Roots of the Living Tree

Matching respect for the letter of the law with an understanding of changing times is central to constitutional interpretation in Canada.

THE HONOURABLE SUZANNE CÔTÉ

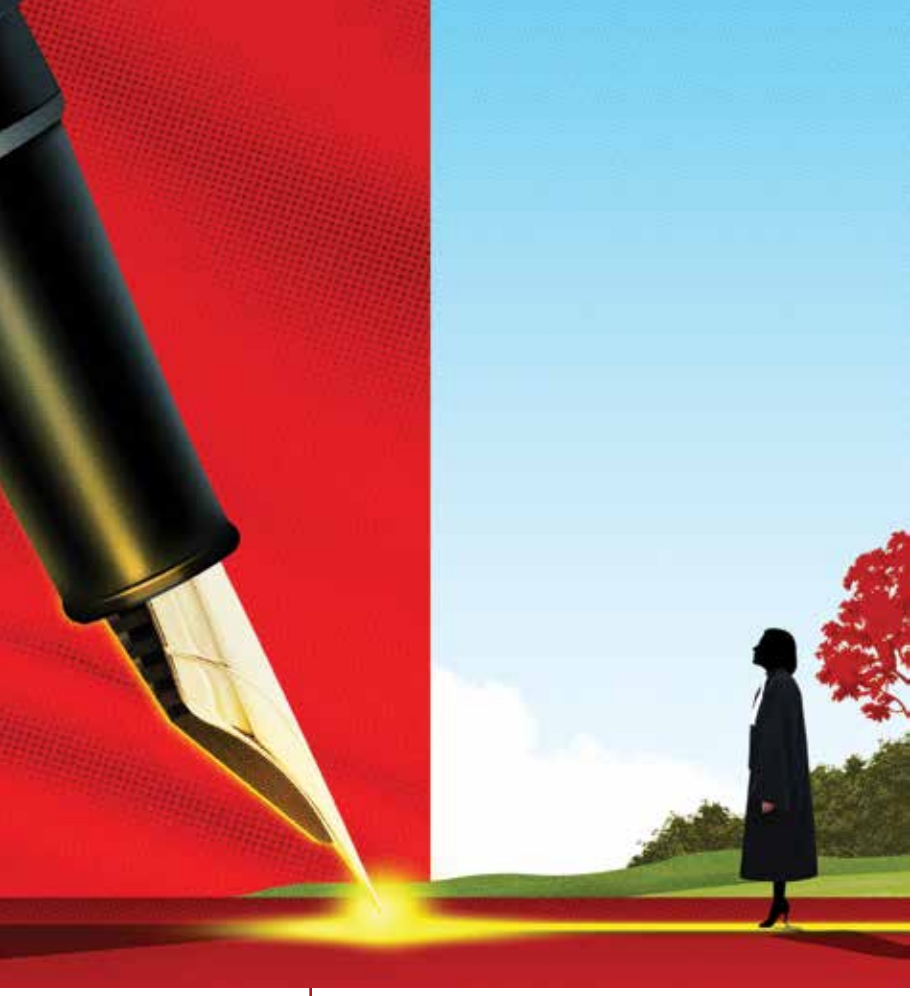
Multiple decisions of the Supreme Court of Canada insist that it is the Constitution itself—as applied by courts pursuant to their constitutional duty—that circumscribes the powers of legislatures. Inherent in this claim is the assertion that courts are bound by the rules and principles enshrined in Canada's constitutional instruments, as defined in Section 52(2) of the Constitution Act, 1982. Our Court has consistently stressed that the Constitution is not "an empty vessel to be filled with whatever meaning we might wish from time to time." Put differently, the Constitution is not merely a reflection of the policy views held by a majority of Supreme Court justices at a given point in time.

This is not to say that the process of developing the law and expounding the Constitution merely consists of mechanically applying established legal rules. As Justice Bradley W. Miller of the Court of Appeal for Ontario wrote in a recent article: "After all, constitutions are not self-interpreting or self-applying." Our Constitution is often cast in highly abstract terms—particularly the rights and freedoms guaranteed in the Canadian Charter of Rights and Freedoms. Most cases that culminate at the Supreme Court raise complex and novel issues to which there is no obvious solution prior to adjudication. For example, in *Frank v. Canada (Attorney General)*, a 2019 case regarding the right to vote of expatriates intending to return to Canada, Justice Russell Brown and I noted that the limitations analysis under Section 1 of the Charter requires a careful assessment of "[t]he moral nuance inherent in defining and defending the boundaries of rights." Indeed, in the words of Justice Miller, judicial review of legislation "is an unavoidably normative exercise."

Although there is some judicial discretion in it, constitutional adjudication is bound by significant legal constraints. Unlike other actors who interpret and apply the Constitution, courts must provide coherent reasons, both internally and externally.

The Hon. Suzanne Côté, justice of the Supreme Court of Canada, delivered the Hallows Lecture at Marquette Law School on March 4, 2024. This is an edited text of that lecture. Before her judicial appointment in 2014, Justice Côté practiced law in Montreal, specializing in complex litigation, and in her native Gaspé Peninsula. She has been a fellow of the American College of Trial Lawyers since 2005. Justice Côté has taught evidence and litigation at the École du Barreau du Québec and has also lectured at the Université du Québec à Rimouski and the Université de Montréal. She received an LL.B. from Université Laval before being called to the Quebec Bar in 1981.

Illustrations by Taylor Callery



Internal coherence requires that judicial decisions are free of contradictions. External coherence dictates that judgments are consistent with relevant case law, subject to strict criteria for departing from stare decisis. But where there is no precedent controlling the outcome of a case, the interpretive methodology set out in the jurisprudence of our Court is perhaps the most significant source of legal constraints. This afternoon, I would like to examine how, in practice, Canadian courts proceed when they approach novel constitutional issues.

At the core of this discussion are two important points: first, the notion of constitutional supremacy within Canada, and second, the Canadian Constitution as a living tree, capable of growth and expansion within its natural limits.

I want to begin by exploring the Constitution and its role in Canadian courts throughout history. You will see that our Constitution is one that is capable of accommodating and addressing the realities of modern life, but one that also has its natural limits, such as its text and its associated unwritten principles. In discussing the principles of constitutional interpretation adopted by our Court, I offer examples of how this approach has guided the growth and interpretation of the Charter of Rights and Freedoms.

Constitutional Interpretation in the Canadian Context

I turn first to the issue of interpretive methodology and the constraints it imposes on judicial discretion in the interpretation of the Constitution. Within this discussion, I attempt to provide a systematic account of the principles established in our Court's jurisprudence. In my view, some of the Supreme Court's recent decisions shed light on the relationship between, on the one hand, the main interpretive tools we use, namely text, purpose, and historical context, and, on the other hand, structure.

It is important to note at the outset that, like the U.S. model of interpretation, Canadian constitutionalism recognizes not only the written Constitution itself but also (as stated by Luc B. Tremblay) the "legitimate authority of the judiciary to review the constitutionality of legislative and executive acts." Indeed, some scholars have highlighted Canada's adoption of rhetoric similar to the U.S. model of constitutionalism, following the words of Chief Justice John Marshall in *Marbury v. Madison*.

For example, in our Court's 1984 decision of *Law Society of Upper Canada v. Skapinker*, a case involving mobility rights under Section 6 of the Charter, the Court characterized the Constitution Act, 1982, as "a part of the constitution of a nation." As in the U.S. model, the supremacy of the Constitution as the "expression [of] 'elected representatives of the people of Canada,' as opposed to the 'Imperial Parliament,'" was clear. Its normative force was such that the people "had an original right to establish for their future the political institutions of their choices." In addition, our Court in *Skapinker* accepted that elected representatives of the Canadian people authorized judicial review of the constitutionality of government actions.

Yet, as you will see, while in some respects there are similarities between the U.S. and Canadian models, there are also stark differences.

Basic Principles of Constitutional Interpretation

To explore interpretive methodology, it is necessary to provide an overview of the leading principles of constitutional interpretation set out in our jurisprudence. It is well-established that the text of the Constitution constitutes the starting point and most authoritative tool in the exercise of

constitutional interpretation. Our Court, in *In re An Act Respecting the Vancouver Island Railway*, made clear that "[a]lthough constitutional terms must be capable of growth, constitutional interpretation must nonetheless begin with the language of the constitutional law or provision in question." Indeed, our Court's jurisprudence has consistently recognized the primacy of the Constitution's written terms in reviewing the validity of legislation.

Textual analysis is complemented by the related, but distinct, principles of "purposive" and "generous" interpretation, which is in many ways distinguished from the U.S. model. In the case of *R. v. Big M Drug Mart Ltd.*, where the Court in 1995 held that the Lord's Day Act violated freedom of religion under Section 2 of the Charter of Rights and Freedoms, Chief Justice Brian Dickson described the elements of a purposive inquiry:

> [T]he purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*.

Chief Justice Dickson further stated that while constitutional interpretation should be "generous rather than . . . legalistic," courts should not "overshoot the actual purpose" of the provision, having regard to "its proper linguistic, philosophic and historical contexts."

Subsequent jurisprudence refined the nature and scope of the purposive inquiry. It is now well established that unwritten constitutional principles are additional indicia of purpose. As denoted by the concept itself, an "unwritten" principle cannot be found in the constitutional text itself. These principles have influenced our constitutional interpretation over time and include democracy, constitutionalism, the rule of law, the independence of the judiciary, the protection of civil liberties, and federalism.

Moreover, our Court specified the hierarchical rank of purpose in relation to the other interpretive tools. On the one hand, in *Quebec (Attorney General) v. 9147-0732 Québec inc.* (2020), which concerned whether Section 12 of the Charter of Rights and Freedoms protects corporations from cruel and unusual punishment, our Court affirmed that the text constitutes "the most primal constraint on judicial review" and shapes "the outer bounds of a purposive inquiry." Relatedly, the Court asserted that the written terms of the Constitution are the "first indicator of purpose." On the other hand, when interpreting Section 11(i) of the Charter of Rights and Freedoms (granting the benefit of the lesser punishment when the sanction has changed between commission of the offence and sentencing), our Court confirmed in *R. v. Poulin* (2019) that "[t]he purpose of a right must always be the dominant concern in its interpretation; generosity of interpretation is subordinate to and constrained by that purpose." That is to say that constitutional provisions "must be interpreted liberally within the limits that their purposes allow."

> Our Court has consistently stressed that the Constitution is not "an empty vessel to be filled with whatever meaning we might wish from time to time."

Progressive Interpretation and the Living Tree Metaphor

The principle of progressive interpretation has started to develop and has been recognized in many cases, but its relationship with other interpretive principles remains unclear. It is tied to the famous "living tree" metaphor at the heart of this lecture. In *In re Same-Sex Marriage* (2004), our Court equated progressive interpretation with the principle of a "large and liberal" interpretation. And in *R. v. Comeau* (2018), a case about whether a provision of the Liquor Control Act infringed Section 121 of the Constitution Act, 1867, our Court determined that progressive interpretation complements the principle that "[c]onstitutional texts must be interpreted in a broad and purposive manner."

To illustrate the nature of progressive interpretation, I turn to the Privy Council's decision in *Edwards v. Canada* (*Attorney General*) (1929), which is colloquially known as the *Persons Case*. The question in that case was whether Section 24 of the Constitution Act, 1867, which authorizes the governor general to appoint "qualified Persons" as

senators, included women. The Privy Council held, after the Supreme Court of Canada had decided otherwise, that the term *person* refers to members of either sex. Three fundamental interpretive principles can be extracted from Lord John Sankey's opinion.

First, the focus of the inquiry is on the text as opposed to the original intent of the framers. In Lord Sankey's words, "the question is not what may be supposed to have been intended, but what has been said." The fact that the framers did not have women in mind when opting for the term *person* in Section 24 was irrelevant. In Canada, it would be perilous for courts to oust the meaning of the text by speculating on the framers' intentions.

The second principle is the presumption of ordinary meaning. For Lord Sankey, the original meaning of the word *person* in Section 24 "would undoubtedly embrace members of either sex." In a rhetorically powerful passage, Lord Sankey expressed the presumption of ordinary meaning as follows:

> The word "person" as above mentioned may include members of both sexes, and to those who ask why the word should include females, the obvious answer is why should it not.
>
> In these circumstances the burden is upon those who deny that the word includes women to make out their case.

But the ordinary meaning of a word is not always determinative given the surrounding context. Lord Sankey therefore conducted what would today be called a "purposive" analysis. He evaluated "external evidence derived from extraneous circumstances such as previous legislation and decided cases." He then concluded that the traditional exclusion of women was not because the word *person* could not include them, "but because at common law a woman was incapable of serving a public office."

Lord Sankey next considered the internal evidence, namely the act itself. Considering the object and structure of the act, he contrasted the use of the word *persons* throughout the act with more specific references to "male British subject[s]" in Sections 41 and 84. This evidence supported the presumption of ordinary meaning.

The final principle to take from the reasons is that a "large [and] liberal" interpretation generally should be given to the Constitution Act, 1867, because it is an "Imperial Act which creates a constitution for a new country." It was here that Lord Sankey first articulated the famous "living tree" metaphor, saying that the Constitution is similar to a "living tree capable of growth and expansion within its natural limits."

For Lord Sankey, the relationship between the text and progressive interpretation deserved further attention. The primacy of the text, which is affirmed in modern case law, is reflected in two ways in the *Persons Case*. First, there is the principle that the Constitution's written terms are the focus. And second, the presumption is to favour the ordinary meaning of words at the time of their enactment. However, Lord Sankey stresses the importance of constitutional evolution through judicial interpretation.

A few years after the *Persons Case*, the Privy Council sought to resolve this apparent tension in a case called *James v. Australia* (1936), which dealt with legislation regulating the dried fruits trade and the interpretation of Section 92 of the Constitution of Australia. In that case, the Privy Council discussed its own Canadian cases on constitutional interpretation:

> It is true that a Constitution must not be construed in any narrow and pedantic sense. The words used are necessarily general, and their full import and true meaning can often only be appreciated when considered, as the years go on, in relation to the vicissitudes of fact which from time to time emerge. It is not that the meaning of the words changes, but the changing circumstances illustrate and illuminate the full import of that meaning.

More recently in *In re Same-Sex Marriage*, our Court ruled that the term *marriage* under Section 91(26) of the Constitution Act, 1867, refers to the "voluntary union of two people to the exclusion of all others." This example illustrates how the interpretation of a provision could not turn solely on how framers would have treated same-sex marriages in 1867.

The living tree metaphor therefore does not entail that words acquire new meanings over time, nor can the purpose of a provision evolve. Rather, it suggests that a generous and dynamic approach in the interpretation of ambiguous or under-determinate terms is warranted to ensure that the Constitution "continually adapt[s] to cover new realities" within the natural limits established by the text.

The living tree metaphor does not appear congruent with the U.S. model, which provides

(as stated by Professor Tremblay) that "the written Constitution is a founding legal text made morally legitimate by virtue of an original act of consent by the people." It is distinct from the notion that constitutional norms must derive from the original will of the people and the "original intention" of the framers.

The Modern Approach to Constitutional Interpretation

I begin first with interpretation, followed by the concept of construction. The case law indicates that the reference point is the ordinary meaning of the language used. I note that in *R. v. Comeau* and several other cases, our Court adopted what we call the "modern approach to statutory interpretation," where the "text of the provision must be read harmoniously with the context and purpose of the statute."

In cases where the written terms are ambiguous, the text of a provision is not sufficient, as it can only define a range of possible interpretations. As a result, the role of "purpose" becomes central to resolving ambiguities. But again, the focus is still on the text actually enacted, not the intention of the framers. The principle of generous interpretation remains subordinate.

Our Court's decision in *R. v. Stillman* (2019) illustrates how courts must proceed to other steps of analysis when the ordinary meaning of a provision is inconclusive. This case pertained to the

"law" exception as to the right to a trial before a jury under Section 11(f) of the Charter, which reads as follows:

> Any person charged with an offence has the right:
>
> . . . .
>
> . . . except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment . . . .

The question at issue in *Stillman* was whether the Section 11(f) exception applied to service offences under Section 130(1)(a) of the National Defence Act—which incorporates into the Code of Service Discipline any "act or omission that takes place in Canada and is punishable under . . . the *Criminal Code* or any other Act of Parliament." In other words, do civilian criminal offences transformed into service offences by the National Defence Act automatically fall within the scope of the military exception under Section 11(f)?

Our Court resolved this ambiguity by conducting a purposive inquiry. Writing for the majority and holding the military exception applicable, Justice Michael Moldaver and Justice Brown asserted as follows: "Generally speaking, the same core interpretive principles that apply to *rights* stated in the *Charter* also apply to *exceptions* stated in the *Charter*. They are to be read purposively, rather than in a technical or legalistic fashion." Justices Moldaver and Brown identified the twin purposes of the *right* to a jury trial. At the individual level, accused persons benefit from a trial by their peers; at the societal level, a jury trial "provides a vehicle for public education about the criminal justice system and lends the weight of community standards to trial verdicts." The purpose of the military *exception* "is to recognize and affirm the existence of a separate military justice system" that is "designed to foster discipline, efficiency, and morale in the military."

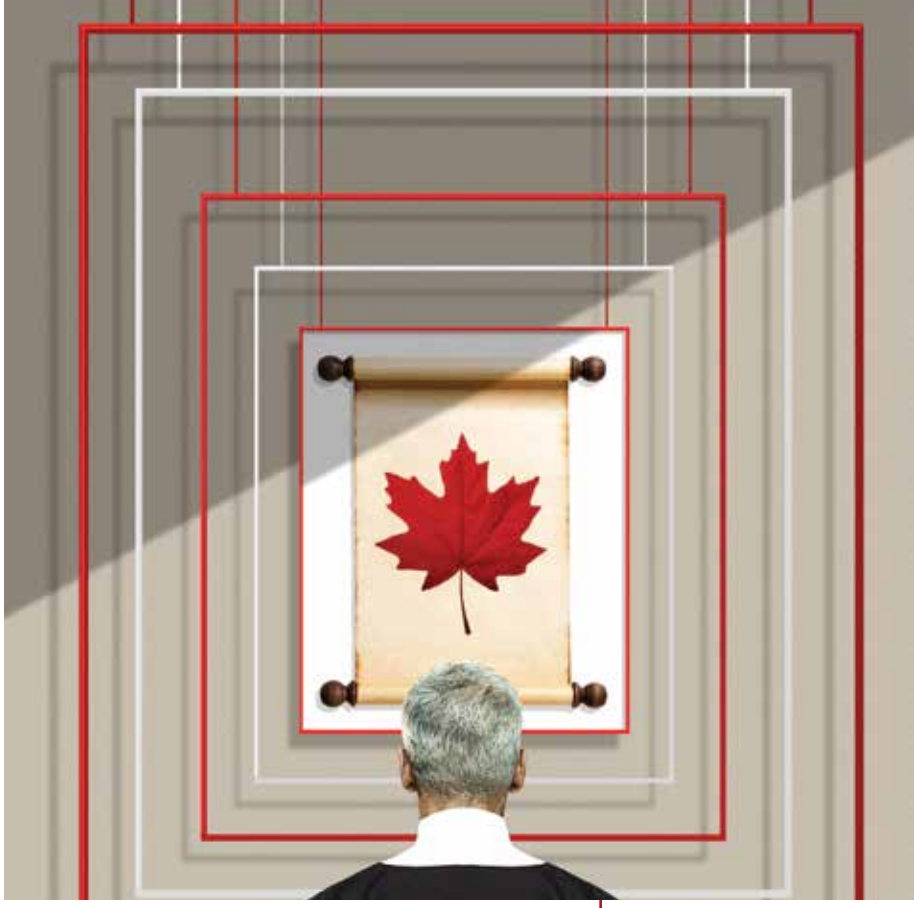
[T]he role of "purpose" becomes central to resolving ambiguities. But again, the focus is still on the text actually enacted, not the intention of the framers.

To recap, then, the first stage of constitutional interpretation consists of ascertaining the meaning of the provision at issue. The focus on the text implies that the written terms of a provision are the starting point of constitutional interpretation, and that meaning is ascertained by reference to the text enacted rather than the intention of the framers. Where a provision is ambiguous, our case law recognizes that a purposive inquiry, having regard to the historical, linguistic, and philosophic contexts, takes center stage. Finally, the principle of generous interpretation applies within the scope permitted by the text and purpose of a provision.

Then comes the second stage of the analysis—construction—which is reached where doubts still persist as to the application of a provision to concrete disputes. It is the role of courts to specify the legal effect of constitutional provisions by elaborating various tests, doctrines, rules, and principles.

Ordinarily, construction helps give legal effect to the meaning of a provision outlined in the first stage. For example, in our Court's decision in *R. v. Grant* (2009), the Court provided a test to determine when a person is detained for the purpose of Sections 9 and 10 of the Charter. This test was based on the definition of *detention* provided earlier in the decision. But in other controversial cases, the written text of the Constitution does not provide a clear solution due to issues that arise from new technology or social or legislative circumstances. In those cases, judges *may* need to develop doctrines that go beyond the text, but only where necessary to realize the purpose underlying the written Constitution. Once again, it is important to remember that the living tree contains its own "natural" limits.

To that end, a particular feature at the construction stage is the significance of structural reasoning and unwritten constitutional principles, which I alluded to earlier. Our Court's opinion in the well-known *In re Secession of Quebec* case (1998) aptly connected the "living tree" metaphor to unwritten constitutional principles. In that case, several questions were before the Court, including whether the province of Quebec could unilaterally effect its secession from Canada. In deciding the matter, our Court opined on various unwritten principles: federalism, the rule of law,



democracy, and the protection of minorities, saying that "observance of and respect for these principles is essential to the ongoing process of constitutional development and evolution of our Constitution as a 'living tree.'" As Chief Justice Richard Wagner and Justice Brown wrote in *City of Toronto v. Ontario (Attorney General)* (2021), unwritten principles may be used to expound the Constitution in two complementary ways: first, they help in the construing of individual provisions, and second, they allow courts to fill gaps by developing structural doctrines flowing from the text by necessary implication.

The case law surrounding Section 96 of the Constitution Act, 1867, provides a useful example of judicial construction going beyond the meaning of a provision. On a plain reading, Section 96 enunciates the governor general's power to appoint superior court judges in each province. And this does not affect the jurisdiction of the provincial legislatures over the "Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts" under Section 92(14). However, our Court has constructed doctrines, based on a purposive and structural analysis, to protect the role of superior courts so as to ensure that the power of appointment does not fall into irrelevance.

The purpose of Section 96 is to maintain a unitary judicial system across our country. As Justice Sheilah Martin and I wrote for a majority of the Court in *In re Code of Civil Procedure (Quebec)* (2021), which concerned the role of superior courts and monetary jurisdiction over certain civil claims (as opposed to provincial courts where judges are appointed by the provinces), "[i]n light of Canada's constitutional architecture, the superior courts are in the best position to preserve the various facets of the rule of law." This is a core principle rooted in our Constitution. The superior courts are in this position due to their national character, independence, and unique protection against legislative interference.

But unwritten principles can also help in other ways. As Chief Justice Wagner and Justice Brown highlighted in the *City of Toronto* case, these principles "can be used to develop structural doctrines unstated in the written Constitution *per se*, but necessary to the coherence of, and flowing by implication from, its architecture."

This gap-filling function of unwritten constitutional principles is only appropriate where it is a necessary implication of the constitutional text. The *In re Manitoba Language Rights* case of 1985 serves as an apt illustration. In that case, the province of Manitoba's legislation was almost entirely invalid because the legislature had failed to conform to its legislative bilingualism requirement under Section 23 of the Manitoba Act, 1870. While there did not exist a textual basis to temporarily suspend declarations of invalidity, our Court recognized that a suspended declaration was required to preserve the rule of law. It held as follows:

> [T]he constitutional guarantee of the rule of law [will not] tolerate the Province of Manitoba being without a valid and effectual legal system for the present and future. Thus, it will be necessary to deem temporarily valid and effective the unilingual Acts of the Legislature of Manitoba which would be currently in force, were it not for their constitutional defect.

To give time for translation and reenactment of the legislation, the suspension was limited to the "minimum period necessary."

In the decades following *In re Manitoba Language Rights*, our Court adopted a much more liberal approach to the exercise of this exceptional power. It is in that context that, in *Ontario (Attorney General) v. G* (2020), Justice Brown and I proposed, in dissent, to rein in the use of suspended declarations, which had "become wholly detached from the principled foundations

stated in [*In re Manitoba Language Rights*] that animated the existence of what was supposed to be considered a measure of last resort." Given the clear text of Section 52 of the Constitution Act, 1982, we stated that suspended declarations could only be grounded in the foundational principle of the rule of law, as reflected in *In re Manitoba Language Rights*. We would have restricted the use of suspended declarations to exceptional situations involving either a legal vacuum or a threat to public safety. In particular, we disagreed with the majority's emphasis on the "respect . . . [for] the role of the legislature" and the need to consider its "ability to set policy," especially for laws to which the derogation mechanism could apply by virtue of Section 33 of the Charter. On our reading of the entire constitutional structure, absent a valid rule of law concern, the power to "keep[] on life support a law that has been struck down for unconstitutionality" rests with the legislative branch.

Ultimately, I stress that the framework articulated by the majority in *Ontario (Attorney General) v. G* is binding on all courts in the country. The majority stated that a suspended declaration should be rare and is "granted only when an identifiable public interest, grounded in the Constitution, is endangered by an immediate declaration to such an extent that it outweighs the harmful impacts of delaying the declaration's effect." Indeed, our Court unanimously applied this framework in *R. v. Albashir* (2021), a recent pronouncement on suspended declarations.

However, in *In re Secession of Quebec*, our Court cautioned that the gap-filling function of structural principles is not "an invitation to dispense with the written text of the Constitution." Chief Justice Wagner and Justice Brown, with whom I concurred, vigorously reiterated this concern for the majority in *City of Toronto*. There, they signaled that unwritten constitutional principles cannot be implemented in a manner that is "wholly untethered" from the Constitution's structure, which is fully enshrined in its text. The Supreme Court's refusal to invalidate a retroactive law in *British Columbia v. Imperial Tobacco Canada Ltd.* (2005) further buttresses the view that unwritten constitutional principles, including the rule of law, are not a standalone basis for judicial review of legislation. The "necessary implication" criterion, now well-established in our Court's jurisprudence, requires that structural doctrines be necessarily derived from, and narrowly tailored to, the written Constitution.

In my view, this prudent approach is consistent with the role of the judiciary in our constitutional democracy. It is also more conducive to maintaining the rule of law and the legitimacy of constitutional adjudication. As *In re Secession of Quebec* suggests, "there are compelling reasons to insist upon the primacy of our written constitution. A written constitution promotes legal certainty and predictability, and it provides a foundation and a touchstone for the exercise of constitutional judicial review." Chief Justice Wagner and Justice Brown further warned in *City of Toronto* that "[a]ttempts to apply unwritten constitutional principles in such a manner as an independent basis to invalidate legislation" would amount to "trespass[ing] into legislative authority to amend the Constitution." These concerns are exacerbated by the potential harm to countervailing constitutional principles such as democracy and constitutionalism.

The Canadian Charter of Rights and Freedoms

Having explored our approach to constitutional interpretation in Canada, I now turn to offer a few examples of how these very principles have been used when interpreting the Canadian Charter of Rights and Freedoms, a central component of our Constitution.

Just over 40 years ago, Canada entered a new phase of its constitutional history with the enactment of the Constitution Act, 1982. Among the legal changes brought about by this constitutional reform, our Charter was enacted. This constitutional instrument enshrined the rights and freedoms that form part of the fabric of Canadian society.

The Charter has had a profound impact on the Canadian constitutional landscape. It accorded constitutional status to various rights and freedoms, thereby protecting them from unjustified legislative and other governmental infringements. The prevalence of judicial review of legislation has also greatly increased because the Charter extended the scope of constitutional adjudication to a wider array of norms. Moreover, the judiciary has given a robust interpretation to the Charter in order to "secur[e] for individuals the full benefit of [its] protection." In doing so, the court must determine what the right is meant to protect and what activity is thereby protected.

But when interpreting the Charter, our Court has made clear that Canadian courts must seek to ensure compliance with Canada's binding

obligations under international law where the express words are capable of supporting such a construction. For example, in the case of *R. v. Hape* (2007), our Court discussed and recognized the doctrine of adoption as operative in Canada "such that prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation." As Justice Louis LeBel wrote, "Absent an express derogation [by the legislature], the courts may look to prohibitive rules of customary international law to aid in the interpretation of Canadian law and the development of the common law."

In *Hape*, a money-laundering case that crossed international borders, our federal police force was involved in a search in another country. The police searched a premise without judicial authorization and seized thousands of documents that were later used at trial.

Our Court "determined that the Charter's scope of application must be interpreted in light of customary international law." In such interpretations, the Court recognized that the concept of "comity" is a "tool[] of construction" in the interpretation of Canadian law "where it affects other sovereign states." As a result, our Court found that the Charter could not be applied extraterritorially, and as I recently wrote in the case of *R. v. McGregor* (2023), the decision in *Hape* remains the governing authority on the territorial reach and limits of the Charter.

Even in the face of these principles, however, we continue to adhere to the living tree metaphor when interpreting the Charter. Once again, it is important to remember that, as the Charter is part of our Constitution, it too must receive a reading consistent with the living tree metaphor ensuring that it is capable of growth and evolution. Let me offer two examples.

The first example is the 1984 case of *Hunter*

v. Southam Inc., one of the very first Charter judgments, which rests at the foundation of how we understand Section 8 of the Charter, i.e., the right to be free from unreasonable search and seizure. The case concerned a provision of the Combines Investigation Act that empowered members of the Restrictive Trade Practices Commission to authorize the search of business premises. Authorizations could only be issued if the director "believe[d] there may be evidence relevant" to an inquiry under the act. The claimant corporation argued that the authorization mechanism provided for in the act contravened its right to be free from unreasonable search and seizure under the Charter.

Our Court unanimously sought to set out multiple principles, which remain authoritative to this day. When the Court interpreted the provision of the Charter, Justice Dickson, who would later become Chief Justice of our Court, observed that the guarantee in Section 8 was "vague and open." Consistent with the interpretive approach I discussed earlier, he stressed the "need for a broad perspective in approaching constitutional documents" and cited Lord Sankey's formulation in the *Persons Case* referring to the living tree metaphor.

Justice Dickson reasoned that courts must interpret the Charter by conducting a "purposive analysis, which interprets specific provisions . . . in the light of its larger objects." Stated differently, courts must specify the underlying purpose of a Charter right or freedom by "delineat[ing] the nature of the interests it is meant to protect."

Applying these principles of constitutional interpretation, Justice Dickson determined that Section 8 of the Charter seeks to protect what we now call "reasonable expectation[s] of privacy." The standard of reasonableness, he said, calls for "an assessment . . . as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement."

The principles outlined in this case, including three presumptive procedural safeguards, live on today. Charter protection under Section 8 has grown and has extended to, depending on the circumstances, sniffer dog searches; hotel room privacy; shared phone and computer data; and even text messages that are sent to another person. Returning to my discussion about interpretation generally, I believe it is reasonable to suggest that the framers did not necessarily contemplate the ubiquity of the online world and text message conversations, for example. The jurisprudence under Section 8, then, is illustrative of the living tree metaphor that allows our Constitution to adapt to the modern day.

A second example, and perhaps a more direct one, illustrates the living tree doctrine in practice by reference to two decisions from our Court separated by approximately 20 years: *Rodriguez v. British Columbia (Attorney General)*, decided in 1993, and *Carter v. Canada (Attorney General)*, from 2015. As I will describe, our Court was split in the *Rodriguez* case but came to a unanimous decision in *Carter*.

In *Rodriguez*, the ultimate question was whether the prohibition in the Criminal Code on the use of a physician's assistance in dying was contrary to the Charter, as Ms. Rodriguez suffered from a disease known as ALS. In a split decision, five judges upheld the constitutionality of the prohibition. Justice John Sopinka, writing for the majority, highlighted the state's interest in the "sanctity of life." He found that the prohibition engaged Ms. Rodriguez's security interest under Section 7 of the Charter. Particularly, the prohibition deprived Ms. Rodriguez of her autonomy over her person and ultimately caused physical pain and psychological

stress. While he recognized this deprivation, he highlighted the state's interest in the fundamental conception of the "sanctity of life" and determined that the deprivation was not contrary to the principles of fundamental justice. Thus, there was no violation under Section 7 of the Charter.

Writing for the dissent, Justice Beverley McLachlin, who would later become the Chief Justice of our Court, maintained that the prohibition infringed the right to security of the person under Section 7. She determined that the denial of Ms. Rodriguez's ability to end her life was arbitrary and, ultimately, was not justified under the saving provision in the Charter.

Fast forward two decades, to 2015, when our Court had the occasion to revisit the issue in a case called *Carter*. This time, the Court unanimously found that the same prohibition unjustifiably infringed Section 7 of the Charter. In doing so, our Court recognized the evolution of the law with respect to the principles of overbreadth and gross disproportionality under the Charter since *Rodriguez* had been decided. The Court determined, for example, that the prohibition forced some individuals to take their lives prematurely "for fear that they would be incapable of doing so when they reached the point where suffering was intolerable." In addition, the issue engaged liberty and security rights in the sense of an individual's response to certain medical conditions being a matter of dignity, autonomy, and bodily integrity, leaving them to endure intolerable suffering.

Indeed, the concept of dignity is inextricably linked to the Charter, as our Court unanimously found two years ago in the case of *R. v. Bissonnette* (2022). In that case, our Court found consecutive parole ineligibility periods in cases involving multiple murders to be contrary to Section 12 of the Charter, which guarantees the right not to be subjected to cruel and unusual punishment or treatment.

In considering whether the Court could depart from the ruling in *Rodriguez*, the Court in *Carter* recognized the similarities in the facts but, more importantly, recognized the development of our understanding of the Charter:

> The argument before the trial judge involved a different legal conception of [Section] 7 than that prevailing when *Rodriguez* was decided. In particular, the law relating to the principles of overbreadth and gross disproportionality had materially advanced since *Rodriguez*. The majority of this Court in *Rodriguez* acknowledged the argument that the impugned laws were "over-inclusive" when discussing the principles of fundamental justice. However, it did not apply the principle of overbreadth as it is currently understood . . . . By contrast, the law on overbreadth, now explicitly recognized as a principle of fundamental justice, asks whether the law interferes with some conduct that has no connection to the law's objectives. This different question may lead to a different answer.

The prohibition was ultimately found to be unconstitutional. But, importantly, the decision in *Carter* and its divergence from *Rodriguez* are consistent with the living tree approach and demonstrate that constitutional values and interpretation develop in accordance with modern-day thought and understanding.

The interpretation of Canada's Constitution continues to evolve within the strictures and guidelines of our Court's approach. The Court's interpretation of the Charter, for example, illustrates how our understanding of constitutional rights, norms, and principles has developed over time. After four decades of Charter jurisprudence, the judicial adjudication of deeply contentious social and moral issues arising under the Charter remains widely accepted in Canadian society.

But it is my belief that the public's esteem for the judiciary cannot be taken for granted. It must continually be earned by the courts—not by rendering popular judgments, but by issuing opinions that are (in the words of *In re Secession of Quebec*) consistent with "the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning." ■

The prevalence of judicial review of legislation has also greatly increased [since 1982] because the Charter extended the scope of constitutional adjudication to a wider array of norms.