from WR Lederman, Lamer CJC stated that the 1867-1982 Acts had 'gaps' which the courts have to 'fill out' using implied constitutional principles.[136] These principles, such as judicial independence, were 'exterior' to the sections of the Acts.[137] He reiterated that the preamble's reference to

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132 *Provincial Court Judges' Assn of New Brunswick v New Brunswick (Minister of Justice)* [2005] 2 SCR 286 [2]-[3].

133 See Ch. 1, '3. Qualifications and Challenges: Implied Constitutional Principles'.

134 *Re Provincial Court Judges* (n 54) [85], [109].

135 ibid [163].

136 ibid [85], [104].

137 ibid [83].

the English constitution was 'textual recognition' and 'affirmation' of the principle of judicial independence.[138] He summarily retraced the historical origins of ss. 96-101 to the Act of Settlement 1701, and stated that it is in the preamble to the 1867 Act that is found the 'true source' of judicial independence.[139] However, Lamer CJC would have been aware that, historically, English judicial independence, even as a fundamental principle of the English constitution, was limited in scope. Therefore, he justified its extension to non-superior courts by invoking the 'evolutive' nature of the Canadian constitution:

> The historical origins of the protection of judicial independence in the United Kingdom, and thus in the Canadian Constitution, can be traced to the Act of Settlement of 1701. As we said in *Valente*[,] that Act was the "historical inspiration" for the judicature provisions of the Constitution Act, 1867. Admittedly, the Act only extends protection to judges of the English superior courts. *However, our Constitution has evolved over time.* In the same way that our understanding of rights and freedoms has grown, such that they have now been expressly entrenched through the enactment of the 1982 Act, *so too has judicial independence grown into a principle that now extends to all courts, not just the superior courts of this country.*[140]

Lamer CJC explained this extension of judicial independence through the development over the years of statutory courts which were entrusted with the same institutional responsibility as the superior courts to impartially settle legal disputes including constitutional disputes. He then concluded that: '[i]nasmuch as that role has grown over the last few years, it is clear therefore that provincial courts must be granted some institutional independence.'[141] Following *Re Prov. Court Judges*, the reference to (constitutional) gaps has also been used elsewhere in the case law and the

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138 ibid[105], [109] citing *Beauregard* (n 7) 72.

139 *Re Provincial Court Judges* (n 54) [146].

140 ibid [106] (my emphasis).

141 ibid [126].

literature.[142] Such a justification seems quite similar to the one used by the Supreme Court to explain why the rule of law should be extended beyond its original scope, i.e. the (unforeseen) development of statutory courts.[143]

Lamer CJC's interpretation of the interactions between the 1867-1982 Acts and implied constitutional principles can be explained as a selective mix of Hartian and Dworkinian features. On the one hand, Hart would have had no objection to Lamer CJC's characterisation of implied constitutional principles and could have considered judicial independence as a principle of the Canadian legal system. The relevant sections of the 1867-1982 Acts 'can be exhibited as the exemplifications or instantiations'[144] or, in the words of Lamer CJC, as 'elaborations, textual recognition and affirmation' of the principle of judicial independence. Another feature of Hart's notion of principles that he would have recognised in judicial independence is its underlying reference to some purpose, goal entitlement or value, which is regarded as desirable to maintain or to adhere to.[145] This feature is found in Lamer CJC's statement that:

> Judicial independence is valued because it serves important societal goals – it is a means to secure those goals.
> One of these goals is the maintenance of public confidence in the impartiality of the judiciary, which is essential to the effectiveness of

142 See for instance *Quebec Secession Reference* (n 77) [53]; *Baie d'Urfé (City) v Québec (AG)* [2001] RJQ 2520 (CA) [106]; *Lalonde v Ontario (Commission de Restructuration des Services de Santé)* (2001) 56 OR (3d) 577 (CA) [115]-[126]; *UL Canada Inc v Québec (AG)* [2003] RJQ 2729 (CA) [67], [71] summarily conf. in *UL Canada Inc v Quebec (AG)* [2005] 1 SCR 143; *R v Mackenzie* (2004) 221 NSR (2d) 51 (CA) [61]-[64]; D Gibson, 'Founding Fathers-in-Law: Judicial Amendment of the Canadian Constitution' (1992) 55 LCP 261, 276; Greene (n 16) 7; V Kazmierski, 'Something to Talk About: Is There a Charter Right to Access Government Information?' (2008) 31 Dalhousie LJ 351; Mullan (n 48).

143 See Ch 5, '4.2.2. Lamer CJC's Conception of Judicial Independence'.

144 *CL* 260.

145 *CL* 260.

> the court system. […] Another social goal served by judicial independence is the maintenance of the rule of law.[146]

Mark Walters suggested that one possible interpretation of *Re Prov. Court Judges* is that Lamer CJC 'reconfigured' the rule of recognition and engineered a legal revolution.[147] Such an explanation could also follow from Peter Hogg's view that judicial review of legislation which is not solely based on the sections of the 1867-1982 Acts marks a departure from orthodox Canadian constitutional theory.[148] If Hogg is correct, then *Re Prov. Court Judges* would also mark a break from the rule of recognition. In slightly less 'radical' terms than Walters and Hogg suggested, one could also argue that *Re Prov. Court Judges* presented a Hartian 'hard case' which Canadian constitutional law had left incompletely regulated as the Framers did not foresee the expansion of the statutory courts in the Canadian legal system. As a result, the question whether judicial independence extends to these courts would amount to an incomplete case. Referring to the case law and his interpretation of the relevant parts of the constitution, Lamer CJC resolved the incomplete case concerning the legal effects of judicial independence.

On the other hand, there are significant parts of Lamer CJC's analysis, including his progressive interpretation of judicial independence, which also display Dworkinian features (even when taking into consideration his use of *some* notion of gaps). At the outset, it is similar to Dworkin's 'most natural reading' of the US Bill of Rights, which points to a 'political ideal' setting out a 'network of principles, some

146 *Re Provincial Court Judges* (n 54) [9]-[10].

147 MD Walters, 'The Common Law Constitution in Canada: Return of *Lex Non Scripta* as Fundamental Law' (2001) 51 UTLJ 91, 93.

148 See Hogg (n 22) 15-51-52; Tremblay, 'Marbury v. Madison and Canadian Constitutionalism' (n 23) 532-35.

extremely concrete, others more abstract, and some of near limitless abstraction.'[149] Indeed, Lamer CJC referred to Rand J in *Switzman v Elbling* for the view that the preamble articulated 'the political theory which the Act embodies': a constitutional democracy modelled on the English constitution.[150] For Lamer CJC, it follows that the 1867-1982 Acts should be understood 'as elaborations of the underlying, unwritten, and organizing principles found in the preamble to the Constitution Act, 1867.'[151] These principles fulfil an essential constitutional role given Lamer CJC's recognition that the relevant sections of the Acts are not 'an exhaustive code of judicial independence'. [152] In this respect, Dworkin similarly recognised that '[f]idelity to the Constitution's text does not exhaust constitutional interpretation, and sometimes, overall constitutional integrity might require a result that could not be justified by the best interpretation of the constitutional text considered apart from the history of its enforcement.'[153] It may be in this particular sense that Lamer CJC spoke of 'gaps' in the 1867-1982 Acts rather than in the positivist sense. Lamer CJC cited some examples taken from the case law of the various principles implied from the preamble: for instance the 'doctrine of full faith and credit' deriving from the federal principle, the latter also being referred to in the preamble to the 1867 Act; and the principle of freedom of (political) expression deriving from the general democratic principle. Lamer CJC backed up his position on implied constitutional principles by invoking prior cases in which they were cited or figured in the argument in addition to the relevant parts and sections of the 1867-1982 Acts. Therefore, these interpretative elements combined with the expansion of statutory courts led

149 Dworkin, 'Unenumerated Rights' (n 63) 382.

150 *Re Provincial Court Judges* (n 54) [95]-[96]. Cf *Switzman v Elbling* [1957] SCR 285.

151 *Re Provincial Court Judges* (n 54) [107].

152 ibid [84]-[87], [109].

153 *JR* 118.

Lamer CJC to progressively interpret judicial independence in a different way than its meaning at Confederation (1867), with the result that its constitutional scope and effects now extends to statutory courts.

6. Conclusion

From its modest beginnings in the *Persons Case*, the living tree metaphor has eventually grown into a general interpretative approach applying to the entire Constitution Acts 1867-1982. The metaphor has also been used in the interpretation of other national Constitutions and by the English courts in their interpretation of the European Convention on Human Rights. Despite the very wide support for the metaphor, the judicial use of progressive interpretation has been subject to relatively little scrutiny and has thus remained a somewhat vague general statement usually announcing some novel constitutional interpretation (or constitutional lawmaking). However, a closer examination of the components, application and development of progressive interpretation suggests that it can be a coherent, well constrained mode of constitutional interpretation. I argued in this chapter that implied constitutional principles can also be subject to progressive interpretation. As a result of judicial progressive interpretation, I suggested that these principles could act as a check upon legislation, and have checked legislation (as shown in the cases examined in Section 5 and in Chapter 2).

Given HLA Hart's and Ronald Dworkin's influence in Canadian constitutional law and practice,[154] I proceeded to develop my argument using their theories of law and adjudication. Under a Hartian account, progressive interpretation can be one way of addressing the human shortcomings in the elaboration of any

[154] See '1. Introduction' and Ch 2, '1. Introduction'.

legally authoritative body of norms. These human shortcomings inevitably result in incomplete cases which need be resolved (or in obsolete legal rules which need be replaced). Alternatively, under a Dworkinian account, progressive interpretation follows from the best interpretation that judges must construct using not only historical facts but all relevant interpretative materials. As a result of both accounts, progressive interpretation would fall on the shoulders of the judges. Indeed, the Canadian courts' gradual extension of the scope of progressive interpretation, from s. 24 of the 1867 Act – the section interpreted in the *Persons Case* – to the various parts of the 1867-1982 Acts, evidences the greater judicial authority over progressive interpretation.

In support of the extension of progressive interpretation to implied constitutional principles, I further pointed to the organic character of the constitution and the case law. As the Supreme Court of Canada stated in *Secession Reference*, the observance of and respect for the foundational constitutional principles underlying the Canadian constitution 'is essential to the ongoing process of constitutional development and evolution of our Constitution as a "living tree"'. [155] Another argument in favour of the view that implied constitutional principles can check legislation would be based on the Canadian law and practice concerning these principles and its fit with my theoretical discussion. Thus, the Court's justification of the extension of the rule of law and its relevant underlying principles was that these implied constitutional principles evolved over time as a product of both the common law and the 1867-1982 Acts. [156] With regard to judicial independence, the Court mentioned that this evolution was necessary in order to adapt the law to the

155 *Quebec Secession Reference* (n 77) [49], [52].

156 See *Prov. Court Judges' Assn* (n 132) [2], [4].

unforeseen ‘rise of the Administrative State’ and the development of statutory courts and administrative bodies. The Court recognised that the functions of the judiciary have also expanded to include not only impartiality in adjudication but also preservation of the constitutional order, and public confidence in the administration of justice.[157]

The discussion of progressive interpretation completes the more descriptive portion of my theoretical argument that implied constitutional principles can check legislation. While the purpose of Chapters 2-3 was to demonstrate that Parliamentary sovereignty can change, and has changed, in order to accommodate the contemplated development of implied constitutional principles, the purpose of the present chapter was to suggest how such a development can occur and, arguably, how it occurred. The next chapter aims at developing the more normative argument that the rule of law is a justification for the view that these principles should check legislation.

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[157] See *Ell v Alberta* [2003] 1 SCR 857 [24].

CHAPTER 5 – THE RULE OF LAW

1. Introduction

At the beginning of this thesis, I examined Canadian Parliamentary sovereignty. According to its orthodox version, the federal Parliament and the provincial legislatures can make or unmake any law whatever and no person or body can legally override or set aside such law, so long as it does not contravene the sections of the Constitution Acts 1867-1982. However, I suggested in Chapter 3 that the orthodox version has been qualified and challenged by the courts' use of implied constitutional principles in conducting judicial review of legislation. In Chapters 2-4, I argued that these qualifications and challenges to the orthodox version can be explained in theory. In this chapter, I will argue that the contemplated legal effect of implied constitutional principles is underpinned and justified by the rule of law.

Any legal discussion of the rule of law is a notoriously complex and intricate undertaking. At the outset, there is no mention of it in the provisions of the 1867-1982 Acts. Nonetheless, the Supreme Court of Canada still stated that the rule of law is recognised in the various parts of the Acts or has been incorporated into Canadian law by the Acts. First, the preamble to the Canadian Charter of Rights and Freedoms 1982 recognises that 'Canada is founded upon principles that recognize the supremacy of God *and the rule of law*'. According to the Court, the rule of law was also implicitly included in the preamble to the Constitution Act 1867 by virtue of its reference to a 'Constitution similar in Principle to that of the United Kingdom', since '[t]he rule of law has always been understood as the very basis of the English

constitution'.[1] In *British Columbia (AG) v Christie*, the Supreme Court stated that the rule of law is also 'implicitly recognized in s. 1 of the Charter, which provides that the rights and freedoms set out in the Charter are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".'[2] More generally, the Court opined that the principle was 'clearly implicit in the very nature of a constitution'. It considered that '[t]he founders of this nation must have intended, as one of the basic principles of nation building, that Canada be a society […] governed by rule of law [sic]'.[3]

A deeper reason for the complexity of the notion of the rule of law is its multifaceted character. A Canadian judge once wrote that, with the rule of law, 'one is at an intersection of philosophy, political science and law'.[4] Indeed, the legal rule of law doubles as a set of political principles and values. As a political principle, the rule of law is often characterised as a constitutional value[5] from which other political principles or values are derived.[6] Jeffrey Goldsworthy explained that '[t]he rule of law is first and foremost a political principle, an ideal or aspiration that may or may not be guaranteed by law. If and insofar as it is judicially enforceable, it can also

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1 *Re Manitoba Language Rights* [1985] 1 SCR 721, 750. See also *Re Provincial Court Judges* [1997] 3 SCR 3 [107]; *British Columbia v Imperial Tobacco Canada Ltd* [2005] 2 SCR 473 [57].

2 *British Columbia (AG) v Christie* [2007] 1 SCR 873 [19].

3 *Re Manitoba Language Rights* (n 1) 751. See also *Reference Re Secession of Quebec* [1998] 2 SCR 217 [50]; *Christie* (n 2) [19].

4 *Vanguard Coatings and Chemicals Ltd v Canada (Minister of National Revenue)* [1988] 3 FC 560 (CA) [23].

5 See for instance *R v Beauregard* [1986] 2 SCR 56, [24]; *Re Provincial Court Judges* (n 1) [123]; PW Hogg and CF Zwibel, 'The Rule of Law in the Supreme Court of Canada' (2005) 55 UTLJ 715, 717-19; 722-23; A Lamer, 'The Rule of Law and Judicial Independence: Protecting Core Values in Time of Change' (1996) 45 UNBLJ 3, 4; N Lyon, 'Is Amendment of Section 96 Really Necessary?' (1987) 36 UNBLJ 79, 80, 86; GdQ Walker, *The Rule of Law: Foundation of Constitutional Democracy* (Melbourne University Press, Carlton 1988) 9.

6 See for instance JL Jowell, 'The Rule of Law and Its Underlying Values' in JL Jowell and D Oliver (eds), *The Changing Constitution* (7th edn, OUP, Oxford 2011) 11, 16-33; J Raz, *The Authority of Law: Essays on Law and Morality* (2nd edn OUP, Oxford 2009) 214-19.

serve as a legal principle.'[7] Because of the similar features between the political and legal conceptions of the rule of law, it is not always easy (or useful) to distinguish between the two in the case law and literature: what is said about the content of the rule of law from a legal perspective is often applicable to the content of the rule of law from a political perspective and vice-versa. My discussion of the rule of law will be mostly conducted from a legal perspective although it will reflect the rule of law's dual nature, especially when its political aspects influence its legal interpretation and application.

The complexity of the rule of law is also reflected in the intertwinement between legal theory and the law and practice, as theory underlies the law and practice which in turn fuels the debates among the different theories or contributes to the emergence of new theories. In *Imperial Tobacco*, the Supreme Court observed that:

> considerable debate surrounds the question of what additional principles, if any, the rule of law might embrace, and the extent to which they might mandate the invalidation of legislation based on its content. P.W. Hogg and C.F. Zwibel write[:]
>
> > 'Many authors have tried to define the rule of law and to explain its significance, or lack thereof. Their views spread across a wide spectrum.... T.R.S. Allan, for example, claims that laws that fail to respect the equality and human dignity of individuals are contrary to the rule of law. Luc Tremblay asserts that the rule of law includes the liberal principle, the democratic principle, the constitutional principle, and the federal principle. For Allan and Tremblay, the rule of law demands not merely that positive law be obeyed but that it embody a particular vision of social justice. Another strong version comes from David Beatty, who argues that the 'ultimate rule of law' is a principle of 'proportionality' to which all laws must conform on pain of invalidity (enforced by judicial review). In the middle of the spectrum are those who, like Joseph Raz, accept that the rule of law is an ideal of constitutional legality, involving open, stable, clear, and general rules, even-

[7] JD Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (CUP, Cambridge 2010) 58.

> handed enforcement of those laws, the independence of the judiciary, and judicial review of administrative action.'[8]

The writings referred to by the Court are but a small sample of the voluminous literature inquiring into the rule of law from various perspectives. One of the most widely used frameworks is based on the distinction between 'formal' and 'substantive' conceptions of the rule of law. Paul Craig defined the formal and substantive conceptions of the rule of law as follows:

> Formal conceptions of the rule of law address the manner in which the law was promulgated (was it by a properly authorised person, in a properly authorised manner, etc.); the clarity of the ensuing norm (was it sufficiently clear to guide an individual's conduct so as to enable a person to plan his or her life, etc.); and the temporal dimension of the enacted norm (was it prospective or retrospective, etc.). Formal conceptions of the rule of law do not however seek to pass judgment upon the actual content of the law itself. They are not concerned with whether the law was in that sense a good law or a bad law, provided that the formal precepts of the rule of law were themselves met. Those who espouse substantive conceptions of the rule of law seek to go beyond this. They accept that the rule of law has the formal attributes mentioned above, but they wish to take the doctrine further. Certain substantive rights are said to be based on, or derived from, the rule of law. The concept is used as the foundation for these rights, which are then used to distinguish between "good" laws, which comply with such rights, and "bad" laws which do not.[9]

Trevor Allan aptly captured the difficulty of adopting or developing an appropriate (legal or political) conception of the rule of law. He noted that:

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8 *Imperial Tobacco* (n 1) [61].

9 P Craig, 'Constitutional Foundations, the Rule of Law and Supremacy' [2003] PL 92, 96; P Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' [1997] PL 467, 467.

> '[a]t the heart of the problem lies the difficulty of articulating a coherent doctrine which resists a purely formal conception of legality--according to which even brutal decrees of a dictator, if formally 'valid', meet the requirements of the rule of law--without instead propounding a complete political and social philosophy.'[10]

Despite the distinction's shortcomings, it remains widely used in the literature, including in Canada,[11] in large part because it provides a relatively convenient theoretical framework for classifying and examining the rule of law as a legal principle. My analysis of the rule of law in this chapter will also use this framework because of its relevance to Canadian law and since it underlies my own proposed conception of the rule of law.

This chapter begins with a review of formal and substantive conceptions of the rule of law and their compatibility with the contemplated legal effects of the rule of law conceived as a set of implied constitutional principles in the Canadian context. I will propose a 'thin' substantive conception of the rule of law in an attempt to avoid the criticisms levelled against the purely formal and substantive conceptions of the rule of law and to attract a wider agreement on a particular conception of the rule of law. In essence, the content of the thin substantive conception would correspond to the *core* or central features of the rule of law (accepted by most lawyers) but, in its legal effects, the rule of law (and the core principles deriving from the rule of law)

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10 TRS Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (OUP, Oxford 1993) 20.

11 See for instance M Carter, 'The Rule of Law, Legal Rights in the Charter and the Supreme Court's New Positivism' (2008) 33 Queen's LJ 453; D Dyzenhaus, 'Recrafting the Rule of Law' in D Dyzenhaus (ed) *Recrafting the Rule of Law: The Limits of Legal Order* (Hart, Oxford 1999) 1; F Gélinas, 'La primauté du droit et les effets d'une loi inconstitutionnelle' (1988) 67 CBR 455, 482-83; Hogg and Zwibel (n 5); A Hutchinson, 'The Rule of Law Revisited: Democracy and Courts' in D Dyzenhaus (ed) *Recrafting the Rule of Law: The Limits of Legal Order* (Hart, Oxford 1999) 196; PJ Monahan, 'Is the Pearson Airport Legislation Unconstitutional? The Rule of Law as a Limit on Contract Repudiation by Government' (1995) 33 Osgoode Hall LJ 411; WN Newman, 'The Principles of the Rule of Law and Parliamentary Sovereignty in Constitutional Theory and Litigation' (2004-2005) 16 NJCL 175; M Ribeiro, *Limiting Arbitrary Power: The Vagueness Doctrine in Canadian Constitutional Law* (UBC Press, Vancouver 2004); D Simsovic, 'No Fixed Address: Universality and the Rule of Law' (2001) 35 RJT 739.

would be able to override legislation and administrative action which unduly interfere with its core content. In order to test my proposed conception of the rule of law, I will examine the extent to which the Canadian law and practice can still be compatible with a formal conception of the rule of law. I will then argue that the courts have pushed their interpretation of the rule of law beyond formal conceptions. In support of this proposition, I will discuss two requirements of the rule of law: (some basic level of) judicial review of executive action and judicial independence. In accordance with the thin substantive conception of the rule of law, I will argue that these two interrelated requirements of the rule of law form part of its core content and that the courts have invoked these requirements in their reasons for striking down or setting aside legislation.

2. Formal and Substantive Conceptions of the Rule of Law

This section examines the fit between different formal and substantive conceptions of the rule of law and my argument in this chapter. Since my argument is concerned with the legal effects of the rule of law, my analysis of these selected conceptions will distinguish between their content and legal effects. While this distinction is not airtight, it should conveniently provide an adequate understanding of what each examined conception of the rule of law stands for and how it should be applied in practice. Noting the respective strengths and weaknesses of those formal and substantive conceptions of the rule of law, I will then sketch out a different conception of the rule of law which I will argue better explains the Canadian law and practice than the other formal and substantive conceptions.

2.1. Formal Conceptions

For Paul Craig, two of the most prominent formal conceptions of the rule of law have been presented by AV Dicey and Joseph Raz. Dicey's three meanings of the rule of law are well known (ie supremacy of the ordinary law, equality before the law, and the constitution being the result of the law of the land).[12] When taking into account Dicey's view of Parliamentary sovereignty, the legal effects of the rule of law are very limited vis-à-vis legislation. A statute which would allow the government to exercise 'wide, arbitrary, or discretionary powers' or allocate to 'special' tribunals a jurisdiction to decide cases concerning the government would be contrary to the Diceyan rule of law. However, according to Dicey, Parliament has the right to make or unmake any law whatever, and nobody, including the courts, could override or void an Act of Parliament. Therefore, in the event of a conflict between a statute and an element of the rule of law, it is believed that the rule of law would have to give way to Parliament's will. While Dicey believed that the rule of law and Parliamentary sovereignty 'favour' each other rather than 'stand in opposition to each other', he still acknowledged that there are extreme circumstances 'when for the sake of legality itself the rule of law must be broken [by the intervention of Parliament].'[13] Raz's conception of the rule of law[14] focuses on a somewhat different set of central meanings (ie laws as general, open and stable rules; law as guidance). As Raz admitted, a legal system can at the same time be wicked and conform to the requirements of his conception of the rule of law. In respect of its legal effects, Raz stated that the rule of law has no more than *prima facie* force: it is only one virtue of

12 AV Dicey and ECS Wade, *Introduction to the Study of the Law of the Constitution* (10th edn Macmillan, London 1959) 110-22.

13 ibid Ch XIII.

14 Raz (n 6) Ch 11.

law and always has to be balanced against other values.[15] In the end, the rule of law 'fulfils essentially a subservient role': conformity to it is not itself an ultimate goal.[16]

To the extent that formal conceptions of the rule of law yield to legislative authority, they are consistent with orthodox constitutional theory (and Parliamentary sovereignty). As Peter Hogg and Cara Zwibel argued, 'the rule of law does not control the substance of laws. The rule of law is trumped by parliamentary sovereignty.'[17]

Whether or not one agrees with Dicey's and Raz's versions of the rule of law, they have been and continue to be greatly influential across the common law world. For Sir Ivor Jennings, Dicey's exposition 'proved to be so acceptable that until recently it was generally assumed that the rule of law and Dicey's exposition of it were the same',[18] and authors such as Timothy Endicott and Jeffrey Goldsworthy opined that Raz's conception of the rule of law has perhaps attracted a consensus among legal philosophers and common lawyers.[19] Dicey's and Raz's influence is also acknowledged and reflected in some Canadian cases. For instance, in *National Corn Growers Assn v Canada (Canadian Import Tribunal),* Wilson J (Dickson CJC and Lamer CJC concurring) stated that '[i]t is by now almost universally acknowledged that the impact of A.V. Dicey's description of the "rule of law" on the early history of Anglo-Canadian administrative law was remarkably influential'.[20] In *Immeubles Port*

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15 ibid 228.

16 ibid 228-29.

17 Hogg and Zwibel (n 5) 726.

18 GH Hewart, *The New Despotism* (Ernest Benn, London 1929) 24; I Jennings, *The Law and the Constitution* (5th edn University of London Press, London 1959) 54. See also *R v Home Secretary, ex p Pierson* [1998] AC 539 (HL) 591 (Lord Steyn).

19 TAO Endicott, *Vagueness in Law* (OUP, Oxford 2000) 185; Goldsworthy (n 7) 58-59. Also Walker (n 5) 21-23.

20 *National Corn Growers Assn v Canada (Canadian Import Tribunal)* [1990] 2 SCR 1324 [74].

Louis Ltée v Lafontaine (Village), the Supreme Court referred to Dicey's account of the rule of law in the following terms:

> The principle that public authorities are subordinate to the supervisory power of the superior Courts is the cornerstone of the Canadian and Quebec system of administrative law. Such judicial review is a necessary consequence of the rule of law as identified by Albert Venn Dicey[.] [Dicey's three meanings of the rule of law] basically mean that the exercise of governmental authority must be controlled, and, as a corollary, that the individual must have the appropriate remedies to protect himself against arbitrary action. In our legal and political system, judicial review of administrative action by the courts of law is based on these principles.[21]

Raz's discussion of the rule of law was cited with approval by the Supreme Court in *Re Manitoba Language Rights* (which was in turn confirmed in subsequent cases).[22]

Consequently, any proposed conception of the rule of law which is intended to explain and justify Canadian constitutional law and practice cannot ignore the Diceyan and Razian conceptions of the rule of law. Through the notion of the core content of the rule of law, my proposed conception of its content will be largely based on the works of Dicey and Raz, although I will argue that the rule of law goes beyond these formal conceptions in terms of its legal effects.

Despite the deep influence of the Diceyan and Razian conceptions of the rule of law, they have been the subject of a number of criticisms. Many authors have questioned whether there can really be purely formal conceptions of the rule of law and, even if there are, whether they can present a fair picture of reality. For instance, whether the Diceyan rule of law is a formal or substantive conception is a highly

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21 *Immeubles Port Louis Ltée v Lafontaine (Village)* [1991] 1 SCR 326 [80].

22 See for instance *Re Provincial Court Judges* (n 1) [99]; *Quebec Secession Reference* (n 3) [71]; *Imperial Tobacco* (n 1) [58]-[60]; *Christie* (n 2) [20].

contentious debate.[23] Even Craig acknowledged that '[f]ormal conceptions of the rule of law are indeed based upon substantive considerations of moral autonomy and the like.' [24] David Dyzenhaus illustrated the blurred distinction between form and substance by referring to Raz's conception of the rule of law, which represents a formal conception according to Craig. Dyzenhaus argued that Raz's criterion that the law must be capable of guiding individual planning 'is about substance since it tells us that particular laws must have a determinate substance before they do their job as law.'[25] Moreover, some authors have criticised a formal conception of the rule of law which ultimately yields to legislative authority. For these authors, legislative authority could not extend to the repudiation or a substantial violation of the rule of law, which would amount to 'the destruction of democracy'.[26]

From a more descriptive perspective, TRS Allan even suggested that 'judicial practice demonstrates adherence to a more substantive understanding, embracing the protection of common law constitutional rights'[27] (although he still admitted that most British jurists continue to endorse a largely formal conception of the rule of law). In the Canadian context, one could argue that formal conceptions do not fit

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23 In support of a formal interpretation of the Diceyan rule of law, see for instance JWF Allison, *The English Historical Constitution: Continuity, Change and European Effects* (CUP, Cambridge 2007) 159-60; Craig, 'Formal and Substantive Conceptions of the Rule of Law' (n 9) 470-74. For the view that the Diceyan rule of law has substantive aspects, see for instance *Pierson* (n 18) 591; TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP, Oxford 2001) 18-21; NW Barber, 'Must Legalistic Conceptions of the Rule of Law Have a Social Dimension?' (2004) 17 Ratio Juris 474, 479-81; Jowell (n 6); G Marshall, *Constitutional Theory* (OUP, Oxford 1971) 138.

24 AW Bradley and KD Ewing, *Constitutional and Administrative Law* (14th edn Longman, Harlow 2006) 103; Craig, 'Formal and Substantive Conceptions of the Rule of Law' (n 9) 481 citing Allan, *Law, Liberty and Justice* (n 10). See also *Pierson* (n 18) 591; W Wade and CF Forsyth, *Administrative Law* (9th edn OUP, Oxford 2004) 19-20; Sir John Laws, 'The Rule of Law: Form or Substance' (2007) 4 JJ 24, 27.

25 D Dyzenhaus, 'Form and Substance in the Rule of Law' in C Forsyth (ed) *Judicial Review and the Constitution* (Hart, Oxford 2000) 141, 148.

26 See for instance TRS Allan, 'The Limits of Parliamentary Sovereignty' [1985] PL 614, 620-21; Jowell (n 6) 32; Lord Woolf, 'Droit Public - English Style' [1995] PL 57, 68-69.

27 T Allan, 'Questions of Legality and Legitimacy: Form and Substance in British Constitutionalism' (2011) 9 ICON 155, 158.

easily with the more recent case law,[28] and are unable to keep up with certain changes to Parliamentary sovereignty or with progressive interpretation, which contemplate the possibility that implied constitutional principles deriving from the rule of law can check legislation. For instance, in *Reference Re Secession of Quebec*, the Supreme Court identified four underlying constitutional principles: federalism, democracy, constitutionalism and the rule of law, and the protection of minorities. The Court then explained their legal effects in the following terms:

> Underlying constitutional principles *may in certain circumstances give rise to substantive legal obligations* (have "*full legal force*", as we described it in the *Patriation Reference*[,] which constitute substantive limitations upon government action. These principles may give rise to very abstract and general obligations, or they may be more specific and precise in nature. The principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments.[29]

By referring to the expression 'full legal force' as used by Martland and Ritchie JJ in *Patriation Reference* (who meant the authority to strike down legislation),[30] the above statement in *Secession Reference* seems to approve their view in *Patriation Reference*. While the terms 'governments' and 'government action' could be understood as references only to the executive branch, Mark Walters pointed out that uses of these same terms a few pages later in the judgment include the legislative branch. For instance, when speaking about the principle of constitutionalism, the Court wrote that it 'requires that all government action must comply with the law, including the Constitution.'[31]

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28 See '4. Confirmation of the "Thin Substantive" Conception'.

29 *Quebec Secession Reference* (n 3) [54] (my emphasis).

30 See '3. The Basic Content of the Rule of Law: *Re Manitoba Language Rights*'.

31 *Quebec Secession Reference* (n 3) [72] cited by MD Walters, 'Nationalism and the Pathology of Legal Systems: Considering the Quebec Secession Reference and Its Lessons for the United Kingdom' (1999) 62 MLR 371, 384-85.

As a result, it is worth examining whether there are other conceptions of the rule of law which can coherently explain my argument concerning its legal effects in the Canadian context. One crucial question, as the Supreme Court put it in *Imperial Tobacco*, is 'what *additional* principles, if any, the rule of law might embrace, and the extent to which *they* might mandate the invalidation of legislation based on its content.'[32] If there are additional principles which can check legislation, they would have to fit within conceptions of the rule of law broader than formal conceptions, namely substantive conceptions of the rule of law.

2.2. Substantive Conceptions

The most prominent proponent of a substantive conception of the rule of law is probably Ronald Dworkin. Dworkin contrasted two conceptions of the rule of law. First he identified the 'rule-book conception', which seemingly corresponds to Dicey's first two meanings of the rule of law. However, under the 'rights conception' of the rule of law, 'citizens have moral rights and duties with respect to one another, and political rights against the state as a whole.'[33] The rights conception 'insists that these moral and political rights be recognized in positive law, so that they may be enforced *upon the demand of individual citizens* through courts'.[34] Here, the ultimate question that the rights conception asks is 'whether the plaintiff has the moral right to receive, in court, what [he] demands', and if he does, then his moral right should be judicially available to him.[35] In Dworkin's rights conception, the rule book continues to exert influence on judicial decision-making: '[s]ome high degree of compliance with the rule-book conception seems necessary to a just society', but, Dworkin added,

32 *Imperial Tobacco* (n 1) [61].

33 *MP* 11.

34 *MP* 11.

35 *MP* 16.

'compliance with the rule book is plainly not sufficient for justice';[36] the rule book is only one source of moral rights. To the extent that the rule book encompasses legislation, it seems to follow from Dworkin's conception of the rule of law that a plaintiff's moral right can check legislation. Such a conclusion would also be confirmed by my earlier account of the Dworkinian notion of principles, more specifically, of his view that legislative supremacy is a set of 'non-conclusive' legal principles which incline towards a certain result but do not command it.[37]

The Dworkinian rule of law would fit with an interpretation of the rule of law according to which it can check legislation. It is also generally compatible with my analysis of Dworkin's theory of constructive interpretation in Chapter 4. Moreover, Dworkin's conception pursuant to which 'the rules in the rule book capture and enforce moral [and political] rights',[38] seems to reflect lawmakers' and decision-makers' aspirations and the content of the Canadian rule book, for instance the enactment of the Canadian Charter of Rights and Freedoms 1982 and the development of human rights law.

Luc Tremblay elaborated a 'descriptive' theory of the rule of law along Dworkinian lines, which he argued was compatible with Canadian constitutional law. For Tremblay, '[t]he rule of law as justice postulates a conception of law in which the fundamental characteristic of its constitutive principles is to promote justice.'[39] He

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36 *MP* 12.

37 See in Ch 2, '3. The Role of the Common Law' and, in Ch 4, '3. Dworkinian Progressive Interpretation'.

38 *MP* 12.

39 L Tremblay, *The Rule of Law, Justice and Interpretation* (McGill-Queen's University Press, Montreal 1997) 166. On the influence of Dworkin's conception of the rule of law in the Canadian literature, see also FC DeCoste, 'Smoked: Tradition and the Rule of Law in British Columbia v Imperial Tobacco Canada Ltd' (2006) 24 Windsor YB Access Just 327; D Dyzenhaus, 'Law and Public Reason' (1998) 38 McGill LJ 366; D Dyzenhaus, 'Pornography and Public Reason' (1994) 7 CanJL& Juris 261; A Hutchinson and P Monahan, 'Democracy

identified three constitutive principles of the 'rule of law as justice': formal justice, material justice and 'equity'. While formal justice essentially refers to the components of a formal conception of the rule of law, material justice requires that the content of the law 'must be acceptable as morally just.'[40] This requirement entails that judges make value judgments.[41] What happens when the application of a legal norm in accordance with formal justice would be inconsistent with material justice? Then the constitutive principle of equity requires judges to determine whether that legal norm must be altered or set aside so that their judgment is morally just.[42]

While Dworkin's and Tremblay's conceptions of the rule of law are compatible with my argument in this thesis, they remain contentious under present Canadian constitutional law and practice.[43] For the purposes of my argument in this chapter, I need not to go as far as Dworkin and Tremblay propose, as there can be another less contentious conception of the rule of law which fits with my interpretation of the legal effects of the rule of law (and of its deriving principles). As with my approach in Chapters 2 and 4 where I tried to identify common aspects of different theories, my underlying intention in this chapter is also to seek the widest possible acceptance of my proposed argument concerning the legal effects of the rule of law.

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and the Rule of Law' in A Hutchinson and P Monahan (eds), *The Rule of Law: Ideal or Ideology?* (Carswell, Toronto 1987) 97; Ribeiro (n 11); Simsovic (n 11).

40 Tremblay (n 39) 170-71.

41 ibid 171.

42 ibid 173.

43 See references cited at (n 11).

2.3. Towards a 'Thin' Substantive Conception

Can there be an alternative conception of the rule of law which is neither purely formal nor substantive, thus escaping the criticism levelled against those two conceptions? Ideally, such an alternative conception would explain the recent case law better than those purely formal or substantive conceptions would. In particular, it would aim at better fitting with Canadian Parliamentary sovereignty's ability to change and, more generally, with the organic nature of the Canadian constitution, both aspects of Canadian law which I sought to establish in Chapters 2-4. It would also allow the courts to uphold and enforce the core content and underlying values of the rule of law against undue interference, including from the legislative branch, without making the rule of law a 'complete social philosophy'. Finally, it would garner a larger acceptance than the purely formal or substantive conceptions.

A conception of the rule of law somehow in-between the purely formal and substantive conceptions is possible when the content of the rule of law is distinguished from its relationship with legislation. For instance, Lord Bingham's conception of the rule of law possesses substantive content, as he opined 'that the law must afford adequate protection of fundamental human rights.'[44] However, because of Parliamentary sovereignty, he admitted that Parliament may validly legislate in a way which infringes the rule of law.[45] Similarly, in *R v Home Secretary, ex p Pierson*, Lord Steyn stated that: '[u]nless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law. And the rule of law enforces minimum standards of fairness, both substantive and procedural.'[46]

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44 Lord Bingham, 'The Rule of Law' [2007] 66 CLJ 67 75.

45 See TH Bingham, *The Rule of Law* (Allen Lane, London 2010) 168.

46 *Pierson* (n 18) 591.

Therefore, these two conceptions of the rule of law show that a conception of the rule of law can be substantive in its content while still yielding to legislative authority. Arguably, one could also imagine a conception of the rule of law whose content would not necessarily encompass the entire range of moral rights, but, in its application, could override legislation unduly interfering with that content. For convenience, this proposed conception will be labelled a 'thin' substantive conception.

The thin substantive conception would stem from the core content of the rule of law, about which there seems to be a consensus. Sir William Wade and CF Forsyth described a set of 'central elements of the rule of law, lying outside the areas of controversy', which most lawyers would agree with (i.e. the principle of legality, prevention of abuse of discretionary powers, independence of judges, the notion that law must be even-handed between government and citizens).[47] Similarly, Mark Elliott considered to be uncontroversial the proposition 'that the principles of good administration which are vindicated through judicial review are based firmly on the rule of law doctrine'.[48] For instance, the rule of law directs that governmental powers should not be exercised abusively.[49] That core content can be associated with the descriptions of the content of the rule of law by leading constitutional scholars and endorsed by the courts.[50]

The thin substantive version would still remain substantive pursuant to Craig's definition of substantive conceptions, in that it seeks – in a limited way – to pass judgment upon the actual content of the law itself and is capable of checking

47 Wade and Forsyth (n 24) 19-20.

48 M Elliott, *The Constitutional Foundations of Judicial Review* (Hart, Oxford 2001) 100-04.

49 ibid 100-01.

50 See '2.1. Formal Conceptions'.

legislation. However its degree of substantive scrutiny would be significantly less than under the Dworkinian conception since the thin substantive conception would only ensure that the accepted core content of the rule of law is not unduly threatened. Consequently, the thin substantive conception does venture into the controversial peripheries at the level of the legal effects of the rule of law, but only to the extent necessary to preserve the rule of law's core content. At the same time, this core content can expand or shrink as the constitution develops over time, notably as the result of some future progressive interpretation of the rule of law. In this respect, the development of an implied freedom of expression before the enactment of the Charter, which I will discuss in Chapter 6, can be considered as one example of an expansion or a potential expansion of the core content of the rule of law. By defining the content of the thin substantive conception on the basis of this notion of core, the contentiousness of the thin substantive conception is more limited to its possible overriding legal effects, so that the more difficult legal issue shifts to how such legal effects can be explained.

This latter issue takes us back to my earlier analysis of the Hartian and Dworkinian theories of law and adjudication. From either theoretical perspective, the courts would seek the 'best' interpretation of the relationship between the rule of law and legislative authority. Under a Hartian framework, the question whether the rule of law can check legislation (in accordance with the thin substantive conception) can be resolved by considering the rule of law as a 'non-conclusive' legal principle used by the courts in the course of their adjudicative functions. To the extent that the Framers did not foresee the eventual development of the relationship between legislative authority and implied constitutional principles, my argument concerning progressive interpretation of the legal effects of the rule of law could be conceived as an attempt

to resolve an incomplete case. Under a Dworkinian framework, the rule of law can also be considered as a principle (irrespective of whether one accepts Dworkin's own conception of the rule of law) which the courts need to interpret along with potentially competing principles and their underlying values in order to determine whether it should check legislation. In this interpretative process, the importance of the rule of law and its deriving principles and underlying values is such that they would also be articulated into rules enforceable against legislation and executive action. As Goldsworthy suggested, the content and scope of the rule of law as a legal principle is ultimately determined by the rule of law as a political principle.[51] This duplication of the political rule of law in the legal realm can be observed in the case law.

In my examination of Hartian and Dworkinian theories, I suggested that the courts would have the last word on the determination of the legal scope of implied constitutional principles such as the rule of law (and its deriving principles). Giving due consideration to the relevant implied principles' underlying values, the courts would assess the rule of law's relative weight compared to Parliamentary sovereignty and any other relevant principle, with the outcome of this evaluation determining whether the rule of law can check legislation in a given case. In Chapter 4, one of the conclusions of my examination of progressive interpretation under the Hartian and Dworkinian frameworks identified the courts as able in theory to progressively interpret implied constitutional principles. The common law nature of the rule of law (in addition to its mostly implicit recognition in the 1867-1982 Acts) should logically entail the same interpretative ability.

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[51] Goldsworthy (n 7) 61.

The common law nature of the rule of law is well captured in Dicey's third meaning of the notion (i.e. that the general principles of the constitution are the result of the ordinary law). Indeed, David Schneiderman actually found that Dicey's third meaning of the rule of law fairly described the 'evolutionary character of the common law'.[52] Similarly, in his book on the rule of law, Lord Bingham suggested that it is left to the judges to rule on what the rule of law means so that it would be possible for it to evolve over time in response to new views and situations.[53] As the Supreme Court of Canada stated, '[t]he rule of law is firmly rooted in the common law and is the source of the very foundations of the British system, on which our own is based.'[54] This view is also widely accepted in Canada.[55]

Does the Canadian law fit the thin substantive conception? Usually the courts do not say which theory of the rule of law they are adopting. Rather, what we see in the case law are statements, reasoning and rulings which sometimes conform to formal conceptions of the rule of law but sometimes do not. In the next sections, I will examine the Canadian law in order to determine how the courts dealt with claims that a particular statute violates the rule of law. I will argue that the courts have declined to strike down or set aside laws that are not unduly interfering with the core area of the rule of law. While it is possible to argue that Canadian law is still governed by a formal conception of the rule of law (in accordance with Canadian orthodox Parliamentary sovereignty), I will argue that the thin substantive conception

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52 D Schneiderman, 'A. V. Dicey, Lord Watson, and the Law of the Canadian Constitution in the Late Nineteenth Century' (1998) 16 Law & Hist Rev 495, 508. See also Bingham (n 45) 7-8.

53 Bingham (n 45) 7-8.

54 *Immeubles Port Louis* (n 21) 80.

55 See for instance *Re: Resolution to Amend the Constitution* [1981] 1 SCR 753, 805-06; *R v Campbell* [1999] 1 SCR 565 [18]; H Brun, G Tremblay and E Brouillet, *Droit constitutionnel* (5th edn Editions Y. Blais, Cowansville, Quebec 2008) 686.

is a more plausible and desirable conception of the rule of law. The argument will be developed first through an analysis of the landmark case *Re Manitoba Language Rights* followed by an examination of the constitutionality of privative clauses and of judicial independence where the courts have arguably used the rule of law to check legislation. Therefore, my conclusion will be that legislation in Canada may not unduly interfere with the rule of law as conceived under the thin substantive conception.

3. The Basic Content of the Rule of Law: *Re Manitoba Language Rights*

Re Manitoba Language Rights is the landmark case on the rule of law. This case concerned the enactment of the laws of Manitoba in the English language only, a practice established following the adoption of the provincial Official Language Act 1890. S. 1 of the Act stated that '[t]he Acts of the Legislature of the Province of Manitoba need only be printed and published in the English language.' The 1890 Act also extended the unilingual requirement to legislative records and journals. However, s. 23 of the federal Manitoba Act 1870, which was later entrenched in the Constitution Act 1871, an Imperial statute, required the Acts of the Legislature to be printed and published in both English and French. In *Re Manitoba Language Rights*, the Supreme Court of Canada ruled that: 'the unilingual enactments of the Manitoba legislature are inconsistent with s. 23 of the Manitoba Act, 1870, since the constitutionally required manner and form for their enactment has not been followed. Thus they are invalid and of no force or effect.'[56] However, the Court realised that, by striking down all the (unconstitutional) laws of Manitoba, 'a legal vacuum will be

[56] *Re Manitoba Language Rights* (n 1) 748-49.

created with consequent legal chaos in the province of Manitoba.'[57] To prevent making the province a lawless state, the Court turned to the rule of law in attempting to find a solution which would also preserve the supremacy of the nation's constitutional instruments.

The Court ascribed two meanings to the rule of law. First, the concept meant 'that the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power.' Second, it 'requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order.'[58] In support of the second meaning of the rule of law, the Court cited one of its own precedents along with a number of English authorities.[59]

How would these two meanings of the rule of law operate? The Court admitted that, pursuant to the first meaning of the rule of law, the unconstitutional laws of Manitoba needed to be declared 'invalid and of no force and effect.'[60] However, it recognised that such a declaration would destroy the positive legal order in that province, thus offending against the second meaning of the rule of law. Consequently, the judicial invalidation of the unconstitutional laws was suspended for a limited period during which the legislature was required to promptly proceed to their translation.

From the content that the Court ascribed to the rule of law, it is apparent that the Court adopted the features of a formal conception. Indeed, the Court's first meaning of the rule of law derives from AV Dicey's supremacy of the ordinary law

57 ibid 747, 753, 760.

58 ibid 750-51.

59 See ibid 749.

60 ibid 748-49.

and equality before the law. With respect to the Court's second meaning of the rule of law, it cited with approval Joseph Raz's view that the rule of law had two aspects: '(1) that people should be ruled by the law and obey it, and (2) that the law should be such that people will be able to be guided by it.'[61] The formal conception is also underlying the Court's emphasis on the necessity of avoiding legal chaos in the province.[62] One could argue that, since neither of the Court's two meanings of the rule of law seeks 'to pass judgment upon the actual content of the law itself', the Court's definition of the rule of law would be considered to be falling under a formal conception of the rule of law. This view appears to have been confirmed in some cases.

For instance, in *British Columbia v Imperial Tobacco Canada Ltd*, a group of tobacco companies challenged the constitutionality of a retroactive provincial Act which created in favour of the government of British Columbia a cause of action to recover the cost of health care caused by exposure to tobacco products. The Act also reversed the burden of proof on certain elements of the claim in favour of the government. The tobacco companies submitted that 'the rule of law requires that legislation: (i) be prospective, (ii) be general in character, (iii) not confer special privileges on the government, except where necessary for effective governance, and (iv) ensure a fair civil trial.'[63] The Court rejected the tobacco companies' arguments. It reiterated the formal meanings of the rule of law adopted in past cases, holding that: 'it is difficult to conceive of how the rule of law could be used as a basis for invalidating legislation such as the Act based on its content. That is because none of

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61 J Raz, *The Authority of Law: Essays on Law and Morality* (OUP, Oxford & New York 1979) 212-13 cited in *Re Manitoba Language Rights* (n 1) 750.

62 *Re Manitoba Language Rights* (n 1) 742, 747, 758.

63 *Imperial Tobacco* (n 1) [63].

the principles that the rule of law embraces speak directly to the terms of legislation.'[64] The Court admitted that the rule of law so described can constrain government action, i.e. 'usually that of the executive and judicial branches'. Actions of the legislative branch are constrained too, but only by legislated manner and form requirements.[65] Since none of the tobacco companies' proposed requirements of the rule of law was constitutionally protected, the impugned Act could not be invalidated on that basis.

The principle of the rule of law has also been unsuccessfully invoked in other cases where claimants sought to challenge the validity of legislation.[66] Many commentators also interpret the Canadian case law as having adopted a formal conception of the rule of law.[67] Thus, both in terms of the content and legal effects of the rule of law, proponents of a formal conception argue that the Canadian courts have adopted a formal conception.

However, the foregoing analysis presents an incomplete view of the Canadian rule of law. Another way of looking at what ultimately happened in *Re Manitoba Language Rights* is that the rule of law was invoked not to set aside legislation in general but rather specifically to set aside the Constitution Act 1871. Indeed, the Court later recognised that its temporarily suspended declaration of invalidity was issued 'notwithstanding the express terms of s. 52(1) of the Constitution Act 1982,

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64 ibid [59].

65 ibid [60].

66 See *Québec (PG) v Société canadienne de métaux Reynolds ltée* [1993] RJQ 98 (CA), (1993) 101 DLR (4th) 480 (Qc CA); *Singh v Canada (AG)* [2000] 3 FC 185 (CA); *Bacon v Saskatchewan Crop Insurance Corp* [1999] 11 WWR 51 (Sask CA); *Babcock v Canada (AG)* [2002] 3 SCR 3; *Christie* (n 2). See also '4.3. The Limits of the Rule of Law'.

67 See RM Elliot, 'References, Structural Argumentation and the Organizing Principles of Canada's Constitution' (2001) 80 CBR 67, 115-16; Hogg and Zwibel (n 5); Hutchinson, 'The Rule of Law Revisited: Democracy and Courts' (n 11) 222; J Leclair, 'Canada's Unfathomable Unwritten Constitutional Principles' (2002) 27 Queen's LJ 389; Newman (n 11) 186-87. See also Gélinas (n 11).

that unconstitutional laws are "of no force or effect", a provision suggesting that declarations of invalidity can only be given *immediate* effect.'[68] Therefore, s. 52(1) directed the Court to strike down all the unilingual statutes of Manitoba with immediate effect, but the Court invoked the rule of law to temporarily circumvent s. 52(1) and allow the unconstitutional statutes to remain on the statute books until their re-enactment in both English and French. This ruling led some legal commentators to query whether the rule of law may be considered to stand above the sections of the 1867-1982 Acts.[69] Since the 1867-1982 Acts stand above federal and provincial legislation, *Re: Manitoba Language Rights* could suggest that the rule of law can also (temporarily or permanently) check legislation. Indeed, some of the statements in *Re Manitoba Language Rights* also seem to point in this direction.

For example, the Court observed that the preamble to the Constitution Act 1867 referred to the rule of law, but also to the federal principle, at which point it cited Martland and Ritchie JJ's dissenting judgment in *Patriation Reference* where they concluded from their case law analysis that judicially developed 'constitutional requirements that derived from the federal character of Canada's Constitution […] *have been accorded full legal force in the sense of being employed to strike down legislative enactments.*'[70] The Court interpreted this statement in the following manner:

> In other words, in the process of Constitutional adjudication, the court may have regard to unwritten postulates which form the very foundation of the Constitution of Canada. *In the case of the* Patriation

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68 *Re Provincial Court Judges* (n 1) [99] (my emphasis).

69 See Gélinas (n 11) 486, 488; L Huppé, 'La concrétisation de la primauté du droit dans l'ordre juridique' (1997) 38 C de D 805, 812; Lamer (n 5) 5; A Tremblay, *Droit constitutionnel: Principes* (2d edn Éditions Thémis, Montréal 2000) 142.

70 *Patriation Reference* (n 55) 844-45 cited in *Re Manitoba Language Rights* (n 1) 752.

> Ref. *this unwritten postulate was the principle of federalism. In the present case it is the principle of rule of law.*[71]

The Court's approval of Martland and Ritchie JJ's statement implies that the rule of law, like the federal principle, could be accorded the same 'full legal force'.

In the next section, I will argue that a deeper examination of how the courts understand the rule of law to operate provides an account of its legal effects vis-à-vis legislation which is different from a formal conception (and from a purely substantive conception). I will examine the Canadian law concerning the rule of law in order to show how it is capable of checking legislation in accordance with the thin substantive conception, and that the courts seem to have followed such a conception of the rule of law. In particular, I will argue that the courts will strike down or set aside legislation if it unduly interferes with judicial independence or with the superior courts' inherent supervisory power over administrative actions. When combined with my analysis from the previous section suggesting that the case law seems usually (but is not always) consistent with a formal conception of the rule of law, the Canadian law and practice can be interpreted as fitting with the thin substantive conception of the rule of law.

4. Confirmation of the Thin Substantive Conception

4.1. Privative Clauses

My argument in this section is that the rule of law can check privative clauses. This argument can be broken down into two claims: first, that privative clauses which prevent the courts from reviewing arbitrary executive or administrative decisions threaten the rule of law, and second, that Canadian courts are willing to strike down

[71] *Re Manitoba Language Rights* (n 1) 752 *in fine* (my emphasis).

or set aside those privative clauses on the basis that they unduly threaten the rule of law. Finally, it is submitted that this judicial position vis-à-vis the constitutional validity of privative clauses accords with the thin substantive conception.

4.1.1. Privative Clauses Threaten the Rule of Law

David Dyzenhaus broadly defined a privative clause as 'a statutory provision to which Commonwealth parliaments resort in order to protect public officials from judicial review.'[72] He identified various kinds of privative clauses.[73] They may, for instance, deem that an administrative decision is final and not reviewable by a court; prohibit a court from inquiring whether an administrative decision has been made within the decision-maker's jurisdiction; or limit the grounds upon which judicial review can be conducted. These clauses are frequently found in the statute books and applied by the courts. The issue is whether they threaten the rule of law and, if so, whether they warrant a judicial response depending on the gravity of their interference with the rule of law.

Both in Canadian and English law, the tension underlying privative clauses between the legislative and judicial functions is well acknowledged. One the one hand, when Parliament or a legislature creates a whole regime which entrusts adjudication of a broad range of legal issues to an administrative body, the manifest legislative intention is to take away adjudication of these issues from the ordinary courts. Such an intention can only be clearer in the presence of a privative clause. On the other hand, under the common law tradition, the superior courts have an inherent power to supervise and control the legality of decisions made by administrative

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72 D Dyzenhaus, 'Disobeying Parliament? Privative Clauses and the Rule of Law' in RW Bauman and T Kahana (eds), *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (CUP, Cambridge 2006) 499, 499.

73 ibid 502-03.

bodies.[74] In her extrajudicial writings, McLachlin J described that tension as laying between the competing legislative intentions of entrusting administrative bodies with an area of jurisdiction to the exclusion of the courts and of allowing the courts 'to prevent administrative boards and agencies from usurping the role of the Legislature and infringing the rights of citizens.'[75] In more theoretical terms, Dyzenhaus referred to the tension between 'formalistic positivism (judicial deference to clearly expressed legislative intent) and a common law tradition of judicial antipositivism (access to the courts and access to the constitutional morality of the common law).'[76] Mark Elliott explained the difficulty of interpreting ouster clauses in terms of the tension between Parliamentary sovereignty and the judicial practice of applying the 'principles of good administration' embodied in the rule of law.[77]

Given this tension, the logic behind the proposition that a privative clause threatens the rule of law is as follows. If a legislature can enact an otherwise constitutionally valid privative clause effectively shielding the decisions of an administrative body from judicial review, then that body would be enabled to decide anything it wants for any reason and such a decision would still be final and binding on the parties. The administrative body could use its power 'for personal gain, out of vengeance or favouritism' or for 'other private ends'.[78] Therefore, these privative

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74 In Canada see for instance *Alliance des professeurs catholiques de Montréal v Labour Relations Board* [1953] 2 SCR 140, 155 (Rinfret CJC); *Crevier v Québec (AG)* [1981] 2 SCR 220, 235; *Immeubles Port Louis* (n 21) [80]; *Dunsmuir v New Brunswick* [2008] 1 SCR 190 [29]-[31], [52], [159].

75 B McLachlin, 'The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law' (1998-1999) 12 CJALP 171 176-77.

76 Dyzenhaus, 'Form and Substance in the Rule of Law' (n 25) 151.

77 Elliott(n 48) 143, 147, 151; M Elliott, 'The Demise of Parliamentary Sovereignty? The Implications for Justifying Judicial Review' (1999) 115 LQR 119; M Elliott, 'The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law' [1999] CLJ 129.

78 Raz, *The Authority of Law* (n 6) 219-20.

clauses threaten the rule of law to the extent that they implicitly allow an administrative body to act in such an arbitrary manner.

It is widely acknowledged that arbitrary powers are contrary to the rule of law. In *Re Manitoba Language Rights*, the Supreme Court stated that the rule of law means 'that the law is supreme over officials of the government as well as private individuals, and thereby *preclusive of the influence of arbitrary power*.' [79] In subsequent cases, the Court stated that the rule of law, at its most basic level, 'provides a shield for individuals *from arbitrary state action*'[80] and derived from AV Dicey's conception of the rule of law the proposition that 'the individual must have the appropriate remedies to protect himself *against arbitrary action.*'[81] Dicey contrasted the supremacy of the ordinary law with a system of government 'based on the exercise by persons in authority of *wide, arbitrary, or discretionary powers of constraint*.'[82] For Joseph Raz, an arbitrary exercise of public power offends against the rule of law if 'it was done either with indifference as to whether it will serve the purposes which alone can justify use of that power or with belief that it will not serve them.'[83]

From a comparative perspective, it is worth outlining the proposition under English law – which is similar to the Canadian position – that ouster clauses (over excess of jurisdiction) threaten the rule of law. To a large extent, the English literature on ouster clauses has revolved around the interpretation of *Anisminic Ltd v Foreign Compensation Commission*. In *Anisminic*, the appellants sought judicial review of a

79 *Re Manitoba Language Rights* (n 1) 747 (my emphasis).

80 *Quebec Secession Reference* (n 3) [70] (my emphasis).

81 *Immeubles Port Louis* (n 21) [80] (my emphasis).

82 ECS Wade, 'Introduction' in Dicey and Wade (n 12) 188 (my emphasis).

83 Raz, *The Authority of Law* (n 6) 219.

provisional determination made by the Foreign Compensation Commission dismissing their claim for compensation. The Commission opposed judicial review on the basis of s. 4(4) of the Foreign Compensation Act 1950 which stated that '[t]he determination by the commission of any application made to them under this Act shall not be called in question in any court of law.' A majority of Law Lords allowed the appeal and ruled that the Commission's decision was made in excess of jurisdiction. The narrow ground of the majority judgments seemed to follow from the interpretation of the 1950 Act whereas the dissenting Law Lords opined that the Commission acted within its jurisdiction. Despite the split on the conclusion, the Law Lords unanimously agreed that, on its proper interpretation, s. 4(4) still did not preclude the courts from intervening when a tribunal has acted outside its jurisdiction.[84]

Sir William Wade characterised *Anisminic* as a prudent concealment of 'the constitutional aspect in a haze of technicality about jurisdiction and nullity.'[85] For Wade, there was no doubt about Parliament's intention: the object of the 1950 Act, and of s. 4(4), in particular, was 'to prevent all litigation over the Commission's awards.'[86] He explained that the courts would not allow such a legislative initiative on the basis of the rule of law:

> For three centuries[,] the courts have been refusing to enforce statutes which attempt to give public authorities uncontrollable power. If a ministry or tribunal can be made a law unto itself, it is made a

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84 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL) 170 (Lord Reid), 181, 185 (Lord Morris), 194 (Lord Pearce), 207-08, 211 (Lord Wilberforce), 215 (Lord Pearson).

85 HWR Wade, 'Constitutional and Administrative Aspecfts of the Anisminic Case' (1969) 85 LQR 198, 200.

86 ibid 199.

> potential dictator; and for this there can be no place in a constitution founded on the rule of law.[87]

Years later, Wade and CF Forsyth reiterated the threat of ouster clauses to the rule of law. Citing Denning LJ, they stated that 'the rule of law would be at an end' if administrative agencies and tribunals could be the sole judges of the validity of their own acts.[88] For Wade and Forsyth, the core of the rule of law emphasises the rejection of arbitrary power.[89]

A more recent example of ouster clauses' offensive nature to the rule of law emerged during the stages leading to the passage of s. 26 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004. At bill stage, the corresponding clause was drafted in a manner intended to completely oust the courts' supervisory jurisdiction save for a few exceptions. Opponents of the ouster clause considered that it would violate the rule of law which 'includes the civil right of everyone within the jurisdiction of the United Kingdom to have unimpeded access to the ordinary courts to test the legality not only of administrative decisions but also of the decisions of inferior tribunals.'[90] Lord Steyn wrote (extrajudicially) that the clause which precluded judicial review on grounds such as lack of jurisdiction was 'an astonishing measure' contrary to the rule of law.[91]

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87 ibid 200.

88 CF Forsyth and W Wade, *Administrative Law* (10th edn OUP, Oxford 2009) (n 24) 720 citing *R v Medical Appeal Tribunal, ex p Gilmore* [1957] 1 QB 574 (CA) 586.

89 Forsyth and Wade (n 24) 20-21. Also Goldsworthy (n 7) 60, 62.

90 Fifth Report from Joint Committee on Human Rights on the Asylum and Immigration (Treatment of Claimants, etc.) Bill HL (2003-04) 35 HC (2003-04) 304 [52]-[76]. See Justice, 'Asylum and Immigration (Treatment of Claimants, etc.) Bill – Clause 10 (December 2003) London; A Lester, 'The Utility of the Human Rights Act: A Reply to Keith Ewing' [2005] PL 249; Lord Woolf, 'The Rule of Law and a Change in the Constitution' (2004) 63 CLJ 317.

91 Lord Steyn, 'Democracy, the Rule of Law and the Role of Judges' [2006] EHRLR 243, 251.

There have been divergent interpretations of the enforceability of ouster clauses in English law. However, they share in common the concern that, if ouster clauses can effectively shield decisions made by administrative bodies from judicial review, these bodies might abuse their delegated powers, thus offending against the rule of law. The next question then is to what extent the courts can intervene when faced with such clauses. Even under a system of Parliamentary omnicompetence, some authors such as Wade believe that the courts would not and should not straightforwardly apply the ouster clauses in their literal sense. In the next section, I will suggest that these clauses would be subject to closer judicial scrutiny in Canada where the courts are empowered to conduct judicial review of legislation.

4.1.2. Validity of Privative Clauses

I have so far argued that privative clauses can theoretically prevent judicial review of administrative uses of arbitrary powers and that, since arbitrary powers threaten the rule of law, therefore such clauses threaten the rule of law. In the Canadian context, the validity of privative clauses is governed by both ss. 96-101 of the 1867 Act and the rule of law. My argument concerning privative clauses is that there has been in Canadian law a constitutionalisation of judicial review of executive and administrative action on the basis of the rule of law, to the extent that it can act as a check upon impermissible privative clauses. Such a constitutionalisation would further support the thin substantive conception of the rule of law, in the sense that protection against arbitrary powers, another core element of the rule of law, can bar the application of impermissible privative clauses.

In *Alliance des professeurs catholiques de Montréal v Labour Relations Board*, the Québec Labour Relations Board invoked s. 17 of the province's Public

Inquiry Commission Act 1941, a privative clause which provided that no writ of prohibition 'or any other legal proceeding shall interfere with or stay the proceedings of the commissioners in the inquiry'. The Supreme Court held that the Board violated the union's right to a hearing and issued a writ of prohibition against the Board despite s. 17. In a concurring judgment, Rinfret CJC additionally addressed the Board's argument that s. 17 prevents the union from challenging its decision. Having found that the Board abused its power, he declared that it would be absurd if a law could validly immunise such an excess of jurisdiction from judicial review.[92] Turning to the privative clause itself, Rinfret CJC stated that 'any restriction on the powers of control and surveillance of a superior court is necessarily of no legal force or effect when it is a question of its preventing the enforcement of a decision, of an order or of a sentence rendered in the absence of jurisdiction.'[93] He then added that:

> The legislator, even if he wanted, could not declare the absurdity that a tribunal which acts without jurisdiction may be immune against the application of the writ of prohibition. Its decision is null and no statute may validate it or decide that, despite its nullity, this decision should still be recognised as valid and enforceable.[94]

It seems that Rinfret CJC considered that the privative clause would not pass constitutional muster although he refrained from explicitly ruling on the general constitutionality of privative clauses.[95] While Rinfret CJC was the only member of the Court who addressed the Board's argument based on the privative clause, his position would be later endorsed by the Court,[96] notably in *Crevier v Québec (AG)*

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92 *Alliance* (n 74) 155.

93 ibid 155 (tr).

94 ibid 155 (tr).

95 ibid 155-56. Also S Scott, 'The Supreme Court and Civil Liberties' (1976) 14 Alta L Rev 97, 133-34.

96 See *Jarvis v Associated Medical Services Inc* [1964] SCR 497, 502 (Cartwright J); *Volvo Canada Ltd. v UAW, Local 720* [1980] 1 SCR 178, 194 (Laskin CJC); *Supermarchés Jean*

where the Court invalidated the impugned privative clause. Delivering the judgment of the Court, Laskin CJC stated that:

> where a provincial Legislature purports to insulate one of its statutory tribunals from any curial review of its adjudicative functions, the insulation encompassing jurisdiction, such provincial legislation must be struck down as unconstitutional by reason of having the effect of constituting the tribunal a s. 96 [of the 1867 Act] court.[97]

Laskin CJC's underlying reasoning was the following: a superior court has an inherent power to perform its supervisory and controlling power over inferior tribunals; this power necessarily implies the power to review whether the inferior tribunal has exceeded its jurisdiction; pursuant to s. 96 of the 1867 Act, the appointment of superior court judges is made by the Governor General of Canada; since the members of the Professions Tribunal are not appointed by the Governor General, the Tribunal is not a superior court; therefore, its decisions cannot be shielded from judicial review of a purported excess of jurisdiction. In striking down the privative clause, Laskin CJC referred to Rinfret CJC's judgment in *Alliance* and ruled 'that a provincially-constituted statutory tribunal cannot constitutionally be immunized from review of decisions on questions of jurisdiction.'[98] Laskin CJC's holding in *Crevier* regarding the constitutional validity of privative clauses remains good law.[99] In *UES, Local 298 v Bibeault*, the Court cited *Crevier* for the proposition that '[t]he role of the superior courts in maintaining the rule of law is so important

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Labrecque Inc v Flamand [1987] 2 SCR 219 [21]; *Noël v Société d'énergie de la Baie James* [2001] 2 SCR 207 [27].

97 *Crevier* (n 74) 234.

98 ibid 236.

99 See for instance *United Nurses of Alberta v Alberta (AG)* [1992] 1 SCR 901, 936; *Macmillan Bloedel Ltd v Simpson* [1995] 4 SCR 725 751-52, 775-76; *Noël* (n 96) [27], [65]; *Paul v British Columbia (Forest Appeals Commission)* [2003] 2 SCR 585 [22].

that it is given constitutional protection',[100] which in turn was cited approvingly in later cases.[101]

Dunsmuir v New Brunswick confirmed that the constitutionalisation of judicial review of administrative action covered not only provincial decision-makers but also federal decision-makers. In *Dunsmuir*, the government of the province of New Brunswick applied for judicial review of an adjudicator's decision to quash the government's termination of the appellant's employment. The adjudicator's decision was protected by a very strong set of privative clauses: s. 101(1) of the province's Public Service Labour Relations Act stated that his decision 'is final and shall not be questioned or reviewed in any court.' In addition, s. 101(2) of the Act prohibited the courts from issuing an order 'by way of injunction, judicial review, or otherwise, to question, review, prohibit or restrain' an adjudicator.

At the outset, Bastarache and LeBel JJ, delivering the majority judgment of the Court, stated that '[a]s a matter of constitutional law, judicial review is intimately connected with the preservation of the rule of law.' Indeed, it is the rule of law which requires 'that the constitutional role of superior courts be preserved'.[102] The rule of law 'explains the purpose of judicial review and guides its function and operation.'[103] When an administrative body acts in the absence of legal authority, it 'transgresses the principle of the rule of law' and it is then the courts' 'constitutional duty' pursuant to ss. 96-101 of the 1867 Act to ensure that it does not overreach its lawful powers.[104]

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100 *UES, Local 298 v Bibeault* [1988] 2 SCR 1048 [126].

101 See for instance *Canada (AG) v Mossop* [1993] 1 SCR 554, 602 (L'Heureux-Dubé J, diss.); *Toronto (City) v CUPE, Local 79*, [2003] 3 SCR 77, 128 (LeBel J); *Dr Q v College of Physicians and Surgeons of BC* [2003] 1 SCR 226 [21]; *Dunsmuir* (n 74) [31].

102 *Dunsmuir* (n 74) [52].

103 ibid [27].

104 ibid [29].

Bastarache and LeBel JJ acknowledged the importance of the legislative intention of establishing these bodies and allowing them to discharge their functions without undue judicial interference. However, there were limits to such legislative authority:

> The legislative branch of government cannot remove the judiciary's power to review actions and decisions of administrative bodies for compliance with the constitutional capacities of the government. Even a privative clause, which provides a strong indication of legislative intent, cannot be determinative in this respect[.][105]

Moreover, since the rule of law is a constitutional requirement, 'neither Parliament nor any legislature can completely remove the courts' power to review the actions and decisions of administrative bodies.'[106] Deschamps J (Charron and Rothstein JJ concurring) expressed a similar view albeit on slightly different grounds. Without invoking ss. 96-101, she opined that neither Parliament nor the legislatures could totally exclude judicial review without overstepping the separation between the judicial branch and the other two branches of government. In addition, she also relied on the ascribed legislative intention that an administrative body will not be protected if it oversteps its delegated powers.[107]

In sum, the argument developed in this subsection could be captured in the following propositions. One of the core elements of the rule of law is the protection from arbitrary government action. The purpose of a privative clause is to (partially or totally) prevent judicial review. If it successfully ousts judicial review of the decisions of an administrative body, then nothing (except proper legislative intervention) can prevent that body from making unreviewable arbitrary decisions. Such an exercise of arbitrary powers is contrary to the core content of the rule of law.

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105 ibid [31].

106 ibid [52].

107 ibid [159], [163].

Ss. 96-101 of the 1867 Act established in Canada the English model of High Courts with their inherent power of supervision over administrative bodies.[108] However, these sections *per se* do not say which level of judicial review is constitutionally protected and, correlatively, which kinds of privative clauses pass constitutional muster. While one could argue that ss. 96-101 would impliedly constitutionalise *some* level of judicial review, it is the rule of law which traces a line between constitutionally permissible and impermissible privative clauses: privative clauses which preclude judicial intervention over arbitrary decisions impermissibly offend the rule of law. I have argued in this section that the courts will not apply those kinds of privative clauses. Such a result is in line with the thin substantive conception of the rule of law according to which elements of the core content of the rule of law can check legislation. Dickson CJC observed extrajudicially that, in Canada, '[t]he dictates of the rule of law combine to limit the supremacy of Parliament and the provinvial legislatures.'[109] The inherent power of the superior courts to control the legality of decisions from administrative bodies is part of that core content.

In itself, the judicial position vis-à-vis the constitutionality of privative clauses is not conclusive as to whether the rule of law in Canada follows the thin substantive conception. However, it seems to be incompatible with a formal conception of the rule of law while not necessarily falling under a purely substantive conception of the rule of law. The following discussion of the Canadian position on judicial independence should further help determine the conformity of Canadian law with the thin substantive conception.

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108 See '4.2. Judicial Independence'.

109 RGB Dickson, 'Keynote Address' in FE McArdle (ed) *The Cambridge Lectures 1985* (Éditions Yvon Blais, Montréal 1987) 4.

4.2. Judicial Independence

The most often acknowledged requirement of the rule of law is judicial independence. Cromwell JA once opined (extrajudicially) that: 'questioning judicial independence is really questioning the rule of law', before adding that: '[t]he starting point of all issues of judicial independence must be the recognition of our commitment to the rule of law'.[110] In *Re Prov. Court Judges*, Lamer CJC, delivering the majority judgment of the Supreme Court, observed that one of the social goals served by judicial independence is the maintenance of the rule of law.[111] Dickson CJC also stated that 'an independent and distinct judicial power is the ultimate guarantor of the rule of law.'[112] The essential character of judicial independence for the maintenance of the rule of law is equally acknowledged in English law: judicial independence is a 'central' aspect, a 'fundamental' and a 'keystone' of the rule of law.[113] More generally, one could say that the relationship between judicial independence and the rule of law is a feature of all democratic common law-based systems. In *DPP of Jamaica v Mollison*, Lord Bingham, delivering the judgment of the Judicial Committee of the Privy Council, stated that:

> Whatever overlap there may be under constitutions on the Westminster model between the exercise of executive and legislative powers, the separation between the exercise of judicial powers on the one hand and legislative and executive powers on the other is total or effectively so. Such separation, based on the rule of law, was recently described by

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110 T Cromwell, 'Judicial Independence and Justice: The Pillars and the Temple' in DN Magnusson, DA Soberman and WR Lederman (eds), *Canadian Constitutional Dilemmas Revisited* (Institute of Intergovernmental Relations, Kingston, Ont. 1997) 163, 169-70.

111 *Re Provincial Court Judges* (n 1) [10], [123].

112 B Dickson, 'The Rule of Law: Judicial Independence and the Separation of Powers' (1985) 9 ProvJJ 4, 6. Also Dickson, 'Keynote Address' (n 109) 2

113 AW Bradley, 'The Constitutional Position of the Judiciary' in D Feldman (ed) *English Public Law* (2nd edn, OUP, Oxford 2009) 281, 288; A Denning, 'The Spirit of the British Constitution' (1951) 29 CBR 1180, 1182; Lord Hope, 'Judicial Independence' [2002] SLT 105, 105-06.

> Lord Steyn as "a characteristic feature of democracies": *R (Anderson) v Secretary of State for the Home Department*[.][114]

Without judicial independence there is no rule of law. My argument in this subsection is that judicial independence in Canada is an implied constitutional principle part of the core content of the rule of law and thus capable of checking legislation.

For the same reasons as those mentioned in my earlier discussion of the rule of law, judicial independence is also a notion which is hard to describe accurately.[115] One difficulty is its dual political and legal nature. On the one hand, the Supreme Court has frequently referred to judicial independence as a 'fundamental' or 'constitutional' value,[116] which also serves to preserve other fundamental constitutional values: '[the] rule of law, fundamental justice, equality, preservation of the democratic process, to name perhaps the most important.'[117] On the other hand, it has become a legal principle to the extent that it is partially recognised in the Constitution Acts 1867-1982 and has been judicially enforced.

As was the case in my discussion of the rule of law, the difficulty with treating judicial independence as a legally enforceable principle is that the 1867-1982 Acts do not expressly entrench a general principle of judicial independence; rather a scattered number of sections and other rules and principles address specific aspects of it. Both Dickson CJC and Scott CJM implied Canadian judicial independence from the following parts of the 1867-1982 Acts:[118] (i) Part VII of the 1867 Act entitled

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114 *DPP of Jamaica v Mollison* [2003] 2 AC 411 (PC) [13].

115 See '1. Introduction'.

116 *Valente v The Queen* [1985] 2 SCR 673 [15], [36]; *Beauregard* (n 5); *Re Provincial Court Judges* (n 1) [111], *Mackin v New Brunswick (Minister of Finance)* [2002] 1 SCR 405 [34]; Lamer (n 5) 4.

117 See *Beauregard* (n 5) [24]; *Re Provincial Court Judges* (n 1) [23]; *Ell v Alberta* [2003] 1 SCR 857 [33].

118 *Beauregard* (n 5) [29]; Dickson, 'The Rule of Law' (n 112) 5; RJ Scott, 'Accountability and Independence' (1996) 45 UNBLJ 27.

'Judicature' (ss. 96-101), in particular s. 99 of that Act, which heavily draws on s. 3 of the Act of Settlement 1701 by providing that superior court judges shall hold office during good behaviour until they reach 75 years old and shall only be removable by the Governor General on an address of both Houses of Parliament; (ii) the mention in the preamble to the 1867 Act that the Canadian constitution is 'similar in Principle to that of the UK', which would implicitly refer to English judicial independence; (iii) the relevant sections of the Canadian Charter of Rights and Freedoms 1982, in particular s. 11(d) which states that any person charged with an offence has the right to be tried by an independent and impartial tribunal. Dickson CJC further implied judicial independence from s. 129 of the 1867 Act, which states that all existing colonial courts, legal commissions, power and authorities, and all officers – judicial, administrative, and ministerial – shall continue, and from 'the very nature of the federal system [which] requires an impartial umpire of disputes between the federal and provincial governments'.[119]

As it appears from most elements of this list, the Canadian principle of judicial independence has historically been inherited from English law. At the outset, such a heritage should be welcome given what are considered to be the hallmarks of English judicial independence, namely security of tenure, fiscal independence, impartiality and freedom from executive pressure.[120] However, by adopting the English model of judicial independence, Canadian law seems to have also received the vague arrangement governing the sources of English judicial independence. Indeed, things get seriously muddled when one examines how or even whether these hallmarks and ideas have translated into legal form. Defining the legal scope of

119 Dickson, 'The Rule of Law' (n 112) 5.

120 See RB Stevens, *The English Judges: Their Role in the Changing Constitution* (Hart, Oxford 2005) 79.

English judicial independence can be a perplexing task as it derives from a disparate ensemble of rules and principles, constitutional conventions, customary practice backed by public opinion, and tradition.[121] According to Robert Stevens, judicial independence 'is not a legal concept in England', but merely 'a term of constitutional rhetoric'.[122] Others have referred to it in more glowing terms, characterising it as a 'fundamental principle of English constitutional law'[123] and 'a cornerstone of Britain's constitutional arrangements'.[124] Nonetheless, it is generally acknowledged, as Lord Ackner once said, that 'by virtue of its being supreme – and that has never been an issue – Parliament has the power to interfere as much as it likes with judicial independence'.[125] In this respect, the Constitutional Reform Act 2005 may well have brought judicial independence closer to the legal realm, with s. 3 of the Act imposing duties on Cabinet members (and others) to uphold 'the continued independence of the judiciary'. If Parliament could validly impose a legal duty to uphold judicial independence, then one would think that it could equally qualify it or repeal it.

Identifying the legal sources of judicial independence is evidently a crucial task, especially in a constitutional democracy such as Canada where any law must comply with the 1867-1982 Acts. Accordingly, the proponents of orthodox Canadian constitutional theory will assert that judicial independence can serve as a basis for judicial review of legislation only to the extent that any rule concerning judicial

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121 See DJC Ackner, *The Erosion of Judicial Independence* (John Stuart Mill Institute, London 1997) 1; Bradley, 'The Constitutional Position of the Judiciary' (n 113) 290.

122 R Stevens, 'Judicial Independence: A Loss of Innocence' in PH Russell and DM O'Brien (eds), *Judicial Independence in the Age of Democracy: Critical Perspectives from around the World* (University Press of Virginia, Charlottesville 2001) 155, 155.

123 Lord Hope (n 113) 105.

124 Lord Irvine, 'Parliamentary Sovereignty and Judicial Independence' in J Hatchard and P Slinn (eds), *Parliamentary Supremacy and Judicial Independence: A Commonwealth Approach* (Cavendish, London 1999) 29, 34.

125 Ackner (n 121) 19.

independence can be properly grounded in the sections of the Acts. From the mid-1980s, the Canadian courts were asked to conduct judicial review of legislation which was claimed to violate not only the sections of the 1867-1982 Acts but also a general principle of judicial independence not specifically entrenched in the Acts. At first sight, such an apparently novel type of constitutional challenge seemed very unusual, especially given the English origins of Canadian judicial independence. However, long before the Canadian courts, other common law courts had been using judicial independence as an implied constitutional principle to conduct judicial review of legislation.

Bribery Commissioner v Ranasinghe and *Liyanage v The Queen* were two appeals from Ceylon to the Judicial Committee challenging the validity of certain Ceylonese legislation on the basis that it contravened the Ceylonese Constitution. As several authors observed, the sections of the Ceylonese and Canadian Constitutions (except for s. 11(d) of the Charter) concerning judicial independence are very similar.[126] In particular, as under the Canadian constitution, the power and jurisdiction of the courts was 'not expressly protected by the Constitution' of Ceylon.[127] Nevertheless, Lord Pearce, for the Judicial Committee, held that 'the importance of securing the independence of judges and of maintaining the dividing line between the judiciary and the executive was appreciated by those who framed the Constitution.'[128] He interpreted the sections of the Ceylonese Constitution and its 'silence as to the vesting of judicial power' as manifesting 'an intention to secure in

126 See for instance F Chevrette and H Marx, *Droit constitutionnel: notes et jurisprudence* (Presses de l'Université de Montréal, Montréal 1982) 160; JN Lyon, 'The Central Fallacy of Canadian Constitutional Law' (1976) 22 McGill LJ 40, 45.

127 *Bribery Commissioner v Ranasinghe* [1965] AC 172 (PC) 190; *Liyanage v The Queen* [1967] 1 AC 259 (PC) 286

128 *Ranasinghe* (n 127) 190.

the judiciary a freedom from political, legislative and executive control.'[129] Following this 'structural' reading of the Constitution, Lord Pearce interpreted the appointment process of 'judicial officers' in s. 55 of the Constitution to refer not only to the judges of the ordinary courts, but also to include officials with judicial duties. Since the appointment process of officials to the Bribery Tribunal under the Ceylonese Bribery Amendment Act 1958 was in contravention of s. 55, Lord Pearce held in *Ranasinghe* that the members of the Tribunal had been unlawfully appointed. In *Liyanage*, Lord Pearce, for the Judicial Committee, invoked that same implied constitutional principle of judicial independence in order to strike down a Ceylonese bill of attainder, on the basis that it was an unlawful legislative attempt to 'usurp the judicial power of the judicature'.[130] The impugned statutes were struck down despite the fact that the Ceylonese Parliament was a 'sovereign legislature' possessing 'the full legislative powers of a sovereign independent state'.[131] *Liyanage* was also cited in *Hinds v The Queen* in support of the proposition that Chapter VII of the Jamaican Constitution, entitled 'Judicature', which is similar in content to the corresponding parts of the Canadian and Ceylonese Constitutions, implicitly guarantees judicial independence and thus implicitly prohibits the Jamaican Parliament from creating a new court with judges not appointed in accordance with the requirements set out in Chapter VII and from transferring the sentencing function to the executive. In Chapter 1, I mentioned a number of other cases where the Judicial Committee used similar reasoning to strike down or set aside legislation interfering with judicial independence based on the structural and interpretative premise that the Constitutions of all these countries were

129 *Liyanage* (n 127) 287.

130 ibid 289.

131 *Ibralebbe v The Queen* [1964] AC 900 (PC) 922-23; *Ranasinghe* (n 127) 197-98.

based on the Westminster model, on which the Canadian Constitution was also based.[132]

My argument in this section can be considered along the same lines as the Judicial Committee's judgments in these cases, and within the general spirit of the English tradition of judicial independence. It develops in two parts. First, since Canadian judges and legal scholars have often referred to the English origins of Canadian judicial independence, I will examine the role of English constitutional law and theory in the development of Canadian judicial independence. Essentially, it is generally considered that Canadian law has adopted the principles of the 1701 Act[133] along with those traditional 'hallmarks of English judicial independence'. From this set of general principles, a sophisticated body of (mostly judge-made) constitutional rules and principles concerning judicial independence has been developed. Second, I will turn to the nature and scope of judicial independence as a general principle implied from the 1867-1982 Acts. More specifically, I will argue that judicial independence eventually broke from orthodox constitutional theory to become an implied constitutional principle capable of checking legislation.

One could say that WR Lederman and Lamer CJC have probably been two of the most representative figures in the debate about Canadian judicial independence. Lederman and Lamer CJC were proponents of an interpretation of judicial independence as a generally implied constitutional principle which they claimed to initially derive from (their interpretation of) the English constitution and recognised by the preamble to the 1867 Act, and the structure and content of the relevant sections of the 1867-1982 Acts dealing with the judiciary. Given Lederman's and

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132 See Ch 1, '1. Preface'.

133 See *Valente* (n 116) [26]; *Re Provincial Court Judges* (n 1) [83], [106], [311].

Lamer CJC's prominent role in the debate and the implications of their views on the development of the enforceability of judicial independence as an implied constitutional principle, my discussion in this chapter will generally draw from their analysis.

4.2.1. WR Lederman: Interpreting English Judicial Independence

In 1956, Lederman published a lengthy two-part article on the origins and content of Canadian judicial independence.[134] While Lederman's conception of Canadian judicial independence was initially considered as 'heresy',[135] the views in the legal community gradually shifted and the Supreme Court eventually adopted Lederman's interpretation of ss. 96-101 of the 1867 Act.[136] The Court agreed with Lederman that ss. 96-101 and the preamble to the 1867 Act implicitly recognise a general principle of judicial independence inspired by the English principle. While Lederman's article was written more than half a century ago, it laid the modern foundations of Canadian judicial independence and continues today to be considered the *locus classicus* on the subject.[137] Given the influence of his work on the development of judicial independence as an implied constitutional principle, it is worth examining the relevant aspects of his interpretation of that principle.

Lederman traced the origins of Canadian judicial independence back to the emergence of the Central Royal Courts following the Norman Conquest. He showed how the modern attributes of English judicial independence came to be established,

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134 See WR Lederman, 'The Independence of the Judiciary' (1956) 34 CBR 769; WR Lederman, 'The Independence of the Judiciary [2]' (1956) 34 CBR 1139.

135 G Bale, 'W.R. Lederman and the Citation of Legal Periodicals by the Supreme Court of Canada' (1993-1994) 19 Queen's LJ 36, 48-49; N Lyon, 'The Lederman Legacy in Legal Education' (1982-1983) 8 Queen's LJ 21, 21.

136 See *Crevier* (n 74) 237. See also (n 99-101).

137 See Cromwell (n 110) 163; B Dickson, 'Remembering Bill Lederman' (1993-1994) 19 Queen's LJ 1, 4.

from the administration of the courts to judicial tenure to judicial remuneration. Lederman claimed that there were 'both historical and theoretical reasons to doubt whether the completely unlimited supremacy of Parliament […] was established' following the revolutionary settlement of 1688 or at any time.[138] One of the principal authorities in support of his proposition was AL Goodhart, in particular the following statement from his Hamlyn Lecture:

> The fourth and final principle which is a basic part of the English constitution is the independence of the judiciary. It would be inconceivable that Parliament should today regard itself as free to abolish the principle which has been accepted as a corner-stone of freedom ever since the Act of Settlement in 1701. It has been recognised as axiomatic that if the judiciary were placed under the authority of either the legislative or the executive branches of the Government then the administration of the law might no longer have that impartiality which is essential if justice is to prevail.[139]

Lederman further supported his claim with an analysis of the historical development of judicial independence in England. For instance, on the impartiality of the Central Royal Courts, Lederman cited an early 18th century case where Holt CJ stated that 'if an Act of Parliament should ordain that the same person should be party and Judge, or which is the same thing, Judge in his own cause, it would be a void Act of Parliament;[...] it cannot make one who lives under a Government Judge and party'.[140] On judicial remuneration, Lederman opined that:

> the balance of authority definitely favours the view that it is unconstitutional in Britain to cut the salary of an individual judge of a superior court during the currency of his commission. It would seem to be unconstitutional also for Parliament to attempt a general reduction of the judicial salary scale to an extent that threatens the independence

138 Lederman, 'Independence of the Judiciary' (n 134) 769.

139 AL Goodhart, *English Law and the Moral Law* (2d edn Stevens, London 1955) 60.

140 *City of London v Wood* (1796) 12 Mod 669, 687-88, 88 ER 1592, 1602

> of the judiciary[.] Subject to these two limitations, Parliament has power to adjust the level of judicial salaries.[141]

From his historical survey of English law, Lederman concluded that English judicial independence had reached the status 'of a first principle of the constitution capable of withstanding even the legislative primacy of the United Kingdom Parliament itself.'[142]

Lederman explained the usefulness of his extended inquiry into English law as follows:

> The [Judicature provisions of the 1867 Act] make it clear that the federating provinces and the new nation were to continue to follow the model afforded by the English judicature. Here, as in other respects, there was to be "a Constitution similar in Principle to that of the United Kingdom". […]
> Even were there no other evidence, a mere reading of [the Judicature provisions of the 1867] Act discloses the intention to reproduce superior courts in the image of the English central royal courts.[143]

For Lederman, if English judicial independence can 'withstand' Parliamentary sovereignty, then 'by so much the more is it reasonable to [take that position] in a federal country like Canada.'[144] In his other works, Lederman remarkably anticipated legal developments which would occur more than twenty years later, by suggesting that his interpretation of a general principle of judicial independence should be extended beyond the Judicature sections of the 1867 Act which apply only to superior court judges.

One of the main criticisms of Lederman's position was that his analysis of the English materials was highly contentious. At the outset, Lederman failed to cite a

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141 Lederman, 'Independence of the Judiciary' (n 134) 795.

142 Lederman, 'Independence of the Judiciary [2]' (n 134) 1178.

143 ibid 1158, 1160.

144 ibid 1177-78.

single English case holding that judicial independence can check a statute (except Holt CJ's statement in *City of London v Wood*). In his extrajudicial writings, Strayer J argued that Lederman's analysis:

> ignores the basic fact that the jurisdiction of the "central royal courts" was subject to limitation by Parliament. Parliament could and still can prevent judicial review of actions of public officers or agencies. Moreover, the "central royal courts" never had the power to review Acts of Parliament for validity, in spite of the pretensions of Coke and others.[145]

One example of Parliament's legislative authority over the scope of the courts' jurisdiction would be the Judicature Acts 1873-1875 which effected a complete reorganisation of the English judicial system, notably in the structure and jurisdiction of the courts. Jeffrey Goldsworthy's later influential historical analysis of English Parliamentary sovereignty confirmed Strayer J's view. According to Goldsworthy, '[t]he idea that courts could invalidate statutes contrary to fundamental principles of common law appeared briefly in the 17th century, but did not enjoy substantial influence either then or since.'[146] Regarding Holt CJ's statement, Goldsworthy argued that its accuracy was doubtful: based on two other unpublished manuscripts of that case, Holt CJ endorsed the principle that no man should be a judge in his own cause without challenging Parliamentary sovereignty.[147]

It seems unlikely that Lederman simply overlooked the scope of Parliamentary sovereignty. In the very first sentence of his 1956 article, he acknowledged that: '[i]t has been widely accepted legal doctrine that the English constitution begins and ends with the one principle that Parliament is supreme – that

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145 BL Strayer, *The Canadian Constitution and the Courts: The Function and Scope of Judicial Review* (3d edn Butterworths, Toronto 1988) 48.

146 JD Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (OUP, Oxford 1999) 233.

147 ibid 197-98.

there is nothing a particular parliament cannot do by an appropriately worded statute.' [148] However, Lederman believed that the historical and theoretical foundations of the English constitution suggested an alternative view of the legal scope of judicial independence in Canada.

From a comparative perspective, Lederman's analysis could be broken down into two parts: a somewhat bold interpretation of English judicial independence focusing on its legal dimension in light of its historical context and political importance; and the use of that interpretation when adapting the relevant elements of English judicial independence to the Canadian context. As part of his analysis, Lederman was able to invoke a distinct aspect of the Canadian constitution which did not exist in the English legal system: the (partial) entrenchment of the 1867 Act, which contributed to the development of a well established practice of judicial review of legislation. As a result, the content of English judicial independence, the continuance in Canada of the English model of judicature and the existence of an entrenched constitution combined to shape Lederman's conception of Canadian judicial independence.

From a more theoretical perspective, Lederman's interpretative approach displays both Hartian and Dworkinian elements. For Lederman, the 1867 Act (as amended):

[148] Lederman, 'Independence of the Judiciary' (n 134) 769.

> was simply ambiguous or incomplete in many respects as originally drafted and the answers just were not in the Act as to how these ambiguities were to be resolved and the gaps filled. [W]ords are not perfect vehicles of meaning, so that no matter how skilfully they are chosen and used, uncertainties about their meaning to some extent remain.[149]

By underlining the need to fill the gaps created by the inevitable incompleteness of the 1867 Act, Lederman's analysis can fall under a Hartian conception of law. However, Lederman also opined that, given the 1867 Act's incompleteness, it should be 'sociologically' interpreted so that its words 'must be carefully linked by judicially noticed knowledge and by evidence to the ongoing life of the country.'[150] In other words, proper constitutional interpretation involves an 'intensive and extensive judicial appreciation of social, political, economic and cultural facts'.[151] Depending on Lederman's meaning of 'gaps', this latter part of his interpretative approach may seem closer to a Dworkinian theory of constructive interpretation, but not necessarily in conflict with HLA Hart, to the extent that the interpretative process can also rely on these 'extra-legal' facts. As suggested in Chapter 4, progressive interpretation can be reconciled with both Hartian and Dworkinian theories when conceived from a common law-based perspective. Lederman's approach to constitutional interpretation seems to confirm my point. To the question 'who watches the watchman' (the watchman being the superior courts which exercises their 'final supervisory review function over lower courts' and administrative bodies and officials), Lederman's response was:

> the superior court judges must be trusted to obey the laws defining their own functions and to check themselves. […] They must be all the more careful about this precisely because there is no one to review

149 WR Lederman, 'Thoughts on Reform of the Supreme Court of Canada' (1970) 8 Alta L Rev 1, 2-3.

150 ibid 2.

151 ibid 3-4.

> their powers, as they review the powers of others. Judicial restraint on these terms […] is the ultimate safeguard of the supremacy of the law, enacted and unenacted[.][152]

In his later works, Lederman further suggested that his conception of the superior courts' judicial independence 'should be followed for all other Canadian courts.'[153] Here again, Lederman was ahead of his time as this latter issue would only reach the Canadian courts some 20 years later in *Re Prov. Court Judges*.

4.2.2. Lamer CJC's Conception of Judicial Independence

As described in Chapter 3,[154] the Supreme Court was asked in *Re Prov. Court Judges* to rule whether a series of provincial statutes regulating the salaries of provincial court judges were invalid on the basis that they violated s. 11(b) of the Charter. However, some of the appeals in *Re Prov. Court Judges* did not arise in a criminal context and so the Court could not have entirely relied on s. 11(d) to invalidate the impugned legislation. Delivering the majority judgment of the Court, Lamer CJC admitted this reality:

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152 WR Lederman, 'The Independence of the Judiciary' in AM Linden (ed) *The Canadian Judiciary* (Osgoode Hall Law School, York University, Toronto 1976) 1, 10-11.

153 ibid 5.

154 See Ch. 3, '3. Qualifications and Challenges: Implied Constitutional Principles' for a summary of the facts of this case.

> However, by its express terms, s. 11(*d*) is limited in scope as well – it only extends the envelope of constitutional protection to bodies which exercise jurisdiction over offences. As a result, when those courts exercise civil jurisdiction, their independence would not seem to be guaranteed. The independence of provincial courts adjudicating in family law matters, for example, would not be constitutionally protected. The independence of superior courts, by contrast, when hearing exactly the same cases, would be constitutionally guaranteed.[155]

According to orthodox constitutional theory, the Court should have dismissed the Charter challenge for the portions of the appeals not arising in a criminal context on the basis that the right protected by s. 11(d) did not extend to non-criminal cases.

However, Lamer CJC, who delivered the majority judgment of the Court, explained why a proper understanding of judicial independence requires courts to refer 'to a deeper set of unwritten understandings which are not found on the face of the document itself.'[156] Lamer CJC presented three arguments in support of this statement. First, s. 52(2) of the 1982 Act states that the Constitution of Canada 'includes' the Imperial Acts and Orders-in-Council listed in the Schedule to the 1982 Act, thus implying that the list was not exhaustive.[157] The second argument addressed Canada's constitutional heritage: since the Canadian constitution 'has emerged from a constitutional order whose fundamental rules are not authoritatively set down in a single document, or a set of documents, it is of no surprise that our Constitution should retain some aspect of this legacy.'[158] The third argument was the preamble to the 1867 Act which refers to the English constitution. For Lamer CJC, the preamble 'does have important legal effects' which are greater than the interpretative effects of

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155 *Re Provincial Court Judges* (n 1) [86].

156 ibid [89].

157 *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)* [1993] 1 SCR 319; *Re Provincial Court Judges* (n 1) [90]-[92]; *Quebec Secession Reference* (n 3) [32]. See also T Kuttner, 'Courts, Labour Tribunals and the Charter' (1990) 39 UNBLJ 85, 97.

158 *Re Provincial Court Judges* (n 1) [92].

the preamble to an ordinary Act.[159] Lamer CJC heavily relied on the latter two arguments as the basis of his theory of constitutional interpretation. As explained in Chapter 4, Lamer CJC considered that the Acts had gaps which the courts would have to fill out through a progressive interpretation of judicial independence.[160]

Lamer CJC's judgment can be considered as the natural extension of Lederman's conception of judicial independence first presented more than 40 years earlier. Lamer CJC adopted Lederman's conception of judicial independence as a fundamental principle of the Canadian constitution inherited from English law. While judicial independence was originally limited to the superior court judges by virtue of ss. 96-101 of the 1867 Act, Lamer CJC extended it to all Canadian courts, a suggestion that Lederman had earlier made in his works. Lamer CJC's interpretation also bears some similarity with Lord Pearce's interpretation in *Ranasinghe* of 'judicial officers' in the Ceylonese Constitution to include not just the judges of the ordinary courts but also government appointees with judicial functions. In striking down the impugned legislation held to violate that fundamental principle, Lamer CJC and Lord Pearce seemed to corroborate Lederman's claim that judicial independence is 'capable of withstanding even the legislative primacy' of the legislative authorities.[161] In reaching this result, Lamer CJC seemed to have consciously or unconsciously borrowed from a selection of Hartian and Dworkinian interpretative elements: he developed a progressive interpretation of judicial independence significantly broader than its historical scope, which is intended to 'fill the gaps' in the constitutional scheme (on a more positivist account) or complement the provisions of the constitutional documents. As Hart and Dworkin suggested (in their

159 ibid.

160 See Ch 4, '5. Applications'.

161 Lederman, 'Independence of the Judiciary [2]' (n 134) 1177-78.

own ways), abstract legal principles can serve to resolve 'hard cases' and, for every one of these cases, judges seek the 'best constructive interpretation'[162] (although both of them had a different understanding of 'hard cases' and 'best' interpretation).

From my review of the case law on judicial independence in Chapter 3, it seems that the courts have adopted the view that judicial independence, as a general principle of the Canadian constitution exemplified in specific sections of the 1867-1982 Acts and deriving from the preamble to the 1867 Act, can check legislation. Dicta to this effect can be found going back to *R v Beauregard*, *R v Lippé* and *Mackeigan v Hickman*. In *Re Prov. Court Judges* and *Mackin v New Brunswick (Minister of Finance)*, the Court struck down legislation on the basis that it violated the implied constitutional principle of judicial independence. As with the Manitoba appeal in *Re Prov. Court Judges*, neither *Lippé* nor *Mackin* arose in a criminal context and so the Court could not have entirely relied on s. 11(d) of the Charter to conduct judicial review of the impugned legislation, much less strike it down. The Court's justification of the extension of judicial independence to these novel situations was that Canadian judicial independence has evolved over time as a product of both the common law and the 1867-1982 Acts.[163] The Court mentioned that this evolution was necessary in order to adapt judicial independence to the development of statutory courts and the (unforeseen) 'rise of the Administrative State'. As a result, the Court extended judicial independence beyond its original boundaries expressed in the sections of the 1867-1982 Acts to reach non-superior courts at large (*Re Prov. Court Judges*, *Mackin*, *Lippé*) and Justices of the Peace (*Ell v Alberta*). Thus, the conclusion

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162 *CL* 274-75; *LE* 225, 231, 255, 379.

163 *Provincial Court Judges' Assn of New Brunswick v New Brunswick (Minister of Justice)* [2005] 2 SCR 286 [2], [4].

from my case law analysis is that the courts have progressively interpreted Canadian judicial independence in a way that can check legislation.

Lower appellate courts have also treated judicial independence as a principle not limited in scope by the sections of the 1867-1982 Acts, with the consequence that some statutes have also been invalidated at Court of Appeal level. In one case,[164] the Newfoundland Court of Appeal struck down s. 4 of the provincial Public Sector Restraint Act which freezes all public sector wages including the judges' wages. Because the judges' wages were frozen without going through the approved mechanism for setting judicial salaries, the Court held that it violated s. 11(d) of the Charter. In another case, [165] the Québec Court of Appeal invoked judicial independence in order to declare inoperative vis-à-vis the Judicial Council a provincial statute concerning access to information which made the Judicial Council subject to the application of that statute, notably the jurisdiction of the commission created by the statute. While the Court recognised that it could not ground its declaration of inoperability in any section of the 1867-1982 Acts, it nevertheless held that, following *Re Prov. Court Judges* and *Quebec Secession Reference*, judicial independence is a constitutional principle 'confirmed by the preamble to the 1867 Act'.

The majority judgment in *Re Prov. Court Judges* has been strongly criticised by most commentators who sided with La Forest J's dissenting judgment and qualified the majority's interpretation of the Canadian constitution as 'dubious',[166]

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164 *Newfoundland Association of Provincial Court Judges v Newfoundland* (2000) 192 Nfld & PEIR 183 (Nfld CA).

165 *Québec (Conseil de la magistrature) v Québec (Commission d'accès à l'information)* [2000] RJQ 638 (CA).

166 RG Richards, 'Provincial Court Judges Decision-Case Comment' (1998) 61 SaskLRev 575, 588.

'unjustified', [167] 'disingenuous' [168] and even 'unprincipled'. [169] In contrast to Lamer CJC's interpretation of judicial independence, the proponents of orthodox constitutional theory reject the argument that the preamble to the 1867 Act signals the existence of a Canadian principle of judicial independence which would operate as a source of legal limitations on legislative authority. While recognising the existence of non-codified constitutional principles, the orthodox view proclaims that any constitutional rules deriving from these principles must ultimately have their source in the sections of the 1867-1982 Acts. Otherwise, they cannot limit legislative authority. In support of their position, they invoke the objections from the Framers' intentions and from Parliamentary sovereignty. Their operation is well illustrated in La Forest J's dissenting judgment in *Re Prov. Court Judges*.

According to La Forest J, all constitutional guarantees of judicial independence must 'really find their origin in specific provisions of the Constitution'. To the extent that such guarantees cannot result from 'usual mechanisms of constitutional interpretation', [170] then the courts cannot use them to overturn legislation. While the preamble to the 1867 Act does refer to the English constitution, there is no English authority for the proposition that the courts could invoke judicial independence (or any legal principle) to strike down a statute: in England, Parliament is supreme. Therefore, the Framers never intended the preamble (or any other part of the 1867-1982 Acts) to mean that there was in Canadian law a general constitutional

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167 J Leclair and Y-M Morissette, 'L'indépendance judiciaire et la Cour suprême: reconstruction historique douteuse et théorie constitutionnelle de complaisance' (1998) 36 Osgoode Hall LJ 485, 487.

168 J Goldsworthy, 'The Preamble, Judicial Independence and Judicial Integrity' (1999-2001) 11 Constit Forum 60, 64.

169 J Cameron, 'The Written Word and the Constitution's Vital Unstated Assumptions' in P Thibault, B Pelletier and L Perret (eds), *Essays in Honour of Gérald-A Beaudoin: The Challenges of Constitutionalism - Les mélanges Gérald-A Beaudoin: les défis du constitutionnalisme* (Éditions Yvon Blais, Cowansville 2002) 89, 113.

170 *Re Provincial Court Judges* (n 1) [319].

principle of judicial independence deriving from English law. As La Forest J emphasised, '[t]he express provisions of the Constitution are not, as the Chief Justice contends, "elaborations of the underlying, unwritten, and organizing principles found in the preamble to the *Constitution Act, 1867*"[.] On the contrary, they are the Constitution.'[171]

La Forest J and most commentators argued that Lamer CJC's interpretation of the legal effects of judicial independence was flawed because it improperly invoked the preamble to the 1867 Act in support of the constitutional character of judicial independence and failed to properly take into account the implications of Canadian and English Parliamentary sovereignty. La Forest J's position is based on an accurate account of the relevant principles of English constitutional law. Moreover, one could reasonably argue that the historical context supports his position. However, as I argued in Chapter 4, Canadian law more generally reflects Lamer CJC's conception of judicial independence.

Taking a step back, my analysis should have established instances where the courts have invoked the rule of law as a basis to strike down or set aside legislation. I argued that they have intervened because the impugned legislation unduly interfered with core elements of the rule of law, namely protection against arbitrary decisions and judicial independence. However, if my analysis was to end at this stage, one could still claim that, strictly speaking, it would only support the position that the Canadian case law is ultimately inconsistent with formal conceptions of the rule of law. In other words, the cases discussed so far in this section do not clearly establish whether Canadian law really follows a thin substantive conception of the rule of law or some other more substantive conceptions. The discussion in the next section is

171 ibid [319].

intended to address this claim and complete my demonstration that Canadian law follows a thin substantive conception of the rule of law.

4.3 The Legal Limits of the Rule of Law

My argument in this part is that the courts have declined to strike down or set aside statutes which did not unduly interfere with a core element of the rule of law or simply did not involve a core element (even though the impugned statute could have been considered to be more loosely related to the rule of law). I will present examples of such cases in the areas of judicial independence and of access to justice before explaining their insufficient connection with the core content of the rule of law.

In *Ell v Alberta*, three Justices of the Peace challenged a provincial statute removing most of the responsibilities of those Justices of the Peace who did not meet a new set of educational and professional qualifications. The Justices of the Peace claimed that the new statute 'contravened their constitutionally required security of tenure and independence.'[172] In a unanimous judgment, the Supreme Court reiterated that the requirements of judicial independence extend beyond the limited scope of the 1867-1982 Acts and that the preamble to the 1867 Act serves as a 'textual affirmation of an unwritten principle of judicial independence in Canada.'[173] Since the Justices of the Peace exercised judicial functions encompassing those of the judiciary, the Court held that the requirements of judicial independence applied to the Justices of the Peace. While the Court engaged in judicial review of the impugned legislation, it determined in the end that the legislation did not contravene judicial independence. The Court reached its decision by referring to one of the 'essential conditions of

172 *Ell* (n 117) [12].

173 ibid [19].

judicial independence'[174] as identified in its previous cases, namely security of tenure. According to the Court, the 'essence of security of tenure is that members of a tribunal be free from arbitrary or discretionary removal from office.' Applying this test to the impugned legislation, the Court concluded that the legislative removal from office of the newly made unqualified Justices of the Peace was intended to strengthen public confidence in the administration of justice and to maintain a strong and independent judiciary. The Court also recognised that 'the positive impact of the reforms on the interests that underlie judicial independence outweighs any negative impact of the respondents' removal from office.'[175] Since the impugned legislation was not arbitrary and thus did not (unduly) interfere with this essential element of judicial independence, it passed constitutional muster.

Lippé is another illustration of the limits of judicial independence as a basis to check legislation. At issue in this case was whether Québec's provincial legislation which allowed part-time municipal court judges to continue practising law, interfered with the court's 'institutional impartiality'. From the case law, the Supreme Court articulated the relevant test to be whether the impugned law gives rise to 'a reasonable apprehension of bias in the mind of a fully informed person in a *substantial number of cases*'.[176] Applying the test to the impugned law, the Court concluded that, *a priori*, the municipal court judges' simultaneous legal practice gives rise to such a reasonable apprehension of bias. However, it identified a number of legislative safeguards (notably the judges' oath of office, their judicial immunity and the existence of a code of ethics applicable to municipal court judges) which

174 ibid [28]-[30].

175 ibid [37].

176 *R v Lippé* [1991] 2 SCR 114, 144 (my emphasis).

'combine to *alleviate* the apprehension of bias'.[177] Therefore, the impugned legislation passed constitutional muster. Here, the Court's *a priori* finding of an apprehension of bias and the alleviating effect of the particular safeguards suggest that there was some degree of interference with another core element of judicial independence or impartiality, which is protection from reasonable apprehension of bias but that degree of interference was not significant enough to warrant judicial intervention.

While *Ell* and *Lippé* concerned a core requirement of the rule of law which I have already identified as such, namely judicial independence, challenges based on other aspects of the rule of law can also be analysed under the thin substantive conception of the rule of law. One example is access to justice.

In its most basic sense, the rule of law means law and order as opposed to chaos and lawlessness. One would think that, for law and order to exist in a society, there must at least be some kind of adjudicative body able to enforce law and order at the demand of members of society, hence the principle or right of access to justice. Indeed, Joseph Raz derived from the rule of law that '[i]t is of the essence of municipal legal systems that they institute judicial bodies charged […] with the duty of applying the law to cases brought before them and whose judgments and conclusions as to the legal merits of those cases are final.'[178] From this principle, Raz derived a further principle: access to the courts.[179] Lord Bingham similarly opined that the rule of law comprises 'the right of unimpeded access to a court as a basic right'.[180] In *BCGEU v British Columbia (AG)*, a labour union challenged the validity

177 ibid 152 (my emphasis).

178 Raz, *The Authority of Law* (n 6) 216-17.

179 ibid 217.

180 Lord Bingham (n 44) 77.

of an injunction ordering it to cease picketing outside the province's law courts. Dickson CJC, delivering the judgment of the Supreme Court, upheld the injunction. He identified the issue as dealing with 'the fundamental right of every Canadian citizen to have unimpeded access to the courts and the authority of the courts to protect and defend that constitutional right.'[181] For Dickson CJC, '[t]here cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice.'[182]

One example of an unsuccessful constitutional challenge of the validity of a statute on the basis of the principle or right of access to justice is *British Columbia (AG) v Christie*. *Christie* arose from a provincial statute which imposed a 7% tax on legal services rendered in the province. The petitioner challenged the constitutionality of the tax on the basis that it made it impossible for some of his low income clients to retain counsel. As a result, the effect of the tax amounted to a denial of their right to counsel, thus causing a violation of their right of access to justice. The petitioner claimed that that right was constitutionally protected as an aspect of the rule of law. In deciding the appeal, the Supreme Court adopted the Court of Appeal's definition of access to justice and framed the issue as a claim for 'the constitutionalization of a particular type of access to justice – access aided by a lawyer' before a court or tribunal.[183] The Court went on to examine 'whether general access to legal services in relation to court and tribunal proceedings […] is a fundamental aspect of the rule of law.'[184] In the end, the Court declined to endorse a general constitutional right to counsel and upheld the impugned statute.

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181 *BCGEU v British Columbia (AG)* [1988] 2 SCR 214 [1].

182 ibid [25].

183 *Christie* (n 2) [10].

184 ibid [21].

It seems that what prompted the Supreme Court to overturn the Court of Appeal's judgment is its (mistaken) attempt to associate a *general* right to counsel with the right of access to justice. Indeed, at the outset, the Supreme Court expressly stated that the starting point of its reasoning was its (over)broad definition of access to justice. It did not affect *BCGEU* as the continuing authority on access to the courts as a central or core aspect of the rule of law. Indeed, the courts have consistently followed *BCGEU*.[185] The Supreme Court's interpretation of *BCGEU* suggested that *some* limits on the right of access to the courts could be unconstitutional. It is submitted that the principle in *BCGEU* would have equally applied if a court was asked to rule on the constitutional validity of a law allowing the kind of picketing at issue in *BCGEU*. *BCGEU* draws some similarity with one of the constitutional challenges in *Re Prov. Court Judges* concerning a provincial bill which imposed days of unpaid leave on court staff, thus forcing the closure of the province's courthouses. The Supreme Court declared the bill to be invalid for its contravention of the implied constitutional principle of judicial independence, noting that it 'had the effect of *absolutely denying access to the courts* for the days on which they were closed.'[186] In the end, *Christie* can be interpreted as a rather narrow ruling, ie that the rule of law cannot be successfully invoked to strike down an otherwise valid 7% provincial tax on legal services.

Ell, *Lippé* and *Christie* provide three illustrations of the limits of the rule of law (in its thin substantive version) as a basis for challenging the validity of legislation and executive action. In *Ell*, the Court identified the notion of arbitrariness

185 See for instance *Newfoundland (AG) v NAPE* [1988] 2 SCR 204; *OPSEU v Ontario (AG)* (2002) 58 OR (3d) 577 (CA); *R v Domm* (1996) 31 OR (3d) 540 (CA) 546; *John Carten Personal Law Corp v British Columbia (AG)* (1998) 153 DLR (4th) 460 (BCCA); *Société de Développement de la Baie James C Compagnie de Développement Cris Ltée* [2001] RJQ 1726 (CA).

186 *Re Provincial Court Judges* (n 1) [285] (my emphasis).

in a legislature's decision to remove Justices of the Peace as the dividing line between a lawful and an unlawful removal of the Justices of the Peace. Therefore, one could say that only their non-removability on arbitrary grounds is a core element of the rule of law, as the Court characterised it as part of the 'essence of security of tenure', which is an 'essential condition of judicial independence'. According to the Court in *Lippé*, the key criterion distinguishing the core element of institutional impartiality from surrounding non-core elements is the notion of reasonable apprehension of bias. While the Court seemingly admitted that the impugned legislation permitting part-time judges to sit on municipal courts affected these courts' impartiality, the legislative safeguards were sufficient to ultimately preserve the relevant core content of the rule of law. In *Christie*, the Court did not set out the relevant core element(s) of the rule of law as clearly as it did in *Ell* and *Lippé*. Nonetheless, the thin substantive conception also seems to fit properly with the cases concerning access to the courts. Indeed, *BCGEU* and *Re Prov. Court Judges* suggest that the courts will intervene when any person or body, including a legislature, prevents (physical) access to the courts, thus making it a core element of the principle of access to justice. By contrast, *Christie* could be interpreted as a judicial unwillingness to consider a general right to counsel as a core element of access to the courts. Tracing the line between what is part and what is not part of the core content of the rule of law is a delicate work which is (mainly) undertaken by the courts.

It is also worth underscoring two more characteristics of the case law concerning the rule of law, which should further strengthen my argument from this chapter in favour of the thin substantive conception of the rule of law: (i) the near unanimity among the judges in the cases discussed in this section, which further testifies to the degree of consensus concerning what I described as the thin

substantive conception of the rule of law, and (ii) the fact that there has been no successful Supreme Court challenge of legislation on the basis of the rule of law (or of an implied constitutional principle deriving from the rule of law) other than in the cases discussed in this chapter. Therefore, the application of the thin substantive conception does not appear to amount to a complete social philosophy.

5. Conclusion

Debates about the place of the rule of law in common law systems have often referred to the theoretical distinction between formal and substantive conceptions of the rule of law. I have examined some the most prominent conceptions of the rule of law, focusing on their content and legal effects, especially in the presence of potentially conflicting legislation. In Canadian law, the debate between proponents of formal and substantive conceptions of the rule of law has proceeded with each side generally rehearsing its arguments and criticising the other side's weaknesses. For instance, proponents of a formal conception cite judicial statements consistent with a formal conception, and repeat that the Supreme Court of Canada has never invoked the rule of law as a basis for striking down or setting aside legislation. Proponents of the substantive conception point to the formal conception's inability to oppose wicked laws and try to recast the discussion of the rule of law within the greater constitutional framework.

The thin substantive conception of the rule of law is an attempt to reach a wider agreement on the rule of law and to reconcile it with Canadian constitutional law and practice. It strives to do so by distinguishing between the content of the rule of law and its legal effects. With respect to content, the thin substantive conception adopts the core elements of the rule of law 'lying outside the areas of controversy'.

When legislation unduly threatens that core, the thin substantive conception of the rule of law directs the courts to intervene against that threat. A re-examination of the case law supports the thin substantive conception. I argued that the Supreme Court's definition given in *Re Manitoba Language Rights* and reiterated or reinterpreted in subsequent cases leads to the recognition of a core content of the rule of law. I then examined two instances suggesting that, in terms of its legal effects, the rule of law in Canada can check legislation: the preservation of judicial review and the principle of judicial independence.

Part of the core of the rule of law is that every person is subject to the ordinary law of the land. To the extent that an official of the executive branch exercises their powers in an arbitrary way, their decision is not rendered in accordance with law, but with indifference to what the law is, and thus offends a core element of the rule of law. It follows that a privative clause that has the effect of condoning the exercise of such arbitrary powers also offends the rule of law. I have argued that the Canadian courts have recognised that privative clauses can unduly threaten the rule of law, and that when such a threat is identified, they have intervened by striking down or setting aside the impugned privative clause.

WR Lederman and Lamer CJC interpreted the preamble to the Constitution Act 1867 as indicating that the Canadian constitution has incorporated (with necessary adaptations) certain general principles of the English constitution such as judicial independence. In their comparative inquiry into English constitutional law and theory, Lederman and Lamer CJC focused on the essential content of judicial independence and its underlying values, which was somehow elevated to a constitutional level. It was Lederman who first gave real impetus to this line of reasoning. While judicial independence in English law has a limited scope, its modern

Canadian version gradually developed to an extent that Canadian lawmakers would now be legally constrained by the requirements of judicial independence. As a result, the scope of judicial independence extends beyond the sections of the Constitution Acts 1867-1982 and the particular rules in the Acts concerning judicial independence are better interpreted as illustrations or exemplifications of the broader, 'non-conclusive', implied constitutional principle of judicial independence. My examination of the case law suggests that the courts have tended to follow the interpretation developed by Lederman and Lamer CJC.

Formal conceptions of the rule of law cannot explain these two instances whereas the case law invoked in support of a formal conception of the rule of law does not fit well with broader substantive conceptions of the rule of law. Moreover, I argued that the unsuccessful constitutional challenges of legislation on the basis of the rule of law further support the thin substantive conception and its notion of the core content of the rule of law. This latter group of cases conflicts with other more substantive conceptions of the rule of law.

The thin substantive conception makes better sense of the case law than the purely formal and substantive conceptions. While the legal effects of the rule of law under the thin substantive conception do depart from orthodox constitutional theory, it does so only to the extent that it seeks to protect the core elements of the rule of law from undue legislative or executive interference. Such a departure can be explained from a Hartian perspective of judicial change in the rule of recognition, according to which the rule of law would be treated as an additional limit on legislative authority. The thin substantive conception could also be defended in Dworkinian terms as part of the best constructive interpretation of the rule of law in the Canadian constitutional context. It better fits the Canadian law and practice than the formal or purely

substantive conceptions of the rule of law, and it better protects the core content of the rule of law than the formal conceptions. The thin substantive conception can check legislation on limited occasions, as confirmed by the Canadian courts, all of which suggest that that conception should not be a slippery slope towards a 'complete social philosophy' without any useful function.

One question vis-à-vis this notion of a core is whether the same argument could (or should) potentially extend to what could be considered as more substantive aspects of the rule of law, such as certain individual rights and freedoms, without falling into a complete social and political philosophy. The next chapter examines this possibility through the 'implied bill of rights' theory.

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CHAPTER 6 – THE IMPLIED BILL OF RIGHTS

1. Introduction

Save for a few specific exceptions, the Canadian Constitution Acts did not include any individual right for more than a century. During that period, one could agree with Peter Hogg that, like the UK, Australia and New Zealand, Canada's record of respect for civil liberties, 'while far from perfect, seem[ed] to be much better than that of most of the countries of the world'.[1] However, despite the generally good record, Canadians still experimented with different ways of strengthening the legal protections of individual rights and freedoms. Among them, the Canadian Bill of Rights 1960, a federal statute, serves as a reminder of the limitations of sub-constitutional methods of protection. Indeed, for a variety of reasons, including the fact that the 1960 Act only applied to federal laws and the judges' reluctance to enforce the rights recognised in it against conflicting legislation, there has been only one successful challenge in the Supreme Court of Canada of a federal law based on the 1960 Act.[2]

In the era prior to the adoption of the Canadian Charter of Rights and Freedoms 1982, another way of securing a measure of protection for individual rights and freedoms was to read them into the constitution, something that a number of Canadian judges attempted to do. This initiative became known as the 'implied bill of rights' theory. While the relevant cases mainly focused on freedom of expression, some of them would also cover rights ancillary to freedom of expression such as

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1 PW Hogg, *Constitutional Law of Canada* (5th edn Carswell, Scarborough 2007) 34-3 (loose-leaf edn).

2 See *R v Drybones* [1970] SCR 282.

freedom of conscience and religion, freedom of assembly and freedom of political association.[3] The notion of an implied bill of rights seems to be fraught with difficulties. Roderick Macdonald drew attention to the 'fundamental ambiguity of all techniques by which courts have asserted civil liberties values in the absence of a legislated Bill of Rights (constitutional or statutory).'[4] In a book on civil liberties in Canada, Douglas Schmeiser counted at least six different views – all the work of Canadian courts – 'about the constitutional position of basic liberties.'[5] Indeed, the case law can support more than one view depending on which cases or even which part of a case one decides to focus. For instance, Duff CJC's judgment in *Re Alberta Statutes* has been interpreted to be both the first implied bill of rights case and a confirmation of orthodox constitutional theory (whereby constitutional questions, whether or not in relation to freedom of expression, are ultimately resolved under the division of powers between the federal and provincial legislative authorities). The reasoning underlying the existence and content of the implied bill of rights theory can be captured in the following propositions: 1) the nature of the Canadian system of government as implied from the Constitution Act 1867, including its preamble, is one of Parliamentary democracy; 2) a functional system of Parliamentary democracy requires that its people have freedom of expression on all public matters; 3) therefore, lawmakers may not curtail the exercise of that freedom 'as substantially to interfere with the working of the parliamentary institutions of Canada'.[6]

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3 See *Re Alberta Statutes* [1938] SCR 100 conf'd *A-G for Alberta v A-G for Canada* [1939] AC 117 (PC); *Saumur v City of Quebec* [1953] 2 SCR 299; *Switzman v Elbling* [1957] SCR 285.

4 RA Macdonald, 'The New Zealand Bill of Rights Act: How Far Does It or Should It Stretch?' (The Law and Politics - Proceedings of the 1993 New Zealand Law Conference 1993) 94, 121.

5 DA Schmeiser, *Civil Liberties in Canada* (OUP, London 1964) 13, 16.

6 *Re Alberta Statutes* (n 3) 134 (Duff CJC). See also *Oil, Chemical and Atomic Workers, International Union, Local 16-601 v Imperial Oil Ltd* [1963] SCR 584, 594 (Abbott J).

In this chapter, I suggest that, notwithstanding the Charter and the 1960 Act, most Canadian jurists have generally come to agree that Canada has had, and would still have, an implied bill of rights capable of checking legislation. In this respect, it is submitted that the overall import of the implied bill of rights theory acts as an extension of my discussion of implied constitutional principles thus far in this thesis. This chapter will centre on freedom of expression as the principal focus of the implied bill of rights theory.

Like the rule of law, freedom of expression is a complex notion which can be conceived both as a political value and a legal principle. For the Canadian courts, freedom of expression has always been a 'deep-rooted', 'essential', 'fundamental' value of the Canadian system of government.[7] At the same time, the implied bill of rights theory has arguably translated the value into a legal principle, which gives rise to more difficulties. For instance, in the pre-1982 legal context, freedom of expression also shares with the rule of law the same difficulty of finding a 'constitutional home' or determining whether it had a constitutional home at all.

Some authors have argued that freedom of (political) expression is implied from Part IV of the 1867 Act, entitled 'Legislative Power', in particular s. 17 which declares that: '[t]here shall be One Parliament for Canada, consisting of the Queen, an Upper House styled the Senate, and the House of Commons.' The explanation was that, in the Canadian constitutional context, s. 17 implied 'that there shall be a freely elected Parliament for Canada, chosen after a free discussion of the party programmes

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7 See *Fraser v PSSRB* [1985] 2 SCR 455, 462-63; *Cromer v BC Teachers' Association* (1986) 29 DLR (4th) 641 (BCCA) 659; *Ontario (AG) v OPSEU* [1987] 2 SCR 2, 7 (Dickson CJC); *R v Keegstra* [1990] 3 SCR 697, 807, 809; A Lamer, 'The Rule of Law and Judicial Independence: Protecting Core Values in Time of Change' (1996) 45 UNBLJ 3.

in the press and on the hustings.'[8] In the next section, I will examine two more popular approaches to the implied bill of rights: one involves the division of powers while the other is based on the common law. A central aspect of these approaches has been the interpretation given to the preamble to the 1867 Act which refers to 'a Constitution similar in Principle to that of the United Kingdom'. In *Re Prov. Court Judges*, Lamer CJC, delivering the majority judgment of the Supreme Court, stated that one implication of the preamble was 'an appreciation of the interdependence between democratic governance and freedom of political speech.' [9] In *Fraser v PSSRB*, Dickson CJC, delivering the judgment of the Court, stated that freedom of speech 'is a principle of our common law constitution, inherited from the United Kingdom by virtue of the preamble to the *Constitution Act, 1867*.'[10] This connection between freedom of expression and the preamble has repeatedly been recognised in the case law and the literature.[11]

With the eventual enactment of the Charter which formally constitutionalised the content of the implied bill of rights, one could question the latter's relevance in

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8 FR Scott, *Civil Liberties & Canadian Federalism* (University of Toronto Press, Toronto 1959) 19. Also D Gibson, 'Constitutional Amendment and the Implied Bill of Rights' (1967) 12 McGill LJ 497, 498; D Gibson, 'Constitutional Vibes: Reflections on the Secession Reference and the Unwritten Constitution' (1999-2000) 11 NJCL 49, 51; IC Rand, 'Some Aspects of Canadian Constitutionalism' (1960) 38 CBR 135, 155; Schmeiser (n 5) 15, 83.

9 *Re Provincial Court Judges* [1997] 3 SCR 3 [102].

10 *Fraser* (n 7) 462-63.

11 See for instance *Re Alberta Statutes* (n 3) 133 (Duff CJ), 145 (Cannon J); *Switzman* (n 3) 306 (Rand J), 326-28 (Abbott J), 330 (Rand J), 354 (Kellock J), 372-76 (Locke J); *Oil, Chemical & Atomic Workers* (n 6) 599 (Abbott J, diss.); *RWDSU v Dolphin Delivery Ltd* [1986] 2 SCR 573 [15]; E Cline and MJ Finley, 'Whither the Implied Bill of Rights? - *A.G. Canada and Dupond* v. *The City of Montreal*' (1980-1981) 45 SaskLRev 137, 142; A Lajoie, 'The Implied Bill of Rights, the Charter and the Role of the Judiciary' (2001) 44 UNBLJ 337, 338-39; G LeDain, 'Sir Lyman Duff and the Constitution' (1974) 12 Osgoode Hall LJ 261, 319; RJ Sharpe and K Roach, *Brian Dickson: A Judge's Journey* (University of Toronto Press, Toronto; London 2003) 259; Schmeiser (n 5) 83; WS Tarnopolsky, *The Canadian Bill of Rights* (2d rev edn McClelland and Stewart, Toronto 1975) 30; W Tarnopolsky, 'Freedom of Expression in Canada' (1993) 19 CLB 1769, 1770; LE Weinrib, 'The Supreme Court of Canada in the Age of Rights: Constitutional Democracy, the Rule of Law and Fundamental Rights under Canada's Constitution' (2001) 80 CBR 699, 711-14.

today's legal landscape. Indeed, those cases involving freedom of expression arising after 1982 would be decided under s. 2(b) of the Charter which guarantees 'freedom of thought, belief, opinion and expression', thus pretty much extinguishing judicial opportunities to rule on the issue of the implied bill of rights. As a result, legal discussions of the implied bill of rights theory have to deal with a dearth of relevant case law. However, the broader implications of the implied bill of rights theory remain significant for our understanding of Canadian constitutional law today. If the implied bill of rights theory is accepted as part of Canadian law, it would further evidence the existence of constitutional principles not expressly stated in the Constitution Acts 1867-1982, which are nevertheless capable of checking legislative authority.

In Chapter 1, I noted that one difficulty with this last proposition is the fact that, at Confederation (1867), most Canadian jurists believed that the courts could not conduct judicial review of legislation on the basis of implied constitutional principles, including freedom of expression. In Chapters 2-4, I argued that this difficulty could be resolved or overcome through the ability of Canadian (and English) Parliamentary sovereignty to change and the notion of progressive interpretation. In Chapter 5, I argued that such a development could be justified by a thin substantive conception of the rule of law. Applying this analysis to freedom of expression, the reasoning would be that progressive interpretation, combined with the changing nature of Canadian Parliamentary sovereignty, can explain how that freedom would have developed from a purely 'residual' freedom under orthodox constitutional theory to an implied constitutional principle. Moreover, the claim that freedom of expression can be justified by the rule of law has some traction in the legal community as many judges and legal scholars have recognised a close relationship between the rule of law and

freedom of expression. For Denning LJ, freedom of expression 'can only be secured by the rule of law.'[12] Similarly, in *R v Home Secretary, ex p Simms*, Lord Steyn (Lord Browne-Wilkinson and Lord Hoffmann agreeing) stated that freedom of expression in a democracy is the most fundamental of all rights and without it an effective rule of law is impossible.[13] More generally, Lord Bingham opined that: '[t]he rule of law must surely require legal protection of fundamental human rights.'[14] Sir Ivor Jennings wrote that: '[a]bove all, the rule of law implies the notion of liberty.'[15] A number of judges and authors have acknowledged a similar connection between judicial independence and the safeguard of individual rights and freedoms. For instance, in *Re Application under s. 83.28 of the Criminal Code*, Iaccobucci and Arbour JJ, delivering the majority judgment of the Supreme Court, stated that:

> [a]n independent judiciary is absolutely necessary to "ensure that the power of the state is exercised in accordance with the rule of law and the provisions of our Constitution. In this capacity, courts act as a shield against unwarranted deprivations by the state of the rights and freedoms of individuals".[16]

In this vein, the cases and the literature dealing with the implied bill of rights theory should go some distance towards establishing (the existence of a consensus) that freedom of expression is a core aspect of the rule of law. However, the dearth of

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12 A Denning, 'The Spirit of the British Constitution' (1951) 29 CBR 1180, 1189.

13 *R v Home Secretary, ex p Simms* [2000] 2 AC 115 (HL) 125. See also Lord Steyn, 'Dynamic Interpretation Amidst and Orgy of Statutes' [2004] EHRLR 245, 255.

14 Lord Bingham, 'The Rule of Law' [2007] 66 CLJ 67, 77.

15 I Jennings, *The Law and the Constitution* (5th edn University of London Press, London 1959) 53.

16 *Re Application under S. 83.28 of the Criminal Code* [2004] 2 SCR 248 [80], citing *Ell v Alberta* [2003] 1 SCR 857 [22]. See also *R v Beauregard* [1986] 2 SCR 56 [26]; *Cooper v Canada (Human Rights Commission)* [1996] 3 SCR 854 [16] (Lamer CJC); *R (Alconbury Ltd) v Environment Secretary* [2003] 2 AC 295 (HL) [70] (Lord Hoffmann); *State of Mauritius v Khoyratty* [2007] 1 AC 80 (PC) [12], [36]; AL Goodhart, *English Law and the Moral Law* (2d edn Stevens, London 1955) 60; Hogg (n 1) 34-3; IR Kaufman, 'The Essence of Judicial Independence' (1980) 80 Colum L Rev 671, 671, 686-87; Tarnopolsky, *The Canadian Bill of Rights* 55; T Kuttner, 'Courts, Labour Tribunals and the Charter' (1990) 39 UNBLJ 85, 93-95.

relevant case law and literature partly caused by the enactment of s. 2(b) of the Charter may render such a demonstration more difficult. Consequently, my discussion in this chapter is limited to an argument of the view that most Canadian jurists support the implied bill of rights theory. As such, the present chapter can be slightly contrasted with the discussion in Chapter 5 which argues that protection from arbitrary decisions and judicial independence are actual grounds of judicial review of legislation.

Despite my justification for the general usefulness of comparative English constitutional law and theory for my thesis,[17] the comparative English common law analysis – outside the scope of the Human Rights Act 1998 – must be undertaken with care. Taking into account that the analysis concerns the nature and extent of individual rights and freedoms in Canada at a time when it had not yet adopted the Charter, my discussion in this chapter highlights two instances of influence of English law in the development of the implied bill of rights theory. One is through the residual conception of individual rights and freedoms (as part of orthodox constitutional theory). The other instance is through the view that the preamble to the 1867 Act somehow translated into the Canadian constitution England's tradition of civil liberties, in particular freedom of expression. These two instances would combine with other relevant rules and principles of the Canadian constitution to the development of a Canadian position on freedom of expression historically based on relevant English legal principles but, in the end, with its own differences from English constitutional law and theory, notably in its potential ability to check legislation.

[17] See Ch 1, '4. Considerations Related to the Use of Comparative Law'.

This chapter will focus on the two main competing views concerning the implied bill of rights (which are partly drawn from English constitutional law and theory), namely a residual conception of freedom of expression and the traditional importance of freedom of expression in a modern Parliamentary democracy. Under one view consistent with orthodox constitutional theory, any constitutional right must find its source in the sections of the 1867 Act as amended. Since the Act did not entrench any bill of rights, then there cannot be any implied bill of rights circumventing the Framers' decision not to adopt a bill of rights until 1982. This view has been somehow qualified by the important role of freedom of expression as a value, which seems to have influenced the judges in finding indirect ways of affording it some degree of protection based on other constitutional grounds, mainly the division of powers and the preamble to the 1867 Act. However, ultimately, the fact remains that, under the orthodox view, there was no constitutional right to freedom of expression. By contrast, the implied bill of rights theory postulates a set of individual rights and freedoms judicially implied from the relevant parts of the Canadian constitution. For most of Canadian history since Confederation (1867), the courts seemed to have favoured the orthodox view. However, after the enactment of the Charter, the courts eventually seemed to have accepted the implied bill of rights theory. This shift from the orthodox view to the implied bill of rights theory would culminate in *Ontario (AG) v OPSEU* where a majority of the Supreme Court was of the view that 'neither Parliament nor the provincial legislatures may enact legislation the effect of which would be to substantially interfere with' freedom of political expression.[18] The judicial position in *OPSEU* is strengthened by a significant series of judicial and extrajudicial statements in favour of the implied bill of rights theory.

[18] *OPSEU* (n 7) 57.

2. Freedom of Expression under Orthodox Constitutional Theory

As in the debate concerning the legal effect of the rule of law vis-à-vis legislation, the opponents of the implied bill of rights generally invoke the same two legal arguments: Parliamentary sovereignty and the Framers' intentions. Their position is well captured by Peter Hogg who wrote that:

> the central feature of the Constitution of the United Kingdom, and of its Parliament, was in 1867, and still is, parliamentary sovereignty: any of the civil liberties, including freedom of political speech, can be abolished by the Parliament at Westminster at any time. […] When the Canadian Constitution established parliamentary institutions on the Westminster model, the plausible assumption would be that they were intended to exercise powers of the same order as those of the Parliament at Westminster, and of course, those powers included the power to curtail civil liberties, including freedom of political speech.[19]

Under orthodox constitutional theory, the notion of freedom of expression can be conceptualised by reference to the Diceyan residual conception of individual freedoms and the division of powers. As a result, freedom of expression exists only to the extent that it has not been limited by law, so any law, provided that it does not contravene any section of the Constitution Act 1867 (mainly the division of powers) can limit that freedom. The discussion in this section serves to set out the nature and scope of freedom of expression under orthodox constitutional theory, and as a point of contrast with the development of the implied bill of rights theory. By shifting from the orthodox theory to the implied bill of rights theory, it is argued that freedom of expression is another example of implied constitutional principles used as a potential check on legislation.

[19] Hogg (n 1) 34-12.

2.1. The Residual Conception

The traditional nature of freedom of expression in English law is generally associated with AV Dicey and has often been characterised as a 'negative' or 'residual' freedom. Dicey wrote that 'the phrases "freedom of discussion" or "liberty of the press" are rarely found in any part of the statute-book nor among the maxims of the common law.'[20] They were the 'mere application of the general principle, that no man is punishable except for a distinct breach of the law.'[21] Sir Ivor Jennings bluntly observed that '[t]here is no more a "right of free speech" than there is a "right to tie up my shoe-lace;" in this sense, that right 'is a liberty, a freedom from restriction.'[22] Accordingly, freedom of expression in traditional English law is not a 'positive' right in the sense of a right affirmed by legislation or the courts; freedom of expression only exists insofar as it has 'not been abrogated or restricted by statute or rules of common law[.][23]

Over the years, Dicey's residual conception of individual freedoms has remained influential in English law. In *Wheeler v Leicester CC*, Browne-Wilkinson LJ wrote that:

> [b]asic constitutional rights in this country such as freedom of the person and freedom of speech are based not on any express provision conferring such a right but on freedom of an individual to do what he will save to the extent that he is prevented from so doing by the law. […] The right to freedom of speech depends on the fact that no one has the right to stop the individual expressing his own views, save to the extent that those views are libellous or seditious. These

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20 AV Dicey and ECS Wade, *Introduction to the Study of the Law of the Constitution* (10th edn Macmillan, London 1959) 239.

21 ibid 248.

22 Jennings (n 15) 262.

23 A Boyle, 'Freedom of Expression as a Public Interest in English Law' [1982] PL 574, 574.

> fundamental freedoms therefore are not positive rights but an immunity from interference by others.[24]

In *A-G v Observer Ltd*, Lord Goff stated that, 'we in this country (where everybody is free to do anything, subject only to the provisions of the law) proceed rather upon an assumption of freedom of speech, and turn to our law to discover the established exceptions to it.'[25] The residual conception is also frequently acknowledged in the literature.[26]

While the purpose of my comparative inquiry in this section is limited to highlighting the English origin of the residual conception of Canadian freedom of expression, it is still worth mentioning that, during the last few decades of the 20th century, the English legal system might have entered a transitional period between the residual conception and the recognition of freedom of expression as a constitutional right.[27] One of the major cases in this period dealing with freedom of expression is *Derbyshire CC v Times Newspapers Ltd*. Delivering the judgment of the House of Lords, Lord Keith interpreted the common law so as to deny Derbyshire City Council the right to sue the Times Newspapers for defamation after it published two articles questioning the propriety of investments made by the City Council. Throughout the judgment, Lord Keith's main concern was the protection of freedom of expression. He stated: 'It is of the highest public importance that a democratically elected

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24 *Wheeler v Leicester CC* [1985] AC 1054 (CA) 1065.

25 *A-G v Observer Ltd* [1990] 1 AC 109 (HL) 283.

26 See for instance TRS Allan, 'Constitutional Rights and Common Law' (1991) 11 OJLS 453, 453; E Barendt, 'Freedom of Expression in the United Kingdom under the Human Rights Act 1998' (2009) 84 Ind LJ 851, 852-53; EM Barendt, *Freedom of Speech* (2nd edn OUP, Oxford 2005) 40; E Barendt, 'Libel and Freedom of Speech in English Law' [1993] PL 449, 459; Boyle (n 23) 574-75; Lord Browne-Wilkinson, 'The Infiltration of a Bill of Rights' [1992] PL 397, 397, 404; R Clayton and H Tomlinson, *The Law of Human Rights* (2nd edn OUP, Oxford 2009) 28; Lord Irvine of Lairg, 'The Development of Human Rights in Britain under an Incorporated Convention on Human Rights' [1998] PL 221, 224; L Wolf-Phillips, 'A Long Look at the British Constitution' (1984) 37 ParlAff 385, 395.

27 See Barendt, 'Libel and Freedom of Speech in English Law' (n 26) 461.

governmental body, or indeed any governmental body, should be open to uninhibited public criticism. The threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech.'[28] Of course, to the extent that the discussion of freedom of expression in the English context involves legal developments considered to have occurred after 1982 when the Canadian Charter of Rights and Freedoms was enacted, one could reasonably argue that it has no direct bearing on the implied bill of rights theory since that theory would have been influenced by English law. As a result, the only relevant source of influence or inspiration for the implied bill of rights theory would be the pre-1982 English case law and materials and perhaps some of the later English authorities on the subject to the extent that they claim to apply or refer to the 'ancient' common law and tradition.

In his *Report on the Royal Commission into Civil Rights*, McRuer CJ defined the notion of residual freedoms in the Canadian context as follows:

> The residual and unspecified character of liberties or freedoms in relation to specific legal obligations is critical when we come to consider the relation of public legislative power to liberties or freedoms. Freedom of expression, for example, […] is the residual area of natural liberty remaining after the makers of the common law and the statute law have encroached upon it by creating inconsistent duties with respect to the exercise of this freedom.[29]

Luc Tremblay described the residual conception along similar lines:

> the orthodox doctrine of parliamentary sovereignty postulated that, beyond the written constitution and a few unwritten antecedent rules, all constitutional norms could be altered by the ordinary legislative process. To that extent, the Canadian constitution was said to be flexible, and insofar as it dealt with certain fundamental rights beyond those expressly laid down in the written constitution, these rights could

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28 *Derbyshire CC v Times Newspapers Ltd* [1993] AC 534 (HL) 547.

29 JC McRuer, *Royal Commission Inquiry into Civil Rights* (1969), vol 4, 1495-96.

> be characterized, in fact, as a residual area of freedom delimited by parliamentary legislation.[30]

Influences of the residual conception can also be found in the Canadian case law. For instance, in *Re Alberta Statutes*, Duff CJC (Davis J concurring) observed that:

> The right of public discussion is, of course, subject to legal restrictions; those based upon considerations of decency and public order, and others conceived for the protection of various private and public interests with which, for example, the laws of defamation and sedition are concerned. In a word, freedom of discussion means, to quote the words of Lord Wright in *James v. Commonwealth* "freedom governed by law."[31]

Duff CJC's adoption of a residual conception appears more clearly when Lord Wright's statement is cited in full: '"Free" in itself is vague and indeterminate. ... Free speech does not mean free speech; it means speech hedged in by the laws against defamation, blasphemy, sedition and so forth; it means freedom governed by law.'[32] In *AG Can v Law Society of BC*, the Court cited Duff CJC's and Lord Wright's statements in support of the proposition that: '[w]here the right [to freedom of expression] is not entrenched beyond the reach of Parliament or Legislature, as has been done for example in the First Amendment to the United States Constitution, the right is subject to curtailment by valid statute law.'[33] Over time, Duff CJC's quote has been regularly cited with approval in a number of cases.[34] In *Robertson and Rosetanni v The Queen*, Ritchie J, delivering the majority judgment of the Court, cited Duff CJC's quote as a confirmation of the general proposition:

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30 L Tremblay, *The Rule of Law, Justice and Interpretation* (McGill-Queen's University Press, Montreal 1997) 131.

31 *Re Alberta Statutes* (n 3) 133.

32 *James v Commonwealth of Australia* [1936] AC 578 (PC) 627.

33 *AG Can v Law Society of BC* [1982] 2 SCR 307, 363.

34 See also for instance *Saumur* (n 3) 330-32 (Rand J), 354 (Kellock J), 372-75 (Locke J); *Switzman* (n 3) 326-27 (Abbott J); *McKay v The Queen* [1965] SCR 798, 815-816; *Gay Alliance toward Equality v Vancouver Sun* [1979] 2 SCR 435, 464, 468-69 (Dickson and Estey JJ, diss); *Manitoba (AG) v Groupe Quebecor Inc* (1987) 45 DLR (4th) 80 (Man CA); *Edmonton Journal v. Alberta (AG)* [1989] 2 SCR 1326.

> that the human rights and fundamental freedoms recognized by the Courts of Canada before the enactment of the Canadian Bill of Rights and guaranteed by that statute were the rights and freedoms of men living together in an organized society subject to a rational, developed and civilized system of law which imposed limitations on the absolute liberty of the individual.[35]

Moreover, proponents of orthodox constitutional theory point to *Dupond v City of Montreal* as authority for the rejection of the implied bill of rights. In *Dupond*, the appellant challenged the constitutional validity of a municipal by-law and ordinance which prohibited any public gathering on public property for a period of 30 days. One of the appellant's arguments was that the by-law and the ordinance were contrary to 'the fundamental freedoms of speech, of assembly and association, of the press and of religion which were inherited from the UK and made part of the Constitution by the preamble' to the 1867 Act. Dismissing the argument, Beetz J, for the majority of the Supreme Court, stated that '[n]one of the freedoms referred to is so enshrined in the Constitution as to be above the reach of competent legislation.'[36] He opined that these freedoms were necessarily ancillary to a matter coming within either federal or provincial legislative powers.

In sum, the residual conception of freedom of expression can be a helpful way of portraying the position held by the proponents of the orthodox theory. As Lorraine Weinrib wrote, for them, '[w]hat would now be considered fundamental rights were protected only to the extent that they were located in the constitutional document.'[37] This position directly follows from orthodox constitutional theory whereby judicial review must be based exclusively on the words of the Constitution.[38] The residual

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35 *Robertson and Rosetanni v The Queen* [1963] SCR 651, 655.

36 *Dupond v City of Montreal* [1978] 2 SCR 770, 796.

37 Weinrib (n 11) 711.

38 See Ch 1, '2. Thesis Overview'.

conception also seems compatible with pre-Charter case law. Indeed, before 1982, no majority of the Supreme Court approved the implied bill of rights theory. However, in *Re Alberta Statutes*, *Saumur v City of Quebec* and *Switzman v Elbling*, the Supreme Court still ended up striking down the impugned statutes and by-laws claimed to violate freedom of expression. This result was formally reached on fully recognised constitutional grounds, namely the division of powers, although the underlying justification for these declarations of unconstitutionality discloses the important role of freedom of expression in constitutional interpretation. The next part examines how freedom of expression influenced the judicial analysis under the division of powers.

2.2. Division of Powers

The division of powers presents another way of interpreting pre-Charter freedom of expression in accordance with orthodox constitutional theory. Bora Laskin (later Chief Justice of Canada) explained this approach as follows:

> An assessment of the civil liberty classifications in terms of legislative power leads to the conviction that, by and large, economic liberty and liberty in the human rights or egalitarian sense are, respectively, subject either to federal or to provincial legislative power or to both concurrently, according to whether the industries, undertakings or activities involved or with which these liberties are connected, are themselves within the legislative power of Parliament or a provincial legislature.[39]

In the pre-Charter era, most judges seemed to agree with Laskin. In *Re Alberta Statutes*, the Supreme Court examined the constitutionality of the Albertan Social Credit Act along with three bills forming part of the Act's economic scheme. The Act set up a new financial system with the predominant function of providing government-controlled credit which was to circulate as a medium of exchange and payment. One of the three bills, Bill 9, required newspapers in the province to publish

[39] B Laskin, 'An Inquiry into the Diefenbaker Bill of Rights' (1959) 37 CBR 76, 104.

any governmental statement upon government request. The Court struck down the Act on the basis that it was an attempt to regulate and control banks and banking, which was an exclusive head of federal jurisdiction. As an *ancillary* measure to the general scheme, Bill 9 was also held to be unconstitutional. Duff CJC explained that the authority to legislate for the protection of the right to free public discussion of public affairs:

> rests upon the principle that the powers requisite for the protection of the constitution itself arise by necessary implication from *The British North America Act* as a whole[;] and since the subject-matter in relation to which the power is exercised is not exclusively a provincial matter, it is necessarily vested in Parliament.[40]

Cannon J more specifically declared that Bill 9 was unconstitutional on the basis that it was in relation to criminal law, a class of subject exclusively reserved to Parliament pursuant to s. 91(27) of the 1867 Act:

> The mandatory and prohibitory provisions of the Press Bill [Bill 9] are, in my opinion, *ultra vires* of the provincial legislature. […] The federal parliament is the sole authority to curtail, if deemed expedient and in the public interest, the freedom of the press in discussing public affairs and the equal rights in that respect of all citizens throughout the Dominion. These subjects were matters of criminal law before Confederation, have been recognized by Parliament as criminal matters and have been expressly dealt with by the criminal code.[41]

In *Switzman*, a tenant challenged the constitutionality of a provincial statute which prohibited the printing, publication and distribution of any writings propagating communism or bolshevism. The statute also authorised the A-G to order the closing of any house where such propaganda was made. Any person found to be in infringement of the prohibition was liable to imprisonment. Rand J (Kellock J agreeing) stated that 'freedom of discussion in Canada, as a subject-matter of

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40 *Re Alberta Statutes* (n 3) 133-34.

41 ibid 146.

legislation, has a unity of interest and significance extending equally to every part of the Dominion. With such dimensions it is *ipso facto* excluded from head 16 as a local matter.'[42] (s. 92(16) of the 1867 Act confers on provincial legislatures jurisdiction over 'generally all matters of a merely local or private nature in the province.') Similarly, Abbott J stated that the power of a provincial legislature to limit the right to freedom of political expression 'is restricted to what may be necessary to protect purely private rights'.[43] Since the impugned statute did not fall within that category, Abbott J held that it was invalid. In the end, the Court struck down the statute, with the majority of the Justices holding that it was in its nature a criminal law, an exclusive federal legislative power.[44]

In *Saumur*, the appellant successfully challenged the validity or application of a municipal by-law forbidding leafleting without the prior written authorisation of the Chief of Police. Four Justices separately concluded that the impugned by-law was in relation to free speech or free exercise of religion and therefore not within provincial legislative competence under the division of powers.[45] In other words, the impugned statutes and regulations were struck down not on the basis of a contravention of a constitutional principle of freedom of expression, but because they were beyond the provincial legislatures' authority under the division of powers. It follows from this reasoning that the principle of freedom of expression would only indirectly constrain provincial legislative authority.

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42 *Switzman* (n 3) 306.

43 ibid 328.

44 ibid 288 (Kerwin CJC), 314, 316 (Locke and Nolan JJ), 316-17 (Cartwright J), 318-19, 322-24 (Fauteux J). See also JN Lyon, 'The Central Fallacy of Canadian Constitutional Law' (1976) 22 McGill LJ 40, 50-53; Scott (n 8) 24.

45 *Saumur* (n 3) (Rand, Kellock, Estey and Locke JJ).

One may reasonably ask on what basis interference with freedom of expression is beyond the competence of the provincial legislatures. According to these same cases, the Justices' explanations bring us to consider the role and weight of freedom of expression as a value. In *Re Alberta Statutes*, Duff CJC opined that the 1867 Act along with its preamble manifestly contemplate democratically elected legislative bodies.[46] For Parliamentary democracy to exist and work efficaciously, freedom of expression was necessary. Parliamentary institutions 'derive their efficacy from the free public discussion of affairs,' which includes 'the freest and fullest analysis and examination from every point of view of political proposals.'[47] Cannon J was even more categorical:

> Under the British system, which is ours, no political party can erect a prohibitory barrier to prevent the electors from getting information concerning the policy of the government. Freedom of discussion is essential to enlighten public opinion in a democratic State; it cannot be curtailed without affecting the right of the people to be informed through sources independent of the government concerning matters of public interest. There must be an untrammelled publication of the news and political opinions of the political parties contending for ascendancy.[48]

In *Switzman*, Abbott J also characterised the right of free expression on public matters as 'essential to the working of a parliamentary democracy such as ours'[49] and then cited with approval Duff CJC's analysis of the underlying values of freedom of (political) expression in *Re Alberta Statutes*. For Rand J, the preamble's reference to the English constitution referred to the 'political theory' embodied in the 1867 Act, which is that of Parliamentary government from which derives freedom of

46 *Re Alberta Statutes* (n 3) 133.

47 ibid 133.

48 ibid 145.

49 *Switzman* (n 3) 326.

expression.[50] These judges' analysis is very similar to Ronald Dworkin's view of constitutional interpretation and adjudication. Dworkin wrote that: '[a]ny justification for one construction […] must be found in political theory. It must be found, for example, in an argument that one conception fits better with the most compelling theory of representative government.'[51] More generally, Nicholas Barber opined that '[w]ritings about Constitutions are always undertaken in the service of political theory.'[52]

The extended judicial references to the values associated with freedom of expression suggest that they have informed the Canadian judges' decisions (in the early implied bill of rights cases) to hold that undue interference with freedom of political expression is outside the boundaries of provincial legislatures. TRS Allan conveniently summed up the analysis under the common law in a way which can also describe the Canadian judicial attitudes under orthodox constitutional theory:

> My right to freedom of speech is the outcome, first, of my undifferentiated residual liberty whose restriction needs lawful authority and thereby moral (albeit utilitarian) justification-and secondly, of the court's attachment to the value of free speech, which is anti-utilitarian in character (in Dworkin's sense) and is of critical importance in determining the scope and effect of purported restrictions on my liberty.[53]

By incorporating the value of freedom of expression in its analysis under the division of powers, the Supreme Court seemed to have used it as a guiding principle in deciding competing claims concerning legislative competence. Between two interpretations under the division of powers, one allowing a provincial law or regulation interfering with freedom of expression to withstand scrutiny and the other

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50 ibid 306.

51 *MP* 55-56.

52 NW Barber, 'Prelude to the Separation of Powers' [2001] CLJ 59, 63.

53 Allan (n 26) 457-58.

resulting in the invalidity of that law or by-law, the Court chose the latter, thus seemingly considering that the importance or weight of freedom of expression in those cases directed such an outcome.[54] As a result, one could say that provincial laws or regulations cannot unduly offend the principle of freedom of expression implied from the division of powers and from the nature of the Canadian constitution. One difficulty with this interpretation is that it would only be applicable against *provincial* laws and regulations. In fact, it has been correctly observed that all the implied bill of rights cases concerned challenges to provincial laws or regulations. By creating a differential treatment between federal and provincial legislation affecting freedom of expression, the reliance on the importance of freedom of expression in the judicial analysis under the division of powers seems to suffer from a lack of coherence. If provincial legislatures cannot impermissibly interfere with freedom of expression because it would threaten Parliamentary democracy as contemplated by the 1867 Act, then should that not be equally true for Parliament (given that both Parliament and the provincial legislatures have been established by the 1867 Act as amended)? [55]

In the pre-1982 context, we have thus reached the limits of orthodox constitutional theory. Despite the undeniable value of freedom of expression and its indispensable importance in a Parliamentary democracy, it ultimately subsists in the absence of a statutory or common law restriction. Some commentators, such as

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54 See *Re Alberta Statutes* 133-35 (n 3) (Duff CJC), 144-46 (Cannon J); *Saumur* (n 3) 330 (Rand J), 354 (Kellock J), 372-75, 379 (Locke J); *Switzman* (n 3) 305-06 (Rand J), 325-28 (Abbott J); *Oil, Chemical & Atomic Workers* (n 6) (Abbott J, diss).

55 J Beetz, 'Le contrôle juridictionnel du pouvoir législatif et les droits de L'homme dans la Constitution du Canada' (1958) 18 R du B 361, 366; Cline and Finley (n 11) 139, 141; Gibson, 'Constitutional Amendment and the Implied Bill of Rights' (n 8) 497, Laskin (n 39) 101-02, 124; E McWhinney, 'The New Canadian Bill of Rights' (1961) 10 AmJCompL 87, 90.

FR Scott, have criticised the distinction between a positive and a negative right embodied in the residual conception:

> There is no freedom where there is no right. It may be true that freedom of speech involves the absence of restraint upon the person enjoying the freedom, but it must also involve a legal restraint upon all persons who would interfere with that freedom, and these legal restraints come either from the common law or from positive legislation.[56]

In Hohfeldian terms, Scott's point could be interpreted as a criticism of the limited weight of freedom of expression in Canadian law because it was not considered a right which would necessarily entail a correlative duty (to refrain from infringing on that right).[57] In the absence of such duty or, in Scott's terms, legal restraint, freedom of expression is more vulnerable to interference.

If none of the sections of the 1867 Act (and its pre-1982 amendments) prevents Parliament from legislating in contravention of freedom of expression, an alternative source and/or mechanism capable in theory of protecting expression from undue federal legislative interference would be the common law. The next section suggests that the development of the implied bill of rights theory would have occurred through the common law.

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56 FR Scott, 'Dominion Jurisdiction over Human Rights and Fundamental Freedoms' (1949) 27 CBR 497, 506-07. See also M MacGuigan, 'Civil Liberties in the Canadian Federation' (1966) 16 UNBLJ 1, 9 (arguing that positive legislation may sometimes be necessary to guarantee negative rights).

57 See W Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913-1914) 23 Yale LJ 16; W Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1916-1917) 26 Yale LJ 710.

3. A Common Law-Based Account of the Implied Bill of Rights Theory

Given the claimed connection between English law and the implied bill of rights theory, the purpose of this section is to examine how the English common law may have partially influenced or inspired the development of the implied bill of rights theory. Although the role of the common law was sometimes uncertain, the cases and literature cited in this section underscore the courts' long-standing concern over protection of certain fundamental rights, such as the right to freedom of expression. More specifically, the courts seemed to have played a role in identifying which individual freedoms deserved greater protection and how far the protection should extend within the current boundaries of Parliamentary sovereignty (that is, short of striking down or setting aside an impugned statute on constitutional grounds like the Canadian courts can do). I suggest that it is that same spirit which permeated the development of the implied bill of rights.

The idea of common law-based individual rights and freedoms is not a new one. In their discussion of the implications of Parliamentary sovereignty for the courts, Sir David Keir and FH Lawson explained that 'the canons of interpretation followed by the judges embody in an attenuated form the ancient doctrine […] that there was a sense in which the common law was fundamental.'[58] They explained that '[t]he judges seem to have in their minds an ideal constitution, comprising those fundamental rules of the common law which seem essential to the liberties of the subject and the proper government of the country.'[59] Keir and Lawson added that these fundamental rules were the same ones which were found in the American

[58] DL Keir and FH Lawson, *Cases in Constitutional Law* (5th edn OUP, Oxford 1967) 9.

[59] ibid 11.

Constitution, the French Déclaration des droits de l'homme and the Canadian Bill of Rights 1960.[60] According to Lord Wilberforce, 'a portion of what the citizen would consider his constitutional rights and liberties has come from the courts of common law, working out, upon the basis of principle and tradition, from case to case, what everyone now takes for granted.'[61] More recently, Sir Jack Beatson and others seemed to be of the same view when they opined that 'many of the rights that are to be found in modern declarations of rights were long ago protected by the common law.'[62]

Subject to my observations in the previous section concerning the usefulness of post-1982 developments in English law, it is worth mentioning that this claim of the courts' ancient role as the guardian of fundamental rights and freedoms has also been acknowledged in some recent cases such as *R v Shayler* and *Reynolds v Times Newspapers Ltd* where the House of Lords recognised a 'basic', 'fundamental' common law right to freedom of expression 'for many years', 'long before the emergence of human rights conventions'[63] (but subject to Parliamentary sovereignty). Within the realm of the common law, the courts sometimes gave more weight to claims of freedom of expression against competing principles and interests. One example mentioned in the previous section is *Derbyshire CC v Times Newspapers Ltd*. However, as the courts often observed, these 'large rights, basic to

60 ibid 11.

61 Lord Wilberforce, 'The Need for a Constitution in the United Kingdom' (1979) 14 IsLR 269, 271.

62 J Beatson and others, *Human Rights: Judicial Protection in the United Kingdom* (Sweet & Maxwell, London 2008) 4. See also Sir John Baker, 'Human Rights and the Rule of Law in Renaissance England' (2004) 2 NwJInt'l HR 1, 16.

63 *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 (HL) 193, 200, 203, 207, 234; *R v Shayler* [2003] 1 AC 247 (HL) [21]. See *A-G v Observer Ltd* [1990] 1 AC 109 (CA) 178; *Derbyshire* (n 28) 550-51; *R v Lord Chancellor, ex p Witham* [1998] QB 575 (QB) 585; *Simms* (n 13) 126; *International Transport Roth Gmbh v Home Secretary* [2003] QB 728 (CA) [71] (Laws LJ, diss).

human dignity and therefore of great weight in any balance,' cannot, even in a democratic country, be absolute.[64] Sometimes, when striking a balance, courts may conclude that freedom of expression must yield to a competing principle or interest, such as national security and protection of individual reputation.[65]

Traditionally, courts have also played a role in determining the scope of potential statutory interference with freedom of expression. Returning to Keir and Lawson's 'ancient doctrine' of fundamental common law, one of its articulations was in the form of a general presumption of statutory interpretation leaving 'the common law rights of the subject intact. To this extent the reason of the common law still prevails'.[66] These rights 'cannot be repealed but by direct and unequivocal enactment. In the absence of express words or necessary intendment, statutes will be applied subject to them.'[67] One more recent illustration of this presumption is in *R v Home Secretary, ex p Simms* where Lord Steyn (Lord Browne-Wilkinson and Lord Hoffmann agreeing) ruled that a Home Office Standing Order unlawfully and unjustifiably curtailed prisoners' right to freedom of expression.[68] *Simms* is part of a later line of cases where the courts applied the interpretative presumption against statutory interference with 'fundamental' or 'basic' common law rights,[69] thus apparently confirming or reviving the common law-based theory advanced by Keir and Lawson. Murray Hunt argued that the courts have been exhibiting 'a judicial willingness to develop the common law in a way which provides recognition for and

64 *Home Office v Harman* [1983] 1 AC 280 (HL) 311-12. Also *A-G v Guardian Newspapers Ltd* [1987] 1 WLR 1248 (HL) 1288; *R. v. Home Secretary, ex p. Brind* [1991] 1 AC 696 (HL) 748-50.

65 See *Brind* (n 64) 748-49 (Lord Bridge); *Reynolds* (n 63).

66 Keir and Lawson (n 58) 9.

67 ibid 11.

68 *Simms* (n 13).

69 See for instance *Harman* (n 64); *R v Home Secretary, ex p Leech* [1994] QB 198 (CA); *R v Home Secretary, ex p Pierson* [1998] AC 539 (HL); *Witham* (n 63).

greater protection of fundamental rights',[70] but, again, subject to Parliamentary sovereignty.

Some constitutional scholars such as Mark Elliott and Keith Ewing expressed scepticism about the actual ability of judges to protect human rights.[71] Ewing attributed what he believed was a poor judicial record in this area to a generally deferential attitude on the part of the judiciary vis-à-vis the decision-maker, especially in times of crisis, and a profound respect for the 'continuing sovereignty of Parliament'. However, both of them suggested that the courts had the authority to adequately protect human rights. Indeed, in Ewing's view, 'it is incumbent on the courts to be more assertive in the protection of the vulnerable individual.'[72] Elliott observed that, in certain limited fields such as access to the courts and freedom of expression, 'the judges have identified common law rights which they have sought to safeguard against legislative and administrative encroachment'.[73]

Section 2 discussed the historical influence of the English constitution on the nature and scope of freedom of expression under pre-Charter Canadian law. In the same vein, the development of the implied bill of rights through the common law has also drawn some degree of inspiration from the English tradition of civil liberties. As in England, Canadian jurists in the pre-Charter era were familiar with the role of the common law vis-à-vis the protection of individual rights and freedoms. In a 1938 article, John Willis criticised the judicial use of presumptions of legislative intent to this effect:

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70 M Hunt, *Using Human Rights Law in English Courts* (Hart, Oxford 1997) 186-87, 205.

71 M Elliott, *The Constitutional Foundations of Judicial Review* (Hart, Oxford 2001) 198-99, 206, 217; KD Ewing, 'The Futility of the Human Rights Act' [2004] PL 829, 852; K Ewing and J-C Tham, 'The Continuing Futility of the Human Rights Act' [2008] PL 668.

72 Ewing, 'The Futility of the HRA' (n 71) 852.

73 Elliott (n 71) 198.

> Only one conclusion can be drawn from the present judicial addiction to the ancient presumptions and that is that the presumptions have no longer anything to do with the intent of the legislature; they are a means of controlling that intent. Together they form a sort of common law 'Bill of Rights'. English and Canadian judges have no power to declare Acts unconstitutional merely because they depart from the good old ways of thought; they can, however, use the presumptions to mould legislative innovation into some accord with the old notions. The presumptions are in short 'an ideal constitution' for England and Canada.[74]

Willis's reference to 'an ideal constitution' was a citation taken from Keir and Lawson's works. Noel Lyon also believed that Keir and Lawson's common law analysis could fit the Canadian constitutional context, as suggested by their reference to the 1960 Act. In Lyon's view, 'both the use of the judicial power of interpretation to protect fundamental liberties and the use of statutes to enact rules of construction are features of the model on which the Canadian Constitution is based.'[75]

One could think that the Canadian courts' interpretation of the 1867 Act was partly inspired by an approach similar to that which underlay Keir and Lawson's 'fundamental common law' notion of the 'ideal constitution'. This seems to be the implication from Dickson CJC's statement in *Fraser v PSSRB* that freedom of expression 'is a principle of our common law constitution, inherited from the United Kingdom by virtue of the preamble' to the 1867 Act. Other judges also opined that '[t]he common law right to freedom of expression is a fundamental freedom which takes its origin not from the Charter but from decisions of the Supreme Court of Canada which recognized that it was a fundamental right deserving of protection.'[76] In other words, Canadian judges would have referred to the value of freedom of

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74 J Willis, 'Statute Interpretation in a Nutshell' (1938) 16 CBR 1, 17.

75 Lyon (n 44) 60.

76 *OK Economy Stores v RWDSU, Local 454* (1994) 118 DLR (4th) 345 (Sask CA) 378-79 (Vancise JA). See also *R v Kopyto* (1987) 62 OR (2d) 449 (CA) (Dubin JA).

expression in the English system of government as one aspect of a novel theory of freedom of expression aimed at supplementing the absence of a formal bill of rights.

According to FR Scott, the implied bill of rights theory responded to 'the need to formulate civil liberties in Canada, not as a comprehensive and broad declaration of rights but as specific solutions to practical problems.'[77] Scott's proposition seems to closely adhere to the traditional (English) common law approach. As Denning LJ once stated (extrajudicially), 'we have worked out our constitution on purely practical grounds based on our own experience and on our own needs.'[78] Similarly, Jennings also noted that '[o]ur laws and institutions have grown together; and what had to be produced was not a theoretical solution but a *modus vivendi*, a practical man's answer to current problems.'[79] Accordingly, the implied bill of rights theory would be a judicial construct combining the longstanding importance of freedom of expression recognised by the common law and the relevant aspects of the Canadian constitution. This use of freedom of expression in the English context seems to be similar to the use of the English principle of the rule of law (and the principles deriving from the rule of law) which I described in Chapter 5. The comparative argument served to help establish the existence of a constitutional principle of freedom of expression lying partly beyond the boundaries of the written Constitution, and its special weight in the English constitution helped justify going beyond the constraints of orthodox Canadian Parliamentary sovereignty and recognise that that principle can have priority over conflicting legislation. In the next section, I will seek to verify such a common law-based approach to the development of the implied bill of rights theory.

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77 Scott, *Civil Liberties & Canadian Federalism* (n 8) 16.

78 Denning LJ, 'The Independence of the Judges' (Holdsworth Club of the University of Birmingham 1950) 2.

79 Jennings (n 15) 157

4. Confirmation of the Implied Bill of Rights Theory

In the pre-1982 case law, only one Justice of the Supreme Court Canada expressly endorsed the implied bill of rights theory: in *Switzman v Elbling*, Abbott J opined that 'the Canadian constitution being declared to be similar in principle to that of the United Kingdom, I am also of the opinion that as our constitutional Act now stands, Parliament itself could not abrogate this right of discussion and debate.'[80] Ivan Rand (a former Justice the Supreme Court) also expressed his agreement with the implied bill of rights theory:

> it was clear that the provinces have no jurisdiction to regulate free speech as such for the reason that that subject matter is not within any head of Section 92.
> On the other hand, in view of the presence in the preamble of the reference to the constitutionalism of Great Britain, coupled with the legislative structure for both province and Dominion, that is, parliamentary government, and taking into account also the specific allocation to the Dominion Parliament of the exclusive jurisdiction over crime and the residual powers, *although there is necessarily a restriction upon interference with free speech including the press*, as with [the First Amendment of the US Bill of Rights], the problem is in the balancing considerations, the delimitation of that restriction... *But the restriction as a necessary corollary of parliamentary government will remain until that institution is abolished.*[81]

With s. 2 of the Canadian Charter of Rights and Freedoms 1982 constitutionalising the individual freedoms associated with the implied bill of rights, one could then have expected that the implied bill of rights theory would have been quickly forgotten as constitutional challenges formerly argued on that basis would now be dealt with directly under the Charter. However, it is interestingly after the

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80 *Switzman* (n 3) 328. See also *Oil, Chemical & Atomic Workers* (n 6) 600 (Abbott J, diss).

81 Letter of IC Rand, 11 Dec. 1962 cited in JA Barron, 'Constitutional Status of Freedom of Speech and Press in Canada: The History of a Quiet Revolution' (1963-1964) 58 Nw U L Rev 73, 100-01.

adoption of the Charter that the best authorities for the implied bill of rights theory can be found.

The strongest authority in favour of the implied bill of rights theory is *Ontario (AG) v OPSEU*, which was summarised in Chapter 2 as one illustration of judicial departure from orthodox constitutional theory. Delivering the majority judgment, Beetz J cited with approval the early implied bill of rights cases before stating (in a dictum) that, quite apart from Charter considerations, 'neither Parliament nor the provincial legislatures may enact legislation the effect of which would be to substantially interfere with the operation of this basic constitutional structure [which contemplates the existence of the right to freedom of political expression].'[82] However, he held in the end that the impugned statute, which prohibited civil servants from getting involved in political activities, did not unduly offend freedom of expression.

Following *OPSEU*, some appellate judges also recognised the constitutional status of freedom of expression prior to the adoption of the Charter.[83] In one case, Vancise JA opined that '[t]here is no reason to distinguish the common law right to freedom of expression which was given constitutional status by the Supreme Court of Canada from the right protected by the Charter.'[84]

While *OPSEU* is the most direct Supreme Court authority in favour of the implied bill of rights theory, all other Supreme Court cases since 1982 which have referred to that theory have favourably referred to it (except *AG Can v Law Society of BC*, decided in the months following the adoption of the Charter). In

82 *OPSEU* (n 7) 57 (my emphasis).

83 See for instance *Kopyto* (n 76) 502, 504, 518 (Dubin JA); *OK Economy Stores* (n 76) 379 (Vancise JA).

84 *OK Economy Stores* (n 76) 380.

RWDSU v Dolphin Delivery Ltd and *R v Keegstra*, the Court was asked if freedom of expression extended respectively to secondary picketing and hate propaganda. Both cases were decided under the Charter but, each time, the Court still referred to the implied bill of rights and its underlying values. In *Dolphin Delivery*, McIntyre J, delivering the majority judgment of the Court, declared that, '[p]rior to the adoption of the Charter, freedom of speech and expression had been recognized as an essential feature of Canadian parliamentary democracy. *Indeed, this Court may be said to have given it constitutional status.*'[85] McIntyre J then extensively quoted from the implied bill of rights cases, including Abbott J's statement in *Switzman* that it should apply to both Parliament and the provincial legislatures, before turning to the Charter analysis. In *Keegstra*, Dickson CJC, for the majority of the Court, also began his discussion of freedom of expression by referring to the pre-Charter implied bill of rights cases. Noting that freedom of expression had long been recognised judicially as 'an essential value of Canadian parliamentary democracy', Dickson CJC observed that it 'was thus protected by the Canadian judiciary to the extent possible[,] and occasionally even appeared to take on the guise of a constitutionally protected freedom' before citing the judgments of Duff CJC in *Re Alberta Statutes* and of Abbott J in *Switzman*.[86]

The Court seemed to have maintained its endorsement of the implied bill of rights theory in *Re Prov. Court Judges* where the validity of several provincial statutes was challenged on the basis of the constitutional principle of judicial independence. For the majority of the Court, Lamer CJC opined that one of the 'organising principles' of the constitution is Parliamentary democracy from which he

85 *Dolphin Delivery* (n 11) [15] (my emphasis).

86 *Keegstra* (n 76) 726.

implied the right to freedom of expression. Lamer CJC then referred to the Court's implied bill of rights cases and commented as follows:

> given the interdependence between national political institutions and free speech, members of the Court have suggested that Parliament itself is incompetent to "abrogate this right of discussion and debate"[.] In this way, the preamble's recognition of the democratic nature of Parliamentary governance has been used by some members of the Court to fashion an implied bill of rights, in the absence of any express indication to this effect in the constitutional text. This has been done, in my opinion, out of a recognition that political institutions are fundamental to the 'basic structure of our Constitution' (*OPSEU*, supra, at p. 57) and for that reason governments cannot undermine the mechanisms of political accountability which give those institutions definition, direction and legitimacy.[87]

For Lamer CJC, 'the inferral of implied limits on legislative sovereignty with respect to political speech' was an illustration of the "special legal effect of the preamble' to the 1867 Act.[88]

McLachlin CJC is the most recent member of the Supreme Court who has expressed her (extrajudicial) agreement with the implied bill of rights theory. While she once observed in a dissenting judgment that the implied bill of rights was ultimately 'subservient to legislative limits',[89] McLachlin CJC later referred to the implied bill of rights cases as supporting the proposition that, prior to the Charter, Parliament and the provincial legislatures were constrained by 'basic constitutional principles, including fundamental democratic rights'.[90] She added that 'even without a written bill of rights, courts required legislatures to conform to the basic principles of democratic government and equality. They did this through interpretation and in

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87 *Re Provincial Court Judges* (n 9) [103].

88 ibid [104].

89 *Keegstra* (n 7) 809.

90 B McLachlin, 'Courts, Legislatures and Executives in the Post-Charter Era' in P Howe and PH Russell (eds), *Judicial Power and Canadian Democracy* (McGill-Queen's University Press, Montreal 2001) 63, 64.

some cases – and this surprises some people – through striking laws down.'[91] McLachlin CJC then pointed to the implied bill of rights as one illustration of 'how pre-Charter courts could and did require lawmakers to conform to fundamental principles of justice by striking down offending legislation.'[92] Referring to *Re Alberta Statutes*, she acknowledged that the case was ultimately decided on the basis of the division of powers. However, she still considered that case as authority for the proposition 'that there was an implied guarantee in the Canadian constitution that protected free expression about the conduct of government.'[93] In subsequent speeches and writings, McLachlin CJC kept favourably referring to the implied bill of rights.[94]

Looking back at the development of the implied bill of rights theory, one could reasonably believe that it has mainly been the product of the common law. Since it first took shape in *Re Alberta Statutes*, most of the discussion on the subject happened in the case law (or was raised by judges in their extrajudicial writings). On the implied bill of rights cases, Deschênes CJ opined that 'it was the Supreme Court of Canada which, in the fifties, wrote the *Magna Carta* of the freedoms of the citizen in this country. […] *Canadian judges set up a Charter of civil liberties where none existed before.*'[95] For FR Scott, the implied bill of rights cases 'show the creative role the courts can and, I suggest, should play in the growth of the constitution.'[96]

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91 ibid 64.

92 ibid 66.

93 ibid 66.

94 See B McLachlin, 'Human Rights Protection in Canada' (2009) 2 Osgoode Hall Rev L & Pol'y 3, 6-7; B McLachlin, 'Judicial Independence: A Functional Perspective' in M Andenas and D Fairgrieve (eds), *Tom Bingham and the Transformation of the Law: A Liber Amicorum* (OUP, Oxford 2009) 269, 272; B McLachlin, 'Unwritten Constitutional Principles: What Is Going On?' (2006) NZJPIL 147, 152-53, 155.

95 J Deschênes, 'The Judge as Lawmaker' in AM Linden (ed) *The Canadian Judiciary* (Osgoode Hall Law School, York University, Toronto 1976) 57, 70, 76 (my emphasis). See also DA Schmeiser, 'The Effective Realization of Civil and Political Rights in Canada' (1968) 33 SaskLRev 179, 188.

96 Scott, *Civil Liberties & Canadian Federalism* (n 8) 21.

Through the common law, the courts took freedom of expression away from under the umbrella of orthodox constitutional theory and made it an implied constitutional principle capable of checking legislation. Brian Dickson (former Chief Justice of Canada) admitted that: '[f]or those of us who had grown up with the British tradition of parliamentary sovereignty, in which courts were expected to respect the will of the legislature, this line of reasoning marked a rather novel development.'[97]

How the courts managed to develop the implied bill of rights theory may be understood along Dworkinian lines. Essentially, the judges reached back to the foundations of the Canadian system of government and justified the importance of freedom of (political) expression through its underlying values and purposes: the proper discharge by the elected representatives of their official responsibilities; the unobstructed diffusion of public information and opinions among the population; and the efficient working of a Parliamentary democracy. Since no section of the 1867 Act (as amended) protected freedom of expression, the judges implied it from various parts and aspects of the Canadian constitution: the preamble to the 1867 Act, which embodies the 'political theory' of the Canadian constitution; the basic structure of the Canadian constitution; certain sections of the Act dealing with legislative authority; and the Canadian constitution's English heritage. While all these parts and aspects existed by 1867, the first step in the development of the implied bill of rights theory was taken only in 1938 and the theory was judicially accepted only half a century later. Since these parts of the 1867 Act concerning individual rights and freedoms remained essentially unchanged until the adoption of the Charter, the judicial recognition of the implied bill of rights would have involved some form of

[97] B Dickson, 'The Canadian Charter of Rights and Freedoms: Dawn of a New Era?' (1994-1995) 2 RevConstit Studies 1, 6. Also Laskin (n 39) 102; Schmeiser, *Civil Liberties in Canada* (n 5) 15.

progressive interpretation. The Framers could not have foreseen the eventual socio-political development in Canada, in particular the increasing importance of freedom of expression partly associated with the gradual implementation of universal suffrage over the first half of the 20th century and the later 'Rights Movement' leading to the enactment of federal and provincial human rights legislation and to the entrenchment of the Charter. As Lorraine Weinrib suggested, the implied bill of rights theory marked some kind of transitional stage in the nation's road towards the elaboration of fundamental constitutional principles.[98] Through the common law process, the judges progressively developed what they believed was the best constructive interpretation of the Canadian constitution, 'all things considered'. Weighing the relevant competing principles within the existing constitutional arrangements in light of the community's evolving values and practices, most Supreme Court judges believed that the Canadian constitution in the pre-Charter era included a legally enforceable principle of freedom of expression. However, as with any other principle or value, freedom of expression is not absolute. As Dickson CJC stated in *Fraser*:

> Probably no values are absolute. All important values must be qualified, and balanced against, other important, and often competing, values. This process of definition, qualification and balancing is as much required with respect to the value of "freedom of speech" as it is for other values.[99]

One could also argue along Hartian lines that, prior to 1982, the legal nature of freedom of expression was an uncertain area of Canadian constitutional law, so the courts resolved the uncertainty created by the Framers' decision not to adopt a constitutional bill of rights – and, more specifically, a right to freedom of expression – by progressively interpreting the relevant parts of the constitution and relying on

98 Weinrib (n 11) 713.

99 *Fraser* (n 7) 463.

their sense of what is ‘best’. In resolving this uncertainty, the courts took guidance from general standards or reasons underlying freedom of political expression as a fundamental of the Canadian system of Parliamentary government and as reflected in the 1867 Act and the common law tradition. To the extent that these standards and reasons are the same as those considered under the Dworkinian analysis, at least some of them would be treated under a Hartian analysis as not dictated by the law. No doubt the implied bill of rights theory marked a departure from orthodox Canadian Parliamentary sovereignty, but the judicial pronouncements seemed not to have met any significant disagreement from the other branches of the government. On the contrary, the enactments of the Canadian Bill of Rights 1960, of the later provincial human rights statutes enacted in virtually every Canadian province, and, ultimately, of the Charter suggest that Canadians desired the creation of stronger human rights safeguards. This might actually have been the message understood by the judges after the enactment of the Charter when they eventually recognised the validity of the implied bill of rights theory.

5. Conclusion

The implied bill of rights is a theory used by Canadian judges in an attempt to safeguard freedom of expression from undue legislative and executive interference in the absence of a constitutional bill of rights. Judges derived the importance of freedom of expression from the Canadian system of government based on Parliamentary democracy, as confirmed by the preamble to the Constitution Act 1867 stating that the Canadian constitution is similar in principle to the English constitution.

Canadian judges were certainly familiar with the English traditional view of Parliamentary sovereignty and the residual conception of individual freedoms, both of which can hardly serve as a springboard for developing the implied bill of rights theory. Rather, I suggested that the purpose of the reference to the English constitution in developing the implied bill of rights theory was to underscore that country's tradition of civil liberties, in particular the importance of freedom of expression in society. The Canadian judges who helped develop the implied bill of rights theory used the English common law on individual freedoms as an inspiration for enhancing the protection of freedom of expression. However, in doing so, Canadian judges could resort to an additional legal instrument unavailable to English judges: an overriding constitutional instrument, the 1867 Act (largely modelled on the principles of the English constitution) used as a basis for judicial review of legislation and executive action.

In the absence of a formal bill of rights, the Canadian (and English) experiences concerning individual rights and freedoms at common law suggest that judicially-carved theories of individual rights and freedoms can be contentious and confusing. If the courts ever achieved some form of consensus, it was confined to limited areas. Indeed, despite its name, the implied bill of rights was centred on freedom of expression. Also, most of the developments concerning individual rights and freedoms in the Canadian case law came only at the same time as, or shortly after, the adoption of supplanting normative instruments, i.e. the Canadian Charter of Rights and Freedoms 1982.

Before the advent of the Charter, Canadian judges developed a number of approaches in dealing with freedom of expression, which could be captured under two main theories. The orthodox theory denies freedom of expression any legal

supremacy over legislation on the basis that its absence from the 1867 Act would imply that the Framers intended that it would not be constitutionally safeguarded. Only the adoption of the Charter turned freedom of expression into a (legally enforceable) constitutional right. *Dupond v City of Montreal* would then seem to fit a 'view that Canadian constitutionalism was based on legislative supremacy' with individual rights and freedoms standing 'dependent on the good will and self-restraint of the majoritarian legislative process.' [100] However, pre-Charter judges still recognised the special importance of freedom of expression for Canadian democracy. Within the boundaries of the 1867 Act, they attempted to constrain provincial legislatures (but not Parliament) from undue interference with freedom of expression using the division of powers. By contrast, the implied bill of rights theory would serve as a constitutional check against both federal and provincial legislative powers. The implied bill of rights theory was developed through the common law by progressive interpretation of the relevant parts and structure of the Canadian constitution and its underlying values and purposes. While the Charter may have contributed to the recognition of the implied bill of rights theory *ex post*, the Supreme Court of Canada eventually held in *Ontario (AG) v OPSEU* that there are implied principles in the Canadian constitution which can check legislation and that freedom of expression is one such example. The implied bill of rights theory conveniently foreshadowed the increased importance of implied constitutional principles for judicial review of legislation and executive action and the later legal developments of the rule of law.

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[100] Weinrib (n 11) 719.

CHAPTER 7 – RECAPITULATION AND CONCLUSION

In this thesis, I have developed three interrelated arguments concerning the legal effects of a category of constitutional principles in Canadian law – ie those which are implied from the Constitution Acts 1867-1982 and historically derive from the English constitution – vis-à-vis legislation (and executive action): first, that these principles can in theory check legislation; second, that they have checked legislation; and third, that embedded in these principles are justifications mainly based on the notion of the rule of law, which support the view that these principles should check legislation. The three main implied constitutional principles that I have examined are judicial review of executive action (and protection from arbitrary decisions), judicial independence and freedom of expression.

This final part of the thesis returns to the entire discussion of implied constitutional principles to highlight the main aspects of my overall argument concerning these principles and to connect some of the issues discussed at various points in the thesis. In this respect, section 1 revisits the notion of implied constitutional principles by focusing on their dual (legal and political or moral) character and their relationship with Parliamentary sovereignty. Section 2 ties together the various parts of the proposed common law-based theory of how implied constitutional principles can and should check legislation. Section 3 summarises the operation of these principles in Canadian law and their fit with the proposed theoretical approach. Finally, section 4 takes a step back and reflects on the place of implied constitutional principles within the much larger subject of judicial review.

1. Principles

Implied constitutional principles are multifaceted. Initially considered as pure values, they would eventually become part of the law, although none of them has been expressly and wholly recognised (as general principles of the Canadian constitution) in the provisions of the Constitution Acts 1867-1982. These principles can be conceived along Hartian and Dworkinian lines as 'standards' which legal officials must take into account in the process of legal reasoning and adjudication.[1] In a given legal problem, a principle operates as a consideration inclining more or less heavily in one direction. In the Canadian context, the provisions of the 1867-1982 Acts affirm, elaborate, instantiate and exemplify implied constitutional principles. In my discussion of the rule of law, judicial independence and freedom of expression, I pointed that these interconnected principles[2] also appeal and refer to other principles and values. For instance, in Chapter 6, I showed that freedom of expression is considered essential to the efficient working of a Parliamentary democracy, which, according to Lord Woolf, is based on the rule of law.[3] In *R v Beauregard*, Dickson CJC stated that there must be judicial independence so that the courts can adequately protect fundamental justice, equality, the democratic process and the other fundamental values of the constitution.[4] To paraphrase Ronald Dworkin, implied constitutional principles would be part of a 'network' or 'constellation' of rules, principles and values.[5] In his 'Postscript', HLA Hart characterised the Dworkinian

1 See Ch 4, '2. Hartian Progressive Interpretation' and '3. Dworkinian Progressive Interpretation'.

2 See Ch 5, '1. Introduction' and '4.2. Judicial Independence', and Ch 6, 'Introduction'.

3 See Lord Woolf, 'Droit Public - English Style' [1995] PL 57, 68.

4 *R v Beauregard* [1986] 2 SCR 56 [24].

5 See *TRS* 44; R Dworkin, 'Unenumerated Rights: Whether and How *Roe* Should Be Overruled' (1992) 59 U Chi L Rev 381, 382.

principles as 'non-conclusive' principles and accepted the view that they 'are an important feature of adjudication and legal reasoning'.[6] Within such a complex socio-legal structure, it is inevitable that, in some cases, one otherwise applicable principle ends up conflicting with another. Depending on the circumstances of each case, including the nature of the particular legal question at issue, the relevant principles will have different weights, so that, in the resolution of a case when more than one principle intersects, one or more principles will outweigh the other principles (or rules or values).[7]

My thesis was mainly concerned with conflicts between implied constitutional principles on the one hand and (some exercises of) legislative authority on the other hand. For instance, in *Mackeigan v Hickman*, McLachlin J (L'Heureux-Dubé and Gonthier JJ concurring) opined that 'judicial independence […] must leave scope for the principle of Parliamentary supremacy.'[8] More generally, as the Supreme Court of Canada held in *Babcock v Canada (AG)*, 'unwritten [constitutional] principles must be balanced against the principle of Parliamentary sovereignty.'[9] Thus, judges recognise that they have a responsibility to ensure such a 'balance' or, as I have argued in this thesis, to evaluate the weight of those relevant principles in the face of conflicting legislation. In *Dunsmuir v New Brunswick*, the majority of the Supreme Court held that judicial review performs two important constitutional functions: upholding the rule of law and maintaining legislative supremacy.[10] As with many aspects of this thesis, the discourse concerning the need for reconciling the role of the

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6 *CL* 263.

7 See Ch 4, '3. Dworkinian Progressive Interpretation'.

8 *Mackeigan v Hickman* [1989] 2 SCR 796, 832.

9 *Babcock v Canada (AG)* [2002] 3 SCR 3 [55].

10 See *Dunsmuir v New Brunswick* [2008] 1 SCR 190 [30].

courts and legislative authority is not specific to the Canadian context. For instance, in the English context, Lord Woolf suggested that:

> [o]ne of the twin principles upon which the rule of law depends is the supremacy of Parliament in its legislative capacity. The other principle is that the courts are the final arbiters as to the interpretation and application of the law. As both Parliament and the courts derive their authority from the rule of law so both are subject to it and can not act in manner which involves its repudiation.[11]

According to Lord Steyn, the democratic ideal has two premises: the responsibility of the government to carry on its business in accordance with the principle of majority rule, and the guarantee of basic values of liberty and justice and respect for human rights and fundamental freedoms. Lord Steyn then added that: '[w]here a tension develops between these two premises a balance has to be struck. And in a democracy the guarantor of that balance can generally only be an impartial and independent judiciary'.[12]

A theory of implied constitutional principles must fit this greater constitutional framework.

2. Constitutional Theory

According to orthodox Canadian constitutional theory, namely the theory which is accepted by most Canadian jurists, judicial review of legislation must be based on the relevant sections of the Constitution Acts 1867-1982. The courts must apply a properly enacted statute if it does not contravene any section of the Acts. As such, orthodox constitutional theory embodies an account of Parliamentary sovereignty largely modelled on English Parliamentary sovereignty. Since the termination by the Constitution Act 1982 of the Imperial Parliament's legislative authority over

11 Lord Woolf (n 3) 68.

12 Lord Steyn, 'Dynamic Interpretation Amidst and Orgy of Statutes' [2004] EHRLR 245, 247.

Canadian affairs, orthodox Canadian Parliamentary sovereignty can be described as the federal Parliament's and the provincial legislatures' authority to pass any properly enacted statute whatever within only the boundaries set out by the sections of the 1867-1982 Acts.

Orthodox constitutional theory does not adequately explain and describe the nature of the Canadian constitution, in particular the increasing importance of implied constitutional principles with the maintenance of the rule of law at its centre. It has also become increasingly difficult to reconcile orthodox constitutional theory with the Canadian law and practice. In this thesis, I have proposed a 'new orthodox theory', so that it can be better suited to, and representative of, the complex nature of the Canadian constitution and modern constitutional practice.

At the outset, my proposed theory of implied constitutional principles acknowledges their English origins by incorporating and adapting the relevant aspects of English constitutional law and theory in the development of these principles within the Canadian constitutional system. At times, the relevant comparative English (and other foreign) legal principles were considered as legally relevant or persuasive in the Canadian context, while, at other times, they served as a source of inspiration in the interpretation and development of Canadian constitutional law. Some of the uses of comparative constitutional law and theory in this thesis may have initially seemed unusual and contentious. Indeed, one may reasonably be surprised that, despite Parliamentary sovereignty, English constitutional principles have been used as part of an argument for expanding the grounds of judicial review of legislation.

As in any area of law, comparative analysis involves an exercise of interpretation which can produce different conclusions from one interpreter to another. This interpretative exercise can also be selective in the choice of foreign

legal materials examined, as long as the interpreter can persuasively defend his interpretation to his (usually domestic) audience. For instance, one contentious use of comparative constitutional law and theory was WR Lederman's interpretation of the scope of English judicial independence, which was eventually adopted by the Canadian courts. By contrast, the Supreme Court of Canada's interpretation of the content (as opposed to the effects) of the Canadian rule of law seems generally faithful to the accepted English account,[13] which has also been adopted or influential in other common law systems. One of the implications of the well-known proposition that 'the courts are not bound by foreign law' is that, if the courts can accept or reject the relevance of foreign law, they can also decide which interpretation of foreign law (or which particular theory) they find persuasive given the relevant foreign and domestic legal contexts. Returning to Lederman's interpretation of judicial independence, it would have surely been strongly criticised in England (as it initially was in Canada), but this fact alone would not prevent the Canadian courts from considering and even adopting Lederman's particular interpretation if they believed that it was the 'best constructive interpretation' of Canadian law.

Another dimension of my proposed theory concerning implied constitutional principles rests on the ability of Parliamentary sovereignty to change and incorporate substantive limitations. I explained this ability through prevalent common law-based theories. For Sir William Wade, the judicial recognition of the supra-legislative effects of implied constitutional principles would probably have amounted to a legal revolution, given that a judicial acceptance of manner and form conditions and that *R v Transport Secretary, ex p Factortame Ltd (No. 2)* were also, in his view, legal

[13] See *Re Manitoba Language Rights* [1985] 1 SCR 721; *Immeubles Port Louis Ltée v Lafontaine (Village)* [1991] 1 SCR 326; *British Columbia v Imperial Tobacco Canada Ltd* [2005] 2 SCR 473. See also Ch 5, '2.1. Formal Conceptions'.

revolutions. To the extent that Canadian law seems to be uncertain on the question whether implied constitutional principles can check legislation, then one could also argue along Hartian lines that it is a question lying in the penumbras of the rule of recognition, which can be judicially clarified. An alternative Hartian interpretation of change in the rule of recognition is that any such change requires a consensus between the senior legal officials representing all three branches of government. Under this latter theoretical approach, the judiciary may initiate a change in the consensus, but such an initiative would only become part of the rule of recognition if the non-judicial officials accept it or acquiesce in it. Finally, the principle of Parliamentary sovereignty itself could be conceived as a pure construct of the common law, which would entail that its content and any change to it would be under judicial control. I argued that one way of partly reconciling these various theories of change to Parliamentary sovereignty was through their acknowledgment that Parliamentary sovereignty can change in order to incorporate new legal self-limitations, and of the courts' authority to decide questions regarding its content, including the validity of purported changes.

Having argued that Parliamentary sovereignty can incorporate legislative limitations from implied constitutional principles and that the courts can rule on such changes, I then suggested that relevant changes can be effected through progressive interpretation. Progressive interpretation can be based on the Hartian premise (accepted by most Canadian jurists) that the Framers did not foresee all the possible future applications of their necessarily open-textured constitution. As a result, the law of the constitution is incomplete, leaving penumbral and unregulated cases which the courts can resolve and gaps which the courts can fill using their lawmaking powers. I argued that the question whether implied constitutional principles can check

legislation in today's constitutional reality can be conceived as an incomplete case (or a series of incomplete cases), and that their resolution involves an interpretation of these principles which can be at variance with the Framers' intentions.

Alternatively, I suggested that progressive interpretation can be explained from a Dworkinian perspective. Dworkinian adjudication is the development of the 'best' constructive interpretation that fits and justifies the community's legal practice and political arrangements using all relevant interpretative sources. In this respect, historical sources are but only one relevant interpretative factor among others and thus may not be the decisive factor in the resolution of a given legal question. Other factors or standards can sometimes convince the courts to progressively interpret the applicable law. I suggested that, in this exercise of constructive interpretation, Parliamentary sovereignty – considered as a set of 'non-conclusive' principles – could be outweighed by implied constitutional principles.

While my proposed theoretical approach has a very important progressive dimension, it is also grounded in the historical heritage and development of the Canadian constitution. This historical aspect has been illustrated in this thesis by the frequent reference to the English roots of the Canadian constitution, the ample consideration of the relevant English legal principles and the continuous judicial and academic efforts to maintain the traditions and longstanding values associated with the Canadian system of Parliamentary government. In *Reference Re Employment Insurance Act (Can.)*, the Supreme Court approved the view that: 'there is no inconsistency between dynamic interpretation and adherence to the framers' intentions: in order for something to evolve, it must have a starting point.' [14]

[14] *Reference Re Employment Insurance Act (Can.)* [2005] 2 SCR 669 [45] citing H Brun and G Tremblay, *Droit constitutionnel* (4th edn Éditions Yvon Blais, Cowansville 2002) 207-08 (tr).

Sometimes a rule need not be progressively interpreted and evidence of the Framers' intentions can be the decisive interpretative factor. In *Reference Re Secession of Quebec*, the Supreme Court reconciled history, traditions and evolution in the following terms: 'our constitutional history demonstrates that our governing institutions have adapted and changed to reflect changing social and political values. This has generally been accomplished by methods that have ensured continuity, stability and legal order.'[15]

Finally, I suggested that the view that implied constitutional principles should check legislation can be based on a thin substantive conception of the rule of law. The thin substantive conception is a response to both the criticism addressed at purely substantive conceptions that they amount to a complete political and social philosophy and the criticism that formal conceptions cannot even prevent the rule of law's own repudiation. To perform its assigned task, the thin substantive conception is based on the idea that the rule of law has a core content which no branch of the government can unduly interfere with. That core content corresponds to those central features of the rule of law as accepted by most jurists.[16] As a substantive conception of the rule of law, the thin substantive conception will still pass judgment on the content of laws but only to the extent necessary to preserve that core part of the rule of law, thus limiting its contentious character. Finally, it is submitted that the thin substantive conception better fits with the Canadian law and practice than formal or purely substantive conceptions of the rule of law.

In this thesis, I strived to demonstrate that the courts have been the driving force behind constitutional interpretation, in particular, the interpretation of implied

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15 *Reference Re Secession of Quebec* [1998] 2 SCR 217 [33].

16 See Ch 5, '2.3. Towards a "Thin" Substantive Conception'.

constitutional principles. Given the rise of the statutory-regulatory-administrative state during the 20th century, it appears somehow paradoxical to bring the common law back into the limelight, even more so in Canada which has a (partly) written constitution. However, a Constitution or a statute cannot interpret itself. To borrow the words of Lord Steyn, '[a] democracy may, and almost invariably does, entrust the task of interpretation to the neutral decision-making of the judiciary' with the help of the legal profession.[17] As with the notion of change to Parliamentary sovereignty, my interpretation of both Hartian and Dworkinian theories of law and adjudication in accordance with the rule of law allocates responsibility over progressive interpretation to the courts, thus completing the theoretical aspects of a common law-based theory of (interpretation of the legal effects of) implied constitutional principles.

In sum, my proposed theory does not put the constitution in a literal, historical or jurisdictional 'straitjacket', but directs a continued evaluation of the respective importance of constitutional principles and their underlying values which are relevant to the resolution of a given legal question. In *Quebec Secession Reference*, the Supreme Court identified four underlying principles of the Canadian constitution – federalism, democracy, constitutionalism and the rule of law, and respect for minority rights – before stating that '[t]hese defining principles function in symbiosis. No single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other.'[18] When necessary, all the parts of the constitution can adapt to properly reflect the relevant changing realities in modern

17 Lord Steyn (n 12) 247.

18 *Quebec Secession Reference* (n 15) [49].

society. I then tested this proposed theory of implied constitutional principles against the Canadian constitutional law and practice. Section 3 will summarise this analysis.

3. Operation of Implied Constitutional Principles

One possible interpretation of the nature and legal effects of implied constitutional principles is consistent with orthodox constitutional theory. Thus, one could argue that the consensus in the legal community is consistent with a formal conception of the rule of law. However, this argument would be more difficult to make in the context of certain implied constitutional principles deriving from the rule of law such as judicial independence given the existence of cases where the courts have invalidated statutes deemed to unduly offend this principle. However, proponents of the orthodox theory can still point to the majority statements in these cases (and other cases) acknowledging the 'supremacy of the written constitution' and to the fact that the constitutional challenge was argued and resolved solely on the basis of the Canadian Charter of Rights and Freedoms 1982.[19] In respect of pre-Charter freedom of expression, one could argue that it was a residual freedom. While judges eventually invoked freedom of expression in conducting pre-Charter judicial review of legislation and executive action, it was always subsumed under the division of powers analysis. Proponents of orthodox constitutional theory also point to the fact that no statute has been struck down or set aside on the sole basis that it contravened an implied principle of freedom of expression. More generally, the Framers never intended that implied constitutional principles can check legislation. On the contrary, if there were such principles deriving from English law, they would have yielded to legislative authority, as would have been the case under English law.

[19] See *Re Provincial Court Judges* [1997] 3 SCR 3 [82], [93]; *Mackin v New Brunswick (Minister of Finance)* [2002] 1 SCR 405 [73]. Cf *Quebec Secession Reference* (n 15) [53].

However, one would think that any theory which seeks to describe the generally accepted view on some legal issue such as the grounds for judicial review might change sooner or later. I criticised the orthodox theory's inability to prevent any (intended) legislative contravention of the rule of law or of its deriving principles. The orthodox theory presents an incomplete portrait of the Canadian law and practice as it does not adequately take into account the recent important legal and political developments in Canadian society, especially since the adoption of the Charter. Orthodox theory cannot explain the case law invoking the rule of law as the basis for declaring that Parliament and the provincial legislatures cannot unduly interfere with the superior court's power to control and review executive action. Orthodox theory does not square with the consistent case law which interpreted judicial independence as a generally implied constitutional principle. Orthodox theory overlooks the many judicial and extrajudicial statements approving the implied bill of rights theory.

The development of implied constitutional principles can be explained along Dworkinian lines. When a statute is found to be in conflict with one of these principles, the courts are engaging in an exercise of constructive interpretation in which they evaluate the relative weights of all relevant standards. The standards include implied constitutional principles but also Parliamentary sovereignty and the historical development of the Canadian constitution. Among the other relevant interpretative standards or factors identified by the courts are: the underlying principles and values of freedom of expression, mainly the efficient working of a democratic system of Parliamentary government; the development over the years of the principle of democracy and universal suffrage; the rise of statutory courts and of the 'Administrative State'; and the role of the Charter in the protection of individual rights and freedoms and in the expansion of judicial review of legislation and

executive action. As these interpretative standards emerged in Canada, the courts evaluated their importance in the overall constitutional scheme and adjusted accordingly their interpretation of the proper grounds for judicial review to include implied constitutional principles.

Alternatively, the legal answer to the question whether implied constitutional principles can check legislation could be considered from a Hartian perspective as not wholly based in the existing law. A legal uncertainty would have resulted from relevant legal and political developments, including some of those interpretative standards and factors considered under the Dworkinian analysis, which the Framers could not have foreseen in 1867. When called to resolve these uncertainties, the courts would also consider interpretative standards not dictated by the law (although they still have a footing in the law). They would rely on their sense of what was best in an interpretative exercise somewhat similar to Dworkin's constructive approach to constitutional interpretation[20] in order to resolve the penumbral or unregulated case or fill the gap.

The result of this evaluative or lawmaking process was that, in some cases, the courts held that the conflict between the implied constitutional principles and Parliamentary sovereignty was resolved in favour of the latter. For instance, in *AG Can v Law Society of BC* and *Dupond v City of Montreal*, the Supreme Court of Canada upheld legislative and regulatory curtailment of freedom of expression.[21] In *Ell v Alberta*, the Court determined that judicial independence extended to the Justices of the Peace, but was not infringed by a statute which changed their required

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20 See *CL* 274; *EJP* 7.

21 *AG Can v Law Society of BC* [1982] 2 SCR 307; *Dupond v City of Montreal* [1978] 2 SCR 770.

job qualifications.[22] In *British Columbia (AG) v Christie*, the Court upheld a provincial tax on legal services, holding that the right of access to the courts, as an aspect of the rule of law, 'is not absolute'.[23] Perhaps the ultimate exemplification of the ability of the rule of law to incline in favour of the legislative branch is in *Re Manitoba Language Rights* where the Court temporarily upheld Manitoba's unconstitutional unilingual statutes and regulations for several years.[24]

However, my case law analysis in this thesis sought to establish that, in some other cases, the relevant implied constitutional principles prevailed over Parliamentary sovereignty. For instance, in *Macmillan Bloedel Ltd v Simpson*, the Supreme Court struck down a federal statute which conferred on a statutory youth court exclusive jurisdiction in respect of *ex facie* contempt of court on the basis of the principle of the inherent jurisdiction of the superior courts.[25] In *Re Prov Court Judges*, the Court struck down the statutes from three provinces which sought to reduce the provincial courts' salaries without prior consultation with a judicial compensation committee in part on the ground that they unduly interfered with an implied constitutional principle of judicial independence. The Court also struck down on the same grounds legislative provisions authorising the Justice Minister to designate the court's sitting days and the judges' place of residence and another legislative provision authorising the government to withdraw court staff on unpaid days of leave.[26] In *Mackin v New Brunswick (Minister of Finance)*, the Court struck

22 *Ell v Alberta* [2003] 1 SCR 857.

23 *British Columbia (AG) v Christie* [2007] 1 SCR 873 [17].

24 See *Re Manitoba Language Rights* (n 13); *Re Manitoba Language Rights Order* [1990] 3 SCR 1417; *Reference Re Manitoba Language Rights* [1992] 1 SCR 212.

25 See *Macmillan Bloedel Ltd v Simpson* [1995] 4 SCR 725.

26 See *Re Provincial Court Judges* (n 19).

down a provincial Act replacing the position of supernumerary judges with a panel of retired judges paid on a per diem basis again on the basis of judicial independence.[27]

It may be worth acknowledging that one theoretical question concerning progressive interpretation left unresolved in this thesis is whether the inclusion of progressive interpretation in my proposed theory of implied constitutional principles renders it a substantive theory in the sense that it seeks to reach specific substantive outcomes.[28] Some political theorists believe that progressive interpretation tends to facilitate successful constitutional challenges to statutes on Charter grounds, as a broad interpretation – or, as Lord Sankey LC stated in the *Persons Case*, a 'large and liberal interpretation' – of the scope of individual rights and freedoms would expand the scope of limitations on legislative authority.[29] However, it has been argued that progressive interpretation can also constrain the scope of Charter protection. In a recent extrajudicial speech, Binnie J gave two examples. One is that the courts did not follow the 'original meaning' of s. 52 of the Constitution Act 1982 concerning the scope of application of the Charter, by narrowly interpreting it so that the Charter only applies against the State and not in cases between individuals.[30] The other example is when the courts disregarded the original meaning of s. 15 of the Charter, also known as the Equality Clause, which would have entailed that 'every classification made in every statute or common law in the country could be the subject of a lawsuit.' For Binnie J, '[i]t was the courts, not the framers, who shrank

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27 See *Mackin v New Brunswick (Minister of Finance)* (n 19).

28 See Ch 1, '3. Overview of the Thesis's Methodologies'.

29 See for instance FL Morton and R Knopff, *The Charter Revolution and the Court Party* (Broadview Press, Peterborough 2000) 46-51; FL Morton and R Knopff, 'Permanence and Change in a Written Constitution: The "Living Tree" Doctrine and the Charter of Rights' (1990) 1 SCLR(2d) 533, 538.

30 See *RWDSU v Dolphin Delivery Ltd* [1986] 2 SCR 573; *Mckinney v University of Guelph* [1990] 3 SCR 229.

from this larger vision of equality and concluded that the Charter should be interpreted as an anti-discrimination law not an anti-classification law'.[31] Similarly, Peter Hogg opined that, in the context of progressive interpretation, 'changes in interpretation need not always take the form of an expansion of the guaranteed rights; in some instances, old interpretations will come to be seen as too broad, and hence too restrictive of legislative policy.'[32] Even Scalia J, a prominent US originalist, agreed with the view that non-originalist constitutional interpretation, that is, one which 'could be adjusted as changing circumstances required', can have the effect of expanding or constraining individual rights and freedoms.[33] In the end, the issue of whether progressive interpretation makes my proposed theory a substantive theory tends to be sidelined by the near unanimous acceptance of progressive interpretation in Canadian law. In any event, Binnie J and Hogg suggested that one can make a good argument that a theory involving progressive interpretation is not necessarily result-oriented.

4. Judicial Review, Consensus and Implied Constitutional Principles

My argument in this thesis concerning the legal effects of implied constitutional principles vis-à-vis legislation joins a perennial debate in modern democracies which may well be 'irresoluble on rational grounds',[34] namely the proper boundaries of the operation of judicial review. The sheer complexity of the debate makes it virtually impossible to examine all its major strands, even in connection with the sole notion of implied constitutional principles in one single legal system. For instance, this thesis

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31 I Binnie, 'Interpreting the Constitution: The Living Tree vs Original Meaning' (2007) 28 Pol'y Options 104, 109.

32 PW Hogg, *Constitutional Law of Canada* (5th edn Carswell, Scarborough 2007) 36-26-36-27.

33 A Scalia, 'Originalism: The Lesser Evil' (1988-1989) 57 U Cin L Rev 849, 855-56.

34 M Tushnet, 'How Different Are Waldron's and Fallon's Core Cases for and against Judicial Review?' (2010) 30 OJLS 49, 70.

did not directly engage with the debate concerning the deeper political and philosophical considerations underlying the idea of judicial review. Even in the purely legal sphere, my thesis discussed only one sub-basis of judicial review of legislation and executive action. This is not to say that my thesis argument can be better developed in isolation from other legal, political and philosophical considerations. Quite the contrary, my discussion often recognised the connection and relevance of these other considerations. For instance, I noted that the development of the legal effects of the implied constitutional principles examined mainly occurred after the adoption of the Charter. Another example is the multifaceted nature of these principles and the underlying values which are necessarily taken into account when determining the principles' legal effects. More generally, the Dworkinian image of the constellation of standards underpins the complex nature of the legal effects of implied constitutional principles. However, within the practical limitations of a research project of the present nature, my primary concern was to demonstrate that my argument is plausible on broadly accepted theoretical grounds, properly preserves the central or core aspects of the rule of law, and fits with the Canadian law and practice. Also, by choosing not to adopt or construct a more value-based or result-oriented theory, I hope that my proposed theory of implied constitutional principles would offer strong prospects for achieving broad acceptance. This concern to pursue consensus should be visible at several stages in this thesis, such as in my analysis of the notion of change to Parliamentary sovereignty, my attempt to reconcile progressive interpretation with both Hartian and Dworkinian theories of law and adjudication, and my adoption of a thin substantive conception of the rule of law.

The search for a coherent, plausible and generally acceptable theory of implied constitutional principles is even more crucial as this area of the Canadian

constitution remains under-theorised and still largely unexplored despite its far-reaching theoretical, legal and practical implications. One could certainly assert that there are more such principles in the Canadian constitution.[35] Moreover, the content and scope of these principles will surely develop as the constitution adapts to relevant social changes. Adrian Vermeule opined that 'the interpretive life cycle of any written constitution, at least one as difficult to amend as [the US Constitution], might display decreasing textualism, as precedents accumulate and social problems change.'[36] It is submitted that Vermeule's opinion is equally applicable to the Canadian context. As the Supreme Court of Canada stated in *Reference Re Secession of Quebec*, 'observance of and respect for [implied constitutional] principles is essential to the ongoing process of constitutional development and evolution of our Constitution as a "living tree"'.[37] They 'infuse our Constitution and breathe life into it.'[38] As jurists engage with uncharted areas of the constitution, they will provide more insights which further enrich our understanding of the constitution and maintain its relevance in society.

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35 See for instance DJ Mullan, 'Underlying Constitutional Principles: The Legacy of Justice Rand' (2010) 34 ManLJ 73, 81 citing MD Walters, 'The Common Law Constitution in Canada: Return of *Lex Non Scripta* as Fundamental Law' (2001) 51 UTLJ 91, 140-41.

36 A Vermeule, 'The Facts About Unwritten Constitutionalism: A Response to Professor Rubenfeld' (2001-2002) 51 Duke LJ 473, 476.

37 *Quebec Secession Reference* (n 15) [52].

38 ibid [50].

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