Q&A with Professor Vanessa MacDonnell: The Future of Unwritten Constitutional Principles

In this Q&A, CCS summer student Stephen Raitz talks to Professor Vanessa MacDonnell (University of Ottawa, Faculty of Law) about the future of unwritten constitutional principles in Canadian law, especially in light of recent and upcoming changes in the Supreme Court's composition.

Q: Unwritten principles are an important but misunderstood part of Canada's constitutional law, and recent events have left some uncertainty over the role that they'll play in the years ahead. Before we talk about this uncertainty, though, let's start with the basics: What are unwritten constitutional principles and can you provide some examples?

A: The Supreme Court has referred to unwritten constitutional principles as the foundational principles "implicit in the very nature of a Constitution" (*Manitoba Language Reference*). They include parliamentary sovereignty, democracy, the rule of law, and judicial independence. These principles help to establish the Constitution's overall structure or "architecture" (*City of Toronto*).

Q: Where do these principles come from? Do other countries have these kinds of unwritten principles acknowledged by courts within their constitutions?

A: These principles have been recognized by courts over time. The courts have anchored these principles in a variety of sources, including the preambles of the *Constitution Acts, 1867* and *1982*, the common law, history, and practice. Other countries' courts have recognized similar principles, such as the UK Supreme Court in the recent *Miller II* case, where the Court invalidated the prorogation of Parliament on the grounds that it violated constitutional principles.

Q: The *City of Toronto* decision was the Supreme Court's last big statement on unwritten principles in 2021. How were unwritten principles treated in SCC cases prior to the *City of Toronto* decision, and in that decision?

A: Prior to *City of Toronto*, the better view of the law was that unwritten constitutional principles could, in appropriate circumstances, be invoked to strike down legislation, since they are part of Canada's fundamental law. In the *City of Toronto* case, however, the majority (5 judges) explained in *obiter* that the legal effects of unwritten principles are more modest. These principles, the majority said, "may be used in the interpretation of constitutional provisions" and "can be used to develop structural doctrines unstated in the written Constitution per se, but necessary to the coherence of, and flowing by implication from, its architecture," but they cannot be invoked to invalidate legislation. The dissent, by contrast, held (also in *obiter*) that unwritten principles are, in fact, capable of invalidating legislation. You can read more about my thinking about this case in a piece recently co-authored with Professor Phil Lagassé here: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4203787.

Q: One of the reasons that we wanted to cover this topic is that the Court was split very narrowly in *City of Toronto* (5-4), and a key member of the 5-judge majority (Justice Brown) has just resigned. How might this shift in the balance of the Court impact its approach to unwritten principles? Does the reasoning in *City*

of Toronto leave any room for a new majority to develop a more robust role for these principles?

A: It is difficult to know what lies ahead for the jurisprudence on unwritten principles. If you look back over the last forty years, a relatively small number of constitutional cases have engaged these principles. However, I think we may see more reference to these principles in the years ahead. Governments across the country are increasingly acting in ways that appear to be at odds with these fundamental principles, and this is part of a larger global trend. In this context, courts may be tempted to return to first principles. There is still a lot of room after *City of Toronto* for evolution in the doctrine, or even for a reversal or refinement of what the majority said in that case.

Q: What approach do you hope the Court will take in the years ahead? And more generally, what role do you hope unwritten principles will have in Canadian law and politics going forward?

A: I would like to see the Court do a better job of distinguishing between the content and legal effect of these principles on the one hand, and questions of institutional legitimacy/competence on the other hand. At least part of what seems to be motivating the Court in these cases is a sense that courts shouldn't be relying on unwritten constitutional law "discovered" by courts to strike down democratically enacted legislation. That might be true most of the time, but that doesn't mean that these principles impose no substantive demands on the state, and that there ought not to be political consequences for their violation. They are, after all, some of the fundamental building blocks of our constitutional order.