Something to Talk About:

Applying the Unwritten Principle of Democracy
to Secure a Constitutional Right to Access Government Information in Canada

by

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ABSTRACT

In this thesis, I argue that the unwritten constitutional principle of democracy provides a foundation for the recognition of a constitutional right to access government information in Canada. More specifically, I argue that the principle of democracy can be used to fill the “access gap” in the written provisions of the Constitution.

I begin by synthesizing the Supreme Court of Canada’s jurisprudence and the work of a number of academics to outline guidelines for the recognition of unwritten constitutional principles. I also attempt to construct a coherent account of the content and effect of the constitutional principle of democracy.

I proceed to argue that recognition of a right of access to government information as part of the principle of democracy fits within the guidelines I identify as it is supported by “strong” pragmatic, historical and structural evidence. I then demonstrate how the constitutional right of access to government information may be applied to protect access to information in at least three different ways: through statutory interpretation, through
the regulation of administrative discretion, and, in exceptional circumstances, through the invalidation of legislation.

I rely on the work of a number of British scholars and on aspects of David Dyzenhaus’s conception of law as a culture of justification to help bridge the divide between the Supreme Court of Canada’s approach to the application of unwritten constitutional principles and the concerns raised by critics of that approach. I argue that the application of the principle of democracy respects the primary role of democratically elected representatives of the public, while establishing that the judiciary also has an important role to play in the identification and enforcement of fundamental values. I suggest that this judicial role can be effectively constrained through the guidelines sketched by the Supreme Court and more fully articulated in this thesis. Finally, I argue that the application of the principle of democracy to invalidate legislation can also be justified in exceptional circumstances where the legislation imposes substantial impediments on fundamental aspects of the democratic process. In such cases, the principle of parliamentary supremacy is properly counterbalanced by the principle of democracy.
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INTRODUCTION

Access to government information has become a foundation of modern democratic governance. Over the past fifty years, both courts and legislatures in Canada have increasingly recognized the importance of access to government information in maintaining the openness and accountability that is crucial for our democratic order. In the judicial realm, developments in the common law have eroded the power of governments to shield documents from disclosure in litigation. In the legislative realm, laws have been introduced by all levels of government to facilitate access to government information. In the process of interpreting such access to information legislation, courts have steadfastly insisted that limitations on access must be narrowly construed in order to promote the primary purpose of these acts, namely protecting the access to information necessary to ensure government accountability and the political participation of citizens.

Notwithstanding the near universal recognition of its importance as a cornerstone of effective democratic governance, the protection of access to government information remains tenuous in Canada. Bureaucratic resistance, unscrupulous (and unsupervised) exercise of administrative discretion and regressive legislative amendments have all been identified as potential threats to our existing (theoretical) levels of access to information concerning government activity. This thesis explores the degree to which these threats may be countered by constitutionally-grounded protections. More specifically, the thesis examines the way in which the Canadian Constitution’s multi-faceted protection of the democratic process, as embodied in the constitutional principle of democracy, may be extended to protect a constitutional right to access government information.

Of course, the primary obstacle to such an argument is that there is no explicit right
to access government information included in the text of the Canadian Constitution. Indeed, a proposal to include such a right in the Charter was rejected by the Special Joint Committee of the Senate and the House of Commons charged with reviewing draft provisions of the Constitution Act, 1982. The question thus becomes whether it is possible to imply some form of constitutional protection for access to government information through the process of constitutional interpretation. In my view it is.

In particular, I argue that protection of access to government information may be realized through the application of the unwritten constitutional principle of democracy. At this point, it seems appropriate to briefly comment on the term “unwritten constitutional principle” itself. I have adopted the term in this thesis because it is the term used by most scholars writing on the subject. However, the term “unwritten constitutional principle” is in many ways a misnomer. Firstly, it implies a distinction between principles that are “written” and principles that are “unwritten”. However, in my view, this is a false distinction, one that is particularly evident when dealing with the constitutional principle of democracy.

It seems trite to observe that all constitutional interpretation relies on unwritten principles or assumptions about how the Constitution is meant to operate. The act of interpretation is precisely one of applying assumptions to text in order to derive meaning. Without assumptions, constitutional interpretation would be reduced to constitutional phonics. In this way, unwritten assumptions inform all constitutional interpretation.

We will see below that the principle of democracy is itself the best example of this. Our understanding of the scope of constitutional protection of democratic governance in Canada has always been, and continues to be, rooted in basic assumptions about how a
parliamentary democracy must function in order to be effective. Many of these basic assumptions are not explicitly identified in the text of the Constitution. As a result, it has been left to the Supreme Court of Canada to more fully articulate the fundamental elements of the democratic process that should receive constitutional protection in Canada. In short, articulation and application of the constitutional principle of democracy has guided the Supreme Court of Canada’s interpretation of the Constitution since the formation of the country.

In this thesis, I will argue that the principle of democracy provides a foundation for the recognition of a constitutional right to access government information. In my view, this may occur in two distinct ways. First, a right to access government information may be recognized as a free-standing right that is supported by the application of the principle of democracy. This free-standing right would be recognized in addition to the rights protected by the explicit provisions of the text of the Constitution. Alternatively, a right to access government information may be recognized as part of an existing written provision of the Constitution, such as section 2(b) or 3 of the Charter. This extension of the scope of an existing right would also result from the application of the principle of democracy to the interpretation of those written provisions. In both scenarios, the right to access is based on the application of the constitutional principle of democracy in the process of constitutional interpretation; the distinction is in the form of the recognition of the right to access. This is not a distinction without a difference. The way in which a right to access is recognized may have important implications for the scope and impact of its application. I will explore these implications in the later stages of the thesis. At this point, it seems prudent to provide a brief outline
of the argument to follow.

**Outline of the Thesis**

I begin by establishing the need for constitutional protection of access to government information in chapter one. To do so, I first canvass the near universal recognition of the importance of access to government information to the democratic process. I then outline existing sources of protection for access in Canada (both common law and statutory) and point out the deficiencies in those protections that highlight the desirability of protection at a constitutional level.

Having identified a need for constitutional protection of access, I proceed in chapter two to outline the way in which interpretation of the Constitution may provide protection for the democratic process beyond the explicit provisions of the Constitution. In particular, I synthesize the Supreme Court of Canada’s evolving discussion of the role of unwritten constitutional principles in the process of constitutional interpretation and identify a number of critiques of the Supreme Court’s approach that will have to be addressed in order to justify the argument I advance.

In chapter two, I also explore the basic foundations of the Supreme Court’s conception of the principle of democracy in order to establish whether the political recognition of the importance of access to government information to the democratic process discussed in chapter one matches the Supreme Court’s constitutional conception of the principle of democracy. The principle of democracy in Canada has been shaped according to the particular form of Canadian democracy – representative and responsible government. The starting point of a system of representative government is the right of citizens to participate in the political process, primarily, though not exclusively, through
the selection of their legislative representatives. The second major aspect of representative government is the capacity of citizens to hold their representatives accountable. The scope of both participation and accountability relates to at least two major types of concerns: the creation of social policy and the governance and effectiveness of political institutions.

In Canada, the process of accountability in our particular system of representative democracy is influenced by the requirements of responsible government - whereby the executive is responsible to the legislature and the legislature is responsible to the electorate. An important characteristic of responsible government is the responsibility of legislators to hold the executive accountable between elections on behalf of the citizens who elected them. The foundation of the principle of democracy in Canada is thus rooted in two requirements: that citizens be able to participate in the political process and that they be able to hold their representatives to account (either through elections or, between elections, through the process of responsible government). Given the near universal recognition of the importance of access to government information for both of these elements of the principle of democracy, I argue that the political conception of the importance of access is thus compatible with the constitutional principle of democracy.

Of course, establishing the compatibility of political ideals and constitutional principles is not nearly sufficient to justify recognition of a constitutional right to access government information. While the application of unwritten constitutional principles in the process of constitutional interpretation has a long-standing history in Canada, the application of the principle of democracy to support a constitutional right to access government information must meet several conditions. The first of these conditions is the
demonstration that there is a need to go beyond the explicit text of the Constitution in light of the fact that no right to access was included in the Charter. In other words, it is necessary to demonstrate that there is an “access gap” in the text of the Constitution that justifies reliance on the principle of democracy. In chapter three, I outline the Supreme Court of Canada’s approach to identifying gaps in the Constitution and discuss several critiques of this method. Ultimately, I argue that the critical concerns raised by academics can be accommodated and that an “access gap” may in fact be identified in the Constitution despite the fact that a proposal to include protection of access to government information in the Charter was rejected in 1981.

Having identified an “access gap”, I proceed in chapters four and five to explore whether the principle of democracy can fill the gap. Again, it is not enough that the Supreme Court of Canada’s conception of the principle of democracy can accommodate the political recognition of the importance of access to government information to the democratic process. It must also be established that, from a legal perspective, the constitutional principle of democracy supports a right to access government information. This requires two steps. The first step, identifying the general test for recognizing or defining an unwritten constitutional principle, is addressed in chapter four. The second step, making the specific argument that a right to access government information should be recognized as part of the principle of democracy, is addressed in chapter five.

1 In light of the fact that the principle of democracy has already been recognized as a fundamental principle of the Canadian Constitution, I argue that access to government information should be recognized as part of (or - in other words – a right that can be supported by) the principle of democracy rather than argue that access should be recognized as an independent principle. This mirrors the general approach applied to recognize that the principle of democracy supports a right to political speech in the Implied Bill of Rights cases, which are discussed in chapter two.
In particular, in chapter four I rely on the jurisprudence of the Supreme Court and the work of a number of academics to outline the guidelines for recognizing unwritten constitutional principles. I also identify and evaluate a number of critiques of the Supreme Court’s approach to recognizing unwritten constitutional principles. Ultimately, I suggest that many of these critical concerns are overstated and that the guidelines identified can address the more legitimate concerns raised. Nonetheless, I suggest that a “sliding scale” approach to recognizing unwritten constitutional principles may be useful. This sliding scale approach would evaluate the evidence supporting recognition of an unwritten principle according to its acceptability to critics and proponents of the application of unwritten constitutional principles alike.

In chapter five, I argue that recognition of a right of access to government information as part of the principle of democracy is supported by “strong” evidence as it is supported by pragmatic, historical and structural evidence. That is to say that: the recognition of a right of access to government information reflects values that have been recognized as important to the social and political institutions of the country; it conforms with the historical development of the Canadian legal framework; and it accords with the structural coherence of the Constitution, and is even supported by links to existing written provisions of the Constitution. More particularly, recognition of the right of access to government information: reflects the general consensus, in Canada and abroad, that access to information is indispensable to the proper functioning of a democratic system of governance; is consistent with the evolution of the common law and legislative approach to the disclosure of government information over the past fifty years; and is supported by
direct links between the proposed right of access to government information and s. 2(b) and s. 3 of the *Charter*.

I proceed to consider the implications of recognizing a constitutional right to access government information in chapters six and seven. As I noted earlier, these implications may differ according to the manner in which the right is recognized. In my view, the evidence is strong enough to support the recognition of a right to access government information as part of section 3 of the *Charter*. However, I recognize that this will not be a view shared by all. In light of this, I consider the implications of recognizing a right to access government information both as a part of section 3 of the *Charter* and as a free-standing constitutional right rooted in the principle of democracy.

I argue that the constitutional right of access to government information may be applied to protect access to information in at least three different ways. First, the right may be applied to ensure that legislation attempting to restrict access to information is interpreted strictly so as to minimize unjustifiable intrusions on access to information that are fundamental to the democratic process. Second, the right may be applied to regulate the exercise of administrative discretion where legislation permits restrictions on access to information. More specifically, officials exercising a discretion to refuse disclosure of information would have to consider the importance to the democratic process of access to the information in question when making their determinations or risk having their decisions overturned.

The third way in which the proposed right to access government information may be used is as a justification for invalidating legislation restricting access to government information in the rare cases where such legislation restricted, without justification,
access to information fundamental to the democratic process. The application of a Charter right to invalidate legislation would be relatively uncontroversial. As a result, I focus in chapter seven on the argument justifying application of a free-standing right to access government information to invalidate legislation.

Invalidation of legislation is the most extreme application of a constitutional principle and is the source of the greatest controversy between proponents and critics of the application of unwritten constitutional principles. Indeed, while both critics and proponents may agree that unwritten constitutional principles may be used to aid in the interpretation of legislation or may restrict administrative discretion, most critics reject the application of unwritten constitutional principle to invalidate legislation, except in extreme circumstances. I argue that the principle of democracy may be used to limit legislation where that legislation imposes substantial interference with fundamental aspects of the democratic process protected by Canada’s constitutional order.

In the course of advancing my argument in favour of the application of the principle of democracy to strike down legislation, I also consider the ways in which the application of that principle must be counter-balanced against other constitutional principles, including the principle of parliamentary supremacy. In particular, I consider how my approach may be justified in the context of a series of Supreme Court of Canada decisions that have been interpreted by some to restrict the application of unwritten constitutional principles as limits on the ability of the legislature to restrict access.

In advancing my argument, I attempt to meet the concerns raised by both judicial and academic critics of the application of unwritten constitutional principles. While I address these concerns throughout the thesis, in chapter eight I set out a more
comprehensive theoretical justification for the application of the principle of democracy as a limit on legislation. I rely, in part, on the work of David Dyzenhaus who has argued that the judiciary works in partnership with the legislature in order to develop and apply the fundamental values of society. The legitimacy of the judicial role in this partnership is rooted in the requirement that judges justify their decisions by providing reasons for them. This requirement allows courts to play a critical role in the dynamic and dialogical process of identifying and justifying fundamental values in society. In my view, it also provides a firm foundation for judicial review of legislation in a constitutional system that has charged judges with enforcing the primacy of constitutional provisions.

From this perspective, I argue that judges who develop and apply unwritten constitutional principles in a case-by-case common law method are fulfilling a legitimate and important role in the legal order and should not be regarded as usurpers of the legislature. Thus, while I accept the basic premise that the application of unwritten constitutional principles to limit government action should be an extra-ordinary occurrence, I contend that the application of these principles to strike down primary legislation in situations where the fundamental elements of democracy are imperiled is legitimate.

A Note on Theory and Method

Although it will discuss fundamental aspects of democratic governance and particularly parliamentary governance, my thesis will not address conflicting academic theories of democratic governance. Rather, the thesis will adopt a jurisprudential approach that focuses on the elements that the Supreme Court of Canada has identified as fundamental to the democratic process in this country. By focusing on the Supreme
Court’s conception of the requirements of democracy, I hope to achieve a more pragmatic, though perhaps more limited, argument in favour of the recognition of a principle of access to government information.

In furtherance of this pragmatic approach, I attempt to demonstrate how the recognition of a constitutional right to access government information may be applied in concrete situations in both chapters six and seven. In particular, in chapter six I consider how recognition of such a constitutional right may influence the interpretation and exercise of administrative discretion under specific provisions of the federal Access to Information Act and the Canada Evidence Act. Similarly, in chapter seven, I consider whether recognition of a constitutional right to access government information may result in invalidation of existing provisions of (and hypothetical amendments to) both the Access to Information Act and the Canada Evidence Act.

Of course, the thesis will also necessarily address theoretical issues and implications. Any discussion of the application of unwritten constitutional principles is fraught with theoretical considerations, not the least of which is the degree to which positivist concerns about the proper limitations on judicial interpretation of the Constitution should be respected. I ultimately reject the positivist characterization of the judicial role as mere readers of the constitutional text in favour of one that recognizes that judges may play a legitimate role in the recognition and application of fundamental constitutional principles in the process of constitutional interpretation. I also reject approaches to constitutional interpretation that ignore the fact that requirements imposed by constitutional principles, both those explicitly enshrined in the text and those that underlie the text, evolve over time. By contrast, I argue that the application of unwritten
constitutional principles must recognize that the requirements imposed by these fundamental principles evolve over time as our democratic institutions and the expectations of citizens change.

Ultimately, I argue that the recognition of a constitutional right of access to government information as part of the principle of democracy accommodates and reinforces the evolution of our democratic system and the growth of expectations of the citizens to have greater participation in and accountability from that system. Critics who argue that such an evolution should not be allowed to undermine the principle of parliamentary supremacy fail to recognize that the principle of parliamentary supremacy is itself subject to these evolutionary pressures. If Parliament cannot meet the evolving expectations of citizens concerning political participation and accountability, it will find the basis of its own legitimacy undermined. Many positivists suggest that, when the people speak, the courts must listen. This thesis ultimately takes the position that, before they can speak, the people must know. If Parliament will not let the people know, the courts must act.
I. CHAPTER ONE

ACCESS TO GOVERNMENT INFORMATION: PROMISE IN PRINCIPLE; PROTECTION IN PASSING; PROBLEMS IN PRACTICE

This thesis proceeds from two fundamental assumptions: the first is that access to government information is necessary for the proper functioning of the democratic process in mature democracies; the second is that, despite the implementation of legislation designed to protect it, access to government information remains threatened in mature democracies such as Canada. In this chapter, I will attempt to lay the foundation for these two assumptions.

I will begin by canvassing the ways in which the important role of access to government information in the modern democratic process has been recognized and affirmed both in Canada and abroad. I will then discuss the ways in which this recognition of the importance of access has been translated into positive protection for access to government information by briefly tracing the evolution of legislative and judicial protection for access to information in Canada. Finally, I will outline some of the threats to access to government information that continue to exist in Canada as identified by Canadian judges, Information Commissioners and parliamentary task forces. In my view, these threats may be countered by recognizing a constitutional right to access government information.

1) The Promise of Access: Recognizing the Importance of Access to Government Information in Mature Democracies

Access to government information has not always been recognized as an important element of the democratic process in Canada. At the time of Confederation,
the concept of providing the public access to government information was an unfamiliar one to say the least. This is not surprising given that the concept of responsible government was still in its infancy in the former colony and the scope of government remained, by modern standards, infinitesimal. Over time, access to government information has become more important as the role of government has expanded and as citizens’ expectations of participation in, and accountability of, the process of governance have increased. In particular, recognition of the need to protect access to government information has grown dramatically since the end of the Second World War and the corresponding expansion of government activity in the past half-century.\(^1\)

Historically, increased access to government information has been championed primarily by academics and non-governmental organizations seeking greater transparency from governments. However, the recognition of the importance of access to government information has grown dramatically since the 1970s in both the judicial and legislative spheres, largely in response to increasing public expectations. This evolution has not always been smooth or linear. Nonetheless, it has, over the course of forty years, resulted in a general consensus that access to government information should be the general rule, except in well-defined (and justifiable) exceptions. This consensus underlies developments in the common law and legislation. However, as we shall see later in this chapter, the recognition by governments of the importance of access to government information in theory does not always translate into willingness to provide access in practice. Ultimately, this practical resistance of government officials against access to

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information motivates the consideration of whether access may find some protection in the Canadian Constitution.

Academic recognition of the importance of access to government information to Canadian democracy has existed since the 1960s and 1970s when a number of academics and organizations began to advocate in favour of the adoption of access to information legislation in this country. Donald C. Rowat took the lead in this regard, writing:

Parliament and the public cannot hope to call the government to account without an adequate knowledge of what is going on; nor can they hope to participate in the decision-making process and contribute their talents to the formation of policy and legislation if that process is hidden from view.  

A similar sentiment was expressed by T. Murray Rankin in 1977, when he wrote: “The right to confront the decision-making apparatus of the State with informed opinions is the foundation of liberal democracies... Access to government information is essential to participatory democracy.”

By the late 1970s, Canadian politicians started to acknowledge the need to provide access to government information, leading ultimately to the enactment of the federal Access to Information Act in June 1982. Nonetheless, as we shall see below, access legislation does not always guarantee access to information. As such, the role of

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academics in advocating for greater access to government information has remained important.

Contemporary Canadian academics have echoed the arguments advanced by Rowat and Rankin. Perhaps the foremost contemporary advocate of generous access to government information in Canada is Alistair Roberts. Roberts argues that basic rights to political participation are useless if citizens are not provided the raw materials necessary for effective self-governance. He notes that the rights to vote and to participate in the political process “have little meaning if government’s information monopoly is not regulated. Otherwise, individuals are invited to apply their rational capacities to the task of self-governance but denied the raw material that this task requires.”

In Roberts’ view, access to information is a necessary part of the structure of modern democratic society. In his words: “Rules to assure access to information then become part of the institutional arrangements – the ‘civic architecture’ – that must be built and maintained by governments so that individuals have the capacity to fulfill their political participation rights.”

This thesis will explore the ways in which this important component of the ‘civic architecture’ can be reflected in, and protected by, the foundation of Canada’s constitutional architecture, the constitutional principle of democracy.

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6 Ibid.

7 Roberts has argued in general terms that a constitutional right to access government information could be linked to the right to freedom of expression and the right to vote. This thesis will provide a more detailed and specific argument demonstrating how existing Canadian jurisprudence may be interpreted to support the recognition of a constitutional right to access government information in Canada through the application of the constitutional principle of democracy. I will discuss the important role of the principle of democracy in greater detail in chapter two.
Not surprisingly, Information Commissioners in Canada have been among the most vociferous defenders of the importance of access to government information in this country. In her 2002 annual report, the Ontario Information and Privacy Commissioner explained the evolution of public attitudes towards access to government information:

As society evolves in our modern democracy, the public’s demand for accountability from its governments keeps increasing. A ‘trust me’ approach to public administration becomes less and less acceptable, and people expect and demand greater levels of transparency in the decision-making processes of government.

Every once in a while, these demands crystallize around a particular element of public accountability and governments take concrete action. In Ontario, we saw that happen in the 1980’s when our provincial government decided it was time to codify the right of access to government-held records. And there really is no ambiguity about why the Freedom of Information and Protection of Privacy Act was introduced and passed into law: it was seen as a necessary and important component of our system of public accountability. As then-Attorney General Ian Scott said in introducing the new law:

When there is true openness in government, we will have a society that is trustful of its government, not fearful of it. We will have a society that is enlightened by information and able to make thoughtful choices as to the future shape of our society.

The importance of access to government information has also been championed by non-governmental international human rights organizations. In the introduction to the 2003 report of the International Advisory Commission of the Commonwealth Human Rights Initiative, the Chair of the Commission Professor Margaret Reynolds states:

“Democracy depends on open, accountable government and the opportunity for citizens

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8 Ontario Information and Privacy Commissioner, Annual Report 2002 (Toronto: Ontario Information and Privacy Commissioner, 2003) at 5 [emphasis in original]. In her 2003 annual report, the Ontario Information and Privacy Commissioner stated the currently prevalent attitude towards access to government-held information, succinctly noting: “The concept of any individual being able to access government-held information is one of the fundamental principles of accountable government and participatory democracy.” [Ontario Information and Privacy Commissioner, Annual Report 2003: Privacy and Access: A Blueprint for Change (Toronto: Ontario Information and Privacy Commissioner, 2004) at 22.] The fact that the notion that greater transparency leads to greater accountability is universally supported in Canada was highlighted by the federal Information Commissioner in his 2003 annual report: “… there has been a clear recognition by this government that a vibrant access law is a key ingredient to the recipe for ensuring accountable government.” (Information Commissioner of Canada, Annual Report 2003-2004 (Ottawa: Minister of Public Works and Government Services Canada, 2004) [Information Commissioner of Canada, 2003-2004] at 3-4.
to actively participate, but this cannot occur unless we insist that the right to information is fundamental to this process.”

The CHRI Open Sesame Report identifies access to information as a necessary corollary to free elections and a functioning bureaucracy. It notes that: “The right to information lays the foundation upon which to build good governance, transparency, accountability and participation, and to eliminate that scourge upon the poor – corruption.”

The position of most non-governmental advocates concerned with access to government information was summarized by the participants of the Third International Conference of Information Commissioners, a meeting of freedom of information commissioners and civil society organizations from around the world. In the Declaration of Cancun: Transparency and Accountability: A Commitment to Democracy, they stated: “access to information is a fundamental right and an essential condition for democratic governance, accountability and the development of participatory democracy.” They issued the following challenge:

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10 The CHRI Open Sesame Report provides a useful perspective of the nature of information controlled by the government. “Information is a public good like clean air and drinking water. It belongs not to the state, the government of the day or civil servants, but to the public. Officials do not create information for their own benefit alone, but for the benefit of the public they serve, as part of the legitimate and routine discharge of the government’s duties. Information is generated with public money by public servants paid out of public funds. As such, it cannot be unreasonably kept from citizens.” [Open Sesame, ibid at 10]. Similarly, David Banisar, in the overview of the global survey of national freedom of information regimes he prepared for the advocacy group FreedomInfo.org, states: “Access to government records and information is an essential requirement for modern government. Access facilitates public knowledge and discussion. It provides an important guard against abuses, mismanagement and corruption. It can also be beneficial to governments themselves – openness and transparency in the decision making process can assist in developing citizen trust in government actions and maintaining a civil and democratic society.” David Banisar, Freedom of Information and Access to Government Records Around the World, online: FreedomInfo.org <http://www.freedominfo.org/survey/global_survey2004.pdf> at 2-3. A draft of his updated version of this report is available online at: <http://www.freedominfo.org/documents/global_survey2006.pdf>.

11 CHRI, Open Sesame, supra note 9 at 15.
We call on governments to promote the full implementation of access to information in line with the highest standards, including the establishment of access to information commissions. We urge those governments which have not yet adopted access to information laws to initiate adoption as rapidly as possible; we urge those governments whose laws do not conform with the minimum standards to improve their legislation. Principles of transparency should be applied to all government decision-making, budgeting, and administrative functions…

The arguments and exhortations of academics, non-governmental organizations and information commissioners have not fallen on deaf ears. The importance of access to government information to the proper functioning of democratic governance has increasingly been recognized by law reform commissions and parliamentary committees who have reviewed existing access legislation or have recommended the implementation of access legislation.

Of particular interest for this thesis are the statements made by commissions reviewing access issues in other mature parliamentary democracies, such as Australia, New Zealand and Great Britain. I use the term “mature democracies” to refer to those countries where the stability of the democratic process has been secured through the establishment and protection of basic democratic rights, such as adult suffrage, and through regularized and fair elections. It is within the context of such mature democracies that the expectations of voters are able to expand to include greater accountability of elected officials (as opposed to their mere election). In other words, in a mature democracy the focus shifts from the stability of the democratic process to the effectiveness of that process, leading to greater expectations of a process that reflects the actual preferences of voters.

The Australian Law Reform Commission performed a review of that country’s federal Freedom of Information Act, 1982 and published a report in 1995.\textsuperscript{13} The Open Government Report underlined that the fundamental reason for providing access to government information is “to ensure open and accountable government.”\textsuperscript{14} It described the link between representative democracy and access to government information, stating:

"Australia is a representative democracy. The Constitution gives the people ultimate control over the government, exercised through the election of the members of Parliament. \textbf{The effective operation of representative democracy depends on the people being able to scrutinize, discuss and contribute to government decision making. To do this, they need information.} While much material about government operations is provided voluntarily and legislation must be published, the FOI Act has an important role to play in enhancing the proper working of our representative democracy by giving individuals the right to demand that specific documents be disclosed. \textbf{Such access to information permits the government to be assessed and enables people to participate more effectively in the policy and decision making processes of the government}…

…

Without information, people cannot adequately exercise their rights and responsibilities as citizens or make informed choices. Government information is a national resource. Its availability and dissemination are important for the economic and social well-being of society generally.\textsuperscript{15}

The Open Government Report specifically noted the importance of access to information for the functioning of systems of responsible government based on a Westminster model.\textsuperscript{16} The report acknowledged that the parliamentary system, and

\begin{itemize}
  \item \textsuperscript{14} \textit{Ibid.} at s. 2.2.
  \item \textsuperscript{15} \textit{Ibid.} at s. 2.3 [emphasis added].
  \item \textsuperscript{16} The Open Government Report specifically addressed the High Court of Australia’s jurisprudence concerning the link between free speech and representative democracy. It stated:
  \begin{quote}
    The High Court in the ‘free speech cases’ demonstrated the importance it places on ensuring the proper working of representative democracy. The Court determined that freedom of public discussion of government (including the institutions and agencies of government) is not merely a desirable political privilege, but inherent in the idea of a representative democracy. It
  \end{quote}
\end{itemize}
particularly the operation of parliamentary committees, enhances the transfer of information from the government to Parliament and through Members of Parliament to the electorate. This transfer of information is both protected and reinforced when access to information is guaranteed.\textsuperscript{17}

The New Zealand Law Commission performed a similar review of New Zealand’s access to information legislation and published its report in 1997.\textsuperscript{18} Report 40 acknowledged the overriding importance of access to government information in modern democracies, stating: “We are often said to live in an information age. Access to information about government, in the late twentieth century, is a prerequisite to effective democracy and participation in it.”\textsuperscript{19}
In Great Britain, a statutory right to access government information has only recently been implemented. The *Freedom of Information Act, 2000*\(^20\) received Royal Assent on November 30, 2000, but came into force only on January 1, 2005. The Act was preceded by a government White Paper entitled: *Your Right to Know*, published in December 1997 and followed by extensive public consultation.\(^21\) In a preface to the White Paper, Prime Minister Tony Blair noted that the purpose of freedom of information legislation was to “[bring] about more open Government. The traditional culture of secrecy will only be broken down by giving people in the United Kingdom the legal right to know.”\(^22\) Similarly, in his foreword to the White Paper, the Chancellor of the Duchy of Lancaster wrote of the fundamental importance of access to government information in a modern state, stating:

Openness is fundamental to the political health of a modern state. This White Paper marks a watershed in the relationship between the government and the people of the United Kingdom. At last there is a government ready to trust the people with a legal right to information. This right is central to a mature democracy.\(^23\)

In the introduction to the White Paper, the Chancellor noted that attitudes concerning access to government information had evolved over time as expectations of government accountability also evolved.

Unnecessary secrecy in government leads to arrogance in governance and defective decision-making. The perception of excessive secrecy has become a corrosive influence in the decline of public confidence in government. Moreover, the climate of public opinion has changed: people expect much greater openness and accountability from government than they used to.\(^24\)

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\(^22\) *Ibid.* at preface.

\(^23\) *Ibid.* at foreword.

Parliamentarians and law reform commissioners in such mature parliamentary democracies as Great Britain, Australia and New Zealand have thus echoed the statements of academics and non-governmental actors in support of the important role of access to government information in democratic societies. Governments have increasingly recognized that access to information has become a crucial part of the democratic process in mature democracies. The legitimacy of the democratic process rests on its ability to meet the expectations of the public concerning their participation in the process of governance. These expectations have grown over time in mature democracies as the focus shifts from stability of democratic government to its effectiveness. Similarly, as the scope of government activity has expanded, the scope of information required by the public to be able to assess the performance of government has correspondingly grown larger.

The fundamental argument in favour of access to government information that emerges from this survey of academics, non-governmental organizations, information commissioners, law reform commissions and parliamentarians may be summarized as follows. Democracy is based on the right of citizens to participate in the process of governance. The size of most modern democracies precludes large-scale direct participation in the process of governance. As such, the primary aspect of this citizen participation is the process of selecting those candidates who will govern on behalf of the citizens. Citizens select these candidates on the basis of their proposed policies or programs of government and, in the case of incumbent candidates, on the basis of their performance in government. In order to ensure that citizens can participate effectively in the democratic process, they require information about the proposed policies of the
candidates for public office and about the performance of the government. Access to this information allows citizens to make informed choices when voting. It allows them to hold the government accountable for its actions.

In short, political participation requires more than just a right to discuss political ideas; it also requires a right to an informed discussion that includes information about the actions taken by government. Access to government information thereby provides access to contextual information that allows a meaningful evaluation of political ideas, policies and conduct. It supplements the right to political speech with a right to political information; it supplements a right to talk with a right to have something to talk about.

In the context of parliamentary democracies, the recognition that access to government information must be the norm, not the exception, is a recognition that the legitimacy of parliamentary governance is rooted in the ability of Parliament to reflect the preferences of the people. These preferences cannot be made evident, at least not accurately, unless the people have sufficient information to make informed choices. In other words, ultimately the sovereignty of Parliament requires the access of the people – access to the information necessary to promote participation in the process of governance and to hold that process accountable.

2) The Protection of Access: Common Law and Statutory Protection of Access to Information in Canada

Has the recognition of the importance of access to government information to the democratic process translated into accordingly robust protection of access? The answer is both yes and no. There are now over 60 countries throughout the world with access to information legislation.\(^{25}\) Of course, the effectiveness of these statutory regimes varies

\(^{25}\) See, Banisar, supra note 10.
widely. Many states with access to information to legislation have very little access to information in practice.\(^{26}\)

In some countries, the right to access has already been explicitly entrenched in the Constitution. For example, section 32 of South Africa’s Constitution states:

32(1) Everyone has the right of access to - (a) any information held by the state, and; (b) any information that is held by another person and that is required for the exercise or protection of any rights; (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.\(^{27}\)

This constitutional right has been implemented in South Africa through the Promotion of Access to Information Act (2000)\(^{28}\). Other countries with explicitly entrenched constitutional rights to access government information include Ghana, Malawi and Mozambique.\(^{29}\) However, it must be noted that many of these constitutions protect access to information in name only.

In some countries, such as India, the judiciary has recognized access to information as an implied constitutional right. More precisely, the Constitution Bench of the Supreme Court of India has recognized that section 19(1) of the Indian Constitution, which protects freedom of expression, also protects the right of access to government information.\(^{30}\) That right has been affirmed, and the importance of access to government information to democracy explained, in a number of cases.

In one of the most wide-reaching decisions, *Union of India v. Association for Democratic Reforms* (2002), the Constitution Bench for the Supreme Court of India

\(^{26}\) CHRI, *supra* note 9.
\(^{29}\) For a list of constitutions protecting access to government information, see, CHRI Open Sesame Report, *supra*, note 9 at 14.
\(^{30}\) Section 19(1) states, in part: “All citizens shall have the right (a) to freedom of speech and expression...”
found that the right to freedom of expression included a right to information concerning candidates for elected office, including whether they have a criminal record, their level of education and their property holdings.\(^{31}\) Justice Shah, who wrote the Court’s decision stated:

Now we would refer to various decisions of this Court dealing with citizens’ right to know which is derived from the concept of ‘freedom of speech and expression’. The people of the country have a right to know every public act, everything that is done in a public way by the public functionaries. MPs or MLAs are undoubtedly public functionaries. Public education is essential for functioning of the process of popular government and to assist the discovery of truth and strengthening the capacity of an individual in participating in decision making process. The decision making process of a voter would include his right to know about public functionaries who are required to be elected by him.\(^{32}\)

Justice Shah later stated:

Under our Constitution, Article 19(1)(a) provides for freedom of speech and expression. Voters’ speech or expression in case of election would include casting of votes, that is to say, voter speaks out or expresses by casting vote. For this purpose, information about the candidate to be selected is must. Voter’s (little man – citizen’s) right to know antecedents including criminal past of his candidate contesting election for MP or MIA is much more fundamental and basic for survival of democracy. The little man may think over before making his choice of electing law breakers as law makers.\(^{33}\)

The decision in *Union of India v. Association for Democratic Reforms* was further explained by a regular three member panel of the Supreme Court of India the following year in *People’s Union for Civil Liberties v. Union of India* (2003).\(^{34}\) Justice Shah wrote the lead judgment in the case. He further elaborated on the importance of information to voters, stating: “Members of a democratic society should be sufficiently informed to that they may cast their votes intelligently in favour of persons who are to govern them.

\(^{31}\) (2002) 5 SCC 294, 2002 SOL Case No. 274 (Supreme Court of India), online: Supreme Court Online <http://www.supremecourtonline.com/cases/7166.html> [cited to SOL online]. The decision was rendered against a backdrop that included fundamental concern about the level of corruption in Indian politics.


\(^{33}\) *Ibid.* at para. 47 [emphasis in original].

\(^{34}\) 2003 SOL Case No. 212 (Supreme Court of India), online: Supreme Court Online http://www.supremecourtonline.com/cases/7068.html
Right to vote would be meaningless unless the citizens are well informed about the antecedents of a candidate.”

These cases point to a general consensus in the Indian Supreme Court that access to government information is so fundamental to the ability of citizens to meaningfully participate in the Indian political system that it must receive constitutional protection. More generally, the movement to constitutionalize protection of access to government information in countries such as India and South Africa is a further recognition of the important role of access to government information in democratic societies.

In Canada, there is no explicit right to access government information included in the text of the Constitution. In addition, at least until very recently, courts in Canada have been reluctant to recognize access to government information as part of the scope of the protection afforded freedom of expression in s. 2(b) of the Charter.36

35 *Ibid.* at para. 76. In a minority opinion, Justice Reddi noted that the right to information concerning candidates for elected office should be understood as directly linked to the expressive nature of voting. He distinguished between the right to vote, which he found to be statutory but not fundamental, and the freedom to vote, which is protected by the constitutional right to freedom of expression. The freedom to vote may more specifically be described as the freedom to choose, the result of which is expressed when voting. He found that, because accurate information about the candidates is necessary to make the choice between candidates meaningful, the freedom to vote required access to information concerning candidates for election. (paras. 91-92).

Justice Reddi noted that the right to access government information was developed in a series of cases dealing with claims of government privilege to refuse disclosure of documents under section 123 of India’s Evidence Act. In *State of U.P. v. Raj Narain* Justice Mathew of the Supreme Court stated: “In a Government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries.” ((1981) Suppl. SCC 87 as cited in *People’s Union for Civil Liberties v. Union of India* (2003), *ibid.* at para. 81.) In *S.P. Gupta v. Union of India*, Justice Bhagwati stated: “The concept of an open government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under Article 19(1)(a). Therefore, disclosure of information in regard to the functioning of the Government must be the rule and secrecy an exception...”((1981) Suppl. SCC 87 as cited in *People’s Union for Civil Liberties v. Union of India* (2003), *ibid.* at para. 81.)

In the absence of explicit constitutional protection of access to government information, protection for access to government information in Canada has developed gradually through a process in which governments have resisted proposals for access as much as they have supported them. Indeed, even after the implementation of legislation protecting basic levels of access to government information, access to government has not always benefited from strong legal protection. In the following sections, I will briefly outline the evolution of protection for access to government information in Canada. Ultimately, I will discuss these protections in more detail in chapter five.

**a) Access to Government Information in Judicial Proceedings**

Prior to the advent of access to information legislation, the issue of access to government documents arose primarily in cases in which the government was a party to litigation, usually a defendant, and received requests for disclosure of documents pertinent to the litigation. In such cases, two principles would have to be balanced: the requirement that parties to the litigation have access to all relevant evidence in the interest of justice and the principle that it was in the public interest that some information concerning government activity should not be disclosed. The balance struck between these conflicting interests has shifted over time.

(i) **Common Law**

Historically, government enjoyed a Crown prerogative at common law immunizing it from discovery. This prerogative was abolished by the enactment of Proceedings Against the Crown legislation, which rendered the Crown subject to
litigation. Notwithstanding this development, the government continued to enjoy an absolute immunity at common law from disclosing documents in its control in cases where the production of those documents would be injurious to the public interest. This immunity is often referred to as a privilege to refuse disclosure. It was assumed that, when claiming this immunity, the government would balance the interest in disclosing the documents against any potential harm to the public interest from disclosure. It was also deemed improper for courts to examine documents that the government refused to disclose for the purpose of determining that this immunity (or privilege) was not abused.

Over time, the common law approach has evolved from one in which government was accorded an absolute immunity from disclosing documents (if the government determined that their disclosure was perceived to be harmful to the public interest) to a relative immunity monitored by the courts. The judiciary has asserted its jurisdiction to examine the documents in question (even when those documents contain Cabinet confidences) in order to determine whether government has properly balanced the competing interests of disclosure and refusal to disclose.

In effect, the absolute immunity from disclosing documents once enjoyed by governments has been eroded by the courts as judges have developed a contextual

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38 This public interest immunity from disclosure is often referred to as a Crown privilege. However, in Carey v. The Queen, (1986), 35 D.L.R. (4th) 161 (S.C.C.) [Carey], Justice La Forest noted that the government’s power to refuse disclosure of a document was not a Crown privilege, but was more properly conceived as a public interest immunity. Since most cases use the term ‘privilege’ I will apply the terms ‘privilege’ and ‘immunity’ interchangeably.

approach to the immunity to refuse disclosure.\textsuperscript{40} The contextual approach considers the nature of the documents sought to be disclosed, the historical setting in which disclosure is sought and nature of the interests sought to be protected by either disclosure or refusal to disclose. While the main struggle has concerned whether courts should have the power to review government decisions to refuse disclosure of documents (and to examine the documents for which immunity from disclosure is sought), the common law has also evolved concerning the types of documents of which disclosure is required. Underlying this evolution has been the consistently recognized responsibility of the government to disclose documents unless the harm from disclosure outweighs the benefit.


The common law approach to the disclosure of government information during the course of litigation has now been largely overshadowed by statutory provisions. Statutory provisions dealing with disclosure of government documents during the course of judicial proceedings were first introduced through the \textit{Federal Court Act}.\textsuperscript{41} Interestingly, section 41 of the \textit{Federal Court Act} re-established the absolute privilege of the Crown to certify that “the production or discovery of a document or its contents would be injurious to international relations, national defence or security, or to federal-provincial relations, or that it would disclose a confidence of the Queen’s Privy Council for Canada” and to therefore refuse disclosure of the document without examination by the court.\textsuperscript{42}


\textsuperscript{41} R.S.C. 1970 (2\textsuperscript{nd} Supp.), c. 10, s. 41.

\textsuperscript{42} Ibid.
These initial statutory provisions were later replaced by provisions of the *Canada Evidence Act*.\(^{43}\) Parliament repealed section 41 of the *Federal Court Act* in 1982 when it amended the *Canada Evidence Act*, adding sections 36.1, 36.2 and 36.3.\(^{44}\) Generally speaking, the new provisions in the *Canada Evidence Act* reinstated much of the common law approach. As such, the government retained a power to claim privilege over documents the disclosure of which would be injurious to the public interest, including documents the disclosure of which would be injurious to international relations or national defence and security.\(^{45}\) In such cases, the Chief Justice of the Federal Court, or another judge of the Federal Court designated by the Chief Justice, could review the documents to determine whether the objection to production was well founded. However, in contrast with the common law approach, the *Canada Evidence Act* provisions maintained an absolute privilege for the government to refuse disclosure of documents if it certified that the documents contained Cabinet confidences. Courts were excluded from reviewing the documents that the government certified contained Cabinet confidences.\(^{46}\)

As will be discussed in chapter five, the provisions of the *Canada Evidence Act* dealing with disclosure of government information during the course of judicial proceedings have been amended a number of times. Nonetheless, the general approach in all of the above iterations of the *Canada Evidence Act* has been that government information must be disclosed in judicial proceedings unless a specific exclusion, based on an identifiable harm to the public interest, may be identified. Government is not given

\(^{44}\) The amendments were actually enacted through the *Access to Information Act*, S.C. 1980-81-82-83, c.111, s. 4. Section 41 of the *Federal Court Act*, was repealed by s. 3 of the same Act.
\(^{45}\) *Canada Evidence Act*, supra note 43, s. 36.2.
\(^{46}\) Ibid., s. 36.3.
a free reign to refuse disclosure of government information; rather, government is
expected to weigh the harm from disclosure against the benefits. With the exception of
information alleged to include Cabinet confidences, courts have retained the jurisdiction
to review the balancing conducted by government, including the power to examine the
documents in question.

Thus, with the notable exception of Cabinet confidences, statutory regimes
dealing with disclosure of government information in judicial proceedings now largely
reflect the same principled approach adopted in the common law. This approach
emphasizes disclosure over secrecy while accepting justifiable exceptions to the general
principle of disclosure. However, it must be noted that this general approach was
modified by the *Anti-terrorism Act*, which was enacted in response to the terrorist
attacks of September, 11, 2001. I will discuss the impact of these amendments in detail
in my discussion of “problems with access” below.

b) **Access to Information Legislation (1981-2002)**

While the common law recognized certain rights to access government
information in the course of litigation, a more general, free-standing right to access
government information was not recognized until access to information legislation was
introduced in Canada in the 1980s. The federal government enacted the *Access to
Information Act* in June 1982; it came into force on July 1, 1983. All provinces and
territories now have some form of legislation protecting access to government
information.\(^48\)

\(^{47}\) S.C. 2001, c.41.

The federal Act and provincial access legislation operate under the same governing principles that access to government information should be protected, that exceptions to access should be narrowly construed and that decisions concerning access should be subject to independent supervision. The two major distinctions between the federal Act and most provincial legislation are that: (a) the Information Commissioner created under the federal Act only has advisory powers, while provincial information commissioners can make binding orders; and (b) Cabinet confidences are excluded from the ambit of the federal Act, while they are simply exempted from provincial legislation.49

The federal Access Act was enacted in recognition of the fact that the government had become the largest collector of information in the country and that providing the public access to information held by the government would both increase public participation in government decision-making and improve the accountability of government.50 Section 2 of the Access Act set out the purpose of the Act and the principles that should guide its interpretation:

2(1) The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the

49 This second distinction, which affects the ability of courts to review decisions to refuse to disclose information deemed to contain Cabinet confidences, will be discussed in greater detail later in this section.
right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.\textsuperscript{51}

The general approach of the federal *Access Act* reflects the approach of the *Canada Evidence Act* to the disclosure of government information: it promotes disclosure unless a particular public interest in non-disclosure is identified. Generally speaking, the *Access Act* attempts to create a workable balance between the principle of access to government information and the need to protect certain information from disclosure in the public interest.

Similar to the *Canada Evidence Act*, the *Access Act* allows the government to refuse to disclose information if the disclosure of the information could reasonably be expected to be injurious to the conduct of federal-provincial affairs,\textsuperscript{52} or to the conduct of international affairs, the defence of Canada or the detection, prevention or suppression of subversive or hostile activities.\textsuperscript{53}

Another example of the balance struck between the need for access to promote transparent governance and the need for confidentiality to promote effective governance is the *Access Act*’s treatment of information related to the policy-making process of government. Section 21 of the *Access Act* provides an exemption from disclosure for advice to Ministers and information derived from the deliberative process of governance.\textsuperscript{54} Section 21 is designed to protect the policy-making process to ensure that Ministers are able to receive full and candid advice while determining policy.

\textsuperscript{51} *Access Act, supra* note 4, s. 2(1).
\textsuperscript{52} Ibid., s. 14.
\textsuperscript{53} Ibid. s. 15.
\textsuperscript{54} Section 21(1) states:

21. (1) The head of a government institution may refuse to disclose any record requested under this Act that contains

(a) advice or recommendations developed by or for a government institution or a minister of the Crown,
A more controversial element of the *Access Act* is its treatment of Cabinet confidences. Cabinet confidences are excluded from the ambit of the *Access Act* pursuant to section 69.\(^55\)

One of the effects of excluding Cabinet confidences from the *Act*, rather than treating them as exemptions within the *Act*, is that there is no provision for review of a decision that a document contains a Cabinet confidence by either the Information Commissioner of Canada or by a judge of the Federal Court.\(^56\) Nonetheless, with the notable exception of Cabinet confidences and a few other types of information excluded from the ambit of the *Access Act*, the courts retain supervisory jurisdiction over the balancing of competing interests in disclosure and non-disclosure. However, like the *Canada Evidence Act*, the general approach of the *Access Act* has been modified by the *Anti-terrorism Act*. I will discuss the impact of these changes in the next section.

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\(^55\) Section 69(1) states:

69. (1) This Act does not apply to confidences of the Queen’s Privy Council for Canada, including, without restricting the generality of the foregoing,

(a) memoranda the purpose of which is to present proposals or recommendations to Council;

(b) discussion papers the purpose of which is to present background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions;

(c) agenda of Council or records recording deliberations or decisions of Council;

(d) records used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;

(e) records the purpose of which is to brief ministers of the Crown in relation to matters that are before, or are proposed to be brought before, Council or that are the subject of communications or discussions referred to in paragraph (d);

(f) draft legislation; and

(g) records that contain information about the contents of any record within a class of records referred to in paragraphs (a) to (f).

\(^56\) However, it is arguable that where extrinsic evidence exists to suggest that the document or information does not actually contain Cabinet confidences then a court may order the disclosure of the information: *Canada (Information Commissioner) v. Canada (Minister of the Environment)*, [2001] 3 F.C. 514 (T.D.).
While governments have gradually recognized the importance of access to government information for the democratic process in theory, the road to greater and more effective access to government information has, in practice, been strewn with barriers and obstacles. Early common law decisions emphasized the absolute privilege of government to refuse to disclose information. Later, as the common law evolved to require greater access to government information in court proceedings, legislatures stepped in to re-impose some of the restrictions rejected by the common law. Nonetheless, the underlying assumption has been that access to government information should be encouraged. We will see below that this assumption is not always honoured in practice.


While the introduction of access to information legislation in Canada was a progressive step in the fight against government secrecy, introduction of the legislation has not dismantled many of the historical barriers to access to government information. Even where legislation has been enacted that improves access to government information, the actions of government officials, both elected and unelected, have, often intentionally, thwarted the purposes of the legislation. Indeed, so widespread is the apparent culture of secrecy in the Canadian government that the Information Commissioner of Canada began his 2003 annual report with a resounding critique of the deplorable record of government disclosure:

Governments make skeptics of Information Commissioners. Time after time, regime after regime, scandal after scandal, government leaders raise expectations by promising to be more accountable and transparent. Just as routinely, governments maintain their deep addiction to secrecy, spin, foot-dragging and decision-making by nods and winks. When it comes to honouring the public’s
“right to know”, governments have found it profoundly challenging to “walk the walk”.  

The problems identified by the federal Information Commissioner in 2003 ranged from the failure of the government to expand the scope of access legislation to intentional efforts by government officials to evade the reach of the existing legislation. In the former category, the Information Commissioner noted the failure of the government to expand the scope of the legislation to cover Crown Corporations and all officers of Parliament, despite repeated reports and requests outlining the desirability of such amendments. In the latter category, the Commissioner described the “disdain” shown for access legislation by former Prime Ministers Mulroney and Chretien, noting that this disdain “spread like a cancer through successive PMO’s, PCOs and the senior bureaucracy”. The result was that requests for allegedly “sensitive” information about government often met a “wall of obstruction, obfuscation and delay” raised by


59 While the government recently amended the Access Act to include Crown Corporations under the jurisdiction of the Act, it remains to be seen whether the inclusion of these Crown Corporations will result in greater access to information in their control. Access Act, supra note 4, s. 3.

60 Information Commissioner of Canada, 2003-2004, supra note 8 at 5.
government officials. According to the Information Commissioner, a pattern developed of “too many senior officials (elected and appointed) consciously evad[ing] public accountability by making sure there is no paper trail.” In all, the Commissioner questioned whether the government had the courage and honesty to “beat the secrecy addiction to which governments fall…”

The tenuous nature of our access to government information has been noted by others beside the Information Commissioner. The Access to Information Review Task Force concluded in its report that many of the problems with the existing Access to Information regime in Canada could be traced to the improper exercise of administrative discretion.

While we have concluded that the overall structure is sound, this does not mean that the outcomes that Parliament intended are always achieved. It is our view that this is not so much due to the general structure of the Act, or even the specific exemptions or exclusions. Rather, it is due to the way discretionary exemptions are understood and applied.

The exercise of discretion inherently implies a consideration of the factors relevant in each particular case, including any anticipated harm from disclosure. However, it is our impression that heads of government institutions (or their delegates) do not always consider all relevant factors in exercising their discretion, nor do they articulate clear reasons for withholding information. We found that this is a problem in all the jurisdictions we consulted.

The tendency of government officials to improperly exercise their discretion when assessing access to information requests has also been noted by the Canadian judiciary.

In Canadian Council of Christian Charities v. Canada, Justice Evans of the Federal

\[\text{\footnotesize 61 \textit{Ibid.} at 5.}\]
\[\text{\footnotesize 62 \textit{Ibid.} at 6.}\]
\[\text{\footnotesize 63 \textit{Ibid.} at 3.}\]
\[\text{\footnotesize 64 Canada, Access to Information Review Task Force, \textit{supra} note 50 at 43. The improper exercise of discretion is not just a Canadian problem. The CHRI \textit{Open Sesame} Report, \textit{supra} note 9 at 10-11, notes that the main obstacle to access to information in the Commonwealth is deliberate restriction by governments: “However, in the main, the poverty of information has been created because the large stockpile of valuable information lying with the government is deliberately held away from people. In much the same way as depriving people of food starves physical development, depriving human beings of information robs them of one of the basic means by which they can become all that they should be.”}\]
Court of Appeal noted that heads of government departments are pre-disposed to prefer non-disclosure of government documents, stating: “Heads of government institutions are apt to equate the public interest with the reasons for not disclosing information, and thus to interpret and apply the Act in a manner that gives maximum protection from disclosure for information in their possession.”

Justice Evan’s comment was quoted, with approval, by Justice Blanchard of the Federal Court in Information Commissioner v. Minister of the Environment. In that case, Justice Blanchard found that the Privy Council Office had deliberately changed the format in which information was provided to Cabinet in order to evade access to information requests for information that would otherwise be subject to disclosure.

The above-noted reports and judicial decisions describe a disturbing disconnect between principle and practice, between the ideal of open and accountable governance and the reality of secretive and unaccountable manipulation. It is, to say the least, a disturbing picture of access against the odds, one that should make skeptics of citizens as well as Information Commissioners. When viewed in the context of the often glowing recommendations for access to government information offered by legislators and government ministers, the resistance against access seems particularly cynical. This cynicism may be at least partially explained by the distinction between legislating and administering, between defining principles and administering programs. This distinction

65 [1994] 4 F.C. 245 at 255. Under the federal Access Act, the Information Commissioner of Canada cannot order disclosure of documents, but rather can only recommend disclosure. As such, it is the Minister’s decision to refuse disclosure that is the subject of review. Justice Evans found that, due in large part to the predisposition of government officials to prefer non-disclosure, the Minister’s refusal to disclose should be reviewed according to the correctness standard.


is sometimes blurred within our parliamentary system with its co-mingling of executive and legislative powers.

All too often, it appears, elected officials lose their appreciation for the importance of providing citizens with access to government information once they themselves are confronted with the task of governing. Typically, government officials point to the need for secrecy in order to ensure effective governance. It is worth remembering that similar arguments concerning the need to insulate Cabinet deliberations from judicial review have been rejected by the common law approach to Crown immunity in judicial proceedings.

Perhaps more disturbing than the cynical resistance to access requests framed within existing access regimes is the possibility the Information Commissioner did not mention in 2003; the possibility of decreased access that results from legislative change as opposed to executive or administrative intransigence.

The potential for legislative restriction of access to government information that is currently available is by no means remote. As noted above, the Access to Information Review Task Force, convened by the government to review the federal Access Act issued its report in June 2002. The Information Commissioner of Canada roundly criticized both the process and results of the Task Force. The Commissioner noted that process was “heavily weighted … towards the ‘insider’ perspective” of bureaucrats resistant to disclosure.

By any reasonable measure, the Task Force review “process” was entirely inadequate for determining how to strengthen the right of access. As a result, there is a great irony in the title which the Task Force gave to its report: “Making It Work For Canadians”. By design of the process, and (as we shall see) from an assessment of its content, this set of reform proposals might, more aptly, be titled: “Making it (less) work for government officials”.

Once again we are, with this Task Force Report, confronted with the reality that bureaucrats like secrets – they always have; they will go to absurd lengths to keep secrets from the public and even from each other. Bureaucrats don’t yet grasp the profound advance our democracy made with the passage, in 1983, of the Access to Information Act. They continue to resent and resist the intentional shift of power, which Parliament mandated, away from officials to citizens. A bureaucrat’s dream of “reform” is to get back as much lost power over information as possible.  

In particular, the Information Commissioner objected to proposed changes to provisions in the Access Act regarding Cabinet confidences that would have made it even more difficult than under the existing legislation to test whether access to such documents was being denied in good faith.

The restrictions on access proposed by the Access to Information Review Task Force pale in comparison to the potential restrictions on access to government information that were suggested in the wake of the September 11, 2001 terrorist attacks in the United States. One critic of the initial draft of Canada’s new anti-terrorism legislation, Bill C-36, noted that the federal government proposed remarkable restrictions on access to government information, specifically on existing rules concerning disclosure of information relevant to various court proceedings. Most of the proposed changes, with one major exception, were implemented.

In particular, the amendments introduced through the Anti-terrorism Act significantly reworked certain aspects of section 38 of the Canada Evidence Act.

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69 Ibid. at 17-19.
70 Bill C-36, An Act to amend the Criminal Code, the Official Secrets Act, the Canada Evidence Act, the Proceeds of Crime (Money Laundering) Act and other Acts, and to enact measures respecting the registration of charities, in order to combat terrorism, 1st Sess., 37th Parl., 2001.
Admittedly, the core focus of section 38 remained unchanged after the amendments implemented by the *Anti-terrorism Act*. Even after the amendments, section 38 allows a judge to order the disclosure of information “unless the judge concludes that the disclosure of information would be injurious to international relations or national defence or national security…”72

Under the combined effect of the predecessor provisions of sections 37 and 38 of the *Canada Evidence Act* a judge could order disclosure of information that would be injurious to international relations or national defence or security if the judge concluded that the public interest in disclosure outweighed the public interest in non-disclosure.73

Similarly, the amendments added through the *Anti-terrorism Act*, maintain the power of a judge to order disclosure of information that would be injurious to international relations or national defence or national security if the public interest in disclosure outweighs the public interest in non-disclosure.74

Many of the amendments to section 38 established more specific rules of procedure for dealing with applications for disclosure of information covered under

72 *Canada Evidence Act, supra* note 43, s. 38.06(1). Compare to the predecessor section 38 which applied to objections to disclosure of information “…on the grounds that the disclosure would be injurious to international relations or national defence or security…”

73 More specifically, section 37(2) stated that: “Subject to sections 38 and 39, where an objection to the disclosure of information is made under subsection (1) before a superior court, that court may examine or hear the information and order its disclosure, subject to such restrictions or conditions as it deems appropriate, if it concludes that, in the circumstances of the case, the public interest in disclosure outweighs in importance the specified public interest.” Section 38 merely established specific procedural restrictions for cases where “objection to the disclosure of information is made under subsection 37(1) on the grounds that the disclosure would be injurious to international relations or national defence or security…”. These restrictions included the fact that such objections could only be heard by the Chief Justice of the Federal Court or the Chief Justices designate.

74 Admittedly, the revised provision is much more detailed. It states: “38.06(6) If the judge concludes that the disclosure of the information would be injurious to international relations or national defence or national security but that the public interest in disclosure outweighs in importance the public interest in non-disclosure, the judge may by order, after considering both the public interest in disclosure and the form of and conditions to disclosure that are most likely to limit any injury to international relations or national defence or national security resulting from disclosure, authorize the disclosure, subject to any conditions that the judge considers appropriate, of all of the information, a part or summary of the information, or a written admission of facts relating to the information.”
section 38. However, the amendments also expanded the scope of section 38 in several ways. First, the amendments introduced by the Anti-terrorism Act imposed a new wide ranging positive duty to notify the Attorney General of the possible disclosure of a wide scope of information, beyond information that “would be injurious to international relations or national defence or security”. This duty is triggered by the potential disclosure of information that is also categorized as either “sensitive information” or “potentially injurious information”.

Sensitive information is defined as “information relating to international relations or national defence or national security that is in the possession of the Government of Canada, whether originating from inside or outside Canada, and is of a type that the Government of Canada is taking measures to safeguard”. Potentially injurious information is defined as “information of a type that, if it were disclosed to the public, could injure international relations or national defence or national security”. As a result, the positive duty to notify the Attorney General of Canada concerning potential disclosure of information applies not just to information that would injure international relations or national defence or national security, but also to information that could injure international relations or national defence or national security and, even more expansively, to information relating to international relations or national defence or national security as long as the Government of Canada is taking measures to safeguard that information.

This positive duty of notification applies not just to the party that may potentially disclose the sensitive or potentially injurious information, but to “every participant” who

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75 Canada Evidence Act, supra note 43, s. 38.01.
76 Ibid., s. 38.
either “is required to disclose” or “expects to disclose” or may simply “cause to disclose” information they “believe” is sensitive information or potentially injurious information.

Perhaps the most important change to the *Canada Evidence Act* introduced by the *Anti-terrorism Act* was the introduction of section 38.13 which provides the federal Attorney General with the power to issue a certificate that prevents disclosure of information in a proceeding regardless of a ruling of the Federal Court mandating disclosure. Section 38.13(1) states:

> 38.13(1) The Attorney General of Canada may personally issue a certificate that prohibits the disclosure of information in connection with a proceeding for the purpose of protecting information obtained in confidence from, or in relation to, a foreign entity as defined in subsection 2(1) of the *Security of Information Act* or for the purpose of protecting national defence or national security. The certificate may only be issued after an order or decision that would result in the disclosure of the information to be subject to the certificate has been made under this or any other Act of Parliament.

Pursuant to s. 69.1 of the federal *Access Act*, which was added to the Act by s. 87 of the *Anti-terrorism Act*, the issuance of a certificate under s. 38.13 of the *Canada Evidence Act* terminates any ongoing Access to Information proceedings regarding the information subject to the certificate. Once a certificate has been issued, the Information Commissioner is required to return any information subject to the certificate that is in his possession to the originating government department within ten days.\(^77\) This effectively precludes the Information Commissioner of Canada from serving as an independent arbitrator of whether the information subject to the certificate should be disclosed.\(^78\) Like the certificate power created by s. 38.13 of the *Canada Evidence Act*, the consequential

\(^77\) *Access Act*, supra note 4, s. 69.1(2)(c).

termination of access to information proceedings when a certificate is issued is a marked departure from the general approach to access to information enshrined in the Access Act.

While the amendments to the Canada Evidence Act introduced by the Anti-terrorism Act maintain the general approach to disclosure of information that mandates that governments disclose information where the public interest in disclosure outweighs the public interest in non-disclosure, the newly added section 38.13 provides the Attorney General with a new discretionary power that may result in information being insulated from disclosure even though it has already been ordered to be disclosed by a judge. This new discretionary power, which falls outside of the general approach to disclosure of government information, is an example of the types of restrictions of access to government information that may be usefully subjected to constitutional scrutiny.

More recent events further indicate that the commitment of politicians to maintaining or improving access to information are less tangible in practice than in theory. The second report of the Commission of Inquiry Into the Sponsorship Program and Advertising Activities (the Gomery Commission) identified a number of areas where the existing Access Act might be improved, agreeing with many of the reforms of the Access Act that had been proposed by the Information Commissioner.79 In particular, the second report, entitled Restoring Accountability, endorsed the Information Commissioner’s call for a re-orientation of the existing federal access regime that would require disclosure of information unless the government could identify an injury to an

important competing interest.\textsuperscript{80}

On the heels of the Gomery Commission’s report, a new Conservative government was elected after promising to implement many of the reforms to the \textit{Access Act} that had been suggested by both the Gomery Commission and the Information Commissioner.\textsuperscript{81} However, instead of implementing those reforms as promised, the new Conservative government introduced a series of amendments to the \textit{Access Act} that ultimately abandoned most of the changes endorsed by the Gomery Commission and the Information Commission.\textsuperscript{82}

The Conservative government also issued a discussion paper on possible amendments to the \textit{Access Act} that has been roundly criticized as regressive by the Information Commissioner.\textsuperscript{83} Like the amendments it enacted to the \textit{Access Act}, the government’s discussion paper effectively abandons many of the reforms the

\textsuperscript{80} Commission of Inquiry Into the Sponsorship Program and Advertising Activities, \textit{Restoring Accountability} (Ottawa: Minister of Public Works and Government Services, 2006) at 183 ff.


• Implement the Information Commissioner’s recommendations for reform of the Access to Information Act.
• Give the Information Commissioner the power to order the release of information.
• Expand the coverage of the act to all Crown corporations, Officers of Parliament, foundations, and organizations that spend taxpayers’ money or perform public functions.
• Subject the exclusion of Cabinet confidences to review by the Information Commissioner.
• Oblige public officials to create the records necessary to document their actions and decisions.
• Provide a general public interest override for all exemptions, so that the public interest is put before the secrecy of the government.
• Ensure that all exemptions from the disclosure of government information are justified only on the basis of the harm or injury that would result from disclosure, not blanket exemption rules.
• Ensure that the disclosure requirements of the Access to Information Act cannot be circumvented by secrecy provisions in other federal acts, while respecting the confidentiality of national security and the privacy of personal information.”


Conservative Party promised to enact in its electoral platform. The course of action of the new government led the Information Commissioner to state:

The clear lesson of my almost eight years of service as Canada’s Information Commissioner, is that – by-and-large- public officials just don’t get it! They don’t get the basic notion that, in passing the Access to Information Act in 1983, Parliament wanted a shift of power away from ministers and bureaucrats to citizens. Parliament wanted members of the public to have the positive legal right to get the facts, not the “spin”; to get the source records, not the managed message; to get whatever records they wanted, not just what public officials felt they should know.

Still, after almost 23 years of living with the Access to Information Act, the name of the game, all too often, is how to resist transparency and engage in damage control by ignoring response deadlines, blacking-out the embarrassing bits, conducting business orally, excluding records and institutions from the coverage of the Access to Information Act and keeping the system’s watchdog overworked and under funded. The clear lesson of these past years is that governments, even very new governments, continue to distrust and resist the Access to Information Act and the oversight of the Information Commissioner.

Clearly, notwithstanding the evolution of common law and statutory protection for access to government information, protection of access remains contingent and, at times, uncertain.

4) Conclusion

The importance of access to government information to the democratic process has evolved over the past 40 years as the role of governments has expanded and the expectations of citizens have grown. There is now near universal recognition of the importance of access to government information to the democratic process. Academics, non-governmental agencies, information commissioners, law reform commissions and parliamentarians have all extolled the virtues of access to government information. In mature democracies, access is recognized primarily as a necessary means to provide citizens with the ability to participate in the political process and to hold their elected

84 Information Commissioner of Canada, supra note 79 at 23ff.
85 Ibid.
representatives accountable.

Regardless of the setting, access to government information is now generally recognized not just as beneficial or preferable, but as essential to democratic governance. Nonetheless, the protection accorded to access to government information varies dramatically. While there are more than 60 countries with access to information regimes, many of these regimes operate in name only. Generally speaking, access rights cannot be relied upon in countries without strong institutions that can enforce the access regimes in place. In other words, access to information requires a certain level of institutional maturity to be effective.

Interestingly, among developing democracies, the strongest protection of access to government information has evolved in jurisdictions that have been faced with the strongest threats to democratic governance. In South Africa, the rejection of apartheid and the implementation of more representative democratic governance has included the entrenchment of a constitutional right to access government information. In India, where endemic corruption threatens the legitimacy of democratic institutions, the Supreme Court has recognized constitutional protection of access to government information, including access to information concerning the finances of candidates for legislative office, as being an implied part of the Indian Constitution.

Ironically, access to government information has not received constitutional protection in more mature democracies. This is perhaps understandable since the stability of the democratic process is more secure in these countries. That is to say that, in addition to regularized electoral processes, mature democracies, such as Canada, Great Britain, Australia and New Zealand, do not face the destabilizing influences of endemic
corruption or recent institutional turmoil that are the reality in countries such as India and South Africa. However, the stability of the political system also allows public expectations of political participation and political accountability to grow. As such, while these more mature democracies do not face immediate threats to their political stability, they do face rising expectations of transparency among their citizens. For the most part, these raising expectations have been addressed by the introduction of access to information legislation. However, the statutory access regimes that have been put in place in countries like Canada do not guarantee access will remain unrestricted. Indeed, it is arguable that there are greater threats to continuing access to government information than are often acknowledged. Those threats ultimately pose an unrecognized risk to the stability of our political system in light of citizens’ raised expectations of political participation and political accountability.

Notwithstanding their rhetoric, governments should not be relied upon to always stay true to principles of transparent governance, particularly when they are confronted with a threat, be it real or imagined. Faced with these bureaucratic and legislative challenges to access to government information, one is motivated to consider whether this foundation stone of modern democratic governance is protected by the Canadian Constitution. This is the task of the balance of this thesis.

86 This is not to say that these countries are free of corruption. One need only refer to the “Sponsorship Scandal” in Canada or the scandal concerning alleged sales of peerages in the United Kingdom to dispel that notion. Rather, what is assumed is that large scale corruption appears to be the exception rather than the rule in these countries. For a summary of the peerages scandal see: Toby Helm, “Labour’s treasurer ‘kept party in dark over loan deals’ Telegraph (13 March, 2006), online: Telegraph Media Group <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2006/03/16/nloans16.xml>
II. CHAPTER TWO

THE CANADIAN CONSTITUTION AND THE PRINCIPLE OF DEMOCRACY:
FROM FUNDAMENTAL PRINCIPLES TO THE FUNDAMENTALS OF THE
PRINCIPLE

Generally speaking, the importance of access to government information has been
recognized by parliamentarians in principle. More importantly, this political recognition
of the importance of access to our democratic process has also been translated into
legislative regimes that seek to provide some protection of access rights. Unfortunately,
the legislative protection afforded access to government information in Canada has
proven, in many cases, to be insufficient in practice. A number of existing and potential
threats to our existing statutory rights to access have been identified. In other words, the
principled recognition of the importance of access has not always translated into
protection in practice. Is there a way to fortify our existing access rights? Is there a way
to match the principled recognition of the importance of access to government
information with the practical protection of that access? Is a higher order of
constitutional protection available?

A strict, literal reading of the text of the Canadian Constitution would suggest
not. A right to access to government information is not explicitly included in the text of
the Constitution. However, there is nothing strict or literal about the prevailing methods
of interpreting the Canadian Constitution. As such, it is arguable that constitutional
protection for access to government information is not dependent on an explicit
constitutional provision outlining a right of access. Instead, constitutional protection of
such a right of access may be rooted in a broader interpretation of the Constitution itself
and of the protection afforded by the Constitution to the principle of democracy.
In this chapter, I will argue that the political recognition of the importance of access to government information outlined in chapter one is compatible with the Supreme Court of Canada’s conception of the scope of the constitutional principle of democracy. In other words, I will demonstrate that, at least in theory, the Court’s jurisprudence could support protection of access to government information as part of the constitutional principle of democracy.

My argument follows two basic steps. The first is to situate the role of the fundamental principle of democracy, which has been described as an “unwritten constitutional principle” within the broader context of constitutional interpretation in Canada. In so doing, I will discuss the ways in which unwritten constitutional principles, such as the principle of democracy, may contribute to our understanding of the scope of protection afforded by the Constitution. The second step involves a general discussion of the Supreme Court of Canada’s jurisprudence concerning the content of the principle of democracy and the ways in which the principle of democracy has been applied by the Court to inform its understanding of our Constitution. The particular argument that there is a specific need to rely on the principle of democracy in order to interpret the Constitution in a way that protects access to government information, in other words that there is an “access gap” in the Constitution, will be advanced in chapter three.

1) **Fundamental Roles of the Canadian Constitution**

It seems appropriate to set the discussion of the principle of democracy in the context of a broader understanding of the role of a Constitution. In short, it will be easier to understand the role that principle of democracy may play if we first agree upon the role of the Constitution more generally. The Supreme Court of Canada set out a concise
definition of the role of a Constitution in the *Manitoba Language Rights Reference*. In that case the Court stated: “The Constitution of a country is a statement of the will of the people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature and government.”

At base, then, the Constitution provides a framework for governance that sets out the fundamental principles to be upheld and promoted by government and that establishes restrictions or limitations on what governments can do. It seems reasonable that the restrictions on government action typically will be rooted in the fundamental principles that are to be protected and promoted. For example, if we accept that democracy is a fundamental principle of our Constitution, it seems reasonable that the Constitution will seek both to promote democratic governance and to restrict the ability of government to undermine democratic governance.

The Court also discussed the specific role of the judiciary with respect to the Constitution in the *Manitoba Language Rights Reference*. It stated:

...[The Constitution] is, as s. 52 of the *Constitution Act, 1982* declares, the “supreme law” of the nation, unalterable by the normal legislative process, and unsuffering of laws inconsistent with it. The duty of the judiciary is to interpret and apply the laws of Canada and each of the provinces, and it is thus our duty to ensure that the constitutional law prevails.

As this Court said in *Amax Potash Ltd. v. Government of Saskatchewan*, [1977] 2 S.C.R. 576, at p. 590:

A state, it is said, is sovereign and it is not for the Courts to pass upon the policy or wisdom of legislative will. As a broad statement of principle that is undoubtedly correct, but the general principle must yield to the requisites of the Constitution in a federal state. By it the bounds of sovereignty are defined and supremacy circumscribed. The Courts will not question the wisdom of enactments which, by the terms of the Canadian Constitution are within the competence of the Legislatures, but it is the high duty of this Court to insure that the legislatures do not

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transgress the limits of their constitutional mandate and engage in the illegal exercise of power.³

One of the primary duties of the judiciary is thus to regulate the exercise of power by government in order to ensure that government does not transgress the fundamental principles and restrictions included in the Constitution. More specifically, within the context of our democratic state, it is the judiciary’s duty to restrict the government from undermining the principles of democratic governance that are protected by the Constitution. This role was succinctly described by Justice McLachlin in RJR-MacDonald Inc. v. Canada (Attorney General):

Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the Constitution. But the courts also have a role: to determine, objectively and impartially, whether Parliament’s choice falls within the limiting framework of the Constitution. The courts are no more permitted to abdicate their responsibility than is Parliament.⁴

Given that the Constitution promotes and protects fundamental principles and the judiciary is bound to encourage the promotion and to enforce the protection of these principles, it is necessary to determine or identify the fundamental principles included in the Constitution. The issue of which particular elements should be considered to be included as part of the Constitution was addressed by the Supreme Court of Canada in the Patriation Reference.⁵ In their reasons for decision in that case, all members of the Court

³ Ibid. at 745 (Emphasis in original).
⁵ Reference Re Resolution to Amend the Constitution, [1981] 1 S.C.R. 753, (sub nom. Reference re Amendment of the Constitution of Canada (Nos. 1, 2 and 3)), 125 D.L.R. (3d) 1 [Patriation Reference cited to D.L.R.]. In the Patriation Reference, the Supreme Court was asked to determine a number of questions arising out of the decision of the federal government to unilaterally seek the amendment of the British North America Act by submitting a Joint Resolution of the House of Commons and the Senate to the British Parliament. In particular, the Court was asked to determine whether the Constitution required that the federal government achieve either unanimous provincial consent or substantial consent from the provinces before enacting amendments to the Constitution that would affect provincial powers. The majority of the Court found that there was no legal requirement that the federal government achieve the consent of the provinces prior to enacting such amendments. However, the majority of the Court also found that a constitutional convention requiring substantial provincial consent existed.
agreed that the Constitution consisted of more than just the written text. The majority (Martland, Ritchie, Dickson, Beetz, Chouinard and Lamar) stated:

A substantial part of the rules of the Canadian Constitution are written. They are contained not in a single document called a Constitution but in a great variety of statutes, some of which have been enacted by the Parliament of Westminster..., or by the Parliament of Canada..., or by the provincial Legislatures.... They are also to be found in Orders in Council....

Another part of the Constitution of Canada consists of the rules of the common law. These are rules which the Courts have developed over the centuries in the discharge of their judicial duties...

Those parts of the Constitution of Canada which are composed of statutory rules and common law rules are generically referred to as the law of the Constitution. In cases of doubt or dispute, it is the function of the Courts to declare what the law is and since the law is sometimes breached, it is generally the function of the Courts to ascertain whether it has in fact been breached in specific instances, and if so, to apply such sanctions as are contemplated by the law, whether they be punitive sanctions or civil sanctions such as a declaration of nullity.6

The “law of the Constitution” thus consists of rules that may be found in both the express provisions of the constitutional text and judge-made common law.

In addition to the law of the Constitution, the Constitution includes conventions. These conventions set out the rules of responsible government, in other words, they “regulate relations between the Crown, the Prime Minister, the Cabinet and the two Houses of Parliament”.7 The majority of the Court described the purpose of constitutional conventions as follows:

The main purpose of constitutional conventions is to ensure that the legal framework of the Constitution will be operated in accordance with the prevailing constitutional values or principles of the period. For example, the constitutional value which is the pivot of the conventions stated above and relating to responsible government is the democratic principle: the powers of the State must be exercised in accordance with the wishes of the electorate; and the constitutional value or principle which anchors the conventions regulating the

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6 Ibid. at 81-82.
7 Ibid. at 83.
relationship between the members of the Commonwealth is the independence of the former British colonies.\textsuperscript{8}

Constitutional conventions are developed by way of custom and precedent. They are not created by the Court, but may be recognized by the Court where there is sufficient precedent, where the parties affected have recognized that they are bound by the precedents and where there is a reason justifying the convention. Contrary to the law of the Constitution, constitutional conventions do not create legal obligations and are not enforceable by the Court.\textsuperscript{9} Rather, they are political practices that can only be enforced by moral suasion and electoral disapproval.

The majority summarized the elements that may be considered as part of the Constitution in an equation: “constitutional conventions plus constitutional law equal the total Constitution of the country.”\textsuperscript{10} This equation left the role of unwritten constitutional principles somewhat uncertain. Certainly the constitutional common law is based on fundamental principles that must be obeyed as part of the “law of the Constitution”. At the same time, the majority’s reasons linked constitutional principles to constitutional conventions, noting that the main purpose of the constitutional conventions is to ensure that the Constitutional framework is operated in accordance with the prevailing Constitutional principles of the period. Constitutional principles were identified as the pivots or guides for the operation of constitutional conventions. In this way, the conventions relating to responsible government are guided by and required to ensure the operation of the democratic principle. As such, it can be said that constitutional

\textsuperscript{8} \textit{Ibid.} at 84.
\textsuperscript{9} \textit{Ibid.} at 84-85.
\textsuperscript{10} \textit{Ibid.} at 87.
principles have a dual role as anchor of both constitutional law and constitutional conventions.

This dual role, however, can lead to confusion. The Supreme Court of Canada has often referred to the role that the principle of democracy plays in relationship to the constitutional convention of responsible government and other conventions that govern the functioning of our democratic institutions. Thus, in *Osborne v. Canada (Treasury Board)*, Justice Sopinka, writing for a majority of the Court, seemed to describe constitutional conventions and the democratic principles underlying our political system as being synonymous. While considering the effect of the constitutional convention of political neutrality of the public service, Justice Sopinka stated:

> Therefore, while conventions form part of the Constitution of this country in the broader political sense, *i.e.*, the democratic principles underlying our political system and the elements which constitute the relationships between various levels and organs of government, they are not enforceable in a court of law unless they are incorporated into legislation.\(^1\)

However, it is clear that the principle of democracy extends beyond its role in supporting the non-binding constitutional conventions regulating the relationship between political institutions in Canada. For instance, in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté Urbaine de Montréal*, the Court relied on “the constitutional framework and principles governing the organization and practices of Canada’s public institutions” to confirm that, absent a finding of bad faith or abuse of power, an award of damages could not be assessed against a municipality for a breach of the Quebec *Charter of Human Rights and Freedoms*. Justice LeBel, writing

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\(^{12}\) Ibid. at 333.


\(^{14}\) R.S.Q., c. C-12.
for the Court, confirmed that unwritten principles governed the exercise of power within our democracy, noting that: “The Constitution includes written rules, of course, but at the same time we cannot ignore the unwritten principles inherent in the democratic and parliamentary form of Canadian government and its origins, principles which govern the exercise of an independent legislative power.”15 Thus, in addition to supporting the non-binding constitutional conventions that regulate the relationship between political institutions in Canada, the principle of democracy also provides the foundation for the binding constitutional provisions that protect the democratic process and the right of citizens to participate in that process.

This dual role as the anchor of both binding constitutional law and non-binding constitutional conventions can be reconciled. This reconciliation is dependent on the recognition that, while constitutional conventions based on practice may not have legal force, the constitutional principles that underlie or guide those conventions may have legal force in particular instances. To decide otherwise would result in the absurd proposition that the mechanism for controlling our system of government could only be established or modified by the very political actors they are meant to restrain. This arises because constitutional conventions arise out of practice of political actors and not out of expectations of citizens. Certainly, in its more recent decisions, the Supreme Court of Canada has recognized that constitutional principles such as the principle of federalism and the principle of democracy may create legal obligations. I will return to this idea below.

2) **Fundamental Principles and the Canadian Constitution**

In order to understand how legal obligations may arise from the application of

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15 *Quebec v. Montreal*, *supra* note 13 at para. 16.
fundamental unwritten principles such as the principle of democracy, it is necessary to understand how these principles fit within our constitutional structure. This may be determined by answering two questions:

(a) What are the defining features of unwritten constitutional principles?
(b) What legitimate roles can unwritten constitutional principles fulfill?

a) **What are the defining features of unwritten constitutional principles?**

The importance of unwritten constitutional principles in the Canadian constitutional framework is at least partially explained by our British constitutional heritage. Indeed, one of the sources of unwritten constitutional principles that has been identified by the Supreme Court of Canada is the Preamble of the *Constitution Act, 1867*. The Preamble states that Canada is to have a “Constitution similar in Principle to that of the United Kingdom”. The Court has used the Preamble as a gateway to import into the Canadian Constitution those principles that are the foundations of the British Constitution. In the *Manitoba Language Rights Reference*, the Court found that the mention of the rule of law principle in the Preamble to the *Constitution Act, 1982* “is explicit recognition that the ‘rule of law [is] a fundamental postulate of our constitutional structure”*. In *New Brunswick Broadcasting*, Justice McLachlin found that the preamble of the *Constitution Act, 1867* “constitutionally guarantees the continuance of Parliamentary governance” which included the privileges that have been historically recognized as necessary for the proper functioning of legislatures. In her view, such privileges were “a legal power fundamental to the constitutional regime which Canada

17 *Manitoba Language Rights Reference, supra* note 1 at 750.
has adopted in its Constitution Acts, 1867 to 1982.”

The preamble is not the only source of unwritten constitutional principles identified by the Court. The Court has often referred to the ways in which unwritten constitutional principles are inherent to the very nature of constitutions and how they may be inferred from the nature and text of the Constitution itself. In their dissenting reasons in the Patriation Reference, Justices Martland and Ritchie described the shared characteristics of the “basic principles of the Constitution” that had been relied upon by the Supreme Court of Canada in many previous cases.

It may be noted that the above instances of judicially developed legal principles and doctrines share several characteristics. First, none is to be found in express provisions of the British North America Acts or other constitutional enactments. Second, all have been perceived to represent constitutional requirements that are derived from the federal character of Canada’s Constitution. Third, they have been accorded full legal force in the sense of being employed to strike down legislative enactments. Fourth, each was judicially developed in response to a particular legislative initiative in respect of which it might have been observed as it was by Dickson J. in the Amax case, supra, at p. 10 D.L.R., p. 591 S.C.R., that: “There are no Canadian constitutional law precedents addressed directly to the present issue…”

At the heart of Justices Martland and Ritchie’s description is the fact that these principles may not be explicitly identified in the text, but they may be inferred, nonetheless, from the Constitution.

In the Manitoba Language Rights Reference, the Court specifically noted that the unwritten constitutional principle that it was relying upon was “clearly implicit in the very nature of a Constitution.” The Court also acknowledged the important theoretical links between the rule of law principle and democratic theory, approving the description of the principle as “‘a philosophical view of society which in the Western tradition is

19 Ibid. at 377.
20 Patriation Reference, supra note 5 at 76.
21 Manitoba Language Rights Reference, supra note 1 at 750.
linked with basic democratic notions”.\footnote{Ibid. at 749.} This reflects an ongoing theme that unwritten constitutional principles are typically principles that are basic or fundamental to the operation of a democratic society.\footnote{Interestingly, the Court very explicitly relied on an interpretation of framer’s intent in order to justify its reliance on the principle of the rule of law in the \textit{Manitoba Language Rights Reference}. The Court found that the founders of the nation “must have intended” that Canadian society be governed by the rule of law. The Court also stated: \begin{quote} This Court cannot take a narrow and literal approach to constitutional interpretation. The jurisprudence of the Court evidences a willingness to supplement textual analysis with historical, contextual and purposive interpretation in order to ascertain the intent of the makers of our Constitution. (\textit{Ibid.} at 751) \end{quote} The Court has moved away from this emphasis on framers’ intent in subsequent decisions. However, it has continued to rely on the reference to a “Constitution similar in Principle to that of the United Kingdom”. It has also relied increasingly on the argument that some principles are inherent in the nature of Constitutions, or at least inherent to the nature and structure of the Canadian Constitution.} 

In the \textit{Quebec Secession Reference}, the Supreme Court engaged in a broader discussion of the nature of unwritten principles. The unwritten principles identified in the \textit{Quebec Secession Reference} were described as principles that “infuse our Constitution and breathe life into it” that are “clearly implicit in the nature of a Constitution”. The Court stated that “it would be impossible to conceive of our constitutional structure without them. The principles dictate major elements of the architecture of the Constitution itself and are as such its lifeblood.”\footnote{\textit{Reference re Secession of Quebec}, [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385 [\textit{Quebec Secession Reference} cited to D.L.R.] at 410.} In this way, the Court emphasized that unwritten principles will almost inevitably involve important, major concepts as opposed to ancillary detail.

The “unwritten principles” that have been identified and applied by the Supreme Court of Canada, principles such as federalism, democracy, the rule of law and protection of minority rights are all foundational aspects of our constitutional order. They are principles the existence of which no judge or scholar could seriously dispute without fundamentally undermining the popular understanding of the Canadian state. They are
also principles that have not been fully articulated in the text of the Constitution despite the fact that they provide the foundation of our constitutional order.

b) **What legitimate roles can unwritten constitutional principles play?**

The Supreme Court of Canada has identified a number of different roles that may be fulfilled by unwritten constitutional principles. The Supreme Court provided its most important discussion of the legitimate roles to be played by unwritten constitutional principles in the *Quebec Secession Reference*. In that case, the Court emphasized that unwritten principles may assist “in the interpretation of the text and the delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of political institutions.”

Assisting in the interpretation of the written provisions of the Constitution is perhaps the least contentious of the roles of unwritten principles. The Supreme Court of Canada has adopted a generous approach to the interpretation of the law of the Constitution. The two guiding principles of this approach are that the Constitution as a whole must be interpreted broadly (as a living tree capable of growth within its natural limits) and that the rights protection provisions of the *Charter*, in particular, should be interpreted in a purposive manner “in light of the interest [they were] meant to protect.” This method of interpretation is “aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter’s protection.”

This approach to interpretation of the written text is based on the assumption that the terms of the text should not be frozen in time, but rather should be allowed to grow

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25 Ibid. at 410.
27 Ibid. at para. 117.
and change in order to meet the needs of an evolving society.\textsuperscript{28} It is also based on the expectation that the Constitution ultimately will provide a comprehensive framework for governance. Not surprisingly, the key to providing such a broad interpretation is to identify the fundamental principles that underlie the more explicit provisions of the text. – to seek the “broader philosophy which is capable of explaining the past and animating the future” in Chief Justice McLachlin’s words.\textsuperscript{29} As such, unwritten constitutional principles are not just necessary for the identification of the current scope of rights and obligation or the current roles of political institutions, they also have a vital role to play in the development and evolution of the Constitution. As noted in the \textit{Quebec Secession Reference}: “… observance of and respect for these principles is essential to the ongoing process of constitutional development and evolution of our Constitution as a “living tree”…”\textsuperscript{30}

What are the roles for unwritten principles beyond that of simply assisting with the interpretation of the written provisions of the Constitution? Or as asked by the Court in the \textit{Quebec Secession Reference}: “Given the existence of these underlying constitutional principles, what use may the Court make of them?”\textsuperscript{31} The answer provided by the Court is multi-faceted. The Court has emphasized the importance of the written provisions of the Constitution, particularly the stabilizing effect of those provisions, noting that “there are compelling reasons to insist upon the primacy of our written Constitution. A written Constitution promotes legal certainty and predictability, and it provides a foundation and a touchstone for the exercise of constitutional judicial

\textsuperscript{29} \textit{Ibid.}
\textsuperscript{30} \textit{Quebec Secession Reference, supra} note 24 at 410.
\textsuperscript{31} \textit{Ibid.} at 411.
review.” 32 Thus, the Court has noted that unwritten principles may not “be taken as an invitation to dispense with the written text of the Constitution.” 33 However, the Court has also agreed with Chief Justice Lamer’s finding in the Provincial Judges Reference that the preamble to the Constitution Act, 1867 “invites the courts to turn those principles into the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text”. 34 As such, the Court has found that, in addition to assisting in interpreting the text, unwritten principles may be used to supplement the text in cases where the text does not provide a clear answer to the issue to be determined.

Unwritten principles do not act simply as substance fillers; they also have substantive force. Indeed, the Court left little doubt that unwritten constitutional principles could be used to impose substantive limits on government action.

Underlying principles may in certain circumstances give rise to substantive legal obligations (have “full legal force”, as we described it in the Patriation Reference, supra, at p. 845), which constitute substantive limitations upon government action. These principles may give rise to very abstract and general obligations, or they may be more specific and precise in nature. The principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments. “In other words”, as this Court confirmed in the Manitoba Language Rights Reference, supra, at p. 752, “in the process of Constitutional adjudication, the Court may have regard to unwritten postulates which form the very foundation of the Constitution of Canada”. 35

In summary, then, according to the Supreme Court of Canada unwritten principles may be relied upon when issues arise that are not dealt with by the text of the Constitution. They may be used not just to assist in the interpretation of the text of the

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32 Ibid.
33 Ibid. See, also, Provincial Judges Reference, infra note 34 at 620-21; New Brunswick Broadcasting, supra note 18 at 376.
35 Quebec Secession Reference, ibid. at 411.
Constitution, but also to fill in clear gaps in the text. These unwritten constitutional principles have normative force, that is to say that they give rise to substantive legal obligations that are binding on courts and legislatures. In certain circumstances, they may have full legal force and as such may constitute substantive limitations on government action.

Drawing from this rough outline of the Supreme Court of Canada’s jurisprudence concerning the role of unwritten constitutional principles, the following basic argument concerning constitutional protection of access to government information may be advanced. Constitutional protection of access is not limited to the strict written terms of the Constitution; rather it may also be rooted in the constitutional principle of democracy. The principle of democracy may be used either to assist in the interpretation of the written provisions of the Constitution that protect the democratic process or to fill gaps in the constitutional protection afforded to the democratic process by those written provisions. In either case, the protection offered through the application of the principle of democracy may impose substantive limitations on government action. More specifically, the recognition of a right to access government information as a part of the constitutional principle of democracy may affect the interpretation of legislative provisions restricting access to information, the exercise of discretion pursuant to such legislative provisions and ultimately the validity of legislative provisions that restrict access to information that is fundamental to the process of democratic governance.

Clearly, the argument supporting the application of the principle of democracy to protect access to government information will have to address a number of concerns. A

\[36\] Ibid.

\[37\] Ibid.
number of academics have raised very specific criticisms of the Supreme Court’s approach to the application of unwritten constitutional principles. Much of this academic critique has focused on the issue of whether the Supreme Court’s approach to applying unwritten principles in the course of constitutional interpretation undermines the legitimacy of judicial review. It thus seems useful to set out some criteria by which theories of constitutional interpretation may be assessed. Without such criteria it would be difficult to assess the criticisms of the Supreme Court of Canada’s approach or to determine why one theory of constitutional interpretation should be accepted over others.

In my view, four related, but distinct, criteria may be suggested:

(a) Does the method retain the primary role of democratically elected representatives of the public?

(b) Does the method provide a role for judges appropriate to their institutional capacity?

(c) Does the method effectively restrain judges from applying their own personal values? and

(d) Does the method respect and/or reinforce the public discourse of rights?

These criteria recognize the basic fact that constitutional interpretation takes place within a democratic polity. The first criterion recognizes the fundamental role of representative legislatures as the primary conduit for expressions of public preference in any democracy; the second recognizes that judges and the judicial process are better suited to some roles than others; the third recognizes that, given their unelected status, judges should not be free to impose their own value judgments on society; and the fourth recognizes that the process of constitutional drafting and amendment can be a profoundly important and stabilizing exercise in a democracy.

It goes without saying that critics with different perspectives will argue that these
criteria may be satisfied by different means. A positivist would argue that the primary role of the democratically elected legislature is ensured by the insistence that the text of the Constitution, enacted by the legislature, is the primary source of judicial norms. From this perspective, judges are considered to be best equipped for determining legal meaning as opposed to analyzing policy options, thus they should be limited to interpreting the text of the Constitution and not permitted to balance competing policy options. In turn, judges are prevented from imposing their personal value preferences by the requirement that they apply only those constitutional values reflected in the text of the Constitution. Finally, a positivist would argue that the public constitutional discourse is reinforced by ensuring that any changes to the Constitution are enacted through the formal political amendment process rather than through judicial interpretation.

Many of the academic critics of the Supreme Court of Canada’s application of unwritten constitutional principles raise issues rooted in this type of positivist perspective. In particular, academic critics have focused on two specific concerns: first, that the application of unwritten principles will result in judges usurping the legislature’s role of creating, rather than simply interpreting, constitutional provisions; and second, that, when applying unwritten principles, judges will impose their personal value preferences in the course of interpreting the Constitution.

38 In their critique of the Supreme Court’s decision in the Quebec Secession Reference, Sujit Choudhry and Robert Howse construct, for comparative purposes, a positivist account of constitutional interpretation in Canada. They suggest that this positivist account reflects many of the assumptions held by various actors in the Canadian constitutional arena. This positivist account views the express provisions of the Constitution’s text as the source of constitutional norms in Canada; it places heavy reliance on judicial precedents; and it allows for amendment only by express addition to the constitutional text. It regards the courts as the exclusive (and therefore supreme) interpreters of constitutional meaning. Finally, given that the positivist account regards the text as the primary legitimate source of constitutional norms, it rejects moral reasoning as an interpretive tool in most cases. In other words, the positivist account “defends the possibility of distinguishing the construction of constitutional provisions from moral reasoning writ-large.” Sujit Choudhry and Robert Howse, “Constitutional Theory and The Quebec Secession Reference” (2000) 13 Can. J.L. & Jur. 143 at 151-153.
Underlying each of these concerns is the common critique that the Supreme Court of Canada has not adequately justified its approach to the application of unwritten constitutional principles because it has left several fundamental questions unanswered. Among these questions are the following:

1. Why should judges, as opposed to legislators, fill gaps in the Constitution?
2. How can judicial discretion be restricted in the process of identifying and applying unwritten constitutional principles?
3. Why should unwritten constitutional principles be given the same normative force as written provisions of the Constitution?

I will address these concerns at different stages of the thesis as I set out the argument in favour of recognizing a constitutional right to access government information through the application of the principle of democracy. More particularly, in chapter three, I will specifically address the critique that allowing judges to identify and fill gaps in the Constitution would allow the judiciary to usurp the legislature’s role as “creators” of the Constitution. I will address the issue of judicial discretion in chapters four and five when I set out the process for recognizing a right to access government information as part of the principle of democracy. Finally, I will address the issue of the normative force to be ascribed to unwritten principles in chapters six, seven and eight when I discuss the specific ways in which the principle of democracy may be applied to protect access to government information.

At this stage, however, I propose to begin with a discussion of the Supreme Court’s evolving understanding of the content of the democracy principle. This discussion will determine whether the principle of democracy is compatible in general terms with protection of access to government information.
3) The Fundamental Principle of Democracy

Not surprisingly, the Supreme Court of Canada’s understanding of the principle of democracy has evolved over time and through a series of cases. As such, in order to understand the scope of the principle of democracy in the Canadian Constitution and, ultimately, to understand whether the principle of democracy may be extended to protect access to government information, it is necessary to explore the Supreme Court’s jurisprudence in some detail. This is the task to which I now turn.

I will start by examining the Supreme Court’s discussion of the democracy principle in the *Quebec Secession Reference*. The Supreme Court of Canada’s reasons in the *Quebec Secession Reference* provided a broad outline of the Court’s understanding of the principle of democracy, but it left many details unexplained. The Court’s discussion did not provide a clear understanding of the theoretical foundation of the principle of democracy, the ways in which our understanding of the principle have evolved over time, or the ways in which the principle may be legitimately applied. Each of these questions must be answered before it is possible to determine whether the principle of democracy supports a right of access to government information that can limit government restrictions of access to information.

To assist in this task, I will examine the Supreme Court’s discussion of the democratic principle in a series of cases known as the Implied Bill of Rights cases. In these cases, members of the Court discussed the foundations of democracy in Canada when considering the issue of protection of political speech prior to the entrenchment of the *Canadian Charter of Rights and Freedoms*. The discussion of the requirements of a
parliamentary democracy that was engaged in these cases has set the foundation of the Supreme Court’s understanding of the democracy principle.\textsuperscript{39}

\textbf{a) Quebec Secession Reference}

In the \textit{Quebec Secession Reference}, the Supreme Court recognized that the principle of democracy has been at the heart of the development of the Canadian Constitution. In the Court’s words, “[d]emocracy is a fundamental value in our constitutional law and political culture.”\textsuperscript{40} In the Court’s view, the principle of democracy was so fundamental to the constitutional order that it was simply assumed to operate by the constitutional framers and did not require direct reference in the text. The Court stated that the democracy principle “can best be understood as a sort of baseline against which the framers of our Constitution, and subsequently, our elected representatives under it, have always operated… The representative and democratic nature of our political institutions was simply assumed.”\textsuperscript{41}

The Court emphasized that democratic institutions in Canada have evolved over time, stating: “… our constitutional history demonstrates that our governing institutions have adapted and changed to reflect changing social and political values. This has generally been accomplished by methods that have ensured continuity, stability and legal order.”\textsuperscript{42} While much of the evolution of Canadian democratic institutions has been enacted by legislatures, the Court recognized that unwritten principles are an integral part

\footnotesize{\textsuperscript{39} While the Supreme Court’s jurisprudence concerning political speech under section 2(b) of the Charter as well as its jurisprudence concerning the right to vote under s. 3 of the Charter have been key elements in the discourse concerning the principle of democracy, I will not deal with these cases in detail until chapter five. In chapter five, I will explain how the Court’s Charter jurisprudence, proceeding from the conception of the democracy principle articulated in the Implied Bill of Rights cases, supports the recognition of a constitutional right of access to government information as part of the principle of democracy.

\textsuperscript{40} Quebec Secession Reference, supra note 24 at para. 61.

\textsuperscript{41} Ibid. at para. 62.

\textsuperscript{42} Ibid. at para. 33.}
of constitutional evolution of democratic institutions in Canada, stating: “… observance of and respect of these principles is essential to the ongoing process of constitutional development and evolution of our Constitution as a ‘living tree’…”\textsuperscript{43}

As a result of the evolution of Canadian democratic institutions, the baseline reflected in the principle of democracy has been raised over time as the Canadian polity has matured. The Court recognized that, traditionally, democracy is understood as a system of majority rules. In recognition of that fact, one of the ultimate goals of the evolution of democratic institutions in Canada has been greater and more effective representation. Repeating the words of the majority in the Saskatchewan Electoral Boundaries Reference, the Court stated: “The Canadian tradition… is ‘one of evolutionary democracy moving in uneven steps toward the goal of universal suffrage and more effective representation.’”\textsuperscript{44} This evolutionary, or maturing, process is to be measured, at least in part, by improvements in the ability of the political system to accurately represent or reflect the views of its constituent members.

The Court, however, did not limit the democracy principle to the process of majority rule, but recognized that the principle includes substantive content also. “Democracy is not simply concerned with the process of government. On the contrary, as suggested in Switzman v. Elbling, … democracy is fundamentally connected to substantive goals, most importantly, the promotion of self government…”\textsuperscript{45}

In Canada, self government has been achieved through the institutions of representative government, the centre of which is our legislative system. As such, much

\begin{footnotesize}
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\item[43] Ibid. at para. 52.
\item[45] Quebec Secession Reference, ibid. at para 64.
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of the Court’s treatment of democracy has focused on the process of delivering representative and responsible government, including the need to ensure fair and regular elections.\footnote{\textit{Ibid.} at para. 65. “Historically, this Court has interpreted democracy to mean the process of representative and responsible government and the right of citizens to participate in the political process as voters (\textit{Reference re Provincial Electoral Boundaries, supra}) and as candidates (\textit{Harvey v. New Brunswick (Attorney General)}, [1996] 2 S.C.R. 876, 137 D.L.R. (4th) 142).”}

The Court was careful to note that the substantive goal of self governance included more than simply reflecting the will of the majority. It included respect for the rule of law and for moral values enshrined in the Constitution itself.

The consent of the governed is a value that is basic to our understanding of a free and democratic society. Yet democracy in any real sense of the word cannot exist without the rule of law. It is the law that creates the framework within which the “sovereign will” is to be ascertained and implemented. To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. That is, they must allow for the participation of, and accountability to, the people, through public institutions created under the Constitution. Equally, however, a system of government cannot survive through adherence to the law alone. A political system must also possess legitimacy, and in our political culture, that requires an interaction between the rule of law and the democratic principle. The system must be capable of reflecting the aspirations of the people. But there is more. Our law’s claim to legitimacy also rests on an appeal to moral values, many of which are imbedded in our constitutional structure. It would be a grave mistake to equate legitimacy with the “sovereign will” or majority rule alone, to the exclusion of other constitutional values.\footnote{\textit{Ibid.} at para. 67.}

The Court linked process with substance by noting that the substantive goal of self governance is protected through the democratic process. “Put another way, a sovereign people exercises its right to self-government through the democratic process.”\footnote{\textit{Ibid.} at para. 64.} If we unpack the Court’s distinction between process and substance, between legality and legitimacy, we see that the ability of the political system to accurately reflect the views of its constituent members is at the core of both legitimacy and legality of the
political system. In other words, at base, the system must ensure sufficient institutional protections to enable citizens to participate in the political process and to hold that process accountable. Indeed, the Court explicitly identified participation and accountability as two fundamental elements of the legal framework of democracy in Canada. However, equally important is the notion that these citizens see their preferences reflected in the outcomes of the system: “The system must be capable of reflecting the aspirations of the people.” Procedural controls are meaningless if they are ineffective. If the system fails to reflect the aspirations of the people, it loses its legitimacy, notwithstanding the existence of legal safeguards. As such, the legitimacy of the system is tied, at least in part, to the effectiveness of the legal safeguards in ensuring that the ability of citizens to participate and hold the process accountable are meaningful.

In recognition of the need to guarantee the accountability of and citizen participation in the political process, the Court underlined the importance of discussion and dissent in ensuring the proper functioning of the democratic process.

Finally, we highlight that a functioning democracy requires a continuous process of discussion. The Constitution mandates government by democratic legislatures, and an executive accountable to them, “resting ultimately on public opinion reached by discussion and the interplay of ideas” (Saumur v. City of Quebec, supra, at p. 330). At both the federal and provincial level, by its very nature, the need to build majorities necessitates compromise, negotiation and deliberation. No one has a monopoly on truth, and our system is predicated on the faith that in the marketplace of ideas, the best solutions to public problems will rise to the top. Inevitably, there will be dissenting voices. A democratic system of government is committed to considering those dissenting voices, and seeking to acknowledge and address those voices in the laws by which all in the community must live.49

The Court’s understanding of the democracy principle in the Quebec Secession Reference may be summarized as follows. The Court noted that the principle of

49 Ibid. at para. 68.
democracy is best understood as a baseline against which the Constitution has always operated. The baseline, which includes the representative and democratic nature of Canada’s political institutions, was not explicitly mentioned in the text of the Constitution Act, 1867 because it was simply assumed to operate. Over time, the democratic baseline has been raised as Canada’s “governing institutions have adapted and changed to reflect changing social and political values.”\(^\text{50}\) This evolution of Canadian democratic institutions, which has largely been the result of legislative action, has resulted in greater and more effective representation and, ultimately, the realization of universal adult suffrage.

The Court did not limit the democratic principle to procedural goals, but also recognized that democracy included substantive goals, most importantly the promotion of self government. Other substantive goals include the respect for the rule of law and moral values that are embedded in the Canadian constitutional structure.\(^\text{51}\) The Court thus emphasized that the democratic principle should not be limited to the notion of majority rule. It also noted that the substantive goal of self-government is achieved through the democratic process. The Court reaffirmed that the democratic process itself requires a continuous process of discussion.

The balance of this chapter will be devoted to discussing and analyzing cases that will assist us to better understand the content of the principle of democracy outlined above. For the purposes of this thesis, I will focus on the procedural aspects of the principle. I acknowledge that it is not possible to fully distinguish between the

\(^{50}\) Ibid. at para. 33.
\(^{51}\) While the Court did not expressly define these moral values, one can presume that the Court as referring to the protection of substantive rights such as the right to equality and the protection, minority education rights and language rights.
procedural aspects and substantive goals of any democratic system. However, the focus on procedure may be justified given that the procedural aspects of a democratic system provide the necessary protection of any substantive goals the system may be designed to attain.

b) “Implied Bill of Rights” Case

The Implied Bill of Rights cases were a series of cases in which a number of justices of the Supreme Court of Canada discussed the notion that some rights, such as the freedom of political speech, may be so important to the democratic process that the power of legislatures to restrict these rights may be limited. The term “Implied Bill of Rights” was applied to these cases by commentators because some decisions in those cases appeared to be implicating rights into the text of the Constitution despite the fact that no written Bill of Rights had been included in the Constitution Act, 1867.

It is important to note at the outset that the so-called Implied Bill of Rights cases were never so identified by the judges of the Supreme Court who wrote the decisions that later carried this label. In most cases, rather than attempting to infer rights from the Constitution, these judges were analyzing the Constitution in order to determine which level of government had jurisdiction over political speech. In so doing, however, these judges provided a valuable insight into both the nature of Canadian democracy and the nature of the Constitution that protected that democratic regime. Their judgments highlighted the importance of reading beyond the text of the Constitution to the underlying assumptions that support the text and opened the door to the Supreme Court’s

application of unwritten constitutional principles in the  *Quebec Secession Reference* and beyond.

(i)  **Reference re Alberta Legislation**\textsuperscript{53}

The first case to raise the possibility that a right of political speech could be implied from the  *Constitution Act, 1867* was the  *Alberta Press* case. The  *Alberta Press* case was a reference case submitted to the Supreme Court of Canada in which the Court was asked to pronounce on the validity of three provincial bills introduced by Alberta’s provincial government in order to implement a system of social credit in the province. The  *Alberta Social Credit Act*,\textsuperscript{54} and ancillary legislation, was drafted to create a complex system designed to regulate the credit available in the province in an attempt to increase the standard of living without giving rise to undue inflation. The Social Credit system was viewed by the Alberta government as a replacement for the existing monetary system and included the provision of Alberta Credit to consumers through channels created by the legislation.

During the course of considering the three bills specifically referred to it, the Supreme Court of Canada found that the  *Alberta Social Credit Act* which was the central legislative measure in the Social Credit scheme, was *ultra vires*. Although they differed over the precise reasons, the various members of the Court ruled that the legislation exceeded the province’s jurisdiction over property and civil rights and over matters merely local and private in the Province since it established a system of banking and was concerned with the regulation of trade and commerce, both of which fall within the


\textsuperscript{54} S.A. 1937, c. 10.
jurisdiction of the federal government. The Court found that the ancillary legislation that was the specific subject of the reference case must also be found ultra vires.

The Act to Ensure the Publication of Accurate Laws and Information, also known as Bill 9, was one of the three bills specifically referred to the Supreme Court for review. Bill 9 was ancillary legislation that was proposed to be enacted together with the Alberta Social Credit Act. It was designed to impose certain duties upon the press with regard to reporting concerning the Social Credit scheme. In particular, it would have required newspapers to publish statements furnished by the Chairman of the Social Credit Board in order to correct or amplify any statements concerning the government’s Social Credit policy. It also required newspapers to provide the government with information concerning the sources of information for statements made in the newspapers about the government’s Social Credit policy. In short, the legislation provided for extensive government control over the content to be published in newspapers concerning government activity.

Chief Justice Duff, writing for himself and Justice Davis, found that Bill 9 was based on the assumption that the Alberta Social Credit Act was valid and that, since that Act was not in fact valid, the ancillary Bill 9 was also, inevitably, invalid. Justices Kerwin and Crocket and Justice Hudson agreed in principle with this portion of Chief Justice Duff’s reasons concerning Bill 9. However, Chief Justice Duff went on to consider, in obiter, whether Bill 9 violated the principle of freedom of public discussion.

Chief Justice Duff began his consideration of this point by noting that the Canadian Constitution contemplates a representative Parliament. He went on to describe the necessary conditions for the efficacy of such a representative system of government:

\(^{55}\) Alberta Press, supra note 53 at 92.
The statute contemplates a Parliament working under the influence of public opinion and public discussion. There can be no controversy that such institutions derive their efficacy from the free public discussion of affairs, from criticism and answer and counter-criticism, from attack upon policy and administration and defence and counter-attack; from the freest and fullest analysis and examination from every point of view of political proposals. This is signally true in respect of the discharge by Ministers of the Crown of their responsibility to Parliament, by members of Parliament of their duty to the electors, and by the electors themselves of their responsibilities in the election of their representatives.56

Chief Justice Duff thus emphasized the importance of free public discussion to the democratic process. However, he did not suggest that the right to free public discussion was an absolute right that was beyond the power of Parliament to regulate in any circumstances. Rather, he observed that Parliament had the power to protect and to regulate the freedom of discussion.

The right of public discussion is, of course, subject to legal restrictions; those based upon considerations of decency and public order, and others conceived for the protection of various private and public interests with which, for example, the laws of defamation and sedition are concerned. In a word, freedom of discussion means, to quote the words of Lord Wright in James v. Commonwealth of Australia, [1936] A.C. at p. 627, “freedom governed by law.”

Even within its legal limits, it is liable to abuse and grave abuse, and such abuse is constantly exemplified before our eyes; but it is axiomatic that the practice of this right of free public discussion of public affairs, notwithstanding its incidental mischiefs, is the breath of life for parliamentary institutions.

We do not doubt that (in addition to the power of disallowance vested in the Governor General) the Parliament of Canada possesses authority to legislate for the protection of this right. The authority rests upon the principle that the powers requisite for the protection of the Constitution itself arise by necessary implication from the B.N.A. Act as a whole (Fort Frances Pulp & Paper Co. v. Manitoba Free Press Co., [19230 3 D.L.R. 629); and since the subject matter in relation to which the power is exercised is not exclusively a provincial matter, it is necessarily vested in Parliament.57

Chief Justice Duff acknowledged that the provinces have some jurisdiction over the regulation of newspapers. However, he found that the limit of that jurisdiction was

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56 Ibid. at 107.
57 Ibid. at 107-08.
reached when that regulation substantially interfered with the functioning of parliamentary institutions.

… Some degree of regulation of newspapers everybody would concede to the Provinces. Indeed, there is a very wide field in which the Provinces undoubtedly are invested with legislative authority over newspapers; but the limit, in our opinion, is reached when the legislation effects such a curtailment of the exercise of the right of public discussion as substantially to interfere with the working of the parliamentary institutions of Canada as contemplated by the provisions of the B.N.A. Act and the statutes of the Dominion of Canada. 58

Chief Justice Duff concluded that law protecting public discussion existed at the time of the enactment of Constitution Act, 1867 (which was known at the time as the B.N.A. Act) and of the Alberta Act (in 1905). Pursuant to s. 129 of the Constitution Act, 1867, Alberta did not have the power to change that law. 59

Justice Cannon found that Bill 9 amounted to an attempt by the Alberta government to amend the Criminal Code to prohibit certain types of statements. He spoke more generally about the importance of the free discussion of public policy:

Under the British system, which is ours, no political party can erect a prohibitory barrier to prevent the electors from getting information concerning the policy of the Government. Freedom of discussion is essential to enlighten public opinion in a democratic State; it cannot be curtailed without affecting the right of the people to be informed through sources independent of the Government concerning matters of public interest. There must be an untrammeled publication of the news and political opinions of the political parties contending for ascendancy. As stated in the preamble of the British North America Act, our Constitution is and will remain, unless radically changed, “similar in principle to that of the United Kingdom.” At the time of Confederation, the United Kingdom was a democracy. Democracy cannot be maintained without its foundation: free

58 Ibid. at 108.
59 While Justices Kerwin, Crocket and Hudson did not comment on the impact of the right of free discussion of public affairs, Justice Cannon provided his views on the subject. Justice Cannon, like Chief Justice Duff, acknowledged that the Constitution must protect the foundations of the Canadian democratic system. Those foundations include the right to free discussion, within the limits set by the law, of all matters affecting the State. Justice Cannon arguably went further than Chief Justice Duff by suggesting that the people of a democracy have a right “to be informed through sources independent of the Government concerning matters of public interest.” Ibid. at 119.
public opinion and free discussion throughout the nation of all matters affecting the State within the limits set by the Criminal Code and the common law.60

In order to understand the importance of the Alberta Press case to the Supreme Court’s understanding of the principle of democracy, it is necessary to deconstruct Chief Justice Duff’s reasons in more detail. There are five important aspects of Chief Justice Duff’s reasoning in the Alberta Press Case. First, the Chief Justice framed the right of free discussion as a right necessary to preserve the efficacy of Canada’s political institutions, particularly Parliament. Thus, Chief Justice Duff acknowledged that it was not sufficient that the institutions themselves be established in the terms of the Constitution. Rather, he argued that the means of protecting the efficacy of the institutions must also be constitutionally protected. In this way, he found that the Constitution contemplates a Parliament working under the influence of public opinion and public discussion, even though there is no explicit stipulation of this in the Constitution Act, 1867. Second, Chief Justice Duff noted that the free discussion of political affairs should extend to both policy and administration. Third, the Chief Justice noted that public discussion and criticism of policy and administration could impact three separate, yet interconnected, spheres of responsibility; the responsibility of Ministers of the Crown to Parliament, the responsibility of Parliament to the electors and the responsibility of electors in electing their representatives. Fourth, Chief Justice Duff acknowledged that the power to protect the fundamental elements of the Constitution is implicit in the Constitution itself. Finally, the Chief Justice noted that a substantial interference with parliamentary institutions could be remedied.

60 Ibid. at 119.
Taken together, these elements start to form the basis of a comprehensive view of the unwritten constitutional principle of democracy in Canada. At the core of this view of the principle of democracy is the fact that the Canadian Constitution established a parliamentary system of representative democracy in Canada and included protection for those elements necessary to make that parliamentary democracy effective. The foundations of the parliamentary system include three overlapping systems of responsibility and accountability: the responsibility of citizens to elect their parliamentary representatives, the responsibility and accountability of parliamentary representatives to the citizens who elect them to the legislature, and the responsibility and accountability of the executive, namely the Cabinet, to the legislature. Each level of responsibility and accountability includes two aspects, policy and administration.

The system of responsibility and accountability may be further explained as follows. While there is no legal duty to vote, our democratic system cannot function unless enough citizens fulfill their democratic responsibility to choose the member they wish to represent them in the legislature. Although this is not a critical element of the democratic principle, it may be argued that citizens are morally accountable to each other for fulfilling their duty to vote conscientiously. In choosing who will represent them in the legislature, citizens may focus on either the proposed policies of the representative and her party or the record of administration of that representative and her party or both. While other factors may come into play, these two factors are the most important ones.

At the next level of responsibility and accountability, it follows that elected representatives may be held accountable for both the policies they and their parties promote and, if their party is in government, the government’s record of administration.
Finally, the government is accountable to the legislature in so far as it must maintain the confidence of the legislature in order to continue to govern during its mandate. In a parliamentary system of democratic governance, that accountability of the government is primarily achieved through the accountability of the Cabinet.

First, the Cabinet as a whole is accountable to the legislature for the policies it promotes. Individual Cabinet members are required to maintain collegiality and support government policy notwithstanding any personal misgivings. These policies will not be implemented in the form of legislation unless they receive the consent of a majority of the legislature. Indeed, important issues of government policy are considered to be issues of “confidence” and, as such, must receive the support of the legislature or result in a “loss of confidence” of the legislature in the government. Where important elements of government policy are voted down in the House of Commons, the government is deemed to lose the confidence of the legislature and may be forced to resign in order to allow another party to attempt to attain the confidence of the legislature to govern or request that the House of Commons be dissolved and an election called.\(^61\)

Second, individual Cabinet members are responsible for the administration of their respective departments. Strictly speaking, this means that Cabinet members can be held accountable, that is forced to resign, if there is mismanagement of the department for which they are responsible. Realistically, this type of ministerial responsibility is no longer strictly enforced except in cases of extreme mismanagement or malfeasance. Nonetheless, Cabinet accountability extends to both government policy and administration.\(^62\)

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\(^62\) Ibid. at 244-245.
It must be noted that this system of responsible government is not strictly enforceable under the Constitution. In other words, it does not form part of the law of the Constitution, but rather is part of the conventions of the Constitution. As noted earlier, these conventions, which are developed through practice, are enforced by political means not legal remedies. Nonetheless, they still remain fundamental to the operation of our parliamentary system of democracy. More importantly, the foundation of this system of accountability, that is the accountability of the legislature to the electorate, is not governed by convention, but is rather rooted in law. Indeed, as noted above, the Supreme Court of Canada recognized in the *Quebec Secession Reference* that institutionalized mechanisms for political participation and accountability are the core of the legal framework for Canada’s political system.

In order for the Canadian parliamentary system to function properly each level of responsibility and accountability must function properly. There is no use in requiring Cabinet to maintain the confidence of the legislature if the legislature is prohibited from discussing the actions of Cabinet. Likewise, the accountability of individual representatives would be meaningless if citizens were unable to discuss and debate the policies and records of administration of the individual representatives and their parties. Such impediments to the proper functioning of these lines of responsibility and accountability would amount to substantial interferences with parliamentary institutions.

Typically, discussion of the implications of representative democracy have focused on the electoral process and the importance of ensuring that citizens can make informed choices about who should represent them in the legislature. This discussion has usually centered on the importance of free discussion of political affairs to ensure that

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citizens may engage in meaningful debate concerning the proposed policies and records of administration of the candidates and their political parties. However, I would argue that the foundations of a properly functioning parliamentary democracy extend beyond the electoral stage to the functioning of Parliament itself.64 Indeed, the importance of maintaining the lines of accountability and responsibility within Parliament as well as between Parliament and the citizens was emphasized by Chief Justice Duff in the Alberta Press case.

The importance of the Alberta Press case extends beyond its implications for the content of the principle of democracy to its implications for the effect of that principle. As noted above, Chief Justice Duff’s discussion of the right of free discussion of public affairs raised the possibility that a legislature may be prevented from restricting that right if the restriction proposed by the legislature would “substantially interfere” with parliamentary institutions. Admittedly, Chief Justice Duff found that right of free discussion of public affairs may be limited under the law and that Parliament, as opposed to provincial legislatures, had the power to regulate free expression. Similarly, Justice Cannon viewed the freedom of discussion as being limited by the law, namely the Criminal Code and the common law. Justice Cannon also considered Parliament, as opposed to provincial legislators, competent to curtail the right of free discussion.65

The fact that both Chief Justice Duff and Justice Cannon recognized that the right to freedom of discussion could be regulated should not come as a surprise given that, even under s. 2(b) of the Charter, free expression may be regulated in certain

65 Alberta Press, supra note 53 at 120.
circumstances. It is thus notable that the Chief Justice left the issue of the degree of acceptable regulation of free discussion of public affairs by Parliament undefined.

Thus, in the *Alberta Press Case*, three of the six judges of the Supreme Court of Canada who participated in the decision held that the free discussion of public affairs was vital to the proper functioning of a representative democracy. Chief Justice Duff went so far as to suggest that the operation of our political system in conjunction with this type of free discussion of public affairs is not just necessary but is contemplated by the Constitution. As such, these judges found that it was beyond provincial jurisdiction to restrict public discussion to the extent that it substantially interfered with the proper functioning of democracy. However, all three of these judges also noted that freedom of discussion and freedom of the press fell under the jurisdiction of the federal Parliament, which was responsible both for protecting freedom of discussion and for restricting it, where necessary, by law. It was left unresolved whether Parliament’s jurisdiction to restrict the right of free discussion of public affairs could also be restricted if legislation it enacted substantially interfered with the proper functioning of parliamentary institutions. Strictly speaking, the comments of Chief Justice Duff and Justice Cannon in the *Alberta Press Case* did not result in any actual restrictions on the power of either Parliament or provincial legislatures to restrict freedom of speech. The case was decided on grounds other than those concerning the right of public discussion. However, the *obiter* comments made by Chief Justice Duff and Justice Cannon suggested that there were principled reasons why provincial legislatures should not be allowed to restrict political
speech. They also held the kernel of the broader argument that certain restrictions of political speech should not be permitted of any level of government.\(^{66}\)

(ii) *Switzman v. Elbling*\(^{67}\)

*Switzman v. Elbling* involved a challenge to the validity of Quebec’s *Communistic Propaganda Act*.\(^{68}\) The Act, popularly known as the Padlock Law, prohibited the use of houses for the propagation of Communism or Bolshevism and also prohibited the publication or distribution of material propagating Communism or Bolshevism. Eight of the nine judges of the Supreme Court of Canada who heard the appeal found the Padlock Law to be invalid. Three judges, Justices Rand, Abbott and Kellock found that the Act violated the freedom of political speech and was thus *ultra-vires* the provincial government’s jurisdiction. Justices Kerwin, Fauteux, Nolan, Locke and Cartwright found that the Act impinged on the federal government’s criminal law power and was *ultra vires* for this reason. None of these judges discussed the issue of freedom of political speech.

Justice Taschereau, in dissent, took judicial notice of the threat of communism and found that the legislation was a proper application of the province’s power to regulate the use of property.\(^{69}\) Justice Taschereau expressed his support for the “fundamental liberties” of free speech and a free press, but insisted that these liberties are not absolute and must be limited in some circumstances. In his view, this case represented one such circumstance since “…these liberties would cease to be a right and become a privilege, if it were permitted to certain individuals to misuse them in order to propagate dangerous

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\(^{66}\) As noted by Dale Gibson, the logic of the argument applies to Parliament as well as provincial legislatures. Dale Gibson, “Constitutional Amendment and the Implied Bill of Rights” (1966) 12 McGill L.J. 497.


\(^{68}\) R.S.Q. 1941, c. 52.

\(^{69}\) Switzman, supra note 67 at 351, 347.
doctrines that are necessarily conducive to violations of the established order.”

Justice Taschereau also held that, although the legislation may “appear rigid to some”, it was not within his jurisdiction to judge the wisdom of the legislation. He thus noted in conclusion that, “the severity of a law adopted by a competent power, does not brand it with unconstitutionality.”

Interestingly, Justice Taschereau did not explicitly reject the reasoning of Chief Justice Duff in the *Alberta Press* case.

Justice Rand began his reasons by discussing the evolution of attitudes towards freedom of speech, noting that the restrictions on speech had gradually been eroded:

For the past century and a half in both the United Kingdom and Canada, there has been a steady removal of restraints on this freedom, stopping only at perimeters where the foundation of the freedom itself is threatened. Apart from sedition, obscene writings and criminal libels, the public law leaves the literary, discursive and polemic use of language, in the broadest sense, free.

Justice Rand thus acknowledged that the recognition of the importance of free speech to the democratic process developed over time. Interestingly, as outlined in chapter one, the protection of access to government information has similarly expanded over time as the recognition of its importance to effective democratic governance has been increasingly recognized.

In *Switzman*, Justice Rand did not make direct reference to the *Alberta Press Case*. However, he engaged in his own defence of the freedom of speech as a vital component of a representative, parliamentary democracy.

Indicated by the opening words of the preamble in the Act of 1867, reciting the desire of the four Provinces to be united in a federal union with a Constitution “similar in Principle to that of the United Kingdom”, the political theory which the Act embodies is that of parliamentary Government, with all its social implications, and the provisions of the statute elaborate that principle in the

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70 Ibid. at 352.
71 Ibid.
72 Ibid. at 356.
institutional apparatus which they create or contemplate. Whatever the
deficiencies in its workings, Canadian Government is in substance the will of the
majority expressed directly or indirectly through popular assemblies. This means
ultimately government by the free public opinion of an open society, the
effectiveness of which, as events have not infrequently demonstrated, is
undoubted.

But public opinion, in order to meet such a responsibility demands the
condition of a virtually unobstructed access to and diffusion of ideas.
Parliamentary Government postulates a capacity in men acting freely and under
self-restraints, to govern themselves; and that advance is best served in the degree
achieved of individual liberation from subjective as well as objective shackles.
Under the Government, the freedom of discussion in Canada, as a subject-matter
of legislation, has a unity of interest and significance extending equally to every
part of the Dominion. With such dimensions it is *ipso facto* excluded from head
16 as a local matter.  

Justice Rand echoed the comments he expressed in an earlier case *Saumur v.
Quebec (City)* as well as the comments of Chief Justice Duff and Justice Cannon in the
*Alberta Press Case*. In particular, he continued a number of themes established by Chief
Justice Duff in the *Alberta Press Case*. He emphasized that the provisions of the
*Constitution Act, 1867* establish a parliamentary form of government either
directly, by
“creating” the elements of the necessary institutional apparatus, or indirectly, by
“contemplating” the necessary elements of the institutional apparatus.

Justice Rand noted that, if any level of government had the jurisdiction to regulate
free speech, it had to be Parliament. However, he was also careful to note that the
degree to which Parliament, as opposed to provincial legislatures, could legitimately
regulate free speech was an issue that remained to be determined. In his words: “…the

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73 Ibid. at 357-58.
75 In his reasons, Justice Rand appeared to lend support to Justice Cannon’s contention in the *Alberta Press*
case that citizens of a democracy should have a right to be informed by sources independent of the
government by stating in *Switzman*, that the choice of members of Parliament was to be made “in the
absence of all due influence”. (*Switzman, supra* note 67 at 357-58.)
degree and nature of its regulation must await future consideration; for the purposes here it is sufficient to say that it is not a matter within the regulation of a Province.”

Justice Abbott held that the Act was specifically aimed at suppressing the propagation of particular ideas with the province of Quebec. He focused his analysis on whether this was within the jurisdiction of the Quebec government and concluded that the by-law’s impingement on freedom of speech was beyond provincial jurisdiction. Justice Abbott’s analysis relied heavily on the reasoning of Chief Justice Duff in the Alberta Press case. He reiterated Chief Justice Duff’s contention in the Alberta Press Case that citizens have a right to discuss both policy and administration and that the right inheres in both members of Parliament and citizens.

The right of free expression of opinion and of criticism, upon matters of public policy and public administration, and the right to discuss and debate such matters, whether they be social, economical or political, are essential to the working of a parliamentary democracy such as ours. Moreover, it is not necessary to prohibit the discussion of such matters, in order to protect the personal reputation or the private rights of the citizen. That view was clearly expressed by Duff C.J.C. in Re Alberta Legislation…

Justice Abbott also specifically linked the right to freedom of public discussion to written provisions of the Constitution, particularly sections 20 and 50 which, respectively, “provide for Parliament meeting at least once a year and for the election of a new Parliament at least every 5 years…”

…”

The Canada Elections Act, R.S.C. 1952, c. 23, the provisions of the B.N.A. Act which provide for Parliament meeting at least once a year and for the election of a new Parliament at least every 5 years, and the Senate and House of Commons Act, R.S.C. 1952, c. 249, are examples of enactments which make specific statutory provision for ensuring the exercise of this right of public debate and public discussion. Implicit in all such legislation is the right of candidates for

76 Ibid. at 358-59.
77 Ibid. at 369. Justice Kellock provided a brief opinion concurring with Justice Rand’s reasons.
78 Constitution Act, 1867, supra note 16 at s. 20, s. 50.
Parliament or for a Legislature, and of citizens generally, to explain, criticize, debate and discuss in the freest possible manner such matters as the qualifications, the policies, and the political, economic and social principles advocated by such candidates or by the political parties or groups of which they may be members. 79

The most interesting aspect of Justice Abbott’s reasons is that he was the first Supreme Court Justice to give voice to that which had only been implicit in the previous judgments of Chief Justice Duff and Justices Cannon, Rand, Kellock and Locke, namely that Parliament’s power to infringe the right of free speech may be limited in the same way that the power of provincial legislatures may be limited.

Although it is not necessary, of course, to determine this question for the purposes of the present appeal, the Canadian Constitution being declared to be similar in principle to that of the United Kingdom, I am also of opinion that as our constitutional Act now stands, Parliament itself could not abrogate this right of discussion and debate. The power of Parliament to limit it is, in my view, restricted to such powers as may be exercisable under its exclusive legislative jurisdiction with respect to criminal law and to make laws for the peace, order and good Government of the nation. 80

The Alberta Press case, Saumur, and Switzman were the three most important cases in the Implied Bill of Rights line of jurisprudence. It is important to note that the notion that provincial legislation might be restricted from impeding the right to freedom of political speech never received the support of a majority of judges in any of these cases. In addition, the possibility that Parliament’s power might be so restricted was only explicitly raised by only one judge. Finally, the impact of this line of jurisprudence must be considered in light of the Supreme Court’s decision in A.G. Canada v. Dupond, 81 in

79 Ibid.
80 Switzman, supra note 67 at 371.
81 (1978), 84 D.L.R. (3d) 420 (S.C.C.) [Dupond].
which the Court appeared to question the Implied Bill of Rights approach developed in the cases above.\(^{82}\)

(iii) Lessons from Implied Bill of Rights Cases

The Implied Bill of Rights cases are notable for two important reasons. First, these cases planted the notion that the foundations of democracy should be constitutionally protected against unjustifiable limitations. While the judgments of Chief Justice Duff, and Justices Cannon, Rand, Kellock, Locke and Abbott acknowledged that Parliament had the power to regulate rights such as the right to free political speech, their reasons suggested that Parliament could not substantially infringe rights that are necessary for the proper functioning of the Constitution. In his judgment in *Switzman*, Justice Abbott explicitly doubted the ability of even Parliament to substantially infringe rights that are foundations of democracy.

Second, the Implied Bill of Rights cases began an important discussion concerning the foundations of the Canadian democratic system. As noted in these cases, those foundations are based on the particular institutions of a parliamentary system of responsible government. This system includes systems of responsibility and

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\(^{82}\) *Dupond* involved a challenge to the validity of a Montreal by-law that prohibited all assemblies, parades and gatherings in the street for a specified period of time. Justice Beetz, writing for the majority of the Supreme Court of Canada, found the by-law to be a valid attempt to regulate the municipal public domain in particular circumstances. He found that the measures in the by-law were preventive, not punitive, and thus did not impinge on federal jurisdiction over criminal law. In his reasons, Justice Beetz appeared to reject arguments that the by-law interfered with the freedom of speech, assembly and association and the approach first adopted by Chief Justice Duff and Justice Cannon in the *Alberta Press Case*. However, while a superficial reading of Justice Beetz’s reasons in *Dupond* may lead to the conclusion that he rejected the Implied Bill of Rights approach, I would argue that a more detailed analysis suggests that Justice Beetz sought to distinguish the issue of a right to hold public meetings on highways and parks from the broader issue of freedom of political speech or other rights necessary to the maintenance of democracy. His reasons did not directly contradict the approach adopted by the Implied Bill of Rights judges. Finally, even if Justice Beetz’s reasons are interpreted as rejecting the Implied Bill of Rights approach, then it must be remembered that Justice Beetz’s position changed dramatically within less than a decade, as demonstrated by his reasons in *O.P.S.E.U. v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, 41 D.L.R. (4th) 1 [*O.P.S.E.U.*, cited to D.L.R.]. Justice Beetz’s reasoning in *O.P.S.E.U.* is discussed in greater detail in chapter seven.
accountability between Cabinet and Parliament and between members of Parliament and the electorate. The accountability extends to issues of both policy and administration. It is sustained by the right of the people to be informed about and to discuss, debate and criticize the policies and actions of their government, legislative representatives and candidates for political office. Indeed, the public may even be entitled to receive its information about the government from a source independent of the government.

In this way, the Implied Bill of Rights cases provide a foundation for a more comprehensive understanding of the democratic principle in Canada. However, it must be remembered that the cases did not explicitly support the notion that this principle could be used to invalidate legislation passed by Parliament. In each of the cases, the principle of democracy was used as a tool to interpret the Constitution and the impugned legislation in order to determine whether the impugned legislation fell under provincial or federal jurisdiction. Chief Justice Duff explicitly acknowledged in his reasons in the Alberta Press Case that it was not his role to rule on the substantive merit of the impugned legislative provisions.

It is no part of our duty (it is, perhaps, needless to say) to consider the wisdom of these measures. We have only to ascertain whether or not they come within the ambit of the authority entrusted by the constitutional statutes (the British North America Act and the Alberta Act) to the Legislature of Alberta and our responsibility is rigorously confined to the determination of that issue. As Judges, we do not and cannot intimate any opinion upon the merits of the legislative proposals embodied in them, as to their practicality or in any other respect.83

Nonetheless, it is possible to argue that the implication of a right to freedom of political speech that was at the centre of the judgments of Chief Justice Duff and Justices Cannon, Rand, Abbott, Kellock and Locke in the above cases may have been legitimately

83 Alberta Press, supra note 53 at 83.
used to invalidate legislation passed by Parliament. In this regard, it is important to note that, in these cases, the freedom of political speech was not simply implied based on the preamble of the *Constitution Act, 1867*. To the contrary, the preamble was used only as an aid to interpret the written provisions of the *Constitution Act, 1867* that established a parliamentary democracy in Canada. Those provisions include section 17, which established the Parliament of Canada; section 20, which required Parliament to be convened once a year; and section 50, which requires a new House of Commons to be elected every 5 years.\(^8^4\)

That the necessity of protecting freedom of political speech was implied from these, and other, written provisions of the *Constitution Act, 1867* that established the Parliament of Canada and not just the preamble is evident at the outset of Chief Justice Duff's discussion in the *Alberta Press Case*:

> Under the Constitution established by the *B.N.A. Act*, legislative power for Canada is vested in one Parliament consisting of the Sovereign, an upper house styled the Senate, and the House of Commons. Without entering in detail upon an examination of the enactments of the Act relating to the House of Commons, it can be said that these provisions manifestly contemplate a House of Commons which is to be, as the name itself implies, a representative body; constituted that is to say, by members elected by such of the population of the united Provinces as may be qualified to vote. The preamble of the statute, moreover, shows plainly enough that the Constitution of the Dominion is to be similar in principle to that of the United Kingdom. The statute contemplates a Parliament working under the influence of public opinion and public discussion.\(^8^5\)

Chief Justice Duff thus based his analysis on that which the written provisions of the *Constitution Act, 1867* “manifestly contemplate” and relied on the preamble as support for this interpretation of the written provision. While Chief Justice Duff did not refer to specific provisions of the *Constitution Act, 1867* in his discussion, Justice Abbott, in his

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\(^{84}\) Section 20 of the *Constitution Act, 1867* has since been repealed and replaced by s. 4 of the *Charter*.

\(^{85}\) *Alberta Press*, supra note 53 at 107.
discussion in Switzman, referred to sections 20 and 50 as “examples of enactments which make specific statutory provision for ensuring the exercise of this right of public debate and public discussion.”

In addition to naming constitutional provisions that supported the right to free discussion, Justice Abbott pointed to the statutory provisions of the Canada Elections Act, and of the Senate and House of Commons Act, as further evidence of the importance of the right of public debate and public discussion rooted in the principle of democracy. Similarly, in his judgment in Switzman, Justice Rand referred to the evolution of attitudes towards freedom of speech reflected in the gradual erosion of restraints on freedom of speech in legislation. Both Justice Rand and Justice Abbott thus bolstered their justification of the right to freedom of political speech with references to legislative affirmation of the importance of the right.

A close examination of the Implied Bill of Rights cases identifies many of the factors that may support the recognition and application of unwritten constitutional principles. Members of the Court who argued in favour of a right of freedom of political speech based on a theory of parliamentary democracy did so by identifying the pragmatic importance of the right, by discussing the historical development of the right, and by linking the right to specific provisions of the constitutional text. Each of these elements was used to support the necessity of recognizing the right as part of the principle of democracy protected by the Canadian Constitution.

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86 Switzman, supra note 67 at 371.
87 R.S.C. 1952, c. 23.
88 R.S.C. 1952, c. 249.
89 Switzman, supra note 67 at 356.
90 We will see in chapters four and five that this general approach continues to be applied by the Supreme Court of Canada when recognizing unwritten constitutional principles.
The Implied Bill of Rights cases involved the application of the unwritten principle of democracy to assist in the interpretation of the Constitution. We will see in chapter seven that later cases have suggested that the principle may also be used to invalidate legislation. Indeed, it is arguable that the principle of democracy could have justified the invalidation of the legislation at issue in the Implied Bill of Rights cases (even if it had been enacted by Parliament) not just because of the strength of the evidence in favour of the principle of political speech, but also because of the danger posed to the democratic process by the impugned legislation.

For example, in the *Alberta Press* case, the impugned legislation effectively mandated that newspapers publish government propaganda and subjected critics of government policy to identification and potential recrimination. Similarly, *Saumur* concerned legislation granting the chief of police of Quebec City the discretion to determine which views and beliefs could be published by way of written material to be distributed on the streets of the city. Finally, in *Switzman*, the impugned legislation effectively outlawed the propagation of an entire theory of politics and governance.

These provisions each amounted to extreme restrictions on political speech that could easily damage the quality of political debate in the country. By restricting the propagation of particular political views, these restrictions could substantively undermine the ability of the political system to accurately reflect the preferences of its members. In short, these types of restrictions certainly passed the threshold of substantially interfering with institutions of parliamentary government.

The Implied Bill of Rights cases thus provide a good example of how the principle of democracy may be interpreted and applied in order to secure a particular
right, in this case, the right to political speech. In chapter five, I will argue that the Supreme Court’s treatment of democratic rights under the *Charter* has built on and expanded the understanding of democracy first articulated by the Court in the Implied Bill of Rights cases. In general, the Court’s *Charter* jurisprudence has relied on a conception of democracy that recognizes and protects the importance of the meaningful participation of citizens in the democratic process, a process that includes, but is not limited to, the selection of legislative representatives based on sufficiently informed choices concerning policy and governance.

4) **Conclusion**

The Canadian Constitution provides the basic framework for democratic government in this country. It is the duty of the judiciary to interpret, apply and enforce that framework in order to protect the democratic process. In fulfillment of their duty, judges have relied upon fundamental principles to flesh out the basic framework outlined in the text of the Constitution. In this way, unwritten constitutional principles have been used to interpret the text of the Constitution and to fill in gaps in the text of the Constitution in order to ensure that the Constitution can provide a comprehensive framework for democratic governance in Canada.

The principle of democracy itself is of particular importance in this process. In the *Quebec Secession Reference*, the Supreme Court of Canada provided the basic outline of its understanding of the principle of democracy in Canada. The Court described democracy as a baseline against which the framers of the Constitution and the Court itself have always operated – a baseline so evident it wasn’t required to be included in the written provisions of the *Constitution Act, 1867*. The Court identified self-governance as
the primary substantive goal of democracy. This substantive goal is facilitated through procedural protections, such as the encouragement of open debate and discussion on political matters. As Canadian society has evolved, so too has its quest to achieve self-governance. Over time, the baseline has been raised. The Supreme Court has recognized that governing institutions and democratic processes have gradually changed and become more representative. In other words, the democratic process has become more effective in protecting and achieving its ultimate goal.

The Implied Bill of Rights cases demonstrate that the theoretical foundations of the Supreme Court of Canada’s understanding of democracy may be traced to the particular requirements of a responsible form of government in which the executive is held accountable by the legislature and the legislature is held accountable by the electorate. The fact that the executive may be held accountable by the legislature between elections means that procedural protections of the democratic process must be maintained at all times, not just during elections.

The discussion of the Canadian democratic process in the Implied Bill of Rights cases also suggested that there are two primary areas in which the responsibility and accountability of the executive and legislature may be measured: policy and governance. The first area of accountability pertains to the goals and measures that any government is elected to implement. The second area of accountability pertains to the way in which the institutions of government are administered, including how the government’s goals and measures are implemented.

Finally, the Implied Bill of Rights cases raised the idea that, in order to ensure that the lines of accountability at the heart of the Canadian democratic process function
properly, it is necessary to ensure open discussion, criticism and debate of political issues, including issues of both policy and governance. Substantial impediments of such political debate and discussion may interfere with the parliamentary system of governance. Although the issue was never decided definitively, these cases suggested the possibility that government legislation that resulted in substantial interferences with the democratic process may be invalidated by the courts on constitutional grounds.

The Supreme Court’s understanding of the constitutional principle of democracy thus clearly accommodates the principled arguments in favour of protecting access to government information that were identified in chapter one. Recall that these arguments emphasized the importance of access to government information in reinforcing democratic participation in the policy-making process and the accountability of government. It follows that the principle of democracy may support a constitutional right to access government information. However, before demonstrating the ways in which the principle of democracy may be applied to provide constitutional protection to the right to access government information, it is first necessary to demonstrate why recourse to the principle of democracy in light of the existing written provisions of the Charter. In other words, it is necessary to explain why it is justifiable to go beyond the explicit provisions of the Constitution to secure constitutional protection for access to government information. It is to this task that I turn in chapter three.
In the next three chapters, I will demonstrate that constitutional protection for access to government information is not just compatible with the constitutional principle of democracy but, in light of the Supreme Court of Canada’s jurisprudence, may legitimately receive constitutional protection through the application of the principle of democracy. The initial argument will proceed in two parts. First, in this chapter, I will demonstrate why there is a legitimate reason to go beyond the explicit provisions of the Constitution to imply a constitutional right to government information. Then, in chapters four and five, I will demonstrate how recognition of a constitutional right to access government information through the application of the principle of democracy may be justified using the methodology developed by the Supreme Court of Canada.

The argument in this chapter will follow three basic steps. First, I will set out the Supreme Court’s methodology for identifying situations where unwritten constitutional principles may be used to interpret the Constitution. These situations usually arise when a “gap” is identified in the text of the Constitution. Second, I will address a number of specific concerns that have been raised by academics regarding the Supreme Court’s method of identifying gaps in the Constitution. Finally, I will demonstrate how an “access gap” may be identified in the Canadian Constitution by applying the Supreme Court’s methodology while also addressing the concerns raised by academic critics of that methodology.
1) How Does the Supreme Court of Canada Identify a “Gap” in the Constitution?

As noted in chapter two, reliance on unwritten assumptions and principles is inherent in the process of interpreting the written provisions of a Constitution. However, the Supreme Court of Canada has established that unwritten principles may also be relied upon to extend the scope of the written provisions of the Constitution in particular circumstances. A review of the Supreme Court’s jurisprudence identifies two distinct types of situations in which unwritten constitutional principles may be recognized or relied upon by courts in this way.

The first situation, which concerns the recognition of a common law principle as a constitutional principle, is exemplified by the *New Brunswick Broadcasting* case. In that case, the Supreme Court of Canada was asked to determine whether the refusal of the Speaker of the Nova Scotia legislature to allow television broadcasts of proceedings in the provincial legislature violated s. 2(b) of the *Canadian Charter of Rights and Freedoms*. The Court found that the Speaker was justified in refusing access to television cameras as a result of the privilege enjoyed by the legislature to exclude strangers from the legislature. This privilege, the Court found, was rooted in a common law principle that had been inherited from the British Constitution and imported into the Canada through the Preamble to the *Constitution Act, 1867*. The constitutional status of this common law principle was affirmed through an analysis of the text of the Constitution, historical tradition and pragmatic considerations regarding the necessities of the legislative process. The Court concluded that s. 2(b) of the *Charter* could not apply to members of the provincial legislature when they were exercising a constitutionally

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protected legislative privilege, since one part of the Constitution could not abrogate another part.

A second situation that may result in the need to rely upon unwritten constitutional principles in the course of constitutional interpretation arises when the terms of the text of the Constitution simply run out. In the *Patriation Reference*, Justices Martland and Ritchie described the situations in which unwritten constitutional principles may be applied as follows:

This Court, since its inception, has been active in reviewing the constitutionality of both federal and provincial legislation. This role has generally been concerned with the interpretation of the express terms of the *B.N.A. Act*. However, on occasions, this Court has had to consider issues for which the *B.N.A. Act* offered no answer. In each case, this Court denied the assertion of any power which would offend against the basic principles of the Constitution.\(^2\)

Thus, according to Justices Martland and Ritchie, the Court may consider basic principles of the Constitution, which they later described as “judicially developed legal principles and doctrines”, when the express terms of the Constitution cannot provide an answer to the issue to be determined.\(^3\) In such cases, the Court must go beyond the text in order to ensure that the basic principles of the Constitution are not transgressed.

A perfect example of a situation in which the express terms of the Constitution did not provide an answer to the issue to be determined is the *Manitoba Language Rights Reference*.\(^4\) In that case the Court was faced with a situation where all of the laws enacted in the province of Manitoba were, and had always been, technically *ultra vires*. This situation arose because the Manitoba legislature had failed to comply with section

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\(^3\) Ibid. at 76.

23 of the *Manitoba Act, 1870* which required that all laws of the province be enacted in English and French. Section 52 of the *Constitution Act, 1982* mandated that these laws be invalidated as being contrary to the Constitution. However, the Court was faced with the potential for a legal vacuum and, indeed legal chaos, if it invalidated the legal framework governing the province.

The written terms of the Constitution did not provide for a way to avoid this vacuum. As a result, the Court relied on the rule of law principle to deem the Acts of the Manitoba Legislature temporarily valid while the Legislature moved to translate them into French in compliance with the legislature’s constitutional obligation. The rule of law principle requires the creation and maintenance of an order of positive laws by which society may be governed. The Court justified its reliance on the principle, despite the fact that the principle was not to be found in the express provisions of the Constitution, noting that: “… in the process of Constitutional adjudication, the Court may have regard to unwritten postulates which form the very foundation of the Constitution of Canada.”

Access to unwritten constitutional principles was expanded somewhat beyond situations in which the express terms of the Constitution could not provide an answer by Chief Justice Lamer in his reasons in the *Provincial Judges Reference*. The *Provincial Judges Reference* involved four appeals, originating in Prince Edward Island, Alberta and Manitoba. The four appeals that were included in the *Provincial Judges Reference* raised a number of issues relating to the independence of provincial courts, but were united by the single issue of whether s. 11(d) of the *Canadian Charter of Rights and Freedoms*

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restricted the ability of provincial governments and legislatures to reduce the salaries of provincial court judges.⁶

A strict interpretation of s. 11(d) would have produced a negative answer in the Provincial Judges Reference, since s. 11(d) had not previously been interpreted to apply outside of the criminal law context and thus was generally regarded not to protect the independence of provincial court judges not seized with cases dealing with criminal offences.⁷ However, Chief Justice Lamer, writing for six of the seven judges on the Supreme Court panel that determined the case, argued that the case raised a broader question, namely: “… whether the constitutional home of judicial independence lies in the express provisions of the Constitution Acts, 1867 to 1982, or exterior to the sections of those documents.”⁸ Chief Justice Lamer found that the principle of judicial independence was “at root an unwritten constitutional principle” whose existence was “recognized and affirmed by the preamble to the Constitution Act, 1867.”⁹

At the outset of his analysis, the Chief Justice noted the fact that the written provisions that dealt with judicial independence, namely s. 11(d) of the Charter and ss.

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⁷ Section 11(d) states:
“Any person charged with an offence has the right … d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal”

⁸ Provincial Judges Reference, supra note 6 at 590.

⁹ Ibid. at 616. It should be noted, however, that, given that all of the parties had focused their arguments on s. 11(d) of the Charter, the Chief Justice explicitly stated that he was deciding the case based on the interpretation of s. 11(d). Chief Justice Lamer’s conception of the evolution of constitutional principles allowed him to interpret section 11(d), the express provisions of which apply to courts only when they are seized with criminal law matters, so as to guarantee the financial independence of provincial court judges even when they are seized with non-criminal matters. He found that section 11(d) of the Charter required that governments must establish judicial compensation commissions to determine the salaries for judges. Although the findings of such commissions are not strictly binding on governments, the Chief Justice found that governments are required to justify decisions not to adopt the findings of the commissions on a reasonableness standard. Chief Justice Lamer also found that the requirements of judicial independence suggest that judges should be prohibited from engaging in salary negotiations directly with governments.
96 to 100 of the *Constitution Act, 1867*, taken together, did not provide for the independence of all courts in all of their functions. More particularly, the express terms of the Constitution failed to ensure the independence of provincial courts when they were dealing with non-criminal matters. The Chief Justice also noted that the interpretation of the written provisions of the Constitution as entrenching elements of judicial independence could only be explained by reference to a broader unwritten conception of judicial independence. In his view, “[t]he only way to explain the interpretation of ss. 96 and 100, in fact, is by reference to a deeper set of *unwritten* understandings which are not found on the face of the document itself.”

In other words, the Chief Justice argued not only that there was a gap in the protection afforded by the text of the Constitution to judicial independence, but also that previous gaps in the text of the Constitution had been filled, through the process of constitutional interpretation of the text, by relying on the unwritten principle of judicial independence. In effect, the Chief Justice thus determined that basic constitutional principles could be applied not just when the express provisions of the Constitution could not provide an answer, but also to supplement the answer provided by the text.

Chief Justice Lamer concluded that the Court could apply the organizing principles of the Constitution as “the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text.” The Chief Justice recognized that such gaps may develop over time, as society’s conception of the roles of democratic institutions evolves. Unwritten constitutional principles may assist in filling these gaps in order to allow the Constitution to evolve with society’s

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evolving expectations of democratic governance. Unfortunately, as noted by many academic critics discussed below, Chief Justice Lamer did not explain why the evolution of the constitutional protection of judicial independence should result from judicial interpretation of unwritten constitutional principles as opposed to constitutional amendment.

The Supreme Court provided a somewhat more detailed explanation of the reasons that courts should fill gaps in the text of the Constitution in its decision in the *Quebec Secession Reference*. In that case, the Supreme Court of Canada was asked to answer three questions concerning a hypothetical secession by the province of Quebec from Canada. Only the Supreme Court’s answer to the first question, which concerned whether an attempt by Quebec to secede unilaterally from Canada would be constitutional, is of direct interest in this thesis.

The Court’s reliance on unwritten principles in the *Quebec Secession Reference* was necessary because the Court found that the text of the Constitution did not provide a clear answer to the question of how a province could secede from the country. The issue thus fell within a gap in the constitutional text, which the Supreme Court filled using the four unwritten constitutional principles it identified as relevant to the case: federalism, democracy, constitutionalism and the rule of law, and protection of minority rights.

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14 I will attempt to address this issue below.
15 The first question asked: Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?
16 *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385 [Quebec Secession Reference] cited to D.L.R.] at 422 ff. As a result of its analysis of the impact of these four principles, the Court determined that a province cannot secede unilaterally from Canada. However, the Court found that a clear expression by the people of Quebec of their will to secede (through, for example, a clear referendum question endorsed by a clear majority) would create a corresponding duty for the federal and other provincial governments to enter into good-faith negotiations concerning the constitutional amendment required for secession. The Court stated that the duty to negotiate in good faith is a legal duty, however, it
The Court began its discussion of the Canadian Constitution by noting that the Constitution includes more than just the explicit textual provisions. According to the Court, the Constitution also includes supporting principles and rules, which are necessary “because problems or situations may arise which are not expressly dealt with in the text of the Constitution.”

The Court went beyond Chief Justice Lamer’s simple identification of a gap in the constitutional text to explain that the inability of the text to address particular issues is problematic since constitutions “must contain a comprehensive set of rules and principles which are capable of providing an exhaustive legal framework for our system of government.”

In summary, then, courts may rely on unwritten constitutional principles, also referred to as basic or fundamental principles of the Constitution, in situations where the text of the Constitution runs out, that is where the text is unable to provide an answer to the problem at hand. This situation, sometimes referred to as a gap in the text, may arise because the constitutional text has not explicitly recognized a fundamental element of the country’s governing framework even though it has been recognized by the common law of the Constitution. This was the case with the Court’s decision to recognize the constitutional status of certain common law based privileges in the New Brunswick Broadcasting case. A gap may also arise because the framers of the Constitution simply did not explicitly address the situation as was evident in the Manitoba Language Rights Reference when the Court was faced with a potential legal vacuum created by the

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17 Ibid. at 403.
18 Ibid.
invalidation of a province’s entire legal framework.

Finally, a gap may arise because the developments of the modern state have outstripped the explicit scope of the written provisions of the Constitution. In this type of case a gap may arise because the existing textual provisions may not extend to cover the situation before the Court, as was the case with respect to the need to extend the protection of judicial independence to provincial court judges in non-criminal matters that arose in the modern context of budgetary cutbacks to judicial salaries in the *Provincial Judges Reference*.

In my view, the absence of explicit constitutional protection for access to government information amounts to the last type of constitutional gap identified above. It is not surprising that access to government information was not explicitly protected in the *Constitution Act, 1867*. As noted in chapter two, none of the modern protections of the democratic process, such as freedom of expression and the right to vote, were expressly included in the Constitution at Confederation. In any event, the conception of democratic governance at the time of the framing of the *Constitution Act, 1867* had not evolved to include widespread public participation in the process of governance. Indeed, the franchise was still restricted to male property-holders at the time.

Nonetheless, before setting out the more detailed argument justifying how this gap may be identified, I will survey the specific concerns raised by academic critics regarding the Supreme Court of Canada’s approach to identifying gaps in the Constitution.

2) **What Concerns are Raised by the Supreme Court’s Approach to Identifying Gaps in the Constitution?**

As noted in chapter two, the most fundamental concern raised by the Supreme
Court’s approach to the identification of gaps in the Constitution is the concern that by identifying and subsequently filling gaps in the Constitution the Court will move beyond its legitimate role as interpreter of constitutional text and take on the legislature’s rightful role of creator of constitutional text. Sujit Choudhry and Robert Howse have provided perhaps the best articulation of the concern that the Supreme Court of Canada’s approach to unwritten constitutional principles has failed to account for the distinction between legislative and judicial roles in the creation and interpretation of constitutional provisions.\(^\text{19}\)

According to Choudhry and Howse, the Supreme Court’s reasoning in the \emph{Quebec Secession Reference} rejected each of the features of the traditional, positivist account of constitutional interpretation in Canada. The Court’s reasoning acknowledged the existence of binding constitutional norms that are not articulated in the text; it admitted that the legislature shares responsibility for interpreting the Constitution and that the Court may not have a supervisory role in certain instances; and, it departed from the text in order to articulate “a normative vision of the Canadian constitutional order.”\(^\text{20}\) Choudhry and Howse provide a rich analysis of these deviations from the positivist approach. For the purposes of this chapter, I will focus only on the first element, the Supreme Court’s deviation from the traditional positivist focus on the text as the primary source of constitutional norms.

Choudhry and Howse argue that the Supreme Court’s reasons fail to provide a sufficient justification for the assertion that it is necessary to go beyond the text of the

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\(^{20}\) \textit{Ibid.} at 164.
Constitution and rely on unwritten principles. They identify two potential justifications in the Court’s reasons. The first justification is that the unwritten principles are the unwritten assumptions upon which the text is based. However, Choudhry and Howse point out that, while this explanation may justify the application of these unwritten principles as interpretive aids, it cannot justify their use as normative, rights-creating instruments.

The second possible justification identified by Choudhry and Howse is that unwritten constitutional principles are functionally necessary to fill in gaps in the Constitution in order to ensure that the Constitution provides “an exhaustive legal framework for our system of government.” Choudhry and Howse argue, however, that this argument does not explain why judges should determine how to fill in the gaps as opposed to legislatures, implementing an amending process. Choudhry and Howse suggest that allowing judges to fill constitutional gaps is part of a larger problem of excluding democratic institutions from the process of constitutional interpretation. This tendency may erode public participation in political discourse.

… By denying democratic institutions any role in constitutional interpretation, those institutions may fail to examine constitutional considerations at all in the legislative process. As a consequence, the Constitution may recede from importance in public life. This is a particular problem for liberal democracies like Canada, for which constitutions are a central component of national self-understanding... Written constitutions, then, serve as the cement of social solidarity, and can give rise to a constitutional patriotism. However, for that constitutional patriotism to be sustained, it is imperative that constitutional discourse take place not just in the courts, but in democratic institutions, giving a concrete political existence to the common values and principles that underpin such constitutional patriotism.

Choudhry and Howse conclude that the Supreme Court fails to provide “an

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21 Ibid. at 154-56.
22 I will deal with this aspect of Choudhry and Howse’s argument in chapter four.
23 Ibid. at 161.
account of sources that justifies the recourse to unwritten constitutional norms.”

They provide their own justificatory theory: dualist interpretation. The dualist interpretation approach suggests that there are two types of constitutional interpretation: ordinary interpretation and extra-ordinary interpretation. Ordinary interpretation involves everyday cases that do not threaten the legitimacy of the constitutional order itself. During the task of ordinary interpretation, courts rely heavily on the text of the Constitution, with occasional reliance on unwritten principles to aid in the interpretation of the text. By contrast, extra-ordinary interpretation is required in cases when the very legitimacy of the constitutional order is itself threatened. In such cases, it may not be practical to wait for the legislature to fill in gaps in the text of the Constitution. Instead, the courts may rely on unwritten principles which are regarded as providing “an exhaustive legal framework for our system of government” in order to fill in the gap in the explicit provisions of the text.

According to Choudhry and Howse, the Quebec Secession Reference is an excellent example of extra-ordinary legal interpretation. The justification for the Court’s direct involvement is the failure of federal political institutions to face the challenge posed by Quebec’s referendum process and the failure of Quebec’s provincial government to address the constitutional issues raised by the legitimate interests of the rest of Canada in any potential secession by Quebec. Choudhry and Howse suggest that

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24 Ibid. at 156.
25 Ibid. at 156-57.
26 Ibid. at 156-7.
27 Ibid. at 167. For additional discussion of the political context of the Quebec Secession Reference, see Sujit Choudhry and Jean Francois Gaudreau-DesBiens, “Frank Iacobucci as Constitution Maker: From the Quebec Veto Reference to the Meech Lake Accord and the Quebec Secession Reference” (2007) 57 U.T.L.J. 165; Sujit Choudhry, “Do constitutional moments travel? Ackerman’s higher lawmaking, constitutional failures and the Quebec Secession Reference” (Paper presented at University of Toronto, Faculty of Law, Faculty Workshop, 15 November 2004) [unpublished].
the Supreme Court’s reliance on unwritten principles was motivated by the precarious position the *Quebec Secession Reference* placed the Court if it supported either the federal government’s or the *amicus curiae*’s approach in its reasons.28

If one understands the Court’s task as to provide a judgment that is legitimate in the eyes of Canadian on both sides of the secession debate, then we can see clearly why it resorted to general principles to craft its ruling. In the perspective of the divide between federalists and secessionists, these principles could enjoy the reasonable assent of everyone, whereas at the core of the debate over secession is in fact the moral bindingness of the constitutional *text* on Quebec.

Choudhry and Howse’s theory of extra-ordinary interpretation is an inviting one in so far as it provides a scope for the application of unwritten constitutional principles that respects the importance of legislatively created constitutional text, while also appreciating the important role the courts can play in identifying and applying the fundamental values of society when required.29 However, it remains unclear whether there is any deeper justification beyond mere circumstance to justify the application of unwritten principles in cases requiring extra-ordinary interpretation. This raises a particular question: given the fact that there was no impending secession referendum at the time that the *Quebec Secession Reference* was heard and decided, was the Supreme Court justified in applying unwritten constitutional principles or should it have waited longer to see if the political actors could resolve their apparent impasse? In other words, when does a political impasse become a crisis requiring extra-ordinary constitutional interpretation?

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28 The Supreme Court of Canada appointed an *amicus curiae* to argue in favour of a right to secession because the government of the province of Quebec refused to participate in the case.
29 Choudhry and Howse’s theory of extra-ordinary constitutional interpretation is an attempt to provide a coherent account of the Supreme Court’s justification for its decision in the *Quebec Secession Reference*. Such a coherent account is necessary since, as they note at the outset of their article, constitutional adjudication cannot be legitimate unless it is supported by reasons that justify the judicial role. *Ibid.* at 145.
Interestingly, while Choudhry and Howse argue that the justification for deviating from this guiding principle in the *Quebec Secession Reference* is found in the political circumstances of the case, they suggest that it may be possible to rely on normative principles absent the breakdown of political institutions.

The resort to abstract normativity in the *Quebec Secession Reference* raises the interesting question of *when* such a shift is justified. In this judgment, for example, the ascent to abstract normativity went hand-in-hand with extraordinary adjudication. In this judgment, the two were part and parcel of the same phenomenon. But one could imagine situations where the sort of institutional failure that gave rise to extra-ordinary interpretation here did not exist, but the Court nevertheless ascended to abstract normativity. Novel cases, cases where there are conflicting lines of authority, or cases where the established case-law seems to run counter to widely held moral and political values – different varieties of hard cases – all might invite the court to engage in what Ronald Dworkin calls a process of “justificatory assent.”

I would agree that the threat to a democratic institution may in and of itself be sufficient to justify the recourse to unwritten principles. However, in my view, that threat must be rooted in more than the immediate political circumstances of the case. It must ultimately threaten the effectiveness of the institution, or of the process it governs, in our constitutional order. I would also argue that Choudhry and Howse’s approach should be supplemented by an enriched conception of the legitimate role of judges in the recognition and application of fundamental values. In my view, such an enriched conception would avoid the requirement of situational crisis to legitimate the application of unwritten principles while maintaining the requirement that the principles applied are tied to the preservation of democratic institutions. I will return to this argument in chapter eight.

3) **The “Access Gap” in the Canadian Constitution**

The critical concerns raised by academics such as Choudhry and Howse suggest

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that the argument that access to government information may receive constitutional protection through the application of the democracy principle in the course of interpreting the Canadian Constitution must address a number of questions. Of prime importance is the question of why constitutional protection should be extended beyond a strict interpretation of the existing written constitutional provisions that have been designed to protect the democratic process. In more colloquial terms: where is the constitutional gap? A question of equal importance is: if a gap is identified, why should the courts fill it instead of the legislature? This question takes on a heightened importance in light of the fact that a proposal to include a constitutional protection of access to government information in the *Charter* was rejected by the Joint Committee of the House of Commons and the Senate that was charged with reviewing draft provisions of the Charter.

I will address these two questions below.

a) **Where is the gap?**

As noted in chapter two, unwritten constitutional principles cannot be used to undermine the written provisions of the Constitution. As such, Canadian courts have insisted that unwritten constitutional principles cannot be relied upon where there is no gap in the coverage provided by the written provisions of the Constitution. Several cases are worthy of note in this regard. In *UL Canada Inc. v. Quebec (Attorney General)*,\(^{31}\) the appellant argued that the principle of federalism should be applied to strike down a section of the *Dairy Products and Dairy Products Substitutes Act*\(^{32}\) that authorized the Quebec government to make regulations governing the colour of margarine. In effect,


\(^{32}\) R.S.Q., c. P-30, s.42.
the appellant argued that the provision violated the federal principle because it prevented the free movement of yellow-coloured margarine into the province of Quebec. The Quebec Court of Appeal found that the appellant was effectively trying to import a right to a common market into the Constitution. It refused to apply the principle of federalism in the case, finding that there was no constitutional gap to be filled as ss. 91(2), 92(13), 92(16) and 121 of the Constitution Act, 1867 provided the necessary framework of constitutional rules to deal with the issue.33

Similarly, in *Baie D’Urfé (Ville) c. Québec (Procureur Général)*34, the Quebec Court of Appeal refused to apply unwritten constitutional principles to invalidate provincial legislation that abolished certain municipalities while creating others.35 The plaintiffs argued that, by allowing the abolition of municipalities that were predominantly populated by Anglophones, the legislation violated the principles of protection of minority rights and the federal principle. The Quebec Court of Appeal rejected this argument noting that the plaintiffs failed to demonstrate a gap in the Constitution that could trigger reliance on unwritten constitutional principles:

> En réalité, ils invoquent ces principes, non pour combler des vides, mais bien pour mettre de côté la compétence des provinces et enchâsser dans la Constitution de nouvelles obligations linguistiques en matière municipale. Ils ignorent l’importance de la réserve formulée par la Cour suprême qui prévoit que la reconnaissance des principes non écrits ne peut être interprétée comme constituant une invitation à négliger le texte écrit de la Constitution.36

The Court particularly noted that the mere fact that the issue of whether provinces had the power to eliminate municipalities is not dealt with expressly in the Constitution

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33 *UL Canada Inc. v. Quebec (Attorney General)*, supra note 31 at paras. 65-71.
35 *Act to reform the municipal territorial organization of the metropolitan regions of Montreal, Quebec and the Outaouais*, S.Q. 2001, c. 25.
36 *Supra* note 34 at para. 92.
does not mean there is a constitutional gap. In the Court’s words: “Le seul silence de la Constitution écrite ne constitue pas nécessairement un vide.”\textsuperscript{37} In the Court of Appeal’s view, if the framers of the Constitution had wanted to protect municipal institutions as opposed to educational or religious institutions, they would have included such protection explicitly in the text of the Constitution. To now apply unwritten constitutional principles to protect Anglophone municipal institutions would amount to rewriting history in the Court’s mind.\textsuperscript{38}

In addition to doubting that mere silence in the Constitution constitutes a gap, Canadian judges have looked to the constitutional drafting process to determine whether failure to protect a particular right is intentional as opposed to unintentional. The best example of this is in respect to the purposeful omission of protection of property rights in the \textit{Charter}. In \textit{Irwin Toy},\textsuperscript{39} a majority of the Supreme Court specifically noted that the exclusion of property rights from protection under section 7 of the \textit{Charter} could be contrasted to the inclusion of protection of such rights in the American Bill of Rights. The majority found that the intentional exclusion of protection of property from the express terms of section 7 meant that protection of property rights should not be read into the \textit{Charter} after the fact. The majority stated: “The intentional exclusion of property from s. 7, and the substitution therefore of “security of the person” … leads to a general inference that economic rights as generally encompassed by the term “property” are not within the perimeters of the s. 7 guarantee.”\textsuperscript{40} In subsequent cases, the Supreme Court has held that pure economic rights are excluded from \textit{Charter} protection.

\begin{itemize}
\item [\textsuperscript{37}] \textit{Ibid.} at para 106.
\item [\textsuperscript{40}] \textit{Ibid.} at para. 95.
\end{itemize}
The fact that property rights were intentionally excluded from the *Charter* by the constitutional framers suggests that the absence of property rights in the Constitution may not be considered a gap in the coverage of the Constitution. Thus in *Shaw v. Stein*,\(^{41}\) Justice Smith found that “the absence of property rights in the Charter is not a result of an oversight. The Charter was born out of protracted negotiations which generated numerous drafts. In the end there was a conscious decision not to create constitutional protection for property rights as exists in the Constitution of the United States of America or which were part of the earlier Canadian Bill of Rights.”\(^{42}\)

The above discussion suggests that any argument in favour of identifying an access gap in the Canadian Constitution must consider both those rights that have been expressly included in the written provisions of the Constitution and the rights that have been purposefully excluded from those written provisions.

Certainly, the *Charter* significantly increased the elements of the democratic process that received explicit constitutional protection. First, the *Charter* included protection of several rights explicitly recognized as “democratic” rights. Sections 3 to 5 of the *Charter* are specifically listed under the heading “Democratic Rights”. Section 3 guarantees the right of every citizen of Canada to vote in elections of the House of Commons and provincial legislatures and to be qualified to sit as a member in those legislatures.\(^{43}\) Section 4 sets a five year limit between legislative elections except in times of real or apprehended war, invasion or insurrection, in which conditions legislatures may vote to continue sitting if the motion is not opposed by more than a third

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\(^{41}\) [2004] SKQB 194.
\(^{42}\) Ibid. at para 26.
of the representatives of the legislature. Section 5 guarantees that there shall be a sitting of Parliament and provincial legislatures at least once every twelve months.

Taken together, sections 3 to 5 are meant to ensure that our system of government is more representative by guaranteeing that all citizens can participate in the selection of representatives, that the representatives chosen by the citizens will be called together every year to conduct the nation’s business, and that the representatives will be held accountable at least every five years. The importance of these rights is underlined by the fact that they are not included within the ambit of the override provision, s. 33 of the Charter.

The Charter also includes written provisions protecting rights that have been recognized as fundamental to the proper functioning of democracy. In particular, section 2 of the Charter, which lists “fundamental freedoms”, protects freedom of conscience and religion, freedom of thought, belief, opinion and expression, including freedom of the press and other media, freedom of peaceful assembly and freedom of association.

In light of these substantive constitutional protections, the argument in favour of recognizing a constitutional right of access to government information must demonstrate that protection beyond the scope of the existing written provisions (as determined by the Supreme Court’s jurisprudence) is merited. This is precisely the type of argument advanced by Chief Justice Lamer’s majority reasons in the Provincial Judges Reference. In that case, it will be remembered, Chief Justice Lamer found that the scope of

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44 Ibid., s. 4.
45 Ibid., s. 5.
protection afforded to the principle of judicial independence must extend beyond the then existing interpretation of section 11(d) of the Charter. In his judgment, he found that the protection of judicial independence was not limited to the strict terms of the text of the Constitution, but rather was rooted in a broader unwritten principle. That unwritten principle mandated that the interpretation of the protection of judicial independence afforded by section 11(d) of the Charter be extended beyond judges dealing with criminal “offences”, as explicitly stated in the text of the section, to include also provincial court judges not seized with criminal law matters.

The argument advanced here is that the currently interpreted scope of the written provisions of the Constitution is insufficient to provide the necessary protection of the democratic process. As a result, a gap has developed that must be filled through recourse to the unwritten principle of democracy that underlies the written terms of the Constitution. Several questions remain to be answered. The first is: what has changed in the past twenty-five years to create a need for constitutional protection that arguably was not recognized in 1982 when the scope of explicit constitutional protection of the democratic process was extended by entrenching ss. 2-5 of the Charter.

Here it must be acknowledged that the Special Joint Committee of the Senate and the House of Commons charged with reviewing draft provisions of the Constitution Act, 1982 considered a motion to include an explicit provision protecting a right to government information. The motion proposed that a clause be inserted into the Charter as follows: “Everyone has a right to have reasonable access to information under the control of any institution of any government.”

The acting Minister of Justice, Robert Kaplan, opposed the motion before the
Special Joint Committee arguing that to enshrine a right to information in the Constitution would amount to a “very serious abandonment by Parliament of a responsibility to deal with the question of access to information.” In short, he argued that the government recognized that there should be a right to information and that it was moving to protect that right through its proposed access to information legislation. The acting Minister of Justice also argued that to entrench the right to information in the Constitution would be unwieldy in the absence of existing access legislation as it would effectively require the courts to deal with access requests on an ad hoc basis until it had constructed an access regime based on its jurisprudence.

The acting Justice Minister’s arguments were rejected by opposition members of the Special Joint Committee who noted that entrenching the right to information in the Charter would not prevent the government from enacting its proposed access legislation, rather it would constitutionally mandate such legislation and provide assurance that the legislation could not be arbitrarily removed by future governments. Nonetheless, the motion to include a right to information in the Charter was defeated by a vote of 14 to 10 in the Special Joint Committee.

The rejection of the proposed motion is not surprising given the government’s opposition to the motion and its dominance of the membership of the committee. However, it is worth noting that the government’s opposition to the inclusion of a right to access government information in the Constitution was not absolute. Rather, the Acting

47 Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, No. 43(22 January, 1981) at 105 (Hon. Robert Kaplan) [Minutes of the Special Joint Committee].
48 The federal Access Act had not yet been passed into law at this time, although it had been drafted.
49 Minutes of the Special Joint Committee, supra note 47.
50 Ibid. at 109-110 (James McGrath); 110-112 (Perrin Beatty); 112-114 Fraser); 114-116 (Svend Robinson).
51 Ibid. at 116.
Minister of Justice insisted that the government believed that it was important to establish a legislative framework for access prior to entrenching a constitutional right of access. Acting Minister Kaplan even contemplated that at some point the Canadian Constitution should include protection of a right to access government information. He stated:

… I want in closing to concede that at some point in our history when this is legislated, when some other piece of legislation is legislated, it might very well be down the road in the development of our constitution, once the basic concept of freedom of information is developed, as they are in the process of being developed now, to talk about entrenchment…

In this way, the decision not to include protection of a right to access government information in the Charter, may be distinguished from the decision to exclude property rights. The latter decision was a principled decision to exclude a particular type of right from constitutional protection. By contrast, the decision not to include protection of access was not based on a principled rejection of constitutional protection of such a right. Rather, it was based on considerations of ripeness, particularly the argument that a statutory framework should be established prior to entrenching a right to access.

It is in keeping with the acting Minister of Justice’s comments to note that even by the time the Canadian Charter of Rights and Freedoms was constitutionally entrenched in 1982, the importance of access to government information in the democratic process was only beginning to be fully understood. Certainly there had been little legislative experience with a general right to access government information in Canada prior to that time. However, in the quarter century since the entrenchment of the Charter, both the recognition of the importance of access to government information and the implementation of legislative access regimes has blossomed in Canada and internationally.

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52 Ibid. at 106.
In light of the evolving recognition of the importance of access to information to the democratic process it is arguable that the time has come to extend the reach of the Constitution to protect access. The recognition of such a right would fill a gap that has developed over time as our democracy has matured and the expectations of citizens to be involved in the process of governance, through mechanisms of participation and accountability, have outstripped the existing constitutional protections for those mechanisms.

The fundamental change in the democratic process that has occurred over the last twenty-five years, which has culminated in the near universal recognition of the vital role of access to government information in ensuring effective democratic governance thus provides an impetus to look beyond a strict interpretation of the written terms of the Constitution that are designed to protect the democratic process, including sections 17, 20 and 50 of the Constitution Act, 1867 and sections 2, 3, 4 and 5 of the Charter. Such a search naturally involves a consideration of the principle of democracy that underlies and informs the written provisions of the Constitution and that holds those provisions together in a comprehensive and coherent whole.

b) Why should judges fill the gap instead of legislatures?

Even when a gap in the Constitution has been identified, the question remains: why should the judiciary fill the gap instead of the legislature? That question may seem particularly prescient in the case of access to government information in light of the fact that a motion to include the right in the Constitution was rejected by the Special Joint Committee in 1981.

At this stage it seems appropriate to distinguish between gaps in the Constitution
and exclusions. In the first situation, a gap may exist because society and its governing processes have evolved beyond the ambit of the written provisions of the Constitution and the legislature has simply failed to update the written provisions of the Constitution. In the second situation, a gap may appear to exist because there is no express protection of a particular right, however the absence of protection is a result of a decision of the legislature to exclude protection of a particular type of right. The best example of this is the decision not to protect property rights in the Charter discussed above.

Despite the fact that the Special Joint Committee rejected a motion to include a right to access government information in the Charter, the protection of such a right was not rejected in principle, but rather as noted in the statements of the acting Minister of Justice, as a practical matter. The government’s stated position in 1981 was that a legislative regime should be put in place prior to entrenching a constitutional right to access. By contrast, the opposition to inclusion of a right to protection of private property was a principled objection.

The primary argument in favour of judicial involvement in protecting a right to access government information is directly connected to the importance of access within the democratic process. As noted in chapter two, one of the primary roles of the judiciary is to ensure the protection of our constitutionally mandated democratic process of governance. The judiciary is tasked with enforcing constitutional limits on the exercise of legislative power. Nowhere can that role be more vital than where the legislature may seek to exercise its power to hinder the democratic process. Given the vital role that access to government information plays in ensuring the effectiveness of our democratic process the legitimacy of judicial intervention to protect against restrictions on access
This recognition that courts must act to counterbalance illegitimate exercises of government power is at the heart of Choudhry and Howse’s dualist theory of constitutional interpretation. According to Choudhry and Howse, the courts may engage in extra-ordinary interpretation and legitimately apply unwritten constitutional principles as more than just interpretive aids in cases where the very legitimacy of the constitutional order is threatened. In their view, in such situations, it may not be practical to wait for the legislature to fill the constitutional gaps at issue. I would go further to argue that it may not be realistic to expect the legislature to fill gaps in the text of the Constitution in cases where the government itself seeks to take advantage of the gap to undermine the democratic process.

In this way, if we extend Choudhry and Howse’s conception of extra-ordinary interpretation to focus on threats to the democratic process, as opposed to merely situational threats to the legitimacy of the constitutional order, we recognize that judges have an important role in filling gaps in the Constitution. This judicial role does not supplant the legislative role, but rather supplements it, particularly in cases where it is either not practical or not realistic to rely on the legislature to fill a gap in the text of the Constitution.

4) Conclusion

The absence of explicit protection of access to government information in the text of the Canadian Constitution is a gap in protection of the democratic process provided by the Constitution. As in the case of the Provincial Judges Reference, this gap has arisen because the developments of the modern state have outstripped the explicit scope of the
written provisions of the Constitution. In particular, the growing expectations of access to government information in order to facilitate participation in the political process and to assist in maintaining accountability of government have outstripped the basic protections offered by section 2(b) and 3 of the Charter (as they have been interpreted to date). While the reluctance of the government to include explicit protection to access to government information in the Charter in 1981 must be acknowledged, that reluctance was based on an assumption that constitutional protection of such a right was desirable, but not yet timely. Twenty five years later, it may be said that the time for constitutional protection of access to government information has arrived. More importantly, in light of the possibility that government itself may benefit from preventing such constitutional protection, the judiciary has a legitimate and necessary (some may say extraordinary) role in filling the access gap in the Constitution through the application of the principle of democracy.
IV. CHAPTER FOUR

THE METHOD AND THE MADNESS OF RECOGNIZING UNWRITTEN CONSTITUTIONAL PRINCIPLES: THE SUPREME COURT OF CANADA AND ITS CRITICS

In chapter three, I argued that there is a gap in the protection afforded by the Canadian Constitution to the democratic process – the “access gap”. In my view, the access gap may be filled by applying the principle of democracy when interpreting the scope of protection to be afforded by the Constitution. In effect, I will argue that a right to access to government information should be protected through application of the constitutional principle of democracy. However, before proceeding to this argument, it is necessary to set out the approach the Supreme Court of Canada has developed for recognizing unwritten constitutional principles and to identify and address the concerns that have been raised concerning this approach.

This chapter will establish the test for recognizing access to information as part of the principle of democracy that will be applied in chapter five. I will first briefly set out a set of guidelines for recognizing unwritten constitutional principles that may be derived from jurisprudence of the Supreme Court of Canada. These guidelines establish the evidentiary requirements necessary to elevate general values and principles from a political or social status to constitutional status. Having distilled the guidelines from Supreme Court jurisprudence, I will proceed to flesh out the guidelines, based in part on the commentary of other academics. Finally, I will consider and evaluate a number of critiques of the Supreme Court of Canada’s approach to the recognition and application of unwritten constitutional principles in order to set the context for the argument in favour of recognizing a right to access government information as part of the principle of
democracy in chapter five.

In essence, in this chapter I will set out the method that the Supreme Court of Canada appears to have adopted for recognizing particular unwritten constitutional principles and I will discuss why some academics have criticized the Supreme Court’s approach as madness. In the next chapter, I will attempt to show how the recognition of a right to access government information as part of the constitutional principle of democracy may be achieved by applying the method established by the Supreme Court while also avoiding the madness feared by academic critics.

1) Factors Considered by the Supreme Court of Canada When Recognizing Unwritten Constitutional Principles

Perhaps the clearest example of the Court’s methodology for recognizing or affirming an unwritten constitutional principle is to be found in *New Brunswick Broadcasting*. In that case, Justice McLachlin, as she then was, applied a three-pronged approach in her analysis recognizing the constitutional status of certain legislative privileges rooted in the common law. Her approach was based on an analysis of three elements: (a) the wording of the Constitution; (b) historical tradition; and (c) the pragmatic effect of the principle on the proper functioning of democratic institutions.¹

In *New Brunswick Broadcasting*, Justice McLachlin found that the constitutional guarantee of the continuance of Parliamentary governance contained in the Preamble of the *Constitution Act, 1867* provided textual support for the constitutional protection of those legislative privileges that have been historically recognized as necessary for the proper functioning of legislatures.² Justice McLachlin thus relied on the preamble to the

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Constitution Act, 1867 to conclude that “the written text of Canada’s Constitution supports, rather than detracts from, the conclusion that our legislative bodies possess those historically recognized inherent constitutional powers as are necessary to their proper functioning.”

Justice McLachlin also set out the historical evolution of the privileges in the common law through an examination of a number of judicial decisions before concluding that “from an historical perspective, Canadian legislative bodies possess such inherent privileges as may be necessary to their proper functioning. These privileges are part of the fundamental law of our land, and hence are constitutional.”

Finally, Justice McLachlin found that the recognition of legislative privileges as constitutional was pragmatically necessary to ensure the proper functioning of legislatures. She framed this pragmatic inquiry as follows:

As a general proposition, can unwritten constitutional privileges inherent to our legislative bodies be justified on the ground of necessity? Putting the matter differently, can our legislative bodies function properly, clothed only with those powers expressly conferred by our written constitutional documents? The answer to this question must, in my view, be negative. The importance of the unwritten constitutional right, for example, to speak freely in the House without fear of civil reprisal, is clear.

Justice McLachlin went on to consider whether the particular privilege of excluding strangers from the legislature was necessary to the proper functioning of the legislature. In doing so, she explicitly noted the importance of considering the effect of the principle both in a historical context and in a modern context. She stated:

The fact that this privilege has been upheld for many centuries, abroad and in Canada, is some evidence that it is generally regarded as essential to the proper functioning of a legislature patterned on the British model. However, it behooves

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3 Ibid. at 378.
4 Ibid. at 384.
5 Ibid. at 385.
us to ask anew: in the Canadian context of 1992, is the right to exclude strangers necessary to the functioning of our legislative bodies?

In my view, this privilege is as necessary to modern Canadian democracy as it has been to democracies here and elsewhere in past centuries. The legislative chamber is at the core of the system of representative government. It is of the highest importance that the debate in that chamber not be disturbed or inhibited in any way. Strangers can, in a variety of ways, interfere with the proper discharge of that business. It follows that the Assembly must have the right, if it is to function effectively, to exclude strangers. The rule that the legislative assembly should have the exclusive right to control the conditions in which that debate takes place is thus of great importance, not only for the autonomy of the legislative body, but to ensure its effective functioning.6

The Supreme Court’s reasons in the *Quebec Secession Reference* also explicitly identified some of the methods that could be used to identify unwritten constitutional principles. In that case, the Court noted that the principles and rules that are contained in a Constitution “emerge from an understanding of the constitutional text itself, the historical context, and previous judicial interpretations of judicial meaning.”7 Textual interpretation, historical analysis, and the application of judicial precedents will all thus play a role in the identification of unwritten constitutional principles.

In the *Quebec Secession Reference*, the Supreme Court provided further directions concerning how unwritten constitutional principles should be treated in light of other constitutional principles, both written and unwritten. As noted in chapter two, the Court has repeatedly stated that unwritten principles are not to “be taken as an invitation to dispense with the written text of the Constitution.”8 As such, the recognition and application of unwritten principles must be consistent with the existing written provisions.

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6 Ibid. at 387.
7 Ibid. at 403. Most recently, in *British Columbia (Attorney General) v. Christie* 2007 SCC 21, [2007] 1 S.C.R. 873 at paras. 18-27, the Court relied on a “review of the constitutional text, the jurisprudence and the history of the concept…” when determining whether “general access to legal services” is a “currently recognized aspect of the rule of law”.
of the Constitution.

The Court’s prime directive regarding the application of unwritten principles is “balancing”. That is to say that unwritten constitutional principles must be balanced against the operation of other constitutional principles, both written and unwritten. However, the Court provided only two general guidelines as to how to achieve balance between unwritten principles. First, the Court noted that the foundational principles “function in symbiosis. No single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other.”\(^9\) In addition, the Court noted that the Constitution has an “internal architecture” or “basic constitutional structure” and that each individual element of the Constitution is linked to the others and cannot be interpreted without reference to the Constitution as a whole.\(^10\) These guidelines, in effect, underline the Court’s direction that the text and structure of the Constitution must guide the identification and application of unwritten constitutional principles.

2) **Guidelines for Recognizing Unwritten Constitutional Principles**

At this stage, it is possible, based on the Supreme Court’s discussion of unwritten constitutional principles in the above-noted cases and the contributions of academics, to identify an approach for recognizing unwritten constitutional principles.\(^11\) This approach

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\(^11\) Not surprisingly, it is the supporters, much more than the critics, who have articulated the types of evidence that may support the identification of unwritten constitutional principles that have not yet been recognized by the Supreme Court.
may then be applied to determine whether a right to access government information should be recognized as part of the principle of democracy.

As noted above, Justice McLachlin’s reasons in the *New Brunswick Broadcasting* case relied upon three different types of evidence when considering the legitimacy of a proposed constitutional principle: historical, structural and pragmatic. The reliance on these three types of evidence has been endorsed by proponents of the application of unwritten constitutional principles, including Marc Cousineau, Mark Walters and Patricia Hughes. I will rely on these authors to help develop our understanding of the substance and application of each type of evidence. In turn, I will demonstrate in chapter five that recognition of a right to access to information as part of the principle of democracy is supported by each type of evidence.

a) Pragmatic Evidence

Pragmatic evidence demonstrates that a principle that is proposed to be recognized as a constitutional principle is important for the proper functioning of the social and political institutions of the country. In *New Brunswick Broadcasting*, Justice McLachlin relied on pragmatic evidence to show that the legislative privilege to exclude strangers from the legislature was necessary to the proper functioning of the legislative process. Similarly, in the *Provincial Judges Reference*, Chief Justice Lamer discussed the pragmatic importance of maintaining an independent judiciary. Academics have suggested that pragmatic evidence may go beyond evidence that demonstrates that the

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proposed principle is necessary for the proper functioning of democratic institutions such as legislature and judiciary. They suggest that evidence that the proposed principle is important for the functioning of social institutions and relations would also be relevant.

Marc Cousineau has identified pragmatic evidence, or functional evidence as he called it, as evidence that a proposed principle is fundamental to the proper functioning of state and social structures within Canadian society.\textsuperscript{15} Hughes explained that a principle may be identified as a fundamental societal value in Canada if it is one that is “… to be taken into account in the ordering of Canadian society through government policy, in the interpretation of the law, and (because of the impact of policy and law) in private contexts, as well.”\textsuperscript{16} Walters, in turn, referred to the importance of “moral, political and social values” that the Constitution seeks to protect.\textsuperscript{17}

In short, pragmatic evidence will consist of evidence that shows that a principle is important to the functioning of those institutions that reflect the moral, political and social values of Canadian society. I would argue that these institutions will often be political institutions, given the importance of such institutions in the ordering of society. As such, I will focus on evidence that demonstrates the importance of access to government information to democratic institutions and processes in Canada when considering pragmatic evidence that supports the recognition of access to government information as a part of the constitutional principle of democracy.

\textbf{b) Historical Evidence}

While pragmatic evidence may be used to demonstrate that a proposed constitutional principle is important to the functioning of the social and political

\textsuperscript{15} Cousineau, “L’Affaire Montfort”, \textit{supra} note 12 at 504.
\textsuperscript{16} Hughes, \textit{supra} note 14 at 22.
\textsuperscript{17} Walters, “Incorporating Common Law”, \textit{supra} note 13 at para. 13.
institutions of the country, historical evidence considers whether recognition of the principle as a constitutional principle accords with the historical development of the country’s legal framework.

Historical evidence has always been an important element in the recognition of unwritten constitutional principles. In *New Brunswick Broadcasting*, Justice McLachlin traced the historical evolution of the legislative privileges through common law decisions in Canada. In the *Provincial Judges Reference*, Chief Justice Lamer referred extensively to the historical protection accorded the principle of judicial independence in Great Britain and Canada. In the *Quebec Secession Reference*, the Court traced the historical evolution of the Canadian federation in order to provide the context for the evolution of the constitutional principles it would rely upon in its reasons.

Marc Cousineau has argued that historical proof consists of evidence that through Canadian history, politicians, judges, jurists and citizens have felt it important to maintain the values protected by a principle.18 Evidence that a particular principle has long been recognized in Canada as being a fundamental part of the legal framework will be important evidence that the principle should be recognized as an unwritten constitutional principle.

Not every constitutional principle must be able to trace its lineage to the formation of the country. Our understanding and application of unwritten constitutional principles, like written constitutional provisions, may evolve over time and either increase or decrease in scope and importance. As noted by Hughes, evidence that a principle has been more recently recognized as fundamental will also be important. She has noted that it is not necessary that the principle has always been recognized or that its

“recognition is unproblematic either legally or in practice”.¹⁹ Nor does the principle have to take the same form in Canada as it may in another country. As Hughes notes, the translation of philosophical principles such as equality may vary with “the demographic composition, history and political personality of a country.”²⁰ Indeed, we will see in chapter five that the consideration of the particular historical context of Canada is an important mechanism for restraining the discretion of judges when recognizing and applying unwritten constitutional principles.

I would add that legislation and judicial decisions are the most likely source of proof that a given principle has been regarded historically as important enough to protect. In other words, historical proof will often consist of proof that the proposed constitutional principle is consistent with the evolution of the Canadian legal framework, that is, the framework set in place to protect our important principles and values. Thus, in order to meet the guidelines for recognizing unwritten constitutional principles, it will be necessary to examine whether there are any historical barriers to the recognition of access to information as a part of the constitutional principle of democracy. As such, in chapter five, I will focus on whether the recognition of a constitutional principle of access to government information would accord with the evolution of the legal framework in Canada by examining the evolution of the treatment of access to government information in the common law and in legislation in Canada over the past half-century.

c) Structural Evidence

Finally, structural evidence demonstrates that the proposed principle fits within the existing constitutional framework including both the text of the Constitution and

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¹⁹ Hughes, *supra* note 14 at 23.
previously recognized unwritten constitutional principles. The consideration of structural evidence thus complies with the Supreme Court’s directive that unwritten constitutional principles must be balanced against other principles of the Constitution.

Structural evidence may include evidence that the principle is necessary for a comprehensive understanding of the framework of the Constitution or that the principle is consistent with the interpretation of existing constitutional provisions. Walters has argued that in order to recognize new unwritten constitutional principles “it will be necessary to demonstrate that their status as supreme constitutional laws is somehow essential to the coherence of the Constitution as a whole when interpreted in today’s light.”

Hughes has argued that it is not necessary that the scope of a proposed principle be limited to the written provisions to which it is linked. Hughes noted that a new underlying principle may be recognized despite the fact that the principle is partially recognized by an explicit provision. She argued that this is appropriate since underlying provisions may be subject to a different analysis and will have a significance beyond that of any explicit provision. For instance, Hughes argues that a fundamental principle of substantive equality should be recognized. Once recognized, she suggests that this principle would not be subject to the confines of the standard s. 15 analysis and would potentially apply to situations beyond which s. 15 currently applies.

21 Walters, “Incorporating Common Law”, supra note 13 at para 50. It is notable that Walters referred to the interpretation of the Constitution “in today’s light”.

22 Hughes, supra note 14 at 28. “As with other principles and ‘their’ express guarantees, a substantive equality foundational principle would serve a different constitutional purpose than its corresponding express guarantee in the written Constitution. Foundational principles attract a different type of analysis from that required under the explicit guarantees… each [foundational principle] attracts a different analysis in a different context from that in which the court engages with respect to any corresponding express guarantee.” Similarly, Hughes argued that existing principles should not be stretched too broadly to cover principles that should be recognized in their own right. Thus, she suggests that the rule of law principle,
I note that Hughes’ argument runs counter to existing jurisprudence. The Supreme Court has been careful to emphasize the importance of not undermining the scope of the written provisions of the Constitution when applying unwritten constitutional principles. In particular, in the recent case of British Columbia v. Imperial Tobacco Canada Ltd., Justice Major noted that unwritten principles should not be used to create broader versions of rights already included in the Charter for fear of undermining the explicit provisions of the Charter. I will consider this argument more carefully in chapter seven but raise it now as a warning sign to be heeded as we proceed forward.

Finally, Hughes noted that it would be possible to determine the parameters of the new principle, in part, through existing jurisprudence of the Supreme Court of Canada concerning the written provisions with which the principle is associated. However, the principle would not be limited by the specific wording of the provision. While the principle may not necessarily be constrained by the wording of the specific provision from which it is derived, it will be constrained by the operation of other principles and the Constitution as a whole. In Hughes’ words: “The constraints will derive from the principle’s inter-relationship with the other foundational principles relevant in any given case and the coherent development of the constitutional framework as a whole.”

In light of the above, the way in which the proposed right of access to information fits with existing constitutional provisions, including sections 2(b) and 3 of the Charter, will play a significant role in the analysis of chapter five.

which embodies a formal conception of equality, should not be expanded to include a notion of substantive equality because to do so would overshadow the important role for formal equality in some instances while all the while failing to capture the full nature of substantive equality. Ibid. at 36.
24 Hughes, supra note 14 at 39-40.
25 Ibid. at 44.
3) Concerns Raised by the Supreme Court of Canada’s Method of Identifying and Applying Unwritten Constitutional Principles

Having outlined the guidelines for recognizing unwritten constitutional principles, it is worth considering the major critiques of the Supreme Court’s approach. In chapter two, I identified two major concerns that have predominated academic critiques of the Supreme Court of Canada’s approach to the application of unwritten constitutional principles. I addressed the first major concern - the fact that allowing judges to identify and fill gaps in the Constitution would result in judges trespassing on the legislative role of constitutional drafting - at the end of the last chapter. I will address the second major concern raised by academic critics - that the application of unwritten constitutional principles will allow judges to impose their personal value preferences in the process of constitutional interpretation - here. This second concern has been emphasized by most critics of the Supreme Court of Canada’s approach to unwritten constitutional principles, but is perhaps best articulated by Robin Elliot, Patrick Monahan and Jean Leclair.26

a) Robin Elliot

One of the best formulated critiques has been advanced by Robin Elliot. In his article, “References, Structural Argumentation and the Organizing Principles of Canada’s

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Constitution,” 27 Elliot suggests that the Supreme Court of Canada’s justification for the application of unwritten principles in the Quebec Secession Reference is based on structural interpretation. He describes structural interpretation as a form of constitutional interpretation based on inferences from the existence of constitutional structures and the relationships between these structures ordained by the Constitution. He sets out to demonstrate some of the weaknesses of the Court’s application of this method of interpretation in that case. 28

Relying on the work of Australian scholar Laurence Claus, Elliot identifies two different conceptions of the character of written constitutions: the “illustrative-document” conception and the “definitive-document” conception. The first conception treats the Constitution’s textual provisions as illustrations of the principles underlying the Constitution. These principles are enforceable beyond the limits of the textual illustrations. The second conception treats the Constitution as a definitive document that exhaustively proscribes the limits placed on government. While the definitive-document approach doesn’t prohibit the use of structural argumentation, it does limit the implication of rights and obligations to those that are necessary or obvious such that they can be drawn from the terms of the text itself and not from extrinsic circumstances.

Elliot notes that the definitive-document conception strengthens the legitimacy of judicial review because it ensures a direct link between the principles and the actual text

27 Robin Elliot, “References, Structural Argumentation and the Organizing Principles of Canada’s Constitution” (2001) 80 Can. Bar Rev. 67. Elliot provides a detailed account of recent jurisprudence in Australia that has resulted in a form of implied rights analysis based on structural interpretation. Elliot notes that, despite the absence of a constitutionally entrenched Bill of Rights, there is a clear consensus in Australia that its Constitution protects “such freedom of communication between people concerning political or government matters as is necessary to enable the people to exercise a free and informed choice as electors.” However, Elliot notes there exists a dispute over the scope of these implied rights with a majority of Australia’s High Court maintaining that these rights cannot be grounded outside of the text of the Australian Constitution. Ibid. at 78.

28 Ibid. at 72-73.
of the Constitution, which is considered the expression of the popular will. Building on Claus’s two conceptions of written constitutions, Elliot argues that there are two distinct categories of unwritten constitutional principles. The first category is those that “can fairly be said to be generated by necessary implication from the text of the Constitution. These are the principles that can be derived from the Constitution conceived of in definitive-document terms.” The second category are those that “while they cannot be said to be generated by necessary implication from the text of the Constitution, can nevertheless fairly be said to underlie – in the sense of helping to explain the inclusion of – provisions of the text of the Constitution.” Each category plays a different role.

Given that they are derived from the text, the first category of principles has the same status in law as the text and may thus be used to strike down legislation. The second category of principles does not have the same status as the text and can only be used to assist in the interpretation of the text. Elliot argues that this way of conceptualizing unwritten principles minimizes the risks to the legitimacy of judicial review that are inherent in the implication of constitutional rights.

According to Elliot, the Supreme Court of Canada’s reasoning in the Quebec Secession Reference was based on a conception of the Constitution as an illustrative document as opposed to a definitive document. The Supreme Court did not attempt to ground the unwritten principles it relied upon in actual provisions of the text of the Constitution; rather it relied upon the preamble of the Constitution as importing a notion

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29 According to Elliot, the majority view within the Australian High Court “now appears strongly to favour the definitive-document conception of the Australian Constitution over the illustrative-document conception.” Ibid. at 82.
30 Ibid. at 83-84 [emphasis in original].
31 Ibid. at 84.
32 Ibid. at 86.
of unwritten principles that the Court should develop. In so doing, the Court raised a serious problem for the legitimacy of judicial review.\textsuperscript{33} That threat arises from the potential for judges to impose their personal normative preferences during the course of constitutional adjudication.

Not only does it suggest that the term “gap” can be understood very broadly, it also suggests that the reasoning process to be used by the court in the filling of “gaps” can be such as to leave the courts with a relatively free hand to devise such rules as in their view best reflect the underlying or organizing principles of the Constitution.\textsuperscript{34}

Elliott suggests that, in order to address this concern, unwritten principles should only be used to invalidate legislation where those principles are directly linked to written provisions of the text.\textsuperscript{35} I am not convinced by this approach. In particular, it is unclear what the distinction is between principles that are derived from the text by “necessary implication” and the standard Canadian “broad and purposive” interpretation of the constitutional text, including the \textit{Charter}.\textsuperscript{36}

A broad and purposive interpretation of \textit{Charter} rights would be meaningless if it excluded rights that are necessarily implied by particular written provisions of the \textit{Charter}. Assume, for example, that a right to access government information is implied by the right to freedom of expression. It follows that the right to access government information must also then be included in a broad and purposive interpretation of the right to free expression protected by s. 2(b) of the \textit{Charter}. If this is the case, then the right to access government information is simply an extension of the right of free expression and Elliot’s necessary implication approach does not add anything beyond the

\textsuperscript{33} \textit{Ibid.} at 95. As noted above, this concern is also raised by Monahan and Leclair. As such, I will provide a specific critique after outlining the specific arguments raised by those authors.

\textsuperscript{34} \textit{Ibid.} at 97.

\textsuperscript{35} \textit{Ibid.} at 86.

broad and purposive interpretation of s. 2(b).

The practical impact is felt if s. 2(b) is interpreted to exclude access to government information. In that situation, the “necessary implication” approach would exclude identification of access to government information as an independent constitutional principle unless it can be necessarily implied by another written provision. The effect of this approach was demonstrated in the judgment of Justice Blair of the Ontario Superior Court of Justice, Divisional Court in Criminal Lawyers Association v. Ontario (Ministry of Public Safety and Security)\textsuperscript{37}. The case, which will be discussed in more detail in chapter five, challenged exclusions from disclosure relating to law enforcement records and records protected by solicitor-client privilege in Ontario’s Freedom of Information and Privacy Act\textsuperscript{38} on the basis that the exclusions infringed s. 2(b) of the Charter and the fundamental principle of democracy.

Justice Blair cursorily dismissed the appellant’s arguments that the principle of democracy included a general “right to know” or right to access government information on the basis that the principle of democracy “already underlies and informs the freedoms outlined in section 2(b) of the Charter.”\textsuperscript{39} He concluded that it would thus be “redundant to apply the unwritten principle of democracy for attacking the purported governmental restriction on the Applicant’s expressive activity.”\textsuperscript{40} In so doing, Justice Blair conflated the freedom of expression with the right to know and thus undermined any potential consideration of the two rights as complementary, but distinct, elements of a properly

\textsuperscript{37} Criminal Lawyers Association v. Ontario (Ministry of Public Safety and Security) (2004) 70 O.R. (3d) 322 (Ont. S.C.J.) [Criminal Lawyers Association]. Justice Blair’s decision has recently been overturned by the Ontario Court of Appeal: Criminal Lawyers’ Association v. Ontario (Public Safety and Security), 2007 ONCA 392. I will discuss the Ontario Court of Appeal decision in some detail in chapter five. However, Justice Blair’s decision remains useful for the purposes of the analysis here.

\textsuperscript{38} Freedom of Information and Privacy Act, R.S.O. 1990, c. F.31.

\textsuperscript{39} Criminal Lawyers Association, supra note 37 at para 42.

\textsuperscript{40} Ibid. at para 44.
functioning democracy.

Having dismissed the principle of democracy as an independent basis for invalidating the impugned provisions, Justice Blair’s analysis was constrained by precedents for interpreting s. 2(b) of the *Charter*. Justice Blair’s section 2(b) analysis thus focused on existing jurisprudence that suggests that the government does not have a positive obligation to facilitate expressive activity except in rare circumstances. He found that the appellants’ section 2(b) challenge amounted to an attempt to increase the effectiveness of its communication by accessing additional information. In Justice Blair’s view, the government had no obligation to increase the effectiveness of the appellant’s communication by disclosing the records the appellants sought.

In this way, by conflating freedom of expression and access to information in the same analysis, Justice Blair’s analysis completely ignored the important role of access to government information as an independent component of a properly functioning democracy. As a result, Justice Blair was not required to consider how, for instance, a complete ban on access to government information would not just reduce the “effectiveness” of communication concerning government policies and actions, but could also potentially impair the meaningfulness of political participation by making it more difficult to hold public officials accountable for their actions. In short, the adoption of a necessary implication approach may thus result in existing *Charter* jurisprudence unwittingly restricting the application of unwritten constitutional principles.

b) Patrick Monahan
Patrick Monahan also discusses the dangers of judges importing their personal value preferences through the application of unwritten constitutional principles.\textsuperscript{41} Monahan is particularly concerned about potentially expansive interpretations of gaps, whereby every matter that the Constitution fails to provide for, or is silent about, is deemed to constitute a gap.\textsuperscript{42} According to Monahan, such an expansive concept of gaps would create an open-ended license for judges to rewrite the Constitution at will, rendering meaningless the distinction between the judicial function of interpreting the Constitution and the legislative function of enacting the Constitution.\textsuperscript{43}

Interestingly, Monahan accepts the legitimacy of the judiciary filling in gaps in the Constitution - when gaps are conceived more narrowly. Such a narrow conception would accept gaps that arise from “the logical or necessary implication of the text. On this view, a gap may arise when, in order to give legal effect to the ‘underlying logic’ of what has been provided for, it becomes necessary to rely upon an unwritten norm.”\textsuperscript{44} Again, as I noted in reference to Elliot’s approach, it is unclear how this “necessary implication” approach would be distinguished from a broad and purposive interpretation of the constitutional text.

In addition to a restrictive interpretation of gaps, Monahan argues for a restrictive method of filling gaps in the constitutional text. He argues that Courts should adopt an


\textsuperscript{42} Like Elliot, Monahan does not take issue with the Court’s identification of unwritten constitutional principles as providing a framework for the text of the Constitution. He is, however, concerned by the Court’s decision to provide these principles with normative force. Also like Elliot, Monahan is quick to note that the “resort to such unwritten norms is clearly an exceptional circumstance.” Ibid. at 74, 75.

\textsuperscript{43} Ibid., at 76. For cases that have narrowly construed the definition of “gaps” in the Constitution, see the decisions of the Quebec Court of Appeal in \textit{Baie D’Urfé (Ville) c. Québec (Procureur Général)}, supra note 20, \textit{Potter c. Québec (Procureur général)}, supra note 20, \textit{UL Canada inc. c. Québec (Procureur général)}, supra note 20.

\textsuperscript{44} Monahan, \textit{ibid.} at 77.
“interpretive” approach, as opposed to “judicial balancing” approach, to filling gaps in the constitutional text. An interpretive approach requires judges to fill gaps by “adopting an interpretation that is most consistent with the underlying logic of the existing text, and then to rely upon that logic in order to ‘complete’ the constitutional text.”\textsuperscript{45} By contrast, a judicial balancing approach allows the Court to fill in gaps “by relying upon its own conception as to the best or most appropriate set of constitutional norms that should be added to the existing text.”\textsuperscript{46} Monahan recognizes that the line between interpretation and legislation is not always clear, but he insists that the distinction is not meaningless and must be observed.\textsuperscript{47}

According to Monahan, only the interpretive method of filling gaps is consistent with the “judicial role” of interpreting the Constitution. By contrast, the judicial balancing theory “fails to distinguish the interpretation of the text from its creation.”\textsuperscript{48} Monahan thus appears to adopt a similar distinction to Elliot’s distinction between the conception of the Constitution as an illustrative document and a definitive document. According to both scholars, the Constitution is to be interpreted as a definitive document and judges should be restricted from adding to that document by applying principles that cannot be derived directly from the text.

Monahan argues that, although the Supreme Court initially appears to adopt the interpretive method in the \textit{Quebec Secession Reference}, it actually adopts the judicial balancing method. This is evident because the Court insists on balancing the four

\textsuperscript{45} Ibid.
\textsuperscript{46} Ibid.
\textsuperscript{47} Ibid.
\textsuperscript{48} Ibid.
constitutional principles it has identified for itself.\textsuperscript{49} In particular, Monahan notes that the Supreme Court insisted that it must balance all of the relevant constitutional principles against each other, without allowing any one principle to trump another. This, he argues, may undermine the intent of the constitutional framers who may well have wanted particular constitutional principles to have primacy in certain circumstances: “In short, the idea that particular constitutional values cannot be used to ‘trump’ or ‘exclude’ others, however desirable in principle, is a judicially created value choice, not one derived from the text itself.”\textsuperscript{50}

In my view, this is the weakest aspect of Monahan’s critique. I would argue that Monahan actually misconstrues the Court’s use of the term “trump”. In effect, Monahan interprets the Court’s use of the term “trump” to mean that no one constitutional value could ever be viewed as more important than another. Under this interpretation all constitutional principles would have to be considered to be equal in all contexts. This cannot be what the Court meant. In my view, the Court indicated that no constitutional value could trump another in order to reinforce the notion that any one constitutional value must always be balanced against other constitutional values. In this way, no one constitutional value may be said to be absolute, or unassailable. However, in particular contexts, one constitutional value may be said to be more important, or more relevant than another. If this is true, then Monahan’s critique of the Supreme Court’s reasons in the \textit{Secession Reference} loses much of its bite.

c) Jean Leclair

Jean Leclair has also expressed great anxiety with the application of unwritten

\textsuperscript{49} Ibid.
\textsuperscript{50} Ibid. at 78.
However, where Elliot and Monahan accept the potential application of unwritten constitutional principles as legal constraints on government action in certain circumstances, Leclair rejects the possibility that unwritten principles should be used as limitations on legislation. 52

According to Leclair, there are three specific contexts in which unwritten constitutional principles have been applied: (a) to reconcile opposing components of the constitutional order; (b) to challenge the constitutionality of a statute; and (c) to aid in the interpretation of constitutional provisions. 53 He includes cases such as the Quebec Secession Reference, 54 the Manitoba Language Rights Reference, 55 and New Brunswick Broadcasting 56 in the first category of cases. He generally approves of the use of unwritten constitutional principles in these cases and notes that unwritten principles were applied in these cases so as to uphold the democratic process and support legislative autonomy, not restrict it. 57 Leclair also approves of the use of unwritten principles as interpretive aids.

By contrast, Leclair wholeheartedly rejects the use of unwritten constitutional principles, by themselves, as limitations on legislation. 58 He notes that only one constitutional principle, judicial independence, has been successfully applied to invalidate legislation in Canadian courts. All other unwritten principles have been held

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52 Warren Newman also is doubtful of whether any legitimate context exists for the application of unwritten constitutional principles to invalidate legislation. See Newman, “Pushing the Edge”, supra note 26.
53 Leclair, supra note 51 at paras. 29-44.
54 Quebec Secession Reference, supra note 16
56 New Brunswick Broadcasting, supra note 1.
57 Leclair, supra note 51 at para 44.
58 Ibid. at para 75.
insufficient, in themselves, to limit legislative action. Leclair goes on to explain how the invalidation of legislation based on the principle of judicial independence has been illegitimate.

Leclair’s greatest concern is with the “interaction” of constitutional principles with one another. He notes that the potential danger of unwritten principles arises because it is “extremely difficult to assign relative weights to competing principles.” This makes it too easy for judges to rely on principles that support their preferred result, while ignoring principles that may counterbalance the effect of those principles.

This is exactly what Leclair contends has occurred in the judicial remuneration cases where the principle of judicial independence has been used to invalidate legislation affecting judicial remuneration. In those cases, Leclair argues, judges failed to adequately address how principles such as the rule of law, the separation of powers and especially parliamentary supremacy, would counterbalance the principle of judicial independence and protect the legislature’s ability to define judicial salary levels.

Why did such a challenge succeed with respect to judicial independence? It succeeded because the courts referred to the principle of judicial independence

59 Leclair distinguishes the decision in Lalonde v. Ontario (Health Services Restructuring Committee) (1999), 48 O.R. (3d) 50, 181 D.L.R. (4th) 263 (C.A.) [Lalonde], arguing that the decision involved statutory interpretation and the use of common law principles to control administrative action, not invalidation of legislation. I discuss the Lalonde case in detail in chapter six.


61 Leclair, supra note 51 at para 58.

62 Ibid.

63 Leclair admits that there is one case that, at first glance, appears to merit the application of the principle of judicial independence to invalidate legislation. In Robert v. Conseil de la Magistrature, supra note 20, the issue arose as to whether the Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information required a judicial council to provide records from its secret deliberations concerning a complaint made against a judge. Leclair goes on to argue that the case would have been better decided based on the application of common law rights to require a strict interpretation of the legislation at issue.
as an absolute concept, rather than as a notion whose existence is closely intertwined with other principles such as the separation of powers. The absence of even the mere mention of the sovereignty of parliament in these cases is quite striking…

Interestingly, all of the cases where the constitutional invalidity or inapplicability of a statute was successfully argued on the basis of the unwritten principle of judicial independence were decided after Secession (with the obvious exception of Remuneration), but none seem to have taken into account the Court’s advice that no principle should be allowed to trump another.  

It is worth noting that Leclair’s broad conclusion seems to contradict his major critique. Leclair’s major concern, that unwritten principles may not be properly balanced by judges, is procedural in nature; however his conclusion, that unwritten principles may be used to achieve certain goals, such as reinforcing our understanding of democracy, is substantive. Arguably, Leclair’s preferred understanding of democracy, which seems to privilege the notion of parliamentary sovereignty, may be reinforced by an un-balanced application of unwritten principles, wherein principles such as judicial independence and freedom of political speech are excluded by the principle of parliamentary sovereignty.

Leclair uses this substantive approach to distinguish between the Supreme Court’s use of constitutional principles in the Quebec Secession Reference and its application of those principles in the Provincial Judges Reference. Leclair argues that the Court’s application of unwritten principles in the Quebec Secession Reference reinforces our understanding of democracy, while the Court’s reasons in the Provincial Judges Reference undermines our understanding of democracy because it undermines the separation of powers principle. Perhaps it is not so much the fact that the Court failed to balance competing principles as the substantive result of that balancing endeavour that

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64 Ibid. at paras. 50-51.
65 Ibid. at note 213. Leclair also argues that the Quebec Secession Reference involved extraordinary circumstances: “Further, Secession constitutes an exceptional case concerning the very existence of the Canadian State; this was certainly not the case with Remuneration.” (Ibid.).
is at the base of Leclair’s critique.

In particular, it seems that Leclair’s understanding of democracy is synonymous with parliamentary supremacy. As a result, in his view, any decision that challenges parliamentary supremacy is suspect. This approach effectively applies the principle of parliamentary supremacy as a trump card that outweighs all other constitutional principles. Ultimately, Leclair is thus guilty of the same failing that he criticizes in the Supreme Court of Canada’s decision in the *Provincial Judges’ Reference* – applying one constitutional principle without considering other counter-balancing principles. The only difference between the two approaches is the principle chosen as the trump card.

**d) Mark Walters**

Finally, it is worth considering the critique offered by Mark Walters in some detail. At the outset, Walters must be distinguished from other critics discussed in this chapter. Although he criticizes the Supreme Court’s explanation for the application of unwritten principles, he is supportive of the notion that such unwritten principles are a legitimate part of the Canadian constitutional order. Walters admits that the notion of a “fundamental law superior to positive or written law operating as a sort of moral ballast for the legal system, providing it with normative consistency, coherence, and direction, is a compelling idea found throughout the history of jurisprudential writing.”[66] According to Walters, the Supreme Court of Canada simply failed to adequately justify its application of unwritten principles in the *Quebec Secession Reference*.

In particular, Walters has offered a historically-based critique of some of the assumptions included in the Supreme Court’s reasoning in the *Quebec Secession Reference*.

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Similarly to Elliott and Monahan, Walters distinguishes between those unwritten principles that can be derived from an analysis of the text (text-emergent norms) and those principles that are free-standing. Text-emergent principles are those that can be “inferred from specific written provisions as interpreted in light of the general structure of the constitution”, through a “structuralist” analysis. Walters contends that the Supreme Court moved away from structuralist analysis to identify free-standing unwritten constitutional principles in the *Quebec Secession Reference*. He argues that the Court attempted to justify the existence of these free-standing unwritten principles by arguing that the preamble of the *Constitution Act, 1867* suggested the intent of the framers of the Constitution to include such unwritten principles. He argues that this justification cannot withstand historical analysis.

Walters thus criticizes the Court’s reasons in the *Quebec Secession Reference* for relying on weak text-based justifications rather than adopting a more principled approach.

A far more plausible and honest explanation would be to concede what should be obvious from the cases examined: that the unwritten foundational rule of recognition in Canada acknowledges that certain substantive unwritten norms are, on rare occasions, supreme over legislation, and that this supremacy is not derived from the written constitutional texts, that on all other occasions, are supreme.

In Walters’ view, a principled justification for allocating a fundamental role to unwritten constitutional principles must be based on a recognition that the concept of unwritten fundamental laws is part of a rich intellectual tradition and an acknowledgement that there is little historical evidence that this intellectual tradition was imported directly into

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68 *Ibid.* at 101. Walters uses the term “structuralist” in a different sense than Robin Elliot, supra note 27. Elliot views structuralist or structural analysis as a way of justifying the existence of free-standing constitutional norms by reference, not to specific provisions of the text, but by reference only to the general structure of the constitution and the state.


70 *Ibid.* at 104.
Canadian constitutional law through the preamble of the *Constitution Act, 1867*. As such, Walters suggests that the justification for the operation of fundamental constitutional principles in Canada must go beyond that proposed by the Supreme Court of Canada to date. This is the challenge that supporters of the application of unwritten constitutional principles must take up.

Interestingly, Walters suggests that it might be possible to construct a principled argument that the Canadian Constitution has evolved to allow the operation of unwritten principles as a normative constraint upon legislators. He suggests, however, that such an argument would have to recognize at least two limitations:

First, the imposition of common law constraints on legislative authority can be justified only in extreme cases in which ‘natural jurisprudence’ - or basic human rights – is violated in particularly egregious ways...

Second, in general, it should be easier to justify the inclusion of ‘text-emergent’ unwritten norms than ‘free-standing’ unwritten norms within the unwritten fundamental law, since text-emergent norms are (or should be) more closely related to sound interpretations of the written constitution…”

In Walters’ view, the first limitation means that “because basic human rights are, for the most part, already protected by the *Charter*, little scope exists for unwritten fundamental law to operate against statute law in Canada today.” Walters notes that the operation of unwritten principles may prevent the use of the notwithstanding clause in cases of “outrageous violation of human rights” and the abolition of certain fundamental rights through amendments to the constitution. Walters adds that “it should be

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72 *Ibid.* at 137-38. Without developing the thought, Walters suggests that one aspect of this principled argument might be the concept of an ongoing dialogue between courts and legislatures. David Mullan has argued for the need for cautious and careful construction of any theory seeking to justify the application of unwritten principles: David Mullan, “The Role for Underlying Constitutional Principles in a Bill of Rights World” [2004] N.Z.L. Rev. 9 at 34.
73 *Ibid.* at 140.
comparatively more difficult to argue that constitutional rules relating to institutional structure, as opposed to basic human rights, should be considered as part of the unwritten fundamental law binding on legislatures…”76

In summary, Walters criticizes the Supreme Court of Canada for not adequately explaining its reliance on unwritten principles and suggests that unwritten principles should be applied in limited circumstances, most preferably where they are linked directly to the text of the Constitution. However, in contrast to other critics discussed above, Walters seems prepared to accept a justification for the application of unwritten principles that is independent of the text of the Constitution. In this way, Walters occupies a middle ground between critics and proponents of the application of unwritten constitutional principles. He acknowledges the concerns raised by critics, such as Monahan and Elliot, arguing that it should be easier to justify the application of unwritten principles that are closely linked to the text of the constitution, without dismissing the possibility that free-standing constitutional principles may also be found to impose legitimate limitations on government action. In my view, this type of sliding-scale is a useful approach to evaluating arguments in favour of the recognition of particular unwritten constitutional principles. Indeed, I will adopt a similar sliding-scale approach when weighing the evidence in support of recognition of a principle of access to government information in chapter five.

4) **Response to the Concerns Raised by Academics**

In my view, Elliot, Monahan and Leclair overstate the danger of judges imposing their personal value preferences when interpreting constitutional provisions. The Supreme Court of Canada has established a framework for recognizing unwritten

constitutional principles that includes consideration of historical, pragmatic and structural evidence. As such, any unwritten constitutional principle that is recognized will have to be demonstrated to conform with the historical evolution of our legal framework, the institutional requirements of our democratic society and the existing provisions and structure of our Constitution. Judges are bound by the requirement that they consider each of these factors when applying unwritten principles in the course of their written reasons.

For instance, Monahan’s concern that the existence of “gaps” in the Constitution may be interpreted so broadly as to permit the importation of constitutional provisions or rights that were rejected by the framers of the Constitution may be addressed, to a great degree, by the Court’s suggestion that the application of unwritten constitutional principles involves a consideration of the historical development of the Constitution. Such a consideration would go a long way to avoiding claims that gaps exist where legislators made conscious and documented choices to exclude rights from constitutional protection. Certainly, it would be difficult for an analysis of the historical development of the Charter to conclude that the exclusion of the right to property is simply a gap not addressed by the framers of the Constitution as opposed to the result of a conscious decision to exclude economic rights in the Charter. As such, it would be extremely difficult to introduce such a right through unwritten constitutional principles absent a fundamental shift in our constitutional structure.

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As noted in chapter three, the argument in favour of recognition of a constitutional right of access to government information must also overcome this historical hurdle. In this regard, I have argued that the issue of protection of access to government information may be distinguished from the issue of protection of property rights because the issue of protecting access to information in the Charter was not one focused on principled reasons for excluding protection of access but rather was focused on whether the timing was right for including protection for access in the Constitution prior to the introduction of access legislation. Whether or not this argument is deemed sufficient to overcome the barriers raised by the historical context of the framing of the Charter, there can be little doubt that the discretion of judges to fill the access gap in the Constitution is constrained by that historical context.

More specifically, judges are constrained by their obligation to consider this historical context in the process of justifying their decisions to recognize and apply unwritten constitutional principle of democracy to protect access to government information. Let me explain. The foundation of the “judicial discretion” critique of the Supreme Court’s application of unwritten constitutional principles is the notion that the text tethers judges to the values explicitly identified in the Constitution. However, it must be noted that the text of the Constitution cannot serve as a complete deterrent to the importation of judicial value preferences in the course of constitutional interpretation. This fact was explicitly, if somewhat reluctantly, recognized by Sujit Choudhry. He noted:

But I would also argue that written constitutions also restrain courts and prevent judicial review from becoming government by the judiciary. To be sure, written constitutions are not a complete guarantee that courts will not overstep their bounds. A textually oriented style of interpretation, at best, will reduce, but
not eliminate, the probability of judicial overreaching. Even with this caveat, unwritten constitutionalism is potentially very dangerous.\textsuperscript{78}

While Choudhry acknowledged that the text cannot fully restrain judges, he seems to view the text as the best restraint of judicial “overreaching”. This argument ignores the fact that the only way to ensure that judges remain “true to the text”, so to speak, is through the reasons they provide for their decisions. I would argue that it is the requirement that judges provide reasons for their decisions, which other judges must then take into account when providing their own reasons for decisions, that is the true restraint on judges.

The ongoing, some might say interminable, American debate concerning legitimate forms of constitutional interpretation provides some illumination in this regard. That debate may be reduced (artificially) to the conflict between those who argue that constitutional interpretation is only legitimate where judges consider values that accord with the intentions of the constitutional framers and those who argue that judges may consider values not reflected in the intentions of the constitutional framers as long as they can show that the values accord with the broader purposes of the Constitution.\textsuperscript{79}

David Strauss has argued that the legitimacy of either approach is ultimately rooted in the ability of judges to provide reasons for particular constitutional interpretations that demonstrate how they have conformed to the approach they are purporting to adopt.\textsuperscript{80} Thus, for example, a claim that a particular interpretation of the


First Amendment of the United States Constitution complies with the original intent of the American Fathers of Confederation, rather than the personal preference of the judge, can only be evaluated on the basis of the reasons provided by the judge for his interpretation.

Constitutional interpretation inevitably requires judges to choose between competing meanings. Those choices - exercises of discretion if you will - are inherent in the judicial role. There are various approaches to constitutional interpretation that may guide how judges will exercise their discretion to choose between competing meanings in specific instances. Ultimately, the question of whether these judges have applied one approach compared to another and whether they have faithfully implemented the particular approach to which they ascribe, or are bound by precedent to implement, can only be answered by examining the reasons the judges provide for their decisions. In the end, the more convincing the reasons provided by the judges, the more likely that their decisions will be applied by other judges, particularly where judges of the Supreme Court are concerned.

In this way, I would argue that the framework identified by the Court for recognizing unwritten constitutional principles is as effective as the text itself in ensuring that judges cannot arbitrarily import their personal value preferences into the process of constitutional interpretation. The reasons provided for recognizing or applying a particular unwritten principle will be evaluated against the framework established by the Supreme Court of Canada. I will return to this issue in chapter eight when I discuss the theoretical justification for this approach.
5) Conclusion

Academic critics have focused on the theoretical implications raised by the application of unwritten constitutional principles for the legitimacy of judicial review. They have raised two concerns in particular; the risk that allowing judges to apply unwritten principles when interpreting the Constitution will allow them to create constitutional provisions as opposed to merely interpret them; and the risk that the application of unwritten constitutional principles will allow judges to impose their personal value preferences in the course of constitutional interpretation.

These concerns have been raised in different ways. Choudhry and Howse argue that the Court has failed to adequately explain its departure from a traditional positivist approach to constitutional interpretation that privileges the text as the source of constitutional norms. Elliot, Monahan and Leclair all argue that the Court has failed to provide sufficient guidance about how and in what circumstances unwritten principles will be applied. They argue that the Court’s reasoning, based on structural aspects of the Constitution as opposed to direct links to written constitutional provisions, is dangerous. In their view, unless restrained by the text of the Constitution, judges will impose their own value preferences when applying unwritten constitutional principles and thereby undermine the legitimacy of judicial review.

Several different approaches for justifying the application of unwritten principles as limits on government action have been proposed. Choudhry and Howse suggest that those principles should only be accorded legal force to restrict government action in cases warranting extraordinary constitutional interpretation, such as instances when democratic institutions are imperiled. Elliot and Monahan have proposed that unwritten principles
should only be accorded legal force when they are “necessarily implied” from written provisions of the Constitution. Finally, Walters, who though critical of the Supreme Court’s historically-based reasoning in the *Secession Reference* supports the notion of a principled justification for the application of fundamental constitutional principles as limits on legislation, argues that such a justification may be easier in relation to principles that are directly linked to written provisions of the Constitution than for principles that are free-standing.

The alternative approaches suggested by critics each have faults that must be accounted for. Choudhry and Howse’s extra-ordinary interpretation theory invokes a situational approach to constitutional interpretation that potentially envisages different restrictions on judges depending on the political circumstances of the case as opposed to the type of principles those judges are asked to apply. The “necessary implication” approach to restricting which unwritten constitutional principles may impose legal obligations on governments, suggested by Elliot and Monahan, is difficult to distinguish from the existing broad and purposive approach to interpreting written provisions of the Canadian Constitution.

The critics also seem to overstate the danger of judges imposing their own value preferences by glossing over the method used by the Supreme Court of Canada in the *Quebec Secession Reference*, which included the consideration of the historical development of the Constitution in addition to existing textual provisions, judicial precedents and the structural coherence of the Constitution. Finally, Monahan and Leclair appear to have misinterpreted the Supreme Court’s balancing approach by failing to recognize that balance does not always entail equality. These weaknesses in the
critical approaches undermine their arguments for restrictions on the application of unwritten constitutional principles and, particularly put into question the necessity of relying on a strict “necessary implication” approach to identifying new unwritten principles.

Of the alternative approaches suggested by critics of the Supreme Court’s approach to the application of unwritten constitutional principles, I would argue that the theory of extra-ordinary constitutional interpretation, proposed by Choudhry and Howse, is the most acceptable as its supporting analysis is the strongest. It also acknowledges that, in certain circumstances, courts have a legitimate role to play in the identification of binding constitutional values. While Choudhry and Howse suggest that the circumstances in which courts should exercise that role are rare, they do not limit the types of values or principles that may be identified directly to specific provisions of the text. This is not to discount the importance of the text in identifying new constitutional principles. Rather, I would suggest that Walters’ sliding scale approach, by which it is more difficult (but not impossible) to recognize principles that are not directly related to the text, is more appropriate than the strict application of the “necessary implication” approach advanced by Elliot and Monahan.

Such a sliding-scale approach recognizes that critics and proponents of the application of unwritten constitutional principles differ concerning the weight to be attributed to particular types of evidence. Many critics argue that unwritten principles should only be recognized as independent limits on government action when they can be linked directly to written provisions of the Constitution. They reject arguments based purely on the structural coherence of the Constitution. By contrast, proponents of the
application of unwritten principles argue that the written terms of the Constitution should not limit the scope of unwritten principles that are fundamental to the proper functioning of both Canadian society and our constitutional order.\textsuperscript{81} 

Rather than reject free-standing unwritten principles altogether, as some critics may suggest, I propose that we differentiate between stronger and weaker evidence in favour of the recognition and application of unwritten principles. The terms stronger and weaker should not be taken to include negative connotations. Rather, the term stronger is used to apply to evidence that satisfies concerns raised by critics since such evidence would also satisfy proponents. By contrast, evidence that would satisfy proponents, but not critics, is referred to as weaker only because it would not satisfy all critics. For example, evidence that a proposed principle is directly linked to a written provision of the Constitution would be stronger evidence; weaker evidence would not be able to show such a direct link, but would demonstrate the proposed principle’s similarity to other constitutional principles and the coherence its inclusion would bring to the constitutional structure as a whole.

Of course, the specific concerns raised by critics who would reject a particular type of evidence may not be well-founded. As such, the term weaker is not reflective of the actual substance of the evidence, but rather of the scope of its acceptability on its face. In addition, it should not be assumed that stronger evidence in one category of evidence will be sufficient to support an argument that a proposed principle should be recognized or that weaker evidence in one category will doom such an argument. For instance, it is possible that the pragmatic importance of a proposed principle may be strong enough to justify recognition of that principle in and of itself. In this way, the

\textsuperscript{81} In particular, see Hughes, \textit{supra} note 14 and Cousineau, \textit{supra} note 12.
pragmatic importance of the principle might overcome potential historical obstacles to its recognition as part of the legal framework. For example, in some cases, the demonstrated necessity of access to particular types of government information to support political accountability may be sufficient to outweigh the presence of historical legislative restrictions on access to such information.

This dichotomy between stronger and weaker evidence can also be applied to the issue of the conditions in which an unwritten principle may be relied upon. Thus, stronger evidence in favour of the application of an unwritten principle will exist when it can be shown that the application of the principle meets the criteria, posed by some critics, that it is necessary to address extra-ordinary circumstances such as the collapse of some aspect of the constitutional democracy or an outrageous violation of human rights. Weaker evidence may rely on historical and pragmatic evidence to demonstrate that the proposed principle has been and is currently regarded as fundamental in Canada, despite the failure to demonstrate such an extra-ordinary circumstance as the collapse of an element of constitutional democracy.

In chapter five, I will argue that recognition of a constitutional right of access to government information rooted in the principle of democracy is supported by all three types of evidence identified by the Supreme Court of Canada and may be also necessary to protect against fundamental threats to the democratic process. I will suggest that the recognition of the principle of access to government information is thus supported by ‘strong’ evidence and should thus be acceptable to proponents and critics alike.
V. CHAPTER FIVE

APPLYING THE METHOD WHILE AVOIDING THE MADNESS: RECOGNIZING A RIGHT TO ACCESS GOVERNMENT INFORMATION AS AN ASPECT OF THE CONSTITUTIONAL PRINCIPLE OF DEMOCRACY

In chapter four, I outlined the guidelines established by the Supreme Court of Canada for the recognition of unwritten constitutional principles. In my view, a proper appreciation of those guidelines addresses many of the critiques of the Supreme Court’s approach to the application of unwritten constitutional principles. In this chapter, I will discuss the ways in which recognition of a right to access government information as part of the constitutional principle of democracy may be supported by each type of evidence included within the guidelines established by the Supreme Court. In so doing, I will demonstrate that the recognition of a constitutional right to access government information is supported by method not madness. The precise impact of this right to access will be considered in more detail in chapters six and seven.

1) Pragmatic Evidence

It will be recalled that the Supreme Court has identified three types of evidence that may support the recognition of a constitutional principle and the delineation of the scope of such principles: pragmatic, historical and structural. Pragmatic evidence relates to the importance of the proposed principle for the functioning of the social and political institutions of the country. In Canada, the importance of access to government information to the democratic process has been repeatedly noted by government reports,

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1 Recall that, in light of the fact that the principle of democracy has already been recognized as a fundamental principle of the Canadian Constitution, I will argue that access to government information should be recognized as part of (or - in other words – a right that can be supported by) the principle of democracy rather than argue that access should be recognized as an independent principle. This mirrors the general approach applied to recognize that the principle of democracy supports a right to political speech in the Implied Bill of Rights cases discussed in chapter two.
royal commissions, judges and information commissioners. For example, the enactment of the federal *Access Act* was preceded by the Government’s 1977 Green Paper, entitled, *Legislation on Public Access to Government Documents*, which specifically noted that “Open government is the basis of democracy.” In Ontario, the implementation of access to information legislation was proposed by the Commission on Freedom of Information and Individual Privacy, commonly referred to as the “Williams Commission”. The Williams Commission noted the importance of ensuring that citizens have sufficient information concerning government, stating: “… there is no question that an informed citizenry, one that has access to government-held information, is better able to make effective use of the means of expression of public opinion on political questions.”

In 1986, the House of Commons Standing Committee on Justice and Solicitor General conducted a statutorily mandated review of the federal *Access Act*. In the introduction to its report, the Standing Committee noted that the general principle underlying the report was “the conviction shared by all parliamentarians that Canadian democracy is strengthened by making government, its bureaucracy and its agencies

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2 Additional evidence of the recognition of the importance of access to government information to the democratic process was provided in chapter one. I will not repeat that evidence here, but rather will build on it.  
3 Hon. John Roberts, Secretary of State, *Legislation on Public Access to Government Documents* (Ottawa: Minister of Supply and Services, Canada, June 1977). It should be noted that this Green Paper was criticized as including too many proposed restrictions on access to government information. See, e.g. Tom Onyshko, “The Federal Court and the *Access to Information Act*” (1993) 22 Man. L.J. 73 at 78. T. Murray Rankin criticized the Green Paper, stating: “… by the paucity of its analysis, the blurring of its stated options, and the misrepresentation of the goals and practices of freedom of information legislation, the Green Paper leaves little doubt that meaningful legislation will not be forthcoming.” T. Murray Rankin, *Freedom of Information in Canada: Will the Doors Stay Shut?* (Ottawa: Canadian Bar Association, 1977) [Rankin, *FOI in Canada*] at 133.  
5 *Ibid.* at 78.  
accountable to the electorate and by protecting the rights of individuals against possible abuse.”

The Committee explained the role of protections for access to government information in ensuring the movement towards greater accountability of governments, stating:

The development of access legislation is part of a widespread ‘open government’ movement in democratic societies. Democracies are strengthened by the ability of electorates to hold decision makers responsible for their policies and actions. Access legislation is one element of this general trend toward greater accountability.

The government’s response to the Open and Shut Report, entitled, Access and Privacy: the Steps Ahead, was also issued in 1987. In its response, the Canadian government explicitly recognized the importance of access to government information in furthering government accountability and public participation in the political process. It stated:

The government recognizes that Canadians need access to a wide range of information about their government. There is a compelling public interest in openness, to ensure that the government is fully accountable for its goals and that its performance can measured against these goals. (sic) This renders the government more accountable to the electorate and facilitates informed public participation in the formulation of public policy. It ensures fairness in government decision-making and permits the airing and reconciliation of divergent views across the country.

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7 Ibid. at 2.
8 Ibid. at 4 [citations omitted]. The Committee went on to note:
   “Gerald Baldwin, Q.C. made this point when he told the House of Commons in 1977 that:
   “Open government by a workable freedom of information law will have very definite advantages for this parliament and for the public of Canada. Canadians are entitled to know what the government is doing to or for them, what it is costing them, and who will receive the benefits of the proposals which are made. This parliament will then be a better place.”
   The Honourable Walter Baker, then President of the Privy Council, reinforced this point when he told the House of Commons on presenting Bill C-15 for Second Reading debate in November, 1979:
   “If this Parliament is to function, if groups in society are to function, if the people of the country are to judge in a knowledgeable way what their government is doing, then some of the tools of power must be shared with the people, and that is the purpose of freedom of information legislation.”

10 Ibid. at 29.
Even the change in political climate triggered by the September 11, 2001 terrorist attacks in the United States has not diminished the importance publicly attributed to access to information. In the introduction to its 2002 report, the Access to Information Review Task Force noted the impact of the September 11th attacks, but went on to emphasize the continued importance of access to information to Canadian society. It noted that: “… the tragedy has also made us more aware than ever that democracy and openness are fundamental values of the society we all want to live in.”

Both internationally and domestically, academics, legislators, law reform commissions, international organizations, parliamentarians and judges alike have all emphasized the important role that access to information plays in enabling individuals to participate in democratic political systems and to hold their governments accountable. Access to government information is universally recognized as a necessity for meaningful participation in democratic political systems; it has become an indispensable part of the fabric of a democratic society. To return to Justice McLachlin’s summary of pragmatic evidence in the New Brunswick Broadcasting case, it is widely recognized that our democratic process “cannot function properly” without access to government information. As such, it may be argued that access to government information has graduated from an important element of our democratic process to a necessary element.

The pragmatic evidence thus overwhelmingly supports the recognition of a principle of access to government information as part of the unwritten constitutional principle of democracy. It remains to determine whether recognizing a constitutional principle of access to government information is also supported by the historical

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evolution of Canada’s legal framework and the existing structure of the Canadian Constitution. In the next section, I will examine the historical evolution of the attitudes of judges and legislators to the issue of access to government information over the past half-century.

2) Historical Evidence

As noted in chapter four, historical evidence may be used to determine whether recognition of the principle as a constitutional principle accords with the historical development of the country’s legal framework. In chapter one, I briefly outlined the evolution of legal protection for access to information in Canada. In the following pages, I will return to this discussion in more detail in order to determine whether the existing legal framework in Canada raises any obstacles to the recognition of a right to access information as part of the principle of democracy.\textsuperscript{12}

a) Common Law Right to Disclosure of Government Information During the Course of Judicial Proceedings

As noted in chapter one, protection of access to information in Canada extends beyond simple access to information legislation to include both common law and statutory protection of a right to disclosure of government information during the course of judicial proceedings. The leading case dealing with the common law approach to disclosure of government information in the course of litigation in Canada is \textit{Carey v.}

\textsuperscript{12} Given the relatively recent evolution of access to information as a legal and social institution, it is unlikely that the framers of the \textit{Constitution Act, 1867} put their minds to the principle. Indeed, even as late as the entrenchment of the \textit{Canadian Charter of Rights and Freedoms} in 1981, legislative access to information regimes in Canada were in their infancy. As such, issues of the compatibility of a right of access to government information with the historical development of the Canadian Constitution, as opposed to the larger legal framework, are more likely to be subsumed under the third type of inquiry, namely the evidence of the proposed principle’s compatibility with the existing structure and text of the Constitution. The broader issue of whether recognition of the proposed principle would run counter to other constitutional principles, such as parliamentary supremacy, will be considered in chapter seven of this thesis.
The Queen.13 *Carey* involved a plaintiff who was suing the Ontario government and two statutory corporations concerning certain agreements that had been entered into regarding a tourist lodge. In particular, Carey claimed that the government had offered to reimburse all losses of operators of a certain lodge if it were reopened and kept operating. The lodge had been closed as a result of mercury contamination in rivers in the vicinity. Carey claimed that he reopened the lodge and kept operating it for a number of years based on several promises made by the government. He sought production of various documents in the possession of the Executive that he believed would support his claim concerning these promises.

During the examinations for discovery, the government claimed an absolute privilege concerning all documents that went to Cabinet and its committees and all documents that emanated from Cabinet. Nonetheless, Carey subpoenaed the secretary of the Ontario Cabinet to attend at trial with the requested documents. The government of Ontario sought to quash the subpoena on the basis that the documents sought were privileged since disclosure of the documents would breach confidentiality and inhibit Cabinet discussion of important public policy issues. The claim of privilege was based not on the specific content of the documents, but merely on the fact that they belonged to the class of Cabinet documents.

No legislation governed the production of the documents. As such, the case was determined according to common law principles. Justice La Forest, writing for the Court, noted that the case involved two competing interests: the interest in ensuring the proper administration of justice by providing access to all relevant evidence and the interest in

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preventing the disclosure of some government information in order to preserve the effective functioning of government. As noted in chapter one, courts historically had been reluctant to question the exercise of government discretion when refusing to disclose documents. Justice La Forest concluded that, in the final analysis, it is the court’s legitimate role to weigh whether the public’s interest is served by disclosure of the information. He stated:

In the end, it is for the court and not the Crown to determine the issue… The opposite view would go against the spirit of the legislation enacted in every jurisdiction in Canada that the Crown may be sued like any other person. More fundamentally, it would be contrary to the constitutional relationship that ought to prevail between the executive and courts in this country.14

Justice La Forest thus underlined the important role that courts play in fettering the abuse of government discretion, noting, in effect, that courts have a constitutional duty to supervise the exercise executive discretion. Justice La Forest also noted that the balance between the two interests that had to be balanced in government disclosure cases had shifted considerably over the years.15 One factor that affected the shift in balance was the type of information that was sought to be disclosed. Justice La Forest explained:

The need for secrecy in government operations may vary with the particular public interest sought to be protected. There is, for example, an obvious difference between information relating to national defence and information relating to a purely commercial transaction. On the other side of the equation, the need for disclosure may be more or less compelling having regard to the nature of the litigation (e.g., between a criminal and civil proceeding) and the extent to which facts may be proved without resort to information sought to be protected from disclosure.16

Justice La Forest’s reasons thus provide an excellent example of how common law reasoning may incorporate a process of internal justification for limitations on

14 Ibid. at 174.
15 Ibid. at 169.
16 Ibid.
common law principles. In this case, Justice La Forest noted that justification for limits on government secrecy would vary according to the types of information at issue and the nature of the opposing interest. In so doing, Justice La Forest recognized that the court could enforce limitations on the general right of disclosure in different circumstances.

Justice La Forest explained that the changes in the approach to disclosure of government documents had been affected by changing social conditions, the changing role of government, and the general social context. The very fact that these factors continue to evolve meant that the question of access to government information “is one that invites periodic judicial reassessment.” This “periodic judicial reassessment” has gradually resulted in a questioning of the old justifications for protecting government secrets in order to protect the efficacy of the mechanics of governing.

Although Justice La Forest was prepared to accord a relatively high level of deference to the public interest in maintaining the integrity of the decision-making process of Cabinet, he specifically noted the presumption in favour of disclosure. He rejected the notion that it was necessary to provide an absolute immunity from disclosure for information related to Cabinet discussions in order to facilitate the process of Cabinet decision-making.

While Justice La Forest certainly demonstrated deference to the need to protect the decision-making process of government, he specifically noted the trend towards more open government and the positive effects of that trend. Justice La Forest also noted the importance of disclosure of government information in promoting faith in government institutions:

17 Ibid. at 170.
18 Ibid. at 186 [emphasis added].
19 Ibid. at 176-184.
Divulgence is all the more important in our day when more open government is sought by the public. It serves to reinforce the faith of the citizen in his governmental institutions. This has important implications for the administration of justice, which is of prime concern to the courts.\textsuperscript{20}

Justice La Forest ordered that the documents at issue in the case should be disclosed to the court for inspection. He found that, as a general rule, Cabinet documents should not be disclosed without a preliminary inspection by the court to “balance the competing interests of government confidentiality and the proper administration of justice.”\textsuperscript{21}

The common law approach to disclosure of government information in the course of litigation in Canada after \textit{Carey} may be summarized as follows: disclosure of government information is required unless it can be demonstrated that disclosure is contrary to a specified public interest. The Supreme Court of Canada has actively guarded its role to determine whether the Executive has properly balanced the public interest in disclosure against the public interest in maintaining government effectiveness. The Court generally will not accept class-based arguments in favour of refusing disclosure, but rather will require evidence that the content of the document is such that the public interest would be harmed if the documents were disclosed. The Canadian approach matches the approach in other common law jurisdictions.\textsuperscript{22}

\begin{flushleft}
\textsuperscript{20} \textit{Ibid.} at 188.
\textsuperscript{21} \textit{Ibid.} at 189.
\textsuperscript{22} As noted by Alan Mewett: “It is now beyond doubt that at common law there is no conclusive right of concealment on the part of the government even in the case of cabinet secrets. Certainly, in England, Australia and New Zealand the courts have insisted upon their ultimate right to inspect and make their own determination as to whether the material should be disclosed. The Canadian courts, too, have maintained this position. It seems clear that when the appropriate person – a Minister or other official – objects to disclosure, even, for example, of a cabinet memorandum, the court has the right to inspect the information for itself and to decide whether the public interest would be better served by disclosure or concealment.” Alan W. Mewett, “State Secrets in Canada” (1985) 63 Can. Bar. Rev. 358 at 370-71 [citations omitted].
\end{flushleft}
Judicial analysis in cases dealing with disclosure of government information in judicial proceedings has necessarily focused on balancing the importance of disclosure to fairness of the judicial process with potential harm from disclosure to the process of governance. However, the evolution in the common law from the acceptance of an absolute immunity from disclosure of government information to a presumption in favour of disclosure in judicial proceedings has been marked by the judiciary's awareness of the expansion of government and the increasing demands for more open and accountable government and by its increasing skepticism towards arguments that government secrecy is indispensable to effective governance. Thus, while claims that Cabinet documents should be absolutely immune from disclosure were unquestioningly accepted in early cases, judges have since doubted many of the justifications initially offered for such secrecy.

This questioning has led the judiciary to lift the class immunity previously enjoyed at common law by Cabinet confidences and to hold that, in the final instance, it is for the court and not Cabinet to determine if the documents should be disclosed. The onus has shifted onto government to demonstrate that the public interest would be prejudiced by disclosure of the documents. Although it is not always explicitly noted, the public interest calculus itself started to take account of the public interest in openness and disclosure quite apart from the impact of disclosure on the fairness of the judicial process. Thus, while Justice La Forest in *Carey* still noted the need for secrecy in the Cabinet decision-making process, he also underlined the growing movement for more open government and the ways in which disclosure and openness reinforced faith in government institutions.
While its approach was developed in the context of access to government information for the purpose of litigation and thus was driven largely by concerns related to the proper administration of justice, the Supreme Court of Canada’s decisions in this area recognize the importance of access to the democratic system and the ways in which access could improve democratic institutions and the faith of citizens in those institutions. More importantly, these decisions reflect the fact that the basic right of access to government information in judicial proceedings, subject to justifiable limitations, is one that has been recognized and approved by the common law in Canada and abroad.

b) Statutory Right to Disclosure of Government Information During the Course of Judicial Proceedings

As noted in chapter one, the common law approach to disclosure of government information during the course of judicial proceedings has now been largely overtaken by statutory provisions. The Canadian Parliament first dealt with the issue when it enacted section 41 of the *Federal Court Act*. Section 41 addressed the procedure for claiming Crown immunity concerning the disclosure of documents of the federal government.

Section 41 of the *Federal Court Act* stated:

41.(1) Subject to the provisions of any other Act and to subsection (2), when a Minister of the Crown certifies to any court by affidavit that a document belongs to a class or contains information which on grounds of a public interest specified in the affidavit should be withheld from production and discovery, the court may examine the document and order its production and discovery to the parties, subject to such restrictions or conditions as it deems appropriate, if it concludes in the circumstances of the case that the public interest in the proper administration of justice outweighs in importance the public interest specified in the affidavit.

(2) When a Minister of the Crown certifies to any court by affidavit that the production or discovery of a document or its contents would be injurious to international relations, national defence or security, or to federal-provincial relations, or that it would disclose a confidence of the Queen’s Privy Council for

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Canada, discovery and production shall be refused without any examination of the document by the court. 24

In effect, section 41 imposed a greater restriction on access to government information than existed by virtue of the common law at that time. Although section 41(1) provided that the court could review documents that were sought to be withheld from disclosure on the basis of a general public interest, section 41(2) prohibited the court from examining documents claimed to contain Cabinet confidences as well as documents that were alleged to contain information the disclosure of which would be injurious to international relations, national defence or security, or federal-provincial relations.

Apparently, the government of the day was unwilling to allow the courts to supervise its determination of the public interest where the disclosure of certain types of government information was concerned. The fact that Parliament wished to impose greater restrictions on access to government information than allowed under the existing common law standard was specifically noted by Justice Mahoney of the Federal Court Trial Division in Landreville v. The Queen:

Bearing in mind the fact that the House of Lords rendered its unanimous decision in Conway v. Rimmer in February 1968, it is apparent that Parliament deliberately codified the common law as stated in Duncan Cammell, Laird & Co. Ltd. to forestall application of Conway v. Rimmer in Canada...

That codification precludes the evolution in Canada of a Crown privilege where the final decision on production in litigation of relevant documents rests with an independent judiciary rather than an interested executive, recognizing that the conflict, in such circumstances, is not between the public interest and a private interest but between two public interests. 25

24 Ibid., s. 41.
Justice Mahoney concluded that a ministerial objection in the proper form was conclusive of the disclosure issue: “Section 41(2) of the Federal Court Act renders the Court powerless in the face of a properly composed ministerial objection to production.”  

Parliament repealed section 41 of the Federal Court Act in 1982 when it amended the Canada Evidence Act, adding sections 36.1, 36.2 and 36.3.  

Section 36.1 of the amended Canada Evidence Act dealt with claims of Crown privilege with respect to government information that should not be disclosed on general public interest grounds. It allowed a judge of a provincial superior court or of the Federal Court Trial Division to review the information in order to balance the public interests in disclosure and non-disclosure.

Section 36.2 dealt with claims of privilege over documents the disclosure of which would be injurious to international relations or national defence and security. Whereas section 41(2) of the Federal Court Act had prohibited judicial examination of such documents, section 36.2 of the Canada Evidence Act allowed the Chief Justice of the Federal Court, or another judge of the Federal Court designated by the Chief Justice, to review the documents to determine whether the objection to production was well founded. Section 36.2 thus marked an evolution of the government’s approach to disclosure of government documents, resulting in the renewal of the right, previously recognized at common law, of judicial examination of documents sought to be  

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26 Ibid. at 422. The constitutional validity of section 41(2) was upheld by the Supreme Court of Canada in Quebec (Human Rights Commission) v. Canada (Attorney General), [1982] 1 S.C.R. 215.

27 The amendments were actually enacted through the Access to Information Act, S.C. 1980-81-82-83, c.111, s. 4. Section 41 of the Federal Court Act, was repealed by s. 3 of the Access to Information Act.
immunized from disclosure due to apprehended harm to international relations, national
defence and security.\textsuperscript{28}

Section 36.3 dealt with objections to disclosure on the grounds that the
information requested constituted a Cabinet confidence or secret. Section 36.3 largely
preserved the restrictive approach to Cabinet secrets enacted in section 41(2) of the
\textit{Federal Court Act}. However, it did provide a detailed description of what constituted a
Cabinet secret.\textsuperscript{29} It also provided for some restrictions on refusals to disclose, for
instance in cases where the confidence has existed for more than 20 years or where the
decision for which the document was prepared had either been made public or where four
years had passed since the decision had been taken. Thus, while section 36.3 maintained
the statutory restriction on the judiciary’s ability to examine documents for which
privilege was claimed, it also included some restrictions on the types of documents for
which that privilege could be claimed legitimately.

Section 36.3 was judicially interpreted as completely prohibiting the courts from
going behind a proper certificate declaring information to constitute confidences of the

\textsuperscript{28} See, e.g., \textit{Henrie v. Canada (Security Intelligence Review Committee} (1988), 53 D.L.R. (4\textsuperscript{th}) 568
(F.C.T.D.) at 572, aff’d (1992), 88 D.L.R. (4\textsuperscript{th}) 575 (Fed. C.A.).
\textsuperscript{29} Section 36.3(2) now provided:
(2) For the purpose of subsection (1), “a confidence of the Queen’s Privy Council for Canada” includes,
without restricting the generality thereof, information contained in
(a) a memorandum the purpose of which is to present proposals or recommendations to Council;
(b) a discussion paper the purpose of which is to present background explanations, analyses of problems or
policy options to Council for consideration by Council in making decisions;
(c) an agenda of Council or a record recording deliberations or decisions of Council;
(d) a record used for or reflecting communications or discussions between Ministers of the Crown on
matters relating to the making of government decisions or the formulation of government policy;
(e) a record the purpose of which is to brief Ministers of the Crown in relation to matters that are brought
before, or are proposed to be brought before, Council or that are the subject of communications or
discussions referred to in paragraph (d); and
(f) draft legislation.
Cabinet. 30 While section 36.3 of the Canada Evidence Act continued to prohibit judicial examination of the documents alleged to contain Cabinet secrets, Canadian courts strictly scrutinized the certificates provided by the Clerk of the Privy Council in order to determine that they met the procedural requirements for asserting immunity from disclosure. Thus, in Smith, Kline & French v. Canada (Attorney General), Justice Strayer of the Federal Court Trial Division rejected the certificate filed by the Clerk of the Privy Council because it failed to properly identify the reasons for which privilege was claimed over the documents. 31

Justice Strayer noted that the legislature must have been aware that the common law asserted that the courts should have a role in balancing the public interest in disclosure against the public interest in maintaining Cabinet confidences. As such, he found that when Parliament sought to amend the Canada Evidence Act to provide a definition for Cabinet confidences it must have intended that information not specifically included in the definition would be treated according to common law principles. He wrote:

…The history of Crown privilege also indicates, however, that the dominant common law view which has developed is that the courts should have a role, in appropriate cases, in balancing the respective public interests. While the Parliament of Canada has not permitted an equally wide role for Canadian courts

30 In Canada v. Central Cartage Co., [1990] 2 F.C. 641 at 652-53, Chief Justice Iacobucci (as he then was), writing for the Federal Court of Appeal, stated:
It appears clear that Parliament intended by passing section 36.3 that the determination of whether any information constitutes a confidence of the Queen’s Privy Council is to be made by a Minister of the Crown or the Clerk of the Privy Council. Subject only to compliance with the express requirements of the section, the decision of the Minister or the Clerk, as certified in writing by him or her, is not subject to review by any court. The court cannot go behind the certificate and examine the documents as it can under sections 36.1 and 36.2 of the Canada Evidence Act. However, it is open to a court to see whether the certificate on its face asserts a privilege within the statutory limitations on claims for privilege by the executive. [citations omitted].

31 [1983] 1 F.C. 917 at 933. Justice Strayer ordered the documents in issue to be disclosed unless a proper certificate was prepared within 30 days.
with respect to federal government documents and information, it must be assumed to have been aware of these common law developments in its most recent legislation. This suggests that Parliament in the amendments to the *Canada Evidence Act* intended to narrow substantially the unfettered discretion of the executive to withhold information and documents which would otherwise be relevant to a matter before the courts. It is surely for this reason that Parliament, for the first time for these purposes, sought to provide at least a partial definition of what is a Cabinet confidence.\(^{32}\)

In this way, the more liberal common law approach to access to government information was deemed to have informed the government’s legislative approach to access.

Sections 36.1, 36.2 and 36.3 of the *Canada Evidence Act*, were replaced in 1985 by Sections 37, 38 and 39 of the *Canada Evidence Act*.\(^{33}\)

Sections 37, 38 and 39 effectively mirrored their predecessor provisions. Section 37 provided a qualified privilege whereby a Minister (or other person) could object to the disclosure of information in the public interest, but it was left to a superior court judge to determine whether the balance of interests resulted in disclosure of the information at issue. Section 38 covered documents where objection to disclosure was based on a claim that disclosure would be injurious to international relations, national defence or national security. In such cases, the Chief Justice of the Federal Court of Canada, or the Chief Justice’s designate, could examine the documents at issue in order to ensure that a government refusal to disclose properly balanced the public interest in disclosure against potential threats to international relations, national defence or national security. Finally, section 39 addressed documents that the government refused to disclose on the grounds that they contained confidences of Cabinet. Unlike sections 37 and 38 it did not provide for judicial examination of the documents under any circumstance.

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\(^{33}\) *R.S.C.* 1985, c. C-5. This change was a simple re-numbering exercise that corresponded with the 1985 consolidation of the statutes of Canada.
Aside from the amendments to the Act introduced by the Anti-terrorism Act, the absolute privilege accorded to Cabinet confidences pursuant to section 39 of the Canada Evidence Act continues to represent the most significant departure from the common law approach to the disclosure of government information in judicial proceedings.\textsuperscript{34} Although the constitutionality of this absolute privilege has been challenged in a number of cases, Canadian courts have repeatedly upheld its validity. Most recently, the Supreme Court of Canada held that section 39 did not violate the unwritten constitutional principles of judicial independence, the rule of law and the separation of powers in Babcock v. Canada.\textsuperscript{35} In that case, which I will discuss in more detail in chapter seven, Chief Justice McLachlin specifically noted that: “Cabinet confidentiality is essential to good government.”\textsuperscript{36}

Despite initially rejecting the common law approach, the statutory regime dealing with disclosure of government information in the course of judicial proceedings has, for the most part, evolved over time to embrace the modern common law approach. In other words, the statutory regime now recognizes a general duty to disclose government information except in those cases where the government can demonstrate that non-disclosure is in the public interest. The balancing of the public interest in favour of disclosure against the public interest in preventing disclosure is usually subject to judicial oversight.

The most long-standing exception to this general approach in the statutory regime is the case of Cabinet confidences, where the government has been granted a largely

\textsuperscript{34} As noted in chapter one, a more recent exception to this general approach to disclosure of government information was introduced through the amendments to the Canada Evidence Act introduced by the Anti-terrorism Act. I will return to consider these particular exceptions in more detail in chapters six and seven.


\textsuperscript{36} Ibid. at para. 15.
unsupervised discretion to refuse disclosure of information it deems to contain Cabinet confidences. Notwithstanding the fact that judges have upheld the constitutionality of this absolute privilege, judges have also restrictively interpreted the ambit of the privilege by narrowly defining the scope of material covered by the privilege and insisting that government officials fulfill the necessary procedural steps when claiming the privilege.

c) Access to Information Legislation

The Canadian legal framework now also includes statutory rights to access government information outside of judicial proceedings. As noted in chapter one, access legislation has been enacted by the federal government and the governments of each province and territory in Canada. While there are important differences in the ways in which governments in different jurisdictions in the country have chosen to protect access to government information, the different legislative regimes all recognize and protect the importance of access to the democratic process.

The Supreme Court of Canada has emphasized that interpretation of the Access Act must be shaped by the Act’s goal of increasing access in order to ensure government accountability. The Court has repeatedly stated that the scope of the Act should be interpreted broadly and “that necessary exemptions to the right of access should be limited and specific.”

More importantly, the Supreme Court of Canada has recognized that access to government information has become a fundamental aspect of this country’s legal framework. This fact was underlined in Canada (Information Commissioner) v. Canada

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(Commissioner of the Royal Canadian Mounted Police), where Justice Gonthier, writing for all nine members of the Court, noted:

…the Access Act makes this information equally available to each member of the public because it is thought that the availability of such information, as a general matter, is necessary to ensure the accountability of the state and to promote the capacity of the citizenry to participate in decision-making processes…”

A similar sentiment was expressed by Justice La Forest in *Dagg v. Canada (Minister of Finance)*. Justice La Forest noted the vital link between access to government information and democracy when explaining the purpose of the *Access to Information Act*:

The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry.

In their dissenting reasons in *Macdonnell v. Quebec (Commission d’access a l’information)*, a case that dealt with the interpretation of the Quebec provincial access to information legislation Justices Bastarache and LeBel further emphasized the important role of access to information in the democratic process, going so far as to approve the description of the right to information as a “cornerstone of our democratic system”.

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38 Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police), *ibid.* at para 32.
39 *Dagg, supra* note 37.
42 *Act respecting Access to Documents Held by Public Bodies and the Protection of Personal Information, R.S.Q., c. A-2.1 [Quebec Access Act].
43 *Macdonnell, supra,* note 41 at para. 72 [emphasis added]. Justices Bastarache and LeBel dissented in the result. However, they did not differ from the majority on the interpretation of the purpose of the Quebec *Access Act.*
The Supreme Court’s recognition of the importance of access to information as a fundamental element of the democratic process does not mean that there can be no legitimate restrictions on access. Rather, the Court has generally upheld the balance established between access and the need to protect information in the public interest established under the Access Act. As noted in chapter one, the Access Act allows the government to refuse to disclose information if the disclosure of the information could reasonably be expected to be injurious to the conduct of federal-provincial affairs,\(^{44}\) or to the conduct of international affairs, the defence of Canada or the detection, prevention or suppression of subversive or hostile activities.\(^{45}\) Similarly, section 21 of the Access Act allows the government to refuse to disclose advice to Ministers and information derived from the deliberative process of governance.

In theory, section 21 is designed to protect the policy-making process to ensure that Ministers are able to receive full and candid advice while determining policy. In his 2003-2004 Annual Report, the Information Commissioner of Canada recognized the strength of the Access Act’s protection of the policy-making process.

The myth that the Access to Information Act removes the ability of public servants to give ministers private advice is the most widespread and pernicious of all. It has no foundation in law, yet it is used by public officials to justify increasing reliance on oral briefings, decreasing the keeping of meeting agendas and minutes and broadening an official zone of secrecy for public officials.

In fact, the Access to Information Act now has a very strong protection for the confidentiality of advice and recommendations developed by officials for ministers. The exemption, set out in section 21 of the Act, is the third most frequently used of the Act’s 13 exemptions to justify secrecy. It has been the subject of litigation, and the Federal Court of Appeal has rendered decisions which have confirmed that this is a strong exemption. The Act recognizes and supports the need for candour between officials and ministers as an element of

\(^{44}\) Access Act, supra note 4, s. 14.
\(^{45}\) Ibid, s. 15.
ministerial accountability, which is a core element of the Westminster style of parliamentary democracy.  

The importance of protecting the policy-making process was recognized by the Federal Court of Canada in *Canadian Council of Christian Charities v. Canada*.  

In that case, the Minister of Finance refused to disclose certain documents concerning the tax-treatment of religious orders based on paragraphs 21(1)(a) and (b) of the *Access Act*.  

In his reasons, Justice Evans noted the need to balance the requirements of openness with the particular need for confidentiality during the policy-making process.  

Justice Evans also noted that it would be undesirable to give section 21(1) a broad interpretation as that would undermine the purpose of the *Access Act*. While discussing the applicant’s argument concerning the interpretation of section 21(1), Justice Evans stated:

> Since citizen participation is more likely to be effective if it comes early in the policy-making process, subsection 21(1) should not be given a broader interpretation than its wording clearly requires. A central purpose of the *Access to Information Act* is, after all, to enhance the democratic foundations of government, and accountability.

Nonetheless, Justice Evans concluded that section 21(1) was specifically designed to provide a broad scope of protection to documents involved in the policy-making process.

It is difficult to avoid the conclusion that the combined effect of paragraphs 21(1)(a) and (b) is to exempt from disclosure under the Act a very wide range of documents generated in the internal policy processes of a government institution…

The Act thus leaves to the heads of government institutions, subject to review and recommendations by the Information Commissioner, the discretion to...
decide which of the broad range of documents that fall within these paragraphs can be disclosed without damage to the effectiveness of government. There is very little role for the Court in overseeing the exercise of this discretion.\textsuperscript{51}

\textit{Canadian Council of Christian Charities} thus provides an example of how Canadian courts have accepted the balance struck by Parliament between the importance of access to government information and the requirements of the policy-making process. It also demonstrates how limitations of the right to access government information may be justified. In particular, the case illustrates that governments may justify limits on the right to access government information where they can demonstrate a genuine public interest in maintaining the secrecy of the type of documents at issue.

While the \textit{Access Act} creates exemptions from disclosure for certain types of information when the government can demonstrate that its disclosure would cause injury to the public interest, the decision to refuse disclosure of such information remains subject to the oversight of the Information Commissioner of Canada. By contrast, information that the government alleges includes Cabinet confidences is completely excluded from the oversight of the Information Commissioner pursuant to section 69 of the \textit{Act}.\textsuperscript{52}

\textsuperscript{51} Ibid. at 262.
\textsuperscript{52} Section 69 states:

69. (1) This Act does not apply to confidences of the Queen's Privy Council for Canada, including, without restricting the generality of the foregoing,  
(a) memoranda the purpose of which is to present proposals or recommendations to Council;  
(b) discussion papers the purpose of which is to present background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions;  
(c) agenda of Council or records recording deliberations or decisions of Council;  
(d) records used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;  
(e) records the purpose of which is to brief ministers of the Crown in relation to matters that are before, or are proposed to be brought before, Council or that are the subject of communications or discussions referred to in paragraph (d);  
(f) draft legislation; and  
(g) records that contain information about the contents of any record within a class of records referred to in paragraphs (a) to (f).
Cabinet confidences are excluded, notionally, in order to protect the process of Cabinet governance whereby members of Cabinet are collectively responsible for the decisions taken by Cabinet and must collectively support those decisions. Excluding Cabinet confidences from disclosure is argued as necessary to allow Cabinet Ministers the freedom to discuss issues within Cabinet without the danger that any dissenting views would become public knowledge and thereby undermine the collegiality of Cabinet decisions.

Successive federal Information Commissioners have denounced the wholesale exclusion of Cabinet confidences from the Access Act. In his Response to the Report of the Access to Information Review Task Force, the Information Commissioner of Canada, referring to section 69, stated:

There is, thus, no meaningful, independent review of government decisions to refuse disclosure of any records it considers to be Cabinet confidences. Often called the Act’s “Mack Truck” clause, this special treatment for Cabinet confidences is entirely at odds with the purpose clause of the Act, set out in section 2. In particular, it infringes the principle that “exceptions to the right of access should be limited and specific” and it infringes the principle that

(2) For the purposes of subsection (1), "Council" means the Queen's Privy Council for Canada, committees of the Queen's Privy Council for Canada, Cabinet and committees of Cabinet.
(3) Subsection (1) does not apply to
(a) confidences of the Queen's Privy Council for Canada that have been in existence for more than twenty years; or
(b) discussion papers described in paragraph (1)(b)
   (i) if the decisions to which the discussion papers relate have been made public, or
   (ii) where the decisions have not been made public, if four years have passed since the decisions were made.
“decisions on the disclosure of government information should be reviewed independently of government.” 53

The Commissioner noted that: “Over the 18 years since the Access to Information Act came into force, numerous instances have arisen where the government has certified information to be a Cabinet confidence when the information clearly does not so qualify.”54 The Commissioner concluded that independent review of decisions to refuse disclosure because of alleged Cabinet confidences is necessary to prevent abuse, stating that: “The point of all this being, that, in the absence of independent review, the Cabinet confidence exclusion is likely to be applied to a broader range of records than intended by Parliament.”55

Notwithstanding the persistent calls for reform by multiple Information Commissioners, successive governments have steadfastly refused to amend the Access Act in order to include Cabinet confidences within the ambit of the Act and the Information Commissioner’s supervision. Given that the scope of unwritten constitutional principles must account for the historical development of the Canadian legal framework, the legislative refusal to include Cabinet confidences within the ambit of the federal Access Act represents a potential limit to the scope of the principle of democracy. However, more generally speaking, it is important to note that the Access Act, like common law and statutory rules concerning disclosure of government information in judicial proceedings recognizes and reinforces the general importance of

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54 Ibid. at 36.
55 Ibid.
access to government information, while also recognizing particular exceptions to the requirement of disclosure.

d) **Summary of Historical Evidence**

Access to government information has been an important part of Canada’s legal framework for over fifty years. Originally, access to government information was restricted to access gained through the process of litigation. In this realm, access was initially subject to the government’s ability to rely on an absolute immunity from disclosing documents it believed would harm the public interest if disclosed. This absolute immunity has been eroded over time, both through the common law and legislation, such that government decisions to refuse disclosure of documents are usually subject to judicial review, including examination of the documents at issue by the court.

Important exceptions, such as cases involving documents alleged to contain Cabinet confidences, remain. Nonetheless, the process of requiring disclosure of government information in the course of litigation has generally increased access to government information over the past fifty years. Most importantly, the process has been predicated on the assumption that government would not refuse to disclose documents without first balancing the public interest in disclosure against potential harm to the public interest from disclosure.

In addition, legislation mandating access to government information has been instituted in Canada over the past twenty-five years. This access legislation has been interpreted liberally by the courts in order to advance the stated purpose of such legislation, namely increasing the ability of the public to participate in political decision-making and to hold governments accountable. The general approach to access enshrined
in access to information legislation mirrors, in many ways, the approach adopted in the
common law and evidence legislation concerning disclosure of government documents in
the course of litigation. That is to say that the general presumption of such legislation is
that access to government information should be granted unless a specific harm to the
public interest may be identified.\textsuperscript{56} Specific provision has been made to protect the
public interest in maintaining the confidentiality of information the disclosure of which
may be dangerous to national security and national defence, among other identifiable
interests.

The evolution of access to government information in both the common law and
statutes over the past fifty years indicates that the recognition of access to government
information as part of the principle of democracy is consistent with the evolution of this
country’s legal framework. However, as noted above, there remain important areas
where legislators have not been willing to extend access as far as it had been extended
under the common law. The most important of these is in the area of Cabinet
confidences. Under both evidence legislation and access legislation, governments have
restricted the ability of courts to review decisions taken by governments to refuse access
to or refuse disclosure of Cabinet confidences. These restrictions have been upheld by
the courts as a proper exercise of parliamentary sovereignty.

Any consideration of the scope of the protection for access to government
information that can be supported by the constitutional principle of democracy will have
to give due consideration to this historical legislative preference for strict limits on access
to Cabinet confidences and to concerns relating to state security. However, the

\textsuperscript{56} It is important to note that not all exceptions to disclosure require proof of a threat to a specific public
interest in each particular case. Some exceptions assume that there is a general public interest in insulating
categories of information from disclosure.
legislative preference for restrictions on access to Cabinet confidences and restrictions aimed at protecting state security must also be balanced against the greater trend towards reducing restrictions on access to government information. In addition, the justifications for strict restrictions on access to government information must be continually re-assessed. As noted by Justice La Forest, the issue of access to government information “invites periodic judicial reassessment.”

3) Structural Evidence

Finally, structural evidence demonstrates that the proposed principle fits within the existing constitutional framework including both the text of the Constitution and previously recognized unwritten constitutional principles. Structural evidence may include evidence that the principle is necessary for a comprehensive understanding of the framework of the Constitution or that the principle is consistent with the interpretation of existing constitutional provisions. In this section, I will examine the link between the proposed protection of access to government information under the principle of democracy and the framework for democratic governance established by the Canadian Constitution. I will begin by briefly considering the role of section 17 of the Constitution Act, 1867. The majority of my analysis will focus on the link between access to government information and sections 2(b) and 3 of the Charter.

Section 17 of the Constitution Act, 1867 formally established Canada as a parliamentary democracy. It states: “There shall be One Parliament for Canada, consisting of the Queen, an Upper House styled the Senate, and the House of Commons”.57 As noted in chapter three, this section, together with section 20, which required Parliament to be convened once a year, and section 50, which required a new

House of Commons to be elected every 5 years, were the only express constitutional requirements of democratic governance in the *Constitution Act, 1867*. Together, they provided the basic constitutional framework that supported the discussion of the importance of freedom of political discussion in Canada in the Implied Bill of Rights cases.

These provisions of the *Constitution Act, 1867* were supplemented in 1981 by sections 2(b) and 3 of the *Canadian Charter of Rights and Freedoms*. As noted in chapter three, section 2(b) formalizes the protection of freedom of expression, while section 3 guarantees the right of every citizen of Canada to vote in elections of the House of Commons and provincial legislatures and to be qualified to sit as a member in those legislatures.

In so far as section 17 of the *Constitution Act, 1867* established a parliamentary democracy in Canada, it invited the creation of those institutions and processes necessary for the functioning of such a form of government. As such, in light of the importance of access to government information to the functioning of modern democracies, it is arguable that section 17 should now be interpreted to protect such access. However, I will argue below that there is a more direct link between sections 2(b) and 3 of the Charter and the proposed right of access to government information.

### a) Freedom of Expression Cases

[58] Section 20 stated: “There shall be a Session of the Parliament of Canada once at least in every Year, so that Twelve Months shall not intervene between the last Sitting of the Parliament in one Session and its first sitting in the next Session.” Section 20 was repealed by the *Constitution Act, 1982* and replaced by section 5 of the Charter. Section 50 states: “Every House of Commons shall continue for Five Years from the Day of the Return of the Writs for choosing the House (subject to be sooner dissolved by the Governor General), and no longer.” Section 50 has been supplemented by s. 4 of the Charter.

[59] In addition, Section 4 of the Charter sets a five year limit between legislative elections with exception for extreme emergencies. Section 5 of the Charter guarantees that there shall be a sitting of Parliament and provincial legislatures at least once every twelve months.
The Supreme Court of Canada’s jurisprudence concerning s. 2(b) of the Charter has built on the foundation established in the Implied Bill of Rights cases. As noted in chapter two, the Implied Bill of Rights approach never received the support of a majority of the Court’s justices prior to the entrenchment of the Charter. Nonetheless, in cases following the entrenchment of the Charter, the Court embraced the notion that freedom of speech was implicitly protected by the Canadian Constitution. In *Fraser v. Canada (Public Service Staff Relations Board)*, Chief Justice Dickson, writing for the Court, stated: “… ‘freedom of speech’ is a deep-rooted value in our democratic system of government. It is a principle of our common law Constitution inherited from the United Kingdom by virtue of the preamble of the *Constitution Act, 1867.*” 60 Then again, in *Retail, Wholesale & Dept. Store Union, Loc. 580 v. Dolphin Delivery Ltd.*, Justice McIntyre speaking for a unanimous court, stated: “Prior to the adoption of the Charter, freedom of speech and expression had been recognized as an essential feature of Canadian parliamentary democracy. Indeed, this court may be said to have given it constitutional status.” 61

The Court has also emphasized the importance, initially recognized in the Implied Bill of Rights cases, of freedom of expression to the democratic process. In *Edmonton Journal v. Alberta (Attorney General)*, Justice Cory wrote:

> It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized. 62

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In R. v. Keegstra, Chief Justice Dickson recognized the important link between freedom of expression and the political process and the importance of freedom of expression in facilitating participation in the political process:

The connection between freedom of expression and the political process is perhaps the linchpin of the s. 2(b) guarantee, and the nature of this connection is largely derived from the Canadian commitment to democracy. Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is open to all persons. 63

The link between political speech and democracy has been particularly evident in a line of cases dealing with freedom of expression in the context of referenda and elections. In these cases, members of the Court have focused on the specific ways in which free expression supports the political process.

(i) Haig v. Canada (Chief Electoral Officer) 64

One of the first cases to deal with the interplay between the electoral process and the freedom of expression under the Charter was Haig v. Canada (Chief Electoral Officer). The Haig case emerged out of the referendum held in relation to the proposals to amend the Canadian Constitution contained in the Charlottetown Accord. The referendum was held pursuant to federal law across Canada, except in Quebec where the referendum was held pursuant to provincial law. The claimant Haig was a resident of Ontario who had recently moved to Quebec. As a result of differences in the residency requirements under the federal legislation and the Quebec legislation, Haig was denied the right to vote in either referendum. He challenged the federal Referendum Act 65

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claiming that, by excluding him from voting in the federal referendum, it violated his right to vote under sections 2(b), 3 and 15 of the Charter.

Justice L’Heureux-Dubé wrote the majority judgment. She found that the Order in Council requiring that a federal referendum be held in some, but not all provinces, was constitutionally valid. She concluded that section 3 of the Charter did not include a constitutional right to vote in a referendum.66 Justice L’Heureux-Dubé also found that there was no violation of section 2(b) of the Charter since the freedom of expression did not guarantee the provision of a specific means of expression such as voting in a referendum.67 Her finding that that the freedom of expression did not include a right to vote in a referendum was based on her view that the Charter’s fundamental freedoms, such as the right to freedom of expression protected by section 2(b) of the Charter, are traditionally conceived as involving only a negative obligation not to restrict the right in question.68

Justice L’Heureux-Dubé concluded that there was no positive obligation on government to ensure that citizens could express their views in any given referendum. As a result, the exclusion of a particular citizen’s right to vote in a consultative process such as a referendum was not a violation of the freedom of expression. She reached this conclusion based on the fact that it had not yet been determined that s. 2(b) of the Charter obliged the government to provide “a particular platform to facilitate the freedom of expression.”69

66 I will deal with this aspect of her decision in section 2(b)(ii)(2) of this chapter.
67 Justice L’Heureux-Dubé also rejected the claim based on section 15, but I will not address that part of her reasons in this thesis.
68 Haig, supra note 64 at 603.
69 Ibid. at 604.
Notwithstanding the above, Justice L’Heureux-Dubé did acknowledge that, in certain circumstances, the government may find itself under a positive obligation to ensure that a right is protected.

The distinctions between “freedoms” and “rights”, and between positive and negative entitlements, are not always clearly made, nor are they always helpful. One must not depart from the context of the purposive approach articulated by this court in *R. v. Big M Drug Mart Ltd.*... Under this approach, a situation may arise in which, in order to make a fundamental freedom meaningful, a posture of restraint would not be enough, and positive governmental action might be required. This might, for example, take the form of legislative intervention aimed at preventing certain conditions which muzzle expression, or ensuring public access to certain kinds of information.70

Thus, in her discussion, Justice L’Heureux-Dubé opened the door to the possibility that a positive obligation to ensure access to information may be imposed upon government in certain situations.71

In *Haig*, Justice L’Heureux-Dubé provided a seemingly restrictive interpretation of political expression. However, her discussion of freedom of expression was specifically linked to the issue of expression through referendum questions. This somewhat restrictive view was alleviated by, and should be read together with, the majority’s decision in *Libman v. Quebec.*72

(ii) *Libman v. Quebec (Attorney General)*

*Libman* concerned a challenge to certain provisions of Appendix 2 of Quebec’s *Referendum Act*.73 The complainant Robert Libman, the president of the Equality Party, claimed that the provisions, which required that certain types of regulated expenses,
including advertising expenses, must be paid out of the funds of committees authorized to represent particular sides in a referendum in Quebec, violated sections 2(b) and 2(d) of the Charter. In effect the provisions required individuals to associate with one of two national committees on either side of a referendum question in order to incur regulated expenses during the course of an election. If the individual wished to pursue a campaign independent of the two committees, then she could not incur any regulated expenses.

In its unanimous reasons for decision, the Court recognized that it had “consistently and frequently held that freedom of expression is of crucial importance in a democratic society” and cited cases from both Charter jurisprudence and Implied Bill of Rights cases. 74 Indeed, the Court again recognized that freedom of expression existed prior to its entrenchment in the Charter, stating: “Freedom of expression was not created by the Canadian Charter but rather was entrenched in the Constitution in 1982 as one of the most fundamental values of our society (see, for example, Switzman v. Elbling, supra, at pp. 306-7)”. 75

The Court concluded that the provisions infringed s. 2(b) and s. 2(d) of the Charter, and that the infringement could not be justified under s. 1. The Court agreed that the provisions served a pressing and substantial objective, namely promoting voter equality by preventing the most affluent members of society from dominating debate during a referendum. The Court also agreed that the spending limits were rationally connected to this objective. In particular, the Court noted that spending limits were an important means to ensure that elections and referendums are fair.

Spending limits are also necessary to guarantee the right of electors to be adequately informed of all the political positions advanced by the candidates and

74 Libman, supra note 72 at 402-03.
75 Ibid. at 403.
by the various political parties. Thus, the principle of fairness presupposes that certain rights or freedoms can legitimately be restricted in the name of a healthy electoral democracy (Lortie Commission, supra, at p. 323). Elections are fair and equitable only if all citizens are reasonably informed of all the possible choices and if parties and candidates are given a reasonable opportunity to present their positions so that election discourse is not dominated by those with access to greater financial resources. (Lortie Commission, supra, at p. 324)\textsuperscript{76}

It is important to note that the Court equated the fairness of elections with the ability of electors to be reasonably informed of all possible choices. This notion of the right to an informed vote, be it in an election or a referendum, recurs in the cases dealing with s. 3 of the Charter that will be discussed below.

In \textit{Libman}, the right to an informed vote translated into the recognition that some limitations on expression could be justified in order to ensure fair votes in referenda or elections. However, the Court concluded that the spending restrictions on third parties, which amounted to an almost complete ban, were not minimally impairing of the right to expression and association. The Court found that allowing individuals and groups who could neither join nor affiliate themselves with the national committees a minimum amount of money that they could spend to communicate their positions would have provided a less intrusive means of achieving the legislation’s stated objective. It struck down the impugned provisions.

Despite the fact that the Court struck down the spending limits imposed by the impugned legislation in \textit{Libman}, the Court’s reasons introduced an important element to the discussion of democratic rights in Canada, namely the right of voters to make informed decisions.

\begin{itemize}
\item[(iii)] \textit{Thomson Newspapers Co. v. Canada (Attorney General)}
\end{itemize}

\textsuperscript{76} \textit{Ibid.} at 410.
The notion that freedom of expression includes a right to an informed vote was taken up by Justice Gonthier in his dissenting reasons in Thomson Newspapers Co. v. Canada (Attorney General). Thomson Newspapers involved a challenge to s. 322.1 of the Canada Elections Act, which banned the broadcasting, publication or dissemination of opinion polls during the final 72 hours of an election campaign.

Justice Bastarache, writing for the majority, found that the provision violated s. 2(b) of the Charter and that the violation could not be saved under s. 1. He found that it was unnecessary to determine whether the provision violated s. 3 of the Charter. Nonetheless, Justice Bastarache opined that “to constitute an infringement of the right to vote, a restriction on information would have to undermine the guarantee of effective representation.”

Justice Gonthier, writing in dissent, found that the ban did not violate s. 3 of the Charter. He explicitly agreed with Justice Bastarache that section 3 could only be violated by a restriction on information if it undermined the guarantee of effective representation. He concluded that the provisions in issue did not have such an effect, but rather assisted effective representation by allowing voters enough time to scrutinize and discuss published poll results before election day. As such, he found no violation of s. 3 of the Charter.

Justice Gonthier agreed with Justice Bastarache that the ban on the publication of opinion polls in the last 72 hours of an election campaign infringed s. 2(b) of the Charter. However, contrary to Justice Bastarache, Justice Gonthier concluded that the

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79 Thomson Newspapers, supra note 77 at 427.
80 Ibid. at 400.
infringement could be justified under s. 1. In order to bolster his finding that the infringement could be justified under s. 1, Justice Gonthier engaged in a detailed discussion of the nature of freedom of expression. In particular, Justice Gonthier emphasized the importance of freedom of expression to the electoral process in order to assist in his justification of the impugned provisions as enhancements of that same electoral process.

The quest for better information gives more meaning to voter participation in the electoral process. The very fact that some voters base their decision on opinion survey polls may justify the means taken to promote voters’ right to good information. This is consistent with the findings of this Court that one of the objectives underlying freedom of expression is the ability of voters to make informed choices (Libman, supra, at para 54; Ford v. Quebec (Attorney General), [1988] 2 S.C.R. 712 at p. 767, 54 D.L.R. (4th) 577).\(^{81}\)

This interpretation of the purpose of section 2(b) allowed Justice Gonthier to conclude that the objective of the ban on the publication of polling results enhanced the purpose of the freedom of expression itself, including “…the ability of voters to make informed choices and the promotion of political and social participation…”\(^{82}\) Justice Gonthier found that there were no equally effective alternatives to the ban and that the limited effect of the 72 hour ban was outweighed by the positive impact of ensuring that voters are properly informed when voting.

(iv) Harper v. Canada (Attorney General)

The notion that the freedom of expression includes a right to receive certain information was once again taken up by dissenting judges in Harper v. Canada (Attorney General).\(^{83}\) The Harper case involved a challenge to spending limits included in the

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\(^{81}\) *Ibid.* at 403-404 [Emphasis in original].

\(^{82}\) *Ibid.* at 410.

which limited the spending of individuals and groups on advertising during an election. The challenge was launched by Stephen Harper, then the head of the National Citizens Coalition, now the Prime Minister of Canada. He argued that the provisions, which restricted individuals and groups, not including political parties, from spending more than $3,000 in any individual electoral district and $150,000 nationally on advertising during an election, violated sections 2(b), 2(d) and 3 of the *Charter*.

All of the judges agreed that the impugned provisions did not infringe the right to vote. All of the judges also agreed that the impugned provisions infringed s. 2(b) of the *Charter*. The majority found that the infringement could be justified under s. 1, while the dissenting judges, Chief Justice McLachlin and Justice Major, found that the infringement created by two of the provisions could not be justified under s. 1.

In their dissenting reasons, the Chief Justice and Justice Major found that the right to participate in political discourse included a right to effective participation, which required, in turn, access to sufficient information.

The right to participate in political discourse is a right to *effective* participation – for each citizen to play a “meaningful” role in the democratic process, to borrow again from the language of *Figueroa*, *supra*. In *Committee for the Commonwealth*, *supra*, at p. 250, McLachlin J. stated that s. 2(b) aspires to protect “the interest of the individual in *effectively communicating* his or her message to members of the public” (emphasis added). In the same case, Lamer C.J. declared that “it must be understood that the individual has an interest in communicating his ideas in a place which, because of the presence of listeners, will favour the *effective dissemination* of what he has to say” (emphasis added); see *Committee for the Commonwealth*, *supra*, at p. 154.

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84 S.C. 2000, c. 9.
85 At present, I will focus on the discussion of the freedom of expression in the dissenting reasons. I will examine the discussion of s. 3 of the *Charter* in the majority reasons in the next section.
86 *Harper*, *supra* note 83 at 205.
Chief Justice McLachlin and Justice Major proceeded to argue that the freedom of expression includes a right to receive the information necessary to exercise an informed vote.

Freedom of expression protects not only the individual who speaks the message, but also the recipient. Members of the public – as viewers, listeners and readers – have a right to information on public governance, absent which they cannot cast an informed vote; see *Edmonton Journal, supra*, at pp. 1339-40.\(^\text{87}\)

According to the Chief Justice and Justice Major, the *Canada Elections Act* undermined the right to listen by withholding from voters the substantive analysis and commentary on political issues that is critical to their individual and collective deliberation.\(^\text{88}\) The dissent concluded that the violation of freedom of expression could not be justified under s. 1 of the *Charter*.

Interestingly, the dissenting judges in both *Harper* and *Thomson* argued that one of the purposes of s. 2(b) of the *Charter* is to protect the right to an informed vote, which includes the right to receive the information necessary to make the right to vote meaningful. While the judgments focused on the right to receive information concerning the political opinions of other parties, it is not difficult to apply the same logic to support an argument in favour of access to information concerning what the government is doing. Indeed, is it not much more compelling to suggest that information concerning what the government is doing is just as necessary as access to the opinions of others concerning political issues? Is the government information not the raw material upon which the opinions may be formed? If so, how can access to opinions be protected if access to information is not?

\(^{87}\) *Ibid.* at 206.

\(^{88}\) *Ibid.*
(v) **Cases Rejecting the Inclusion of Access to Government Information Under s. 2(b) of the Charter**

Finally, it is necessary to consider several cases that have rejected the inclusion of a right to access government information under section 2(b) of the Charter. The first case that considered whether section 2(b) of the Charter included protection of access to government information was *Ontario (Attorney General) v. Fineberg*.\(^89\) *Fineberg* related to a request for disclosure made by the respondent newspaper reporter of the Ministry of the Attorney General. Fineberg requested information pertaining to the financial funding provided to a particular criminal investigation. The Minister refused disclosure based on section 14 of the Ontario *Freedom of Information and Protection of Privacy Act*, which permitted a head of department to refuse disclosure of information in certain categories.\(^90\) The inquiry officer of the Ontario Information and Privacy Commissioner ordered the Ministry to disclose much of the requested information, but held that some of the information was not relevant to Fineberg’s request.

The Ministry applied for judicial review of the inquiry officer’s decision. Fineberg cross-appealed, arguing, in part, that certain provisions of the *FOIPPA* governing the method of inquiry violated s. 2(b) of the *Canadian Charter of Rights and Freedoms*. The Divisional Court dismissed the Ministry’s application and allowed the cross-appeal in part. However, the Divisional Court rejected Fineberg’s argument that section 2(b) of the Charter included a right to access government information.

Justice Adams, who delivered the unanimous decision of the Divisional Court (Justices Hartt and Then, concurring), summarized Fineberg’s argument as follows: “It is his position that the freedom of the press, provided by s. 2(b) of the Charter, entails a

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\(^89\) (1994) 19 O.R. (3d) 197 (S.C.J.) [*Fineberg*].

\(^90\) *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 [*FOIPPA*].
constitutional right of access to any and all information in the possession and under the control of government, subject to whatever limitations might be justified pursuant to s. 1 of the Charter. “91 He characterized the argument somewhat dismissively, stating: “[e]ffectively, the submission amounts to the claim of a general constitutional right to know…”92

Justice Adams noted that Fineberg’s argument was “based on the principle that a democratic government must be accountable to the people and information concerning its performance is essential to such accountability.”93 He noted that providing access to government information required a balancing of many conflicting interests, including the right to privacy. He argued that the difficulty of balancing these competing interests “may explain why there is no history of unfettered public access to all information controlled by government akin to our almost unqualified tradition of open courts.”94

Justice Adams opined that the system of political accountability provided the necessary accountability of the bureaucracy and government. In his view, elected officials hold the bureaucracy accountable and are, in turn, held accountable through elections. In addition, the opposition parties hold the government accountable by asking critical questions in the legislature and committees. He concluded that: “Against this tradition, it is not possible to proclaim that s. 2(b) entails a general constitutional right of access to all information under the control of government and this is particularly so in the context of an application relating to an active criminal investigation.”95

91 Fineberg, supra note 89 at 203.
92 Ibid.
93 Ibid.
94 Ibid. at 204.
95 Ibid.
Justice Adams notably failed to explain how either the opposition or the electorate could actually hold the government to account if they were insufficiently informed of what the government was actually doing. In addition, Justice Adams’ reasons continually characterized the respondent’s argument as an impossibly broad claim for access to all government information, using terms like “unfettered” access to “any” or “all” information under the government’s control. As such, Justice Adams’ reasons failed to adequately consider the possibility that a constitutional right to access information may exist where that information is necessary to ensure the meaningfulness of participation in the political process.

Justice Adams’ finding that section 2(b) did not “entail a general constitutional right of access to all information under the control of government” was referred to by the Federal Court of Appeal in Yeager v. Canada (Correctional Service). However, Justice Isaac qualified his reasons by noting that he referred to the case “without endorsing all the reasons for decision given in that case…” and limited his findings by noting that there was no infringement of s. 2(b) in the particular case of Yeager.

The issue of whether s. 2(b) included a right to access government information was also addressed by the Ontario Court (General Division) in National Bank of Canada v. Melnitzer. Melnitzer concerned an order sealing the minutes of the meeting between Melnitzer and the receiver of his assets, undertakings and businesses. A newspaper moved to have the sealing order set aside, arguing that the order infringed the right to

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97 Ibid. at 255.
98 Yeager involved a claim that the Correctional Service of Canada infringed the applicant’s s. 2(b) Charter right by refusing to produce certain data concerning offenders, a code book necessary to interpret the data and a copy of software used to compile the data. The Correctional Service refused to provide the data on the basis that it would interfere with the operation of the facility concerned.
freedom of the press entrenched in s. 2(b) of the *Charter*. Justice Killeen found that the order should be varied, but rejected the applicant newspaper’s argument that s. 2(b) had been infringed. In particular, Justice Killeen rejected the notion that freedom of the press meant that the press should have privileged access to information that was otherwise unavailable to the public.

Freedom of the press is not equivalent of a Freedom of Information Act nor does it have the effect of appointing the press as a sort of permanent and roving Royal Commission entitled at its own demand and in every circumstance to any and all information or documentation which might be extant in civil or criminal litigation.\(^{100}\)

Notably, *Melnitzer* concerned press access to information of private parties that had been sealed in a court proceeding and not to government information. In reviewing American jurisprudence concerning freedom of speech, Justice Killeen remarked that she rejected the contention that freedom of expression included “a full-blown right to know anything and everything which is in the hands of the parties or which has been handled by the court.”\(^{101}\)

*Melnitzer*, even more so than *Fineberg*, reflected a judicial rejection of an extremely broad right to access information. *Fineberg* concerned rights to access information concerning a criminal investigation, while *Melnitzer* concerned a right to access the information of non-governmental actors. Neither of these subject matters has been accepted as a legitimate subject of access requests under existing access legislation. Neither case may be said to undermine the argument that access to information that is necessary to provide meaningful participation in the political system should be recognized as constitutionally protected.

\(^{100}\) *Ibid.* at 239.

The most recent consideration of whether s. 2(b) of the Charter protects access to government information is Criminal Lawyers Association v. Ontario (Ministry of Public Safety and Security).\textsuperscript{102} The case arose because the Assistant Commissioner of the Office of the Information Commissioner of Ontario made an order refusing to provide the Criminal Lawyers Association (the “CLA”) with access to certain records under the Ontario FOIPPA.

Once again, the central issue concerned access to records in a criminal investigation. In particular, the case concerned whether documents that were protected from disclosure as containing either information pertaining to law enforcement records or solicitor/client information should be disclosed pursuant to the public-interest override provided by section 23 of the FOIPPA. The CLA argued that the unavailability of the public interest override in section 23 of the FOIPPA for cases involving law enforcement records and solicitor-client privilege infringed the freedom of expression protected by s. 2(b) of the Charter and the constitutional principle of democracy. The CLA also argued that the Assistant Commissioner failed to take into account the principle of democracy when interpreting and applying the sections of the FOIPPA that provide exemptions to disclosure under the Act. The CLA submitted that section 23 of the FOIPPA should be “read-up” to include sections 14 and 19 among the sections that are subject to the public interest override.

The CLA’s principle of democracy argument was based on the notion that institutions that are fundamental to society must be subject to scrutiny and criticism. As

\textsuperscript{102} (2004), 70 O.R. (3d) 332 (Ont. Div. Ct). The decision of the Divisional Court was recently overturned by the Ontario Court of Appeal: 2007 ONCA 392. In my view, the decision of the majority of the Ontario Court of Appeal does not adequately deal with the points raised in Justice Blair’s decision for the Divisional Court. As such, I will deal with Justice Blair’s decision in some detail before turning to the decision rendered by the Court of Appeal.
such, information concerning the functioning of these institutions must be accessible to
the public, subject to reasonable limits and public interest restrictions.

Justice Blair, writing for the panel of the Divisional Court of the Ontario Superior
Court of Justice, dismissed the application for judicial review. Justice Blair rejected the
CLA’s argument that there is a constitutional right to access government information
subject to a balancing test to determine if the public interest favours non-disclosure,
stating: “… it boils down to the submission that the public has a constitutional right to
know, subject to a case-by-case public interest balancing test. In my view, there is no
such constitutional right in the circumstances of this case.”

Justice Blair’s section 2(b) analysis focused on existing jurisprudence that
suggests that the government does not have a positive obligation to facilitate expressive
activity except in rare circumstances. He found that the applicants’ section 2(b)
challenge amounted to an attempt to increase the effectiveness of its communication by
accessing additional information. In Justice Blair’s view, the government had no
obligation to increase the effectiveness of the appellant’s communication by disclosing
the records the appellants sought.

Justice Blair acknowledged that, in Haig, Justice L’Heureux-Dubé of the Supreme
Court of Canada stated that there may be instances where there is a positive obligation on
government to make the protection of freedom of expression meaningful by, for instance,
providing access to certain kinds of information. However, Justice Blair opined that

103 Ibid. at para. 34.
104 Ibid. at para. 46. As noted in chapter two, Justice Blair rejected the applicants’ argument that the
principle of democracy could be used to challenge the legislation at issue. I will focus here on Justice
Blair’s analysis regarding whether s. 2(b) of the Charter could be interpreted to protect access to
information.
105 Ibid. at para. 65.
106 Ibid. at para. 61.
such a positive obligation would only arise where there was a complete suppression of expression. The general rule, he noted, is that there is no positive obligation on government to facilitate expressive activity or to make expression more effective. Justice Blair found that the CLA was not barred from expressing its opinions in the case at bar, but rather that the effectiveness of its expression was hindered by the failure to disclose the requested documents.\footnote{107}{\textit{Ibid.} at para. 65.}

In my view, Justice Blair’s analysis confused effectiveness with meaningfulness. Admittedly, the Supreme Court of Canada has doubted whether s. 2(b) imposes an obligation on governments to enhance the effectiveness of expression through, for instance, distributing megaphones. Justice L’Heureux-Dubé stated this argument succinctly in \textit{Haig} writing:

\begin{quote}
It has not yet been decided that, in circumstances such as the present ones, a government has a constitutional obligation under s. 2(b) of the Charter to provide \textit{a particular platform} to facilitate the exercise of freedom of expression. The traditional view, in colloquial terms, is that the freedom of expression contained in s. 2(b) prohibits gags, but does not compel the distribution of megaphones.\footnote{108}{\textit{Haig}, supra note 64 at 604 [emphasis in original].}
\end{quote}

It is useful to pause here to unpack the metaphor used by Justice L’Heureux-Dubé. The distribution of megaphones mentioned by Justice L’Heureux-Dubé would improve the effectiveness of communication by ensuring that any communication would be heard by more people because of the augmented volume provided by the megaphone. Alternatively, the distribution of megaphones would facilitate expression by making it easier to communicate with a given number of people by eliminating the need for the speaker to shout, for example.
The Court’s finding that governments do not have an obligation to either facilitate, or magnify the volume of, expression must be contrasted with its recognition that, in some circumstances, governments may be under a positive obligation to ensure the meaningfulness of expression. This potential obligation was also recognized by Justice L’Heureux-Dubé in *Haig*:

Under this approach, a situation might arise in which, in order to make a fundamental freedom meaningful, a posture of restraint would not be enough, and positive governmental action might be required. This might, for example, take the form of legislative intervention aimed at preventing certain conditions which muzzle expression, or ensuring access to certain kinds of information.  

Justice L’Heureux-Dubé thus explicitly recognized that access to certain kinds of information may be necessary to support the meaningfulness of expression as opposed to facilitating expression or increasing its volume. In the *Criminal Lawyers Association* case, the applicants sought access to the records in issue in order to render their expression meaningful, not in order to facilitate that expression or to magnify its volume. In other words, without the information they sought, the CLA could not meaningfully comment on the report issued by the police.

In my view, Justice Blair erred in finding that the plaintiffs’ claim that s. 2(b) included a right to the information sought in this case should be dismissed because it amounted to an attempt to impose an obligation on the government to increase the effectiveness of their expression. I note, however, that I do not disagree with Justice Blair’s conclusion that any violation of s. 2(b) may have been justifiable under s. 1 of the *Charter*, given the type of information sought. I will return to this below.

Despite acknowledging the “vitally important principles” of “freedom of expression, and the principle of democracy and the right of the public to know”, Justice

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109 *Ibid.* at 607 [emphasis added].
Blair found that the applicants’ claim of a right to access criminal investigation records would prove unworkable.\textsuperscript{110} Justice Blair concluded:

\begin{quote}
I am not satisfied, therefore, that the ‘various strands’ which the Applicant asks us to splice together to create the constitutional link between the CLA’s section 2(b) rights and access to the law enforcement and privileged information here in question, enable us to do so. I reject the position that there is a constitutional obligation upon the government to provide access to the information.\textsuperscript{111}
\end{quote}

Justice Blair thus found that the expressive activity in the case was not protected under s. 2(b). He also found that, even if the expressive activity was protected, the infringement would be justified under s. of the \textit{Charter}.\textsuperscript{112} Interestingly, in considering the section 1 analysis, Justice Blair once again noted the importance of access to information to the democratic process.

There can be little debate, in my view, that the objectives of the Legislature in enacting the scheme to ensure that government information is more readily accessible to the public, subject to limited and specific necessary exceptions as set out in the Act “relate to concerns that are pressing and substantial in a free and democratic society”. \textit{Greater accessibility to such information – promoting as it does, greater transparency and accountability in government} – \textit{is responsive to important principles underlying our democratic society}, as the authorities referred to us by the Applicant demonstrate.\textsuperscript{113}

In my view, Justice Blair may have been correct in concluding that any potential violation of s. 2(b) of the \textit{Charter} in this case may be justified under section 1. The exclusion of access to information in criminal investigations may be justified in a free and democratic society. However, Justice Blair’s s. 2(b) analysis was flawed in so far as it portrayed access to government as a means of rendering expression more effective

\textsuperscript{110} \textit{Criminal Lawyers Association v. Ontario (Ministry of Public Safety and Security), supra} note 102 at para. 94.
\textsuperscript{111} \textit{Ibid.} at para. 97.
\textsuperscript{112} \textit{Ibid.} at para. 99.
\textsuperscript{113} \textit{Ibid.} at para. 24 [emphasis added].
rather than as a means of rendering it meaningful. Blinkered by the formal requirements of s. 2(b) analysis and convinced that s. 2(b) should not result in positive obligations being placed on the government, Justice Blair’s analysis was unable to make the link between expression and access to government information despite the fact that he repeatedly recognized the important role of access to government information in the democratic process.

Interestingly, the decision of the Divisional Court was recently overturned by the Ontario Court of Appeal. The majority decision, written by Justice LaForme, rejected the reasoning of Justice Blair and determined that the FOIPPA unjustifiably limited the appellant’s right to freedom of expression under section 2(b) of the Charter. In other words, the majority of the Court of Appeal extended section 2(b) to protect a right to access information in the circumstances of the case.

While generally sympathetic to the result of the majority’s analysis, I must admit that I cannot support much of the analysis that underlies it. The weaknesses in Justice LaForme’s analysis are two-fold. First, Justice LaForme, like Justice Blair, gets caught-up in the debate concerning rights and freedoms and the distinction positive and negative obligations that may be supported by section 2(b). As a result, rather than simply arguing that section 2(b) supports an obligation to provide access to information in some contexts, Justice LaForme engages in a somewhat tortured analysis of the FOIPPA to suggest that requiring the government to disclose the information at issue would not be imposing a positive obligation on the government.

In Justice LaForme’s view, the positive obligation to disclose such information already exists pursuant to section 10 of FOIPPA. The decision of the government to

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114 Ontario Criminal Lawyers Association v. Ontario (Public Safety and Security), supra note 102.
exercise its statutory discretion to refuse to disclose information relating to a criminal investigation, pursuant to section 14 of the Act is thus viewed as a choice to reject this previously-existing positive obligation.

In the current case, had the information sought by the CLA not fallen within the exemptions, the Ministry would have been required to provide it. The Act, in other words, requires the Crown to assist the CLA with their attempt at expression through positive acts. The fact that the CLA requested information that falls within a statutory exemption does not, in my view, automatically change this requirement since the exemptions at issue are discretionary, not mandatory.

\[\ldots\]

Where a record falls under a discretionary exemption, the Crown does not commit a positive act if it decides to disclose the record. Rather it commits a positive act if it refuses to disclose the record, because the obligation pursuant to the purpose of the Acts is disclosure. Falling within a discretionary exemption does not change this position, as it would with a mandatory exemption.\[115\]

This leads Justice LaForme to conclude that the issue of whether section 2(b) can trigger positive obligations does not arise in the case.

For the purposes of this case, there is no requirement to decide whether there is a constitutional right to know or a positive obligation on the part of the government to disclose, the information requested by the CLA. The issue, as I have explained, is not whether the Crown’s act of providing the CLA with the information it requested is a Charter-imposed positive act. As I see it, pursuant to the Act itself, the lack of government action would automatically lead to disclosure.\[116\]

Justice LaForme’s analysis fails to consider that the extent of the statutory right of access must be interpreted by considering the FOIPPA as a whole. Such an analysis would recognize that a the statutory right to access information is limited by the statutory discretion to refuse access to information concerning criminal investigations. In other words, when FOIPPA is interpreted as a whole, there is no unlimited statutory right to access criminal investigation records and thus no positive statutory duty to disclose them. This greatly weakens Justice LaForme’s analysis.

\[115\] Ibid. at paras. 35-37.
\[116\] Ibid. at para. 40.
The second major weakness in Justice LaForme’s analysis is that if fails to directly counter the claim, raised by the government and accepted by the dissenting reasons of Justice Juriansz, that section 2(b) should not be interpreted to support a right to access government information because a motion to include a constitutional right to access information in the Charter was defeated in proceedings of the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada. I have already argued that the results of this motion should not prohibit recognition of a constitutional right to access government information because the primary reason for not including an explicit right to access was strategic rather than principled. More specifically, it will be recalled that the Acting Minister of Justice specifically recognized that constitutional protection of a right to access may be desirable in the future but he argued that the legislative protection for access should be established prior to the entrenchment of a constitutional right of access.

Unfortunately, rather than deal with this issue head-on, Justice LaForme argues that the rejection of an entrenched right to access to information does not prohibit consideration of whether provisions of FOIPPA contravene section 2(b) of the Charter. Unfortunately, Justice LaForme does not explain how section 2(b) may be extended to protect a right to access information in light of the decision of the Special Committee.

(vi) Lessons Learned from the Freedom of Expression Cases

117 Ibid. at para 60. “Thus where the government has passed a freedom of information statute, the statute must comply with Charter jurisprudence”.

118 In the dissent, Justice Juriansz, repeats many of the points raised by Justice Blair at the Divisional Court. Justice Juriansz gives particular weight to the decision of the Special Joint Committee to reject an entrenched right to access government information and to the prevailing attitude that section 2(b) should not be interpreted to impose positive obligations except in the rarest of circumstances. Ibid. at paras. 107-119, 125-138.
The Supreme Court’s s. 2(b) jurisprudence has reaffirmed the approach to freedom of political speech adopted by the Implied Bill of Rights judges and built on the theory of democracy that provided the foundation of the approach in the Implied Bill of Rights cases. First, the Court has repeatedly recognized that freedom of political speech was constitutionally protected prior to the entrenchment of the *Charter* and that the foundation of its constitutional protection is the role it plays in protecting the democratic process. Second, in post-*Charter* cases, justices of the Supreme Court have emphasized that the role of freedom of expression in protecting the democratic process extends beyond simply promoting open debate to ensuring that voters have sufficient information to ensure that their votes accurately reflect their preferences. The Court has recognized that a fundamental requirement of Canadian democracy is that voter preferences are accurately reflected in the ballots cast to select legislative representatives (or to answer referendum questions).

There is a very strong link between freedom of expression and access to government information. Democracies cannot function unless voters are allowed to discuss, debate, and criticize political issues, policies and government behaviour. However, the right to expression may be rendered meaningless without access to information concerning what the government is actually doing. There is no reason to have a right to talk unless one has something to talk about.

This link between freedom of expression and access to government information has been noted explicitly by the Supreme Court of Canada. Most notably, Justice L’Heureux-Dubé noted in *Haig* that in some circumstances governments may be required
to take positive action in order to protect freedom of expression by protecting access to certain forms of information.

As a result of the above, there is a very strong argument that the unwritten principle of democracy requires that section 2(b) of the Charter be interpreted to include protection of access to government information. At the very least, the Supreme Court of Canada’s discussion of the role of freedom of expression in reinforcing meaningful participation in the democratic process suggests a strong link between s. 2(b) of the Charter and access to government information. This link supports the recognition of a constitutional right to access to government information as part of the principle of democracy. Those decisions that have rejected the inclusion of a right to information as part of s. 2(b) are readily distinguished as they concerned claims for access to information not generally regarded as being necessary for democratic participation or information that has been being legitimately excluded from access regimes.

b) Section 3 of the Charter

While a strong argument has been advanced for the link between freedom of expression and access to government information, an even stronger argument may be made in support of the link between the right to vote protected by s. 3 of the Charter and the right to access government information. The right to vote stands at the heart of the democratic process. Without it, there can be no claim to democratic legitimacy. In Canada, the right to vote has been recognized as consisting of more than simply the right to mark a ballot every four years. Indeed, the Supreme Court of Canada has developed a highly substantive conception of the right to vote that is based on the importance of meaningful participation of citizens in the democratic process.
(i) **Ref. re: Electoral Boundaries Commission Act, ss. 14, 20 (Sask.)**

Ref. re: Electoral Boundaries Commission Act, ss. 14, 20 (Sask.) \(^{119}\) was the first case in which the Supreme Court of Canada considered the scope of the right to vote protected by s. 3 of the Charter. The Saskatchewan Electoral Boundaries Reference concerned revisions to the electoral boundaries for the Province of Saskatchewan established by the Representation Act, 1989.\(^{120}\) The Act mandated the creation of a fixed distribution of constituencies: 29 urban, 31 rural and 2 northern. As a result of the redistribution of constituencies, rural constituencies tended to have smaller populations than urban constituencies. Under the Act population variances of up to 25 percent from the provincial quotient were permitted in southern constituencies and up to 50 percent in the northern constituencies.

The Saskatchewan government sent a reference case to the Saskatchewan Court of Appeal to determine whether the Act violated the right to vote protected by section 3 of the Charter. In particular, the government asked whether the distribution of constituencies and the variance in population between constituencies allowed by the Act violated s. 3. The Court of Appeal found that the electoral boundaries established by the Act violated s. 3 and could not be justified under s. 1, with the exception of the two northern constituencies. The government of Saskatchewan appealed to the Supreme Court of Canada.

Justice McLachlin (as she then was) wrote the majority judgment for the Supreme Court. Justice McLachlin held that the variance in constituency size allowed by the Act did not infringe s. 3. She concluded that the purpose of section 3 was not to ensure


\(^{120\text{S.S. 1989-90, c. R-20.2.}}\)
equality of voting *per se*, but rather to ensure “effective representation”. Ensuring effective representation required consideration not just of parity of voting power, but also consideration of factors such as geography, community history, community interest and minority representation.

As this was the first case in which the Supreme Court had to deal with s. 3, Justice McLachlin began with a discussion of the proper method of interpreting *Charter* rights. As part of this discussion, Justice McLachlin discussed the role of historical conceptions of rights on contemporary constitutional interpretation. She rejected the notion that our understanding of rights must be frozen in a particular historical context.

The doctrine of the Constitution as a living tree mandates that narrow technical approaches are to be eschewed: *Law Society of Upper Canada v. Skapinker* (citations omitted)… It also suggests that the past plays a critical but non-exclusive role in determining the content of the rights and freedoms granted by the Charter. The tree is rooted in past and present institutions, but must be capable of growth to meet the future. As Dickson J. stated in *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 359:

… the Charter is intended to set a standard upon which present as well as future legislation is to be tested. Therefore the meaning of the concept of freedom of conscience and religion is not to be determined solely by the degree to which that right was enjoyed by Canadians prior to the proclamation of the Charter.

(Emphasis in original.) This admonition is as apt in defining the right to vote as it is in defining freedom of religion. The right to vote, while rooted in and hence to some extent defined by historical and existing practices, cannot be viewed as frozen by particular historical anomalies. What must be sought is the broader philosophy which is capable of explaining the past and animating the future.123

Justice McLachlin also recognized the primary importance of interpreting rights in light of the democratic context upon which they are based: “Of final and critical importance to this appeal is the canon that in interpreting the individual rights conferred by the Charter the Court must be guided by the ideal of a “free and democratic society”

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121 *Saskatchewan Electoral Boundaries Reference, supra* note 119.
upon which the Charter is founded.” Finally, Justice McLachlin reiterated her contention in *Dixon v. British Columbia (Attorney General)* that the Canadian tradition is one of “evolutionary democracy moving in uneven steps toward the goal of universal suffrage and more effective representation…”

Justice McLachlin’s discussion of the method of interpreting section 3 thus reinforced the fact that the principle of democracy in general, and democratic rights in particular, though historically rooted, must be understood as evolving over time. As noted in chapter two, this view was supported by the entire court in the *Quebec Secession Reference*. This notion of evolutionary democracy and the rejection of a frozen definition of democratic rights is key to understanding how the interpretation of democratic rights in Canada may be expanded over time to include a right to access government information even though such a right was not explicitly included in the text of the *Charter* in 1982. A parallel may be drawn to the way in which the modern conception of the requirements of effective democracy have changed over time from one based on a franchise restricted, in large part, to able-bodied, white, property-owning males to one that includes all adult citizens. In the same way, one can argue that our conception of the requirements of democratic governance has changed over time to include a greater appreciation of the necessity of access to government information to ensure the effectiveness of representative government.

Justice McLachlin also provided a useful description of “representative democracy”:

> Ours is a representative democracy. Each citizen is entitled to be represented in government. Representation comprehends the idea of having a

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124 Ibid. at 33.
125 Ibid. at 37.
voice in the deliberations of government as well as the idea of the right to bring one’s grievances and concerns to the attention of one’s government representative; as noted in Dixon v. British Columbia (Attorney General) (1989) 59 D.L.R. (4th) 247 at pp. 265-6, [1989] 4 W.W.R. 393, 35 B.C.L.R. (2d) 273 (S.C.) elected representatives function in two roles – legislative and what has been termed the “ombudsman role”.

The dual role of representation identified by Justice McLachlin reflects the understanding, expressed initially by Chief Justice Duff in the Alberta Press case, that citizens have a right not just to participate in the formation of public policy but also to raise comments and concerns regarding the functioning of government institutions. Again, the ability to raise such concerns is dependent on our access to information relating to the functioning of those government institutions. The need for such access has intensified over time as the scope of government activity has expanded and become more complex.

(ii) Haig v. Canada (Chief Electoral Officer)

The Supreme Court further considered the right to vote and the meaning of the right to “effective representation” under s. 3 of the Charter in Haig v. Canada (Chief Electoral Officer). As noted above, the Haig case concerned a claim that provisions in the federal Referendum Act that excluded certain persons from voting in a federal referendum violated his right to vote under sections 2(b), 3 and 15 of the Charter. Justice L’Heureux-Dubé wrote the majority judgment.

Justice L’Heureux-Dubé concluded that section 3 of the Charter did not include a constitutional right to vote in a referendum. She found that the right to vote itself did not extend beyond the right to vote in “elections of representatives of the federal and

\[126\] Ibid. at 35.
\[127\] I dealt with Justice L’Heureux-Dubé’s reasons concerning s. 2(b) of the Charter above. I will deal with her treatment of s. 3 in this section.
provincial legislative assemblies.” Nonetheless, she highlighted the fact, identified by Justice McLachlin in the *Saskatchewan Electoral Boundaries Reference*, that the interpretation of the right to vote must consider the democratic context that is its foundation. In her view, “in a democratic society, the right to vote as expressed in s. 3 must be given a content commensurate with those values embodied in a democratic state.” As such, her analysis of the right to vote was informed by the principle of democracy, which includes the recognition of a right to effective representation. According to Justice L’Heureux-Dubé, the right to effective representation protected by section 3 of the *Charter* includes the right to play a *meaningful* role in the selection of elected representatives.

The purpose of s. 3 of the Charter is, then, to grant every citizen of this country the right to play a meaningful role in the selection of elected representatives who, in turn, will be responsible for making decisions embodied in legislation for which they will be accountable to their electorate.

Interestingly, Justice L’Heureux-Dubé noted that the democratic rights enshrined in sections 3-5 of the *Charter* impose positive obligations on governments to hold elections. These positive obligations associated with the *Charter’s* “democratic rights” may be contrasted with the traditional interpretation of the *Charter’s* “fundamental freedoms”. While the Court has recognized that protection of fundamental freedoms such as the freedom of expression may require the state to fulfill positive obligations in rare circumstances, in most cases fundamental freedoms will not result in positive obligations being imposed on the government. This is significant in the context of access to government information because providing access to government information is often

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128 Haig, supra note 64 at 600.
129 Ibid.
130 Ibid.
131 Ibid. at 601.
portrayed as requiring the state to accept positive obligations. Without conceding that a right to access government information should be characterized as a positive obligation, the link between access and the right to vote would make it easier to justify the imposition of positive obligations through application of a constitutional right of access.

(iii) **Figueroa v. Canada**

Justice L’Heureux-Dubé’s concept of a right to meaningful participation in the electoral process was further developed in *Figueroa v. Canada*. Justice L’Heureux-Dubé’s concept of a right to meaningful participation in the electoral process was further developed in *Figueroa v. Canada*. 132 *Figueroa* concerned a challenge to the *Canada Elections Act* 133 by the leader of the Communist Party of Canada. In particular, Figueroa challenged the provisions of the *Act* that prohibited candidates from parties that failed to field 50 candidates in a federal election from issuing tax receipts outside of the election period, transferring unspent election funds to their party (rather than remitting them to the government) and listing their party affiliation on the election ballot. 134 He argued that the provisions violated sections 2(b), 3 and 15 of the *Charter*.

All nine members of the Supreme Court of Canada agreed that the provisions infringed section 3 of the *Charter* and that the infringement could not be justified under section 1. The majority decision written by Justice Iacobucci and concurred with by five other judges, differed from the minority, written by Justice LeBel, over the precise method of interpreting section 3, but not in the result. I will focus here on the reasons of the majority.

133 *Canada Elections Act*, supra note 78.
134 *Ibid.*, ss. 24(2), 24(3), 28(2)
Justice Iacobucci noted at the outset of his majority reasons that the appeal raised “fundamental questions in respect of the democratic process in our country.” He traced the Court’s early jurisprudence regarding section 3, noting that Justice McLachlin had identified in the Saskatchewan Electoral Boundaries Reference the purpose of section 3 as ensuring effective representation, which means at a minimum that each citizen had “an effective representative in the legislative assembly.” He noted, however, that the right to effective representation extended beyond simply voting to include the right of each citizen to play a meaningful role in the electoral process. In his words:

… this Court has already determined that the purpose of s. 3 includes not only the right of each citizen to have and to vote for an elected representative in Parliament or a legislative assembly, but also to the right of each citizen to play a meaningful role in the electoral process. This, in my view, is a more complete statement of the purpose of s. 3 of the Charter.

Justice Iacobucci held that section 3 guaranteed a certain level of participation - meaningful participation - in the electoral process, rather than a specific type of electoral outcome.

On its very face, then, the central focus of s. 3 is the right of each citizen to participate in the electoral process. This signifies that the right of each citizen to participate in the political life of the country is one that is of fundamental importance in a free and democratic society and suggests that s. 3 should be interpreted in a manner that ensures that this right of participation embraces a content commensurate with the importance of individual participation in the selection of elected representatives in a free and democratic state.

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135 Figueroa, supra note 132 at 9.
136 Ibid. at 17.
137 Ibid. at 19.
138 Ibid.
Justice Iacobucci held that participation in the electoral process had intrinsic value independent of the impact of that participation on the actual outcome of the election. This value was related to the importance of different perspectives and opinions in enriching the political debate that is the lifeblood of an open society. “Defining the purpose of s. 3 with reference to the right of each citizen to meaningful participation in the electoral process, best reflects the capacity of individual participation in the electoral process to enhance the quality of democracy in this country.” Justice Iacobucci’s majority reasons thus advanced the proposition that democratic rights should be interpreted so as to enhance the quality of democracy in Canada. As a result, the important link between access to government information and democratic participation and democratic accountability should play an important role in the interpretation of the Constitution in general and the right to vote in particular.

Justice Iacobucci emphasized that elections are important as the primary means by which average citizens participate in political debate and the determination of social policy. He also noted that the right to meaningful participation included both a right to comment on the formation of policy and the right to comment on the functioning of public institutions. Justice Iacobucci reiterated this point later when discussing the role of political parties in the Canadian political system:

In respect of their ability to act as an effective outlet for the meaningful participation of individual citizens in the electoral process, the participation of political parties in the electoral process also provides individuals with the

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139 Ibid. at 20.
140 Ibid. at 19-20.
141 Ibid. at 20-21.
142 Ibid. at 21. “In each instance, the democratic rights entrenched in s. 3 ensure that each citizen has an opportunity to express an opinion about the formation of social policy and the functioning of public institutions through participation in the electoral process.”
opportunity to express an opinion on governmental policy and the proper functioning of public institutions.\textsuperscript{143}

Justice Iacobucci concluded that the purpose of section 3 was not limited to ensuring the participation in the electoral process but also extended to the right to participate in the larger political process of the country: “Absent such a right, ours would not be a true democracy.”\textsuperscript{144}

Given that Justice Iacobucci’s majority reasons in \textit{Figueroa} reinforced the conception, initially established by the Court in \textit{Libman}, that section 3 includes a right to meaningful participation in the electoral process in particular and in the political process more generally, it remains to determine the content of the term “meaningful participation”. Justice Iacobucci adverted to the importance of access to information in order to render participation in the electoral process meaningful. In his view, without access to sufficient information concerning the candidates, citizens could not ensure that their votes reflect their preferences.

The right to play a meaningful role in the electoral process includes the right of each citizen to exercise the right to vote in a manner that accurately reflects his or her preferences. In order to exercise the right to vote in this manner, citizens must be able to assess the relative strengths and weaknesses of each party, voters must have access to information about each candidate. As a consequence, legislation that exacerbates a pre-existing disparity in the capacity of various political parties to communicate their positions to the general public is inconsistent with s. 3. This, however, is precisely the effect of withholding from political parties that have not satisfied the 50-candidate threshold the right to issue tax receipts for donations received outside the election period and the right to retain unspent election funds. By derogating from the capacity of marginal or regional parties to present their ideas and opinions to the general public, it undermines the right of each citizen to information that might influence the manner in which she or he exercises the right to vote.\textsuperscript{145}

\textsuperscript{143} \textit{Ibid.} at 26.
\textsuperscript{144} \textit{Ibid.} at 21.
\textsuperscript{145} \textit{Ibid.} at 30.
Justice Iacobucci’s justification for the necessity of access to information concerning political candidates in order to ensure that citizens may exercise their right to vote in a manner that accurately reflects their preferences applies equally to the necessity of access to information concerning government activity. The fact that access to government information may be necessary in certain circumstances in order to ensure that the actual preferences of citizens are reflected when they vote, particularly when they use their votes to pass judgment on issues of governance and the functioning of political institutions thus offers strong support for the recognition of a constitutional right to access government information.

(iv) Harper v. Canada (Attorney General)

The content of the right to effective representation under s. 3 of the Charter was further explored in Harper v. Canada (Attorney General). As noted above, the Harper case involved a claim that spending restrictions on citizens and groups during the course of an election campaign violated sections 2(b), 2(d) and 3 of the Charter. I will deal with the section 3 arguments below.

Justice Bastarache, writing for the majority, noted at the outset of his reasons that “the right to free expression and the right to vote are distinct rights”. He rejected the argument that the right to meaningful participation included a right to unimpeded and unlimited electoral debate and expression. He recognized that the s. 3 right to vote included a right to meaningful participation in the electoral process and indeed meaningful participation in the political process. The salutary effects of such participation were also recognized: “Greater participation in the political discourse leads to a wider expression of beliefs and opinions and results in an enriched political debate,

146 Harper, supra note 83 at 228.
thereby enhancing the quality of Canada’s democracy.” This seems to reinforce the position adapted by Justice Iacobucci in *Figueroa* that democratic rights should be interpreted so as to increase the effectiveness of the democratic process.

Justice Bastarache noted that the issue raised in the *Harper* case was the right of the citizen to exercise their vote in an informed manner.

This case engages the informational component of an individual’s right to meaningfully participate in the electoral process. The right to meaningful participation includes a citizen’s right to exercise his or her vote in an informed manner. For a voter to be well-informed, the citizen must be able to weigh the relative strengths and weaknesses of each candidate and political party. The citizen must also be able to consider opposing aspects of issues associated with certain candidates and political parties where they exist. In short, the voter has a right to be “reasonably informed of all the possible choices”: *Libman*, at para. 47.

Justice Bastarache held that, in order to protect the right to an informed vote, there had to be limits on the information disseminated by third parties, candidates and political parties. In particular, he found that spending limits ensured that affluent individuals or groups pooling their resources would not dominate the political discourse. He concluded that equality in the political discourse thereby promoted the right to vote, while an unlimited right to convey information or opinions may undermine that right.

In this way, equality in the political discourse is necessary for meaningful participation in the electoral process and ultimately enhances the right to vote. Therefore, contrary to the respondent’s submission, s. 3 does not guarantee a right to unlimited information or unlimited participation.

However, Justice Bastarache did recognize that limitations on access to information may infringe the right to vote in circumstances where those limitations undermined the right to meaningfully participate in the electoral process. In his words:

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“To constitute an infringement of the right to vote, these spending limits would have to restrict information in such a way as to undermine the right of citizens to meaningfully participate in the political process and to be effectively represented.”

The right to meaningfully participate in the democratic process requires not just access to information provided by political parties, but also access to information concerning the actions of government; this follows from Justice Iacobucci’s discussion in *Figueroa*. As such, it is arguable that restrictions on access to government information may constitute infringements of the right to vote.

(v) Lessons Learned from the Right to Vote Cases

The Court’s section 3 jurisprudence provides further support for three aspects of its understanding of the principle of democracy. First, it reinforces an approach to the interpretation of democratic rights that stresses the evolution of democratic norms and institutions over time. Second, the Court’s s. 3 jurisprudence strengthens the notion that the Constitution protects the right of Canadians to meaningfully participate in the democratic process. Applying a purposive approach to interpretation, the Court has found that the right to vote means more than simply marking a ballot in an election, but includes a right to meaningful participation in the Canadian political process. Indeed, the Court’s conception of meaningful participation includes a right to a minimum amount of information necessary to reflect the actual preferences of voters. Finally, the Court’s s. 3 jurisprudence reinforces the understanding that the selection of representatives involves decisions concerning the effectiveness of governance and the functioning of political institutions in addition to decisions concerning social policy.

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150 This had been noted by both the majority reasons of Bastarache and the dissenting reasons of Justice Gonthier in *Thomson Newspapers*. 
The Supreme Court has repeatedly identified the requirement that citizens have adequate information to make informed choices when voting and otherwise participating in the political system. The ability of voters to make “informed” choices is necessary to ensure that the choices made reflect the actual preferences of voters. If voters’ choices don’t reflect their actual preferences then the democratic process becomes seriously undermined.

Although the Court has not yet explicitly linked the need to have adequate information to make informed choices when voting to a right to access government information, the linkage is easily made. It will be remembered that the Supreme Court has identified two primary areas of voter selection and participation in the democratic process: policy and governance. In the first instance, voters make choices concerning policy options provided by particular candidates or political parties; they may also seek to participate in the formation of government policy. In the second instance, voters may also make choices concerning issues of governance, including the performance of government institutions and the behaviour of government officials.

Discussion and debate concerning policy options may be possible, at a basic level, when relying simply on the publications and pronouncements of political parties and candidates for political office since parties and candidates have some interest in providing sufficient information to convince voters to select them based on that information. The sincerity of the information provided may be suspect, of course, however voters will be able to hold the parties or candidates accountable in a future election for their failure to fulfill campaign promises concerning policy issues. More meaningful participation requires accurate and detailed information.
Discussion and debate concerning the functioning and performance of government institutions is not possible at even a basic level without a right of access to government information since it is precisely access to information concerning failures in administration or misbehaviour that is likely to be denied. It would be virtually impossible for voters to make informed choices concerning the performance of a government without access to information concerning the government’s behaviour. In the absence of such information, it is possible, indeed likely, that voter choices concerning issues of governance and institutional performance, namely a choice of whether or not to re-elect a governing party or candidate, will fail to reflect the actual preferences of voters.

c) Summary of Structural Evidence

The recognition of a principle of access to government information as part of the unwritten constitutional principle of democracy is fully supported by the structural evidence. Although neither the Constitution Act, 1867, nor the Constitution Act, 1982 outline the specifics of the functioning of parliamentary democracy in Canada, there can be no doubt that the Constitution protects those institutions necessary for the fulfillment of a meaningful democratic process. To be sure, the initial textual protections were basic. Section 17 of the Constitution Act, 1867 mandated the establishment of the houses of Parliament. Sections 20 and 50 of the Constitution Act, 1867 established the requirements that Parliament would sit at least once a year and that its membership would be renewed every five years. These provisions were supplemented by the enactment of ss. 2(b) and 3 of the Canadian Charter of Rights and Freedoms, which explicitly protected the freedom of expression and the right to vote, respectively.
Consistent with its broad and purposive approach to constitutional interpretation, the Supreme Court of Canada has interpreted s. 2(b) and s. 3 of the Charter generously, recognizing the importance of both expression and voting to the realization of a meaningful democratic process in Canada. In its s. 2(b) jurisprudence, the Court has reinforced the recognition, initially made in the Implied Bill of Rights cases, of the importance of political debate and discussion to the democratic process. It has underlined the need for free expression to support the ability of citizens to make informed choices when voting and to support their right to be able to meaningfully participate in the political process, whether it be concerning issues of policy or governance.

The fact that the meaningful participation envisioned by the Court sometimes requires access to government information was explicitly acknowledged by the Court in Haig where Justice L’Heureux-Dubé acknowledged that it might be necessary to provide access to information to make the s. 2(b) protection of freedom of expression meaningful. While Canadian courts have been reluctant to recognize a general right to information as part of the protection accorded to freedom of expression under s. 2(b), none of the cases in which a right to information was rejected involved core aspects of the proposed constitutional right of access to government information.

An even stronger link may be identified between the principle of access to government information and the right to vote protected by s. 3 of the Charter. The Supreme Court has found that section 3 protects the right of citizens to meaningful participation in the political system. This meaningful participation requires the ability to make informed choices when voting in order to ensure that voters’ selections reflect their actual preferences. It is difficult to imagine how voters could possibly make informed
choices without information concerning the government’s actions. Indeed, the necessity of such information to ensure government accountability and meaningful democratic processes has been identified by academics, judges, international organizations and even the Canadian government.

The link between access to government information and the right to vote is strong enough to suggest that the right to access information may be included in a purposive analysis of s. 3 of the *Charter*. In this case, it might be argued that there is no need to consider the principle of access to government information independently of s. 3 of the *Charter*. However, it should be remembered that the Supreme Court’s substantive conception of the right to vote has been developed as part of the evolution of the Court’s conception of the meaning of democracy more generally. Indeed, the Court’s understanding of the right to vote has been developed in tandem with its interpretation of freedom of expression, in particular the role of freedom of expression in fostering meaningful participation in the democratic system. The principle of democracy, in turn, has been the foundation for the interpretation of both section 2(b) and section 3 of the *Charter*.151

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151 The potential pit-fall of identifying the principle of access to government information solely with either the freedom of expression or the right to vote is that the scope of the right to access government information may be confined to the specific limits of either right. This type of problem was evidenced, in the section 2(b) context, by Justice Blair’s analysis in the *Criminal Lawyers’ Association* case. In that case Justice Blair rejected the existence of a free-standing principle of democracy on the basis that any consideration of the democratic principle was already subsumed in the section 2(b) analysis. In my view, this led Justice Blair to apply an unduly restrictive approach when considering whether a right to access government information may be included in the *Charter*. In particular, Justice Blair’s section 2(b) analysis failed to consider the importance of access to information to the democratic process and instead unduly focused on the issue of whether section 2(b) could support a “positive obligation” on government to disclose information.
4) Conclusion

Recognition of a right to access government information as a part of the principle of democracy is supported by all three types of evidence that may support the recognition of an unwritten constitutional principle. There is near universal recognition of the pragmatic importance of access to government information to the democratic process. Academics, international organizations, law reform commissions and parliamentarians, both internationally and domestically, have recognized the need for access to government information in a mature democracy.

This pragmatic evidence of the importance of access to government information matches the general trend in the historical development of the treatment of access to government information in Canada. Over the past fifty years, both the common law and legislation have evolved in Canada to recognize a general right to access government information, both in the specific context of judicial proceedings and in the more general context of access requests by citizens. Of course, access to government information is not unrestricted. Both the common law and legislation recognize exceptions to the principle of access. However, the general approach is that access to government information should be provided unless a harm to a specific public interest may be identified. As such, recognition of a constitutional principle of access to government information as part of the unwritten constitutional principle of democracy is consistent with the evolution of the legal framework in Canada.

Finally the recognition of a principle of access to government information is supported by structural evidence, namely the protection accorded to free expression and the right to vote by the sections 2(b) and 3 of the Canadian Charter of Rights and
 Freedoms. The Supreme Court has interpreted these written constitutional provisions in accordance with its substantive understanding of the principle of democracy. The Court has found that sections 2(b) and 3 must be interpreted so as to protect the rights of Canadian citizens to meaningful participation in the democratic process. This meaningful participation requires citizens to be able to make informed choices, that reflect their actual preferences, when they vote and otherwise participate in our democratic system.

It is difficult to perceive how citizens could make informed choices concerning issues of governance without access to information concerning the activities of government. This fact has been recognized by academics, judges, international organizations, law reform commissions and even the Canadian government. Recognition of a right to access government information is not only consistent with the Court’s interpretation of sections 2(b) and 3 of the Charter, it is arguably required by it. In any case, the fact inclusion of a constitutional right of access to government information as part of the principle of democracy is supported by pragmatic, historical and structural evidence suggests that recognition of such a constitutional right should be acceptable to both critics and proponents of the application of unwritten constitutional principles.
VI. CHAPTER SIX

DEMOCRACY AND THE LIMITS OF ADMINISTRATIVE DISCRETION: LIMITING THE DISCRETION OF GOVERNMENT OFFICIALS TO RESTRICT ACCESS TO GOVERNMENT INFORMATION

Thus far, this thesis has focused on the task of supporting the recognition of a constitutional right to access government information. It has progressed from an exposition of the ongoing need for constitutional protection of access to government information to an analysis of how the recognition of such protection would fit within the Supreme Court’s approach to constitutional interpretation and finally to a detailed argument of how this constitutional right of access may be rooted in the constitutional principle of democracy. Having established, at least for argument’s sake, that a constitutional right to access government information may be supported by both the text of the Constitution and existing jurisprudence, it remains to consider the impact that the recognition of such a right may have in practice.

The discussion in chapter one suggests a number of possible scenarios that would invite judicial application of a constitutional right of access. The first scenario concerns a possible amendment to existing access legislation. As discussed in chapter one, there has been significant resistance to increased access to government information among some members of the bureaucracy. Indeed, when consulted by the Access to Information Review Task Force, members of the bureaucracy consistently complained about the scope of existing access provisions and suggested changes to the federal Access to Information Act.\(^1\) Many of these proposed changes were cloaked in the garb of

protecting the efficacy of the governing process.²

It is possible that the government, in response to bureaucratic pressure, may amend the purpose clause of the Access Act to include a secondary purpose for the Act – the maintenance of government efficacy. Such a secondary purpose may undermine the primary purpose of ensuring transparency and accountability. Alternatively, the government could enact legislative provisions using wording that may be interpreted to provide greater restrictions on access to information.

A second scenario, and perhaps the scenario that is the most likely to be played out on a day-to-day basis, involves the administration of existing access regimes. In practice, access to government information is determined by the exercise of discretion by those who control the information. At all stages of the access process, decisions are made by officials concerning whether or not to disclose information. The impact of administrative discretion is particularly acute given the fact that the government of Canada suffers from an entrenched culture of secrecy - a fact that has been noted by Information Commissioners, Parliamentary Task Forces and even judges. The issue of administrative discretion is also highlighted by the fact that the amendments to the Access Act and the Canada Evidence Act³ introduced by the government’s new Anti-terrorism Act⁴ provide the Attorney General with a new discretionary power to issue certificates refusing disclosure of information even after disclosure has been ordered by a commission or judge.⁵ The second scenario thus focuses on the potential for

⁴ S.C. 2001, c. 41.
⁵ Ibid., s. 38.13.
administrative discretion to be exercised improperly in order to refuse disclosure of information that ought otherwise be disclosed.

Still a third scenario involves a potential amendment of existing legislation that would explicitly restrict access to information that is currently available. For example, existing legislation may be amended to prohibit the disclosure of intra-departmental information concerning program delivery. Alternatively, a government may determine that it no longer wishes to disclose any information at all regarding foreign relations.

These hypothetical scenarios suggest three possible ways in which a constitutional right of access to government information may be important. In particular, such a constitutional right may affect the following: the interpretation of legislation restricting access to government information; the regulation of the exercise of administrative discretion to refuse disclosure of government information pursuant to legislation; and, potentially, even the constitutional validity of legislation restricting access to government information.

In the next two chapters, I will consider these three aspects of the application of a constitutional right to access information in relation to particular provisions of the *Canada Evidence Act* and the federal *Access to Information Act*. More specifically, in this chapter I will focus on the way that a constitutional right to access government information may restrict administrative decisions limiting access. In chapter seven, I will turn to a consideration of the restrictions of the legislature’s ability to limit access to information that may be imposed by such a constitutional right.

It is important to pause here to recall that I have argued that the constitutional right to access government information may be recognized in two distinct ways, both
rooted in the application of the constitutional principle of democracy. First, the constitutional principle of democracy may influence the interpretation of section 3 of the *Charter* so as to include a right to access government information where necessary to support the right to vote. Second, the right to access government information may be recognized as a part of the principle of democracy operating as a free-standing constitutional principle, independent of the written provisions of the Constitution. In this way, the right to access information would exist in addition to the right to vote and not simply as extension of section 3.

In my view, there is sufficient evidence to support both manifestations of the right to access government information. However, important implications arise depending on the manner in which the right is recognized. In particular, while recognition of a right to access government information as an extension of section 3 of the *Charter* is more difficult to prove, it raises less concerns regarding legitimate application of the right once recognized. There are also important, though subtle, distinctions between the application of unwritten constitutional principles to administrative decisions and the application of *Charter* provisions to those decisions. In order to deal with these various implications and distinctions, I will discuss the application of the right of access to government information in both of the above contexts throughout this chapter.

Finally, it is worth noting that a number of different levels of analysis are engaged where there is a claim that an administrative decision by a government official violates a constitutional right.\(^6\) The first level of analysis determines whether the legislation granting the decision-making power in question is constitutional. If the statutory grant of

\(^6\) David Elliott, “Suresh and the Common Borders of Administrative Law: Time for the Tailor?” (2002) 65 Sask. L. Rev. 469 at 490-49. There is an ongoing debate about the order in which these levels of analysis should be engaged. That debate is not directly relevant to this thesis.
power is itself unconstitutional then the decision made pursuant to that statute cannot be constitutional. At this stage, a court faced with legislation that appears to violate the Constitution on its face may proceed in one of two ways. It can either invalidate the legislation, or more particularly the specific legislative provisions that violate the Constitution, or it can interpret the legislation such that it conforms to constitutional requirements.⁷

If it is determined that the authorizing legislation is constitutional, whether on its face or as a result of judicial interpretation to meet constitutional requirements, then the court’s attention turns to whether the administrative decision made pursuant to the authorizing legislation is valid. The administrative decision may be found to be invalid as a result of the application of constitutional principles or by principles of administrative law. In the first instance, the administrative decision may violate a substantial constitutional right, such as protected by section 2(b) or 7 of the Charter. In the second case, the administrative decision may be invalidated for violating a procedural rule of administrative law, such as a failure to allow the affected party the right to be heard before rendering the decision, or for violating a substantive rule of administrative law in cases where the substance of the decision is determined to violate the appropriate standard of judicial review.

A detailed discussion of the specific procedural protections that should be accorded to parties requesting access to government information is beyond the scope of this thesis. As such, I will not consider the procedural protections available under

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⁷ I discuss the ways in which the constitutional right to access government information may inform the interpretation of legislation restricting access to government information below. The more controversial issue of the invalidation of legislation for breaching the right of access to government information is addressed in the next chapter.
administrative law in this chapter. Of more specific interest for the purpose of this thesis is whether substantive principles of administrative law may be applied to restrict administrative decisions to refuse access to government information. In particular, I will consider whether decisions to refuse access to government information may be invalidated in cases where the official rendering the decision failed to take account of the importance of access to government information to the democratic process when determining that the information at issue should be withheld.

I) **Applying Constitutional Principles as Limits on Administrative Action**

The grant of administrative power is never absolute; it can be constrained in a number of different ways. Perhaps the most basic postulate of administrative law is that administrative actors may not exceed the authority granted to them by statute. As such, government officials and others working under statutory grants of power are constrained by their authorizing statutes. Administrators are also constrained by the explicit terms of the Constitution. Thus, just as administrators may not render decisions that exceed the scope of their authorizing legislation, they cannot render decisions or exercise powers that conflict with constitutional rights. In addition, in the past decade the Supreme Court of Canada has recognized that the scope of administrative decisions may also be restricted by fundamental principles that are not explicitly mentioned in the text of the Constitution. These fundamental principles include unwritten constitutional principles, such as the principle of democracy.

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8 It is worth noting that the *Access Act* and other provincial access statutes dealing specifically with requests for access to legislation establish basic procedures for reviewing access decisions, including rights of the affected parties to make representations and receive reasons for decision. See, for instance, sections 35-37 of the federal *Access Act*. 
a) **Baker v. Canada**

The leading case dealing with the impact of fundamental principles on administrative decisions is *Baker v. Canada (Minister of Citizenship and Immigration)*. Mavis Baker, a citizen of Jamaica entered into Canada as a visitor in August 1981 and stayed in the country illegally for eleven years after her visitor’s visa expired. She gave birth to four children while living in Canada, all of whom were Canadian citizens. In 1992, Ms. Baker was ordered deported. She applied for an exemption from the requirement that permanent residence applications be made from outside the country on humanitarian and compassionate grounds. She based her application on her concerns that she could not receive adequate medical treatment for an ongoing mental illness if returned to Jamaica and on her concerns of the negative impact on her children in Canada that would result if she was ordered to leave the country.

Pursuant to regulations created under section 114(2) of the *Immigration Act*, the Minister of Citizenship and Immigration (the Minister) was granted the discretion to “exempt any person from [the requirement to file an application for permanent residence from outside of Canada] or to otherwise facilitate the admission to Canada of any person” where the Minister was satisfied of the existence of compassionate or humanitarian considerations. The Minister’s delegate, senior Immigration Officer Caden, considered Ms. Baker’s application for exemption and rejected it on the basis that insufficient humanitarian and compassionate grounds existed to justify issuing an exemption.

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10 R.S.C. 1985, c. I-2, s. 114(2).
11 *Immigration Regulations*, 1978, SOR/78-172, as am. by SOR/93-44.
12 Ms. Baker’s application for judicial review of the decision not to grant her an exemption was denied by the Federal Court Trial Division: (1995), 101 F.T.R. 110. The decision of the Federal Court trial division was upheld by the Federal Court of Appeal: [1997] 2 F.C. 127. However, Ms. Baker’s appeal to the Supreme Court of Canada was allowed.
The Supreme Court of Canada found that the decision to deny Ms. Baker an exemption for humanitarian and compassionate grounds should be quashed under principles of administrative law. In her majority reasons, Justice L’Heureux-Dubé found that the decision not to grant the exemption should be overturned on both procedural and substantive grounds. She concluded that procedural principles of administrative law were violated because the reasons for the decision raised a reasonable apprehension of bias.

Interestingly, no formal reasons for the decision were provided in the letter informing Ms. Baker that her application for an exemption had been denied. However, Ms. Baker requested the notes that were used by Officer Caden when he made his decision. Justice L’Heureux-Dubé found that the notes formed the basis of the decision and that they raised a reasonable apprehension of bias. In particular, the notes raised a reasonable apprehension of bias because they emphasized the fact that Ms. Baker had an ongoing mental illness and was a single mother with a total of eight children, four in Canada and four in Jamaica.

In addition, Justice L’Heureux-Dubé found that the decision should be overturned on substantive grounds of administrative law. Justice L’Heureux-Dubé concluded that the decision not to grant Ms. Baker an exemption on compassionate and humanitarian grounds was unreasonable because the “reasons of the immigration officer show that his decision was inconsistent with the values underlying the grant of discretion. They therefore cannot stand up to the somewhat probing examination required by the standard

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13 The notes had been prepared by a junior Immigration Officer, Officer Lorenz, and then relied upon by the senior Immigration Officer, Officer Caden, when he made his decision.
14 Baker, supra note 9 at paras. 35-44. Justice L’Heureux-Dubé found that there was a common law duty to provide reasons for administrative decisions, even discretionary decisions, in certain circumstances. She found that the notes of Immigration Officer Lorenz could serve as reasons since they formed the basis of Immigration Officer Caden’s decision.
of reasonableness.”\textsuperscript{15} The primary reason that the decision was inconsistent with the grant of the discretion was that the notes demonstrated that the decision did not adequately consider the impact of the refusal to grant an exemption, and the subsequent deportation of Ms. Baker, on her Canadian children.

Justice L’Heureux-Dubé concluded that the interests of Ms. Baker’s children were an important consideration in the determination of an application on humanitarian and compassionate grounds based on a consideration of the purposes of the \textit{Citizenship and Immigration Act}, international law, and the guidelines for making decisions relating to humanitarian and compassionate grounds published by the Minister.\textsuperscript{16} The fact that Justice L’Heureux-Dubé found that the recognition of the importance of children’s rights and the best interests of children in the \textit{International Convention on the Rights of the Child}\textsuperscript{17} must inform the interpretation of the \textit{Citizenship and Immigration Act} and the scope of discretion given to the Minister pursuant to the \textit{Act} is particularly significant. This was noteworthy because the Convention, though ratified by Canada, had not yet been implemented into Canadian legislation by Parliament.

The failure to implement the Convention into legislation meant that, strictly speaking, the Convention was not binding in Canada. Similarly, Justice L’Heureux-Dubé regarded the Ministerial guidelines as a “useful indicator of what constitutes a reasonable interpretation of the power conferred by the section, and the fact that this decision was contrary to their directives is of great help in assessing whether the decision was an

\textsuperscript{15} \textit{Ibid.} at para. 66.

\textsuperscript{16} \textit{Ibid.} at paras. 67 – 75.

unreasonable exercise of the H&C power.”18 Typically, Ministerial guidelines, like ratified treaties that have not been incorporated into domestic legislation, are not considered binding sources of law.

Justice L’Heureux-Dubé’s consideration of the impact of international law and Ministerial guidelines when determining the reasonable scope of the Minister’s discretion fit within her general approach to the regulation of administrative discretion. This approach balances deference with a contextual consideration of the limits imposed on discretion in particular cases. In her words: “… though discretionary decisions will generally be given considerable respect, that discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the Charter.”19

Justice L’Heureux-Dubé’s decision was ground-breaking in its recognition of the role of fundamental values in constraining administrative discretion. It is now generally accepted that, following the approach developed in Baker, unwritten constitutional principles that reflect the fundamental values of Canadian society may be relied upon to determine the scope of administrative discretion and limits on the exercise of that discretion. The leading example of this is a decision of the Ontario Court of Appeal, Lalonde v. Ontario (Health Services Restructuring Committee).20

b) Lalonde v. Ontario (Health Services Restructuring Committee)

The Lalonde case involved an application for judicial review of directives issued by the Health Services Restructuring Commission (the “Commission”). The Commission

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18 Baker, supra note 9 at para. 72.
19 Ibid, at para. 56.
had been charged by the Ontario government with developing recommendations for restructuring hospitals in Ontario. Among its recommendations, the Commission issued a direction substantially reducing the services offered by Hôpital Montfort (“Montfort”) in Ottawa. Montfort serves the francophone community in Eastern Ontario. It was the only hospital in the province in which the working language was French and where services were available in French on a full-time basis. The hospital also played an important role in the education and training of French-speaking health care workers.\footnote{Ibid. at para. 2.}

The Commission’s decision to reduce services offered by Montfort was challenged primarily on the basis that the decision would eliminate the only francophone (as opposed to bilingual) community hospital and would undermine the ability of Montfort to train French language health care professionals. As such, the decision threatened the francophone minority in Ontario. As a result, it was argued that the decision failed to comply with the requirements of the \textit{French Language Services Act}\footnote{R.S.O. 1990, c. F.32 [F.L.S.A.].} and also failed to consider the importance of the unwritten constitutional principle of respect for and protection of minorities.

The Ontario Court of Appeal found that the decision of the Commission should be quashed because it failed to comply with the requirements of the \textit{F.L.S.A.} and it did not properly consider the impact of the unwritten constitutional principle of respect for and protection of minorities. The Court, taking account of the Supreme Court of Canada’s decision in \textit{Baker}, and relying on the work of academics such as Sujit Choudhry and
Robin Elliott proceeded from the basis that “[u]nwritten constitutional norms may, in certain circumstances, provide a basis for judicial review of discretionary decisions”

The Court of Appeal found that the Commission failed to consider the impact of its decision on the rights of the francophone minority in Ontario. In particular, the Court found that the Commission failed to consider the impact of its decision on the francophone minority in light of the fact that the reduction of services at Montfort would effectively eliminate the only francophone (as opposed to bilingual) community hospital in Ontario and severely restrict the capacity to train doctors in a French language (as opposed to bilingual) setting. When confronted with these issues during the consultation process surrounding its decision, the president of the Commission had denied he had either the jurisdiction or the duty to consider these concerns. Indeed, he stated in a letter that “[d]ebate of this belief is not within the purview of the Health Services Restructuring Commission.”

In the Court’s view, this failure to consider the impact of its decision on the francophone minority was a fundamental flaw in light of the fact that the Commission was statutorily mandated to act in accordance with the public interest. In the words of Justices Weiller and Sharpe: “it must be the case that failure to take into account a fundamental principle of the Constitution when purporting to act in the public interest renders a discretionary decision subject to judicial review.” In particular, the

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23 Lalonde, supra note 20 at para 176. Justices Weiller and Sharpe, concurred with by Justice Rivard, noted that the application of fundamental principles to limit administrative discretion dated from long before the enactment of the Charter.
24 Ibid, at para. 49.
26 Lalonde, supra note 20 at paras. 165-169.
Commission should have had regard to the principle of respect for and protection of minorities when determining the public interest as it was statutorily mandated to do.\(^{27}\)

\textit{Baker} and \textit{Lalonde} thus establish that fundamental principles may be applied to restrict the decisions of administrators. In the balance of this chapter, I will consider more specifically how the decisions of government officials to refuse access to government information may be restricted through the recognition of a constitutional right to access government information rooted in the unwritten principle of democracy. Of course, there are a number of different ways in which the discretion exercised by public officials dealing with requests for access to government information may be restricted. The scope and nature of the restrictions imposed on officials will vary depending on the context in which they are acting. This context may change depending on whether access is being sought pursuant to the \textit{Access Act}, or through other statutory frameworks such as the \textit{Canada Evidence Act}.

As noted earlier, the context in which the constitutional right of access is recognized may also affect the way in which the restrictions are imposed. In other words, whether the constitutional right of access is deemed to be simply an extension of an existing \textit{Charter} right, such as section 3, or whether the right of access is determined to be a free-standing constitutional right anchored in the unwritten principle of democracy, may affect the manner in which a court will evaluate and impose restrictions on the discretion of officials to refuse access to government information.

2) \textbf{Statutory Interpretation}

There are potentially two stages of analysis involved in judicial review of an administrative decision concerning the disclosure of government information. The first

\(^{27}\) \textit{Ibid.} at para. 180.
stage involves an evaluation of the administrator’s decision about whether the information at issue falls within an exception (or an exemption) to the general statutory right of access to government information. The administrator’s decision at this stage is one made through statutory interpretation. In some cases, a second stage of analysis is triggered because administrators are granted a statutory discretion to disclose information that may otherwise fall within a statutory exception to the right of access. The administrator’s decision at this stage is a discretionary decision, rather than an exercise in statutory interpretation. There may be different standards of review accorded to each of these stages.

a) Using Unwritten Constitutional Principles to Interpret Statutory Language: General Principles

It has been widely recognized that unwritten constitutional principles may be relied upon to assist in the interpretation of both constitutional text and legislation. As such, regardless of whether a constitutional right to access government information is recognized as an extension of an existing Charter right, such as the right to vote, or as a free-standing right rooted in the unwritten principle of democracy, the impact at this stage of analysis would be the same.

An excellent example of how an unwritten constitutional principle may assist in the interpretation of statutory language is the Lalonde case discussed earlier. It will be remembered that in the Lalonde case a decision to eliminate certain services provided by the Montfort hospital was challenged both on the basis that the decision failed to account for the operation of the constitutional principle of protection of and respect for minorities and on the basis that it violated provisions of the French Language Services Act.28 As a

28 F.L.S.A., supra note 22.
result, the Court of Appeal was tasked with interpreting the scope of a number of provisions of the *F.L.S.A.*

According to the Court, the purposes of the *F.L.S.A.* included protection of the minority francophone population in Ontario, the advancement of the French language and the promotion of the equality of French with English in Ontario. Section 5(1) of the *F.L.S.A.* stated that persons have the right to “communicate in French with, and receive available services in French from, any head or central office of a government agency” and “the same right in respect of any other office of such agency… that is located in or serves an area designated in the Schedule.”

Of particular concern in the *Montfort* case was whether the term “available services” should be interpreted to include those services that had been traditionally offered by Montfort. If so, then pursuant to section 7 of the *F.L.S.A.*, the right to receive these services could only be limited “as circumstances make reasonable and necessary, if all reasonable measures and plans for compliance with this Act have been taken or made.”

The Ontario government argued that section 5(1) should be interpreted narrowly so as to ensure only that the applicants would have a right to services offered by the Montfort after the Commission’s decision took effect, but not to services that had been offered previously. The Court of Appeal rejected this argument, finding that the term “available services” must refer to those services available at the time the agency is designated under the *F.L.S.A.*. This interpretation, the Court noted, was consistent with the objectives of the *F.L.S.A.*, the aspirational element of linguistic protections under the *Charter*, and the unwritten constitutional principle of respect for and protection of

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29 *Ibid.*, s. 5(1).
minorities. In this way, in addition to relying on the normal rules of statutory interpretation, the Court of Appeal specifically referred to the unwritten principle of protection of minorities in the course of interpreting the F.L.S.A. The Court concluded that the Commission’s decision to reduce “available services” at Montfort failed to comply with the requirement under section 7 of the F.L.S.A. of taking “all reasonable measures” before limiting access to available services.

While Lalonde is helpful in underlining the manner in which constitutional principles may assist in the interpretation of statutory provisions, it is important to remember that there are also limits to the impact of an unwritten constitutional principle when interpreting statutory language. Courts in a number of different cases have insisted that, while legislation must be interpreted to conform with constitutional principles, those principles should not be used to import concepts or duties not intended by the legislature. Thus, for example, in Giroux v. Ontario (Minister of Consumer and Business Services), a panel of the Divisional Court of Ontario found that the principle of recognition and protection of minority rights could not be used to interpret the French Language Services Act in a way that would impose a duty to create services not intended by the legislature.

The Giroux case concerned, in part, a decision of the Minister of Consumer and Business Services of the Ontario government to relocate its Land Registry Office from Welland to St. Catherines, Ontario. Welland is a designated area under the F.L.S.A. and as such the residents of Welland are guaranteed certain services will be available in the French language pursuant to section 5 of the Act. The francophone minority in Welland is extremely vulnerable to assimilation into the Anglophone community and challenged

31 Lalonde, supra note 20.
32 Ibid, at para 162.
33 (2005), 75 O.R. (3d) 759 [Giroux].
the decision to relocate the Land Registry Office for its failure to recognize the impact the decision would have on it as a vulnerable minority community. Members of the community argued that the principle of respect for and protection of minority rights mandated that the F.L.S.A. should be interpreted so as to prevent the transfer of the Land Registry office from Welland to St. Catherines.

The Ontario Divisional Court acknowledged that “the constitutional principle of respect for and protection of minorities should be used to interpret and understand the F.L.S.A.” However, the Divisional Court found that the constitutional principle could not be used to change the plain meaning of the F.L.S.A., particularly section 5, to require the government to provide French language services in particular offices. In the Divisional Court’s words, the constitutional principle does “not work in such a way as to change a clear text.” As a result, the Court concluded that the decision to move the Land Registry Office from Welland to St. Catherines did not violate the F.L.S.A.

A similar decision was reached in Forum des maires de la peninsule acadienne v. Canada (Canadian Food Inspection Agency). In the C.F.I.A. case, the Forum des maires de la peninsule acadienne (the Forum) challenged a decision of the Canadian Food Inspection Agency (the Agency) to transfer four seasonal jobs for inspectors from the town of Shippagan to the town of Shediac. The Forum argued that the Agency had failed to consider its obligations under section 41 in Part IV of the Official Languages Act to enhance the vitality of English and French linguistic minority communities.

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34 Ibid. at para. 20.
35 Ibid. at para. 25.
36 Ibid. at para. 30.
38 R.S.C. 1985, c. 31 (4th Supp.).
39 Ibid., s. 41. Section 41 states:
The Federal Court of Appeal found that section 41 of the Act was declaratory only and did not create enforceable rights or duties that could be enforced by a court. The Court emphasized that the principle of respect for and protection of minorities should be used to assist in the interpretation of the Official Languages Act, but could not be used to impose new obligations not intended by the government.\(^{40}\)

The above cases demonstrate that legislative provisions must be interpreted in light of the operation of unwritten constitutional principles and the rights that they secure. At the same time, these unwritten principles cannot be used to rewrite the terms or scope of legislation through the process of statutory interpretation. It is with this in mind that I now consider the specific ways in which these general rules apply to the interpretation of legislation dealing with disclosure of government information.


It is important to recognize that the question of whether administrators have fulfilled their duties to recognize and apply constitutional principles when making administrative decisions will be formally evaluated either through the process of judicial review or of statutory appeal of a particular administrative decision. As such, it is necessary to consider what standard of review will normally be applied to administrative decisions involving statutory interpretation.

The standard of review applied to decisions concerning interpretation of access

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41. The Government of Canada is committed to
(a) enhancing the vitality of the English and French linguistic minority communities in Canada and supporting and assisting their development; and
(b) fostering the full recognition and use of both English and French in Canadian society.

40 C.F.I.A., supra note 37 at para. 39: “It is true that the protection of language rights constitutes a fundamental constitutional objective and requires particular vigilance on the part of the courts, and that the courts must generously construe the texts that confer these rights, but it is also necessary that these be rights to protect and not policies to define.”
legislation by administrative officials is typically the least deferential standard of correctness. Pursuant to the pragmatic and functional approach, this standard is determined by weighing factors such as the presence or absence of a privative clause, or right of appeal, the expertise of the decision-maker, the nature of the decision and the purpose of the statutory provision. Generally speaking, where the federal Access Act is concerned, the Supreme Court of Canada has concluded that the absence of a privative clause insulating decisions by administrators, combined with the fact that the Act contemplates review by the Federal Court and includes a guiding principle that access decisions are to be reviewed independent of government suggest less deference should be accorded to administrative decisions concerning access requests.

While courts have tended to recognize that administrative officials may develop a certain expertise in processing access requests and would certainly have an appreciation for the ways in which access requests may interfere with the efficiency of government, the expertise of administrators is counter-balanced by their natural tendency to wish to interpret access legislation so as to limit access. In addition, the important interest in providing access to promote democratic accountability and participation also suggest that less deference should be accorded to administrative decisions in this realm. Finally, interpretation of Access Act provisions is regarded as interpretation of legal rules of general application, a role that courts are better placed to fulfill than administrators.41

The application of a correctness standard to administrative decisions concerning the interpretation of access provisions means that administrators must correctly weigh the

41 Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police), 2003 SCC 8 at paras. 14-19. See also, Canada (Information Commissioner) v. Canada (Minister of Environment), 2006 FC 1235 (T.D.) at para. 27; Canada (Information Commissioner) v. Canada (Minister of Industry), 2001 FCA 254 at paras. 28-42; Canada (Information Commissioner) v. Canada (Minister of the Environment), 2001 FCT 277, [2001] 3 F.C. 514 at para 39.
impact of the principle of democracy on the interpretation of access legislation. As such, failure to interpret access legislation in a manner that emphasizes the importance of access to democratic governance, as mandated by the principle of democracy, would constitute reviewable error and invalidate the administrative decision. This applies to both the Access Act and other legislation dealing with disclosure of government information such as the Canada Evidence Act.  

Practically speaking, this does not mean that exceptions to access must be interpreted more narrowly than they are drafted. Where the statutory language is clear, the language should not be given a different meaning. However, where there is ambiguity in a section, then the provision should be interpreted such that it “infringes on the public’s stated right to access to information contained in section 4 [of the Access Act] the least.”

Admittedly, recourse to constitutional principles may not be necessary when assessing whether an administrator’s interpretation of access legislation such as the federal Access Act (as it is currently drafted) appropriately considers the importance of access to the democratic process. This is because administrators must interpret the provisions of the Access Act in accordance with the purpose of the Act. This limitation is imposed by the basic administrative law principle that officials cannot exceed their statutory authority. As a result, when deciding to invoke particular statutory exceptions to the right of access, officials must inform their determination of whether the information at issue legitimately falls within a particular exception with the basic

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42 Of course, the standard of review may be affected where legislation dealing with access to government information contains restrictions on judicial review. However, the tendency is for statutory interpretation questions to be evaluated according to a correctness standard.

principles set out in section 2 of the Act, particularly the principles that “government information should be available to the public,” and “that necessary exceptions to the right of access should be limited and specific…”\(^{44}\)

Thus, as long as the Access Act continues to reflect these basic principles in its purpose clause, the recognition of a constitutional right to access government information rooted in the principle of democracy will simply support the existing statutory language. By contrast, the impact of recognizing a constitutional right to access government information will be more dramatic where decisions to refuse disclosure are made pursuant to legislation that does not explicitly recognize the importance of access to the democratic process, such as the *Canada Evidence Act*.

As noted in chapter one, one of the most important changes to the *Canada Evidence Act* introduced by the *Anti-terrorism Act* was the introduction of section 38.13. This section provides the federal Attorney General with the power to issue a certificate that prevents disclosure of government information in a proceeding where a ruling of the Federal Court mandates disclosure. In short, it empowers the Attorney General to override a decision of the Federal Court ordering disclosure of government information pursuant to the *Canada Evidence Act* or other legislation.\(^ {45}\)

The issuance of a certificate under s. 38.13 of the *Canada Evidence Act* terminates any ongoing Access to Information proceedings regarding the information

\(^{44}\) *Access Act*, *supra* note 1, s. 2.  
\(^{45}\) Section 38.13(1) states:

38.13(1) The Attorney General of Canada may personally issue a certificate that prohibits the disclosure of information in connection with a proceeding for the purpose of protecting information obtained in confidence from, or in relation to, a foreign entity as defined in subsection 2(1) of the *Security of Information Act* or for the purpose of protecting national defence or national security. The certificate may only be issued after an order or decision that would result in the disclosure of the information to be subject to the certificate has been made under this or any other Act of Parliament.
subject to the certificate.\(^{46}\) Once a certificate has been issued, the Information Commissioner is required to return any information subject to the certificate that is in his possession to the originating government department within ten days.\(^{47}\)

The recognition of a constitutional right of access to information would affect the interpretation of s. 38.13 of the *Canada Evidence Act*. Unlike the *Access Act*, the *Canada Evidence Act* does not have a purpose clause that identifies the principle that government information should be available to the public as a guiding principle of its interpretation.\(^{48}\) As such, in the absence of a constitutional right of access to information, there is no statutory language that mandates that the interpretation of s. 38.13 of the *Canada Evidence Act* must account for the importance of disclosure of government information to the democratic process.

However, the recognition of a constitutional right of access to information would require that s. 38.13 be interpreted so as not to interfere with the principle that access to government information necessary to the democratic process should be disclosed. This is particularly important in light of the fact that s. 69.1 of the *Access to Information Act* terminates proceedings under the *Access Act* once a s. 38.13 certificate has been issued.

The concrete effect of the constitutional right to access on the interpretation of s. 38.13 may be seen when one considers subsections 38.131(8) –(10). These subsections set out the power of a judge of the Federal Court of Appeal to vary, cancel or confirm a certificate issued under s. 38.13. As noted in chapter one, while subsection 38.13(1) states that a certificate may be issued “for the purpose of protecting national defence or

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\(^{46}\) *Access Act*, supra note 1, s. 69.1. Section 69.1 was added to the *Access Act* by s. 87 of the *Anti-terrorism Act*.

\(^{47}\) *Access Act*, supra note 1, s. 69.1(2)(c).

\(^{48}\) Indeed, s. 69.1 of the *Access Act* terminates any proceedings under the *Act* once a certificate is issued under s. 38.13 of the *Canada Evidence Act*. 
national security”, subsections 38.131(8) to (10) refer only to information that “relates to… national defence or security” and not the more demanding standard of “protecting national defence or national security”.

Recognition of a constitutional principle of access to information would mandate that subsections 38.131(8) to (10) be interpreted so as not to conflict with the principle that access to government information that is necessary to the process of democratic governance should not be restricted unnecessarily. While it is generally accepted as compatible with the democratic principle that access to government information may be restricted in order to protect national security, national defence or even international relations, it is not as readily accepted that any information that simply relates to these issues must be protected from disclosure. As such, I would argue that ss. 38.131(8)-(10) would be constitutionally required to be interpreted such that a judge of the Federal Court of Appeal could only confirm a certificate if she found that all of the information subject to the certificate should be prohibited from disclosure in order to protect national defence or national security as opposed to the lower standard requiring that all of the information simply relate to national defence or national security.

More importantly, the Attorney General would be required to interpret the statute so as to prohibit issuance of a certificate where the information in question simply “related” to national defence or national security. Failure to interpret the statute in this way would be reversible under the correctness standard of review due to the failure to interpret the provision in accordance with the constitutional right to access government information.
3) Exercise of Administrative Discretion

While many of the provisions in access legislation are mandatory in nature, either mandating disclosure of government information or mandating non-disclosure, the majority of access provisions are discretionary, allowing government officials to disclose certain types of information that may otherwise be exempt from disclosure. For example, section 21(1)(a) of the Access Act states that the head of a government institution “may refuse” to disclose information that includes advice and recommendations developed by or for a government institution, among other types of information.\(^\text{49}\) Similarly, outside of the context of access to information regimes, section 38.13(1) of the Canada Evidence Act states that the “Attorney General of Canada may personally issue a certificate” prohibiting disclosure of certain information.\(^\text{50}\)

In situations where the statute governing access provides for an administrative discretion concerning whether or not to disclose government information, a separate determination of the standard of review to be applied to this discretionary decision must be made. Generally speaking, courts are extremely deferential to decisions made by government officials pursuant to a statutory grant of discretion. Historically, pursuant to the principles of judicial review of administrative action established by the Supreme Court of Canada, decisions made by government officials under a statutory grant of discretion were subject to the greatest amount of discretion. These decisions were usually only subject to being overturned on judicial review if the exercise of discretion could be shown to be made in bad faith, if it was made with a lack of evidence or if the decision failed to consider a relevant factor or considered an irrelevant factor. In some

\(^{49}\) Access Act, supra note 1, s. 21(1)(a).

\(^{50}\) Canada Evidence Act, supra note 3, s. 38.13(1).
cases, discretionary decisions would be overturned if they were deemed to be sufficiently unreasonable.  

a) The Pragmatic and Functional Approach For Determining Standards of Review of Discretionary Decisions

More recently, the Supreme Court has considered discretionary decisions within its pragmatic and functional approach to judicial review. This means that the level of deference to be accorded to a particular discretionary decision will depend on a number of different factors, including the language of the statutory provision creating the discretion, the purpose of the provision and of the statute in general, the presence or absence of statutory language restricting or negating a right of appeal, the expertise of the tribunal, and the nature of the decision being made. Typically discretionary decisions are given a fair amount of deference and reviewed on either a standard of reasonableness or a standard of patent unreasonableness. This reflects the fact that the “pragmatic and functional approach can take into account the fact that the more discretion that is left to a decision-maker, the more reluctant courts should be to interfere with the manner in which decision-makers have made choices among various options.”

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53 Baker, *ibid.* at para. 56. The Supreme Court of Canada released its decision in *Dunsuir v. New Brunswick*, 2008 SCC 9, just prior to the submission of this thesis. In *Dunsuir*, the Supreme Court adjusted its approach to judicial review. In the decision, the Court abandoned the “patent unreasonableness” standard of review to shift from three standards of review to only two standards: correctness and unreasonableness. Interestingly, the *Dunsuir* case dealt with the standard of review to be applied to the decision of an administrative tribunal. Although the majority decision of Justices Bastarache and LeBel discussed the importance of a general shift in the Court’s approach to judicial review, the concurring reasons of Justice Binnie make it clear that it remains uncertain how this new approach will be applied to decisions dealing with the exercise of administrative discretion by government officials. In particular, it remains uncertain how the elimination of the standard of patent unreasonableness will affect the level of deference to be accorded to discretionary decisions in the context of national security.
The leading case dealing with this new approach to judicial review of the exercise of administrative discretion is the *Baker* case discussed above. *Baker* was the first case in which the pragmatic and functional approach was applied to a discretionary decision. Applying the pragmatic and functional approach in that case, Justice L’Heureux-Dubé determined that the decisions of the Minister concerning whether exemptions under the *Immigration Act* should be granted on humanitarian and compassionate grounds should be reviewed according to the standard of reasonableness. During her consideration of the appropriate standard of review, Justice L’Heureux-Dubé noted that “considerable deference” should be accorded to the administrators in light of the fact-specific nature of the inquiry, the role of the decision within the statutory scheme as an exception, the fact that the Minister had considerable expertise dealing with immigration-related matters, and the “considerable discretion evidenced by the statutory language”. 54 However, these factors had to be balanced against “the absence of a privative clause, the explicit contemplation of judicial review by the Federal Court… and the individual rather than polycentric nature of the decision…” 55 In light of all these factors, Justice L’Heureux-Dubé found that the appropriate standard of review was reasonableness simpliciter.

While the Supreme Court has now determined that discretionary decisions should be subjected to the same pragmatic and functional approach as other administrative decisions, it has yet to provide an adequate framework for applying the standards of correctness, unreasonableness or patent unreasonableness to discretionary decisions and evaluating whether the standards are breached. As noted by Genevieve Cartier: “If the

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54 *Baker*, ibid. at para. 63.
reasonableness of any discretionary decision depends on its consistency with the values underlying the grant of the power, the task of identifying those values is not enough. One must still conceive a structure of analysis which allows courts to actually determine in concrete cases whether a decision lives up to those values.”

The difficulty of applying these standards of review in concrete cases is reflected in the Baker decision itself. In her reasons, Justice L’Heureux-Dubé described the failure of the Minister’s decision to meet the test of reasonableness as a “failure to give serious weight and consideration to the interests of the children”. She also noted that in order to meet the standard of reasonableness, “the decision-maker should consider the children’s best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them.” She noted that this did not mean that the interests of the children must always outweigh other considerations, but that the best interests of the children could not be minimized. However, as noted by Lorne Sossin, it is not at all clear what it means, in practice, to be “alert, alive and sensitive” to the best interests of the children. More importantly, it is arguable that Justice L’Heureux-Dubé’s finding that the best interest of the children must be considered as an “important factor” with “substantial weight” edged towards imposing a particular value on different factors and thus into a correctness level of review.

In addition, it is notable that since Baker, particularly in Suresh v. Canada

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56 Cartier, “The Baker Effect” supra note 51 at 85.
57 Baker, supra note 9 at para. 65.
58 Ibid. at para 75.
60 See David Mullan, “Deference from Baker to Suresh and Beyond – Interpreting the Conflicting Signals” in Dyzenhaus, ed. The Unity of Public Law, supra note 51 at 27ff.
(Minister of Citizenship and Immigration), the Supreme Court has seemingly narrowed its approach to the review of discretionary decisions by insisting that judges should be reluctant to assess the weight given to various factors by an official rendering a decision pursuant to a discretionary authority. In particular, in Suresh, the Court was careful to note that the apparent weighing of factors by Justice L’Heureux-Dubé in Baker must be read in the context of the failure of the Minister’s delegate “to comply with self-imposed ministerial guidelines, as reflected in the objectives of the Act, international treaty obligations and, most importantly, a set of published instructions to immigration officers.”

Indeed, the Court emphasized that “the weighing of relevant factors is not the function of a court reviewing the exercise of ministerial discretion” noting that, even in Baker, “[i]t is the Minister who was obliged to give proper weight to the relevant factors and none other.”

The Court went on to note that deferring to the weight allocated by the Minister to particular factors was consistent with the separation of powers between the Executive, the Legislature and the Judiciary:

This standard appropriately reflects the different obligations of Parliament, the Minister and the reviewing court. Parliament’s task is to establish the criteria and procedures governing deportation within the limits of the Constitution. The Minister’s task is to make a decision that conforms to Parliament’s criteria and procedures as well as the Constitution. The court’s task, if called upon to review the Minister’s decision, is to determine whether the Minister has exercised her decision-making power within the constraints imposed by Parliament’s legislation and the Constitution. If the Minister has considered the appropriate factors in conformity with these constraints, the court must uphold his decision. It cannot set

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61 2002 SCC 1 [Suresh]. In Suresh, the Court was charged with reviewing a decision of the Minister of Citizenship and Immigration, made pursuant to s. 53(1)(b) of the Immigration Act, ordering a refugee to be deported where the Minister considers the person to constitute a danger to the security of Canada.
62 Ibid. at paras. 34-37. See also, Sossin, “The Rule of Policy”, supra note 59 at 106; David Mullan, supra note 60 at 22.
63 Suresh, supra note 61 at paras. 36-37.
64 Ibid. at para. 34.
65 Ibid. at para. 37.
it aside even if it would have weighed the factors differently and arrived at a different conclusion.\textsuperscript{66}

The Court explained that deference accorded to the Minister’s decision meant that the “court may not reweigh the factors considered by the Minister, but may intervene if the decision is not supported by the evidence or fails to consider the appropriate factors.”\textsuperscript{67}

\textbf{b) Applying the Pragmatic and Functional Approach in Practice}

Taken together, \textit{Baker, Suresh} and \textit{Lalonde} confirm that constitutional principles, both written and unwritten, may restrict the exercise of administrative discretion. Unfortunately, these cases do not provide a useful framework for evaluating administrative decisions according to the pragmatic and functional approach. However, David Elliott has proposed an approach for measuring whether discretionary decisions meet the three standards of substantive review that may provide a workable framework. In particular, Elliott’s approach focuses on how we might measure the impact of failing to take into account a necessary factor during the decision-making process.

According to David Elliott’s approach, whether an exercise of discretion meets the three standards of review may be measured as follows. The patent unreasonableness standard would only be breached where the defects in the reasoning of the administrator were very serious and the factor in question must have a determinative effect on the administrator’s decision: “A reviewing court should be able to say that, were it not for

\textsuperscript{66} \textit{Ibid.} at para. 38. See Trevor Allan, “Common Law Reason and the Limits of Judicial Deference” in David Dyzenhaus, ed. \textit{The Unity of Public Law, supra} note 51 at 289 for a critique of this application of separation of powers doctrine as a justification for judicial deference to discretionary decisions.

\textsuperscript{67} \textit{Ibid.} at para. 39. The Court concluded that the appropriate standard of review in \textit{Suresh} was the standard of patent unreasonableness. It justified applying this highly deferential standard based on the fact that the Minister’s decision on whether the refugee faces a substantial risk of torture on deportation was largely a fact-driven inquiry, involving considerations largely outside the realm of the expertise of reviewing courts.
that factor, the administrator would have reached a radically different conclusion." A patently unreasonable decision is one that is undermined by the traditional nominate defects such as failure to consider a relevant factor. This follows from *Suresh* where the Supreme Court specifically characterized a patently unreasonable decision as one that “was made arbitrarily or in bad faith, it cannot be supported on the evidence, or the Minister failed to consider appropriate factors. The court should not reweigh the factors or interfere merely because it would have come to a different conclusion.”

Where failure to consider a relevant factor is specifically concerned, a patently unreasonable decision is one in which the administrator has failed to consider the factor at all. For example, in *Lalonde*, the decision of the Commission was deemed patently unreasonable because it did not take any account whatsoever of the impact of its decision on the Franco-Ontarian minority as mandated by the principle of respect for and protection of minorities. Instead, the Commission appeared to have completely ignored the principle of respect for and protection of minorities in general and the impact of its decision on the francophone minority in particular.

The Commission offered no justification for diminishing Montfort’s important linguistic, cultural and educational role for the Franco-Ontarian minority. It said that matter was beyond its mandate. The Commission failed to pay any attention to the relevant constitutional values, nor did it make any attempt to justify departure from those values on the ground that it was necessary to do so to achieve some other important objective. While the Commission is entitled to deference, deference does not protect decisions, purportedly taken in the public interest, that impinge on fundamental constitutional values without offering any justification.

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68 David Elliot, *supra* note 6 at note 64.
69 *Suresh*, *supra* note 61 at para. 29.
70 *Ibid.* at para. 184 [emphasis added].
Ultimately, the Ontario Court of Appeal found that the decision could not pass even the most deferential standard of patent unreasonableness because “the Commission refused to take into account or give any weight to Montfort’s broader institutional role.”

Using Elliott’s approach, an unreasonable decision is one where an administrator has “failed to try to balance relevant factors (by engaging in comparisons, an assessment of strengths and weaknesses, and so forth).” Finally, Elliott describes an incorrect decision as “one in which an administrator has failed to attach a specified weight to one or more relevant factors, or has come to the wrong conclusion after balancing them.”

If we apply Elliott’s methodology to the Baker decision, the failure to account for the best interests of Ms. Baker’s children may be evaluated as follows. For the decision of the Minister to pass the test of patent unreasonableness, the decision would simply need to show consideration of the interests of the children, but need not demonstrate any weighing of their interests against other considerations. To pass the test of reasonableness, the decision must demonstrate that the interests of the children were not just considered, but weighed against other interests, although the specific weight to be given to each factor would be left to the Minister. In the words of David Dyzenhaus, you “cannot equate mere mention of the children as a factor in the decision with taking their interests into account. A mere tick in the box is not enough.” Finally, in order to meet the standard of correctness, the Minister’s decision would have to demonstrate not just that the interests of the children were weighed against other factors, but that each of these

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71 Ibid. at para. 186 [emphasis added].
72 David Elliott, supra note 6 at 489.
73 Ibid.
74 David Dyzenhaus, “Baker: The Unity of Public Law?” in Dyzenhaus, ed. The Unity of Public Law, supra note 51 at 10.
factors was accorded the proper weight in the Court’s eyes.\footnote{Again, it is worth noting that Justice L’Heureux-Dubé’s statement that the best interest of the children was an “important factor” that should be given “substantial weight” seem to suggest that her analysis in \textit{Baker} came close to applying a correctness standard to the decision of the Minister of Citizenship and Immigration’s delegate because her reasons appear to go so far as to ascribe a certain weight to the factor of the best interests of the children, namely substantial weight.}

c) **Determining the Standard of Review for Discretionary Decisions Regarding Access to Government Information**

The above discussion establishes that any assessment of whether the exercise of discretion to refuse access to government information should be quashed requires a preliminary determination of the standard of review to be applied to that decision. However, the standard of review is only useful if there are reasons for the decision to which the standard can be applied.

In \textit{Baker}, the Supreme Court of Canada found that reasons may be required for an administrative decision where they are necessary to ensure the fairness of the decision. Certainly, the ability of the court to assess the fairness of discretionary decisions concerning requests for access to government information is largely determined by the availability of reasons to support the decisions. Indeed, in \textit{Canada (Information Commissioner) v. Canada (Minister of Industry)}, Justice Evans noted that the importance of the right to access information certainly militated in favour of a requirement of reasons in support of decisions to refuse access:

Since the right of access to information under the control of government has been compared in importance to the quasi-constitutional statutory rights created by human rights legislation… it is certainly arguable that an institutional head is obliged to give reasons for the exercise of the discretion not to disclose when, without reasons, the Court could not effectively discharge its statutory duty to review the legality of the refusal.\footnote{\textit{Canada (Information Commissioner) v. Canada (Minister of Industry)}, supra note 41 at para. 102.}

It is clear that the reasons need not be formal. In \textit{Baker}, the Supreme Court of Canada found that the notes of an investigating Immigration Officer could serve as the...
reasons for the refusal to grant an exemption. In *Canada (Information Commissioner) v. Canada (Minister of Industry)*, the Federal Court of Appeal accepted internal memoranda outlining the reasons why disclosure may be damaging as representative of the reasons for the ultimate decision not to disclose information concerning a federal telecommunications licensing application. Ultimately, the reasons must be evaluated according to whether they “provide a sufficient explanation for a refusal to disclose so as to enable the Court to perform its reviewing function, or reveal that the Minister’s discretion to withhold documents… was not exercised according to the law.”

Once reasons for the exercise of discretion have been identified, it is possible to determine the standard of review to be applied to the discretionary decision. As established in *Baker*, the standard of review to be applied to such decisions must also be determined through an application of the pragmatic and functional approach. Many of the factors considered in this analysis will be similar to those considered in the first stage of analysis. For instance, in most cases, the access legislation will not include a privative clause and will specifically contemplate judicial review and the concept that access decisions should be reviewed independently of the government. Similarly, it will be recognized that administrators have a tendency to exercise their discretion so as to limit access. Certainly, the importance of the interest in promoting access will also be recognized. Each of these factors will continue to weigh in favour of a lower standard of deference being applied.

However, whereas the statutory interpretation phase involves interpretation of a general legal rule, the second phase involves exercise of a discretion. Typically, the

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language granting the discretion is broad, indicating a greater amount of deference is due to the decision of the administrator. These factors suggest a greater level of deference. As such, it is more likely that a standard of reasonableness will be applied to discretionary decisions concerning whether to disclose government information than a standard of correctness.

For example, in both Canada (Information Commissioner) v. Canada (Minister of Environment) and Canada (Information Commissioner) v. Canada (Minister of Industry) the Federal Court of Appeal found that the standard of review to be applied to the exercise of a Minister’s discretion to refuse disclosure of government information pursuant to sections 21(1)(a) and (b) of the Access Act was reasonableness simpliciter. In Canada (Information Commissioner) v. Canada (Minister of Industry), Justice Evans found that the “expertise available to the Minister in making the decision, and his accountability to Parliament, are outweighed by the importance afforded by the Act to the right affected, namely, the public right of access to government records secured by an independent review of refusals to disclose, and by the case-specific nature of the policy decision made.”

Of course, the standard of review to be applied to such discretionary decisions will be highly influenced by the type of factors the decision maker is asked to balance. In particular, courts are much more likely to apply a standard of patent unreasonableness where the decision-maker is asked to exercise their discretion after considering issues of national security and national defence. Thus, for instance, in Suresh, where the Supreme Court had to determine the level of deference to accord to the Minister of Citizenship and Immigration’s discretionary determination that a refugee constitutes a danger to the

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79 Canada (Information Commissioner) v. Canada (Minister of Industry), supra note 76 at para. 45.
security of Canada, the Court applied a standard of patent unreasonableness. This contrasted with the standard of reasonableness that the Court applied in *Baker* to discretionary decisions of the same Minister concerning whether a person should be granted an exclusion under the *Immigration Act* on humanitarian and compassionate grounds.

It will be recalled that similar factors were considered in both cases. In both *Baker* and *Suresh*, the Supreme Court found that the broad scope of discretion granted under the *Act* suggested a standard of deference should be applied. Similarly, in both cases, the expertise of the Minister in immigration matters suggested deference. However, in *Suresh*, special emphasis was made of the fact that the Minister has a special expertise and access to information related to national security.  

In addition, the decision in *Suresh* was characterized as being fact-based and contextual and requiring a balancing of the individual’s interest in not being tortured against the public interest in preventing danger to Canadian society.  

By contrast, in *Baker*, Justice L’Heureux-Dubé focused on the fact that the decision concerning the granting of an exception based on humanitarian and compassionate grounds was one that “relates directly to the rights and interests of an individual in relation to the government, rather than balancing the interests of various constituencies or mediating between them.”

Thus, it appears that the defining difference between the application of the reasonableness standard in *Baker* and the standard of patent unreasonableness in *Suresh* was the polycentric nature of decisions involving national security, where individual rights and interests must be balanced against concerns of public safety and security - an

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80 *Suresh*, supra note 61 at para. 31.
82 *Baker*, supra note 9 at para. 60.
area that the Court has recognized the government has a special level of expertise.\(^{83}\)

There is no reason to expect that a similar impact would not occur when these factors are balanced in an access to information context. Indeed, the Supreme Court of Canada in its recent decision in *Charkaoui v. Canada (Minister of Citizenship and Immigration)*\(^{84}\) noted that “the Court has repeatedly recognized that national security considerations can limit the extent of disclosure of information to the affected individual.”\(^{85}\)

Once the standard of review is established, the weight accorded to the consideration of the importance of access to government information to promoting democratic accountability and participation may be determined. In other words, the level of deference accorded to the administrative decision determines the impact of the constitutional right to access information. Typically, where a standard of patent unreasonableness is applied, it will be sufficient for the administrator to demonstrate that the importance of disclosure of the information to maintaining democratic participation and accountability was considered in the decision-making process. However, it will not be necessary to demonstrate that any balancing or weighing of this factor occurred.

Where a standard of reasonableness is applied, it will be necessary for the administrator to demonstrate that she did more than simply consider the importance of access to government information to the democratic process. Rather, the administrator will have to demonstrate that she weighed the importance of access when balancing other

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\(^{83}\) Interestingly, in both cases, the absence of a privative clause in the Citizenship and Immigration Act suggested less deference should be accorded. However, in *Baker*, Justice L’Heureux-Dubé found that the fact that judicial review was expressly contemplated (though limited by a requirement of leave from the Federal Court) suggested less deference, while in *Suresh* the Court found that the requirement of leave to appeal from the Federal Court suggested a deferential standard.


\(^{85}\) *Ibid.* at para. 58.
factors in her decision to refuse disclosure. However, where the reasonableness standard is applied, typically the court should not inquire into the actual weight given to any given factor in the balancing process, including the importance of disclosure to the democratic process.

Thus, for instance, in his dissenting reasons in Dagg, Justice La Forest found that there were no reasons to overturn the discretionary decision at issue because the Minister had weighed the conflicting interests. At issue in that case was whether the Minister should have exercised his discretion to disclose logs containing information about employees of the federal government entering and leaving their workplace pursuant to s. 19(2) of the Access Act. While section 19(1) prohibited the disclosure of records that contained personal information, section 19(2) provided a discretion to disclose records that contain personal information in certain situations. Justice La Forest would have upheld the decision of the Minister not to disclose the logs because, in his view, the Minister had weighed the conflicting interests of the privacy interests of the employees against the public interest in disclosure. Justice La Forest did not consider whether the Minister had given proper weight to each conflicting interest.

It is also worth considering a case where the government official failed to meet the test of reasonableness such as Canada (Information Commissioner) v. Canada

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86 Dagg was decided before the Supreme Court of Canada began applying the pragmatic and functional approach to discretionary decisions.
87 Section 19 states:

19. (1) Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Act that contains personal information as defined in section 3 of the Privacy Act.

(2) The head of a government institution may disclose any record requested under this Act that contains personal information if

(a) the individual to whom it relates consents to the disclosure;

(b) the information is publicly available; or

(c) the disclosure is in accordance with section 8 of the Privacy Act.

88 Dagg, supra note 51 at para 102.
In that case, Justice Kelen evaluated whether the refusal of the Minister of Environment to disclose portions of the Memorandum to Cabinet concerning Methylcyclopentadienyl Manganese Tricarboxyl (MMT), a controversial gas additive, was an abuse of his discretion pursuant to s. 21(1)(a) and (b) of the Access Act.  

Justice Kelen noted that the Minister’s designate “considered the ‘active’ status of the MMT file as the overriding factor in refusing disclosure.” However, Justice Kelen could find no evidence that the Minister’s designate had balanced this factor against the public interest in disclosure. This failure to balance the public interest in disclosure rendered the decision unreasonable since the Minister was required “to consider the public interest for and against disclosure and weigh these competing interests with the purposes of the Act in mind.”

Generally speaking, where a discretionary decision is to be made “in the public interest” it will be incumbent on the decision-maker to demonstrate that the importance of access to the information to democratic accountability and participation was considered when determining the public interest. Indeed, it is arguable that the

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89 Canada (Information Commissioner) v. Canada (Minister of Environment), supra note 41.
90 Section 21 states:
21. (1) The head of a government institution may refuse to disclose any record requested under this Act that contains
(a) advice or recommendations developed by or for a government institution or a minister of the Crown,
(b) an account of consultations or deliberations in which directors, officers or employees of a government institution, a minister of the Crown or the staff of a minister participate,
(c) positions or plans developed for the purpose of negotiations carried on or to be carried on by or on behalf of the Government of Canada and considerations relating thereto, or
(d) plans relating to the management of personnel or the administration of a government institution that have not yet been put into operation,

if the record came into existence less than twenty years prior to the request.

(2) Subsection (1) does not apply in respect of a record that contains
(a) an account of, or a statement of reasons for, a decision that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of a person; or
(b) a report prepared by a consultant or an adviser who was not a director, an officer or an employee of a government institution or a member of the staff of a minister of the Crown at the time the report was prepared.

91 Canada (Information Commissioner) v. Canada (Minister of Environment), supra note 41 at para 75.
92 Ibid. at para. 76.
recognition of a constitutional right to access government information would impose a public interest exception on any statutory power that provided public officials with a discretion to refuse access to government information. In other words, any discretionary decision to refuse disclosure of government information would have to involve a consideration of whether the public interest in disclosure of the information – specifically the impact of disclosure on public participation in and accountability fostered by the democratic process – outweighed the interest in refusing disclosure. This follows from the approach adopted by the Ontario Court of appeal in Lalonde, where, it will be remembered, Justices Weiller and Sharpe found that “failure to take into account a fundamental principle of the Constitution when purporting to act in the public interest renders a discretionary decision subject to judicial review.” 93

Nonetheless, it must be noted that, under the reasonableness standard, the court would typically not inquire into the specific weight given to the importance of access in determining the public interest. This requirement is significant given the number of statutory provisions that provide a discretion to disclose government information that might otherwise be exempted from disclosure where the administrator determines that disclosure would be in the public interest. 94

Of course, it must again be noted that existing federal and provincial access laws often incorporate the core of the proposed constitutional right to access government information in their purpose clauses. As in the context of statutory interpretation, discretionary powers must be exercised in accordance with the guiding principles of the

93 Lalonde, supra note 20 at paras. 165-169.
94 The question of where the burden of proof falls when reviewing an exercise of statutory discretion will depend on the specific language of the statutory provisions setting out the discretion.
legislation, namely to provide greater access to government information in order to promote democratic participation and accountability. As noted in Rubin:

Accordingly, it is incumbent upon the institutional head (or his delegate) to have regard to the policy and object of the Access to Information Act when exercising the discretion conferred by Parliament pursuant to the provisions of subsection 21(1). When it is remembered that subsection 4(1) of the Act confers upon every Canadian citizen and permanent resident of Canada a general right to access and that the exemptions to that general rule must be limited and specific, I think it is clear that Parliament intended the exemptions to be interpreted strictly.  

As long as the federal Access Act and other provincial access legislation maintain their current orientation towards promoting access in order to facilitate democratic accountability and participation, the recognition of a constitutional right of access simply supports the enforcement of the purpose of the existing legislation. However, it cannot be forgotten that resistance to the current access regime among government officials has been strong and continues to this day. In this way, the recognition of a constitutional right of access to government information would secure existing rights reflected in existing provincial and federal access laws.

In any case, the more pressing question at this time is the impact of the recognition of a constitutional right to access government information in shaping the exercise of discretion to refuse disclosure of government information outside of the context of the federal Access Act and equivalent provincial legislation. For instance, what limits would such a constitutional right impose on the exercise of the Attorney General’s discretion to issue a certificate exempting information from disclosure pursuant to s. 38.13 of the Canada Evidence Act? As noted earlier, it is a basic principle of administrative law that the Attorney General is only able to exercise his discretion

95 Rubin, supra note 43 at 274.
96 See the discussion of this issue in chapter one.
pursuant to the terms of the legislation providing the discretionary power. However, unlike the Access Act, neither s. 38.13 in particular, nor the Canada Evidence Act in general, explicitly notes the importance of maintaining access to government information.

In my view, in addition to mandating a restrictive interpretation of the type of information that may be the subject of a certificate under the statute, recognition of a constitutional right to access government information would impose upon the Attorney General a requirement of considering whether access to the information he wished to prohibit from disclosure was necessary to enhance democratic accountability or participation before exercising his discretion to issue a certificate. It is most likely that, given the fact that the Minister is granted a discretion to issue the certificate when the Minister considers it necessary to protect national security or national defence that the Minister’s decision will be reviewed according to a standard of patent unreasonableness. This follows from the deferential approach adopted by the Supreme Court of Canada in Suresh. As a result, evidence that the Attorney General had not turned his mind to the importance of access to the democratic process may result in a decision to issue a certificate being remanded to the Attorney General for proper consideration of the importance to the democratic process of access to the information subject to the certificate.

The recognition of a constitutional right to access government information may also influence the exercise of discretion to refuse disclosure of government information under other provisions of the Canada Evidence Act. It should be remembered that the Canada Evidence Act grants government officials the discretion to object to disclosure of government information for a number of reasons unrelated to national security or national
defence. Section 37 of the Act states that a government official “may object to the disclosure of information before a court, person or body with jurisdiction to compel the production of information” by certifying that “the information should not be disclosed on the grounds of a specified public interest.” In turn, section 37(5) states that a court determining an objection made pursuant to section 37(1) may order disclosure of the information to which the objection was made where it determines that the public interest in disclosure of the information outweighs the public interest specified by the government official.

Recognition of a constitutional right of access to government information would require that, in the course of assessing the public interest, the government official would be required to consider the importance of access to the information to not just the parties involved in the law suit, but also to the process of democratic accountability and democratic participation. In addition, while the exercise of discretion under section 38 of the Canada Evidence Act would likely be assessed according to the patent unreasonableness standard, it is likely that the exercise of discretion under section 37 of the Act would attract a less deferential standard of reasonableness simpliciter where information not implicating national security or national defence was at issue. As such, government officials exercising their discretion under section 37 would be required to demonstrate not just that they considered the importance of disclosure of the information

97 Canada Evidence Act, supra note 3, s. 37(1).
98 Ibid., s. 37(5): “If the court having jurisdiction to hear the application concludes that the disclosure of the information to which the objection was made under subsection (1) would encroach upon a specified public interest, but that the public interest in disclosure outweighs in importance the specified public interest, the court may, by order, after considering both the public interest in disclosure and the form of and conditions to disclosure that are most likely to limit any encroachment upon the specified public interest resulting from disclosure, authorize the disclosure, subject to any conditions that the court considers appropriate, of all of the information, a part or summary of the information, or a written admission of facts relating to the information.”
to democratic accountability and participation, but that they also included consideration of the importance of this factor in a balancing exercise.

d) What if a right to access government information is recognized as part of section 2(b) or 3 of the Charter?

It is important to recognize that recognition of a right to access government information as an extension of an existing Charter right will likely change the analytical approach, if not necessarily the result, applied to administrative decisions concerning access. As a result, it is necessary to briefly consider how the recognition of a constitutional right to access government information as part of section 3 of the Charter would change the analysis above.

Here it is worth recalling that the first step in determining whether an administrative decision concerning access is unconstitutional per se will be to determine whether the authorizing legislation is constitutional. In most cases, once the authorizing legislation is determined to be constitutional, it would be redundant to then question whether the exercise of discretion pursuant to the legislation is itself unconstitutional. Rather, once the authorizing legislation is determined to be constitutional, the appropriate next step is to determine whether the discretionary decision respects the scope of the statutory grant of power under the principles of administrative law.

However, in some cases it may be determined that the administrative decision itself breached the Constitution. For instance, in Slaight Communications v. Davidson,99 the Supreme Court of Canada determined that orders issued pursuant to a statutory discretion contravened section 2 of the Charter despite the fact that the statute authorizing the orders was deemed not to contravene the Charter. In that case, the orders

were issued by an adjudicator, appointed under s. 61.5(6) of the *Canada Labour Code*,\(^{100}\) to adjudicate a complaint that a radio-salesman had been unjustly dismissed. The adjudicator found that the salesman had been unjustly dismissed and ordered his employer to provide him with a letter of recommendation including prescribed information only and prohibited the employer from responding to requests for information about the employee except by way of the letter of recommendation. The majority of the Court found that, while the orders infringed s. 2(b) of the *Charter*, the infringements were justifiable in a free and democratic society, pursuant to section 1 of the *Charter*.

More recently, in *Multani v. Commission scolaire Marguerite-Bourgeoys*\(^{101}\) the Supreme Court of Canada found that a decision of a school board council of commissioners to absolutely prohibit a Sikh student from wearing a kirpan to school violated section 2(a) of the *Charter* and could not be justified under section 1 of the *Charter*. In her majority decision, Justice Charron held that administrative decisions that are claimed to infringe *Charter* rights must be considered using a constitutional framework of analysis – namely *Charter* analysis, including application of the *Oakes* guidelines for determining if a violation is justified under s. 1- rather than administrative law principles.

The approach in *Multani* suggests that a full *Charter* analysis should be applied where it was argued that an administrative decision breached a right to access government information protected under s. 3 of the *Charter* as opposed to a claim based on a right to access based only on the free-standing principle of democracy. In this

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\(^{100}\) R.S.C. 1970, c. L-1, s. 61.5(6).
\(^{101}\) 2006 SCC 6, [2006] 1 S.C.R. 256 [*Multani*].
situation, the Court would then consider whether the breach of the access right was justified under section 1 of the Charter. As such, the Court would have to consider whether the purpose of the infringement of the right of access was pressing and substantial, whether the infringement was rationally connected to this purpose, whether the infringement was minimally impairing of the right and whether the beneficial effects of the infringement outweighed the deleterious effects.

Admittedly, the possibility that a discretionary decision may be subjected to review based on either administrative law principles or Charter principles creates a potential source of uncertainty. Arguably, this uncertainty is somewhat relieved by the fact that both administrative law principles and the considerations underlying section 1 of the Charter are rooted in the same fundamental principles, namely that restrictions on rights be both justifiable and justified in the circumstances. This is a reflection of the phenomenon that is increasingly being referred to as “the unity of public law”. ¹⁰²

The Supreme Court itself has recognized that it would be unlikely for a decision to be found reasonable under administrative law principles if it contravened a Charter right in a manner that could not be justified under section 1 of the Charter. However, it should be remembered that the process of justification under section 1 of the Charter is more formal and, potentially, more rigorous than the standard applied under administrative law.

As such, it is possible that an administrative decision that infringed the right to access government information may be upheld where that right is protected only by the free-standing principle of democracy, while the same decision may be quashed where the right to access is protected as part of an existing provision of the Charter.

4) Conclusion

Access to government information is largely determined by administrative decisions. In making these decisions, administrators often exercise extraordinary amounts of discretion. Protection of a right to access government information is thus contingent on the ability to constrain the exercise of administrative discretion to refuse disclosure of such information.

Recognition of a constitutional right to access government information would establish restrictions on the discretion of administrators to refuse access to government information. Where such a constitutional right to access government information is recognized as an application of the free-standing principle of democracy, administrators would have to demonstrate that they considered the importance of access to the information at issue to the democratic process when deciding to refuse to disclose the information. Of course, the level of consideration to be given to the importance of access to the information to the democratic process would vary according to the context of the request for disclosure, and thus the standard of review to be applied to that decision.

Thus, where decisions concerning access are taken in relation to national security considerations or issues of national defence, it is likely that administrators will likely be required to demonstrate simply that the importance of the information to the democratic process was considered as part of the decision-making process. By contrast, where the issue of access is considered in the context of issues of administrative efficiency, it is likely that administrators will have to demonstrate that they weighed the importance of access against countervailing values such as governing efficiency, and in some cases may need to show that they gave the importance of access to the information at issue to the
democratic process the proper weight in that balancing analysis. Where a constitutional right to access is recognized as part of an existing *Charter* provision, the process of justifying a failure to provide access will be more formal, and potentially more difficult. In such cases, the decision to refuse access to government information would have to be justified pursuant to section 1 of the *Charter*.

Finally, it is worth noting the limits of any application of the right to access government information to administrative decisions concerning access. Ultimately, the principles recognized and affirmed by the judiciary must be applied by public servants. As noted by Lorne Sossin, these standards are not only applied by public servants, they are also interpreted by them. As such, there is room for disagreement concerning the application of the principles recognized by the judiciary. In this way, the way in which the importance of access to government information to the democratic process is incorporated into discretionary determinations to disclose or refuse disclosure of this information is uncertain at best. To some extent, the translation of the constitutional requirement to consider the importance of access to the democratic process from judicial pronouncements to on-the-ground decisions will be accomplished through instruments of “soft law” such as ministerial guidelines. Ultimately, the impact of the constitutional right to access government information may be best measured by the way in which the recognition of such a right is reflected in changes to such soft law instruments.

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104 Ibid. at 107 ff.
VII. CHAPTER SEVEN

DEMOCRACY AND THE LIMITS OF PARLIAMENTARY SOVEREIGNTY:
LIMITING THE POWER OF PARLIAMENT TO RESTRICT
ACCESS TO GOVERNMENT INFORMATION

In chapter six, I explored the ways in which a constitutional right to access government information may be applied to restrict the exercise of administrative decisions refusing access to government information. The improper exercise of administrative discretion is currently the most significant threat to access to government information. However, the threat of the imposition of new legislative restrictions on access to government information remains very real. In this chapter, I will consider the ways in which recognition of a constitutional right to access government information rooted in the constitutional principle of democracy may be applied to limit threats to access that may be imposed through legislation.

A constitutional right of access to government information may impose limits on the capacity of the legislature to restrict access to information in two ways: statutory interpretation and invalidation. I will briefly explore the ways in which a constitutional right of access may be applied to guide the interpretation of legislation in order to maximize access to government information in the first section of this chapter. This will supplement my discussion of statutory interpretation in chapter six.

In the second section of the chapter, I will focus on the more controversial aspect of the application of a constitutional right to access government information – application of the right to invalidate legislation. This requires a consideration of how the principal of democracy should be balanced against the principle of parliamentary supremacy. I will start by considering several recent decisions of the Supreme Court of Canada that have
considered, and rejected, the application of unwritten constitutional principles to strike down legislative provisions restricting disclosure of government information in judicial proceedings. Based on my analysis and criticism of these cases, I will suggest that application of the unwritten principle of democracy to invalidate legislation may be justified where legislation threatens fundamental elements of the democratic process. In particular, I will argue that in such cases the principle of democracy may outweigh the principle of parliamentary supremacy. I will support this contention with reference to existing Supreme Court jurisprudence before considering how several historical cases that also rejected the invalidation of restrictions on access to information may be accommodated within my argument. Finally, I will consider three hypothetical scenarios to demonstrate how the unwritten principle of democracy may be applied in practice to determine whether legislative provisions should be invalidated for violating the proposed right to access government information.

1) **Statutory Interpretation**

As noted in chapter six, the legitimacy of the application of unwritten constitutional principles in order to assist in the process of statutory interpretation has been generally accepted by academics and judges in Canada. As such, whether a constitutional right of access to government information is recognized as an extension of an existing *Charter* right or as a free-standing right rooted in the principle of democracy should not affect the impact of the right on statutory interpretation. In either case, the recognition of a constitutional right to access government information would mandate that legislation be interpreted to conform with the right where possible.
I explored how legislation may be interpreted with the assistance of unwritten constitutional principles in chapter six. I do not propose to repeat that analysis here. However, in my view, it is worth briefly considering an additional example of the way in which a constitutional principle may be used to assist in the interpretation of legislation. In particular, the Quebec Court of Appeal’s decision in Robert c. Québec (Conseil de la magistrature)\(^1\) is worth considering in some detail because it involved a balancing of two constitutional principles.

Recall that, once an unwritten constitutional principle has been recognized and determined to be relevant in any given case, it is necessary to balance the application of that principle against the effect of other constitutional principles that are also relevant to the case. As noted by the Supreme Court of Canada, no one constitutional principle trumps other principles; rather, the relevant principles must be weighed against each other in the context of the case at issue. As I argued in chapter four, this does not mean that one principle may not carry more weight than another in a particular context. Rather, it simply requires that relevant opposing principles be adequately considered before determining the effect of any one constitutional principle.

The Robert case required the balancing of the principle of judicial independence and the principle of access to government information. More specifically, the case concerned whether s. 4 of Quebec’s provincial access to information legislation\(^2\) was binding on the Quebec Judicial Council and whether the Quebec Access to Information Commissioner had jurisdiction over the Judicial Council when it performed disciplinary duties. The case arose out of several complaints made by two citizens against Justice

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\(^1\) Robert c. Québec (Conseil de la magistrature), [2000] R.J.Q. 638 (C.A.) [Robert].
\(^2\) An Act respecting access to documents held by public bodies and the protection of personal information, R.S.Q., c. A-2.1 [Quebec Access to Information Act].
Jean-Pierre Bonin concerning his handling of their case before him. The Judicial Council determined that the complaints were *prima facie* receivable and mandated Justice Yvon Mercier, a member of the Council, to investigate the file. Justice Mercier instigated a pre-inquest and interviewed the complainants and Justice Bonin. Justice Bonin provided Justice Mercier with a memo in which he explained his decision and described his deliberations and his perceptions of the file and the complainants.

Justice Mercier submitted two reports to the Judicial Council. The Judicial Council determined that the complaints were not receivable as they were groundless and nothing in the file allowed a conclusion that Justice Bonin breached the judicial code of conduct. Dissatisfied with the decision of the Judicial Council, the complainants requested that the Council provide them with three documents:

a) a copy of the transcript of Justice Bonin’s testimony;
b) a copy of the two reports submitted by Justice Mercier to the Judicial Council; and
c) a copy of the transcript of the meeting at which the decision was made to dismiss the complaints.

The Judicial Council refused to disclose the documents requested, arguing that the documents related to secret, closed-door deliberations. The Council noted that s. 252 of the Quebec *Courts of Justice Act* allows the Council to conduct closed-door meetings.³

Having been refused disclosure by the Judicial Council, the complainants brought their case to Quebec’s Access to Information Commissioner, relying on s. 135 of the *Quebec Access to Information Act*. At the hearing before the Access to Information Commissioner, the Judicial Council raised a preliminary argument that the *Quebec

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³ *Courts of Justice Act*, R.S.Q. c. T-16, s. 252.
Access to Information Act is constitutionally invalid with respect to the Judicial Council because it contravenes the fundamental principle of judicial independence.\(^4\)

The Commissioner’s decision rejected the Judicial Council’s argument. The Commissioner ruled that access to information is itself a fundamental right which should have precedence over the vague and general right to judicial independence. According to the Commissioner, the Judicial Council is not a judicial body, but rather serves as an administrative body linked to the executive. By contrast, the Access to Information Commission enjoys sufficient independence and impartiality to investigate the Judicial Council’s decision.\(^5\)

The Judicial Council applied for judicial review of the Commissioner’s decision by the Quebec Superior Court. Justice Roland Tremblay rejected the application for judicial review and affirmed the Access to Information Commissioner’s decision. Justice Tremblay found that, even though judicial independence is a fundamental value it should not be given a rigid interpretation so as to exclude the right to information concerning documents such as those at issue in this case. In addition, he found that the Quebec Access to Information Act contained enough safeguards to protect the secrecy of Council deliberations.\(^6\)

The Judicial Council appealed the decision of Justice Tremblay to the Quebec Court of Appeal. Justice Baudouin, writing for the Court of Appeal, accepted the Judicial Council’s arguments and allowed the appeal.\(^7\) At the outset of his reasons, Justice

\(^4\) The constitutionality of the Quebec Access to Information Act was determined as a preliminary matter, before consideration of the substance of the complaint.


\(^6\) Robert c. Québec (Conseil de la magistrature), 1994 Carswell Que 909.

\(^7\) Justice Baudouin agreed with the parties that the correctness standard applied to the Commission’s determination of an issue of constitutional law.
Baudouin acknowledged that the case concerned two important principles: access to information and judicial independence. He noted that access to information is one of the bases of our democratic system and that public administration must be characterized by transparency, guaranteed by the exercise of the citizen’s democratic rights. According to Justice Baudouin, the Quebec Access to Information Act is quasi-constitutional, particularly in light of its links to fundamental rights protected by the Quebec Charter of Rights and Freedoms, namely the right to privacy protected by s. 5 and the right to information protected by section 44 of the Quebec Charter.

However, Justice Baudouin noted that the right to access information must be counterbalanced against the principle of judicial independence. He recognized that the principle of judicial independence was a founding principle of Canadian democracy, rooted in sections 7-11 of the Canadian Charter and section 23 of the Quebec Charter, as well as sections 96, 99 and 100 of the Constitution Act, 1867. However, Justice Baudouin noted that none of these textual provisions were directly applicable to this case as the Judicial Council is not a superior court, the case did not concern a criminal accused and there was no threat to life, liberty or security of the person. Nonetheless, Justice Baudouin observed that the Supreme Court of Canada’s decisions in the Provincial Judges’ Reference and the Secession Reference established that the principle of judicial independence was constitutionally protected beyond the strict text of the Constitution and that the Judicial Council could invoke the principle to challenge the applicability of the Quebec Access to Information Act to its disciplinary proceedings. As a result, the

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8 Robert, supra note 1 at para. 47.
9 R.S.Q., c.12.
10 Robert, supra note 1 at para. 48.
11 Ibid. at paras. 57-66.
Robert case is an excellent example of how an unwritten constitutional principle which both underlies “written” constitutional rights and exists independent of the scope of those written provisions may be used to interpret legislation.

Having established that the Judicial Council acts like a court when hearing public complaints against members of the judiciary, Justice Baudouin conducted an extensive consideration of the requirements of the principle of judicial independence and proceeded to outline the potential threats to judicial independence that may arise through application of the Quebec Access to Information Act to the disciplinary proceedings of the Council.12 Justice Baudouin concluded that allowing the Quebec Information Commissioner to review the Judicial Council’s deliberations in disciplinary matters would contravene the principle of judicial independence. He found that the Judicial Council should thus be exempted from the jurisdiction of the Access to Information Commission, set out in s. 4 of the Act.13

The decision in Robert underlines the uncertain barrier between statutory interpretation and invalidation. In Robert, the Quebec Court of Appeal decided to interpret section 4 of the Quebec Access to Information Act as not including the Quebec Judicial Council in the definition of public authorities in those situations where the Judicial Council was engaged in determining disciplinary matters. This narrow interpretation of the scope of section 4 of the Act effectively invalidated part of the section – the part that would have included the Judicial Council under the authority of the

12 Justice Baudouin recognized that the Judicial Council performs both administrative and adjudicative functions. While noting the similarities of the Council to other administrative bodies and the fact that the Council does not appear in the Act that establishes tribunals in Quebec, he concluded that the Council remains independent from the executive in the course of its adjudicative functions, particularly during the course of receiving complaints from members of the public against members of the judiciary. Ibid. at para. 91.
13 Quebec Access to Information Act, supra note 2, s. 4.
Quebec Access to Information Act – based on the application of the unwritten constitutional principle of judicial independence. However, this partial invalidation of the Quebec Access to Information Act has not raised the usual alarm bells associated with applying unwritten constitutional principles to invalidate legislation because it can be characterized as a mere narrowing of the scope of the legislation through the process of statutory interpretation.

In this way, application of the principle of democracy to interpret the scope of legislation restricting access to government information may present an uncontroversial method for restricting the scope of such legislation. Certainly, the requirement that legislation be interpreted to comply with the Constitution is an effective method of imposing constitutional values short of the much more draconian method of invalidating legislation.14

2) Invalidation

The issue of whether a free-standing constitutional right to access government information could be applied to invalidate legislation restricting access is perhaps the most controversial issue in this thesis. More generally, the potential use of unwritten constitutional principles to invalidate legislation is the most controversial aspect of the application of unwritten constitutional principles. At the heart of this controversy is the issue of whether it is legitimate for judges to invalidate legislation using principles that are not explicitly set out in the text of the Constitution.

It is important to note that the controversy is a contingent one that only arises if the constitutional right is deemed to exist only through free-standing unwritten principle. The controversy is largely averted where the constitutional right is deemed to exist as an

14 See, in particular, the discussion of T.R.S. Allan in chapter eight.
extension of the scope of an existing right entrenched in the written text of the Constitution. For instance, there has been much controversy surrounding the legitimacy of the interpretation of section 15 of the Charter to include protection on the grounds of sexual orientation. However, there is very little doubt that, once the scope of section 15 was extended to include protection of the ground of sexual orientation, courts could legitimately invalidate legislation that discriminated on the basis of sexual orientation where that discrimination could not be justified pursuant to section 1 of the Charter. Similarly, once the scope of “freedom of expression” protected under section 2(b) of the Charter was interpreted to include commercial expression, there was no doubt that legislation that restricted commercial expression could be invalidated unless the restriction on commercial expression could be justified under section 1 of the Charter. As such, if the application of the principle of democracy leads to an interpretation of the scope of section 3 of the Charter to include a right to government information, there can be little doubt that legislative restrictions on access to government information could be invalidated by the judiciary unless justified under section 1 of the Charter.

In light of this, any controversy concerning the application of a constitutional right to government information to invalidate legislation restricting access to such information only arises if the right is not recognized as the extension of an existing Charter right but is rather recognized as part of a free-standing unwritten constitutional principle. I argued in chapter five that the evidence in favour of the recognition of a right to access government information as part of the principle of democracy is strong enough to garner support of even critics of the application of unwritten constitutional principles. This argument was based, in part, on the close ties between the principles underlying the

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scope of section 2(b) and 3 of the Charter and the arguments concerning the importance of access to government information in the democratic process.

This proximity of purpose between the roles of section 2(b) and 3 of the Charter and access to government information in supporting the democratic process in Canada suggests that recognition of a constitutional right of access to government information may be justified by the “necessary implication” approach favoured by critics such as Elliott and Monahan.\footnote{See discussion in chapter four, particularly pages 135-143.} In other words, it is arguable that the purpose of protecting access to government information necessary to promote political participation and accountability is so closely aligned to the purpose of promoting meaningful political participation protected by section 3 of the Charter that the right to access government information must necessarily be implied as part of the Constitution. If this is true, then there would be no reason to oppose the application of the right to access government information to invalidate legislation.

However, notwithstanding the evidence supporting the recognition of a constitutional right of access to information as either an extension of an existing Charter right or as a necessarily implied right that supplements the rights explicitly set out in the text of the Charter, it is worth considering whether a right to access government information could be applied to invalidate legislation even if the right was deemed to exist only as a free-standing unwritten constitutional principle. In order to do so, it is necessary to consider the counter-arguments that have been raised against the application of unwritten constitutional principles to invalidate legislation.

As noted in chapter five, several reasons have been advanced for preventing judges from invalidating legislation through the application of unwritten constitutional
principles. Among the concerns raised by critics are the potential for judges to apply their own value preferences under the cover of unwritten constitutional principles and the potential for judges to usurp the role of the legislature. I have addressed these concerns, in part, in my discussion in chapters three, four and five. I will return to them again in chapter eight when I expand my argument in favour of the theoretical legitimacy of the application of the principle of democracy to invalidate legislation restricting access to government information.

A third concern that has been raised by critics and judges alike is that applying unwritten constitutional principles to invalidate legislation would contravene the most fundamental constitutional principle in Canada, the principle of parliamentary supremacy. Judges in Canada have been reluctant to consider any weakening of the traditional conception of parliamentary sovereignty in this country. These judges, joined by academic critics, have noted that, despite the fact that the principle of parliamentary sovereignty is attenuated in Canada by the operation of written constitutional instruments, namely the Constitution Acts, 1867 and 1982, legislatures remain sovereign as long as they act within their respective jurisdictions and do not violate the express provisions of the Charter.  

It is not surprising, then, that the obstacle that is most often raised against the application of unwritten constitutional principles to protect access to government information is the principle of parliamentary supremacy. Thus, in order to support the

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invalidation of legislation through the application of a right to access government information rooted in the democratic principle, it is necessary to balance the principle of democracy against the principle of parliamentary supremacy. I will discuss the ways in which these two principles may be weighed against each other in this chapter. In so doing, I will recognize that there are instances in which the principle of parliamentary supremacy may be accorded greater weight than the principle of democracy. However, I will also argue that the principle of parliamentary supremacy may be limited by the principle of democracy in those cases where access to government information is necessary to ensure meaningful democratic governance.

a) The case for parliamentary supremacy

Generally speaking, appellate and lower court judges have reacted cautiously to the Supreme Court of Canada’s application of unwritten principles. In most cases, appellate and lower courts have attempted to distinguish or marginalize the Supreme Court’s discussion of the normative role of unwritten constitutional principles. Thus, while courts have been willing to apply unwritten constitutional principles to aid in the interpretation of legislative or constitutional provisions,\(^{18}\) or to guide the regulation of administrative discretion,\(^{19}\) they have generally refused to apply unwritten constitutional principles to invalidate legislation.\(^ {20}\)

\(^{19}\) See e.g. Lalonde v. Ontario (Health Restructuring Commission) (1999), 48 O.R. (3d) 50, 181 D.L.R. (4th) 263 (C.A.) (The failure to consider the principle of protection of minorities in the course of exercise of
When the application of unwritten constitutional principles has been argued, Canadian judges have tended to privilege the principle of parliamentary supremacy over other fundamental principles such as the rule of law and the separation of powers. In particular, judges have emphasized the fact that the Supreme Court did not indicate that it was rejecting or limiting the principle of parliamentary supremacy in its reasons in the Quebec Secession Reference. This sentiment has been particularly evident in cases

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21 A notable exception are cases dealing with judicial remuneration. For an analysis of this fact see Jean Leclair, “Canada’s Unfathomable Unwritten Constitutional Principles” (2002) 27 Queen’s L.J. 389.
dealing with disclosure of government information. I will discuss two of the most important cases, Singh v. Canada (Attorney General) and Babcock v. Canada (Attorney General) in some detail below.

(i) Singh v. Canada (Attorney General)

The Singh case concerned a challenge to the constitutionality of section 39 of the Canada Evidence Act. As noted in chapter one, section 39 provides the government with a right to refuse disclosure of information containing Cabinet secrets. The issue arose during the course of hearings held by the Royal Canadian Mounted Police Public Complaints Commission (the “Commission”) concerning allegations of misconduct by the RCMP during demonstrations held to protest the Asian Pacific Economic Cooperation Conference (“APEC Conference”) in Vancouver in November 1997. Readers may remember that the APEC Conference witnessed the infamous “Sergeant Pepper” incident in which an RCMP officer was filmed using liberal amounts of pepper spray to disperse protesters. Some of the protesters alleged that the heavy-handed tactics used by the RCMP were linked to discussions between the Prime Minister’s Office and the RCMP concerning security at the APEC Conference.

During the course of the hearings, counsel for the Commission requested that the Government of Canada disclose to the Commission all government records relevant to the hearing. The request arose out of an earlier ruling by the Commissioner that he may inquire into whether there had been improper political interference in RCMP operations if

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the evidence were to be supportive of him doing so. The requests for disclosure were denied as the Clerk of the Privy Council filed certificates under section 39(1) of the Canada Evidence Act certifying that the information contained in certain documents was considered “confidences of the Queen’s Privy Council for Canada” otherwise known as Cabinet secrets. Pursuant to section 39, this meant that the documents could not be disclosed and that the Court was prohibited from reviewing the documents in order to verify the veracity of the certificate.

(1) Federal Court Trial Division

Counsel for the Commission did not continue to seek the requested documents in the face of the certificate of the Clerk of the Privy Council. However, several of the complainants commenced an application to challenge the constitutionality of section 39 of the Canada Evidence Act on the basis that it contravened ss. 2(b) and 7 of the Charter and that it was inconsistent with the preamble of the Constitution Act, 1867 and certain unwritten constitutional principles. McKeown J. of the Federal Court Trial Division dismissed the application, finding no violation of the Charter and ruling that unwritten constitutional principles had no application in the case.

(2) Federal Court of Appeal

The complainants appealed McKeown J.’s decision to the Federal Court of Appeal, arguing that he should have found that s. 39 violated fundamental unwritten principles of the Constitution, including the principles of the independence of the judiciary, the rule of law and the separation of powers. The complainants further argued that the trial judge should have read down section 39 such that it would not apply in

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26 Singh, supra note 22 at 465.
circumstances where the Executive allegedly acted unconstitutionally and where the
documents being sought would disclose the existence of such unconstitutional conduct.

The Federal Court of Appeal panel, consisting of Strayer, Robertson and
McDonald JJ.A., was not convinced. The judgment of the Court was delivered by Justice
Strayer, who expressed general agreement with the reasons of the trial judge and rejected
all of the complainants’ arguments. Justice Strayer rejected the application of unwritten
constitutional principles in the case, dismissing the discussion of such principles in the
Provincial Judges Reference and the Quebec Secession Reference as “observations” of a
“general nature”. More importantly, he emphasized the continued dominance of the
notion of parliamentary supremacy. He stated:

Furthermore, [the Provincial Judges Reference and the Quebec Secession Reference] dealt with matters not specifically dealt with in the Constitution and
not subject to a well-established jurisprudence. I do not interpret them as having
put an end to another constitutional principle, namely the supremacy of
Parliament or the supremacy of legislatures when acting in their own domain.

Justice Strayer surmised that the applicants’ arguments were based on the premise
that the enactment of the Charter ousted parliamentary sovereignty as one of the
principles of the Constitution. He rejected this premise, noting that:

Both before and after 1982 our system was and is one of parliamentary
sovereignty exercisable within the limits of a written Constitution. These were
solely quantitative limits on the exercise of legislative power prior to 1982. It is
ture that the adoption of the Charter in 1982 added a multitude of qualitative
limitations on the exercise of power, but it is difficult to ascertain any change in
the principle that the Constitution of Canada was and is supreme over ordinary
laws. As a result one is driven as before 1982 to looking at the specific
requirements of the Constitution to determine whether in a given case Parliament
has infringed a constitutional limit (express or implied) on its power.

28 Singh, supra note 22 at 469.
29 Ibid. at 469. Justice Strayer, like Justice Wakeling of the Saskatchewan Court of Appeal in the Bacon
decision, thus appears to have assumed that the Supreme Court does have the power to change the principle
of parliamentary supremacy, but argued that the Court has not yet done so.
30 Ibid. at 471.
In Justice Strayer’s view, the principle of parliamentary sovereignty protects the legislature’s right to define privileges of the Executive “in the furtherance of the well-established and well-accepted principles of Cabinet secrecy. In the absence of some clear and compelling constitutional imperative to the contrary the legislation is valid and effective”.\(^{31}\) Justice Strayer concluded that the constitutional principles of separation of powers, judicial independence and rule of law were not compelling enough to counteract the impetus of parliamentary sovereignty in this case.\(^{32}\)

The approach adopted by the Federal Court of Appeal in *Singh* includes three notable components:

(a) the Supreme Court of Canada’s discussion of the normative role of constitutional principles in the *Quebec Secession Reference* is marginalized;

(b) when constitutional principles are acknowledged, the principle of parliamentary sovereignty is accorded preferential status; and

(c) the rule of law principle is accorded a formalistic content.\(^{33}\)

These three factors form a template that has been applied in many appellate and lower court decisions dealing with unwritten constitutional principles since the Supreme Court of Canada’s decision in the *Quebec Secession Reference*.\(^{34}\) More importantly, in

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\(^{31}\) Ibid. at 475.

\(^{32}\) Ibid. at 477 ff.

\(^{33}\) These components mirror the approach adopted by the Saskatchewan Court of Appeal in *Bacon*, supra note 22.

\(^{34}\) See, e.g., *JTI-Macdonald Corp. v. Attorney General of British Columbia* (2000), 184 D.L.R. (4th) 335 (B.C.S.C.) at para. 150, Holmes, J. (“I also accept the reasoning and the result in *Singh v. Canada (Attorney General)* and *Bacon v. Saskatchewan Crop Insurance Corp.*, and by Edwards J. in *Babcock v. Canada (Attorney General)*, supra, that in any event the rule of law itself is not a basis for setting aside legislation as unconstitutional.”); *Moncton (City) v. Charlebois* (2001), 242 N.B.R. (2d) 259 (N.B.C.A.) at para. 58, Daigle, C.J.: (“As I understand the effect of the statements made by the Supreme Court concerning the use of these principles, I think that the argument that this unwritten and underlying principle can also be used independently of any constitutional text, as a basis of an application for judicial review to strike down government action is not very convincing. I believe that the “powerful normative force” referred to by the Supreme Court concerns the interpretation of constitutional texts and not the creation of rights outside of
several cases involving applications to strike statements of claim, judges have used the rulings in *Singh*, and in the similarly reasoned ruling by the Saskatchewan Court of Appeal in *Bacon*, to find that it is a matter of settled law that unwritten constitutional principles cannot be used to strike down legislation.\(^{35}\) As a result, the Supreme Court’s first major case dealing with the application of unwritten constitutional principles to legislation after the *Quebec Secession Reference* should have provided an opportunity for the Court to clarify its position on the role of unwritten constitutional principles. Unfortunately, the Court’s reasons in that decision both reinforced its position from the *Quebec Secession Reference* and adopted the reasoning of the Federal Court of Appeal in *Singh*. The result, predictably, was continued confusion.

(ii) *Babcock v. Canada (Attorney General)*

The Supreme Court of Canada’s first major case concerning the application of unwritten constitutional principles to legislation after the *Quebec Secession Reference* was *Babcock v. Canada (Attorney General)*. Like the *Singh* case, the *Babcock* case concerned Cabinet secrets and specifically the constitutional validity of s. 39(1) of the *Canada Evidence Act*. Staff lawyers of the Vancouver office of the federal Department of Justice (“Vancouver DOJ lawyers”) sued the federal Crown for breach of contract and breach of fiduciary duty after the Department of Justice decided to raise the pay of lawyers in the Toronto office but not that of lawyers in other offices around the country. The parties to the action exchanged lists of documents pursuant to the *British Columbia
In addition, the government filed an affidavit of an officer of the Treasury Board Secretariat setting out the rationale for the pay raise for Toronto lawyers in support of an unsuccessful motion to have the action transferred to Federal Court.

Almost two years after it delivered its first list of documents, the federal government changed its position regarding disclosure. Pursuant to s. 39(1) of the Canada Evidence Act, it delivered a certificate of the Clerk of the Privy Council objecting to the disclosure to a total of 51 documents on the basis that they contained “information constituting confidences of the Queen’s Privy Council for Canada” or Cabinet secrets. The Vancouver DOJ lawyers brought an application to compel production of the documents listed on the certificate of the Clerk of the Privy Council.

(1) Chambers Judge

The Chambers Judge rejected the application, finding that the certificate of the Clerk of the Privy Council under s. 39 provided absolute protection for the documents listed, which could not be challenged. He rejected the argument that the privilege had been waived by the previous listing of the documents as producible or by the disclosure of information in the affidavit of the officer of the Treasury Board. Finally, he found that s. 39 did not infringe the core jurisdiction of the superior courts protected by s. 96 of the Constitution Act, 1867 in light of the long-standing recognition of Cabinet privilege as a legitimate part of Parliament’s power.

(2) British Columbia Court of Appeal

The Vancouver DOJ lawyers appealed the chambers judge’s decision to the British Columbia Court of Appeal. The majority of the Court of Appeal allowed the
appeal, ordering production of the documents on the basis that the federal government had waived its right to claim confidentiality because it had previously listed some of the documents as producible and it had selectively disclosed information in the affidavit of the officer of the Treasury Board Secretariat.38

(3) Supreme Court of Canada

The federal government appealed the decision of the Court of Appeal to the Supreme Court of Canada. At the Supreme Court, the Vancouver DOJ lawyers argued that s. 39 was ultra vires Parliament as a result of the application of the unwritten constitutional principles of the rule of law, the independence of the judiciary and the separation of powers. The Supreme Court rejected the arguments advanced by the Vancouver DOJ lawyers and allowed the appeal.

The majority reasons were written by Chief Justice McLachlin.39 Although the Chief Justice acknowledged that “unwritten constitutional principles are capable of limiting government actions” she concluded that “they do not do so in this case.”40

According to the Chief Justice, the “unwritten principles must be balanced against the principle of Parliamentary sovereignty”.41 In her view, the principle of Parliamentary sovereignty carried greater weight in this case.

At the outset of her reasons, the Chief Justice framed the issue in the case as one of a conflict between values:

Cabinet confidentiality is essential to good government. The right to pursue justice in the courts is also of primary importance in our society, as is the rule of law, accountability of the executive, and the principle that official actions

39 Chief Justice McLachlin’s reasons were supported by seven other justices; Justice L’Heureux-Dubé provided brief concurring reasons of her own.
40 Babcock, supra note 23 at para 54.
41 Ibid. at para 55.
must flow from statutory authority clearly granted and properly exercised. Yet sometimes these fundamental principles conflict. How are such conflicts to be resolved? This is the question posed by this appeal. 

According to the Chief Justice, the key to resolving the conflict between values within the Babcock case lay simply in an understanding of the role of Cabinet confidentiality in Canada and the role of s. 39 of the *Canada Evidence Act* in protecting Cabinet confidentiality. Chief Justice McLachlin’s conclusion that s. 39 should not be invalidated by the unwritten principles relied upon by the Vancouver DOJ lawyers was based primarily on the existence of the long-standing tradition of protecting Cabinet secrets in Canada. Unfortunately, while the Chief Justice’s conclusion may be justifiable, it is regrettable that her reasons did not subject the Canadian tradition of protecting Cabinet secrets to a searching critical analysis.

Interestingly, Chief Justice McLachlin noted that section 39, which protects Cabinet secrets, differed from sections 37 and 38 of the *Canada Evidence Act*. Neither section 37, which deals with claims for Crown privilege to refuse disclosure in the general public interest, nor section 38, which deals with claims for Crown privilege to refuse disclosure due to threats related to international relations or national security or defence, prohibited judges from viewing the information for which protection from disclosure is sought. Rather, a judge could view the documents and balance the competing public interests in protection or disclosure of the information. 

Chief Justice McLachlin also noted that s. 39 represents a departure from the common law rule which would permit a judge to review the information claimed to be a confidence of the Cabinet

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43 *Ibid.* at para 17. The content of these provisions was amended by the *Anti-terrorism Act*, S.C. 2001, c.41.
in order to perform the balancing of competing public interests envisioned under sections 37 and 38.\textsuperscript{44}

Given that the protection of Cabinet secrets afforded by s. 39 is more extreme than that afforded to Cabinet secrets by the common law and the protection otherwise afforded by the \textit{Evidence Act} to information protected by Crown privilege, it would seem desirable for the government to justify the extra layer of protection, namely the exclusion of judicial review of the certification of Cabinet secrets. According to the Chief Justice, the major justification for the protection of Cabinet secrets is to allow full and frank discussions of policy alternatives around the Cabinet table.\textsuperscript{45} Interestingly, all of the examples provided by the Chief Justice relate to the need to maintain the confidentiality of opinions expressed by members of Cabinet, which only covers part of the documents shielded from disclosure pursuant to section 39. No justification was provided for shielding briefing memoranda from review by the judiciary. Nor did the Chief Justice provide an explanation of how allowing judicial review of the determination that information should not be disclosed would affect the efficacy of Cabinet decision-making.

The Chief Justice identified a second role for protecting Cabinet secrets, a role identified by the Supreme Court in \textit{Carey v. the Queen},\textsuperscript{46} namely, to avoid ‘creat[ing] or fan[ning] ill informed or captious public political criticism”’.\textsuperscript{47} Unfortunately, the Chief Justice provided no explanation why it would not be possible to establish a gate-keeper test to avoid the danger of captious political criticism.

\textsuperscript{44} \textit{Ibid.} at para 19.
\textsuperscript{45} \textit{Ibid.} at para 18. This reason was rejected by the English courts as a insufficient reason for maintaining absolute immunity from disclosure at common law.
\textsuperscript{46} \textit{Carey v. The Queen} (1986), 35 D.L.R. (4th) 161 (S.C.C.) \textit{[Carey]}.
\textsuperscript{47} Babcock, \textit{ supra} note 23 at para 18.
Chief Justice McLachlin noted that the Supreme Court upheld the constitutionality of the predecessor to s. 39 in *Commission des droits de la personne v. Attorney General of Canada*. 48 She also noted that the Federal Court of Appeal upheld the constitutionality of s. 39 of the *Canada Evidence Act* in the *Singh* case. In fact, the Chief Justice accepted the Federal Court of Appeal’s reasoning in the *Singh* case, stating that Strayer J.A. conducted a “thorough and compelling review of parliamentary sovereignty in the context of unwritten constitutional principles…” 49 She concluded her analysis of the constitutionality of s. 39, stating:

I share the view of the Federal Court of Appeal that s. 39 does not offend the rule of law or the doctrines of separation of powers and the independence of the judiciary. It is well within the power of the legislature to enact laws, even laws some would consider draconian, as long as it does not fundamentally alter or interfere with the relationship between the courts and other branches of government. 50

The decision of the Supreme Court of Canada in *Babcock* thus exhibited some of the tendencies exhibited by the Saskatchewan Court of Appeal and the Federal Court of Appeal in the *Bacon* and *Singh* cases, respectively. Most importantly, the principle of parliamentary sovereignty appears to have been allocated a place of privilege among constitutional principles by the Chief Justice. In this case, the concept of parliamentary sovereignty was interpreted as protecting a tradition of allowing the legislature to protect Cabinet secrets. This tradition of protecting Cabinet secrets, and the justification for the practice, appears to have been accepted uncritically, without any consideration of how the practice fits within the evolving understanding of the democratic process in Canada.

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48 Commission des droits de la personne v. Attorney General of Canada, [1982] 1 S.C.R. 215. The precursor to s. 39 of the *Canada Evidence Act* was Section 41(2) of the *Federal Court Act*, R.S.C. 1970 (2nd Supp.), c. 10, s. 41... Section 41(2) permitted the government to claim absolute privilege over a broader class of confidences than s. 39(1) currently does.

49 Babcock, supra note 23 at para 56.

50 Ibid. at para 57.
However, the Supreme Court distinguished itself in *Babcock* in one important respect from the approaches adopted by the appellate courts in the *Bacon* and *Singh* cases. First, Chief Justice McLachlin reaffirmed the fact that unwritten constitutional principles have normative force, stating unequivocally that: “unwritten constitutional principles are capable of limiting government actions”. The Chief Justice also appears to have given some indication of the type of legislation that might be vulnerable to limitation by unwritten constitutional principles: legislation which “fundamentally alter[s] or interfere[s] with the relationship between the courts and other branches of government.”

In light of the fact that the *Babcock* case dealt specifically with the issue of judges reviewing documents alleged to contain Cabinet secrets, it is not surprising that the Chief Justice confined her remarks to the structural relationship between the courts and other branches of government. However, applying the same logic, it is arguable that the notion of a “fundamental” alteration or interference with an aspect of the democratic process in this country would be vulnerable to limitation by the unwritten constitutional principle of respect for democracy. Indeed, the Supreme Court’s most recent discussions of the role of unwritten principles, though generally tending to restrict the application of unwritten principles as independent limits on legislative authority, do not exclude this possibility.

(iii) *British Columbia v. Canada Ltd*

The scope of the application of unwritten constitutional principles was once again addressed by the Supreme Court in *British Columbia v. Imperial Tobacco Canada Ltd.* In *Imperial Tobacco*, the Supreme Court of Canada upheld the constitutionality of

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52 2005 SCC 49, [2005] 2 S.C.R. 473 [*Imperial Tobacco*].
provincial legislation that established particular rules concerning legal claims launched by the government of British Columbia against tobacco manufacturers for recovery of health care costs linked to cigarette smoking.\footnote{53} Justice Major, writing for the Court, rejected the tobacco manufacturers arguments that the particular rules implemented by the provincial legislation to govern law suits against them were unconstitutional as invalidating the rule of law principle. He did so for several reasons. First, he rejected the notion that the rule of law principle, as understood by the Supreme Court, could be applied to invalidate legislation based on its content.\footnote{54} Justice Major also doubted whether unwritten principles in general could be used to invalidate legislation. Thus, while he admitted that the rule of law principle had normative force, he suggested that that normative force was likely limited to restricting the action of the executive and the judiciary as opposed to the legislature. He stated:

This does not mean that the rule of law as described by this Court has no normative force. As McLachlin C.J. stated in Babcock, at para. 54, “unwritten constitutional principles”, including the rule of law, “are capable of limiting government actions”. See also Reference re Secession of Quebec, at para. 54. But the government action constrained by the rule of law as understood in Reference re Manitoba Language Rights and Reference re Secession of Quebec is, by definition, usually that of the executive and judicial branches. Actions of the legislative branch are constrained too, but only in the sense that they must comply with legislated requirements as to manner and form (i.e. the procedures by which legislation is to be enacted, amended and repealed).\footnote{55}

Justice Major went on to note that the application of the rule of law principle suggested by the tobacco manufacturers would undermine the legitimacy of judicial review for two reasons. First, he noted that many of the substantive elements of the rule

\footnote{53 Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 2000, c. 30.} \footnote{54 Imperial Tobacco, supra note 52 at para. 59. In particular, Justice Major noted that “it is difficult to conceive of how the rule of law could be used as a basis for invalidating legislation […] based on its content”.} \footnote{55 Ibid. at para. 60.}
of law principle that were proposed by the tobacco manufacturers were “broader versions of rights contained in the Charter. As such, to give effect to these substantive elements as part of the rule of law principle would undermine the existing written provisions of the Constitution, rendering those written provisions effectively redundant.” Second, Justice Major found that application of the rule of law principle as argued by the tobacco manufacturers would undermine the principles of democracy and constitutionalism, since those principles “very strongly favour upholding the validity of legislation that conforms to the express terms of the Constitution (and to the requirements, such as judicial independence, that flow by necessary implication from those terms).” Justice Major went on to note that “the appellants’ arguments fail to recognize that in a constitutional democracy such as ours, protection from legislation that some might view as unjust or unfair properly lies not in the amorphous underlying principles of our Constitution, but in its text and the ballot box.”

At this point, it is worth noting an apparent contradiction in Justice Major’s reasoning. On the one hand, Justice Major argued that the Court should not give effect to unwritten principles, such as the rule of law, that support broader versions of existing rights. On the other hand, Justice Major implied that legislation should conform with the requirements that flow by “necessary implication” from the written terms of the Constitution, such as judicial independence. However, it must be recalled that the judgment of the Supreme Court of Canada in the Provincial Judges’ Reference

56 Ibid. at para 65.
57 Ibid. at para 66.
58 Ibid. For a similar view of the role of the rule of law principle, see Peter W. Hogg and Cara F. Zwibel, “The Rule of Law in the Supreme Court of Canada” (2005) 55 U.T.L.J. 715.
extended the constitutional protection accorded by the principle of judicial independence beyond the scope of the explicit provisions of the Constitution to include provincial judges operating outside of criminal law settings. The Supreme Court did not regard this broader version of the rights included in the Charter to undermine the existing provisions of the Charter in the Provincial Judges’ Reference. Instead, the extension of the existing rights was seen as supplementing, rather than undermining, the protection of judicial independence that was reflected in the explicit text of the Constitution Act, 1867 and the Constitution Act, 1982.

In addition, in the more recent case of Charkaoui v. Canada (Citizenship and Immigration), the Supreme Court has acknowledged that Justice Major’s discussion of the application of the rule of law principle in Imperial Tobacco “leaves room for exceptions.” Moreover, despite his near categorical rejection of the power of unwritten principles to invalidate legislation in Imperial Tobacco, Justice Major, like Chief Justice McLachlin in the Babcock case, noted that legislation may be found to be unconstitutional where it substantially interferes with judicial independence.

None of this is to say that legislation, being law, can never unconstitutionally interfere with courts’ adjudicative role. But more is required than an allegation that the content of the legislation required to be applied by that adjudicative role is irrational or unfair, or prescribes rules different from those developed at common law. The legislation must interfere, or be reasonably seen to interfere, with the courts’ adjudicative role, or with the essential conditions of judicial independence. As McLachlin C.J. stated in Babcock, at para. 57:

> It is well within the power of the legislature to enact laws, even laws which some would consider draconian, as long as it does not fundamentally interfere with the relationship between the courts and the other branches of government.61

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60 2007 SCC 9 [Charkaoui] at para. 135, McLachlin, C.J.C. See also British Columbia (Attorney General) v. Christie 2007 SCC 21, [2007] 1 S.C.R. 873 at para. 21, where the Court stated: “… in Imperial Tobacco, this Court left open the possibility that the rule of law may include additional principles.”
61 Ibid, at para. 54.
Again one is led to consider whether fundamental interferences with the democratic process should receive the same type of treatment as fundamental interferences with the relationship between the courts and other branches of government. Certainly, the argument advanced by Justice Major and by many other Canadian judges that protection against arbitrary legislation is in the ballot box rings hollow if the results of the ballot box are not representative of the preferences of the electorate.

Theoretically, there does not appear to be any justification for elevating the principle of judicial independence over other important constitutional principles such as the principle of democracy. As such, it is unclear how the Court could justify applying unwritten constitutional principles to invalidate legislation that imposed substantial interferences on the adjudicative role of the courts while refusing to apply unwritten principles to invalidate legislation that imposed substantial interferences on the representative role of the legislature. Indeed, the motivation behind enforcing the principle of judicial independence and the principle of democracy in either situation is fundamentally the same, namely preventing the government from using its control of the legislature to undermine the limits on its own power. In the case of the principle of judicial independence, the government should be restricted from interfering with the ability of the judiciary to act as an independent arbiter of the exercise of government power. With respect to the principle of democracy, the government should be restricted from interfering with the ability of citizens to participate in the political process and to hold their representatives accountable.

A review of Babcock, Imperial Tobacco and Charkaoui thus suggests that, while the Supreme Court of Canada has sought to limit the potential application of unwritten
constitutional principles as mechanisms for invalidating legislation, it has left open the possibility that certain principles may be used to invalidate legislation in extreme circumstances. While the court has thus far focused exclusively on the capacity of the principle of judicial independence to invalidate legislation where it substantially interferes with the adjudicative role of the courts, there is no principled reason why the principle of democracy could not also be used to invalidate legislation that imposed substantial interference with the democratic process – perhaps through unjustifiable restrictions on access to government information.

b) Limiting Parliamentary Supremacy Through the Principle of Democracy

In my view, the proposition that the principle of democracy may be used to invalidate legislation that threatens fundamental aspects of the democratic process is supported by a number of other Supreme Court of Canada cases. As noted in chapter two, the notion that parliamentary sovereignty may be attenuated where the exercise of parliamentary power would threaten the very foundations of our democratic order finds its earliest roots in the Implied Bill of Rights cases. It has been reinforced in several cases following the entrenchment of the Charter.

(i) O.P.S.E.U. v. Ontario (Attorney General)

The first case to be considered in this regard is O.P.S.E.U. v. Ontario (Attorney General). O.P.S.E.U. involved a challenge to several sections of Ontario’s Public Service Act on the grounds that they were ultra vires the power of the Ontario government. The impugned provisions prohibited civil servants from participating in particular political activities such as running for election to Parliament and canvassing or


\[63\] R.S.O. 1970, c. 386.
soliciting funds on behalf of political parties. Justice Beetz, writing for the majority of the Supreme Court of Canada, concluded that the impugned legislation could be considered as amendments to the Ontario Constitution. He found that the impugned sections were constitutional in nature in so far as they imposed duties on members of a branch of government in order to implement the principle of impartiality of the public service. He found this principle to be an essential prerequisite of responsible government.

Justice Beetz also found that the provisions fell within the provincial government’s jurisdiction over the establishment and tenure of provincial offices pursuant to s. 92(24) of the Constitution Act, 1867. He held that the provisions did not impinge on federal jurisdiction even though they related to both provincial and federal elections. Rather, he found that they aimed to reinforce the operation of responsible government within a federal framework.

In addition to their division of powers arguments, the appellants had sought to impugn the legislation on the basis of Charter grounds. However, the Supreme Court refused to hear the Charter arguments. In the alternative, the appellants advanced an argument, relying on several Implied Bill of Rights cases, that the legislation violated fundamental rights to participate in certain political activities. In the course of examining this argument in his reasons, Justice Beetz accepted the basic premise that there are fundamental rights enshrined in the Constitution, independent of the Charter. Justice Beetz stated:

Perhaps the appellants’ strongest argument was the one based on the existence in Canada of certain fundamental rights to participate in certain political activities. For this argument, they relied on such cases as Reference re Alberta Legislation and Switzman v. Elbling.
There is no doubt in my mind that the basic structure of our Constitution as established by the *Constitution Act, 1867* contemplates the existence of certain political institutions, including freely elected legislative bodies at the federal and provincial levels. In the words of Duff C.J.C. in *Reference re Alberta Legislation* at p. 107 D.L.R., p. 133 S.C.R., “such institutions derive their efficacy from the free public discussion of affairs…” and, in those of Abbott J. in *Switzman v. Elbling* at p. 371 D.L.R., p. 328 S.C.R., neither a provincial legislature nor Parliament itself can “abrogate this right of discussion and debate.” Speaking more generally, I hold that neither Parliament nor the provincial legislature may enact legislation the effect of which would be to substantially interfere with the operation of this basic constitutional structure.64

Justice Beetz thus found, in *obiter*, that the basic constitutional structure, which includes freely elected legislatures functioning in an environment of free discussion of political issues, must be protected from substantial interference. Justice Beetz’s comments concerning the inability of either Parliament or the provincial legislatures to substantially interfere with the operation of a basic constitutional structure supporting political participation are strikingly similar to comments made by a number of English academics and jurists that will be discussed in chapter eight.

Interestingly, in his minority opinion, Chief Justice Dickson, as he then was, also discussed the existence of constitutional principles. He noted that several decisions of the Supreme Court, “… manifest a clear recognition that freedom of speech and expression is a fundamental animating value in the Canadian constitutional system.”65 However, Chief Justice Dickson was quick to point out that no one constitutional principle should be held as the ultimate constitutional principle. Different constitutional principles may come into conflict with each other and must each be accorded appropriate respect. He stated:

It must not be forgotten, however, that no single value, no matter how exalted, can bear the full burden of upholding a democratic system of government.

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64 *O.P.S.E.U.*, supra note 62 at 40. Justice Beetz concluded that the argument based on the Implied Bill of Rights cases did not apply in this case because the *Public Service Act* only incidentally affected provincial and federal elections.

Underlying our constitutional system are a number of important values, all of which help to guarantee our liberties, but in ways which may sometimes conflict. It is for that reason that the passage in Fraser upon which the appellants rely so heavily is followed immediately by these words, at p. 128 D.L.R., p. 463 S.C.R.:

But [freedom of speech] is not an absolute value. Probably no values are absolute. All important values must be qualified, and balanced against, other important, and often competing values. This process of definition, qualification and balancing is as much required with respect to the value of “freedom of speech” as it is for other values.\footnote{Ibid.}

Chief Justice Dickson’s warning applies as readily to the principle of parliamentary sovereignty as it does to the principle of freedom of expression. Neither principle may be taken as absolute, but rather each must be understood in light of the other and in light of their role in promoting the democratic system of governance that is the ultimate foundation of the Canadian Constitution. This balancing process is required under the Supreme Court of Canada’s approach to the application of unwritten constitutional principles.

The Robert case, discussed in section 1 of this chapter, provides an excellent example of how distinct constitutional principles must be balanced against each other within the context of particular cases. In Robert, the Quebec Court of Appeal concluded that the importance of maintaining the independence of the judiciary outweighed the importance of access to information within the particular context of the disciplinary hearings held by the Quebec Judicial Council. In other contexts, the importance to the democratic process of access to particular types of information may be found to outweigh competing constitutional values or principles. I will explore this more fully below.

(ii) Reference Cases

O.P.S.E.U. was not the only case in which members of the Supreme Court of
Canada have favourably commented on the limitations on parliamentary sovereignty suggested by the Implied Bill of Rights approach. In the *Provincial Judges Reference*, Chief Justice Lamer noted that the Supreme Court’s decisions in the Implied Bill of Rights cases determined that the protection of political speech was so important to national political life that it could only be restricted by Parliament, despite the fact that political freedoms such as freedom of expression are not enumerated heads of jurisdiction under ss. 91 and 92 of the *Constitution Act, 1867*. He also noted that the logic of this argument was extended, by some members of the Court, such that Parliament itself was deemed incompetent to restrict the right to political speech and debate.

In this way, the preamble’s recognition of the democratic nature of Parliamentary governance has been used by some members of the Court to fashion an implied bill of rights, in the absence of any express indication to this effect in the constitutional text. This has been done, in my opinion, out of a recognition that political institutions are fundamental to the “basic structure of our Constitution” (*O.P.S.E.U., supra*, at p. 57) and for that reason governments cannot undermine the mechanisms of political accountability which give those institutions definition, direction and legitimacy.\(^{67}\)

Chief Justice Lamer’s reasons in the *Provincial Judges Reference* thus appear to have approved the approach adopted in the Implied Bill of Rights cases that suggested that the Court could prescribe limits on government’s ability to “undermine the mechanisms of political accountability.”

Similarly, it will be recalled that in the *Patriation Reference*, Justices Martland and Ritchie noted that, at times, the Supreme Court has had to consider issues for which the text of the Constitution provided no answer. In such situations, they found, the Court “denied the assertion of any power which would offend against the basic principles of the

Constitution.” Justices Martland and Ritchie themselves relied on the approach adopted by Chief Justice Duff in Alberta Press Reference. This approach held that “the powers requisite for the protection of the Constitution itself arise by necessary implication from the B.N.A. Act as a whole….” Justices Martland and Ritchie noted that the approach adopted by Chief Justice Duff in the Alberta Press case was an example of “judicially developed legal principles and doctrines” that had been “accorded full legal force in the sense of being employed to strike down legislative enactments.” In the Quebec Secession Reference, the Supreme Court of Canada endorsed this view that such legal principles, derived from the basic structure of the Constitution, may have full legal force.

The recognition that the courts have the power to restrict the government from interfering with the basic structures established by the Constitution is also consistent with the approach to Charter interpretation advocated in the Chief Justice’s majority reasons in Sauvé v. Canada (Chief Electoral Officer). In considering whether denying the vote to prisoners serving sentences of two years or more violated the right to vote protected by s. 3 of the Charter, Chief Justice McLachlin emphasized the fundamental importance of the right to vote to the democratic framework established by the Constitution. She went on to underline the importance of judicial protection of such fundamental aspects of the democratic framework.

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70 Patriation Reference, supra note 68 at 76.
72 (2002), 168 C.C.C. (3d) 449 (S.C.C.) [Sauvé].
The Charter charges courts with upholding and maintaining an inclusive, participatory democratic framework within which citizens can explore and pursue different conceptions of the good. While a posture of judicial deference to legislative decisions about social policy may be appropriate in some cases, the legislation at issue does not fall into this category. To the contrary, it is precisely when legislative choices threaten to undermine the foundations of the participatory democracy guaranteed by the Charter that courts must be vigilant in fulfilling their constitutional duty to protect the integrity of this system.73

The above cases suggest that parliamentary sovereignty may be limited where legislation threatens fundamental elements of the democratic process. Democracy is the foundation of the Canadian Constitution. The mechanisms of political accountability are basic structures of the Constitution, which the courts must vigilantly protect. Fundamental interferences with these basic structures must be rejected by the judiciary; this is not a matter of judicial discretion, but rather is a duty imposed on judges by the Constitution. Chief Justice McLachlin’s reasons in Sauvé, like the passages cited above from O.P.S.E.U., the Patriation Reference, the Provincial Judges Reference, and the Quebec Secession Reference, emphasize the important institutional role the courts must play in ensuring that legislatures do not undermine the very source of their legitimacy.

c) Balancing Democracy with Parliamentary Supremacy: Previous Cases Dealing with Access to Government Information

This approach to the possible limitation of parliamentary supremacy in those rare cases where fundamental elements of the democratic process are endangered by Parliament provides a framework that assists us in understanding why limitations on access to government information were permitted in a number of important cases to come before the Supreme Court of Canada. Most of these cases have focused on restrictions on the judiciary’s jurisdiction to review decisions that documents should not be disclosed in judicial proceedings.

73 Ibid. at 468.
The first case I will discuss is *Quebec (Human Rights Commission) v. Canada* (Attorney General).\(^74\) This case evolved out of an investigation by the Quebec Human Rights Commission (the “Quebec HRC”) of the dismissal of two young women hired for the 1976 Olympic Games in Montreal. The young women were dismissed following an unfavourable report by the Royal Canadian Mounted Police (RCMP), who had been asked to provide background checks on potential employees at the games. The young women claimed they had been dismissed for discriminatory reasons contrary to the Quebec Charter of human rights and freedoms.\(^75\)

During the course of its investigation, the Commission ordered a member of the RCMP to appear and produce documents relating to the investigation. This order was made despite the fact that the Solicitor General of Canada had filed an affidavit claiming that disclosure of information contained in the RCMP files may be injurious to national security. The Quebec HRC ordered the member of the RCMP to appear with the documents at issue.

The Commission’s decision was challenged before the Quebec Superior Court. The Quebec HRC argued that section 41(2) of the *Federal Court Act* was unconstitutional because it violated the separation of powers between the executive and the judiciary by allowing the Executive to prevent the judiciary from reviewing its determination of whether certain documents should be protected from disclosure. The

\(^74\) *1982* 1 S.C.R. 215 [*Quebec HRC v. Canada*].
\(^75\) S.Q. 1975, c. 6, ss.10-19.
Chief Justice of the Quebec Superior Court rejected this argument, finding that Parliament was perfectly entitled to legislatively prefer executive review, as opposed to judicial review, of the issue of which documents should be disclosed.

[Translation] As between the two options open to it, between the two arguments each of which has at times held sway, Parliament decided to select, in matters of national security among others, the theory that the Crown enjoys an absolute immunity from the courts. It reposed its complete confidence in the Ministers of the Crown and it divested the courts of all discretion. As Mahoney J. put it (Landreville v. R. (1977), 70 D.L.R. (3d) 122, 124 and 125), Parliament preferred an interested executive to an impartial judiciary.

Respondent Commission is free to regret this development and complain of it; but it does not follow that Parliament exceeded its jurisdiction or that its legislation is invalid, and the Commission cannot expect to obtain a legislative amendment from the Superior Court.76

The Commission appealed the decision of the Quebec Superior Court all the way to the Supreme Court of Canada. Before the Supreme Court of Canada, the Commission changed tact and argued that section 41(2) of the Federal Court Act was ultra vires because it invaded an area of exclusive provincial jurisdiction, the administration of justice. The Supreme Court rejected this argument.

In addition, the Quebec government intervened to argue that section 41(2) was ultra vires because it sought to forbid review by the judiciary of a decision by the federal Executive to produce documents. In essence, the Quebec government argued that judicial review was necessary to ensure that the federal government did not abuse its power by, for instance, interfering with provincial public interest when restricting the disclosure of documents.

Justice Chouinard, writing for the Court, rejected the argument that the courts could find legislation ultra vires simply because the Executive might abuse the power it was granted under the legislation. He stated:

Once Parliament and the provincial legislatures are admitted to have the power to legislate on this matter in their respective fields (and the power cannot be denied), the risk exists. However, the risk that the Executive will apply legislation that has been validly adopted by Parliament with malice or even arbitrarily does not have the effect of divesting Parliament of its power to legislate. It is important not to confuse the statute adopted by Parliament with the action of the Executive performed in accordance with that statute.

Once it is admitted that Parliament and the provincial legislatures have the power to legislate, it necessarily follows that they can make the privilege absolute. In my view, saying that Parliament and the legislatures cannot make the privilege absolute amounts to a denial of parliamentary supremacy, and to denying Parliament and the legislatures their sovereign power to legislate in their respective fields of jurisdiction.\textsuperscript{77}

Both the Chief Justice of the Quebec Superior Court and Justice Chouinard of the Supreme Court of Canada based their reasons on the traditional conception of parliamentary supremacy. In particular, the principle of parliamentary supremacy was relied upon to support the legislature’s insulation from judicial review of a Minister’s determination of whether certain documents should be disclosed.

As discussed above, the insulation from judicial review of a Minister’s determination of which documents should be disclosed has deep historical roots. While courts throughout the Commonwealth have questioned the necessity of providing class-based immunity for documents, the judiciary has maintained a healthy deference for the requirements of policy-making, particularly for the requirements of Cabinet-based decision-making, and the need to maintain confidentiality of certain information relating to foreign relations, national defence and national security.

Thus, while the common law has evolved to allow courts the jurisdiction to examine documents for which Crown immunity is claimed, there has been no wholesale rejection of the need for maintaining secrecy in certain instances. In this light, the reassertion by Parliament of its immunity from disclosing certain information and, more

\textsuperscript{77} Quebec HRC v. Canada, supra note 74 at 228.
importantly, from judicial review of such determinations, did not represent a rejection of existing norms of democratic governance. Thus, Justice Chouinard’s reasons in *Quebec HRC v. Canada* provide an example of how parliamentary supremacy may outweigh the principle of access in certain contexts where existing, historically entrenched norms of democratic governance are not threatened.

(ii)  *Canada (Minister of Energy) v. Canada (Auditor General)*

The principle of parliamentary supremacy has also been relied upon in cases involving officers of Parliament such as the Auditor General. *Canada (Minister of Energy) v. Canada (Auditor General)*78 concerned an attempt by the Auditor General of Canada to secure information as part of an audit of the Canadian ownership account. The Auditor General requested information concerning the purchase of an oil company by Petro-Canada, a Crown Corporation. The Auditor General sought information from Petro-Canada and also sought access to certain Cabinet documents relating to evaluation reports and analyses of the purchase in order to determine if Petro-Canada had received “value for money” from the deal.

The requests for information from Petro-Canada and Cabinet were both refused. In addition, Cabinet refused to use its power to force Petro-Canada to disclose the information requested by the Auditor General. The Auditor General wrote to the Prime Minister requesting the documents, but was advised that the information at issue included Cabinet secrets and would not be disclosed. The Auditor General brought an action against the Minister of Energy, Mines and Resources, the Deputy Minister of that department as well as the Minister of Finance and the Deputy Minister of Finance. The trial judge issued a declaration granting access to certain specified information. On

appeal, the Federal Court of Appeal overturned the trial judge’s decision. The Supreme Court of Canada dismissed the appeal from the decision of the Federal Court of Appeal.

In his reasons in the Auditor General case, Chief Justice Dickson relied on the principle of parliamentary supremacy in order to uphold the legislative restrictions on the Auditor General’s powers. The Chief Justice explained the principle of parliamentary sovereignty as follows:

The most basic notion of justiciability in the Canadian legal process is that referred to in Pickin, and inherited from the English Westminster and unitary form of government, namely, that it is not the place of the courts to pass judgment on the validity of statutes. Of course, in the Canadian context, the constitutional role of the judiciary with regard to the validity of laws has been much modified by the federal division of powers as well as the entrenchment of substantive protection of certain constitutional values in the various Constitution Acts, most notably that of 1982. There is an array of issues which calls for the exercise of judicial judgment on whether the questions are properly cognizable by the courts. Ultimately, such judgment depends on the appreciation by the judiciary of its own position in the constitutional scheme.

In the realm of Charter adjudication, s.1 is “the uniquely Canadian mechanism through which the courts are to determine the justiciability of particular issues that come before it” (Wilson J. in Operation Dismantle, supra, at p. 518). Ultimately, the courts are constitutionally charged with drawing the boundaries of justiciability, except as qualified by s. 33. By way of contrast, in the residual area reserved for the principle of parliamentary sovereignty in Canadian constitutional law, it is Parliament and the legislatures, not the courts, that have ultimate constitutional authority to draw the boundaries. It is the prerogative of a sovereign Parliament to make its intentions known as to the role the courts are to play in interpreting, applying and enforcing its statutes. While the courts must determine the meaning of statutory provisions, they do so in the name of seeking out the intention or sovereign will of Parliament, however purposively, contextually or policy-oriented may be the interpretive methods used to attribute such meaning. If, then, the courts interpret a particular provision as having the effect of ousting judicial remedies for entitlements contained in that statute, they are, in principle, giving effect to Parliament’s view of justiciability of those rights. The rights are non-justiciable not because of the independent evaluation by the court of the appropriateness of its intervention, but because Parliament is taken to have expressed its intention that they be non-justiciable.

The just-stated view sits comfortably with the occasions on which the courts give effect to so-called privative clauses that explicitly oust judicial review.
As a constitutional matter, it is not appropriate for the court to intervene by virtue of the simple fact that Parliament has directed that they must not.\textsuperscript{79}

Like Justice Chouinard’s description in \textit{Quebec HRC v. Canada}, Chief Justice Dickson’s description of the “residual area reserved for the principle of parliamentary sovereignty in Canadian constitutional law” reflected the traditional conception of parliamentary sovereignty supported by British disciples of Dicey such as Wade, Elliott and Forsyth. In particular, Chief Justice Dickson focused on the role of the courts to seek out the intention of Parliament and the power of Parliament to absolutely oust judicial review.

Chief Justice Dickson’s description of parliamentary sovereignty is best understood in the context of the facts of that case. In the words of Chief Justice Dickson, the particular issue to be determined in this case was “whether the Auditor General [had] a judicially enforceable right of access to information…” However, the Chief Justice noted that the broader issue raised by the case was “the issue as to the proper role of the courts and their constitutional relationship to the other branches of government.”\textsuperscript{80} After a review of the legislative scheme set out in the \textit{Auditor General Act},\textsuperscript{81} the Chief Justice determined that Parliament intended that it should be the final arbiter of any disputes with the Auditor General.\textsuperscript{82} The Chief Justice found that the only remedy available to the Auditor General was its reporting remedy, by which the Auditor General could report to Parliament the failure of the government or a Crown corporation to provide necessary information. This political remedy was deemed sufficient since the Auditor General acts

\textsuperscript{79} Ibid. at 635.
\textsuperscript{80} Ibid. at 606.
\textsuperscript{81} \textit{Auditor General Act}, R.S.C. 1985, c. A-17.
\textsuperscript{82} \textit{Auditor General}, supra note 78 at 641.
on Parliament’s behalf in carrying out a Parliamentary function – oversight of executive spending pursuant to parliamentary appropriations. Chief Justice Dickson stated:

…For this court to order access to information for the Auditor General would be, in effect, to overrule a decision of the House of Commons not to act in this matter and to disturb the balance of constitutional powers between the executive and legislative branches of government. The Auditor General is the political servant of Parliament who carries out Parliament’s function on its behalf. In the respondent’s view, to provide a judicial remedy for s. 13(1) rights of the Auditor General would amount to substituting the court’s view for that of the House of Commons on the extent of Parliament’s own rights, albeit statutory, vis-à-vis, the executive.83

And later:

In this case, it is reasonable to interpret s. 7(1)(b) as the Auditor General’s only remedy for claimed denials of s. 13(1) entitlements not only because the text is conducive to such an interpretation but also because, in the circumstances, a political remedy of this nature is an adequate alternative remedy. The Auditor General is acting on Parliament’s behalf carrying out a quintessentially parliamentary function, namely, oversight of executive spending pursuant to parliamentary appropriations. Where the exercise of this auditing function involves the Auditor General in a dispute with the Crown, this is in essence a dispute between the legislative and executive branches of the federal government. Section 7(1)(b) would seem to be the means by which Parliament itself retains control over the position it wishes to take in such a dispute.

It is of no avail to point to the fusion of powers which characterizes the Westminster system of government. That the executive through its control of a House of Commons majority may in practice dictate the position the House of Commons takes on the scope of Parliament’s auditing function is not, with all respect to the contrary position taken by Jerome A.C.J., constitutionally cognizable by the judiciary. The grundnorm with which the courts must work in this context is that of the sovereignty of Parliament. The Ministers of the Crown hold office with the grace of the House of Commons and any position taken by the majority must be taken to reflect the sovereign will of Parliament. Where Parliament has indicated in the Auditor General Act that it wishes its own servant to report to it on denials of access to information needed to carry out its functions on Parliament’s behalf, it would not be appropriate for this court to consider granting remedies for such denials, if they, in fact, exist.84

Interestingly, Chief Justice Dickson differentiated the role of Auditor General from the role of Ombudsperson precisely because the Auditor General is the servant of

83 Ibid. at 633.
84 Ibid. at 643-44.
Parliament, while the Ombudsperson is the servant of individual citizens. He stated: “… While acknowledging that the Auditor General fulfills a crucial function in the sphere of public accountability and thereby enhances our democratic system, the Auditor General does not play the same role as does an ombudsperson as protector of citizens against administrative abuse.” 85 As a result, the power of Parliament to restrict the access to information of the Auditor General may not be viewed as an impingement of parliamentary institutions, whereas the restriction of access to information of individuals may be viewed as such an impingement.

While the Auditor General case related to a denial of a request for access to information, the circumstances of that case did not involve a threat to the operation of democratic institutions or the democratic process. Rather, the case involved the special relationship between Parliament and one of its servants, the Auditor General. The Supreme Court found that Parliament was within its rights to determine that the only remedy the Auditor General had for a failure to disclose information was a reporting remedy to Parliament itself.

A review of the above cases, in concert with the decisions in Singh and Babcock, demonstrates that there is no existing jurisprudence that inhibits the application of the principle of democracy to invalidate legislation that substantially interferes with the democratic process. The common characteristic of Singh and Babcock is that they did not involve fundamental interferences with the democratic process in Canada. Rather, they involved challenges to long-established practices. The protection of Cabinet confidences from disclosure has been accepted as a natural and necessary component of democratic governance in Canada for over a century. A similar observation may be made

85 Ibid. at 647.
of the application of the principle of parliamentary supremacy to restrict the Auditor General’s power to compel disclosure of government information. The Auditor General is a servant of Parliament who fulfills an essentially parliamentary role – the review of government accounts. It is not unusual that the Auditor General’s powers to compel disclosure of documents could be curtailed by Parliament and limited to a reporting power. By contrast, the right to access government information is a right enjoyed by individuals, not just Parliament. As such, Information Commissioners resemble Ombudsmen much more closely than they do Auditors General. In this way, the findings of the Auditor General case should not apply to restrict the right to access government information enjoyed by individuals.

In summary, the principle of parliamentary supremacy has been relied upon to support the historically-recognized need to insulate certain information in order to protect Cabinet confidentiality, policy-making, national security and the relationship between Parliament and its servants, among other concerns. While there are strong arguments that the justifications for insulating such determinations from judicial review should be re-evaluated, the application of the principle of parliamentary supremacy in these cases has not undermined the fundamental requirements of the democratic process.

3) Hypothetical Scenarios: Applying the Principle of Democracy to Invalidate Legislation That Restricts Access to Government Information

In light of the evidence that suggests that the principle of democracy may be applied to invalidate legislation that substantially interferes with the democratic process, it remains to consider how this principle may be applied in specific situations. In this section, I will consider three potential scenarios in which legislation restricting access to government information may be challenged for violating the right to access rooted in the
principle of democracy. I will consider, in turn, legislative restrictions on access that are meant to protect national security, the decision-making process in Cabinet, and, finally, the administration of government programs.

a) Restrictions on Access Aimed at Protecting National Security: Section 69.1 of the Access to Information Act

The first scenario involves legislative restrictions on access to government information that are imposed in order to protect national security. As discussed at several points in this thesis, the Anti-terrorism Act\(^\text{86}\) introduced important changes to both the federal Access to Information Act\(^\text{87}\) and the Canada Evidence Act\(^\text{88}\) imposing new restrictions on access to government information in the name of protecting national security. I have already discussed the ways in which a constitutional right to access government information may influence both the interpretation of, and the exercise of ministerial discretion under, section 38.13 of the Canada Evidence Act. In this section, I would like to consider whether a right to access government information rooted in the constitutional principle of democracy could justify invalidating s. 69.1 of the federal Access Act.\(^\text{89}\)

It will be remembered that section 69.1 was added to the Access Act in tandem

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\(^{86}\) S.C. 2001, c.41.


\(^{89}\) Section 69.1 of the Access Act states:

69.1 (1) Where a certificate under section 38.13 of the Canada Evidence Act prohibiting the disclosure of information contained in a record is issued before a complaint is filed under this Act in respect of a request for access to that information, this Act does not apply to that information.

2) Notwithstanding any other provision of this Act, where a certificate under section 38.13 of the Canada Evidence Act prohibiting the disclosure of information contained in a record is issued after the filing of a complaint under this Act in relation to a request for access to that information,

(a) all proceedings under this Act in respect of the complaint, including an investigation, appeal or judicial review, are discontinued;

(b) the Information Commissioner shall not disclose the information and shall take all necessary precautions to prevent its disclosure; and

(c) the Information Commissioner shall, within 10 days after the certificate is published in the Canada Gazette, return the information to the head of the government institution that controls the information.
with section 38.13 of the *Canada Evidence Act* as a result of amendments enacted through the *Anti-terrorism Act*. In effect, section 69.1 of the *Access Act* stipulates that the *Access Act* does not apply to information subject to a certificate issued pursuant to section 38.13 of the *Canada Evidence Act*. Section 38.13 certificates allow the Attorney General to refuse disclosure of government information that has been ordered disclosed in a proceeding if the Attorney General believes that refusal to disclose the information is necessary to protect “information obtained in confidence from, or in relation to, a foreign entity as defined in subsection 2(1) of the *Security of Information Act* or for the purpose of protecting national defence or national security”.\(^9^0\) Section 69.1(2) of the *Access Act* stipulates that the issuance of a certificate under section 38.13 of the *Canada Evidence Act* causes any ongoing Access to Information proceedings covered by the ministerial certificate to be discontinued\(^9^1\) and imposes a duty on the Information Commissioner to return any of the information at issue to the responsible Minister within 10 days.\(^9^2\)

The fundamental question raised by the combined impact of section 38.13 of the *Canada Evidence Act* and section 69.1 of the *Access Act* is whether legislation creating the power to issue certificates that restrict access to government information in order to protect confidential relations with foreign entities and/or national defence and national security violates the principle of democracy in such a way as to justify invalidating the legislation. This requires that we balance the principle of democracy, including the right to access government information that it supports, against any opposing principles within the specific context that the legislation is enacted.

The broad parameters of the principle of democracy and the more specific

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\(^9^0\) *Canada Evidence Act*, supra note 88, s. 38.13(1).  
\(^9^1\) *Access Act*, supra note 87, s. 69.1(2)(a)  
justification of the application of the principle to protect access to government information were discussed at length in chapters two and five. In summary, the principle of democracy supports a right to access government information where that information is necessary to reinforce the representative nature of our democratic process. More specifically, the democratic principle supports a right to government information that is necessary to allow citizens to engage in meaningful participation in the political process. This participation includes both engaging in debates concerning appropriate government policies and holding elected officials accountable for their actions. The right to information thus extends to the information necessary to participate in debates and to hold elected officials accountable.

In the case of the provisions enacted through the Anti-terrorism Act, the first question thus becomes do the provisions restrict access to information necessary to allow citizens to participate in the policy-making process or to hold government officials accountable. As noted in chapter six, one difficulty in assessing the constitutional validity of legislation that provides government officials with the discretion to exercise particular powers is that it is often not the grant of discretion that violates the Constitution as much as the exercise of that discretion in particular circumstances. This is particularly true of the legislative grant of discretion to issue certificates under s. 38.13 of the Canada Evidence Act. As such, it is highly likely that a reviewing court would assume that the legislative grant of discretion under section 38.13 and the resultant impact of section 69.1 of the Access Act were constitutional on their face, preferring to

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93 Here it is worth recalling the words of Justice Chouinard in Quebec HRC v. Canada, supra note 74 at 228: “... the risk that the Executive will apply legislation that has been validly adopted by Parliament with malice or even arbitrarily does not have the effect of divesting Parliament of its power to legislate. It is important not to confuse the statute adopted by Parliament with the action of the Executive performed in accordance with that statute.”
consider the exercise of discretion in particular circumstances as the proper forum for determining whether constitutional rights have been violated.

Nonetheless, for the purposes of this chapter, I will consider whether the legislation at issue, as opposed to exercise of discretion under the legislation, violates the principle of democracy. It seems evident that much of the information that would be insulated from disclosure through the issuing of a s. 38.13 certificate and the resultant discontinuance of Access to Information proceedings pursuant to section 69.1 of the Access Act would be considered information necessary to allow citizens to more fully participate in the policy-making process or to allow them to hold government officials accountable. At the very least, access to information deemed vital to national security or national defence would allow citizens to more accurately gauge whether government officials were effectively protecting national security and effectively securing national defence. Access to such information would allow citizens to more accurately consider the level and nature of threats to national security and national defence. This, in turn, would assist them in assessing the adequacy of government policies and actions to reduce or counteract these threats.

Having confirmed that the legislation restricts access to information necessary for promoting participation in the democratic process, it remains to balance this infringement of the democratic principle against other constitutional principles that may justify the infringement. The primary countervailing principle in this case would be the principle of national security itself – namely the recognition that one of the fundamental obligations of any democratic government is to keep its citizens safe.

As noted in chapter six, the restriction of access to information in order to protect
national security and national defence or even to protect international relations has been recognized as a legitimate consideration in a democratic society. Indeed, recent decisions the Supreme Court of Canada suggest that, in extreme circumstances, the need to protect national security might justify the deportation of a refugee to a country where they are likely to face torture and, the potential for extended periods of detention of foreign nationals.\textsuperscript{94} The fact that a right to access to government information might be limited in order to protect national security and national defence is also consistent with the historical evolution of both common law and legislative provisions dealing with disclosure of government information. Common law rules dealing with disclosure of government information recognized a privilege for information relating to national security and national defence.\textsuperscript{96} This common law privilege was included in statutory provisions dealing with disclosure of government information in judicial proceedings included in both the \textit{Federal Court Act}\textsuperscript{97} and the \textit{Canada Evidence Act}.\textsuperscript{98} Similarly, from its inception, the federal \textit{Access Act} has included a discretionary exemption for information that may compromise national defence or national security.\textsuperscript{99}

In light of the above, it is unlikely that the recognition of a right to access government information as part of the principle of democracy would result in the invalidation of either section 38.13 of the \textit{Canada Evidence Act} or section 69.1 of the \textit{Access Act}. The remedy of invalidation pursuant to the constitutional principle of

\textsuperscript{94} Suresh \textit{v.} Canada (Minister of Citizenship and Immigration}, 2002 SCC 1, [2002] 1 S.C.R. 3 [\textit{Suresh}].
\textsuperscript{95} Charkaoui \textit{v.} Canada (Minister of Citizenship and Immigration}, 2007 SCC 9, [2007] 1 S.C.R. 350 [\textit{Charkaoui}].
\textsuperscript{97} \textit{Federal Court Act}, R.S.C. 1970 (2\textsuperscript{nd} Supp.), c. 10, s. 41.
\textsuperscript{98} \textit{Canada Evidence Act}, supra note 88, s. 36.2 [repealed].
\textsuperscript{99} \textit{Access Act}, supra note 87, s. 15.
democracy will only be justified where the legislative provision at issue substantially interferes with a fundamental element of the democratic process without justification. Certainly, the protection of national security and national defence is a substantial justification for limiting access to government information. In addition, the Canadian legal framework has historically provided mechanisms for shielding disclosure of government information the disclosure of which would threaten national security or national defence.

Of course, this does not address the possibility that the discretion to refuse disclosure of government information on the ground that disclosure of the information would threaten national defence or national security may be exercised in bad faith. There is no paucity of examples in which national security has been cited as justification for refusing to disclose information that was ultimately demonstrated to be damaging to the interest or reputation of the withholding agency or person rather than the nation’s security. Even in Canada, the example that springs most quickly to mind is the argument advanced by the Nixon White House that the tape recordings of the President’s conversations should not be disclosed for national security reasons. Ultimately, it was discovered that these recordings were more damaging to the President’s personal interests than interests of national security since they demonstrated President Nixon’s knowledge of the Watergate break-ins.

Closer to home, recent documents released after a lengthy court battle related to the Commission of Inquiry into Actions of Canadian Official in Relation to Mahar Arar also provide a poignant reminder that Canadian officials are just as willing to use national security concerns as a cloak for withholding documents that impugn their own behaviour.

rather than endangering national security. Ultimately, this highlights the fact that notwithstanding the constitutional validity of s. 38.13 of the *Canada Evidence Act* and section 69.1 of the *Access Act*, the exercise of discretion under these provisions may be deemed to violate the principle of democracy and thereby restricted as described in chapter six.

b) **Restrictions on Access Aimed at Protecting the Cabinet Decision-Making Process: Section 69 of the Access Act**

A second possible scenario where legislation restricting access to government information may be challenged for violating a constitutional right to access government information arises out of the current exclusion of Cabinet confidences from the scope of the federal *Access Act*. Section 69 of the *Access Act* currently excludes records that

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102 Section 69 of the *Access Act* states:

69. (1) This Act does not apply to confidences of the Queen’s Privy Council for Canada, including, without restricting the generality of the foregoing,

(a) memoranda the purpose of which is to present proposals or recommendations to Council;
(b) discussion papers the purpose of which is to present background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions;
(c) agenda of Council or records recording deliberations or decisions of Council;
(d) records used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;
(e) records the purpose of which is to brief ministers of the Crown in relation to matters that are before, or are proposed to be brought before, Council or that are the subject of communications or discussions referred to in paragraph (d);
(f) draft legislation; and
(g) records that contain information about the contents of any record within a class of records referred to in paragraphs (a) to (f).

**Definition of “Council”**

(2) For the purposes of subsection (1), “Council” means the Queen’s Privy Council for Canada, committees of the Queen’s Privy Council for Canada, Cabinet and committees of Cabinet.

**Exception**

(3) Subsection (1) does not apply to

(a) confidences of the Queen’s Privy Council for Canada that have been in existence for more than twenty years; or
(b) discussion papers described in paragraph (1)(b)

(i) if the decisions to which the discussion papers relate have been made public, or
(ii) where the decisions have not been made public, if four years have passed since the decisions were made.
include information concerning potential policy options presented to Cabinet, or debate or discussion of these options among members of Cabinet. An exception exists allowing the disclosure of Cabinet confidences that are more than twenty years old or for the disclosure of discussion papers concerning decisions that have already been made public or where four years have passed if the decision at issue has not been made public.

The exclusion of Cabinet confidences from the scope of the Access Act has been decried by both academics and the Information Commissioner of Canada.103 In particular, the Information Commissioner has criticized the fact that a complete exclusion of Cabinet confidences from the scope of the Act eliminates any substantive oversight of the process of certifying that information requested to be disclosed contains Cabinet confidences. As noted in chapter one, the current process allows the Clerk of the Privy Council to certify that the requested information contains Cabinet confidences and insulates the actual information at issue from any judicial review. The only way in which this certification may be reviewed is if there exists external evidence that the official abused the certification process.104

As noted above, the exclusion of Cabinet confidences from legislative disclosure requirements has been challenged a number of times in the context of evidence legislation. In the most recent case, Babcock v. Canada, the Supreme Court of Canada confirmed that section 39 of the Canada Evidence Act is constitutionally valid.105 Of

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105 Babcock v. Canada (Attorney General), supra note 23. Section 39 provides an absolute immunity from disclosure of any information that is certified to contain Cabinet confidences. It also prohibits any judicial review of the information alleged to contain Cabinet confidences. The only way to impugn a section 39 certificate is through external evidence of improper certification. In Babcock, the Supreme Court rejected the argument that this exclusion of judicial review of the information subject to a section 39 certificate violated such unwritten constitutional principles as the rule of law, the separation of powers, and judicial
course, the constitutional challenge that I propose to consider in this section is different than that considered in Babcock. First, I am proposing to consider the constitutionality of section 69 of the Access Act as opposed to section 39 of the Canada Evidence Act. While the two legislative provisions are very similar, the context in which they are raised and the factors to be considered in their adjudication are somewhat different. Most importantly, section 39 is most often raised in judicial proceedings, resulting in the fact that the primary factor that weighs in favour of disclosure of the information is not the public interest in access to the information for the political process, but rather the private interest of the litigant in access to important evidence in the judicial process.

The differing contexts of the Canada Evidence Act and the Access Act explain why the principle of democracy was not considered in Babcock. As a result, the importance to the democratic process of access to information alleged to contain Cabinet confidences was not considered in the case. By contrast, this would be a primary factor for consideration in a case involving the validity of section 69 of the Access Act.106

As noted earlier, the first consideration when assessing whether a legislative provision restricting access to information violates the proposed constitutional right of access to information is whether the information at issue triggers a threat to either political participation or accountability. Certainly, information concerning the potential policy options considered by Cabinet when making decisions, the content of debate concerning Cabinet decisions and the resulting decisions are all types of information that

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106 Notwithstanding this important difference between considerations relevant to the Canada Evidence Act and the Access Act, I will return to the Supreme Court’s decision in Babcock in my discussion below.
would assist citizens in the process of holding their elected officials accountable. What better way to assess the performance of a government than to know exactly which policy alternatives were considered and the reasons one particular alternative was chosen over others? As such, a restriction of access to Cabinet confidences would certainly trigger the constitutional right to access government information rooted in the principle of democracy.

The second stage of the analysis, then, is to consider whether the restriction of the right to access information may be justified by countervailing principles. In the *Babcock* case, Chief Justice McLachlin noted that the principle of parliamentary supremacy supported legislation that limited judicial review of decisions not to disclose certain documents. Interestingly, while the principle of parliamentary supremacy was identified as the source of Parliament’s power to legislate, the justification for the decision to exclude Cabinet confidences from disclosure in judicial proceedings was rooted in concerns related to the principle of responsible government.  

The protection of Cabinet confidences against disclosure in judicial proceedings and Access to Information proceedings has long roots in the history of the Canadian legal system. I noted in chapter one that, historically, even the decision to declare a record as a Cabinet confidence was insulated from judicial review at common law such that judges were not permitted to review alleged Cabinet confidences. Over time, many of the reasons for insulating decisions concerning the disclosure Cabinet confidences from any

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107 The principle of responsible government holds that the government must maintain the confidence (or support) of a majority of the elected representatives in the legislature in order to stay in power. It also provides that the government is to include a Cabinet composed of the Prime Minister and Ministers. The deliberations of the Cabinet are to remain confidential and all decisions are to be represented as decisions of a unified body. It is this requirement of confidentiality of Cabinet decision-making process that has been one of the most prevalent historical justifications for insulating Cabinet confidences from disclosure. Additional arguments in favour of the insulation of Cabinet confidences include the need to prevent capricious interference with the process of governance.
type of judicial review have been rejected by both English and Canadian courts and the absolute immunity of Cabinet confidences from judicial review was eroded at common law. However, that absolute immunity was later reinstated by legislation protecting the disclosure of Cabinet confidences in judicial proceedings. This insulation of Cabinet confidences was reflected in their exclusion from the ambit of the *Access Act* as a result of the operation of section 69 of the *Act*.

While many of the historical justifications for shielding decisions concerning whether information is properly considered to contain Cabinet confidences from judicial review have been discredited, the basic contention that Cabinet confidences should be protected from disclosure in order to protect the system of responsible government remains uncontested. Indeed, the Information Commissioner himself has not advocated that Cabinet confidences be disclosed under the *Access Act*. Rather, the Information Commissioner has suggested that the *Access Act* be amended to include a mandatory exception for Cabinet confidences as opposed to a complete exclusion of this information from the ambit of the *Act*.\(^\text{108}\)

This proposed change to section 69 of the *Access Act* would mean that decisions concerning whether or not particular information includes Cabinet confidences and should be exempted from disclosure would be reviewable by the Information Commissioner, and ultimately the courts, based on a review of the information itself. However, information properly certified as containing Cabinet confidences would be subject to a mandatory exemption from disclosure.

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\(^{108}\) Information Commissioner of Canada, *Proposed Changes to the Access to Information Act*, online: [http://www.infocom.gc.ca/specialreports/pdf/Access_to_Information_Act_-_changes_Sept_28_2005E.pdf.](http://www.infocom.gc.ca/specialreports/pdf/Access_to_Information_Act_-_changes_Sept_28_2005E.pdf) The Information Commissioner has also proposed that all decisions of Cabinet be disclosable four years after the decisions have been taken. In addition, he has proposed some modifications and clarifications to the definition of Cabinet confidences contained in the Act.
When considered together, the historical roots of the exclusion of access to Cabinet confidences combined with the principled rationale for the protection of such information from disclosure suggest that the application of the principle of democracy would not result in the constitutional invalidation of section 69 of the Access Act. In particular, the historically accepted requirement that Cabinet confidences be protected from disclosure in order to protect the principle of responsible government would outweigh the interest in access to this information as a mechanism for improving political accountability and political participation.

c) **Restrictions on Access Aimed at Protecting Government Program Implementation: Hypothetical Amendment to Section 21(1) of the Access Act**

The final scenario to be considered involves a hypothetical amendment to section 21 of the Access Act. It will be recalled that section 21(1) of the Act creates a discretionary exemption for records involved in the policy-making process, including records that contain “advice or recommendations developed by or for a government institution or minister of the Crown…” and “plans relating to the management of personnel or the administration of a government institution that have not yet been put into operation.”

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Section 21 of the Access Act states:

21. (1) The head of a government institution may refuse to disclose any record requested under this Act that contains

(a) advice or recommendations developed by or for a government institution or a minister of the Crown,

(b) an account of consultations or deliberations in which directors, officers or employees of a government institution, a minister of the Crown or the staff of a minister participate,

(c) positions or plans developed for the purpose of negotiations carried on or to be carried on by or on behalf of the Government of Canada and considerations relating thereto, or

(d) plans relating to the management of personnel or the administration of a government institution that have not yet been put into operation,

if the record came into existence less than twenty years prior to the request.

**Exercise of a discretionary power or an adjudicative function**

(2) Subsection (1) does not apply in respect of a record that contains

(a) an account of, or a statement of reasons for, a decision that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of a person; or

(b) a report prepared by a consultant or an adviser who was not a director, an officer or an employee of a government institution or a member of the staff of a minister of the Crown at the time the report was prepared.
personnel or the administration of a government institution that have not yet been put into operation”.\textsuperscript{110} In this scenario, I will consider a hypothetical amendment to section 21 that would add a mandatory exclusion for information concerning program administration. Such an amendment could read as follows:

\textbf{Section 21(1.1) The head of a government institution shall refuse to disclose any record requested under this Act that contains plans relating to the management of personnel or the administration of a government program.}

Admittedly, such an amendment would amount to a particularly drastic departure from the existing federal Access to Information regime. While such an amendment is improbable, it would likely be valid in the absence of a constitutional right to access government information. As such, this hypothetical amendment is a useful mechanism for considering the practical application of such a right.

The value of information concerning the administration of government programs has been highlighted in recent years through a series of scandals resulting from the exposure of negligence and misfeasance by government officials, and others, in the administration of government programs. In the first scandal, sometimes referred to as the “Billion Dollar Boondoggle”, an internal audit of the federal Department of Human Resources and Development identified serious deficiencies in the oversight of grants made by the Department. Among the problems identified were the following:

\begin{itemize}
  \item 15 percent of approved projects did not have an application
  \item Nearly 70 percent of the files had no explanation for why a project was accepted or rejected
  \item 87 percent of the projects had no evidence of supervision\textsuperscript{111}
\end{itemize}

The second scandal, known as the Sponsorship Scandal, resulted from the

\textsuperscript{110} Ibid. s. 21(1)(d).
operation of a program known as the “Sponsorship Program” initiated by Prime Minister Chretien. The program, created after the Quebec Referendum in 1995, was designed to provide money to support advertising and sponsorship initiatives to increase the profile of the Canadian government, particularly in Quebec. As a result of a combination of the failure of proper administrative oversight, political interference, and misfeasance by both government officials and private business operators, the program ultimately was used to fund advertising agencies that had supported the governing Liberal Party, enriching the owners of these agencies without requiring any proof that the agencies had provided the services they contracted to provide.\(^{112}\)

These scandals highlight the importance of access to information concerning the administration of government programs to the process of holding government officials accountable for their actions. Without access to information concerning the way in which programs such as the Human Resource and Development Grants Program or the Sponsorship Program were administered, it would be impossible for citizens to properly assess whether these programs had been administered in an acceptable manner. The importance of a protected right to access such information was particularly highlighted in the case of the Sponsorship Scandal since the existence of the Sponsorship Program was kept secret from Parliament and even from many of the members of Cabinet. The Sponsorship Program was initially brought to light as a result of access to information requests made by reporters.

Indeed, in his report concerning the Sponsorship Scandal, Justice Gomery specifically identified the importance of the access to information regime in facilitating

the discovery of the Sponsorship Scandal. He stated:

Public disclosure of the Sponsorship Program was the result of efforts by a diligent journalist whose access to information requests resulted in knowledge about the Program, to the public and parliamentarians alike, for the first time. This serves to illustrate the role that an effective access to information regime can play, enabling a more informed public and a vigilant opposition in Parliament.\textsuperscript{113}

It is fairly evident that access to information concerning the administration of government programs would contribute to the ability of citizens to hold government officials accountable and thereby is an important aspect of the democratic process in a modern democracy. This type of information thus triggers the operation of the democratic principle.

It remains to consider whether any other principles or considerations might outweigh the importance of access to this information to the democratic process. The types of reasons used for justifying restricting access to Cabinet confidences or even to information concerning the policy-making process in general do not apply in this scenario. There is no particular benefit to keeping the way in which programs are administered secret that is akin to the potential benefit of allowing Cabinet to consider policy alternatives in secret or to allow a certain degree of confidentiality concerning the policy-making process in general.

Nor can it be said that information concerning program administration has historically enjoyed a legal protection from disclosure. Thus, while both the common law and statutory regimes have provided mechanisms for shielding Cabinet confidences and information relating to national security or national defence from disclosure, no specific exclusion for program administration information exists. Arguably, in some

circumstances, information about program administration could be shielded from disclosure under general public interest provisions of both the common law and statutory frameworks. However, there has not been a general justification for non-disclosure of such information as a category.

In light of the absence of either a principled reason for limiting access to information concerning program administration or a historically accepted source of limitations on access of this kind, I would argue that the principle of democracy could be applied to invalidate a legislative amendment that restricted access to information concerning the administration of government programs.

4) Conclusion

In this chapter, I have set out the argument for the application of the principle of democracy to invalidate legislation that interferes with fundamental elements of the democratic process. The fact that such substantial interferences with the democratic process may be invalidated was first suggested by the Supreme Court in the Implied Bill of Rights cases and has since confirmed by the Court in several cases.

The statements made by various Supreme Court of Justices concerning the potential limits of parliamentary sovereignty start from the foundation that Parliament cannot be allowed to undermine its own legitimacy. If the legitimacy of parliamentary sovereignty is based primarily on the fact that Parliament is the primary conduit of majoritarian preferences in a democratic society, as I think it must be, then any act of Parliament that undermines the ability of Parliament to reflect majoritarian preferences

114 See for instance, s. 37 of the Canada Evidence Act, which allows a Minister or other official to certify that the information should not be disclosed “on the grounds of a specified public interest.” Section 37(4) allows a court to order information to be disclosed if the public interest in disclosure outweighs the public interest in non-disclosure.
could potentially undermine the legitimacy of parliamentary sovereignty. While such interferences with the primary role of Parliament may be justifiable in particular circumstances, substantial interferences with the ability of Parliament to reflect the preferences of the majority must be suspect. In other words, to allow Parliament to create substantial threats to the democratic process would allow it to undermine the very foundation of its own power.

Given that the primary means by which Parliament is able to reflect democratic preferences is through the democratic process itself, the primary mechanism of which is the holding of periodic elections, then substantial interferences with this fundamental element of the democratic process must be viewed as potential threats to the legitimacy of parliamentary sovereignty. In Canada, substantial threats to fundamental elements of the democratic process include, at a minimum, those threats that undermine the ability of electors to make meaningful choices, which reflect their actual preferences, when they vote. As we have seen, these choices will most likely concern the policies or governance of the candidates for whom the electors are voting.

While the principle of parliamentary supremacy must be accorded proper weight, in some cases it may be legitimately counter-balanced by the principle of democracy, resulting in the invalidation of the offending legislative provision. Of course, the application of the principle of parliamentary supremacy to restrict access to government information is not disputed in cases involving practices that have been recognized historically as a legitimate part of the democratic process in Canada. However, the recognition of a constitutional right to access to government information as part of the constitutional principle of democracy would suggest that the justifications for these
historical practices should be re-evaluated periodically according to standards of modern democratic governance. Ultimately, the principle of parliamentary supremacy may not be sufficient to protect practices that are found to jeopardize rather than support fundamental aspects of democratic governance, regardless of whether the practices are traditional or newer practices.
VIII. CHAPTER EIGHT

DEMOCRACY AND THEORIES OF JUDICIAL REVIEW:
A THEORETICAL JUSTIFICATION FOR APPLYING THE PRINCIPLE OF
DEMOCRACY AS A LIMIT ON GOVERNMENT ACTION

I noted in chapter seven that the legitimacy of applying a constitutional right to access government information to invalidate legislation that violated the right to access would be assumed where the right to access was recognized as part of an existing written provision of the Constitution, such as section 3 of the Charter. By contrast, the legitimacy of invalidating legislation that contravenes a free-standing right to access government information rooted in the principle of democracy is not so readily assumed. In this chapter, I will complete the argument justifying the application of such a free-standing right as a limit on legislation that I began in chapter seven.

I will begin by considering the growing British scholarship that challenges the absolute sovereignty of Parliament and posits limits on that sovereignty where fundamental rights, essential to the maintenance of democracy, are challenged. This scholarship suggests that the justification for limiting democratic decisions, implemented through legislation enacted by Parliament, may be found in the democracy-protecting nature of a particular unwritten constitutional principle. In other words, the application of unwritten principles as a limit on legislation may be justified where that application is necessary to preserve democratic institutions or processes.

The British scholars discussed below and the Canadian cases discussed in chapter seven provide support for my argument in favour of applying the principle of democracy to invalidate legislation that creates substantial interferences with fundamental elements of the democratic process by restricting access to government information. However,
they do not directly respond to the criticisms raised by critics of the Supreme Court of Canada’s application of unwritten constitutional principles that were discussed in chapters three and four. In the second part of this chapter, I will argue that the notion of law as a “culture of justification,” most recently advanced by David Dyzenhaus, provides an alternative conception of the legitimate role of judges in recognizing and applying fundamental values. In my view, this alternative conception provides a framework in which positivist concerns regarding the application of unwritten constitutional principles can be addressed. This framework assists in providing a more complete theoretical justification for the limitation of parliamentary supremacy advanced in chapter seven.

Finally, in the last section of the chapter, I consider the arguments raised by Jeffrey Goldsworthy, the foremost contemporary defender of the principal of parliamentary sovereignty. In particular, I discuss how Goldsworthy’s concerns may no longer be applicable to the Canadian constitutional context and should thus not be viewed as barriers to application of the principle of democracy to invalidate legislation restricting access to government information.

1) **The British Debate Concerning the Limits of Parliamentary Sovereignty**

My view that the scope of parliamentary supremacy may be limited by unwritten constitutional principles in certain circumstances is supported by the recent work of a number of British scholars who have challenged the traditional conception of the principle of parliamentary sovereignty. Much of the modern English debate concerning the scope of parliamentary sovereignty has revolved around the particular issue of whether the *ultra vires* doctrine is the proper foundation for judicial review.
Traditionalists, such as Sir William Wade\(^1\) and, more recently, Christopher Forsyth\(^2\) and Mark Elliott,\(^3\) argue that judges may only review administrative action if they can demonstrate that Parliament intended them to have that power, either expressly or impliedly. As such, judges can only restrain administrative action if they can show that action is outside of the grant of power provided by the legislature or \textit{ultra vires}.

By contrast, common law critics of the traditional view argue that heads of judicial review are a common law creation and that resort to the notion of parliamentary intent is neither necessary nor desirable. Some critics have questioned the very essence of parliamentary sovereignty, suggesting that Parliament may not have the power to violate certain fundamental rights. I will set out a brief outline of some of these arguments below.

\textbf{a) Sir John Laws}

Interestingly, this debate has been fuelled by the extra-judicial writings of a number of English judges. Sir John Laws, a justice of the High Court, Queen’s Bench Division, invigorated the debate in his seminal article “Law and Democracy” in which he emphasizes the important role of the judiciary in controlling government.\(^4\) In an oft quoted passage, Laws argues that the heads of judicial review are judicial creations and dismisses the notion that they can be the result of legislative intention. He writes: “They are, categorically, judicial creations. They owe neither their existence nor their acceptance to the will of the legislature. They have nothing to do with the intention of

Parliament, save as a fig-leaf to cover their true origins. We do not need the fig-leaf any more.”

At the core of his argument is Laws’ belief that a Constitution that gives all power to its elected government is undemocratic because it fails to protect fundamental freedoms.

As a matter of fundamental principle, it is my opinion that the survival and flourishing of a democracy in which basic rights (of which freedom of expression may be taken as a paradigm) are not only respected but enshrined requires that those who exercise democratic, political power must have limits set to what they may do: limits which they are not allowed to overstep. If this is right, it is a function of democratic power itself that it be not absolute.

According to Laws, the only way that these fundamental rights can be secured is through the acknowledgement of a “higher order law” that cannot be reversed by a simple majority in Parliament. Such higher order laws secure the fundamental rights of citizen from interference by the government, including those rights necessary to protect democracy itself.

Ultimate sovereignty rests, in every civilized Constitution, not with those who wield governmental power, but in the conditions under which they are permitted to do so. The Constitution, not the Parliament, is in this sense sovereign. In Britain these conditions should now be recognized as consisting in a framework of fundamental principles which include the imperative of democracy itself and those other rights, prime among them freedom of thought and expression, which cannot be denied save by a plea of guilty to totalitarianism.

Laws acknowledged that the existing jurisprudence did not currently support his view that legislative authority can be limited by judicial review in England. However, he argues that public law jurisdiction should not and probably will not remain static. Rather,
he notes that the legal distribution of power consists of a “dynamic settlement” between different arms of government. “The settlement is dynamic because, as our long history shows, it can change; and in the last three hundred years has done so without revolution.”\textsuperscript{10} Indeed, it is worth noting that three members of the British House of Lords recently raised the possibility that there may be limits on parliamentary supremacy in their reasons for decision in \textit{R (Jackson) v. Attorney General}.\textsuperscript{11}

\textbf{b) Sir Stephen Sedley}

Sir Stephen Sedley has also joined the chorus for greater judicial oversight.\textsuperscript{12} Sedley argues that Dicey’s notion of a supreme Parliament whose will could not be challenged is no longer valid. Instead, he suggests the existence of a “bi-polar sovereignty of the Crown in Parliament and the Crown in its courts, to each of which the Crown’s ministers are answerable – politically to Parliament, legally to the courts.”\textsuperscript{13}

Contrary to Laws, Sedley does not suggest that Parliament can be subjected to higher-order laws. Rather, he emphasizes that the rights valued by any given society as fundamental are always temporary, local and contextual. He thus cautions against treating any rights as universal or absolute and notes that courts are sometimes responsible for illiberal decisions. Nonetheless, it is the courts’ role to uphold those rights which society holds as fundamental. “[I]f in our own society the rule of law is to mean much, it must at least mean that it is the obligation of the courts to articulate and

\textsuperscript{10} \textit{Ibid.} at 80-81.
\textsuperscript{13} \textit{Ibid.} at 388-89.
uphold the ground rules of ethical social existence which we dignify as fundamental human rights, temporary and local though they are in the grand scheme of things.”

While Sedley acknowledges the pitfalls of this approach, including the potential commodification of human rights, he views the alternative of retreating from the protection of fundamental rights as the greater evil.

The only choice in this situation – and it is a choice which the judiciary can make for itself but which Parliament can no longer realistically make for it – is to retreat from rights adjudication into the long sleep of *Wednesbury* and before, or to develop the role with which we are now becoming familiar and to continue to move in the direction of a rights culture compatible with the constitutional adjudication in a democracy.

c) **Paul Craig**

Paul Craig, perhaps the author most associated with the common law critique of the *ultra vires* doctrine, has also questioned the legitimacy of the positivist model of parliamentary sovereignty. Craig argues that modern proponents of parliamentary sovereignty have failed to provide a normative justification for parliamentary sovereignty and have instead relied blindly on the work of Dicey and Blackstone, without recognizing the context in which those constitutional theorists wrote about parliamentary sovereignty.

According to Craig, Dicey advocated parliamentary sovereignty in the context of a self-correcting Parliament which would prevent the executive from acting contrary to the interests of the electors. In Craig’s view, “our system of democracy probably never operated in this self-correcting way, and this vision of the relationship between electors, Parliament and the executive certainly does not accord with present reality.”

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Blackstone advocated parliamentary sovereignty only within the context of a balanced constitutionalism which, according to Craig, did not exist in Blackstone’s day and certainly does not exist in this era of executive dominance of the parliamentary system.\(^{17}\)

Like Laws, Craig acknowledges that the existing English jurisprudence does not currently support a strong judicial challenge to the notion of parliamentary sovereignty, although he suggests that the law might develop in this way.\(^{18}\) Craig prefers to suggest that the notion of parliamentary sovereignty can survive only if an adequate normative justification for this power can be provided. In Craig’s view, this “…opens the way for legal argument about whether a legally untrammeled Parliament is justified in the present day. There are stimulating contributions to both sides of this debate… These should be regarded as firmly within the mainstream of legal argument about sovereignty which continues a discourse dating back over three hundred years.”\(^{19}\)

Interestingly, Craig emphasizes that, historically, supporters of parliamentary sovereignty such as Dicey and Blackstone viewed the common law as the natural vehicle for the development of legal doctrine on the basis of sound, principled arguments. In Craig’s view, the \textit{ultra vires} doctrine of judicial review, which ascribes the power of judicial review to the intent of the legislature, is not based on sound, principled arguments and cannot be supported any longer.\(^{20}\)

d) \textbf{Trevor Allan}

\(^{17}\) Craig, “Public Law,” \textit{ibid.} at 219.  
\(^{18}\) \textit{Ibid.} at 229.  
\(^{19}\) \textit{Ibid.} at 230.  
\(^{20}\) \textit{Ibid.} at 235.
Trevor Allan has also argued that the traditional notion of parliamentary sovereignty should be rejected.\textsuperscript{21} He argues that absolute parliamentary sovereignty is not compatible with democratic principles:

It would clearly be absurd to permit a Parliament whose sovereign law-making power was justified on democratic grounds to exercise that power to destroy democracy, as by removing the vote from sections of society or abolishing elections. Moreover, an appropriately sophisticated conception of democracy will be likely to recognize the existence of certain basic individual rights, whose importance to the fundamental idea of citizenship in a free society, governed in accordance with the rule of law, will properly place them beyond serious legislative encroachment. In stressing the importance of fundamental rights to the survival of democracy, Sir John Laws observes that “the doctrine of Parliamentary sovereignty cannot be vouched by Parliamentary legislation; a higher-order law confers it, and must of necessity limit it”.\textsuperscript{22}

Allan goes on to link his position to a constitutional theory based on fundamental principles:

An adequate constitutional theory, appropriate to current circumstances, would recognize limitations on legislative power in order to ensure an adequate separation of powers, which Blackstone – often treated as an authority for the doctrine of unlimited sovereignty – rightly thought essential to the prevention of tyranny. The validity of traditional assertions of absolute sovereignty can only be determined by analysis of their normative grounding in political theory. When constitutional debate is opened up to ordinary legal reasoning, based on fundamental principles, we shall discover that the notion of unlimited parliamentary sovereignty no longer makes any legal or constitutional sense.\textsuperscript{23}

While Allan rejects the absolute supremacy of Parliament he does not do so in favour of judicial supremacy. Allan’s approach is built upon a challenge to the Diceyan model of parliamentary sovereignty, or at least the current form of that model. Allan argues that Dicey perceived parliamentary supremacy as only one of the pillars of the Constitution. The other pillar, which was just as important, was the rule of law. He


\textsuperscript{23} \textit{Ibid.} at 449.
complains that not enough attention has been paid to this second pillar of constitutional law, allowing the notion of parliamentary sovereignty to expand beyond its intended reach.\textsuperscript{24}

Allan’s work has emphasized the importance of judicial interpretation of statutes as a means to ensure that the rule of law is abided.\textsuperscript{25} In Allan’s view, the intentions of Parliament and the rule of law must both be respected. This is usually possible because legislation necessarily deals with general guidelines which can always be interpreted so as to ensure the rule of law is respected in specific instances. Thus, Allan advocates a qualified notion of parliamentary sovereignty that coexists with a qualified doctrine of \textit{ultra vires} in which legislative intention, properly understood, remains important but where it is possible for the courts to reject breaches of the rule of law. This leads Allan to characterize sovereignty as bipolar, shared between Parliament and the Courts.\textsuperscript{26}

The limitation of parliamentary sovereignty is not a rejection of British constitutional tradition, according to Allan, but rather a necessary part of the evolution of British constitutional theory. As such, limits on parliamentary sovereignty do not portend the revolutionary imposition of foreign legal principles on the common law Constitution of England, but rather constitute a natural outgrowth of a maturing constitutional democracy.

\textsuperscript{24} T.R.S. Allan, “Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism” [1985] C.L.J. 111. Allan argues that, rather than risk radical reform such as the adoption of an entrenched bill of rights, the British constitutional order can be restored to balance by placing an appropriate amount of weight on the principle of the rule of law: “It is the failure to recognize the importance and scope of the rule of law as a juristic principle, it will be argued, which has distorted our understanding of parliamentary supremacy and led in part to our present fears of constitutional imbalance.” \textit{Ibid.} at 114.

\textsuperscript{25} \textit{Ibid.} at 119.

Interestingly, Mark Walters argues that Allan’s approach may have relevance to the application of unwritten principles in Canada. He notes that “Allan has consistently defended a conception of constitutional order in which reason, as manifested within the common law, prevails over sovereign will.” Walters argues that Allan’s theory may provide a partial justification for the application of unwritten constitutional principles in Canada despite the existence of a written Constitution. In particular, he notes:

…Allan’s statement that ‘written constitutions [cannot] make redundant judicial resort to implicit understandings about the nature of law’ parallels closely comments by Lamer C.J.C. that the ‘written text of the Constitution’ is not ‘comprehensive and definitive’ but is supplemented by ‘a deeper set of unwritten understandings which are not found on the face of the document itself,’ and that ‘the Constitution embraces unwritten, as well as written rules.’

e) Implications of the British Debate for the Application of the Constitutional Principle of Democracy in Canada

Laws, Sedley, Craig and Allan represent an important challenge to the traditional conception of parliamentary sovereignty in Great Britain. While they all challenge the notion that Parliament has the power to breach rights that are fundamental to the democratic process, their contrasting perspectives raise a number of interesting questions: Are fundamental rights universal or transitory? What is the role of liberalism in shaping the recognition of fundamental principles: are all the foundations of liberalism fundamental principles; can some liberal principles be excluded from recognition as fundamental principles; can non-liberal principles be recognized as fundamental? Should courts be limited to interpreting legislation such that it complies with fundamental

28 Ibid. at 67.
29 Ibid. at 86. However, Walters notes that Allan’s theory may explain the application of principles such as the rule of law, judicial independence and democracy, but may not explain the legal status of principles such as federalism and parliamentary privileges and certain aspects of the respect for minorities principle such as language rights which are particular to the Canadian constitutional settlement.
principles or can they invalidate legislation that violates these principles? Has the power of courts to recognize fundamental principles (and enforce those principles) historically existed or is it an evolving power?

These tensions within the British critique of parliamentary sovereignty need not be completely resolved for the purposes of this thesis. However, I would suggest that the following considerations apply where the application of principle of democracy in Canada is concerned. The principle of democracy is a universal principle that may take various forms in different countries. At its foundation, however, is the notion that members of the government are elected as representatives of the people. In this way, I would tend to favour the contextual approach to fundamental rights of Sir Stephen Sedley over the universalist approach advocated by Sir John Laws. As such, while representative governance is a necessary component of the principle of democracy, the particular form of representation may differ depending on the historical, social, cultural and legal context in any given country.

In Canada, the specific requirements imposed by the principle of democracy have also evolved over time, such that the demands of effective democratic governance are much greater today than ever before. Admittedly, the requirements imposed by governance of millions of people in a technologically advanced era where the state has intervened in vast areas of modern life suggest that citizen participation must be less direct. At the same time, expectations of accountability and participation, catalyzed in part by expansion of the franchise to include all adult citizens, have increased, suggesting that governments must do more to ensure that citizens feel meaningfully included in the process of governance. In this way, the requirements imposed by the principle of
democracy may shift over time to accommodate the changing demands imposed by social, economic, technological or political change.

Where courts intervene to protect the democratic process, they must do so in a manner that reflects and respects the legitimacy of democratic governance itself. In other words, courts should not invalidate legislation if it may be interpreted to comply with constitutional requirements. Certainly, the Robert decision discussed at the outset of chapter seven is evidence that there is much to be said for Allan’s view that Court’s may achieve much of the necessary balancing of fundamental principles through the process of statutory interpretation.

At the same time, where legislation clearly violates constitutional requirements, courts must honour their role as guardians of the basic principles of the Constitution and strike down the offending provisions. Admittedly, Canadian courts have not been quick to use their power to invalidate legislation that violates basic principles of the democratic process, nonetheless this power is inherent in the role of judges as guardians of the Constitution. As such, I would agree with both Craig and Law that the paucity of incidents of invalidation is unrelated to the legitimacy of the role of courts in defending the fundamental elements of the democratic process.

Finally, it should be noted that, despite the fact that many basic principles that are to be protected by the courts are rooted in liberal principles, it is not the “liberal” pedigree of the principles that determines their fundamental status. Rather, as will be discussed below, the fundamental nature of these principles is rooted in their role in protecting the democratic process itself. Here, I tend to agree more readily with David Dyzenhaus’s democratic conception of the role of fundamental principles than with
Trevor Allan. At the same time, where Dyzenhaus undervalues the importance of the separation of powers, I would argue with Allan that the separation of powers, and particularly the independence of the judiciary that is reflected in that separation of powers, is a potent justification for judges having the final word in the adjudication of fundamental values, particularly in cases where governments attempt to undermine the democratic process itself.  

While the British scholars discussed above thus provide further justification for the limitation of parliamentary sovereignty where fundamental elements of the democratic process are threatened, they do not directly address the concerns raised by critics in Canada concerning the application of unwritten constitutional principle. The reader will recall that there were two main concerns raised by critics: first, the fact that the application of unwritten constitutional principles would allow judges to create constitutional provisions, rather than simply interpret them, and thereby usurp the legislature’s proper role; and, second, the fact that the application of unwritten principles would allow judges to impose their own value preferences when interpreting the Constitution.

I suggested, in chapter three, that these critiques were based in a positivist conception of constitutional interpretation. In my view, David Dyzenhaus’s discussion of law as a “culture of justification” provides a workable framework for addressing these positivist critiques.

2) **David Dyzenhaus and the Culture of Justification**

David Dyzenhaus is one of a growing number of international scholars who reject the positivist approach to judicial review and who are searching for a justification for

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30 I will discuss these themes in more detail in the next section.
judicial review that finds its core in the internal morality of the law and that reconciles the conflict between liberal values that posit limits on governmental authority and democratic values that promote majoritarian preferences. Dyzenhaus has suggested that this conflict can only be reconciled by reuniting both political theory, which emphasizes democratic majoritarianism, and legal theory, which emphasizes liberal values. In his view, such a reconciliation may be achieved by a “position which holds that [judicial] review is legitimate when it answers to fundamental values, the fundamental status of which comes about because of their role in securing democracy.”

Dyzenhaus suggests that there are two major competing visions of legal culture: law as a culture of reflection and law as a culture of neutrality. Democratic positivists embrace law as a “culture of reflection”. The culture of reflection, as developed through Jeremy Bentham’s work, conceives of legislation as the accurate reflection of majoritarian preferences in a democracy. Legislation reflects the outcome of public rational reason, while the common law reflects the subjective views of judges. As such, judicial decisions, and particularly the application of the common law are to be viewed skeptically.

By contrast, liberal anti-positivists, Dyzenhaus suggests, embrace law as a culture of neutrality. He argues that “[l]aw as the culture of neutrality is the liberal attempt to preserve a realm of principles safe from democracy. It is a culture of neutrality because the main criterion for illegitimate state action is that the state has acted non-neutrally in

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infringing the individual’s right to decide for himself how to live.”33 Law is viewed, at its essence, as protecting principles that protect core individual rights against legislative encroachment. This approach to law, in contrast to the legislative basis of the culture of reflection, is primarily based on a model of adjudication whereby judges determine whether legislation improperly infringes against the protected principles.34

Dyzenhaus posits a third vision of legal culture, the culture of justification. Dyzenhaus’s vision, based in part on the work of Jurgen Habermas and Etienne Muernik, is, in some ways, a hybrid of the democratic positivist and liberal anti-positivist approaches. It is based on a particular conception of democracy, one that views justification as the heart of the democratic process, whereby legislators must justify their policies to co-legislators in Parliament, to the public during elections and to the judiciary in court. In Dyzenhaus’s view, the basic principle of democracy “is that all decisions backed by the public force that goes with invoking the authority of ‘the people’ are legitimate only if they can be shown to be justifiable.”35 Dyzenhaus thus rejects the positivist claim that legislation is legitimate simply because it is enacted by the people’s representatives. Rather, he argues that there must be a process of justification.

The role of the courts is to ensure that the legislature meets and upholds the requirements of justification. Dyzenhaus thus agrees with liberal antipositivists that courts must preserve fundamental values, but he rejects the view that those principles are necessarily liberal values of individual rights and freedoms necessary to preserve a private sphere of liberty for individuals. Rather, Dyzenhaus argues that the fundamental

33 Ibid.
34 Ibid. at 33-34.
35 Ibid. at 35.
principles are developed primarily through a legislative process and include those that protect the process of justification.

Dyzenhaus suggests that the principled justification of the application of fundamental values and of the court’s important role in applying those principles leads to a different view of the relationship between courts and Parliament such that, “… the courts, the legislature, and the executive are not best viewed as engaged in a struggle with each other for sovereign power, but as engaged in a collaborative enterprise whose common aim is to live up to and develop the fundamental values of legal order.” This view is in direct opposition to the view of democratic positivists who rely on the separation thesis which insists on a strict separation of powers between legislature, executive and judiciary. It also differs from the view of liberal antipositivists who view judges as the supreme interpreters of the law.

Dyzenhaus explores how this applies in the Canadian context in his article, “Constituting the Rule of Law: Fundamental Values in Administrative Law.” In this article, Dyzenhaus discusses the decision of the Supreme Court of Canada in Baker v. Canada. Dyzenhaus argues that the Supreme Court’s decision in Baker reflects a transition from a formalist conception of the separation of powers and constitutionalism to a democratic conception. The formalist conception privileges the role of the courts to

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36 Dyzenhaus, “Reuniting the Brain”, supra note 31 at 107.
38 Baker v. Canada, [1996] 3 S.C.R. 854. Interestingly, Baker was not decided on constitutional grounds. The specific issue in the case was what legal effect the Convention on the Rights of the Child, which had been ratified by the federal government but was not incorporated into law, could have on the determination of whether an individual ordered deported should be granted an exemption on “humanitarian and compassionate grounds. In her majority reasons, Justice L’Heureux-Dubé found that unincorporated human rights conventions may be used as evidence in determining whether an exercise of discretion has met a particular standard of review. She also identified a general common law duty for administrative officials to provide reasons for their decisions and imposed a sliding scale of review of the discretionary decisions made by administrative officials.
interpret the law and thus restricts the ability of tribunals to interpret the law by imposing a correctness standard of review on any interpretations of law made by tribunals. By contrast, the democratic conception does not reserve a monopoly of legal interpretation onto judges. Rather it provides that legislatures, courts, and even the public, have a role in determining the fundamental values of Canadian society. These fundamental values “condition the exercise of political power” in a rule-of-law state such as Canada.\textsuperscript{39}

Dyzenhaus argues that the shift from a formal conception of constitutionalism and the division of powers to a democratic conception is presupposed by the Supreme Court of Canada’s recent renewed interest in fundamental unwritten constitutional principles. He notes that some may view the recognition and application of unwritten constitutional principles with trepidation and equate it with an expansion of judicial supremacy and indeed a sort of judicial imperialism whereby judges attempt to extend their power beyond the strict confines of the \textit{Charter} to those areas of the legal order not directly affected by it.\textsuperscript{40}

However, Dyzenhaus argues that the Supreme Court’s decision in \textit{Baker} indicates that the Court recognizes that it does not have an interpretive monopoly, but rather that tribunals also have a role to play in recognizing the fundamental values of Canadian society. He argues that those fundamental values are reflected in the \textit{Charter}, but pre-existed their entrenchment in the \textit{Charter} itself.

… Rather, the \textit{Charter} is understood as a document that makes more explicit the fundamental values that were already part of the common law Constitution – the legal order was subject to the reign of these values prior to the enactment of the \textit{Charter}. Moreover, the \textit{Charter} is best understood not only as an extension of the substantive values of the common law Constitution, but as continuing, through sections 1 and 33, the methodology of the common law Constitution, a

\textsuperscript{39} Dyzenhaus, “Constituting the Rule of Law”, \textit{supra} note 37 at 450-51.
\textsuperscript{40} \textit{Ibid.} at 487-88.
methodology which does not entail the judicial monopoly on interpretation of the law.\(^1\)

Later, Dyzenhaus describes this democratic conception of constitutionalism as follows:

> It regards the *Charter* along with the common law and international human rights instruments as sources of what L’Heureux-Dubé J. referred to as the “fundamental values” of Canadian society. The *Charter* is not an intrusion into the Canadian legal order. Rather, it is a much more explicit and novel statement of fundamental values, so it represents continuity rather than radical change. It is also significant in that the fundamental values infuse the legal order, so an exercise of official discretion that affects interests which fall within the scope of those values must be exercised reasonably – in a manner which can be adequately defended as an application of the relevant values.”\(^2\)

Dyzenhaus recognizes that there are valid concerns about judges exercising too much power through their ability to limit the exercise of public power through rule of law principles. He states: “Any attempt to elaborate this idea has to take into account that it has been used to thwart the administrative state in ways that have justified charging judges with being either mainly concerned with preserving their sense of place in the legal order or with being determined to obstruct progressive social change.”\(^3\) However, Dyzenhaus argues that this power is tempered by the common law requirement that judges and administrators must provide reasons for their decisions. Thus, he states: “… the distance between the democratic vision and either judicial imperialism or judicial supremacism, or a combination of the two, is established by the practice of reason-giving – of justification in terms of the application of the values to the particular problem – and by a focus of the reviewing court on reasons for the decision, rather than on the decision itself.”\(^4\)

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\(^1\) *Ibid.* at 488-89.
\(^2\) *Ibid.* at 491
\(^3\) *Ibid.* at 499.
Dyzenhaus rejects the notion that the application of fundamental principles leads to an undermining of the legitimacy of judicial review. Rather, he notes that the legitimacy of the judicial interpretation of the law is rooted in the requirement that judges justify their decisions through reasons.

In the democratic vision, the open texturedness of law does not present a problem – a kind of legitimacy crisis for judges... Ultimately, judges might have the final say as to the best interpretation of the law. But if that is the case, the authority of their decisions is not constituted by the fact that they spoke, nor by their unique access to the law. Rather, it is because they have entered into the justificatory exercise of reason-giving that the democratic vision regards as an essential component of the rule of law.45

Dyzenhaus’s discussion of the “justificatory process of reason-giving” is an interesting complement to current dialogue theories of judicial review in Canada.46 Dialogue theorists seek to justify judicial review by arguing that a judicial declaration that a statute is invalid is but one stage in an ongoing dialogue between courts and legislatures concerning fundamental rights. Faced with a declaration of invalidity, a legislature may choose from several options, including simply accepting the Court’s decision or adopting a revised version of the statute that either avoids the rights violation identified by the courts or provides a more focused and constitutionally justifiable response to the issue identified by the legislature. A legislature could also decide to invoke section 33 in order to override the operation of the Charter right at issue for a period of five years. Such a dialogue would be virtually impossible if courts were not required to provide coherent reasons for their decisions to invalidate statutes.

The quality of the dialogue is also affected by the coherence of the response from legislators. Traditionally, the justificatory process of reason-giving emphasized by Dyzenhaus has been a requirement of judicial decision-making, but not of legislative decision-making. While it is true that legislators have always had to justify their broad policies in order to gain re-election, there was no formal requirement that any particular piece of legislation was rationally conceived and implemented. That changed dramatically with the implementation of the Charter and the subjection of legislation to a regular course of rights-based screening both by the courts and by the government itself. In particular, the requirement that legislation that infringes rights and freedoms protected by the Charter be justified under section 1 of the Charter, using the Oakes guidelines concerning the types of limitations that may be considered “reasonable in a free and democratic society”, has resulted in governments spending a great deal more time, effort and money preparing justificatory reasons for their legislative decisions both before and after enacting legislation. It is the reasons provided by judges when interpreting the Constitution that often serve as the starting point for the legislature and executive’s own justifications for their proposed limitations on rights or for their own interpretations of particular rights and freedoms.

In summary, Dyzenhaus presents a perspective of the interaction between courts, legislatures and executive where all branches of government play a legitimate role in the identification of fundamental principles. These fundamental principles are primarily identified through the legislative process, in recognition of the fact that the legislature is the primary conduit of majoritarian preferences. For this reason, it is the best barometer of what is fundamental to the members of society. At the same time, the judiciary is not

relegated to a minor role. Rather, it is recognized as an important partner in the identification of fundamental principles. The legitimacy of the role played by the judiciary is rooted in the justificatory process of reason-giving that is the foundation of the judicial process. This judicial role did not begin with the enactment of the Charter, rather the Charter merely formalized the courts’ pre-existing role in identifying fundamental principles, together with the legislature.

3) Implications and Concerns Raised by Dyzenhaus’s approach

Admittedly, much of Dyzenhaus’s article on the application of unwritten constitutional principles in Canada focuses on the principle of the rule of law and is based in the administrative law realm and not the realm of constitutional law. However, Dyzenhaus asserts that the “democratic vision is a vision of constitutionalism – a vision of how in a rule-of-law state fundamental legal values condition the exercise of power.”48 Dyzenhaus uses the term “rule of law” in its broadest sense as “the rule of fundamental values which documents like the Charter articulate without exhausting – the idea that there is a substantive common law Constitution…”49 This common law Constitution is a source of protection against government: “the common law Constitution provides protection even when there is no explicit or positive source for such protection, at the same time as our understanding of its content is influenced by positive sources, most notably the Charter.”50

Thus, while Dyzenhaus’s approach is rooted in administrative law principles it is directly relevant to the issue of constitutional interpretation, particularly where issues of the legitimacy of judicial review are concerned. Nonetheless, certain factors must be

49 Ibid. at 498.
50 Ibid. at 503.
taken into consideration when adapting Dyzenhaus’s approach to justify the invalidation of legislation. When dealing with administrative decisions, fundamental principles act as guidelines of a sort that ensure that the fundamental values are taken into account in the decision-making process. Because their impact is not determinative, there is less concern over the application of these principles in the administrative process. However, the potential impact on legislation is much greater and requires that more care be taken.

Dyzenhaus’s contention that the fundamental nature of fundamental principles is their role in securing democracy provides guidance as to when these principles should be allowed to limit legislation. If their importance is derived from their role in securing democracy, then certainly their potency should be linked to that role as well. For this reason, I have suggested that these fundamental principles should only be used as limits on legislation where fundamental aspects of the democratic process are at risk. Thus, for instance, the principle of democracy would only limit legislation that imposed substantial restrictions on access to government information that was necessary to ensure that citizens could meaningfully participate in the political process. Such restrictions would have to substantially impede the ability of citizens to participate in the policy-making process or their ability to hold the government accountable.

This raises a potential conflict with Dyzenhaus’s approach to fundamental principles. While Dyzenhaus argues that judges must protect those rights that are necessary to sustain the process of deliberation, he raises several concerns about the application of such values as limits on legislation. These concerns relate to: (a) the operation of limitation provisions when rights are constitutionally entrenched; (b) the

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51 These types of principles, such as freedom of expression, which regulate the participation of citizens in the democratic process may be distinguished from rules relating to institutional structure, such as the separation of powers, which regulate the relationships of political institutions to each other. (Ibid. at 486)
operation of constitutional overrides; and (c) the existence of textual support for the invalidation of legislation.

Dyzenhaus acknowledges that it may be desirable to entrench those values/rights that sustain the process of deliberation.\textsuperscript{52} However, he argues that the content of those rights is not to be determined absolutely at one particular point in time, but rather must be developed over time through legislation and judicial precedent.\textsuperscript{53} Those rights should also continue to be subject to the justificatory process.\textsuperscript{54} Thus, Dyzenhaus suggests that those rights should not be insulated from legislative influence. He reiterated this concern in “Law as Justification” stating:

A proponent of law as the culture of justification may well argue, as Etienne did, for constitutionalising certain fundamental values, including the principles of judicial review. But the Constitution which the proponent will favour will be the democratic model. A Constitution on either model, liberal or democratic, increases the reach of legality by subjecting the decisions of the supreme lawmaking body to review. But only the democratic model makes even the most fundamental criteria of legality themselves the proper subject of the process of justification.\textsuperscript{55}

Dyzenhaus’s understanding of the democratic model of constitutionalism is the key to understanding his concerns regarding the content of fundamental principles. Dyzenhaus contrasts the democratic model of constitutionalism with the liberal model. According to Dyzenhaus, the liberal model views rights as absolute and the courts as the supreme interpreters of the Constitution. By contrast, the democratic model, as demonstrated by the \textit{Canadian Charter of Rights and Freedoms}, includes limitation provisions which allow legislatures to justify the limitation of rights within a free and democratic society. In the democratic model of constitutionalism, legislatures continue

\textsuperscript{53} \textit{Ibid.} at 163-64.
\textsuperscript{54} \textit{Ibid.} at 176.
\textsuperscript{55} Dyzenhaus, “Law as Justification”, \textit{supra} note 32 at 36.
to play an important role in the definition of the substance of fundamental values because they are able to present arguments - justifications - for limitations of those fundamental values. Thus, they are an integral part of the process of defining the scope of fundamental values through a process of justificatory reason-giving.

Not surprisingly, one of the concerns raised by positivist critics of the application of unwritten constitutional principles is that the application of unwritten principles is not subject to section 1 analysis and thus not subject to a formal justification provision.\(^{56}\) In other words, there is no formal mechanism for legislatures to provide a justification for legislative restrictions of unwritten constitutional principles. In my view, this concern should be alleviated by the realization that the Charter, including section 1, is a more explicit expression of previously existing fundamental values. Indeed, the section 1 analysis is a formalization of a proportionality-based review of fundamental rights contained not just in European rights documents, but long considered a part of common law rights jurisprudence.\(^{57}\) For this reason, it is not surprising that the judges who advanced the so-called Implied Bill of Rights approach to constitutional interpretation would admit that the freedom of political discussion could be regulated by Parliament to an extent. This acknowledgement was consistent with the general approach to fundamental common law rights. It is also reasonable to expect that the application of unwritten constitutional principles will be subject to a “balancing” exercise akin to a proportionality analysis.\(^{58}\) Indeed, the Supreme Court has emphasized the fact that the

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58 Jean Leclair, “Canada’s Unfathomable Unwritten Constitutional Principles” supra note 56.
application of any one unwritten constitutional principles must be balanced against both the written provisions of the constitutional text and the operation of other relevant constitutional principles. As discussed in chapter seven, the application of the principle of democracy to protect the right of access to government information will have to be balanced against other principles such as the principle of parliamentary supremacy and national security.

This leads to a second concern raised by some critics of the application of unwritten principles, namely that the application of unwritten principles is not subject to s. 33. These critics argue that the application of unwritten principles may effectively amend the Constitution, resulting in the principles thereby becoming immune to modification by the legislature except through formal constitutional amendment. This particular concern is not necessarily addressed by Dyzenhaus’s approach, since he suggests that the operation of section 33 reinforces the democratic conception of judicial review by ensuring that judges do not always have the last word in the best interpretation of the law.

Further, the democratic vision does not require that judges have such a final say. It can be given to the legislature, as section 33 of the Charter does, or to some specialized tribunal, such as an administrative appeals tribunal over which the superior courts have minimal or no jurisdiction. What matters most for the democratic vision is that the reason-giving practices of law are given institutional expression rather than any particular model.

However, Dyzenhaus does not insist that a legislative override is necessary in order to justify judges determining whether legislation complies with fundamental values.


60 Dyzenhaus, “Constituting the Rule of Law”, supra note 37 at 501-02.
Indeed, Dyzenhaus acknowledges that judges may legitimately have the last say because they engage in the justificatory process of reason-giving. In my view, an additional reason that judges may have the last word when protecting fundamental elements of the democratic process is that, compared to government, judges have no vested interest in limiting democratic freedoms. I will return to this point in section 3 below.

In any case, I maintain that the application of such principles to invalidate legislation should be limited to extra-ordinary circumstances. I have argued that the application of unwritten principles to limit legislation may be justified when where legislation imposes substantial impediments to fundamental aspects of the democratic process. Indeed, it would seem counter-intuitive if those most fundamental values, necessary to maintain the democratic order, could be revoked arbitrarily. I say arbitrarily, because if the revocation of these rights could be justified as a necessary measure to protect democracy, during a time of war or extreme crisis for example, then there is arguably no violation of the principle in the first instance.

In addition, I would re-emphasize that fundamental status would only be accorded to those principles required to maintain the democratic process - characterized by Dyzenhaus as the process of justification. For example, the Court has found that the protection of section 2(b) of the Charter extends to artistic expression as well as political expression. Arguably, the principle of political speech, which is at the core of section 2(b) and indispensable to the democratic process in most circumstances, may be protected against override by section 33 as a fundamental constitutional principle. By contrast, artistic expression, which is also protected by s. 2(b), would not be subject to
such protection from override because it is not indispensible to the democratic process and thus should not be accorded fundamental status.

The final concern relating to the adaptation of the culture of justification approach is the issue of whether a textual foundation for invalidating legislation is required. Dyzenhaus suggests that such a textual basis may be necessary to justify invalidation. In a discussion concerning privative clauses, he writes:

… Whether judges are entitled to react to a substantive privative clause by voiding it will depend largely on their understanding of their written constitution, if their legal order has one.

It might seem that I have just conceded that the question whether judges are entitled to enforce fundamental values of legality depends on whether there is a written Constitution which permits them to do so, a concession which then undermines the claim that there are such values inherent in legal order. However, I have only conceded that there is such a question when the legislature very explicitly announces its intention to exclude such a value.61

Dyzenhaus goes on to argue that legislators may be constrained from infringing fundamental values even if judges cannot enforce the constraint. “I would argue further that this constraint is constitutional, even though it might be the case that in the absence of a written constitutional protection of the judges’ review authority over such matters, the judges cannot enforce the constraint in the face of a clear legislative statement.”62

Dyzenhaus suggests the court’s identification of the unconstitutional action of the legislature may carry enough weight to curb the legislature’s activity despite the fact that the court cannot invalidate the legislation at issue.63

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63 Dyzenhaus, “Disobeying Parliament” ibid. at 517: “If the judge has no explicit constitutional basis for invalidating the provision, she can still point out its illegality in her judgment, in effect doing what Article 4 of the Human Rights Act requires judges to do in issuing a declaration of incompatibility. One should not underestimate the political clout that attaches even to such an informal declaration.”
This presents an interesting possibility in the case that invalidation of legislation that restricts the right to access government information is not accepted as a legitimate application of the principle of democracy. In this situation, it may remain within the Court’s purview to declare the offending legislation unconstitutional without invalidating it. In such a case, the declaration of unconstitutionality would serve as a marker noting the violation of the constitutional principle of democracy. This marker may then be taken into account by citizens in the electoral process.

In my view, it is not necessary to address this issue directly in the Canadian context because s. 52 of the Constitution Act, 1982 specifically authorizes the invalidation of legislation that violates the Constitution.\textsuperscript{64} In other words, s. 52 specifically recognizes the courts as the guardians of the Constitution and recognizes their power to invalidate legislation that contravenes it. Section 52 applies both to those provisions that fall under the ambit of the s. 33 override and those that do not. As such, the Constitution has explicitly determined that, in some instances, the judiciary is to be given the last word in the enforcement of fundamental, constitutional principles. Thus, while I agree with Dyzenhaus that judges and legislatures must work together to define the content of these fundamental principles, I would argue that, in Canada, the fact that judges will have the last word in enforcing these principles has been conclusively determined by the text of the Constitution.

4) **Jeffrey Goldsworthy and the Defence of Parliamentary Sovereignty**

Finally, it is necessary to consider the critiques of the defenders of parliamentary sovereignty when determining the feasibility of the approach I am suggesting. The most

\textsuperscript{64} Section 52(1) states:
The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.
ardent defence of the traditional conception of parliamentary sovereignty has been mounted by Jeffrey Goldsworthy. In his book, *The Sovereignty of Parliament: History and Philosophy*, Goldsworthy argues that the principle of parliamentary sovereignty has deep historical roots and that it should be legitimately recognized as the foundational principle of constitutional law in common law jurisdictions, particularly Great Britain, New Zealand and Australia.

Goldsworthy bases much of his theoretical argument on the notion advanced by H.L.A. Hart that certain principles must be recognized as “rules of recognition”. Rules of recognition are the rules that establish the criteria by which all other rules are assessed as valid laws. Rather than being based on theoretical or principled arguments, rules of recognition are a matter of political fact, determined according to a general consensus among decision-making elites in a country, namely the senior officials of all three branches of government. Thus, according to Goldsworthy, parliamentary sovereignty is the rule of recognition, or fundamental principle, in Britain because there is a consensus among top-level legislators and judges that it is.

Goldsworthy admits that, in hard cases, where relevant legal rules cannot provide a clear answer, “judges look ‘behind’ the rules to the principles that underlie and justify them.” However, he contends that this does not mean either that these principles are legal principles, or that judges may then rely on these underlying principles in easy cases, where the principle of parliamentary sovereignty is neither ambiguous or uncertain.

66 Ibid. at 237.
67 Ibid. at 236-38.
68 Ibid. at 247.
69 Ibid. at 259.
Goldsworthy argues that a distinction must be made between legal validity and moral authority. Thus, he suggests that judges may be morally entitled to disobey particularly unjust laws passed by Parliament, but this does not mean the unjust laws are legally invalid. Goldsworthy suggests that it would be dangerous to make such moral determinations legal because it would lead to a type of jurisdictional creep, whereby judges’ decisions would slowly, cumulatively restrict the freedom of Parliament to Act.

...Occasional injustice is a price that must be paid for democracy – as indeed for any decision-making procedure, since none can be guaranteed never to produce unjust laws. It is possible to imagine ‘hard cases’, involving statutes so outrageously unjust that morally they ought not to be obeyed, even by judges. But it does not follow that the doctrine of parliamentary sovereignty ought to be abandoned, and the judges authorized to invalidate outrageously unjust statutes. They might interpret that authority too broadly, and invalidate statutes that are not outrageously unjust. According to Goldsworthy, the benefit of maintaining the principle of parliamentary sovereignty in the face of potentially unjust laws is threefold. First, the system generally works, producing for the most-part, just laws. Indeed, while Goldsworthy agrees that representative democracy requires such protections as freedom of political speech, he notes that the history of England, Australia and Canada, prior to 1982, suggest that it does not necessarily require judicial enforcement of such freedoms. Second, the principle of parliamentary sovereignty is widely accepted by the decision-making elite of Great Britain. Thus, the principle corresponds with the practice of the three branches of government. Finally, allowing hard cases to be decided by Parliament

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70 Ibid. at 254, 264.
71 Ibid. at 269.
72 Ibid. at 278.
means that the electorate rather than unelected judges determine the fundamental questions, which is the purpose, in his view, of having a democracy.73

In my view, Goldsworthy’s argument does not undermine the justification for the application of the unwritten constitutional principle of democracy that I am proposing. First, the application of unwritten constitutional principles in situations where the actions of Parliament undermine fundamental aspects of the democratic process is not an issue of just or unjust laws, but rather a question of whether Parliament should be allowed to undermine the very source of its own legitimacy. If Parliament is allowed to undermine the democratic process, the very purpose of having a democracy is itself undermined.

This point may be further explained with reference to Goldsworthy’s theory. Goldsworthy acknowledges that rules of recognition must be accepted for a reason, at least by the members of society who are able to enforce compliance with them.74 Goldsworthy states: “To accept that such a law is binding is to have what Hart called the ‘internal point of view’ towards the law: it is to believe that there are good reasons for insisting that it be obeyed, and for criticizing those who fail to obey it.”75 The internal point of view towards the notion of parliamentary sovereignty is rooted in the fact that Parliament is the conduit for the expression of majoritarian preferences. However, if Parliament acts so as to inhibit its role as the conduit of majoritarian preferences it destroys this internal perspective.

Goldsworthy suggests that this argument, which is also raised by Trevor Allan, is not a valid challenge in Britain because it does not take into account the actual practice of British legal officials, namely their acceptance, over the course of centuries, of the

73 Ibid. at 263, 269.
74 Ibid. at 237.
75 Ibid. at 237.
According to Goldsworthy, the only perspective that counts is the perspective of those making the decisions. So long as these decision-makers adhere to the rule of recognition, then they must be assumed to recognize it as legitimate from an internal perspective.

Goldsworthy’s argument does not account for the possibility, raised by some British judges and scholars, such as Law and Craig, that the perspective of judges in Great Britain is in fact evolving so as to accept greater limitations on the principle of parliamentary sovereignty. More importantly, the internal perspective is fundamentally different in Canada than in Great Britain. Not only has parliamentary sovereignty been explicitly attenuated by an entrenched Charter of Rights and Freedoms for a quarter of a century, but the Supreme Court of Canada has been applying unwritten constitutional principles in the course of constitutional interpretation for more than fifty years. In addition, the Court has expressly stated that these unwritten constitutional principles may be used to limit government action. Judgments that have imposed normative obligations on governments based on the application of these principles have met with academic criticism and some judicial resistance, but no outright revolt. Thus, even if the Court has yet to explicitly overturn legislation using unwritten constitutional principles, the likelihood that such an action would be completely rejected by members of the legislature and executive is much diminished in Canada compared to the Great Britain described by Goldsworthy.\footnote{Ibid. at 248.}

It is important to note that Goldsworthy admits that rules of recognition may change in a society, if the change is accepted by the necessary members of the decision-makers.\footnote{The decision in Robert c. Québec (Conseil de la magistrature), supra note 20, resulted in the reading down of legislation as opposed to the complete invalidation of the impugned Act.}
making elite. Indeed, such a change may be initiated by one level of the elite, the judiciary for example, if the other members of the elite accept the change. The danger is that a change initiated by one level may be rejected by another, leading to a constitutional crisis. In Canada, the application of unwritten constitutional principles has not resulted in a constitutional crisis to date. In my view, if the rule of recognition in Canada has not always included the power of the courts to apply such principles it must certainly be recognized as including it now.

Finally, Goldsworthy argues that it is wrong to assume that judges are the only rational decision-makers. He argues that legislative decisions are also rationally based.

Both statute law and common law are therefore ‘instituted reason’. Both result from the reasoning of their makers, and both are binding on other officials (including judges) even if they disagree with that reasoning… There is no logical or practical necessity that the instituted reason of judges must be legally superior to the instituted reason of legislators. It is therefore question-begging to equate, as Detmold does, ‘reason’ with ‘the common law’ and ‘judicial power’. Whose ‘instituted reason’ is supreme within a legal system is determined by agreement among all those whose acceptance of its authority is essential to maintaining it.78

Goldsworthy is not wrong to suggest that legislators, like judges, must support their decisions with articulated reasons, particularly where they seek to defend such legislation in the course of electoral contests. The reality of majoritarian politics is such, however, that the reasons offered need not be so much rational as merely convincing to a majority of voters. For instance, arguments that play to prejudices or fears shared by a majority of voters, but that cannot be supported by fact or logical argument, may carry the day in an election. Of course, in Canada, the requirement that legislative decisions be supported by rational justifications has been enhance through the entrenchment of the Charter and the subjection of impugned legislation to section 1 style proportionality analysis.

78 Ibid. at 275.
Perhaps, then, it is necessary to admit that the fact that judges must engage in a process of justificatory-reason giving legitimizes their participation in the process of recognizing and applying fundamental principles, but it does not necessarily justify judges having the last say on what those fundamental principles include. Both judges and legislators engage in rational decision-making, although the standards applied to judges are arguably more stringent. Ultimately, the benefit of allowing judges to make the ultimate determination of whether legislative action has threatened fundamental aspects of the democratic process lies in the fact that, judges, unlike governments, are not likely to directly benefit from manipulations of the democratic process. Moreover, in Canada, the Constitution explicitly recognizes that judges may be the final arbiters of whether legislation violates the Constitution.

Judges act as neutral arbitrators of the dispute between governments and those they govern. Even in cases concerning judicial remuneration, where it has been argued that judges have misapplied the principle of judicial independence to gain financial advantage, it is not possible to argue that the application of unwritten principles has resulted in the restriction of individual rights in any significant manner. Thus, while Goldsworthy argues that the potential for judges to use such principles to slowly expand their power should be feared, it is the possibility of governments slowly expanding their power in the absence of such principles that is the greater fear. Trevor Allan describes the motivation for legislative incursions on fundamental elements of the democratic process, stating: “Fundamental rights of speech, conscience and association are always under threat because they facilitate opposition to the present majority, or to those who exercise power in the name of the majority; and courts cannot safely assume that
legislative restrictions will always reflect a defensible view of the needs of the common good."

In the end, it is not expansions in the jurisdiction of judges that lead to tyranny, but rather the unchecked exercise of governmental power. Nowhere is this easier to perceive than where issues of access to government information are raised. Far too often, limitations on access, whether resulting from legislative restrictions or the exercise of administrative discretion, have been demonstrated to be motivated by the best interests of the government officials resisting disclosure as opposed to the best interests of the public they are meant to serve.

5) Conclusion

The challenge of this chapter is to articulate a coherent theoretical justification for the application of the principle of democracy as a limit on legislation restricting access to government information that meets the concerns raised by positivist critics of the application of unwritten constitutional principles. The British scholars discussed at the outset of this chapter support the argument that the judiciary may impose limits on the power of the legislature to create restrictions that undermine the very source of the legislature’s legitimacy. In this way, these scholars argue that courts play an important and legitimate role in protecting certain values and processes that are fundamental to our democratic societies. However, these British scholars do not address all of the concerns raised in the Canadian constitutional context.

In my view, David Dyzenhaus’s notion of a culture of justification supplements the work of these British scholars because it provides a framework for a justification of this role of judges that addresses the concerns raised by critics in the Canadian constitutional context.

79 Trevor Allan, Constitutional Justice, supra note 21 at 232-33.
Dyzenhaus argues that the judiciary works together with the legislature, in partnership, in order to develop and apply the fundamental values of society. These values are recognized as fundamental because of their role in preserving democracy. The legitimacy of the judicial role in this partnership is rooted in the requirement that judges justify their decisions by providing reasons for them. Arguably, judges are constrained as much by the requirement that they must follow precedent and provide reasons for their judgments as they are by the actual constitutional text. From this perspective, judges who develop and apply unwritten constitutional principles in a case-by-case common law method are fulfilling a legitimate and important role in the legal order and should not be regarded as usurpers of the legislature.

My approach, when viewed through the framework, or perspective, proposed by Dyzenhaus, meets the four criteria for evaluating theories of judicial review set out in chapter three. It respects the primary role of democratically elected representatives of the public while establishing that the judiciary also has an important role to play in the identification and enforcement of fundamental values. The approach respects the role of legislatures because it limits the application of unwritten principles as limits on legislation to exceptional circumstances where substantial impediments are imposed on fundamental aspects of the democratic process.

The important role accorded to judges as partners with the legislature in identifying fundamental principles is justified by the justificatory process of reason-giving that is the foundation of the judicial process. This process of reason-giving serves as a fetter on judges, disciplining their identification and application of unwritten principles and ensuring that judges cannot arbitrarily impose their personal value
preferences in the course of constitutional interpretation. In this way, the framework established by the Supreme Court of Canada to guide the recognition of unwritten constitutional principles disciplines the judicial identification of such principles, requiring that judges account for factors that recognize the importance of legislative choices through inquiries concerning how the proposed principle fits with the historical development of our legal framework and whether the proposed principle accords with the existing structure and text of the Constitution.

Where positivists fear that the application of unwritten constitutional principles will result in judges performing tasks that are not suited to their institutional capacity, this approach suggests that the process of reasoning inherent in judicial decision-making is precisely suited to the task of identifying the values that society regards as fundamental. The justificatory process of reason-giving ensures a rational dialogue is possible between courts and legislatures. This dialogue facilitates the process of identifying fundamental values. Finally, I would argue that the process through which courts and legislatures identify fundamental principles serves to strengthen, not weaken, public participation in the political process by engaging a rational debate concerning the health of democratic institutions.

Additional concerns regarding the interaction between unwritten constitutional principles and explicit protections contained in the Charter may also be addressed by my approach. Although not explicitly subject to section 1 of the Charter, it is reasonable to expect that the application of any particular unwritten constitutional principle will be subject to a proportionality-type, balancing analysis where the potential justifications for limitations on the fundamental principle will be weighed. After all, this type of analysis
is inherent in the common law method. Additionally, the fact that these fundamental principles are not subject to the override provision of the Charter is justified given their fundamental nature. While it is true that this means that judicial application of fundamental principles is not as readily disciplined by the reactions of the legislature, comfort may be taken in the fact that judges are, by and large, not the direct beneficiaries of changes to the democratic process. Moreover, the Constitution explicitly recognizes that judges will legitimately have the final say in enforcing the Constitution in some cases. Finally, it must be remembered that the protection of fundamental principles, such as the principle of democracy, will always be protection against arbitrary, not all, infringements of these principles, since justifiable infringement may be permitted pursuant to the balancing analysis required by the Supreme Court’s approach to the application of unwritten constitutional principles.

Ultimately, the legitimacy of legislative decisions is rooted in the fact that legislators are the representatives of the citizens of a democracy and as such are a conduit for majoritarian preferences. Where legislators seek to undermine the very source of their legitimacy by imposing substantial impediments to fundamental elements of the democratic process, the courts must intervene. In my view, the legitimacy of such judicial intervention in Canada –whether in support of explicit constitutional provisions or unwritten constitutional principles - is not only justifiable in principle, but would also be accepted in practice.
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