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### **Article Submissions**

Peter Carver, Professor  
Editor-in-Chief  
Faculty of Law, Room 443  
University of Alberta  
Edmonton, AB T6G 2H5  
[pcarver@ualberta.ca](mailto:pcarver@ualberta.ca)  
Phone: (780) 492-3313

### **Book Review Submissions**

Dwight Newman, Professor  
College of Law  
University of Saskatchewan  
15 Campus Drive  
Saskatoon, SK S7N 5A6  
[dwight.newman@usask.ca](mailto:dwight.newman@usask.ca)  
Phone: (306) 966-4847

# review

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# All I Really Needed to Know About Federalism, I Learned from Insurance Law

*Barbara Billingsley\**

*Canadian law is commonly learned through the examination of court decisions. This “case study” technique is intended to demonstrate not only the prevailing principles of law but also how these principles have developed over time. Taking this approach a step further, this paper demonstrates that the governing principles of Canadian constitutional law pertaining to federalism (i.e. the division of powers) can be discovered by studying Canadian court decisions on a discreet topic: namely, insurance law. While reviewing the fundamental principles of federalism analysis, this paper illustrates the important role that insurance has and continues to play as a focal point for developing constitutional law principles; reminds readers that matters of public law are often decided on the basis of private law disputes; and examines the approach that Canadian courts have taken to federalism issues where the relevant subject matter (i.e. insurance) is not specifically itemized in the written text of the constitution.*

*Le droit canadien s'apprend généralement par l'examen de décisions judiciaires. Cette technique « d'étude de cas » est destinée à démontrer non seulement les principes de droit actuels mais aussi comment ces principes se sont développés au fil du temps. Poussant cette approche un peu plus loin, l'auteur de cet article démontre qu'on peut découvrir les principes directeurs du droit constitutionnel canadien en matière de fédéralisme (c.-à-d. le partage des pouvoirs) en examinant les décisions judiciaires canadiennes portant sur un sujet discret, à savoir le droit des assurances. En examinant les principes fondamentaux de l'analyse du fédéralisme, l'auteur illustre le rôle important des assurances, qu'elles continuent de jouer, comme point central dans l'élaboration de principes de droit constitutionnel; il rappelle aux lecteurs et lectrices que les questions de droit public sont souvent décidées à partir de litiges de droit privé; et il examine l'approche prise par les tribunaux canadiens par rapport aux questions de fédéralisme là où la matière pertinente (c.-à-d. les assurances) n'est pas expressément détaillée dans le texte de la constitution.*

\* Professor, University of Alberta Faculty of Law. I am grateful to Haley Edmonds, who provided exceptional research assistance for this paper while she was a JD student at the University of Alberta Faculty of Law. Haley's work was generously supported by the Roger S. Smith Undergraduate Student Researcher Award, jointly funded by the University of Alberta Faculty of Law and the University of Alberta. I am also grateful to the University of Alberta Faculty of Law, and in particular to the Dean's Special Fund for Research and Personal Development, for supporting my presentation of this paper at the Constitution 150 conference, *The Canadian Confederation: Past, Present & Future*, held at l'Université de Montréal, May 15-18, 2017.

## I. Introduction

In 1988, Robert Fulghum published his bestselling book, *All I Really Needed to Know ... I Learned in Kindergarten*. In this book, Fulghum contends that the cardinal rules for success in life can be gleaned from the fundamental lessons taught in a single, elementary institution: namely, kindergarten. Adopting, and adapting, Fulghum's approach (and his catchy title), the main objective of this paper is to demonstrate how the basic principles of Canadian constitutional law regarding federalism — that is, the fundamental legal doctrines pertaining to the division of legislative powers between the federal and provincial governments — can be gleaned solely from court decisions concerning the provision and regulation of insurance.

Readers may appropriately wonder about the relevance of this objective. One hundred and fifty years after Confederation, the central elements of Canadian law regarding division of powers analysis are well-established. One might therefore ask why it is important to look at these basic principles through the lens of insurance law. My answer to this question is threefold. First, the significant role that insurance law cases have played in developing fundamental constitutional law doctrine merits recognition. Insurance law cases depict the evolution of judicial thinking about the division of powers from Confederation to the present day. Moreover, insurance remains an important subject for federalism analysis today. For example, questions have been raised about the constitutionality of the recently passed federal *Genetic Non-Discrimination Act*, which, among other things, prohibits a party from withdrawing from or refusing to enter into a contract with an individual who refuses to undergo genetic testing or who refuses to release the results of genetic testing.<sup>1</sup> Although not aimed specifically at insurance companies, this prohibition applies to insurance companies. In particular, this legislation has the effect of preventing life and disability insurers from requiring their clients to undergo or to disclose genetic testing as a condition of providing insurance coverage. The federal government has therefore raised the possibility of referring this legislation to the Supreme Court of Canada to determine whether the impact of this federal legislation on the provincial authority over insurance is constitutional.<sup>2</sup>

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1 SC 2017, c 3, ss 3-4.

2 See e.g. Donna Glasgow, "Genetic Non-Discrimination Act Comes into Force", *The Insurance and Investment Journal* (5 May 2017), online: <[insurance-journal.ca/article/genetic-non-discrimination-act-comes-into-force/](http://insurance-journal.ca/article/genetic-non-discrimination-act-comes-into-force/)>; Joan Bryden, "Wilson-Raybould wants Supreme Court advice on genetic non-discrimination bill", *CBC News* (9 March 2017), online: <[www.cbc.ca/news/politics/jod-raybould-genetic-descrimin.-1.4018680](http://www.cbc.ca/news/politics/jod-raybould-genetic-descrimin.-1.4018680)>.

Second, because federalism concerns the legislative competence of provincial and federal governments, it is easy to lapse into thinking that Canadian constitutional law concerns only public law matters. Insurance law cases remind us otherwise. In legal terms, an insurance arrangement is a contract, and therefore is a matter of private law. Nevertheless, insurance is heavily regulated, and sometimes mandated, by governments. Therefore, court decisions about which order of government can provide for, regulate, or otherwise impact insurance contracts prompt us to acknowledge that the line between public law matters and private law matters is not always clear in Canadian constitutional law.<sup>3</sup> Finally, insurance is not expressly itemized as a subject of legislative authority under the *Constitution Act, 1867*.<sup>4</sup> Nevertheless, it was “one of the first industries to attract fundamental regulation.”<sup>5</sup> Accordingly, constitutional law cases concerning legislative competence over insurance matters demonstrate how Canadian courts have developed constitutional law principles in the absence of express constitutional text.

Another question that may be raised in respect of my thesis is what is meant by the “basic principles” of federalism. Over the past 150 years, the courts have produced a plethora of case law regarding federalism analysis, and the principles derived from these cases can be described, categorized, and counted in a number of ways. For the purposes of the present discussion, I have reduced these principles to five key propositions, which I believe collectively provide a reasonably comprehensive overview of how disputes over legislative jurisdiction are resolved under Canadian law. These propositions are:

1. The classes of legislative authority exclusively provided to the federal Parliament and to the provincial legislatures by sections 91 and 92 of the *Constitution Act, 1867*, respectively, are defined by applying the doctrine of mutual modification.
2. Identifying the “pith and substance” of legislation is key to determining its validity under the *Constitution Act, 1867*.

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3 As noted by Peter W Hogg, *Constitutional Law of Canada: Student Edition* (Toronto, Ontario: Thomson Reuters Canada Limited, 2016) at 21-3, “the original distinction between private and public law has tended to break down for constitutional purposes, as governments have increasingly intervened to regulate the economic life of the nation ... Much business activity is no longer governed simply by contract, but by statutory rules and the decisions of government officials ... In other words, the evolution of our laws has now swept much public law into the rubric which was originally designed to exclude public law.”

4 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.

5 Hogg, *supra* note 3 at 21-5.

3. In narrowly defined circumstances, the doctrines of interjurisdictional immunity and paramountcy may apply to limit the application or impact, respectively, of otherwise valid provincial legislation.
4. Courts should employ judicial restraint when assigning remedies for *ultra vires* legislation.
5. A judicial finding that a law is invalid on federalism grounds can be overcome by a constitutional amendment.

Below, I discuss each of these propositions in turn, focusing on the major insurance law cases that have contributed to the development of each principle. Since 1867, Canadian courts have decided 59 insurance cases touching on one or more of these five propositions.<sup>6</sup> Rather than trying to address all of these cases, my comments are intentionally restricted to those cases that I have identified as being particularly significant in establishing, applying or explaining each of the five principles stated above. Considered in the context of these five propositions, the selected cases demonstrate that the fundamentals of Canada's constitutional law regarding federalism are effectively captured in the country's insurance law jurisprudence. Before proceeding with this discussion, however, I offer some general observations about the nature of insurance and insurance law in order to explain more fully why insurance is the ideal subject matter for the development and understanding of basic federalism principles.

## II. Insurance and Federalism

Insurance is a subject that, while fundamentally pertaining to private contracts, uniquely lends itself to government regulation and intervention. First, insurance benefits society economically by spreading the risk of financial loss and providing a source of recovery against fortuitous loss. This benefit is only achieved, however, if insurance companies "are solvent and financially capable of fulfilling their obligations to pay for insured losses."<sup>7</sup> Regulations regarding the formation and operation of insurance companies are needed to ensure that this is the case. Second, most insurance contracts are contracts of adhesion: that is, they are drafted by sophisticated insurance companies and are sold to customers as a prepared product. This situation means that insurance is a

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6 This figure includes only the highest level of court decision for each case and captures cases where federalism principles were applied in the *ratio decidendi* as well as those where federalism principles were addressed in *obiter dictum*. For a complete list of these cases, see Appendix A.

7 Barbara Billingsley, *General Principles of Canadian Insurance Law*, 2nd ed (Markham, Ont: LexisNexis Canada Inc, 2014) at 2.

prime subject for consumer protection legislation to “regulate[] the content and enforceability of insurance contracts.”<sup>8</sup> Finally, with respect to some common and inherently dangerous activities, there is a societal benefit to mandatory insurance coverage. The quintessential example of such an activity is the operation of a motor vehicle. It is in society’s interests to ensure that insurance coverage is readily available to assist people who suffer physical injuries and incur associated expenses arising from a motor vehicle accident. Legislation is needed to establish and enforce the insurer’s obligation to provide motor vehicle insurance coverage and the obligation of vehicle owners and drivers to purchase this coverage. If a government acts as the insurance provider, as it does for motor vehicle liability insurance in some provinces, legislation is needed to create the insurance scheme.<sup>9</sup>

Despite the need for insurance laws and regulations, however, insurance is not specifically identified as a subject of legislative authority under section 91 or section 92 of the *Constitution Act, 1867*.<sup>10</sup> Owing to this lack of express constitutional authority over insurance, “[i]n the latter part of the nineteenth century, both levels of government began to regulate the insurance industry.”<sup>11</sup> Resulting disputes over which level of government was permitted to legislate on insurance law matters had to be resolved by the courts. The courts were forced to resolve this question by considering the scope of broadly worded subject matter classes, including the provincial authority over property and civil rights and the federal authority over trade and commerce; banking; criminal law; and Peace, Order and Good Government (hereafter “POGG”). Even after concluding that insurance fell under provincial jurisdiction over property and civil rights, courts had to adjudicate federal-provincial disagreements regarding the extent to which valid federal laws could touch on insurance matters and the extent to which provincial insurance laws could impact federal institutions. The courts were forced to develop and apply federalism doctrines to respond to these nuanced considerations.

In addressing these disputes, the courts reached some fundamental conclusions about the legislative authority over insurance law in Canada. These findings include that:

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8 *Ibid.*

9 *Ibid* at 2-3.

10 This was changed in 1940 when the *Constitution Act, 1867* was amended to include section 91(2A), which expressly gives the federal Parliament authority to legislate in the area of unemployment insurance. For more on this amendment, see the discussion of Principle 5 in Part III of this paper.

11 Hogg, *supra* note 3 at 21-6. See also Christopher Armstrong, “Federalism and Government Regulation: The Case of the Canadian Insurance Industry 1927-34” (1976) 19:1 CanPublic Administration 88.



- pursuant to their legislative authority over property and civil rights, the provinces have exclusive legislative jurisdiction over insurance contracts and the operation of the insurance industry within each province (except in relation to marine insurance);<sup>12</sup>
- pursuant to its legislative authority to create federal corporations, the federal Parliament has exclusive legislative jurisdiction over the incorporation of national insurance companies,<sup>13</sup> but a federally incorporated insurance company is nonetheless subject to provincial legislation regarding insurance industry operations;<sup>14</sup>
- pursuant to its authority over shipping and navigation, the federal government has exclusive legislative jurisdiction over marine insurance;<sup>15</sup>
- provincial insurance legislation may regulate the promotion of insurance products by federal banks;<sup>16</sup> and
- provincial workers' compensation legislation may bar civil lawsuits relating to marine liability, notwithstanding federal legislative jurisdiction over shipping and navigation.<sup>17</sup>

### **III: Five Fundamental Federalism Principles Developed in Insurance Law Cases**

**Principle 1: The classes of legislative authority exclusively provided to the federal Parliament and to the provincial legislatures by sections 91 and 92 of the *Constitution Act, 1867*, respectively, are defined by applying the doctrine of mutual modification.**

The subject of insurance initially gained prominence as a vehicle for the development of constitutional law in *Parsons v Citizens Insurance Co. of Canada*,<sup>18</sup> an 1881 decision of the Judicial Committee of the Privy Council ("JCPC"). This case, which has been described as "the first important case to involve a direct

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12 *Citizens Insurance Co v Parsons* (1881), 7 App Cas 96, 1881 CarswellOnt 253 (WL Can) (PC) [*Parsons* cited to App Cas].

13 *Ibid.*

14 *Re Insurance Act of Canada* (1931), [1932] AC 41 at 45-46, [1931] 2 DLR 297 (PC) [*Re Insurance Act*].

15 *Zavarovalna Skupnost Triglav v Terrasses Jewellers Inc*, [1983] 1 SCR 283, 54 NR 321.

16 *Canadian Western Bank v Alberta*, 2007 SCC 22, [2007] 2 SCR 3 [*Canadian Western Bank*].

17 *Marine Services International Ltd v Ryan Estate*, 2013 SCC 44, [2013] 3 SCR 53.

18 *Parsons*, *supra* note 12.

conflict between the enumerated heads of federal and provincial jurisdiction,”<sup>19</sup> involved a constitutional challenge to provisions of an Ontario statute which required all fire insurance contracts issued in the province to include specified conditions. Notably, this case “was not fought directly between the Dominion and the provinces, either as parties or interveners.”<sup>20</sup> Instead, the case involved an action by a private individual to recover payment under an insurance contract. In defence of the claim, the insurer argued that the insured had forfeited its right to indemnity by failing to comply with its obligations under the statutory conditions imposed by provincial legislation. In response, the insured argued that the statutory provisions were *ultra vires* the province. Therefore, the central issue in this private lawsuit was whether the statutory provisions were a valid exercise of the province’s authority over property and civil rights<sup>21</sup> or whether the provisions were *ultra vires* the province because they fell under Parliament’s authority over trade and commerce.<sup>22</sup> In this respect, the case is a salient example of how a private law dispute can drive the development of federalism principles. Writing for the JCPC, Sir Montague Smith upheld the legislation as a valid exercise of provincial authority.

As a matter of insurance law, Smith’s judgment established the essential principle that insurance contracts fall within provincial authority over property and civil rights. As a matter of constitutional law, Smith’s judgment did much more. Specifically, it established a methodology for the constitutional analysis of a provincial law<sup>23</sup> and “embedded what has become known as the double-aspect and mutual-modification doctrines.”<sup>24</sup> The key principle of mutual modification states that the legislative powers listed in sections 91 and 92 must be defined with reference to one another “so as to eliminate the overlapping and make each power exclusive.”<sup>25</sup> In particular, “in order to place each head of

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19 John T Saywell, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism* (Toronto: University of Toronto Press, 2002) at 81.

20 *Re Insurance Act*, *supra* note 14 at 45.

21 *Constitution Act, 1867*, *supra* note 4, s 92(13).

22 *Ibid*, s 91(2).

23 The methodology involves first determining whether the law *prima facie* falls within one of the areas of authority assigned to the provinces and, if it does, proceeding to the second step of determining whether the law also falls within a class of subject assigned to the federal Parliament and whether the law thereby exceeds the jurisdiction of the province. *Parsons*, *supra* note 12 at 109-10.

24 Saywell, *supra* note 19 at 84. Double-aspect recognizes that a single matter might, in respect of some aspects, fall under federal authority and, in respect of other aspects, fall under provincial legislative authority. In other words, while sections 91 and 92 of the *Constitution Act, 1867* delineate exclusive classes of legislative authority, different aspects of the same matter might fall under more than one class. For more on the double aspect doctrine, see Hogg, *supra* note 3 at 15-12 to 15-14.

25 Hogg, *supra* note 3 at 20-2.

power in its context as part of two mutually exclusive lists,”<sup>26</sup> the scope of broad legislative powers must be understood to be restricted by the legislative territory occupied by more narrowly expressed powers. Often, this means that broadly worded federal powers must be interpreted as excluding specifically identified areas of provincial authority. Generally, the purpose of this doctrine is to “ensure that no order of government has so extensive a *scope* of jurisdiction that it effectively eliminates the other jurisdiction’s effective regulatory capacity.”<sup>27</sup> In the context of *Parsons*, application of the doctrine of mutual-modification prevented “either the broadly phrased federal power over trade and commerce or the broadly phrased provincial power over property and civil rights from being interpreted so expansively that the other power has no meaningful content.”<sup>28</sup>

Considering the overall structure and wording of sections 91 and 92 of the *Constitution Act, 1867*, Smith reasoned that a “sharp and definite distinction” between the listed subjects was not intended and that “some of the classes of subjects assigned to the Provincial Legislatures unavoidably ran into and were embraced by some of the enumerated classes of subjects in sect. 91.”<sup>29</sup> Further, he held that, despite its clear intention to “give pre-eminence to the Dominion Parliament in cases of a conflict,” the *Constitution Act, 1867* should not be read as meaning that provincial authority is subsumed by the federal Parliament every time an apparent conflict of jurisdiction arises.<sup>30</sup> Instead, Smith concluded that the broad classes of subjects assigned to the federal Parliament under section 91 are limited in scope by the classes of subjects assigned to the provincial legislatures under section 92. So, in order to avoid a conflict of authority, “the two sections must be read together, and the language of one interpreted, and, where necessary, modified, by that of the other ... to arrive at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain, and give effect to all of them.”<sup>31</sup>

Applying these principles to the case at hand, Smith held that the Ontario insurance legislation related to insurance contracts, which in turn fall within the “fair and ordinary meaning” of civil rights under section 92 of the *Constitution Act, 1867*. According to Smith, this conclusion is consistent with the scope of federal legislative authority because “bills of exchange and promissory notes” are the only class of contracts expressly mentioned in section 91,

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26 *Ibid* at 15-39.

27 Hoi L Kong, “Republicanism and the Division of Powers in Canada” (2014) 64:3 UTLJ 359 at 394.

28 *Ibid*.

29 *Parsons*, *supra* note 12 at 107-08.

30 *Ibid* at 108.

31 *Ibid* at 108-09.

which “would have been unnecessary to specify if authority over all contracts and the rights arising from them had belonged to the Dominion Parliament.”<sup>32</sup> Similarly, Smith found that, while the words “trade and commerce” can be broadly understood to “include every regulation of trade ranging from political arrangements in regard to trade with foreign governments ... down to minute rules for regulating particular trades,” this interpretation does not make sense in light of other specified areas of federal authority, such as banking, weights and measures, and bills of exchange. Again, Smith reasoned that “[i]f the words [trade and commerce] had been intended to have the full scope of which in their literal meaning they are susceptible, the specific mention of several of the other classes of subjects enumerated in sect. 91 would have been unnecessary.”<sup>33</sup>

Ultimately, the principle of mutual modification (that the legislative powers listed in sections 91 and 92 must be defined in relation to one another) led Smith to conclude that Parliament’s trade and commerce power is limited to the regulation of inter-provincial trade or the general regulation of trade affecting the whole country. It does not include the regulation of a particular business or industry. This finding set the stage for future judicial consideration of the scope of this federal power.<sup>34</sup> The same can be said for Smith’s finding that Parliament’s authority to incorporate companies operating inter-provincially does not restrict provincial authority to regulate the operation of those companies within provincial boundaries.<sup>35</sup>

*Parsons* was followed by a series of cases that further entrenched both the provinces’ jurisdiction over insurance law and the notion that the exclusive classes of legislative authority listed in sections 91 and 92 of the *Constitution Act, 1867* must be defined in relation to one another. These cases include *Reference re Insurance Companies*,<sup>36</sup> *Ontario (Attorney General) v Reciprocal Insurers*,<sup>37</sup> *Re Insurance Contracts*,<sup>38</sup> *Re Insurance Act of Canada*,<sup>39</sup> and *Re Section 16 of Special*

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32 *Ibid* at 110.

33 *Ibid* at 112.

34 As stated by Hogg, *supra* note 3 at 20-2:

Since the *Parsons* case, it has been accepted that, in general, intraprovincial trade and commerce is a matter within provincial power, under ‘property and civil rights in the province’ (s. 92(13)), and the federal trade and commerce power is confined to (1) interprovincial or international trade and commerce, and (2) ‘general’ trade and commerce.

35 *Parsons*, *supra* note 12 at 117.

36 [1916] 1 AC 588, [1916] 26 DLR 288 [*Reference re Insurance Companies*, cited to AC].

37 [1924] AC 328, [1924] 1 DLR 789 (PC) [*Reciprocal Insurers*, cited to AC].

38 [1926] 58 OLR 404, [1926] 2 DLR 204 (ONCA) [*Re Insurance Contracts* cited to OLR].

39 *Supra* note 14.

*War Revenue Act*.<sup>40</sup> In each of these cases, “attempts by the federal government to secure regulatory control over the insurance industry failed, regardless of the jurisdictional basis cited — be it criminal law, aliens, immigration, bankruptcy and insolvency, or taxation.”<sup>41</sup>

In *Reference re Insurance Companies*, the Court considered the validity of the federal *Insurance Act, 1910*, which required insurance companies to obtain an operating license from the federal Minister of Finance. Although the statute included an exemption for provincially incorporated companies operating solely within provincial boundaries, the JCPC nonetheless held that the legislation was invalid. The Court found that the law infringed upon provincial authority over insurance by effectively prohibiting provinces from working together without the involvement of the federal government to allow an insurance company incorporated in one province to carry on business in another. The Court concluded that the statute did not fall under the federal trade and commerce power because this legislative authority “does not extend to the regulation by a licensing system of a particular trade in which Canadians would otherwise be free to engage in the provinces.”<sup>42</sup> The Court also rejected the suggestion that the legislation fell under Parliament’s POGG power because POGG must be interpreted as being limited by the specific heads of power listed in sections 91 unless “the subject-matter lies outside all of the subject-matters enumeratively entrusted to the province under s. 92.”<sup>43</sup>

In response to the Court’s finding in *Reference re Insurance Companies*, Parliament passed the *Insurance Act* of 1917. This statute empowered the federal Minister of Finance to grant operating licenses to insurance companies. Further, relying on its authority over criminal law, Parliament inserted a provision into the federal *Criminal Code* making it an offence for companies to sell insurance without obtaining such a license. The constitutionality of this legislative scheme came before the JCPC in *Ontario (Attorney General) v*

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40 [1942] SCR 429, [1942] 4 DLR 145.

41 Saywell, *supra* note 19 at 172. For a detailed discussion of the motivating factors behind these attempts by the federal government to have legislative control over some element of insurance, see Armstrong, *supra* note 11.

42 *Reference Re Insurance Companies*, *supra* note 36 at 596.

43 *Ibid* at 595. At the time this ruling was issued, the JCPC had already decided *Russell v The Queen* (1882), 7 App Cas 829, [1882] UKPC 33. In *Russell*, the Court upheld the *Canada Temperance Act* as a legitimate exercise of the POGG power, despite the fact that, being contracts, liquor sales transactions fall within the scope of provincial authority over property and civil rights. Responding to the argument that the *Insurance Act, 1910* should be upheld based on the precedent set by *Russell*, the JCPC stated, at 597, that although “the business of insurance is an important one, which has attained to great dimensions in Canada,” this does not justify Parliament using the POGG power to usurp provincial authority over the operation of insurance within provincial boundaries.

*Reciprocal Insurers*. While recognizing that the criminal law power is “a far-reaching one,”<sup>44</sup> the Court reiterated the foundational principle that the legislative powers described in sections 91 and 92 of the *Constitution Act, 1867* must be construed with reference to one another. This means that the scope of the criminal law power should not “be ascertained by obliterating the context, in which the words are placed.”<sup>45</sup> Ultimately, the JCPC held that the impugned *Criminal Code* provision was a colourable attempt by Parliament to “appropriate to itself” the provincial authority over insurance “by purporting to create penal sanctions.”<sup>46</sup> In essence, the Court found that this was “not a bona fide attempt to create the crime of carrying on the business of insurance without a license.”<sup>47</sup> This finding demonstrates that the substance of legislation, rather than the form, is the determinative factor in a division of powers analysis.

Similar findings were made by the courts in *Reference re Insurance Act (Canada)* and in *Reference re Section 16 of Special War Revenue Act*. In the former case, the JCPC held that federal legislation imposing license requirements on resident British and foreign insurers and taxing customers of unlicensed insurers was a colourable use of federal powers over immigration, aliens and taxation. The Court characterized the legislation as the “same old attempt”<sup>48</sup> by the federal Parliament “to intermeddle with the conduct of insurance business”<sup>49</sup> which fell within provincial legislative authority. In the latter case, the Supreme Court of Canada relied on the principles established by the JCPC to strike down federal legislation imposing a tax on premiums paid by an insured person in respect of Canadian property insured by a British or foreign insurer.

The Ontario Court of Appeal again considered the constitutionality of aspects of the federal *Insurance Act* of 1917 in *Re Insurance Contracts*. This time the Court’s focus was on provisions of the federal statute which required a series of statutory conditions to be included in insurance contracts issued by federally incorporated insurance companies. A majority of the Ontario Court of Appeal held that the federal authority to legislate in respect of the incorporation of federal insurance companies includes controlling the subsequent operations of such companies only if such control is a necessary incident to the power of incorporation. Since the “absence of such conditions would not have

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44 *Reciprocal Insurers*, *supra* note 37 at 340.

45 *Ibid* at 341.

46 *Ibid* at 342.

47 Morris Manning, “Criminalization by Regulation: The Outer Limits of Section 91(27) of the Constitution Act, 1867” (2002) 13 NJCL 309 at 312.

48 *Re Insurance Act*, *supra* note 14 at 53.

49 *Ibid* at 51.

caused the action of the Federal authority to become a dead letter when incorporating insurance companies,”<sup>50</sup> the Court concluded that the legislation in question was invalid. In short, the Court held that mandating contract conditions is “not necessarily incidental to the incorporation of Dominion insurance companies.”<sup>51</sup>

Specific constitutional concepts established and applied in these cases (such as double aspect, colourability, and necessarily incidental) are components of the larger principle that the legislative powers provided by the *Constitution Act, 1867* must be defined in relation to one another. Years later, these concepts played an implicit role in the Supreme Court of Canada’s ruling in *Canadian Indemnity Company v British Columbia*,<sup>52</sup> which upheld the constitutionality of British Columbia’s government monopoly over automobile insurance in the province. The Court held that the “effect of the legislation upon companies whose operations are interprovincial in scope does not mean that the legislation is in relation to interprovincial trade and commerce” because the “aim of the legislation relates to a matter of provincial concern.”<sup>53</sup>

## **Principle 2: Identifying “pith and substance” of legislation is key to determining its validity under the *Constitution Act, 1867*.**

It has long been established that the crucial first step in a division of powers analysis is to identify the “pith and substance” — otherwise described as the “matter” or the “true nature and character” — of the challenged legislation.<sup>54</sup> Insurance law cases have played a fundamental role in establishing and defining this principle. For example, in *Ontario (Attorney General) v Reciprocal Insurers*, the JCPC noted that, in a federalism enquiry: “the Courts must ascertain the ‘true nature and character’ of the enactment, its ‘pith and substance’”; that “it is the result of this investigation, not the form alone ... that will determine which of the categories of subject matters mentioned in ss. 91 and 92 the legislation falls”; that “for this purpose the legislation must be ‘scrutinised in its entirety’”; and that “where the law-making authority is of a limited or qualified character, obviously it may be necessary to examine with some strictness the substance of

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50 *Re Insurance Contracts*, *supra* note 38 at 420.

51 *Ibid.*

52 *Canadian Indemnity Co v British Columbia (AG)* (1976), [1977] 2 SCR 504, 73 DLR (3d) 111 [*Canadian Indemnity* cited to SCR].

53 *Ibid.*, at 512.

54 Hogg, *supra* note 3 at 15-7.

the legislation for the purpose of determining what it is that the Legislature is really doing.”<sup>55</sup>

The Supreme Court of Canada relied on the pith and substance principle in *Canadian Indemnity Co v British Columbia*, which involved a constitutional challenge brought by private insurance companies to the provincial government’s legislation establishing a compulsory motor vehicle insurance system provided by a government-controlled monopoly. The Court upheld the provincial plan as a valid exercise of the province’s authority over property and civil rights, noting that the “constitutional validity of the legislation depends upon its aim and purpose.”<sup>56</sup> The Court found that the law was intended to control “the business of automobile insurance in British Columbia,”<sup>57</sup> which fell within provincial jurisdiction notwithstanding the legislation’s impact on companies with inter-provincial operations. In *R v Eurosport Auto Co*,<sup>58</sup> the British Columbia Court of Appeal similarly applied the pith and substance doctrine to rule in favour of the province’s mandatory automobile insurance scheme. In this case the Court upheld provincial legislation that imposed penalties on individuals who provided fraudulent information to the government insurer, even though the impugned provisions had features (prohibitions and penalties) characteristic of criminal law. The Court stated that, “where the ‘matter’, ‘dominant characteristic’ or ‘pith and substance’ of an enactment” falls within provincial authority under section 92 of the *Constitution Act, 1867*, “then any incidental effects the enactment may have on federal jurisdiction do not affect its validity.”<sup>59</sup>

Finally, the significance of the pith and substance principle, and its relationship to the associated doctrines of colourability, necessarily incidental, and double-aspect was more recently recognized by the Supreme Court of Canada in *Canadian Western Bank v Alberta*.<sup>60</sup> The Court in this case stated that:

- “the resolution of a case involving the constitutionality of legislation in relation to the division of powers must always begin with an analysis of the ‘pith and substance’ of the impugned legislation”,<sup>61</sup>

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55 *Reciprocal Insurers*, *supra* note 37 at 337. (Note: judicial citations, including a reference to *Parsons*, have been omitted from the quoted passage).

56 *Canadian Indemnity*, *supra* note 52 at 512.

57 *Ibid.*

58 2003 BCCA 281, 13 BCLR (4th) 220.

59 *Ibid* at para 18.

60 *Canadian Western Bank*, *supra* note 16. See the discussion of Principle 3 in Part III of this paper for a more detailed discussion of the facts and issues involved in this case.

61 *Ibid* at para 25.



- this analysis “may concern the legislation as a whole or only certain of its provisions”;<sup>62</sup>
- determining the pith and substance of legislation “consists of an inquiry into the true nature of the law in question for the purpose of identifying the ‘matter’ to which it essentially relates”;<sup>63</sup>
- “[t]o determine the pith and substance, two aspects of the law must be examined: the purpose of the enacting body and the legal effect of the law... . To assess the purpose, the courts may consider both intrinsic evidence, such as the legislation’s preamble or purpose clauses, and extrinsic evidence, such as Hansard or minutes of parliamentary debates”;<sup>64</sup>
- the focus of the pith and substance analysis is to “ascertain the *true* purpose of the legislation, as opposed to its mere stated or apparent purpose”;<sup>65</sup>
- “legislation whose pith and substance falls within the jurisdiction of the legislature that enacted it may, at least to a certain extent, affect matters beyond the legislature’s jurisdiction without necessarily being unconstitutional. At this stage of the analysis of constitutionality, the ‘dominant purpose’ of the legislation is still decisive ... merely incidental effects will not disturb the constitutionality of an otherwise *intra vires* law ... . By ‘incidental’ is meant effects that may be of significant practical importance but are collateral and secondary to the mandate of the enacting legislature”;<sup>66</sup>
- “some matters ... may have both provincial and federal aspects. Thus the fact that a matter may for one purpose and in one aspect fall within federal jurisdiction does not mean that it cannot, for another purpose and in another aspect, fall within provincial competence”;<sup>67</sup> and
- “[i]f the pith and substance of the impugned legislation can be related to a matter that falls within the jurisdiction of the legislature that enacted it, the courts will declare it *intra vires*. If, however, the legislation can more properly be said to relate to a matter that is outside the jurisdiction of that legislature, it will be held to be invalid owing to this violation of the division of powers.”<sup>68</sup>

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62 *Ibid.*

63 *Ibid* at para 26.

64 *Ibid* at para 27.

65 *Ibid.*

66 *Ibid* at para 28.

67 *Ibid* at para 30.

68 *Ibid* at para 26.

**Principle 3: In narrowly defined circumstances, the doctrines of interjurisdictional immunity and paramountcy may apply to limit the application or impact, respectively, of otherwise valid provincial legislation.**

Interjurisdictional immunity and paramountcy are part of “the framework of principles of Canadian federalism aimed at reconciling federal values with the reality that laws enacted by one level of government will inevitably have an impact on matters within the jurisdiction of the other level of government.”<sup>69</sup> As exceptions to the fundamental principle of pith and substance (which permits “the co-existence of laws of the two levels of government in the same field”<sup>70</sup>), these doctrines prioritize federal legislation over provincial laws and therefore have the potential to shift the constitutional division of powers in favour of the federal Parliament.<sup>71</sup> The risk of this power imbalance has been reduced, however, by the modern iteration of these doctrines, which makes them principles of last resort. This modern approach is founded in the Supreme Court of Canada’s decision in the insurance law case of *Canadian Western Bank*<sup>72</sup> and the companion case of *British Columbia (Attorney General) v Lafarge Canada Inc.*<sup>73</sup> These cases have been described as “perhaps the most important federalism rulings in 20 years.”<sup>74</sup>

*Canadian Western Bank* involved a constitutional challenge to licensing requirements set out in Alberta’s *Insurance Act*. The impugned provisions required any lending institution wanting to promote insurance products to obtain a license from the province, which in turn meant complying with marketing standards set by provincial regulation. While acknowledging that the regulation of insurance falls within the legislative authority of the provinces, a group of banks promoting optional credit-related insurance to their loan-seeking customers sought a declaration that the provincial licensing provisions

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69 Peter W Hogg & Rahat Godil, “Narrowing Interjurisdictional Immunity” (2008) 42 SCLR (2d) 623 at 623.

70 *Ibid.*

71 In *Canadian Western Bank*, *supra* note 16 at para 35, the Supreme Court stated that, as a matter of constitutional theory, the doctrine of interjurisdictional immunity should be reciprocal, applying equally to protect federal undertakings from provincial legislation and provincial undertakings from federal legislation. The Court also noted, however, that the principle has consistently been invoked in favour of federal interests only. For more commentary on the reciprocal operation of interjurisdictional immunity, see Hogg, *supra* note 3 at 15-38.5 to 15-38.7, and Michelle Biddulph, “Shifting the Tide of Canadian Federalism: The Operation of Provincial Interjurisdictional Immunity in the Post-Canadian Western Bank Era” (2014) 77:1 Sask L Rev 45.

72 *Supra* note 16.

73 2007 SCC 23, [2007] 2 SCR 86.

74 Hogg & Godil, *supra* note 69 at 635.

were “constitutionally inapplicable and/or inoperative to the banks’ promotion of insurance.”<sup>75</sup> The *Bank Act*, enacted by Parliament pursuant to its constitutional authority over banks,<sup>76</sup> authorized banks to promote certain types of insurance products to their clients, mostly relating to credit-protection.<sup>77</sup> The banks argued that “when banks promote credit-related insurance, they are carrying on the business of banking, not the business of insurance”<sup>78</sup> and so should not be subject to a provincial insurance law.

The Supreme Court of Canada ultimately rejected the banks’ argument and ruled in favour of the province.<sup>79</sup> In doing so, the Court “restrained the application of the interjurisdictional immunity doctrine”<sup>80</sup> and reinforced its previously strict approach to paramountcy. The Court held that such federalism doctrines serve three goals, namely: (1) to “permit an appropriate balance to be struck in the recognition and management of the inevitable overlaps in rules made at the two levels of legislative power, while recognizing the need to preserve sufficient predictability in the operation of the division of powers”; (2) “to reconcile the legitimate diversity of regional experimentation with the need for national unity”; and, (3) while recognizing that “the task of maintaining the balance of powers in practice falls primarily to governments”, to “facilitate ... ‘co-operative federalism.’”<sup>81</sup>

In regards to interjurisdictional immunity, the Supreme Court expressed concern about widespread use of a doctrine that is inconsistent with a modern “view of federalism that puts greater emphasis on the legitimate interplay between federal and provincial powers.”<sup>82</sup> Accordingly, the Court established a restrictive interjurisdictional immunity test, holding that provincial legislation is inapplicable to a federal undertaking only where the application of the

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75 *Canadian Western Bank*, *supra* note 16 at para 11.

76 *Constitution Act, 1867*, *supra* note 4, s 91(15).

77 For an itemized list of the types of insurance included, see *Canadian Western Bank*, *supra* note 16 at para 6.

78 *Ibid* at para 20.

79 The Court’s ruling was issued in two concurring judgments. While the majority of the Court held that paramountcy should generally be applied in advance of interjurisdictional immunity (*ibid* at paras 77-78), Justice Bastarache, writing for himself, postulated that the proper methodology for a division of powers analysis considers interjurisdictional immunity before paramountcy (*ibid* at para 113). Justice Bastarache also opted for a less restrictive approach to interjurisdictional immunity overall. See *infra* note 84.

80 Hogg and Godil, *supra* note 69 at 635.

81 *Canadian Western Bank*, *supra* note 16 at para 24. For more on this case in respect of judiciary’s role in facilitating intergovernmental co-operation, see Wade K Wright, “Facilitating Intergovernmental Dialogue: Judicial Review of the Division of Powers in the Supreme Court of Canada” (2010) 51 SCLR (2d) 625.

82 *Canadian Western Bank*, *supra* note 16 at para 36.

provincial law impairs an essential or vital element of the federal undertaking.<sup>83</sup> This test was not met in the case at bar because, in the opinion of the Court, “[t]he promotion of ‘peace of mind’ insurance can hardly be considered ‘absolutely indispensable or necessary’ to banking activities...”.<sup>84</sup> Noting that the banks’ “sole purpose of engaging in the promotion of insurance appears to be to generate additional revenue as a separate product line and profit centre” and that “the insurance promoted is optional and can be cancelled at any time,” the Court concluded that “the promotion of authorized insurance is not part of the core of banking because it is not essential to the function of banking.”<sup>85</sup>

With regard to paramountcy, the Court held that, while this doctrine is “much better suited to contemporary Canadian [co-operative] federalism than is the doctrine of interjurisdictional immunity,”<sup>86</sup> it should likewise be applied only in narrowly defined circumstances. Specifically, “the mere existence of a duplication of norms at the federal and provincial levels”<sup>87</sup> is an insufficient basis to apply the paramountcy doctrine. The doctrine applies only where the federal and provincial laws are “incompatible” because “it is impossible to comply with both laws” or because applying the provincial law “would frustrate the purpose of the federal law.”<sup>88</sup> Applying this strict test to the facts of the case, the Court found that the *Bank Act* provisions were not incompatible with the provincial *Insurance Act*. If the banks chose to promote insurance products, they could do so in compliance with the provincial statute, so “[t]his is not a case where the provincial law prohibits what the federal law permits.”<sup>89</sup> Further, the Court noted that the *Bank Act* provisions were permissive and that, “while permitting the banks to promote authorized insurance, [these provisions contain] references that assume the relevant provincial law to be applicable.”<sup>90</sup> The Court therefore concluded that the ability of banks to promote insurance products as authorized by the *Bank Act* was not frustrated by the provincial licensing requirement.

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83 *Ibid* at paras 48-51. While concurring in the result, Justice Bastarache took issue with the majority’s restrictive approach to the interjurisdictional immunity doctrine. He held, at paras 111 and 123, that interjurisdictional immunity applies where the provincial law severely “affects”, rather than “impairs”, the core of a federal power.

84 *Ibid* at para 51. For a detailed discussion of the facts supporting the Court’s conclusion that banking is fundamentally distinct from credit-protection insurance, see paras 86-97.

85 *Ibid* at para 122.

86 *Ibid* at para 69.

87 *Ibid* at para 72.

88 *Ibid* at para 75.

89 *Ibid* at para 100.

90 *Ibid* at para 103. See paras 103-108 for the Court’s discussion of the history and the purpose of the *Bank Act* provisions.

Most recently, the Supreme Court considered interjurisdictional immunity and paramountcy in an insurance context in *Marine Services Ltd v Ryan Estate*.<sup>91</sup> This case arose from the death of two Newfoundland fishermen who died when their ship capsized. After receiving compensation under Newfoundland's *Workplace Health and Safety Compensation Act* ("WHSCA"), the survivors of the accident brought a tort action against several entities responsible for the design and construction of the deceased's vessel and against Transport Canada for negligent inspection of the vessel. The defendants argued that the lawsuit, which was brought pursuant to the statutory cause of action set out in the federal *Marine Liability Act* ("MLA") was barred by section 44 of the WHSCA, which prohibited tort recovery where compensation is provided under the WHSCA. In response, the claimants argued that interjurisdictional immunity made the WHSCA inapplicable to an action brought under the MLA or, alternatively, that paramountcy rendered the WHSCA inoperable in respect of an action brought under the MLA. Relying on the scope of these doctrines as defined in *Western Canadian Bank*, the Supreme Court held that neither principle applied to the case at bar.

As to interjurisdictional immunity, the Court held that "[m]aritime negligence law is indeed at the core of the federal power over navigation and shipping" and that "s. 44 of the WHSCA trenches" on this core.<sup>92</sup> Nevertheless, the Court concluded that interjurisdictional immunity did not apply to this situation because the provincial law did not "impair" the federal authority.<sup>93</sup> In arriving at this conclusion, the Court rejected its own earlier ruling that "interjurisdictional immunity applies where a provincial statute of general application has the effect of indirectly regulating a maritime negligence law."<sup>94</sup> This rejection was based on the fact that the precedent in question pre-dated the narrowing of the interjurisdictional immunity test in *Canadian Western Bank* and subsequent rulings.

With regard to paramountcy, the Court held that there was no operational conflict between the provisions of the WHSCA and the MLA. The MLA permitted tort recovery in circumstances where the deceased person could have recovered damages and the WHSCA stated that a person cannot recover tort damages if they have been compensated under the provincial workers' compensation scheme. The provisions can be read harmoniously because "the text

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91 *Supra* note 17.

92 *Ibid* at para 59.

93 *Ibid* at para 60.

94 *Ibid* at para 64.

of [the *MLA*] accommodates the statutory bar in [the *WHSCA*].”<sup>95</sup> That is, where the *WHSCA* barred a person from recovering damages, that person is no longer someone who could have recovered damages as defined by the *MLA*. The Court also held that the *WHSCA* “does not frustrate”<sup>96</sup> the purpose of the *MLA*. The Court found that “the *MLA* was enacted to expand the range of claimants who could start an action in maritime negligence law” and “[t]he *WHSCA*, which establishes a no-fault regime to compensate for workplace-related injury, does not frustrate that purpose.”<sup>97</sup> Instead, the *WHSCA* “simply provides for a different regime for compensation that is distinct and separate from tort.”<sup>98</sup> Noting in particular that the *MLA* is permissive in allowing, but not requiring, the commencement of litigation, the Court concluded that “[t]he high standard for applying paramouncy on the basis of the frustration of a federal purpose is not met here.”<sup>99</sup>

#### **Principle 4: Courts should employ judicial restraint when assigning remedies for *ultra vires* legislation.**

This principle is one of several tenets which can be drawn from *Schachter v Canada*,<sup>100</sup> a key constitutional law decision of the Supreme Court of Canada. This decision, which addresses the remedies available when a court determines that a legislative provision is unconstitutional, arose from a constitutional challenge to the parental benefits available under Canada’s *Unemployment Insurance Act*. Although the constitutional challenge in this case was brought on the basis of the *Canadian Charter of Rights and Freedoms* rather than on federalism grounds,<sup>101</sup> much of the Supreme Court’s commentary about constitutional

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95 *Ibid* at para 77.

96 *Ibid* at para 84.

97 *Ibid*.

98 *Ibid*.

99 *Ibid*.

100 [1992] 2 SCR 679, 93 DLR (4th) 1 [*Schachter* cited to SCR].

101 The challengers argued that section 32 of the *Unemployment Insurance Act* was an unjustified violation of the equality protection guaranteed by s 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. The statute provided for unemployment benefits to be paid to natural mothers and to either the mother or father of an adopted child, but benefits were not available to natural fathers. The trial judge held that the statutory provision violated the *Charter* by discriminating against natural fathers on the basis of parental status. As a remedy, he issued a declaration entitling natural fathers to obtain benefits if they otherwise qualified under the legislation. On appeal, the parties conceded the constitutional breach so the Ontario Court of Appeal and, ultimately, the Supreme Court of Canada considered only the issue of remedy.

remedies applies equally to judicial remedies in the context of a division of powers analysis.<sup>102</sup>

First, in regard to the judicial authority to strike out unconstitutional legislation, the Supreme Court acknowledged that “[s]ection 52 of the *Constitution Act, 1982* mandates the striking down of any law that is inconsistent with the provisions of the Constitution, but only ‘to the extent of the inconsistency.’”<sup>103</sup> The Court also pointed out, however, that this remedial authority “is not a new development in Canadian constitutional law” because “[t]he courts have always struck down laws only to the extent of the inconsistency.”<sup>104</sup> According to the Court, this restrained approach is consistent both with “common sense” and with principles of law which favour preserving “as much of the legislative purpose as possible.”<sup>105</sup>

Second, the Supreme Court identified severance as a remedial doctrine which can be applied by Canadian courts to minimize judicial interference with legislative intention. The Court described severance as “an ordinary and everyday part of constitutional adjudication” which provides that “if a single section of a statute violates the Constitution, ... that section may be severed from the rest of the statute so that the whole statute need not be struck down.”<sup>106</sup> The Court also cautioned, however, that there may be some situations where the unconstitutional portion of legislation is inextricably tied to other constitutionally sound provisions such that the legislating body would not have passed the latter without the former. Accordingly, the Court concluded that in order to limit the impact on legislative intent:<sup>107</sup>

...the doctrine of severance requires that a court define carefully the extent of the inconsistency between the statute in question and the requirements of the Constitution, and then declare inoperative (a) the inconsistent portion, and (b) such part of the re-

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102 The Supreme Court’s decision was issued in two concurring judgments. The minority judgment, written by Justice LaForest, took issue with the majority reasons of Lamer, C.J. in respect of comments relating “the means for assessing when the techniques of reading down or reading in should be adopted” (*Schachter*, *supra* note 100 at 727). This disagreement between the judgments is not relevant to a remedy in a division of powers context so will not be discussed in this paper.

103 *Ibid* at 695.

104 *Ibid* at 696.

105 *Ibid* at 696-97.

106 *Ibid* at 696.

107 *Ibid* at 697. The JCPC’s decision in *Reference Re Employment and Social Insurance Act, 1935*, [1937] AC 355, [1937] 1 DLR 684 is an insurance case which serves as an example of a situation in which the Court found that the challenged parts of a statute were “so inextricably mixed up” with the remainder of the legislation that it was “impossible to sever them.” (cited to AC at 367). This case is discussed in more detail under Principle 5, Part III of this paper.

remainder of which it cannot be safely assumed that the legislature would have enacted it without the inconsistent portion.

Third, the Court recognized “reading down” as an appropriate, and long-standing, remedy to limit the negative impact a constitutional law ruling on legislative intent.<sup>108</sup> Reading down calls for a statutory provision to be interpreted narrowly if possible where a broad interpretation would cause the provision to be constitutionally invalid. As described by Professor Hogg, reading down is “like severance in that both techniques mitigate the impact of judicial review” but “reading down achieves its remedial purpose solely by the interpretation of the challenged statute, whereas severance involves holding part of the statute to be invalid.”<sup>109</sup> Thus, by approving of this doctrine in *Schachter*, the Supreme Court essentially approved the technique that makes the principle of interjurisdictional immunity functional.<sup>110</sup>

Finally, the Court in *Schachter* discussed the scope of the Court’s authority to suspend temporarily a declaration of invalidity. Here again, the Supreme Court emphasized the need for judicial restraint, noting that a suspended declaration is “not a panacea for the problem of interference with the institution of the legislature.”<sup>111</sup> Further, the Court held that deciding the question of whether to suspend a declaration of invalidity should be the “final step” in the analysis of a constitutional remedy and is “an entirely separate question” from “the appropriate route under s. 52 of the *Constitution Act, 1982*.”<sup>112</sup> A suspended declaration of invalidity is “clearly appropriate where the striking down of a provision poses a potential danger to the public ... or otherwise threatens the rule of law” and “may also be appropriate in cases of underinclusiveness as opposed to overbreadth.”<sup>113</sup>

Given these criteria, a suspended declaration of invalidity may be more likely to be issued as a remedy in respect of legislation which violates the *Charter* than legislation which violates federalism principles. It is possible, however, for a suspended declaration to be issued in a division of powers case. This is illustrated by the Supreme Court’s ruling in another insurance law case, *Confédération des syndicats nationaux v Canada*.<sup>114</sup> Here the Court held that provisions of the federal *Employment Insurance Act* were an invalid exercise of

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108 *Schachter*, *ibid* at 696.

109 Hogg, *supra* note 3 at 15-26.

110 *Ibid* at 15-28.

111 *Schachter*, *supra* note 100 at 716.

112 *Ibid* at 715-16.

113 *Ibid* at 715.

114 2008 SCC 68, [2008] 3 SCR 511.



the federal taxing authority and that employment insurance premiums collected pursuant to those provisions had been unlawfully collected. As a remedy, the Court suspended the declaration of invalidity for 12 months “to allow the consequences of that invalidity to be rectified.”<sup>115</sup>

**Principle 5: A court’s finding that a law is invalid on federalism grounds can be overcome by constitutional amendment.**

This principle is vividly illustrated by the amendment of the *Constitution Act, 1867* to expressly provide Parliament with legislative authority over unemployment insurance.<sup>116</sup> This amendment was passed in response to the JCPC’s 1937 decision in *Reference re The Employment and Social Insurance Act, 1935*,<sup>117</sup> which involved a constitutional challenge to federal legislation establishing a national unemployment insurance scheme. The JCPC struck down the legislation on the grounds that insurance matters, including unemployment insurance, fall under the provincial authority over property and civil rights. This ruling was ultimately by-passed by amending the *Constitution Act, 1867* to add section 92A, which expressly authorizes Parliament to legislate in the area of unemployment insurance.

Of course, at the time of the *Unemployment Insurance Reference*, Canada’s Constitution was more easily amended than it is today. Prior to 1982, amendments to Canada’s Constitution were made by the United Kingdom Parliament, at the request of the Canadian government. Since 1982, Canada amends its own Constitution pursuant to a complex amending formula which, for amendments involving the redistribution of legislative power, requires substantial agreement between the provinces and the federal Parliament.<sup>118</sup> Nonetheless, it remains a fundamental principle of Canadian constitutionalism that judicial interpretation of constitutional text *can* be overcome by alteration of the text, assuming that the textual alteration can be achieved by the requisite amending process.

This is not to say, however, that disputes about the scope of legislative authority are necessarily put to rest once a constitutional amendment is achieved. On the contrary, the constitutional amendment may serve as the basis for still another federalism argument. For example, decades after the *Constitution Act*,

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115 *Ibid* at para 94.

116 See *Constitution Act, 1867*, *supra* note 4, s 92(2A), as amended by *Constitution Act, 1940*, 3-4 Geo VI, c 36 (UK).

117 *Supra* note 107. This reference is commonly referred to as *Unemployment Insurance Reference*.

118 For a detailed discussion of the process of constitutional amendment before and after 1982, see Hogg, *supra* note 3 at 4-1 to 4-16.

1867 was amended to provide Parliament with authority over unemployment insurance, a challenge was brought to federal legislation enacted pursuant to this new class of legislative authority in *Reference re Employment Insurance Act (Canada)*, ss 22 & 23.<sup>119</sup> The argument was that maternity and parental benefits provided under this legislation were *ultra vires* the federal government because they encroached on provincial jurisdiction over property and civil rights and matters of a local and private nature (sections 92(13) and 92(16) respectively of the *Constitution Act, 1867*). Ultimately, the Court rejected this contention and upheld the impugned statutory provisions as a valid exercise of the federal authority over unemployment insurance on the basis that the definition of this authority must evolve with the times. Holding that a “generous interpretation of the provisions of the Constitution” should be applied so as to recognize the “evolution of the role of women in the labour market and of the role of fathers in child care,” the Court concluded that, while the provinces “have jurisdiction over social programs ... Parliament also has the power to provide income replacement benefits to parents who must take time off work to give birth to or care for children.”<sup>120</sup> Apart from restating the crucial principle that constitutional provisions should be interpreted progressively so as to reflect social developments,<sup>121</sup> this case illustrates the dynamic and ongoing relationship between the text of the written Constitution and judicial interpretation of that text. That is, while constitutional amendments may be employed to overcome the consequences of a court ruling on federalism, the amended provisions are also subject to judicial interpretation.

## IV. Conclusion

Since Confederation, the insurance industry has served as “the arena in which the two levels of government contended for the power to regulate business, or at least that part of business activity over which legislative power was not specifically allocated by the *Constitution Act, 1867*.”<sup>122</sup> Consequently, as I have aimed to demonstrate in this paper, insurance law has played a central role in the development of essential principles of Canadian constitutional law relating to federalism. In particular, disputes over insurance law jurisdiction have prompted Canadian courts to define the essential federalism principles of mutual modification, pith and substance, paramountcy, and inter-jurisdictional immunity

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119 2005 SCC 56, [2005] 2 SCR 669.

120 *Ibid* at para 77.

121 This principle was famously established in *Edwards v Canada (AG)* (1929), [1930] AC 124 at 136, 1 DLR 98 (PC) by Lord Sankey’s statement that the written constitution “planted in Canada a living tree capable of growth and expansion within its natural limits.”

122 Hogg, *supra* note 3 at 21-5.

and to delineate the appropriate scope of judicial remedies in the constitutional context. Insurance has also provided the context for constitutional amendment to be used as a means of overcoming judicial rulings regarding the division of legislative authority under the written Constitution. Additionally, the trajectory of judicial approaches to federalism, from the early compartmentalization of legislative authority (as seen through early application of the principle of mutual modification) to modern day co-operative federalism (as seen through the narrowing of the principles of paramountcy and inter-jurisdictional immunity), can be traced through insurance law jurisprudence. In the end, while there admittedly may be some hyperbole in the suggestion that *everything* one needs to know about federalism can be gleaned from insurance law, looking to insurance law is certainly not a bad start.

## APPENDIX A: Insurance Law Federalism Cases (1867 to May 2017)

1. *Dear v Western Assurance Co* (1877) 41 UCQB 553, 1877 CarswellOnt 233 (WL Can).
2. *Quebec (AG) v Queen Insurance Co* (1878) 3 App Cas 1090 (PC).
3. *Citizens' Insurance Co of Canada v Parsons* (1881), 7 App Cas 96, 1881 CarswellOnt 253 (WL Can) (PC).
4. *Goring v London Mutual Fire Insurance Co* (1885) 11 OR 82 (Ont HC).
5. *Bank of Toronto v Lambe* (1887), 12 App Cas 575, [1887] UKPC 29 (PC).
6. *R v Holland* (1900), 7 BCLR 281, 1900 CarswellBC 53 (WL Can) (BCSC).
7. *Canadian Pacific Railway Co v Ottawa Fire Insurance Co* (1907), 39 SCR 405, 1907 CanLII 13.
8. *Re Companies Case* (1913), 25 WLR 712, 1913 CarswellNat 18 (WL Can) (SCC).
9. *Reference Re Insurance Companies* [1916] 1 AC 588, 26 DLR 288 (PC).
10. *Farmers Mutual Hail Insurance Assn (Iowa) v Whittaker* (1917), 12 Alta LR 309, 37 DLR 705 (ABCA).
11. *Guardian Assurance Co v Garrett* (1918), 58 SCR 47, 45 DLR 32.
12. *Canadian Pacific Railway Co v Workmen's Compensation Board* (1919), [1920] AC 184, 48 DLR 218 (PC).
13. *Ontario (Attorney General) v Reciprocal Insurers*, [1924] AC 328, [1924] 1 DLR 789 (PC).
14. *Re Insurance Contracts*, [1926] 58 OLR 404, [1926] DLR 204 (Ont CA).
15. *Ontario (AG) v Canada (AG)*, [1931] OR 5, [1931] 2 DLR 297 (Ont SC (AD)).
16. *Re Insurance Act of Canada*, [1932] AC 41, [1932] 1 DLR 97 (PC).
17. *Reference Re Employment and Social Insurance Act, 1935*, [1937] AC 355, [1937] 1 DLR 684 (PC).
18. *Reference Re Special War Revenue Act (Canada), s 16*, [1942] SCR 429, [1942] 4 DLR 145, leave to appeal to PC refused, [1943] 4 DLR 657.
19. *Porter v R* (1964), [1965] 1 Ex CR 200, 1964 CarswellNat 372 (WL Can).

20. *Ontario (Attorney General) v Policy Holders of Wentworth Insurance Co*, [1969] SCR 779, 6 DLR (3d) 545.
21. *Scottish Canadian Assurance Corp v Dufour* (1969), [1970] 1 OR 362, 8 DLR (3d) 420 (Co Ct).
22. *R v Scheer Ltd* (1972), [1974] SCR 1046, 27 DLR (3d) 73.
23. *Martin Service Station Ltd v Minister of National Revenue* (1976), [1977] 2 SCR 996, 67 DLR (3d) 294.
24. *Canadian Indemnity Co v British Columbia (Attorney General)* (1976), [1977] 2 SCR 504, 73 DLR (3d) 111.
25. *Intermunicipal Realty & Development Corp v Gore Mutual Insurance Co* (1977), [1978] 2 FC 691, 108 DLR (3d) 494.
26. *Canadian Pioneer Management Ltd v Saskatchewan (Labour Relations Board)* (1979), [1980] 1 SCR 433, 107 DLR (3d) 1.
27. *Canada (Attorney General) v Cardinal Insurance Co* (1982), 39 OR (2d) 204, 1982 CanLII 2017 (Ont SC).
28. *Zavarovalna Skupnost Triglav (Insurance Community Triglav Ltd) v Terrasses Jewellers Inc*, [1983] 1 SCR 283, 54 NR 321.
29. *Amo Containers Ltd v Drake Insurance Co* (1984), 51 Nfld & PEIR 55, 1984 CarswellNfld 30 (WL Can) (NLTD).
30. *Switzerland General Insurance Co v Logistec Navigation Inc* (1986), 7 FTR 196, 1986 CarswellNat 100 (WL Can) (FCTD).
31. *YMHA Jewish Community Centre of Winnipeg Inc v Brown*, [1989] 1 SCR 1532, 59 DLR (4th) 694.
32. *H Smith Packing Corp v Gainvir Transport Ltd* (1989), 61 DLR (4th) 489, 1989 CanLII 5275 (FCA).
33. *Re Advocate General Insurance Co of Canada* (1989) 60 Man R (2d) 186, 1989 CarswellMan 30 (MBQB).
34. *Life Underwriters Assn of Canada v Provincial Assn of Quebec Life Underwriters*, [1992] 1 SCR 449, 133 NR 223.
35. *Fudge v Charter Marine Insurance Co* (1992), 97 Nfld & PEIR 91, 1992 CanLII 7364 (NLTD).
36. *Schachter v Canada*, [1992] 2 SCR 679, 93 DLR (4th) 1.
37. *Biggin v British Marine Mutual Insurance Assn*, [1992] 101 Nfld & PEIR 156, 1992 CanLII 7377 (NLTD).

38. *Ultramar Canada Inc v Mutual Marine Office Inc* (1994), [1995] 1 FC 341, 1994 CanLII 3505 (TD).
39. *Tolofson v Jensen*, [1994] 3 SCR 1022, 314 DLR (4th) 257.
40. *Hurst v Leimer* (1995), 26 OR (3d) 760, 130 DLR (4th) 166 (Ct J (Gen Div)).
41. *Non-Marine Underwriters, Lloyd's London v British Columbia (Superintendent of Financial Institutions)* (1997), 86 BCAC 306, 1997 CanLII 3430.
42. *Neshkewe v Royal Insurance* (1999), 41 OR (3d) 480, 1999 CanLII 18730 (Ont CA).
43. *Hogan v Doiron*, 2001 NBCA 97, 243 NBR (2d) 263.
44. *Royal & Sun Alliance Insurance Co of Canada v Sinclair*, 2001 FCT 1050, 220 FTR 28.
45. *Bank of Nova Scotia v British Columbia (Superintendent of Financial Institutions)*, 2003 BCCA 29, 11 BCLR (4th) 206, leave to appeal to SCC refused, [2003] 3 SCR viii.
46. *R v Eurosport Auto Co*, 2003 BCCA 281, 13 BCLR (4th) 220, leave to appeal to SCC refused, 2003 CarswellBC 2940 (WL Can).
47. *Unifund Assurance Co v Insurance Corp of British Columbia*, 2003 SCC 40, [2003] 2 SCR 63.
48. *Reference re Employment Insurance Act (Canada)*, ss 22 & 23, 2005 SCC 56, [2005] 2 SCR 669.
49. *Thon v Manitoba Public Insurance Corp.* 2004 BCSC 1468, 37 BCLR (4th) 186.
50. *Kingsway General Insurance Co v Alberta*, 2005 ABQB 662, 53 Alta LR (4th) 147.
51. *Secunda Marine Services Ltd v Fabco Industries Ltd*, 2005 FC 1565, [2006] 3 FCR 3.
52. *Hartling v Nova Scotia (Attorney General)*, 2006 NSSC 225, 247 NSR (2d) 154.
53. *Williams v Brown*, 2006 NBCA 123, 311 NBR (2d) 331.
54. *Canadian Western Bank v Alberta*, 2007 SCC 22, [2007] 2 SCR 3.
55. *Confédération des syndicats nationaux v Canada (Attorney General)*, 2008 SCC 68, [2008] 3 SCR 511.

56. *Royal Bank of Canada v Mijagic*, 2010 ONSC 550, 2010 CarswellOnt 260 (WL Can).
57. *Bruyère v Québec (Commission de la santé & de la sécurité du travail)*, 2011 SCC 60, [2011] 3 SCR 635.
58. *Newfoundland (Workplace Health, Safety & Compensation Commission) v Ryan Estate*, 2013 SCC 44, [2013] 3 SCR 53.
59. *Insurance Corp of British Columbia v Automotive Retailers Assn*, 2013 BCSC 2062, 57 BCLR (5th) 183.

# The Protective Function of the Constitutional Amending Formula

*Sébastien Grammond\**

*The Reference re Supreme Court Act and the Reference re Senate Reform have often been interpreted as widening the body of norms that form part of the Constitution. The author submits that in those two references, the Supreme Court of Canada has instead given effect to the protective function of the constitutional amending formula. This means that the amending formula limits the action of Parliament and the provincial legislatures. A historical and purposive interpretation of sections 41 and 42 of the Constitution Act, 1982 leads to the conclusion that the framers of the Constitution intended to limit the power of Parliament and the provincial legislatures to affect certain essential characteristics of the main components of Canada's political system. The author then spells out the consequences of this reading of the two references on possible reforms of the Supreme Court, the federal judiciary, the Senate and the electoral system.*

*Le Renvoi relatif à la Loi sur la Cour suprême et le Renvoi relatif à la réforme du Sénat ont souvent été interprétés comme élargissant l'ensemble des normes qui font partie de la constitution. L'auteur soutient que dans ces deux renvois, la Cour suprême du Canada a plutôt donné effet à la fonction protectrice de la procédure de modification de la constitution du Canada. Cela signifie que la procédure de modification limite l'action du Parlement et des législatures provinciales. Une interprétation historique et téléologique des articles 41 et 42 de la Loi constitutionnelle de 1982 mène à la conclusion que les rédacteurs de la constitution avaient l'intention de limiter le pouvoir du Parlement et des législatures provinciales afin d'avoir une incidence sur certaines caractéristiques essentielles des éléments principaux du système politique canadien. L'auteur décrit ensuite les conséquences de cette interprétation des deux renvois sur les réformes éventuelles de la Cour suprême, la magistrature fédérale, le Sénat et le système électoral.*

\* D.Phil. (Oxon.), MSRC, Ad.E. Professor, Civil Law Section, University of Ottawa; Legal counsel, Dentons Canada. The author wishes to thank Yan Campagnolo, Warren Newman, Peter Oliver, and Mark Walters, who kindly commented on a previous version of this article, as well as anonymous reviewers. As a lawyer, the author represented certain interveners before the Quebec Court of Appeal and the Supreme Court of Canada in the *Reference re Senate Reform* and the *Reference re Supreme Court Act*. This is an English translation of a paper that is published in the *Revue générale de droit*: (2017) 47:1 RGD 119.



In the spring of 2014, the Supreme Court of Canada rendered two major advisory opinions: the *Reference re Supreme Court Act*<sup>1</sup> and the *Reference re Senate Reform*.<sup>2</sup> These were the Court's first decisions dealing directly with the interpretation of the amending formula for the Constitution of Canada adopted in 1982. In the first reference, the Court ruled that Parliament could not amend the provisions of the *Supreme Court Act* governing the eligibility requirements for appointment to the Court. In the second reference, it determined that Parliament could not enact a law providing for the holding of "consultative elections" intended to guide the Prime Minister's choice in appointing senators. The common element in these two initiatives was that Parliament claimed to be acting alone without amending the text of the Constitution. Furthermore, the legislative texts in question had been carefully drafted so as not to contradict any existing provisions of the Constitution.

The challenge to the validity of such initiatives made it urgent to address a blind spot in constitutional doctrine. Up to that point, most analyses of the amending formula had sought to determine what procedure would apply to efforts to amend a given provision of the current Constitution, or to add certain types of provision to the Constitution.<sup>3</sup> In other words, the amending formula has been viewed as a switching mechanism for selecting the appropriate procedure. A discussion of those questions is extremely useful, but it assumes a willingness on the part of politicians to amend the Constitution, a willingness that is rare indeed these days.<sup>4</sup> Few authors had analysed the constraints that the amending formula could impose on what the ordinary legislator can do, although some had examined the case of the Supreme Court<sup>5</sup> and studied the

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1 *Reference re Supreme Court Act*, ss 5 and 6, 2014 SCC 21, [2014] 1 SCR 433 [*Reference re Supreme Court*].

2 *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 SCR 704 [*Reference re Senate*].

3 See in particular the monograph of Benoît Pelletier, *La modification constitutionnelle au Canada* (Toronto: Carswell, 1996), or the chapters on constitutional amendment in constitutional law textbooks, such as Henri Brun, Guy Tremblay & Eugénie Brouillet, *Droit constitutionnel*, 6th ed (Cowansville: Yvon Blais, 2014) at 214-256; Jacques-Yvan Morin & José Woehrling, *Les constitutions du Canada et du Québec: du régime français à nos jours* (Montréal: Thémis, 1992), at 487-539; Peter W Hogg, *Constitutional Law of Canada* (Toronto: Thomson Carswell, 2007) (loose-leaf revision 2016 - Rel. 1), ch 4 [Hogg, *Constitutional Law*].

4 See Richard Albert, "The Difficulty of Constitutional Amendment in Canada," (2015) 53:1 *Alta L Rev* 85.

5 Some authors claimed that certain provisions of the *Supreme Court Act* had been constitutionalized: Patrick J Monahan & Byron Shaw, *Constitutional Law*, 4th ed (Toronto: Irwin Law, 2013) at 205. Others maintained that the reference to the Supreme Court in the amending formula was only intended for future additions to the Constitution regarding the Supreme Court: Pelletier, *supra* note 3 at 74, 214, 280; Morin & Woehrling, *supra* note 3 at 483; Hogg, *supra* note 3 at ch 4-14, 4-15. A detailed summary of this debate can be found in Warren J Newman, "The Constitutional Status of the Supreme Court of Canada" (2009) 47 *SCLR* (2d) 429.

constraints on the power of the provinces to amend their own constitutions.<sup>6</sup> Thus, when debate began over the validity of the federal proposals for Senate reform, there was no consensus on a general theory of constitutional amendment that would have allowed the validity of this initiative to be determined without controversy.<sup>7</sup>

In this paper, we hope to make a contribution to the development of such a theory. We submit that the amending formula has a *protective function*, i.e., it protects certain rules, principles or institutions from the action of the ordinary legislator.<sup>8</sup> This protective function is in addition to the *enabling function* studied by the abovementioned authors, which permits certain legislative bodies, acting together, to amend or add provisions to the formal text of the Constitution.

We also submit that this perspective provides for a better explanation of the Supreme Court's two 2014 advisory opinions than the perspective adopted by most commentators. Due to the use of unwritten principles and the concept of "constitutional architecture," it has become commonplace to claim that the Court has "constitutionalized" certain rules or principles that were not previously included in the Constitution. Some have criticized this type of reasoning on the grounds that the Court has appropriated the power to infinitely expand the scope of political changes that would require a constitutional amendment.<sup>9</sup> This vision, which we will call the "open constitution," nevertheless raises significant conceptual problems, which can be avoided with the theory of the protective function. Moreover, a careful reading of the opinions rendered by the Court shows that these opinions are as compatible, if not more so, with the protective function theory as with the open constitution theory. Finally, we will

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6 See e.g. Morin & Woehrling, *supra* note 3, at 488-501.

7 Two opposing contributions illustrate the range of opinions on this subject: Robert E Hawkins, "Constitutional Workarounds: Senate Reform and Other Examples" (2010) 89:3 Can Bar Rev 513; Mark D Walters, "The Constitutional Form and Reform of the Senate: Thoughts on the Constitutionality of Bill C-7" (2013) 7 JPPL 37. See also Jennifer Smith, ed, *The Democratic Dilemma: Reforming the Canadian Senate* (Montréal and Kingston: McGill-Queen's University Press, 2009).

8 For examples of authors who have considered this question, see Peter C Oliver, "Quebec and the Amending Formula: Protection, Promotion and Federalism" in Stephen Tierney, ed, *Accommodating Cultural Diversity: Contemporary Issues in Theory and Practice* (Aldershot: Ashgate, 2007) 167; Warren J Newman, "Living with the Amending Procedures: Prospects for Future Constitutional Reform in Canada" (2007) 37 SCLR (2d) 383 at 386.

9 See e.g. Dennis Baker & Mark D Jarvis, "The End of Informal Constitutional Change in Canada?" in Emmett Macfarlane, ed, *Constitutional Amendment in Canada* (Toronto: University of Toronto Press, 2016) 185; Peter W Hogg, "Senate Reform and the Constitution" (2015) 68 SCLR (2d) 591.

demonstrate that certain aspects of the 2014 decisions can also be explained by an application of the ordinary principle of the supremacy of the Constitution.

The theory we intend to explain in the following pages is a doctrinal endeavour. It is important to clarify from the outset what that means. Legal doctrine is not intended merely to describe the status of the law, nor to explain how the law obeys a number of social, political or historical determinants as a sociologist or a political scientist would do. Unlike the social sciences, legal doctrine participates in the construction of its object, within the framework of the role attributed to it by the theory of the sources of law.<sup>10</sup> It adopts an “internal point of view” of the law.<sup>11</sup> It seeks to improve the law by presenting it as a coherent and morally justifiable whole. Of course, it must respect the facts as represented by statutes and court decisions, but it can criticize them or propose a general theory that transcends them.<sup>12</sup> This is the challenge that we intend to tackle.

Such an undertaking is all the more urgent given that the new federal government has proposed a number of changes to Canadian political institutions, and some opponents of these reforms argue that they can only be implemented by means of a constitutional amendment. Indeed, in the summer of 2016, the government was unclear as to whether it was willing to respect the tradition of regional representation in the Supreme Court. A group of Nova Scotia lawyers filed a lawsuit, arguing that any departure from that tradition constituted a constitutional amendment. The possibility of incorporating a requirement of bilingualism into the *Supreme Court Act* raises similar doubts. Other political initiatives, such as the reform of the electoral system, are also being challenged on the grounds that they would require an amendment to the Constitution. A logical framework is necessary to sort out all these assertions.

## **I. Three competing theories to explain the Supreme Court advisory opinions**

For the sake of analytical clarity, it is important from the outset to describe the three theories that could explain the advisory opinions of the spring of 2014.

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10 John EC Brierley & Roderick A Macdonald, eds, *Quebec Civil Law: An Introduction to Quebec Private Law* (Toronto: Emond Montgomery, 1993) at 127.

11 Jacques Chevallier, “Doctrin juridique et science juridique” (2002) 50 Dr et soc 103.

12 As Justice Beetz stressed with regard to the limits of the rule of unjustified enrichment, “it is really a matter for authors [doctrine] systematically to clarify these difficulties.”: *Cie immobilière Viger v L Giguère Inc* (1976), [1977] 2 SCR 67 at 77, 10 NR 277.

We will call them: the theory of implicit finding of incompatibility; the open constitution theory; and the protective function theory.

In order to differentiate between them, it is useful to bear in mind the basic legal principle by which the holder of a delegated power is subject to two types of limits: it must act within the powers entrusted to it, and it must comply with the hierarchically higher norms. This principle is sometimes more clearly stated in the field of administrative law,<sup>13</sup> but it is equally valid for constitutional law. It is, in fact, a corollary of the principle of the rule of law. When it comes to federalism or the division of powers, the question is whether Parliament or the legislative assembly concerned has acted within the limits of its powers, while in matters of rights and freedoms the question is, rather, whether a statute is inconsistent with a hierarchically higher norm in the *Canadian Charter of Rights and Freedoms*. The three theories combine these two types of constraint differently.

### A. The theory of implicit finding of incompatibility

The theory of implicit finding of incompatibility is simply a corollary of the principle of the supremacy of the Constitution (i.e., the necessity to respect higher-level norms). Section 52 of the *Constitution Act, 1982* provides that ordinary law that is not compatible with the constitutional text may be declared inoperative. Based on this theory, the rulings on Senate reform and judicial appointments could be explained as simply the invalidation of federal statutes on the grounds that they would be inconsistent with a provision of the Constitution, even if it is not expressed this way by the Court (hence the “implicit finding”).

In Canadian constitutional law, the concept of incompatibility (or conflict) has been developed primarily with respect to the paramountcy of federal statutes. Indeed, in order to determine when a provincial law must yield to a federal law, the courts have had to develop an analytical framework that clarifies this notion of incompatibility. Without going into all the intricacies of Supreme Court case law,<sup>14</sup> we can say that there are two scenarios where two laws will be declared incompatible: the first is where there is operational conflict, while the second involves conflict with the purpose of a federal law. In

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13 See e.g. 114957 *Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town of)*, 2001 SCC 40, [2001] 2 SCR 241.

14 See in particular the rulings in *Multiple Access Ltd v McCutcheon*, [1982] 2 SCR 161, 138 DLR (3d) 1; *Saskatchewan (Attorney General) v Lemare Lake Logging Ltd*, 2015 SCC 53, [2015] 3 SCR 419 [*Lemare Lake*].

the first scenario, it is impossible to comply with both laws at the same time.<sup>15</sup> The second scenario arises when a provincial law frustrates the attainment of the purpose of a federal statute.<sup>16</sup> For example, such a conflict will occur when a provincial statute seeks to change the order of priority in which creditors will be paid in a bankruptcy case governed by federal law. It is also said, in such cases, that the purpose of the federal statute is to establish a “complete code,” i.e., to thoroughly regulate a specific subject.<sup>17</sup>

A little-known ruling of the Supreme Court, *Sutherland*,<sup>18</sup> provides an example of an implicit finding of incompatibility outside the context of the paramountcy of federal laws over provincial laws. This case involved a conflict between a provincial law and a constitutional provision that protected the right of Aboriginal people to hunt on “unoccupied Crown lands.”<sup>19</sup> The impugned Manitoba statute provided that certain wildlife areas were not “unoccupied Crown lands” for the purposes of the constitutional provision at issue. The Supreme Court ruled that the Manitoba statute was invalid because it was, in effect, intended to implicitly alter the constitutional provision at issue. According to Justice Dickson, the statute had the “effect” of amending the Constitution, even if the constitutional text remained officially unaltered.<sup>20</sup> It could also be said, using the concepts developed with respect to the doctrine of paramountcy, that Manitoba’s law thwarted the attainment of the purpose of the constitutional provision, which was to guarantee certain rights to Aboriginal peoples. At the end of the day, the two statutes were found to be incompatible.

The concept of “constitutional architecture,” which is often mentioned by the Supreme Court in its two advisory opinions, can be used to give effect to the principle of supremacy of the Constitution. When a statute is said to be incompatible with the constitutional architecture, this may well mean that it frustrates the achievement of the purposes of certain constitutional provisions,

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15 See the majority reasons in *407 ETR Concession Co v Canada (Superintendent of Bankruptcy)*, 2015 SCC 52, [2015] 3 SCR 397, Gascon J.

16 See in particular *Bank of Montreal v Hall*, [1990] 1 SCR 121, 65 DLR (4th) 361. In that case, the Supreme Court concluded that for all intents and purposes, federal law must be considered to be a hierarchically higher norm. The Court also stated that the doctrine of paramountcy, particularly as it pertains to conflict with the purpose of the federal law, should be applied restrictively. See *Lemare Lake*, *supra* note 14 at paras 20-27.

17 *Husky Oil Operations Ltd v MNR*, [1995] 3 SCR 453 at para 85, 128 DLR (4th) 1.

18 *R v Sutherland*, [1980] 2 SCR 451, 113 DLR (3d) 374 [*Sutherland*].

19 This involved paragraph 13 of the Memorandum of Agreement approved under the *Manitoba Natural Resources Transfer Act*, RSM 1970, c N30, constitutionalized by the *Constitution Act, 1930*, RSC 1985, Appendix II, No 26.

20 *Sutherland*, *supra* note 18 at 456.

even if these objectives are not explicitly stated in the text. We will come back to that.

## B. The open constitution theory

The open constitution theory is based on the wording of section 52(2) of the *Constitution Act, 1982*, which states that “the Constitution of Canada includes” a number of statutes listed in a schedule.<sup>21</sup> Since 1982, constitutional lawyers have debated whether this list is exhaustive or open-ended. If it is open-ended, laws that are not listed could acquire the distinctive characteristics of the formal Constitution, i.e., they would override incompatible ordinary laws (section 52(1)) and could only be amended through the special procedure for amending the Constitution (section 52(3)).

Authors who advocate recognition of the open nature of the Constitution often refer to the example of the *Supreme Court Act* to support their argument. The reason for this is quite simple. The amending formula refers twice to the Supreme Court (in sections 41(d) and 42(1)(d)). There is no mention of the Supreme Court elsewhere in the constitutional text, however,<sup>22</sup> which would make sections 41(d) and 42(1)(d) irrelevant. This can only make sense if we conclude that certain provisions of the *Supreme Court Act* are implicitly part of the Constitution of Canada.

From this perspective, there is no limit to the powers of Parliament and provincial legislatures other than the requirement for compatibility with the Constitution (and, of course, the limits that flow from federalism). As such,

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21 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 52(2). The origin of this non-exhaustive definition of the Constitution of Canada can be found in the resolution tabled by the federal government in October 1980 with a view to patriating the Constitution without the consent of provinces: Anne F Bayefsky, *Canada's Constitution Act, 1982, and Amendments: A Documentary History* (Toronto: McGraw-Hill Ryerson, 1989) vol 2 at 757. Previous plans to patriate the Constitution included a clause that exhaustively defined the Constitution of Canada. A document that was apparently prepared for the Minister of Justice at the time provides the following explanation: “The definition is not exhaustive; it includes the documents specifically listed. The Constitution of Canada is found in other documents as well as those listed, such as the letters patent appointing the Governor General, the instructions to Lieutenant Governors, provincial statutes relating to the constitution of the province, federal statutes such as the Succession to the Throne Act. To try to enumerate such documents would be too time-consuming. There would be a danger of leaving some out.”: *Briefing book for clause-by-clause consideration of the proposed resolution (Book III)* (January 1980), Ottawa, Library and Archives Canada (R11344, vol 406, files 7-9).

22 For the sake of precision, it should be mentioned that section 101 of the *Constitution Act, 1867* empowers Parliament to create a “General Court of Appeal,” without further details as to its jurisdiction or organization: *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.

the amending formula would not limit the powers of Parliament and the legislatures; it would merely indicate how to amend the other provisions of the constitutional text that, alone, can render an ordinary statute inoperative. It follows that if in the *Supreme Court Act Reference* the Court declared an Act of Parliament to be invalid, it must have been because of an inconsistency with a provision of the Constitution, which is hard to find elsewhere than in the *Supreme Court Act* itself. Moreover, in denying the existence of limits to the powers of legislatures other than those arising from the requirement of constitutional compatibility, this approach aligns with the oft-repeated idea that the *Constitution Act, 1867* exhaustively distributed the power to enact laws between the two levels of government in Canada.<sup>23</sup>

This is how most commentators have read the two advisory opinions.<sup>24</sup> By following that line of thinking to its logical conclusion, one could go so far as to argue that any rule, principle, or institution that can be characterized as part of the “constitutional architecture” can no longer be modified in any way, without making a constitutional amendment in accordance with Part V. Some authors, no doubt aware of the extreme consequences of such a position, have instead proposed criteria for delimiting the new boundaries of the Constitution of Canada.<sup>25</sup>

### C. The protective function theory

Unlike the open constitution theory, the protective function theory asserts that the amending formula found in Part V of the *Constitution Act, 1982*, not only clarifies the procedure for changing certain categories of provisions in the Constitution (the enabling function), but also excludes certain matters or areas from the jurisdiction of Parliament or provincial legislatures (the protective function). In other words, the constituent power has reserved certain questions to itself, even if the Constitution does not (or does not yet) include norms pertaining to these subjects.

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23 *Ontario (AG) v Canada (AG)*, [1912] AC 571 (PC) at 581, 3 DLR 509; See also *Murphy v Canadian Pacific Railway*, [1958] SCR 626 at 643, 15 DLR (2d) 145.

24 See e.g. Hogg, *Constitutional Law*, *supra* note 3 at ch 4-23, which states that according to the Court, some provisions of the *Supreme Court Act* “have mysteriously migrated into the Constitution of Canada”; Kate Glover, “Structure, Substance and Spirit: Lessons in Constitutional Architecture from the *Senate Reform Reference*” (2014) 67 SCLR (2d) 221 at 248.

25 See e.g. Adam Dodek, “Uncovering the Wall Surrounding the Castle of the Constitution: Judicial Interpretation of Part V of the *Constitution Act, 1982*” in Macfarlane, *supra* note 9, 42 at 51-53; Philippe Lagassé & Patrick Baud, “The Crown and Constitutional Amendment after the *Senate* and *Supreme Court References*” in Macfarlane, *supra* note 9, 248; Noura Karazivan, “De la structure constitutionnelle dans le *Renvoi relatif au Sénat*: vers une *gestalt* constitutionnelle?” (2015) 60:4 McGill LJ 793.

A statute can therefore be declared invalid for two different reasons: it is incompatible with an existing provision of the Constitution; or it relates to a subject that the constituent power reserved for itself and has removed from the jurisdiction of the ordinary legislator. Part V of the *Constitution Act, 1982* therefore has the effect of limiting the jurisdiction of the ordinary legislator, without it being necessary to prove incompatibility within the meaning of section 52 of that Act.

The simplest example of the protective function of the amending formula is found in section 42(1)(a), which provides that amendments to the “principle of proportionate representation of the provinces in the House of Commons” must be made in accordance with the procedure set out in section 38, i.e., the “7/50 formula.” The representation of the various provinces in the House of Commons and its decennial adjustment is provided for in section 51 of the *Constitution Act, 1867*. According to section 44, this section may be amended by Parliament acting alone. Indeed, Parliament has amended it twice since 1982.<sup>26</sup> These amendments respected the principle of proportionate representation. They did not invade the area protected by section 42(1)(a) — that is, the choice between various principles of provincial representation (equal, proportionate to the population, proportionate to wealth, etc.). In reality, what is protected is a principle rather than the precise provision that implements that principle, as demonstrated by the two amendments made to section 51 of the *Constitution Act, 1867*, since 1982, and as clearly spelled out in section 52 of that same Act.

In most cases, the area covered by the enabling function of a provision of the amending formula is broader than the area covered by its protective function. Section 41(c) provides an example. It specifies that any amendment to the Constitution relating to the use of English and French (with certain exceptions) must be approved by all provinces. This section does not preclude Parliament from enacting legislation respecting the use of English and French, such as the *Official Languages Act*. Rather, it indicates how to go about adding new language rights to the Constitution or amending existing language rights provisions. If this section had a protective function, it would doubtless be limited to the choice of two, and only two, official languages. It is even possible that section 41(c) has no protective function and has only an enabling function.<sup>27</sup>

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26 *Representation Act 1985*, SC 1986, c 8, Part I; *Fair Representation Act*, SC 2011, c 26, s 2.

27 See *infra* note 82 and accompanying text.



A comparison with civil law provides a better understanding of the distinction between enabling and protective functions. To a large extent, the Civil Code has an enabling function. Among other things, it sets out the rules enabling willing parties to enter into contracts. The Code also, however, includes a small number of rules of public order, i.e., rules that are binding on the parties, and that prohibit them from entering into certain types of contracts or including certain types of clauses in their contracts.<sup>28</sup> The protective function is, in a sense, a constitutional public order: it prohibits the ordinary legislator from adopting certain types of legislation.

In the area of the division of powers, the concept of interjurisdictional immunity could serve as an analogy to explain the protective function. As an exception to the double aspect doctrine, which allows for the coexistence of federal and provincial laws dealing with the same subject, the doctrine of interjurisdictional immunity protects the “core” competence (usually federal jurisdiction) arising out of a law of the other order of government.<sup>29</sup> For example, the Supreme Court ruled that Quebec legislation protecting agricultural land could not be applied to prevent the construction of an aerodrome, a matter at the heart of federal jurisdiction over aeronautics.<sup>30</sup> One important aspect of this doctrine is that it applies even in the absence of federal legislation dealing with the same subject matter as the provincial law, or in other words, even if the authority being protected has not been exercised. The same is true of the protective function of the amending formula, which applies even in the absence of a constitutional provision on the subject matter.

Before going any further, it is important to dispel any potential confusion. We use the term “protective function” in a specific sense, which is that the amending formula has the effect of protecting certain rules or principles that are not expressly provided for in the Constitution. In the broader sense, the amending formula obviously protects the entire Constitution against unilateral changes, but that is not the subject of this paper.

## **II. Assessment of the three theories**

Having described the three theories that explain how the Supreme Court can rule that the adoption of an ordinary law actually requires an amendment to the Constitution, we can now assess which of these three theories constitutes

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28 See in particular art 1732 *CCQ*, on sales warranties.

29 See the landmark ruling in *Canadian Western Bank v Alberta*, 2007 SCC 22, [2007] 2 SCR 3 [Canadian Western Bank].

30 *Québec (AG) v Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 SCR 536.

the best explanation for the two 2014 advisory opinions. Drawing insight from the theories of Ronald Dworkin,<sup>31</sup> we will approach this question from two main perspectives: first, the compatibility of each of these theories with the facts (i.e., their capacity to explain what the Court said or did); and second, their justification (i.e., whether or not they are acceptable).

## A. Compatibility with the Court's reasons

We will begin by examining whether each of the theories provides a plausible explanation for the Court's reasons in the two advisory opinions. In this assessment, we will accept the possibility that the reasons are not fully consistent themselves and that the judges who drafted them did not necessarily have these three theories in mind. We shall consider the reasoning actually employed by the Court as much as the principles it sets forth, because as the Court has already said, it is "wise to look at what the courts do as distinguished from what they say."<sup>32</sup>

### ***1. The theory of implicit finding of incompatibility: a hidden but real foundation***

The theory of implicit finding of incompatibility explains the result of the *Senate Reform Reference*, although the Court does not explicitly use this analytical framework. In fact, despite the oft-cited references to the Constitution's architecture, the Court was also careful to identify certain specific constitutional provisions that would be affected by the establishment of consultative elections: sections 24 and 32 of the *Constitution Act, 1867*. These provisions, the Court tells us, provide that senators shall be appointed, while other provisions provide that members of the House of Commons shall be elected.<sup>33</sup> After describing the basis for the selection process for members of both houses of Parliament, the Court concludes that "the proposed consultative elections would fundamentally modify the constitutional architecture we have just described."<sup>34</sup> In other words, even assuming that there is no operational conflict between section 24 and a federal law providing for consultative elections, there would at the very least be a conflict with the purpose of the higher norm, in this case section 24, which is to provide the Senate with a different type of political legitimacy than that of the House of Commons. (As mentioned above, the concept of the

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31 Ronald Dworkin, *Law's Empire* (Oxford: Harvard University Press, 1986); see also Stephen A Smith, *Contract Theory* (Oxford: Oxford University Press, 2004) at 7-32.

32 *Canadian Western Bank*, *supra* note 29 at para 52.

33 *Reference re Senate*, *supra* note 2 at para 55.

34 *Ibid* at para 60.

constitutional architecture is used here as a synonym for the intended purpose of certain provisions of the Constitution).

The concept of incompatibility may also have played a role in the Court's ruling on Senate abolition. There was general agreement that such action would require a formal amendment to the Constitution, but the Court had to determine whether the applicable formula was the general formula ("7/50") or that of unanimity. In deciding in favour of unanimity, the Court emphasized that the abolition of the Senate would render "inoperative"<sup>35</sup> the provisions of Part V that provide for Senate participation in the constitutional amendment procedure. This, in my opinion, is another way of stating a finding of incompatibility.

However, there was no implicit finding of incompatibility in the *Supreme Court Act Reference* for the simple reason that there is no provision in the Constitution of Canada establishing the eligibility requirements for appointment to the Supreme Court. The Court does not reason in terms of incompatibility. The wording it uses when declaring invalid section 6.1 of the *Supreme Court Act*, added in 2013, focuses on the fact that it is an "amendment" to the composition of the Court.<sup>36</sup>

## ***2. The open constitution theory: obvious answer or illusion?***

Several passages in the *Senate Reform Reference* easily lend themselves to the interpretation that, for all intents and purposes, the Court has added to the constitutional text. In the introductory paragraphs of its reasoning, the Court begins by recalling its previous decisions in which it asserted that the list of constitutional texts set out in the Schedule to the *Constitution Act, 1982* is not exhaustive.<sup>37</sup> It then introduces a concept that is central to its reasoning, that of the constitutional architecture:

As discussed, the Constitution should not be viewed as a mere collection of discrete textual provisions. It has an architecture, a basic structure. By extension, amendments to the Constitution are not confined to textual changes. They include changes to the Constitution's architecture.<sup>38</sup>

In many respects, this concept of architecture seems to be key to the Court's reasoning. As stated above, the Court puts consultative elections out of the reach of the ordinary legislator because they would transform the architec-

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<sup>35</sup> *Ibid* at para 107.

<sup>36</sup> *Reference re Supreme Court*, *supra* note 1 at paras 104-106.

<sup>37</sup> *Reference re Senate*, *supra* note 2 at para 24.

<sup>38</sup> *Ibid* at para 27.

ture of the Constitution. The Court also repeatedly refers to “the Senate’s fundamental nature and role” — presumably a component of the constitutional architecture — which would be affected by the consultative elections.<sup>39</sup> It is tempting to conclude that the Court has added new rules or principles to the constitutional corpus that can only be amended in accordance with Part V. Nevertheless, before jumping to conclusions, it is important to note that at no time does the Court state that it has made such an addition.<sup>40</sup>

Even more than the *Senate Reform Reference*, the *Supreme Court Act Reference* has been viewed as a clear example of an addition to the Constitution. Is the assertion that “the *Constitution Act, 1982* confirmed the constitutional protection of the essential features of the Supreme Court”<sup>41</sup> not an acknowledgement of such an addition? In fact, these features are nowhere to be found in the texts listed in the Schedule to the *Constitution Act, 1982*. The conclusion seems all the more inescapable in that the Court identifies three provisions of the *Supreme Court Act*, sections 4(1), 5 and 6, that “codify”<sup>42</sup> the composition of the Court referred to in section 41(d) of the *Constitution Act, 1982*. These statements led several authors to assert that these three provisions had been “constitutionalized” or had become part of the Constitution.<sup>43</sup>

### ***3. The protective function theory’s presence in the Court’s reasons***

Is it possible to argue instead that the Supreme Court attributed a protective function to Part V’s amending formula? References to this protective function abound in the two advisory opinions. Indeed, the Court held that “the framers of the *Constitution Act, 1982* extended the constitutional protection provided by the general amending procedure to the entire process by which Senators are ‘selected,’”<sup>44</sup> and that these framers intended “to ensure that Quebec’s representation was given special constitutional protection.”<sup>45</sup>

The Court also associates the idea of a protective function with the intention of the framers of the *Constitution Act, 1982* to “freeze the *status quo*”<sup>46</sup> in relation to certain institutions until a consensus emerged on the reforms that should be made. For example, with regard to the Senate, the Court notes that

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39 *Ibid* at paras 52, 69, 79.

40 Karazivan, *supra* note 25 at 816.

41 *Reference re Supreme Court*, *supra* note 1 at para 90.

42 *Ibid* at paras 91, 104.

43 See e.g. Hogg, *Constitutional Law*, *supra* note 3 at ch 4-23.

44 *Reference re Senate*, *supra* note 2 at para 65.

45 *Reference re Supreme Court*, *supra* note 1 at para 92. See also paras 93, 99.

46 *Ibid* at para 100; See also *Reference re Senate*, *supra* note 2 at paras 31, 100.

“the framers of the *Constitution Act, 1982* intended to constitutionally entrench the *status quo* with respect to the Senate until the day when broad federal-provincial consensus could be obtained on the matter of Senate reform.”<sup>47</sup> It also mentions certain specific types of reform that had been envisaged in the 1970s,<sup>48</sup> suggesting that reforms of such magnitude should be implemented through a constitutional amendment. In the *Supreme Court Act Reference*, this intention to protect is linked to the guarantee given to Quebec that three of the nine judges of the Supreme Court will be Quebec jurists. This is no more and no less than a right of veto for Quebec (and all the other provinces) on any amendment to this fundamental compromise.

It is worth mentioning that the idea of preserving the *status quo* had previously been developed by the Quebec Court of Appeal, which had also been called upon to give an advisory opinion on the question of Senate reform. The Court of Appeal stated:

The interpretation of section 42 must also take account, in particular, that because of the inability of the federal government and the provinces to agree in 1982 on a total reform of the Constitution, including the Senate, amongst other institutions, the framers decided to postpone further discussion of the matters it contains, while specifying the applicable amending procedure to incorporate an eventual consensus in the Constitution.<sup>49</sup>

The Court of Appeal drew the following conclusion, which succinctly describes the difference between the enabling and protective functions of the amending formula, although it undoubtedly exaggerates the scope of the protective function:

... section 42 prescribes not only the amendment procedure for such matters, but recognizes that they are not within the sole jurisdiction of Parliament.<sup>50</sup>

The protective function theory is also consistent with the Supreme Court’s key assertion with regard to the general framework for analysis that the first step is to “determine whether the changes contemplated in the *Reference* amend the Constitution and, if so, which amendment procedures are applicable.”<sup>51</sup>

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47 *Reference re Senate*, *supra* note 2 at para 11.

48 *Ibid* at para 18.

49 *Renvoi relatif au projet de loi fédéral relatif au Sénat*, 2013 QCCA 1807 at para 40, 370 DLR (4th) 711 [*Renvoi relatif au Sénat*].

50 *Ibid* at para 48.

51 *Reference re Senate*, *supra* note 2 at para 21.

Indeed, the protective function theory makes it possible to answer the first of these two questions not by broadening the concept of constitution, but by broadening that of amendment.

## **B. Justification for the different theories**

Beyond the compatibility of each of the three theories with what the Court said and did in the two advisory opinions of spring 2014, it is also important to ask which of these three theories is more justified (or preferable). This is an essentially normative judgment. As Dworkin says, it is a question of presenting the law in its best light, i.e., as a coherent whole, compatible with the values and principles underlying the legal and political system, and possessing, as far as possible, the qualities usually associated with the law, such as intelligibility and predictability, even if absolute certainty is illusory.<sup>52</sup>

Presenting the law in its best light is a difficult exercise, particularly when there are disagreements about the role of law and the constitution in a democratic state. There are two possible strategies: either choose a particular vision of the role of the constitution and propose an interpretation that adheres to this vision, at the risk of it being rejected by those who refute this role; or, propose an interpretation that is compatible with a range of different visions of the role of the constitution. We have opted for this second approach.<sup>53</sup>

In the case at hand, it is clear that the relationship between the Constitution, the judiciary, and democracy is the subject of considerable debate. Some authors suggest that the courts have the power to review the validity of statutes passed by Parliament on the basis of general moral criteria (i.e., in the absence of a specific constitutional text against which to evaluate legislation).<sup>54</sup> The Court's assumption of a power of judicial review in the absence of a textual basis poses a democratic problem, however, given that unelected judges find themselves establishing the supreme norm. Justice La Forest summarized these concerns

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52 Dworkin, *supra* note 31 at 254-258. See also *Consolidated Fastfrate Inc v Western Canada Council of Teamsters*, 2009 SCC 53 at para 45, [2009] 3 SCR 407.

53 This is the strategy recommended by Daniel Weinstock to find a compromise between the proponents of two sets of conflicting fundamental principles: Daniel Weinstock, "So, Are You Still a Philosopher?" (Lecture delivered at the Big Thinking Lecture Series, University of Victoria, 5 June 2013), 5 Trudeau Foundation Papers 127, online: <[www.fondationtrudeau.ca/sites/default/files/u5/trudeau\\_foundation\\_papers\\_vol.\\_5\\_2013\\_daniel\\_weinstock.pdf](http://www.fondationtrudeau.ca/sites/default/files/u5/trudeau_foundation_papers_vol._5_2013_daniel_weinstock.pdf)>.

54 See e.g. TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2001); TRS Allan, *The Sovereignty of Law: Freedom, Constitution and Common Law* (Oxford: Oxford University Press, 2013).

in his response to the majority opinion of the Chief Justice in *Reference re Remuneration of Judges*:<sup>55</sup>

Judicial review, therefore, is politically legitimate only insofar as it involves the interpretation of an authoritative constitutional instrument . . . . This legitimacy is imperiled, however, when courts attempt to limit the power of legislatures without recourse to express textual authority.<sup>56</sup>

The Court adopted this approach in subsequent decisions and refused to review the validity of statutes solely on the basis of the unwritten constitutional principles it had set out in the *Quebec Secession Reference*.<sup>57</sup> In particular, it ruled that the principle of the rule of law did not preclude Crown immunity,<sup>58</sup> did not prohibit the legislator from making exceptions to general rules of law<sup>59</sup> and did not conflict with the imposition of a tax on legal services.<sup>60</sup> The Court's recent decision to invalidate a system of hearing fees was founded on an existing constitutional provision: section 96 of the *Constitution Act, 1867*.<sup>61</sup> This means that the Court itself, in the vast majority of cases, refuses to engage in judicial review based exclusively on unwritten principles.<sup>62</sup> In our analysis of the competing theories to explain the two advisory rulings of 2014, we will therefore favour a theory that avoids the exclusive use of unwritten rules.

### ***1. The open constitution theory***

Numerous authors, notably political scientists, formulated criticisms of the two advisory rulings based on the open constitution theory.<sup>63</sup> These criticisms can be summarized as follows.

The first target of criticism is the methodology employed by the Court; it essentially ignored the text of the Constitution and based its reasoning on

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55 *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3, 150 DLR (4th) 577 [*Reference re Remuneration*].

56 *Ibid* at paras 315-316. See also Jean-François Gaudreault-DesBiens, "Le juge comme agent de migration de canevas de raisonnement entre le droit civil et la *common law*? Quelques observations à partir d'évolutions récentes du droit constitutionnel canadien" in Ghislain Otis, ed, *Le juge et le dialogue des cultures juridiques* (Paris: Karthala, 2013) 41 at 56.

57 *Reference re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385.

58 *Babcock v Canada (AG)*, 2002 SCC 57, [2002] 3 SCR 3.

59 *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49, [2005] 2 SCR 473.

60 *British Columbia (AG) v Christie*, 2007 SCC 21, [2007] 1 SCR 873.

61 *Trial Lawyers Association of British Columbia v British Columbia (AG)*, 2014 SCC 59, [2014] 3 SCR 31 [*Trial Lawyers Association*].

62 By way of analogy, in France, the extension of the "Constitutional block" has been attached, in the vast majority of cases, to certain elements of the text of the 1958 Constitution: Louis Favoreu et al, *Droit constitutionnel*, 13th ed (Paris: Dalloz, 2013) at 121-128.

63 See *supra* note 9.

abstract principles of uncertain origin. This is particularly evident in the *Senate Reform Reference*. The Court appears to have disregarded the meaning of the expression “method of selecting” found in section 42(1)(b), basing its reasoning instead on the concept of constitutional architecture. Critics claim, however, that this concept is unclear, making it difficult to predict what type of reform requires an amendment to the Constitution.

These methodological shortcomings would undermine the legitimacy of the Court’s new jurisprudence. Indeed, recourse to the concept of constitutional architecture would be somewhat akin to judicial invention. Furthermore, the idea that non-listed texts may form part of the Constitution of Canada has always raised questions about the legitimacy of a judicial addition to the “constitutional block.”<sup>64</sup> The Court would be arrogating to itself, without a democratic mandate deriving from the constitutional text, the power to prevent Parliament from undertaking certain types of reform. The lack of clarity in the concept of constitutional architecture would even allow the Court, according to some authors, to disguise a value judgment about the desirability (or lack thereof) of the reform that is the subject of a court challenge.<sup>65</sup> This would call into question the political neutrality of the Court and the Constitution.

On the practical front, these authors argue that the Court’s interpretation of the amending formula would make it almost impossible to amend the Constitution even when the reform in question appears to be relatively limited in scope. Given the difficulty of implementing the amending procedure, the additional rigidity arising from the two advisory rulings would lead to constitutional paralysis in Canada.

## ***2. The protective function theory***

The protective function theory offers a better justification for the Court’s advisory rulings given that, despite appearances, it allows them to be considered as the outcome of an exercise in interpreting the constitutional text that does not imply adding extrinsic elements or extending the constitutional block. This theory allows for the Court’s reasoning to be seen as being based on an interpretation of the provisions of Part V of the *Constitution Act, 1982*, which interpretation is itself based on an analysis of the purpose of Part V derived from the discussions leading up to its adoption.

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64 Unless a text attained suprallegislative status prior to 1982 based on the principles of British Imperial law. This could be the case, for example, with *The Quebec Boundaries Extension Act*, SC 1912, c 45; see *R v Sparrow*, [1990] 1 SCR 1075 at 1104, 70 DLR (4th) 385.

65 Baker & Jarvis, *supra* note 9 at 195.



Part V of the *Constitution Act, 1982* was not drafted overnight in November 1981.<sup>66</sup> The text of the constitutional amending formula is the result of a long process that began with the first serious discussions on the subject in the 1930s.<sup>67</sup> Studying these negotiations provides an understanding as to the function of the various components of Part V and an appreciation of the political consensus on certain principles, or in some cases, an understanding of how a position put forward by certain parties was accepted by the other parties to these negotiations. Without necessarily seeking to determine the actual intent of individual participants in these negotiations, this approach does provide for relatively precise indications as to the objective of certain provisions of Part V.

In particular, an historical review provides an understanding of the origin of the lists of subjects referred to in sections 41 and 42. In 1949, following the failed discussions of the 1930s, the Canadian Parliament obtained an amendment to the *Constitution Act, 1867* from the British Parliament that authorized the Canadian Parliament to amend certain aspects of the Canadian Constitution without the intervention of British authorities. This provision, section 91(1), included a list of exceptions to this new jurisdiction of Parliament: matters within the jurisdiction of the provinces, denominational school rights, provisions on the use of English and French and the mandate of the House of Commons.

This addition to the Constitution was made without the consent of the provinces and despite opposition from some of them. According to these provinces, the formulation of exceptions to the federal power to amend the Constitution was too narrow and allowed for certain unilateral changes that could affect the balance of federalism or the interests of the provinces. Then Prime Minister Louis St. Laurent quickly acknowledged the validity of these criticisms and stated that a future amending formula should limit the unilateral power of Parliament more than did section 91(1).<sup>68</sup> All subsequent proposals for amending formulae (including the Fulton-Favreau formula and the Victoria Charter) included a list of subjects that were explicitly excluded from the scope

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66 Even if some elements of the final version of this text were drafted in a hurry: Mary Dawson, "From the Backroom to the Front Line: Making Constitutional History" (2012) 57:4 McGill LJ 955 at 965.

67 For the history of these negotiations, see in particular Paul Gérin-Lajoie, *Constitutional Amendment in Canada* (Toronto: University of Toronto Press, 1950); J Peter Meekison, "The Amending Formula" (1982) 8 Queen's LJ 99; Peter H Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?*, 2nd ed (Toronto: University of Toronto Press, 1992); Nadia Verrelli, "Searching for an Amending Formula: The 115-Year Journey" in Macfarlane, *supra* note 9, 19 [Verrelli, "Amending Formula"]; James Ross Hurley, *Amending Canada's Constitution: History, Processes, Problems and Prospects* (Ottawa: Canada Communications Group, 1996).

68 Verrelli, "Amending Formula", *supra* note 67 at 26.

of Parliament's unilateral power to amend certain aspects of the Constitution, and were therefore subject to a multilateral formula requiring a high degree of provincial consent. The precise content of these lists varied slightly from one proposal to another, but the principle of limiting the powers of Parliament has been the subject of political consensus since that time. In particular, this protection was a corollary of Quebec's claims regarding its right of veto over constitutional amendments.<sup>69</sup> It could certainly be argued that the Supreme Court took note of this consensus when it rendered its opinion in the *Upper House Reference* in 1979.<sup>70</sup> In that case, the federal government had asked the Court whether Parliament could use section 91(1) to unilaterally amend certain important features of the Senate. Although it did not answer all the questions, the Court did rule that Parliament could not change the method of selecting senators to provide for their election, as this would result in a profound change in the role of the Senate within the Canadian political system. According to the Court, section 91(1) did not apply to amendments affecting provincial interests. Given that the Senate has a regional representation role, however, the interests of the provinces are affected by any change in the Senate's essential characteristics. The Court's opinion in this case undoubtedly contributed to legitimizing the presence of lists of subjects removed from Parliament's unilateral amending power, which became sections 41 and 42.

Interpreted in light of this historical background, sections 41 and 42 of the *Constitution Act, 1982* were not established primarily for an enabling purpose.<sup>71</sup> Rather, they were intended to restrict Parliament's unilateral authority to amend certain parts of the Constitution, initially provided for by section 91(1) of the *Constitution Act, 1867*, and subsequently by section 44 of the *Constitution Act, 1982*. It is therefore logical that sections 41 and 42 have a protective function, i.e., that they limit not only the powers deriving from section 44, but also any authority of Parliament to enact or amend ordinary laws dealing with those same subjects, pursuant to section 91 of the *Constitution Act, 1867*. In other words, section 91 must now be interpreted in light of sections 41 and 42.

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69 See Oliver, *supra* note 8.

70 *Reference re Authority of Parliament in relation to the Upper House*, [1980] 1 SCR 54, 102 DLR (3d) 1.

71 As we will see further on (*infra* note 82 and accompanying text), this philosophy of protection may translate into the protective function analyzed in this paper, but also in the fact that the constitutional provisions that establish bilingualism at the federal level cannot be amended without the support of all the provinces, which means that Quebec has a right of veto on this subject.

Such a conclusion is founded on the text and on usual methods of interpretation.<sup>72</sup> It does not propose an extension of the constitutional block that would be devoid of any textual hook.<sup>73</sup> It therefore presents a justification that is more likely to find consensus than the open constitution theory. From this perspective, the concept of “constitutional architecture” found in the Court’s reasons appears in a different light. It is not a set of diffuse principles that would be added to the constitutional text and given independent normative force. The concept is more akin to what is usually called the purpose of legislation, and serves as a basis for a purposive interpretation of the constitutional text. This purpose emerges from the structure of the text, the history of its adoption and the function of the institutions it establishes. Thus, paradoxically, the constitutional architecture would be the invention of politicians and not judges.

It is true that there is little direct evidence that the “framers” of the Constitution specifically contemplated the protective function.<sup>74</sup> However, the Fulton-Favreau formula contained a provision explicitly providing for the full retention of the existing powers of Parliament and the provincial legislatures.<sup>75</sup> The abandonment of this provision in subsequent drafts may show that the drafters were aware that the adoption of a constitutional amending formula could result in a narrowing of the powers of Parliament and the provincial legislatures.

### ***3. The theory of implicit finding of incompatibility***

Explaining certain aspects of the 2014 references by an implicit finding of incompatibility with existing provisions of the Constitution does not raise any particular problem of justification. Indeed, to the extent that the invalidation of an ordinary law is simply based on the principle of the supremacy of the Constitution, this does not lead to any specific problems of legitimacy, beyond the issues usually associated with the interpretation of constitutional texts.

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72 And in particular, it could be said, on the interpretation methods specific to civil law.

73 Glover, *supra* note 24 at 237.

74 See e.g. Meekison, *supra* note 67 at 115-116, who appears to envisage an enabling function for sections 41(d), 42(1)(b) and 42(1)(d). Meekison was Deputy Minister of Alberta Intergovernmental Affairs at the time.

75 Reproduced in Hurley, *supra* note 67 at 186.

### III. Delimiting the area protected by the amending formula

We therefore come to the conclusion that the protective function theory is superior to the open constitution theory given that it is more compatible with what the Court said and did in the *Supreme Court Act Reference* and the *Senate Reform Reference* and provides more convincing justification. The theory of implicit finding of incompatibility may be used to complement the protective function theory. We shall now propose a method for determining the scope of this protective function. We shall do so by drawing the logical conclusions from the protective function theory and tying them to some of the Supreme Court's statements in the two references.

The underlying principle is that the scope of the protective function should be determined by a purposive interpretation of sections 41 and 42 of the *Constitution Act, 1982*. Indeed, these sections reflect the will of the provinces, accepted by the federal government, to limit the power of Parliament (and that of provincial legislatures) to unilaterally change certain institutions. It is therefore logical that the wording of these sections would be the starting point for an analysis of the protective function. This was also the case in the two references: the Supreme Court based its reasoning on the wording of sections 41(d) and 42(1)(b), which deal with the composition of the Supreme Court and the method of selecting senators. It also follows that the protective function should not, in principle, be associated with matters that fall under the general procedure of section 38 but are not covered by sections 41 and 42.<sup>76</sup> In these areas, the concept of incompatibility should determine in most cases whether a legislative initiative is contrary to the Constitution.<sup>77</sup>

In some instances, the wording of sections 41 and 42 precisely describes the subject of constitutional protection. For example, the "extension of existing provinces into the territories" (section 42(1)(e)), the "principle of proportionate representation of the provinces in the House of Commons prescribed by the Constitution of Canada" (section 42(1)(b)), or "the right of a province to a number of members in the House of Commons not less than the number of Senators by which the province is entitled to be represented at the time this Part comes into force" (section 41(b)) are relatively well-defined concepts that leave

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<sup>76</sup> See *infra*.

<sup>77</sup> See *infra*, the section dealing with the judiciary. Furthermore, as mentioned earlier, the amending formula also serves to "protect" the provisions of the Constitution from unilateral amendment, but the concept of the protective function that we are developing here deals with amendments to rules or principles that are not explicitly mentioned in the Constitution.

only limited room for interpretation. In such cases, Parliament cannot legislate in a manner that carries out the action prohibited by sections 41 and 42, or that undermines the principle or right protected by these provisions.

In other cases, the wording of sections 41 and 42 is less specific and makes general references to certain institutions, such as the monarchy, the Senate and the Supreme Court. In such situations, the Supreme Court relied on the concept of “essential characteristics” to determine the area protected. Once again, reducing the scope of the protection afforded to the institutions concerned to what is “essential” is consistent with the intent that can be ascribed to the constituent power in the context of the negotiations leading to the adoption of the *Constitution Act, 1982*. The framers of the constitutional text were well aware that these institutions were already governed by a combination of constitutional provisions and ordinary statutes, or in the case of the Supreme Court, almost exclusively by ordinary statutes.<sup>78</sup> Knowing from experience that it is not easy to agree on a constitutional amendment, they would not have sought to prevent the normal evolution of protected institutions, but rather any fundamental changes affecting the essential characteristics of those institutions.

History can help determine what these essential characteristics are. First, we can examine the negotiations that led to the patriation of the Constitution. Although the negotiations were not successful with regard to the Senate and the Supreme Court, these institutions were nevertheless the subject of substantial discussions. The main topics of discussion provide a good idea of what politicians of the time considered to be essential characteristics. This is precisely the approach taken by the Supreme Court in the reasons for its decisions. In the *Supreme Court Act Reference*, the Court notes that the concept of the “composition” of the Court should be primarily understood as the reflection of the provinces’ desire to guarantee Quebec’s representation within the institution. In the *Senate Reform Reference*, the Court refers, albeit briefly, to the constitutional discussions of the 1970s and the various proposals regarding the Senate. It implicitly concludes that whether members of the Senate were appointed or elected was an essential characteristic of the Senate.<sup>79</sup> The Court does not limit itself to the *travaux préparatoires* of the *Constitution Act, 1982*, however. It also examines the history of the establishment of the institutions in question — beginning in 1867 for the Senate, and in 1875 for the Supreme Court. The Court deduces from its inquiry that politicians had specifically intended, in the

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<sup>78</sup> The authority to create the Supreme Court is set out in section 101 of the *Constitution Act, 1867*, *supra* note 22.

<sup>79</sup> *Reference re Senate*, *supra* note 2 at paras 54–63.

first case, that the Senate not be an elected chamber, and in the second, that Quebec's representation in the Supreme Court be ensured in order to guarantee the vitality of the civil law tradition. In this regard, the Court uses the concept of historical compromise to stress the importance of the choices made by the framers of the Constitution. What this means is that two historical wills combine to define what is protected by the amending formula: that of the politicians who shaped the institution in question and that of the politicians who agreed on the amending formula.

It is possible that certain categories of sections 41 and 42 have only a limited protective function. Section 41(c) deals with amendments to the Constitution relating to "the use of the English or French language." Most existing constitutional provisions on this subject confer rights. We cannot assume a desire on the part of the constituent power to prohibit the ordinary legislator from guaranteeing additional rights beyond those provided for in the Constitution.<sup>80</sup> Indeed, the *Official Languages Act*<sup>81</sup> and the language laws of several provinces confer rights that go beyond those entrenched in the Constitution. Section 41(c) therefore has no protective function with respect to language rights. (Obviously, a law that purported to reduce rights guaranteed by the Constitution would be inoperative due to incompatibility with the Constitution, but not because of the protective function.) The only protective function that could be envisaged in section 41(c) would involve the choice of official languages at the federal level: this provision could be interpreted as referring to the choice of two, and only two, official languages, such that Parliament could not add a third.<sup>82</sup> In fact, section 41(c) is primarily intended to subject certain provisions of the Constitution to the rule of unanimity rather than the general formula, so as to grant a right of veto to Quebec on any amendment to the principle of bilingualism. This analysis of section 41(c) reveals an interesting aspect of the protective function; it focuses on institutions rather than on rights.

What are the effects of the protective function? Concluding that an ordinary statute deals with a subject covered by the protective function does not prohibit amendments to that statute. The protective function does not apply to legislative texts, but rather to the essential characteristics of the institutions concerned. Let us take the example of section 42(1)(a), the principle of proportionate representation of the provinces in the House of Commons. This

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80 See e.g. *Jones v New Brunswick (AG)*, [1975] 2 SCR 182 at 192-195, 45 DLR (3d) 583.

81 RSC 1985, c 31 (4th Supp).

82 André Bračn, "Le statut des langues autochtones au Canada: le cas de l'Inuit au Nunavut" (2008) 87 Can Bar Rev 741 at 751 argues in fact that section 16 does not prohibit creating official status for Aboriginal languages.

representation is provided for in section 51 of the *Constitution Act, 1867*, which the federal Parliament has amended twice since 1982.<sup>83</sup> This therefore means that the wording of ordinary legislation is not protected from amendment. The constraint on the legislator lies with the requirement to safeguard the protected principle when legislating. Thus, to the extent that amendments to section 51 maintain proportionate representation, they are valid. Another way of looking at the relationship between the protective function and ordinary legislation is to say that the latter does not suddenly become part of the “Constitution of Canada” as defined in section 52 of the *Constitution Act, 1982*, which is paramount over other statutes and can only be amended under Part V. The Supreme Court’s reasons demonstrate this. The Court held that section 5.1 of the *Supreme Court Act*, added by Parliament in 2013, was valid because it did not change the substance of the eligibility requirements that had existed up to that time. This would have been impossible had the provisions of the *Supreme Court Act* in question been part of the Constitution strictly speaking, just as Parliament cannot add sections to the *Canadian Charter of Rights and Freedoms* even if it asserts that the addition does not change its substance.

It is not always possible to precisely determine in advance what types of legislative changes are prohibited by the protective function of the amending formula. The concept of subterfuge or circumvention is likely to play an important role in this respect. Indeed, in the situations that led to the two advisory opinions of 2014, Parliament had obviously attempted to circumvent the constitutional amending procedure, or at the very least, to make maximum use of the flexibility it believed it had. Some authors even suggested that such processes were legitimate, provided that the constitutional text was not formally amended and the discretionary power granted to certain political actors was officially preserved.<sup>84</sup> Obviously, the question of what constitutes a subterfuge can hardly be the subject of abstract definitions.

At the end of this overview, a final question should be asked: Can the protective function be applied to institutions or principles that are not listed in sections 41 and 42? Let us recall here one of the reasons the protective function theory is more attractive than its rival, the open constitution theory: it is based on the constitutional text and does not purport to add to it. The reference to specific subjects highlights the special concern of the framers of the Constitution with regard to those subjects, and justifies the interpretation of

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83 *Supra* note 26. These amendments were adopted pursuant to section 44 of the *Constitution Act, 1982*, *supra* note 21.

84 Hawkins, *supra* note 7.

these sections as conferring a protective function. In contrast, section 38 does not target any particular subject. It is much more difficult to deduce a protective function for this section and to determine its boundaries. Ultimately, associating a protective function with section 38 without a precise textual basis is tantamount to defining subjects or matters that can no longer be touched by ordinary legislators. In that case, the protective function theory would be confused with that of the open constitution. It is therefore preferable to limit the protective function to the subjects referred to in sections 41 and 42.

It may well be said that such a vision is too narrow, and that it is incompatible with the elements of the *Senate Reform Reference* dealing with amendments to senators' term of office. On that front, the Supreme Court held that the length of term was outside the jurisdiction of Parliament acting alone, even if this characteristic of the Senate is not mentioned in section 42, because it nevertheless constitutes an essential characteristic that "engages the interests of the provinces."<sup>85</sup> It is true that these passages in the Court's reasons suggest that the concept of the interests of the provinces is more decisive than a basis in the text of sections 41 and 42.<sup>86</sup> The fact remains that length of term may be intimately related to the explicitly mentioned characteristics, as pointed out by the Quebec Court of Appeal. According to that Court, the different characteristics of the Senate are interrelated, and "an amendment to the duration of that mandate could affect both the powers of the Senate and the method of selecting senators."<sup>87</sup>

## IV. Application to specific cases

We shall now consider the application of the protective function theory to certain subjects that have recently attracted attention, namely the Supreme Court, the Senate, the judiciary and the electoral system. Other issues could also be considered, such as the monarchy and the constitutional amending formula itself, but they will be left for a subsequent study.

### A. The Supreme Court

For at least 40 years now, the Supreme Court of Canada has been the subject of various reform proposals.<sup>88</sup> These proposals have dealt with subjects as

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85 *Reference re Senate*, *supra* note 2 at para 78.

86 See Catherine Mathieu & Patrick Taillon, "Le fédéralisme comme principe matriciel dans l'interprétation de la procédure de modification constitutionnelle" (2015) 60:4 McGill LJ 763.

87 *Renvoi relatif au Sénat*, *supra* note 49 at para 82.

88 For an overview, see Nadia Verrelli, ed, *The Democratic Dilemma: Reforming Canada's Supreme Court* (Montréal and Kingston, McGill-Queen's University Press, 2013).



diverse as the method of appointment, a requirement for judges to be bilingual, a gender balance requirement, the jurisdiction of the Court with respect to appeals from Quebec, and so on. Over the past dozen years, successive governments have also implemented administrative policies governing the process for appointing judges to the Court. Although provisions relating to the Court were included in several agreements to amend the Constitution (the Victoria Charter, the Meech Lake Accord, the Charlottetown Accord), politicians have always appeared to assume that Parliament possessed considerable flexibility for amending the *Supreme Court Act*. For example, when he was a member of Parliament, Yvon Godin introduced several bills to require judges of the Court to be bilingual, one of which was passed by the House of Commons.<sup>89</sup> During debates on this bill, there was never a serious suggestion that Parliament lacked the authority to adopt it. Has the *Supreme Court Act Reference* changed the situation?<sup>90</sup> Does the protective function associated with sections 41(d) and 42(1)(d) prevent Parliament from amending significant portions of the *Supreme Court Act*?

It is not easy to give an answer that is both compatible with every statement of the Court and satisfactorily justified by the protective function theory. The Court's reasoning, it must be said, includes some shortcuts that should be addressed if we are to arrive at conclusions compatible with the scheme of the constitutional text. We therefore propose an interpretation that reconciles as closely as possible the various constraints arising from the constitutional text and from the authority attaching to the Court's ruling.

As discussed above, the starting point for the analysis should be the recognition that, pursuant to section 101 of the *Constitution Act, 1867*, Parliament retains jurisdiction to legislate with regard to the Supreme Court.<sup>91</sup> In other words, and contrary to what has often been argued, the *Supreme Court Act* is not, in the formal sense, part of the "Constitution of Canada." However, Parliament's jurisdiction must now be exercised in a way that does not affect the areas reserved for the action of the constituent power. The Supreme Court

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89 Bill C-232, *An Act to amend the Supreme Court Act (understanding the official languages)*, 3rd Sess, 40th Parl, 2010 (as passed by the House of Commons 31 March 2010).

90 See e.g. Josh Hunter & Padraic Ryan, "The Entrenchment of Discretion: Prospects for Judicial Appointment Reform after a Trio of References" in Lisa M Kelly & Ivo Entchev, eds, *Judicious Restraint: The Life and Law of Justice Marshall E. Rothstein* (Toronto: LexisNexis, 2016) 117 at 153-156; Emmett Macfarlane, "The Uncertain Future of Senate Reform," in Macfarlane, *supra* note 9, 228 at 242.

91 Warren Newman, *supra* note 5, reaches a similar conclusion in suggesting that Parliament's powers flowing from section 101 of the *Constitution Act, 1867* are now subject to an implicit prohibition on amending the essential characteristics of the Court.

explains this in the reference: “Parliament undoubtedly has the authority under s. 101 to enact routine amendments necessary for the continued maintenance of the Supreme Court, but only if those amendments do not change the constitutionally protected features of the Court.”<sup>92</sup> Indeed, Parliament has made several amendments to the *Supreme Court Act* since 1982.

Thus, in order to determine whether a proposed amendment to the *Supreme Court Act* is within Parliament’s authority, it is first necessary to determine whether the amendment relates to the “composition of the Court” and second, if it affects another essential characteristic of the Court. If not, the proposed amendment can validly be passed by Parliament without following the procedures set out in Part V of the *Constitution Act, 1982*. With a view to further clarifying these issues, we undertake a review of the Court’s ruling in light of the constitutional text itself, the history of the discussions leading to its adoption and the essential characteristics of the Court.

### ***1. The composition of the Court***

The question of the composition of the Court was at the heart of the *Supreme Court Act Reference*. The Court’s reasoning relied heavily on the history of the negotiations immediately preceding passage of the *Constitution Act, 1982*. The Court notes that Part V is a direct result of an agreement reached by eight provinces in April 1981. In that agreement, the explanatory note accompanying what became section 41(d) explicitly stated that this provision was intended to protect Quebec’s representation on the Court. Without explaining the logic underlying the assertion, the Court equated the composition of the Court protected by section 41(d), the eligibility requirements for becoming a judge, and the precise provisions of its constituent Act:

The notion of “composition” refers to ss. 4(1), 5 and 6 of the *Supreme Court Act*, which codify the composition of and eligibility requirements for appointment to the Supreme Court of Canada as they existed in 1982. By implication, s. 41(d) also protects the continued existence of the Court, since abolition would altogether remove the Court’s composition.<sup>93</sup>

As Justice Moldaver also pointed out in his dissenting reasons,<sup>94</sup> the guarantee of three seats for judges from Quebec does not mean that the specific eligibility requirements under the current Act must be maintained as is. If we take a step back, we can see that this guarantee can be assured in two ways: by

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<sup>92</sup> *Reference re Supreme Court*, *supra* note 1 at para 101.

<sup>93</sup> *Ibid* at para 91.

<sup>94</sup> *Ibid* at para 115.

imposing special eligibility requirements to determine who can be considered a judge from Quebec; or by giving a representative political body in Quebec the power to appoint these three judges. In both cases, the methods employed have the same objective: to ensure authentic representation for Quebec. This means that the eligibility requirements affect an essential characteristic of the Court only insofar as they seek to ensure that authenticity. It is true that the Court completely avoids this question in rendering its opinion. It is easy to understand why: tackling it head-on would have required the Court to propose its own definition of “true Quebec jurist,” whereas a very broad consensus already existed in Quebec’s political circles and media that a Federal Court judge was not eligible to be appointed to one of the three Quebec seats on the Supreme Court.<sup>95</sup> By drawing parallels between composition and eligibility requirements, the Court avoided this trap.

In our view, this parallel between composition and eligibility requirements should be confined to the particular case before the Court; here, the definition of the eligibility requirements *intended to give effect to the guarantee of Quebec representation*, assuming that this guarantee is given effect by means of eligibility requirements rather than according the power of appointment to a Quebec political body.<sup>96</sup> The Court’s remarks cited above should not be read as a statute that generally applies to any situation falling within the scope of the description contained therein, but as a jurisprudential statement that cannot be dissociated from the context of the case. Such a restriction would be consistent with the text of section 41(d), with history and with a structural analysis.

First, the expression “composition of the Court” must be contrasted with other expressions used in sections 41 and 42 of the *Constitution Act, 1982*, such as the “method of selecting Senators” and the “residence qualifications of senators.” This choice of words reflects the intent of the framers of the Constitution to attribute a very specific meaning to the expression “composition,” which does not include all the characteristics of the Court associated with the selection of judges, and only includes eligibility requirements to the extent that they have a significant impact on the “composition.”

Second, there is no indication that the federal and provincial governments sought to protect anything other than Quebec’s representation on the Supreme

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95 With regard to the political context in this matter, see Hugo Cyr, “The Bungling of Justice Nadon’s Appointment to the Supreme Court of Canada” (2014) 67 SCLR (2d) 73.

96 For example, we might ask what the Court would have done with a federal Act providing that the three Quebec judges be appointed by the Government of Quebec, and leaving it up to the Quebec National Assembly to determine the eligibility requirements...

Court. It should be borne in mind that during the negotiations between 1978 and 1981, governments intended to incorporate a chapter on the Supreme Court into the Constitution. Due to the civil law/common law duality, the proposal that received majority support was to enshrine a Supreme Court composed of eleven judges, including five civil-law judges from Quebec.<sup>97</sup> Before that time, the Supreme Court had never been mentioned in drafts of the amending formulae that would become sections 41 and 42. When in April 1981, eight provinces (including Quebec) proposed to proceed with patriation and the adoption of an amending formula, while postponing changes to institutions such as the Senate and the Supreme Court, Quebec suddenly saw the opportunity to increase its quota on the Court disappear. This probably explains the appearance of references to the Supreme Court in the lists of matters subject to the general amending formula or unanimity.<sup>98</sup> As to the requirement for unanimous support for changes in the composition of the Court, the most plausible explanation is that it was intended to give a veto to Quebec on any change to its relative weight on the Court. We are unaware of any other justification that could explain the special treatment accorded to the composition of the Court in section 41. This is the conclusion reached by the Court in the reference:

The intention of the provision [section 41(d)] was demonstrably to make it difficult to change the composition of the Court, and to ensure that Quebec's representation was given special constitutional protection.<sup>99</sup>

Third, from the standpoint of justifications associated with the political structure, or the “architecture” of the Constitution, it is difficult to discern justifications for a broad interpretation of the composition of the Court referred to in section 41. In its reasons, the Court suggests that the guarantee of its composition protects it against an attempt at abolition, which it states, “would altogether remove the Court’s composition.”<sup>100</sup> It is also conceivable that the guarantee relative to the composition of the Court could help to prevent serious attacks on its independence. For example, by enshrining the number of judges on the Court, section 41(d) prevents Parliament from implementing a “court-packing plan” similar to that envisaged by US President Roosevelt in the

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97 See in particular the “Report of the Continuing Committee of Ministers on the Constitution to First Ministers: Supreme Court” (September 1980), in Bayefsky, *supra* note 21 at 718; Roy Romanow, John Whyte & Howard Leeson, *Canada... Notwithstanding: The Making of the Constitution 1976-1982*, 2nd ed (Toronto: Thomson Carswell, 2007) at 80-82.

98 This is an assumption that cannot be confirmed through published sources. Archival research would no doubt be required to shed more light on the reasons for this inclusion.

99 *Reference re Supreme Court*, *supra* note 1 at para 92.

100 *Ibid* at para 91.

1930s. None of this is related to the eligibility requirements, except perhaps the principle that the Court should consist exclusively of jurists.<sup>101</sup>

It follows that, notwithstanding what may appear from a cursory reading of the *Supreme Court Act Reference*, not all aspects of the composition of the Court are covered by the protective function of the constitutional amending formula. The only aspects that are protected are those that are essential characteristics of the Court and that have implications for the guarantee given to Quebec concerning its representation within the institution. The eligibility requirements may be protected, but only to the extent that they contribute to guaranteeing the representation of Quebec. Subject to this reservation, Parliament may amend sections 4, 5, and 6 of the *Supreme Court Act*, in particular to create a requirement for bilingualism<sup>102</sup> or gender parity or a geographical distribution of seats other than those of Quebec.

## ***2. Other protected characteristics of the Court***

Beyond the composition of the Court, section 42(1)(d) of the *Constitution Act, 1982*, provides that amendments to the Constitution relating to the Supreme Court of Canada must be made using the general procedure in section 38. In its advisory opinion, the Court provided the following explanations:

Section 42(1)(d) applies the 7/50 amending procedure to the essential features of the Court, rather than to all of the provisions of the *Supreme Court Act*. The express mention of the Supreme Court of Canada in s. 42(1)(d) is intended to ensure the proper functioning of the Supreme Court. This requires the constitutional protection of the essential features of the Court, understood in light of the role that it had come to play in the Canadian constitutional structure by the time of patriation. These essential features include, at the very least, the Court's jurisdiction as the final general court of appeal for Canada, including in matters of constitutional interpretation, and its independence.<sup>103</sup>

Do the text, the negotiating history, and the analysis of the political structure give indications as to the scope of this protection?

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101 Contrary, for example, to the French Constitutional Court: Favoreu, *supra* note 62 at 310-311.

102 See *contra* Léonid Sirota, "The Comprehension of 'Composition'" (16 May 2016) *Double Aspect* (blog), online: <<https://doubleaspectblog.wordpress.com/2016/05/16/my-comprehension-of-composition/>>; Kate Glover, "A Third View on Legislating Two Languages at the SCC" (18 May 2016) *Double Aspect* (blog), online: <<https://doubleaspectblog.wordpress.com/2016/05/18/a-third-view-on-legislating-two-languages-at-the-scc/>>.

103 *Reference re Supreme Court*, *supra* note 1 at para 94.

The text of section 42(1)(d) provides no guidance as to the scope of the protective function that flows from it. Indeed, as we pointed out earlier, the protective function is necessarily narrower than the enabling function of the amending formula. It follows that only a subset of the rules governing the Court is protected against unilateral amendment. Do the discussions that led to patriation of the Constitution make it possible to define this subset? Unfortunately, these discussions do not provide information as precise as that relating to section 41(d).<sup>104</sup> In fact, the explanatory notes to the April Accord of 1981, upon which the Court relied heavily in its interpretation of section 41(d), recall that the Court is established by an Act of Parliament and not by the Constitution itself. They go on to state that the provision that became section 42(1)(d) “anticipates constitutional amendments relating to the Court.”<sup>105</sup> This tends to reinforce the arguments put forward by the Attorney General of Canada in the *Supreme Court Act Reference* that this provision has only an enabling function and not a protective function (the “empty vessel theory”).

In deciding otherwise, the Court relied on the need to protect its essential characteristics against unilateral amendments. In order to better understand these characteristics, it is possible to draw some indications from the historical evolution of the role of the Court, to which it refers in its advisory opinion. In a federal system, one of the crucial roles of the Court is to arbitrate the division of powers.<sup>106</sup> Moreover, since 1982, the Court has also played the role of guardian of the rights and freedoms guaranteed by the *Canadian Charter of Rights and Freedoms*.<sup>107</sup> The role of the Court, however, is not limited to constitutional questions; its role in public and provincial law is equally essential “to the development of a unified and coherent Canadian legal system.”<sup>108</sup> Indeed, in the absence of any clues arising from the text or constitutional negotiations, it is undoubtedly the structural analysis that will determine the scope of the protective function with respect to the characteristics of the Court other than its composition.<sup>109</sup>

It is not possible in the context of this article to consider all imaginable reforms involving the Court’s jurisdiction. Nevertheless, Parliament remains

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104 Bear in mind that only published sources have been used; exhaustive archival research may reveal little-known information.

105 Reproduced in Bayefsky, *supra* note 21 at 811. It should be mentioned that the French version of these notes, reproduced in Hurley, *supra* note 67 at 251, does not mention the idea of “anticipation.” See also Meekison, *supra* note 67 at 116.

106 *Reference re Supreme Court*, *supra* note 1 at para 83.

107 *Ibid* at para 89.

108 *Ibid* at para 85.

109 See also Newman, *supra* note 5. at 439.

competent to amend this jurisdiction, provided that it does change the essence of the Court's role, as described above. For example, the *Supreme Court Act* was amended in 1991 and 1996 to eliminate certain appeals as of right in criminal matters, and these changes are undoubtedly valid. However, one might wonder about an eventual total abolition of the Court's jurisdiction with respect to the application of provincial laws or other similarly significant amendments.

Any amendments to the *Supreme Court Act* should also safeguard the independence of the Court. In any case, this independence was certainly already protected as a result of the *Reference re Remuneration of Judges*.<sup>110</sup> The Court's case law on the independence of the judiciary may serve as a guide in this respect.

What about the appointment process? Unlike section 42(1)(b), which explicitly deals with the method of selecting senators, section 42(1)(d) does not mention the method of selecting judges. This is an important textual difference. Moreover, in its advisory ruling, the Court failed to include the appointment process among protected characteristics, although the reform of this process has been the subject of numerous proposals in recent years. Does this mean that there is no constraint on Parliament's action in this area? We believe that the response is somewhat more nuanced. Parliament could not fundamentally alter the way in which Supreme Court judges are selected — currently appointment by the executive — by replacing it, for example, with popular elections. That would certainly affect an essential characteristic of the Court. However, there is nothing to prevent Parliament from legislating a framework for the process of appointments by the executive, even if that circumscribes the discretion of political actors.<sup>111</sup> The same goes for the appointment of senators, which we will now discuss.

## **B. The appointment of senators**

In the wake of the *Reference re Senate Reform*, it is now clear that Parliament cannot unilaterally implement a mechanism that transforms the Senate into an elective chamber. The new federal government's focus has shifted to less ambitious targets that do not require a constitutional amendment. Thus, the gov-

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110 *Reference re Remuneration*, *supra* note 55.

111 Remember that the Constitution does not give "discretion" to the Governor General (in practice, the Prime Minister) to appoint judges to the Supreme Court, contrary to the situation with senators and superior court judges. The appointment power is found in the *Supreme Court Act*. See also Hunter & Ryan, *supra* note 90 at 149-153.

ernment has put in place a selection process that allows any citizen to apply.<sup>112</sup> An independent committee reviews candidacies and proposes a short list to the Prime Minister, who then makes the selection. This process is not legislated, however. To date, it is only an administrative policy that the government could modify or abandon at any time.

No doubt, certain passages in the *Reference re Senate Reform* discouraged the government from proposing legislation to implement its reform. The Court drew attention to the broad meaning of the term “method of selecting senators.” This does not only cover the formal act of appointment. On the contrary, the Court tells us, “By employing this language, the framers of the *Constitution Act, 1982* extended the constitutional protection provided by the general amending procedure to the entire process by which Senators are ‘selected.’”<sup>113</sup> Does this mean that Parliament has no competence to legislate on this subject? That would lead to an absurd consequence whereby Parliament would be incapable of doing what the government can do by means of a simple administrative policy.<sup>114</sup>

The theory of the protective function that we have outlined above leads us to qualify the Court’s assertions. It is true that the enabling function of section 42(1)(b) covers the entire selection process. However, the protective function is narrower in scope, and as the Court points out elsewhere, refers only to the essential characteristics of the Senate. What, then, are these essential characteristics, having regard to the selection process? The Court’s ruling draws our attention to certain clues arising from the discussions surrounding Confederation: members of the Senate were to be appointed, not elected. Other indicators are provided by documents from the time of the adoption of the *Constitution Act, 1982*, which outline the main options for the selection of senators: appointment, election, or appointment as agents of provincial legislatures.<sup>115</sup> It seems to us that the protective function is aimed at the fundamental choices involving the method of selecting senators that have an impact on the source

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112 See Annex: Qualifications and Merit-Based Assessment Criteria (Consulted December 13, 2016), online: < <https://www.canada.ca/en/campaign/independent-advisory-board-for-senate-appointments/assessment-criteria.html>>.

113 *Reference re Senate*, *supra* note 2 at para 65.

114 Macfarlane, *supra* note 90 at 234-235.

115 Memorandum from Michael Kirby to Prime Minister Pierre Elliott Trudeau (21 August 1980), reproduced in Linda Cardinal & Sébastien Grammond, *Une tradition et un droit: le Sénat et la représentation de la francophonie canadienne* (Ottawa: University of Ottawa Press, 2017) in Appendix; Special Joint Committee of the Senate and of the House of Commons on Senate Reform, *Reform of the Senate: A Discussion Paper* (16 June 1983) (Chairs: Honourable Gildas Molgat, Honourable Paul Cosgrove).



of their political legitimacy. The political importance of the selection method stems from the fact that it largely determines the type of legitimacy that the selected person can claim, and consequently, the political role of the institution of which he or she is a member. As such, an appointed person can possess legitimacy based on expertise and independence, an elected person enjoys democratic legitimacy, and a person designated by a provincial legislature acts as an agent of his or her province.

However, the protective function does not affect the detailed implementation of any of these three options. In other words, the choice between appointment, election or designation by the provinces is a matter for the constituent power, but Parliament still has jurisdiction over the specific means of giving effect to that choice. For example, if the Constitution were amended to provide for senators to be elected from now on, Parliament could govern the election process, the voting system, the role and funding of political parties, etc. The only constraint at this level of detail is that which arises from the requirement that ordinary legislation must be compatible with the Constitution. Thus, if the Constitution were amended to provide not only for senators to be elected, but to be elected by proportional representation, Parliament could not, by ordinary legislation, adopt another method of voting.

What are the implications of the above for the current system? In 1867, the constituent power indicated that senators would be appointed and not elected. The constituent power of 1982 indicated that this fundamental choice could not be set aside without changing the Constitution. However, there is nothing to prevent Parliament from legislating on the method of selecting senators, provided that it does not alter this fundamental choice and that it legislates in a manner consistent with the existing provisions of the Constitution. The only relevant provision is section 24 of the *Constitution Act, 1867*, which provides that senators will be appointed by the Governor General. This provision has a formal aspect (the appointment is signed by the Governor General) and a substantive aspect (the power of appointment rests with the federal executive). As long as these two aspects are preserved, an Act of Parliament can establish the process that the federal executive must follow in order to appoint a senator.

Some argue that an Act of Parliament that provides for such a process must nevertheless preserve the discretion of the ultimate decision-maker (the Governor General, or in practice, the Prime Minister) to choose as he or she sees fit. In other words, the process put in place by Parliament should remain purely advisory. Yet, once the limited scope of the protective function is conceded, there seems to be no reason why the selection process should not constrain the

choice of the Prime Minister, for example, by requiring the Prime Minister to select senators from a short list prepared by an independent committee. Such a requirement would not be inconsistent with section 24. Formally, senators would still be appointed by the Governor General, and in substance they would still be appointed by the federal executive. In fact, the Canadian political system does not maintain a strict separation between the legislature and the executive. It is recognized that legislatures may, by statute, grant or withdraw powers of the executive or adjust the decision-making process followed by the executive. This explains why the Supreme Court has already recognized that Parliament can restrict the exercise of a power that the Constitution grants to the executive, or even exercise that power itself.<sup>116</sup>

In fact, it seems that the idea that Parliament can legislate, provided that it does not in any way restrict the exercise of a discretionary power conferred by the Constitution, was the corollary of the theories of “constitutional work-around.” These theories were intended to enable Parliament to make major changes to political institutions, provided that it found a way to appear to maintain the discretionary power provided for in the constitutional text.<sup>117</sup> These theories focus on form rather than substance and are incompatible with the Court’s 2014 advisory rulings. A rule derived from these theories should therefore not be applied.

### C. The judiciary

It has occasionally been suggested that sections 96 to 100 of the *Constitution Act, 1867*, impose limits on Parliament’s power to legislate on the eligibility requirements or the process for appointment to the federal judiciary. For example, one might question the validity of section 3 of the *Judges Act*, which provides that persons appointed to the federal judiciary must have been members of a bar for at least ten years, given that sections 97 and 98 of the *Constitution Act, 1867*, do not impose any time requirement.<sup>118</sup>

The approach to addressing this issue should begin with an examination of the scope of the protective function. Apart from the Supreme Court, the judiciary is not mentioned in sections 41 and 42 of the *Constitution Act, 1982*.

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116 *Munro v National Capital Commission*, [1966] SCR 663 at 669-670, 57 DLR (2d) 753.

117 Hawkins, *supra* note 7.

118 Gilles Pépin, *Les tribunaux administratifs et la Constitution: étude des articles 96 à 101 de l’A.A.N.B.* (Montréal: Presses de l’Université de Montréal, 1969) at 116-129. Followed to its logical conclusion, this reasoning would lead to calling into question the validity of large segments of the *Judges Act*, notably those dealing with judicial discipline and the periodic adjustment of remuneration: *Judges Act*, RSC 1985 c J-1.

The provisions of the *Constitution Act, 1867*, concerning the judiciary may be amended by following the ordinary procedure provided for in section 38 of the *Constitution Act, 1982*. As noted above, the protective function should be attached to the matters referred to in sections 41 and 42, but not to those falling under section 38 independently of those two provisions. It follows that the federal judiciary would not be subject to the protective function. Some might be alarmed by this conclusion, for fear that an institution essential to preserving democracy and the rule of law is being left to the mercy of Parliament. This view overlooks the fact that the protective function is complemented by the theory of implicit finding of incompatibility. In other words, while Parliament may legislate regarding the judiciary, it cannot do so in a manner incompatible with the provisions of the Constitution, interpreted in light of their purpose and the essential features of the institutions they establish.

This means that the validity of a provision such as section 3 of the *Judges Act* must be judged on the basis of its compatibility with the constitutional text. This incompatibility could stem from an operational conflict, i.e., the impossibility of respecting both texts at the same time. In the case of section 3, there would be no conflict since it is possible to comply with this statutory provision and sections 97 and 98 by appointing only persons with at least ten years of membership in the bar. Inconsistency may also arise from a conflict with the purpose of the hierarchically superior text. As pointed out above, this notion of conflict with the purpose can be synonymous with an amendment to the architecture of the Constitution. Here, the courts have identified several objectives underlying sections 96 to 100, including ensuring the independence of the judiciary,<sup>119</sup> the creation of a unitary judicial system modelled after the British courts,<sup>120</sup> and more recently, the guarantee of access to the courts.<sup>121</sup> It could also be said that these elements are part of the constitutional architecture with respect to the judiciary. Without going into details, it is nevertheless difficult to see how section 3 would prevent the achievement of any of these objectives.

More generally, it can be argued that the Constitution does not prevent Parliament from legislating with respect to the process of appointing federal judges, for the same reasons that it can legislate with respect to the appointment of senators. The constraints, if any, would arise from the requirement for

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119 *Martineau & Sons v Montréal (City of)*, [1932] AC 113 (PC) at 120; *Toronto (City of) v York (Township of)*, [1938] AC 415 (PC) at 426; *R v Beaugregard*, [1986] 2 SCR 56 at 73, 30 DLR (4th) 481; *MacMillan Bloedel Ltd v Simpson*, [1995] 4 SCR 725 at 741, 130 DLR (4th) 385, Lamer CJ [MacMillan].

120 *MacMillan*, *ibid* at 741, Lamer J, and 759-760, McLachlin J dissenting; *Reference re Residential Tenancies Act*, [1981] 1 SCR 714 at 728, 235 DLR (4th) 176.

121 *Trial Lawyers Association*, *supra* note 61.

compatibility in its two prongs. For example, if Parliament were to provide that judges be elected, this would probably be inconsistent with section 96, which, like section 24 regarding the Senate, provides that judges will be appointed and not elected.

#### **D. The electoral system**

Doubts have recently been raised about the constitutionality of a possible reform of the electoral system used to elect members of the House of Commons. Some have suggested that because of its political importance, such a reform would affect the architecture of the Constitution and could be implemented only through a constitutional amendment. Is the electoral system covered by the protective function?

Again, the analysis should begin with sections 41 and 42. Two features of the House of Commons are specifically mentioned: proportionate representation of the provinces (section 42(1)(a)) and the “Senate floor” (section 41(b)), i.e., the guarantee of minimum representation for small provinces. As stated above, it is clear that these provisions have a protective function and that Parliament is not competent to legislate without regard to these principles.

Does the protective function go further? We can compare the provisions regarding the House of Commons with those pertaining to the Senate. Sections 41(b) and 42(1)(a) can be read in conjunction with section 42(1)(c), which refers to the number of seats for each province in the Senate. However, the Senate is also mentioned in section 42(1)(b), which is much broader in scope. This is not surprising. In the discussions leading up to Confederation, the Senate occupied a large place because of the role of regional representation that it was intended to be given, in order to counterbalance a House of Commons governed by the principle of representation proportionate to the population. Similarly, the Senate featured prominently in constitutional discussions that have taken place since the 1960s, in the hopes of finding a way for the institution to better fulfill the role originally assigned to it. The House of Commons, on the other hand, does not play such a role of regional representation. For that reason, it does not appear that the House of Commons is at the heart of provincial interests. This has led the Supreme Court, on two occasions, to assert that Parliament cannot unilaterally alter the essential characteristics of the Senate.

It is therefore difficult to see why the constitutional amending formula would have a protective function with respect to the electoral system, beyond the principle of proportionate representation of the provinces and the guarantee of representation for the smaller provinces. It should be stressed, however,

that these principles can impose significant constraints. Provincial representation implies that each MP represents a province, even if he or she does not represent a specific constituency. To ensure this representation, it is logical to require that MPs representing a province be chosen by the electors of that province. This requirement can be compared to the requirement that judges of the Supreme Court who represent Quebec must meet certain eligibility requirements to ensure that they can truly be considered Quebecers. It follows that a proportional electoral system should be applied on the basis of lists established for each province, to ensure that MPs are from the province they represent and are chosen on the basis of the proportion of votes won by the various parties in the province in question, and not across the country.

It should also be noted that the reasoning that led the Supreme Court to rule that the term of office of senators could not be changed unilaterally by Parliament cannot be transposed to the question of the electoral system. Indeed, the term of office of senators was expressly provided for by a constitutional provision, section 29 of the *Constitution Act, 1867*. Consequently, any amendment had to follow the amending formula in Part V of the *Constitution Act, 1982*, and the Supreme Court ruled that section 44 did not allow for amending an essential characteristic of the Senate, whether or not it is mentioned in section 42. A change to the electoral system would be made under the general powers of Parliament flowing from sections 41 and 91 of the *Constitution Act, 1867*, and not Part V of the *Constitution Act, 1982*.

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We have shown that the theory of the protective function of the amending formula of the Constitution of Canada is the best explanation for the reasoning used by the Supreme Court in the *Senate Reform Reference* and the *Supreme Court Act Reference*. In its reasons, the Court explicitly mentions this protective function. Moreover, since it avoids the constitutionalization of rules or principles outside the constitutional text, it preserves the legitimacy of constitutional judicial review against frequent objections. In reality, the protective function flows from the provinces' desire to protect the essential characteristics of certain institutions from any federal attempt at unilateral change. Sections 41 and 42 of the *Constitution Act, 1982*, which reflect the will of the provinces, provide a textual basis for the protective function. The protective function can be complemented by the principle of the supremacy of the Constitution, which allows for ordinary statutes that are not compatible with the constitutional provisions to be declared inoperative, either directly or because they thwart the attainment of the Constitution's purposes. That is what we have called the theory of implicit finding of incompatibility.

We have suggested a method for determining the scope of the protective function and have given examples of the results of its application to the Supreme Court, the Senate, the federal judiciary and the reform of the electoral system. Our findings show that the constraints imposed by the Constitution on several types of reform of these institutions are less onerous than several authors claimed following the two advisory rulings rendered by the Supreme Court in 2014. Our conclusions will certainly not achieve unanimity, particularly because they lead to qualifying certain statements of the Supreme Court, at least if these are taken literally.

It would be helpful for the Supreme Court to revisit these issues in order to avoid foreclosing reforms that might be desirable, and to refocus debate on their merits rather than their constitutional validity. The current government has announced its intention to move forward on several of these issues. In view of the anticipated legal challenges, it would no doubt be wise to refer certain questions to the Supreme Court, allowing it to rule on Parliament's authority to carry out specific reforms, and more generally, to continue the construction of a general theory of constitutional amendment.



# Surfing the Surveillance Wave: Online Privacy, Freedom of Expression and the Threat of National Security

*David M. Tortell\**

*This article traces the emergence of section 2(b) of the Canadian Charter of Rights and Freedoms as a response to privacy breaches resulting from internet government surveillance. Just as significant privacy rights have been read into sections 7 and 8 of the Charter, the author argues that section 2(b) can likewise be viewed through a privacy lens, particularly in the online context. The author first examines the concept of privacy, addressing definitional problems and the ways in which privacy has been located in, and excluded from, the Charter. Next, he focuses on aspects of section 2(b): the chilling effects of surveillance, freedom of thought and the pinpointing by Canadian courts of connections between privacy and expression. The article concludes with a review of ongoing constitutional challenges which embrace a privacy-centric approach to section 2(b) in attacking state surveillance powers created by Canada's 2001 and 2015 anti-terrorism statutes.*

*L'auteur retrace l'apparition de l'article 2(b) de la Charte canadienne des droits et libertés comme une réaction aux atteintes à la vie privée résultant de la cybersurveillance gouvernementale. Tout comme les articles 7 et 8 de la Charte ont été interprétés comme incluant des droits de la protection des renseignements personnels importants, l'auteur soutient que l'article 2(b) peut également être considéré à travers le prisme de la vie privée, notamment dans un contexte en ligne. Il examine d'abord le concept de la vie privée, abordant des problèmes de définition et les façons dont la vie privée a été située dans (et exclue de) la Charte. Ensuite il se penche sur des aspects de l'article 2(b) : les effets effrayants de la surveillance, la liberté de pensée et la détermination par les tribunaux canadiens des liens entre la vie privée et l'expression. Cet article se termine par un examen des contestations constitutionnelles actuelles qui incluent une approche à l'article 2(b) axée sur la vie privée en attaquant les pouvoirs de surveillance étatiques créés par les lois antiterrorisme canadiennes de 2001 et 2015.*

\* Counsel, Ontario Ministry of the Attorney General. The views expressed in this article are those of the author and do not purport to reflect the views of the Ministry of the Attorney General. The author is indebted to Professor Kent Roach for his comments on an earlier draft of this article.



## 1. Introduction

Everyone is preoccupied with surveillance nowadays, judging from the near ubiquity of academic and non-academic writing and popular sentiment that has been devoted to this topic in recent years, particularly after Edward Snowden's 2013 leak of classified National Security Agency documents. Everywhere one turns, one comes across warnings regarding the contemporary dangers of government intrusion (often with the help of a co-opted corporate sector), especially online, into the nether regions of our personal lives. According to Neil Richards, we now face a "digital privacy Armageddon,"<sup>1</sup> a political and technological tipping point threatening to tear down the private realm in ways unparalleled in our history. For Richards and others, "privacy is one of the most important questions facing us as a society,"<sup>2</sup> a state of affairs that has spawned a cottage industry of "how to" guides and other materials on anti-surveillance techniques. For instance, Laura Poitras, the documentary filmmaker who along with Glenn Greenwald was instrumental in the release of the Snowden leaks, has published *Astro Noise: A Survival Guide for Living Under Total Surveillance*.<sup>3</sup> The Electronic Frontier Foundation, in a similar vein, has prepared "survival" resources, including "Ten Steps You Can Take Right Now Against Internet Surveillance"<sup>4</sup> and the web-based "Surveillance Self-Defense" project, billed by the Foundation as "Tips, Tools and How-tos for Safer Online Communication."<sup>5</sup>

This heightened concern is understandable, particularly in light of the Snowden revelations and ongoing debates regarding the legality of government incursions into internet privacy and the individual's right to be left alone. Roused by such state interference, and intent on upholding the multiple con-

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1 Neil M Richards, "Four Privacy Myths" in Austin Sarat, ed, *A World Without Privacy: What Law Can and Should Do* (Cambridge: Cambridge University Press, 2015) 33 at 41.

2 *Ibid.*

3 (New York: Whitney Museum of Art, 2016). Edward Snowden is currently involved in developing an "introspection engine," a mobile telephone case designed to help users avoid surveillance. See Nathaniel Mott, "Edward Snowden Designs Phone Case to Show When Data is Being Monitored", *The Guardian* (22 July 2016), online: <<https://www.theguardian.com/us-news/2016/jul/21/phone-case-privacy-data-monitor-bluetooth-wifi-snowden-introspection-engine>>.

4 Danny O'Brien, "Ten Steps You Can Take Right Now Against Internet Surveillance" (25 October 2013), online: <<https://www.eff.org/deeplinks/2013/10/ten-steps-against-surveillance>>.

5 Online: <<https://ssd.eff.org/en>>. Such materials are also available in the Canadian context, as reflected in Laura Beeston's article "How to be Invisible: Designers Create Anti-Surveillance Products to Protect Privacy", *The Globe and Mail* (14 October 2015), online: <[www.theglobeandmail.com/life/anti-surveillance-items-helping-people-go-off-the-grid/article26805195/](http://www.theglobeandmail.com/life/anti-surveillance-items-helping-people-go-off-the-grid/article26805195/)>. See also Eric R Danton, "'The Shadow State Is Not Really a Shadow State': How Surveillance Anxiety Is Shaping Pop Culture", *Flavorwire* (23 February 2015), online: <[flavorwire.com/506101/the-shadow-state-is-not-really-a-shadow-state-how-surveillance-anxiety-is-shaping-pop-culture](http://flavorwire.com/506101/the-shadow-state-is-not-really-a-shadow-state-how-surveillance-anxiety-is-shaping-pop-culture)>.

stitutional rights and interests breached in Canada and elsewhere through this stealth tracking of online activity, legal experts and non-specialists alike have initiated a “global push back against surveillance.”<sup>6</sup> Focused on “law reform, including substantive statutory changes, the overturning of problematic constitutional doctrines, and improved oversight,”<sup>7</sup> this movement has sought to stem the tide of government snooping. More and more, the idea of privacy itself has been absorbed within this broader theme, so that as David Lyon writes “[h]owever privacy may have been conceived in times past, today it is tightly tied to avoiding surveillance.”<sup>8</sup> For Lyon, who penned this insight over two decades ago, the electronic monitoring of our personal activities by government and corporate actors is the hallmark of the “surveillance society.”<sup>9</sup> Once relegated to the province of conspiracy theorists and other “paranoid” types,<sup>10</sup> this Orwellian construct of the Big Brother state has returned with a vengeance and informs much of the current thinking about privacy and the web.<sup>11</sup>

In Canada, the flashpoint for such concern has been Bill C-51, the omnibus legislation which introduced new laws and amended existing statutes in ways that could be said to undermine privacy and other rights and interests. The centrepiece of this suite of legislative changes is the *Security of Canada Information Sharing Act* (“SCISA”),<sup>12</sup> which affords Parliament the ability to use and disseminate personal information without ever having to obtain consent from the targeted persons. Such sweeping powers, and the exceptionally broad definitions of “activity that undermines the security of Canada”<sup>13</sup> (section 2 of

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6 Lisa M Austin, “Enough about Me: Why Privacy Is About Power, not Consent (or Harm)” in Sarat, *supra* note 1, 131 at 131. Austin adds: “If privacy is supposedly dead, it is a death whose report has been greatly exaggerated. The ongoing Snowden revelations have made us all acutely aware that the internet has become an infrastructure of surveillance” (*ibid*).

7 *Ibid*.

8 David Lyon, *The Electronic Eye: The Rise of Surveillance Society* (Minneapolis, MN: University of Minnesota Press, 1994) at 180.

9 *Ibid* at 3.

10 Beeton recaps: “We’ve come a long way from the tinfoil hat, that traditional aluminum trademark of conspiracy theorists. These days, the idea that average citizens need protection from Orwellian-style surveillance seems more practical than paranoid”: Beeton, *supra* note 5. In “Humanizing Cyberspace: Privacy, Freedom of Speech, and the Information Highway” (1995) 28 Human Rights Research & Education Bull 1 at 5, Valerie Steeves anticipates this development in conjuring “images of an Orwellian future where Big Brother watches from every television screen and computer monitor.”

11 George Orwell, *1984* (London: Penguin Books, 1954). First published in 1949 by Secker & Warburg Ltd.

12 *Security of Canada Information Sharing Act*, SC 2015, c 20, s 2.

13 *Ibid*, s 2. In *Our Security, Our Rights: National Security Green Paper, 2016* at 27 [*Green Paper*], the Government of Canada justifies this broad SCISA definition on the basis that it “covers a broad range of national security-related activities” and is “intended to provide flexibility to accommodate new

SCISA) and “terrorism offences in general” (section 83.221(1) of the *Criminal Code*<sup>14</sup>), showcase just some of the serious flaws critics have identified in the *Anti-Terrorism Act, 2015*.<sup>15</sup> In response to this government offensive on privacy, Canadians continue to demand transparency and safeguards. As Michael Geist declares: “Rather than slowing down work on Canadian privacy and surveillance policy, recent events in Europe point to the urgent need to address the inadequacies of Canadian oversight.”<sup>16</sup> Striking the same tone, Ronald Deibert remarks that “Canadians are long overdue for a serious discussion about the proper limits of powerful security agencies like [the Communications Security Establishment (“CSE”)] in the era of Big Data,” adding that “[w]ithin a few short years we have fundamentally transformed our communications environment, turning our digital lives inside out.”<sup>17</sup>

One of the casualties of this assault on privacy has been freedom of expression. There exists a necessary connection between these rights, a “speech-privacy matrix” or “continuum”<sup>18</sup> in which privacy, especially in relation to anonymity, facilitates truly free, unrestrained speech and thought. With the introduction of SCISA and other anti-privacy initiatives, the impact is more wide-ranging than an attack on privacy as understood in the narrow sense of control over one’s personal information. Beyond this type of injury, protected by section 8 (and, in certain scenarios, section 7) of the *Canadian Charter of Rights and Freedoms*,<sup>19</sup> government surveillance could also interfere with section 2(b) rights. While the use of section 2(b) of the *Charter* to resist privacy invasions has received little attention in scholarship and case law to date, this possibility is being tested in a 2015 application commenced in Ontario Superior Court by the Canadian Civil Liberties Association (“CCLA”) and Canadian Journalists for Free Expression (“CJFE”) and a pair of 2014 cases brought in Federal Court by the British Columbia Civil Liberties Association (“BCCLA”). These cases (and a prior effort by the CCLA to impugn Canadian Security

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forms of threats that may arise.” Online: <[www.publicsafety.gc.ca/cnt/rsrscs/pblctns/ntnl-scrtr-grnppr-2016-bckgrndr/index-en.aspx](http://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/ntnl-scrtr-grnppr-2016-bckgrndr/index-en.aspx)>.

14 *Criminal Code*, RSC 1985, c C-46, s 83.221(1).

15 *Anti-Terrorism Act, 2015*, SC 2015, c 20.

16 Michael Geist, “What Now? Privacy and Surveillance in Canada After the Paris Attacks”, *Canadian Progressive* (7 December 2015), online: <[www.canadianprogressiveworld.com/2015/12/07/michael-geist-what-now-privacy-and-surveillance-in-canada-after-the-paris-attacks/](http://www.canadianprogressiveworld.com/2015/12/07/michael-geist-what-now-privacy-and-surveillance-in-canada-after-the-paris-attacks/)>.

17 Ronald Deibert, “Who Knows What Evils Lurk in the Shadows?” in Edward M Iacobucci & Stephen J Toope, eds, *After the Paris Attacks: Responses in Canada, Europe and Around the Globe* (Toronto: University of Toronto Press, 2015) 191 at 200 [*After the Paris Attacks*].

18 David M Tortell, “Two Tales of Two Rights: *R v Spencer* and the Bridging of Privacy and Free Speech” (2016) 36:2 NJCL 253 at 255, 270.

19 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

Intelligence Service (“CSIS”) privacy-invasive powers) hint at a further means of defending against the surveillance state, and trace the emerging relevance of this largely neglected dimension of section 2(b).

In what follows I will trace this use of section 2(b) as a tonic to privacy breaches stemming from state surveillance practices, within and beyond the limits of Bill C-51. Just as a privacy right has been read into sections 8 and (more narrowly) 7 of the *Charter*, I propose that section 2(b) is also triggered by invasive government interception, use and sharing of personal information, especially in the online context. I first consider the privacy right, focusing on the challenges of defining this right and the limited ways in which it has been read into section 2(b) and other *Charter* provisions. Next, I turn my attention to the section 2(b) guarantee itself, examining the continuity of speech and privacy, the chilling effects of surveillance and the impact of technology on freedom of thought. This paper closes with a review of the above-noted CCLA/CJFE and BCCLA litigation, in an attempt to highlight present day uses of this privacy-centric approach to section 2(b) in Canadian courtrooms. This analysis, which mines legal and non-legal sources and ranges across different historical settings, seeks to contribute to discussions regarding the nature and limits of freedom of expression. Expanding the parameters of section 2(b) to make room for a privacy component, I argue, only enhances the menu of possible constitutional tools with which to shore up privacy, thereby promoting transparency and oversight in our own surveillance society.

## 2. The (expanding) parameters of privacy

A significant challenge in writing about “privacy” is the lack of consensus as to what this term means, conceptually and in practice, in any given context. In the most general sense, privacy can be understood as an attempt to protect private information from the gaze of others. Upon further scrutiny, however, this broad definition quickly unravels. Among other issues, the distinction between public and private realms has been rendered more complex with the advent of social media and other web platforms that allow, and in some sense require, that we live our private experiences in public. This lack of conceptual clarity is routinely picked up on by scholars, and constitutes a meeting point for many amidst the swirl of competing theoretical perspectives.<sup>20</sup> Of course,

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20 See, for instance, Neil Richards, *Intellectual Privacy: Rethinking Civil Liberties in the Digital Age* (Oxford: Oxford University Press, 2015) at 112; Lesley A Jacobs, Nachshon Goltz & Matthew McManus, *Privacy Rights in the Global Digital Economy: Legal Problems and Canadian Paths to Justice* (Toronto: Irwin Law, 2014) at 4; Daniel J Solove, “A Taxonomy of Privacy” (2006) 154:3 U Pa L Rev 477 at 479; Mark Tunick, *Balancing Privacy and Free Speech: Unwanted Attention in the Age of*

this lack of clarity has not been lost on the Supreme Court of Canada. In *Dagg v Canada (Minister of Finance)*, Cory J. related that “[p]rivacy is a broad and somewhat evanescent concept.”<sup>21</sup> Several years later Binnie J., in *R v Tessling*, concluded that “[p]rivacy is a protean concept,”<sup>22</sup> while Deschamps J. in *R v Gomboc* allowed that “privacy is a varied and wide-ranging concept.”<sup>23</sup> Most recently, in *R v Spencer*, Cromwell J. advised: “Scholars have noted the theoretical disarray of the subject and the lack of consensus apparent about its nature and limits.”<sup>24</sup>

While this definitional quagmire significantly confuses the issue at hand, it also has its benefits, especially in Canada and other jurisdictions that have not formally adopted a stand-alone constitutional right to privacy. This conceptual fluidity, while admittedly problematic, could nonetheless prove in situations where one needs the privacy construct to serve a number of different functions.<sup>25</sup> In the Canadian context, a flexible approach has allowed for the identification of privacy themes across distinct issues and scenarios. Thus, this concept is as much at home in debates over the right to make personal life decisions without state interference as it is in search and seizure lawsuits. Such malleability is a good thing, and provides a fuller canvas onto which to project existing and future possibilities for judicial expansions of privacy protections

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*Social Media*, (New York: Routledge, 2015) at 24; Gus Hosein, “Privacy as freedom” in Rikke Frank Jørgensen, ed, *Human Rights in the Global Information Society* (Cambridge, MA: MIT Press, 2006) 121 at 122-24.

21 *Dagg v Canada (Minister of Finance)*, [1997] 2 SCR 403 at para 67, 148 DLR (4th) 385 [*Dagg*]. In this decision, which focused on the definition of “personal information” at section 3 of the *Privacy Act*, the Court concluded that details regarding the number of hours worked by an employee fell within the section 3(j) exemption (information relating “to the position or functions of the individual”) and could thus be disclosed.

22 *R v Tessling*, 2004 SCC 67 at para 25, [2004] 3 SCR 432 [*Tessling*]. Addressing the legality of Forward Looking Infra-Red (“FLIR”) heat detecting technology, the Court found in this judgment that the defendant (whose marijuana grow operation had been detected through FLIR imaging) did not have a reasonable expectation of privacy in “[e]xternal patterns of heat distribution on the external surfaces of a house” (at para 63).

23 *R v Gomboc*, 2010 SCC 55 at para 19, [2010] 3 SCR 211. Building on *Tessling*, the Court held in this case that the use of a digital recording ammeter to detect electricity patterns consistent with a grow-op did not violate section 8 because the defendant did not have a reasonable expectation of privacy in such information.

24 *R v Spencer*, 2014 SCC 43 at para 35, [2014] 2 SCR 212 [*Spencer*]. In this case the Court ruled that the police’s warrantless collection of subscriber information from an Internet Service Provider (ISP) constituted an unreasonable search and violated section 8 of the *Charter*.

25 One could argue that such fluidity is central to the *Privacy Act*, RSC 1985 c P-21, which at section 3 sets out a very broad definition of personal information that consequently blurs the limits and function of this legislation.

north of the forty-ninth parallel.<sup>26</sup> This is directly relevant to the application of section 2(b) in this context, and affords champions of this vision of free speech a stronger basis for reading privacy interests into section 2(b) than might otherwise be available were the contours of the *Charter* privacy landscape more firmly set in stone.

There is no stand-alone constitutional right to privacy in Canada, although things nearly turned out differently in the lead up to the 1982 launch of the *Charter*.<sup>27</sup> Despite this fact, constitutional protection of privacy interests has nevertheless made significant inroads over the last several decades. This is due in no small part to Justice La Forest, a well-known privacy booster who asserted in *R v Dymnt* that privacy is “worthy of constitutional protection” and sits “at the heart of liberty in a modern state.”<sup>28</sup> Abella and Cromwell JJ. concurred in *Alberta (Information and Privacy Commissioner) v United Food and Commercial Workers, Local 401*: “As this Court has previously recognized, legislation which aims to protect control over personal information should be characterized as ‘quasi-constitutional’ because of the fundamental role privacy plays in the preservation of a free and democratic society.”<sup>29</sup> Such an approach to privacy,

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26 As Lillian R BeVier writes in “Information about Individuals in the Hands of Government: Some Reflections on Mechanisms for Privacy Protection” (1995) 4:2 Wm & Mary Bill Rts J 455 at 458: “Privacy is a chameleon-like word, used ... connotatively to generate goodwill on behalf of whatever interest is being asserted in its name.”

27 On 20 January 1981, Jake Epp, a Progressive Conservative member of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada (“Committee”) tasked with finalizing the contents of the proposed *Charter*, urged the Committee to adopt a stand-alone privacy right. Specifically, Epp moved (with support from the New Democrats) that “Clause 2” of the draft *Charter*, which dealt with “fundamental freedoms” be expanded to include a fifth section: section 2(e), guaranteeing “freedom from unreasonable interference with privacy, family, home, correspondence, and enjoyment of property.” *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, 32nd Parl, 1st Sess, No 41 (21 January 1981) at 97 [*Minutes of Proceedings and Evidence*]. This proposal was defeated on January 22 by a mere four votes, as recounted in the Committee records: “it was negated on the following show of hands: YEAS: 10; NAYS: 14”: *ibid*, No 43 at 7. Following the voting down of section 2(e) Parliamentarians attacked this result in the House of Commons and continued to underscore the need for privacy protection. On January 29 Svend Robinson, a New Democrat, channelled Orwell in invoking “Big Brother” and admonishing that “as we approach that famous year of 1984 ... we must ensure that the government does not have sweeping and arbitrary powers to intrude into the private lives of Canadians.” *House of Commons Debates*, 32nd Parl, 1st Sess, No 6 (29 January 1981) at 6696. That same day Perrin Beatty, a Progressive Conservative, complained that while the “current government has endlessly argued that a complete and fundamental bill of rights ought to be included in any constitutional amendments ... shockingly, one of the most basic of human rights has been left out of the government’s charter of rights, and that is the right to privacy” (*ibid* at 6704).

28 *R v Dymnt*, [1988] 2 SCR 417 at 427-28, 55 DLR (4th) 503.

29 *Alberta (Information and Privacy Commissioner) v United Food and Commercial Workers, Local 401*, 2013 SCC 62 at para 19, [2013] 3 SCR 733.

which Alysia Davies describes as an “overlooked *Charter* right,”<sup>30</sup> is viewed by Lesley A. Jacobs as “hermeneutic rights to privacy” which, although they “may not receive explicit recognition in the *Constitution Act, 1982*, [are] closely tied to existing constitutional rights and values.”<sup>31</sup> International commentators have likewise taken notice of this homegrown “quasi-constitutional” model. As reported in a United Nations survey on online privacy and free speech, “many countries include a right to privacy in their constitutions, provide for it in specific laws or have had the courts recognize implicit constitutional rights to privacy, as they do in Canada.”<sup>32</sup>

The original locus for this “implicit constitutional right” was section 8 of the *Charter*, a development in the law first charted in *Hunter v Southam*, in which, as summarized thirty years later by Binnie J. in *Tessling*, “the Court early on established a purposive approach to s. 8 in which privacy became the dominant organizing principle.”<sup>33</sup> This use of section 8 as a vehicle for privacy cannot have come as much of a surprise in 1984, when *Hunter v Southam* was decided, given section 8’s focus on search and seizure and the connection of such violations to the private sphere. Indeed, at least one member of the Parliamentary committee tasked in the early 1980s with drafting the *Charter* anticipated this application of section 8 to privacy rights,<sup>34</sup> and subsequent decisions of the Supreme Court of Canada and other courts have followed suit. Many of the foundational “privacy” judgments are rooted in section 8. This includes *Spencer*, which has propelled the jurisprudence into the twenty-first century through its attention to online activity and the role of internet service providers in disclosing personal subscriber information.<sup>35</sup> If one were forced to identify a part of the *Charter* most closely associated with privacy, section 8 would be it. It is important to remember, however, that although this *Charter* provision may constitute the most usual suspect in this regard, it has not cornered the market by any means.

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30 Alysia Davies, “Invading the Mind: The Right to Privacy and the Definition of Terrorism in Canada” (2006) 3 U Ottawa L & Technology J 249 at 261.

31 Jacobs et al, *supra* note 20 at 23.

32 UNESCO, *Global Survey on Internet Privacy and Freedom of Expression* (2012) at 10-11, online: <unesdoc.unesco.org/images/0021/002182/218273e.pdf>.

33 *Tessling*, *supra* note 22 at para 19.

34 As noted by Liberal Member of Parliament Jean Lapierre on 22 January 1981: “I think that the concerns of [the Progressive Conservatives] relating to privacy, family, home and correspondence are guaranteed by Section 8 which offers a fairly wide array of protections.”: *Minutes of Proceedings and Evidence*, *supra* note 27, No 43 at 58.

35 *Spencer*, *supra* note 24 at para 5.

Perhaps as a function of the “evanescent” or “protean” nature of privacy,<sup>36</sup> the Supreme Court of Canada has also read a privacy component into section 7 of the *Charter*. The evolution of section 7 in this regard is of particular interest since its protection of “life, liberty and security of the person,” unlike section 8’s emphasis on search and seizure, does not seem immediately connected to privacy. With respect to section 7, any such link is less straightforward and requires more conceptual legwork. For one thing, the phrase “life, liberty and security of the person” does not suggest the public-private divide to the same extent as “unreasonable search and seizure.” It may have been for this reason that Dickson C.J.C., in his 1988 ruling in *R v Morgentaler*, declined to interpret section 7 within a privacy framework.<sup>37</sup> Justice Wilson, writing in this same judgment, took a different view, underlining that “an aspect of the respect for human dignity on which the *Charter* is founded is the right to make fundamental personal decisions without interference from the state. This right is a critical component of the right to liberty.”<sup>38</sup> Her opinion has since been affirmed on a number of occasions, thus allowing section 7 to join section 8 as one of the *Charter* rights identified by the Supreme Court of Canada as protecting privacy interests. As stated by L’Heureux-Dubé in *R v O’Connor*, “This Court has on many occasions recognized the great value of privacy in our society” and “has expressed sympathy for the proposition that s. 7 of the *Charter* includes a right to privacy.”<sup>39</sup>

In reviewing the ways in which privacy has been read into sections 7 and 8, the elastic nature of this interpretative process becomes clear, as does the fact that a privacy quotient need not be limited to these two *Charter* provisions. Put differently, given the absence of any dedicated privacy right and the flexibility of this concept, there is no reason why the hunt for privacy protection should end with sections 7 and 8. Daphne Gilbert adopts this position, maintaining that “the positioning of privacy in the Legal Rights section alone neglects privacy’s relevance to other *Charter* guarantees.”<sup>40</sup> Making the case

36 *Dagg*, *supra* note 21 at para 67; *Tessling*, *supra* note 22 at para 25.

37 *R v Morgentaler*, [1988] 1 SCR 30 at 51, 44 DLR (4th) 385 [*Morgentaler*].

38 *Ibid* at 166.

39 *R v O’Connor*, [1995] 4 SCR 411 at para 110, 130 DLR (4th) 235. The Supreme Court of Canada has also recognized the possibility of incorporating a privacy element into s 7 in other cases, including *R v Beare*; *R v Higgins*, [1988] 2 SCR 387 at 412, 55 DLR (4th) 481; *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326 at 1376-1377, 64 DLR (4th) 577; *Dagg*, *supra* note 21 at para 66; *AM v Ryan*, [1997] 1 SCR 157 at para 79, 143 DLR (4th) 1; *Godbout v Longueuil (City of)*, [1997] 3 SCR 844 at paras 65-66, 152 DLR (4th) 577 and *Ruby v Canada (Solicitor General)*, 2002 SCC 75 at para 32, [2002] 4 SCR 3.

40 Daphne Gilbert, “Privacy’s Second Home: Building a New Home for Privacy Under Section 15 of the Charter” in Ian Kerr, Valerie Steeves & Carole Lucock, eds, *Lessons from the Identity Trail*:



that privacy rights should also be located in section 15, she posits that “understanding privacy as an equality issue could present more expansive possibilities for safeguarding a range of different kinds of privacy interests, over and above those protected”<sup>41</sup> by sections 7 and 8. To stop there, she proposes, creates an “impoverished interpretation of what privacy could offer to human rights protections in Canada”<sup>42</sup> and an “incomplete and inadequate vision of a constitutional privacy interest.”<sup>43</sup> For her, “finding a home” for privacy outside the parameters of sections 7 and 8 “opens new possibilities for expanding its constitutional protection and its utility as a tool in advancing other Charter rights.”<sup>44</sup> Turning now to freedom of expression, I take up this argument on behalf of section 2(b), showing how it too can serve the interests of protecting privacy.

### **3. The freedom of expression-privacy connection**

As I have written elsewhere,<sup>45</sup> there is a natural connection between freedom of expression and privacy that makes section 2(b) ripe for inclusion in that collection of *Charter* rights isolated to date as privacy-friendly. Just as sections 7 or 8 (or 15, as per Gilbert) can be viewed through the privacy lens, so too could section 2(b) be read in this way, particularly since the utility of privacy as a vehicle for free speech has been recognized by the Supreme Court of Canada in *Spencer*. If it was not sufficiently evident beforehand, Justice Cromwell’s ruling, beyond finding a reasonable expectation of privacy in personal online subscriber information, establishes a constitutional link between privacy and speech. While the role of anonymity in fostering expression had previously been flagged in several judgments concerned with defamation in cyberspace, *Spencer* was the first substantive foray by the Supreme Court of Canada into such issues, especially vis-à-vis internet expression. Citing the work of A. F. Westin, Cromwell J. noted that “[a]nonymity permits individuals to act in public places but to preserve freedom from identification and surveillance,”<sup>46</sup> a real-

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*Anonymity, Privacy and Identity in a Networked Society* (Oxford: Oxford University Press, 2009) 139 at 139.

41 *Ibid* at 145.

42 *Ibid* at 139.

43 *Ibid* at 144. Graham Mayeda, in “My Neighbour’s Kid Just Bought a Drone ... New Paradigms for Privacy Law in Canada” (2015) 35 NJCL 59 at 60, 83, similarly speaks of “emerging paradigms of privacy,” arguing that “we need a more flexible legal notion of privacy” and that the “law must allow law-makers and judges more flexibility to recognize a new dimension of privacy.”

44 Gilbert, *supra* note 40 at 139.

45 *Supra* note 18.

46 *Spencer*, *supra* note 24 at para 43. From the federal government perspective, *Spencer* is problematic in limiting access to certain types of information in a law enforcement context (*Green Paper*, *supra* note 13 at 63). The Privacy Commissioner of Canada has expressed a more positive view of *Spencer*,

ity of particular importance “in the context of Internet usage.”<sup>47</sup> In this context, Cromwell J. singled out that “form of anonymity” critical to the author “who wants to present ideas publicly but does not want to be identified,” which is one of the “defining characteristics of some types of Internet communication.”<sup>48</sup>

Although *Spencer* may be the most significant Supreme Court of Canada decision to date dealing with the intersection of expression and privacy, it is not the first time that the Court has taken notice of the complementarity of these two fundamental interests. A review of the case law establishes that the Court has on a number of earlier occasions signalled the possibility of such a mash-up of constitutional principles. In *Canada (Human Rights Commission) v Taylor*, Dickson C.J.C., contrasting the extent and nature of hate speech protection in section 319(2) of the *Criminal Code* (which does not apply to private communications) with that in section 13(1) of the *Canadian Human Rights Act* (which does), opined that the “connection between s. 2(b) and privacy is thus not to be rashly dismissed.”<sup>49</sup> The following decade, Chief Justice McLachlin underscored this link in *R v Sharpe* when she defined privacy not merely in terms of sections 7 and 8 but also in relation to section 2(b): “Privacy, while not expressly protected by the *Charter*, is an important value underlying the s. 8 guarantees against unreasonable search and seizure and the s. 7 liberty guarantee... [It] may also enhance freedom of expression claims under s. 2(b) of the *Charter*, for example in the case of hate literature.”<sup>50</sup> Taken together, these three decisions, rendered in 1990, 2001 and 2014, reflect the Court’s ongoing pairing of these rights over many years.

Aside from the Supreme Court of Canada, other courts have traced the various ways in which privacy and speech interact. In the defamation context, leading cases like *Warman v Wilkins-Fournier*<sup>51</sup> and *King v Power*,<sup>52</sup> rendered by the Ontario Divisional Court and the Newfoundland and Labrador Superior Court respectively, have weighed the impact of anonymity on reputation and online expression. The Alberta Court of Queen’s Bench, in *Harper v Canada*

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finding that “impartial oversight in the form of judicial authorization is critical before sensitive personal information may be turned over to the State.” *2015-2016 Annual Report to Parliament on the Personal Information Protection and Electronic Documents Act and the Privacy Act: Time to Modernize 20th Century Tools* (September 2016) at 23-24, online: <[https://www.priv.gc.ca/media/4516/ar\\_201516\\_eng.pdf](https://www.priv.gc.ca/media/4516/ar_201516_eng.pdf)>.

47 *Spencer*, *supra* note 24 at para 45.

48 *Ibid.*

49 *Canada (Human Rights Commission) v Taylor*, [1990] 3 SCR 892 at 936, 75 DLR (4th) 577 [*Taylor*].

50 *R v Sharpe*, 2001 SCC 2 at para 26, [2001] 1 SCR 45 [*Sharpe* (SCC)].

51 *Warman v Wilkins-Fournier*, 2010 ONSC 2126, 100 OR (3d) 648.

52 *King v Power*, 2015 NLTD(G) 32, 374 Nfld & PEIR 285.

(*Attorney General*) — a challenge brought by Stephen Harper (then on hiatus from federal politics) to third party spending and advertising provisions of the *Canada Elections Act* — likewise points out the continuity of these rights. As Cairns J. recaps, pointing to *Sharpe* and *Taylor*: “There are cases which have found a connection between freedom of expression and privacy... . The jurisprudence is clear that privacy values can enhance or strengthen a claim under s. 2(b) of the *Charter*.”<sup>53</sup> In the lower court *Sharpe* decision, similarly, Shaw J. of the British Columbia Supreme Court confirmed (again relying on *Taylor*) that the “case law on freedom of expression reflects the *Charter*’s concern for the right of privacy.”<sup>54</sup> Even in the pre-*Charter* period, courts were alert to this feature of free speech. Berger J., commenting in *R v Bengert (No. 8)* in 1979, struck a decidedly modern note: “With the advance of technology, the possibilities for the infringement of privacy have proliferated... . [T]he right of privacy ... is essential to freedom of thought and freedom of speech.”<sup>55</sup>

These decisions signal an emerging view of the mutually enhancing relationship between expression and privacy, most recently articulated by Cromwell J. in *Spencer*. To be sure, these interests have frequently been characterized, by commentators and courts, as being opposed in interest, a long-championed notion of speech (and freedom of the press in particular) versus the private sphere crystallized in multiple Supreme Court of Canada judgments and the famous Warren and Brandeis article “The Right to Privacy.”<sup>56</sup> That said, rulings like the ones just reviewed present the other side of the coin: the possibility of harnessing privacy as a vehicle for expressive freedom. This body of case law, touching on different topics across criminal and civil proceedings, tracks the expansion of section 2(b) along lines similar to those evidenced with respect to sections 7 and 8 of the *Charter*. Just as courts have read a privacy component into these two provisions, such jurisprudence telegraphs that “[i]nstead of being conflicting values, privacy and speech can instead be mutually supportive.”<sup>57</sup> It seems reasonable to suggest, therefore, that section 2(b) has also come to provide a “new home” for this right, as Gilbert might put it,<sup>58</sup> given that this connection has been pinpointed by the Supreme Court of Canada and lower courts across the country.

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53 *Harper v Canada (Attorney General)*, 2001 ABQB 558 at paras 184-85, 295 AR 1.

54 *R v Sharpe* (1999), 169 DLR (4th) 536 at para 44, 1999 CanLII 6380 (BCSC).

55 *R v Bengert, Robertson (No 8)*, 15 CR (3d) 37, 1979 CanLII 525 at para 5.

56 Samuel D Warren & Louis D Brandeis, “The Right to Privacy” (1890) 4:5 Harv L Rev 193.

57 Richards, *supra* note 20 at 95.

58 Gilbert, *supra* note 40 at 139.

Reading section 2(b) as encompassing protection against privacy violations also makes sense, separate and apart from the foregoing judgments, in terms of broader principles of statutory interpretation regularly applied to this *Charter* provision. It is trite law that section 2(b) is intended to be understood and applied in an expansive manner. This idea found early expression in *Irwin Toy Ltd. v Québec (Attorney General)*, where the Supreme Court of Canada established that the “content of expression can be conveyed through an infinite variety of forms of expression” and accordingly called for a “broad, inclusive approach to the protected sphere of free expression.”<sup>59</sup> In *Baier v Alberta*, LeBel J. reiterated this point, saying that “the Court has traditionally defined freedom of expression in broad terms.”<sup>60</sup> Quoting an earlier Supreme Court of Canada decision, he continued that the “Court favours a very broad interpretation of freedom of expression in order to extend the guarantee under the Canadian *Charter* to as many expressive activities as possible.”<sup>61</sup> McLachlin C.J.C., in *Sharpe*, provided context for such breadth by stressing the singular function played by section 2(b), depicted by her as being “[a]mong the most fundamental rights possessed by Canadians,” a guarantee which “makes possible our liberty, our creativity and our democracy.”<sup>62</sup>

Following in the footsteps of the “life, liberty and security of the person” makeover, section 2(b) would thus appear to be taking its place alongside sections 7 and 8 as a constitutional device for protecting Canadians against state-sponsored privacy violations. Evincing the “living tree” nature of our constitution,<sup>63</sup> this ongoing evolution of section 2(b) should provide comfort to those concerned over the growing technological (and, in some cases, ideological) reach of government into our private lives. As the spectre of surveillance grows, particularly online, and professional critics and regular citizens become more alert to this reality, it makes sense that this dimension of section 2(b) would come into greater focus. Of course, the privacy protections afforded by the “freedom of thought, belief, opinion and expression” guarantee will prove more apposite in some circumstances than in others. And while it is likely that any such use of section 2(b) will overlap with other *Charter* provisions (most

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59 *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at 969-70, 58 DLR (4th) 577.

60 *Baier v Alberta*, 2007 SCC 31 at para 90, [2007] 2 SCR 673.

61 *Ibid* at para 91, quoting *Libman v Quebec (Attorney General)*, [1997] 3 SCR 569 at para 31, 151 DLR (4th) 385. See also Peter W Hogg, *Constitutional Law of Canada*, 5th ed, vol 2 (Scarborough, ON: Carswell, 2007) (loose-leaf 2014 supplement) at Part 43:9-10; Robert J Sharpe and Kent Roach, *The Charter of Rights and Freedoms*, 5th ed (Toronto, Irwin Law, 2013) at 157.

62 *Sharpe* (SCC), *supra* note 50 at para 21.

63 *Eduards v Attorney-General for Canada* (1929), [1930] AC 124 at 136, [1930] 1 DLR 98 (Lord Sankey).

likely section 8), challenging state action on multiple grounds is a common litigation strategy. In the end, there is little downside in adding free speech to the constitutional privacy mix, especially given the potential contemporary threats to our web-based information security.

#### **4. Grave new world of online surveillance**

The pathways of the internet have had an indisputably positive impact on the well-being of persons worldwide, an innovation as paradigm shifting, arguably, as the introduction of the printing press in fifteenth century Europe. Canadian courts understand this reality, taking notice in their decisions of this “communications revolution” and its “heralding [of] a new and global age of free speech and democracy.”<sup>64</sup> Justice Abella, speaking for the majority of the Supreme Court of Canada in *Crookes v Newton*, which probed the legal responsibility of authors for defamatory hyperlinks included in their work, observed that the “Internet’s capacity to disseminate information has been described by this Court as ‘one of the great innovations of the information age.’”<sup>65</sup> This comes as no surprise, certainly, as we take for granted (at least in wealthy first world communities) that the online universe has shaped many if not most aspects of our lives. Gone are the days when a connection to cyberspace was seen as an optional luxury, to the extent that there is now a movement afoot to enshrine such access as a human right.<sup>66</sup> As Paul Bernal has pointed out: “For most people in what might loosely be described as the developed world the internet can no longer be considered an optional extra, but an intrinsic part of life in a modern, developed society.”<sup>67</sup>

As with every advance, however, there are drawbacks to our increasing global access to the internet and growing dependence on this technology for an expanding set of diurnal tasks. From love, sex and friendship to banking, grocery shopping and nearly everything in between, the data trail of our private lives can now be tracked online, a reality that has greatly enhanced the threat of surveillance creep. This paradox of a simultaneous facilitating and closing down of freedom is a fact of modern life, and looms large in academic

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64 *Barrick Gold Corp v Lopehandia*, (2004) 71 OR (3d) 416, 239 DLR (4th) 577 (quotation immediately preceding start of judgement, citing Matthew Collins, *The Law of Defamation and the Internet* (Oxford: Oxford University Press, 2001) at para 24.02).

65 *Crookes v Newton*, 2011 SCC 47 at para 34, [2011] 3 SCR 269.

66 For more on this development see Michael Karanickolas, “Understanding the Internet as a Human Right” (2012) 10 CJLT 263.

67 Paul Bernal, *Internet Privacy Rights: Rights to Protect Autonomy* (Cambridge: Cambridge University Press, 2014) at 2.

and other discussions of Bill C-51 and similar state initiatives. Davies is downbeat, lamenting the “prospect of unavoidable, all-pervasive monitoring by the state invading the privacy of our thoughts, our moments alone, or our intimate encounters with others.”<sup>68</sup> Equally pessimistic, Monroe E. Price reports that among civil liberties groups there exists “deep anxiety about the future of freedom of expression itself — a haunting and often undeclared pessimism triggered by the feeling that these same potentially liberating technologies ... have instead ushered in an era of surveillance.”<sup>69</sup> Richards agrees, cautioning that although the “embrace of digital platforms has been an undeniable force for good, enabling almost anyone with a networked computer or mobile phone to read widely and speak to the world instantaneously ... [such platforms] have been designed to create a data trail for each of us of what we think, read, and say privately.”<sup>70</sup>

One of the first casualties of this grave new world, then, is privacy, as government actors follow the data trail in pursuit of criminals and other national security threats, at times with the intentional or unwitting assistance of corporations.<sup>71</sup> Although it goes without saying that states should take all reasonable steps to protect their citizens, such strategies do at times appear to overreach. Relying on the well-worn shibboleth of national security, officials in Canada and elsewhere have created instruments like SCISA to the detriment of our fundamental liberties. Arthur J. Cockfield avers: “Canada and other governments are responding to ... concerns about security by promoting the use of new technologies by police and/or intelligence officials to locate, track and arrest suspected criminals and/or terrorists.”<sup>72</sup> Likewise, in his re-telling of the Snowden saga Greenwald isolates this central feature of post-9/11 thinking. As he argues, the “opportunity those in power have to characterize political opponents as ‘national security threats’ or even ‘terrorists’ has repeatedly prov-

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68 Davies, *supra* note 30 at 265.

69 Monroe E. Price, *Free Expression, Globalism and the New Strategic Communication* (Cambridge: Cambridge University Press, 2015) at 5.

70 Richards, *supra* note 20 at 2.

71 Critics have catalogued the ways in which corporations are complicit in undermining online privacy and free speech. See Austin, *supra* note 6 at 132; Deibert, *supra* note 17 at 197-98; Richards, *supra* note 20 at 174; Jacobs, *supra* note 20 at 2-3; Bernal, *supra* note 67 at 55; Price *supra* note 69 at 34; Glenn Greenwald, *No Place to Hide: Edward Snowden, the NSA and the Surveillance State* (Hamish Hamilton: London, 2014) at 170.

72 Arthur J. Cockfield, “Protecting the Social Value of Privacy in the Context of State Investigations Using New Technologies” (2007) 40 UBC L Rev 41 at 52. John Stuart Mill, in his 1859 tract *On Liberty*, Alan S. Khan, ed (Boston, Bedford / Martin’s, 2008) at 30, reminds us that this linking of security and surveillance dates back to the “ancient commonwealths”. Lyon also makes this point: “Surveillance is not new. Since time immemorial, people have ‘watched over’ others to check what they are up to, to monitor their progress, to organize them or to care for them”: *supra* note 8 at 22.

en irresistible.”<sup>73</sup> This view is shared by Davies, in whose opinion the “new terrorism legislation passed in almost every Western country since 9/11 has been based on the motto of ‘everything has changed.’”<sup>74</sup> On the basis of such “[v]ague and unspecified notions of ‘national security,’”<sup>75</sup> privacy and freedom of expression are now under attack, in Canada and around the planet.

Within this shadowy world, where one can never be quite certain if one is being watched (especially if one is on the government’s radar for whatever reason), the right to freedom of expression can take a significant hit. As various critics have observed,<sup>76</sup> Jeremy Bentham’s concept of the Panopticon,<sup>77</sup> a prototype of the Big Brother trope created by Orwell over one hundred and fifty years later,<sup>78</sup> is an apt metaphor for the chilling effects of such surveillance. A prison in which inmates are housed along the perimeter walls and never know if they are being watched by the centrally situated guard, this design was meant to instill a sense of the “apparent omnipresence of the inspector.”<sup>79</sup> In a similar way, certain components of Bill C-51 and like legislative instruments could be said to chill expression. Critically, the point here is not that one must be aware that he or she is being monitored but, rather, that the mere reasonable apprehension of being monitored can deter speech. This dynamic, that “even the *perception* ... of being surveilled can have a chilling effect,”<sup>80</sup> is a common leitmotif in analyses of the impact of state snooping on online freedom.<sup>81</sup> Like Bentham’s prisoners, persons with some realistic sense that they are under scrutiny, and who as a result refrain from making (typing) this or that statement

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73 Greenwald, *supra* note 71 at 186.

74 Davies, *supra* note 30 at 263.

75 *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, Frank La Rue, 23rd Sess, UN Doc A/HRC/23/40 (17 April 2013) at para 58, online: <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G13/133/03/PDF/G1313303.pdf?OpenElement>>.

76 See Richards, *supra* note 20 at 104; Greenwald, *supra* note 71 at 175.

77 Jeremy Bentham, “Panopticon, or The Inspection House” in John Bowring, ed, *The Works of Jeremy Bentham*, vol 4 (New York: Russell & Russell, 1962) 37.

78 Orwell, *supra* note 11 at 5.

79 Bentham, *supra* note 77 at 45.

80 Jillian York, “The Harms of Surveillance to Privacy, Expression and Association” in *Global Information Society Watch 2014: Communications Surveillance in the Digital Age* 29 at 29, online: <[giswatch.org/sites/default/files/gisw2014\\_communications\\_surveillance.pdf](http://giswatch.org/sites/default/files/gisw2014_communications_surveillance.pdf)> [Global Information Society Watch].

81 For analyses of this chilling effect across different jurisdictions see Steven Penney, “Updating Canada’s Communications Surveillance Laws: Privacy and Security in the Digital Age” (2008) 12 Can Crim L Rev 115 at 145; Sunny Skye Hughes, “US Domestic Surveillance after 9/11: An Analysis of the Chilling Effect on First Amendment Rights in Cases Filed against the Terrorist Surveillance Program” (2012) 27:3 CJLS 399 at 400; Demetrius Klitou, *Privacy-Invasive Technologies and Privacy by Design: Safeguarding Privacy, Liberty and Security in the 21st Century* (The Hague: Asser Press, 2014) at 253.

for fear of reprisal, might well be able to argue cogently that their liberties have been abridged.<sup>82</sup>

In the wake of the Snowden leaks much attention has focused on the U.S. government spying undertaken by the National Security Agency, though it has become apparent that Canada too is active in this regard. As has been documented in academic and media circles, CSE (along with the other members of the secretive Five Eyes Alliance<sup>83</sup>) has been busy sorting through huge amounts of intercepted online communications in an effort to thwart potential security threats.<sup>84</sup> Referencing a Canadian “spying initiative” with the code name Levitation, Greenwald and Ryan Gallagher reported that the “Canadian government has launched its own globe-spanning Internet mass surveillance system.”<sup>85</sup> According to a Canadian Broadcasting Corporation story two weeks later, “Canada’s electronic spy agency sifts through millions of videos and documents downloaded online every day by people around the world, as part of a sweeping bid to find extremist plots and suspects.”<sup>86</sup> And while CSE might insist that in “collecting and analyzing metadata [it] does not direct its activities at Canadians or anyone in Canada,”<sup>87</sup> the discovery care of Snowden that CSE tapped into an internet server at a “major Canadian airport” has led experts to challenge this claim.<sup>88</sup> Given these reported covert operations, and

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82 For a recent study of “chilling effects theory” see Jonathon W Penney, “Internet Surveillance, Regulation and Chilling Effects Online: A Comparative Case Study” (2017) 6:2 Internet Policy Rev, online: <<https://policyreview.info/articles/analysis/internet-surveillance-regulation-and-chilling-effects-online-comparative-case>>. Beyond reviewing the current academic literature on this point, Penney seeks to measure the behavioural impact of web surveillance through a “first-of-its-kind online survey” (at 1).

83 The other four members of this group are the U.S. National Security Agency, the United Kingdom’s Government Communications Headquarters, the Australian Signals Directorate and New Zealand’s Government Communications Security Bureau.

84 In *False Security: The Radicalization of Canadian Anti-Terrorism* (Irwin Law: Toronto, 2015) at 166, Craig Forcese and Kent Roach remark: “We now have the technology to store and mine unprecedented amounts of data. The haystacks are exponentially expanding, but it is also becoming more difficult to find the needles of actionable intelligence that could present a future Air India bombing.” See also Lisa M Austin, “Anti-Terrorism’s Privacy Slight-of-Hand: Bill C-51 and the Erosion of Privacy” in *After the Paris Attacks*, *supra* note 17, 183 at 186.

85 Ryan Gallagher and Glenn Greenwald, “Canada Casts Global Surveillance Dragnet over File Downloads”, *The Intercept* (18 January 2015), online: <<https://firstlook.org/theintercept/2015/01/28/canada-cse-levitation-mass-surveillance>>.

86 Amber Hildebrandt, Dave Seglins & Michael Pereira, “CSE Tracks Millions of Downloads Daily: Snowden Documents”, *CBC News* (27 January 2015), online: <[www.cbc.ca/news/canada/cse-tracks-millions-of-downloads-daily-snowden-documents-1.2930120](http://www.cbc.ca/news/canada/cse-tracks-millions-of-downloads-daily-snowden-documents-1.2930120)>.

87 Jim Bronskill, “Canada’s Electronic Spy Agency Defends Role in Hunt for Terrorists”, *Global News* (28 January 2015), online: <[globalnews.ca/news/1799807/canadas-electronic-spy-agency-defends-role-in-hunt-for-terrorists/](http://globalnews.ca/news/1799807/canadas-electronic-spy-agency-defends-role-in-hunt-for-terrorists/)>.

88 Greg Weston, Glenn Greenwald & Ryan Gallagher, “CSEC used Airport Wi-Fi to Track Canadian Travellers: Edward Snowden Documents”, *CBC News* (30 January 2014), online:



federal powers like those authorized under the *Canadian Security Intelligence Service Act*<sup>89</sup> and SCISA's information-sharing regime, it is not unreasonable to suggest that our internet freedoms may potentially be in jeopardy, at home as well as abroad.

This is where section 2(b) could come into play. In cases involving government surveillance of online communication, the chilling of expression flowing from this interference falls precisely within the ambit of a privacy-responsive free speech right. Although the injured party might in this case also attack this privacy violations through section 8, section 2(b) is the preferable option for targeting any resulting chilling effect. To the extent that victims can show that state surveillance impinges on their ability to "express their opinions or communicate with other persons for fear that they will face sanctions,"<sup>90</sup> they could make use of section 2(b), either on its own or in conjunction with section 8. Because "mass surveillance violates both the right to privacy and to freedom of expression,"<sup>91</sup> it makes sense that section 2(b) would feature in any challenge to such activity touching on expression, alongside or instead of search and seizure. In a sense, utilizing section 2(b) thus recalls the failed bid during parliamentary debates over the drafting of the *Charter* to introduce a section 2(e), which if adopted would have guaranteed "freedom from unreasonable interference with privacy, family, home, correspondence, and enjoyment of property."<sup>92</sup> It is noteworthy that the proponents of this doomed section 2(e) project chose "Clause 2," which already housed freedom of expression, for their proposed privacy right, as if confirming in the structure of the *Charter* itself the continuity of these two interests.

## 5. Freedom of thought

It is easy to forget, in exploring the privacy aspects of section 2(b), that this constitutional provision entails two distinct ideas: freedom of expression and

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<[www.cbc.ca/news/politics/csec-used-airport-wi-fi-to-track-canadian-travellers-edward-snowden-documents-1.2517881](http://www.cbc.ca/news/politics/csec-used-airport-wi-fi-to-track-canadian-travellers-edward-snowden-documents-1.2517881)>. See also Kent Roach, "CSEC's Airport Program: Questions of Legality, Propriety and the Adequacy of Review" (2014) 60:4 Crim LQ 469.

89 *Canadian Security Intelligence Service Act*, RSC 1985, c C-23 [*CSIS Act*].

90 *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, Martin Scheinin, 13th Sess, UN Doc A/HRC/13/37 (28 December 2009) at para 34, online: <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G09/178/04/PDF/G0917804.pdf?OpenElement>>.

91 Privacy International and Amnesty International, *Two Years After Snowden: Protecting Human Rights in an Age of Mass Surveillance* (4 June 2015) at 3, online: <[https://www.privacyinternational.org/sites/default/files/Two%20Years%20After%20Snowden\\_Final%20Report\\_EN.pdf](https://www.privacyinternational.org/sites/default/files/Two%20Years%20After%20Snowden_Final%20Report_EN.pdf)>.

92 *Supra* note 27, No 41 at 97.

freedom of thought. While certainly related, these twin concepts are substantively different, a fact that has been overlooked in the Canadian context for a number of reasons. First, both are included within the same section of the *Charter*, which lists “freedom of thought, belief, opinion and expression” in a single phrase as if grouping them together without distinction. However, the coupling of these rights is far from the accepted standard in international human rights instruments. In such instruments, thought and speech are often treated separately, with “freedom of thought, conscience and religion” being distinguished from “freedom of expression”.<sup>93</sup> Here, the right to think for oneself, an internal intellectual process, is grouped with other forms of pre-expressive activity, necessary yet antecedent to public, externalized speech. Those who prefer the international model can at least take comfort that the *Charter* incorporates freedom of thought at all. Its predecessor, the 1960 *Canadian Bill of Rights*,<sup>94</sup> refers only to “freedom of speech” (section 1(d)) with no mention of thought whatsoever.

The second reason that freedom of thought (as opposed to expression) gets short shrift in Canadian jurisprudence is the obvious point that, at least until recently, it was far more difficult in practice to control internal ideas than external speech. Although Orwell might speak of “Thought Police”<sup>95</sup> and the possibility of mapping our unspoken impulses and desires, such reach, by government agents or anyone else, might strike one as the stuff of dystopian fiction. This point of view is echoed in Peter W. Hogg’s overview of section 2(b), where he explains that the “references to ‘thought, belief, opinion’ will have little impact, since even a totalitarian state cannot suppress unexpressed ideas,” adding that “[i]t is the reference to ‘expression’ in s. 2(b) that is the critical one, and the word expression is very broad.”<sup>96</sup> While it is no doubt correct that the expression piece in section 2(b) gets more attention in constitutional litigation, the right to think freely has taken on greater significance in this “golden age of surveillance.”<sup>97</sup> What Richards calls “intellectual privacy,”<sup>98</sup> this ability to think without limits has come under attack in recent years, a development that has of late given this element of section 2(b) more relevance and “impact.”

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93 See, for instance, the *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71, arts 18-19; *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 arts 18-19.

94 *Canadian Bill of Rights*, SC 1960, c 44, s 1(d).

95 Orwell, *supra* note 11 at 6.

96 Hogg, *supra* note 61 at Part 43.3. J B Bury, in *A History of Freedom of Thought* (Oxford: Oxford University Press, 1952) at 1, is likewise of the view that one “can never be hindered from thinking what he chooses so long as he conceals what he thinks.”

97 Gus Hosein, “Introduction” in *Global Information Society Watch*, *supra* note 80, 9 at 10.

98 Richards, *supra* note 20 at 5.

Long overshadowed by free speech since first debuting on the Canadian constitutional stage in 1982, the freedom of thought guarantee might now be gearing up for its own close-up.<sup>99</sup>

While the section 2(b) jurisprudence is almost exclusively focused on freedom of expression, Canadian courts have on occasion considered freedom of thought as well and, in doing so, have emphasized the privacy component of this right. In *Taylor*, for instance, Dickson C.J.C. accepted that “the freedoms of conscience, thought and belief are particularly engaged in a private setting,”<sup>100</sup> a comment cited by McLachlin C.J.C. in *Sharpe*.<sup>101</sup> More generally, some judgments have underlined the importance of this inward-looking right to individual liberty and the process of self-fulfillment and realization. As articulated by the Supreme Court of Canada, the “right to think and reflect freely on one’s circumstances and condition”<sup>102</sup> is central to section 2(b) and forms an “extension of individual liberty.”<sup>103</sup> Another forceful endorsement of this facet of section 2(b), and the need to shelter ideas from public scrutiny, is found in *R v Watts*, where the Provincial Court of British Columbia celebrated the realm of private thought. Justice Angelomatis asked: “What could be more implicit in freedom of thought, belief, opinion and expression than the right to hold those beliefs and communicate those opinions privately?”<sup>104</sup> For him, it was “only through the exercise of our privacy rights that we are able to distinguish ourselves from animals. It is only on that philosophical plane that we are truly distinct from other societies and cultures that are either dictatorships or socially constrained cultures.”<sup>105</sup>

So why has freedom of thought, formerly largely ignored in the case law, suddenly become relevant in the surveillance context? The answer is that tech-

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99 This tendency to valorize speech over thought is evinced by Dickson C.J.C. in *R v Andrews*, [1990] 3 SCR 870 at 879, 77 DLR (4th) 128, when he comments (quoting Cory J.A., then on the Court of Appeal for Ontario): “Freedom of thought is of limited value without the freedom to express that thought.”

100 *Taylor*, *supra* note 49 at 937.

101 *Sharpe* (SCC), *supra* note 50 at para 26. In *R v Wong*, 56 CR (3d) 352, 1987 CarswellOnt 88 (WL Can) at para 39 the Court of Appeal for Ontario similarly concludes (in the context of s. 8): “No doubt the greatest expectation of privacy will exist in the home, where there must be freedom to express one’s innermost thoughts and feelings.”

102 *RWDSU, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd*, 2002 SCC 8 at para 32, [2002] 1 SCR 156.

103 *Lavigne v Ontario Public Service Employees Union*, [1991] 2 SCR 211 at 273, 81 DLR (4th) 545 (quoting the Ontario Court of Appeal).

104 *R v Watts*, 2000 BCPC 191, [2000] BCJ No 2721 (QL) at para 9.

105 *Ibid* at para 10. This insistence on the primacy of private thought is also reflected in the child pornography exemptions carved out by the Supreme Court of Canada in the *Sharpe* decision, *supra* note 50 at para 108.

nological advances have rendered the once seemingly impossible task of reading minds more reality than fantasy, as online data trails expose private thoughts and desires to state (and corporate) scrutiny. Richards identifies such scrutiny as a fact of contemporary life: “although it is an old idea, intellectual privacy has remained under-appreciated and underdeveloped ... not because intellectual privacy is trivial, but because until very recently, it has been difficult as a practical matter to interfere with the generation of ideas.”<sup>106</sup> As he discerns, while “in the past, access to ideas has come principally from print media,” today this access is web-based so that “gradually, over the decades, technologies have come to mediate our thinking, reading, and communications.”<sup>107</sup> Cockfield too is alert to this new normal, warning that while “governments and businesses have always watched us to a certain extent ... new surveillance technologies exponentially increase the ability of others to gather, store and index information about us.”<sup>108</sup> Ultimately, this heightened scrutiny results in self-censorship: “Greater scrutiny could make us take greater care before we visit a website or tap out a few thoughts on our word processors. If an individual thinks that her activities ... will somehow be stored and potentially used against her in the future, she may change her behaviour.”<sup>109</sup>

According to Richards, “if we are interested in freedom of speech and the ability to express new and possibly heretical ideas, we should care about the social processes by which these ideas are originated, nurtured, and developed.”<sup>110</sup> This statement is particularly apropos in light of present-day concerns over government surveillance, and rings true in any jurisdiction in which internet privacy is under siege. While it might once have been true that speech, not thought, could be caught by the state’s monitoring apparatus, technological developments, in combination with post-9/11 security malaise, have created a “perfect storm” in which one’s private musings may no longer be safe. David Kaye, United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, brings this issue to the at-

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106 Richards, *supra* note 20 at 96.

107 *Ibid* at 97, 175.

108 Arthur J Cockfield, “Who Watches the Watchers? A Law and Technology Perspective on Government and Private Sector Surveillance” (2003) 29:1 Queen’s LJ 364 at 395. Jeffrey Rosen agrees in *The Unwanted Gaze: The Destruction of Privacy in America* (New York: Random House, 2000) at 7: “For as thinking and writing increasingly take place in cyberspace, the part of our life that can be monitored and searched has vastly expanded...On the Internet, every Web site we visit, every store we browse in, every magazine we skim, and the amount of time we spend skimming it, create electronic footprints that increasingly can be traced back to us, revealing detailed patterns about our tastes, preferences, and intimate thoughts.”

109 Cockfield, *ibid* at 395.

110 Richards, *supra* note 20 at 103.

tention of the U.N. Human Rights Council in a 2015 report. Insisting on the necessity of protecting both speech and thought, he draws attention to the fact that the “right to hold opinions without interference also includes the right to form opinions.”<sup>111</sup> “[T]argeted and mass” systems of surveillance, he continues, “may undermine the right to form an opinion, as the fear of unwilling disclosure of online activity, such as search and browsing, likely deters individuals from accessing information, particularly where such surveillance leads to repressive outcomes.”<sup>112</sup>

In addition to speech issues resulting from online surveillance, then, the privacy aspect of section 2(b) could likewise assist with respect to any freedom of thought violation. A litigant relying on section 2(b) could focus on external and internal processes, addressing both the impact of government monitoring on both expression as well as embryonic thoughts in the process of development. Given the ascendancy of our surveillance society, section 2(b) could serve double duty in this regard, as those deterred from speaking and/or internet surfing could add this *Charter* provision (along with section 8 and, possibly, section 7) to their constitutional tool kit. Sometimes, despite the popular saying, more is more, not less, and it is difficult to understand how expanding the range of legal responses in Canada to such government-induced deterrence is a bad thing, provided that it has some basis in law and, ideally, a chance of success. And it would appear, as I discuss below, that the CCLA, CJFE and BCCLA have all evinced faith in this approach by featuring it in legal challenges to Canada’s 2001 and 2015 anti-terrorist legislation. Turning to review these judicial proceedings, which continue to make their way through Canadian courts, I will provide an overview of how section 2(b) is currently being deployed in connection with privacy rights.

## **6. Litigation featuring a privacy-centric approach to section 2(b)**

As with any constitutional argument, the rubber really hits the road when such ideas are battle tested in litigation, an indication that (at least in theory) the parties have sufficient confidence in particular strategies to submit them to judicial scrutiny. One of the interesting things about cases like *Spencer*, *Sharpe* and *Taylor*, which recognize the intersection of speech and privacy, is that none

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111 *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, David Kaye*, 29th Sess, UN Doc A/HRC/29/32 (22 May 2015), at para 21, online: <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/095/85/pdf/G1509585.pdf?OpenElement>>.

112 *Ibid.*

of them feature or otherwise address the privacy-inflected approach to section 2(b) outlined above. *Spencer*, the most recent and arguably on point of these Supreme Court of Canada decisions, is actually a section 8 proceeding and, despite its forward-looking and novel treatment of anonymity and freedom of expression, never formally considers section 2(b) itself. Only one completed *Charter* challenge has made use of section 2(b) thus: *CCLA v Canada*,<sup>113</sup> which sought to attack surveillance powers in the *CSIS Act*.<sup>114</sup> Abella J.A. (as she then was), while concurring with the majority of the Ontario Court of Appeal that the case should be dismissed on standing and evidentiary grounds, allowed that the case “raises serious questions” about the impact of such powers on section 2(b) rights.<sup>115</sup> It is reasonable to assume that, should Canadians continue to encounter privacy-invasive legislation of the sort challenged in *CCLA v Canada*, new legal proceedings will be initiated to stem the tide of invasive government action.

While there exists little in the way of concluded litigation on point, two *Charter* challenges (one comprised of two distinct proceedings) have been commenced which illustrate how section 2(b) can be utilized with a privacy focus to combat online surveillance. A challenge to Bill C-51, initiated jointly in July 2015 by the CCLA and CJFE,<sup>116</sup> covers a great deal of legal ground in attacking five separate aspects of the omnibus statute. In addition to impugning SCISA and speech limiting amendments to the *Criminal Code*, the applicants zero in on the *Secure Air Travel Act* and revisions to the *Immigration and Refugee Protection Act* and the *Canadian Security Intelligence Act*.<sup>117</sup> This lawsuit,

113 *Corporation of the Canadian Civil Liberties Association v Canada (AG)*, 74 OR (2d) 609, 1990 CanLII 6715 (H Ct J) [*CCLA v Canada* (H Ct J)]; *Corporation of the Canadian Civil Liberties Association v Canada (AG)*, 40 OR (3d) 489, 1998 CanLII 6272 (CA) [*CCLA v Canada* (CA)].

114 *CSIS Act*, *supra* note 89.

115 As Abella J.A. said of the merits: “The information contained in C.C.L.A.’s supporting affidavits raises serious questions about whether the constitutionally protected rights of citizens to engage in lawful expression... may be compromised or threatened under the authority of the *Canadian Security Intelligence Act*.”: *CCLA v Canada* (CA), *supra* note 113 at 522. She suggested that government surveillance can cause violations of s. 2(b) and that the CCLA did adduce some (though, apparently, not enough) evidence to this effect. “There is no question,” Abella J.A. wrote, “that the perception of C.S.I.S. intervention was, to say the least, unsettling to the people involved and potentially inhibiting”: *ibid.* At an earlier point of the proceeding Justice Potts of the Ontario High Court of Justice characterized the claim in these terms: “individuals proposing to do no more than engage in advocacy and dissent do not always know whether their lawful activities will be monitored” and the “cautious among them may, and do, choose to refrain from engaging in legitimate political activities for fear of becoming objects of CSIS surveillance.”: *CCLA v Canada* (H Ct J), *supra* note 113 at 619.

116 *CCLA v Canada (AG)* (21 July 2015), Toronto, CV-15-532810 (Ont Sup Ct) (Notice of Application), online: <<https://ccla.org/cclanewsites/wp-content/uploads/2015/08/Issued-Notice-of-Application-Bill-C-51-C1383715xA0E3A.pdf>> [CCLA Notice of Application].

117 *Ibid* at paras 3-4.

as explained by the moving parties, was commenced because of the “disturbing implications for free speech, privacy” and the “powers of government”<sup>118</sup> presented by Bill C-51. According to Tom Henheffer, CJFE Executive Director, Bill C-51 “unjustifiably infringes on the rights of all Canadians without making our country any more secure, and must be struck down.”<sup>119</sup> For her part, Sukanya Pillay, Executive Director of the CCLA, makes clear that this law is being opposed because it “creates broad and dangerous new powers, without commensurate accountability.”<sup>120</sup>

While this proceeding has yet to advance to a hearing, certain aspects of its approach to section 2(b) are evident from the Notice of Application, particularly as it relates to SCISA and the *Criminal Code* amendments. These parts of the pleadings disclose both a conventional approach to section 2(b), along with a parallel use of this provision anchored in privacy considerations. The former centres on section 83.221 of the *Criminal Code*, which outlaws advocating for or promoting the “commission of terrorism offences in general.” Here the applicants allege a narrowing of expression, characterizing section 83.221 as criminalizing “constitutionally protected speech and other expressive activities.”<sup>121</sup> This traditional leveraging of section 2(b) is supplemented, in relation to SCISA, with an argument based entirely in a privacy framework. Taking issue with the breadth of the SCISA information-sharing powers, the CCLA and CJFE claim that the “invasive state archiving and information sharing” between government departments will “chill” and “deter legitimate expression.”<sup>122</sup> Such “secret” intelligence activity is portrayed in a manner evoking Bentham’s Panopticon, as those under observation cannot “determine (or challenge in any meaningful way) how their activities and conduct have been ... construed ... [or] shared and used”<sup>123</sup> by Ottawa.

On April 1, 2014, more than a year prior to Bill C-51 coming into force and the start of the CCLA/CJFE litigation, the BCCLA commenced a class action challenging sections 273.65, 273.68 and 273.7 of the *National Defence*

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118 Canadian Civil Liberties Association, Media Release, “CCLA & CJFE Mounting Charter Challenge Against Bill C-51” (21 July 2015), online: <<https://ccla.org/ccla-and-cjfe-mounting-charter-challenge-against-bill-c-51>>.

119 *Ibid.*

120 *Ibid.*

121 CCLA Notice of Application, *supra* note 116 at paras 24, 26. The CCLA and CJFE argue that this concept is “overly vague, broad and imprecise” and that, consequently, it exerts a “chilling effect on freedom of expression and association, even if no prosecution is ever brought”: *ibid* at paras 26-27.

122 *Ibid* at para 34.

123 *Ibid* at paras 34-35.

*Act*,<sup>124</sup> legislative provisions relating to CSE surveillance efforts.<sup>125</sup> Later that year, the BCCLA initiated a second proceeding, similar in scope to its first case but packaged as a regular action and dropping any reference to section 273.7.<sup>126</sup> Central to both claims, advanced on the basis of sections 2(b) and 8 of the *Charter*, are the CSE powers granted by section 273.65 to “intercept private communications.”<sup>127</sup> As stipulated in the statute, such powers are available for two purposes: “obtaining foreign intelligence” or “protecting the computer systems or networks of the Government of Canada from mischief, unauthorized use or interference.”<sup>128</sup> Regarding the former, section 273.65(2) requires that any CSE interception must be “directed at foreign entities located outside Canada” and can only be “used or retained if they are essential to international affairs, defence or security.”<sup>129</sup> Ministerial authorizations are needed to engage in this monitoring activity, though section 273.68 is vague on timelines or the possibility of multiple renewals, other than specifying that “[n]o authorization or renewal may be for a period longer than one year.”<sup>130</sup> According to the BCCLA’s October 27, 2014 Statement of Claim, the “Minister issued at least 78 Authorizations between 2002 and 2012.”<sup>131</sup>

The constitutional arguments raised by the BCCLA in the April and October 2014 proceedings are nearly identical and foreground the privacy implications stemming from this interception of online communications. In impugning sections 273.65 and 273.68, introduced into the *National Defence Act* via the 2001 *Anti-Terrorism Act*,<sup>132</sup> the petitioners make interference with the private sphere a central issue, which they tackle not merely through section 8 but equally by means of section 2(b). As alleged by the BCCLA in its October 2014 Statement of Claim, the “impugned provisions and Authorizations that purport to provide [CSE] with legal authority to intercept the private communications of persons in Canada are an infringement of s. 2(b).”<sup>133</sup> Complementing the BCCLA’s use of section 8, on the basis of which such surveillance is attacked

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124 *National Defence Act*, RSC 1985, c N-5, ss 273.65, 273.68 and 273.7.

125 *BCCLA v Canada (AG)* (1 April 2014), Vancouver, T-796-14 (FCTD) (Statement of Claim), online: <<https://bccla.org/wp-content/uploads/2014/04/20140401-Statement-of-Claim-Class-Action-Proceeding.pdf>> [BCCLA April Statement of Claim].

126 *BCCLA v Canada (AG)* (27 October 2014) Vancouver, T-2210-14 (FCTD) (Statement of Claim), online: <<https://bccla.org/wp-content/uploads/2014/12/20141027-CSEC-Statement-of-Claim.pdf>> [BCCLA October Statement of Claim].

127 *National Defence Act*, *supra* note 124 at s 273.65(1), (3).

128 *Ibid* at s 273.65(3).

129 *Ibid* at s 273.65(2).

130 *Ibid* at s 273.68(1).

131 BCCLA October Statement of Claim, *supra* note 126 at para 26.

132 *Anti-Terrorism Act*, SC 2001, c 41.

133 BCCLA October Statement of Claim, *supra* note 126 at para 38.



as violating “reasonable expectation[s]” regarding the use and dissemination of personal information, the right to free speech is vital to this litigation. Beyond targeting the interception of speech, section 2(b) is also enlisted to challenge CSE’s powers to “collect, analyze, retain, use and/or distribute internationally metadata that is associated with or produced by persons in Canada.”<sup>134</sup> In harnessing section 2(b) in terms of information sharing and expression, these BCCLA lawsuits reflect the breadth of privacy-related possibilities attaching to this *Charter* right.

The CCLA/CJFE and BCCLA proceedings are ongoing and it is difficult to predict if they will make it to the hearing stage, let alone how their privacy-centric uses of section 2(b) will be received by the courts. Whatever its outcome, such advocacy represents a recent development in *Charter* litigation in which section 2(b) is pleaded in response to the chilling effects of surveillance and related information-sharing activities. Moreover, while the statutory provisions at issue in these cases do not exclusively concern online themes, these challenges have the potential to shine a light on the internet dimension of state surveillance of concern to Canadians. Though the CCLA/CJFE Notice of Application does not refer explicitly to the Web (other than citing the *Criminal Code* “internet deletion provisions”<sup>135</sup>), its invoking of the “era of ‘big data’ information processing”<sup>136</sup> in connection with SCISA is a nod to the massive data trails subject to monitoring. The BCCLA statements of claim are more directly on point, and speak of “metadata” as “expressive content that is protected under section 2(b).”<sup>137</sup> Together, these lawsuits signal an expanded potential for the free speech guarantee, a modern take on this right responsive to our privacy perils in cyberspace.

## 7. Conclusion

In this paper I have traced the connections between privacy and expression and have outlined how this link, acknowledged by Canadian courts, has been incorporated into section 2(b) litigation targeting invasive government surveillance. This highlighting of the privacy-speech nexus is timely, given our increasing dependence on the internet and the ease with which both thoughts and speech can now be intercepted online. Responding to this twenty-first century threat, which has gripped the popular imagination, advocates have

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134 *Ibid* at para 39.

135 CCLA Notice of Application, *supra* note 116 at para 9.

136 *Ibid* at para 35.

137 BCCLA April Statement of Claim, *supra* note 125 at para 45; BCCLA October Statement of Claim *supra* note 126 at para 37.

taken hold of this vision of section 2(b) in their defence of the private sphere. As Abella J.A. asserted in *CCLA v Canada*: “It goes to the heart of an open democracy that members of the public are, and perceive that they are, free from unwarranted government surveillance when they are engaging in lawful, even if provocative, activity.”<sup>138</sup> While this 1990s case may not have been a win for the CCLA, its forceful attack on CSIS’s “exceptional legislative tool”<sup>139</sup> set the stage for future challenges, including the ongoing BCCLA and CCLA/CJFE lawsuits surveyed above. And, as concerns regarding online state surveillance continue to grow in our post-9/11 reality (the Court of Appeal rendered its *CCLA v Canada* decision in 1998), it seems likely that judges will remain ever more mindful of digital privacy.

Time will tell if Bill C-51 represents a low water mark in recent Canadian law-making efforts or whether it constitutes merely the first gambit in the ongoing development of federal surveillance powers. The Trudeau Liberals, since capturing a majority government in October 2015, have yet to take steps toward repealing any part of the *Anti-Terrorism Act, 2015*, despite promises to do so. As announced on the official party website: “We will repeal the problematic elements of Bill C-51, and introduce new legislation that better balances our collective security with our rights and freedoms.”<sup>140</sup> Among the eight priorities pledged in this context is the assurance that such legislation will “guarantee that all [CSE] warrants respect the *Charter*,” reign in CSE “powers by requiring a warrant to engage in the surveillance of Canadians,” ensure that “Canadians are not limited from lawful protests and advocacy” and assemble an “all-party national security oversight committee.”<sup>141</sup> Though certainly a start, the value of some of these commitments remains an open question. Even Parliament’s Standing Committee on Public Safety and National Security would seem to be running out of patience. In its May 2, 2017 report *Protecting Canadians and their Rights: A New Roadmap for Canada’s National Security*, which offers up more than 40 recommendations for updating SCISA and related statutes, the Committee rejects the “false dichotomy” between “national security efforts”

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138 *CCLA v Canada* (CA), *supra* note 113 at 522.

139 *Ibid.*

140 Official Liberal Party website, online: <<https://www.liberal.ca/realchange/bill-c-51/>>. This need for balancing national security interests against *Charter* rights is also trumpeted in the *Green Paper*, *supra* note 13 at 6: “In protecting national security, the Government must find an appropriate balance between the actions it takes to keep Canadians safe and the impact of those actions on the rights we cherish.”

141 *Ibid.* It is at present too soon to judge whether Bill C-59 (“An Act respecting national security matters”), tabled in the House of Commons on June 20, 2017, will (assuming it passes into law) substantively address issues of concern to groups like the CCLA, the BCCLA and CJFE. Online: <<http://www.parl.ca/DocumentViewer/en/42-1/bill/C-59/first-reading>>.

and “uphold[ing] human rights.”<sup>142</sup> In the meantime, one can take comfort in the expanding reach of section 2(b), which remains poised to defend our privacy as well as our speech.

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<sup>142</sup> Online: <<https://www.ourcommons.ca/DocumentViewer/en/42-1/SECU/report-9/page-105#29>>.

# Baxter Family Competition on Federalism

*Rachel and Colin Baxter*

The following papers by Erika Arban and Éléonore Gauthier are two of the three winners of the Baxter Family Competition on Federalism,\* organized for the first time in 2017 at the McGill Faculty of Law, our *alma mater*. The Competition was established to encourage young lawyers, legal academics, and law students to write and talk about federalism – the pros and cons of our form of democracy which divides up powers and responsibilities between provinces and a common federal government. By inviting legal scholars who are either still students, or with less than five years' experience, we hope to rekindle interest for federalism from a legal perspective, one that may not have received as much attention as it deserved, or required, over the last few decades, at least in Canada.

In this inaugural year, 47 papers were submitted, from nine countries. They were judged by an independent panel with expertise in law and governance, and the top three winners were invited to Montreal in March 2017 to present their papers at a Symposium held at the McGill Faculty Club. We were thrilled that several members of the international jury were in attendance and impressed by the lively discussion that followed the presentations.

As founders of the Competition, we strongly believe that we can all benefit from a more thoughtful discourse about the strengths and weaknesses of federalist systems. If properly and respectfully fostered at law schools, such enquiries and debates can promote a new generation of citizens who have given some thought to how our country operates and to ways to make it better. Recent world events give one lots to think about in terms of the division of powers, and the way our Constitution shapes political debate. We believe that the Competition also has the collateral benefit of teaching people (possibly future leaders) about other systems and promoting respect and tolerance of differ-

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\* The first prize winner, "Constitutional Jurisdictions" by Asha Kaushal, is to be published separately by the University of Toronto Press.

ences. Our hope is to foster study and dialogue that can lead to real, practical improvements in our form of government.

This year's event would not have been such a success without the commitment of Professor Johanne Poirier, holder of the Peter MacKell Chair in Federalism at the McGill Faculty of Law, and the dedication of our international panel of judges who carefully read and analysed each of the submissions. We sincerely thank Professor Poirier and the judges:

- Prof. Eva Maria Belser, Co-Director, Institute of Federalism, University of Fribourg, Switzerland
- The Honourable Ian Binnie, lawyer and former Justice of the Supreme Court of Canada
- The Honourable Marie Deschamps, lawyer and former Justice of the Supreme Court of Canada
- Prof. Jean Leclair, Faculty of Law, Université de Montréal
- Prof. Peter Oliver, Faculty of Law, University of Ottawa
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We also wish to express our gratitude to the *Review of Constitutional Studies* for publishing these papers, and thereby bringing them to a wider audience.

The Baxter Family Prize in Federalism will be awarded every second year. This was its inaugural year, which also happens to be Canada's 150<sup>th</sup> anniversary. The next call for papers will be in 2018, with the Symposium to be held in 2019. Please stay tuned for dates, themes and conditions by visiting the Peter MacKell Chair's website at the McGill Faculty of Law.

We look forward to the second round in 2018-2019 and encourage the submission of papers from young legal thinkers, in Canada and from around the world!

# Exploring the Principle of (Federal) Solidarity

*Erika Arban\**

*Over the past few years, legal scholarship has showed a renewed interest in the principle of solidarity. While this notion is entrenched in many legal texts, it is neither easy to conceptualize nor to define its precise legal meaning. Solidarity is commonly understood as a principle sparking positive values such as cooperation, equality, loyalty, mutual help, compassion or assistance, yet it remains an elusive concept that can be explored from many perspectives. In this regard, solidarity finds its most interesting nuances in the specific ambit of federalism. This paper explores the scope of the principle of (federal) solidarity and illustrates its interconnectedness with other doctrines such as Bundestreue, federal loyalty and cooperative federalism. It argues that federal solidarity goes beyond the idea of altruism or philanthropy as it implies duties of reciprocity between the parties involved. It also contends that, while federal solidarity is implicit in (the mostly German concept of) Bundestreue, these concepts are not identical. The paper concludes that federal solidarity encompasses not only a vertical but also a horizontal aspect, in a way that generates interesting applications for federal or otherwise decentralized systems.*

*Au cours des dernières années, le principe de solidarité a connu un regain d'intérêt parmi les juristes. Cependant, bien que cette notion soit reprise dans de nombreux textes juridiques, elle reste difficile à conceptualiser et la définition juridique du concept reste souvent évasive. La solidarité est généralement considérée comme un principe évoquant des valeurs positives telles que la coopération, l'égalité, la loyauté, l'entraide, la compassion ou l'assistance. La solidarité peut être explorée sous divers angles, notamment dans le cadre spécifique du fédéralisme. Cet essai explore donc la portée du principe de la solidarité (fédérale) et illustre particulièrement son interaction avec d'autres doctrines telles que la Bundestreue, la loyauté fédérale et le fédéralisme coopératif. L'essai soutient que la solidarité fédérale va au-delà de l'altruisme ou de la philanthropie car elle implique des devoirs de réciprocité entre les parties. Bien que la solidarité fédérale soit implicite dans le principe de Bundestreue, ces concepts ne sont pas synonymes. L'essai conclut que la solidarité fédérale englobe non seulement une dimension verticale, mais également une dimension horizontale, ce qui génère un potentiel intéressant des mises en œuvre dans les systèmes fédéraux décentralisés.*

\* Dr Erika Arban is a post-doctoral fellow at Melbourne Law School and a sessional lecturer at the University of Antwerp. She was the second prize winner in the 2017 Baxter Family Competition on Federalism.

## Introduction

Over the past few years, academic studies in general, and legal scholarship in particular, have shown a renewed interest in the principle of solidarity. Yet, conceptualizing solidarity, especially in its legal mode, is not easy: in fact, although this notion is embedded, more or less explicitly, in several international treaties and constitutional texts across the world, no agreement exists on its exact meaning and scope. As a result, it may be difficult to interpret or translate into practice the numerous solidarity-based principles and provisions ingrained in legal documents. In this regard, one of the least explored — but perhaps most intriguing — avenues of solidarity pertains to federal theory, where the idea of (federal) solidarity is often interlaced with doctrines such as *Bundestreue*, which is federal loyalty or cooperative federalism.

In very general terms, solidarity is understood as a principle that sparks positive values such as altruism, cooperation, equality, loyalty, fairness, mutual help, benevolence, sympathy, compassion, brotherhood, assistance, and kindness to others,<sup>1</sup> and is commonly opposed to sentiments such as selfishness, discordance, hatred, antagonism, or separation.<sup>2</sup> At the same time, solidarity is an ambiguous and elusive concept that can be explored from a variety of perspectives and that displays features of great interest to many disciplines: as a consequence of its multifaceted and complex nature, the characterization of this principle by a political scientist or jurist might be significantly different than that of a philosopher, although these various perspectives may eventually intersect and overlap.

The goal of this paper is to explore the scope and place of the principle of (federal) solidarity in its different nuances to help demystify its actual meaning. By adopting an analytical and comparative approach, this paper begins with a cursory overview of the various implications of solidarity in private, public, and international law (an exercise that helps contextualize the principle). Next, it explores the idea of (federal) solidarity, particularly in its interconnectedness with other related doctrines such as *Bundestreue* (or federal loyalty) and cooperative federalism (the latter being a well-known concept in Canada). The paper concludes that federal solidarity goes beyond the idea of altruism or phi-

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1 Juliane Ottmann, “The Concept of Solidarity in National and European Law: The Welfare State and the European Social Model” (2008) 2:1 Vienna Online J on Intl Const L 36 at 38.

2 The Oxford English Dictionary defines solidarity as “[t]he fact or quality, on the part of communities, etc., of being perfectly united or at one in some respect, esp. in interests, sympathies, or aspirations; spec. with reference to the aspirations or actions of trade-union members.” See *The Oxford English Dictionary*, 2nd ed, *sub verbo* “solidarity”.

lanthropy typical of the moral or philosophical connotation of this principle, as it implies duties of reciprocity among the parties involved instead of an asymmetrical sense of sacrifice on the part of one party. The paper also advances the idea that, while federal solidarity is implicit in *Bundestreue*, and can thus be construed as an expression of it, at the same time the two concepts are not exact synonyms. Finally, and most importantly, federal solidarity encompasses not only a *vertical* (from the centre to the periphery) but also a *horizontal* (at the peripheral level) aspect: appropriately strengthened with suitable legal or constitutional instruments, horizontal solidarity may reveal interesting and novel applications for many federal or quasi-federal systems.

## 1. Overview of the legal meaning of solidarity

Although it pervasively infuses many constitutional texts and international treaties, conceptualizing the principle of solidarity in law is a complex and intricate task for two main reasons. First, solidarity in the legal ambit may acquire different meanings and nuances depending on whether it is entrenched in international or domestic law, in private or public law, or in federal theory. Second, legal solidarity differs from its moral or philosophical counterparts. Moral solidarity can be construed as a voluntary charitable act (or even as philanthropy),<sup>3</sup> consisting of values such as mutual assistance, whereas legal solidarity must be “conceptualized in terms of rights”<sup>4</sup> being it an “obligatory act based on legal rights and duties”<sup>5</sup> as Ottmann points out, although some sentiments of mutual assistance might always come into play.

### a. Solidarity and private law

The more classic version of solidarity in private law finds its roots in Roman Civil Law, which first identified solidarity in the legal concept *obligatio in solidum*: Black’s Law dictionary defines it as “[t]he state of being jointly and severally liable (as for a debt).”<sup>6</sup> French jurists consistently used the term *solidarité* throughout the sixteenth century to refer to the “common responsibility for debts incurred by one of the members of a group”<sup>7</sup> and the term

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3 Ottmann, *supra* note 1 at 40; WT Eijssbouts & D Nederlof, “Editorial: Rethinking Solidarity in the EU, from Fact to Social Contact” (2011) 7:2 Eur Const L Rev 169 at 172.

4 Ottmann, *ibid* at 44.

5 *Ibid* at 39-40.

6 Black’s Law Dictionary, 9th ed, *sub verbo* “solidarity”.

7 Steinar Stjernø, *Solidarity in Europe: The History of an Idea* (New York: Cambridge University Press, 2004) at 27.



was also included in Napoleon's *Code Civil* of 1804.<sup>8</sup> To date, this type of solidarity still characterizes several legal systems operating in the civil law tradition.<sup>9</sup> This private law version of solidarity can be considered the only existing undisputed and universally accepted definition of the principle in the legal domain.

## b. Solidarity and public law

In public law, there are at least three ambits where the principle of solidarity is expressed, although the term *solidarity* is not necessarily spelled out. The first relates to so-called “socio-economic rights” and, more generally, to welfare provisions: it is actually in relation to the national welfare state that the legal concept of solidarity has mostly been developed,<sup>10</sup> with issues of redistribution acquiring a prominent relevance. Here, the spirit of solidarity infuses those mechanisms offered by central governments to help citizens protect and enjoy these rights, such as national programs providing health and social services on a universal basis.<sup>11</sup>

The second avenue where solidarity-based tools are most used is in the event of drastic emergencies such as terrorist attacks or natural disasters. This is perhaps the most obvious example of solidarity, intimately connected to sentiments such as mutual aid and assistance, and binding actors at all levels: local and national governments and institutions, states in the international commu-

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8 *Ibid.*

9 Ottmann, *supra* note 1 at 38.

10 *Ibid* at 39. The expression “socio-economic rights” commonly identifies a bundle of rights such as private property, health, education, work, social security, equality of salary between men and women for the same job, etc.

11 As far as “socio-economic rights” are concerned, the *Canadian Charter of Rights and Freedoms* follows the North American tradition whereby more emphasis is given to “individualism” over “communalism”: see The Honourable Mr Justice Charles D Gonthier, “Liberty, Equality, Fraternity: the Forgotten Leg of the Trilogy, or Fraternity: the Unspoken Third Pillar of Democracy” (2000) 45:3 McGill LJ 567 at 569; *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. Consequently, other than the general protection assured to the right to life, liberty and security of the person contained in section 7 of the *Charter*, not much is said in regards to welfare, health, work, personal property or other social rights, differently than what happens in many European constitutions which offer constitutional protection to a number of socio-economic rights such as employment, family, health, social security, etc.: in this regard, see e.g. articles 35, 39, 41 and 43 of the Spanish Constitution (Arts 35, 39, 41, 43 CE) or articles 31, 32 and 38 of the Italian Constitution (Arts 31-32, 38 Cost). The English version of the Italian Constitution is available here: <[https://www.senato.it/documenti/repository/istituzione/costituzione\\_inglese.pdf](https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf)>; the English version of the Spanish Constitution is available here: <[www.congreso.es/portal/page/portal/Congreso/Congreso/Hist\\_Normas/Norm/const\\_esp\\_texto\\_ingles\\_0.pdf](http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist_Normas/Norm/const_esp_texto_ingles_0.pdf)>.

nity, etc.<sup>12</sup> Similar understandings of solidarity infuse, both at national and international level, areas such as border control, human rights, and asylum rights.

Finally, the third example of public law solidarity may have either a *political* or a *socio-economic* nature, and mainly refers to the general responsibility of the individual towards the community at large: *political* solidarity commonly includes duties performed by subjects such as voting, homeland defense, and military service (when applicable), whilst *socio-economic* solidarity comprises the duty to get proper education, to work, to contribute to public expenses, etc.<sup>13</sup> This type of solidarity moves vertically from the individual to the collectivity or to central institutions and *vice versa*, in a dynamic movement that brings reciprocal benefits to the parties involved.

### c. Solidarity and international law

Solidarity in its extended public law meaning has often been associated with the French term *fraternité*, which was one of the three linchpins inspiring the French Revolution (along with *liberté* and *égalité*).<sup>14</sup> The general notion of solidarity as spelled out in the French Constitution was so powerful and innovative that it was eventually included in the first article of the Universal Declaration of Human Rights. Solidarity also prominently appeared in the papal encyclical *Pacem in Terris*,<sup>15</sup> where Pope John XXIII acknowledged the existence of

12 References to emergencies are pervasive in the Basic Law for the Republic of Germany (*Grundgesetz der Bundesrepublik Deutschland*): see for instance article 35, which details the legal and administrative type of support that *Länder* shall offer to each other in the event of an adversity (Art 35 GG), but also article 91(1) dealing with solidarity-based provisions in case of internal emergency (Art 91 Abs 1 GG). Also, pursuant to article 104b(1), “the Federation may grant financial assistance even outside its field of legislative powers in cases of natural disasters or exceptional emergency situations beyond governmental control and substantially harmful to the state’s financial capacity”: Art 104b Abs 1 GG. The English version of the German Basic Law is available here: <<https://www.btg-bestellservice.de/pdf/80201000.pdf>>

13 See Giovanna Razzano, “La materia concorrente della produzione, trasporto e distribuzione nazionale dell’energia nella recente giurisprudenza costituzionale, fra leale collaborazione e doveri di solidarietà” (2011) 13 *Federalismi*.it at 12, online: <[www.federalismi.it/AppOpenFilePDF.cfm?artid=18394&dpath=document&dfile=28062011112903.pdf&content=La+materia+concorrente+della+produzione,+trasporto+e+distribuzione+nazionale+dell%27energia+nella+recente+giurisprudenza+costituzionale,+fra+leale+collaborazione+e+doveri+di+solidarier%C3%A0+--stato+--dottrina+-->](http://www.federalismi.it/AppOpenFilePDF.cfm?artid=18394&dpath=document&dfile=28062011112903.pdf&content=La+materia+concorrente+della+produzione,+trasporto+e+distribuzione+nazionale+dell%27energia+nella+recente+giurisprudenza+costituzionale,+fra+leale+collaborazione+e+doveri+di+solidarier%C3%A0+--stato+--dottrina+-->)>, citing Franco Modugno, ed, *Lineamenti di diritto pubblico* (Torino: G Giappichelli Editore, 2008) at 598-601 and Livio Paladin, *Diritto costituzionale*, 2nd ed (Padova: CEDAM, 1995) at 588-593.

14 Gonthier, *supra* note 11 at 572. To this date, the adage *Liberté, Égalité, Fraternité* remains the official motto of the French Republic, as indicated by article 2 of the French constitution: see Guy Canivet, “La fraternité dans le droit constitutionnel français” in Michel Morin et al, eds, *Responsibility, Fraternity and Sustainability in Law: In Memory of the Honourable Charles Doherty Gonthier* (Markham, ON: LexisNexis Canada, 2012) 463; Const, Art 2.

15 Pope John XXIII, “*Pacem in Terris*: On Establishing Universal Peace in Truth, Justice, Charity and Liberty” (11 April 1963), online: <[www.vatican.va/holy\\_father/john\\_xxiii/encyclicals/documents/hf\\_j-xxiii\\_enc\\_11041963\\_pacem\\_en.html](http://www.vatican.va/holy_father/john_xxiii/encyclicals/documents/hf_j-xxiii_enc_11041963_pacem_en.html)>.

two understandings of the principle: a religious one, with human solidarity as a synonym of Christian charity in the specific ambit of refugee's rights (paragraph 107), and a more political one, with active solidarity (paragraphs 98 and 99) crystallized in the need for States to join forces and make unified plans.<sup>16</sup>

More generally, Macdonald posits that solidarity in international law enshrines a duty for states to give "mutual assistance in order to improve their general situation and relations."<sup>17</sup> In other words, his argument is that solidarity "creates a context for meaningful cooperation that goes beyond the concept of a global welfare state; on the legal plane it reflects and reinforces the broader idea of a world community of interdependent states."<sup>18</sup>

It is, however, in the specific ambit of federalism and federal theory that the principle of solidarity acquires some interesting nuances, particularly in its association with such doctrines as *Bundestreue* and cooperative federalism.

## 2. Exploring (federal) solidarity: *Bundestreue* and cooperative federalism

Federalism is a resilient scheme for a division of powers conceived to reconcile unity and diversity, as differences (having a cultural, linguistic and/or socio-economic or political nature) are intrinsic to the federal idea.<sup>19</sup> Federalism and

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16 With specific regards to the latter, it might be helpful to entirely reproduce the commands of John XXIII, *ibid*:

98. Since relationships between States must be regulated in accordance with the principles of truth and justice, States must further these relationships by taking positive steps to pool their material and spiritual resources. In many cases this can be achieved by all kinds of mutual collaboration; and this is already happening in our own day in the economic, social, political, educational, health and athletic spheres — and with beneficial results. We must bear in mind that of its very nature civil authority exists, not to confine men within the frontiers of their own nations, but primarily to protect the common good of the State, which certainly cannot be divorced from the common good of the entire human family.

99. Thus, in pursuing their own interests, civil societies, far from causing injury to others, must join plans and forces whenever the efforts of particular States cannot achieve the desired goal. But in doing so great care must be taken. What is beneficial to some States may prove detrimental rather than advantageous to others.

17 R St J Macdonald, "Solidarity in the Practice and Discourse of Public International Law" (1996) 8:2 Pace Intl L Rev 259 at 260, citing Emer de Vattel, *Le droit des gens, ou principes de la loi naturelle, appliqués à la conduite et aux affaires des nations et des souverains*, vol 1 (London: 1758) at 8, s 13.

18 Macdonald, *ibid* at 260.

19 This paper does not delve into the various meanings of federalism; however, building upon Burgess, Watts and Elazar, federalism is here construed as a philosophical or ideological concept that advocates for a division of authority and a dispersion of powers among and between the different levels of government in society, and as an umbrella term encompassing various experiences. This includes not

solidarity are inextricably interlaced to the point that some scholars contend that solidarity is an intrinsic trait of federalism,<sup>20</sup> even if it may take other names or the principle is not explicitly entrenched in the federal constitution, being rather the product of doctrinal or judicial activity. But what is the actual meaning and scope of federal solidarity?

First, federal solidarity is often linked to the doctrine of *Bundestreue* or federal loyalty, whose literal meaning can be rendered as fidelity, loyalty or faithfulness (*Treue*) to the federal compact (the *Bund*): as De Villiers posits, this principle thus reflects “the comity and partnership upon which the federal constitution is based”,<sup>21</sup> and in fact certain scholars have explained this principle as “federal comity”,<sup>22</sup> as it implies a “constitutional duty to keep ‘faith’ (*Treue*) with the other and to respect the rightful prerogatives of the other”<sup>23</sup> as explained by Kommers. *Bundestreue* also reflects the idea of faith and trust that is expressed in the same etymology of the word federalism (rooted in the concept of *foedus* – or contract, pact – and *fides* – or faith), that is a covenant based upon reciprocal trust and faith.

The *Bundestreue* doctrine developed mainly in the ambit of German constitutionalism but it infuses — although under different names — other federal legal orders, including that of Canada. *Bundestreue* originated in the nineteenth century in Germany with the Reich Constitution of 1871, but reached full maturity as a legal principle only with the enactment of the German Basic Law of 1949 (the *Grundgesetz*) and the ensuing judicial activity of the Federal

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only classic federations modeled on the 1787 US Constitution, but also regional (or quasi-federal) systems and even hybrid supra-national schemes such as the European Union. See Michael Burgess, *Comparative Federalism. Theory and Practice* (Florence, KY: Routledge, 2006); Daniel Elazar, *Exploring Federalism* (Tuscaloosa, AL: The University of Alabama Press, 1987); Ronald L. Watts, *Comparing Federal Systems* (Kingston: Institute of Intergovernmental Relations, Queen’s University, 1999).

20 See e.g. Edmond Orban, “La Cour constitutionnelle fédérale et l’autonomie des Länder en République fédérale d’Allemagne” (1988) 22 RJT 37 at 42.

21 Bertus De Villiers, “Federations: Shared Rule and Self-Rule in the Search for Stable Governance” (2012) 39:3 *Politikon* 391 at 396 [De Villiers, “Federations”]; see also Dirk Brand, “The South African Constitution: Three Crucial Issues for Future Development” (1998) 9:2 *Stellenbosch L Rev* 182 at 186 [Brand, “SA Constitution”].

22 Uwe Leonardy & Dirk Brand, “The Defect of the Constitution: Concurrent Powers are not Co-operative or Competitive Powers” [2010]:4 *J South African L* 657 at 663 [Leonardy & Brand, “Concurrent Powers”].

23 Donald Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham: Duke University Press, 1989) at 73, cited in Mark Tushnet, “What Then is the American?” (1996) 38:3 *Ariz L Rev* 873 at 879-880.

Constitutional Court (the *Bundesverfassungsgericht*, or “BVerfG”):<sup>24</sup> in fact, while *Bundestreue* is not explicitly crystallized in the *Grundgesetz*, the BVerfG acknowledged it as a principle intrinsic to the federal nature of Germany, infusing it with concrete meaning over several years of constitutional adjudication. It is thus a consolidated constitutional principle that the BVerfG has invoked as a “regulatory principle” to maintain, as Gaudreault-Desbiens explains, “some equilibrium between the federal government and the *Länder*, and between the *Länder* themselves, as well as inducing respect for core federal values.”<sup>25</sup> In a 1958 decision, the BVerfG explained *Bundestreue* in the following terms:

[i]n a federal state the federal government and the Lander have the common duty to preserve and maintain constitutional order throughout the entire union. Where the federal government does not have the power in its own right to maintain constitutional order, but is dependent on the co-operation of the Lander, such Lander are obliged to act. This follows from the unwritten rule of the duty of *Bundestreue* ...<sup>26</sup>

Elaborating upon the concept of federal loyalty as developed by the BVerfG, scholars have explained *Bundestreue* as follows:

[i]n pursuance of the German *Bundestreue* principle [...] governments in all spheres must promote national unity, respect one another’s status and powers, refrain from encroaching on one another’s integrity and from assuming powers not conferred on them in the constitution, and co-operate in mutual trust and good faith. They must support and consult one another, co-ordinate their actions and in case of conflict exhaust all remedies before turning to the courts. In addition, governments participate in decision-making in other spheres (*eg* through the national council of provinces), may delegate their powers to other spheres, and may intervene in the affairs of another sphere under circumstances that may threaten good governance [...].<sup>27</sup>

As explained by Van Gerven, *Bundestreue* as developed in German constitutionalism appears as an overarching concept that imposes a duty for central

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24 Bertus De Villiers, “Comparative Studies of Federalism: Opportunities and Limitations as Applied to the Protection of Cultural Groups” [2004] J South African L 209 at 215, n 24 [De Villiers, “Comparative Studies”]. For similar definitions made by Kommers on *Bundestreue* as “federal comity” see Vicki C Jackson, “Narratives of Federalism: Of Continuities and Comparative Constitutional Experience” (2001) 51:1 Duke LJ 223 at 284; Jean-François Gaudreault-DesBiens, “Cooperative Federalism in Search of a Normative Justification: Considering the Principle of Federal Loyalty” (2014) 23:4 Const Forum Const 1 at 3. For a more detailed intellectual history of *Bundestreue*, see Daniel Halberstam, “Of Power and Responsibility: The Political Morality of Federal Systems” (2004) 90:3 Va L Rev 731 at 740ff; Geert De Baere & Timothy Roes, “EU Loyalty as Good Faith” (2015) 64:4 ICLQ 829 at 861-66 [De Baere & Roes].

25 Gaudreault-DesBiens, *ibid* at 3.

26 1958 decision by the BVerfG, cited in De Villiers, “Federations”, *supra* note 21 at 396.

27 Leonardy & Brand, “Concurrent Powers”, *supra* note 22 at 661.

and peripheral governments of federal and decentralized systems “to preserve and restore the constitutional order in all its components and on all levels of the State, and to cooperate and assist one another whenever appropriate.”<sup>28</sup> *Bundestreue* is thus premised on the duty of central and peripheral governments to consider their reciprocal interests when carrying out their institutional powers so that some kind of partnership is created between the various levels of government.<sup>29</sup> Consequently, among the many implications of *Bundestreue* there is the need for central and peripheral governments to cooperate in mutual trust and good faith, support and consult one another, coordinate their actions, participate in decision-making in other spheres, and delegate their powers when necessary.<sup>30</sup> And because, as scholars contend, federal loyalty requires “an absolute duty of conciliation between the two orders of government” or the “complementarity” between the two orders of government,<sup>31</sup> cooperative federalism is construed as one of the most classic ways to express the spirit of *Bundestreue*.<sup>32</sup>

Cooperative federalism is commonly opposed to the idea of “competitive” or “dual” federalism premised on the traditional idea of “watertight compartments” and “dual sovereignty” between central and peripheral governments seen as “co-equals” and functioning independently from one another within their own separate spheres of action — the US federal model being the most classic example in this sense.<sup>33</sup> Yet, in the wake of the economic crisis of the 1930s, an awareness emerged in federal states that an overlapping between the central and peripheral spheres of government was almost inevitable, thus leading to an elaboration of the theory of cooperative federalism, according to which federal and local governments “work together and share functions and powers in the same areas as long as these powers and functions do not conflict.”<sup>34</sup>

Over the past few decades, cooperative federalism has prominently emerged in a number of federations such as Canada. The judicial interpretation of the

28 Walter van Gerven, “Federalism in the US and Europe” (2007) 1:1 Vienna Online J on Intl Const L 25-26.

29 Brand, “SA Constitution” *supra* note 21 at 186, citing Bertus De Villiers, *Bundestreue: The Soul of an Intergovernmental Partnership* (Johannesburg: Konrad-Adenauer-Stiftung, 1995) at 10.

30 Leonardy & Brand, “Concurrent Powers”, *supra* note 22 at 661, 663.

31 Orban, *supra* note 20 at 42, citing HA Schwartz-Liebermann von Wahlendorf, “Une notion capitale du Droit constitutionnel allemande: la Bundestreue (fidélité fédérale)” [1973] RDP 769.

32 De Villiers, “Comparative Studies”, *supra* note 24 at 215.

33 Robert Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford: Oxford University Press, 2009) at 5; Brand, “SA Constitution”, *supra* note 22 at 185.

34 Michael D Reagan, *The New Federalism* (Oxford: Oxford University Press, 1972) at 21, cited in Schütze, *supra* note 34 at 5.

Canadian Supreme Court (“SCC”) has progressively departed from the idea of “watertight compartments” and embraced a more flexible view of federalism, one that encourages intergovernmental cooperation and accepts intrusions of one level of government into the other as long as there is no frustration of purpose or clear conflict in operation.<sup>35</sup> In fact, as argued by the SCC, Canadian federalism “recognize[s] that overlapping powers are unavoidable” and courts have “observed the importance of cooperation among government actors to ensure that federalism operates flexibly.”<sup>36</sup> Similarly, the SCC contended that

[y]et we may appropriately note the growing practice of resolving the complex governance problems that arise in federations, not by the bare logic of either/or, but by seeking cooperative solutions that meet the needs of the country as a whole as well as its constituent parts. Such an approach is supported by the Canadian constitutional principles and by the practice adopted by the federal and provincial governments in other fields of activities. The backbone of these schemes is the respect that each level of government has for each other’s own sphere of jurisdiction. Cooperation is the animating force.<sup>37</sup>

As noted above, even if the doctrine of *Bundestreue* has clearly German origins, its spirit has quickly penetrated — although under different names and often in connection with the idea of cooperative federalism — the constitutional texts or legal systems of a number of federal or quasi-federal states, not only in Europe but elsewhere. For instance, article 41 of the Constitution of South Africa<sup>38</sup> directly builds upon *Bundestreue*<sup>39</sup> to provide that

1. All spheres of government and all organs of state within each sphere must
  - g. exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and
  - h. co-operate with one another in mutual trust and good faith by
    - i. fostering friendly relations;

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35 *Reference re Securities Act* 2011 SCC 66 at para 57, [2011] 3 SCR 837 [*Reference re Securities*]; Brand, “SA Constitution”, *supra* note 21 at 185; Gaudreault-DesBiens, *supra* note 24 at 10; Hugo Cyr, “Autonomy, Subsidiarity, Solidarity: Foundations of Cooperative Federalism” (2014) 23:4 Const Forum Const 20 at 20.

36 *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 42, [2007] 2 SCR 3.

37 *Reference re Securities*, *supra* note 35 at paras 132-33.

38 The English version of the *Constitution of the Republic of South Africa, 1996*, No 108 of 1996 can be consulted here: <[www.gov.za/documents/constitution-republic-south-africa-1996](http://www.gov.za/documents/constitution-republic-south-africa-1996)>.

39 De Villiers, “Comparative Studies”, *supra* note 24 at 215-16. According to De Villiers, articles 40 and 41 of the South African Constitution are “probably the most elaborate constitutional recognition of the notion of cooperative federalism”: *ibid* at 216; see also Brand, “SA Constitution”, *supra* note 21 at 186.

- ii. assisting and supporting one another;
- iii. informing one another of, and consulting one another on, matters of common interest;
- iv. co-ordinating their actions and legislation with one another;
- v. adhering to agreed procedures; and
- vi. avoiding legal proceeding against one another

Similarly, a principle akin to *Bundestreue* and cooperative federalism is contained in articles 44(1) and (2) of the Swiss Constitution,<sup>40</sup> whereby the central (or confederal) government and the Cantons “shall support each other in the fulfillment of their duties and shall generally cooperate with each other.” Furthermore, “[t]hey owe each other a duty of consideration and support. They shall provide each other with administrative assistance and mutual judicial assistance.” Article 143(1) of the Belgian Constitution likewise mandates that “[i]n the exercise of their respective responsibilities, the federal State, the Communities, the Regions and the Joint Community Commission act with respect for *federal loyalty*, in order to prevent conflicts of interest” (emphasis added).<sup>41</sup> And, in Austria, while the doctrine is not constitutionally entrenched, federal loyalty has been developed by the Constitutional Court under the name of “mutual consideration.”<sup>42</sup>

The constitutional texts of a number of quasi-federal states also contain references to principles reminiscent of federal loyalty. For instance, in Italy, reference is made to the doctrine of “loyal collaboration”<sup>43</sup> whose roots can be traced back to *Bundestreue*.<sup>44</sup> article 120 of the Italian Constitution embeds this principle when dealing with “substitution powers” that the central government may take under certain conditions in the event the peripheral units fail to properly exercise their powers,<sup>45</sup> while in Spain a doctrine analo-

40 Art 44 Satz 1-2 BV. The English version of the Federal Constitution of the Swiss Confederation is available here: <<https://www.admin.ch/opc/en/classified-compilation/19995395/201506140000/101.pdf>>.

41 Art 143(1), GGW. The English text of the 1993 Belgian Constitution is available online here: <[www.const-court.be/en/basic\\_text/belgian\\_constitution.pdf](http://www.const-court.be/en/basic_text/belgian_constitution.pdf)>. Interestingly enough, the German (official) version of the document talks about “*föderale Loyalität*” and not of *Bundestreue*, the latter being an exclusively German principle. See also Anna Gamper, “On Loyalty and the (Federal) Constitution” (2010) 4:2 Vienna Online J on Intl Const L 157 at 164; Gaudreault-DesBiens, *supra* note 24 at 6; Kamiel Mortelmans, “The Principle of Loyalty to the Community (Article 5 EC) and the Obligations of the Community Institutions” (1998) 5:1 MJECL 67 at 85.

42 Gamper, *ibid* at 160.

43 *Ibid* at 162, n 25.

44 Cristina Bertolino, “La leale collaborazione quale principio cardine dei sistemi multilivello” (2006) *Centro Studi sul Federalismo* Paper Series, at 13, n 19, online: <[www.csfederalismo.it/attachments/article/864/RP\\_Bertolino\\_06.pdf](http://www.csfederalismo.it/attachments/article/864/RP_Bertolino_06.pdf)>.

45 Art 120 Cost; Gamper, *supra* note 41 at 164.



gous to loyal collaboration has been judicially acknowledged by the Spanish Constitutional Court even in the absence of a specific reference to the principle in the Constitution.<sup>46</sup>

While *Bundestreue* and cooperative federalism present many points of convergence, the two concepts are not perfect synonyms as some scholars tend to suggest;<sup>47</sup> in this regard, Jackson talks about cooperative federalism as the “consultative aspects of *Bundestreue*”.<sup>48</sup> In fact, *Bundestreue* is not exhausted in the idea of intergovernmental relations and overlapping jurisdiction between the centre and the periphery, as it encompasses other dimensions as well, dimensions that go back to the idea of mutual aid and assistance that are well incarnated by the concept of solidarity. This will be explained in the following discussion.

### **3. *Bundestreue* and federal solidarity: vertical and horizontal features**

Thus far, we have explored the scope of *Bundestreue* and explained that, at least according to the interpretation given in German constitutional theory, this principle runs in three directions: from the centre to the periphery, from the periphery to the centre, and among peripheral units.<sup>49</sup> In fact, the *foedus* (meaning the compact or covenant) — on which all federal arrangements are premised — implies some form of collaboration and reciprocal respect or trust among all the different components of the federal compact.<sup>50</sup> The idea of cooperative federalism among central and peripheral units described above represents perhaps the most common way to express the spirit of *Bundestreue* in the specific ambit of intergovernmental relations. But, federal loyalty presents other perspectives that help express the idea of comity and faithfulness or fidelity to the federal compact intrinsic in *Bundestreue*: this is where the principle of solidarity comes into play.

However, solidarity in this particular federal sense cannot be unidirectional or univocal: rather, it needs to be reciprocal and polyvocal, thus engaging central and peripheral governments alike, both in a vertical (e.g. from the centre to the periphery and *vice versa*) and in a horizontal (e.g. among peripheral units) dynamic. Both dynamics call for elaboration.

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46 Mortelmans, *supra* note 41 at 85, nn 105-06.

47 Gamper, *supra* note 41 at 161.

48 Jackson, *supra* note 24 at 285.

49 *Ibid* at 284.

50 Gamper, *supra* note 41 at 169.

### a. Vertical solidarity: equalization payments

In many federal or quasi-federal systems, it has become a common practice to constitutionally entrench provisions implementing mechanisms such as equalization payments, usually running from the centre to the periphery (and thus vertically), in order to contain the inevitable fiscal and economic unbalances between richer and poorer areas and thus foster national unity. These mechanisms can be seen as an expression of the principle of federal solidarity construed as an elaboration of *Bundestreue*, here justified more by an “economic approach to redistribution” than an altruistic sentiment, as Ottmann posits.<sup>51</sup> In fact, these instruments bear close resemblance to the welfare state provisions discussed earlier in regards to solidarity and public law. For example, in Canada the *Constitution Act, 1982* contains a section (Part II) devoted to “Equalization and Regional Disparities”: section 36(1) refers to a general “commitment to promote equal opportunities” and it can be seen as a solidarity-based provision binding the provinces and the federal government in promoting services and tools that help curbing inequalities among the various regions. Section 36(2), on the other hand, creates equalization payments, a common solidarity-based legal tool that facilitate the reduction of the unbalances.<sup>52</sup> We can also mention articles 107(1) and (2) of the German *Grundgesetz* containing provisions on distribution of tax revenue, financial equalization among *Länder* and supplementary grants.<sup>53</sup> Article 158 of the Spanish constitution provides for clearing funds to redress “interterritorial economic imbalances” and implement “the principle of solidarity”; similarly, article 138(1) mandates that the State shall safeguard “the establishment of a just and adequate economic balance between the different areas of the Spanish territory and taking into special consideration the circumstances pertaining to those which are islands.”<sup>54</sup> Finally, articles 119(3) and (5) of the Italian Constitution provide for equalization funds for territories with lower per-capita taxable capacity and supplementary resources to promote economic development, social cohesion and solidarity and to reduce economic and social imbalances, respectively.<sup>55</sup>

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51 Ottmann, *supra* note 1 at 45.

52 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, ss 36(1)-(2). As Brun et al indicate, equalization payments in Canada exist since 1957, but they were “constitutionalized” only in 1982: see Henri Brun, Guy Tremblay & Eugénie Brouillet, *Droit constitutionnel*, 5th ed (Cowansville, QC: Éditions Yvon Blais, 2008) at 430.

53 Art 107 Abs 1-2 GG. Also article 104b GG contains provisions on financial assistance in specific circumstances.

54 Art 158 CE; art 138(1) CE.

55 Arts 119(3), (5) Cost.

This vertical aspect of solidarity is a mature and well-articulated concept that distinguishes many constitutional arrangements in decentralized states, and that has been extensively studied by federalism scholarship; rather, it is the horizontal counterpart (e.g. the specific relationship, including rights and duties, among and between the constituent units of a federation) that is often disregarded by students of federalism. This concept consequently needs more theorization.

## **b. Horizontal solidarity**

Building upon the *Bundestreue* doctrine, a number of federal or decentralized states have acknowledged the importance of a certain solidarity bond among constituent units of a federal compact (the horizontal aspect of solidarity). Yet, although it is somehow implicit in *Bundestreue*, this component remains under explored and under theorized because of the intrinsic difficulties in practically implementing horizontal solidarity-based instruments. The next section thus addresses the issue of whether there is a need to theorize federal solidarity beyond the classic examples of equalization funds and welfare provisions, so as to encompass a legally binding duty for federated entities to collaborate more actively with each other for the common good of the federation. In order to proceed, I will begin with a comparative overview of horizontal solidarity-based provisions in a selection of federal and quasi-federal states.

### ***i. A comparative overview of horizontal solidarity in federal theory***

In the ambit of EU constitutionalism, it is undisputed that the entire legal framework of the Union is interspersed with solidarity-based provisions, to the point that solidarity is seen as one of the most important pillars of its whole legal architecture: the animating force that informs all types of dynamics, not only among member states and central institutions, or between the Union and the international community, but also among and between its member states.<sup>56</sup> For example, article 4(3) of the Treaty on European Union (“TEU”) provides that both the Union and member states shall “assist each other in full mutual respect in carrying out tasks which flow from the Treaties”<sup>57</sup> and this idea is reiterated in articles 24(3), 32, 267 and 351 TEU.<sup>58</sup> The Treaty on the

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56 As a milestone of EU integration, solidarity was first mentioned in the 1950 Schuman Declaration. For an exhaustive depiction of the meaning of solidarity in EU law see e.g. Peter Hilpold, “Filling a Buzzword with Life: the Implementation of the Solidarity Clause in Article 222 TFEU” (2015) 42:3 Legal Issues of Economic Integration 209 at 210.

57 EC, *Consolidated Version of the Treaty on European Union*, [2012] OJ, C 326/01, art 4(3), cited in De Baere & Roes, *supra* note 24 at 834; Gamper, *supra* note 41 at 164.

58 De Baere & Roes, *supra* note 24 at 835, 850.

Functioning of the European Union (“TFEU”), as amended by the Lisbon Treaty, also emphasizes the relevance of solidarity for the EU: for example, article 67 TFEU welcomes solidarity as the guiding principle informing the relationships among member states of the Union, especially when it comes to drafting policies on “asylum, immigration and external border control” and this is reiterated in article 80 of the TFEU. Touching upon the energy sector, article 122 of the TFEU identifies solidarity among member states as the guiding principle of their relationship.<sup>59</sup> Perhaps the most important novelty embedded in the TFEU is Title VII containing the so-called “solidarity clause” which entails a solidarity-based relationship among member states in the event of a terrorist attack or of a natural or man-made disaster. Finally, among the various interpretations offered by the European Courts to the principle of solidarity is that of a “mutual duty of genuine cooperation and assistance between Member States and Union institutions.”<sup>60</sup>

Similarly, article 2 of the Spanish Constitution also spells out a general duty of solidarity among the nationalities and regions that compose the Spanish nation, while at the same time acknowledging their right to self-government.<sup>61</sup> While the reference to solidarity is not as extensive as in the EU treaties, it is noteworthy to underline how also Spain entrenched the (horizontal) solidarity principle in its constitution.

In other federal or decentralized states, this horizontal duty of solidarity among constituent units has been discussed at a judicial level and with specific reference to financial help, absent a specific provision in the constitutional text. For example, in Germany the BVerfG held that the duty of cooperation embedded in the *Bundestreue* runs both vertically (e.g. between the *Bund* and the *Länder*) and horizontally (among *Länder*).<sup>62</sup> Furthermore, in a 1952 decision, the BVerfG ruled that “[t]he federal principle by its nature creates not only rights but also obligations” so that “financially strong states [have]

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59 Article 122 TFEU mandates that “[t]he policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle.”: EC, *Consolidated Version of the Treaty on the Functioning of the European Union*, [2008] OJ, C 115/47, art 122.

60 De Baere & Roes, *supra* note 24 at 850.

61 In particular, it provides that “[t]he Constitution [...] recognises and guarantees the right to autonomy of the nationalities and regions of which it is composed, and the solidarity amongst them all.”: Art 2 CE.

62 See e.g. *Housing Funds Case*, 1 BVerfGE 299 at 315 (1952) [*Housing Funds*], cited in De Baere & Roes, *supra* note 24 at 859.

to give assistance within certain limits to financially weaker states.”<sup>63</sup> Next, as explained by Reich, there is a constitutional obligation binding the federal government in its relations with the *Länder* and the *Länder* in their common relations to act in good faith and work in order to achieve mutual understanding.<sup>64</sup> Consequently, this unwritten constitutional principle of reciprocal solidarity guides the relationships between federal and *Länder* governments.<sup>65</sup> Scholars also point out that *Bundestreue* implies “mutual cooperation” — and therefore solidarity — in “exceptional circumstances” both between the federal government and the *Länder* and between the same *Länder*.<sup>66</sup>

Conversely, in decision 176/2012, the Italian Constitutional Court (“ItCC”) took a different approach than the BVerfG, and explained that all equalization interventions shall come from the central government only (not from other regions), in the logic of vertical equalization payments enshrined by the legislator in article 119 of the constitutional text.<sup>67</sup> It thus appears that some disagreement exists on whether to recognize a legally enforceable duty on wealthier component units of a federal or quasi-federal compact to provide help to other federated entities in case of financial difficulties.

Aside from the specific adoption of cooperative federalism by the SCC described above, the Canadian Constitution makes no reference to anything resembling the spirit of *Bundestreue*. Yet some scholars suggest that although the SCC has never justified cooperative federalism on grounds of federal loyalty, and in spite of the lack of reference to anything akin to *Bundestreue*, solidarity represents the normative basis for Canadian cooperative federalism.<sup>68</sup> Furthermore, federal solidarity imbues political practices and constitutional rules, and the SCC itself has acknowledged that

[i]t is a fundamental principle of federalism that both federal and provincial powers must be respected, and one power may not be used in a manner that effectively eviscerates another. Rather, federalism demands that a balance be struck, a balance that

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63 *Finance Equalization Case I*, 1 BVerfGE 117 at 131 (1952), cited in Donald Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2nd ed (Durham: Duke University Press, 1997) at 72 [translated by Kommers]; see also De Baere & Roes, *supra* note 24 at 860, n 194.

64 Donald R Reich, “Court, Comity, and Federalism in West Germany” (1963) 7:3 *Midwest J of Political Science* 197 at 209, citing *Housing Funds*, *supra* note 62.

65 *Kalkar II Case*, 81 BVerfGE 310 (1990), cited in Gaudreault-DesBiens, *supra* note 24 at 4 [translated by Kommers, *supra* note 63 at 86].

66 De Baere & Roes, *supra* note 24 at 859-60.

67 See decision 176/2012 of the Italian Constitutional Court.

68 Gaudreault-Desbiens, *supra* note 24 at 14

allows both the federal Parliament and the provincial legislatures to act effectively in their respective spheres.<sup>69</sup>

In light of the above, it could be helpful to proceed with a theorization of the principle in Canadian law.

## ***ii. Possible ways to acknowledge horizontal solidarity***

Acting for the ultimate good and benefit of the federation should be the animating force of all federal or quasi-federal states. In this sense, federal solidarity — in its vertical but particularly in its horizontal component — can be conceived as the glue that links together all the components of the federation, the bond that cements and strengthens the relationships among the constituent units of the federal scheme, thus expanding the idea of federal loyalty and cooperation enshrined in the doctrine of *Bundestreue*. For this reason, federal solidarity is intrinsic in the nature of the federal compact even when it is not specifically spelled out in the constitutional text. And while horizontal solidarity implies some sense of collaboration, this concept is not perfectly identical to cooperative federalism. The latter focuses mainly on the conciliation, cooperation, and complementarity among and between the two different orders that compose the federation (e.g. the centre and the periphery), while horizontal solidarity mostly refers to a duty to be supportive and not in competition with one another that should inform the relationship among the constituent units, such as the peripheral entities of the federal scheme. The idea behind horizontal solidarity is one of limiting selfish behaviors by some regions so as not to frustrate its neighbours.

But what are the specific avenues in which the concept of horizontal solidarity may come into play? We noted how federal solidarity — both in the vertical and horizontal components — is most often associated with economic and financial issues, as well as with the redistribution of resources. Is it possible to single out other ambits where horizontal solidarity might be invoked? The scarcity of models from which to seek inspiration does not help in the endeavor, and when solidarity is entrenched in some basic legal text, it is used rather elusively without exactly specifying its actual scope. In this regard, the solidarity-based provisions contained in the EU Treaties and briefly illustrated above may offer some food for thought: areas such as energy redistribution, natural resources, environmental, and immigration or asylum issues may request more collaboration, help, or support from among the constituent units of a federal or quasi-federal state, thus representing the ideal platform where

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69 *Reference re Securities*, *supra* note 35 at para 7.

horizontal solidarity could be expressed and strengthened through appropriate legal mechanisms. Immigration and asylum issues are an overwhelming problem in Europe at the moment, with the need to “redistribute” migrants and refugees among member states and, within member states, among the various regions. This is perhaps a good example of the meaning of horizontal solidarity just discussed: should regions within member states (and states within the EU) be entitled to decide whether, and in which measure, to accept migrants, or should there be some horizontal solidarity-based stratagem that requires more prosperous regions to absorb a higher number of them?

An eventual entrenchment or judicial acknowledgement of horizontal solidarity would inevitably raise a number of issues. One concern that certainly needs to be taken into account and carefully addressed pertains to the justiciability or enforceability of horizontal solidarity and, consequently, to its legalization. Positions of various scholars differ. For some, *Bundestreue* — and thus, by extension, federal solidarity — is a justiciable legal principle and in fact it has been developed both judicially and by academic literature,<sup>70</sup> whilst other scholars argue that the obligations created by solidarity are more moral than legal and, consequently, difficult to enforce.<sup>71</sup>

Another concern linked to an eventual entrenchment of horizontal solidarity pertains to whether the assistance provided among and between the constituent units should be more systematic or occasional, offered only under exceptional circumstances. Certainly, each perspective presents its positive and negative aspects. On the one hand, constituent units of a federal or quasi-federal state should always work in solidarity with each other for the ultimate benefit of the federation; on the other hand, systematic interventions might eventually disfigure the uniqueness and variegated nature of constituent units that is at the basis of a federal scheme. Furthermore, it might elicit the discontent of more “successful” territories if called to constantly take charge of the problems affecting other regions, especially in matters of finance; a corollary problem would also be to determine which unit is in a better position to help the others.

Finally, it should be acknowledged that, because of their cross-regional nature, in most federal states issues that engage or pertain more than one constituent unit are part of the exclusive jurisdiction of the federal government: in this sense, horizontal solidarity may blend into the vertical aspect.

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70 Brand, “SA Constitution”, *supra* note 21 at 186.

71 Macdonald, *supra* note 17 at 261, citing de Vattel, *supra* note 17.

In any event, federal solidarity (both in its horizontal and vertical aspects) is a concept that significantly differs from pure altruism or philanthropy, even if sentiments such as collaboration, mutual help, or assistance always lurk behind it: in fact, while altruism implies an act of charity or unilateral help without the expectation of repayment, federal solidarity is based on reciprocity and on the idea of *do ut des*.<sup>72</sup> This goes back to the distinction made before between moral and legal solidarity, where the latter shall be construed in terms of rights. Law creates not only rights but also obligations, so the eventual entrenchment of the principle of horizontal solidarity requires not only the enjoyment of rights but also the recognition of some duties on all the component parts of the federation: in this specific case, a duty not to frustrate each other but rather to collaborate for the ultimate benefit of the federation.

## Conclusion

The purpose of this paper was to explore the place and scope of federal solidarity and ultimately determine its relationship with other doctrines such as *Bundestreue* or federal loyalty and cooperative federalism, as scholarly literature on this topic is still scarce. In this regard, we observed how *Bundestreue* is more or less implicit in most federal and quasi-federal schemes, as it reflects the essential nature of the federal compact. *Bundestreue* (or federal loyalty), federal solidarity — both in its horizontal and vertical aspects — and cooperative federalism are concepts that, although referring to different things, have a common thread. They complement each other and help to better define the nature of the federal compact. Whether entrenched in the federal Constitution or simply acknowledged through judicial activity, the doctrine of *Bundestreue* can be construed as an overarching concept that condenses the very meaning and sense of federalism and it does so in many declinations: in the specific ambit of division of powers, it is expressed through the concept of cooperative federalism, whilst in welfare provisions and equalization funds it takes the form of federal solidarity in its vertical connotation. Federal solidarity may encompass other dimensions as well, such as its horizontal perspective: in fact, the depiction of *Bundestreue* herewith provided would not be complete without taking into account the glue that holds together the various components of the federation, or the “condition of unity” binding the members of a group.<sup>73</sup> In fact, federal solidarity can be traced back to the overall meaning of *Bundestreue* as it is part of the duty to be loyal to the federal compact and to the idea of

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72 Hilpold, *supra* note 56 at 212-13.

73 Vestert Borger, “How the Debt Crisis Exposes the Development of Solidarity in the Euro Area” (2013) 9 *Eur Const L Rev* 7 at 10.



cooperation and support with one another. As a result, federal solidarity runs not only vertically but also horizontally as a mechanism that helps soften self-centered behaviours of the constituent units towards each other in the interest of the whole. The concept of (federal) solidarity fortifies the relationships interconnecting the various actors of the complex federal scheme. It goes beyond the idea of philanthropy or altruism, instead mirroring the idea of taking full responsibility for being part of the federal compact.<sup>74</sup>

In conclusion, exhibiting solidarity-based interests among constituent units of a federal scheme (e.g. horizontal solidarity) — whether mediated through the centre or directly — would represent the translation into practical terms of the natural connection that characterizes a federal arrangement, thus offering the perfect platform to define the principle in federal theory: in fact, the spirit of federal solidarity truly reflects the nature of federalism and the theoretical equality of both levels of government in the federal compact.

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<sup>74</sup> Eijssbouts & Nederlof, *supra* note 3 at 172.

# Spending Power, Social Policy, and the Principle of Subsidiarity

*Éléonore Gauthier\**

*This essay argues that theories relating to the spending power theory could be enhanced by an application of the principle of subsidiarity. Subsidiarity shares a number of attributes with federalism, and allows for a conception of spending power as a flexible tool of governance of the welfare state. This essay links social and economic development with Canadian constitutional design by advocating for the use of the principle of subsidiarity when analyzing governmental action in the context of social policy.*

*Dans cet essai, l'auteure décrit et contextualise le pouvoir de dépenser et le principe de subsidiarité. Elle soutient que la théorie du pouvoir de dépenser pourrait être renforcée par un recours au principe de subsidiarité. Ce dernier partage certains attributs avec le fédéralisme. Il permet de concevoir le pouvoir de dépenser comme un outil flexible de gouvernance dans un État providence qui est également un État fédéral. En favorisant l'application du principe de subsidiarité dans le contexte des politiques sociales, cet essai contribue à la création d'un lien entre le développement social et économique, d'une part, et le design constitutionnel, d'autre part.*

\* LLB (Université de Montréal, 2014), JD (Osgoode, 2015), Lawyer (Law Society of Upper Canada). Ms. Gauthier was the third prize winner in the 2017 Baxter Family Competition on Federalism.

## Introduction

The Canadian Constitution contains explicit text but also abstract concepts, such as conventions and principles that were adopted and described over time; its design is fluid and responsive to social changes. Since Confederation, spending power has slowly appeared as a concept in Canadian jurisprudence and scholarly literature along with the development of social policies in Canada. Debates over its exercise can be traced back to at least the 1940s, and by the 1960s various cost-sharing programs between the federal and the provincial governments had been established.<sup>1</sup> The words “spending power” do not appear in the Constitution’s text but this constitutional power is inferred in sections of the Constitution that allow the federal and the provincial governments to tax and spend.<sup>2</sup>

The federal spending power has been controversial. Both levels of governments have such power, but the federal government has in practice gained a lot more spending power than the provinces, and even so comparatively to its legislative power. In fact, the limits of the spending power are only vaguely defined and it does not follow the division of legislative powers, even though the distribution of public property it enables is determined by a law. Its exercise has thus led to centralisation and spending in areas of provincial jurisdiction. One reason spending power has never been strictly limited is because it is understood as allowing the federal government to ensure standard levels of economic and social development across Canada, which requires a central exercise of policy determination and spending. Thus, the federal government has been given broad powers, a reality that has been accused of frustrating the values protected by federalism.<sup>3</sup> Political attempts to limit it, such as Meech Lake and Charlottetown Accords as well as the Social Union Framework Agreement, have not led to desired results and some authors are still questioning the constitutionality of federal spending in areas of provincial jurisdiction.<sup>4</sup>

Only recently has the Supreme Court of Canada (SCC) referred to the principle of subsidiarity, and the details of its application remain uncertain. It has been used internationally in other federations to guide the exercise of leg-

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1 Ronald L Watts, *The Spending Power in Federal Systems: A Comparative Study* (Kingston: Queen’s University Institute of Intergovernmental Relations, 1999) at 1.

2 *Constitution Act, 1867* (UK), 30 & 31, c 3, reprinted in RSC 1985, Appendix II, No 5, ss 91(1A), 91(3), 92(2), 92A(4), 102, 106.

3 Nadia Verrelli, “The ‘Cents’ and Nonsense of the Federal Spending Power” (2013) 7 JPPL 111 at 124-125 [Verrelli]; Hamish Telford, “The Federal Spending Power in Canada: Nation-Building or Nation-Destroying?” (2003) 33:1 *Publius: The Journal of Federalism* 23 at 23-24.

4 Verrelli, *ibid* at 121-123 and 113-114.

islative powers in areas that are non-exclusive. Subsidiarity shares values with federalism and presents attributes that could make it a promising principle for Canadian constitutional law. This essay will consider the principle of subsidiarity as a possible means of promoting a constructive exercise of spending power by the federal government; it also offers a compromise between unity and diversity. Part I will describe spending power; Part II will describe the principle of subsidiarity and its use in Canada; and, Part III will analyse subsidiarity in the context of spending power.

## I. Spending Power and Social Policy

### 1. Origin, Constitutional Interpretation, and Criticisms

In Canada, the federal government and the provinces have spending power that allows them to redistribute tax revenues. The concept evolved rapidly following the Second World War when Canada increasingly played a role of “state provider” through welfare initiatives and fiscal intervention.<sup>5</sup> Federal spending power dwarfs that of the provinces, as the federal government is the centralising unit of government that collects more taxes from the residents of Canada.

The exercise of federal spending power can take many forms, such as shared-cost programs with the provinces, unconditional grants (including equalisation payments), and conditional grants.<sup>6</sup> The federal government can spend from the Consolidated Revenue Fund directly on individuals, organisations, and provincial governments in areas where it does not hold legislative competence.<sup>7</sup> Canada’s health care insurance program, for example, is implemented by the provinces but partly funded by the federal government. It establishes the conditions of its grants for this service through the *Canada Health Act*.<sup>8</sup> To receive the cash contribution from the federal government towards health care insurance plans, the provinces must ensure their plans satisfy the following conditions: public administration, comprehensiveness, universality, portability, and accessibility.<sup>9</sup>

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5 Watts, *supra* note 1 at 1; for a historical account see Verrelli, *supra* note 3 at 116-119.

6 Johanne Poirier, “Federalism, Social Policy and Competing Visions of the Canadian Social Union” (2002) 14 NJCL 355 at 364-65.

7 Peter W Hogg, *Constitutional Law of Canada: 2013 Student Edition* (Toronto: Carswell, 2013) at 6-18; Watts, *supra* note 1 at 1.

8 *Canada Health Act*, RSC 1985, c C-6.

9 *Ibid.*, s 7.

The concept of spending power does not appear in the Constitution's text. It is inferred from the provisions of the Consolidated Revenue Fund (section 102 of the *Constitution Act, 1867*), the power to levy taxes (section 91(3)), the power to legislate in relation to public debt and property (section 91(1A)), the power of the provinces to establish direct taxation (section 92(2)) and tax in regards to natural resources (section 92A(4)), and the power to appropriate federal funds (section 106).<sup>10</sup> It has also been associated with section 36 of the *Constitution Act, 1982*.<sup>11</sup> This section stipulates the commitment of both federal and provincial governments to promote equal opportunities as well as the commitment of the federal government to ensure, through equalisation payments, that the provinces have sufficient revenues to promote comparable levels of public services.

Spending power is not limited by the doctrine of the divisions of legislative powers.<sup>12</sup> The enactment of legislation and the redistribution of public property have been understood as different processes that do not have the same level of constraints on citizens and that do not stem from the same governmental role. Legislation is understood as creating more constraints than spending, and spending as creating more opportunities than legislation.<sup>13</sup> In relation to the difference in the governmental role in each exercise, Peter Hogg asserted that "there is no compelling reason to confine spending or lending or contracting within the limits of legislative power, because in those functions the government is not purporting to exercise any peculiarly governmental authority over its subjects."<sup>14</sup>

A limit to federal spending power exists. An exercise of spending power is considered impermissible if it amounts to regulation of a matter within provincial jurisdiction.<sup>15</sup> In 1937, in the *Employment and Social Insurance Act Reference*, Lord Atkin found the Act invalid as it affected property and civil

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10 *Constitution Act, 1867*, *supra* note 2; Hogg, *supra* note 7 at 6-18, 6-19; *YMHA Jewish Community Centre of Winnipeg Inc v Brown*, [1989] 1 SCR 1532 at 1548, 59 DLR (4th) 694 [YMHA].

11 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11; *Winterhaven Stables Ltd v Canada*, 1988 ABCA 334 at para 21, 53 DLR (4th) 413 [Winterhaven]; Marc-Antoine Adam, "The Spending Power, Co-operative Federalism and Section 94" (2008) 34:1 Queen's LJ 175 at 182 [Adam]; Thomas J Courchene, "Reflections on the Federal Spending Power: Practices, Principles, Perspectives" (2008) 34:1 Queen's LJ 75 at 103 [Courchene, "Reflections"].

12 *YMHA*, *supra* note 10 at 1548-49; *Reference Re Canada Assistance Plan (BC)*, [1991] 2 SCR 525 at 564-67, 83 DLR (4th) 297 [CAP Reference]; Watts, *supra* note 1 at 1.

13 Hogg, *supra* note 7 at 6-18, 6-19.

14 *Ibid.*

15 *Canada (Attorney General) v Ontario (Attorney General)*, [1937] AC 355, [1937] 1 DLR 684 (PC) (*sub nom Reference Re Employment and Social Insurance Act, 1935*) [Employment Act Reference]; *YMHA*, *supra* note 10 at 1548-49; *CAP Reference*, *supra* note 12 at 567.

rights in the province.<sup>16</sup> By doing so, the Privy Council indicated this limit on spending power, which is still used today.

The SCC has had little chance to interpret spending power as there have been few claims before the courts that its exercise was *ultra vires*.<sup>17</sup> Governments have found the risks of constitutional litigation of the issue too high compared to its benefits.<sup>18</sup> In *YMHA*, Justice L'Heureux-Dubé, writing for the Court, analysed its limit the following way:

[W]hile Parliament may be free to offer grants subject to whatever restrictions it sees fit, the decision to make a grant of money in any particular area should not be construed as an intention to regulate all related aspects of that area. Thus, a decision to provide a job creation grant to an organization such as the YMHA should not be construed, without other evidence, as an intention to remove provincial labour law jurisdiction over the project.<sup>19</sup>

In *Reference Re Canada Assistance Plan*,<sup>20</sup> the SCC considered a case in which the federal government had cut its contribution under the Canada Assistance Plan to richer provinces. The Plan was a shared-cost welfare and social-assistance program.<sup>21</sup> The Attorney General of Manitoba argued that given the direct influence Canada had on the population of the provinces through the funding of the program, the withholding of money was creating constraints that amounted to regulation.<sup>22</sup> Justice Sopinka, delivering the judgment for the Court, rejected this position:

The new legislation does not amount to regulation of an area outside federal jurisdiction. Bill C-69 was not an indirect, colourable attempt to regulate in provincial areas of jurisdiction. It is simply an austerity measure. Further, the simple withholding of federal money, which had previously been granted to fund a matter within provincial jurisdiction, does not amount to the regulation of that matter.<sup>23</sup>

Thus, it could be said that an exercise of spending that creates constraints akin to those created by legislation would be *ultra vires*. For example, when strict and specific conditions are added to the provision of funds by the federal

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16 *Employment Act Reference*, *ibid*.

17 Two provincial judgments are often cited: *Canada Mortgage and Housing Corp v Iness*, (2004) 70 OR (3d) 148, 236 DLR (4th) 241 (Ont CA), and *Winterhaven*, *supra* note 11.

18 Sujit Choudry, "Constitutional Change in the 21st Century: A New Debate over the Spending Power" (2008) 34:1 Queen's LJ 375 at 383 [Choudry, "Constitutional Change"].

19 *YMHA*, *supra* note 10 at 1549.

20 *CAP Reference*, *supra* note 12.

21 *Ibid* at 526.

22 *Ibid* at 566.

23 *Ibid* at 529.

government to a province, an exercise of spending power could create improper constraints. Professor J-F. Gaudreault-Desbiens gave the example, in relation to the *Canada Health Act*, of a “norm determining the maximum delay to be respected for treatment in an emergency room.”<sup>24</sup> In this example, the condition imposed by the federal government for the granting of money to the provinces for the provision of health care insurance creates constraints that are akin to those of a legislation in the matter of health care, a power allocated to the provinces under 92(7) of the *Constitution Act, 1867*. Gaudreault-Desbiens also added that a difference should be made between conditions that create standards, such as those of the *Canada Health Act*, that give a substantial margin of appreciation to the provinces and those that would leave no margin. Only the latter would be unconstitutional.

Political attempts to limit federal spending power have not led to the desired results. Meech Lake (1987) and the Charlottetown Accord (1992) failed to be adopted.<sup>25</sup> The Social Union Framework Agreement (1999),<sup>26</sup> which was signed by all provinces except Quebec, was questioned for its effectiveness.<sup>27</sup>

Thus, the spending power *per se* has been understood by some as having no limits,<sup>28</sup> or at least as being extremely broad. In relation to federalism, the question of the constitutionality and legitimacy of spending power has been debated at length by Canadian scholars and policy-makers,<sup>29</sup> the biggest opposition coming from Quebec. Critics have said that by spending on social programs, the federal government intervened in the provincial sphere of com-

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24 Jean-François Gaudreault-Desbiens, “The Irreducible Federal Necessity of Jurisdictional Autonomy, and the Irreducibility of Federalism to Jurisdictional Autonomy” in Sujit Choudry, Jean-François Gaudreault-Desbiens & Lorne Sossin, eds, *Dilemmas of Solidarity: Rethinking Redistribution in the Canadian Federation* (Toronto: Toronto University Press, 2006) 185 at 190 [Choudhry et al, *Dilemmas*].

25 For a description of the propositions in the Accords see Verrelli, *supra* note 3 at 121-22. For an account of the critiques associated with the propositions, see Alain Noël, “How Do You Limit a Power that Does Not Exist?” (2008) 34:1 Queen’s LJ 391 at 400-401.

26 Canadian Intergovernmental Conference Secretariat, *A Framework to Improve the Social Union for Canadians: An Agreement between the Government of Canada and the Government of the Provinces and Territories*, 4 February 1999, online : <[www.scics.ca/en/product-produit/agreement-a-framework-to-improve-the-social-union-for-canadians/](http://www.scics.ca/en/product-produit/agreement-a-framework-to-improve-the-social-union-for-canadians/)>; For a factual analysis see Poirier, *supra* note 6 at 393-405.

27 Adam, *supra* note 11 at 177; Choudry, “Constitutional Change”, *supra* note 18 at 383; Alain Noël, *supra* note 25 at 404-405.

28 See e.g. Adam, *ibid*; Noël, *ibid*.

29 See e.g. Quebec, Commission on Fiscal Imbalance, *Fiscal Imbalance: Problems and Issues*, Discussion Paper (Quebec : Bibliothèque Nationale du Québec, 2001); Andrew Petter, “Federalism and the Myth of the Federal Spending Power” (1989) 68 Can Bar Rev 448; Choudhry et al, *Dilemmas*, *supra* note 24; The multiple essays published following the 2008 Symposium “Open Federalism and the Spending Power” were sponsored by Queen’s University.

petence and had a direct effect on people, altering social standards when it was not competent to do so.<sup>30</sup> By using conditional grants, the federal government has been accused of creating constraints often close to those created by legislation. Parliament was accused of doing indirectly what it cannot do directly.<sup>31</sup> Furthermore, repeated instances of federal spending in the areas of provincial jurisdiction is said to have the effect of centralising power. Spending power could thus be understood as leading to “de facto changes in the divisions of powers”<sup>32</sup> in favour of federal interests.

On the other hand, the fact that flexible spending power leads to centralisation and allows a ‘direct impact’ on citizens can be viewed as essential to providing the level of social services that we have today. Canada acts as a generous state provider that maintains relatively high standards of social security across the country in key areas of development and addresses disparities across provinces. These initiatives necessitate the allocation of funds, which the central government is more apt to collect and redistribute. Conditions attached to the spending exercises are a way to safeguard a certain level of social security and reduce disparities among provinces.<sup>33</sup>

## 2. Spending Power, Development, and Human Rights

Social programs are important in the development of the State and of its individual members. Canada as a welfare state has a responsibility to develop opportunities for its residents. It is a question of fostering human rights; in this case, mainly economic and social rights. Ultimately, it is a question of interpersonal equality and distribution of freedoms. Amartya Sen’s writings have defined human rights in the context of welfare economics. Human rights can be linked to the degree of freedom that a person possesses, which enables her or him to realise her or his capabilities.<sup>34</sup> In turn, we can think of these capabilities as “the opportunity to achieve valuable combinations of human

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30 Courchene, “Reflections”, *supra* note 11 at 77.

31 Noël, *supra* note 25 at 395.

32 Thomas J Courchene, “Variations on the Federalism Theme” (2006) 27:7 Policy Options 46 at 46, cited in Library of Parliament, Karine Richer, *The Federal Spending Power*, PRB 07-36E (Ottawa: Library of Parliament, 2007) at 21, online: <[www.lop.parl.gc.ca/content/lop/researchpublications/prb0736-e.pdf](http://www.lop.parl.gc.ca/content/lop/researchpublications/prb0736-e.pdf)>.

33 Harvey Lazar, “The Spending Power and the Harper Government” (2008) 34:1 Queen’s LJ 125 at 1-2; Poirier, *supra* note 6 at 6 citing Robin Boadway, “Delivering the Social Union: Some Thoughts of the Federal Role” (1998) 19 Policy Options 37 at 38.

34 Kim Lane Scheppele, “Amartya Sen’s Vision for Human Rights - And Why He Needs The Law” (2011) 27:1 Am U Intl L Rev 17 at 18, citing Amartya Sen, *The Idea of Justice* (Cambridge: Harvard University Press, 2009) at 231; See also generally Amartya Sen “Human Rights and Capabilities” (2005) 6:2 J Human Development and Capabilities 151 [Sen, “Human Rights”].



functionings — what a person is able to do or be.”<sup>35</sup> Thus, if human rights and human development advance together, they reinforce each other,<sup>36</sup> and Canada as a welfare state has taken the responsibility of fostering both.

Section 36 of the *Constitution Act, 1982*, which is sometimes cited in the literature as justifying federal spending power, is reminiscent of this theory; it enacts the commitment of all levels of government to promote equal opportunities, reduce disparities in opportunities, provide essential public service of reasonable quality to all Canadians,<sup>37</sup> and reinforce the federal government’s commitment to ensuring comparable levels of public services at reasonably comparable levels of taxation.<sup>38</sup> This vision of welfare economics, as established in section 36, allows for an expression of multicultural diversity in the way programs are implemented. In fact, in Canada there is no claim of uniformity of social programs.<sup>39</sup> Policies engendering centralisation in the federation are only necessary because maintaining standard levels of social security and human development is seen as an obligation on the part of the country.

Canadian identity has been shaped by the development of the welfare state. In Canada outside of Quebec, the national sense of belonging is normally one of belonging to Canada and not to the province where one resides.<sup>40</sup> Hence, flexible spending power, which has a double role of developing the welfare state and building Canadian citizenship, can be perceived as “desirable.”<sup>41</sup> On the other hand, the people of Quebec who identify with their province want to have the freedom to envision their own welfare program where possible, define their own national priorities,<sup>42</sup> and preserve their national sense of identity. Flexible spending power can thus be seen as illegitimate, even threatening. The debate very much revolves around the idea of identity and protecting it, and not on the importance of having a welfare state. Writing on the Social Union, Johanne Poirier pointed out that one of its challenges was to “[o]ne of the dilemmas of a multinational federation such as Canada, is that there are

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35 Sen, “Human Rights”, *ibid* at 153.

36 *Human Development Report 2000*, UNDP (2000) at 2, online: <[hdr.undp.org/en/content/human-development-report-2000](http://hdr.undp.org/en/content/human-development-report-2000)>; The Human Development Reports are based on Amartya Sen’s ‘Capabilities Approach’.

37 *Supra* note 11, s 36(1).

38 *Ibid*, s 36(2).

39 Poirier, *supra* note 6 at 428.

40 *Ibid* at 422.

41 *Ibid*; For the full analysis read pages 421-434.

42 Hamish Telford, *supra* note 3 at 43.

competing nations, and competing state apparatus, seeking to build themselves with similar tools”.<sup>43</sup>

In the Canadian federation, would identities and human rights be better served by having an unlimited federal spending power, or by placing limits on the power to preserve the agency of the provinces? In light of this question, let us now turn to the principle of subsidiarity as a means of providing a compromise between unity and diversity.

## II. The Principle of Subsidiarity

### 1. Origin, Definition, and Relation to Federalism

Subsidiarity is understood as regulating the exercise of authority in a political order between a central unit and various subunits.<sup>44</sup> It suggests that legislative action is better achieved at the level of government closest to the people who will benefit from the measure unless the central government would be more effective in achieving the objective of the proposed action.<sup>45</sup> Subsidiarity also implies that the “burden of argument lies with attempts to centralise authority.”<sup>46</sup> Subsidiarity preserves democratic agency, preserves autonomy of lower levels of authority, reduces threats of dominance, and increases efficiency.

Subsidiarity is understood as having many roots. Some trace it back to Greek philosophy,<sup>47</sup> but it was more fully theorised in the seventeenth century by Johannes Althusius in *Politica methodice digesta*,<sup>48</sup> and in the twentieth century by the Catholic Church in the 1931 Papal Encyclical *Quadragesimo Anno*,<sup>49</sup> a letter sent out to all priests to address certain aspects of the Catholic doctrine. The Church was reacting to its loss in power in Italy at the time, in the areas of health, education, and welfare and was calling for limited interven-

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43 Poirier, *supra* note 6 at 423.

44 Andreas Føllesdal & Victor M Muñiz Fraticelli, “The Principle of Subsidiarity as a Constitutional Principle in the EU and Canada” (2015) 10:2 The Ethics Forum 89 at 89.

45 Andreas Føllesdal, “Survey Article: Subsidiarity” (1998) 6:2 The Journal of Political Philosophy 190 at 190 [Føllesdal, “Survey”].

46 Andreas Føllesdal, “Subsidiarity and the Global Order” in Michelle Evans & Augusto Zimmermann, eds, *Global Perspectives on Subsidiarity* (New York: Springer, 2014) 207 at 208.

47 Eugénie Brouillet “Canadian Federalism and the Principle of Subsidiarity: Should We Open Pandora’s Box?” (2011) 54 SCLR (2d) 601 at 604, citing Philippe Brault, Guillaume Renaudineau & François Sicard, *Le principe de subsidiarité* (Paris: La documentation française, 2005) at 11-23.

48 For a detailed background see Føllesdal, “Survey”, *supra* note 45 at 200-201.

49 Pope Pius XI, “*Quadragesimo Anno*: On Reconstruction of the Social Order” (15 May 1931), online: <w2.vatican.va/content/pius-xi/en/encyclicals/documents/hf\_p-xi\_enc\_19310515\_quadragesimo-anno.html>; Føllesdal & Fraticelli, *supra* note 44 at 95.

tions of the State in areas of real need.<sup>50</sup> The Church understood that the State was overwhelmed by its tasks, and individuals threatened to be destroy[ed] and absorb[ed] by the State.<sup>51</sup> The Church called for a new associative structure in line with the principle of subsidiarity:

The supreme authority of the State ought, therefore, to let subordinate groups handle matters and concerns of lesser importance, which would otherwise dissipate its efforts greatly. Thereby the State will more freely, powerfully, and effectively do all those things that belong to it alone because it alone can do them: directing, watching, urging, restraining, as occasion requires and necessity demands. Therefore, those in power should be sure that the more perfectly a graduated order is kept among the various associations, in observance of the principle of “subsidiary function”, the stronger social authority and effectiveness will be the happier and more prosperous the condition of the State.<sup>52</sup>

This quote reminds the reader of the governance of a federative structure; however, in a federation there is no relationship of subordination between the levels of governments. The subsidiarity described above applies horizontally and not vertically as it would apply in a federation.<sup>53</sup> The private sector, to which the Church belongs, is one of the subordinate groups to consider.<sup>54</sup>

In any case, subsidiarity is a similar principle to federalism and can help justify its pertinence. Federalism can be understood as a constitutionally defined structure of governance in which power is shared between a central government and the lower levels of governments. The division of specific powers is entrenched in the Constitution.<sup>55</sup> Both subsidiarity and federalism imply that power is organised under levels of authority. Under this kind of multilevel governance there will be tension between centralisation and decentralisation of power and between the values of unity and diversity in policy across the State. Subsidiarity is a broader principle, however. If federalism were not to give a clear answer to the question of which level of government should legislate, subsidiarity would be helpful.

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50 Federico Fabbrini, “The Principle of Subsidiarity” (2016) iCourts Working Paper No 66 at 11 [forthcoming in Takis Tridimas & Robert Schütze, eds, *Oxford Principles of European Union Law* (Oxford: Oxford University Press, 2018)].

51 Pope Pius XI, *supra* note 49 at paras 78-79.

52 *Ibid* at para 80.

53 Fabbrini, *supra* note 50 at 11.

54 Føllesdal, “Survey” *supra* note 45 at 209.

55 Daniel M Weinstock, “Liberty and Overlapping Federalism” in Sujit Choudhry et al, *Dilemmas*, *supra* note 24, 167 at 168, citing William H Riker, “Federalism” in Robert E Goodin & Philip Pettit, eds, *A Companion to Contemporary Political Philosophy* (Oxford: Basil Blackwell, 1993), 508 at 508-09.

Subsidiarity has been associated with constitutional provisions in other federations. For example, it has been interpreted in the content of article 72(2) of the German Constitution of 1949 to regulate the action of the central government in situations of concurrent powers.<sup>56</sup> More importantly, subsidiarity was included in the Maastricht Treaty as a governing principle of the European Union (EU).<sup>57</sup> It was meant as a political compromise for all EU Members to be able to accept the Treaty, as it could diminish the risk of over-centralisation.<sup>58</sup> By adopting the principle, the EU intended to ensure a degree of autonomy for the lower bodies in relation to the central authority within the federation.<sup>59</sup>

In the EU, subsidiarity is understood as being the principle that regulates the exercise of the Union's powers in areas of shared competencies. Article 5(3) of the *Treaty on European Union* describes its application in these terms:

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.<sup>60</sup>

56 Føllesdal, "Survey", *supra* note 45 at 193; Fabbrini, *supra* note 50 at 12. The Bund was entitled to legislate if federal regulation was needed: 1) because a matter could not be settled effectively by the legislation of the various Länder; 2) because the regulation of a matter by the law of a Land could affect the interests of other or all Länder; 3) to safeguard the legal or economic unity, and in particular, to safeguard the homogeneity of the living conditions beyond the territory of a Land. The text of Article 72(2) of the German Basic Law was amended in 1994 by the *Gesetz zur Änderung des Grundgesetzes*, BGBl. I 3146. It now reads that the Bund shall have the powers to legislate in areas of concurrent competences "if and to the extent that the establishment of equivalent living conditions throughout the federal territory or the maintenance of legal or economic unity renders federal regulation necessary in the national interest": Art 72 Abs 2 GG.

57 EC, *Consolidated Version of the Treaty on European Union, Treaty of Maastricht* [2002] OJ, C 325/05 [TEU]. The principle of subsidiarity was formally enshrined in EU law by the Maastricht Treaty in 1992. Before, a reference to subsidiarity was included in the EC, *Consolidated Version of the Treaty Establishing the European Community*, [2002] OJ, C 325/33 [TEC]. The *Treaty of Lisbon*, [2007] OJ, C 306/01, repealed the reference in the TEC and incorporated it in article 5(3) TEU: see European Parliament, *Fact Sheets on the European Union: The Principle of Subsidiarity* (2017), online: <www.europarl.europa.eu/ftu/pdf/en/FTU\_1.2.2.pdf>.

58 Mark A Pollack, "The End of Creeping Competence? EU Policy-Making Since Maastricht" (2000) 38:3 J Common Market Studies 519 at 525.

59 Fabbrini, *supra* note 50 at 6, n 19, citing Mattias Kumm, "Constitutionalising Subsidiarity in Integrated Markets: The Case of Tobacco Regulation in the European Union" (2006) 12:4 Eur LJ 503.

60 *Consolidated version of the Treaty on European Union*, [2012] OJ, C 326/19. The action of the Union pursuant to the principle are limited by the principle of proportionality: "[u]nder the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.": TEU, art 5(4). Both the principle of subsidiarity are analysed in tandem. The *Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality*, [2004] OJ, C 310/207 [Protocol No 2], regulates their application.

Furthermore, in the EU, compliance with the principles of subsidiarity is reviewed at multiple levels.<sup>61</sup> For example, draft legislative acts have to state how they comply,<sup>62</sup> national parliaments can flag inconsistencies with the principle according to a specific procedure,<sup>63</sup> and the EU Court of Justice can review their compliance.<sup>64</sup> Authors have generally found the principle of subsidiarity helpful as a general legislative principle, but judicial review by the EU Court of Justice has proven challenging.<sup>65</sup> The principle is political in nature and policy decision-making is understood as being discretionary.<sup>66</sup> In fact, the European Court of Justice has never held that a legislative act was invalid on the basis of subsidiarity and gives considerable deference to the opinion of the legislative authorities in its judgments.<sup>67</sup> This shows its uneasiness with reviewing a political process of decision-making at the EU level.<sup>68</sup>

Competing views on the nature of the principle of subsidiarity have arisen. Some scholars perceived the principle as carrying a negative bias<sup>69</sup> towards the Member states and restricting the actions of the Union unless its intervention is necessary for reasons of scale and externalities.<sup>70</sup> This version of the principle gives an answer to the question of *whether* the Union is entitled to act.<sup>71</sup> In this case the central government's actions would be the exception to the norm. Another perception of the principle viewed it as more

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61 For a description of the procedures, see Patricia Popelier & Werner Vandenbruwaene, "The Subsidiarity Mechanism as a Tool for Inter-Level Dialogue in Belgium: On 'Regional Blindness' and Co-operative Flaws" (2011) 7:2 Eur Const L Rev 204.

62 *Protocol No 2*, *supra* note 60, art 5.

63 *Ibid*, art 6; *Protocol on the Role of National Parliaments in the European Union*, [2004] OJ, C 310/204, art 3.

64 *Protocol No 2*, *ibid*, art 8.

65 Fabbrini, *supra* note 50 at 14; Gabriël A Moens & John Trone, "The Principle Of Subsidiarity In EU Judicial And Legislative Practice: Panacea Or Placebo?" (2015) 41:1 Journal Legis 65 at 72; Popelier & Vandenbruwaene, *supra* note 61 at 210.

66 Popelier & Vandenbruwaene, *ibid* at 210. It has been said that the courts are not well equipped to challenge that discretion because they cannot incur the information cost necessary to assess the socio-economic rationality of a proposed law: see Aurélian Portuese, "The Principle of Subsidiarity as a Principle of Economic Efficiency" (2011) 17:2 Colum J Eur L 231 at 257; Brouillet, *supra* note 47 at 611, citing Renaud Dehousse, "Réflexions sur la naissance et l'évolution du principe de subsidiarité" in Francis Delpérée, ed, *Le principe de subsidiarité* (Bruxelles: Bruylant, 2002) at 364.

67 Moens & Trone, *supra* note 65 at 72, 77.

68 Fabbrini, *supra* note 50 at 15.

69 According to Føllesdal, subsidiarity can be interpreted positively or negatively. Since subsidiarity is imposed on the actions of the Union, the "negative" version of subsidiarity can proscribe central action in the absence of comparative efficiency with the Member states. On the other hand, the "positive" version of subsidiarity can require the Union's action when it is comparatively more efficient: Føllesdal, "Survey", *supra* note 45 at 195.

70 Fabbrini, *supra* note 50 at 7.

71 Robert Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford: Oxford University Press, 2009) at 262-63.

neutral, almost Janus-faced, with regard to its positive and negative aspect.<sup>72</sup> Subsidiarity would guide the allocation of power, depending on capacities of the different levels of government to deal with specific problems at one time. It would respond to the question of *how* the Union is entitled to act.<sup>73</sup> What has not been contested is the fact that definitions of the principle in the treaties are ambiguous.<sup>74</sup>

## 2. The Principle of Subsidiarity in Canadian Law

The principle of subsidiarity is not formally entrenched in Canadian law. According to Peter Hogg, the broad interpretation given by the Privy Council and the SCC to the provincial power to legislate over property and civil rights is a manifestation of their acceptance of the principle of subsidiarity.<sup>75</sup> The SCC has recently referred to the principle in three major decisions in a way that suggests new possibilities for the principle.

In *Spraytech* the Court had to decide if the Town of Hudson was authorised by statute to pass a by-law regulating and restricting pesticide use.<sup>76</sup> The impugned provision was found valid pursuant to a *Cities and Town Acts* provision that allows municipalities to enact bylaws related to health and general welfare.<sup>77</sup> It was also found not to interfere with related federal legislation, even though it exceeded federal norms. This made the units of governments' interventions complementary and not conflicting. To introduce her judgment, Justice L'Heureux-Dubé referred to the principle of subsidiarity:

The case arises in an era in which matters of governance are often examined through the lens of the principle of subsidiarity. This is the proposition that law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity. La Forest J. wrote for the majority in *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213, at para. 127, that “the protection of the environment is a major challenge of our time. It is an international problem, one that requires action by governments at all levels”. [...] The so-called “Brundtland

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72 Fabbrini, *supra* note 50 at 7.

73 Schütze, *supra* note 71 at 262-63.

74 Fabbrini *supra* note 50 at 7.

75 *Reference Re Assisted Human Reproduction Act*, 2010 SCC 61 at para 183, [2010] 3 SCR 457 [AHRA Reference], citing Peter Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) (loose-leaf 2013 revision 1) at 5-13.

76 114957 *Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town of)*, 2001 SCC 40 at para 17, [2001] 2 SCR 241 [Spraytech].

77 *Ibid* at paras 21 and 43.

Commission” recommended that “local governments [should be] empowered to exceed, but not to lower, national norms” (emphasis added).<sup>78</sup>

In *Canadian Western Bank*, the SCC reviewed the pertinence of the doctrine of interjurisdictional immunity.<sup>79</sup> This doctrine articulates that legislation enacted by a level of government cannot have incidental effects on the core of a jurisdiction assigned to the other level of government, even in the absence of law on the subject by the other level of government.<sup>80</sup> The Court argued at length for a limited use of the doctrine. It found that if used broadly, the doctrine would lead to centralisation and would not be compatible with “the flexibility and co-ordination required by contemporary Canadian federalism.” At that point it cited the principle put forward in *Spraytech*: “The asymmetrical effect of interjurisdictional immunity can also be seen as undermining the principles of subsidiarity, i.e. that decisions ‘are often best [made] at a level of government that is not only effective, but also closest to the citizens affected.’”<sup>81</sup>

Both in *Spraytech* and in *Canadian Western Bank*, the principle of subsidiarity is used to push the analysis towards an interpretation of federalism that would empower all levels of government to act in solidarity towards common goals. Subsidiarity is used as a broad principle, broader than federalism, but that same broadness/breadth can help interpret it in a constructive way. While cooperative federalism also encourages solidarity, and is a similar principle to subsidiarity, subsidiarity adds the idea of deference for the unit of government most able to respond to the residents’ needs.

In the *Reference re Assisted Human Reproduction Act*, the Province of Quebec challenged the validity of certain provisions of the statute related to medical practice and research related to human reproduction.<sup>82</sup> The question was whether the impugned provisions were part of a statutory scheme validly enacted under the federal power over criminal law. Justices Lebel and Deschamps, writing for the minority (Justices Abella and Rothstein concurring), placed a lot of importance on the principle of subsidiarity, even more so than Justice L’Heureux-Dubé had done in *Spraytech*. They tracked its brief history in Canadian law.<sup>83</sup> The justices expressed the view that the impugned provisions were outside federal jurisdiction and related instead to the provinces’ jurisdictions over hospitals, property, and civil rights and matters of a merely

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78 *Ibid* at para 3.

79 *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 33.

80 *Ibid* at para 44.

81 *Ibid* at para 45.

82 *AHRA Reference*, *supra* note 75 at para 21.

83 *Ibid* at para 183.

local or private nature.<sup>84</sup> Subsidiarity could potentially be invoked if a doubt remained and, in this case, it would favour the provinces since they were closest to the matter of health. They added “[i]f any doubt remained, this is where the principle of subsidiarity could apply,”<sup>85</sup> suggesting a new application of the principle.

Justice McLachlin, writing for the majority (Justices Binnie, Fish, and Charron concurring),<sup>86</sup> argued that the impugned provisions were valid under the federal criminal law. On subsidiarity, she replied that in *Spraytech*, the principle was invoked to explain a valid legislative exercise by the municipality that was complementary to that of the federal; it did not infer a preference for the lower level of government that would suggest the federal government should not interfere.<sup>87</sup> More importantly, the principle itself could not be used to stop Parliament from legislating on the shared subject of health.<sup>88</sup>

Justice McLachlin stated first that the minority had treated subsidiarity as having a more powerful influence than intended by Justice L’Heureux-Dubé in *Spraytech*. This recalls the discourse in the EU where subsidiarity can be seen as restrictive, indicating whether the central government could act in a particular situation. The majority supported subsidiarity as a neutral principle and argued against giving it a negative force that could mean the preference for provincial exercise in the area of health care, “free from interference of the criminal law.”<sup>89</sup> Second, Justice McLachlin rejected the proposition that subsidiarity could be added to the analysis of the divisions of powers (if doubts remained). Where Justice L’Heureux-Dubé had referred to subsidiarity in “matters of governance,” Justices Lebel and Deschamps referred to it in the “operation of Canadian federalism.” They suggested this same principle could be employed to decide which level of government would be better suited to address the subject at hand, which is something that had not been done before. Justices Lebel and Deschamps even supported their argument for an application of the principle by interpreting a passage of the *Secession Reference* and the intention of the Court at the time:

In *Reference re Secession of Quebec*, the Court expressed the opinion that “[t]he federal structure of our country also facilitates democratic participation by distributing power to the government thought to be most suited to achieving the particular soci-

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84 *Ibid* at para 158.

85 *Ibid* at para 273.

86 Justice Cromwell wrote a separate concurring judgment.

87 *AHRA Reference*, *supra* note 75 at paras 69,70.

88 *Ibid* at para 72.

89 *Ibid* at para 69.



etal objective having regard to this diversity” (para. 58). In taking this position, the Court recognized the possibility inherent in a federal system of applying the principle of subsidiarity, thereby enhancing its democratic dimension and democratic value added.<sup>90</sup>

Interestingly, Justice Deschamps had written a solo dissent in *Lacombe*<sup>91</sup> only two months earlier. Justice Deschamps stipulated that the principle of subsidiarity was a component of Canadian federalism.<sup>92</sup> She also used the principle of subsidiarity to support an application of the doctrine of interjurisdictional immunity and paramountcy that could advantage provincial legislation as much as federal legislation in a dispute over the division of power. Neither the majority judgment by Justice McLachlin nor the concurring judgment by Justice Lebel in *Lacombe* referred to the principle, however. While this dissent is not as novel as the minority opinion in *Reference re Assisted Human Reproduction Act*, it seems to pave the way to what Justices Deschamps and Lebel stated in the *Reference*. It points to the principle as being one that can make sense of the choice of one level of government over another, and that the potential of both levels of government to enact law should be protected.

The question that remains following the *Reference re Assisted Human Reproduction Act* would be of the precise application of the principle. The interpretation of Justices L’Heureux-Dubé and McLachlin prevails, but Justices Lebel and Deschamps’s new proposition (with Justices Abella and Rothstein concurring) suggests that the application of this principle could be defined more precisely in the future. Justices Lebel and Deschamps, however, omitted to expand on the reasons for their new proposition. They did not point to the difference in breadth of the principles of subsidiarity and of federalism and why the principle of subsidiarity should be applied the way they suggested within the Canadian federalism doctrine.

As this author understands it, their use of the principle suggests that the principle of subsidiarity can be helpful where the federative principle does not give a clear answer to the question of which level of government should legislate. Justice McLachlin’s argument did not expressly reject this definition, but would limit the use of subsidiarity to a simple justification of existing dynamics.

In the next section, we return to spending power. Given that the theory of spending power lacks maturity and is being contested, it is suggested that

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90 *AHRA Reference*, *supra* note 75 at para 183.

91 *Quebec (AG) v Lacombe*, 2010 SCC 38, [2010] 2 SCR 453.

92 *Ibid* at para 109.

the principle of subsidiarity would help frame it in a more constructive way for Canadian society.

### III. Applying the Principle of Subsidiarity to Spending Power

The entrance of the principle of subsidiarity into Canadian law has been solidified by *Spraytech* and *Canada Western Bank*. It is now possible to foresee that the principle will be given greater attention in Canadian case law. The following is a creative attempt to think of it as a guiding principle for Parliament in justifying an exercise of spending power.

One of the reasons spending power has never really been limited is because of the nature of the rights it creates. Social policy generates widespread opportunities that enable citizens to live better lives, as well as to build a better society. It fosters interpersonal equality and the realisation of individual freedom. Accomplishing this requires the development of countrywide social standards, which in turn leads to centralisation, as it is a matter of scale and the federal will to lead the action. According to this argument, spending power's legal justification would include section 36 of the *Constitutional Act of 1982*, as it anchors these ideas in Canadian law.

The huge potential of centralising actions under a barely limited spending power has been perceived by some, mainly in Quebec, as breaching the federative agreement. Subsidiarity would give some importance to the provinces and the municipalities as the levels of government closest to the people. It would not only be a matter of efficiency, which can sometimes lead to over-simplification and unintentional disregard of diversity.

Identities are to be preserved and opportunities to be developed, which requires that we look at what we collectively had in the past and what is needed in the future. However, the evolution of identities has to be accepted as governance looks to the future and leads to inevitable changes, hopefully for the common good. If subsidiarity would be affirmed in the spending power context, or in any context, it would have to be accepted because of social change. Federalism was chosen as a structure of governance in Canada with a view towards future developments and this should inform how we make and accept gradual changes to constitutional design. The reality that informed the divisions of power at that time is not the same reality that exists today. The definition and notion that we attach to Canadian federalism must allow for a fluid evolution, considering the demographic changes the country has seen,

as well as changes in social and economic priorities. Subsidiarity is well suited to Canadian federalism and would not disturb its definition, while questioning centralisation, for some of the same reasons federalism was established in the first place. In the context of the spending power, it would challenge the discourse of unity with the important task of considering diversity. Amartya Sen has asserted that “sometimes human diversities are left out of account not on the misconceived ‘high’ ground of ‘equality of human beings’, but on the pragmatic ‘low’ ground of the need for simplification. But the net result of this can also be to ignore centrally important features of demands of equality.”<sup>93</sup>

For this purpose, subsidiarity should not be conceived as a justiciable principle, as it is too broad to have a high normative value, and the experience of the EU speaks to the difficulty of reviewing it judicially. It should instead serve as a guiding principle for the federal government. Parliament could still bind itself by agreement on some aspects of fiscal federalism.<sup>94</sup> The SCC treats it as a guiding principle in *Spraytech* and *Canada Western Bank* and refuses the proposition made in the *Reference re Assisted Human Reproduction Act* to see it as having a higher normative value. Also, in line with this proposition, the exercise of spending power would still have the same limit, which is that it should not amount to legislation. Spending power is otherwise not reviewed by the courts, unless it leads to the violation of one of the rights protected by the Charter.<sup>95</sup>

Further, it is suggested that subsidiarity should not imply any inability but a comparative advantage, thus the principle should not be conceived of as being restrictive. Subsidiarity empowers all levels of government to act in solidarity towards common goals. Once a level of government has decided to tackle an issue, it would guide how power should be distributed to effectively achieve the desired objective. It would mainly act as a guard against undue centralisation.

Subsidiarity promotes efficiency, which can advantage any level of government depending on the scale and externalities of the proposed action.<sup>96</sup> By matter of efficiency, it could be inferred that projects of a larger scale generating potential externalities would be better accomplished through action at the central level or through a complementary action of all levels of government but not through the action of a small unit of government alone. However, in such

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93 Amartya Sen, *Inequality Reexamined* (Cambridge: Harvard University Press, 1995) at 1.

94 It could potentially be conceivable to have political safeguards and reinforcements such as in the EU, but more research would be needed on the feasibility of establishing such mechanisms in the Canadian context.

95 *CAP Reference*, *supra* note 12 at 567.

96 Føllesdal, “Survey”, *supra* note 45 at 206.

cases, subsidiarity would help focus the exercise of spending and its implementation in a way that respects the potential of all levels of government in developing the proposed measure. The threat of dominance by the federal government and the idea that it would bypass the provinces and directly impact residents would thus be reduced. The federal government would have to wonder if the provinces could better achieve the objective of the proposed program. Perhaps the provinces would be more empowered to spend in any area. It can also promote the idea that the multiplication of exercise of authority can lead to innovative ways to conceive projects that can lead to better policy, which is desirable.<sup>97</sup> Importantly, the principle of subsidiarity promotes the needs and the ideas of people, which we value in the exercise of democracy.

If subsidiarity could not stop Parliament from spending, it would at least trigger the dialogue with the provinces on how the program should be implemented and under which conditions it should function. Diversity appears in the way programs are implemented. Subsidiarity promotes diplomacy between levels of government, which is an intrinsic process of the federated structures of governance. Daniel Weinstock wisely pointed out that federations “incorporate a multitude of occasions for deliberation, discussion, and negotiation, so that the interdependence that holds in a federation can aspire to being reflective and deliberative, rather than the result of the causality of force and power differentials.”<sup>98</sup>

## Conclusion

Spending power is a complex and controversial element of Canadian federalism. It has hit the main federalist tension of unity versus diversity at its core. The division of powers has served as constitutional protection in Quebec for much longer than the *Charter of Rights and Freedoms*, and spending power challenges that protection.<sup>99</sup> The debates over spending power have very much been informed by differing notions of Canadian identities and how we should let them evolve. It is inherently a question of human dignity, interpersonal equality, and freedom. In the Canadian federation, would identities and human rights be better nurtured by an unlimited federal spending power, or it was limited in order to preserve the agency of the provinces? The principle of

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97 Weinstock, *supra* note 55 at 170, 173.

98 *Ibid* at 173.

99 Adam, *supra* note 11 at 181, citing Hamish Telford, “Survivance Versus Ambivalence: The Federal Dilemma in Canada” (2005) Queen’s University School of Policy Studies Special Series on Asymmetric Federalism Working Paper, online: <[www.queensu.ca/iigr/sites/webpublish.queensu.ca/iigrwww/files/files/WorkingPapers/asymmetricfederalism/Telford2005.pdf](http://www.queensu.ca/iigr/sites/webpublish.queensu.ca/iigrwww/files/files/WorkingPapers/asymmetricfederalism/Telford2005.pdf)>.

subsidiarity, recently referred to by the SCC and of increasing interest around the world, might offer some clues on how to answer this question.

## BOOK REVIEW

### *The Right Relationship: Reimagining the Implementation of the Historical Treaties*

John Borrows & Michael Coyle, eds  
(Toronto: University of Toronto Press, 2017)

*Katherine Starks\**

*The Right Relationship: Reimagining the Implementation of the Historical Treaties*, edited by John Borrows and Michael Coyle, is a timely collection. Published this year amid the “Canada 150” celebrations and their corresponding Indigenous activist and artistic responses,<sup>1</sup> *The Right Relationship* takes the 1764 Treaty of Niagara, rather than Confederation, as its starting point.<sup>2</sup> The 250th anniversary of this treaty between Britain and Indigenous peoples passed in 2014 with significantly less state fanfare, but was one “impetus for this book.”<sup>3</sup> Still, *The Right Relationship* shares with Canada 150 a focus on national identity and the origins of Canada. The central concern of this collection is “the right relationship between Canada’s Indigenous peoples and the modern nation that is

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\* B.A. (Saskatchewan), M.A. (Alberta); J.D. candidate, University of Saskatchewan.

1 See e.g. Resistance 150, a project initiated by Isaac Murdoch, Christi Belcourt, Tanya Kappo and Maria Campbell showcasing “Indigenous resistance, resilience, resurgence, rebellion, and restoration”, and Unsettling Canada 150, a day of action planned for July 1 alongside promotion of Arthur Manuel & Grand Chief Ronald M Derrickson’s book *Unsettling Canada: A National Wake-up Call* (Toronto: Between the Lines, 2015) throughout the month of June. Resistance 150, online: Twitter <twitter.com/resistance150>; Onaman Collective, “#Resistance150”, online: <onamancollective.com/resistance150/>; Alicia Elliott, “#Resistance150: Christi Belcourt on Indigenous History, Resilience and Resurgence”, *CBC* (22 February 2017), online: <cbc.ca>; “Unsettling 150: A Call to Action” (5 May 2017), *Idle No More* (blog), online: <www.idlenomore.ca/unsettling\_150\_a\_call\_to\_action>; Unsettling Canada 150, online: <unsettling150.ca>.

2 John Borrows & Michael Coyle, “Introduction” in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017) 3 at 4.

3 Jacinta Ruru, “A Treaty in Another Context: Creating Reimagined Treaty Relationships in Aotearoa New Zealand” in Borrows & Coyle, *ibid* 305 at 305.

Canada," which it frames as a foundational issue for the legitimacy of Canada.<sup>4</sup> The collection considers the Treaty of Niagara and subsequent historical treaties as the founding framework for this relationship, creating a partnership that may yet be reinvigorated as the basis of right relations today.

Borrows and Coyle seek a wide audience for this work, framing its topics as "not just academic concerns"<sup>5</sup> and directing the book to "lawyers, elected officials, public servants, journalists, and indeed all concerned citizens."<sup>6</sup> The degree to which the collection actually speaks to this multifaceted audience varies; Jean Leclair's legal theory contribution, if not totally inaccessible to a lay audience, may be somewhat difficult for a non-specialist to frame in terms of its immediate social relevance. Similarly, Francesca Allodi-Ross's tightly-focused treatment of the uncertainty regarding Aboriginal individuals' assertions of harvesting rights seems directed to practitioners.<sup>7</sup> However, as a whole, the collection is written in clear, accessible prose, and succeeds in contextualizing its concerns in ways that make it a relevant and welcome work for a broad non-specialist audience. Furthermore, in its focus on treaty remedies and implementation, this collection makes an important contribution to the study of Indigenous-settler relations and the fields of Aboriginal and Indigenous law.

The collection is divided into three parts, focusing in turn on history, Indigenous legal orders, and forums for treaty dispute resolution. Part I opens with Borrows's account of a set of constitutional narratives of Canada, from the doctrine of discovery to treaty federalism to recent section 35 jurisprudence that increases provincial power over First Nations.<sup>8</sup> In the second chapter, Coyle identifies significant gaps in Canada's legal approach to historical treaties and develops a legal framework for implementation of these treaties.<sup>9</sup> These two chapters set the stage for the collection as a whole. Coyle centres historical treaties as the basis for an enduring partnership between Indigenous and settler peoples, a key theme animating most of the subsequent essays. Borrows challenges the dominant framework of reconciliation under section 35, arguing that given the power dynamics that marginalize Indigenous peoples in Canada,

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4 "Introduction", *supra* note 2 at 3.

5 *Ibid* at 5.

6 *Ibid* at 13.

7 Jean Leclair, "Nanabush, Lon Fuller, and Historical Treaties: The Potentialities and Limits of Adjudication" in Borrows & Coyle *supra* note 2 at 325; Francesca Allodi-Ross, "Who Calls the Shots? Balancing Individual and Collective Interests in the Assertion of Aboriginal and Treaty Harvesting Rights" in Borrows & Coyle, *supra* note 2, 149.

8 John Borrows, "Canada's Colonial Constitution" in Borrows & Coyle, *ibid* at 17.

9 Michael Coyle, "As Long as the Sun Shines: Recognizing That Treaties Were Intended to Last" in Borrows & Coyle, *supra* note 2 at 39.

reconciliation will typically force First Nations to align their interests with broader provincial interests, in essence “requir[ing] that Indigenous peoples reconcile themselves to colonialism.”<sup>10</sup> Rather than embracing reconciliation, he recognizes the complexity of Indigenous-settler relations in Canadian political and judicial contexts over time and accordingly calls for a realistic outlook that seeks the best possible outcomes for Indigenous communities. As I discuss below, this skepticism of reconciliation is taken up in different ways by other contributors. As a whole, the collection is cognizant of both current Canadian jurisprudential and political realities. It is, at times, deeply critical of these realities and calls for reform or even radical change.

The remaining essays in Part I take up some specific issues in treaty implementation, with a focus on the role of history. Kent McNeil pointedly critiques one Crown expert witness to discuss broader issues of the development of the common law and the use of historical evidence.<sup>11</sup> Julie Jai traces the shifting levels of bargaining power held by First Nations treaty negotiators from Niagara to today, ultimately arguing that principles and mechanisms in modern treaties should be brought to bear on historical treaties.<sup>12</sup> Allodi-Ross highlights the tension between the collective nature of Aboriginal rights and the position of individuals who seek to assert an Aboriginal right as a defence; she calls on courts to bring clarity to this area of the law by balancing individual and collective interests.<sup>13</sup> Finally, Sari Graben and Matthew Mehaffey present a case study of funding negotiations under a modern treaty, arguing that courts must enforce modern treaties as constitutional documents limiting governmental power to prevent a return to the *Indian Act* model of external control over First Nations communities.<sup>14</sup>

Part II turns to Indigenous legal orders, beginning with Mark D. Walters’s account of the Covenant Chain treaty, a relationship between the Crown and Indigenous peoples affirmed by the Treaty of Niagara. Arguing from first principles drawn from Anishinaabe origin stories, he outlines a legal framework for understanding this treaty as establishing a relationship in which right and

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10 *Supra* note 8 at 33.

11 Kent McNeil, “Indigenous Rights Litigation, Legal History, and the Role of Experts” in Borrows & Coyle, *supra* note 2 at 70.

12 Julie Jai, “Bargains Made in Bad Times: How Principles from Modern Treaties Can Reinvigorate Historic Treaties” in Borrows & Coyle, *ibid* at 105.

13 *Supra* note 7.

14 Sari Graben & Matthew Mehaffey, “Negotiating Self-Government Over & Over & Over Again: Interpreting Contemporary Treaties” in Borrows & Coyle, *supra* note 2 at 164.



remedy are intertwined.<sup>15</sup> Aaron Mills/Waabishki Ma'iingan presents a scathing critique of social contract theory and an account of Anishinaabe constitutionalism based on the Anishinaabe teaching that all life is a unique and interrelated part of creation.<sup>16</sup> Heidi Kiiwetinepinesiik Stark focuses on the earliest treaties known to Anishinaabe law, which govern the relationship between Anishinaabe people, the Earth, and the Creator, and considers the implications of these sacred agreements today.<sup>17</sup> Sarah Morales adopts an intercultural approach in a case study of negotiations between the Hul'qumi'num Treaty Group and the Crown.<sup>18</sup> She analyzes the concept of good faith under Canadian, international, and Hul'qumi'num law, observing shared values among these approaches and arguing that Hul'qumi'num dispute resolution processes could help meet the needs of the parties in modern treaty negotiation.

Section III considers alternative forums for treaty dispute resolution. Jacinta Ruru discusses the Waitangi Tribunal, a permanent forum for treaty dispute resolution in Aotearoa New Zealand that has yielded some promising results for Maori communities, including a recent settlement that changed a national park into a legal personality under Maori management.<sup>19</sup> Jean Leclair explores the possibilities of adjudication through foundational questions regarding the purpose and morality of law and the courts.<sup>20</sup> Looking beyond domestic judicial enforcement, the collection concludes with two essays on international law. Sara L. Seck highlights international law's capacity to advance Indigenous rights through resistance movements and through Indigenous peoples strengthening their international legal personalities by taking on responsibilities as non-state actors.<sup>21</sup> Shin Imai discusses the international legal standard of "free, prior and informed consent" (FPIC) for development on Indigenous land, arguing that Canada should follow the lead of industry actors who have already embraced this standard.<sup>22</sup> Imai notes uncertainty as to whether the Liberal government elected in 2015 will accept FPIC; recent remarks of Indigenous Affairs Minister

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15 Mark D Walters, "Rights and Remedies within Common Law and Indigenous Legal Traditions: Can the Covenant Chain Be Judicially Enforced Today?" in Borrows & Coyle, *ibid* at 187.

16 Aaron Mills/Waabishki Ma'iingan, "What is a Treaty? On Contract and Mutual Aid" in Borrows & Coyle, *ibid* at 208.

17 Heidi Kiiwetinepinesiik Stark, "Changing the Treaty Question: Remediating the Right(s) Relationship" in Borrows & Coyle, *ibid* at 248.

18 Sarah Morales, "(Re)Defining 'Good Faith' through *Snuw'uyulh*" in Borrows & Coyle, *ibid* at 277.

19 *Supra* note 3.

20 *Supra* note 7.

21 Sara L Seck, "Treaties and the Emancipatory Potential of International Law" in Borrows & Coyle, *supra* note 2 at 344.

22 Shin Imai, "Consult, Consent, and Veto: International Norms and Canadian Treaties" in Borrows & Coyle, *ibid* at 370.

Carolyn Bennett make clear that it has, at least nominally.<sup>23</sup> While FPIC in Canada is an emerging policy area that requires further scholarly attention, Imai's essay provides useful context for these ongoing developments.

A distinct strength of this collection is its treatment of Indigenous legal orders. It presents a fine example of rigorous and specific engagement with Indigenous law, rather than a vague or perfunctory reference to "the Aboriginal perspective." This engagement occurs throughout the collection, as an Indigenous perspective on the historical treaties as a framework for relationship is a premise of the work as a whole. It also occurs in different ways at the level of individual essays, such as in the comparative polyjural approach of Morales's contribution. However, the key contribution of this collection in terms of Indigenous legal orders is its treatment of Anishinaabe law. Three essays on Anishinaabe law account for more than a fifth of the text of the collection, addressing constitutionalism, remedies, and treaty law. Though clearly based in shared principles, these essays offer diversity and debate rather than homogeneity. To cite just one example, Walters and Mills present divergent treatments of treaty remedies in Anishinaabe law. Walters, while complicating the separation of "right" and "remedy" and emphasizing treaty as a structure for relationship, nonetheless seriously engages with possible remedies in the Canadian courts, such as declaratory relief and the extension of cooperative federalism.<sup>24</sup> Mills argues that under Anishinaabe constitutionalism, "treaty isn't even the sort of thing capable of giving rise to a legal remedy"; as a comprehensive framework for relationship among different communities, treaties demand structural political change in which they are recognized as the basis of citizenship.<sup>25</sup> For her part, Stark argues that treaty remedies can only be approached through the wider issue of treaty interpretation; this reframing becomes the basis of her contribution on Anishinaabe sacred law and its implications for modern relationships between Indigenous and settler peoples and the Earth.<sup>26</sup> Thus, within their nationally specific frame, the contributions of Walters, Mills, and Stark offer a window into Anishinaabe law as a rigorous, contested, living legal tradition.

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23 *Ibid* at 377, n 22; The Honourable Carolyn Bennett, Address (United Nations Permanent Forum on Indigenous Issues 16th Session delivered at the United Nations Headquarters, General Assembly Hall, 24 April 2017), online: Indigenous and Northern Affairs Canada News Releases <[https://www.canada.ca/en/indigenous-northern-affairs/news/2017/04/united\\_nations\\_permanentforumonindigenousissues16thsessionopenin.html?=&wbdisable=true](https://www.canada.ca/en/indigenous-northern-affairs/news/2017/04/united_nations_permanentforumonindigenousissues16thsessionopenin.html?=&wbdisable=true)>; Gloria Galloway, "Ottawa Drops Objections to UN Resolution on Indigenous Consent", *The Globe and Mail* (24 April 2017), online: <[theglobeandmail.com](http://theglobeandmail.com)>.

24 *Supra* note 15 at 202-05.

25 *Supra* note 16 at 225.

26 *Supra* note 17.

As this extensive treatment of Anishinaabe law underscores the value of deep engagement with a particular Indigenous legal order, it inevitably begs the question of those Indigenous legal orders the collection does not specifically address. It also creates something of a focus on central Canada in *The Right Relationship*. Such limitations are less a failing of the work than a necessary implication of the breadth of the task the collection sets out for itself. As a point of entry into settler-Indigenous relations in Canada as whole, the historical treaties are at once challengingly broad — evidenced, for instance, in the numerous different Indigenous legal traditions raised by these treaties — and arguably under-inclusive, given the significant tracts of Canada not covered by historical treaties. *The Right Relationship* navigates these challenges admirably, striking a balance of depth and breadth. The focus on a particular Indigenous legal tradition is surely valuable, both for expressing complexity within that tradition, and for offering a corrective to a superficial or pan-Indigenous approach. Anishinaabe law is arguably a fitting area of focus for this collection, given the centrality of the Treaty of Niagara to the work.<sup>27</sup> Furthermore, discussion of modern treaties, in terms of negotiation and implementation of these agreements in Yukon and British Columbia, is threaded throughout the collection, buttressing its relevance to Canada as a whole.

A further strength of this work is the critical dialogue it establishes, not just with the wider scholarship, but also among the contributions to the collection. The editors note that as part of the process of developing this collection, the contributors gathered at two colloquia to discuss its areas of focus.<sup>28</sup> Almost all the authors speak directly to the other contributors and make an effort to position their work within the collection. This collaborative approach has the side effect of highlighting those essays that fail to engage with the themes in which the total work is invested. For instance, McNeil's focus on the Royal Proclamation without mention of the Treaty of Niagara sits somewhat uncomfortably with the rest of the collection; while his attention to current evidentiary issues in Canadian courts is a valuable perspective, his essay misses an opportunity to connect this reality to the question of treaty implementation at the heart of this work. Generally, though, these efforts succeed in creating a cohesive scholarly contribution. Moreover, this conversation is a contribution in itself, as the collection models a productive mode of engagement across different approaches in this crucial and at times contentious field.

27 Of course, many different Indigenous nations, not all Anishinaabe, agreed to the Treaty of Niagara. As Mills notes, the meeting renewed the treaty between the Haudenosaunee and Britain, and extended it to the Western Confederacy, including Anishinaabe and Cree peoples; some other Indigenous nations opted not to attend: *supra* note 16 at 240.

28 *Supra* note 2 at 5.

The cohesive scholarly contribution of this work, along with the diversity of its perspectives, can be usefully traced through the themes of reconciliation and treaty introduced by Borrows and Coyle in their opening chapters. As mentioned above, several contributors share Borrows's skepticism of reconciliation under Section 35 and offer reconsiderations — or indeed entire redefinitions — of reconciliation as it pertains to the topics they take up. In perhaps the most comprehensive rejection of the current reconciliation paradigm, Mills argues that reconciliation ought to require the settler constitutional order to reconcile itself to treaty as the basis of citizenship.<sup>29</sup> Seck gestures toward a similarly transformative agenda, positing that Indigenous peoples could embrace norms of environmental stewardship as an international legal responsibility to work toward the “transformation of [the] destructive narrative of reconciliation and colonialism” identified by Borrows.<sup>30</sup> Others deploy the concept of reconciliation strategically — Jai advocates for reconciliation that recognizes Indigenous sovereignty and emphasizes government-to-government relationships between the Crown and Indigenous peoples,<sup>31</sup> while Walters sees the judiciary's support for reconciliation through political negotiation as an opening for non-traditional treaty remedies.<sup>32</sup> What connects these pieces, and the collection as a whole, is a forward-looking orientation focused on treaty as the framework for settler-Indigenous relations.

*The Right Relationship* is a wide-ranging collection that explores the roles of history, the courts, Indigenous law, and extrajudicial forums in the implementation of historical treaties. It represents a significant scholarly contribution in these areas, especially in its focus on how disputes might be resolved in the treaty relationship and what remedies may be available for failures to implement treaty promises. This is a boundary-breaking and relationship-building collection, bringing together a diverse set of perspectives on Canadian Aboriginal law and Indigenous legal orders, and speaking to a broad audience of concerned citizens within and beyond the legal profession. At Canada 150, *The Right Relationship* is a crucial reminder of a much longer history, in which treaties — from the treaty between Anishinaabe people and creation reaching back to time immemorial, to the 1763 Treaty of Niagara, to modern treaties — have governed right relations on this land. *The Right Relationship* embraces this history as a means to imagine new ways forward in Indigenous-settler relations in Canada.

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29 *Supra* note 16 at 242-43.

30 *Supra* note 21 at 368.

31 *Supra* note 12 at 144.

32 *Supra* note 15 at 202-03.

