

Responsabilité, fraternité et développement durable en droit:

Une conférence en mémoire de l'honorable Charles D. Gonthier

Responsibility, Fraternity, and Sustainability in Law

A Symposium in honour of Charles D. Gonthier

20-21 Mai 2011 à la faculté de droit de l'université McGill

May 20-21, 2011 at the McGill University Faculty of Law

Manuscripts de la conférence Conference Proceedings

Charles Gonthier and the Unwritten Principles of the Canadian Constitution

Ian Binnie

Justice Charles Gonthier and the Unwritten Principles of the Constitution

Notes prepared for an address to be delivered at a celebration of the life and work of Justice Charles Gonthier to be held at McGill University on May 20-21, 2011

by Justice Ian Binnie[†]

The title of this paper refers of course to the Supreme Court's observation in the *Quebec Secession Reference*¹ that the Constitution includes a number of unwritten principles that are fundamental to its operation, including the principles of democracy, the rule of law, federalism and constitutionalism, and respect for minorities. Peering even further below the surface however, I believe the Court's decision in that case can best be understood in the context of two additional propositions taken from the writings of Charles Gonthier. In *Fraternity, The Unspoken Third Pillar of Democracy*, he spoke of "Core values held by most, if not all, Canadians . . . [a] belief in consultation and dialogues [and the] importance of accommodation and tolerance"² and, elsewhere, he argued that "[a] society that does not succeed in meeting the needs of a significant segment of its population is a society doomed to instability, no matter how many black letter laws it has."³ These two propositions describe aspects of his view of fraternity, a concept which he more or less single-handedly rescued from the dustbin of Canadian legal obscurity. Indeed, when it comes to the *legal* dimensions of "fraternity", Charles Gonthier

[†]of the Supreme Court of Canada. I would like to thank a succession of my law clerks Erin Morgan, Laurence Biche-Carrière and James Wishart for their helpful research into these matters.

¹ *Reference re Secession of Quebec*, [1998] 2 SCR 217 [*Quebec Secession Reference*].

² "Liberty, Equality, Fraternity: The Forgotten leg of the Trilogy, or Fraternity; the unspoken Third Pillar of Democracy" (2000) 45 McGill LJ 567 at 576.

³ Charles D. Gonthier, "Sustainable Development and the law" (2005) 1 McGill JSDLP 11 at 13.

pretty well owned the franchise. The other “two” pillars of French revolutionary rhetoric — liberty and equality — were explicitly entrenched in our current constitutional arrangements. Yet almost no other scholars had hitherto been making much of the third pillar — fraternity — until Justice Gonthier took up the cause with relentless enthusiasm.

I joined the Supreme Court of Canada in January 1998. The *Quebec Secession Reference* was heard the following month. Six months later the Court came down with a unanimous judgment. It was a collective effort issued in the name of the Court, but anyone who knew Justice Gonthier would expect that given his background and interests he would have been in the thick of the debate within the Court. It could not have been otherwise.

In the *Quebec Secession Reference* the Court was asked to *assume* a unilateral declaration of secession by the Province of Quebec following a hypothetical unilateral declaration of independence by the government of Quebec following a hypothetical majority vote on a hypothetical referendum question. This was an eventuality neither covered by the text of any constitutional document, nor anticipated by the jurisprudence. What was the Court’s answer to be? The judges had either to throw up their collective hands in despair and to declare there to be no satisfactory legal response, or to identify a fresh analytical framework within which to consider the consequences under both domestic and international law.

Justice Gonthier was ideally suited to the challenge. Being of a philosophical turn of mind, he once wrote that “as a complement to [the] rule of law, there is the spirit of the law. The spirit of the law is not concerned so much with setting down rules. Rather, it reflects the values

which a society draws upon in its development of legal rules.”⁴ Such underlying values formed the bedrock of his work as a jurist. He was sceptical that complex legal problems could be resolved by black letter law. Every legal principle had a purpose, and in his view the search for underlying values applied as much or more to the Constitution as to the solution of any other legal conundrum.

Although the “unwritten constitutional principles” identified in the *Quebec Secession Reference* are surely unremarkable in themselves — they may almost be characterized as trite — their emergence in the Court’s judgment created much excitement in academic and media circles. In part this was because the Court concluded that these unwritten “principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments.”⁵ In part, perhaps, it was because of an anticipation that the Court would merely rubber stamp the federal government position that to be “constitutional” an act of secession would have to comply with the amending formula in Part IV of the *Constitution Act, 1982*. Whatever the reason, Professor Jamie Cameron pronounced the Court’s analysis in the *Quebec Secession Reference* to be “deeply troubling”.⁶ She adopted the words of a U.S. academic who criticized *Roe v. Wade* as bad because it is “bad constitutional law, or rather because it is not constitutional law and gives almost no sense of any obligation to try to be.”⁷ Other concerns about resort to unwritten constitutional principles were voiced by commentators such as Professor Jean Leclair of the Université de Montréal (who supported the *Quebec*

⁴ Ibid. at 13.

⁵ *Supra* note 1 at para. 54.

⁶ Jamie Cameron, “The Written Word and the Constitution’s Vital Unstated Assumptions” in *Essays in honour of Gérald-A. Beaudoin: The challenges of constitutionalism*, Pierre Thibault et al. (Cowansville, Qué.: Éditions Yvon Blais, 2002), 89 at 108.

⁷ *Ibid.*, citing J. Ely, “The Wages of Crying Wolf: A Comment on *Roe v. Wade*”, (1973) 82 Yale LJ 920 at 947.

Secession judgment in general but considered the unwritten constitutional principles “unfathomable”, particularly as they applied in the judicial remuneration cases⁸) and by Professor Peter Hogg, a leading commentator on all such matters.⁹

Was Charles Doherty Gonthier in fact a closet revolutionary — “red in tooth and claw” — and did his longstanding advocacy of unwritten constitutional principles present dangers to Canada’s free and democratic society? The thesis of this paper is that such propositions are absurd. On the contrary, the fact the Court’s judgment in the *Quebec Secession Reference* was supported by so principled and careful a jurist as Charles Gonthier undoubtedly added greatly to its credibility, both within and outside his home province of Quebec.

The concern of some academics about “unwritten” constitutional principles seems to be based on a rather limited group of cases beginning with the *Manitoba Language Reference*¹⁰ leading on to *New Brunswick Broadcasting* on the topic of legislative privilege,¹¹ the *Provincial Judges’ Remuneration Reference* dealing with judicial independence,¹² and the *Quebec Secession Reference* the following year. At the provincial appellate court level there has been little attempt subsequent to the *Quebec Secession* judgment to apply these principles in a way feared by some of the academic critics, apart from the British Columbia Court of Appeal in *Christie*, that sought to develop a fundamental principle of access to justice,¹³ and the decision of the Ontario Court of Appeal in the *Montfort Hospital* case, which held that minority language

⁸ Jean Leclair, “Canada’s Unfathomable Unwritten Constitutional Principles” (2002) 27 Queen’s LJ 389 at 392.

⁹ Peter Hogg, *Constitutional Law of Canada*, Student Ed., (Thomson Carswell, 2006) at p. 428

¹⁰ *Re Manitoba Language Rights*, [1985] 1 SCR 721.

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

¹² *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3; 150 DLR (4th) 577 [*Provincial Judges’ Remuneration Reference*].

¹³ *Christie v. British Columbia*, 2005 BCCA 631, 263 DLR (4th) 582, Newbury J., rev’d 2007 SCC 21.

rights was a relevant consideration in a decision by a provincial agency to close the only hospital in Ontario that functioned both therapeutically and educationally in French.¹⁴ This is hardly a record of judicial carnage of the rightful constitutional order.

Yet Professor Jean Leclair wrote that: “*Remuneration* and similar [judicial compensation] cases bear witness to the fact that unwritten principles may serve as the courts’ instrument to impose their will on the legislatures, in minute detail and in a manner which deprives the elected representatives of the people of any means of response” and “judges are not akin to Roman pontiffs having sole access to magic legal formulae.”¹⁵ Professor Peter Hogg, more generally, wrote that “when an unwritten constitutional principle is directly enforced ... it is hard to avoid the conclusion that the Constitution has been amended by judicial fiat in defiance of the procedure laid down by the Constitution for its amendment.”¹⁶

When such prominent academics sound various alarm bells, it is not surprising that editorial writers and practitioners who take an interest in the topic have also voiced concern. In writing about the *Montfort Hospital* case, the *Globe & Mail* editorialized that:

[O]ur courts are amending the Constitution as they will, when they will, spinning principles into protections with an entrepreneurial fervour with no more than lip service to those who drafted the highest law in the land.¹⁷

¹⁴ *Lalonde v. Ontario (Commission de restructuration des services de santé)*, 56 OR (3d) 577, 208 DLR (4th) 577 [*Montfort Hospital*].

¹⁵ Leclair, *supra* note 8 at paras. 69 and 71. The abstract to this article states that the author “question[s] the legitimacy of judicial review based on unwritten constitutional principles, and criticize[s] the courts’ recourse to such principles in decisions applying the principle of judicial independence to the issue of the remuneration of judges.”

¹⁶ Hogg, *supra* note 9 at 428.

¹⁷ “How the courts are rewriting the constitution: the reasons in the *Montfort* ruling treat the land’s highest court as a mere template”, Editorial, *Globe and Mail* (Toronto), 3 December 1999.

At one stroke the *Globe & Mail* identified itself with a form of U.S. style originalism (“those who drafted the highest law”) and raised a scare about activist judges running amok. I think this concern is misplaced. I do not dispute that some of the more grandiose passages in Supreme Court judgments, (e.g. “the preamble is the grand entrance hall to the castle of the Constitution”) may have created some disturbance in a system that prizes blandness, but when we look at what the courts have done in this area the result seems to me by and large to be quite sensible.

I would first like to make a few preliminary observations.

Firstly, nobody but a few newspaper editorial writers believes that the whole of the Constitution of Canada is enacted somewhere and that recognition of “unwritten constitutional principles” represents some sort of judicial invention of a Trojan horse for judicial policy making. The written constitution is spread over thirty (30) documents, but explains little about how our system of government actually operates. Nevertheless, Professor Jamie Cameron is concerned about “the pedigree” of unwritten constitutional principles:

The constitutional text identifies the principles that are infringed as the supreme law of our land. Unstated assumptions which might be considered vital cannot claim the pedigree of the text or the supreme status it confers.¹⁸

Some of the constitutional texts are focused on such worthy subjects as the *Ontario Boundary Act* of 1889¹⁹ and the *Canadian Speaker, (Appointment of Deputy) Act* of 1895.²⁰ None of the constitutional texts mentions the office of Prime Minister. The written Constitution

¹⁸ Cameron, *supra* note 6 at 91.

¹⁹ *Canada (Ontario Boundary) Act*, 1889 52-53 Vic., c. 28 (U.K.).

²⁰ *Canada Speaker (Appointment of Deputy) Act*, 1895 2nd Sess. 59 Vict., c. 3 (U.K.).

does not even say that the government of the day (which the *Constitution Act, 1867* deems to be the Queen) must enjoy the support of the House of Commons and must tender its resignation if it loses a Vote of Confidence.

The preamble of the *Constitution Act, 1867* says that Canada will have “a constitution similar in principle to that of the United Kingdom.” The essential structure of the British Constitution is also, of course, unwritten. Apart from the division of powers and the *Canadian Charter of Rights and Freedoms*, many of the really important elements of our Constitution are not enacted by any formal legislative process. Section 52(2) of the *Constitution Act 1982*, itself says only that the Constitution *includes* the enumerated “statutes”. Nowhere does it say, nor could it plausibly say, that the listed statutes are exhaustive. Rather than being characterized as an exception, “unwritten” constitutional principles are more accurately described as the general rule.

It is also salutary to point out that much of what the constitutional text *does* say is, in modern terms, unworkable. For example, the *Constitution Act, 1867* still contains in sections 56 and 90 a power of disallowance under which the Governor General (i.e., the federal government) may disallow any provincial statute which for any reason the federal government regards as unacceptable.²¹ This power was used as recently as the late 1930s in connection with some of the legislation passed by the Alberta Social Credit government.²² A subsequent use in 1943,

²¹ *Reference re Powers of Disallowance and Reservation*, [1938] S.C.R. 71; Gerard V. La Forest, *Disallowance and Reservation of Provincial Legislation*, (Ottawa, Department of Justice, 1955) at 78.

²² *The Bank Taxation Act; The Credit of Alberta Regulations Act, 1937; The Accurate News and Information Act*.

again involving an Alberta Statute, was less controversial.²³ However, its use in 2011 would be regarded by any federal government, I would expect, as unthinkable. One can only imagine the furor that would greet federal disallowance of the *Quebec Charter of the French Language*²⁴ or the Alberta legislation governing development of the tar sands.²⁵

Moreover, it is well understood that the text is subject to a constitutional “living tree” reinterpretation, as was most famously illustrated in the *Persons* case. In its decision in that controversy, the Supreme Court of Canada did a meticulous historical study of what would have been understood in 1867 by the term, “fit and qualified person” to be called to the Senate, and concluded that in the context of s. 32 of the *Constitution Act, 1867* such a “person” did not include a woman.²⁶ According to those who believe in original intent (like the editorialist at the *Globe and Mail*), the Supreme Court was probably correct. However, the decision was reversed by the Judicial Committee of the Privy Council, hardly a hotbed of revolutionaries, on the basis that times change and our interpretation and understanding of the Constitution must change with it where circumstances require.²⁷ By 1930, it was evident that, regardless of original intent, women *were* (and are) fit and proper persons for appointment to the Senate.

Given this background, it seems clear that unwritten unconstitutional principles should not be a controversial topic, particularly having regard to the limited and rather anodyne principles acknowledged in the *Quebec Secession Reference*. Nevertheless, Professor Peter

²³ See La Forest, *supra* note 21 at 82 re *An Act to prohibit the Sale of land to Enemy Aliens and Hutterites for the duration of the war*.

²⁴ R.S.Q. c. C-11.

²⁵ *Oil Sands Conservation Act*, R.S.A. 2000, c. O-7.

²⁶ *Edwards v Canada (AG)*, [1928] SCR 276.

²⁷ *Edwards v Canada (AG)*, [1930] AC 124.

Hogg, in a state of apparent anxiety, writes that such unwritten “constitutional principles are vague enough to arguably accommodate virtually any grievance about government policy.”²⁸

The sensible approach, it seems to me, is not to conjure up fears and anxieties, but to look at how in fact the courts have employed unwritten constitutional principles. What will be found, essentially, is that resort to unwritten unconstitutional principles has not concerned individual grievances about government policy at all, despite the fears of Professor Hogg, but concerned structural issues related to what the Court calls the “internal architecture” of the Constitution.²⁹ Thus the *Provincial Judges’ Remuneration Reference* dealt with the relationship between the judiciary, the executive and the legislature.³⁰ While it may have been triggered by the grievances of individual judges who considered themselves underpaid, the general principles elaborated in that case operated at a higher level of abstraction — setting out some of the organizing principles of the Constitution, as the Court conceived them to be.

Similarly, the *Quebec Secession Reference* addressed the relationship of the provinces within the federation and with the Federal Parliament in a hypothetical situation for which the written Constitution, including what might be inferred from the preamble to the *Constitution Act, 1867*, had little to say. Of course the Court could have concluded that there are no relevant constitutional principles, or that a sovereigntist Quebec would be thwarted (at least at the theoretical level) by judicial insistence on meticulous observance of the constitutional amending formula, but in my view, such an ineffectual and impractical response would have represented an institutional failure. It was imperative, the Court decided, to identify a set of *legal* principles that

²⁸ Hogg, *supra* note 9 at 430.

²⁹ *Quebec Secession Reference*, *supra* note 1 at para 50.

³⁰ *Supra* note 12.

might usefully guide the political actors in a process of negotiation which the Court said explicitly would neither be supervised nor enforced by the Courts. This sensible approach attracted support from all sides of the political controversy, including the then Premier of Quebec.

Professor Mark Walker of Queens' University argues that the use of unwritten constitutional principles in these cases took little account of the doctrine of parliamentary supremacy (although I would have thought parliamentary supremacy is itself the expression of the more general "unwritten" democratic principle).³¹ However, the Court was deeply committed to giving full effect to the democratic principle. Indeed the democratic question at the heart of the *Quebec Secession Reference* was whether the democratic will of one of the legislatures in a complex federation could justify the dissolution of the federation regardless of the democratic choice expressed by the other provincial legislatures and the Federal Parliament that the federation *not* be dissolved. In a manner of speaking two expressions of the democratic will faced each other like two mirrors in a jurisprudential void (a theological metaphor borrowed from St. Augustine that Justice Gonthier might himself have utilized). The Court escaped this impasse by putting the democratic principles in the broader context of other fundamental constitutional values, including the rule of law, federalism, constitutionalism and respect in minorities. Put more simply, as did Justice Gonthier in his *Fraternity* lecture, "the law demands a degree of commitment and responsibility" between neighbours and communities.³² He was not a supporter of unilateral or peremptory behaviour either at the community or at the individual level. The simple idea of good neighbours (or "fraternity"), dressed up in the more elaborate

³¹ Mark D. Walters, "The Common Law Constitution in Canada: Return of *Lex Non Scripta* as Fundamental Law", (2001) 51 UTLJ 91.

³² *Supra* note 2 at 574.

language and rhythms of the law, underlies much of what the Court had to say in the *Quebec Secession Reference*.

The usual complaint is that resort to unwritten constitutional principles gives judges too much leeway to indulge their personal policy preferences but have judges, as alleged, conferred on themselves a licence they were never intended to have — a licence that poses the risk of great mischief to our society? Would Justice Gonthier, a deeply religious and traditionally minded jurist from Outremont, have lent his support to the sort of “unruly horse” doctrine that generally troubles judges more than it does the bolder *genre* of academics?

It is not in question that the constitutional text is both the starting point and the concluding point of many disputes. Insofar as the *law* of the Constitution is concerned, unwritten principles may be used to elucidate or elaborate on the meaning of written terms but not to “alter the thrust of its explicit text”.³³ Nevertheless, as mentioned earlier, the Supreme Court observed thirty years ago in the *Patriation Reference* that “many Canadians would perhaps be surprised to learn that important parts of the Constitution of Canada are ... nowhere to be found in the law of the Constitution”.³⁴ The great advocate John J. Robinette, acting for the federal government in the *Patriation Reference*, argued that a Commons resolution authorizing the Trudeau government to go unilaterally to London to seek passage of what became the *Canada Act 1982*, including the *Charter*, would be a purely political act, and be no more amenable to judicial supervision than a resolution wishing the Queen a Happy Birthday. The Court took a more nuanced approach, holding that while nothing in the *law* of the Constitution

³³ *Re Eurig Estate*, [1998] 2 SCR 565, at para. 66.

³⁴ *Reference re a Resolution to amend the Constitution*, [1981] 1 SCR 753 at 878.

prevented such an initiative, to do so would be *unconstitutional* if done without “a substantial degree of provincial consent” — to be determined by the politicians not the courts.³⁵ The conventional requirement of consultation and a measure of federal-provincial agreement was laid down as a matter of constitutional obligation but nothing in the text of the Constitution so stated. Indeed, the Court in 1981 observed that these important “constitutional conventions are usually unwritten rules.”³⁶ What was emphasized subsequently in the *Quebec Secession Reference* is that the *law* of the Constitution also includes fundamentally important “unwritten” principles.

Can it therefore be said, as the *Globe & Mail* argued, that unwritten principles are spun by judges “with an entrepreneurial fervor”? Methinks not. The courts have been quite careful to link unwritten constitutional principles either to what is implicit in the text of the various constitutional documents or, where necessary, to a *demonstration* of long-standing constitutional practice in Canada or the United Kingdom.

The interpretive technique of “necessary implication” sometimes draws on broad considerations of state. In the *Manitoba Language Rights* case, for example, the Court invalidated unilingual English statutes enacted by Manitoba because unilingual enactment was contrary to the *Constitution Act 1870*.³⁷ However, the result would have left Manitoba without an effective legal system. The Court held (not surprisingly) that a functioning legal system is an essential element of the constitutional order. It therefore stayed the effect of its judgment to give Manitoba time to re-enact its English-only legislation in both official languages. What rational

³⁵ *Ibid* pp. 904-5

³⁶ *Ibid* p. 880

³⁷ *Supra* note 10.

objection could there be to such a conclusion — despite the fact the underlying constitutional principle was, until enactment of the *Charter*, unwritten.

A similar approach was taken in the *New Brunswick Broadcasting* case.³⁸ An issue arose in Nova Scotia as to whether the legislature, which sits and deliberates in a very small but historic space, was within its rights to exclude media cameras from the gallery. Some of the members of the legislature were concerned that journalists would easily be able to read documents sitting on members' desks. Indeed, the federal government had earlier been embarrassed when a media telephoto lens at a press briefing picked up the text of a budget document held by the then Finance Minister. This “forced leak” caused the government to accelerate the handing down of the budget. The concern of the Nova Scotia legislators was therefore not without some basis.

At issue, was the traditional legislative privilege to “exclude strangers from the house”. The federal Parliament has a general power in s. 18 of the *Constitution Act 1867* to “define” privileges within the limits prescribed by British Parliamentary practice in 1867, but the provinces must rely on the language of the preamble.³⁹ British Parliamentary practice generally defines “privilege” as whatever is “necessary” for the functioning of the legislative body. If a special power or immunity is not necessary, then it will not be recognized by the courts as a privilege. The Court concluded that the unwritten rules of the Parliamentary privilege were *not* trumped by the written *Charter* guarantee of “freedom of the press and other media of communication”.

³⁸ *Supra* note 11.

³⁹ *Canada (House of Commons) v Vaid*, [2005] 1 SCR 667 at para 29.

Although the *New Brunswick Broadcasting* decision was deplored by the media, who were obliged to trundle their cameras elsewhere, the media themselves had been the beneficiary of unwritten constitutional principles in the *Alberta Press* case as far back as 1938. In that case the Court held, in effect, that the existence of a functioning democracy implies the free flow of ideas and opinions.⁴⁰ The same idea was carried forward in *Switzman v. Elbling*⁴¹ and *Saumur v. City of Quebec*.⁴² In the absence of a constitutional text the Court was necessarily relying on unwritten constitutional principles but there was no need for public anxiety then and there is no need for public anxiety now. What could be more fundamental to our constitutional arrangements than freedom of speech?

In my view, the *Provincial Judges' Remuneration Reference* can be similarly explained. That case, it will be remembered, arose out of conflicts raging across the country from Prince Edward Island to British Columbia between provincial governments and provincial court judges. Some of the judges claimed that the arrangements for their pay and pensions did not constitute them as “independent” within the exigencies of s. 11(d) of the *Charter* which requires in criminal cases a “fair and public hearing by an independent and impartial tribunal”.

After reviewing the facts, Chief Justice Lamer noted that on the evidence “the proper constitutional relationship between the executive and the provincial court judges in those provinces has come under serious strain.”⁴³ He was careful, however, to locate his decision in

⁴⁰ *Reference re Alberta Statutes*, [1938] S.C.R. 100.

⁴¹ [1957] S.C.R. 285.

⁴² [1953] 2 S.C.R. 299.

⁴³ *Supra* note 12 at para 7.

the context of the architecture of the Constitution not individual grievances. The litigation involved “two primary organs of our constitutional system – the executive and the judiciary – which both serve important and interdependent roles in the administration of justice.”⁴⁴ After speaking generally about the principles of judicial independence, and his description of the preamble of the *Constitution Act, 1867*, as the “grand entrance hall to the castle of the Constitution,”⁴⁵ Chief Justice Lamer actually planted his decision much more narrowly on the basis of s. 11(d) of the *Charter*. He noted that this provision applied only to criminal cases. This theoretically left open to question the guarantee of the independence of provincial court judges in *civil* matters. It would, of course, be anomalous to hold that the public was entitled to provincial court judges sitting in criminal matters to have a level of independence but not when appearing before the same judges (or their colleagues) sitting in civil matters. Again, Chief Justice Lamer, leaving aside the rhetoric about the preamble, actually anchored his decision (as I read it) in the text of section 92(14) of the *Constitution Act, 1867*, when he said:

By implication, the jurisdiction of the provinces over “courts” as that term is used in section 92(14) of the *Constitution Act, 1867*, contains within it an implied limitation that the independence of those courts cannot be undermined.⁴⁶

Why, then, apart from some of the rhetorical flourishes, did the *Provincial Judges’ Remuneration Reference* cause so much controversy? It seems to me the reasons are two in number. First of all, the case was portrayed as the judiciary acting in its own financial interest. Professor Leclair wrote that “The methods employed by some members of the judiciary in the handling of cases concerning their own remuneration are not respectful of the most basic rules of

⁴⁴ *Ibid.*

⁴⁵ *Ibid.* at para. 109.

⁴⁶ *Ibid.*

propriety.”⁴⁷ He continued, “In view of the context and the manner in which the Courts have appealed to the unwritten principle of judicial independence, they have crossed the line between legitimate and illegitimate action.”⁴⁸ Another Professor, a Mr. Jeffrey Goldsworthy speaking from his perch in Australia, wrote that the majority reasons in the *Provincial Judges’ Remuneration Reference* were “mush”. Moreover, he said, it was “mush in the service of an agenda” allowing the judges to protect their own salaries during hard economic times when others paid by the public purse were taking cuts.⁴⁹ Methinks that if such a dismal view of judicial integrity were based on reality rather than academic imaginings we would have much bigger problems in our legal system than the supposed bogeyman of “unwritten constitutional principles”.

The second, and I think more substantive cause of controversy, was the nature of the remedy arrived at by the Court. Having identified a breach of judicial independence, the Chief Justice propounded a constitutional principle that any changes to or freezes in judicial remuneration require governments to have prior recourse to a special process which must be “independent, effective, and objective”. The purpose of this process is to avoid the possibility of, or even the appearance of, political interference through economic manipulation. If the executive or legislature chooses to depart from the recommendations of an independent “commission” set up for that purpose it would have to justify its decision “according to a standard of simple rationality”.⁵⁰ I accept that the remedy was controversial, but subsequent cases have demonstrated that the alarm raised by the critics was unjustified. When governments

⁴⁷ Leclair *supra* note 8 at para 86

⁴⁸ *Ibid.* at para 92.

⁴⁹ Jeffrey Goldsworthy, “The Preamble, Judicial Independence and Judicial Integrity, (2000) 11:2 Constitutional Forum 60 at 64.

⁵⁰ *Ibid.*

have “departed from” recommendations by the compensation commissions (as has frequently been the case) the governments have generally been able to show their decisions met a test of “simple rationality”.⁵¹ The unwritten principles have not been deployed to subvert the Constitution, and in particular have not been deployed to remove from the elected representatives their usual and proper control of the public purse.

The next important judicial remuneration case involved New Brunswick legislation that replaced the existing system of supernumerary judges with a panel of retired judges paid on the basis of a *per diem* allowance.⁵² Justice Gonthier pushed the envelope on that one, (I think) in holding, for the majority, that the principle of judicial independence had been violated. He contended that the elimination of supernumerary status “constituted a change in the conditions of office which were advantageous to the judges by denying them the option of being eligible for a less demanding workload to be determined in a manner respectful of the institutional independence of the court. This benefit was likely to be substantial, impacting the quality and style of life judges in their latter years.”⁵³ I dissented from this result, writing for myself and Justice Lebel, on the basis that “[t]he repeal of a potential benefit voluntarily conferred by the legislature, that was wholly discretionary as to whether in practice it produced any benefit at all, could not and in my view did not undermine their institutional independence.”⁵⁴ However, in my view, the *Mackin* decision was no more than an error in the application of a valid principle — not a reason to condemn resort to the underlying principle itself.

⁵¹ *Provincial Court Judges’ Assn. of New Brunswick v New Brunswick (Minister of Justice); Ontario Judges’ Assn. v Ontario (Management Board); Bodner v Alberta; Conférence des juges du Québec v Quebec (AG); Minc v Quebec (AG)*, 2005 SCC 44, [2005] 2 SCR 286.

⁵² *Mackin v New Brunswick (Minister of Finance); Rice v New Brunswick*, 2002 SCC 13, [2002] 1 SCR 405.

⁵³ *Ibid.* at para 67.

⁵⁴ *Ibid.* at para 96.

Up to this point I have been talking about cases that arguably merely fill gaps in our constitutional machinery. The same cannot be said, of course, of the *Quebec Secession Reference*. The issue of the break-up of the country went well beyond a simple matter of “gap” in the constitutional text, and addressed a hypothetical risk to the continued existence of the country itself.⁵⁵

In approaching the *Quebec Secession Reference*, however, it is important to understand the nature of the questions before the Court. Although the legal challenge began as a private application by the flamboyant Quebec lawyer Guy Bertrand, the initiative was picked up by various governments and proceeded essentially as a series of references to provincial courts of appeal and thus, on further appeal, to the Supreme Court. A similarly framed reference was made directly to the Supreme Court by the federal government.

Being a reference, it was within the government’s prerogative to ask the Court to assume a situation where Quebec voters had endorsed a referendum question calling for a unilateral secession from Canada. The issue in the case really revolved around the legitimacy of “unilateralism”. Quebec (represented by an *amicus curiae*) claimed that an affirmative vote of 50 per cent plus one would be enough for Quebec to leave Canada without further ado. In fact, it

⁵⁵ Professor Leclair took exception to a previous version of this paper wherein, he says, I erroneously lumped him in with some critics of the *Quebec Secession Reference* with whom he does not agree. In fact, he pointed out, “Not only have I been one of the few Quebec scholars to laud the decision and the Court’s reasoning, but I also praised the Court’s moderation in Quebec’s general francophone newspapers”. Where we disagree, it seems, is on his view that he says “it is hard to see how these judicially created principles, on their own, could legitimately be used to invalidate legislation”. My position is that if one accepts that such unwritten principles are constitutional in nature they will, according to the orthodox hierarchy of sources of law, prevail over ordinary statutes.

emerged after the referendum result was known that such a unilateral action was precisely what the Parizeau Government had in mind.

At issue, therefore, was what role, if any, the rest of Canada would have in such a hypothetical situation. After all, Canada had been functioning as an interdependent society for 130 years at that point and the question facing the Court was whether a simple democratic vote in one province could constitutionally trump all other constitutional norms. Could Quebec just leave without any requirement of an orderly negotiation of the terms of separation? On the other hand, could the rest of Canada simply ignore a democratic vote in Quebec authorizing such a departure? Was the answer as simple as “good neighbourliness”? As Justice Gonthier stated in his subsequent *Fraternity* lecture, “the backbone of civil society rests on treating each of our neighbours in a fair manner and with a degree of trust.”⁵⁶ But in what way can such a sentiment be transformed into constitutional law?

Interestingly, the only real historical precedent was the request by Nova Scotia in 1868 to withdraw unilaterally from Confederation. The Colonial Secretary in London rejected this demand on the basis that commitments had been entered into by all of the provincial entities on the strength of a Confederation and the scale of this interdependence rendered Nova Scotia’s request unacceptable. As stated by the Colonial Secretary, “vast obligations, political and commercial, have already been contracted on the faith of a [Confederation] so long discussed

⁵⁶ *Supra* note 2 at 574.

and so solemnly adopted.”⁵⁷ By 1998, the intervening 130 years had added multiple layers of interdependence and complexity to those original colonial arrangements.

Of course the inverse of unilateralism is multilateralism. In conducting its historical research into our constitutional practice beginning with the rejection of the Nova Scotia initiative in 1868, the Court concluded that on any objective view Canada’s entrenched *modus operandi* as a country has been multilateralism. Canada is not a revolutionary society. Our statesmen through the years have emphasized stability and continuity, or as it was put in the Court’s judgment, constitutionalism and the rule of law.⁵⁸ They considered themselves *required* to proceed in this way. Thus a democratic vote in one province would, if expressed in favour of separation, demand respect from the other partners in Confederation, but the mutual commitments and interdependence built over the intervening years would equally require respect from Quebec. Mutual respect would lead to an orderly transition (if such proved to be the outcome of negotiations) to avoid legal chaos, thus vindicating the “unwritten principles” by which the country had governed itself from the outset. I do not myself see why this constitutional approach should be considered a judicial overreach.

Interestingly enough, a similar path has been taken by the High Court of Australia which has held that in addition to their constitutional text, the Constitution also incorporates unwritten principles which are said to derive from its structure and purpose. These principles include responsible government, federalism, representative democracy and the separation of powers, all

⁵⁷ Quoted in H. Wade MacLauchlan, “Accounting for Democracy and the Rule of Law in the Quebec Secession Reference” (1997), 76 Can Bar Rev 155, at 168.

⁵⁸ *Quebec Secession Reference*, *supra* note 1 at para 33.

of which are said to be reflected, although not explicitly set out, in the text.⁵⁹ These principles, of course, look very much like those endorsed by the Supreme Court of Canada in the cases we are discussing. The Supreme Court of India has taken a comparable approach.⁶⁰ Moreover, there is now, apparently, an equivalent approach in France where unwritten principles have been said, as in the case of a fresh shipment of Beaujolais, to give rise to the cry that “le droit constitutionnel nouveau est arrivé.”⁶¹

Quebec’s position (as advanced by the *amicus curiae*) was that in a democratic state the holding of a referendum trumped all other principles of the Constitution – written or unwritten. But why should it excite such controversy for the Court’s judgment to put the principle of democracy in the broader context of other fundamental principles, primarily the rule of law, and of the history and constitutional practice of our federation? In *De Legibus*, Cicero wrote that “*Salus populi est Suprema lex*” — the welfare of the people is the ultimate law — and Charles Gonthier would likely have said — had he been asked — that in this respect nothing very much has changed in the last 2000 years. The Court’s decision was grounded on a constitutional imperative to preserve continuity, stability and order through the rule of law. What is so scary about that?

Perhaps the most controversial of the listed “unwritten principles of the Constitution” was the fourth principle – namely, the protection of minorities. However, as Justice Gonthier subsequently observed in his *Fraternity* lecture, “Inclusion is essential for the proper functioning

⁵⁹ *Abebe v. Commonwealth*, [1999] HCA 14; 197 CLR 510.

⁶⁰ Vivek Krishnamurthy, “Colonial Cousins: Explaining India and Canada’s Unwritten Constitutional Principles” (2009) 34 *Yale J Int’l L* 207 at 218.

⁶¹ Dominique Turpin, *Droit constitutionnel*, 4e ed. (Paris : Presses universitaires de France, 1999).

of a polyethnic state such as Canada.”⁶² He expanded on this theme a few years later in his *Law and Morality* paper:

I believe that Canada’s multilingual, multiethnic and multicultural background has resulted in legal structures which foster a variety of moral perspectives. This variety was a function of increased immigration from a range of cultures, which allowed different value systems to interact more directly. ... Our legal system has adapted to accommodate these realities, not by using the law to enforce particular moral choices, but rather by limiting its application to cases where the community cannot tolerate a form of behaviour because it threatens the fabric of the community.⁶³

The issue of minority rights was of course directly raised in the *Quebec Secession Reference*. Quebec society includes important ethnic linguistic and religious minorities, including a large aboriginal population resident in a vast resource-rich northern portion of the province that was only added to Quebec in 1912.⁶⁴ What of the rights of these minorities?

It can hardly be doubted that “the respect for minorities” has been a fundamental principle of our constitutional arrangements from the beginning. The *Royal Proclamation of 1763* was designed to calm the fears of First Nations in the face of expected disruption brought about by colonization and settlement. Some years later the *Quebec Act of 1774* sought to reconcile the former residents of New France to British rule by guaranteeing accommodation of the Roman Catholic religion (including the church’s right to collect tithes) and the French civil law, all of which protected the interest of what was becoming a linguistic, cultural and religious minority. The *Constitution Act, 1867* contains numerous provisions dealing with linguistic and

⁶² *Supra* note 2 at 574.

⁶³ Charles Gonthier, “Law and Morality” (2003) 29 Queen’s LJ 408 at para. 47.

⁶⁴ *The Quebec Boundaries Extension Act, 1912*, S.C. 1912, c. 45, s. 2; *An Act respecting the extension of the Province of Quebec by the annexation of Ungava*, S.Q. 1912, c. 7, s. 1.

religious minorities. “Indians and land reserved for Indians” was the subject of a specific federal legislative and executive power. The *Indian Act* is today denounced in some quarters as an instrument of oppression not protection, but one wonders what would have happened to First Nations’ lands if it had never been passed.

It should hardly have been controversial for the Supreme Court to write in the *Quebec Secession Reference* that “although Canada’s record of upholding the rights of minorities is not a spotless one, that goal is one towards which Canadians have been striving since Confederation, and the process has not been without successes. The principle of protecting minority rights continues to exercise influence in the operation and interpretation of our Constitution.”⁶⁵

In the 1900s of course there were numerous controversies regarding minorities. One of the more troubling events was the deportation of Japanese Canadians after the Second World War by executive order under the *War Measures Act*.⁶⁶ The order targeted not only non-citizens of Japanese origin, but Canadian citizens of Japanese descent who had no connection whatsoever with the state of Japan. Many of these people had lived their entire lives in Canada. Despite its court victories the Federal Government abandoned the deportations in January 1947 and paid \$1.3 million dollars in compensation to almost 1500 Japanese Canadians. In subsequent cases the Supreme Court did better. An unpopular minority of trade unionists espousing communism, for example, found some protection in the Supreme Court of Canada despite the bonfire of McCarthyism south of the border.⁶⁷ The Court struck down a decision by the Nova Scotia

⁶⁵ *Supra* note 1 at para 81.

⁶⁶ See *The Cooperative on Japanese Canadians v Canada (AG)*, [1946] SCR 248, aff’d [1947] AC 47. The Supreme Court of Canada nevertheless upheld the validity of the order, Justice Rand dissenting..

⁶⁷ *Smith and Rhuland Limited v The Queen*, [1953] 2 SCR 95 at 98-99.

Labour Board that had refused to certify a trade union because of its alleged domination by communist leadership.

More dramatically, in *Switzman v. Elbling*, the Court struck down what was popularly known as the *Padlock Law*, a Quebec statute which made illegal the promotion of communism in the province and authorized the police to padlock any house where such propaganda was to be found.⁶⁸ Invalidation of such a law, and the implicit message of respect for political minorities was undoubtedly as controversial in its day as anything done to date by the courts under the *Charter*. Communists in that era were regarded as every bit as scary as *jihadists* today.

The Supreme Court's intervention in the campaign waged by the Duplessis Government against Jehovah's witnesses in Quebec is now widely approved, but at the time it was denounced in some quarters as judicial activism of the most pernicious sort, especially by the Roman Catholic Church. The provocative conduct by the religious minority of Jehovah's Witnesses was much resented by the Catholic majority. *Boucher v. the King* involved the distribution of a pamphlet entitled "Quebec's Burning Hate for God, Christ and Freedom is the Shame of all Canada".⁶⁹ After listing various grievances, the pamphlet concluded that "the force behind Quebec's suicidal hate is priest domination." This was powerful stuff. A number of Jehovah's witnesses were charged with sedition but the Supreme Court (at a re-hearing) quashed the prosecution. Quebec's treatment of its religious minority of Jehovah's witnesses also

⁶⁸ *Supra* note 41.

⁶⁹ [1951] SCR 265.

preoccupied the Court in *Saumur v. City of Quebec*⁷⁰ and, perhaps most famously, in *Roncarelli v. Duplessis*.⁷¹

In *Roncarelli*, the Court gave voice to some of the unwritten constitutional principles subsequently endorsed in the *Quebec Secession Reference*. Rand J. said that “the rule of law [is] a fundamental postulate of our constitutional structure”⁷² even though (lest we forget) it was nowhere mentioned in the constitutional documents of the day.

For those who doubt the existence of unwritten constitutional principles, it must be remembered that this string of decisions by the Supreme Court of Canada was delivered in the absence of any *Bill of Rights* or *Charter*. Nothing in the constitutional text plausibly justified the approach. Although some academics spoke of an “implied *Bill of Rights*”, and the expression found favour with one of the judges in the *Alberta Press* case,⁷³ the Court in fact proceeded on the basis of broad legal principles, unwritten yes, but basic and essential to our constitutional order.

Finally, I turn to the question of whether the case law subsequent to the *Quebec Secession Reference* bears out the alarm expressed by some of the more anxious academics (as well as the Nervous Nellies at the Toronto *Globe and Mail*) that the unwritten principles of the Constitution pose a threat to an orderly and predictable legal system.

⁷⁰ *Supra* note 42.

⁷¹ [1959] SCR 121.

⁷² *Ibid.* at 142.

⁷³ *Reference re Alberta Statutes*, *supra* note 40 at 133ff, Duff CJC.

In *British Columbia v. Imperial Tobacco Ltd.*⁷⁴ the Court upheld a British Columbia statute that created a retroactive cause of action against tobacco companies to help defray health costs incurred in the treatment of smokers. The Court held that “protection from legislation that some might view as unjust or unfair properly lies not in the amorphous underlying principles of our Constitution, but in its text and the ballot box.”⁷⁵ This observation did not purport to denigrate the importance of unwritten principles generally, but the Court clearly rejected a constitutional challenge to specific legislation on a vague notion that the statute did not live up to the tobacco companies’ idea of the rule of law.

It is true that in *Christie v. British Columbia*, the British Columbia Court of Appeal accepted that access to justice was a component of the rule of law and that, based on the *Quebec Secession Reference*, it could be used to strike down otherwise valid provincial legislation. The challenged law was a tax on legal services. This view was rejected on appeal to our Court because of its “fiscal implications” and the lack of any blanket constitutional right – written or otherwise – to legal services.⁷⁶ *Christie* shows that the “unwritten constitutional principles” are not spun “with entrepreneurial fervour” as the anxious *Globe* editorial feared, but are rooted deeply in constitutional history and practice. The principles accepted to date by the Supreme Court are essentially truisms. It is hard to think of any legal principles less controversial in Canada than federalism and the rule of law, constitutionalism, the protection of minorities and democracy.

⁷⁴ *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 SCR 473.

⁷⁵ *Ibid.* at para 66.

⁷⁶ *Supra* note 13, SCC at para 14.

In *Hogan v. Newfoundland*, the Court of Appeal of Newfoundland and Labrador rejected an argument that a constitutional amendment eliminating the right to denominational education for Roman Catholics was invalid despite its compliance with s. 43 of the *Constitution Act 1982*. The Newfoundland Court of Appeal denied that the unwritten constitutional principle protecting minorities could trump or override compliance with the text of the constitutional amending formula.⁷⁷

Similarly in *Baie D'Urfé (Town) v. Quebec (A.G.)*, the Quebec Court of Appeal rejected an argument by the town against municipal amalgamation based on the unwritten constitutional principle of protection of minorities.⁷⁸ The Court held that such an unwritten constitutional principle cannot be interpreted as granting a language minority a right to municipal structures frozen in time, which right would in practice grant them a veto over any municipal reform in perpetuity.

What then about the controversy created by the decision of the Ontario Court of Appeal in the *Montfort Hospital* case? Here again it is necessary to look at exactly what the Court was dealing with and the precise decision that was made. At issue was closure of Ottawa's Montfort Hospital by order of the Ontario Health Services Restructuring Commission. It was established that Montfort was (and is) the only hospital in Ontario providing a wide range of medical services and professional training in French.

⁷⁷ *Hogan v Newfoundland (AG)*, 2000 NFCA 12, 189 Nfld & PEIR 183 at paras 123-25. Leave to appeal to the Supreme Court was denied, 183 DLR 4th 225.

⁷⁸ [2001] RJQ 2520.

The Court was not asked to invalidate any law as impinging on minority rights. All sides accepted the validity of the legislation setting up the Ontario Health Services Restructuring Commission, and its discretionary mandate. The French speaking claimants were not seeking the establishment of a facility that did not already exist. The Court simply looked at whether the Hospital Commission, in ordering the closure of the Montfort Hospital, had looked at all of the relevant circumstances. This included the Ontario *French Language Services Act* which provided in s. 5 that a person has the right to communicate in French with, and to receive available services in French from, Ontario government agencies which included the Montfort Hospital in a designated area, such as Ottawa-Carleton.⁷⁹ It appeared to the court that the Hospital Commission had simply ignored the *French Language Services Act* without explanation or justification.⁸⁰ The Court went on to say that unwritten constitutional principles may be relied upon to delineate the scope of administrative discretion and to place some relevant limits on its exercise. The Supreme Court had already said in *Babcock* that “the unwritten constitutional principles are capable of limiting government actions.”⁸¹

The Ontario Court of Appeal concluded that the Commission had a statutory mandate to consider the “public interest” and that it had failed to adequately consider the fundamental principle of protection of minority rights in assessing the public interest, particularly minority rights entrenched by the Legislature itself in the *French Language Services Act*. In other words, the Commission had failed to take into account relevant considerations established by the Legislature itself and its decision was quashed on ordinary administrative law grounds. The Ontario Government did not seek to appeal the decision.

⁷⁹ R.S.O. 1990, c. F.32.

⁸⁰ *Supra* note 14 at 63.

⁸¹ *Babcock v Canada (AG)*, 2002 SCC 57, [2002] 3 SCR 3 at para 54.

I expect Charles Gonthier would have approved. Certainly nothing in the Ontario Court of Appeal's decision justified the *Globe and Mail's* anxiety attack.

In closing, I offer a few concluding observations.

Firstly, the elaboration of the unwritten principles of the Constitution was an enduring and important concern of Charles Gonthier throughout his long judicial career. The Court was fortunate to have him as a senior and highly esteemed colleague at the time the *Quebec Secession Reference* came before us. The analytical approach adopted in that case by the Court was not novel and it ought not to have been considered scary.

Moreover, none of the critics have offered any constructive alternative to the approach taken by the Court in the *Quebec Secession Reference* apart from standing aside in favour of a sort of political explosion if the people of Quebec were to vote in favour of separation. The judgment in the *Quebec Secession Reference* was in an important sense, a profound and nuanced expression of the principle of *fraternité* writ large.

The unwritten principles identified from time to time by the Supreme Court have long legal roots in our constitutional history. They did not spring from the heads of the Supreme Court Judges in 1998 to express their personal prejudices and policy preferences. On this point as well I refer to the observation of Justice Gonthier in his *Fraternity* paper that fraternity or a sense of *mutual* obligation within the community is "the glue that binds liberty and equality to a

civil society” and “provides a sense of continuity with the past and the future.”⁸² The personal situation of Charles Gonthier, of course, embodied that sense of historical continuity. His father had served as Auditor General of Canada and his uncle as a federal Minister of Justice.

Charles Gonthier was a man whose depth of learning was exceeded only by his sense of personal modesty and decorum. As one of the most respected bicultural, bilingual and bijural jurists ever to sit on the Supreme Court, Justice Gonthier’s presence added immense credibility to the work of the Court at a critical juncture in its history. Canada is greatly in his debt.

⁸² *Supra* note 2 at 569.