The Separation of Powers in Canada

The Honourable Malcolm Rowe, Chris Puskas and Allyse Cruise*

I. INTRODUCTION

The edifice of state has at its foundation the separation of powers. This relationship between the legislature, executive and judiciary has been described as "perhaps the single most crucial relationship in a constitutional system".[1] Indeed, what is more fundamental than "Who decides what?" How legal philosophy and contemporary jurisprudence deals with this question is our topic.

The separation of powers is about matching functions of the state with the institutions of the state best suited to carry out those functions. Thus, the design and operation of the legislature best suits it to fulfil the legislative function, *i.e.*, the making of general laws. And, the design and operation of the executive best suits it to administer the laws enacted by the legislature and to exercise the authority delegated to it by the legislature, regarding both policy and finances. Finally, the design and operation of the courts best suits them to adjudicate disputes between citizens and between citizens and the state regarding legal rights and obligations. As a corollary, the separation of powers avoids institutions of the state carrying out functions for which they are ill-suited.

Canada's constitution consists of several components, some written, others unwritten. The written instruments are principally the *Constitution Act, 1867*[2] and the *Constitution Act, 1982*.[3] The unwritten components include constitutional conventions, parliamentary privilege, Crown prerogative, Aboriginal and treaty rights and underlying constitutional principles.[4]

The paper is organized as follows. In Part II, we describe the conceptual basis for the separation of powers. We outline the philosophical underpinnings of the doctrine to explain why it is foundational to the proper operation of the state. In Part III, we explain why the separation of powers is fundamental to the operation of the Westminster system of government in Canada. In Part IV, we briefly digress to

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* The Honourable Justice Malcolm Rowe was appointed to the Supreme Court of Canada in 2016, having served from 1999 on the Superior Court and then the Court of Appeal of Newfoundland and Labrador. In 2021-22, Christopher Puskas and Allyse Cruise served as clerks for Justice Rowe at the Supreme Court of Canada. Both are currently in private litigation practice.

[1] Geoffrey Marshall, *Constitutional Theory* (Oxford: Oxford University Press, 1971) at 97.

[2] *Constitution Act, 1867*, 30 & 31 Vict., c. 3.

[3] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[4] Of these, Aboriginal and treaty rights are *sui generis*. The analytical structure for such rights is distinct and these concepts are not addressed in this article.

describe other unwritten constitutional principles, in order to situate the separation of powers in that context. In Part V, we review the treatment of the separation of powers by the Supreme Court of Canada; this jurisprudence is fragmentary in describing the principle and its operation. Finally, in Part VI, drawing on guidance provided by the Supreme Court of Canada, we provide a general picture of what powers belong to each branch of the state.

II. CONCEPTUAL BASIS FOR THE SEPARATION OF POWERS

Montesquieu's 1748 work *The Spirit of the Laws* (*De l'Esprit des Loix*) is often referred to as the source for the concept of the separation of powers. While the phrase first appears in Montesquieu, the concept had been outlined by John Locke in his 1690 *Second Treatise on Government*. However, the concept has deeper roots in Western thought.

Aristotle wrote in his *Politics* that it would be "bad for a man, subject as he is to all the accidents of human passion, to have the supreme power".[5] Aristotle wanted to separate legislative from executive authority. In his view, laws should be arrived at by the many, while their administration should be by the few. (By contrast, Aristotle's teacher, Plato, favoured the concentration of legislative and executive authority to be exercised by philosopher kings in his Utopia, *The Republic*.) Aristotle wrote, "[t]he multitude ought to be supreme rather than the few best".[6] Aristotle wasn't a democrat. But he understood the danger of too great a concentration of authority. (His pupil, Alexander the Great, had a different view.)

While Aristotle, Locke and Montesquieu wanted to separate legislative from executive authority, they paid less attention to judicial authority.[7] The classic statement of the separation of powers among the legislature, the executive and the judiciary is in the *Federalist Papers* in 1787-88, leading up to the American Constitution. As we will explain, Alexander Hamilton and James Madison believed that liberty required such a separation.

This was illustrated all too clearly by reference to Article 16 of the *Declaration of the Rights of Man and the Citizen* adopted by the National Assembly in 1789, early in the French Revolution at a time when efforts were made (notably by Lafayette and Mirabeau) to establish a constitutional monarchy. Article 16 reads (in translation): "Any society in which the safeguarding of rights is not assured, and the separation of powers is not established, has no constitution." The separation of powers established in revolutionary France, and any safeguarding of rights related to it, was rendered meaningless by 1793 with the onset of the Reign of Terror. After

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[5] Aristotle, *The Politics of Aristotle*, translated by B. Jowett (Oxford: Clarendon Press, 1885), vol. 1, online: oll.libertyfund.org/titles/579#Aristotle_0033-01_496.

[6] Aristotle, *The Politics of Aristotle*, translated by B. Jowett (Oxford: Clarendon Press, 1885), vol. 1, online: oll.libertyfund.org/titles/579#Aristotle_0033-01_496.

[7] Geoffrey Marshall, *Constitutional Theory* (Oxford: Oxford University Press, 1971) at 102.

the fall of Robespierre in 1794, the Directory maintained the form but not the substance of the separation of powers by exercising near dictatorial authority. The vestiges of the separation of powers, ineffective as they had proven, were swept away by Napoleon under the Consulship, then the Empire.

These chaotic events in France coincided with orderly and enduring developments in the new United States of America, including: the adoption of the American Constitution and the *Bill of Rights*; the presidency of Washington; and foundational decisions by the Supreme Court of the United States ("SCOTUS"), notably *Marbury v. Madison*.[8]

The key issue in that case was whether courts could review legislation enacted by Congress for conformity with the Constitution and whether they could declare laws that did not so conform to be invalid on that basis. While the Constitution established SCOTUS, no provision expressly authorized such judicial review: Congress asserted that it was within its competence to determine whether its laws were constitutional. SCOTUS held to the contrary, that such authority was to be exercised by the courts. Chief Justice John Marshall's reasoning, in simplified form, was along the following lines: the purpose of a written constitution is to delimit the authority conferred under it; it is implicit in the nature of such a constitution that legislation enacted pursuant to it be within the authority that it confers. Where the enactment of legislation is not authorized by the constitution it follows necessarily that the legislation is invalid and, consequently, without legal effect. It being the duty of courts to decide questions of legality, it thus is for the courts to decide whether laws are in conformity with the Constitution. As put by Chief Justice Marshall:

> The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. . .. Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void . . . It is emphatically the province and duty of the Judicial Department to say what the law is.[9]

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[8] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Note that American courts engaged in judicial review prior to *Marbury*. However, as noted by Keith E. Whittington, before *Marbury*, "like many state courts, the Supreme Court simply exercised the power to evaluate the constitutionality of federal laws, without any explanation of where such a power might come from": *Repugnant Laws: Judicial Review of Acts of Congress from the Founding to the Present* (Lawrence: University of Kansas, 2019) at 76. The importance of *Marbury* lies in its detailed explanation for judicial review as grounded in the separation of powers and constitutional supremacy.

[9] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) at 176-177. There is some debate over the meaning of this quote, with some academics arguing that *Marbury*'s logic means that other branches of government can also engage in equally authoritative constitutional interpretation. See, *e.g.*, Michael Stokes Paulsen, *The Irrepressible Myth of Marbury* (2003)

In Canada, this issue is dealt with expressly today by section 52(1) of the *Constitution Act, 1982*, which states that the Constitution is the "supreme law of Canada" and any law that is "inconsistent" with the Constitution is of "no force or effect". This provision sets out the fundamental principle of constitutional law that the Constitution is supreme and gives courts a basis to declare the laws inconsistent with the Constitution as invalid.[10]

But what of the period from 1867 to 1982? The *Constitution Act, 1867* contains no provision corresponding to section 52(1) of the *Constitution Act, 1982*. And, in contrast to the United States, there was no early landmark Privy Council or Supreme Court of Canada decision that justifies the judiciary's power to overrule legislation it holds to be in conflict with the Constitution.[11] But that fact did not prevent courts from striking down legislation as unconstitutional. Some courts based their authority to do so on an *ultra vires* theory similar to the one that had been accepted in *Marbury v. Madison*: it was the courts implicit and inherent duty to ensure that the legislature did not enact laws outside the scope of its powers. So, even without textual authority to do so, courts could review laws for constitutional conformity.[12]

Some academics, however, suggest that judicial review for constitutionality before 1982 was justified by statute, not implicit authority. The *Colonial Laws Validity Act*, *1865*[13] and the *Statute of Westminster*, *1931*,[14] prevented colonial legislatures from enacting laws that conflicted with — or were "repugnant" to — laws passed by the Parliament of the United Kingdom. According to this view (often known as "repugnancy theory"), the CLVA and the *Statute of Westminster*, *1931* acted like section 52 in the *Constitution Act, 1982*: the legislatures gave courts a textual authority for striking down laws that conflicted with the distribution of powers outlined in the *Constitution Act, 1867*.[15]

101:8 Mich. L. Rev. 2706. As Paulsen acknowledges, this view is inconsistent with "nearly all of [America's] contemporary constitutional practice": at 2724. It is also inconsistent with the doctrine of *stare decisis*, which, in our view, is integral to a properly functioning legal system. See *R. v. Kirkpatrick*, [2022] S.C.J. No. 33, 2022 SCC 33 at paras. 171-267 (S.C.C.).

[10] *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295 at 313 (S.C.C.); *Ontario (Attorney General) v. G*, [2020] S.C.J. No. 38, 2020 SCC 38 at paras. 85-89 (S.C.C.).

[11] Peter H. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson Press, 1987) at 93.

[12] See Peter Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Thomson Reuters, 2022) at § 5:20; see also Norman Siebrasse, "The Doctrinal Origin of Judicial Review and the Colonial Laws Validity Act" (1993) 1 Rev. Const. Stud. 75, which discusses the role of the doctrine of *ultra vires* in early decisions discussing judicial authority to strike legislation as unconstitutional.

[13] *Colonial Laws Validity Act, 1865* (U.K.), 28 & 29 Vict., c. 63 ("CLVA").

[14] *Statute of Westminster, 1931* (U.K.), 22 Geo. 5, c. 4.

[15] See *Operation Dismantle Inc. v. Canada*, [1985] S.C.J. No. 22, [1985] 1 S.C.R. 441 at 482 (S.C.C.); *R. v. Albashir*, [2021] S.C.J. No. 48, 2021 SCC 48 at para. 29 (S.C.C.). While

Writings on the separation of powers also emphasize functional considerations based on the institutional capacities of the three main institutions of the state. In this view, each institution (often referred to as a "branch of government") has a specific and specialized function which it is designed to fulfil within the organization of the state.[16] In broad terms, these functions are:

a) Legislative — Enactment of laws setting out rules of general application for the governance and ordering of society;[17] the raising of revenue and authorizing the expenditure of public funds; and, holding the executive accountable for the exercise of authority delegated to it by the legislature and for public expenditures.

b) Executive — Giving effect to laws enacted by the legislature, exercising authority conferred on it by the constitution or delegated to it by the legislature (including extensive authority to make policy), the maintenance of public order, the expenditure of public funds and the conduct of foreign affairs.

c) Judicial — Adjudicating disputes as to the law in specific cases. This entails interpretation and application of constitutional, statutory and common law.[18]

Thus, the rationale for the separation of powers is twofold:

1. A Safeguard to Liberty

The separation of powers results in countervailing sources of authority divided among different state actors. For the state to operate, these actors need to exercise their authority in complementary ways. And if one branch oversteps its authority, the other branches can act as a check and balance to preserve the separation of powers.[19]

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a full discussion of this debate is beyond the scope of this paper, for more, see: Barry L. Strayer, *Judicial Review of Legislation in Canada* (Toronto: University of Toronto Press, 1968); Robert Leckey, *Bill of Rights in the Common Law* (Cambridge: Cambridge University Press, 2015); Brian Bird, "The Unbroken Supremacy of the Canadian Constitution" (2018) 55:3 Alta. L. Rev. 755; and Alexandre Marcotte, "A Question of Law: (Formal) Declarations of Invalidity and the Doctrine of Stare Decisis" (2021), 42 N.J.C.L. 1.

[16] Nicolas W. Barber, "Prelude to the Separation of Powers" (2001) 60 Cambridge L.J. 59 at 60; Roger Masterman, *The Separation of Powers in the Contemporary Constitution* (Cambridge: Cambridge University Press, 2011) at 15-16; Eric Barendt, "Separation of Powers and Constitutional Government" in Richard Bellamy, ed., *The Rule of Law and the Separation of Powers* (London: Routledge, 2005) 599 at 605.

[17] We note Lon Fuller's description of legislation as being, *inter alia*, general, prospective, public, intelligible and stable.

[18] See *Fraser v. Canada (Public Service Staff Relations Board)*, [1985] S.C.J. No. 71, [1985] 2 S.C.R. 455 at para. 44 (S.C.C.).

[19] Geoffrey Marshall, *Constitutional Theory* (Oxford: Oxford University Press, 1971) at 99, 103.

The separation of powers thus prevents one group of state actors from monopolizing power. In *Myers v. United States*, for example, Justice Brandeis wrote that the purpose of the separation of powers was "not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental power among three [branches], to save the people from autocracy".[20] Montesquieu had stated similar views: "Where the legislative and executive powers are vested in the same person, or in the same body of magistrates, there can be no liberty . . ." and "there is no liberty if the judiciary power be not separated from the legislative and executive".[21] Locke said something similar in his "Second Treatise", that it may be "too great temptation for human frailty, apt to grasp at power, for the same persons who have the power of making laws to have also in their hands the power also to execute them, whereby they may exempt themselves from obedience to the laws they make."[22]

Madison in the *Federalist Papers* described the separation of powers as an "essential precaution in favor of liberty". He wrote in the Federalist Paper No. 47:

> The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many . . . may justly be pronounced the very definition of tyranny. . . . In order to form correct ideas on this important subject, it will be proper to investigate the sense in which the preservation of liberty requires that the three great departments of power [legislative, executive and judicial] should be separate and distinct.[23]

In the Federalist Paper No. 78, Hamilton agreed with Madison and went to argue for the independence of courts:

> The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex-post-facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.[24]

In England, such matters had been dealt with in the 1689 *Bill of Rights* that, *inter alia*, prohibited the monarch from enacting laws or imposing taxes without Parliament's approval and from either suspending statutes or dispensing anyone

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[20] *Myers v. United States*, 272 U.S. 52 (1926) at 293.

[21] See Montesquieu, *The Spirit of the Laws*, Book XI, c. 6 for the latter quote.

[22] John Locke, *The Second Treatise of Government* (1690), c. 12, section 143.

[23] Madison, J. (1788), The Federalist Papers. No. 47: The Particular Structure of the New Government and the Distribution of Power Among Its Different Parts. New York Packet.

[24] Although note that Hamilton explicitly opposed the Bill of Rights in Federalist Paper No. 84, writing it would be "dangerous" and would provide men a "plausible pretense for claiming" powers not granted to them by the Constitution.

from complying with a statute, as well as in decisions by the great English jurist, Sir Edward Coke, notably in the *Case of Impositions* (1606) regarding taxes, the *Case of Prohibitions* (1607) regarding the role of the courts and the supremacy of law over the Royal Prerogative and the *Case of Proclamations* (1610) regarding statutes.

The separation of powers has been relied on in more contemporary jurisprudence of the Judicial Committee of the Privy Council. In *Liyange v. The Queen*, the Sri Lankan legislature threatened to upend the separation of powers by passing legislation that amended criminal and evidence laws for the trial of plotters of a failed coup.[25] The Privy Council held that this legislation was unconstitutional because it violated the separation of powers. While the Privy Council accepted that the legislation targeted a serious offence, it stressed that derogating from the separation of powers in these circumstances would jeopardize the long-term liberty interests of the public: "What is done once, if it be allowed, may be done again and in a lesser crisis and less serious circumstances".[26] As well, Viscount Simonds wrote in *Australia (Attorney General) v. The Queen and The Boilermakers' Society of Australia* that "[t]o vest in the same body executive and judicial power is to remove a vital constitutional safeguard."[27]

2. Institutional efficiency

The separation of powers causes the institutions of the state to operate more efficiently by conferring authority on the state actors that are best equipped to use such authority efficiently. Locke developed this efficiency rationale to justify the separation of powers.[28]

> [I]n well-ordered commonwealths, where the good of the whole is so considered, as it ought, the legislative power is put into the hands of divers persons, who duly assembled, have by themselves, or jointly with others, a power to make laws, which when they have done, being separated again, they are themselves subject to the laws they have made; which is a new and near tie upon them, to take care, that they make them for the public good.
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> But because the laws, that are at once, and in a short time made, have a constant and lasting force, and need a perpetual execution, or an attendance thereunto; therefore it is necessary there should be a power always in being, which should see to the execution of the laws that are made, and remain in force. And thus the legislative and executive power come often to be separated.

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[25] *Liyange v. The Queen*, [1967] 1 A.C. 259 (P.C.).

[26] *Liyange v. The Queen*, [1967] 1 A.C. 259 at 291 (P.C.).

[27] *Australia (Attorney General) v. The Queen and The Boilermakers' Society of Australia*, [1957] A.C. 288 (P.C.); see also Lord Diplock in *Duport Steels Ltd. v. Sirs*, [1980] 1 All E.R. 529 at 541 (H.L.), regarding the separation between legislative and judicial authority.

[28] Roger Masterman, *The Separation of Powers in the Contemporary Constitution* (Cambridge: Cambridge University Press, 2011) at 14.

. . .

> WHERE the legislative and executive power are in distinct hands, (as they are in all moderated monarchies, and well-framed governments) there the good of the society requires, that several things should be left to the discretion of him that has the executive power: for the legislators not being able to foresee, and provide by laws, for all that may be useful to the community, the executor of the laws having the power in his hands, has by the common law of nature a right to make use of it for the good of the society, in many cases, where the municipal law has given no direction, till the legislative can conveniently be assembled to provide for it. Many things there are, which the law can by no means provide for; and those must necessarily be left to the discretion of him that has the executive power in his hands, to be ordered by him as the public good and advantage shall require: nay, it is fit that the laws themselves should in some cases give way to the executive power, or rather to this fundamental law of nature and government, viz.[29]

Legislatures are well equipped to make polycentric decisions, as they can consider alternative courses of action, receive the views of experts and the broader public, and enact detailed laws that structure competing values and interests. By contrast, the judiciary is institutionally "ill equipped to make polycentric choices or to evaluate the wide-ranging consequences that flow from policy implementation . . . courts possess neither the expertise nor the resources to undertake public administration."[30]. Courts rely on the parties that appear before them to identify the issues and present the best case possible. It is not open to the courts, for example, to establish commissions to study and report on policy options.[31] Instead, courts are most efficient when they operate in their triadic form — a judge independently and objectively adjudicating a dispute between competing parties. "Our system works best when constitutional actors respect the role and mandate of other constitutional actors."[32]

With the adoption of the *Constitution Act, 1982* (as well as the adoption in 1975 in Quebec of the *Charter of Human Rights and Freedoms*), the courts took on additional authority that modified but did not detract from the separation of powers, any more than did the adoption of the 1797 *Bill of Right* in the United States.

That said, courts were given additional "countervailing" authority in 1982, with the adoption of the *Canadian Charter of Rights and Freedoms*.[33] This authority is

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[29] John Locke, *The Second Treatise of Government* (1690) at c. 12, sections 143-144, c. 14, section 159.

[30] *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] S.C.J. No. 63, 2003 SCC 62 at para. 120 (S.C.C.), *per* LeBel and Deschamps JJ. dissenting, but not on this point.

[31] Nicolas W. Barber, "Prelude to the Separation of Powers" (2001) 60 Cambridge L.J. 59 at 74-78.

[32] *Newfoundland v. N.A.P.E.*, [2004] S.C.J. No. 61, 2004 SCC 66 at para. 104 (S.C.C.).

[33] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

expressly intended to operate in a counter-majoritarian way, when specified rights are infringed. But protection of such rights engages only a small subset of policies and actions by the legislature and executive. For all matters that do not involve the infringement of a protected right, the separation of powers remains unaffected by the *Constitution Act, 1982*.

We would underline that the separation of powers is politically neutral. It is indifferent as to what goals the state pursues. The separation of powers: (1) prevents authority from being concentrated in a single institution; and (2) allocates authority to institutions of the state having regard to which are best able to use such authority.[34]

In summary, given its proper effect, the separation of powers both protects liberty and advances the efficiency of the state. Liberty is protected because each branch of the state has sufficient authority to act as a meaningful check on the other two branches. And efficiency is promoted as authority is exercised by the branch of the state best suited to utilize it.

III. THE SEPARATION OF POWERS IN THE WESTMINSTER SYSTEM OF GOVERNMENT

Our constitution is the Canadian version of the Westminster system of government, one that we inherited from Britain and that we have adapted to our own circumstances.

The Westminster system evolved over the centuries to incorporate a separation of powers. During the 17th century, under James I, the courts notably limited the Royal Prerogative in two cases: first, in the 1611 Case of Proclamations, which held that only the King in Parliament, and not the monarch alone, can legislate; and second, in the 1607 Prohibition del Roy, which held that the courts only, and not the monarch personally, can adjudicate cases. Charles I's efforts to undercut Parliament's role led to his defeat in the English Civil War and his execution. At the Restoration, Parliament's role was affirmed, while that of the monarch was circumscribed. The English Bill of Rights of 1689 settled in broad terms the relationship between Parliament and the executive (then led by the monarch personally). The supremacy of law administered by independent judges was confirmed by the *Act of Settlement, 1701*.[35] During the 18th century, executive authority shifted from the monarch to a Cabinet comprising Parliamentarians led by a Prime Minister. By the mid-19th century, the system had evolved such that political parties competed in general elections and their leaders held office as long as their administration maintained the confidence of Parliament; this remains so in both the United Kingdom and Canada today.

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[34] Nicolas W. Barber, "Prelude to the Separation of Powers" (2001) 60 Cambridge L.J. 59 at 66.

[35] (U.K.), 12 & 13 Wm. III, c. 2.

In what is now Ontario and Quebec, the rebellions of 1834 led to Lord Durham's report which called for colonial self-government. This cause was vigorously advanced by the English philosopher and Member of Parliament, John Stuart Mill. During the 1840s and 1850s, the colonies of British North America became self-governing under a local version of the Westminster system. In 1867, the system was adapted to a federal structure in the Dominion of Canada. This is indicated in the preamble to the *Constitution Act, 1867*, which states that Canada is to have "a Constitution similar in Principle to that of the United Kingdom" (*i.e.*, the Westminster system).[36] The "preamble . . . incorporates the notion of the separation of powers, inherent in British parliamentary democracy, which precludes the court from trenching on the internal affairs of other branches of government".[37]

Like the Westminster system as practised in Britain, ours is not a "pure" separation of powers. The "pure" theory calls for a complete separation of the three branches of the state.[38] Each branch is strictly confined to the exercise of its own function and persons can hold office in only one of the three branches at any given time.[39] The United States Constitution expressly provides for a "pure" separation of powers: Article I vests legislative power in Congress, Article II executive power in the President, and Article III judicial power in a Supreme Court and lower courts established by Congress.[40]

In the Westminster system, by contrast, those who exercise executive authority in Cabinet must be members of the legislature.[41] This departure from a "pure" theory of the separation of powers, important though it is, does not undercut that the separation of powers remains an important principle in Canadian constitutional law.[42] As Lord Bingham stated in *Director of Public Prosecutions of Jamaica v. Mollison*:

> Whatever overlap there may be under Constitutions on the Westminster model

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[36] See *Cooper v. Canada (Human Rights Commission)*, [1996] S.C.J. No. 115, [1996] 3 S.C.R. 854 at para. 22 (S.C.C.).

[37] *Harvey v. New Brunswick (Attorney General)*, [1996] S.C.J. No. 82, [1996] 2 S.C.R. 876 (S.C.C.), *per* McLachlin C.J.C. and L'Heureux-Dubé J. concurring.

[38] Nicolas W. Barber, "Prelude to the Separation of Powers" (2001) 60 Cambridge L.J. 59 at 60.

[39] Roger Masterman, *The Separation of Powers in the Contemporary Constitution* (Cambridge: Cambridge University Press, 2011) at 11.

[40] Eric Barendt, "Separation of Powers and Constitutional Government" in Richard Bellamy, ed., *The Rule of Law and the Separation of Powers* (London: Routledge, 2005) 599.

[41] Roger Masterman, *The Separation of Powers in the Contemporary Constitution* (Cambridge: Cambridge University Press, 2011) at 11, 18.

[42] Kent Roach, *The Separation and Interconnection of Powers in Canada: The Role of Courts, the Executive and the Legislature in Crafting Constitutional Remedies* (Hong Kong: JICL, 2018) at 315.

between the exercise of executive and legislative powers, the separation between the exercise of judicial powers on the one hand and legislative and executive powers on the other is total or effectively so. Such separation, based on the rule of law, was recently described by Lord Steyn as "a characteristic feature of democracies": *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837, 890-891, para 50.[43]

IV. DIGRESSION INTO THE ROLE OF UNDERLYING CONSTITUTIONAL PRINCIPLES

Before reviewing the Supreme Court jurisprudence on the separation of powers, it is worthwhile to digress briefly to consider the role of "underlying" (also referred to as "unwritten") constitutional principles. Specifically, such underlying constitutional principles can be used by the Court in the two ways listed below.

1) **Textual interpretation:** Courts can use underlying constitutional principles to interpret constitutional text.[44] "Structural analysis of the underlying principles of our Constitution can inform and assist in the proper interpretation of constitutional provisions."[45]

2) **Gap-filling:** Structural analysis can also identify principles unstated in the written constitution, but which flow from its architecture so as to address issues not dealt with in the text. "Structural doctrines can fill gaps and address important questions on which the text of the Constitution is silent."[46]

Such underlying constitutional principles are not, however, a licence for courts to develop new constitutional rules as they see fit. Such underlying principles cannot be untethered from the text of the written Constitution, as that would trespass into the authority conferred on legislatures to amend the Constitution (under Part V of the *Constitution Act, 1982*), "thereby raising fundamental concerns about the legitimacy of judicial review and distorting the separation of powers".[47]

V. TREATMENT OF THE SEPARATION OF POWERS BY THE SUPREME COURT OF CANADA

From time to time, the Supreme Court has expressed doubt as to the importance

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[43] *Director of Public Prosecutions of Jamaica v. Mollison*, [2003] UKPC 6 at para. 13, [2003] 2 A.C. 411 (P.C.).

[44] *Toronto (City) v. Ontario (Attorney General)*, [2021] S.C.J. No. 35, 2021 SCC 34 at paras. 54-56 (S.C.C.).

[45] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 128 (S.C.C.), *per* Rowe J.

[46] *Toronto (City) v. Ontario (Attorney General)*, [2021] S.C.J. No. 35, 2021 SCC 34 at para. 56 (S.C.C.). See also Malcolm Rowe & Manish Oza, "Structural Analysis and the Constitution" (2023) 101:1 Can. Bar Rev. 205.

[47] *Toronto (City) v. Ontario (Attorney General)*, [2021] S.C.J. No. 35, 2021 SCC 34 at para. 58 (S.C.C.).

or even the existence of the separation of powers in Canada. For example, in *Reference re Residential Tenancies Act (Ontario)*[48] the Court, citing Peter Hogg, wrote "[o]ur Constitution does not separate the legislative, executive, and judicial functions and insist that each branch of government exercise only its own function."[49] The decision addressed the constitutionality of delegating responsibility for landlord-tenant disputes to an administrative body. The Ontario Court of Appeal determined it was "not within the legislative authority of Ontario to empower the Residential Tenancy Commission to make eviction orders and compliance orders".[50] In overturning that decision, the Supreme Court determined it was "clear" that the legislature could "confer non-judicial functions on the courts . . . and, subject to s. 96 of the B.N.A. Act . . . confer judicial functions on a body which is not a court".[51] Subsection 92(14) of the *Constitution Act, 1867* provides legislatures "a wide power" with respect to the administration of justice, subject to "subtraction of ss. 96 to 100".[52] Accordingly, "the belief that any function which in 1867 had been vested in a s. 96 court must forever remain in that court" was not supported by case law.[53]

In *Douglas/Kwantlen Faculty Assn. v. Douglas College*, the Supreme Court dismissed separation of powers concerns by noting that, unlike the American constitution, the Canadian constitution did not have a "rigidly" defined separation of powers:

> While in broad terms, such a separation of powers does exist, it is not under our system of government rigidly defined . . . At most, the theory of separation of powers reminds us that important judicial functions should not lightly be delegated to administrative agencies, especially where they are not adequately organized . . . Those who object to tribunals deciding constitutional issues also point to the American position where the supremacy clause of the United States Constitution, art. VI, bears considerable similarity to s. 52(1) of the Constitution Act, 1982. In that country, the rule at least at the federal level, is that administrative agencies may not determine constitutional questions. Such a doctrine, I noted earlier, finds no place in the Canadian constitutional structure.[54]

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[48] [1981] S.C.J. No. 57, [1981] 1 S.C.R. 714 (S.C.C.).

[49] *Reference re Residential Tenancies Act (Ontario)*, [1981] S.C.J. No. 57, [1981] 1 S.C.R. 714 at para. 26 (S.C.C.).

[50] *Reference re Residential Tenancies Act (Ontario)*, [1981] S.C.J. No. 57, [1981] 1 S.C.R. 714 at para. 3 (S.C.C.).

[51] *Reference Residential Tenancies Act (Ontario)*, [1981] S.C.J. No. 57, [1981] 1 S.C.R. 714 at para. 26 (S.C.C.).

[52] *Reference Residential Tenancies Act (Ontario)*, [1981] S.C.J. No. 57, [1981] 1 S.C.R. 714 at para. 27 (S.C.C.).

[53] *Reference re Residential Tenancies Act (Ontario)*, [1981] S.C.J. No. 57, [1981] 1 S.C.R. 714 at paras. 27-30 (S.C.C.).

[54] *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] S.C.J. No. 124, [1990] 3

In *Wells v. Newfoundland*, the Supreme Court determined that the government could not "rely on . . . formal separation [between the executive and the legislature] to avoid the consequences of its own actions".[55] The legislature in that case had amended a statute to abolish an employee's position, even though he had a contract of employment until the age of 70.[56] The employee was not offered compensation for termination of his employment. The government argued that "the separation of powers between the legislative and executive branches means that a legislative act which bars the executive from performing pending contractual obligations does not constitute self-induced frustration, as these branches are independent entities."[57] In refusing to accept this argument, the Supreme Court wrote:

> The separation of powers is not a rigid and absolute structure. The Court should not be blind to the reality of Canadian governance that, except in certain rare cases, the executive frequently and *de facto* controls the legislature. The new *Public Utilities Act* in Newfoundland was a government bill, introduced by a member, as directed by Cabinet Directive C 328-'89. Therefore, the same "directing minds," namely the executive, were responsible for both the respondent's appointment and his termination.[58]

Various other decisions downplay the significance of the separation of powers. These decisions generally emphasize that the doctrine is not rigid and hold that the powers of each branch of government can overlap. In *Cooper v. Canada (Human Rights Commission)*, it noted that the "separation of powers is not strict" and that the absence of a strict separation of powers means that the Canadian Constitution only needs to sustain "some notion of the separation of powers".[59] In *Reference re Secession of Quebec*, it noted that it could render advisory opinions because, unlike the American constitution, "the Canadian Constitution does not insist on a strict separation of powers."[60] *MacMillan Bloedel Ltd. v. Simpson*, stated that "a strict separation of judicial and legislative powers is not a feature of the Canadian Constitution" as there is "no general 'separation of powers' in the *Constitution Act, 1867*: each branch of the state does not necessarily need to exercise only 'its own' function."[61] *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, noted that academic and judicial writing has sometimes cast "the existence of a true doctrine

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S.C.R. 570 at paras. 86, 89 (S.C.C.) [citations omitted].

[55] *Wells v. Newfoundland*, [1999] S.C.J. No. 50, [1999] 3 S.C.R. 199 at para. 52 (S.C.C.).

[56] *Wells v. Newfoundland*, [1999] S.C.J. No. 50, [1999] 3 S.C.R. 199 at paras. 2-8 (S.C.C.).

[57] *Wells v. Newfoundland*, [1999] S.C.J. No. 50, [1999] 3 S.C.R. 199 at para. 51 (S.C.C.).

[58] *Wells v. Newfoundland*, [1999] S.C.J. No. 50, [1999] 3 S.C.R. 199 at para. 54 (S.C.C.).

[59] *Cooper v. Canada (Human Rights Commission)*, [1996] S.C.J. No. 115, [1996] 3 S.C.R. 854 at paras. 10-11 (S.C.C.).

[60] *Reference re Secession of Quebec*, [1988] 2 S.C.R. 217 at paras. 13, 15 (S.C.C.).

[61] *MacMillan Bloedel Ltd. v. Simpson*, [1995] S.C.J. No. 101, [1995] 4 S.C.R. 725 at para. 61 (S.C.C.).

of separation of powers in Canada . . . in doubt", and that "Canadians have never adopted a watertight system of separation of judicial, legislative and executive functions.[62] In *Hislop v. Canada (Attorney General)*, the Court linked strict "separation of powers" concern to the outdated Blackstonian view that "judges do not create law but merely discover it".[63] In *Mikisew Cree v. Canada (Governor General in Council)*, Brown J. noted that the separation of powers in our parliamentary system "is not a rigid and absolute structure" which follows neatly drawn lines.[64] In *Reference re Greenhouse Gas Pollution Pricing Act*, Côté J. wrote that "[a]s an abstract theory, the separation of powers may embody three dimensions: the same persons should not form part of more than one branch, one branch should not control or intervene in the work of another, and one branch should not exercise the functions of another . . . In Canada, the first two dimensions of the separation of powers are not always met."[65]

The Supreme Court's jurisprudence on occasion has recognized that one branch of the state should not "overstep its bounds" and that each must "show proper deference for the legitimate sphere of activity of the other".[66] But the "bounds" of each branch are not delineated with clarity.[67] The separation of powers doctrine remains ill-defined, despite the concerns associated with one branch of the state encroaching on another's role. Warren Newman writes that the Supreme Court's jurisprudence "has yet to provide a comprehensive and persuasive account of the meaning, scope, and normative effect of this principle . . . nowhere in Canadian constitutional jurisprudence is there a thorough analysis of the constitutional meaning animating the concept of the separation of powers, or the constitutional values . . . it is meant to protect and enhance".[68]

Three concerns arise from this lack of clarity. First, much of the case law deals with the separation of powers in Canada by reference to differences with the United States. This provides a weak analytical framing, as to define properly Canada's constitutional arrangements one must come to grips with the history of *our*

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[62] *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] S.C.J. No. 63, 2003 SCC 62 at paras. 107-109 (S.C.C.).

[63] *Hislop v. Canada (Attorney General)*, [2007] S.C.J. No. 10, 2007 SCC 10 at para. 84 (S.C.C.).

[64] *Mikisew Cree v. Canada (Governor General in Council)*, [2018] S.C.J. 40, 2018 SCC 40 at para. 119 (S.C.C.).

[65] *Reference re Greenhouse Gas Pollution Pricing Act*, [2021] S.C.J. No. 11, 2021 SCC 11 at paras. 280-281 (S.C.C.).

[66] *Anderson v. Alberta*, [2022] S.C.J. No. 6, 2022 SCC 6 at para. 29 (S.C.C.).

[67] *Anderson v. Alberta*, [2022] S.C.J. No. 6, 2022 SCC 6 at para. 29 (S.C.C.).

[68] Warren J. Newman, "The Rule of Law, the Separation of Powers and Judicial Independence in Canada", in the *Oxford Handbook of the Canadian Constitution*, Peter Oliver *et al.*, eds. (New York: Oxford University Press, 2017) 1031 at 1039-1040.

constitution. A more appropriate frame of reference for understanding the separation of powers in Canada is to understand it as it existed in the United Kingdom at the time of Confederation, as referred to above. Second, the tired mantra that Canada does not have a strict separation of powers leaves the door open to arguments that one of the principal institutions of the state can trench on the role or powers of another.[69] Such a proposition has far-reaching but difficult to ascertain consequences. Third, by failing to provide clarity the Supreme Court has left the doctrine open for misuse. Doctrinal clarity is a bulwark against results-oriented reasoning. To address these concerns, we seek to synthesize the Supreme Court of Canada jurisprudence on the separation of powers.

VI. THE SEPARATION OF POWERS IN CANADA'S CONSTITUTION

Having regard to this jurisprudence, we seek to outline what has been stated as to the scope of each branch's powers and, thereby, identify the limits of such powers.

1. Judicial Branch

(a) *Scope of Judicial Powers*

The judicial branch interprets, applies and states the law (*e.g.*, common law, statute, or constitutional law).[70] When courts interpret the Constitution, it is not the Court itself that limits legislative or executive action; rather, "it is the Constitution, which must be interpreted by the courts, that limits the legislatures".[71] Actions by the executive may be curtailed because they are inconsistent with parliamentary intent embodied in a statute: this is the essence of administrative law.

Justiciability describes the demarcation between the exercise of judicial authority that is acceptable and that which is unacceptable. Courts should decide only issues that are "suitable for judicial determination".[72] Justiciability asks "[i]s the issue one that is appropriate for a court to decide?"[73] This doctrine, like the separation of powers, is "linked to the concern about the proper role of the courts and their constitutional relationship to the other branches of state".[74] Thus, justiciability is

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[69] See Peter Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Thomson Reuters, 2022) at § 7.3.

[70] *Reference re Code of Civil Procedure (Que.) Art. 35*, [2021] S.C.J. No. 27, 2021 SCC 27 at para. 46 (S.C.C.).

[71] *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] S.C.J. No. 61, 2004 SCC 66 at para. 105 (S.C.C.), citing *Vriend v. Alberta*, [1998] S.C.J. No. 29, [1998] 1 S.C.R. 493 at para. 56 (S.C.C.).

[72] *British Columbia (Attorney General) v. Council of Canadians with Disabilities*, [2022] S.C.J. No. 27, 2022 SCC 27 at para. 50 (S.C.C.), citing *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, [2018] S.C.J. No. 26, 2018 SCC 26 (S.C.C.).

[73] *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, [2018] S.C.J. No. 26, 2018 SCC 26 at para. 32 (S.C.C.).

[74] *British Columbia (Attorney General) v. Council of Canadians with Disabilities*, [2022]

another way of giving effect to the separation of powers — courts should decide an issue only if it comes within the scope of their proper role, *i.e.*, interpreting, applying, and stating the law to resolve a live dispute[75] before the courts (or, in rare circumstances, based on a reference question by the government to the Court, such as in the *Secession Reference*). Absent this, the issue is to be decided through other branches of the government or by non-state means (such as by persons through voluntary arrangements) rather than the judiciary.

(b) ***Limits on Judicial Powers***

While the general principles above could be used to broadly define the limits on judicial powers, the Supreme Court has set out certain defined limits on the scope of judicial powers, as we explain below.

(i) Courts do not establish spending priorities

Courts do not decide how the legislative and executive branches allocate public resources. Allocating public resources among competing public priorities is "a political decision".[76] Courts have refused to issue orders establishing government spending priorities. In *Ontario v. Criminal Lawyers' Assn. of Ontario*, for example, the Court concluded that trial judges could not set the rate of compensation for *amici curiae* because this power could undermine the separation of powers; courts could not direct how much a province should spend on legal aid.[77] "It is for the duly elected members of the legislature to determine what funds are expended on the administration of justice, not the judges."[78]

Anderson v. Alberta affirmed courts' limited jurisdiction to award "advance costs" for similar reasons.[79] In *British Columbia (Minster of Forests) v. Okanagan Indian Band*,[80] and *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customer and Revenue)*,[81] the Supreme Court held that courts could use their equitable jurisdiction over costs to award advance costs in limited circumstances. *Anderson* affirmed this, while at the same time stressing that routinely awarding

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S.C.J. No. 27, 2022 SCC 27 at para. 48 (S.C.C.).

[75] See, *e.g.*, *Ontario (Attorney General) v. Persons Unknown*, [2020] O.J. No. 4944, 2020 ONSC 6974 (Ont. S.C.J.) and *A. (S.) v. Metro Vancouver Housing Corp*., [2019] S.C.J. No. 4, 2019 SCC 4 at para. 60 (S.C.C.).

[76] *Anderson v. Alberta,* [2022] S.C.J. No. 6, 2022 SCC 6 at para 22 (S.C.C.).

[77] *Ontario v. Criminal Lawyers' Assn. of Ontario*, [2013] S.C.J. No. 43, 2013 SCC 43 at paras. 15, 27-31, 43, 47, 71, 79 (S.C.C.).

[78] *Ontario v. Criminal Lawyers' Assn. of Ontario*, [2013] S.C.J. No. 43, 2013 SCC 43 at para. 69 (S.C.C.). Note that ss. 53 and 54 of the *Constitution Act, 1867* reflects that spending priorities remain a core legislative branch power.

[79] *Anderson v. Alberta*, [2022] S.C.J. No. 6, 2022 SCC 6 (S.C.C.).

[80] [2003] S.C.J. No. 76, 2003 SCC 71 (S.C.C.).

[81] [2000] S.C.J. No. 66, 2000 SCC 69 (S.C.C.).

advance costs would undermine the separation of powers by creating a "parallel system of legal aid".[82]

There are a few exceptions to this, notably when courts deal with minority language education rights under section 23 of the *Charter*.[83]

(ii) The courts do not interfere with "core policy" decisions

"Core policy" consists of polycentric decisions as to those objectives that the state should prioritize. Such policy decisions involve "weighing competing economic, social, and political factors and conducting contextualized analyses of information. These decisions are not based only on objective considerations but require value judgments — reasonable people can and do legitimately disagree."[84]

Courts are not well equipped to make such core policy decisions.[85] Courts rely on the parties that appear before them to identify the issues and present the best cases possible for their clients. As noted, courts cannot call their own witnesses, order commissions to study and report on problems, or engage in public debate.[86] Thus, courts are not equipped to make core policy decisions.

By contrast, the legislative process is designed to make such policy decisions.[87] The "constitutionally mandated process in ss. 17 and 91 of the *Constitution Act, 1867*, ensures that the legislation is made in public forums that provide opportunities for substantial examination and debate."[88] Legislatures also have the institutional capacity to study and assess the consequences of major legal change.[89]

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[82] *Anderson v. Alberta*, [2022] S.C.J. No.6, 2022 SCC 6 at paras. 21-24 (S.C.C.); see also *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customer and Revenue)*, [2000] S.C.J. No. 66, 2000 SCC 69 at paras. 5, 44 (S.C.C.).

[83] See, *e.g.*, *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, [2020] S.C.J. No. 13, 2020 SCC 13 (S.C.C.). Consider also, *Eldridge v. British Columbia (Attorney General)*, [1997] S.C.J. No. 86, [1997] 3 S.C.R. 624 at 691 (S.C.C.), which "direct[ed] the government of British Columbia to administer the *Medical and Health Care Services Act* (now the *Medicare Protection Act*) and the *Hospital Insurance Act* in a manner consistent with the requirements of s. 15(1)". Ensuring legislation complies with Charter equality rights may result, necessarily, in government spending.

[84] *Nelson (City) v. Marchi*, [2021] S.C.J. No. 41, 2021 SCC 41 at para. 44 (S.C.C.).

[85] *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] S.C.J. No. 63, 2003 SCC 62 at para. 120 (S.C.C.), *per* LeBel and Deschamps JJ. dissenting, but not on this point.

[86] Nicolas W. Barber, "Prelude to the Separation of Powers" (2001) 60 Cambridge L.J. 59 at 74-78; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] S.C.J. No. 63, 2003 SCC 62 at para. 120 (S.C.C.); *Mikisew Cree v. Canada (Governor General in Council)*, [2018] S.C.J. 40, 2018 SCC 40 at paras. 2, 32 (S.C.C.).

[87] *Nelson (City) v. Marchi*, [2021] S.C.J. No. 41, 2021 SCC 41 at paras. 44-45 (S.C.C.).

[88] *Reference re Greenhouse Gas Pollution Pricing Act*, [2021] S.C.J. No. 11, 2021 SCC 11 at para. 291 (S.C.C.), *per* Côté J., dissenting in part, but not on this point.

[89] *R v. Kirkpatrick,* [2022] S.C.J. No. 33, 2022 SCC 33 at para. 264 (S.C.C.).

As the Court held in *Nelson (City) v. Marchi*,[90] core policy decisions are immune from tort liability because subjecting those decisions to private law duties of care would inappropriately "entangle the courts in evaluating decisions best left to the legislature or executive".[91]

(iii) Courts do not (ordinarily) re-draft legislation

When interpreting a statute, the Court's task is to give effect to legislative intent, not to interpret the statute in a way that accords with the judge's sense of what would be good policy.[92]

As a consequence, courts should not read in or read down legislation when to do so would create a law that the legislature would not otherwise have adopted. "If granted in the wrong circumstances, tailored remedies [reading in and reading down] can intrude on the legislative sphere . . . tailored remedies should only be granted where it can be fairly assumed that the legislature would have passed the constitutionally sound part of the scheme without the unsound part and where it is possible to precisely define the unconstitutional aspect of the law."[93]

(iv) Courts do not interfere in foreign affairs

The executive has authority to conduct foreign affairs under Crown prerogative.[94] Judicial decisions directing the conduct of foreign affairs would violate the separation of powers. In *Khadr v. Canada (Prime Minister)*, the Court did not order the government to seek the return of Mr. Khadr to Canada, even though the Court found that his section 7 rights had been violated and he had sought such an order.[95] Rather, the Court held that such an order would violate the separation of powers by interfering with the executive's authority to conduct foreign affairs: "Consistent with the separation of powers and the well-grounded reluctance of courts to intervene in matters of foreign relations, the proper remedy is to grant Mr. Khadr a declaration that his *Charter* rights have been infringed, while leaving the government a measure

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[90] *Nelson (City) v. Marchi*, [2021] S.C.J. No. 41, 2021 SCC 41 (S.C.C.).

[91] *Nelson (City) v. Marchi*, [2021] S.C.J. No. 41, 2021 SCC 41 at para. 42 (S.C.C.); see also para. 49.

[92] See *ATCO Gas & Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, [2006] S.C.J. No. 4, 2006 SCC 4 at para. 49 (S.C.C.); *Bell ExpressVu Limited Partnership v. Rex*, [2002] S.C.J. No. 43, 2002 SCC 42 at para. 66 (S.C.C.).

[93] *Ontario (Attorney General) v. G*, [2020] S.C.J. No. 38, 2020 SCC 38 at para. 114 (S.C.C.) (citing *Alberta (Attorney General) v. Canada (Attorney General)*, [1947] A.C. 503518 (P.C.)). See also *R. v. Bissonnette*, [2022] S.C.J. No. 23, 2022 SCC 23 at para. 133 (S.C.C.); *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] S.C.J. No. 63, 2003 SCC 62 at para. 34 (S.C.C.).

[94] *Canada (Prime Minister) v. Khadr*, [2010] S.C.J. No. 3, 2010 SCC 3 at para. 39 (S.C.C.).

[95] *Canada (Prime Minister) v. Khadr*, [2010] S.C.J. No. 3, 2010 SCC 3 (S.C.C.).

of discretion in deciding how best to respond."[96] To the extent that difficulties and delay followed in that case, they are better ascribed to the response of the executive, rather than the doctrinal soundness of the Court's decision.

(v) Courts do not interfere with the legislative process or the adopting of legislation

The legislative process is protected from judicial oversight through the doctrine of parliamentary privilege, which prevents courts from subjecting anything said or done during the legislative proceedings from judicial review. It protects the separation of powers by giving the Senate, the House of Commons, and provincial legislative assemblies an exclusive sphere in which to carry out their constitutionally assigned functions.[97] Among other protections, parliamentary privilege ensures that the legislature has: (1) freedom of speech (meaning nothing said during legislative proceedings can be the subject of court proceedings); (2) control over "debates or proceedings in Parliament", including day-to-day procedure of the legislature; (3) the power to exclude strangers from proceedings; (4) disciplinary authority over members and non-members who interfere with the discharge of parliamentary duties; and (5) immunity for members from subpoena during parliamentary sessions.[98] These broad immunities also prevent the judiciary from interfering with the legislature's ability to prepare and consider legislation.[99]

(vi) Courts do not (ordinarily) interfere with prosecutorial discretion

The executive exercises prosecutorial discretion. Courts can intervene only in very limited circumstances to prevent abuse of process in the exercise of this discretion. Regularly reviewing the exercise of prosecutorial discretion would make the courts part of the executive branch, thereby violating the separation of powers.[100]

2. Legislative Branch

(a) *Scope of Legislative Powers*

The legislative branch enacts laws of general application for the good governance

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[96] *Canada (Prime Minister) v. Khadr*, [2010] S.C.J. No. 3, 2010 SCC 3 at para. 2 (S.C.C.).

[97] *Canada (House of Commons) v. Vaid*, [2005] S.C.J. No. 28, 2005 SCC 30 at paras. 21, 29 (S.C.C.); *British Columbia (Attorney General) v. Provincial Court Judges' Assn. of British Columbia*, [2020] S.C.J. No. 20, 2020 SCC 20 at para. 66 (S.C.C.).

[98] *Canada (House of Commons) v. Vaid*, [2005] S.C.J. No. 28, 2005 SCC 30 at para. 29 (S.C.C.).

[99] *Mikisew Cree First Nation v. Canada (Governor General in Council)*, [2018] S.C.J. No. 40, 2018 SCC 40 at paras. 2, 32 (S.C.C.).

[100] *Krieger v. Law Society (Alberta)*, [2002] S.C.J. No. 45, 2002 SCC 65 at paras. 31-32 (S.C.C.).

and ordering of society, as noted above.[101]

(b) ***Limits on Legislative Power***

The Supreme Court has indicated certain limits on legislative authority, by reference to the separation of powers.

(i) Legislatures cannot interfere with judicial independence

Any legislative action that interferes with the Court's ability to independently interpret, apply and state the law violates the separation of powers.[102]

Judicial independence includes individual independence (from the litigants in a case) and institutional independence — courts should be free and appear to be free from legislative and executive influence.[103] Institutional independence requires: (1) financial security; (2) security of tenure; (3) a degree of administrative autonomy; and (4) a secret deliberative process.[104]

Legislation that interferes with judicial independence would violate the separation of powers. In *Mackin v. New Brunswick (Minster of Justice)*, the Court held that failing to refer the decision to eliminate the office of supernumerary judge to an independent body violated judicial independence and the separation of powers.[105]

(ii) The legislature cannot abdicate its legislative role

While the legislature can delegate broad authority to the executive, it cannot

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[101] See, *inter alia*, *R. v. Imona-Russell*, [2013] S.C.J. No. 43, 2013 SCC 43 at para. 28 (S.C.C.); *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 133 (S.C.C.), *per* Rowe J., citing *Watkins v. Olafson*, [1989] S.C.J. No. 94, [1989] 2 S.C.R. 750 at 760-761 (S.C.C.); *Reference re Greenhouse Gas Pollution Pricing Act*, [2021] S.C.J. No. 11, 2021 SCC 11 at para. 21 (S.C.C.), *per* Côté J., dissenting in part, but not on this point; *Mikisew Cree First Nation v. Canada (Governor General in Council)*, [2018] S.C.J. No. 40, 2018 SCC 40 at paras. 160, 164 (S.C.C.), *per* Rowe J.

[102] *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] S.C.J. No. 75, [1997] 3 S.C.R. 3 at paras. 125, 138 (S.C.C.); *Mackin v. New Brunswick (Minister of Justice)*, [2002] S.C.J. No. 13, 2002 SCC 13 at para. 39 (S.C.C.); *Conference des judges de paix magistrate du Quebec (Attorney General)*, [2016] S.C.J. No. 39, 2016 SCC 39 at para. 31 (S.C.C.).

[103] *Reference re Application Under s. 83.28 of the Criminal Code*, [2004] S.C.J. No. 40, 2004 SCC 42 at paras. 172, 179 (S.C.C.), *per* LeBel J. dissenting, but not on this point.

[104] *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] S.C.J. No. 75, [1997] 3 S.C.R. 3 at para. 134 (S.C.C.); see also paras. 166, 239; *Commission scolaire de Laval v. Syndicat de L'eseignement de la region de Laval*, [2016] S.C.J. No. 8, 2016 SCC 8 at paras. 57, 64 (S.C.C.).

[105] *Mackin v. New Brunswick (Minster of Justice)*, [2002] S.C.J. No. 13, 2002 SCC 13 at para. 69 (S.C.C.).

abdicate its legislative role to the executive.[106] This point is, admittedly, ill-defined.[107]

3. Executive Branch

The executive branch administers and implements the legislature's policy decisions.[108] The "executive must execute and implement the policies which have been enacted by the legislature in statutory form. The role of the executive, in other words, is to effectuate legislative intent."[109] In "a system of responsible government, once legislatures have made political decisions and embodied those decisions in law, it is the constitutional duty of the executive to implement these choices".[110]

The executive implements and administers laws enacted by the legislature. It cannot itself enact laws. However, where such authority is delegated under legislation, the executive can make policy and apply that policy in particular instances.

When the executive ratifies an international treaty, that treaty does not automatically become binding law in Canada; the treaty can only be given effect through legislation enacted by the relevant legislature or through regulations adopted pursuant to authority delegated by legislation. As a corollary, the "separation of powers requires that courts give effect to a statute that demonstrates legislative intent not to comply with a treaty."[111] As the Supreme Court recently held: "Giving an unimplemented treaty binding effect in Canada would result in the executive creating domestic law — which, absent legislative delegation, it cannot do without infringing on legislative supremacy and thereby undermining the separation of powers."[112]

One notable outlier to this rule are "Henry VIII clauses", the validity of which

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[106] *Reference re Greenhouse Gas Pollution Pricing Act*, [2021] S.C.J. No. 11, 2021 SCC 11 at para. 85 (S.C.C.).

[107] See also *Reference re Greenhouse Gas Pollution Pricing Act*, [2021] S.C.J. No. 11, 2021 SCC 11 at paras. 247-258 (S.C.C.).

[108] *R. v. Imona-Russell*, [2013] S.C.J. No. 43, 2013 SCC 43 at para. 28 (S.C.C.); *Mikisew Cree First Nation v. Canada (Governor General in Council)*, [2018] S.C.J. No. 40, 2018 SCC 40 at para. 117 (S.C.C.), *per* Brown J.

[109] *Cooper v. Canada (Human Rights Commission)*, [1996] S.C.J. No. 115, [1996] 3 S.C.R. 854 at para. 23 (S.C.C.), *per* Lamer C.J.C.

[110] *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] S.C.J. No. 75, [1997] 3 S.C.R. 3 at para. 139 (S.C.C.).

[111] *Society of Composers, Authors and Music Publishers of Canada v. Entertainment Software Assn.*, [2022] S.C.J. No. 30, 2022 SCC 30 at para. 47 (S.C.C.).

[112] *Nevsun Resources Ltd. v. Araya*, [2020] S.C.J. No. 5, 2020 SCC 5 at paras. 148, 158-159 (S.C.C.), *per* Brown and Rowe JJ., dissenting in part; see also para. 297, *per* Moldaver and Côté JJ., dissenting in part.

were recently upheld in *Reference re Greenhouse Gas Pollution Pricing Act*.[113] In that Act, Cabinet was granted regulation-making authority that can be utilized to override other provisions in the statute.

VII. CONCLUSION

The separation of powers is foundational to the Westminster system of government as it operates in Canada. While there is no express statement of a separation of powers in the written constitution, the principle — like other underlying principles that are unwritten (*e.g.*, democracy, federalism and the rule of law) — operates to define how the institutions of the state relate to one another and, thus, "who gets to decide what".

Political theorists have identified two main purposes for the separation of powers. First is the protection of liberty by dividing the operation of the state into institutions that can serve as a check and balance on one another, thereby avoiding a potentially dangerous concentration of authority. Second is the efficient operation of the institutions of the state by dividing the authority of the state among the legislature, the executive and the courts in line with the capacity which by their design each of these institutions can best fulfil. The genius of the separation of powers is to contribute both to liberty and to efficiency in the operation of the institutions of the state. It is unfortunate that the Supreme Court "has yet to provide a comprehensive and persuasive account of the meaning, scope, and normative effect of [the separation of powers]".[114]

While the Supreme Court has not provided a general description of the separation of powers, nonetheless it has recognized it as a principle underlying the Canadian Constitution; indeed, though its jurisprudence on this principle is defined by fragmentary rather than definitive pronouncements, the Court has given effect to the separation of powers in a broadly consistent way.

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[113] *Reference re Greenhouse Gas Pollution Pricing Act*, [2021] S.C.J. No. 11, 2021 SCC 11 (S.C.C.).

[114] Warren J. Newman, "The Rule of Law, the Separation of Powers and Judicial Independence in Canada" in *Oxford Handbook of the Canadian Constitution*, Peter Oliver *et al.*, eds. (New York: Oxford University Press, 2017) 1031 at 1039.