Article: Christopher Edward Taucar, "The Court's Adoption of Unwritten Principles Such as "Charter Values" and Deference to Bureaucracies on Constitutional Pronouncements"

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There is growing unease among scholars, lawyers and even judges with the Supreme Court of Canada's (SCOC's) adoption of unwritten constitutional principles such as "charter values," and deference to bureaucracies on Constitutional pronouncements. The Canadian System of Government approach provides an authoritative repudiation of these practices. First, judges cannot, and never had the legal authority to use unwritten constitutional principles such as "charter values", as they said they can, to strike down or override or amend legislation or the Constitution, or treat it as law, for example as Constitutional law even if the Constitution does not apply. Second, the bureaucratization of the Charter has been impermissibly permitted and required by SCOC, in which executive government is to be given deference in its interpretation and application of the Charter or "charter values" if they "proportionately balance these with statutory objectives, including deference on whether their own decisions violate the Charter. These impermissible practices violate the basic rules of the Canadian System of Government, are illegal, and create a threat to real legal and Constitutional rights.

This article is based on a book on the British System of Government and a study of approximately 160,000 words, as well as another volume to be completed. The complete evidence and argument cannot be covered in this article. It only provides some highlights or points. The reader is invited to take a detailed look into the evidence and argument by reading *The British System of Government and Its Historical Development*, as well as the further studies on the Canadian System of Government.

I System of Government

In every country a system of government exists. It is a judicial system, authoritative, knowable, based on law, and State power holders may only act according to law, within the bounds of their jurisdiction, and never inconsistently with the basic rules of that system. These basic rules can only be changed by legal means as set out in the Constitution. Stated in another way, the system of government describes the totality of sovereign power legally exercisable in a country by state institutions or officers, and the extent of that respective authority.

The system of government provides the basis for objective jurisprudence. These basic rules of the system of government can be employed as a measure against the actions or decisions of legislature, the executive, and courts to determine their consistency or inconsistency with those basic rules.

The Canadian System of Government provides what is and is not a law in Canada. There is both a legal hierarchy in the status of that law as well as among State officials or institutions.

In terms of the hierarchy of laws, for example, the Constitution trumps the next highest laws – legislation, and beneath that delegated legislation, which trumps the common law, or other judicially created policies, techniques of interpretation or decisions.

In terms of hierarchy of status, in large part inherited from the British System of Government including a parliamentary supremacy model, all other state institutions and officials are legally inferior to Parliament (and Legislatures), such as courts, executive government, the Queen or Queen's representative, and so on. Parliament is supreme and unrestricted except insofar as specifically enacted to limit itself through the Constitution.

A clear Parliamentary Intention concerning its enactment must be obeyed by all inferior bodies and officials, including courts, tribunals, administrative bodies, and other bodies exercising a statutorily granted power of decision.[1] Courts and other inferior bodies may not contradict, interpret inconsistently with, or subvert a clear Parliamentary Intention. It is particularly egregious when judges purport to do so on a matter that Parliament took an explicit vote, and for example specifically rejected adding something as being in the Charter or legislation. This sort of illegal action involves the judge usurping power by purporting to act as Sovereign in Canada and amending the Constitution.

Courts are State institutions created by and which can only operate according to applicable law, with judges as their officers. They exercise a legally delegated jurisdiction, primarily by legislation, but also by the Constitution, and historically elements of it by prerogative. There is a narrow jurisdiction of inherent powers based on necessity to enable the institution to function, which is not relevant to the task of interpreting the Constitution. Accordingly, the courts may not act outside their legally prescribed delegated jurisdiction and authority in any way whatsoever, or purport to delegate their jurisdiction, for example to an administrative body.[2]

The nature and jurisdiction of Canadian courts remains, in essence, the same after Patriation and the Charter. The significant change in legal terms was a quantitative change in the expanded scope of judicial interpretation and its effect on Parliamentary legislation. The courts have no legal authority to either legislate or amend either the Constitution or constitutionally valid legislation. Their role legally is strictly interpretive.

In this way and within the Canadian System of Government, the Rule of Law operates, and its supremacy legally reigns over all State officials and institutions, and none may legally act in contradiction to it. Important formulations of the Rule or Supremacy of Law are that all State officials must act according to the law and only have such authority as the law gives to them under the Canadian System of Government, and no more.

II Unwritten Constitutional Principles

SCOC and its judges on speaking tours have stated that unwritten constitutional principles exist, and courts can use them to add to the terms of the Constitution and even to impinge upon duly enacted legislation by competent authority.[3] These assertions, as well as its newest strategy of employing "charter values" and even "shared values", are not consistent with the Canadian System of Government and its imperatives, including the power and authority of courts.

Courts in Britain dating from pre-Conquest times or in Canada have never had the legal authority to employ unwritten principles to override the Constitution or legislation, including to

compel Parliaments to do anything, nor would such an asserted power be legally possible under a parliamentary model of government.

The British System of Government was the system of government over Canadian territories in pre-Confederation times, and carried into Confederation except as specifically modified in actual Constitutional documents. The Constitution was framed against a backdrop of existing court powers.

The British system is characterized by parliamentary sovereignty, in which Parliament may legislate anything except that which is impossible, and aside from manner and form of legislating, one Parliament may not bind a future one.[4] The basic maxim in law is that it requires the same strength (or status) to dissolve as to create an obligation. Parliament can make or unmake any law whatsoever. It follows Whitelocke's view and others of the parliamentary party leading to the Revolution of 1688 which established parliamentary sovereignty in a manner omnicompentent that Parliament is the place where absolute despotic power resides as entrusted by the constitution. Thus, an Act of Parliament is the highest authority Britain acknowledges on earth. It has the power to bind every subject, even the king. It cannot be altered, amended, dispensed, suspended or repealed, but by the same form and authority of Parliament.

These limitations on Parliament are legal limitations, and not otherwise, be they moral rights, unwritten principles, or common law principles. In turn, courts have no legal authority to invalidate statutes thought to be contrary to fundamental legal or moral principles, constitutional "values", or the common law, let alone their own policy preferences. The court is limited to applying law. Outside the common law, courts may not even apply unwritten principles as if they have the force of law. At best, such principles can be used as an aid to interpretation of the common law or legislation. Second, courts are inferior to Parliament within the British System of Government and as such cannot overrule a legally superior institution.

Confederation

The Canadian System of Government is characterized by a model of parliamentary supremacy, with modifications as stated specifically in written Constitutional documents. Parliaments are sovereign and supreme within the spheres of legislative competence set by the written texts of the Constitution. Stated as a negative proposition, Parliaments are only limited by specific provisions as contained in Constitutional instruments that define or limit state power. To say that the model of parliamentary sovereignty in Canada entails legal limitations, which may very well in effect comprise noteworthy constraints, is not to be confused with the *nature* of that government system. These limitations are legal limitations only, and not of any other nature.

It is only recently in countries, such as Canada, Britain, Australia, and New Zealand, that there have been challenges to this legal position which coincides with increasing judicial 'activism', as well as the judicial imposition of postmodernist ideology. The rule in Canada has always been Dicey's description of parliamentary sovereignty, as modified by a written and entrenched Constitution; that is, legislatures are legally unconstrained within the sphere of legislative competence established by the written constitution.[5]

The courts are State institutions that are created by and can only operate according to applicable law, with judges as their officers. In the Canadian System of Government, the

essential nature of their jurisdiction was established prior to 1867, which was incorporated into the *Constitution Act, 1867*, including s. 129 providing for the continuance of existing laws, courts, officers, etc. This period and Constitutional document mark a *foundational* point in the jurisdiction of courts and judges.

III Unwritten Principles

Astounding assertions have been made by judges in their decisions and in their public speaking tours that they can use unwritten constitutional principles to defy or change legislation and the Constitution. SCOC asserted the Confederation Preamble and the *Constitution Act, 1982*, s. 52, the supremacy clause, as the basis for its authority to do so. The latest manifestation of these illegal judicial usurpations of Canadian sovereign powers involve judges applying "charter values" that do not correspond with actual Constitutional Charter provisions in the Charter, or in applying them in defiance of the Constitutionally limited application of the Charter under s. 32, or sometimes both. It is a revolution in legal dress.

The 1867 Preamble

The Preamble contains four paragraphs. The first expresses one desire, composed of four elements, to: (1) unite in one Dominion; (2) federally; (3) under the UK Crown; and (4) with a "Constitution similar in Principle to that of the United Kingdom." The 'similar in principle' clause reflects the fact that parliamentary supremacy is the first and foremost law of the British constitution, and the parliamentary model of government was above all created in Canada (only subject to some agreed upon limitations) as established in the Constitution. Some other aspects of the British constitution were specifically entrenched in the Canadian Constitution. Other aspects were not entrenched, and therefore left to constitutional convention, such as responsible government. The one exception, is the incorporation from the legacies of the British constitution the long established Divine or natural law, including the right to disobey laws or decisions contrary to it and the right of rebellion in case of tyranny.[6] This is not a legal right within the Canadian System of Government, but a moral one (based on higher law). It does not legally empower courts, for example, to invalidate legislation.

The 'similar in principle' clause was intended to secure for Canada the various nonjusticiable constitutional conventions necessary for a system of responsible parliamentary government. Resolution 3 of the Quebec Resolutions (1864) states that in framing the constitution, the conference desired to follow the British model so far as 'our' circumstances would permit. [7]

Preambles do not empower courts within a system of government characterized by parliamentary supremacy to do anything. It is well established in Canadian law that preambles have no enacting force.[8] A preamble is not a source of positive law, unlike the provisions that follow it. Legislatures intended such be the case. Otherwise, they would have put such provisions as are purportedly in the preamble into the Constitution as they had done with respect to its provisions. Preambles are only to be used in interpreting the actual provisions of the Constitution or legislation.[9] Preambles identify the purpose of a statute, and aid in construing ambiguous statutory language.[10] This aid to interpretation is, in effect, a fetter on judicial powers of

interpretation as the legislature or Parliamentary Framers had declared its intention and purpose to the extent outlined in the preamble. Judges are bound by that preamble and may not substitute their purpose for the one stated and intended in the preamble.[11]

The meaning of the Preamble (a constitution similar in principle to the UK) refers to British parliamentary sovereignty. Courts do not have the power to overrule legislation under such a system of government. Other principles of constitutionalism exist, such as constitutional convention, but these are not law, are not enforceable by courts, let alone empower courts to strike down legislation.[12] Therefore, saying that the court can overturn Parliamentary legislation on the basis of unwritten constitutional principles is to turn a constitution similar in principle to the UK on its head, and would be subverting the one or pre-eminent law of the British constitution—parliamentary sovereignty.

Some legal powers/privileges survive 1688 and the final legal establishment of parliamentary sovereignty in Britain, such as a residue of prerogative and parliamentary privilege. However, Parliament exercising its sovereignty can override these. None of these matters mean new common law powers/principles with constitutional status can be developed, especially by courts, except by parliament(s).

Thus, contrary to McLachlin J's view in *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly),*[13] unwritten constraints of fundamental principles or fundamental common law were not legally (re)imposed by the Preamble, and other fundamental law theories thereby (re)introduced into Canadian constitutional law. This view is, also, without merit in constitutional history.[14]

Lamer C.J.'s argument in *Remuneration Reference*, which was accepted by all judges but one, of the existence of an unwritten fundamental principle of judicial independence is based on the premise that judicial independence is at root an unwritten constitutional principle not found in particular sections of the *Constitution Acts*. The principle is said to be recognized and affirmed by the Preamble. He asserts the written text is not a comprehensive and definite set of Constitutional provisions largely on the basis of the wording of s. 52(2). Many unwritten rules of the Canadian Constitution are said to come from the Preamble.

While the court cites the legacies of the British constitution, it provides no details. The British Constitution does not aid the court in achieving its preferred outcomes, including the invention of Judicial Compensation Committees and extending all the Constitutional protections to all courts which these judges wanted. The court was, in fact, usurping, through judicial revolution, who will control the content of the principle of judicial independence, a contest between the Constitution and the judges.

The courts do not have the jurisdiction to amend or legislate the Constitution ('gap' fill). The legacies of the British constitution for Canada, including as entrenched in s. 129, mean the courts exercise a delegated jurisdiction, and a very narrow band of inherent jurisdiction, neither of which support a 'gap' filling jurisdiction. First, in exercising a delegated jurisdiction, it must consider and interpret the actual provisions of the Constitution. Preambles do not confer jurisdiction to 'gap' fill or otherwise.

The proposition that principles are the source of the substantive provisions of the Constitution clearly cannot be the case in either the Canadian or British Systems of Government.

It is the State sovereign exercising its powers of sovereignty through the System of Government that creates positive law which is the source of authority for substantive provisions of law. Principles in and of themselves be they based in perfect reason/natural law, conventions or otherwise do not have the status of law within the British or Canadian legal systems, even though natural law is higher law.

Second, the basic principles of the Preamble are not the source of the substantive provisions of the Constitution. Legally, the source of the substantive provisions is the substantive provisions themselves as made by those with legal authority to do so within the system of government. This description is the only one consistent with the existence of a State sovereign and a model of government based on parliamentary supremacy, in which the powers of legislature can only be limited by express provisions of law it created and only to the extent it intended. To say otherwise is an impossibility. This conclusion is legally incontrovertible. Furthermore, there are principles in the preamble that are not part of the written constitution, and were not intended to be, such as the constitutional conventions of responsible government, and these lack the status of law.

Also, the Preamble refers to basic principles that cannot be enforced by judges. There is no larger "gap" in the Canadian Constitution than the lack of explicit Constitutional recognition and provisions putting into effect the constitutional convention of responsible government. Judges cannot enforce constitutional convention, and have recognized this fact.[15]

Section 52

Section 52(1) of the *Constitution Act, 1982* is the supremacy clause. Under sub-section (2), the Constitution includes the *Canada Act, 1982*; Acts and orders referred to in the schedule, which includes 30 legal documents including the *British North America Act, 1867*, past amendments, such as those establishing the provinces; and, finally, it encompasses any future amendments. Sub-section (3) states that amendments to the Constitution shall be made only in accordance with the authority contained in the Constitution.

Based on the Constitution's words, only the written documents (Acts and orders) referred to in s. 52(2) constitute the Constitution of Canada, with perhaps the exception of parliamentary privilege. Parts VI and VII of the *Constitution Act, 1982* only refer to such documents.

Fundamental unwritten principles were not incorporated into the Constitution which would have given them legal effect. Furthermore, the *Constitution Act, 1867* dealt comprehensively with which common law rules incorporated into the Constitution, and the manner in which they could be changed, or the limitations on such changes. All other matters, common law or otherwise, are of lower legal force than parliamentary legislation and can be changed by it through ordinary legislation, or are not law at all.

This conclusion is further supported by s. 52(3), and Part V of the *Constitution Act, 1982*, dealing with Constitutional amendment procedures, which can only be accomplished by legislatures, and not the courts. All matters referred to in Part V deal with: Constitutional provisions themselves, legislation to the extent entrenched as in part of the *Supreme Court Act*, or rules based on common law and/or inherent jurisdiction that were incorporated explicitly into

the Constitution in some fashion, other than those such as s. 18 dealing with parliamentary privilege which are changeable by ordinary legislation.

There exists a clear distinction between the written Constitution, which has the status of Constitutional law, and other norms, such as unwritten norms, some of which are sometimes termed constitutional but lack legal status. This conclusion is also reflected in the jurisdiction of courts being limited to applying law and not other norms or matters, such as conventions.

Constitutional convention is not law, but political practice. It is not enforceable by courts, and is modified ('amended') not by legislation or Constitutional amendment, but political action. This legal position is so, even though conventions may be recognized in the Preamble.

One of the most fundamental organizing unstated assumptions of our system of governance is the constitutional convention of responsible government, which is a major component of our democracy. Democracy may be an "organizing principle" of the constitution, but responsible government is not law within Canada, nor can it be enforced by courts.

It is also telling that the Amendment sections do not require an amendment to 'unwritten principles' of the Constitution or to the Preamble, which may reflect certain principles. The Charter modified significantly a 'Constitution similar to the U.K." in terms of the scope in which parliamentary supremacy operates. Yet, no amendment to the Preamble was required. If preambles have independent constitutional effect in law and one part of the Constitution cannot override another part,[16] then a Constitutional amendment to the Preamble would be necessary. However, in Canadian Constitutional law, no such amendment is necessary. Also, it is unclear how an amendment to the constitution's 'unwritten principles' can even occur. There is nothing written to refer to, unless it means judicial decision.

There is no evidence that the Framers of the *Constitution Act, 1982* intended that the Constitution meant anything but written laws, which is further reinforced by the fact that there is no evidence they believed the convention of responsible government was to be entrenched. If the Framers wanted to constitutionalize one or more broad principles, outside of the Constitution and directed judges to apply (or legislate) on that basis, they would have done so. They did not. Furthermore, it is inconceivable that the Framers would have allowed judges to have such great power. There was a distrust of judicial power even with a Charter. One result was the entrenchment of the s. 33 notwithstanding clause.

Nor can it be said that s. 33, a constitutional power, can override fundamental rights and freedoms entrenched in the Constitution, but not unwritten principles reflecting those rights as philosophized by judges.

Finally, the Parliamentary supremacy model, as reflected in the Preamble and our System of Government, means Parliament is only bound or limited by what it legislates in the Constitution, which *ipso facto* means it cannot be limited by unwritten constitutional principles.

Structural Argumentation

Section 52 also excludes the possibility of 'implying' constitutional principles with independent legal force, or using such principles to extend or modify constitutional provisions or strike down legislation. It is limited to Constitutional provisions, which excludes unwritten

provisions. It cannot refer to matters "necessarily implied," at least as described by structural argumentation.[17] There can be nothing that need be necessarily implied in a constitutional provision, as that provision includes the full scope of the right, and must include anything that must be theoretically necessary for the right to exist. That is, a right cannot be given, and entirely taken away at the same time. Such a position would be impossible.

There are numerous other problems with structural argumentation. For example, structural argumentation might create or find principles contradictory to those stated in the preamble or in legislative/Constitutional provisions. However, this result would be legally impossible. The constitutional convention of Responsible government is necessarily implied in the Constitution, but cannot be enforced by courts.

Structural argumentation itself, if its conclusions are in fact necessarily and accurately implied, would undermine most structural arguments. For example, the legal basis of legislature is the model of parliamentary supremacy as limited only by actual Constitutional provisions.

There is nothing in an 'organizing principle' in Canadian law that has the status of a law.

Structural argumentation cannot override the sovereign basis of the State and government, which in Canada is a model of parliamentary supremacy.

Structural argument cannot be used to make or extend rights because they are not already in the Constitution.

III Charter "Values" Incantations and the Bureaucratization of the Charter

The latest judicial strategy of using 'unwritten constitutional principles' is to invoke "Charter values," and even of "shared values," which are not the Charter provisions themselves as if they have status or significance in Constitutional law. Also, SCOC has permitted and even required the bureaucratization of the Charter, in which executive government is to be given deference on their interpretation and application of the Charter or "charter values" and even "shared values", including deference on whether their own decisions violate the Charter. These violate the basic rules of the Canadian System of Government, which also a violation of the Rule of Law.

These two strategies are often combined and hold immense perils in terms of judicial usurpation of Canadian sovereign powers by purportedly amending the Constitution constitutionalizing their own personal policy preferences or ideology, and also for the undermining of fundamental rights and freedoms as specifically contained in the Constitution, which becomes modified and replaced with a judge's 'charter'. It is particularly dangerous when this new judicial 'charter' is the spawn of postmodernist/cultural marxist ideology.

Charter "Values"

Section 32 of the Charter reflects clear Parliamentary Intention, reinforced by the Parliamentary Record, that the Charter only applies to Parliament and the government of Canada and the Legislatures. Accordingly, s. 32 discredits the purported judicial and bureaucratic

application of 'charter values' to private individuals and disputes, outside of judicial interpretation of the common law.

The use of so-called 'charter values' is wrong, and indeed illegal, as being contrary to the basic rules of the Canadian System of Government when Charter "values" do not correspond strictly to the Charter provision. Such non-legal 'values' are impermissibly used as law, as a standalone basis for Charter adjudication, or are used to limit or negate legal rights, especially Constitutional rights. It puts a judge's private conceptions or policy preferences, which are not law in Canada, above real laws, be they legislation, or the highest laws in Canada – the Constitution.

Charter rights are contained in the Charter, not elsewhere. Section 52 does not refer to Charter "values" or "shared values". Charter provisions themselves do not refer to "charter values". A Charter right or freedom protects the content of that right or freedom as set out in the Constitution, as intended by the Canadian State sovereign, not "Charter values", "shared values" or "perceptions" as philosophized or invented by some bureaucrat or judge.

Indeed, some constitutionally minded justices, such as Lauwers, Miller, Côté and Brown, have finally begun to publicly recognize that "charter values" are really only subjective inventions and rhetorical moves of judges seeking to justify their ideology as decisive or worthy of a preference in legal analysis, leading to unpredictability, lack of clarity, and lack of consistency.[18]

This sort of illegal judicial and bureaucratic usurpation is widespread. So much so, that the majority of SCOC boldly asserts: "Constitutional and *Charter* values have been recognized as an important tool in judicial decision making … Far from controversial, these values are accepted principles of constitutional interpretation," and even further that bureaucrats may consider "shared values, such as equality"[19] For SCOC, "values" protected by the Charter are equivalent to legal rights, and made shocking reference to "shared values—equality, human rights and democracy" as "values the state always has a legitimate interest in promoting and protecting" and thus to infringe upon real Charter rights.[20] These are not law but are now used to limit Charter rights when actual Canadian law and Constitution does not, and Canadian law is opposite to the effect these postmodernist judges and bureaucrats want to give to "charter values," "shared values", and "public perceptions".

An example of this sort of illegality is the case of Trinity Western University's attempt to create a law school. It is absolutely clear that TWU's Community Covenant does not violate any laws concerning equality or discrimination, be it under the Charter or human rights codes, or violate any laws whatsoever. First, the Charter does not even apply to TWU pursuant to s. 32. Therefore, no Charter rights were violated. Furthermore, there is no TWU violation in light of denominational school rights under the *Constitution Act, 1867*, s. 93, and the Charter s. 29 in which the Charter does not affect denominational school rights. If nothing in the Charter can affect these rights, then so much more so "Charter values" or "shared values". This is further fortified by the Constitutional rights to such a school by virtue of s. 2(a) freedom of religion and s. 2(d) freedom of association. Finally, the Charter's Preamble states that "Canada is founded upon the principles that recognize the supremacy of God and the rule of law." It would indeed be incongruous to adopt interpretations that would deny basic rights for Christian educational institutions.

Provincial Legislatures put their minds to the issue and expressed through legislation an understanding, balance, and Intention that is part of the fundamental bargain inherent in human rights codes, including that denominational schools with codes of conduct or hiring codes do not violate human rights codes. Therefore, there is no human rights violation by TWU. See, Ontario *Human Rights Code*,[21] s. 18, 19(1), 24(1)(a). Concerning the BC *Human Rights Code*,[22] see *Trinity Western University v. British Columbia College of Teachers* (2001).[23] The British Columbia's human rights legislation accommodates religious freedoms by allowing religious institutions to favour in their admissions policies on the basis of religion. Furthermore, the legislature gave recognition to TWU as an institution affiliated to a particular Church whose views were well known to it. The BC Code, for example, ss. 8 and 13, permit such distinctions based on bona fide and reasonable justification, or bona fide occupational requirement.

Furthermore, Canadian Parliament legislated that holding and expressing views of marriage are not inconsistent with the public interest, are worthy of freedom or accommodation to express and not to result in any burden or withholding of benefit.[24]

Yet, certain Law Societies and the SCOC majority now repudiate the law and replace it with their own values as if law and capable of eliminating these legal and Constitutional rights. Only the legal rights of TWU and its prospective law students have been violated, and in a very serious way, including religion, association, denominational education, expression, and equality (the right not to be discriminated against on the basis of religion).

Furthermore, as noted, these Law Societies and courts, unsympathetic to TWU's Christian values, purported to replace the conceptions and application of discrimination and equality as established in Canadian law with their own private conceptions and preferences which are not law, but rather directly contradicted Canadian law, including the Constitution and statute, and applied them as if they had status of law (under cover of Charter "values" or "public interest" and even "shared values"), which is contrary to the Canadian System of Government, the Rule of Law, and outside their jurisdiction to make or enact, and therefore also illegal, and in rebellion to the Constitution,[25] if not displaying outright anti-Christian chauvinism or 'phobia'.

Further violations of the Rule of Law are evident. For example, the applicable provision invoked to support the failure to accredit is the BC *Legal Profession Act* s. 3(a): "It is the object and duty of the society to uphold and protect the public interest in the administration of justice by preserving and protecting the rights and freedoms of all persons." This can only mean legal rights and freedoms established under Canadian law, including the Constitution. None were ever violated. The Ontario *Law Society Act*, s. 4.2 3 states that in carrying out its functions under the Act, for example accreditation, the Society shall have regard to the principle of the duty to protect the public interest. The Ontario judges said it was 'discriminatory', as did SCOC judge McLachlin, and the majority led by Abella J. suggesting or stating that other rights and freedoms were implicated and violated (which the Law Society was to consider under its governing statute and "public interest" mandate allowing it to infringe Charter rights). The Ontario Court held that it was appropriate for the Law Society to consider its statutory objective, "informed by the values found in the *Charter* and [Human Rights Code], when deciding whether to accredit TWU." The Ontario Court of Appeal acted illegally and contrary to the Rule of law in concluding that this case involves a collision between two rights or freedoms, namely, a "clash between religious freedom and equality" as distinct from a mere clash with important government objectives.[26] In essence, they stated the bureaucratic definition of discrimination or equality made under its

statutory mandate to make decisions consistent with the "public interest" (and without authority to make laws and regulations creating new categories or definitions than as established in Canadian law), created new Constitutional rights and duties now applicable to TWU. Or, the court was saying it could act in this illegal fashion, under the guise of "Charter values" or otherwise, which do not exist in Canadian law. They illegally purported to amended Canadian statute, and even worse the Canadian Constitution.

It was plainly absurd and illegal for MacPherson, Cronk and Pardu, at para. 115, to assert that the Community Covenant discriminates against the LGBTQ on the basis of sexual orientation contrary to s. 15 of the Charter and s. 6 of the *Human Rights Code*. They also did so without having regard to the wording of s. 15, including the opposing s. 15 rights not to be discriminated against on the basis of religion, or the other violations in addition to freedom of religion, such as freedom of association.

Even more surprising, the SCOC majority asserted discrimination and violation of equality or inequity, but failed to point to any Constitutional or legislative authority whatsoever to support such a claim! Another example of the majority's illegality is that it failed its Charter duty to examine all Charter violations against TWU.

With this hocus-pocus of coven gender ideology judgery, core fundamental Constitutional rights were made to disappear.

Bureaucratization of the Charter - Doré

More recent postmodernist courts have held that not only can state officials and bureaucracies interpret and apply the Charter, but they will give those bureaucrats deference in their decisions. This approach is often linked with the illegal "charter values" invention which the courts say bureaucracies are to apply, and has been extended to "shared values" and concerns about possible and unproven "public perception" about the State institution or official. These have made rights fragile, and easy to cover violation of even core rights by bureaucracies.

The Charter's clear and plain wording is that courts are granted the power to declare and remedy Charter violations. There is no other grant of authority for any other State official or institution to do so, such as administrative tribunals. Section 52 makes no mention of tribunals or bureaucracies. Section 24(1) refers to "courts of competent jurisdiction".

Doré v Barreau du Québec (2012)[27] is the latest court attempt at grappling with the application of the Charter to administrative decisions. The British Columbia Court of Appeal in *TWU* indicated its unease with *Doré*.[28]

Doré contradicts and leads to results that contradict the basic rules of the Canadian System of Government, including the Constitution. On that basis alone, it cannot survive. It is, also, an unmanageable airy-fairy radical approach, and represents a further judicial retreat from enforcing the Rule of Law as against government administration. The danger of elevating private policy preferences, especially through the use of "charter values," or "shared values" to the status of Canadian law or even Constitutional law is a real danger of *Doré* analysis that has occurred all too often.

Some of the problems with *Doré* will be discussed.

The previous leading court jurisprudence, *Dunsmuir* and prior cases, correctly held that administrative bodies must necessarily be correct on constitutional matters (leaving aside the fact that those bodies were not granted authority to make such decisions). This is particularly so in view of the unique role of courts as interpreters of the Constitution, and on other matters such as general questions of law central to the legal system,[29] as well as s. 24.

Doré impermissibly requires deference to bureaucrats making Constitutional decisions, contrary to the very words of the *Constitution Act, 1982*, ss. 24(1), 52, and the Parliamentary Intention. The decision requires judicial deference to bureaucracies which engage in a "proportionate balance" of Charter "values" and statutory objectives (or even so low a standard as merely considering these points) when Charter rights or "values" are at stake. The inquiry is not whether the decision involving Charter interpretation and application was correct. Section 52's supremacy clause and s. 24(1) and its reference to "court of competent jurisdiction" means that Canadians have the right to go to Court to vindicate their Charter rights, not to a bureaucracy, and even less to deference to bureaucracies on their pronouncements on the Charter, its "balancing", or application of s. 1. Anything short of a court's pronouncement on Charter violation, including s. 1 denies the Constitutional rights of Canadians. There is an impermissible shirking of the judges' legal duty to determine Charter violation and s. 1 justification. The courts have no jurisdiction (as it apparently suggested it had in *Doré*) to delegate or give such rights to bureaucracy over our Charter. That is illegal.

Second, opinions of the lowest level State officials cannot trump the decisions of higher bodies, in this case the Court, concerning the constitution, with or without a privative clause. The court is to enforce the Charter, and if an administrative decision violates it or is incorrect in its decision concerning Charter interpretation or application, a remedy is to be given. Bureaucrats are not granted jurisdiction by law to decide or decide with deference Constitutional questions, or get deference if their unconstitutional decision may be called "reasonable" balancing.

The formulation of *Doré* may result in decisions which are unconstitutional as determined by the highest "court of competent jurisdiction" specifically tasked with that decision, and violations not specifically justified by s. 1.

Third, *Doré* logically results in the bureaucratic "balkanization of rights" in Canada, and works to deny the universality of Charter rights within Canada. *Doré's* results are not legally permissible in view of Parliamentary Intention and the *Constitution Act, 1982*, ss. 24(1) and 52, including in view of Charter mobility rights.[30] Parliament's clear Intention was the universality and its protection throughout Canada, and that was a prime reason for having a Charter. Charter rights do not depend upon province or region within a province, or depend upon the bureaucracy before which one appears. They do not apply maybe here and maybe there, subject to the inconsistent results depending on varying "reasonable" interpretations or "balancing" as different bureaucracies decide and as a sympathetic court might deferentially find, rather than determining whether the Charter was infringed and the decision unconstitutional. The majority in *TWU* admit, at para. 79, citing *Loyola*, that *Doré* recognizes there may be more than one outcome that strikes a proportionate balance between Charter and statutory objectives, so long as the decision "falls within a range of possible acceptable outcomes", it will be "reasonable". They say at para. 81, that is the test.

Furthermore, the Framers explicitly thought that a Charter was necessary in view of the threats from the ever increasing rule of government bureaucracy in Canada. The bureaucratic ghettoization of our Constitutional rights is inconsistent with that Intention for the same rights applying throughout Canada, it cheapens our rights, make them vulnerable to executive government decisions, and leads to the very arbitrary government that one of the main aims against which the Charter was to protect.

Fourth, *Doré* shirks the judicial duty to examine the evidence and Constitution and to apply that rigorous analysis to a government decision. *Doré*, in effect, covers up Charter violation by not talking about the Charter but rather focusing on deference. It also sets out a framework which covers a judge's ideology, for example, by a judge simply asserting the balance was 'reasonable', without the court's own independent analysis of the Constitution and its application to the circumstances.

Fifth, *Doré* indicated that, the administrative decision-maker is required to balance or weigh the potential Charter infringement against the objectives of the administrative regime, and if it does so it is entitled to court deference. *Loyola High School v Quebec* (2015) held that a discretionary administrative decision affecting a Charter right (freedom of religion) must take account of the Charter right and ensure the right was limited no more than necessary to achieve the statutory purposes the decision-maker was obliged to pursue.[31] Even this later formulation does not ensure that the infringement is not contrary to the Charter. Similarly, *Doré*, at para. 56, asking how the Charter "value" will best be protected in view of the statutory objectives is putting the cart before the horse and devalues the right. There is no requirement of serious analysis of the statutory purpose and its weightiness and sufficiency to justify the infringement of the right, and particularly in light of the seriousness of the rights infringement.

The TWU majority judges' assertion that the *Doré/Loyola* framework 'flexes the same justificatory muscles' as a rigorous s. 1 or *Oakes* test, or Charter rights are no less protected under this administrative law framework is poppycock covering their ideology, and "does not make it so" in the words of dissenting justices Côté and Brown, para. 304. Indeed, the majority is betrayed by their overarching formulation, as well as application. The majority admits, at para. 79, it applies "a robust proportionality analysis consistent with administrative law principles" instead of "a literal s. 1 approach." If the substance is the same, then why not apply the literal s. 1 approach? The reason is that it is not the same. SCOC refuses to apply the words of the Constitution to bureaucrats, and illegally substitutes its own "framework".

The majority admits on numerous occasions that "The *Doré/Loyola* framework is concerned with ensuring that *Charter* protections are upheld to the fullest extent possible given the statutory objectives within a particular administrative context."[32]

In the test, they say the impact on the Charter protection must be proportionate in light of the statutory objectives, and the decision reflects a proportionate balancing. Then, they reiterate that the overall framework of proportionality balance is to give effect "as fully as possible" to the Charter protections at stake "given the particular statutory mandate"; and, the Charter protection must be "affected as little as reasonably possible in light of the applicable statutory objectives." Of course, they say it is "highly contextual" inquiry, allowing them to play the "context" hoe down and come to any ideological "socially constructed reality" and decision they want. Importantly, the court role is limited to being "satisfied" the decision reflects a "proportionate

balance" between the Charter protections and the relevant statutory mandate,[33] and not for the courts to discharge their s. 24 Constitutional duty.

The court essentially talks out of both sides of its mouths saying rights are fully protected, and the consideration is whether other reasonable possibilities give effect to Charter protections more fully "in light of the state objectives", which does not mean choosing the option that limits the Charter least or weighing the statutory objective. The test is whether the decision falls within a range of reasonable outcomes.[34]

Such a standard, does not even meet the s. 1 criteria of reasonable justification in a "free and democratic society". For example, achieving a totalitarian objective, such as societal acceptance of gender ideology, or indoctrinating of children into accepting gender ideology which genderists consider highly important, rather than tolerance or anti-bullying, requires a serious and extensive subjugation of rights to achieve that objective. The same is true for marxism, radical feminism, or whatever illiberal ideology, particularly totalitarian state planning of the economy, to achieve socialist or feminist "substantive equality" or collectivized state discrimination. The reason is that there is no minimally impairing of rights to achieve the totalitarian State goal of acceptance of the ideology.

Similarly, in the TWU case, there can be no minimally impairing of rights than the total denial of the existence of a law school with a code of conduct based on denominational and religious rights that does not recognize or affirm gender ideology. There is the objective of prevention of hurt feelings of homosexual persons, which is deemed to be "significant harm" on the basis of "identity harm" (a great cultural marxist ideological harm, but not a harm known to Canada and its law), which is presumed and does not require proof or medical evidence; or, that they "may suffer harm to dignity and self-worth, confidence and self-esteem, and may experience stigmatization and isolation"[35] at the very existence of such a law school.

The majority's chauvinistic view and inflammatory rhetoric constitutes State de-legitimization of an identifiable group in society and also fuels discrimination against them. The decision imposes postmodernist collectivized state discrimination, which only favours its ideological interests; only some feelings and inherent dignity count.

The British Columbia Court of Appeal also stated the concern of the real possibility of a tribunal's preoccupation with its own statutory regime will lead it to value the statutory objectives of that regime too highly against Charter values.[36]

The court's deferential position in respect of the duty to give reasons has gone too far in *Newfoundland Nurses* and accepted in *LSBC v. TWU,* para. 56. The courts have in effect held that to fulfil a decision-maker's duty to give reasons, the reasons need not even be set out in the decision as long as courts (who do not want to delve into a real examination of the rationality and evidence in the decision itself) can "find" reasons in the record (e.g. the materials filed with the court or administrative body), thereby imputing to the bureaucrat what was not said or intended in order to uphold the decision. It has led to courts attributing to bureaucrats extensive reasons which are wholly pure invention and fiction. The Law Societies in TWU gave no reasons. Even worse, it led the postmodernist court to proffer 'reasons' which it knew or ought to have known were not true.[37] Secondly, the LSBC admitted that it did not do "proportionate balancing." When a decision maker gives actual reasons for the decision—in this case, to simply act according to

the results of the referendum—the court's jurisdiction does not give it authority to misrepresent what the decision maker actually stated was true, and thus to state what is not true.

Constitutional Defects of Doré and the Section 1

The Constitution requires that any violation of the Charter be justified under s. 1. Section 1 states that the only allowable limits on Charter rights must meet the legal criteria of "reasonable limits prescribed by law demonstrably justified in a free and democratic society." Any judicially invented standard or interpretation that does not strictly adhere to all elements of the s. 1 justification is unconstitutional and of no force and effect under the Canadian System of Government. *Doré's* deference to bureaucratic "proportional balancing" of Charter "values" (and "shared values" or assumed "public perceptions") and government objectives and their application to its decision fall short of the s. 1 standard. A couple examples are provided.

Demonstrably Justified

One seeking to uphold the rights violation has the burden of proving all the elements of the section 1 criteria on a balance of probabilities, including submitting the evidence to meet that standard.

The standard of deference to administrative tribunals "balancing" does not meet this standard of demonstrable justification. Nor does deference to bureaucratic findings of social or legislative facts (as opposed to litigation facts of what occurred between the parties) meet that standard, unless specifically the actual evidence relied upon by government in making its decision, if any, is assessed on a balance of probabilities standard by the court and not *Doré's* deference, and discharging its Charter, s. 24 duty to determine violation. Nevertheless, in *TWU,* the Law Societies' mere assertions (imputed to them by SCOC) about "concerns" over public perceptions toward the Law Society, or "harms" to homosexuals (later turned into "risk" of harm, and then the mere ideological assumption of harm or "identity harm") were accepted without evidence and used to infringe core Charter rights. These are not acceptable or "demonstrably justified."

Prescribed by Law

Prescribed by law means that there is legal authority for the government action or legislation in the first place or underpinning the State objective when it infringed Charter rights. That legal authority can be statutory or common law.

In the TWU case, not even the "prescribed by law" standard is met. No violation of the Rule of Law can be "prescribed by law". The application of the "public interest" in the Law Society statutes cannot meet the "prescribed by law" criteria because the decision or action is not in accordance with law. TWU has not violated any legal rights under Canadian law whatsoever. Any assertion that it has "discriminated" or violated "equality" based on any other standard than Canadian law itself is contrary to the Rule of Law and Canadian System of Government, and fails to meet the "prescribed by law" criteria. Indeed, the Law Societies and courts imposed their

own private conceptions in terms of definition and application as if they were law, and which were contrary to Canadian law. The Law Societies have absolutely no statutory authority permitting them to pass subordinate legislation altering the legal definitions of rights or freedoms, nor has it purported to do so in the TWU case. As noted earlier, there can be no applicability of "charter values", but only Charter rights and legal rights.

Reasonable Justification in a "Free and Democratic Society"

In no civilized free and democratic society are denominational schools of established religions, especially Christian based ones, denied existence and accreditation based solely on adherence to their religious precepts, particularly because they do not conform to or actively propound a State or a government institution ideology, be it gender ideology or otherwise. Such religious rights have been and are denied in fascist, socialist and radical theocratic Islamic regimes which seek to suppress all others. However, such does not occur in "free and democratic" societies.

Conclusion

Judges cannot, and never had the legal authority to use unwritten constitutional principles, as they said they can, to strike down or override or amend legislation or the Constitution, or treat it as law. Second, the bureaucratization of the Charter has been impermissibly permitted and required by SCOC, in which executive government is to be given deference on their interpretation and application of the Charter or "charter values" if they "proportionately balance" these with statutory objectives, including deference on whether their own decisions violate the Charter. These impermissible practices violating the basic rules of the Canadian System of Government are not only illegal, but create a threat to real legal and Constitutional rights.

Another result of this illegal judicial behaviour purporting to amend the Constitution is that it has led to the further illegality of judges, such as in essence imposing taxation and disbursements upon Canadians in order to achieve their self-interested or postmodernist policies. The illegal imposition of judicial taxes has cost Canadians at least hundreds of Millions of dollars. For example, despite judges being the highest paid profession at the time, they were unsatisfied and massively increased their salaries even in the middle of a global recession by 60-80%, through their illegal constitutionalization of judicial compensation committees. In essence, these salary increases are an illegal tax imposed by judges on Canadian taxpayers, which judges required of Parliament and Legislatures against their will to collect and pay to them—the 'judicial privilege and emoluments tax'. These illegally imposed taxes or disbursements constitute a theft of labour of Canadians, upon which their taxes are paid, and violate natural law, including the fundamental natural law principle of 'no taxation without representation'.

How frightful it is to see how postmodernist judges and bureaucrats have illegally made core fundamental rights and freedoms disappear forwarding their ideology in place of Canadian law, and contrary to the Canadian System of Government, particularly through the dual strategies of "Charter values" and the *Doré/Loyola* bureaucratization of the Charter.

In so doing, these judges have purported to usurp Canadian sovereign powers, including engaging in extensive purported amendments to the Canadian Constitution while imposing their ideology. In light of the evidence, it is evident that these judges have acted in a lawless manner and will not obey the law, or the limits to their delegated powers and legal constraints put on them. The Rule of Law has been badly damaged, and the secure basis of our legal rights and freedoms and our ancient liberties have been greatly undermined. The stage is set for further undermining of our rights and liberties in service of postmodernist or "progressive" ideology and its totalitarian tendencies (such as required acceptance of these ideologies or State penalties, burdens, or withholding of state benefits will be imposed) unless Canadians put an end to it.

Endnotes

1. Christopher Edward Taucar, *The British System of Government and Its Historical Development* (Montreal and Kingston: McGill-Queen's University Press, 2014).

[2] Ibid.

3. See, for example, *Reference re Remuneration of Judges*, [1997] 3 S.C.R. 3. (*Remuneration Reference),* and a number of subsequent judicial independence cases, as well as the *Quebec Secession Reference*, [1998] 2 S.C.R. 217; McLachlin, CJ "Unwritten Constitutional Principles: What is Going On?" (Lord Cooke Lecture, Wellington, New Zealand, 2005); and concerning present Chief Justice Wagner, Tonda MacCharles, "Top judge touts court's leadership role" *Toronto Star* 24 June 2018, https://pressreader.com/canada/toronto-star/20180624/281479277143979; Tonda MacCharles, "Canada's top judge says Supreme Court should provide leadership at a time when fundamental values are being undermined in the world" *Toronto Star* 22 June 2018.

4.See also William Blackstone, *Commentaries on the Law of England: In Four Books* (New York: E. Duychnick, 1822), I:185-6, 160.

5.*Auditor General Canada v Minister of Energy, Mines and Resources et. al.* [1989] 2 SCR 49, Dickson CJ at 405 (there operates in Canada 'a doctrine of parliamentary supremacy within the limits of legislative power' as defined by the written constitution); Peter Hogg, *Constitutional Law of Canada*, 2009 Student Edition (Toronto: Thomson Reuters Canada Ltd., 2009), ch. 12.o

[6] Taucar, *British System of Government*.

7. Quebec Resolution 3 and 4, incorporated into the London Resolutions of 1866. G. P. Browne, *Documents on the Confederation of British North America* (Toronto: McClelland and Stewart Limited, 1969), 154, 163.

8.See, for example, *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, at 805; *Reference re Powers of Reservation and Disallowance*, [1938] S.C.R. 71.

9.*Ref re Powers of Reservation and Disallowance*. *In re The Criminal Code, 1892, Sections 275-276, relating to Bigamy* (1897), 27 SCR 462, per Strong C.J. at 473.

10.See, for example, *Remuneration Reference*, at para. 95.

11.The same limitation applies to administrative law and delegated legislation. See, Christopher Edward Taucar, "Standards of judicial review of administrative bodies: The consideration of citizen participation" (March 2010) Vol. 53, No. 1 *Canadian Public Administration* 67, 71.

12.*Reference re Amendment of the Constitution of Canada* (1982), 125 D.L.R. (3d) 1 (S.C.C.).

13.[1993] 1 S.C.R. 319.

14. See Quebec Resolutions (1864), London Resolutions (1866), together forming the basis of Confederation; *Colonial Laws Validity Act* and its history; Browne, *Documents on the Confederation*, for Quebec Resolutions, 154-65; and London Resolutions, 217-18.

15.See, *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, 805; *Reference re Powers of Reservation and Disallowance*, [1938] S.C.R. 71.

16.*Re Bill 30, An Act to amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148; *Adler v. Ontario*, [1996] 3 S.C.R. 609; *New Brunswick Broadcasting*, supra.

17.See, for example, as espoused by Robin Elliot, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001), 80 *Can. Bar. Rev.* 67, 86.

18.See, for example *E.T. v Hamilton-Wentworth District School Board*, 2017 ONCA 893, per Justices Lauwers and Miller, esp. paras. 103-4; *Gehl v Canada (Attorney General)*, 2017 ONCA 319, para. 79. See also *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 (*LSBC v TWU).*

[19] *LSBC v TWU*, paras. 41, 44, 46, 47.
[20] *LSBC v TWU*, paras. 58, 41, also citing Abella's reference in *Loyola*, para. 47.

21. R.S.O. 1990, c. H. 19.

22.R.S.B.C. 1996, c. 210.

23.2001 SCC 31, at para. 28.

[24] *Civil Marriages Act*, S.C. 2005, c. 33, preamble, ss. 3, 3.1.
25.*LSBC v TWU; Trinity Western University v LSUC*, 2018 SCC 33*; Trinity Western University v The Law Society of Upper Canada*, 2016 ONCA 518, paras. 68, 69, 130-141 (*TWU v LSUC ONCA);* and *Trinity Western University v. The Law Society of Upper Canada*, 2015 ONSC 4250 (Div. Ct.).

26.*TWU v LSUC ONCA*, paras. 4, 3, 115.

27.2012 SCC 12.

28.*Trinity Western University v. The Law Society of British Columbia*, 2016 BCCA 423.

29.*Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 198, paras. 58, 60.

30.Except as explicitly specified in provisions such as s. 23, and in perhaps in exceptional circumstances regional concerns can be taken into account in s. 1 analysis, such as the consideration of the French Fact in North America, although this consideration was not enough to save French language of outdoor advertising legislation - *Ford v Quebec*, [1988] 2 S.C.R. 712.

31.2015 SCC 12, paras. 3, 4, and 10.

[32] *LSBC v TWU*, para. 57.

[33] *LSBC v TWU*, para 59.
[34] *LSBC v TWU*, para. 81.
[35] *LSBC v TWU*, paras. 96, 98.

36.*TWU v LSBC*, BCCA, para. 82.

[37] Ibid, para. 299.