

Unwritten Constitutional Principles

This article was written by a law student for the general public.

The Constitution is Canada's supreme law. The rules written in the Constitution are superior to all other laws in the country. However, it may be surprising to learn that Canada's Constitution is composed of both written rules and unwritten principles. This article looks at Canada's unwritten constitutional principles.

Justification for Unwritten Principles

A constitution must contain a complete legal framework of rules and principles in order to endure over time.^[1] According to the Supreme Court of Canada, unwritten constitutional principles are necessary because Canada's written Constitution does not deal with every problem or situation that could arise.^[2]

Unwritten principles are rooted in Canada's constitutional history. The preamble to Canada's Constitution says that Canada "is to have a Constitution similar in principle to that of the United Kingdom." This means that Canada's Constitution "was meant to continue the constitutional principles from the United Kingdom."^[3] The United Kingdom's Constitution is comprised of written and unwritten components.

Where Do Unwritten Principles Come From?

Canada's unwritten constitutional principles come from a number of sources. According to the Supreme Court of Canada, unwritten principles come from an understanding of the constitutional text itself, the Constitution's historical context, and previous court interpretations of constitutional meaning.^[4] The Supreme Court has identified unwritten constitutional principles in various cases from those sources.^[5]

Nature of Unwritten Principles

Unwritten principles are the implied and unstated assumptions of the Constitution.^[6] The Supreme Court of Canada has said that Canada's Constitution has an internal architecture, and that all of the individual elements of the Constitution are linked together.^[7] Unwritten principles are part of the internal architecture of the Constitution, and are as much a part of the Constitution as any of its written provisions.^[8] All of the unwritten principles are interdependent, which means they are all related to one another, and cannot be used to trump each other.

Unwritten principles help the courts interpret the Constitution. They can be used to determine the "scope of rights and obligations, and the role of our political institutions."^[9] Since the written part of the Constitution cannot deal with every situation,

unwritten principles help fill gaps in the written text.^[10] The Court’s job is to interpret and apply unwritten principles to a particular constitutional problem.

For example, the written Constitution contains provisions that protect the judicial independence of superior courts, but it does not mention the same protections for provincial courts. Therefore, the written Constitution contains a “gap.” The Supreme Court of Canada has held that since judicial independence is an unwritten constitutional principle, it must apply to all courts. Therefore, the unwritten principle of judicial independence fills the gap in the written Constitution so that the independence of provincial courts is also protected.^[11]

Unwritten principles can be used to interpret the Constitution so that it evolves to address new circumstances that the written rules do not address.^[12] In this way, using unwritten principles is consistent with the idea of the Constitution as a “living tree.” In 1929, Canada’s highest court at the time declared that the word “persons” in the Constitution includes women, and not just men. In the decision, Lord Sankey stated that the Constitution “planted in Canada a living tree capable of growth and expansion within its natural limits.”^[13] Since unwritten principles can be used to interpret the Constitution so that it can adapt to circumstances that weren’t originally contemplated when it was written, they are part of the process of constitutional evolution.^[14]

Unwritten principles also have legal force. This means the principles can create general or specific legal obligations, and impose limitations on government action.^[15] For example, the Supreme Court has ruled that if a “clear majority” of Quebecers votes in favour of seceding from Canada, then unwritten constitutional principles require provincial and federal governments to negotiate the terms of that secession. The unwritten principles referred to in that case were democracy, constitutionalism and the rule of law, respect for minorities, and federalism.

Finally, the written text of the Constitution is the primary authority. Unwritten principles cannot be used to trump the written Constitution.^[16] For example, the Constitution requires that an accused person is entitled to legal representation. In one Supreme Court case, the plaintiff argued that the unwritten principle of the “rule of law” guarantees the right to have a lawyer before any court or tribunal. The Supreme Court disagreed. Though the Constitution mandates a right to legal representation in some circumstances - criminal law - the unwritten principle of the “rule of law” does not impose a “general constitutional right to counsel.” ^[17]

Some Existing Unwritten Principles

| Name of Principle | Description |
|--------------------------|--------------------|
|--------------------------|--------------------|

| | |
|---------------------------------|--|
| Federalism | Canada is a federal state, meaning that the Constitution gives the federal government and provincial governments the authority to govern. Sections 91 and 92 of the <i>Constitution Act, 1867</i> set out the powers of both governments. Federalism is also an unwritten principle because it is inherent in Canada's political and legal systems. ^[18] Federalism respects the ability of individual provinces to pursue their goals ^[19] and to work together with the federal government to achieve those goals. ^[20] |
| Democracy | Democracy is a fundamental value in the Constitution that gives people the right to choose who governs them. ^[21] It involves a system of majority rule, but includes respect for inherent human dignity, cultural and group identity, and a commitment to social justice and equality. ^[22] |
| <u>Constitutionalism</u> | This principle is central to Canada's system of government. ^[23] Constitutionalism means that the Constitution is the supreme law and that all government action must comply with the Constitution. ^[24] |
| <u>Rule of Law</u> | The rule of law is similar to constitutionalism. It means that all government action must comply with the law, including the Constitution. ^[25] Constitutionalism and the rule of law protect us from government interference with fundamental human rights. ^[26] |
| Protection of Minorities | The Constitution, including the <i>Charter of Rights and Freedoms</i> , contains a number of written sections that protect minority rights, such as language, education, and religion. However, protection of minorities is also an unwritten principle because it is rooted in the history of the Constitution. When governments or decision-makers create rules, they must consider the needs and interests of majorities and minorities alike. ^[27] |

| | |
|--|---|
| <p><u>Judicial Independence</u></p> | <p>Judicial independence means that the judiciary must be “completely independent of every other entity,” including legislatures and executive branches of government.[28] Courts protect the Constitution because they make sure that government action complies with the Constitution, including our rights and freedoms as outlined in the <i>Charter</i>. [29]</p> |
| <p>Separation of Powers</p> | <p>This principle means that Canada’s three <u>branches of government</u> -executive, legislative, and judicial - are independent from each other.[30] Each of the branches exercises separate and distinct functions that the other branches cannot interfere with. The branches also have a particular relationship with each other based on their functions.[31]The legislature creates legislation, the executive implements the policies created by the legislature, and the judiciary interprets and applies the law.[32]</p> |
| <p>Parliamentary Sovereignty</p> | <p>Parliamentary sovereignty means that Parliament and the provincial legislatures can make or unmake any law as long as it is within their constitutional boundaries.[33]</p> |
| <p>Parliamentary Immunity</p> | <p>Parliamentary immunity means that the members of Parliament and the provincial legislatures must have certain immunities in order to do their job, such as immunity from civil proceedings related to carrying out the duties of an elected representative.[34]</p> |
| <p>Neutrality of the Public Service</p> | <p>This principle is essential to a democratic system, and means that all civil servants and government employees must be politically neutral.[35] To be politically neutral means that members of the public service cannot publicly endorse political parties or candidates.</p> |

Conclusion

Unwritten constitutional principles are an essential part of Canada’s Constitution. They are rooted in Canada’s history, and can be used to help interpret the Constitution to adapt to new circumstances. Most important, unwritten constitutional principles have legal force. As

Canada's cultural and political landscape changes over time, unwritten constitutional principles will continue to play a vital role in ensuring that the Constitution is robust and responsive to current realities.

[1] *Supra* note 1 at 32.

[2] *Ibid.*

[3] *Supra* note 1 at para 44.

[4] *Reference re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385, at para 32.

[5] See *Reference re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385; *Provincial Court Judges Assn (Manitoba) v Manitoba (Minister of Justice)*, [1997] 3 SCR 3, 150 DLR (4th) 577; *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49, 2 SCR 473.

[6] *Ibid* at para 51.

[7] *Ibid* at para 50.

[8] *Ibid* at para 50.

[9] *Ibid* at para 52.

[10] *Reference re Remuneration of Judges of the Provincial Court (PEI)*, [1997] 2 SCR 3 at para 104.

[11] *Ibid.*

[12] *Supra* note 1 at para 52.

[13] *Edwards v Attorney General of Canada*, [1930] 1 DLR 98, [1930] AC 124 at para 54.

[14] *Ibid* at para 52.

[15] *Ibid* at para 54.

[16] *Ibid* at para 53.

[17] *British Columbia (Attorney General) v Christie*, 2007 SCC 21 at para 27, [2007] 1 SCR 873.

[18] *Ibid* at para 58.

[19] *Ibid* at para 59.

[20] *Quebec (Attorney General) v Canada (Attorney General)*, 2015 SCC 14 at para 17, 383 DLR (4th) 614.

[21] *Supra* note 1 at 61.

[22] *R v Oakes* at p 136.

[23] *Supra* note 1 at para 70.

[24] *Ibid* at para 72.

[25] *Ibid* at para 72.

[26] *Ibid* at para 74.

[27] *Vriend v Alberta*, [1998] 1 SCR 493, [1998] SCJ No 19 at para 176.

[28] *Mackin v New Brunswick (Minister of Justice)*, 2002 SCC 13 at para 35, [2002] 1 SCR 405.

[29] *Beauregard v Canada*, [1986] 2 SCR 56 at para 28, [1986] SCJ 50.

[30] *Ibid* at 101.

[31] *Ref re Remuneration of Judges of the Prov Court of PEI; Ref re Independence and Impartiality of Judges of the Prov Court of PEI*, [1997] 3 SCR 3 at para 139.

[32] *Supra* note 28 at 101

[33] *Supra* note 28 at 69

[34] See *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319, [1993] SCJ No 2

[35] *Supra* note 28 at 99