

British Columbia Tobacco Litigation and the Rule of Law

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A subject that has recently been consuming a substantial portion of my professional time is the rule of law and its impact on British Columbia's suit against the tobacco industry for the recovery of health care costs associated with tobacco use. About seven years ago my law firm was retained as counsel for Philip Morris to defend it in proceedings that were anticipated pursuant to legislation that was being passed by the government of British Columbia. Since then, the legislation, which borrowed heavily from similar legislation in Florida, has undergone two further substantial revisions in an attempt to bring it into compliance with Canada's constitutional requirements and at the same time preserve the potential success of the province's claim. The first revision occurred before the legislation was proclaimed and the second, after the British Columbia Supreme Court found the Act was unconstitutional because it exceeded constitutionally imposed territorial limitations. The third version of the legislation has recently been rejected on the same ground, that the legislation is extraterritorial.

Two Philip Morris companies found themselves named as defendants in the latest proceedings brought by the British Columbia government. Philip Morris International was incorporated in 1986 and does not manufacture, market or sell cigarettes anywhere. It supplies management services to sister companies. The second company, Philip Morris USA, manufactures cigarettes in the United States. Marlborough is its best known brand. It is the company that started in the cigarette business and is now a wholly owned subsidiary of Altria, a large multinational company which owns companies such as Kraft General Foods. Philip Morris' history in Canada began in the 1950s with the acquisition of Benson & Hedges. This company amalgamated with Rothmans Canada in 1986 and Philip Morris was left with a 40% interest in Rothmans, Benson & Hedges.

The government has based its actions solely upon the British Columbia *Tobacco Damages and Health Care Costs Recovery Act*. No claims are made under the common law. Although the Act does have some generic provisions such as the removal of limitation periods, it primarily creates a cause of action for the benefit of the government against tobacco manufacturers. There are three tobacco manufacturers in Canada whose products are available in British Columbia. The cause of action created by the Act does not follow the traditional requirements of a tort, particularly with respect to causation and damages. The Act provides special evidentiary rules which benefit the government in the action. From the perspective of a Defendant, the Act is designed to significantly improve the government's prospects of success on liability and minimize potential problems with proving the damages to be awarded, which could potentially total many billions of dollars.

This legislation raises fundamental constitutional concerns. As part of our application urging the British Columbia court to decline jurisdiction over the claim, we led expert evidence from leading constitutional scholars in Europe, the United States and Japan, each of whom stated that the application of the British Columbia legislation would be taken to fundamentally violate the constitutions of each of those jurisdictions. We also led opinion evidence that because of those violations, a judgment based upon the Act would not be enforced in those jurisdictions. The government countered with differing opinions, but it is clear that this legislation would be controversial from a constitutional perspective in those jurisdictions. Most legally trained people would find this legislation offensive, although some seem prepared to overlook this, perhaps because of the general unpopularity of the targeted defendants.

The Philip Morris portion of the constitutional challenge to the legislation focussed on the rule of law. It was based upon a series of Supreme Court of Canada cases where unwritten principles of the Constitution, including the rule of law, were formally recognized as Canadian constitutional standards.¹ There has been a great deal of scholarly writing and debate on the rule of law and its breadth. Dicey's early formulation of the principle was exceedingly narrow but modern scholarly analysis of the rule of law examines how it has played a fundamental underlying role in modern western constitutional democracies. The scholars attempt to distill the broadly accepted principles that have been generally applied in the constitutions, legislation and common

¹ *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *Re Provincial Court Judges Reference*, [1997] 3 S.C.R. 3; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.

law of developed western nations. There is also some case law on the meaning of the rule of law in Europe. The difficulty is that, although the Supreme Court of Canada has said that the rule of law is one of the “pillars” of our constitution and that together with the other unwritten principles it forms the “... grand entrance hall to the castle of the Constitution”,² the Court has not fully defined the nature and extent of the rule of law as it applies in the Canadian Constitutional context and the law respecting the availability of remedies is still being developed.

One of the issues in the British Columbia tobacco litigation is how the courts will define the rule of law. The parties argued two very different conceptions of this principle. The Attorney General took the position that the rule of law is comprised solely of the following principles:

1. There must be a basis in law for any action on the part of the state or its officials which limits individual freedoms.³
2. The law must be equally applied to all those to whom the law by its terms applies⁴.
3. If the effect that declaring legislation invalid on the basis that it violates a provision of the Constitution of Canada would be to destroy the institutions of government within the jurisdiction in question, and thereby produce a state of legal chaos, the declaration of invalidity should be suspended for such time as is necessary to permit the remedying of the problem that gave rise to the constitutional violation.⁵
4. All action on the part of governments in Canada must be consistent with the provisions of the Constitution of Canada and any government action that is found by the courts to be “inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and effect”, in accordance with the provisions of section 52(1) of the *Constitution Act, 1982*

² *Provincial Court Judges Reference*, *ibid.* at para. 109.

³ A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan, 1897) at 85 ff; *Roncarelli v. Duplessis*, [1959] S.C.R.121.

⁴ Dicey, *ibid.*

⁵ *Re Manitoba Language Rights*, *supra* note 1.

(this principle, known as the principle of constitutionalism, often stands on its own as an independent principle).⁶

In contrast, our argument respecting the content of the rule of law as it applies to this legislation was diametrically opposed to the Attorney General's position. We focussed upon what we submitted were five violations of the rule of law using a much broader formulation. We were much like two ships passing in the night. The Government's conception of the rule of law would clearly provide our clients with no basis for relief. If the position we advocated was accepted, there remained the question of what relief was available. This case may ultimately provide some definition of the role that the rule of law is going to assume in the Canadian constitutional context.

A brief review of the aspects of the rule of law that we asserted were violated by the Act follows.

I. THE REQUIREMENT OF GENERALITY IN THE LAWS

Here we relied upon the proposition that 'generality' in the law is a central requirement of the rule of law. This requires that a legal rule take the form of "a ... command that is directed to unknown people and that is abstracted from all particular circumstances of time and place and refers only to such conditions as may occur anywhere and at any time."⁷ To conform with this principle, legal norms should represent "... a hypothetical judgment of the state regarding the future conduct of its subjects..." Rousseau's formulation was as follows:

"When I say that the object of law is always general, I mean that the law considers subjects *en masse* and actions in the abstract, and never a particular person or action. Thus the law may indeed decree that there shall be privileges, but cannot confer them on anybody by name... In a word, no function which has a particular object belongs to the legislative power."⁸

⁶ *Refence re Quebec Secession*, *supra* note 1.

⁷ Quoted in R. Flathman, "Liberalism and the Suspect Enterprise of Political Institutionalization: The Case of the Rule of Law" in I. Shapiro, ed., *The Rule of Law* (New York: New York University Press, 1994) 297 at 305.

⁸ F.L. Neumann, "The Change in the Function of Law in Modern Society", in W.E. Scheuerman, ed., *The Rule of Law under Siege: Selected Essays of Franz L. Neumann & Otto Kirchheimer* (Berkeley: University of California Press, 1996) 101 at 106-107.

We argued that to achieve “generality” in the sense required by the rule of law, legislators should not in enacting laws “foresee what will be their effects on particular people... [S]pecific ends of action, being always particulars, should not enter into general rules.”⁹

Generality is violated by laws which single out particular groups or individuals for special treatment. One author has said in this connection that:

“Only when such interferences [with liberty and property] are controlled by general laws is liberty guaranteed, since in this manner the principle of equality is preserved. Voltaire’s statement that freedom means dependence on nothing save law refers only to general laws. If the sovereign is permitted to decree individual measures, to arrest this man or that one, to confiscate this or that piece of property, then the independence of the judge is extinguished. The judge who has to execute such individual measures becomes a mere policeman. Real independence presupposes the rule of the state through general laws.”¹⁰

Absent this form of “generality” the law ceases to be a system of norms, and instead permits government to engage in the kind of arbitrary behaviour which is the “single greatest antagonist” of the objectives underlying the rule of law.¹¹

The British Columbia legislation at issue in our case is not directed to “unknown people” but instead targets a finite and relatively small group of tobacco manufacturers. Nor is it directed to future and hypothetical conditions but is instead directed to known or supposed past events. It attaches entirely new consequences to those past events. This is done for the sole benefit of the Government as claimant in a specific action. Our argument was that this constituted a violation of the requirement under the rule of law of generality in the laws, so that the Government was obliged to justify the legislation on an analysis similar to that under section 1 of the Charter.

⁹ Flathman, *supra* note 7 at 306-307, quoting from F. Hayek, *The Constitution of Liberty* (London: Routledge & Kegan Paul, 1960) at 152.

¹⁰ Neumann, *supra* note 8 at 118; see also A.C. Hutchinson & P. Monahan, “Democracy and The Rule of Law” in A.C. Hutchinson & P. Monahan, eds., *The Rule of Law: Ideal or Ideology* (Toronto, Calgary, Vancouver: Carswell, 1987) 97 at 122; G. de Q. Walker, *The Rule of Law: Foundation of a Constitutional Democracy* (Carlton: University Press, 1988) at 25.

¹¹ Walker, *ibid.*; Flathman, *supra* note 7 at 303-304.

Justice Holmes, in dealing with this argument, found that generality as we had presented it was not a constitutionally entrenched rule and could not therefore assist.¹²

II. THE REQUIREMENT THAT LAWS SHOULD BE PROSPECTIVE AND NOT RETROACTIVE

The second aspect of the rule of law we relied upon was the requirement that laws should be prospective and not retroactive. In order to conform with the rule of law, legislation must, absent reasonable justification, be prospective in nature. This aspect of the rule of law serves to protect the reasonable expectations of those bound by the laws enacted by legislature: “The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it.”¹³

Conversely, retroactive legislation, which would alter the law which was applicable to acts at the time of their commission, violates the rule of law:

“Because a retroactive law applies to past events, its practical effect is to change the law that was applicable to those events at the time they occurred. To change the law governing a matter after it has already passed violates the rule of law. In fact, it makes compliance with the law impossible. As Raz points out, the fundamental tenet on which the rule of law is built is that in order to comply with the law, or rely on it in a useful way, the subjects of the law have to know in advance what it is. By definition, a retroactive law is unknowable until it is too late.

No matter how reasonable or benevolent retroactive legislation may be, it is inherently arbitrary for those who could not know its content when acting or making their plans. And when retroactive legislation results in a loss or disadvantage for those who relied on the previous law, it is not only arbitrary but also unfair. Even for persons who are not directly affected, the stability and security of law[s] are

¹² *HMTQ v. Imperial Tobacco Ltd.*, 2003 BCSC 877 at para. 133 [hereinafter *Imperial Tobacco*].

¹³ *Black-Clawson International Ltd. v. Papierwerke A.G.*, [1975] A.C. 591 (H.L.) at 638 (emphasis added); see also *Reclamation Systems Inc. v. Rae* (1996), 27 O.R. (3d) 419 (Gen. Div.) at 431-435.

diminished by the frequent or unwarranted enactment of retroactive legislation.

In short, retroactive legislation is undesirable because it is arbitrary and because it tends to be unfair. It upsets plans and undermines expectations and it may impose penalties or other disadvantages without fair warning.”¹⁴

The British Columbia tobacco legislation abolishes limitation defences and revives any actions which have been dismissed in the past on the basis of limitation defences. Under section 10 of the Act, “... a provision of [the] Act has the retroactive effect necessary to give the provision full effect for all purposes including allowing an action to be brought under section 2(1) arising from a tobacco-related wrong, whenever the tobacco-related wrong occurred.” The result is that the Act imposes on tobacco manufacturers substantial new consequences for past acts. This initial proposition was accepted by the Court but it went on to adopt the Attorney General’s argument that because the Act simply attaches new consequences to past wrongs it is not retroactive in a manner that offends the rule of law.¹⁵ In other words, since the manufacturers knew it was wrong to breach a duty when they breached it, all the legislation does is to extend the consequences of those wrongful acts to include liability to the Government for health care costs. This explicitly raises the question of the extent to which new consequences can be retroactively attached to past wrongs under the rule of law.

III. THE REQUIREMENT OF EQUALITY IN THE LAW AS BETWEEN SUBJECTS

Our third argument was that the rule of law requires equality in the law as between subjects. The complaint under this heading was that members of the tobacco industry are, under the British Columbia legislation, treated differently from similarly situated product manufacturers who are not members of the tobacco industry and that the distinction could not be constitutionally justified.

¹⁴ R. Sullivan, ed., *Driedger on the Construction of Statutes*, 3d ed. (Toronto, Vancouver: Butterworths, 1994) at 513; *Re Indian Residential Schools*, [2000] A.J. No. 638. (Q.B.), online: QL (AJ) at para. 29.

¹⁵ *Imperial Tobacco*, *supra* note 12 at paras. 111, 122-125.

It is well established that the rights to equality before the law and equal protection of the law are central aspects of the rule of law. In its modern formulation, this requires that there should be equality not only in the application of the laws, but in the substance of the laws themselves. This has been recognized by acknowledged legal scholars including Chief Justice McLachlin.

The substantive right to equality in the laws is also an unwritten “fundamental right” under European Community law. Anti-discrimination provisions found in the EC Treaty are regarded merely as “specific enunciation[s]” of this fundamental principle of substantive equality, which has broader and more general application. This fundamental principle in European Community law requires that Community legislation must be such that “... similar situations shall not be treated differently unless differentiation is objectively justified”.¹⁶

The reason this principle of equality must be “entrenched beyond the reach of simple majority rule [*i.e.* legislature]” was articulated as follows in the *Quebec Secession Reference*:

“... a constitution may provide an added safeguard for fundamental human rights and individual freedoms which might otherwise be susceptible to government interference. Although democratic government is generally solicitous of those rights, there are occasions when the majority will be tempted to ignore fundamental rights in order to accomplish collective goals more easily or effectively. Constitutional entrenchment ensures that those rights will be given due regard and protection.”¹⁷

The effect of the Act is to abrogate the elements of a traditional common law claim against a manufacturer—and to replace it with a regime under which a defendant who has committed no actionable wrong against the plaintiff (or, for that matter, anyone else) may be found liable to a government which has suffered no loss. We argued that this is a classic illustration of “the majority [through the legislature] ... ignor[ing] fundamental rights in order to accomplish collective goals more easily or effectively”—the danger cited by the Supreme Court of Canada in the

¹⁶ S.A. de Smith et al., *Judicial Review of Administrative Action*, 5th ed., (London: Sweet & Maxwell, 1995) at 577-578; *Weiser v. Caisse nationale des barreaux français*, C-37/89, [1990] E.C.R. I-2395 at I-2420-2421 (E.C.J.); *Ruckdeschel v. Hauptzollamt Hamburg-St. Annen*, C-117/76 & C-16/77, [1977] E.C.R. I-1753 at I-1769 (E.C.J.).

¹⁷ *Reference re Quebec Secession*, *supra* note 1 at para. 74.

Quebec Secession Reference as demanding the constitutional entrenchment of equality before the law beyond the reach of majority rule.¹⁸

We also argued that the Government's singling out of tobacco manufacturers alone for this arbitrary and "unequal" treatment must be subject to much more rigorous scrutiny in circumstances where the underlying object is to generate revenue for the Government itself. Mr. Justice Holmes rejected this argument on the basis that treating all participants in the tobacco industry equally was sufficient compliance with the rule of law.¹⁹ This is another aspect of the rule of law which may require further judicial definition.

IV. THE REQUIREMENT OF EQUALITY AS BETWEEN SUBJECTS AND THE CROWN

Our fourth argument raised the issue of equality between subjects and the Crown. We argued that the Act gives the Government, in advancing this claim, special and unprecedented exemptions and privileges to which no other claimant is entitled at common law, and that the rule of law analysis requires that such special exemptions and privileges in favour of government be objectively justified.

The central element of this aspect of the rule of law is that, with limited exceptions, the same laws should be applied to government as to private parties. This principle operates to control the coercive powers of the state which might otherwise be used to oppress private parties. Professor Hogg (as he then was) has stated: "In that way, government is denied the special exemptions and privileges that could lead to tyranny".²⁰ Once again this aspect of the rule of law has been the subject of extensive scholarly writing which points out the dangers of allowing government to afford itself special privileges in its relations with private citizens.

¹⁸ *Ibid.*

¹⁹ *Imperial Tobacco*, *supra* note 12 at para. 141.

²⁰ P. W. Hogg & P. Monahan, *Liability of the Crown*, 3rd ed. (Toronto: Carswell, 2000) at 1-2, 156; E.C.S. Wade & A.W. Bradley, *Constitutional and Administrative Law*, 10th ed. (London and New York: Longman, 1985) at 92; Ontario Law Reform Commission, *Report on The Liability of the Crown* (Toronto: Queen's Printer, December 15, 1989) at 2-3.

The British Columbia Court held that the Crown's right to recover from tobacco companies did not have to be identical to that of an individual smoker, because to do so ignores the nature of an aggregate action, the nature of the loss and who sustained it.²¹ However, this analysis, which focusses exclusively on the aggregated aspect of the claim, does not take into account other features of the Act, such as the abrogation of limitation periods, the presumptions in favour of the government regarding causation, the provision for the calculation of health care costs, which enable it to potentially recover this amount without taking into account the taxes which it collected on the sale of the cigarettes, or explain how the government is able to justify these features of the Act in a legal system which respects the rule of law.

V. THE REQUIREMENT OF A FAIR TRIAL

The last aspect of the rule of law that we raised was the requirement of a fair trial. We argued that a "fair trial" requires that parties to the proceeding must have a reasonable opportunity of presenting their case under conditions which do not place any party under a "substantial disadvantage". This right has been aptly described in the jurisprudence of the European Court of Human Rights as the right to "equality of arms". The effect of the Act, we submitted, is to change the "rules of engagement" to favour the Government in its action against the tobacco industry. The Act imposed specific changes in the law directed solely to the Government's action against the tobacco industry which were selectively designed to minimize problems, defences, and gaps in proof that have posed obstacles to the success of similar litigation in the past. The Act was in other words designed to ensure to the extent possible that this specific litigation was "unwinnable" by the defendants. The Court in dealing with this issue concluded that there was nothing inherently unfair in an aggregate action and accordingly found no violation of the rule of law.

In summary the Court held with respect to the five alleged violations of the rule of law, they either were not violations or were not recognized as carrying constitutional consequences.

²¹ *Imperial Tobacco*, *supra* note 12 at para. 150.

VI. GOVERNMENT JUSTIFICATION OF VIOLATIONS OF THE RULE OF LAW

Obviously, the requirements of the rule of law, however it is ultimately defined by the courts, cannot be regarded as absolute, but instead must be balanced against other constitutional values. The courts have not yet formulated a clear test on this issue, but Chief Justice McLachlin has said that in societies governed by the rule of law, the exercise of public power is only appropriate where it can be justified in terms of “rationality and fairness”.²² In *Mackin*, a strong majority of the Supreme Court of Canada said that where there is an infringement of an unwritten constitutional principle which plays a vital role in the Canadian constitutional structure (in that case, the principle of judicial independence), the onus on the Government to justify the infringement is a “more demanding” one than (even) that imposed under section 1 of the *Charter*. In connection with issues relating to the financial security of the judiciary, the example cited by the Supreme Court of Canada as being a potentially appropriate justification for infringement was “... cases of dire and exceptional financial emergencies caused by extraordinary circumstances such as the outbreak of war or imminent bankruptcy.”²³

The Government faces two significant difficulties in justifying its legislation. The first arises out of the Supreme Court of Canada’s recognition in the *Mackin* case that section 1 of the *Charter* provides the appropriate framework for the more demanding justification analysis required in the case of an infringement of fundamental unwritten constitutional principles (para. 73). Under section 1 of the *Charter*, enumerated rights are guaranteed “...subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. We argued that a retroactive law cannot be regarded as a limit “prescribed by law” for the purpose of justifying a breach of fundamental rights.

The issue of justification of interference with fundamental rights has been considered under the *European Convention on Human Rights* which requires in identical terms that a restriction on rights must be “prescribed by law”. It has been consistently held in the European cases decided in this connection (which the Supreme Court of Canada has acknowledged as being “a very

²² B. McLachlin, “The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law”, (1998)12 C.J.A.L.P. 171 at 174.

²³ *Mackin v. New Brunswick (Minister of Finance)* (2002), 209 D.L.R. (4th) 564 (S.C.C.) at paras. 71-73 [hereinafter *Mackin*].

valuable guide” in connection with constitutional issues implicating the rule of law²⁴) that the phrase “‘prescribed by law’ ... refers to the *quality* of the law, requiring it to be compatible with the rule of law, a principle which is expressly mentioned in the preamble to the Convention”. It is considered implicit in this latter requirement that a restriction on fundamental rights can only be regarded as being “prescribed by law” where it meets the requirements of:

- accessibility: “the law must be adequately accessible: the citizen must have an indication which is adequate in the circumstances of the legal rules which are applicable to the given case”; and
- foreseeability: the law must be formulated with sufficient precision to enable a person affected to regulate his or her conduct and to foresee with reasonable certainty the consequences that a given action will entail.²⁵

Assuming that the Act violates numerous precepts of the rule of law, then by virtue of its retroactivity it also fails to meet these requirements of accessibility and foreseeability which are essential to the rule of law. We argued that the Act cannot for this reason be characterized as a “reasonable limit prescribed by law” within the meaning of section 1 of the *Charter* in order to justify the numerous violations of the rule of law nor, as any form of legitimate justification under the “more demanding” analysis required in the case of a violation of fundamental unwritten constitutional principles.

The second difficulty the government faces on this issue is that although one may be able to justify one or the other of the five violations of the rule of law to some meaningful standard, it is a much greater challenge to justify the violations when viewed in combination.

What precisely is required to justify legislation that violates the unwritten principles of our constitution remains to be clarified by the higher courts. Justice Holmes did not deal with this issue in light of his findings that there were no constitutional violations of the rule of law.

²⁴ *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 at 636-637, 640-643.

²⁵ R. Clayton et al., *The Law of Human Rights* (Oxford University Press) at 321-324; *Sunday Times v. United Kingdom* (1979), 2 E.H.R.R. 245 (Eur. Ct. of Human Rights) at paras. 46-50; *Malone v. United Kingdom* (1984), 7 E.H.R.R. 14 (Eur. Ct. of Human Rights) at paras. 66-67, 79-80.

VII. WHAT ARE THE CONSEQUENCES OF A VIOLATION OF THE RULE OF LAW?

The existing decisions of the Supreme Court of Canada, dealing with the effects of the unwritten principles underlying the constitution, have received differing interpretations by Canadian trial courts and our courts of appeal. Understandably, as a trial judge, one would be hard pressed to strike down legislation in circumstances where the meaning of the rule that you are applying has not been clearly defined by any court in Canada, is the subject of extensive scholarly debate, and where no Canadian court has expressly set aside legislation on this particular ground alone.

VIII. LEGISLATION VIOLATING UNWRITTEN CONSTITUTIONAL PRINCIPLES IS INVALID

We argued and the decisions of the Supreme Court of Canada support the view that if the violations of the rule of law are not properly justified by the Government, then the legislation must be struck down as being unconstitutional.²⁶ Although the authority on this point has been developing as the tobacco litigation has proceeded, it is arguably not yet definitive. Further support for our position is found in section 52 of the *Constitution Act* which provides in section 52(1) that "... any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." The question then reverts to one of whether there are unwritten principles which form part of our constitution and if so, what are they?

In the constitutional sphere, the Supreme Court of Canada has recognized that the adoption of the *Charter* had the effect of transforming the Canadian system of government to a significant extent "from a system of Parliamentary supremacy to one of constitutional supremacy", with the proviso that Parliament and the legislatures retain their supremacy to the extent that they can still exempt themselves from the *Charter* and the Constitution can, at least in theory, be amended under the amending formula.

²⁶ *Babcock v. Canada (Attorney General)*, 2002 SCC 57; *Hunt v. T&N*, [1993] 4 S.C.R. 289; *Mackin*, *supra* note 23; *Provincial Court Judges Reference*, *supra* note 1; *Rice v. New Brunswick* (1999), 181 D.L.R. (4th) 643 (N.B.C.A.); *Re Manitoba Language Rights*, *supra* note 1; *Reference re Quebec Secession*, *supra* note 1.

Since our trial court's most recent decision was rendered, the Supreme Court of Canada handed down its reasons in *Ell v. Alberta*²⁷ where it dealt with the unwritten principle of judicial independence as it applies to justices of the peace in Alberta. In that case the court concluded that the unwritten principle of judicial independence applied and was violated, but it also held that the violation was justified in the circumstances by the important legislative purpose of improving the quality of justice in the Province of Alberta, in particular by independently setting minimum qualifications of presiding justices of the peace and assigning unqualified justices of the peace to other responsibilities. It is clear from the court's reasons, however, that the legislation would have been struck down for a violation of an unwritten constitutional principle had the violation not been found to have been justified. This case provides strong support for our argument that, in proper circumstances, legislation can be struck down for a violation of unwritten constitutional principles.

Given his findings on violations of the rule of law, Mr. Justice Holmes did not have to consider the question of justification. He did, however, conclude that the rule of law cannot be used to strike down legislation. He also concluded that the rule of law could not be "invoked to give freestanding rights to individuals" and he went on to concur with Madam Justice Allan's earlier opinion²⁸ that violations of the rule of law may be used to inform the interpretation of legislation, but not to strike it down.²⁹

IX. THE GOVERNMENT'S CONDUCT IN COMMENCING ACTION UNDER THE ACT IS UNCONSTITUTIONAL

Our argument under this heading was that, even if the courts lack jurisdiction to strike down the Act itself for violation of the rule of law, the court clearly has jurisdiction to invalidate the Government's action in commencing litigation under the Act. In the *Quebec Secession Reference*, a unanimous Supreme Court of Canada confirmed that fundamental unwritten constitutional principles, which include the rule of law, may "... constitute substantive limitations upon Government action", and that they operate to fill gaps in the constitutional text. These principles, the court said are "...

²⁷ *Ell v. Alberta*, 2003 SCC 35.

²⁸ *Johnson v. British Columbia (Securities Commission)*, 67 B.C.L.R. (3rd) 145 (S.C.C.) at para. 25.

²⁹ *Imperial Tobacco*, *supra* note 12 at para. 164.

invested with a powerful normative force, and are binding upon both courts and governments.” With particular reference to the unwritten principle of constitutionalism and the rule of law, the court said:

“Simply put, the constitutionalism principle requires that all government action comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the Constitution... The Constitution binds all governments, both federal and provincial, including the executive branch... They may not transgress its provisions; indeed, their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source.”³⁰

These passages were quoted by the Ontario Divisional Court in a case involving a challenge to “directions” issued by a Hospital Services Commission, which would have destroyed the ability of Ontario’s only francophone hospital to provide truly francophone medical services and training. The applicants contended that the directions were unconstitutional for violation of their entitlement to “protection of minority rights”—which, together with “constitutionalism and the rule of law” had been identified in the *Quebec Secession Reference* as being a “fundamental [albeit, unwritten] organizing principle” of the Canadian Constitution. The court rejected the respondent’s argument that a violation of these unwritten principles gave rise to no remedy, and struck down the impugned directions as being unconstitutional.³¹

An appeal from this decision was dismissed by the Ontario Court of Appeal, which expressly affirmed the distinction drawn by the Divisional Court between the validity of legislation and the constitutionality of conduct under the legislation.³²

While there may be controversy (at least in the lower courts) about the jurisdiction of the courts to strike down legislation for violation of fundamental unwritten constitutional principles, we argued that the courts clearly have jurisdiction to invalidate other government conduct which violates these fundamental precepts. Mr. Justice Holmes rejected this argument,

³⁰ *Reference re Quebec Secession*, *supra* note 1 at paras. 54, 72.

³¹ *Lalonde v. Ontario (Commission de restructuration des services de santé)* (1999), 48 O.R. (3d) 50 (Div. Ct.) at 66-68, 83-84.

³² *Lalonde v. Ontario (Commission de restructuration des services de santé)* (2001), 208 D.L.R. (4th) 577 (Ont. C.A.).

distinguishing the *Lalonde* decision on the basis that the underlying legislation in that case required the Government to take into account the “public good” when making decisions.³³

X. DECLARATION THAT THE LEGISLATION VIOLATES THE RULE OF LAW

Finally, we argued in the alternative that if legislation cannot be set aside for violation of the rule of law, then the applicants would be entitled to a declaration that the Act violates the rule of law. Such a declaration lacks coercive effect, but it is responsive to contemporary notions of the courts’ role as critical participants in a constitutional “dialogue” with the legislative and executive branches of government, and indeed, to the obligation of the courts as “trustees” of our constitutional rights and freedoms. Another unsuccessful submission!

SUMMARY

In summary, the Supreme Court of Canada has, through its clear recognition of unwritten constitutional principles, apparently opened the door to the grand entrance hall of the Constitution. The subject is intriguing but it is also complex and uncertain. In the context of the rule of law, answers to the following questions require substantial clarification by the courts:

What principles are encompassed by the rule of law in the Canadian constitutional context?

Do different aspects of the rule of law carry different weight in the constitutional context?

What is the test that must be satisfied by government to justify violations of the rule of law?

Does the test vary depending upon the manner in which the rule of law is violated?

³³ *Imperial Tobacco, supra* note 12 at para. 168.

What are the consequences of a violation of the rule of law?

Finally, will the idea of unwritten constitutional principles continue to develop and become a defined and entrenched part of our constitutional law or will the complexities and uncertainties this theory raises force the Court to convert the entrance hall to a vestibule or close the door and abandon it altogether?