CASE COMMENT

ERRONEOUS UPHOLDING OF BILL 21 IN *HAK v. AG OF QUEBEC*

The Quebec Superior Court decision of Justice Blanchard in *Hak v. AG of Quebec*, 2021 QCCS 1466, is wrongly decided. Justice Blanchard upheld the constitutional validity of Bill 21, except in respect of English education. I say this with some caution in that I read a translation of the case. I will focus on and address the issues of concern to the mandate of the Constitutional Rights Centre (CRC). The arguments made and rejected in *Hak* that deal with unwritten constitutional rights and principles, such as freedom of religion and expression; equality (based on the constitutional architecture (generally) and the constitutional duty to protect minorities and the Rule of Law); and the violation of s. 6 of the *Charter* will be addressed. Additional arguments based on Division of Powers and Pre-Confederation Statutes have some merit, but will not be the focus of this Case Comment.

The wrinkle in any constitutional analysis of Bill 21 is that the Quebec Legislature invoked and applied s. 33 of the *Charter*, the 'Notwithstanding' Clause. Had this not been the case, the law would clearly be unconstitutional, contrary to sections 2(a) and (b) and sections 6, 7 and 15 of the *Charter*. The use of the Notwithstanding Clause precludes the application of most, but not all of the *Charter* as a means to challenge the legislation. In this regard, Justice Blanchard was correct. However, unwritten constitutional rights and principles and some *Charter* protections are not subject to s. 33. The treatment of unwritten constitutional rights and principles was therefore, key to determining the constitutional validity of the legislation. The approach of Justice Blanchard was to reject any substantive limits on legislative authority based on unwritten constitutional rights and principles. His analysis was unprincipled and unsupported by legal principle and precedent. Yet, he ultimately relied on the rule of *stare decisis*, that the holdings of higher courts bind the lower courts, but at the same time he rejected or ignored what the Supreme Court of Canada ("SCC") has directed. It appears that the Court seeks to uphold the legislation because it is popular in the eyes of the majority of Quebeckers, not because that was the correct legal response.

The legislation purports to protect the principle of secularism in government. Secularism in government is meant to prevent the establishment of a state sanctioned religion. This purported goal is espoused in this legislation while the Quebec Legislature prominently displays a big cross in the legislature building. Unlike the US Constitution, the Canadian Constitution does not expressly protect against the establishing of a state religion. However, s. 2(a) of the *Charter* has been interpreted as precluding such establishment in as part of the freedom of religion in Canada.[1] However, there is a vast difference between a secular government or the non-establishment of a state-endorsed religion and allowing government workers who have religious beliefs to practice their religion. The wearing of religious symbols does not signify that the state endorses that religious view or that the state is not secular.

Justice Blanchard suggests that the law's support of secularism is justifiable because it is neutral. [paras 406-407]. This is false. This is reminiscent of what Justice Stevens, of the US Supreme Court ("USSC"), said about Chief Justice Roberts' judgment in *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701 (2007). He said:

> There is a cruel irony in The Chief Justice's reliance on our decision in *Brown* v. *Board of Education*, 349 U. S. 294 (1955). The first sentence in the concluding paragraph of his opinion states: "Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin." *Ante*, at 40. This sentence reminds me of Anatole France's observation: "[T]he majestic equality of the la[w], forbid[s] rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread." The Chief Justice fails to note that it was only black schoolchildren who were so ordered; indeed, the history books do not tell stories of white children struggling to attend black schools.

Here, the law is not any more neutral than law that precludes all people equally from sleeping under bridges. Similarly, Chief Justice Roberts' misuse of a concept that was meant to protect, to oppress, is also what Justice Blanchard did in this case. Justice Blanchard relies on multiculturalism to reject a constitutional argument based on Quebec's culture that supports a law, which is clear discrimination against other oppressed religious cultures.

[1] *R. v. Big M Drug Mart Ltd*., [1985] 1 S.C.R. 295

Leaving aside the legal nuances for now, the first issue is whether the law furthers the secularism objective. The logic of the law is fundamentally unsound. The wearing of religious symbols by government workers does not in fact or symbolically indicate a sanction or support by the government of the religion represented by such symbols. In light of the fact that the supposedly offensive symbols relate to a whole host of religions: Islam; Judaism; Sikhism, *etc*., it can hardly be said that any particular religion is established or sanctioned because the symbols are worn.

Further, if government workers were allowed to wear their symbols, how does that mean that the government itself, as opposed to the workers, is behaving is a non-secular way. Does tolerance by the government of a worker booking off time from work for Yom Kippur, Ede or Christmas mean that the government is being religious as opposed to secular? This merely reflects tolerance for the religious practices of people. It is not about appearances. People may wear beards because they like beards or because it is an accepted religious practice. Is that banned? Presumably, beards are not banned because it could just be a fashion statement. People may wear a cross or star of David under their shirts. Is that banned? There is nothing saying that it is acceptable. If it is banned regardless of religious practice and/or regardless of what can be seen, how does that promote secularism? A constitutional democracy must be tolerant. This legislation does nothing to secure secularism. All it does is promote and inflict intolerance. It is xenophobic and racist legislation designed by the majority to tyrannize the minorities, rather than protect minorities as government is mandated by the Constitution to do.

(1) THE EFFECT OF UNWRITTEN CONSTITUTIONAL RIGHTS AND PRINCIPLES

The law is clear that unwritten constitutional principles can be used to challenge and invalidate legislation. Any litigants who advance such principles must have standing to complain that the legislation adversely impacts them. They may also argue that these principles give rise to unwritten constitutional rights and freedoms that can be advanced as the rights of such individuals. Justice Blanchard rejected clear law that unwritten constitutional principles and the rights and freedoms that flow from such principles can invalidate legislation. His reasoning is flawed. He recognizes, as he must, that the SCC has repeatedly said that unwritten constitutional

rights and principles are part of the Canadian Constitution and that they can have substantive effect. He then ignores or distinguishes these concepts by relying on cases that do not allow for such treatment. He claims that he is bound by *stare decisis* to obey the dictates of higher courts [para 633]. He then cites cases that do not say what he asserts that they say. He uses this misinterpreted case law to ignore the real binding law.

As context, it is important to understand the following: Quebec has misused law to persecute religious minorities before. It is part of a long and glorious history of mistreating Jehovah's Witnesses, Jews and, now, Muslims. This was done in early times and reached great heights in the 1950s when encouraged from the top. In *Roncarelli v. Duplessis*, [1959] S.C.J. No. 1, the Premier himself was sued for improper use of the law to persecute Jehovah's Witnesses. There was a similar misuse of laws to persecute the same group in *Saumur v. Quebec*, [1953] S.C.R. 299. In *Saumur* and in *Switzman v Elbling*, [1957] S.C.R. 285 (political persecution of communists by restricting freedom of expression), the SCC found that the misuse of laws to persecute minorities by the Quebec Government was unconstitutional. The majority did not decide the cases on the basis that there were inviolable freedoms of religion and freedom of speech. However, some judges relied upon the preamble to the *Constitution Act, 1867* (previously known as the *BNA Act*), which says that Canada has a constitution "similar in principle to that of the United Kingdom". The United Kingdom ("UK") has some historic constitutional documents, such as the *Magna Carta* and the *English Bill of Rights, 1689* that reflect constitutional rights and principles, but essentially it has an unwritten constitution, based on Parliamentary Democracy and principles of religious freedom and freedom of speech. The judges in these cases found such unwritten rights are incorporated as a part of our constitution because we have a constitution similar in principle to the UK, dictated by the preamble to the *Constitution Act, 1867*. The principles of the U.K. Constitution referenced by the preamble, they reasoned, warranted constitutional limits on both Parliament and the Legislatures of the Province to violate freedom of religion and freedom speech. While these reasons in these cases did not appear to affect constitutional litigation for decades, in the last few decades, the SCC has unanimously revived and recognized them in the *O.P.S.E.U. v. Ontario*, [1987] 2 S.C.R. 2; *Provincial Court Judges Reference*, [1997] S.C.J. No. 75; and the *Quebec Succession Reference*, [1998] 2 S.C.R. 217. These unwritten constitutional rights and principles create substantive limits

on the legislative authority of Parliament and the Provincial Legislatures.

The conclusion of Justice Blanchard in *Hak* was that unwritten constitutional rights and principles did not have any substantive impact in limiting the legislative authority of legislatures. His position is false and unsupportable. He said:

- that this principle in *Saumur* has been abandoned since the 1970s [para 294 of *Hak*]. As is clear from the cases in the 1980s and 90s cited above, this is false.
- that only the *Charter* has limited Parliamentary Supremacy [paras 448; 573]. As is clear from *Saumur* and *Switzman*, later adopted by the whole SCC, this is false.
- that these 1950s case were based on Division of Powers [para 528] (Federal vs. Provincial jurisdiction). While this is true, it ignores the fact that the preamble judgments, in particular those of Justice Rand, were later adopted by the SCC.
- that a Quebec Court of Appeal case [*Motard*, para 574; 628] bound him. As should be obvious and as the SCC has recently made clear in *Canada v. Craig*, [2009] S.C.J. No. 23 *stare decisis* does not allow a court to rely on Court of Appeal cases that are inconsistent with the dictates of the SCC.
- that the SCC rejected the use of the preamble to the *Constitution Act, 1867* to challenge laws in *Dupond*, [1978] 2 S.C.R. 770 [para 575]. This is false. The case did not say that the preamble cannot be used in that way. It said that the preamble did not give the same level of protection to the freedom of association as it did to the freedom of religion or speech.
- that the *Quebec Succession Reference* was only to be used to address gaps in the Constitution [para 577]. As will be discussed below (*Quebec Succession Reference*, para 54) and as Justice Blanchard himself later admitted [para 595], but ignores, this is false.
- that the SCC rejected the substantive use of unwritten constitutional principles to challenge laws in *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473 [para 631 of *Hak*] This is false. In para 66 of *Imperial Tobacco*, the SCC said that laws cannot be challenged by arguments based on an "amorphous" concept of fairness founded on the Rule of Law. It is clear that the Rule of Law does have specific and accepted meaning beyond an amorphous concept of the fairness, as has been recognized in

several cases.

- that to accept such a right or principle from the preamble would mean that the right was absolute because there would be no s. 1 *Charter* limit on the right [para 578]. This is nonsense. Canada is unique in having a separate limitation of rights provision like s. 1 of the *Charter*. Most constitutions that protect rights, including the US Constitution, are analyzed based on the inherent and logical limits of the rights and countervailing considerations that warrant limiting of the rights. The lack of a discrete limitation provision does not make rights absolute. Hak specifically argued that the rights had limits.
- that it would be confusing to have limits on written constitutional rights and then have no such limits on unwritten rights. This is patently false, contrary to s 26 of the *Charter* that preserves rights from other sources of law and the express approach of the SCC in the *Provincial Court Judges Reference*. In that case, the Court expressly looked to, recognized and relied upon the unwritten constitutional principle of judicial independence because the written rights and principles (s. 96 of the *Constitution Act, 1867* only applicable to superior courts; s. 11(b) of the *Charter* that was only applicable to criminal courts) were too limited to cover other situations.

Justice Blanchard created false excuses to say that he was not bound to follow and apply unwritten constitutional rights or principles as substantive limits on the legislative authority of legislatures.

The SCC in the *Quebec Succession Reference* recognized that unwritten constitutional rights and principles can be used to interpret written constitutional principles (para 52), to fill gaps (para 53) and as substantive limits on Parliamentary/legislative authority and the powers of the executive. On this last point, the Court said:

> **54 Underlying constitutional principles may in certain circumstances give rise to substantive legal obligations (have "full legal force",** as we described it in the Patriation Reference, supra, at p. 845), **which constitute substantive limitations upon government action. These principles may give rise to very abstract and general obligations, or they may be more specific and precise in nature. The principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments.** "In other words", as this Court confirmed in the Manitoba Language Rights Reference, supra, at p. 752, "in the process of Constitutional adjudication,

> the Court may have regard to unwritten postulates which form the very foundation of the Constitution of Canada"…

In light of this, how does *stare decisis* permit, let alone dictate, a conclusion that unwritten constitutional rights and principles cannot create substantive limits on Legislative authority? The SCC has applied this approach to unwritten constitutional principles in *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9 where the unwritten Rule of Law principle was the basis for the judicial review as a constitutional right and the SCC said that legislative attempts to prevent judicial review through privative clauses in legislation were unconstitutional.

(2) THE UNWRITTEN CONSTITUTIONAL RIGHTS AND PRINCIPLES

There were arguments that unwritten constitutional rights of freedom or religion and expression and equality dictated a conclusion that Bill 21 was unconstitutional. There was also argument that s. 6(2) of the Charter, that is not subject to the s. 33 notwithstanding clause, also made the law unconstitutional. Justice Blanchard rejected these arguments. His reasoning is flawed and his conclusions are unsupportable.

a) Unwritten Constitutional Freedom of Religion and Expression

Justice Blanchard dismissed an argument that the content and meaning of the unwritten constitutional right of freedom of religion, by saying that the *Saumur* case was decided as a division of powers issue [paras 552-573, especially 558]. As noted above and below, the judgements of Justices Rand, Locke, (and Estey and Kellock to a lesser extent) in *Saumur* went beyond division of powers and posited substantial constitutional protection of the freedom of religion and speech founded on the unwritten constitutional principles flowing from the preamble, later accepted by the entire SCC.

In *Saumur v. Quebec*, [1953] S.C.R. 299, the SCC said that freedoms of religious belief and expression could not be licensed by the Provincial Legislatures. Justices Rand and Locke said

and Justices Estey and Kellock suggested, but did not decide, that no legislature, including Parliament, could violate freedom of the expression or freedom of religion because this would violate fundamental freedoms that are essential to any democracy and part of the Constitution of the U.K. This recognition was one of the few limitations on Parliamentary Supremacy. Because of this case, the *Alberta Reference* referred to therein and *Switzman*, Justices of the SCC later accepted that the preamble created substantive limits on Parliamentary Supremacy. This was recognized as the law in the *O.P.S.E.U.* case, the *Quebec Succession Reference* and the *Provincial Court Judges Reference*.

In *Saumur*, Justice Rand recognized that "freedom of speech" and "freedom of religion" flowed from the Constitution as a whole, based on the preamble. He found that a democracy could not function without "discussion and the interplay of ideas". The idea of government licensing of religion or expression was inimical to a democratic government such as existed in the UK in 1867. He found that any such government licensing would be "incompetent to the legislatures of the provinces" and "<u>any authority</u> within" [a federal structure].[2]

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[2] **…So is it with freedom of speech**. The Confederation Act **…"with a constitution similar in principle to that of the United Kingdom.** … **government resting ultimately on public opinion reached by discussion and the interplay of ideas. If that discussion is placed under license, its basic condition is destroyed: the government, as licensor, becomes disjoined from the citizenry.** The only security is steadily advancing enlightenment, for which the widest range of controversy is the sine qua non.

In the Reference re The Accurate News and Information Act of Alberta [[1938] S.C.R. 100], Sir Lyman Duff deals with this matter. … Quoting the words of Lord Wright in James v. Commonwealth [[1936] A.C. 578 at 627.], that **freedom of discussion means "freedom governed by law"** he says at p. 133:

> ... it is **axiomatic that the practice of this right of free public discussion** of public affairs, notwithstanding its incidental mischiefs, **is the breath of life for parliamentary institutions.**

He deduces authority to protect it from the principle that the powers requisite for the **preservation of the constitution arise by a necessary implication of the Confederation Act as a whole**. He proceeds:

> But this by no means exhausts the matter. **Any attempt to abrogate this right of public debate or to suppress the traditional forms of the exercise of the right** (in public meeting and through the press) would, in our opinion, **be incompetent to the legislatures of the provinces**, …

Cannon J. expressed similar views:

> **Freedom of discussion is essential to enlighten public opinion in a democratic State; it cannot be curtailed without affecting the right of the people to be informed through sources independent of the government concerning matters of public interest. There must be an <u>untrammelled publication of the news</u> and political opinions of the political parties contending for ascendancy. As stated in the <u>preamble of The British North America Act</u>, our constitution is and will remain, unless radically changed, "<u>similar in principle to that of the United Kingdom.</u>" At the time of Confederation, the United Kingdom was a democracy. <u>Democracy cannot be maintained without its foundation: free</u>**

Justice Locke expressed views similar to Justice Rand.[3]

Justice Estey's reasons supported the same approach, albeit it was less clear.

Justice Kellock echoed some of these principles.[4] After referring to the *Reference re the Alberta Accurate News and Information Act* [[1938] S.C.R. 100] case also referenced by Justice Rand

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> **public opinion and free discussion throughout the nation of all matters affecting the State within the limits set by the criminal code and the common law.**…

Conceding, as in the Alberta Reference, that aspects of the **activities of religion and free speech may be affected by provincial legislation, such legislation, as in all other fields, must be sufficiently definite and precise to indicate its subject matter**. In our political organization, as **in federal structures generally**, that is **the condition of legislation by any authority within it: the courts must be able from its language and its relevant circumstances, to attribute an enactment to a matter in relation to which the legislature acting has been empowered to make laws.** … and by no expedient which ignores that requirement can constitutional limitations be circumvented.

[3] …Not only **the right of freedom of worship would be affected but the exercise of other fundamental rights, such as that of free speech** on matters of public interest and to publicly disseminate news, subject only to the restraints imposed by the Criminal Code and to such civil liability as may attach to the publication of libelous matters, might be restrained or prohibited….

[after referencing the preamble to the *Constitution Act, 1867*]

… **the right to freedom of religious belief and worship was in force in Canada and gave to the inhabitants of the provinces the same rights in that respect as were then enjoyed by the people of the United Kingdom**.

It has, I think, always been accepted throughout Canada that, **while the exercise of this right might be restrained** under the provisions of the saving clause of the statute of 1852 **by criminal legislation passed by Parliament** under Head 27 of section 91, **it was otherwise a constitutional right of all the inhabitants of this country.**

[4] Clearly, therefore, **the by-law** is not directed to the mere physical act involved in the handing to another of a document but **has in view the contents of the document** and the desirability or otherwise, in the view of the chief of police, as to its circulation…

… in granting or refusing licences, the **by-law can be used, as it has been, to deny distribution of its literature to one religious denomination, while granting that liberty to another or others.** …

The respondent strenuously argued that the Jehovah's Witnesses were not entitled to rely upon the Act as they were not **a "religious denomination"** within the meaning of the statute. …. With respect I am of opinion that **neither contention is tenable**…

By sec. V of the Act of 1774 it was "the free exercise of the Religion of the Church of Rome" which was granted. **The principle of legal equality provided for by the Act of 1852 can mean no less than this. I would adopt the language of the writer** in Volume II, "La Revue Critique", p. 130, where he says:

> From this principle of our public law flow **the rights and liberties which are dearest to our mixed population; liberty of conscience, freedom of public worship and freedom of the press in religious matters.... Every person has a right to speak, write and print his opinion upon any religious question or point of controversey, without permission from the government or from anyone else…**
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> To sum up the discussion, it may confidently be concluded that it is a **fundamental maxim of law in Canada, consecrated both by the French and the British constitutions of the country,** by imperial statutes and treaties, by the peculiar jurisdiction and by repeated decisions of our courts, **that all the churches in the colony are free and independent of civil or judicial intervention in spiritual matters.**

and the preamble to the *Constitution Act, 1867*, although the previous language suggests that no governmental interference, at any level, is allowed with these freedoms, Justice Kellock declined to decide whether this limited Parliament as well as the Provincial Legislatures.

In addition to freedom of religion, freedom of speech or expression is engaged in respect of Bill 21 through the wearing of symbols which is an expression of religious practice. In *Swiztman v. Elbling*, [1957] S.C.R 285, some of the Justices of the SCC applied *Saumur* and the *Alberta Reference* to recognize that the preamble to the *Constitution Act, 1867* created constitutional limits on all legislatures to violate freedom of speech, subject only to the limits of the criminal law, which itself had and has substantive limits based on risk of harm (see the *Alberta Reference* itself and Rand, J. in the *Margarine* case[5]).

In *Switzman*, Justice Rand said the preamble required that "parliamentary government, with all its social implications", including "free public opinion of an open society" requires "a virtually unobstructed access to and diffusion of ideas" This requires that people "govern themselves" and that Government not restrain such access. He said that there is "little less vital to man's mind and spirit than breathing is to his physical existence".[6]

> **From this principle of our public law flow the rights and liberties which are dearest to our mixed population: liberty of conscience, freedom of public worship and freedom of the press in religious matters.**

[5] *Reference Re Dairy Industry Act*, [1949] S.C.R. 1 ("Margarine case")

[6] …**The ban is directed against the freedom or civil liberty** of the actor; no civil right of anyone is affected nor is any civil remedy created. The aim of the statute is … to protect him, in short, from his own thinking propensities**. There is nothing of civil rights in this**; it is to **curtail or proscribe those freedoms** which the **majority** so far consider to be the condition of social cohesion and its ultimate stabilizing force…

Indicated by the opening words of the preamble in the Act of 1867, reciting the desire of the four Provinces to be united in a federal union with **a constitution "similar in principle to that of the United Kingdom", the political theory which the Act embodies is that of parliamentary government, with all its social implications**, and the provisions of the statute elaborate that principle in the institutional apparatus which they create or contemplate. Whatever the deficiencies in its workings, **Canadian government is in substance the will of the majority expressed directly or indirectly through popular assemblies. This means ultimately government by the free public opinion of an open society, the effectiveness of which, as events have not infrequently demonstrated, is undoubted.**

… But **public opinion, in order to meet such a responsibility, demands the condition of a virtually unobstructed access to and diffusion of ideas. Parliamentary government postulates a capacity in men, acting**

Justice Kellock referenced his own judgement in *Saumur* and agreed with Justice Rand.

Justice Abbott also agreed with Justice Rand and he clearly indicated that these freedoms could not be abrogated by the Provincial legislatures or Parliament, except within the limited confines of the criminal law, which itself had substantive limits.[7]

This principle, espoused only by some members of the SCC decades ago, has been accepted and revived in recent times by a series of cases from the SCC that recognize and apply unwritten constitutional rights and freedoms as limits on Parliament and the Provincial Legislatures as substantive limits on legislative authority.

In the *Provincial Court Judges Reference*, [1997] S.C.J. No. 75, a unanimous SCC expressly adopted the preamble principle discussed in *Saumur* and *Switzman* that recognized unwritten constitutional freedoms of religion and speech flowing from the UK constitution:

> **83**… **unwritten constitutional** principle… **is recognized and affirmed by the preamble to the Constitution Act, 1867**. The specific provisions of the Constitution Acts, 1867 to

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freely and under self-restraints, to govern themselves; and that advance is best served in the degree achieved of individual liberation from subjective as well as objective shackles. Under that government, the freedom of discussion in Canada, as a subject-matter of legislation, has a unity of interest and significance extending equally to every part of the Dominion. With such dimensions it is ipso facto excluded from head 16 as a local matter.

This constitutional fact is the political expression of the primary condition of social life, thought and its communication by language. Liberty in this is little less vital to man's mind and spirit than breathing is to his physical existence. As such an inherence in the individual it is embodied in his status of citizenship…

Prohibition of any part of this activity as an evil would be within the scope of criminal law…

[7] **The right of free expression of opinion** and of criticism, upon matters of public policy and public administration, **and the right to discuss and debate such matters**, whether they be social, economic or political, **are essential to the working of a parliamentary democracy**…

This right cannot be abrogated by a Provincial Legislature, … Although it is not necessary, of course, to determine this question for the purposes of the present appeal, the **Canadian constitution being declared to be similar in principle to that of the United Kingdom, I am also of opinion that as our constitutional Act now stands, Parliament itself could not abrogate this right of discussion and debate. The power of Parliament to limit it is, in my view, restricted to such powers as may be exercisable under its exclusive legislative jurisdiction with respect to criminal law and to make laws for the peace, order and good government of the nation.**

1982, merely "elaborate that principle in the institutional apparatus which they create or contemplate": **Switzman v. Elbling, [1957] S.C.R. 285, at p. 306, per Rand J…**

92 … **I agree with the general principle that the Constitution embraces unwritten, as well as written rules**, largely on the basis of the wording of s. 52(2). Indeed, given that **ours is a Constitution that has emerged from a constitutional order whose fundamental rules are not authoritatively set down in a single document, or a set of documents, it is of no surprise that our Constitution should retain some aspect of this legacy…**

94 In my opinion, **the existence of many of the unwritten rules of the Canadian Constitution can be explained by reference to the preamble of the Constitution Act, 1867…**

95 … **In the words of Rand J., the preamble articulates "the political theory which the Act embodies": Switzman, supra, at p. 306.** It recognizes and affirms the basic principles which are the very source of the substantive provisions of the Constitution Act, 1867. As I have said above, those provisions merely elaborate those organizing principles in the institutional apparatus they create or contemplate…

96 What are the organizing principles of the Constitution Act, 1867, … its reference to "a Constitution similar in Principle to that of the United Kingdom", **the preamble indicates that the legal and institutional structure of constitutional democracy in Canada should be similar to that of the legal regime out of which the Canadian Constitution emerged…**

99 The preamble, by its reference to "a Constitution similar in Principle to that of the United Kingdom", points to the nature of the legal order that envelops and sustains Canadian society. That order, … is **embraced by the notion of the rule of law.** ..

100 Finally, the preamble also speaks to the kind of constitutional democracy that our Constitution comprehends. One aspect of our system of governance is the importance of "parliamentary institutions, including popular assemblies elected by the people at large in both provinces and Dominion": Saumur v. City of Quebec, [1953] 2 S.C.R. 299, at p. 330, per Rand J. Again, the desire for Parliamentary government through representative institutions is not expressly found in the Constitution Act, 1867..

In the *Quebec Succession Reference*, [1998] 2 S.C.R. 217, the SCC reaffirmed the principles from *O.P.S.E.U.* and the *Provincial Court Judges Reference* adopting the preamble as the source of these unwritten constitutional rights, freedoms and principles. In addition, the Court recognized that these principles form the architecture of the constitution along with the four pillars. These references are quoted because they are important in the next section as well. These principles, together with others recognized in other cases (Judicial independence (*Provincial Court Judges*

Reference); Separation of Powers (*R. v. Power* (1994), 89 C.C.C. (3d) 1 (S.C.C.)) are all part of the nature of the unwritten UK constitution. The SCC said:

> **32** …**The "Constitution of Canada" certainly includes** the constitutional texts … they are not exhaustive. The Constitution also **"embraces unwritten, as well as written rules", as we recently observed in the Provincial Judges Reference, supra, at para. 92.** … In order to endure over time, **a constitution must contain a comprehensive set of rules and principles which are capable of providing an exhaustive legal framework for our system of government. Such principles and rules emerge from an understanding of the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning. In our view, there are four fundamental and organizing principles of the Constitution which are relevant to addressing the question before us (although this enumeration is by no means exhaustive): federalism; democracy; constitutionalism and the rule of law; and respect for minorities…**
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> **49** What are those underlying principles? Our Constitution is primarily a written one, the product of 131 years of evolution. Behind the written word is an historical lineage stretching back through the ages, which aids in the consideration of the underlying constitutional principles. **These principles inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based. The following discussion addresses the four foundational constitutional principles that are most germane for resolution of this Reference: federalism, democracy, constitutionalism and the rule of law, and respect for minority rights. These defining principles function in symbiosis. No single principle can be defined in isolation from the others,** nor does any one principle trump or exclude the operation of any other.
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> **50** Our Constitution has an **internal architecture**, or what the majority of this Court in OPSEU v. Ontario (Attorney General), [1987] 2 S.C.R. 2, at p. 57**, called a "basic constitutional structure"**. The individual elements of the Constitution are linked to the others, and **must be interpreted by reference to the structure of the Constitution as a whole.** As we recently emphasized in the Provincial Judges Reference, certain underlying principles infuse our Constitution and breathe life into it. …**the rule of law**…"…principle **is clearly implicit in the very nature of a Constitution". The same may be said of the other three constitutional principles we underscore today.**
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> **51** Although these underlying principles are not explicitly made part of the Constitution by any written provision, other than in some respects by the oblique reference in the **preamble to the Constitution Act, 1867, it would be impossible to conceive of our constitutional structure without them. The principles dictate major elements of the architecture of the Constitution itself and are as such its lifeblood.**

Accordingly, the interference with religious practices by banning the display of religious symbols is contrary to the unwritten constitutional freedoms of religion and freedom of expression as was recognized by some SCC judges in *Saumur* and *Switzman*, and is now the law of Canada as is

clear from *O.P.S.E.U.*, the *Provincial Court Judges Reference* and the *Quebec Succession Reference*. For Justice Blanchard to dismiss these foundational, "vital" rights and principles that are the "lifeblood" of the constitution as effectively meaningless commentary is offensive to the very principle of constitutionalism, itself a foundational principle, that dictates that any law that is inconsistent with these rights and principles is void.

Unlike s. 2(a) of the *Charter*, the constitutional limits of these unwritten constitutional freedoms are not subject to any notwithstanding clause which only applies to portions of the *Charter*. The failure of Justice Blanchard to recognize these freedoms as fundamental to the nature of our constitution with substantive effect as limits on the Legislature of Quebec aside from the *Charter* is wrong.

b) Unwritten Constitutional Rights and Principle of Equality

It was argued that the architecture of the Constitution demanded constitutional protection based on equality [paras 590, 612, 621], primarily founded upon the constitutional duty to protect minorities. Justice Blanchard rejected this argument on the following based on the Quebec Court of Appeal case of *Motard* [para 628] and his interpretation of *Dupond* and *Imperial Tobacco* [para 629-631], which he said required him to reject this argument. As addressed above and discussed further below, this approach was unsupportable. It does not appear to have been argued that the concept of arbitrariness in the Rule of Law also mandated an unwritten constitutional right or principle of equality. However, the argument was founded on the concept of constitutional architecture in the *Quebec Succession Reference*, the protection of minorities and there was argument based on arbitrariness founded in the Rule of Law. Accordingly, the arguments below basing equality on non-arbitrariness in the Rule of Law were effectively before the Court.

(i) Architectural constitutional Principle of Equality

Separate and apart from the unwritten constitutional protection of religion, there are unwritten constitutional rights flowing from principles that preclude discrimination. These are founded on the architectural pillars of the Constitution recognized in the *Quebec Succession Reference*.

The four unwritten pillars of the architecture of the constitution are democracy, protection of minorities, federalism and the rule of law (recognized in the *Quebec Succession Reference*). Justice Blanchard appears to deal with these issues discretely, by focusing on the Protection of Minorities and the Rule of Law, in turn. contrary to the direction in para 49 and 50 of the *Quebec Succession Reference*. I would argue that each of the various pillars include an aspect of equality. Federalism recognizes the equality of Provinces as part of a federal union. Democracy recognizes the equality of voters (one person/one vote). The Rule of Law recognizes equality in that all are subject to the law and the law cannot be applied arbitrarily. The protection of minorities may be a duty to protect traditional disadvantaged groups or may reflect a more general concept of equality as a countervailing principle to democracy, which ensures that there is no oppression of the minority in democracies, as observed by deTocqueville by the "tyranny of the majority".[8] Collectively, these pillars reflect a recognition of a 5th central pillar of equality. These threads or elements of equality, together with an inherent natural law "ideal of fairness" (see *infra*, *Bolling v. Sharpe*), demonstrate the underlying equality concept as a web or penumbra of basic constitutional structure.

While the SCC has not yet recognized this fifth central pillar as a separate unwritten constitutional principle of equality flowing as a part of this architecture and from an interconnectedness of the other four pillars, it is certainly implicit and has received recognition as a principle related to the protection of minorities and the Rule of Law.

(ii) Protection of Minorities:

The constitutional right of minorities to be protected, which flows from the principle of protection

[8] A. deTocqueville, Democracy In America

of minorities, is directly violated by this law. The SCC in the *Quebec Succession Reference*, said this about the protection of minorities:

> **79** The fourth underlying constitutional principle we address here concerns the protection of minorities. …
>
> **80** … such **a concern reflects a broader principle related to the protection of minority rights.** Undoubtedly, the three other constitutional principles inform the scope and operation of the specific provisions that protect the rights of minorities. **We emphasize that the protection of minority rights is itself an independent principle underlying our constitutional order**. …
>
> **81** …**the protection of minority rights had a long history before the enactment of the Charter.** …The principle of protecting minority rights continues to exercise influence in the operation and interpretation of our Constitution.
>
> **82** Consistent with this long tradition of respect for minorities, which is at least as old as Canada itself, …. **The protection of these rights, so recently and arduously achieved, whether looked at in their own right or as part of the larger concern with minorities, reflects an important underlying constitutional value.**

Just as a law can be struck as unconstitutional if it is contrary to the Rule of Law (*Quebec Succession Reference*, para 54; *Dunsmuir, supra*), so too can a law be struck if it discriminates against religious minorities in Quebec. Justice Blanchard did not reject the proposition that the law failed to protect minorities. Justice Blanchard refused to strike the law because he said that unwritten rights and principles do not have such an effect. As discussed above, he was wrong.

(iii) Protection of Equality through the Rule of Law

Aside from equality as a right flowing from the architecture itself or the constitutional duty to protect minorities, equality is also a right flowing from the Rule of Law itself. The essence of this principle is that discrimination, or unequal treatment based on irrelevant grounds, is, in essence, a form of arbitrariness. The protection against arbitrariness as part of the Rule of Law is clear from the following passages in the *Quebec Succession Reference*:

> **70** The principles of constitutionalism and the **rule of law lie at the root of our system of government.** The rule of law, as observed in Roncarelli v. Duplessis, [1959] S.C.R. 121, at p. 142, is **"a fundamental postulate of our constitutional structure".** As we noted in the Patriation Reference, supra, at pp. 805-6, "[t]he 'rule of law' is a highly

> textured expression, importing many things which are beyond the need of these reasons to explore …. **It provides a shield for individuals from arbitrary state action.**

The SCC reaffirmed these principles in *B.C. v. Christie*, [2007] 1 S.C.R. 173, when the SCC said:

> **20 The rule of law embraces at least three principles. The first principle** is that the "**law is** supreme … and thereby **preclusive of the influence of arbitrary power"**…

The essence of discrimination is an arbitrary distinction. Treating someone differently and disadvantageously based on race or religion is arbitrary because such a basis for differential treatment is irrelevant and therefore arbitrary. Since discrimination is necessarily based on arbitrariness, equal treatment is necessarily a part of the rule of law. This was recognized as a matter of common sense in respect of the unequal treatment of foreign nationals, which was found to be an underlying constitutional principle in *Winner v. S.M.T. (Eastern) Ltd.*, [1951] S.C.R. 887.

The US Supreme Court ("USSC") recognized this right in a companion case to *Brown v. Board of Education*, the landmark busing case that overruled the 'separate but equal doctrine' of *Plessy v. Ferguson*: *Bolling v. Sharpe*, 347 U.S. 497 (1954). In *Bolling*, the 14th Amendment equal protection clause did not apply directly in Washington D.C. because it only applied to the States. However, the USSC applied equal protection to the Federal Government through due process in the 5th amendment, that does apply to Congress and the Federal Government. In so doing the USSC also made the following comments that suggest that equal protection is a fundamental Constitutional principle inherent in a Constitution that acts as a limit on government action:

> Segregation in public education is **not reasonably related to any proper governmental objective**, and thus it imposes on Negro children of the District of Columbia **a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause**"

The USSC in *Bolling* also included equal protection to the "ideal of fairness" underling the basic notions of the American Bill of Rights.

The primary authority on the Rule of Law in the UK is the English author and scholar, Dicey. As indicated above with reference to *Saumur, Switzman, Provincial Court Judges Reference* and *Quebec Succession Reference*, the UK Constitution is key to the interpretation of the preamble. Dicey included equality as an aspect of the Rule of Law in his writings. This was expressly stated by Dicey in his text, Introduction to the Study of the Law of the Constitution, (1961), p. 183-203, where he said that the basic principles of the rule of law, include:

> **equality before the law**, excluding the idea of any exemption of officials or others from the **duty of obedience to the law which governs other citizens.**
> [emphasis added].

There is also language in one of the first equality cases under section 15 of the *Charter* decided by the SCC: *R. v. Turpin,* [1989] S.C.J. No. 47, wherein, Justice Wilson wrote for the Court:

> [41] The guarantee of equality before the law is designed to advance the value that all persons be subject to the equal demands and burdens of the law and not suffer any greater disability in the substance and application of the law than others. **This value has historically been associated with the requirements of the rule of law that all persons be subject to the law impartially applied and administered**
> [emphasis added].

As indicated in the previous section, the *Quebec Succession Reference* and the *Provincial Court Judges Reference* make it clear that these unwritten constitutional principles are a substantive limitation on Government, including the Quebec Legislature. Laws have been found to be capable of being struck if they were inconsistent with the Rule of Law. In *Imperial Tobacco Canada Ltd.*, although the law was not struck, the SCC considered the substantive use of the Rule of Law to strike a law. Although the SCC eschewed the use of the Rule of Law as an amorphous concept of unfairness, it did not dispute that the principle could be used in a more concrete way to invalidate legislation. In *Dunsmuir v. N.B.,* [2008] S.C.J. No. 9, the SCC indicated that any law purporting to preclude judicial review through the use of a statutory privative clause would be unconstitutional as judicial review was mandated by the constitutional principle of the Rule of Law.

Unlike ss. 15 and 7 of the *Charter*, the unwritten right and principle of equality is a constitutional

limit on legislatures and is not subject to any notwithstanding clause which only applies to portions of the *Charter*. The failure of Justice Blanchard to recognize these rights as fundamental to the nature of our constitution with substantive effect as limits on the Legislature of Quebec aside from the *Charter* was wrong.

c) <u>Right to Travel to other provinces to work. S. 6(2)(b) Charter</u>

There was also argument based on s. 6(2) of the *Charter*. Unlike sections 2(a)(b), 7 and 15 of the *Charter*, section 6 is not subject to the Notwithstanding Clause of section 33. Section 33 reads:

> **33 (1)** Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate **notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.**

Section 6(2) of the *Charter* reads:

> **6 (2)** Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right
>
> > **(a)** to move to and take up residence in any province; and
> >
> > **(b)** to **pursue the gaining of a livelihood in any province.**

This is subject to sub-section 6(3) of the *Charter*, which reads:

> **(3)** The **rights specified in subsection (2) are subject to**
>
> > **(a)** any **laws or practices of general application** in force in a province **other than those that discriminate** among persons primarily on the basis of province of present or previous residence; and
> >
> > **(b)** any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

However, since the law of general application has a discriminatory effect in respect of those pursuing a livelihood in government in Quebec, it cannot be relied upon as an exception to the violation of ss. 6(2). The real issue is whether the law violates s. 6(2).

The reasoning rejecting this argument is unclear. There were comments that there is no freestanding right to work recognized under s. 6 of the *Charter* [para 929]. This argument, based on s. 6 and 7, has not been clearly addressed and rejected by the SCC. However, that does not matter. The argument is not based on a freestanding right to work. Rather, laws that create barriers to moving within Canada for purposes of work are unconstitutional unless they are supported by non-discriminatory laws of general application. Here, one of the Applicants had been working in BC after having been educated in Quebec and wanted to move back to work in a government job in Quebec [para 14 of *Hak*]. The law precluding wearing religious symbols prevented this from happening. There was no analysis by Justice Blanchard of whether Bill 21 was discriminatory. It clearly is in that there is differential treatment that is disadvantageous that impacts all those wishing to move to Quebec to work in government jobs.

It is clear that people who have jobs that are necessarily public sector jobs (teachers; doctors; government administrators; police officers; prosecutors) could not move to Quebec without being subjected to limits on wearing religious symbols. Necessarily, a portion of Canadian society moves to other Provinces all of the time. Necessarily, a portion of that group have religious beliefs that involve the display of religious symbols. That group of persons is affected by the law in question. The fact that subsection 6(3) addresses discrimination makes it clear that laws that create hurdles to moving for work inter-provincially that are discriminatory violate s. 6(2) of the *Charter.*

Section 27 of the Charter is not a right but is an interpretative aid that applies in this context. It is also not subject to the notwithstanding clause. It reads:

> **27** This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

This provision was applied to assist in interpreting other rights by the SCC in *R. v. Keegstra*, [1990] 3 S.C.R. 697. The interference with the wearing of religious symbols of minority groups is contrary to the idea of multiculturalism in s. 27 of the *Charter*. If s. 27 means anything, it must be applicable to undermine the validity of the law in these circumstances.

Yet, Justice Blanchard turns the concept on its head and uses it to justify the law. The only articulated basis he advances for rejecting the s. 6 Charter argument is s. 27 of the *Charter* [paras 930-935]. This is not legitimate because: there is no culture of Quebec that desires the persecution of minorities; if there is, multiculturism cannot be used to justify a law with such an intent and effect.

Dealing with the first point, it is implicit in the argument accepted by Justice Blanchard that the culture of Quebec supports this kind of law. I find it hard to accept that which is implicit in Justice Blanchard's conclusion: that the majority of Quebeckers are xenophobic racists. However, the majority of Quebeckers are reported to support this law. I assume that they do so because it purports to protect a worthy goal: secularism in government. I suggest that the majority of Quebecker do not realize, perhaps because they do not have the perspective of the religious minorities affected by this law, that the law does not, in fact, protect secularism. It only oppresses religious minorities. Accordingly, I submit that the support by Quebeckers does not mean that it is part of Quebec culture to be xenophobic and racist. If it is not part of Quebec's culture to persecute religious minorities, then Multiculturalism cannot support this law.

In the alternative, if it is part of the culture of Quebec to encourage discriminatory persecution of other religions from many minority cultures, which I dispute, this still could not be a justification. As Justice Stevens said in the *Parents Involved in Community Schools v. Seattle* case, quoted above, it is a perversion and misuse of a concept designed to protect minorities to justify their persecution. Multiculturalism is a principle that protects cultural minorities from being absorbed or hurt by the majority culture. From a linguistic perspective, this is a concept that most Quebeckers understand. Multiculturalism cannot legitimately be used to justify such discrimination.

Accordingly, since the Notwithstanding Clause does not apply to section 6 of the *Charter*, the law violates s. 6 of the *Charter* and is of no force and effect, unless it is a reasonable limit on that right under s. 1 of the *Charter*. It does not appear that there was any justification of any section 6 violation as a reasonable under s. 1 of the *Charter*.

There is a wrinkle in that a question logically arises about whether a constitutional remedy short of striking the entire law could apply. It could be argued that the law is only inconsistent to the extent that it applies to a person from out of province who wants to move to Quebec for a public job. However, the purpose of the law is to prevent sending a message to the public about government sanctioning a particular religion or government appearing secular to the general public. Assuming that this law furthers that objective, to allow a small portion of the public service to be exempt because they came from out of province undermines that purpose. To make such exceptions is to make the law even more irrational. I suggest that such a limited striking of the law undermines its purpose. The law must be struck as a whole.

I hope that this ruling is appealed. Perhaps, the CRC will seek to add its voice beyond this case comment at some point in the future.

Paul Slansky