

# THE INDEPENDENCE OF THE BAR: AN UNWRITTEN CONSTITUTIONAL PRINCIPLE

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*The Supreme Court of Canada has affirmed the existence of unwritten constitutional principles and their application in both interpreting and testing the validity of legislation and government action. The author argues that the independence of the bar should be recognized as an unwritten constitutional principle. It is a foundational norm that is necessary for the maintenance of our constitutional freedoms.*

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*La Cour suprême du Canada a confirmé l'existence de principes constitutionnels non écrits et leur application dans l'interprétation et l'examen de la validité d'une loi et d'une mesure gouvernementale. Selon l'auteur, l'indépendance du Barreau devrait être reconnue comme principe constitutionnel non écrit. Il s'agit d'une norme fondamentale qui est nécessaire au maintien de nos libertés constitutionnelles.*

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The independence of the bar is “one of the hallmarks of a free society.”<sup>1</sup> An independent bar provides citizens with access to justice. It is also critical to the independence of the judiciary, the proper functioning of the administration of justice and the maintenance of the rule of law. It is one of the unwritten constitutional principles that create the conditions for the protection of our rights and freedoms.

The Supreme Court of Canada has affirmed the existence of unwritten constitutional principles, declaring them to have “full legal force.”<sup>2</sup> Scholars and judges have debated whether the unwritten principles only fill “gaps” in the written constitution or are independently enforceable primary values. On either view, the independence of the bar fits comfortably within our constitution. It is firmly connected with the existing jurisprudence, the written text of the constitution and with numerous international principles. To the extent legislation is inconsistent with the independence of the bar, it may be struck down or declared inoperative.

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<sup>1</sup> *Canada (Attorney General) v. Law Society of B.C.*, [1982] 2 S.C.R. 307 at 335.

<sup>2</sup> *Reference re: Secession of Québec*, [1998] 2 S.C.R. 217 at 249.

*Unwritten Constitutional Principles*

A number of cases decided by the Supreme Court of Canada have confirmed the application of unwritten constitutional principles in the judicial review of government legislation and action.<sup>3</sup> Two decisions by the Supreme Court in the 1980s applied, but did not develop, the concept of unwritten constitutional norms.<sup>4</sup> The real resurgence began in 1993 with the judgment of Justice McLachlin in *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*.<sup>5</sup> Justice McLachlin held that legislative assemblies have the inherent privilege to control access to and order within their chambers.<sup>6</sup> She referred first to the preamble to the *Constitution Act, 1867*, which provides that Canada is to have a “Constitution similar in Principle to that of the United Kingdom.”<sup>7</sup> She concluded that Canadian legislative bodies would have those powers and privileges that inhered in the Parliament of the United Kingdom in 1867 – including the power to control their chambers.<sup>8</sup> Her second source of authority was section 52 of the *Constitution Act, 1982*.<sup>9</sup> The statement in section 52(2) that the constitution “includes” certain documents indicates that the list is not exhaustive. Unwritten foundational principles remain part of the constitution.<sup>10</sup>

In the 1997 *Remuneration Reference*, Justice Lamer held that judicial independence is an unwritten constitutional rule.<sup>11</sup> He noted the provisions of the constitution that protect the independence of the judiciary in most situations.<sup>12</sup> Those express provisions, however, did not comprise “an exhaustive and definitive code.”<sup>13</sup> Rather, they represented a specific expression of the underlying principle of judicial independence. An independent judiciary is critical to the rule of law and the maintenance of all other constitutional values. Its fundamental nature is broader than the provisions of the written text of the constitution:

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<sup>3</sup> Judicial review of this nature is not new. See *Reference re: Alberta Legislation*, [1938] S.C.R. 100; *Switzman v. Elbling*, [1957] S.C.R. 285.

<sup>4</sup> *Reference re: Manitoba Language Rights (Man.)*, [1985] 1 S.C.R. 721; *Ontario Public Service Employees' Union v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2.

<sup>5</sup> [1993] 1 S.C.R. 319.

<sup>6</sup> *Ibid.* at 377.

<sup>7</sup> (U.K.), 30 & 31 Vict., c. 3.

<sup>8</sup> *Supra* note 5 at 375.

<sup>9</sup> Being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>10</sup> *Supra* note 5 at 376.

<sup>11</sup> *Reference re: Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3.

<sup>12</sup> *Constitution Act, 1867*, ss. 96-100; *Canadian Charter of Rights and Freedoms*, s. 11(d).

<sup>13</sup> *Supra* note 11 at 64.

I am of the view that judicial independence is at root an *unwritten* constitutional principle, in the sense that it is exterior to the particular sections of the *Constitution Acts*. The existence of that principle, whose origins can be traced to the *Act of Settlement of 1701*, is recognized and affirmed by the preamble to the *Constitution Act, 1867*. The specific provisions of the *Constitution Acts, 1867 to 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.<sup>14</sup>

There is some uncertainty here as to the true standing of unwritten constitutional values. On one hand, Justice Lamer stated that these unwritten norms may be used to “fill out gaps in the express terms of the constitutional scheme.”<sup>15</sup> The “gap” theory would indicate that all of the foundational values were expressed in the written text in some form, but their application may be somewhat broader than the text would indicate. On the other hand, Justice Lamer also wrote that “the express provisions of the Constitution should be understood as elaborations of the underlying, unwritten, and organizing principles found in the preamble to the *Constitution Act, 1867*.”<sup>16</sup> Putting primacy on the “organizing principles” of the constitution indicates that the express written provisions are derived from those foundational norms.

The latter theory carried the weight of the reasoning in the *Secession Reference*, where the court identified four foundational constitutional principles: federalism, democracy, constitutionalism and the rule of law, and respect for minorities.<sup>17</sup> According to the court: “These principles inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based.”<sup>18</sup> That is, the unwritten assumptions are core constitutional values and the written provisions express those values.

The “gap” theory is not entirely absent from the court’s decision, meriting reference in the discussion of the use of the underlying principles in constitutional litigation.<sup>19</sup> The court nevertheless maintained the independent enforceability of the unwritten principles. They do not merely fill gaps in the written text. In the right circumstances, they may apply of their own right and with independent force. If need be, a court may resort to the foundational principles to determine the question at issue, given that the foundational principles are primary and the written text is derivative or expressive. Accordingly, government action and legislation may be impugned by reference to the principles on their own.

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<sup>14</sup> *Ibid.* at 63-64.

<sup>15</sup> *Ibid.* at 69.

<sup>16</sup> *Ibid.* at 76.

<sup>17</sup> *Supra* note 2 at 240.

<sup>18</sup> *Ibid.* at 247.

<sup>19</sup> *Ibid.* at 249.

After the release of the *Secession Reference* in 1998, it was clear that the unwritten constitutional principles were accepted in the Supreme Court jurisprudence. Some commentators suggested that the judiciary would now go about striking down legislation on the basis of rules drawn from thin air.<sup>20</sup> The lower courts, however, have not been as active as feared. For the most part, they have been reluctant to apply unwritten principles.<sup>21</sup> They have acted in only a few cases – striking down legislation<sup>22</sup> and discretionary decisions.<sup>23</sup> It may be that the unsuccessful arguments stretch the written text too far, as opposed to those, like judicial independence, that have a firm textual grounding. For its part, the Supreme Court has shown no intention of resiling from its position on the enforceability of foundational constitutional norms. In *Babcock v. Canada (Attorney General)*, Justice McLachlin stated that “the unwritten constitutional principles are capable of limiting government actions,” but found that they did not do so in that case.<sup>24</sup> In *Mackin v. New Brunswick*, the court struck down legislation on the basis that it offended the principle of judicial independence.<sup>25</sup> The court has also referred to unwritten principles in other cases.<sup>26</sup> These decisions leave open the possibility of the acceptance of other unwritten constitutional principles. In the remainder of this paper, I explain why the independence of the bar should be recognized as one of them.

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<sup>20</sup> See W. Hurlburt, “Fairy Tales and Living Trees: Observations on Some Recent Constitutional Decisions of the Supreme Court of Canada” (1999) 26 Man. L.J. 181; J. Leclair, “Canada’s Unfathomable Unwritten Constitutional Principles” (2002) 27 Queen’s L.J. 389; P. Hogg, *Constitutional Law of Canada*, looseleaf (Scarborough: Carswell, 1997) at p. 15-47; R. Elliot, “References, Structural Argumentation and the Organizing Principles of Canada’s Constitution” (2001) 80 Can. Bar Rev. 67.

<sup>21</sup> See *Bacon v. Saskatchewan Crop Insurance Corp.*, [1999] 11 W.W.R. 51 (Sask. C.A.); *Westergard-Thorp v. Canada (Attorney General)* (2000), 183 D.L.R. (4th) 458 (F.C.A.); *British Columbia v. Imperial Tobacco Canada Ltd.* (2003), 227 D.L.R. (4th) 323 (B.C.S.C.), revd. (2004), 239 D.L.R. (4th) 412; *Criminal Lawyers’ Assn. v. Ontario (Ministry of Public Safety and Security)* (2004), 237 D.L.R. (4th) 525 (Ont. S.C.J.).

<sup>22</sup> *Polewsky v. Home Hardware Stores Ltd.* (2003), 66 O.R. (3d) 600 (S.C.J.).

<sup>23</sup> *Lalonde v. Ontario (Commission de Restructuration des Services de Santé)* (2001), 208 D.L.R. (4th) 577 (Ont. C.A.). See also *Moncton (City) v. Charlebois* (2001), 242 N.B.R. (2d) 259 (C.A.); *R. v. MacKenzie* (2004), 181 C.C.C. (3d) 485 (N.S.C.A.); *Campbell v. British Columbia (Attorney General)* (2000), 189 D.L.R. (4th) 333.

<sup>24</sup> [2002] 3 S.C.R. 3 at 29.

<sup>25</sup> [2002] 1 S.C.R. 405. See also *Ell v. Alberta*, [2003] 1 S.C.R. 857; *Application under s. 83.28 of the Criminal Code (Re)*, [2004] 2 S.C.R. 248.

<sup>26</sup> See *Vancouver Sun (Re)*, [2004] 2 S.C.R. 332; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209; *R. v. Demers* (2004), 240 D.L.R. (4th) 629 (S.C.C.); *Newfoundland (Treasury Board) v. N.A.P.E.* (2004), 244 D.L.R. (4th) 294 (S.C.C.).



*The Independence of the Bar*

The legal profession has been autonomous since the thirteenth century.<sup>27</sup> The royal courts of England were being centralized at that time, and there developed a small group of advocates, or “pleaders,” who argued their clients’ cases before the courts. In time, it became an accepted principle that the judges of the courts should be appointed from within the legal profession, rather than from the civil service, as a way of ensuring the independence of the judiciary from the monarchy.<sup>28</sup> In addition, it has been recognized that an independent bar is required to provide citizens and others with access to justice and an advocate for their cause.<sup>29</sup>

The Supreme Court has extolled the virtues and necessity of an independent legal profession in a number of judgments. One of the most-cited judicial statements is found in *Canada (Attorney General) v. Law Society of B.C.* (popularly known as the *Jabour* case).<sup>30</sup> In that case, the law society initiated steps to discipline Jabour, a lawyer whose advertisements of his practice contravened law society rules. Jabour sought a declaration that the rules offended combines legislation. The law society argued that the legislation did not apply to it because of its provincial enabling legislation. In considering the merits of the claim, Justice Estey described the reasons a province would enact legislation for the self-regulation of the legal profession:

The independence of the Bar from the state in all its pervasive manifestations is one of the hallmarks of a free society. Consequently, regulation of these members of the law profession by the state must, so far as by human ingenuity it can be so designed, be free from state interference in the political sense, with the delivery of services to the individual citizens in the state, particularly in fields of public and criminal law. The public interest in a free society knows no area more sensitive than the independence, impartiality and availability to the general public of the members of the Bar and through those members, legal advice and services generally. The uniqueness of position of the barrister and solicitor in the community may well have led the province to select self-

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<sup>27</sup> W. Lederman, “The Independence of the Judiciary” (1956) 34 Can. Bar Rev. 769 at 775.

<sup>28</sup> *Ibid.* at 776-78. See also R. Peck, “The Independence of the Bar” in J. Giles, ed., *The Splendour of the Law: Allan McEachern – A Tribute to a Life in the Law* (Toronto: Dundurn Press, 2001) at 47; J. Giles, “The Independence of the Bar” (2001) 59 Advocate (B.C.) 549.

<sup>29</sup> The analysis in this paper is not concerned with the independent governance of the legal profession by the provincial and territorial law societies. On self-governance, see *Finney v. Barreau du Québec*, [2004] 2 S.C.R. 17. Self-governance is an important adjunct of the independence of the bar (*i.e.* the independence of lawyers generally from the apparatus of the state), but it is not the *gravamen* of the principle.

<sup>30</sup> *Supra* note 1.

administration as the mode for administrative control over the supply of legal services throughout the community.<sup>31</sup>

He went on to find that the provincial legislation protected the law society from the federal anti-monopoly provisions.<sup>32</sup>

Justice Estey's statement was quoted by Justice Iacobucci in *Pearlman v. Manitoba Law Society Judicial Committee*.<sup>33</sup> Pearlman challenged a section of the Manitoba *Law Society Act* that provided for the awarding of the costs of an investigation against a lawyer. Pearlman argued that the provision raised a reasonable apprehension of bias because the benchers on the committee had a pecuniary interest in the outcome. The costs award would generate revenue for the law society, slightly reducing the fees charged to all Law Society members, including the benchers making the decision. Justice Iacobucci analysed the claim under section 7 of the *Charter*, holding that the principles of fundamental justice depend on the context in which they are invoked. The context in *Pearlman* was the self-regulation of the legal profession and hence the independence of the bar. He quoted with approval an extract from a report of the Ministry of the Attorney General of Ontario: "Stress was rightly laid on the high value that free societies have placed historically on an independent judiciary, free of political interference and influence on its decisions, and an independent bar, free to represent citizens without fear or favour in the protection of individual rights and civil liberties against incursions from any source, including the state."<sup>34</sup> Justice Iacobucci went on to conclude that there was no reasonable apprehension of bias on the part of the benchers. Although he did not explicitly state that the independence of the bar is a principle of fundamental justice, he did consider the principle an important contextual factor in determining the application of the principles of fundamental justice.<sup>35</sup>

Judges have also affirmed the importance of the independence of the bar outside their courtrooms.<sup>36</sup> In a 1989 speech, Justice Dickson made the following observations:

<sup>31</sup> *Ibid.* at 335-36.

<sup>32</sup> See also *Krieger v. Law Society of Alberta*, [2002] 3 S.C.R. 372 at 389.

<sup>33</sup> [1991] 2 S.C.R. 869.

<sup>34</sup> *Ibid.* at 887. See also *Gibbs v. Law Society of British Columbia* (2003), 22 B.C.L.R. (4th) 134.

<sup>35</sup> See also *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 187 ("[I]n the absence of an independent legal profession, skilled and qualified to play its part in the administration of justice and the judicial process, the whole legal system would be in a parlous state").

<sup>36</sup> *Gibbs*, *supra* note 34 at 148; M. Taylor, "The Independence of the Bar" (1981) *Advocate* (B.C.) 209.

At the very heart of the judicial system, especially the trial process, lies the practicing Bar. The role of the criminal lawyer, whether it be in the presentation of the government's case or in the vigorous defence of the accused, is essential to the western legal tradition. Judges are wont to speak of the independence of the judiciary. Independence of the Bar is also a central characteristic which must be maintained with vigilance and passion. Without the dignity, independence and integrity of the Bar, impartial justice and the maintenance of the rule of law are impossible.<sup>37</sup>

Justice Dickson ended his speech by quoting the great English advocate Thomas Erskine: "I will forever, at all hazards, assert the dignity, independence and integrity of the...Bar; without which, impartial justice, the most valuable part of [our] Constitution can have no existence."<sup>38</sup>

American jurisprudence also supports the importance of the independence of the bar.<sup>39</sup> The United States Supreme Court has held that "An independent judiciary and a vigorous, independent bar are both indispensable parts of our system of justice."<sup>40</sup> In *Re Griffiths*, Justice Burger wrote that: "In some countries the legal system is so structured that all lawyers are literally agents of government and as such bound to place the interests of government over those of the client. That concept is so alien to our system with an independent bar..."<sup>41</sup> In its recent decision in *Legal Services Corporation v. Velazquez*, the Supreme Court struck down a law that prohibited an attorney funded by legal aid from mounting a challenge to the constitutional or statutory validity of any welfare law.<sup>42</sup> The majority of the court held that the restriction violated the First Amendment, which protects freedom of speech. The court noted the importance of an independent system of justice for determining the validity of the laws passed by government. Referring to "the state and federal courts and the independent bar on which those courts depend for the proper performance of their duties and responsibilities," the court held that lawyers must be able to present all arguments necessary for the resolution of the case.<sup>43</sup>

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<sup>37</sup> See "Remarks by the Right Honourable Brian Dickson, P.C. to the Criminal Lawyers' Association Conference" (1990) 11 Ontario Criminal Lawyers' Association Newsletter 9.

<sup>38</sup> *Ibid.* at 11.

<sup>39</sup> See the *Task Force on Gatekeeper Regulation and the Profession, Report to the House of Delegates*, American Bar Association, 2003.

<sup>40</sup> *In Re McConnell*, 370 U.S. 230 at 236 (1962).

<sup>41</sup> 413 U.S. 717 at 733 (1973). See also *Sacher v. United States*, 343 U.S. 1 at 38-39 (1952).

<sup>42</sup> 531 U.S. 533 (2001).

<sup>43</sup> *Ibid.* at 544.

*Rationales for an Independent Bar*

Explanations as to why the bar must remain independent in order to maintain our constitutional structure generally have two basic themes, one focused on public interest and one focused on private interest. The private theme is that lawyers represent their clients and protect their rights, and in doing so provide clients with access to the law. In order to perform their role as advocate, lawyers must be independent from the state. Lawyers also serve a greater public good. Lawyers are integral to the administration of justice and the maintenance of the rule of law. Protection of these fundamental aspects of our constitutional structure require that lawyers be independent. These two themes, while conceptually separate, are often intermingled.

Access to the courts depends on the independence of the bar.<sup>44</sup> The Supreme Court of Canada has recently reaffirmed the important role of counsel in providing citizens with access to justice, particularly when they seek to resolve matters of consequence to the community as a whole. In such cases, the court has held that interim costs may be awarded in advance in any event of the cause, in order to ensure that the case proceeds.<sup>45</sup>

In *Lavallee, Rackel & Heintz v. Canada*, both Justice Arbour for the majority and Justice LeBel for the minority made strong statements supporting the right of the public to have access to confidential legal advice. Both judges refer to lawyers as “gatekeepers” for the judicial system, providing their clients with access to legal services and the legal system.<sup>46</sup> Justice Arbour’s reasoning also places great emphasis on the importance of the sanctity and confidentiality of information provided by clients to their lawyers. The client must be able to put full faith in the lawyer and provide the lawyer with all relevant information, secure in the knowledge that information will remain sacrosanct and will not be used against the client. That is the fundamental principle upon which solicitor-client privilege is based. It also founds the principle of the independence of the bar. There are numerous other cases affirming solicitor-client privilege as a principle of fundamental justice.<sup>47</sup> Without confidentiality,

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<sup>44</sup> See *John Carten Personal Law Corp. v. British Columbia (Attorney General)* (1997), 153 D.L.R. (4th) 460 at 485, 467-68.

<sup>45</sup> *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371 at 391-400.

<sup>46</sup> *Supra* note 26 at 234 and 256, respectively.

<sup>47</sup> See *Smith v. Jones*, [1999] 1 S.C.R. 455 at 476; *R. v. McClure*, [2001] 1 S.C.R. 445; *Foster Wheeler Power Co. v. Société intermunicipale de gestion et d'élimination des déchets (SIGED) Inc.*, [2004] 1 S.C.R. 456 at 475-76; *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809 at 816-19.



the essence of the solicitor-client relationship is lost.<sup>48</sup>

The importance of the principles of solicitor-client privilege and confidentiality is demonstrated by the fact that lawyers may not disclose, or be compelled to disclose, information about a potential crime a client may commit, unless “the facts raise real concerns that an identifiable individual or group is in imminent danger of death or serious bodily harm.”<sup>49</sup> The “future harm” exception to privilege, which is also an ethical rule,<sup>50</sup> makes it clear that where a conflict arises between the public interest in maintaining client confidences and the state interest in the effective enforcement of the criminal law, it is the former that trumps in all but the most extreme circumstances.<sup>51</sup>

Justice LeBel quoted Justice Major in an earlier case: “Today the right to effective assistance of counsel extends to all accused persons. In Canada that right is seen as a principle of fundamental justice. It is derived from the evolution of the common law, s. 650(3) of the *Criminal Code* of Canada and ss. 7 and 11 (d) of the *Canadian Charter of Rights and Freedoms*.”<sup>52</sup> Justice LeBel went on to reason that, with the assistance of able and diligent counsel, the rights of clients to the protection of privileged information would not be breached by the process envisaged by the legislation. He would have upheld the legislation because the bar is independent and capable of protecting the interests of clients.

Since the *Lavallee* case, two Supreme Court decisions on lawyer-client communications have highlighted the importance of confidentiality and the need to preserve the integrity of the relationship. In *Maranda v. Richer*, the court considered the lawfulness of a warrant to search the office of a lawyer for documents relating to fees and disbursements billed to his clients.<sup>53</sup> The police argument was that the information might indicate that the client had the ability to pay the lawyer more than the lawful income the client had disclosed, showing that the client was likely involved in drug trafficking and money laundering. Justice LeBel emphasized the principle discussed in *Lavallee* that any impairment of solicitor-client privilege that might arise out of a search and seizure must be minimized. It must be shown that there is “no other reasonable alternative to the search.”<sup>54</sup> Here, given that at least half of the information could have been obtained from

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<sup>48</sup> See generally *Descôteaux v. Mierzewski*, [1982] 1 S.C.R. 860 at 875; *Maranda v. Richer*, [2003] 3 S.C.R. 193 at 213-15.

<sup>49</sup> *Smith v. Jones*, *supra* note 47 at 489.

<sup>50</sup> See D. Layton, “The Public Safety Exception: Confusing Confidentiality, Privilege and Ethics” (2001) 6 Can. Crim. L. Rev. 217.

<sup>51</sup> See Peck, “The Independence of the Bar,” *supra* note 28 at 552.

<sup>52</sup> *Supra* note 26 at 258, quoting from *R. v. G.D.B.*, [2000] 1 S.C.R. 520 at 530-31.

<sup>53</sup> *Supra* note 48.

<sup>54</sup> *Ibid.* at 203.

other sources, that standard was not met. Referring to the prior jurisprudence of the court on privilege in criminal cases, Justice LeBel observed that: “The aim in those decisions was to avoid lawyers becoming, even involuntarily, a resource to be used in the criminal prosecution of their clients, thus jeopardizing the constitutional protection against self-incrimination enjoyed by the clients.”<sup>55</sup> Justice LeBel re-emphasized the point later in his reasons: “It is important that lawyers, who are bound by stringent ethical rules, not have their offices turned into archives for the use of the prosecution.”<sup>56</sup>

One of the critical issues before the court was whether the fact and amount of fees paid by a client was privileged information. Recognizing the distinction between facts (which are not necessarily privileged) and communications (which are), Justice LeBel stressed that payment of a lawyer’s bill cannot easily be separated from communication between lawyer and client. That being so, there is a “general rule” that a lawyer cannot be compelled to provide information showing payment of bills of account in an investigation or in evidence against his or her client.<sup>57</sup> If the Crown wishes to search a lawyer’s office for this information, it must prove that disclosure of the amount of billings would not violate the confidentiality of the solicitor-client relationship.

The second case, *Foster Wheeler Power Co. v. Société intermunicipale de gestion et d’élimination des déchets (SIGED) Inc.*, concerned discovery questions regarding information provided to municipal authorities by their lawyers.<sup>58</sup> The discovered party objected to the questions on the basis of professional secrecy (in common law terms, confidentiality). Noting the existence of the obligation of confidentiality in Québec’s civil law, Justice LeBel discussed the social importance of that obligation and the need to uphold it.<sup>59</sup> He stressed the integrity of the solicitor-client relationship: “The lawyer’s obligation of confidentiality is necessary to preserve the fundamental relationship of trust between lawyers and clients. Protecting the integrity of this relationship is itself recognized as indispensable to the continued existence and effective operation of Canada’s legal system.”<sup>60</sup> He held that there is a rebuttable presumption that all communications between client and lawyer are confidential. A party claiming otherwise has the onus of proving that disclosure of the specific information sought will not breach the obligation of confidentiality. The effect would be to “prevent ‘fishing expeditions’ in which lawyers...are used as a source of

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<sup>55</sup> *Ibid.* at 205.

<sup>56</sup> *Ibid.* at 216.

<sup>57</sup> *Ibid.* at 215.

<sup>58</sup> *Supra* note 47.

<sup>59</sup> *Ibid.* at 470-71.

<sup>60</sup> *Ibid.* at 475-76.

information for building cases against their own clients.”<sup>61</sup> That statement echoes Justice LeBel’s earlier comments in *Maranda*. It also has resonance with the comment by the majority of the court in the *Anti-terrorism* case that a judge must not act as an “agent of the state.”<sup>62</sup>

An eloquent expression of the importance of lawyers in taking in, protecting and acting upon confidential information provided by their clients is found in the dissenting judgment of Justice Cory in *MacDonald Estate v. Martin*: “[A] client will often be required to reveal to the lawyer retained highly confidential information. The client’s most secret devices and desires, the client’s most frightening fears will often, of necessity, be revealed. The client must be secure in the knowledge that the lawyer will neither disclose nor take advantage of these revelations.”<sup>63</sup> The rationale for the protection of confidential and privileged information provided to lawyers is also a rationale for the independence of the bar. Taken to its logical conclusion, the protection of solicitor-client confidentiality so strongly endorsed in *MacDonald*, *Lavallee*, *Maranda*, and *Foster Wheeler* necessitates an equally strong endorsement of the independence of the bar.

The effective assistance of counsel is premised on the lawyer’s duty of loyalty to the client. That principle of loyalty is the foundation for our law on conflict of interest, which precludes legal counsel from permitting their own interests or those of their clients to come into conflict with other clients’ interests.<sup>64</sup> The principle established in *MacDonald* was most emphatically upheld in *R. v. Neil*.<sup>65</sup> That case involved a paralegal who was charged with various offences relating to improper practice. He had sought legal advice from a law firm over a number of years. A member of the law firm attended a meeting with the appellant paralegal at the Remand Centre. At that time, however, the lawyer was in fact acting for the appellant’s assistant, who was also named in the charges, and who eventually agreed to testify against the appellant in return for having the charges dropped against her. Clearly, the lawyer was in a conflict of interest. The lawyer was also in conflict in relation to other charges. The appellant sought a stay of all of the proceedings against him on the basis of these conflicts. The Supreme Court held that while there was a conflict, neither the lawyer involved nor the law firm possessed any confidential information that related to the charges, and therefore there was no reason to stay the charges.

In the course of his reasons, Justice Binnie analyzed the lawyer’s duty

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<sup>61</sup> *Ibid.* at 480.

<sup>62</sup> *Application under s. 83.28 of the Criminal Code (Re)*, *supra* note 25 at 290.

<sup>63</sup> [1990] 3 S.C.R. 1235 at 1265-66.

<sup>64</sup> The principle is also enshrined in the rules of professional conduct. See, for example, the *Code of Professional Conduct*, Canadian Bar Association, c. VI, XXII.

<sup>65</sup> [2002] 3 S.C.R. 631.

of loyalty at some length. In the following passage, he related the duty of loyalty to the independence of the bar:

[The duty of loyalty] endures because it is essential to the integrity of the administration of justice and it is of high public importance that public confidence in that integrity be maintained.... Unless a litigant is assured of the undivided loyalty of the lawyer, neither the public nor the litigant will have confidence that the legal system, which may appear to them to be a hostile and hideously complicated environment, is a reliable and trustworthy means of resolving their disputes and controversies.<sup>66</sup>

This passage neatly wraps up a number of the “private” themes that underlie the principle of protecting the independence of the bar.<sup>67</sup> Without an independent bar, clients can have no assurance that their rights will be protected from threat – whether that threat comes from another citizen or, as is the case in the public and criminal law fields, from the state.<sup>68</sup>

Many decisions addressing the independence of the bar relate the principle to the need for an independent judiciary, the maintenance of an effective system of justice, and the rule of law. These “public” interests involve a different perspective. The premise is that these public goods cannot exist without an independent bar.

Without a separate, independent pool of advocates from which to draft judges, the state would be left to appoint its own employees as judges.<sup>69</sup> A judge who is beholden to the state cannot be expected to adjudicate disputes between the state and private citizens without bias, and would not be seen as capable of doing so. That is the principle of judicial independence, enshrined as an unwritten constitutional principle in the *Remuneration Reference*. Justice LeBel, in his reasons in *Lavallee*, explicitly connected judicial independence with the role of counsel and the vital need for an independent bar. He went on to note “the importance the jurisprudence of our Court attaches to the legal profession and to the essential role its members are expected to play in the administration of justice and the upholding of the rule of law in Canadian society.”<sup>70</sup>

In *Law Society of British Columbia v. Mangat*, Justice Gonthier wrote that “lawyers play an essential role in society” and that “they have the obligation of upholding the various attributes of the administration of justice such as judicial impartiality and

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<sup>66</sup> *Ibid.* at 641.

<sup>67</sup> See also *Côté v. Rancourt* (2004), 244 D.L.R. (4th) 25 (S.C.C.).

<sup>68</sup> For an example of what can happen when the independence of the bar is threatened by the state, see D. Dlab, “Canadian Lawyers Defend the Independence of the Bar in Malaysia” (2002) 60 *Advocate* (B.C.) 227.

<sup>69</sup> See Lederman, *supra* note 27 at 775-78.

<sup>70</sup> *Supra* note 26 at 257-58.



independence.”<sup>71</sup> There is a similar passage in *R. v. Lippé*.<sup>72</sup> The connection between an independent bar, an independent judiciary and the administration of justice is therefore clear.<sup>73</sup>

The connection between an independent bar and the rule of law rests on slightly different grounds. The rule of law is premised on the governance of society by law, rather than by the rule of particular men and women. The danger of the latter is captured in the famous description of equity as varying with the “length of the Chancellor’s foot.”<sup>74</sup> An independent bar assures the maintenance of the rule of law by calling to account those who trespass against the law, contrary to the interests of the lawyer’s client. By working within the legal system to redress wrongs done to the client, counsel ensure the continuation of the rule of law. Were it otherwise, and independent counsel could not be obtained, private citizens would be left to their own devices in defending themselves against the state or the infringement of their rights by other private parties. A “dependent” bar, one that is beholden to the state or interests other than those of the client, cannot effectively preserve the rule of law. As the majority of the court noted in the *Vancouver Sun* case in reference to the investigative hearing procedure, “shortcomings in the original decision also become apparent when a hearing is truly adversarial, with all affected interests represented.”<sup>75</sup> In some ways, this line of reasoning brings us back to the private interest protected by the independence of the bar, but in the name of a greater public cause. It is not simply one person’s interests that are protected by the rule of law, but society’s general interests. Without the rule of law, as the court wrote in *Reference re: Manitoba Language Rights*, we would have “anarchy, warfare and constant strife.”<sup>76</sup>

A further connection between the private and public interest in an independent bar is discussed briefly in the recent Supreme Court decision in *Côté v. Rancourt*.<sup>77</sup> The case concerned an alleged conflict of interest, where a lawyer represented an accused client while one of the lawyer’s nominal partners represented another accused who had adverse interests.

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<sup>71</sup> [2001] 3 S.C.R. 113 at 142. See also *Fortin v. Chrétien*, [2001] 2 S.C.R. 500 at 530 and the *Report of the Canadian Bar Association Committee on The Independence of the Judiciary in Canada* (Ottawa: Canadian Bar Foundation, 1985) at 47.

<sup>72</sup> [1991] 2 S.C.R. 114 at 141.

<sup>73</sup> See also *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469 at 1518, where Justice Sopinka lists a number of principles relevant to determining whether a person facing extradition will be delivered to a country with a fair legal system. His list includes the existence of an independent bar.

<sup>74</sup> Attributed to John Selden, a seventeenth century jurist. See *Laidlaw v. Lear* (1898), 30 O.R. 26 at 29-30 (H.C.).

<sup>75</sup> *Supra* note 26 at 356.

<sup>76</sup> *Supra* note 4 at 749.

<sup>77</sup> *Supra* note 67.

Following the *Neil* decision, the court held that the duty of loyalty invokes both private and public interests. First, every client has an obvious private interest in having their counsel fulfil the duty of loyalty. Second, in some cases, the discharge of that duty affects the public interest in the integrity of the judicial system. Where a lawyer represents two co-accused with adverse interests, the reliability of the verdict is put in question, and respect for the integrity of the judicial system is threatened.<sup>78</sup> Thus, as with maintaining the independence of the bar, there is both a private and a public interest in ensuring the loyalty of counsel.<sup>79</sup>

Finally, in *Finney v. Barreau du Québec*, Justice LeBel noted that the Barreau was given a legislative monopoly over the regulation of lawyers “to recognize the social importance of the role of the lawyer in a democratic society founded on the rule of law.”<sup>80</sup>

### *Connection to Written Canadian Constitutional Principles*

Proponents of the “gap” theory of unwritten principles use the metaphor of filling cracks in the constitutional armour. Where a principle can be said to arise by necessary implication from the written constitution, or emerge from the text, it may be enforced.<sup>81</sup> This assigns primacy to the written text, and allows the derivation of norms from that text that can in turn be used to interpret the text. That approach might be seen as no more than an application of the “purposive” theory of legislative interpretation to the text of the constitution. The broader alternative view sees the text as implementing a set of organizing principles. To the extent those principles may not be fully implemented in the text, one may turn for support to the principle itself.

The division over this theoretical issue may be seen in *Eurig Estate (Re)*, where the Supreme Court addressed the constitutionality of Ontario’s probate fees.<sup>82</sup> Justice Major held that the “fees” were in fact direct taxes. They were authorized only by regulation and not by the provincial legislature, and fell afoul of section 53 of the *Constitution Act, 1867*, which provides that bills for the imposition of a tax must originate in the legislature. The “rationale” or “basic purpose” of that section, according to Justice Major, was to codify the principle of

<sup>78</sup> *Ibid.* at 30.

<sup>79</sup> The court in *Côté v. Rancourt*, *supra* note 67, held that while the conflict should have been avoided, it was not such as to threaten the public interest or prevent the lawyer from representing the client effectively.

<sup>80</sup> *Supra* note 29 at 30.

<sup>81</sup> See Elliot, *supra* note 20 and M. Walters, “The Common Law Constitution of Canada: Return of *Lex Non Scripta* as Fundamental Law” (2001) 51 U.T.L.J. 91.

<sup>82</sup> [1998] 2 S.C.R. 565.

no taxation without representation.<sup>83</sup> In a concurring judgment, Justice Binnie thought that the majority appeared to be relying on a constitutional principle that was at odds with the explicit text of section 53. Accusing Justice Major of “rewriting s. 53,” Justice Binnie insisted that “implicit principles can and should be used to expound the Constitution, but they cannot alter the thrust of its explicit text.”<sup>84</sup> In *R. v. MacKenzie*, the Nova Scotia Court of Appeal expressed a similar view, finding that although there is an unwritten principle of normative force governing the protection of minority language rights, that principle cannot amend the text of the *Charter*.<sup>85</sup> It will be appreciated that what one judge sees as “rewriting” or “amending” the written constitution will be regarded by another as merely interpreting its “rationale” or “basic purpose.”

Whichever theory one subscribes to, the independence of the bar is a principle that is entirely consistent with the existing text of the constitution. Sections 97 and 98 of the *Constitution Act, 1867* prescribe that the superior court judges of the provinces “shall be selected from the respective Bars of those Provinces.”<sup>86</sup> That ensures judges are knowledgeable in the applicable law of a province and also ensures their independence. Judges are to be appointed from the bar rather than from the civil service to guarantee their independence from the government. If judges are to be independent, the bar from which they are appointed must also be independent.

The provisions of the *Charter* also support the principle of an independent bar. Section 8 protects everyone from “unreasonable search or seizure.”<sup>87</sup> Section 10(b) provides that “everyone has the right on arrest or detention to retain and instruct counsel without delay and to be informed of that right.” Section 11(d) provides that “any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.” It may be questioned whether the independence of the bar arises from these provisions by “necessary implication,” in the sense that these provisions assume the existence of an independent bar. Arguably, however,

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<sup>83</sup> *Ibid.* at 581-82.

<sup>84</sup> *Ibid.* at 594. See also *N.A.P.E.*, *supra* note 26 at 328-32.

<sup>85</sup> *Supra* note 23 at 509.

<sup>86</sup> Section 98 refers to Quebec, requiring that judges be “selected from the Bar of that Province.”

<sup>87</sup> Section 1 permits the government to infringe the rights guaranteed by the *Charter* where the infringement constitutes a reasonable limit demonstrably justified in a free and democratic society. The section, however, does not apply to unwritten constitutional principles. The Supreme Court held in *Mackin*, *supra* note 25 at 439, that the government must meet a higher threshold if it seeks to justify an infringement of the foundational constitutional principle of judicial independence. See also *Lavallee*, *supra* note 26 at 247.

the principle does emerge from the text as a grounding norm. It is consistent with the text, not contrary to it, to assert that the independence of the bar is an unwritten constitutional principle.

### *A Principle of Fundamental Justice*

It is arguable that the independence of the bar is a principle of fundamental justice protected by section 7 of the *Charter*. In *Re B.C. Motor Vehicle Act*, Justice Lamer stated that “the principles of fundamental justice are to be found in the basic tenets of our legal system.”<sup>88</sup> In a sense, they are akin to the unwritten constitutional principles that Justice Lamer affirmed in the *Remuneration Reference*, but with somewhat less scope for application. They also tend to be confined to the administration of justice, whereas unwritten constitutional principles may encompass a broader range of values.<sup>89</sup> As Justice Gonthier observed in *Mackin*, the independence of the judiciary functions as “a prerequisite for giving effect to a litigant’s rights including the fundamental rights guaranteed in the *Charter*.”<sup>90</sup> That statement also applies to fundamental principles such as the independence of the bar. While the principles of fundamental justice generally comprise particular rules according to which the legal system must abide if citizens are to obtain justice, the unwritten constitutional principles are the necessary preconditions to the very operation of that system.<sup>91</sup> In *Reference re: ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, Justice Lamer described the principles of fundamental justice as those “that govern the justice system,” including the conduct of judges and other actors within the system.<sup>92</sup>

As noted above, sections 10(b) and 11(d) of the *Charter* indicate the importance of the independence of the bar in the protection of the rights of an accused within the criminal justice system. All of the authorities cited earlier that affirm the importance of the independence of the bar more generally are also relevant here. In *Pearlman v. Manitoba Law Society Judicial Committee*, for example, Justice Iacobucci held that the principle of the independence of the bar was an important contextual factor in determining the application of the principles of fundamental justice to the case before him.<sup>93</sup> Justice Major held in *R. v. G.D.B.* that the right to the

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<sup>88</sup> [1985] 2 S.C.R. 486 at 503.

<sup>89</sup> See *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76 at 92-93.

<sup>90</sup> *Supra* note 25 at 439.

<sup>91</sup> But see *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429 at 488-92, where Justice McLachlin leaves open the possibility that section 7 might encompass positive economic rights, even if unconnected with the administration of justice.

<sup>92</sup> [1990] 1 S.C.R. 1123 at 1173.

<sup>93</sup> *Supra* note 33.



effective assistance of counsel is a principle of fundamental justice.<sup>94</sup> In addition, the protection of solicitor-client privilege has been held to be a principle of fundamental justice, on many of the same bases on which the independence of the bar would be so found.

There is a strong argument, therefore, that the independence of the bar merits section 7 protection as a principle of fundamental justice. The limitation in section 7 of the *Charter*, that it only applies where there is a threat to life, liberty or security of the person, reduces to some extent the breadth of such a finding. Judicial review of government under section 7 is limited to those cases where a state-imposed threat to liberty can be found. Nevertheless, a finding that the independence of the bar is one of the (unwritten) principles of fundamental justice within section 7 would be a step towards a finding that it is also one of the unwritten principles of the constitution as a whole.

### *Consistency with International Principles*

It is well-accepted that international instruments cannot stand alone as the basis for a constitutional challenge. However, our own constitution should not sharply diverge from the values we espouse on the international stage. For this reason, the Supreme Court has held that Canada's international obligations may inform the interpretation of the content of the rights guaranteed by the Canadian constitution, as well as the interpretation of what can constitute pressing and substantial objectives that may justify restrictions upon those rights.<sup>95</sup> The extent to which international instruments protect certain human rights shows the high degree of importance attached to those rights.<sup>96</sup> Judicial review, therefore, may properly be informed by the values reflected in international human rights law.<sup>97</sup>

The importance of the independence of the bar as an essential guarantee of the rule of law, judicial independence and the protection of human rights has been recognized in numerous international instruments, many of which Canada assisted in drafting. The 1993 *Vienna Declaration and Programme of Action* recognizes that "an independent judiciary and legal profession...are essential to the full and non-discriminatory

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<sup>94</sup> *Supra* note 52.

<sup>95</sup> *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at 1056-57. See also *Canadian Foundation for Children, Youth and the Law v. Canada*, *supra* note 89 at 93-94.

<sup>96</sup> See, for example, *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 at 31, where the court held that the inquiry into the principles of fundamental justice may be informed by international law.

<sup>97</sup> *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at 861.

realization of human rights and indispensable to the processes of democracy and sustainable development.”<sup>98</sup> The *Basic Principles on the Role of Lawyers*, adopted by the Eighth United Nations Congress on the prevention of crime and the treatment of offenders, sets out a number of core values related to the role of legal counsel, including confidentiality, loyalty and access.<sup>99</sup> The document states that “adequate protection of the human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or civil and political, requires that all persons have effective access to legal services provided by an independent legal profession.”<sup>100</sup> It also provides that lawyers shall be able to perform their duties without improper interference, and shall enjoy immunity for relevant statements made in good faith before a court.

The *Universal Declaration on the Independence of Justice* was adopted at a world conference in 1983.<sup>101</sup> The conference was convened at the prompting of the United Nations to consider the independence of judges, lawyers, jurors and assessors. In its chapter on lawyers, the *Declaration* provides that:

The legal profession is one of the institutions referred to in the preamble to this declaration. Its independence constitutes an essential guarantee for the promotion and protection of human rights.

There shall be a fair and equitable system of administration of justice, which guarantees the independence of lawyers in the discharge of their professional duties without restrictions, influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

All persons shall have effective access to legal services provided by an independent lawyer to protect and establish their economic, social and cultural as well as civil and political rights.<sup>102</sup>

The *Declaration* has been cited positively by the Supreme Court of Canada in numerous cases involving the independence of the judiciary.<sup>103</sup>

<sup>98</sup> U.N. Doc. A/CONF.157/23, cl. 27 (1993).

<sup>99</sup> U.N. Doc. A/CONF.144/28/Rev.1 (1990).

<sup>100</sup> *Ibid.* (preamble).

<sup>101</sup> First World Conference on the Independence of Justice, Montreal, 1983. The *Declaration* is reproduced in S. Shetreet & J. Deschenes, eds., *Judicial Independence: The Contemporary Debate* (Boston: Martinus Nijhoff Publishers, 1985) at 447.

<sup>102</sup> Paras. 3.02-3.04.

<sup>103</sup> See *Valente v. The Queen*, [1985] 2 S.C.R. 673; *Beauregard v. Canada*, [1986] 2 S.C.R. 56; *R. v. Lippé*, *supra* note 72; *Remuneration Reference*, *supra* note 11; *Ruffo v. Conseil de la Magistrature*, [1995] 4 S.C.R. 267; *Mackin v. New Brunswick*, *supra* note 25.

Finally, the importance of the independence of the bar was affirmed in the *Latimer House Guidelines for the Commonwealth*.<sup>104</sup> The guidelines were developed by representatives of the Commonwealth Parliamentary Association, the Commonwealth Magistrates' and Judges' Association, the Commonwealth Lawyers' Association and the Commonwealth Legal Education Association. They were intended to promote good governance, the rule of law and human rights. They include the statement that "an independent, organized legal profession is an essential component in the protection of the rule of law."<sup>105</sup>

These international instruments affirm the importance of the independence of the bar to the administration of justice in a just and democratic society, for both the protection of human rights and more broadly the rule of law. In this context, the independence of the bar is generally affiliated with, and given as much recognition as, the independence of the judiciary. The fact that the independence of the bar has been recognized as an important value in international law should inform constitutional adjudication of the issue in Canada.

#### *Adjudicating the Principle of Independence*

The authorities discussed above affirm the importance of the independence of the bar and explain the need for that independence. The independence of the bar is also consistent with the written constitution, in the specific provisions of the text and the preamble to the *Constitution Act, 1867*, and with the unwritten principles that have already been affirmed. Accordingly, one may conclude with some considerable justification that the independence of the bar is an unwritten constitutional principle. What remains is the adjudication of that principle.

The expression of the principle of the rule of law in the *Reference re: Manitoba Language Rights* was minimal: any law is sufficient, as long as there is some law. If an independent bar were given only that degree of protection, a litigant relying on the principle might be disappointed. That, however, has not been the case. In addition to the numerous cases cited above, the independence of the bar has been given more vigorous protection in the lower courts when the principle has come up directly for adjudication.

The enforceability of the principle of the independence of the bar was a primary issue in *Law Society of British Columbia v. Canada (Attorney*

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<sup>104</sup> The *Guidelines* were developed at a colloquium on parliamentary supremacy and judicial independence held at Latimer House in the United Kingdom, June 1998. See c. 2 in J. Hatchard & P. Slinn, eds., *Parliamentary Supremacy and Judicial Independence: A Commonwealth Approach* (London: Cavendish Publishing, 1999).

<sup>105</sup> *Ibid.*, VIII(3).

*General*).<sup>106</sup> The case concerned a federal legislative regime requiring financial entities and professionals to report transactions that are “suspicious,” involve cash in amounts of \$10,000 or more, or involve the importation to or exportation from Canada of negotiable instruments valued at \$10,000 or more.<sup>107</sup> Lawyers were required to determine whether their clients and others were involved in transactions that, on an objective view, might be “suspicious.” If so, the lawyer was required to obtain and report full details of the transaction, including details of all parties involved and a “detailed description of the grounds to suspect” that the transaction was related to a money laundering offence. The legislation also prohibited lawyers from “tipping off” their clients if the lawyer made a report.<sup>108</sup>

When the legislative regime was first imposed on lawyers, the Federation of Law Societies of Canada and the Law Society of British Columbia brought parallel petitions challenging the application of the regime to lawyers. The petitioners sought a temporary injunction suspending the application of the reporting requirements to lawyers until the case could be fully argued, and a declaration that the legislative regime was unconstitutional in its application to lawyers. The primary principle on which the petitioners challenged the legislation was that it violated the independence of the bar. By requiring legal counsel to search out and secretly report confidential information about their clients, the legislative regime made lawyers agents for the state.

Because the case was decided on an interlocutory basis, the court did not need to finally determine whether the independence of the bar was an unwritten constitutional principle. It was only necessary to decide whether the petitioners had a serious issue to be tried.<sup>109</sup> In determining that the petitioners had raised serious issues, Justice Allan noted the extensive jurisprudence affirming the importance of an independent bar and the “interdependent relationship between an independent bar and an independent judiciary.”<sup>110</sup> Moving on to the second aspect of the test for

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<sup>106</sup> (2001), 207 D.L.R. (4th) 705 (B.C.S.C.), *affd.* (2002) 207 D.L.R. (4th) 736 (B.C.C.A.). Josiah Wood and the author were counsel for the Federation of Law Societies of Canada, the petitioner in a parallel constitutional challenge that was heard and decided with that of the Law Society of British Columbia. Opinions expressed herein are my own and do not necessarily represent the views of the Federation.

<sup>107</sup> *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17.

<sup>108</sup> *Ibid.* at ss. 7, 8 and see the regulations, S.O.R./2001-317. See generally *Law Society of British Columbia* (B.C.S.C.), *supra* note 106 at 714-15.

<sup>109</sup> See *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311; *Harper v. Canada (Attorney General)*, [2000] 2 S.C.R. 764.

<sup>110</sup> *Law Society of British Columbia* (B.C.S.C.), *supra* note 106 at 726.



interlocutory relief, she determined that irreparable harm would result if the application of the legislative regime to lawyers was not suspended. Finally, examining the balance of convenience, Justice Allan noted the unique position occupied by lawyers in the administration of justice, and concluded that the legislative regime amounted to “an unprecedented intrusion into the traditional solicitor-client relationship.”<sup>111</sup> She ordered that legal counsel be exempt from the application of the recording and reporting regime, pending a full hearing of the petitions on their merits.

The court’s order was upheld on appeal.<sup>112</sup> Judgments were soon granted in Alberta,<sup>113</sup> Saskatchewan,<sup>114</sup> Ontario<sup>115</sup> and Nova Scotia,<sup>116</sup> each one in similar or identical terms to the British Columbia order. Eventually, the federal government repealed the regulations by which the regulatory regime was made applicable to lawyers. In the Regulatory Impact Analysis Statement accompanying the repealing regulations, the government concluded that it was “preferable not to retain the current regime for legal counsel.”<sup>117</sup> Following the decision of Justice Allan, several judgments of the Supreme Court have provided support for her reasoning. The *Lavallee* decision, along with the *Maranda* and *Foster Wheeler* cases, established conclusively that lawyers cannot be used as sources of information against their clients, unless the party seeking the information can demonstrate that it cannot be obtained through any other means, and its disclosure will not breach solicitor-client confidentiality. Further support is found in the reasoning in *R. v. Neil*, which emphasized the importance of lawyers remaining loyal to their clients.<sup>118</sup> It can be seen, therefore, that the principle of the independence of the bar has gained

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<sup>111</sup> *Ibid.* at 735.

<sup>112</sup> *Law Society of British Columbia* (B.C.C.A.), *supra* note 106. Leave to appeal was granted but an application for an interim stay was dismissed, and the appeal was discontinued. See [2002] S.C.C.A. 52.

<sup>113</sup> *Federation of Law Societies of Canada v. Canada (Attorney General)*, [2001] A.J. 1697 (Q.B.).

<sup>114</sup> *Federation of Law Societies of Canada v. Canada (Attorney General)* (2002), 218 Sask. R. 193 (Q.B.).

<sup>115</sup> *Federation of Law Societies of Canada v. Attorney General of Canada* (2002), 207 D.L.R. (4th) 740 (Ont. S.C.J.).

<sup>116</sup> *Federation of Law Societies of Canada v. Canada (Attorney General)* (2002), 203 N.S.R. (2d) 53 (S.C.).

<sup>117</sup> *Regulations Amending Certain Regulations Made under the Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.O.R./2003-102. A hearing on the merits of the law societies’ challenge to the legislation has been formally scheduled to commence in October 2005. I cannot comment on the issues to be tried with respect to the challenge to the legislation if the hearing on the merits does proceed. For further discussion of this case, see M. Gallant, “Sentries or Facilitators?: Law and Ethics in Trusting Lawyers with Money Laundering Prevention” (2004) 49 *Crim. L. Q.* 34.

<sup>118</sup> *Supra* note 65.

strength since Justice Allan's decision.

In *LaBelle v. Law Society of Upper Canada*, the plaintiff claimed that the Attorney General of Ontario failed to adequately supervise the Law Society of Upper Canada in its handling of a complaint she filed concerning a lawyer.<sup>119</sup> The Attorney General brought a motion to strike that aspect of the claim as disclosing no cause of action, arguing that the Attorney General had no control over the disciplinary process of the law society. The court considered the relationship between the Attorney General and the law society. After reviewing the history of self-governance of the profession, the court explained that: "The legal profession is a fundamental component of our historical system of government and predates *Magna Carta*. Self-government was assumed by the English Inns of Court since the fourteenth century. The independence of the bar is a conventional constitutional requirement designed to maintain a free society."<sup>120</sup> The court went on to quote others<sup>121</sup> and noted the importance of an independent bar to the maintenance of an independent judiciary and the confidence of the citizens in their ability to be represented in court.<sup>122</sup> The court then dismissed the claim against the Attorney General. An appeal from that order was dismissed orally.<sup>123</sup>

In *Wilder v. Ontario (Securities Commission)*, the court considered the power of the Securities Commission to reprimand a lawyer.<sup>124</sup> The lawyer argued that the rule of law is a fundamental principle of the constitution, the protection of which requires an independent bar. The Divisional Court held that "the Commission's proposed proceeding does not interfere with the independence of the bar, nor can it be said to undermine the Rule of Law."<sup>125</sup> Implicitly, the court appears to have accepted that the independence of the bar may merit constitutional protection. The Court of Appeal agreed with the disposition of the Divisional Court.<sup>126</sup>

In the recent case of *Winnipeg Child and Family Services v. A.(J.)*, the appellant argued that the government's ability to set legal aid tariff rates

<sup>119</sup> (2001) 52 O.R. (3d) 398 (S.C.J.).

<sup>120</sup> *Ibid.* at 406. In *Law Society of British Columbia (B.C.S.C.)*, *supra* note 106 at 727, the court commented on this passage, stating: "With respect, McKinnon J. may be in error in describing the independence of the bar as a constitutional convention."

<sup>121</sup> G. Finlayson, "Self-Government of the Legal Profession – Can It Continue?" (1985) 4 *Advocates' Soc. J.* 11.

<sup>122</sup> *LaBelle*, *supra* note 119 at 406-407.

<sup>123</sup> The Court of Appeal expressed a reservation as to the reasoning in the court below, but did not contest the constitutional importance of the independence of the bar. See *LaBelle v. Law Society of Upper Canada* (2001), 56 O.R. (3d) 413 (C.A.).

<sup>124</sup> (2000), 184 D.L.R. (4th) 165 (Ont. S.C.J.).

<sup>125</sup> *Ibid.* at 174.

<sup>126</sup> *Wilder v. Ontario Securities Commission* (2001), 197 D.L.R. (4th) 193 (Ont. C.A.).

violated the independence of the bar because lawyers were made financially dependent on government.<sup>127</sup> The appellant sought an order requiring that the tariffs be set by an independent commission, similar to that required for judges' salaries pursuant to the *Remuneration Reference*. The court held that: "It is undeniable that the legal profession plays a fundamentally important role in the administration of justice."<sup>128</sup> However, reasoned the court, "even assuming that the independence of the legal profession may be considered either an unwritten constitutional principle or a principle of fundamental justice in some cases," it did not guarantee the same degree of financial independence required for judges.<sup>129</sup> A similar case is *R. v. Bruha*, in which the court denied an application for an order for government-funded counsel apart from the legal aid plan.<sup>130</sup> The court held that the independence of the bar was not violated by the requirement that the accused, if he sought government-funded counsel, was restricted to retaining legal aid counsel.

On balance, then, the independence of the bar has been given considerable recognition as a principle meriting constitutional protection. As with any constitutional principle, written or unwritten, not every case alleging a violation of the principle has succeeded. Nevertheless, there is an emerging consensus that the independence of the bar may rank with the independence of the judiciary and the other unwritten norms that underlie our constitutional structure, a violation of which will require judicial intervention.

### *Conclusion*

The Supreme Court of Canada has confirmed that unwritten constitutional norms inform the written text of the constitution. Some lower courts have been reluctant to apply unwritten rules to impugn government action. The Supreme Court, however, remains committed to the principles it has identified, and open to the possible identification of other principles. The court is not averse to using unwritten principles to test the constitutionality of legislation. There can be no doubt, now, that legislation is susceptible to challenge on the basis of unwritten constitutional norms.

I do not contend that all unwritten constitutional principles are equally authoritative. Some principles have been found to have limited application as independent bases to challenge legislation – the rule of law being the most obvious example. My point is simply that in some cases, unwritten principles have a legitimate role to play, and the independence of the bar is

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<sup>127</sup> (2003), 235 D.L.R. (4th) 292 (Man. C.A.).

<sup>128</sup> *Ibid.* at 302.

<sup>129</sup> *Ibid.*

<sup>130</sup> [2003] 1 W.W.R. 339 (N.W.T. S.C.).

one of those principles enforceable in its own right.

The Supreme Court has continuously affirmed the important role lawyers play in the administration of justice. Recent decisions, including *Neil* and *Lavallee*, confirm that view. These cases provide a strong foundation for concluding that the independence of the bar is an unwritten constitutional principle against which government actions and legislation may be evaluated. Federal legislation that amounted to an unprecedented intrusion into the traditional solicitor-client relationship has already been suspended, in part on the strength of a finding that it threatened to violate the independence of the bar. Put simply, the maintenance of our constitutional values and freedoms requires a bar that is independent from the state.