The Obsolete Theory of Crown Unity in Canada and Its Relevance to Indigenous Claims

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This article examines the application of the theory of the unity of the Crown in Canada in the context of Indigenous peoples. It reveals a consistent retreat by the courts from acceptance of the theory in the late nineteenth century to rejection of it in the second half of the twentieth century. This evolution of the theory's relevance, it is argued, is consistent with Canada's federal structure and eventual independence from the United Kingdom. However, in a startling reversal, the Supreme Court reverted to the theory in its 2014 judgment in Grassy Narrows First Nation v Ontario (Minister of Natural Resources) to support its decision that the provinces have control over natural resource development in the areas of Canada that are covered by the numbered treaties.

L'auteur de cet article examine l'application de la théorie de l'unité de la Couronne au Canada dans le contexte des peuples autochtones. Il révèle une retraite constante de la part des tribunaux de l'approbation de la théorie à la fin du dix-neuvième siècle à son rejet au cours de la deuxième moitié du vingtième siècle. Il soutient que cette évolution de la pertinence de la théorie correspond au régime fédéral canadien et son indépendance ultime du Royaume-Uni. Cependant, dans un renversement surprenant, la Cour suprême est retournée à la théorie dans son arrêt de 2014 dans Première Nation de Grassy Narrows c. Ontario (Ressources Naturelles) pour appuyer sa décision voulant que les provinces ont l'autorité sur l'exploitation des ressources naturelles dans les zones du Canada faisant l'objet de traités numérotés.

* Professor, Osgoode Hall Law School. I am grateful to Michael Asch, Robert Janes, Rarihokwats, Kathy Simo, Roger Townshend, James Tully, and Kerry Wilkins for reading a draft of this article and providing me with very helpful comments. This article examines the theory of Crown unity from the perspective of Canadian constitutional law. I acknowledge that Indigenous peoples in Canada may have very different perspectives, especially where their treaty relationship with the Crown is concerned. The notion that the nation-to-nation treaties they entered into with the Queen or King of the British Empire were somehow unilaterally transformed into domestic treaties with the Crown in Canada as a result of constitutional evolution, as determined by case law discussed in this article, may be unacceptable. I would like to thank Michael Asch for reminding me of this.

For the King has in him two Bodies, viz., a Body natural and a Body politic . . . . [T]he Body politic includes the Body natural, but the Body natural is the lesser, and with this the Body politic is consolidated. So that he has . . . a Body natural and a Body politic together indivisible; and these two bodies are incorporated in one Person, and make one Body and not diverse, that is the Body corporate in the Body natural, et e contra the Body natural in the Body corporate.

Case of the Duchy of Lancaster (1562) 1 Plowden's Reports 212

Her Majesty's a pretty nice girl
But she changes from day to day.

John Lennon and Paul McCartney (1969)

The orthodox theory is well-known and used to be generally accepted: there is only one Crown in Canada, though the Crown acts through various ministers and other officials at both the federal and provincial levels of government. But, does this theory make sense? Who or what exactly is the Crown? Does the Crown have legal personality and, if so, on what basis? Moreover, what impact has the theory had on the Aboriginal and treaty rights of the Indigenous peoples of Canada? The recent decision of the Supreme Court of Canada in *Grassy Narrows First Nation v Ontario (Minister of Natural Resources)*[1] provides some insight into the last question, revealing that the theory's impact on Indigenous rights tends to be negative.

Grassy Narrows First Nation involved Treaty 3, entered into in 1873 between "Her Most Gracious Majesty the Queen of Great Britain and Ireland, by her Commissioners, . . . and the Saulteaux Tribe of Ojibbeway Indians, inhabitants of the country within the limits hereinafter defined and described, by their Chiefs."[2] A clause of the treaty provides:

> Her Majesty further agrees with her said Indians, that they, the said Indians, shall have [the] right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by her Government of her Dominion of Canada, and saving and excepting such tracts as may, from time to time, be required or taken up for settlement, mining, lumbering or other purposes, by her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefor by the said Government.[3]

1 2014 SCC 48, 372 DLR (4th) 385 [*Grassy Narrows First Nation*].

2 Treaty 3, in Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Toronto: Belfords, Clarke & Co, 1880, reprinted Toronto: Coles Publishing Company, 1979), 320-26 at 320, online: <www.aadnc-aandc.gc.ca/eng/1100100028675/1100100028679>.

3 *Ibid* at 323.

The main issue in *Grassy Narrows First Nation* was whether the taking-up authority in this clause could be exercised by the government of Ontario, without the government of Canada's participation or consent, after the lands in question were included in the Province of Ontario by the northern extension of Ontario's boundary in 1912.[4] In a unanimous judgment delivered by Chief Justice McLachlin, the Supreme Court decided that Ontario, and Ontario alone, can take up Treaty 3 lands within the province, as long as the government of Ontario consults with the First Nations whose rights would be affected and accommodates them in appropriate circumstances.[5] There is no role for Canada in this process. If, however, "the taking up leaves the Ojibway with no meaningful right to hunt, fish or trap in relation to the territories over which they traditionally hunted, fished, and trapped, a potential action for treaty infringement will arise."[6]

In deciding that Ontario alone can take up lands, McLachlin CJC implicitly endorsed the concept of the unity of the Crown: "although Treaty 3 was negotiated by the federal government, it is an agreement between the Ojibway and the Crown. The level of government that exercises or performs the rights and obligations under the treaty is determined by the division of powers in the Constitution."[7] In reaching this conclusion, she cited the opinion of the Privy Council in *St. Catherine's Milling and Lumber Company v. The Queen*,[8] where, she said, "Lord Watson concluded that Treaty 3 purported to be 'from beginning to end a transaction between the Indians and the Crown', not an agreement between the government of Canada and the Ojibway people."[9] In another passage, the Chief Justice put it this way:

> The view that only Canada can take up, or authorize the taking up of, lands under Treaty 3 rests on a misconception of the legal role of the Crown in the treaty context. It is true that Treaty 3 was negotiated with the Crown in right of Canada. But that does not mean that the Crown in right of Ontario is not bound by and empowered to act with respect to the treaty.[10]

4 By the *Ontario Boundaries Extension Act*, SC 1912, c 40.

5 In accordance with *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, [2005] 3 SCR 388 [*Mikisew Cree First Nation*].

6 *Grassy Narrows First Nation*, *supra* note 1 at para 52.

7 *Ibid* at para 30. See also the decision of the Ontario Court of Appeal that was affirmed by the Supreme Court, *Keewatin v Ontario (Minister of Natural Resources)*, 2013 ONCA 158, 114 OR (3d) 401 [*Keewatin*].

8 (1888), 14 App Cas 46 [*St. Catherine's Milling*].

9 *Ibid* at 60, as quoted by McLachlin CJC in *Grassy Narrows First Nation*, *supra* note 1 at para 33.

10 *Grassy Narrows First Nation*, *supra* note 1 at para 32.

In this article, I will examine how the theory of unity of the Crown was applied in Canada prior to the *Grassy Narrows First Nation* decision, especially where Indigenous peoples were concerned. While examining the matter historically, I will also attempt to explain the doctrinal underpinnings of the theory, with emphasis on the common law requirement that rights and obligations be vested in a juristic entity with legal personality. I will suggest that the theory makes no sense in Canada's federal context, and should not have been transported here by Privy Council judges whose constitutional mindset was English. I will conclude by critiquing the Supreme Court's revival of the theory to support its decision in *Grassy Narrows First Nation*.

1. Early Application of the Theory in Canada

(a) *Attorney General of Ontario v Mercer*

The first important Canadian case of which I am aware that has some bearing on this issue of the unity of the Crown is *Attorney General of Ontario v Mercer*.[11] The case involved a dispute between Canada and Ontario over entitlement to land, title to which had become vested in the Crown by escheat when the fee simple titleholder died intestate without heirs.[12] Interpreting several provisions of the *Constitution Act, 1867* (then the *British North America Act, 1867*),[13] the Privy Council decided that the province was entitled to the lands, principally due to section 109, which provides:

> All lands, mines, minerals, and royalties belonging to the several provinces of Canada, Nova Scotia, and New Brunswick, at the Union, and all sums then due or payable for such lands, mines, minerals, or royalties, shall belong to the several provinces of Ontario, Quebec, Nova Scotia, and New Brunswick, in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the province in the same.[14]

Although the Lord Chancellor (the Earl of Selborne), delivering the opinion, suggested that the term "lands" in this section may not include the right to

11 (1883), 8 App Cas 767 [*Mercer*].

12 The case was commenced by an information laid by the Attorney General of Ontario to recover possession of the escheated lands from the defendant Mercer and others, but after Ontario succeeded at trial Canada appealed in the name of the defendant, whereupon the action proceeded to determine the question of whether Ontario or Canada was entitled to lands in the province that escheated to the Crown.

13 30 & 31 Vic, c 3.

14 *Ibid*, s 109.

escheat,[15] he nonetheless decided that "royalties," broadly interpreted, does encompass this right. Accordingly, lands that escheat to the Crown, whether before or after Confederation, belong to the province in which they are located, not to Canada.

The Lord Chancellor did not mention the unity of the Crown in reaching this conclusion. However, when basing his decision on statutory interpretation, he begged the question of how "lands, mines, minerals, and royalties" can "belong" to a province. Does this mean that each province has legal personality, so that it can hold property? In the common law, legal rights — especially property rights — can only be vested in juristic persons, whether natural (living human beings) or artificial (corporations).[16] In England, the dual capacity of the King or Queen was acknowledged and explained in the sixteen century by inventing the concept of his or her two bodies: the natural body, which can live and die and own property as a natural person, and the body politic — the Crown — which does not die and which owns property as a corporation sole.[17] But while this ingenious device may work, however awkwardly,[18] in England, how does a province, or indeed the Dominion of Canada, fit into the scheme?

15 This is questionable (see Sir Frederick Pollock and Frederic William Maitland, *The History of English Law before the Time of Edward I*, 2nd ed (Cambridge: Cambridge University Press, 1898), vol II, 82: "Escheat . . . can hardly be described as [a mode] by which property rights are acquired. The lord's rights have been there all along; the tenant's rights disappear; the lord has all along been entitled to the land; he is entitled to it now, and, since he has no tenant, he can enjoy it in demesne."), but for our purposes it is irrelevant.

16 See Sir Robert Megarry and HWR Wade, *The Law of Real Property*, 5th ed (London: Stevens & Sons Limited, 1984), 49-52.

17 See *Case of the Duchy of Lancaster* (1562) 1 Plow 212 (QB); *Willion v Berkley*, (1561) 1 Plow 223 (CP). For detailed discussion, see Ernst H Kantorowicz, *The King's Two Bodies: A Study in Mediaeval Political Theology* (Princeton, NJ: Princeton University Press, 1957). See also Paul Lordon, *Crown Law* (Toronto: Butterworths, 1991), 1-5. For a definition of corporation sole, see Megarry and Wade, *supra* note 16 at 51: "A corporation sole consists of a single individual holding an office which has a perpetual succession."

18 See FW Maitland, "The Crown as Corporation Sole" (1901) 17 Law Q Rev 131-46, reprinted in HAL Fisher, ed, *The Collected Papers of Frederic William Maitland* (Cambridge: Cambridge University Press, 1911), vol III, 244-70, and David Runciman and Magnus Ryan, eds, *F.W. Maitland: State, Trust and Corporation* (Cambridge: Cambridge University Press, 2003), 32-48 [Maitland, "Crown as Corporation," cited to Fisher], arguing that the concept of corporation sole had been invented in an attempt (unsuccessful, in Maitland's learned opinion) to rationalize the anomalous situation of the parish parson, whose right to the glebe passed to his successor (not to his heirs), even though a successor would not be named until after his death: see FW Maitland, "The Corporation Sole" (1900) 16 Law Q Rev 335-54, reprinted in Fisher, *ibid*, vol III, 210-43, and Runciman and Ryan, *ibid*, 9-30. Sir Frederick Pollock, in the 6th edition of his *First Book of Jurisprudence* (London: MacMillan and Co, 1929), at 121, cited these two articles by Maitland and wryly observed: "In England we now say that the Crown is a corporation, though this is an innovation made in an age of pedantry, and seems to be of no real use."

(b) *St. Catherine's Milling and Lumber Company v The Queen*

Lord Watson attempted to answer this question in *St. Catherine's Milling*.[19] As is well known, the case decided that the beneficial interest in the lands in Ontario that are covered by Treaty 3 belonged to the province, not to the Dominion of Canada, after the surrender provision in the treaty removed the burden of the Ojibway's Aboriginal title from the Crown's underlying title. In reaching this conclusion, the Privy Council relied on section 109 of the *Constitution Act, 1867*.[20] Lord Watson stated:

> The Crown has all along had a present proprietary estate in the land, upon which the Indian title was a mere burden. The ceded territory was at the time of the union, land vested in the Crown, subject to "an interest other than that of the Province in the same," within the meaning of sect. 109; and must now belong to Ontario in terms of that clause . . . .[21]

On what this provision means when it says that the lands "belong to Ontario" after the Aboriginal title was surrendered by Treaty 3, Lord Watson observed:

> In construing these enactments [of the *Constitution Act, 1867*], it must always be kept in view that, wherever public land with its incidents is described as "the property of" or as "belonging to" the Dominion or a Province, these expressions merely import that the right to its beneficial use, or to its proceeds, has been appropriated to the Dominion or the Province, as the case may be, and is subject to the control of its legislature, the land itself being vested in the Crown.[22]

This passage is a clear expression of the theory of the unity of the Crown, as applied in Canada's federal context. Public property is held by a single juristic entity, the Crown,[23] which we know has legal personality and

19 *St. Catherine's Milling*, *supra* note 8.

20 *Supra* note 13.

21 *St. Catherine's Milling*, *supra* note 8 at 58-59. Note that Lord Watson's view that the Crown has "a present proprietary estate" in land that is subject to Aboriginal title and that such land is "vested in the Crown" has been rejected by the Supreme Court of Canada: see *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 3 CNLR 362 [*Tsilhqot'in Nation*], at paras 70-71, 110-16.

22 *St. Catherine's Milling*, *supra* note 8 at 56.

23 The term "Crown" appears as a noun only once in the *Constitution Act, 1867*, *supra* note 13, in the Preamble: "Whereas the Provinces of Canada, Nova Scotia and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom." Used as an adjective in the phrase "Commissioner of Crown Lands," the term appears in sections 63, 83, 134, and 135, in each instance in reference to the member of the executive occupying that office before Confederation in the Province of Canada and after Confederation in the provinces

perpetual succession as a corporation sole (though Lord Watson did not refer to it as such). But what of the provinces that were united and formed by the *Constitution Act, 1867*, and the Dominion of Canada that was created by the same statute — do they lack legal personality? If they have legal personality, why can't they own land in their own right? If they don't have legal personality, how can they have a beneficial interest in lands owned by the Crown? And yet, according to Lord Watson, they clearly can have such an interest. He said this:

> The enactments of sect. 109 are, in the opinion of their Lordships, sufficient to give to each Province, subject to the administration and control of its own Legislature, the entire beneficial interest of the Crown in all lands within its boundaries, which at the time of the union were vested in the Crown, with the exception of such lands as the Dominion acquired right to under sect. 108, or might assume for the purposes specified in sect. 117.[24]

Apparently, the legal position regarding public lands was the same after Confederation as before. Referring to the *Act of Union*[25] that united Upper and Lower Canada in 1840, Lord Watson said:

> By an Imperial statute passed in the year 1840 . . . , the provinces of Ontario and Quebec, then known as Upper and Lower Canada, were united under the name of the Province of Canada, and it was, *inter alia*, enacted that, in consideration of certain annual payments which Her Majesty had agreed to accept by way of civil list, the produce of all territorial and other revenues at the disposal of the Crown arising in either of the united Provinces should be paid into the consolidated fund of the new Province. There was no transfer to the Province of any legal estate in the Crown lands, which continued to be vested in the Sovereign; but all moneys realized by sales or in any other manner became the property of the Province. In other words, all beneficial interest in such lands within the provincial boundaries belonging to the Queen, and either producing or capable of producing revenue, passed to the Province, the title still remaining in the Crown. That continued to be the right of the Province until the passing of the *British North America Act, 1867*.[26]

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of Ontario and Quebec. This usage assumes that public lands in the provinces were Crown lands, before and after Confederation. If "Crown" means the same thing in these sections as in the Preamble, it evidently refers to "the Queen," the term commonly used throughout the Act to refer to Her Majesty in her official capacity.

24 *St. Catherine's Milling*, *supra* note 8 at 57-58. See also *ibid* at 59. Section 108 of the *Constitution Act, 1867* (*supra* note 13) provides that "[t]he Public Works and Property of each Province, enumerated in the Third Schedule to this Act, shall be the Property of Canada." Section 117 gives Canada the right "to assume any Lands or Public Property required for Fortifications or for the Defence of the Country."

25 3 & 4 Vic, c 35.

26 *St. Catherine's Milling*, *supra* note 8 at 55. Cf Lord Watson's observations on the *Constitution Act, 1867*, in *Liquidators of the Maritime Bank of Canada v Receiver-General New Brunswick*, [1892] AC

In this passage, Lord Watson appears to have used the terms "Her Majesty," "the Queen," "the Sovereign," and "the Crown" interchangeably — they all refer to the Queen in her official capacity as the sovereign of her overseas colonies as well of the United Kingdom and as the owner of Crown lands, wherever situated within her dominions.[27]

Frederic William Maitland, with his usual directness and wit, took Lord Watson to task for being a "lawyer with theories in his head" and "placing a legal estate in what he calls the Crown or Her Majesty."[28] The *British North America Act, 1867*, Maitland wrote, contains "courageous words," such as: "Canada shall be liable for the Debts and Liabilities of each Province existing at the Union" (section 111); "[t]he several Provinces shall retain all their respective Public Property not otherwise disposed of in this Act" (section 117); "[n]o Lands or Property belonging to Canada or any Province shall be liable to Taxation" (section 125), etc.[29] But, as a result of Lord Watson's decision in *St. Catherine's Milling*, Maitland observed that

> . . . we have to distinguish the lands vested in the Crown "for" or "in right of" Canada from lands vested in the Crown "for" or "in right of" Quebec or Ontario or British Columbia, or between lands "vested in the Crown as represented by the Dominion" and lands "vested in the Crown as represented by a Province." Apparently "Canada" or "Nova Scotia" is person enough to be the Crown's *cestui que trust* and at the same time the Crown's representative, but is not person enough to hold a legal estate. It is a funny jumble, which becomes funnier still if we insist that the Crown is a legal fiction.[30]

To this we might add that, not only can provinces have a beneficial interest in Crown lands, but according to Lord Watson they also have "the property" in moneys obtained from the sale of these lands. Apparently, the provinces have legal personality for some purposes, but not for others.

437, at 441-42 [*Maritime Bank of Canada*], quoted in note 58 *infra*.

27 The distinction between land owned by the Queen in her official capacity as corporation sole and land owned by her in her personal capacity as a natural person is vital. When she dies, the latter goes to her heir whereas the former goes to her successor. See *Mercer*, *supra* note 11 at 778-79.

28 Maitland, "Crown as Corporation," *supra* note 18 at 264.

29 *Ibid* at 263.

30 *Ibid* at 264-65. See also Bora Laskin, *The British Tradition in Canadian Law* (London: Stevens & Sons, 1969), at 118, commenting on the "sophistry" reflected in Lord Watson's judgment by "emphasis on Her Majesty personally as being vested with title to property, whether it was that of Canada or of a Province, but acknowledging that different administrating persons or bodies would wield effective control." Laskin observed: "This simply confused the Crown as executive and the Crown as personification of the state, but contributed nothing to its evident differentiation as federal and provincial executive. It was a lingering grasp of unreality which no longer has any international legal significance since Canada can contract with foreign states independently" (*ibid*).

2. Modern Case Law

(a) *The Queen v The Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta*

The issue of the divisibility of the Crown was revisited by the English Court of Appeal in *The Queen v The Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta*.[31] That case involved a challenge by the Indian Association of Alberta, the Union of New Brunswick Indians, and the Union of Nova Scotian Indians to patriation of Canada's Constitution in 1982. Briefly, those First Nation organizations objected to patriation because they thought it would violate the direct relationship the Indian nations have with the Queen of the United Kingdom and interfere with her obligations to them, established by solemn declarations and agreements such as the *Royal Proclamation of 1763*[32] and the historical treaties. The Court of Appeal, while sympathetic to their position, decided that responsibility for Indian affairs had been entirely transferred from the government of the United Kingdom to the Canadian government by devolution of constitutional authority. Any obligations of the Crown to the First Nations were therefore owed by the Crown in right of Canada, not the Crown in right of the United Kingdom. Accordingly, there was no basis in law for the plaintiffs to object to patriation.

In reaching this decision, the judges re-examined the old theory of the unity of the Crown and concluded that its application had been modified in the context of the British Commonwealth. Lord May said this:

> Although at one time it was correct to describe the Crown as one and indivisible, with the development of the Commonwealth this is no longer so. Although there is only one person who is the Sovereign within the British Commonwealth, it is now a truism that in matters of law and government the Queen of the United Kingdom, for example, is entirely independent and distinct from the Queen of Canada. Further, the Crown is a constitutional monarchy and thus when one speaks today, and as was frequently done in the course of the argument on this application, of the Crown "in right of Canada," or of some other territory within the Commonwealth, this is only a short way of referring to the Crown acting through and on the advice of Her Ministers in Canada or in that other territory within the Commonwealth.[33]

31 [1982] QB 892, [1981] 4 CNLR 86 [*Indian Association of Alberta*, cited to QB]. See also *Manuel et al v Attorney-General of England*, [1982] 3 CNLR 13 (Ch), aff'd [1982] 3 WLR 821 (Eng CA).

32 6 October 1763, in RSC 1985, App II, No 1.

33 *Indian Association of Alberta*, *supra* note 31 at 928.

Lord Denning observed that "in the 18th and 19th centuries it was a settled doctrine of constitutional law that the Crown was one and indivisible. The colonies formed one realm with the United Kingdom, the whole being under the sovereignty of the Crown. The Crown had full powers to establish such executive, legislative and judicial arrangements as it thought fit."[34] The *St. Catherine's Milling* case, he noted, had been decided at a time when the theory of the unity of the Crown still applied. But the constitutional position has changed since then. Lord Denning stated:

> Hitherto I have said that in constitutional law the Crown was single and indivisible. But that law was changed in the first half of this century — not by statute — but by constitutional usage and practice. The Crown became separate and divisible — according to the particular territory in which it was sovereign. This was recognised by the Imperial Conference of 1926 . . . . Thenceforward the Crown was no longer single and indivisible. It was separate and divisible for each self-governing dominion or province or territory.[35]

The case before the Court of Appeal involved separation of the Crown in right of Canada from the Crown in right of the United Kingdom.[36] In that context, Lord Denning was perhaps justified in situating the change in the period leading up to and including the Imperial Conference of 1926, during which time the Dominions began to exercise independence from the United Kingdom in foreign affairs.[37] In so situating the change, His Lordship was also able to avoid disagreeing with Lord Watson's views on the matter in *St. Catherine's Milling*.[38] However, in the domestic context of Canadian federalism, there was no corresponding shift in the constitutional position between the time *St. Catherine's Milling* was decided in 1888 and the Imperial Conference of 1926. Apart from the creation of the new provinces of Saskatchewan and Alberta in 1905 and the retention by Canada of public lands and resources

34 *Ibid* at 911.

35 *Ibid* at 916-17. For authority, Lord Denning cited *R v Secretary of State for Home Department, Ex parte Bhurosah*, [1968] 1 QB 266, where the English CA held that Queen is Queen of Mauritius and so the Crown in right of Mauritius can issue passports, and *Mellenger v New Brunswick Corporation (C.A.)*, [1971] 1 WLR 604, where the same court held that the Queen is Queen of New Brunswick and so the Province has state immunity.

36 See Peter W Hogg, Patrick J Monahan, and Wade K Wright, *Liability of the Crown*, 4th ed (Toronto: Carswell, 2011), at 14, describing the result in *Indian Association of Alberta*, *supra* note 31: "The Crown was thus divisible: the Crown in right of Canada was a separate legal entity from the Crown in right of the United Kingdom."

37 See David E Smith, *The Invisible Crown: The First Principle of Canadian Government*, 2nd ed (Toronto: University of Toronto Press, 2013), at 28-30.

38 See text accompanying notes 21-27 *supra*.

in the Prairie Provinces until 1930,[39] the allocation of public property and division-of-powers as set out in the *Constitution Act, 1867*, remained the same. The Crown in right of Canada and the Crown in right of the four original provinces were conceptually separated in 1867, as made clear by the various provisions of that Act that distributed public property, debts and liabilities between Canada on the one hand and the various provinces on the other.[40] As Maitland suggested, it would make sense to accord legal personality to each of these domestic manifestations of the Crown from the time of Confederation forward, even if the Crown in right of Canada did not have legal personality internationally until it gained control of Canada's foreign affairs.[41]

Unlike Lord Denning, Lord Kerr did not regard the degree of independence of a colony or dominion as having anything to do with the location of the Crown's rights and obligations:

> The situs of such rights and obligations rests with the overseas governments within the realm of the Crown, and not with the Crown in right or respect of the United Kingdom, even though the powers of such governments fall a very long way below the level of independence. Indeed, independence, or the degree of independence, is wholly irrelevant to the issue, because it is clear that rights and obligations of the Crown will arise exclusively in right or respect of any government outside the bounds of the United Kingdom as soon as it can be seen that there is an established government of the Crown in the overseas territory in question. In relation to Canada this had clearly happened by 1867.[42]

Referring to the *Constitution Act, 1867*, his Lordship said this:

> The effect of the 1867 Act and its successors, up to the *Statute of Westminster, 1931*, was accordingly to create an all-embracing federal governmental structure for Canada, which — subject to one point discussed hereafter —

39 This anomaly meant that s 109 of the *Constitution Act, 1867*, quoted in text accompanying note 14 *supra*, did not apply to the Prairie Provinces. This discriminatory treatment was corrected by the Natural Resources Transfer Agreements, given constitutional force by the *Constitution Act, 1930*, 20 & 21 Geo V, c 26 (UK).

40 See text accompanying note 29 *supra*. See also Laskin, *supra* note 30 at 118-19.

41 It is entirely possible for an entity to have legal personality in domestic law but not in international or British Imperial law. For example, Aboriginal nations in Canada apparently did not have legal personality internationally prior to the United Nations Declaration on the Rights of Indigenous Peoples, which may have changed this, but since Crown assertion of sovereignty they have had legal personality in Canadian law for the purpose of holding Aboriginal title, a proprietary right: see *Delgamuukw v British Columbia*, [1997] 3 SCR 1010; *Tsilhqot'in Nation*, *supra* note 21. See discussion in "The Post-*Delgamuukw* Nature and Content of Aboriginal Title," in Kent McNeil, *Emerging Justice: Essays on Indigenous Rights in Canada and Australia* (Saskatoon: University of Saskatchewan Native Law Centre, 2001), 102 at 124-27.

42 *Indian Association of Alberta*, *supra* note 31 at 927.

> was wholly independent and autonomous in relation to all internal affairs.[43]

In relation to the division of powers and of public property, he continued:

> Since the passing of this Act [the *Constitution Act, 1867*] there have been numerous cases, many of which reached the Privy Council, concerning the respective rights and obligations as between the Dominion and the provinces. In the present context the most important ones arose out of the dichotomy between sections 91(24) and 109: whereas the Dominion Government was vested with exclusive legislative power concerning the Indian peoples and the lands reserved for them, the lands themselves, and the usufructuary rights arising out of them, were vested in the provinces.[44]

While not disagreeing expressly with the way Lord Watson had described the meaning of "belong to the several Provinces" in section 109,[45] Lord Kerr nonetheless showed no hesitation in speaking of powers being "vested" in the Dominion government and public property being "vested" in the provinces. I have no doubt that Maitland would have approved of this apparent acknowledgement of the constitutional reality in federal Dominions and of the implied attribution of legal personality to the Crown in right of Canada and to the Crown in right of each of the provinces as separate juristic entities.[46]

Lord Kerr pointed out that the decision in *St. Catherine's Milling*, holding that legislative authority over "Indians, and Lands reserved for the Indians" was vested in the Parliament of Canada while underlying title to those lands was vested in the provinces, resulted in further litigation. The most important cases involved responsibility for fulfillment of the Crown's obligations under the Indian treaties, especially Treaty 3.[47] In *Attorney-General for Canada v Attorney-General for Ontario*,[48] the Privy Council decided that Ontario, although benefiting from the surrender of Aboriginal title by the 1850 Robinson Treaties, had no legal obligation after Confederation to pay

43 *bid* at 924-25. The exception referred to is the reservation and disallowance power in ss 55-56, by which the UK government retained ultimate authority over enactments of the Parliament of Canada.

44 *Ibid* at 925

45 See discussion of *St. Catherine's Milling*, *supra* note 8, in text accompanying notes 21-22 *supra*. Lord Kerr referred to the Privy Council's judgment in that case as authority that s 109, "and the cession under the treaty, vested the whole of the beneficial interest in the land (including its timber, etc.) in the province to the exclusion of the Dominion, notwithstanding the legislative power of the Dominion under section 91(24)": *Indian Association of Alberta*, *supra* note 31 at 925.

46 See also Laskin, *supra* note 30 at 119.

47 For critical discussion of the leading cases, see Leonard Ian Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto Press, 1996), 221-39.

48 [1897] AC 199.

the annuities owing to the Indian parties. The Privy Council came to the same conclusion with regard to the annuities payable under Treaty 3 in *Dominion of Canada v Province of Ontario*.[49] In *Ontario Mining Company and Attorney-General for Canada v Seybold et al. and Attorney-General for Ontario*,[50] the Privy Council left open the question of whether the Province had any obligation to provide lands for the reserves that had been promised to the Saulteaux Tribe by the terms of Treaty 3.[51]

This litigation between the Dominion of Canada and the Province of Ontario over responsibility for promises made in the treaties reveals even more clearly that the Crown in right of Canada and the Crown in right Ontario are separate juristic entities with distinct legal personalities, for otherwise how could they sue one another?[52] The issue usually got finessed by the technique of bringing the action in the name of and against attorneys general rather than the Queen or King, but that could not hide the reality of what was taking place: the legal actions were really between two governments acting on behalf of two Crowns, one in right of Canada and the other in right of Ontario.[53] Using attorneys general as plaintiff and defendant was little more than a semantic slight-of-hand in the style of cause to avoid the appearance of the Crown suing itself and to side-step the issue of the legal personality of Canada and Ontario.[54]

(b) *Mitchell v Peguis Indian Band*

In *Mitchell v Peguis Indian Band*,[55] the Supreme Court addressed the issue of the

49 [1910] AC 637.

50 [1903] AC 73.

51 The case decided that Canada was unable on its own to fulfill its treaty obligation to create reserves, as the beneficial interest in the lands surrendered by Treaty 3 had vested in the Crown in right of Ontario, as held by the Privy Council in the *St. Catherine's Milling* case: see text accompanying notes 19-21 *supra*. The matter was resolved by federal-provincial agreements, culminating in 1924: see Peter A Cumming and Neil H Mickenberg, eds, *Native Rights in Canada*, 2nd ed (Toronto: Indian-Eskimo Association of Canada and General Publishing Co, 1972), 230-31. The 1924 agreement was implemented by reciprocal legislation: SC 1924, c 48; SO 1924, c 15.

52 Of course this issue arises in virtually every division-of-powers case involving Canada and a province, not just cases involving Aboriginal peoples and their land rights: see the many cases discussed in the federalism chapters in Peter W Hogg, *Constitutional Law of Canada* (Toronto: Carswell, Looseleaf Edition) [Hogg, *Constitutional Law*].

53 *Ibid* at 10-3, n 5. See also Hogg, Monahan, and Wright, *supra* note 36 at 14, n 71.

54 An equivalent issue arises where Canada and a province contract with one another, as happens frequently. See Laskin, *supra* note 30 at 122: "it is mere word-playing or play-acting to say that because a person cannot at common law contract with himself, there cannot in law be a contract to which Her Majesty is a party on each side." But to be a party on each side of a contract, the Crown must have more than one legal personality.

55 [1990] 2 SCR 85 [*Mitchell*].

meaning of "Her Majesty" in the context of a section of the *Indian Act*.[56] The provision in question, s. 90(1), deems "personal property that was (a) purchased by Her Majesty with Indian moneys or moneys appropriated by Parliament for the use and benefit of Indians or bands, or (b) given to Indians or to a band under a treaty or agreement between a band and Her Majesty, . . . always to be situated on a reserve." This deeming provision relates to section 87, which exempts the property of an Indian or band situated on a reserve from taxation, and section 89 (the section involved in the case), which provides that such property "is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian." The litigation involved money owed by the Province of Manitoba to the Peguis Indian Band and other First Nations under an agreement by the Province to refund taxes improperly collected on electricity supplied to their reserves. Before the money was paid to the First Nations, the appellants obtained a pre-judgment garnishing order against it for a sum allegedly owing to them for negotiating the tax refund agreement. The First Nations denied liability, *inter alia* on the ground that the agreement had not been obtained through the appellants' efforts, but the issue of their liability to pay had not yet gone to trial.

The case before the Supreme Court involved the legality of the garnishing order, which depended in part on whether the term "Her Majesty" in section 90(1) is limited to the Crown in right of Canada, or encompasses the Crown in right of Manitoba and the other provinces as well. Of the seven Supreme Court justices hearing the appeal, only Dickson CJC was of the opinion that the term included the provincial Crowns so that the money the Province owed to the First Nations was deemed to be located on their reserves and could not be garnished for that reason. Although the other six judges disagreed with this interpretation, they decided in favour of the First Nations nonetheless, mainly on the basis of Crown immunity and construction of the provincial *Garnishment Act*.[57]

For our purposes, the relevance of the *Mitchell* decision lies in the approaches taken by Dickson CJC alone and La Forest J for the rest of the Court to interpretation of "Her Majesty" in section 90(1). Both judges seem to have rejected the suggestion that, as a matter of constitutional law, the Crown is indivisible within Canada. Dickson CJC wrote:

> The Court of Appeal relied on the idea that the Crown was indivisible to hold that "Her Majesty" had to apply to both levels of government. With respect,

56 RSC 1970, c I-6, currently RSC 1985, c I-5.
57 RSM 1970, c G20.

> I cannot adopt that approach. The Court of Appeal's interpretation seems grounded in the belief that there cannot be "two Queens." As Professor Hogg succinctly notes in *Constitutional Law of Canada*, 2nd ed., at p. 216, divisibility of the Crown in Canada does not mean that there are eleven Queens or eleven Sovereigns but, rather, it expresses the notion (at p. 217) of " . . . a single Queen recognized by many separate jurisdictions." Divisibility of the Crown recognizes the fact of a division of legislative power and a parallel division of executive power.[58]

However, the Chief Justice did not think the question of whether "Her Majesty" in section 90(1) includes the provincial Crowns hinges on the issue of the divisibility of the Crown. Instead, this is a question of statutory interpretation that he said could be resolved by applying the principle from *Nowegijick v The Queen* that "doubtful expressions" in treaties and statutes affecting Indians should be interpreted in their favour.[59] In the context of section 90(1), he said this principle is supported by taking the Aboriginal perspective into account:

> [T]he Indians' relationship with the Crown or sovereign has never depended on the particular representatives of the Crown involved. From the aboriginal perspective, any federal-provincial divisions that the Crown has imposed on itself are internal to itself and do not alter the basic structure of Sovereign-Indian relations. This is not to suggest that aboriginal peoples are outside the sovereignty of the Crown, nor does it call into question the divisions of jurisdiction in relation to aboriginal peoples in federal Canada.[60]

La Forest J did not share Dickson CJC's perception of the Aboriginal perspective, at least in modern times. He stated:

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58 *Mitchell*, *supra* note 55 at para 23. Dickson CJC went on to say that, if "a principle so basic" needed to be supported by judicial authority, it could be found in the Privy Council decision in *Maritime Bank of Canada*, *supra* note 26, where Lord Watson stated at 441-42: "The object of the Act [the *British North America Act, 1867*] was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy. That object was accomplished by distributing, between the Dominion and the provinces, all powers executive and legislative, and all public property and revenues which had previously belonged to the provinces." The Chief Justice did not refer to Lord Watson's opinion in the *St. Catherine's Milling* case, delivered just four years earlier, where his Lordship expressed the view that there is just one Crown in Canada: see text accompanying note 22 *supra*. Instead, Dickson CJC found support for the divisibility of the Crown in the judgments in *Indian Association of Alberta*, *supra* note 31, discussed in text accompanying notes 31-54 *supra*. See also *Smith v The Queen*, [1983] 1 SCR 554 at 571 [*Smith*], where Estey J, for a unanimous Court, spoke of "two Crowns" (in the French version, expressed as "la Couronne du chef du Canada et du chef de la province"), while applying *St. Catherine's Milling* in the context of a surrender of reserve lands in New Brunswick.

59 [1983] 1 SCR 29 at 36.

60 *Mitchell*, *supra* note 55 at para 35.

> In arriving at his conclusion that the trial judge was correct in interpreting "Her Majesty" in s. 90(1)(b) as including the provincial Crowns, the Chief Justice sets considerable store on what he takes to be the aboriginal perception of "Her Majesty." With deference, I question his conclusion that it is realistic, in this day and age, to proceed on the assumption that from the aboriginal perspective, any federal-provincial divisions that the Crown has imposed on itself are simply internal to itself, such that the Crown may be considered what one might style an "indivisible entity."[61]

So, while Dickson CJC and La Forest J disagreed over the Aboriginal perception of the Crown, they both appear to have come to the conclusion that the Crown is divisible in Canadian constitutional law.

(c) Osoyoos Indian Band v The Town of Oliver

Osoyoos Indian Band v The Town of Oliver[62] involved an Indian band's authority under the *Indian Act* to tax reserve lands. In 1925, the Province of British Columbia constructed a concrete-lined irrigation canal across the reserve of the Osoyoos Band in the Okanagan Valley. Apparently, this was done without proper legal authority, a problem that Canada addressed in 1957 by issuing an Order in Council that transferred an interest in the reserve land on which the canal was located to the Province. In so doing, Canada relied on section 35 of the *Indian Act*, which authorizes the Governor in Council to consent to the expropriation of reserve lands pursuant to provincial legislation and to "authorize a transfer or grant of such lands to the province."[63] Specifically, the Order in Council provided that

> the Governor General in Council, on the recommendation of the Minister of Citizenship and Immigration, pursuant to the provisions of Section 35 of the *Indian Act*, is pleased hereby to consent to the taking of the said lands [as described in the Order] by the Province of British Columbia and to transfer the administration and control thereof to Her Majesty the Queen in right of the Province of British Columbia.[64]

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61 *Ibid* at para 122. La Forest J continued: "But even accepting that assumption, it does not follow that fairness requires one to proceed on the basis that Indians would be justified in concluding that all property they may acquire pursuant to agreements with that 'indivisible entity' should be automatically protected, regardless of situs, by the exemptions and privileges conferred by ss. 87 and 89 of the *Indian Act*. I have no doubt that Indians are very much aware that ordinary commercial dealings constitute 'affairs of life' that do not fall to be governed by their treaties or the *Indian Act*. Thus I take it that Indians, when engaging in the cut and thrust of business dealings in the commercial mainstream are under no illusions that they can expect to compete from a position of privilege with respect to their fellow Canadians."

62 [2001] 3 SCR 746 [*Osoyoos Indian Band*].

63 RSC 1952, c 149, s 35, currently RSC 1985, c I-5, s 35.

64 Order in Council 1957-577, dated 25 April 1957, as quoted in *Osoyoos Indian Band*, *supra* note 62 at para 6.

The issue before the Supreme Court was whether the effect of the Order was to remove the lands in question from the reserve so that they would not be subject to the property assessment and property taxation by-laws enacted by the Osoyoos Indian Band Council in 1994 pursuant to section 83 of the *Indian Act*. This depended in turn on whether the Order had transferred the fee simple title to the Province, thereby removing the lands from the reserve, or merely granted the Province an easement for irrigation canal purposes, in which case the lands remained part of the reserve.

A majority of the Court, in a judgment delivered by Justice Iacobucci, held that only an easement had been granted, with the result that the lands were still part of the reserve and subject to the property tax by-laws of the Band. Regarding the nature of the interest transferred, Iacobucci J wrote:

> I conclude that the Order in Council is ambiguous. There are no clear words of exclusion or limitation that make plain the extent of the interest being transferred. Some phrases in the recitals suggest that a transfer of a fee simple is contemplated . . ., while others suggest a more restricted interest . . . . Given that the law views property as a bundle of rights, that the Order in Council grants "a portion" of the reserve is not inconsistent with the granting of an easement or a right to use the land "for irrigation canal purposes." A right to use the land for a restricted purpose is part of the bundle of rights that make up the property interest in the reserve and so may be referred to as "a portion" of the reserve.[65]

Iacobucci J thus held that a property interest, albeit less than fee simple, had been transferred from Canada to the Province of British Columbia by the Order. He did not discuss and did not seem to have been concerned about the theoretical indivisibility of the Crown or the question of how the Crown in right of Canada could convey property to the Crown in right of British Columbia. On the contrary, he took it for granted that such a transaction could take place.[66]

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65 *Osoyoos Indian Band*, *supra* note 62 at para 81.

66 Regarding the words "transfer the administration and control" in the Order, Iacobucci J said they "are not determinative of the nature of the interest acquired by the Province in this case. Administrative powers can be ancillary to an easement for irrigation purposes": *ibid* at para 88. He therefore regarded administrative powers over land as distinct from proprietary interests, both of which can be transferred from the Crown in right of Canada to the Crown in right of a province. Compare *Canada (Attorney General) v Higbie and Albion Investments Ltd*, [1945] SCR 385, per Rinfret CJ and Taschereau J, affirming the theory of Crown unity by relying on *St. Catherine's Milling*, *supra* note 8, and other cases, in particular *Saskatchewan Natural Resources Reference*, [1931] SCR 263, where Newcombe J stated at 275: "It is not by grant *inter partes* that Crown lands are passed from one branch to another to the King's government; the transfer takes effect, in the absence of special provision, sometimes by order in council, sometimes by despatch. There is only

Justice Gonthier delivered the opinion of the four dissenting members of the Court in the *Osoyoos Indian Band* case. Unlike the majority, he thought that the Order transferred the fee simple, which he equated with full ownership, to the Province, removing the lands in question from the reserve and thus from the taxation authority of the Osoyoos Band Council. He concluded that, "through the adoption of the Order in Council by the federal government, Her Majesty the Queen in right of the Province of British Columbia obtained full ownership over the lands on which the irrigation canal is situated."[67]

All the judges in *Osoyoos Indian Band* were thus in agreement that property interests can be transferred by Order in Council from the Crown in right of Canada to the Crown in right of British Columbia. This must mean that these Crowns are separate juristic entities, each with legal personality and the capacity to obtain, hold, and transfer property rights.

(d) Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)

In *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*,[68] the Supreme Court went even further than it had in *Osoyoos Indian Band* in dividing the Crown in the context of dealings with Indian reserve lands. In the 1940s, the Beaver Indian Band had surrendered its reserve lands near Fort St. John in British Columbia to the Crown, in accordance with the surrender provisions of the *Indian Act*.[69] In 1948, the federal Department of Indian Affairs (DIA) sold these lands to the Director, the *Veterans' Land Act* (DVLA).[70] Contrary to its own policy and to the interests of the Band to which the Crown owed fiduciary obligations in the context of the surrender,[71] the DIA did not retain the mineral rights when it transferred title to these lands to

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one Crown, and the lands belonging to the Crown are and remain vested in it, notwithstanding that the administration of them and the exercise of their beneficial use may, from time to time, as competently authorized, be regulated upon the advice of different Ministers charged with the appropriate service." Here, Newcombe J was expressing the old view of unity of the Crown and administrative control that was accepted by Rinfret CJ and Taschereau J in *Higbie* in 1945, but that has since been discarded in the more recent decisions examined in this article, until *Grassy Narrows First Nation*, *supra* note 1.

67 *Osoyoos Indian Band*, *supra* note 62 at para 188.

68 [1995] 4 SCR 344 (*Blueberry River Indian Band*). I have chosen to discuss this case after *Osoyoos Indian Band* rather than chronologically because *Osoyoos*, like *Mitchell*, involved division between the Crown in right of Canada and the Crown in right of a province, whereas *Blueberry River* involved a division within the federal government itself.

69 RSC 1927, c 98, ss 50-54, currently RSC 1985, c I-5, ss 37-41.

70 SC 1942, c 33.

71 See *Guerin v The Queen*, [1984] 2 SCR 335 [*Guerin*].

the DVLA. After the DVLA in turn transferred its title to veterans, oil and gas were discovered on the lands. The Beaver Indian Band and its successors (the plaintiffs in this case) received no benefit from this discovery.

In this action for breach of the Crown's fiduciary obligations, the Supreme Court held that the DIA breached these obligations when it transferred the surrendered lands to the DVLA without reserving the mineral rights. However, recovery for this breach was barred by the applicable statutory limitation period. The Court nonetheless held that the DIA breached the Crown's fiduciary obligations again when it failed to recover the mineral rights from the DVLA prior to the conveyances to the veterans, as the DIA could and should have done after becoming aware that the mineral rights might be of value, by invoking section 64 of the *Indian Act*, which empowered the Superintendent General of Indian Affairs to cancel any sale of Indian land and resume the land if the sale was made "in error or mistake."[72]

The relevance of this decision to the unity of the Crown arises from an argument made by the plaintiffs in relation to the nature of the 1948 transfer of the lands from the DIA to the DVLA. McLachlin J, as she then was, summarized the argument as follows:

> [T]he Bands argue that the 1948 transfer to the DVLA was not a transfer at all, but merely an administrative allocation within the bosom of the unified Crown. Thus, the Crown's fiduciary duty continued, although it was transferred for administrative purposes to the DVLA after 1948. Consequently, the cause of action did not arise until the land was alienated from the DVLA to the veterans.[73]

Justice McLachlin's response is noteworthy:

> I cannot accept this argument. Although the transfer was from one Crown entity to another, it remained a transfer and an alienation of title. First, the transfer converted the Band's interest from a property interest into a sum of money, suggesting alienation. Second, the continuing fiduciary duty proposed for the DVLA is problematic from a practical point of view. Any duty would have applied, at least in theory, both to the mineral rights and the surface rights. Each sale to a veteran would have required the DVLA to consider not only those matters he was entitled to consider under his Act, but sometimes conflicting matters under the *Indian Act*. This would have made the sale in 1948 pointless from the DVLA's point of view and have rendered it impossible

72 *Indian Act*, *supra* note 69, s 64 (RSC 1927). Gonthier and McLachlin JJ, who delivered judgments concurring in result, were in agreement on this issue: *Blueberry River Indian Band*, *supra* note 68 at paras 20-23 (Gonthier J), 112-18 (McLachlin J).

73 *Blueberry River Indian Band*, *supra* note 68 at para 110.

> to administer. Moreover, it is not clear that the DVLA had any knowledge of the fiduciary obligations which bound the DIA. In fact, the DVLA and the DIA acted at arms length throughout, as was appropriate given the different interests they represented and the different mandates of their statutes. In summary, the crystallization of the property interest into a monetary sum and the practical considerations negating a duty in the DVLA toward the Band negate the suggestion that the 1948 transfer changed nothing and that the real alienation came later.[74]

So even though the DIA and the DVLA were both entities of the federal government, McLachlin J treated them as separate and capable of owning and conveying property, both real (the reserve lands) and personal (the money from the sale of the lands). She might have relied on section 5(1) of the *Veterans' Land Act*, which makes the DVLA "a corporation sole" with perpetual succession for "the purposes of acquiring, holding, conveying and transferring . . . property" as authorized by the Act, but she did not do so explicitly, perhaps because the section goes on to provide that, in so doing, the DVLA acts as "the agent of His Majesty in the right of Canada."[75]

3. *Grassy Narrows First Nation v Ontario*: An Aberration?

The modern case law thus reveals a growing tendency to accept the reality that the Crown is divisible in the Commonwealth and within the Canadian federation.[76] The Crown in right of Canada and the Crown in right of each of the provinces are clearly separate juristic entities, each endowed with distinct legal personality.[77] This tendency to view the Crown as divisible has generally worked against the interests of Aboriginal parties. In *Indian Association of Alberta*, where the Aboriginal claimants relied on the unity of the Crown, the English Court of Appeal held that the Crown in right of Canada is a legal entity separate from the Crown in right of the United Kingdom. In *Mitchell*, unity of the Crown would have strengthened the First Nations' argument regarding the meaning

74 *Ibid* at para 111.

75 *Veterans' Land Act*, *supra* note 70, s 5(1). Prior to the surrender, legal title to these reserve lands was "in the Crown" (see the definition of "reserve" in the *Indian Act*, RSC 1927, c 98, s 2(j)), and so the DIA must have been acting on behalf of the Crown in right of Canada when it conveyed legal title to these lands to the DVLA. But how, one might ask, could the DVLA have received title from the Crown in right of Canada as agent of the same Crown? The answer may be found in s 7, which provides that the DVLA may, for the purposes of the Act, "acquire by consent or agreement from His Majesty in the right of Canada or from any province or municipal authority, or from any person, firm or corporation, such lands and buildings situate in any part of Canada ... as the Director may deem necessary." The statute therefore not only provides express authority for the DVLA to acquire lands from the Crown in right of Canada, apparently as agent of the same Crown, but also treats the provinces as separate legal entities from whom the Director can acquire property.

76 See *Halsbury's Laws of England*, 4th ed 2003 Reissue (London: LexisNexis UK, 2003), vol 6, at 424 n 1.

77 Accord Hogg, *Constitutional Law*, *supra* note 52 at 10-3.

of "Her Majesty" in section 90 of the *Indian Act*, but the majority held that even First Nations would not perceive the Crown as an "indivisible entity."[78] While the divisibility of the Crown did not affect the outcome in *Osoyoos Indian Band*, it certainly would have been detrimental to the plaintiffs in *Blueberry River Indian Band* had it not been for section 64 of the *Indian Act*, and it could have a negative impact on First Nations generally by restricting the scope of the Crown's fiduciary obligations within federal government departments.[79]

Yet in the *Grassy Narrows First Nation* case, where divisibility of the Crown clearly would have favoured the First Nation plaintiffs, the judges in both the Ontario Court of Appeal and Supreme Court of Canada reverted to and relied upon the old theory of the unity of the Crown.[80] This reliance is evident in the unanimous judgment of the Court of Appeal that was affirmed by the Supreme Court. After reviewing the relevant Treaty 3 case law, especially *St. Catherine's Milling* where Lord Watson had emphasized the unity of the Crown, the Court of Appeal stated:

> The Ojibway's Treaty partner is the Crown, not Canada. Canada is not a party to the Treaty. The Treaty promises are made by the Crown, not by a particular level of government. The Ojibway may look to the Crown to keep the Treaty promises, but they must do so within the framework of the division of powers under the Constitution.[81]

The Court of Appeal then took the constitutional evolution of Canada into account:

> The taking up clause [in Treaty 3[82]] also has to be interpreted in the light of the process of constitutional evolution from the time of the *Royal Proclamation* in 1763, to the creation of the Province of Canada in 1840, the creation of the Dominion of Canada and the Province of Ontario at Confederation in 1867, and finally, the extension of Ontario's border in 1912. Throughout that process of constitutional evolution, the Crown and the relationship between the Crown and Canada's Aboriginal peoples remains a constant, central and defining feature. What has evolved is the allocation of legislative and administrative powers and responsibilities to different levels of government. In formal terms, what changes with constitutional evolution is the level of

78 *Mitchell*, *supra* note 55 at para 122.

79 See text accompanying note 74 *supra*.

80 Patrick Macklem, in his article "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill LJ 382, found a parallel tendency on the part of the courts to embrace Indigenous difference when it supports the dominant legal paradigm of the Canadian state and to deny Indigenous difference when it does not.

81 *Keewatin*, *supra* note 7 at para 135.

82 See text accompanying note 3 *supra*.

> government on whose advice the Crown acts.[83]

The Court viewed this process of constitutional evolution as continuing up to the present and as informing the interpretation of treaties: "Treaties must be capable of adapting to the natural evolution of the Constitution, which evolves as a 'living tree' to meet 'the changing political and cultural realities of Canadian society'".[84] For the Court, this meant that the power to take up lands in the Treaty 3 area that Canada had added to Ontario by the extension of the provincial boundaries in 1912 passed from the Canadian to the Ontario government by constitutional evolution, even though the Treaty stated that taking up was to be "by her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefor by the said Government."[85]

What is remarkable here is the Court of Appeal's view that constitutional evolution has affected the way treaties are understood and has extended provincial authority in relation to treaty lands, but has not changed "the Crown and the relationship between the Crown and Canada's Aboriginal peoples" — that "remains a constant, central and defining feature."[86] Yet when the plaintiffs in *Indian Association of Alberta* argued that the Crown is a constant in the context of treaties, the English Court of Appeal clearly rejected that argument, holding that the Crown itself had evolved from an indivisible entity into many separate Crowns within the Commonwealth.[87] Moreover, we have seen that

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83 *Keewatin*, *supra* note 7 at para 136.

84 *Ibid*, quoting from *Canadian Western Bank v Alberta*, [2007] 2 SCR 3 at para 23.

85 Treaty 3, *supra* note 2.

86 *Keewatin*, *supra* note 7 at para 136, quoted in greater length in text accompanying note 83 *supra*. Compare *McAteer v Canada (Attorney General)* (2014), 121 OR (3d) 1 [*McAteer*], leave to appeal dismissed [2014] SCCA 444, involving the requirement of an oath to "the Queen" to become a Canadian citizen, at para 48, per Weiler JA for the Court: "The evolution of Canada from a British colony into an independent nation and democratic constitutional monarchy must inform the interpretation of the reference to the Queen in the citizenship oath. As Canada has evolved, the symbolic meaning of the Queen in the oath has evolved."

87 *Indian Association of Alberta*, *supra* note 31, was cited in *Keewatin*, *supra* note 7 at para 138, as authority for the proposition that "treaty interpretation has to evolve along with the constitution," without reference to the English Court of Appeal's opinion that the meaning of the Crown has evolved as well. However, more recently in *McAteer* the Court of Appeal cited Lord Denning's judgment in *Indian Association of Alberta* as authority that the Crown is "separate and divisible for each self-governing dominion or province or territory" (*McAteer*, *supra* note 86 at para 51, quoting from *Indian Association of Alberta* at 917). Delivering the unanimous judgment in *McAteer*, Weiler JA at para 49 also agreed with the application judge's statement that "Her Majesty the Queen in Right of Canada (or Her Majesty the Queen in Right of Ontario or the other provinces), as a governing institution, has long been distinguished from Elizabeth R. and her predecessors as individual people." She continued at paras 50-51: "During the heyday of the Empire, British constitutional theory saw the Crown as indivisible . . . . However, as Canada developed as an independent federalist state, the conception of the Queen (commonly referred to as the Crown)

the Supreme Court of Canada, in *Mitchell*, *Osoyoos Indian Band*, and *Blueberry River Indian Band*, has treated the Crown as divisible. One would therefore have thought the Supreme Court would have disagreed with the Ontario Court of Appeal on this issue.

That is not what happened. The Supreme Court not only affirmed this aspect of the Ontario Court of Appeal's decision, but went even further. As we have seen, the Supreme Court agreed that Treaty 3 was with the Crown, not with Canada, and that Ontario — and Ontario alone — has the constitutional authority to exercise the taking-up power. But the Supreme Court also decided an issue that the Court of Appeal had left unresolved, namely that section 91(24) of the *Constitution Act, 1867* and the doctrine of interjurisdictional immunity[88] do not prevent the Province from justifiably infringing the treaty right to hunt and fish, which could happen if the taking up of lands left no meaningful scope for the exercise of that right.[89] In so deciding, the Supreme Court relied, without discussion, on its own judgment in *Tsilhqot'in Nation*[90] from two weeks earlier,[91] in which it overruled its decision in *R. v Morris*[92] on the protection provided to treaty rights by section 91(24) and interjurisdictional immunity.[93]

But what is this entity, "the Crown," with whom both the Ontario Court of Appeal and the Supreme Court said the treaty had been made? We have seen that the notion of the Crown as a single abstract entity with legal personality as a corporation sole made some sense in England, but with the creation of the Canadian federation in 1867 and the subsequent development of the Commonwealth, the notion became conceptually and practically unworkable. Lord Watson's reliance on the unity of the Crown in the Canadian context in *St. Catherine's Milling* in 1888 was probably already an anachronism,

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evolved . . . . Moreover, the Crown may for some purposes fall within provincial power under s. 92 of the *Constitution Act, 1867*, and for other purposes fall within federal power under s. 91. For the purposes of Canadian federalism, the Crown therefore cannot be viewed as a single indivisible entity." Given the discrepancy between *Keewatin* and *McAteer* (decided just 18 months apart) on the issue of the divisibility of the Crown, is it indiscreet to point out that none of the judges from *Keewatin* sat on *McAteer*?

88 Briefly, this doctrine protects a core of federal jurisdiction under s 91(24) and other heads of federal legislative authority from provincial laws, even in the absence of federal legislation occupying the field: see Hogg, *Constitutional Law*, *supra* note 52 at 15-28 to 15-38.8.

89 *Grassy Narrows First Nation*, *supra* note 1 at para 52: see text accompanying note 6 *supra*.

90 *Supra* note 21.

91 *Grassy Narrows First Nation*, *supra* note 1 at para 53.

92 [2006] 2 SRC 915.

93 The Supreme Court's deviation in *Tsilhqot'in Nation* and *Grassy Narrows First Nation* from earlier precedents on the application of the doctrine of interjurisdictional immunity in the context of s 91(24) is discussed in Kent McNeil, "Aboriginal Title and the Provinces after *Tsilhqot'in Nation*" (2015) 71 Supreme Court L Rev (2d), forthcoming [McNeil, "Aboriginal Title and the Provinces"].

but in any case by the time of the *Statute of Westminster* in 1931 the Crown had clearly been divided into separate juristic entities, as acknowledged by the English Court of Appeal in *Indian Association of Alberta*. Within Canada this separation, which should have operated at the federal and provincial levels from the time of Confederation, is expressed by the terminology "the Crown in right of Canada," "the Crown in right of Ontario," etc., and is evidenced by division-of-powers litigation and federal-provincial agreements.[94] Yet Chief Justice McLachlin concluded in *Grassy Narrows First Nation* that "[t]he treaty, as discussed, was between the Crown — a concept that includes all government power — and the Ojibway."[95] The problem with this, in my view, is that the Crown as a "concept that includes all government power" cannot have legal personality in our federal system. So how could this conceptual entity be party to a treaty? The Supreme Court nonetheless relied on the old notion of a unified Crown from *St. Catherine's Milling* — when its application in Canada already made little sense, as Maitland pointed out — and used it to justify an interpretation of Treaty 3 today that flies in the face of the express words of the Treaty.[96]

4. Conclusion

Our examination of the case law relating to the theory of the unity of the Crown in the context of the Indigenous peoples of Canada reveals progression from rigid application of the theory in *St. Catherine's Milling*, through explicit rejection of the theory's applicability in the context of Canada's federal structure

94 See Laskin, *supra* note 30 at 122; Hogg, *Constitutional Law*, *supra* note 52 at 10-3 n 5; Smith, *supra* note 37 at 153. Compare Lordon, *supra* note 17 at 282-83. See e.g. An Agreement between the Government of Canada and the Government of the Province New Brunswick respecting Indian Reserves, 25 March 1958, confirmed by SC 1959, c 47, and SNB 1958, c 4. Section 3 of the Agreement provides: "New Brunswick hereby transfers to Canada all rights and interests of the Province in reserve lands except lands lying under public highways, and minerals." In *Smith*, *supra* note 58, the Supreme Court apparently had no difficulty concluding that this Agreement transferred legal title to reserve lands in New Brunswick from the provincial to the federal government. For a traditional explanation of the legal nature of federal-provincial agreements, see David W Mundell, "Legal Nature of Federal and Provincial Executive Governments: Some Comments on Transactions Between Them" (1960) 2 Osgoode Hall LJ 56 at 70-75.

95 *Grassy Narrows First Nation*, *supra* note 1 at para 39.

96 Interestingly, in its recent decision in *McAteer*, *supra* note 86, the Ontario Court of Appeal has provided additional insight into its conception of "the Queen" (which Weiler JA at para 51 said is "commonly referred to as the Crown"), in the context of the citizenship oath. *Inter alia*, Weiler JA observed at para 54: "Although the Queen is a person, in swearing allegiance to the Queen of Canada, the would-be citizen is swearing allegiance to a symbol of our form of government in Canada. This fact is reinforced by the oath's reference to 'the Queen of Canada,' instead of 'the Queen.' It is not an oath to a foreign sovereign. Similarly, in today's context, the reference in the oath to the Queen of Canada's 'heirs and successors' is a reference to the continuity of our form of government extending into the future."

and independence from the United Kingdom in *Indian Association of Alberta*, to disregard of the theory's relevance in the context of transfers of reserve lands in *Osoyoos Indian Band* and *Blueberry River Indian Band*. Leading constitutional scholars generally concur in dismissing the theory's application within Canada.[97] In 1969, Justice Bora Laskin, then a member of the Ontario Court of Appeal and later Chief Justice of Canada, wrote:

> Her Majesty has no personal physical presence in Canada . . . and only the legal connotation, the abstraction that Her Majesty or the Crown represents, needs to be considered for purposes of Canadian federalism . . . . Where it is necessary to personify the state, whether it be Canada or a Province, the common reference to the Crown has been modified by the addition of an identifying phrase "in right of Canada" or in right of the particular Province. This is recognition that it makes no sense juristically to insist that it is the same Crown that is meant when in fact it is not Her Majesty who is involved.[98]

Similarly, Peter Hogg, in the first edition of his influential text, *Constitutional Law of Canada*, wrote in 1977:

> There is only one individual at any time who is the Queen (or King). The Crown accordingly has a monolithic connotation, which has sometimes been articulated in dicta such as that the Crown is "one and indivisible." For nearly all purposes the idea of the Crown as one and indivisible is thoroughly misleading . . . . In a federal system, such as Canada's, it is frequently necessary to distinguish one government from another. The federal government is the Crown in right of Canada (or the Dominion), of course, and each of the provincial governments is the Crown in right of Ontario or whichever province it may be. Each province, and the Dominion, has a separate legal existence, evidenced by a separate treasury, separate property, separate employees, separate courts, and a separate set of laws to administer.[99]

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97 Contrast Mundell, *supra* note 94. Mundell provided a useful doctrinal description of the application of the theory of the unity of the Crown (though he preferred the term "Her Majesty") in Canada as of 1960, the purpose which he admitted was "purely explanatory": *ibid* at 56.

98 Laskin, *supra* note 30 at 118-19. See also the quotation accompanying note 30 *supra*, where Laskin commented on the unreality of Lord Watson's views on the unity of the Crown in *St. Catherine's Milling* (this part of Laskin's book was relied on extensively by the Ontario Court of Appeal in *McAteer*, *supra* note 86 at paras 50-51). Later, Laskin CJC observed in *Alberta v Canadian Transport Commission*, [1978] 1 SCR 61 at 71: "There may be something to be said for the view that, having regard to the nature of Canada's federal system, the notion of the indivisibility of the Crown should be abandoned. The Constitution of Canada distributes legislative power between a central Parliament and provincial Legislatures and prerogative or executive power (which is formally vested in the Queen) is similarly distributed to accord with the distribution of legislative power, thus pointing to different executive authorities."

99 Peter W Hogg, *Constitutional Law of Canada*, Student Edition (Toronto: Carswell, 1977), 164. Hogg, Monahan, and Wright, *supra* note 36 at 13-14, contains a very similar passage, while adding at 15 that the usage "the Crown 'in right of' . . . is obviously suggestive of indivisibility, but the suggestion must be resisted. Each government is a separate legal entity. In asking whether the

Professor Hogg has maintained essentially the same position up to and including the most recent update of the Looseleaf Edition of his text, with the addition of discussion of the decision of the English Court of Appeal in *Indian Association of Alberta* for further support.[100]

The position stated by Justice Laskin and Professor Hogg makes eminent good sense. As Hogg has maintained, in the Canadian context the concept of a unified Crown is misleading and impractical. The reality is that a single Crown no longer exists as a juristic person that is somehow different from the governments that have legal rights and exercise constitutional powers in our federal system. Instead, Canada and each of the ten provinces are separate juristic entities with distinct legal personalities. The unified Crown is an abstraction — Maitland called it a legal fiction — that outlived its purpose as a juristic entity long ago and should be relegated to legal history. So although one can still refer to the Crown in general terms — e.g. when speaking of the honour of the Crown or the fiduciary obligations of the Crown — this does not mean that a single juristic entity is meant. Instead, in these contexts the term encompasses the Crown in all its separate manifestations in Canada.[101] In specific instances, one then has to proceed to identify which Crown is involved. In some cases, it will be the Crown in right of Canada,[102] whereas in others it will be the Crown in right of a province.[103] It is those specific, individual Crowns that have legal personality, not "the Crown."[104] This separation was made conceptually possible by the realization in the 16th century that the King or Queen has two bodies — the natural body obviously cannot be divided, but the body politic can and has been.[105]

Crown in right of Ontario, for example, is liable under a contract, we are asking a question about the legal duties of a legal person, the government of Ontario." See also Lordon, *supra* note 17 at 29-34, 293-306; Smith, *supra* 37 at 28-30, 183-84.

100 Hogg, *Constitutional Law*, *supra* note 52 at 10-2 to 10-3.

101 See Lordon, *supra* note 17 at 5-7.

102 See e.g. *Mikisew Cree First Nation*, *supra* note 5, and *Guerin*, *supra* note 71, involving honour of the Crown in right of Canada and federal fiduciary obligations respectively.

103 See e.g. *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511, and *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, [2004] 3 SCR 550, involving honour of the Crown in right of British Columbia.

104 Contrast Mundell, *supra* note 94.

105 See note 17 *supra* and accompanying text. When Aboriginal peoples in Canada contend that their treaties are agreements with the Queen, as argued in *Indian Association of Alberta*, *supra* note 31, they seem to mean the Queen and her successors as living persons. The notion that the Queen is really two or more persons, and that their treaties are with the Queen as a body politic, may not have been understood by people whose societies are kinship-based. Moreover, when Treaty 3 and the other numbered treaties of the 1870s were being negotiated, the treaty commissioners frequently employed kinship language and represented the treaties as agreements with a personal sovereign. An example is Alexander Morris's statement to the assembled chiefs during the Treaty

What then is one to make of the Supreme Court's decision in *Grassy Narrows First Nation*? Quite frankly, I think the Court reverted to unity of the Crown in the treaty context in order to avoid concluding that Treaty 3 was made with the Crown in right of Canada because the Court thought such a conclusion might upset the balance of federalism. If the Treaty was with Canada and the taking-up clause meant what it said, namely that the power to take up Treaty 3 lands could be exercised only by or with the authorization of the Dominion of Canada, this could have had serious implications for the Province of Ontario's control over natural resource development. In my opinion, *Grassy Narrows First Nation* and *Tsilhqot'in Nation* are companion decisions in this respect — recall that they were released just two weeks apart, and so no doubt were being written by Chief Justice McLachlin at roughly the same time. As mentioned earlier, *Tsilhqot'in Nation* reversed *R. v Morris*[106] on the protection provided to treaty rights by section 91(24) of the *Constitution Act, 1867* and the doctrine of interjurisdictional immunity. As *Tsilhqot'in Nation* involved Aboriginal title to land, the implications of the rejection of the application of this doctrine are enormous — it means that provincial laws in relation to resource development can infringe Aboriginal title, as long as the infringement can be justified under the *Sparrow* test.[107]

So *Grassy Narrows First Nation* and *Tsilhqot'in Nation* achieve the same result: in both cases resource development is placed firmly within provincial jurisdiction, regardless of whether the development impacts treaty rights or Aboriginal rights and title. This result was achieved in *Tsilhqot'in Nation* by rejecting the application of the doctrine of interjurisdictional immunity. *Grassy Narrows First Nation* applied this aspect of *Tsilhqot'in Nation*, while empowering Ontario to take up lands by deciding that Treaty 3 is with the Crown, not Canada. Both decisions therefore favour provincial over federal jurisdiction, a result that Canada was as eager as the provinces of Ontario

3 negotiations, in Morris, *supra* note 2 at 58: "I told you I was to make the treaty on behalf of our Great Mother the Queen, and I feel it will be for your good and your children's . . . . We are all children of the same Great Spirit, and are subject to the same Queen." Again, at the beginning of the Treaty 6 negotiations in 1876, Morris said: "You are, like me and my friends who are with me, children of the Queen" (*ibid* at 199). Regarding Treaty 6, Elder Alma Kytwayhat stated that the Queen "offered to be our mother and to love us in the way we want to live": quoted in Harold Cardinal and Walter Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream Is That Our Peoples Will One Day Be Clearly Recognized As Nations* (Calgary: University of Calgary Press, 2000), 34. See also JR (Jim) Miller, "The Aboriginal Peoples and the Crown," in D Michael Jackson and Philippe Lagassé, eds, *Canada and the Crown: Essays on Constitutional Monarchy* (Montreal and Kingston: McGill-Queen's University Press, 2012), 255-69; Michael Asch, *On Being Here to Stay: Treaties and Aboriginal Rights in Canada* (Toronto: University of Toronto Press, 2014), 77-99.

106 *Supra* note 92.

107 *R v Sparrow*, [1990] 1 SCR 1075. See McNeil, "Aboriginal Title and the Provinces", *supra* note 93.

and British Columbia to achieve, as evidenced by the fact that, as a party in these cases, Canada supported the provinces on division-of-powers and interjurisdictional immunity.[108] The losers on the jurisdictional issues in each case were First Nations, whose rights are now subject to justifiable infringement by the provinces.[109]

From the case law, it is thus hard to avoid the conclusion that unity of the Crown tends to get invoked by the courts when it works against Indigenous claimants, but is disregarded when it would assist them. In this context, at least, one has to agree with the Beatles that "Her Majesty . . . changes from day to day,"[110] depending on whose interests are at stake.

108 See Respondent's factum on Behalf of the Attorney General of Canada, in *Tsilhqot'in Nation*, SCC file no. 34986: online <http://www.scc-csc.gc.ca/factums-memoires/34986/FM030_Respondent_Attorney-General-of-Canada.pdf>, especially paras 86-110; Factum of the Respondent (Third Party) the Attorney General of Canada, in *Grassy Narrows First Nation*, SCC file no. 35379: online <http://www.scc-csc.gc.ca/factums-memoires/35379/FM030_Respondent_Attorney-General-of-Canada.pdf>, especially paras 56, 79. 89-103. I find it disturbing that the Attorney General of Canada usually supports the provinces against First Nations in these kinds of cases, even when it means sacrificing federal jurisdiction (does this ever happen in other division-of-powers cases?), but this is a subject for another article.

109 Treaty rights, however, may still be protected against infringing provincial laws by s 88 of the *Indian Act*, RSC 1985, c I-5, as the Supreme Court's judgments in *Tsilhqot'in Nation* and *Grassy Narrows First Nation* did not address this issue. For cases holding that s 88 provides treaty rights with broad protection against provincial laws, see *R v White and Bob* (1964), 50 DLR (2d) 613 (BCCA), aff'd (1964) 52 DLR (2d) 481 (SCC); *Simon v The Queen*, [1985] 2 SCR 387; *R v Sioui*, [1990] 1 SCR 1025. These unanimous decisions were not mentioned, let alone overruled, in *Tsilhqot'in Nation* and *Grassy Narrows First Nation*.

110 I would like to thank my daughter Katie for rekindling my appreciation of the Beatles, leading me to make this link between their lyrics and what Paul McHugh and Lisa Ford have termed "the shapeshifting Crown" in their chapter, "Settler Sovereignty and the Shapeshifting Crown," in Lisa Ford and Tim Rowse, eds, *Between Indigenous and Settler Governance* (Abingdon, Oxon: Routledge, 2013), 23.

Bedford, Substantive Rationality, and Participatory Democracy

*Wayne Renke**

The Supreme Court of Canada is developing doctrines of arbitrariness, overbreadth, and gross disproportionality under the aegis of fundamental justice protection in section 7 of the Canadian Charter of Rights and Freedoms. These doctrines are means to measure the "substantive rationality" of legislation. The author contends that judicial review reliant on these doctrines promotes recognition of marginalized stakeholder interests in the crafting of legislation, respect for the value of each individual in legislation, and bridging of gaps between the legislative processes that we have and those we should have given our commitments to equality under the law. Substantive rationality doctrine promotes participatory democracy. The Supreme Court's Bedfordcase, which struck down several Criminal Code provisions relating to sex trade work, is addressed as a concrete example of the protection of participatory democracy through the application of substantive rationality doctrine.

La Cour suprême du Canada élabore des doctrines arbitraires, de portée excessive et exagérément disproportionnées sous l'égide de la protection de la justice fondamentale dans l'article 7 de la Charte canadienne des droits et libertés. Ces doctrines sont un moyen de mesurer la « rationalité substantive » des dispositions législatives. L'auteur prétend que la révision judiciaire qui dépend de ces doctrines favorise la reconnaissance des intérêts d'intervenants marginalisés dans l'élaboration de dispositions législatives, le respect de la valeur de chaque individu dans les lois et comble le fossé entre les processus législatifs que nous avons et ceux que nous devrions avoir étant donné nos engagements envers l'égalité en vertu de la loi. La doctrine de la rationalité substantive favorise la démocratie participative. La cause Bedford, instruite par la Cour suprême, qui annula plusieurs dispositions du Code criminel se rapportant au travail lié au commerce du sexe, est traitée comme un exemple concret de la protection de la démocratie participative par l'application de la doctrine de la rationalité substantive.

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The Supreme Court's *Bedford* decision[1] has life-altering significance for sex trade workers and is crucial to the prospects of Parliamentary regulation of the sex trade through the *Criminal Code*.[2] In *Bedford*, a unanimous decision written by Chief Justice McLachlin, the Supreme Court struck down three sets of offence provisions relating to the sex trade under the *Charter*[3] and established the framework under which the constitutionality of the new sex trade provisions in the *Protection of Communities and Exploited Persons Act* (Bill C-36) are likely to be determined.[4] The decision addressed numerous issues, including exceptions to *stare decisis*,[5] social fact evidence in *Charter* cases,[6] the "shifting objective" doctrine,[7] and the division of judicial labour between trial and appellate courts.[8] The public interest standing issue was raised at trial,[9] but

1 *Canada (Attorney General) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101, McLachlin CJ [*Bedford*].

2 RSC 1985, c C-46.

3 *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*].

4 *Protection of Communities and Exploited Persons Act*, SC 2014 c. 25 (*An Act to amend the Criminal Code in response to the Supreme Court of Canada decision in Attorney General of Canada v. Bedford and to make consequential amendments to other Acts*), which received Royal Assent on November 6, 2014, after this paper was submitted. In this paper, I am trying to make constitutional sense of the tools used by the Supreme Court in *Bedford*. Applying those tools to Bill C-36 is another project, particularly because of complexities raised by its form of the "Nordic model" of sex trade regulation. I will, however, refer below to a few features of Bill C-36 relevant to my exposition.

5 "The issue of when, if ever, such precedents may be departed from takes two forms. The first 'vertical' question is when, if ever, a lower court may depart from a precedent established by a higher court. The second 'horizontal' question is when a court such as the Supreme Court of Canada may depart from its own precedents:" *Bedford*, *supra* note 2 at para 39. "In my view, a trial judge can consider and decide arguments based on *Charter* provisions that were not raised in the earlier case; this constitutes a new legal issue. Similarly, the matter may be revisited if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate": *ibid* at para 42. See also *Carter v Canada (Attorney General)*, 2015 SCC 5 at paras 44, 46 [*Carter*].

6 "[T]his Court has expressed a preference for social science evidence to be presented through an expert witness …. The assessment of expert evidence relies heavily on the trial judge …. This is particularly so in the wake of the Ontario report by Justice Goudge, which emphasized the role of the trial judge in preventing miscarriages of justice flowing from flawed expert evidence . . . . The distinction between adjudicative and legislative facts can no longer justify gradations of deference:" *Bedford*, *supra* note 2 at para 53.

7 *Ibid* at para 132.

8 "When social and legislative evidence is put before a judge of first instance, the judge's duty is to evaluate and weigh that evidence in order to arrive at the conclusions of fact necessary to decide the case. The trial judge is charged with the responsibility of establishing the record on which subsequent appeals are founded. Absent reviewable error in the trial judge's appreciation of the evidence, a court of appeal should not interfere with the trial judge's conclusions on social and legislative facts. This division of labour is basic to our court system. The first instance judge determines the facts; appeal courts review the decision for correctness in law or palpable and overriding error in fact. This applies to social and legislative facts as much as to findings of fact as to what happened in a particular case:" *ibid* at para 49; *Carter*, *supra* note 6 at para 109.

9 *Bedford v Canada (Attorney General)*, 2010 ONSC 4264, Himel J at paras 60-62 [*Bedford (Trial)*]; on the issue of private interest standing, see *ibid* at paras 44-59.

did not figure in the appeal[10] or Supreme Court decisions. I shall address the Supreme Court's use of the section 7 principles of arbitrariness, overbreadth, and gross disproportionality to measure the "substantive rationality" of legislation. My task shall be to take some steps towards an account of these principles' place in the Canadian constitutional framework.

Why should one bother with this task? There is nothing new about the judicial review of legislation under the constitution, whether the *Constitution Act, 1867* or the *Charter*. There is nothing new about the review of legislation under section 7 of the *Charter*. There is nothing new about "overbreadth" arguments under section 7 [11] or "disproportionality" arguments under section 12 of the *Charter*.[12] There is nothing new about "proportionality" assessments, whether under section 1 of the *Charter* or elsewhere in the law. Yet, the sort of review at work in *Bedford* seems to augment the scope of section 7, authorizing legislative policy assessment based on weighing the merits or effectiveness of legislation. And while there is nothing new about the concern that *Charter*-based judicial review threatens the due separation of powers, the new approach to section 7 may appear to support a "judicial activism" that undermines the democratic legislative process.[13]

I do not dispute that the substantive rationality doctrines could be misused and could unbalance constitutional ordering. I shall contend, however, that the substantive rationality analysis exemplified in *Bedford* does not undermine but supports the democratic legislative process. *Bedford*-style judicial review, turning on the doctrines of arbitrariness, overbreadth, and gross disproportionality, identifies and helps to correct defects in the legislative process. It ensures that marginalized stakeholder interests are reasonably taken into account in the crafting of legislation. It ensures that the value of each individual is reflected and respected in legislation. It helps to bridge the gap between the legislative processes that we have and the legislative processes that we should have, given our commitments to equality under the law. In short, it promotes participatory democracy. The Supreme Court's analysis in *Bedford* provides a concrete example of fundamental justice protecting participatory democracy.

10 *Bedford v Canada (Attorney General)*, 2012 ONCA 186 at para 50 [*Bedford (Appeal)*].

11 See e.g. *R v Heywood*, [1994] 3 SCR 761 [*Heywood*] and *R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606 [*Nova Scotia Pharmaceutical Society*].

12 See e.g. *R v Goltz*, [1991] 3 SCR 485 and *R v Smith*, [1987] 1 SCR 1045.

13 Dwight Newman, "The *PHS* Case and Federalism-Based Alternatives to Charter Activism" (2013), 22:1 Const Forum Const 85 at 86-87.

To make out my claims, I shall discuss

(A) the constitutional order that supports the interpretation of section 7;

(B) the *Bedford* applicants' satisfaction of the threshold conditions of section 7;

(C) the failure of the impugned legislation to meet the section 7 standards of substantive rationality; and

(D) the role of section 1 of the *Charter* when legislation fails to meet section 7 substantive rationality standards.

A. The Constitutional Order and Fundamental Justice

The discussion of "fundamental justice" in *Bedford* provides a passageway towards the constitutional order that supports and is supported by the *Charter*. In the *BC Motor Vehicle Act* reference, (then) Justice Lamer had described the principles of "fundamental justice" as "the basic tenets of our legal system."[14] In *Bedford*, Chief Justice McLachlin took up Justice Lamer's guidance, but with some twists: "The *Motor Vehicle Reference* recognized that the principles of fundamental justice are about the basic values underpinning our constitutional order . . . . The principles of fundamental justice are an attempt to capture those values."[15] Notice that McLachlin CJ looked not to "basic tenets" of (or in) our legal system, but to "basic values" that lie beyond and "underpin" not only the "legal system" but "our constitutional order." Chief Justice McLachlin's recasting of Lamer J's advice moves us towards an understanding of not only the principles of fundamental justice at work in *Bedford* but of the principles of our constitutional order.

14 *Re B.C. Motor Vehicle Act*, [1985] 2 SCR 486, Lamer J at 503 [*BC Motor Vehicle Act*].

15 *Bedford*, *supra* note 2 at para 96; *Carter*, *supra* note 6 at para 81. The Chief Justice seems to be engaged in the same project as the German Federal Constitutional Court, as reported by Habermas: "The law is not identical with the totality of written laws. Besides the law enacted by state authorities, under certain conditions an additional element of law can exist that has its source in the constitutional legal order as a whole and is able to work as a corrective to the written law; the task of the judiciary is to find this element and realize it in its decisions" (resolution of February 14, 1973) in Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans William Rehg (Cambridge, Massachusetts: The MIT Press, 1996) at 244 [Habermas, *Between Facts and Norms*]; in the words of Habermas, what are sought are the "architectonic principles of the legal order": *ibid* at 247. For the Federal Constitutional Court, the Basic Law is a "concrete order of values": *ibid* at 254.

1. Basic Features of the Constitutional Order

An important "basic value" that underpins our legal system and constitutional order, while not being itself a principle of fundamental justice, is respect for individual dignity, worth, and autonomy.[16] Different aspects of this value can be reflected in different legal principles (such as the presumption of innocence or the requirement of blameworthiness). Aspects of the value, one might say, are refracted through the prism of our constitutional order.

A further aspect of the valued individual is that he or she is not solitary. We encounter the legal subject as a being-with-others. From a legal perspective, the individual is embedded in the "constitutional order" to which McLachlin CJ referred. It is only when "freely associated citizens join together in a politically autonomous legal community" that the legal subject and the legal subject's rights emerge.[17] The Constitution provides the framework for individuals to come together within a common national project, and enables the pursuit of regional, local, and individual projects through law-making.[18]

Within a democratic constitutional order, the value of the individual is not surrendered but preserved. Legally (and meta-legally) each individual retains value; and more precisely, each individual retains equal value. As section 15(1) of the *Charter* has it, "[e]very individual is equal before and under the law."[19] In our common projects undertaken within our constitutional order, all individuals have claims of right; none can be simply excluded. If individuals have value which should be promoted, it follows that individuals — all individuals with a stake in a project — should have their interests taken into account in democratic decision-making. Individuals and their interests should not be ignored, especially when a project will result in significant adverse impacts. Democracy entails a radical inclusiveness.

16 See e.g. *R v Oakes*, [1986] 1 SCR 103 [*Oakes*] at para 29; *BC Motor Vehicle Act*, *supra* note 15 at 503; *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519, Sopinka J at 592 [*Rodriguez*]; Federal Republic of Germany, *Basic Law*, Article 1(1) ("Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority"), trans Christian Tomuschat et al, online: Deutscher Bundestag <https://www.btg-bestellservice.de/pdf/80201000.pdf>.

17 Habermas, *Between Facts and Norms*, *supra* note 16 at 250.

18 "[T]he constitution sets down political procedures according to which citizens can, in the exercise of their right to self-determination, successfully pursue the cooperative project of establishing just (i.e. relatively more just) conditions of life": Habermas, *Between Facts and Norms*, *supra* note 16 at 263.

19 An important issue raised by Professor Jennifer Koshan in conversation is the relationship between s 7 substantive rationality claims and s 15 claims. I will not pursue that issue here.

Two sets of issues emerge at the intersection of individuals in the constitutional order. On the one hand, individuals cannot simply interact randomly. Rules are required for coordination and the pursuit of joint projects; mechanisms are required for the resolution of disputes under rules; rules must be enforced. Organized social interaction engenders law and the State. Given the need for rule-based organization, institutions and processes for the establishment of rules are required. In a social system based on the value of the individual, rule-making institutions and processes will entail some form of individual, democratic input. The nature of rule-making institutions and processes will vary between and even within social organizations, but democratic law-making, in whatever form it takes, is an essential part of the fabric of the constitutional order.

On the other hand, in the common project that is the constitutional order, an individual cannot always get his or her way. The terms of some laws or the objectives pursued through some joint projects will be contrary to the interests of some individuals. A problem arises: individuals must (practically) exist together; but if each individual is equally valuable, how can the interests of some individuals be subordinated to the interests of others, even through legislation resting on democratic processes? Should each individual have a veto over legislation? This is one of the classic problems of political theory, pursued especially by contractarian philosophers from Locke and Rousseau to John Rawls. Fully working out the answer to this problem provided by our constitutional order would be a large and difficult undertaking. For present purposes, I can only offer an hypothesis, or a sketch of one.

2. Integration through Reason and Reasonableness

An aspect of the valued individual is rationality, the ability to reason. True, rationality does not exhaust and is not co-extensive with human dignity and worth. We are not always rational (we sometimes sleep or are unconscious); we may face challenges that reduce our ability to reason; we begin as children whose reason must form. Part of being human, moreover, is our emotion, our passion, which may or may not be rational. Yet, an important part of what it means to be a legal subject, a participant in our constitutional order, a being-with-others in the legal reality defined by our constitution, is that we can reason. Indeed, if we are not rational, we cannot be held responsible for failing to follow the law.

We can reason for ourselves; we can reason for others. A distinction may be

drawn between individuals as "consumers" and as "citizens."[20] Individuals have particular, personal interests (various appetites and passions, egoistic or altruistic) which, one may broadly assume, individuals wish to maximize. In this sense, individuals are "consumers" (the consumer is sometimes described as a "rational utility maximizer"). Individuals, though, are also capable of understanding and appreciating the interests of others in their communities as well as their own interests. Further, individuals can understand and appreciate resolutions of competing interests which do not maximize their private interests. In this sense, individuals are "citizens."

The shift by an individual to a citizens' perspective is not at all unusual. Judges are required, in a wide variety of contexts, to step outside their own particular perspectives into the perspectives of others, so they can determine the "reasonableness" of conduct or of others' decisions. A finding that conduct or a decision is reasonable is not a finding that the judge would have acted or decided in the same way, but that the conduct or decision is one that others (the "reasonable person") could have come to, that fell within the range of behaviour of others or the range of reasonable conduct or decisions in the circumstances. Politicians, similarly, shift to the perspective of others when legislating. The justification of legislation should not be that it serves some particular individuals' interests, but that it serves the interests of the community. Individuals who are bound by legal requirements of reasonableness (whether, e.g., the law of negligence or the law of self-defence) are expected to conduct themselves as reasonable people, duly taking into account the interests of others.

As citizens, individuals can recognize that legislative determinations that do not maximize their own interests are nonetheless acceptable. At their very worst, "unacceptable" results would support leaving the body politic or calling for revolution. Reasons for the acceptability of legislative determinations may be more-or-less purely practical or prudential. More fundamentally, though, what makes legislative determinations acceptable is that the determinations on the whole or generally are "reasonable" or "rational." A key feature of law, of rules that are to be understood and applied by rational subjects, is that the law too must be rational: "Law is a rule and measure of acts, whereby man is induced to act or is restrained from acting . . . Now the rule and measure of human acts is the reason, which is the first principle of human acts."[21] That is to say, a

20 See Sunstein, *After the Rights Revolution*, *supra* note 1 at 40, 42, 57, 59.

21 St Thomas Aquinas, *Summa Theologica*, Part I-II (Pars Prima Secundae), Q 90, Art 1,online: The Project Gutenberg eBook, <http://www.gutenberg.org/cache/epub/17897/pg17897.html> [Aquinas, *Summa*].

principle of fundamental justice is that law must be reasonable or rational.

(a) formal rationality

The requirement that the law be reasonable is reflected in the formal features that any system must display to be properly a system of laws. The rules of a legal system

(i) must be public (or promulgated or published), so that people can learn the standards that govern their conduct;[22]

(ii) must not be retroactive, so people can properly adjust their conduct;[23]

(iii) must not be vague — otherwise neither citizens nor officials and administrators would be able to discern standards of conduct from the text of rules;[24] and

(iv) must not be mutually contradictory.[25]

These features of law, while important, do not get at the reasonableness of democratic decisions. They do not get at the substance of legal rationality.

(b) substantive legal rationality and participatory democracy

Substantive legal rationality turns on law's status as the product of processes involving rational agents. Law is the product of deliberative assessments, whether in Parliament, legislative assemblies, municipal councils, or court

22 For a discussion from the perspective of the European Court of Human Rights, see Damien Scalia, "A few thoughts on guarantees inherent to the rule of law as applied to sanctions and the prosecution and punishment of war crimes" (2008) 90:870 Intl Rev Red Cross 343, online: International Committee of the Red Cross <https://www.icrc.org/eng/assets/files/other/irrc-870_scalia.pdf> at 347-48 [Scalia, "Rule of Law"].

23 *Charter,* s 11(g); Scalia, "Rule of Law," *supra* note 23 at 355-56.

24 "A law is unconstitutionally vague if it 'does not provide an adequate basis for legal debate' and 'analysis'; 'does not sufficiently delineate any area of risk'; or 'is not intelligible'. The law must offer a 'grasp to the judiciary' (*R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606 at 639-400. Certainty is not required": *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4, [2004] 1 SCR 76 at para 15 [*Canadian Foundation*]. See also Scalia, "Rule of Law," *supra* note 23 at 346-47.

25 Lon L. Fuller, *The Morality of Law, Revised Edition* (New Haven: Yale University Press, 1969) at 39; see Habermas, *Between Facts and Norms*, *supra* note 16 at 252.

rooms. We negotiate our common projects through reason, through public debate and questioning, through argument before tribunals. What makes legal results acceptable, even if they are not results that would maximize our own interests, is that they maintain their character as rational products, that is to say, so long as the results are reasonable. Democracy depends on perspectives being put before law-makers and decision-makers. Democracy depends on legislative determinations being made in light of those perspectives. No single solution to a legislative problem may be available. No one perspective may overwhelm all others beyond any objection. But, citizens would expect that the legislative determination would take competing perspectives into account. Citizens would expect, since all citizens have equal value, that legislation would promote the common good while minimizing adverse impacts on those who are adversely affected by the determination. The notion that the law should promote the common good has a venerable heritage:

> Now the end of law is the common good; because, as Isidore says . . . that "law should be framed, not for any private benefit, but for the common good of all the citizens." Hence human laws should be proportionate to the common good. Now the common good comprises many things. Wherefore law should take account of many things, as to persons, as to matters, and as to times. Because the community of the state is composed of many persons; and its good is procured by many actions; nor is it established to endure for only a short time, but to last for all time by the citizens succeeding one another, as Augustine says . . . .[26]

The common good is a desired end-point. The process to reach that end-point requires the consideration of citizens' perspectives, especially given the equal value of citizens. For legislative determinations to be acceptable to citizens as reasonable, these determinations must be the product of participatory democracy.[27] A "republican" understanding of our democracy best accommodates the deep constitutional commitment to the value of individuals:

> The republican concept of 'politics' refers not to rights of life, liberty, and property that are possessed by private citizens and guaranteed by the state, but pre-eminently to the practice of self-determination on the part of enfranchised citizens who are oriented to the common good and understand themselves as free and equal members of a cooperative, self-governing community.[28]

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26 Aquinas, *Summa*, *supra* note 22 at Q 96, Art 1.

27 Sunstein, *After the Rights Revolution*, *supra* note 1 at 12, 42.

28 Habermas, *Between Facts and Norms*, *supra* note 16 at 286.

Meditation along these lines leads to the realization of the "radical-democratic meaning of the system of rights."[29] As equal, we deserve to participate and be heard, to have our interests taken into account in law formation; as rational, we deserve reasonable decisions based on evidence and that take into account our arguments. Within our constitutional order, participatory democracy should be promoted. Laws should be the reasoned product of participatory democracy.

3. Contending with the Potentially Unreasonable: Section 7 of the *Charter*

What, then, should be the remedy of an individual who believes that a law is unreasonable? In some cases, depending on the nature of the alleged unreasonableness and the impact of the law, there need be no remedy at all outside of ordinary political processes. If, however, a law were to have a serious adverse impact on an individual, there should be some mechanism available to the individual as citizen to confirm the reasonableness of the law. If the law is found not to be reasonable, it should no longer qualify as law at all. As provided under section 52(1) of the *Constitution Act, 1982*, "[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." It is not that an irrational law must be nullified, as if some bureaucratic act were needed to transform it into a nullity. By virtue of its irrationality, an unreasonable law nullifies itself. It is not law. Nonetheless, a practical requirement of social order is that citizens do not serve as their own judges of unreasonableness. Official recognition of reasonableness must be awaited. At least in our constitutional order, the task of confirming the reasonableness or unreasonableness of law falls to the judiciary, specifically, for present purposes, under section 7 of the *Charter*: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

At the commencement of this provision, we encounter "Everyone" — the individuals, the legal subjects that are the primary elements in our constitutional order. Those individuals, it should be noted, are encountered only as they exist already embedded in a constitutional order. Section 7 refers to conditions that law must meet to bind those individuals, or, to put it another way, for promulgated rules to have legal validity.

29 *Ibid* at 252.

The opening words of section 7 have a gatekeeping function. Section 7 does not establish a free-standing constitutional right to fundamental justice generally or to a proportionality assessment of impugned law in particular.[30] An applicant is not entitled to a fundamental justice review of legislation just because he or she is unhappy with legislation or because legislation harms any identifiable interest whatsoever of the applicant. The applicant must show that specified serious personal interests have been harmed. The applicant must also show that the State and not, for example, non-State actors, should be held responsible for that risk. If either of these conditions is not satisfied, a fundamental justice analysis is not engaged and legislation is protected from section 7 scrutiny.[31]

(a) threshold interests

The threshold conditions of section 7 distinguish primary from secondary interests. Section 7 refers to, and gives primary importance to, life, liberty, and security of the person. "Life," "liberty," and "security of the person" are abstract, open-textured concepts that — like other *Charter* provisions — pose interpretative challenges.[32] The Court of Appeal's observations in *Bedford* respecting "security of the person" could apply to the other protected rights: the terms "[defy] exhaustive definition;" their meaning is "best articulated in the context of the specific facts and claims advanced in a given case."[33] Nonetheless, if deprivations of these rights are considered, paradigm-case examples are readily available. Legislation that provided for a penalty of death for specified offences would limit an applicant's right to life, as would legislation that imposed an increased risk of death on an individual.[34] Legislation providing for a penalty of imprisonment upon conviction for an offence would engage an applicant's liberty interests,[35] as would legislation that permitted State interference with

30 *Carter, supra* note 6 at para 71.

31 Through the imposition of the burden of proof on an applicant respecting these issues, the threshold conditions support the presumption of constitutionality of legislation. See *R v Ahmad*, 2011 SCC 6, [2011] 1 SCR 110 at para 32.

32 "[T]he Constitutional Court is concerned only with cases of collision; its rulings always deal with hard cases .... Hence, the problem of the 'indeterminacy of law' ... accumulates and intensifies in constitutional jurisdiction, as it tends to do in higher courts anyway:" Habermas, *Between Facts and Norms*, *supra* note 16 at 243; see also Alana Klein, "The Arbitrariness in 'Arbitrariness' (and Overbreadth and Gross Disproportionality): Principle and Democracy in Section 7 of the Charter" (2013), 63 SCLR (2d) 377 at 379-81 [Klein, "Arbitrariness"]..

33 *Bedford (Appeal), supra* note 11 at para 97.

34 *Carter, supra* note 6 at para 62.

35 *Bedford (Appeal)*, supra note 11 at para 92; *R v Malmo-Levine; R v Caine*, 2003 SCC 74, [2003] 3 SCR 571 at para 84 [*Malmo-Levine*].

individuals' ability to make "fundamental personal choices."[36] In *Carter*, the Supreme Court confirmed that

> Security of the person encompasses "a notion of personal autonomy involving . . . control over one's bodily integrity free from state interference" (*Rodriguez*, at pp. 587-88, per Sopinka J., referring to *R v Morgentaler*, [1988] 1 SCR 30) and it is engaged by state interference with an individual's physical or psychological integrity, including any state action that causes physical or serious psychological suffering.[37]

Legislation that diminished an applicant's ability to mitigate risks of physical danger would impair the applicant's security of the person.

The primary value accorded to these interests is apparent. If a constitutional order did not take special steps to guarantee these interests for all of its citizens, those at risk could have little motivation to remain in and remain loyal to that social arrangement. If a constitutional order were not to protect these interests, "what point could there be for beings such as ourselves in having rules of *any* other kind?"[38] A democratic constitutional order, one that values the individual, must guarantee "reasonable" protection of at least *these* interests .

(b) threshold deprivation

The threshold conditions require that there be a "deprivation" of a relevant interest. This would entail proof of adverse impact, of a diminution, restriction, reduction, or removal of life, liberty, or security of the person (hence the importance of evidential issues in section 7 cases). The deprivation could apply to everyone; it could apply to only particular individuals; the deprivation might only be evident by comparing the impact of a measure on particular affected individuals as opposed to others. The State must be responsible for the deprivation. The *Charter* applies to the State, that is, to federal or provincial legislative or executive action.[39] Further, the standard of fundamental justice, which will govern the propriety of the deprivation, applies to the State and not private individuals, who are bound only by the strictures of ordinary justice of ordinary law.

36 *Carter*, *supra* note 6 at para 64, quoting *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 SCR 307 at para 54.

37 *Carter*, *supra* note 6 at para 68.

38 H.L.A. Hart, *The Concept of Law, 2d ed* (Oxford: Clarendon Press, 1994) at 193.

39 *Charter*, s 32.

A State-caused legislative deprivation of a protected interest is not in itself sufficient to invalidate the legislation. Under section 7, law is invalidated only if it is established that the law is not "in accordance with the principles of fundamental justice:" "Section 7 does not promise that the state will never interfere with a person's life, liberty or security of the person — laws do this all the time — but rather that the state will not do so in a way that violates the principles of fundamental justice."[40]

(c) fundamental justice and substantive rationality

What is "fundamental justice"? According to Justices Gonthier and Binnie in *Malmo-Levine*, a principle of fundamental justice must be

(i) a legal principle,

(ii) fundamental to the operation of the legal system,

(iii) accepted as a fundamental principle by "significant social consensus," and

(iv) identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.[41]

As legal principles, "[t]hey do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system."[42] As the subject of consensus, the principles would have "general acceptance among reasonable people."[43] As guidelines for identifying principles of fundamental justice, these criteria are not especially illuminating.

The Supreme Court has identified a variety of principles of fundamental justice, ranging from the enumerated legal rights in the *Charter*,[44] to the right to make full answer and defence (and derivatively for an accused to receive

40 *Carter*, *supra* note 6 at para 71.

41 *Malmo-Levine*, *supra* note 36 at para 113; *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 SCR 791 at para 127 [*Chaoulli*]; *Canadian Foundation*, *supra* note 25 at para 8. For difficulties with the application of this framework, see Nader R Hasan, "Three Theories of 'Principles of Fundamental Justice'" (2013), 63 SCLR (2d) 340 at 365-68 [Hasan, "Three Theories"].

42 *BC Motor Vehicles Act*, *supra* note 15 at 503.

43 *Rodriguez*, *supra* note 17 at 607.

44 *BC Motor Vehicles Act*, *supra* note 15 at 502.

Crown disclosure),[45] to the requirement that offences for which imprisonment is a possible penalty have at least a negligence fault requirement,[46] to the requirement that murder offences have a subjective *mens rea* element (mere negligence does not suffice).[47]

Despite what one might conclude from this list, fundamental justice cannot concern only narrowly legal or judicially-oriented processes. Fundamental justice is what the State owes the individual as citizen in rule-making. Fundamental justice concerns the legal order that binds a country constitutionally. Ensuring that legislation is in accordance with the principles of fundamental justice ensures that Canada remains a "just society:"

> The Just Society will be one in which the rights of minorities will be safe from the whims of intolerant majorities. The Just Society will be one in which those regions and groups which have not fully shared in the country's affluence will be given a better opportunity. The Just Society will be one where such urban problems as housing and pollution will be attacked through the application of new knowledge and new techniques. The Just Society will be one in which our Indian and Inuit population will be encouraged to assume the full rights of citizenship through policies which will give them both greater responsibility for their own future and more meaningful equality of opportunity.[48]

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45 *R v Stinchcombe*, [1991] 3 SCR 326, Sopinka J at 336.

46 *BC Motor Vehicle Act*, *supra* note 15 at 515.

47 *R v Martineau*, [1990] 2 SCR 633, Lamer CJ at 645-46. This amounts to the principle that things should be called by their right name. "If names be not correct, language is not in accordance with the truth of things. If language be not in accordance with the truth of things, affairs cannot be carried on to success. When affairs cannot be carried on to success, proprieties and music do not flourish. When proprieties and music do not flourish, punishments will not be properly awarded. When punishments are not properly awarded, the people do not know how to move hand or foot": Confucius, The Analects, Part 13, online: The Internet Classics Archive <http://classics.mit.edu/Confucius/analects.3.3.html>. For a survey of the principles of fundamental justice, see Hasan, "Three Theories," *supra* note 42 and Klein, "Arbitrariness," *supra* note 33 at 382-83.

48 Pierre Elliott Trudeau, Official Statement by the Prime Minister, "The Just Society," June 10, 1968, in Ron Graham, ed, *The Essential Trudeau* (Toronto: McClelland and Stewart, 1998) at 18-19; See also the Remarks of the Right Honourable Beverley McLachlin, P.C., "The Challenges We Face," Presented at the Empire Club of Canada, Toronto, March 8, 2007, online: Supreme Court of Canada <http://www.scc-csc.gc.ca/court-cour/judges-juges/spe-dis/bm-2007-03-08-eng.aspx> ("More than a quarter century ago, a Canadian Justice Minister, Pierre Elliott Trudeau, challenged Canadians to build "the just society". In the ensuing years, thousands of Canadians have worked to establish their visions of a just society. The centrepiece of Prime Minister Trudeau's vision of the just society was the *Charter of Rights and Freedoms*, adopted in 1982, and whose 25th anniversary we will celebrate on April 17, 2007. Whatever our political persuasion or our particular conception of justice, there can be no doubt that Canadians today expect a just society. They expect just laws and practices. And they expect justice in their courts.")

Whatever else might be included as a principle of fundamental justice, for a law to be fundamentally just, it must be rational, both formally and substantively. The specific fundamental justice principles recognized by the Supreme Court in *Bedford*, *PHS*, and *Carter* against arbitrariness, overbreadth, and gross disproportionality may be understood as proceeding from the requirement of substantive rationality of democratic decisions. These principles protect against irrational democratic or undemocratic decisions:[49] "What emerges is a jurisprudence that inspects legislation to determine whether representatives have attempted to act deliberatively."[50] This interpretation elaborates on the Supreme Court's own understanding of the foundation of the substantive rationality principles:

> Although there is significant overlap between these three principles, and one law may properly be characterized by more than one of them, arbitrariness, overbreadth, and gross disproportionality remain three distinct principles that stem from what Hamish Stewart calls "failures of instrumental rationality" — the situation where the law is "inadequately connected to its objective or in some sense goes too far in seeking to attain it" (*Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (2012), at p. 151). As Peter Hogg has explained:
>
> > The doctrines of overbreadth, disproportionality and arbitrariness are all at bottom intended to address what Hamish Stewart calls "failures of instrumental rationality", by which he means that the Court accepts the legislative objective, but scrutinizes the policy instrument enacted as the means to achieve the objective. If the policy instrument is not a rational means to achieve the objective, then the law is dysfunctional in terms of its own objective.[51]

As Habermas has observed, these considerations establish the courts as the "custodians of deliberative democracy."[52]

The courts are called on to compare legislative purposes and adverse effects on individuals and determine whether the legislation adopted was rationally

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49 "Means-ends proportionality is none other than the deployment of reason as a limit on political will:" Benjamin L Berger, "Children of two logics: A way into Canadian constitutional culture" (2013) 11:2 *International Journal of Constitutional Law* 319 at 330; "irrationality and injustice, measured against the statute's own purposes, are avoided": Habermas, *Between Facts and Norms*, *supra* note 33 at 252, quoting Sunstein.

50 C. R. Sunstein, "Interest Groups in American Public Law" (1985) 38 Stan L Rev 29 at 59, quoted in Habermas, *Between Facts and Norms*, *supra* note 16 at 276.

51 *Bedford*, *supra* note 2 at para 107.

52 Habermas, *Between Facts and Norms*, *supra* note 16 at 275.

defensible. The courts are passing judgment on the adequacy of the political process, from the standpoint of whether all of the relevant evidence of adverse effect was considered, either properly or at all.

(d) substantive rationality and democratic law-making

While the requirements of formal rationality may not be contentious, there are concerns that substantive rationality assessment constitutes an undue intrusion by the courts into the democratic political order. In part, the issue of legitimacy was answered by the adoption of the *Charter*, as Justice Lamer observed some time ago:

> From this have sprung warnings of the dangers of a judicial "super-legislature" beyond the reach of Parliament, the provincial legislatures and the electorate. The Attorney General for Ontario, in his written argument, stated that,
>
> > . . . the judiciary is neither representative of, nor responsive to the electorate on whose behalf, and under whose authority policies are selected and given effect in the laws of the land.
>
> This is an argument which was heard countless times prior to the entrenchment of the Charter but which has in truth, for better or for worse, been settled by the very coming into force of the *Constitution Act, 1982*. It ought not to be forgotten that the historic decision to entrench the Charter in our Constitution was taken not by the courts but by the elected representatives of the people of Canada. It was those representatives who extended the scope of constitutional adjudication and entrusted the courts with this new and onerous responsibility. Adjudication under the Charter must be approached free of any lingering doubts as to its legitimacy.[53]

A consistent view was expressed in *Chaoulli* by McLachlin CJ and Major J:

> The fact that the matter is complex, contentious or laden with social values does not mean that the courts can abdicate the responsibility vested in them by our Constitution to review legislation for Charter compliance when citizens challenge it. As this Court has said on a number of occasions, "it is the high duty of this Court to insure that the Legislatures do not transgress the limits of their constitutional mandate and engage in the illegal exercise of power": *Re B.C. Motor Vehicle Act, 1985*, [1985] 2 SCR 486, at p. 497, per Lamer J. (as he then was), quoting *Amax Potash Ltd. v. Government of*

53 *BC Motor Vehicle Act*, *supra* note 15 at 497.

Saskatchewan, [1977] 2 SCR 576, at p. 590, per Dickson J. (as he then was).[54]

More importantly, far from subverting democracy, substantive rationality review enhances democracy by ensuring that perspectives that may not have been heard or may not have been listened to in democratic processes are given their due public airing. Legislative decisions must be justifiable on the basis of reasons "that can be publicly advocated."[55] If, in the cold light of day, nothing better can be said in favour of injurious legislation than that it favours a particular set of interests, its factionalism is inconsistent with the common good, it manifestly ignores the interests of all, and it should be struck down.

If injurious legislation cannot be rationally supported given consideration of all relevant interests, the legislation was likely the product of a process that improperly or unfairly discounted or ignored some perspectives. Voices that were silenced can be heard in the courts. Substantive rationality doctrine compensates "for the gap separating the republican ideal from constitutional reality."[56] Judicial review serves as a surrogate for a wanting democratic process. Substantive rationality review recalls equal consideration as a condition and goal of democratic law-making.

Yet in all this, courts should extend deference to the law-maker. The standard, after all, is one of reasonableness or rationality (not the court's view of the "correct" legislative solution) given the adverse impacts of the legislation. In *Bedford*, McLachlin CJ emphasized that establishing arbitrariness, overbreadth, and gross disproportionality is difficult. Legislators are extended a significant margin of appreciation.[57] In particular, the disproportionality test is one of *gross* disproportionality, not simple or marginal disproportionality: "The rule against gross disproportionality only applies in extreme cases where the seriousness of the deprivation is totally out of sync with the objective of the measure . . . . The connection between the draconian impact of the law and its object must be

54 *Chaoulli*, *supra* note 42 at para 107. The "new constitutionalism," as Sweet has observed, "requires massive delegation to constitutional judges" who "[possess] the power to govern the rulers themselves": Alec Stone Sweet, "Proportionality Balancing and Global Constitutionalism" (2008) 47 Colum J of Transnat'l L 72 at 85, online: Yale Law School, *Faculty Scholarship Series, Paper 1296* <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2296&context=fss_papers> [Sweet, "Proportionality Balancing"].

55 Habermas, *Between Facts and Norms*, *supra* note 16 at 276.

56 *Ibid* at 277.

57 As regards arbitrariness and overbreadth, see *Bedford*, *supra* note 2 at para 119: "This standard is not easily met."

entirely outside the norms accepted in our free and democratic society."[58]

Furthermore, the complete assessment of reasonableness requires consideration of the State's reasons for enacting the challenged law. In our system, reasons of the State figure in the analysis under section 1 of the *Charter.* Under section 1, the State is to be given "a measure of leeway" when seeking (in particular) to reduce "antisocial behaviour." The Supreme Court has recognized that "[t]he primary responsibility for making the difficult choices involved in public governance falls on the elected legislature and those it appoints to carry out its policies. Some of these choices may trench on constitutional rights."[59] In addition, "[t]he bar of constitutionality must not be set so high that responsible, creative solutions to difficult problems would be threatened. A degree of deference is therefore appropriate."[60]

With an account in hand of the constitutional order that informs the interpretation and understanding of section 7, we can turn to the application of section 7 in *Bedford.*

B. Bedford: Engaging section 7

The *Bedford* applicants sought to have a set of *Criminal Code* provisions relating to prostitution declared invalid. *Bedford* did not concern the legality of selling or purchasing sexual services by adults, since these transactions were not prohibited in Canada. Neither did *Bedford* concern all *Criminal Code* provisions relating to prostitution. At issue were section 210 and the definition of "common bawdy house" in section 197(1) [the "common bawdy-house provisions"], section 212(1)(j) [the "living on the avails provisions"], and section 213(1)(c) [the "communication for the purposes provisions"] of the *Criminal Code.* These provisions criminalize certain conduct surrounding prostitution:

> 210(1) Every one who keeps a common bawdy-house[61] is guilty of an indictable

58 *Ibid* at para 120; *Carter, supra* note 6 at para 89: "The standard is high: the law's object and its impact may be incommensurate without reaching the standard for *gross* disproportionality ...."

59 *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567 at para 35 [*Hutterian Brethren*].

60 *Ibid* at para 37.

61 A "common bawdy-house" is a place that is "(a) kept or occupied, or (b) resorted to by one or more persons

for the purpose of prostitution or the practice of acts of indecency": *Criminal Code*, supra note 3, s 197(1). Bill C-36 repeals the definition of "prostitute" (s 12(1)) and provides a new definition of "common bawdy house" - "common bawdy-house" means, for the practice of acts of indecency, a

offence and liable to imprisonment for a term not exceeding two years.

(2) Every one who

(a) is an inmate of a common bawdy-house,

(b) is found, without lawful excuse, in a common bawdy-house, or

(c) as owner, landlord, lessor, tenant, occupier, agent or otherwise having charge or control of any place, knowingly permits the place or any part thereof to be let or used for the purposes of a common bawdy-house, is guilty of an offence punishable on summary conviction.

(3) Where a person is convicted of an offence under subsection (1), the court shall cause a notice of the conviction to be served on the owner, landlord or lessor of the place in respect of which the person is convicted or his agent, and the notice shall contain a statement to the effect that it is being served pursuant to this section.

(4) Where a person on whom a notice is served under subsection

(3) fails forthwith to exercise any right he may have to determine the tenancy or right of occupation of the person so convicted, and thereafter any person is convicted of an offence under subsection (1) in respect of the same premises, the person on whom the notice was served shall be deemed to have committed an offence under subsection (1) unless he proves that he has taken all reasonable steps to prevent the recurrence of the offence.

212(1) Every one who . . .

(j) lives wholly or in part on the avails of prostitution of another person,
is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

213(1) Every person who in a public place[62] or in any place open to public view . . .

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place that is kept or occupied or resorted to by one or more persons" (s 12(2)). "Indecent" conduct is conduct that (a) by its nature, causes harm or presents a significant risk of harm to individuals or society in a way that undermines or threatens to undermine a value reflected in and formally endorsed through the Constitution or similar fundamental laws; and (b) poses a risk of harm of a *degree* that is incompatible with the proper functioning of society: *R v Labaye*, 2005 SCC 80, [2005] 3 SCR 728 McLachlin CJ at para 62.

62 Under s 213(2) of the *Criminal Code*, "'public place' includes any place to which the public have access as of right or by invitation, express or implied, and any motor vehicle located in a public place or in any place open to public view."

> (c) stops or attempts to stop any person or in any manner communicates or attempts to communicate with any person
>
> for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute is guilty of an offence punishable on summary conviction.

The claims that these provisions were invalid were founded on section 7.[63]

The finding of legislative invalidity based on section 7 had three stages.[64] First, the applicants must establish on a balance of probabilities that the legislation deprived or would deprive him or her[65] of life, liberty, or security of the person. Second, the applicants must establish on a balance of probabilities that the deprivation was not "in accordance with the principles of fundamental justice." Third, if the applicants has succeeded in establishing the first two points, the State had the burden of justifying the limitation of the applicants' rights under section 1 of the *Charter*.[66]

1. The *Bedford* Applicants and the Threshold Conditions for Section 7

The sex trade is dangerous. It has been well-known for some centuries that sex trade workers face threats of severe violence.[67] Sex trade workers' exposure to violence has been the subject of official reports[68] and has figured in Supreme Court decisions.[69] The investigation and prosecution of Robert Pickton provided a worst-case demonstration of the risks faced by sex trade workers.[70]

Sex trade workers have suffered and died at the hands of men. Yet, the violence

63 Paragraph 213(1) (j) was also challenged under s 2(b) of the *Charter*, but the Supreme Court did not rule on this issue: *Bedford*, *supra* note 2 at para 160.

64 State (executive) action may also be challenged under the *Charter*.

65 On the issue of the standing of corporations to raise constitutional issues based on s 7, see *R v Wholesale Travel Group Inc*, [1991] 3 SCR 154 at 181.

66 The mechanics and interpretation of s 1 follow *Oakes* and subsequent jurisprudence: *Oakes*, *supra* note 17; see also *R v Laba*, [1994] 3 SCR 965 at 1006-11 [*Laba*], *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835 at 888-89, and *Hutterian Brethren*, *supra* note 60.

67 "No one knows the tally of murdered London prostitutes in the nineteenth century. We can assume they died in some numbers every year, their true count disguised by the crude forensic understanding of the time:" Jerry White, *London In The Nineteenth Century: 'A Human Awful Wonder of God'* (Jonathan Cape: London, 2007) at 315; *Bedford (Trial)*, *supra* note 10 at paras 227, 229, 239.

68 *Bedford (Trial)*, *supra* note 10 at paras 141-42, 157, 161, 169, 171.

69 *Smith v Jones*, [1999] 1 SCR 455, Cory J at paras 37-39.

70 See e.g. *R v Pickton*, 2010 SCC 32, [2010] 2 SCR 198.

of men was not the focus of the applicants' section 7 concerns. The bases of the applicants' arguments were the failings of the State, manifested through the impugned legislation.

The applicants' claim was that the legislation deprived sex trade workers of "security of the person." "Security of the person" must include personal security: "[p]roperly understood, the [applicants'] security of the person claim is about self-preservation."[71] The legislation diminished the ability of sex trade workers to mitigate risks of physical danger from third parties. It limited their ability to take preventative, self-protective measures.

The applicants argued as follows: The common bawdy-house provisions prevented sex trade workers from delivering services from fixed indoor locations (including safe houses) with attendant security features, consigning them to less safe locations such as the street or areas over which they did not exercise adequate control.[72] The living on the avails provisions prevented sex trade workers from hiring staff, such as drivers, receptionists, and bodyguards, who could increase their safety.[73] The communication for the purposes provisions prevented sex trade workers from screening clients and advising of transaction terms.[74]

The Crown contended in response that any deprivation of the applicants' interests was not the responsibility of the Parliament through the impugned legislation. The applicants were at risk because of men or because they chose dangerous work, not because of law.

The Court of Appeal in *Bedford* was uncomfortable with the notion that legislation could be the "cause" of the deprivation of the applicants' security of the person:

> It may be helpful to use a traditional causation analysis when deciding whether the actions of a government official are sufficiently connected to an infringement of a s. 7 interest to render the government responsible for that infringement. However, that analysis is inappropriate where legislation is said to have caused the interference with the s. 7 interest. The language of causation does not aptly capture the effect of

71 *Bedford (Appeal)*, *supra* note 11 at para 99. If further confirmation were needed, McLachlin CJ wrote in *PHS* that "[w]here the law creates a risk not just to the health but to the lives of the claimants, the deprivation is even clearer": *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44, [2011] 3 SCR 134 at para 93 [*PHS*].

72 *Bedford*, *supra* note 2 at para 64.

73 *Ibid* at para 67.

74 *Ibid* at para 71.

> legislation. Legislation, including legislation that creates crimes, is not so much the physical cause of a particular consequence as it is part of the factual and social context in which events happen and consequences flow.[75]

(Nonetheless, the Court of Appeal did find that the legislation increased the risk of harm to the applicants.[76]) The Court of Appeal's discomfort was not unwarranted. In ordinary language, we would be more apt to say that legislation provides "reasons" for acting or not acting than to say that legislation provides "causes" for acting or not acting.[77] One way to probe the discomfort of the Court of Appeal would be to ask whether it ever makes sense to describe "reasons" as "causes." This draws us towards the philosophy of action. In an influential 1963 article, Donald Davidson made a strong case that reasons could indeed be regarded as causes.[78] If this technical debate may be side-stepped, we do in practice think of legislation as having causal effect. We create offences because we wish to cause persons not to commit prohibited conduct. Prohibition — aside from enforcement and penalty — is itself regarded as a means of controlling undesirable conduct.

In the *Bedford* circumstances, because of the legislation, sex trade workers could not (e.g.) operate in-door fixed premises, hire security staff, or verbally screen potential clients. The law, then, was at least a cause-in-fact of the applicants' reduced ability to mitigate personal risk. Without the legislation, the applicants could have taken more and better steps to protect their personal security.[79] Many individuals in many occupations face risks of physical attack by third parties, but they are entitled to take steps to reduce those risks. The *Bedford* applicants established that the impugned legislation diminished their ability to protect themselves in comparison with persons in other occupations. The legislation deprived them of rights to security of the person. The legislation, in effect, deprived the *Bedford* applicants of equal treatment under the law.

The Crown's contention that men, and not laws, were the cause of any danger faced by sex trade workers missed the point.[80] The legislation deprived the

75 *Bedford (Appeal)*, *supra* note 11 at para 107.

76 *Ibid* at para 111.

77 A P Simester & Andreas von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Portland, Oregon: Hart Publishing, 2014) at 6-7.

78 Donald Davidson, "Actions, Reasons, and Causes" (1963) 60:23 *The Journal of Philosophy* 685.

79 Similarly, in *PHS*, the threat of imprisonment impaired the ability of caregivers to assist clients, depriving the clients of "potentially lifesaving medical care". The clients' rights to life and security of the person were thereby limited: *PHS*, *supra* note 72 at para 91.

80 *Bedford*, *supra* note 2 at paras 84-85.

applicants of their security of the person not by actually causing physical injury or threatening physical injury, but by diminishing the applicants' ability to take steps to prevent assault, to mitigate risks of physical threats. The Supreme Court got it right: "The violence of a john does not diminish the role of the state in making a prostitute more vulnerable to that violence."[81] According to Himel J at trial,

> [T]hese three provisions prevent prostitutes from taking precautions, some extremely rudimentary, that can decrease the risk of violence towards them. Prostitutes are faced with deciding between their liberty and their security of the person. Thus, while it is ultimately the client who inflicts violence upon a prostitute, in my view the law plays a sufficient contributory role in preventing a prostitute from taking steps that could reduce the risk of such violence.[82]

Furthermore, Parliament knew that sex trade workers were working in a dangerous environment and that its legislation, while permitting the trade, denied workers the benefit of taking basic steps to preserve personal safety. Violence by johns was not an unexpected, independent intervention,[83] somehow overwhelming the State's contribution to sex workers' vulnerability.

As in an *actus reus* causality analysis, the State should not be responsible under section 7 for every "but-for" cause that links it to particular consequences. The Crown had argued in *Bedford* that the standard for legally attributing responsibility to the State, so that the State could be viewed as having deprived an applicant of his or her rights, is an "active and foreseeable" and "direct" causal connection.[84] The Supreme Court disagreed, endorsing instead a standard of "sufficient" cause:

> A sufficient causal connection standard does not require that the impugned government action or law be the only or the dominant cause of the prejudice suffered by the claimant, and is satisfied by a reasonable inference, drawn on a balance of probabilities . . . . A sufficient causal connection is sensitive to the context of the particular case and insists on a real, as opposed to a speculative, link . . . . [it involves] a "practical and pragmatic" inquiry . . . .[85]

81 *Ibid* at para 89.
82 *Bedford (Trial)*, *supra* note 10 at para 362.
83 *Ibid* at paras 121, 123-24, 293, 295-98.
84 *Bedford*, *supra* note 2 at para 74.
85 *Ibid* at para 76.

A standard of "sufficiency" may seem vague and unhelpful. All that this language is signalling, though, is that a court must make a normative assessment of the degree of responsibility of the State for the limitation of the applicant's security of the person, based on a review of the context and the contributions of the State and other causal factors to the limitation. The term "sufficiency," it should be noted, is also deployed in determinations of legal causation for *actus reus* purposes: "Legal causation, however, is a narrowing concept which funnels a wider range of factual causes into those which are *sufficiently* connected to a harm to warrant legal responsibility."[86] At least one of the important reasons for sex trade workers' lack of security-promoting spaces and security-promoting staff was that creating these spaces and hiring these staff would be illegal. The State should not have been permitted to avoid responsibility for creating the very circumstances it legislated. Note that satisfaction of the standard of sufficiency entails only that the State has contributed *enough* to be held responsible. Satisfaction of the standard does not entail that the State is the *only* actor responsible for the outcome or even that it is the actor that is *most* responsible for the outcome. Further, a finding that the State is responsible for a deprivation does not specify the extent of the injury caused by the deprivation or measure the full impact of the deprivation. Such matters are best left to the fundamental justice and section 1 assessments.

The Crown also advanced a "volenti" argument. Given that the sex trade is beset with risks of physical violence, individuals can choose whether or not to engage in this work. Either those risks were accepted by engaging in this work or the true cause of the risks is the choice by individuals to engage in this work.[87] The Court rejected this line of argument for two reasons. First, at least some individuals do not enter the sex trade through "free choice." The Court alluded to a form of moral involuntariness: "Whether because of financial desperation, drug addictions, mental illness, or compulsion from pimps, they often have little choice but to sell their bodies for money."[88] That some individuals enter the sex trade for lack of other real options is doubtless regrettably true. Some

86 *R v Maybin*, 2012 SCC 24, [2012] 2 SCR 30, Karakatsanis J at para 16 (emphasis added).

87 *Bedford*, *supra* note 2 at paras 79, 80. The Crown made the same sort of (unsuccessful) claim in *PHS* – the health risks were "the consequence of the drug users' decision to use illegal drugs": *PHS*, *supra* note 72 at para 97. According to Sunstein, ". . . the strategy of blaming the victim, or assuming that an injury was deserved or inevitable, tends to permit nonvictims or members of advantaged groups to reduce [cognitive] dissonance by assuming that the world is just – a pervasive, insistent, and sometimes irrationally held belief:" Sunstein, *After the Rights Revolution*, *supra* note 1 at p 66; see Sunstein, p 63.

88 *Bedford*, *supra* note 2 at para 86. In *PHS*, the Crown's "personal choice" argument was rebutted by the fact that, for many users, the cause of drug use was not choice but addiction: *PHS*, *supra* note 72 at para 99.

individuals are forced into this trade. They find themselves in the life, but not because they wanted it or chose it. Regardless of whether any one or any institution or any set of institutions is to blame, at the very least the Crown cannot escape responsibility for diminishing sex trade workers' personal security through the plea of voluntary acceptance of risk — there was no voluntary acceptance. Second, some individuals do freely choose to enter the sex trade. That, however, does not make them responsible for the limitations on their ability to mitigate risk. Again, the point is that the legislation diminishes the ability to mitigate risk. The business of supplying sexual services is legal, just as the supply of many other services is legal. The applicants' concern was that their ability to conduct their business in safety was impaired by the legislation: "they are asking this Court to strike down legislative provisions that aggravate the risk of disease, violence and death."[89]

The unexpressed argument of the Crown may have been that no one should be involved in the sex trade at all. It is wrong to engage in it, and if one does, one suffers the consequences. This sort of approach might make sense for persons engaged, say, in international drug trafficking. Yet again, as the Court points out in this regard, "it must be remembered that prostitution — the exchange of sex for money — is not illegal."[90] The legislation indirectly treated the sale of sexual services as if it were illegal, when it was not.[91]

From the standpoint of participatory democracy, a key lesson of *Bedford* is that the State may be held to account for the actual adverse effects of legislation, if the legislation "sufficiently" contributes to a deprivation of life, liberty, or security of the person. The State is bound to answer for injuries suffered by individuals who are entitled to the (equal) protection of the law. The State cannot simply ignore the impact of laws on citizens, as if their interests need not be considered by law or in law.

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89 *Bedford*, *supra* note 2 at para 88.

90 *Ibid* at para 87; Furthermore, at this point, "[t]he morality of the activity the law regulates is irrelevant:" *PHS*, *supra* note 72 at para 102.

91 Michael Plaxton rightly reminds us that between manifestly criminalized conduct and manifestly legal conduct lies conduct that is legal, but discouraged. The State does not prohibit the conduct, but aims through ancillary legislation to decrease the incidence of the conduct. Legislation can "nudge" us towards behavioural change: Michael Plaxton, "First Impressions of Bill C-36 in light of Bedford" (12 June 2014), online: SSRN <http://ssrn.com/abstract=2447006> or <http://dx.doi.org/10.2139/ssrn.2447006> at 5. Plaxton also rightly comments that the casting of a "shadow" of criminalization by nudging legislation does not make the conduct (such as sex work) criminal: *ibid*.

Having engaged the threshold conditions of section 7, the *Bedford* applicants were required to establish that the State-caused deprivations of their protected interests were not in accordance with the principles of fundamental justice. The *Bedford* applicants sought to show that the impugned legislation was not fundamentally just because it was not substantively rational.

C. Fundamental Justice, Substantive Rationality, and the Impugned Legislation

The *Bedford* applicants relied on three substantive rationality principles — the principles against arbitrariness, overbreadth, and gross disproportionality. To expose the workings of the substantive rationality principles and their promotion of participatory democracy, I will consider their shared features, then the specific scope of the principles.

1. Shared Features of the Substantive Rationality Doctrines

An arbitrary, overbroad, or disproportionate law may be properly promulgated, not retroactive, clear, and wholly consistent with other laws. The irrationality may lie not in the formal features of the law, but in the relationship (or better, lack of relationship) between the objective pursued by the law and the actual impact of the law. Arbitrariness, overbreadth, and disproportionality analysis each involve comparisons between the objectives of legislation and the effects of legislation.[92] The overarching question, asked from the perspective of the individual whose interests have been limited by the legislation, is whether the limitations imposed on him or her are rational: is the impairment of interests he or she has suffered rationally defensible? The comparison has three elements — the identification of the purpose or objective of the law, the interpretation of the legislative means adopted to achieve that objective, and the determination of the limitations of interests resulting from those legislative means.[93]
The comparison, as will be seen, is limited. The section 7 comparison defers broader social impact issues to the analysis under section 1.

92 *Carter*, *supra* note 6 at para 73. The development of these principles in Canadian constitutionalism, it should be understood, is neither alarming nor novel. Canada is keeping step with the development of constitutionalism internationally. See Sweet, "Proportionality Balancing," *supra* note 55 at 73-74, 79, 84.

93 The first two elements engage the problem of statutory interpretation, which is not pursued in the substantive rationality jurisprudence. Sunstein considers statutory interpretation to be a critical issue for courts in a regulatory state: see Sunstein, *After the Rights Revolution*, *supra* note 1, chapters 4, 5; Habermas, *Between Facts and Norms*, *supra* note 16 at 251-53.

(a) purpose

The approach to the purpose of the law is the same for each principle. The purpose is considered "in itself" or by itself. The law's effectiveness is not addressed. At this stage of *Charter* analysis, there is no assessment of ". . . how well the law achieves its object, or . . . how much of the population the law benefits;" or whether the legislation produces "ancillary benefits" for the general population.[94]

The isolation of purpose may seem unusual. Legislative purpose may be one consideration when interpreting legislation;[95] it may be one consideration when considering whether legislation fits under a particular subject matter under sections 91 or 92 of the *Constitution Act, 1867*.[96] In contrast, legislative purpose (whether impugned legislation serves a pressing and substantial objective) is a primary consideration in section 1 analyses. The focus on purpose in section 7 (and section 1) assessment is apt. Within the space created by judicial review, the legislator is compelled to address the individual whose interests have been adversely affected by the impugned legislation. To assess the rationality of the legislation, the first step must be to work out the nature of the legislative project: what was to be accomplished? What was the goal, the objective, the purpose?

The interests of others, those who have not been adversely affected, are not introduced into the analysis. True, positive effects on others could have an overall mitigating effect. While the applicant has suffered injury, that could be regrettable but justified by the greater good. At this point, though, issues of mitigation or excuse or justification have not been reached, and won't be reached unless and until the analysis enters section 1. The section 7 issue is whether there has been a legal injury to the applicant. The issue is whether the applicant's rights to fundamental justice have been violated. If they have not, that's an end on it. If they have, then issues of impact on others and justification from broader perspectives may be considered under section 1. Introducing impact on others at this point would mix up issues.

The identification of legislative purpose is obviously a crucial step. The difficulty

94 *Bedford*, *supra* note 2 at paras 123, 127. "In determining whether the deprivation of life, liberty and security of the person is in accordance with the principles of fundamental justice under s 7, courts are not concerned with competing social interests or public benefits conferred by the impugned law. These competing moral claims and broad societal benefits are more appropriately considered at the stage of justification under s 1 ....": *Carter*, *supra* note 6 at para 79.

95 See e.g. *Interpretation Act*, RSC 1985, c I-21, s 12.

96 30 & 31 Victoria, c. 3 (U.K.). See e.g. *R v Keshane*, 2012 ABCA 330, Berger JA at paras 20-26.

of identifying legislative purpose will vary. In some cases, the characterization of purpose may be hotly contested. In some cases, Parliament may attempt to tell the courts what its legislative purposes were, as in the preamble to Bill C-36. A preamble, though, does not oust the courts' jurisdiction to determine legislative purpose.[97] In some cases, legislation may serve more than one purpose — perhaps some general and some specific, or perhaps, two or more of equal value.[98] If a purpose is narrowly interpreted or its interpretation is not well-fitted to its legislative means, findings that some or all effects are unnecessary or inimical to that purpose will be facilitated.[99] If a purpose is very broadly interpreted, that may immunize the law from *Charter* challenge.[100] There may be concern about courts' abilities to determine legislative purpose accurately. As indicated above, though, courts determine legislative purpose in other contexts (and, for that matter, parties' purposes in cases of contractual interpretation). Determining purpose is a task that courts perform. Any problems with performance are not unique to section 7 analyses.

(b) legislative means

The approach to the interpretation of legislative means is the same for each principle. In substantive rationality review, the interpretation of statutes follows the ordinary rules of interpretation. This point would be trivial, hardly worth mentioning, except that when faced with an over-reaching statute (one which may be overbroad) a temptation may arise to interpret the statute to circumvent constitutional scrutiny. In *Bedford* itself it was noted that the living on the avails provisions has been "judicially restricted" rendering the prohibition "narrower than its words might suggest" — although the provision was still found to be overbroad.[101] In *Boudreault*, Justice Cromwell in dissent opposed the majority's interpretation of the impaired care or control provisions of the *Criminal Code* (i.e., the reading in of an element of danger to avoid penalizing benign conduct):

97 Section 13 of the *Interpretation Act*, *supra* note 96, provides as follows: "The preamble of an enactment shall be read as a part of the enactment intended to assist in explaining its purport and object." The preamble assists, but does not conclusively determine. See *Quebec (Attorney General) v Moses*, 2010 SCC 17, [2010] 1 SCR 557, LeBel and Deschamps JJ, dissenting, at para 101; *Canadian Western Bank v Alberta*, 2007 SCC 22, [2007] 2 SCR 3, Binnie J at para 27; *M v H*, [1999] 2 SCR 3, Gonthier J, dissenting, at para 185.

98 Janneke Gerards, "How to improve the necessity test of the European Court of Human Rights" (2013) 11:2 *International Journal of Constitutional Law* 466 at 478-79 [Gerards, "Necessity Test"].

99 Klein, "Arbitrariness," *supra* note 33 at 384-87.

100 *Carter*, *supra* note 6 at para 77

101 *Bedford*, *supra* note 2 at paras 141, 142.

> It is well established that absent ambiguity in the statutory text, the courts should not apply an interpretative presumption of *Charter* compliance: see, e.g., *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 SCR 559, at para. 62. Applying such a presumption pre-empts judicial review and the possibility of resort to the justification of limiting provisions under s. 1 of the *Charter*. The appropriate context in which to assess whether Parliament has appropriately balanced the rights of the accused is in a *Charter* challenge to the legislation, not in the course of interpreting an unambiguous statutory text.[102]

In *Khawaja*, the Supreme Court's efforts to insulate an anti-terrorism provision from overbreadth review produced an interpretation that promoted constitutionality over intelligibility.[103] It is true that a principle of interpretation is that a statute should be interpreted to be constitutionally valid, but that principle is engaged when a statute is ambiguous, when more than one meaning is available;[104] the principle does not entail that statues unconstitutional on their face should be the subject of "reading in" or "reading down" to render them constitutional.

(c) effects

The approach to the effects of the law is the same for each principle:

> . . . none of the principles measure the percentage of the population that is negatively impacted. The analysis is qualitative, not quantitative. The question under s. 7 is whether *anyone's* life, liberty or security of the person has been denied by a law that is inherently bad; a grossly disproportionate, overbroad, or arbitrary effect on one person is sufficient to establish a breach of s. 7.[105]

Three comments are warranted:

First, the restrictiveness of this analysis might seem odd: an adverse effect on *one* person can trigger a finding of a violation of fundamental justice? But the restrictiveness is entirely appropriate. The context is a section 7 challenge. To reach this stage of the analysis, the applicant had to establish a deprivation of constitutionally-protected rights (in the *Bedford* circumstances, security of the

102 *R v Boudreault*, 2012 SCC 56, [2012] 3 SCR 157 at para 85.

103 *R v Khawaja*, 2012 SCC 69, [2012] 3 SCR 555, paras 44, 53, 57, 62-63; see Peter Sankoff, "*Khawaja*: Mixed Messages on the Meaning of Intention, Purpose and Desire," (2013) online: SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2201685>.

104 *R v Mills*, [1999] 3 SCR 668 at para 118.

105 *Bedford*, *supra* note 2 at para 123.

person). The applicant bears the burden of proof and must contend with the applicable evidential doctrines. The applicant is dealing with adverse impacts on himself or herself alone. The cause of complaint is the personally-experienced adverse impact. The question is whether this adverse impact, this injury that the applicant has suffered, is in accordance with fundamental justice or not. Whether or not others have or have not suffered similar misfortunes does not add to or detract from whether fundamental justice was respected for this individual. And this individual, like each other individual, has constitutional rights that must be respected: "*Everyone* has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

It should be recalled that the substantive rationality assessment is not necessarily completed under section 7 alone. Substantive rationality is determined under both section 7 (under which the claimant has the burden of proof) and section 1 (under which the State has the burden of proof). It would not be right to say that the *Charter* establishes two "proportionality" tests. Rather, there is one test, which has two procedural stages. It is not that effectiveness, social benefit, and degree of adverse impact are irrelevant and should not be considered in a substantive rationality assessment. Rather, this evidence should be considered in its proper place, with the burden of proof allocated to the proper party.

Second, within the space created by the judicial review process, the applicant's interests are being put to the legislator: "I see what you're trying to do — I see your purpose; but do you see what your legislation is doing to me?" Within the space created by judicial review, the applicant's interests are being taken into account, are being considered. This may or may not have actually occurred in the process through which the legislation was passed. Within this space, democratic participation may be occurring that had earlier been denied.[106] Substantive rationality is corrective participatory democracy.

Third, the test that will be applied is one of rationality. Given the legislative purpose, and given the adverse impacts, was the legislative program reasonable or rationally defensible? Or, did the legislative pursuit of the purpose violate fundamental justice by having arbitrary effects, by being overbroad, or by having effects grossly disproportionate to the legislative purpose?

106 Klein, "Arbitrariness," *supra* note 33 at 398-99, 401; Alana Klein, "Section 7 of the Charter and the Principled Assignment of Legislative Jurisdiction" (2012), 57 SCLR (2d) 59 at 60-61 [Klein, "Principled Assignment"].

While arbitrariness, overbreadth, and disproportionality analyses share the foregoing features, the nature of the comparison made between purpose and effect differs (or may differ) between arbitrariness and overbreadth on the one hand and gross disproportionality on the other.

2. Arbitrariness and Overbreadth

(a) the principles

Arbitrariness and overbreadth may be considered together.[107] Arbitrariness and overbreadth "compare the rights infringement caused by the law with the objective of the law."[108] The issue is whether the adverse effects of the law (properly interpreted) actually promote the law's objective. The "evil" addressed by the arbitrariness doctrine is "the absence of a connection between the infringement of rights and what the law seeks to achieve — the situation where the law's deprivation of an individual's life, liberty, or security of the person is not connected to the purpose of the law."[109] The deprivation of rights serves no purpose — it is unsuitable, superfluous, or arbitrary (the applicant has been harmed "for nothing").[110] An arbitrary deprivation of rights is irrational or not rationally justifiable:

> the decision maker may not make *any* choice. He must take account of any negative consequences of a certain choice of means for fundamental rights. It would be clearly unreasonable if an instrument would only harm Convention rights, without actually being able to benefit anyone or to achieve the desired results (test of effectiveness).[111]

An overbroad provision is arbitrary in part. Some effects of the law (properly interpreted) do promote the law's objective. Some effects, however, do not promote the law's objective. Hence, the law is too broad; it brings too much

107 One might say that the principles are distinct but not separate. On the one hand, McLachlin CJ writes that "[a]lthough there is significant overlap between these three principles, and one law may properly be characterized by more than one of them, arbitrariness, overbreadth, and gross disproportionality remain three distinct principles": *Bedford, supra* note 2 at 107; but on the other hand, McLachlin CJ writes that "[m]oving forward, however, it may be helpful to think of overbreadth as a distinct principle of fundamental justice related to arbitrariness, in that the question for both is whether there is no connection between the effects of a law and its objective. Overbreadth simply allows the court to recognize that the lack of connection arises in a law that goes too far by sweeping conduct into its ambit that bears no relation to its objective": *ibid* at 117.

108 *Ibid* at para 123.

109 *Ibid* at para 108; see also paras 111 and 119; *Carter, supra* note 6 at para 83.

110 See Gerards, "Necessity Test," *supra* note 99 at 469.

111 *Ibid* at 470, footnotes omitted.

conduct within its scope. Insofar as the law is too broad, it is arbitrary.[112]

A rights deprivation may fail to promote a legislative objective in two ways.[113] First, the deprivation may have consequences contrary to and may undermine or subvert the legislative objective:

> Most recently, in *PHS*, this Court found that the Minister's decision not to extend a safe injection site's exemption from drug possession laws was arbitrary. The purpose of drug possession laws was the protection of health and public safety, and the services provided by the safe injection site actually contributed to these objectives. Thus, the effect of not extending the exemption — that is, prohibiting the safe injection site from operating — was contrary to the objectives of the drug possession laws.[114]

While arbitrariness on the "contrary effect" basis was established in *PHS*, this approach imposes a high burden on an applicant, entailing a standard that is very deferential to the legislator.[115]

Second, the deprivation may simply not promote the objective at all. The deprivation is "unnecessary" because it does not in fact promote the legislative objective:

> In *Chaoulli*, the applicant challenged a Quebec law that prohibited private health insurance for services that were available in the public sector. The purpose of the provision was to protect the public health care system and prevent the diversion of resources from the public system. The majority found, on the basis of international evidence, that private health insurance and a public health system could co-exist. Three of the four-judge majority found that the prohibition was "arbitrary" because there was no real connection on the facts between the effect and the objective of the law.[116]

This seems like a less onerous standard from an applicant's perspective, but it masks some difficulties. While clear and obvious mistakes about cause and effect could occur, legislation that does not serve its purpose *at all* is likely to be rare. What would be more likely would be to encounter legislation that focuses on some conduct that has little causal impact on the purpose, but ignores (or includes) other conduct with stronger causal relations to the

112 *Bedford*, *supra* note 2 at paras 101-02, 112-13; *Carter*, *supra* note 6 at para 85.
113 *Bedford*, *supra* note 2 at para 119; see also paras 99-100.
114 *Ibid* at para 100.
115 Gerards, "Necessity Test," *supra* note 99 at 475.
116 *Bedford*, *supra* note 2 at para 99.

purpose. Practically, the arbitrariness problem is less likely to be about whether an infringement promotes a purpose *at all* than about whether the infringement has a *sufficient* causal link to the purpose.[117] *Chaoulli* spoke of the need for a "real connection" between the infringement and the purpose.[118] Determining whether an infringement has a real or sufficient connection to a purpose will turn on both factual and normative assessments.

On the factual side, the lack of connection between legislative effects and legislative purposes may be evident without the need to tender evidence.[119] In *Heywood*, for example, overbreadth was made manifest through reasonable hypotheticals showing the excessively broad scope of the former vagrancy offence (it applied to too many accuseds, in relation to too many places, for too long (without provision for review)).[120] But if *Heywood* required no significant evidence, *PHS* and *Chaoulli* did require significant evidence respecting causal issues. *Chaoulli* in particular involved the courts in difficult issues of causal assessment. For example, in a case like *Chaoulli*, evidence of the co-existence of a "banned" factor and a desired outcome would be relevant on the issue of whether the "banned" factor was causally inimical to the desired outcome: one might conclude that the "banned" factor had no causal relationship with the desired outcome, since the desired outcome was produced even if the "banned" factor was present. However, it may be that if the "banned" factor were not present, the desired outcome would have been greater; or some third factor may have either neutralized the effects of the "banned" factor or promoted the desired outcome despite the negative effects of the "banned factor." These sorts of factual complexities have led critics to argue that courts are ill-prepared to tackle evidence in disciplines that lie beyond legal training, and that legislative processes are better for accumulating and assessing the evidence required to legislate social policy.[121] One might similarly argue that courts are ill-suited to determine Aboriginal title cases, given the wide array of disciplines and types of

117 See *ibid* at para 118; see Gerards, "Necessity Test," *supra* note 99 at 474.

118 *Chaoulli*, *supra* note 42 at paras 131, 139.

119 Gerards, "Necessity Test," *supra* note 99 at 473.

120 *Heywood*, *supra* note 12; Gerards, "Necessity Test," *supra* note 99 at 484. See also *R v Demers*, 2004 SCC 46, [2004] 2 SCR 489 (The purpose of the provisions was "to allow for the ongoing treatment or assessment of the accused in order for him or her to become fit for an eventual trial" (para 41). The Court found that insofar as the provisions applied to permanently unfit accuseds, who would never become fit to stand trial, the provisions were overbroad). On the appropriate use of reasonable hypotheticals, see *Bedford (Trial)*, *supra* note 10 at para 364.

121 Klein, "Arbitrariness," *supra* note 33 at 378, 388 n 55; Klein, "Principled Assignment," *supra* note 107 at 68.

evidence relevant to determining title issues;[122] or for that matter that the courts are ill-suited to hear any other type of case that turns on expert evidence. Yet the courts soldier on in all of these sorts of cases. That is their assigned lot in the administration of justice: "The fact that the matter is complex, contentious or laden with social values does not mean that the courts can abdicate the responsibility vested in them by our Constitution to review legislation for *Charter* compliance when citizens challenge it."[123] Moreover, if the courts do not grapple with the evidence, there is no guarantee that the legislator will generate similar evidence or, if it does, that it will give it proper consideration. The section 7 problem is before the court because of a concern that proper evidence was not gathered or proper regard was not paid to the evidence by the legislator.

On the normative side, the "real or sufficient connection" assessment involves a comparison between the assessment of likelihood of a causal connection and the impact of the limitation on the applicant. The more severe the impact on the applicant, the higher the required degree of probability of causal efficacy:

> In order not to be arbitrary, the limit on life, liberty and security requires not only a theoretical connection between the limit and the legislative goal, but a real connection on the facts. The onus of showing lack of connection in this sense rests with the claimant. The question in every case is whether the measure is arbitrary in the sense of bearing no real relation to the goal and hence being manifestly unfair. The more serious the impingement on the person's liberty and security, the more clear must be the connection. Where the individual's very life may be at stake, the reasonable person would expect a clear connection, in theory and in fact, between the measure that puts life at risk and the legislative goals.[124]

This approach suggests a sliding scale of deference. It also requires identification of gradations of the "clarity" of causal connections. Both inspire complexities and uncertainties. Further, one might suggest that the "impact vs probability" comparison is really masking the true comparison, which is between the impact of legislative measures and their benefits. A "real" or "sufficient" connection

122 "At the British Columbia Supreme Court, McEachern CJ heard 374 days of evidence and argument. Some of that evidence was not in a form which is familiar to common law courts, including oral histories and legends. Another significant part was the evidence of experts in genealogy, linguistics, archeology, anthropology, and geography:" *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 5; see *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 7.

123 *Chaoulli*, *supra* note 42 at para 107.

124 *Ibid* at 131.

arbitrariness argument may be a disproportionality argument in disguise (this may be the reasoning behind the view that the "three" principles are really one or are aspects of a single principle).

Regardless, the virtue of even the "real or sufficient connection" arbitrariness assessment is that it puts the rationality of the limitation of the applicant's rights into question by asking whether there was truly any need for the applicant to be adversely affected. The applicant has the opportunity to show that the limitation was not reasonable, on the evidence, because of its lack of causal relationship to the legislative goal. The principles against arbitrariness and overbreadth impose a requirement of evidence-based legislative decision-making — which is only rational.

(b) the impugned legislation and overbreadth

The Supreme Court found that the living on the avails provisions served the purpose of criminalizing conduct that exploited sex trade workers.[125] That legislation, however, was overbroad:

> The law punishes everyone who lives on the avails of prostitution without distinguishing between those who exploit prostitutes (for example, controlling and abusive pimps) and those who could increase the safety and security of prostitutes (for example, legitimate drivers, managers, or bodyguards). It also includes anyone involved in business with a prostitute, such as accountants or receptionists. In these ways, the law includes some conduct that bears no relation to its purpose of preventing the exploitation of prostitutes.[126]

125 *Bedford*, *supra* note 2 at para 137.

126 *Ibid* at para 142; *Carter*, *supra* note 6 at para 88. Looking to the future, (1) Bill C-36 appears to go some distance towards addressing the Supreme Court's concerns. While Bill C-36 repealed s 212 in s 13, in s 20 it created a new offence of obtaining material benefit from sexual services (new s 286.2). Two purposes in the preamble relevant to this offence are that "the Parliament of Canada has grave concerns about the exploitation that is inherent in prostitution and the risks of violence posed to those who engage in it" and "it is important to continue to denounce and prohibit the procurement of persons for the purpose of prostitution and the development of economic interests in the exploitation of the prostitution of others as well as the commercialization and institutionalization of prostitution." The new offence, then, serves the purpose of criminalizing conduct that exploits sex trade workers. To deal with the Supreme Court's overbreadth concerns, the new s 286.2(4) exempts persons from s 286.2(1) liability who do not exploit sex trade workers. Under the new s 286.2(5), however, the s (4) exemption does not apply to a person who "procures" a person to offer or provide sexual services for consideration (ss 286.2(5)(d) and 286.3) or if the person "received the benefit in the context of a commercial enterprise that offers sexual services for consideration" (s 286.2(5)(e)). Generally, the new provisions support only the independent or solo provision of sexual services, not the provision of sexual services through

This conclusion was unassailable.

3. Gross Disproportionality

(a) the principle

In a disproportionality analysis, the adverse effects suffered by the applicant do in fact contribute to the legislative purpose. The disproportionality comparison is between the legislative purpose and the degree of adverse effect suffered by the applicant:

> Gross disproportionality asks a different question from arbitrariness and overbreadth. It targets the second fundamental evil: the law's effects on life, liberty or security of the person are so grossly disproportionate to its purposes that they cannot rationally be supported . . . .
>
> Gross disproportionality under s. 7 of the Charter does not consider the beneficial effects of the law for society. It balances the negative effect on the individual against the purpose of the law, not against societal benefit that might flow from the law . . . .
>
> [G]ross disproportionality is not concerned with the number of people who experience grossly disproportionate effects; a grossly disproportionate effect on one person is sufficient to violate the norm.[127]

The disproportionality question is this: given the legislative purpose, is its pursuit permissible given *these* adverse impacts on *this* applicant? Can we pursue that

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cooperative enterprises. The issue will be whether overbreadth has been wholly or only partially corrected.

(2) Bill C-36 also created in s 20 a new offence of obtaining sexual services for consideration (new s 286.1). This provision applies to a "john" only – the purchaser, not the vendor of sexual services (so long as those sexual services are one's own (new s 286.5(2)). For the first time, Canada has partially criminalized prostitution. The criminalization is only partial, since the provision or sale of one's own sexual services remains legal. The new offence does not appear to be arbitrary. It manifestly promotes the purposes identified in the Bill C-36 preamble respecting exploitation as well as the need to address "the social harm caused by the objectification of the human body and the commodification of sexual activity" and the need to denounce and deter "the purchase of sexual services because it creates a demand for prostitution." Given those purposes, the new offence does not appear overbroad, since it applies to those who create the incentive to go into prostitution, and those who treat sexual services as a "commodity" to be purchased.

127 *Bedford*, *supra* note 2 at paras 120, 121, 122. In *PHS*, McLachlin CJ wrote that "[g]ross disproportionality describes state actions or legislative responses to a problem that are so extreme as to be disproportionate to any legitimate governmental interest": *PHS*, *supra* note 72 at para 133.

objective, if these will be the consequences for this applicant? Put another way: in deciding to pursue this purpose, has the legislator taken into account the adverse impact on the applicant? A finding of gross disproportionality amounts to a finding that no reasonable or rational legislator could pursue that objective in that way if this would produce these adverse effects.

As *Bedford* illustrates, disproportionality analysis involves a weighing of the value of an objective against the value (severity) of the adverse impact caused by the legislation. Proportionality assessments are not new to the courts. Proportionality assessments occur, for example, in the application of the defences of necessity,[128] common law duress,[129] and self-defence;[130] in sentencing;[131] and in the *Oakes* test under section 1 of the *Charter*.[132] The process has some conceptual challenges, though, despite judicial familiarity with proportionality assessment in practice.

The notion of proportionality (or disproportionality) suggests an objective comparison that can be observed.[133] Further, it suggests some single metric or standard for judging which can be applied to the matters being compared, and it suggests that each of the matters being compared can be measured as against that metric. These sorts of presuppositions seem to lie behind McLachlin CJ's comment that "[t]he rule against gross disproportionality only applies in extreme cases where the seriousness of the deprivation is totally *out of sync* with the objective of the measure."[134] "Out of sync" is not precise language, and may draw on the wrong analogy (proportionality and synchronization are not identical concepts) but what seems to be conveyed is an absence of matching. Excess on one side, as against defect on the other. In ordinary language, we might say of an artist's rendering of a planned building that some elements are not "proportional," meaning that those elements do not properly match actual size (are not properly "scaled down"); or of a portrait that "he didn't get the ears right — they're not proportional" (they're too big or small). The judgment of proportionality depends on us being able (in principle) to take a ruler and do the requisite measurements and comparisons. If items have cash values, money

128 *R v Latimer*, 2001 SCC 1, [2001] 1 SCR 3 at para 31.

129 *R v Ruzic*, 2001 SCC 24, [2001] 1 SCR 687 at para 62.

130 *Criminal Code*, *supra* note 3, s 34(2)(g).

131 *Ibid*, s 718.1: "A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender." See Scalia, "Rule of Law," *supra* note 23 at 352-53.

132 *Supra* note 17; On the roots of proportionality in German law, see Sweet, "Proportionality Balancing," *supra* note 55 at 97 n 53.

133 See Gerards, "Necessity Test," *supra* note 99 at 471.

134 *Bedford*, *supra* note 2 at para 120 (emphasis added).

provides the metric by which comparisons are possible. We could convey the sense of disproportionality by claiming "he paid way too much for that." The difficulty is that purposes (such as decreasing public nuisance) and adverse effects (such as assault and murder) do not have an observable common metric. Neither can their "values" be objectively measured. The relative weights of death vs. consumer tranquility are very clear — but the "weighing" lies in a normative or moral assessment of the events. While in *Bedford* the proportionality assessment was obvious given the purposes of the legislation, in other cases the relative moral values of purpose and effect may not be so obvious. This does not mean that weighing and proportionality assessment cannot be done. It does mean that, to ensure transparency, judges should provide their reasons for their weighing and comparison.[135] The mechanical application of proportionality language or hiding moral reasoning behind false analogies should be avoided:[136] "Properly employed, [proportionality analysis] requires courts to acknowledge and defend — honestly and openly — the policy choices that they make when they make constitutional choices."[137]

(b) the impugned legislation and gross disproportionality

In *Bedford*, the purpose of the common bawdy house provisions was "to combat neighbourhood disruption or disorder and to safeguard public health and safety."[138] The adverse effects of the provisions, which exposed sex trade workers to risks of murder and severe violence, were found to be grossly disproportional to the goal of reducing public nuisance:

> [t]he harms identified by the courts below are grossly disproportionate to the deterrence of community disruption that is the object of the law. Parliament has the power to regulate against nuisances, but not at the cost of the health, safety and lives of prostitutes. A law that prevents street prostitutes from resorting to a safe haven such as Grandma's House while a suspected serial killer prowls the streets, is a law that has lost sight of its purpose.[139]

The communication for the purposes provisions also served the purpose of combating public nuisance.[140] The adverse effects of these provisions were similar

135 Dieter Grimm, "Proportionality in Canadian and German Constitutional Jurisprudence" (2007) 57 UTLJ 383 at 396.

136 Klein, "Arbitrariness," *supra* note 33 at 390, 397.

137 Sweet, "Proportionality Balancing," *supra* note 55 at 77.

138 *Bedford*, *supra* note 2 at para 132.

139 *Ibid* at para 136.

140 *Ibid* at para 147.

— "communication is an essential tool that can decrease risk. The assessment is qualitative, not quantitative. If screening could have prevented one woman from jumping into Robert Pickton's car, the severity of the harmful effects is established."[141] Enhanced peace of mind for shop-keepers and shoppers should not be bought with death. No reasonable or rational legislator could determine that sex trade workers' sacrifices balanced marginal tranquility for others. The applicants had therefore satisfied their burden of establishing that the legislation did not respect their rights to fundamental justice.[142]

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141 *Ibid* at para 158.

142 Looking to the future, (1) Bill C-36 repealed the s 213(1)(c) communication for the purposes offence, but in s 15 created a new offence (new s 213(1.1)) of communicating to provide sexual services for consideration "in a public place, or in any place open to public view, that is or is next to a school ground, playground or daycare centre." This new offence promotes, in particular, Parliament's commitment "to protecting communities from the harm associated with prostitution." The new s 213(1) applies to persons who communicate for the purposes of offering or providing sexual services. Apparently, only persons selling sexual services – not johns – are targeted by this offence. This reduces the prosecution risk for johns and diminishes their incentive to keep communications in private (and more dangerous) locations. The new s. 213(1.1) does not prohibit communication in public places, but only in those public places where children are likely to be found. The new s. 213(1.1) appears to address the Supreme Court's overbreadth concern.

(2) Bill C-36, however, did not eliminate the "common bawdy house" provisions, although the definition is now restricted to places kept for the "practice of acts of indecency." The provision of sexual services for consideration, which is not (at least on the supply side) illegal, may not be "indecent:" Library of Parliament, Legislative Summary of Bill C-36, online: Parliament of Canada <http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?ls=c36&Parl=41&Ses=2> at 12. See note 62 above. Hence, a safe place for typical street-level prostitution transactions like a "Grandma's House" may not fall within the definition of "common bawdy house." The new "Commodification of Sexual Activity" provisions established by s 20 remain antagonistic to the offering of sexual services through commercial enterprises (see, e.g., the new ss 286.2(5)(e) and 286.2(6)). The preamble to Bill C-36 refers to the need to denounce and deter "the development of economic interests in the exploitation of prostitution of others as well as the commercialization and institutionalization of prostitution." A non-profit, sex-trade-worker supportive institution such as a "Grandma's House" would appear to fall within the new s 286.2(4) exemptions. A for-profit establishment would not. One might observe that given Parliament's stated objectives of discouraging prostitution, it would be inconsistent for Parliament to encourage (or not discourage) the proliferation of prostitution on the commercial enterprise level. Parliament does appear to have gone a substantial distance towards addressing the Supreme Court's gross disproportionality concerns bearing on venues for sexual services transactions.

(3) The most significant problem posed by Bill C-36 will be whether the new obtaining of sexual services offence (new s 286.1) is grossly disproportional. The new offence will have to be considered not only with the retention of the common bawdy house provisions, but also with the new exemptions available to service providers, the geographical limitation of the communication for the purposes offence, and the targeting of the offering of services (only) by the communication for the purposes offence. The new offence will leave sex trade workers exposed to at least some of the former dangers of the life. Johns will still face prosecution, and will try to keep transactions private. The

D. Section 1 of the Charter and Substantive Rationality

In *Bedford*, the Crown made no serious effort to support the legislation under section 1 of the *Charter*.[143] The Court declared all three provisions to be constitutionally invalid, but suspended the declaration for one year to permit Parliament to develop new laws (the result being Bill C-36).[144]

Historically, the view had been that if legislation were found to deprive individuals of rights in violation of the principles of fundamental justice, a section 1 argument was doomed to failure. The only exceptions might be in extraordinary circumstances calling for extraordinary measures, such as times of war, epidemic, or natural disaster:

> This Court has expressed doubt about whether a violation of the right to life, liberty or security of the person which is not in accordance with the principles of fundamental justice can ever be justified, except perhaps in times of war or national emergencies: *Re B.C. Motor Vehicle Act*, *supra*, at p. 518. In a case where the violation of the principles of fundamental justice is as a result of overbreadth, it is even more difficult to see how the limit can be justified. Overbroad legislation which infringes s. 7 of the Charter would appear to be incapable of passing the minimal impairment branch of the s. 1 analysis.[145]

In *Bedford*, however, McLachlin CJ did not simply dismiss the potential for successful governmental recourse to section 1. She devoted some paragraphs to the differences between sections 7 and 1, suggesting that, in the navigation of section 1's different terrain, the State could have some hope of justifying legislation that limits section 7 rights.[146] Two questions arise: is section 1 consistent with the sketch of the constitutional order presupposed by section 7? Could section 1 validate legislation found to limit substantive rationality under section 7?

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greater the privacy, the greater the danger. The purposes served by the new offence are significant, far exceeding the import of nuisance to shopkeepers and shoppers. The question will be whether Parliament has the power to regulate against exploitation, commodification, and the protection of human dignity and equality, at the cost of the health, safety and lives of sex trade workers, given increased protections now available under the new legislation.

143 *Bedford*, *supra* note 2 at para 161.

144 *Ibid* at para 169.

145 *Heywood*, *supra* note 12 at 802; see *Bedford*, *supra* note 2 at para 129; *Bedford (Trial)*, *supra* note 10 at para 440.

146 See also *Carter*, *supra* note 6 at paras 82, 95.

1. Section 1 and Participatory Democracy

Section 1 provides as follows: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Duly enacted legislation would satisfy the "prescribed by law" element of section 1. The State must establish that legislation that limits *Charter*-protected rights imposes only "reasonable limits" that are "demonstrably justified in a free and democratic society." The Supreme Court has interpreted these conditions to require the State to satisfy the following multi-part test:

> 1) In order to be sufficiently important to warrant overriding a constitutionally protected right or freedom the impugned provision must relate to concerns which are pressing and substantial in a free and democratic society;
>
> 2) The means chosen to achieve the legislative objective must pass a three-part proportionality test which requires that they (a) be rationally connected to the objective, (b) impair the right or freedom in question as little as possible and (c) have deleterious effects which are proportional to both their salutary effects and the importance of the objective which has been identified as being of "sufficient importance."[147]

Section 1 requires consideration not only of the interests of an applicant, but of affected persons generally. On entering section 1, the perspective shifts from the narrow perspective of the aggrieved individual to the perspective that includes all members of the constitutional order. A pressing and substantial objective would serve the "common" good. But the valued individual is not abandoned at the door to section 1. Section 1 is not a "utilitarian" or consequentialist provision that allows the claimant individual's interests to be ignored in pursuit of the greatest good for the greatest number. The pressing and substantial objective (the common good promoted by legislation) is a good not only for others but for the applicant individual as well. The applicant is one of the participants in the "free and democratic society." Thus, in *Oakes*, Dickson CJ quoted Wilson J: "As Wilson J. stated in *Singh v. Minister of Employment and Immigration, supra*, at p. 218: '. . . it is important to remember that the courts are conducting this inquiry in light of a commitment to uphold the rights and freedoms set out in the other sections of the Charter'."[148] Further, Dickson CJ wrote as follows:

147 *Laba*, *supra* note 67 at 1006.
148 *Oakes*, *supra* note 17 at 135-36.

> A second contextual element of interpretation of s. 1 is provided by the words "free and democratic society." Inclusion of these words as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the Charter was originally entrenched in the Constitution: Canadian society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.[149]

Section 1 expressly requires justifiable limitations on *Charter*-protected rights to be "reasonable." The link between reasonableness and the valued individual remains presupposed by section 1. The tripartite "proportionality" test for legislative means delineates conditions that must be satisfied for the State to "reasonably" limit a claimant's rights; that is, for a claimant to be "reasonably" satisfied (or for a "reasonable applicant" to be satisfied), even if the limit is not his or her preference, that a rights limitation is acceptable.

The reasonable is the practical: "In some cases the government, for practical reasons, may only be able to meet an important objective by means of a law that has some fundamental flaw."[150] The State has the burden of demonstrating the lack of practical alternatives. The State is entitled to deference in its selection of the legislative means to deal with complex social problems: "In making this assessment, the courts accord the legislature a measure of deference, particularly on complex social issues where the legislature may be better positioned than the courts to choose among a range of alternatives."[151]

The reasonable is also the proportional. In the final *Oakes* subtest, the good (or the benefits) to be achieved by the legislation are weighed against the actual harm (or the costs) caused by the legislation:

> At the final stage of the s. 1 analysis, the court is required to weigh the negative impact of the law on people's rights against the beneficial impact of the law in terms of achieving its goal for the greater public good. The impacts are judged both qualitatively and quantitatively. Unlike individual claimants, the Crown is well placed to call the social science and expert evidence required to justify the law's impact in terms of

149 *Ibid* at 136.

150 *Carter*, *supra* note 6 at para 82.

151 *Hutterian Brethren*, *supra* note 60 at para 53.

> society as a whole.[152]

Thus, "[d]epending on the importance of the legislative goal and the nature of the s. 7 infringement in a particular case, the possibility that the government could establish that a s. 7 violation is justified under s. 1 of the Charter cannot be discounted."[153]

2. Section 1 and Legislation that Fails Section 7 Substantive Rationality

While legislation found to be "arbitrary" under section 7 may not be sustainable under section 1, overbroad and even grossly disproportional legislation could, at least in theory, be sustained under section 1.

Chaoulli appears to stand in the path of arbitrary legislation surviving the rational connection test. If legislation is arbitrary, either running contrary to its objective or not supporting its objective at all, satisfaction of the *Oakes* requirement that legislation be "rationally connected" to its objective may be precluded:

> The government undeniably has an interest in protecting the public health regime. However, given the absence of evidence that the prohibition on the purchase and sale of private health insurance protects the health care system, the rational connection between the prohibition and the objective is not made out. Indeed, we question whether an arbitrary provision, which by reason of its arbitrariness cannot further its stated objective, will ever meet the rational connection test under *R. v. Oakes*, [1986] 1 SCR 103.[154]

However, while Cory J suggested in *Heywood* that an overbroad law would be difficult to characterize as "minimally impairing" *Charter* rights, McLachlin CJ allowed in *Bedford* that even an overbroad law might, in the right circumstances, pass this test: "As stated above, if a law captures conduct that bears no relation to its purpose, the law is overbroad under s. 7; enforcement practicality is one

152 *Bedford*, *supra* note 2 at para 126. "Whereas the rational connection test and the least harmful measure test are essentially determined against the background of the proper objective, and are derived from the need to realize it, the test of proportionality (*stricto sensu*) examines whether the realization of this proper objective is commensurate with the deleterious effect upon the human right. . . . It requires placing colliding values and interests side by side and balancing them according to their weight": Aharon Barak, quoted in *Hutterian Brethren*, *supra* note 60 at para 76.

153 *Bedford*, *supra* note 2 at para 129.

154 *Chaoulli*, *supra* note 42 at para 155.

way the government may justify an overbroad law under s. 1 of the *Charter*."[155] This possibility is opened by the nature of the "minimal impairment test:" "'Minimal impairment" asks whether the legislature could have designed a law that infringes rights to a lesser extent; it considers the legislature's reasonable alternatives."[156]

A grossly disproportional law is not arbitrary or overbroad. It would be rationally connected to its objective, and may well minimally impair rights, in the sense that no practical alternative to its legislative means are available. The section 7 finding was that promotion of the law's purpose, by itself, did not justify the adverse impact of the law on the claimant. From the deliberative democracy standpoint, the law maker had failed to listen to the claimant or to take the claimant's interests into account. The final stage of the section 1 inquiry allows the voices of others to be considered: "We see how the law affects you, but consider how the law affects all of us as well as you." A critical concern at this point is the actual benefit achieved by the law (for all, including the claimant) as set against the actual degree of adverse impact of the law.[157] These are matters of evidence, not anecdote, with the burden of proof remaining on the State.[158] But it is possible that the State may satisfy this burden, given the significance of legislative objective, the link between the legislation and the objective, the lack of practical alternatives to the legislation, and weight of the benefits of the legislation as compared with the adverse effects of the legislation. Legislation that is not reasonable from the standpoint of the affected individual may, from the standpoint of other affected individuals, turn out to be reasonable. Deliberative democracy does not entail that even the adversely affected valued individual always gets his or her own way.

The availability of section 1 moderates the impact of section 7 substantive rationality on the separation of powers. The State gets its fair chance under section 1 to justify the rationality of the impairment of individuals' life, liberty, or security of the person.

CONCLUSION

The substantive rationality principles of fundamental justice — which resist arbitrariness, overbreadth, and gross disproportionality — reflect the dignity

155 *Bedford*, *supra* note 2 at para 144.
156 *Ibid* at para 126.
157 *Hutterian Brethren*, *supra* note 60 at para 77.
158 *Carter*, *supra* note 6 at para 120.

and worth of individuals in the constitutional order, their rationality and their equality. Judicial review based on these principles imposes standards of rational, evidence-based, inclusive decision-making on legislators. Within the judicial review process, individuals have the opportunity to make the case that the legislator should have heard.

The principles, though, operate in the real world. Doctrines have not been fully and clearly worked out. Judges will make mistakes in applying the principles. Those who require recourse to these principles bear double burdens. They bear the burdens that prevented their voices from being heard or listened to when legislators acted. They bear the very real burdens of carrying their rights limitations into litigation, of getting access to court-based justice when politically-based justice was denied.

Yet cases like *PHS* and *Bedford* make their way to the courts. When they do, they help to move our constitutional order closer toward the goals identified by Sunstein in this paper's epigraph: promoting deliberation in government, furnishing surrogates for it when it is absent, limiting factionalism and self-interested representation, and bringing us toward political equality.[159]

159 Sunstein, *After the Rights Revolution*, *supra* note 1 at 171.

Le transport interprovincial sur le territoire local : vers un nécessaire équilibre*

*David Robitaille***

Le transport interprovincial d'hydrocarbures par trains et pipelines ainsi que l'aviation et la navigation suscitent de vives controverses au sein de populations locales. Ces activités font cependant l'objet de compétences que la Loi constitutionnelle de 1867 accorde au Parlement fédéral. Les élus provinciaux et municipaux se demandent alors dans quelle mesure ils peuvent ou non intervenir, en vertu des compétences provinciales sur l'aménagement du territoire, la santé et l'environnement, pour pallier les risques qu'elles engendrent. Ce texte est l'occasion d'analyser en profondeur la jurisprudence constitutionnelle canadienne récente en ces domaines. Si cette dernière a élargi la possibilité que les normes provinciales et municipales valides s'appliquent aux entreprises fédérales, elle n'a pas encore permis d'en arriver à un équilibre satisfaisant entre les compétences provinciales et fédérales sur le territoire local. Nous avançons que cet équilibre sera atteint lorsque les tribunaux reconnaîtront, dans une certaine mesure, la voix des instances locales dans la détermination de l'emplacement des infrastructures fédérales de transport.

The interprovincial transport of hydrocarbons by rails and pipelines, as well as airport location and marine navigation issues, are increasingly causing controversy within local populations. These activities are the object of powers that the Constitution Act, 1867, attributes to the federal Parliament. Provincial officials and municipal councilors often wonder to what extent they can or cannot intervene under provincial jurisdiction over land use, health and the environment, to mitigate the risks oil transportation poses. This article analyzes recent Canadian constitutional jurisprudence in these areas. While recent case law expands the possibility that valid provincial and municipal laws and regulations can apply to federal undertakings, judicial rulings have not yet achieved a satisfactory balance between provincial and federal jurisdiction. I argue that such a balance requires a recognition by Canadian courts that local authorities should have a voice in determining the location of federal transport infrastructure.

* J'exprime ma sincère gratitude aux professeurs Sébastien Grammond, Sophie Thériault et Jean Baril. Leurs commentaires pertinents et perspicaces d'une version antérieure de ce texte ont contribué à en améliorer les idées. Pour cette même raison, je remercie également les évaluateurs externes mandatés par la revue. Je remercie aussi Me Michel Bélanger et Me Karine Peloffy du Centre québécois du droit de l'environnement. Ce sont les discussions que nous avons eues avec Jean au courant de la dernière année qui m'ont incité à rédiger ce texte, qui n'engage bien sûr que moi. Celui-ci a été réalisé grâce à une subvention du programme Savoir du Conseil de recherches en sciences humaines du Canada (CRSH), pour un projet intitulé « Citoyenneté locale, enjeux environnementaux et partage des compétences : Combler le déficit démocratique issu d'un fédéralisme bidimensionnel », mené conjointement avec les professeurs Lucie Lamarche et Benoît Frate. Je remercie enfin les professeurs Stéphane Beaulac et Jean-François Gaudreault-Desbiens, directeurs de la Collection droit public du Jurisclasseur Québec. Lorsqu'ils m'ont sollicité en 2012 pour rédiger un chapitre résumant le partage des compétences provinciales et fédérales sur les municipalités, les transports et les communications, je ne me doutais pas que cela inaugurait le début d'un vaste et passionnant chantier de recherche.

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Introduction

Plusieurs citoyens et municipalités au Canada revendiquent le droit de participer et d'être consultés quant aux décisions qui affectent quotidiennement leurs droits, leur santé et l'environnement sur le territoire local.[1] C'est notamment le cas en ce qui concerne le transport de pétrole ou d'autres hydrocarbures par trains ou par pipelines qui a pris une ampleur sans précédent au Canada. Qu'il suffise de mentionner, en particulier, les projets de pipelines bien connus Énergie Est,[2] Northern Gateway[3] et Trans Mountain,[4] de même que la construction envisagée d'un terminal pétrolier à Belledune au Nouveau-Brunswick qui accentuerait le transport par wagons.[5] Dans ce contexte, se pose l'importante question de savoir jusqu'où peuvent aller les provinces et municipalités préoccupées par le transport d'hydrocarbures à l'intérieur du cadre constitutionnel canadien.[6] C'est aussi le cas lorsque des citoyens

1 Nous utiliserons l'expression « territoire local » à quelques reprises dans ce texte. Elle ne sert nullement, bien entendu, à nier la légitimité du pouvoir législatif du Parlement sur ce territoire, mais s'inspire des nombreux travaux en sciences sociales selon lesquels le « territoire local » est un lieu où s'expriment avec vivacité les intérêts et besoins citoyens locaux. De manière générale, voir : Henri Lefebvre, *Le droit à la ville*, Paris, Anthropos, 1968; Martin Horak et Robert Young, dir, *Sites of Governance: Multilevel Governance and Policy Making in Canada's Big Cities*, Montréal et Kingston, McGill-Queen's University Press, 2012; Eugene J McCann, « Space, citizenship, and the right to the city: A brief overview » (2002) 58 GeoJournal 77; Mark Purcell, *Recapturing Democracy: Neoliberalization and the Struggle for Alternative Urban Futures*, New York, Routledge, 2008; Saskia Sassen, « The Repositioning of Citizenship: Emergent Subjects and Spaces for Politics » (2002) 46 Berkeley Journal of Sociology 4; Lynn A Staeheli, « Cities and Citizenship » (2003) 24:2 Urban Geography 97.

2 Daniel Breton, « TransCanada : motion unanime à l'Assemblée Nationale », *Journal de Montréal* (6 novembre 2014); Félix Morrissette-Beaulieu, « Projet Énergie Est : Brad Wall fustige le Québec et l'Ontario », *Ici Radio-Canada* (16 juillet 2015); Christian Noël, « L'Ontario et le Québec unissent leurs voix face au projet de pipeline de Transcanada », *Ici Radio-Canada* (20 novembre 2014); Alexandre Shields, « Fronde municipale contre le projet Énergie Est », *Le Devoir* (26 février 2015).

3 Robin Rowland, « Kitimat residents vote "no" in pipeline plebiscite », *The Globe and Mail* (12 avril 2014); Carrie Tait, « B.C. municipalities oppose Enbridge pipeline », *Financial Post* (1er octobre 2010); Les Whittington, « Unprecedented opposition may make British Columbia pipeline a non-starter », *The Star* (10 septembre 2012).

4 Tara Carman, « Mayor Derek Corrigan says Burnaby will stop Kinder Morgan pipeline in the courts », *The Vancouver Sun* (18 novembre 2014); Laura Kane, « Trans Mountain pipeline expansion would be "disastrous": Vancouver mayor », *The Globe and Mail* (27 mai 2015).

5 Sébastien Lachance, « Plus de 200 wagons chargés de pétrole vont chaque jour traverser le Restigouche », *Acadie Nouvelle* (31 mai 2015).

6 Jean Baril et David Robitaille, « Oléoduc Énergie Est : Les lois du Québec sont applicables », *Le Devoir* (31 octobre 2014); Bruce McIvor, « Provinces have every right to set conditions on pipelines » (14 décembre 2009), *Aboriginal Law News & Analysis* (blogue), en ligne : <http://www.first-peopleslaw.com/index/articles/172.php>; Dwight Newman, « Provinces have no right to pipeline "conditions" », *The Globe and Mail* (3 décembre 2014); Martin Olszynski, « Whose (Pipe)line is it Anyway? » (3 décembre 2014), *ABlawg* (blogue), en ligne : <http://ablawg.ca/2014/12/03/whose-pipeline-is-it-anyway/>; Kristen Pue, « B.C. Premier Vows to Shut Down Northern Gateway

demandent à leur conseil municipal de « faire quelque chose » à propos du bruit et de la pollution de l'air et de l'eau causés par des aérodromes locaux ou la navigation sur les lacs. Puisque ces activités de transport, d'aéronautique ou de navigation font l'objet de compétences fédérales et constituent des « entreprises fédérales »,[7] il arrive que des citoyens pensent conséquemment que seuls les lois et règlements fédéraux seraient applicables à ces dernières; l'imposition de normes ou d'exigences à ces entreprises relèverait aussi uniquement des organismes fédéraux, par exemple de l'Office national de l'énergie (ONÉ).

Comme l'affirmait l'ONÉ récemment, la réalité constitutionnelle est toutefois plus complexe :

> Cela ne veut pas dire qu'une société pipelinière peut se soustraire à une loi provinciale ou à un règlement municipal de façon générale. Bien au contraire. Les pipelines relevant de la réglementation fédérale doivent, en application des lois et des conditions imposées par l'Office, respecter toute une panoplie de lois provinciales et de règlements municipaux.[8]

Les compétences qui interagissent relativement à différents aspects du transport sont ainsi divisées entre le Parlement et les provinces. Le présent texte porte uniquement sur le transport d'hydrocarbures et les enjeux locaux soulevés par l'aviation et la navigation, dont les compétences sont prévues aux paragraphes 92(10) (transport local et interprovincial), [9] 92(13) (propriété et droits civils

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Pipeline Project if 5 "Bottom-Lines" Aren't Met: Can She, Constitutionally? » (31 août 2012), *Centre for Constitutional Studies, Centre d'études constitutionnelles*, en ligne : <http://ualawccsprod.srv.ualberta.ca/ccs/index.php/constitutional-issues/federalism/765-b-c-premier-vows-to-shut-down-northern-gateway-pipeline-project-if-5-bottom-lines-aren-t-met-can-she-constitutionally>; David Robitaille et al, « Opinion : Provinces can impose conditions », *The Vancouver Sun* (16 décembre 2014).

7 En droit constitutionnel, l'expression « entreprises fédérales » ne fait pas référence aux compagnies ou sociétés privées elles-mêmes, mais à l'infrastructure matérielle et physique ou aux services qu'elles offrent : *Consolidated Fastfrate Inc c Western Canada Council of Teamsters*, 2009 CSC 53, au para 41, [2009] 3 RCS 407 [*Consolidated Fastfrate*].

8 Office national de l'énergie, *Demande présentée par Trans Mountain Pipeline ULC (Trans Mountain) concernant le projet d'agrandissement du réseau de Trans Mountain. Avis de requête et avis de question constitutionnelle de Trans Mountain du 26 septembre 2014, Décision no 40* (23 octobre 2014), Office National de l'énergie à la p 15, en ligne : <https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2449981/2541380/A97-2_-_D%C3%A9cision_no_40_-_Avis_de_motion_de_Trans_Mountain_et_l_avis_d_une_question_constitutionnelle_en_date_du_26_septembre_2014_-_A4D6G9.pdf?nodeid=2541053&vernum=-2> [*Décision no 40 (Trans Mountain)*].

9 Le paragraphe 92(10)a) énonce : « 92. Dans chaque province la législature pourra exclusivement faire des lois relatives aux matières tombant dans les catégories de sujets ci-dessous énumérés, savoir : [...] 10. Les travaux et entreprises d'une nature locale, autres que ceux énumérés dans les

dans la province) et (16) (questions de nature locale), 91(10) (navigation), et au paragraphe introductif de l'article 91 (théorie des dimensions nationales) qui permet au Parlement d'intervenir sur des sujets circonscrits lorsque l'intérêt canadien l'exige.

Nous verrons, dans la partie 1, que l'équilibre entre les intérêts, la diversité et les besoins locaux, d'une part, et les intérêts nationaux, d'autre part, est au cœur même de la Loi constitutionnelle de 1867[10] et du paragraphe 92(10). Le principe fédératif et ses principes sous-jacents de subsidiarité et d'interprétation coordonnée ou harmonieuse des compétences respectives des provinces et du Parlement (qui se distinguent du principe de fédéralisme coopératif)[11] posent ainsi la recherche d'un équilibre comme une exigence fondamentale[12] dans l'aménagement des compétences législatives des deux paliers.[13] Ces principes ne seront donc pas utilisés comme source autonome d'obligations ou de pouvoirs législatifs, mais au soutien d'une interprétation selon nous plus équilibrée du partage des compétences.

Nous observerons ensuite dans la partie 2 que les décisions des tribunaux n'ont pas toujours reflété cet engagement. À une certaine époque, en vertu d'une application large de la doctrine de l'exclusivité des compétences, alors appelée doctrine de l'immunité interjuridictionnelle, les tribunaux jugeaient fréquemment que les entreprises fédérales de transport n'étaient pas assujetties aux normes provinciales et municipales qui affectaient leurs

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catégories suivantes : *a*) Lignes de bateaux à vapeur ou autres bâtiments, chemins de fer, canaux, télégraphes et autres travaux et entreprises reliant la province à une autre ou à d'autres provinces, ou s'étendant au-delà des limites de la province », *Loi constitutionnelle de 1867* (R-U), 30 & 31 Vict, c 3, reproduite dans LRC 1985 annexe II, n° 5 [*LC 1867*]. Pour de plus amples détails sur les critères permettant de qualifier de « locale » ou d'« interprovinciale » une entreprise, voir : Henri Brun, Guy Tremblay et Eugénie Brouillet, *Droit constitutionnel*, 6e éd, Cowansville (Qc), Yvon Blais, 2014 aux pp 560-576 [Brun, Tremblay et Brouillet] et David Robitaille, « Le local et l'interprovincial : Municipalités, transports et communications », dans Stéphane Beaulac et Jean-François Gaudreault-DesBiens, dir, *Droit constitutionnel*, Jurisclasseur Québec, Fascicule 22, Lexis Nexis, 2012 (feuilles mobiles; mise à jour annuelle) [Robitaille, « Le local et l'interprovincial »].

10 *LC 1867*, *supra* note 9.

11 Selon la majorité de la Cour, le fédéralisme coopératif constitue essentiellement un principe politique qui, sur le plan juridique, ne sert qu'à décrire des pratiques de coopération intergouvernementale sans pour autant qu'il ne dispose d'une portée normative : *Québec (Procureur général) c Canada (Procureur général)*, 2015 CSC 14 au para 17 [*Québec c Canada*, 2015]. Il en va autrement, comme nous le verrons, des principes de subsidiarité et d'interprétation coordonnée.

12 Voir Hugo Cyr, « Autonomy, Subsidiarity, Solidarity: Foundation of Cooperative Federalism » (2014) 23:4 Forum constitutionnel 20.

13 Le professeur Bruce Ryder est également de cet avis : Bruce Ryder, « Equal Autonomy in Canadian Federalism: The Continuing Search for Balance in the Interpretation of the Division of Powers » (2011) 54 SCLR 565 aux pp 574-579.

activités essentielles ou le contenu minimum des compétences fédérales.[14] Après avoir décrit sur quels éléments des compétences fédérales sur le transport interprovincial, l'aéronautique et la navigation porte ce cœur ou contenu minimum, nous verrons que la Cour suprême du Canada a opéré un revirement jurisprudentiel majeur en 2007 dans l'arrêt Banque canadienne de l'Ouest c. Alberta,[15] confirmant que les lois provinciales peuvent avoir des effets significatifs sur les entreprises fédérales.[16] Nous analyserons les effets de cet arrêt sur l'interaction des compétences provinciales et fédérales sur le territoire local en matière de transport et constaterons, à la lumière de la jurisprudence récente, que la nouvelle approche de la Cour est en voie de permettre d'atteindre un meilleur équilibre entre ces dernières. Ce fut notamment le cas dans le récent arrêt White c. Châteauguay,[17] dans lequel la Cour d'appel du Québec a jugé qu'une municipalité avait le pouvoir de refuser la construction d'une antenne de communications à proximité de maisons, alors que la compagnie disposait d'un site alternatif dans une aire territoriale qu'elle avait préalablement établie. Si cet arrêt porte sur la compétence en matière de communications, il demeure d'un grand intérêt en raison des enjeux environnementaux, municipaux et constitutionnels qu'il pose. Aussi, puisque la compétence sur les communications relève elle aussi en partie du paragraphe 92(10)a) LC 1867, l'analyse de l'arrêt Châteauguay, dont la Cour suprême entendee le pourvoi à l'automne 2015,[18] s'avère pertinente aux fins de ce texte.

Cette contribution est ainsi l'occasion d'analyser, dans une perspective de droit positif canadien, la jurisprudence constitutionnelle contemporaine alors que le transport interprovincial pose de nombreux et importants défis environnementaux et citoyens.[19] Pour ce faire, nous analysons principalement les décisions pertinentes des cours supérieures et d'appel dans chaque province, de la Cour fédérale, de la Cour d'appel fédérale et de la Cour suprême en matière de transport interprovincial, d'aéronautique et de navigation rendues

14 Les compétences que la *LC 1867* attribue aux provinces et au Parlement disposent en effet d'un noyau essentiel ou d'un contenu minimum, composé des éléments les plus importants de la compétence. Ces compétences permettent aussi à ces instances de légiférer sur d'autres aspects, plus périphériques, qui y sont néanmoins liés. Voir notamment : *Banque canadienne de l'Ouest c Alberta*, 2007 CSC 22, aux paras 50, 86, [2007] 2 RCS 3 [*Banque canadienne de l'Ouest*].

15 *Ibid.*

16 *Infra* notes 91-123

17 *White c Châteauguay (Ville de)*, 2014 QCCA 1121 [*Châteauguay*].

18 Demande d'autorisation d'en appeler accueillie : *Rogers Communications Inc, et al c Ville de Châteauguay, et al*, 2014 QCCA 1121, autorisation d'appel à la CSC accordée, 36027 (29 janvier 2015).

19 En matière de pipelines, voir Nicolas Roy, « The Trans Quebec & Maritimes Pipeline Project: The jurisdictional debate in the area of land planning » (1982) 23:1 C de D 175 aux pp 186-197.

depuis 2007. Nous constatons que l'état actuel du droit confirme que si les entreprises fédérales[20] ne peuvent pas voir leurs activités bloquées par les provinces et municipalités, ces dernières disposent néanmoins de pouvoirs utiles en matière notamment de santé, de sécurité et d'environnement, qui s'appliquent généralement aux entreprises fédérales.

1. Le transport : l'équilibre entre l'intérêt local et l'intérêt national

Le paragraphe 92(10) constitue une particularisation du principe de subsidiarité,[21] voulant

> que le niveau de gouvernement le mieux placé pour adopter et mettre en œuvre des législations soit celui qui est le plus apte à le faire, non seulement sur le plan de l'efficacité mais également parce qu'il est le plus proche des citoyens touchés et, par conséquent, le plus sensible à leurs besoins, aux particularités locales et à la diversité de la population.[22]

Dans le Renvoi relatif à la Loi sur la procréation assistée,[23] les juges LeBel et Deschamps en résumaient bien l'importance en droit constitutionnel canadien :

> Ce principe veut que l'intervention législative provienne de l'ordre de gouvernement qui est le plus proche du citoyen et qui est ainsi jugé le plus à même de répondre aux préoccupations de ce citoyen [...]. À l'occasion du Renvoi relatif à la sécession du Québec, la Cour a en effet exprimé l'opinion que « [l]a structure fédérale de notre pays facilite aussi la participation à la démocratie en conférant des pouvoirs au gouvernement que l'on croit le mieux placé pour atteindre un objectif sociétal donné dans le contexte de cette diversité » (par.

20 L'argumentation que nous développons dans ce texte pourrait aussi valoir pour les sociétés ou entreprises qui, par leurs lois constitutives, sont mandataires de la Couronne fédérale, par exemple Postes Canada. Pour de plus amples développements sur le sujet, qui dépassent l'objet du présent texte, voir : Brun, Tremblay et Brouillet, *supra* note 9 aux pp 750, 753-754. Comme le font d'ailleurs remarquer ces derniers à la p 754, la Cour suprême a déjà jugé une loi provinciale sur le transport applicable à une société mandataire de la Couronne fédérale : *Commission de transport de la Communauté urbaine de Québec c Canada (Commission des champs de bataille nationaux)*, [1990] 2 RCS 838.

21 Le partage des compétences sur les entreprises locales et interprovinciales en constituerait effectivement un exemple : Eugénie Brouillet, « Canadian Federalism and the Principle of Subsidiarity : Should We Open Pandora's Box? », (2011) 54 SCLR (2d) 601, 613 [Brouillet « Canadian Federalism »]; Peter W Hogg, « Subsidiarity and the Division of Powers in Canada » (1993) 3 NJCL 341 à la p 346.

22 *114957 Canada Ltée (Spraytech, Société d'arrosage) c Hudson (Ville)*, 2001 CSC 30 au para 3, [2001] 2 RCS 241 [*Spraytech*].

23 *Renvoi relatif à la Loi sur la procréation assistée*, 2010 CSC 61, [2010] 3 RCS 457.

> 58). [...] De plus, dans Banque canadienne de l'Ouest c. Alberta, 2007 CSC 22, [2007] 2 R.C.S. 3, la majorité s'est mise en garde contre l'effet asymétrique de la doctrine de la protection des compétences, notant que cette doctrine peut être considérée comme une menace au principe de subsidiarité (par. 45). La nature des compétences attribuées aux provinces d'une part et à l'autorité centrale d'autre part dans la Loi constitutionnelle de 1867 serait largement conforme au principe de subsidiarité. [...] [L]'interprétation généreuse qu'ont généralement donnée le Conseil privé et notre Cour à la compétence provinciale en matière de propriété et droits civils s'explique par leur acceptation du principe de subsidiarité [...]. Ce principe constitue donc une composante importante du fédéralisme canadien.[24]

Comme l'écrivait le professeur Hugo Cyr, ce principe ne sert pas qu'à décrire les fondements ou la logique sous-jacente de la LC 1867, mais constituerait maintenant, peu à peu, un principe normatif structurant du fédéralisme canadien[25] dont les juges doivent tenir compte dans l'interprétation du partage des compétences.[26] Bien que les juges LeBel et Deschamps n'aient alors écrit que pour quatre juges, ne formant donc pas la majorité, la juge McLachlin, au nom de quatre juges, ne remit aucunement en question l'existence même de ce principe. Il faut toutefois souligner qu'elle différait d'opinion quant à sa portée, soulignant que celui-ci ne pouvait restreindre la capacité du Parlement de légiférer sur une matière lui étant clairement reconnue par la LC 1867.[27] Ajoutons à cela que huit juges de la Cour suprême y référaient dans un passage important de l'arrêt Banque canadienne de l'Ouest[28], tandis qu'une majorité de la Cour le mentionnait explicitement et s'en inspirait pour conclure à la validité d'un règlement municipal dans l'arrêt 114957 Canada Ltée (Spraytech,

24 *Ibid* au para 183 (juges LeBel et Deschamps, en leur nom et au nom des juges Abella et Rothstein). Voir également le *Renvoi relatif à la sécession du Québec*, [1998] 2 RCS 217 au para 58.

25 Cyr, *supra* note 12 aux pp 27-28 et ss. Voir également : Brun, Tremblay et Brouillet, *supra* note 9 à la p 458; Dwight Newman, « Changing Division of Powers Doctrine and the Emergent Principle of Subsidiarity », (2011) 74 Sask L Rev 21 à la p 28 [Newman, « The Emergent Principle of Subsidiarity »].

26 *Renvoi relatif à la réforme du Sénat*, 2014 CAC 32, aux para 25-26, [2014] 1 RCS 704; *Renvoi relatif à la sécession du Québec*, *supra* note 24 aux para 52-54; *Renvoi relatif à la rémunération des juges de la Cour provinciale (Î.-P.-E.)*, [1997] 3 RCS 3 au para 95.

27 *Renvoi relatif à la Loi sur la procréation assistée*, *supra* note 23 aux para 69-72.

28 *Banque canadienne de l'Ouest*, *supra* note 14 au para 45 : « Les auteurs ont signalé qu'une application extensive de la doctrine afin de protéger les chefs de compétence fédéraux et les entreprises fédérales n'est ni nécessaire [TRADUCTION] "ni souhaitable dans une fédération où les provinces sont chargées d'adopter et d'appliquer un aussi grand nombre de lois visant à protéger les travailleurs, les consommateurs et l'environnement (pour ne nommer que ceuxci)" [référence omise]. L'effet asymétrique de la doctrine de l'exclusivité des compétences peut aussi être considéré comme une menace aux principes de subsidiarité ».

Société d'arrosage) c. Hudson (Ville).[29] Si le silence de la Cour à ce propos dans le Renvoi relatif à la Loi sur les valeurs mobilières[30] peut laisser perplexe,[31] soulignons néanmoins que la Cour s'en inspire manifestement. Il s'agit effectivement d'un litige dans lequel la tension entre les intérêts économiques et politiques provinciaux et nationaux était au cœur de la problématique. Le Canada alléguait que le marché des valeurs mobilières avait à ce point évolué qu'il était devenu d'intérêt national et de compétence fédérale concurrente en vertu du par. 91(2) LC 1867 portant sur les échanges et le commerce. Les motifs unanimes de la Cour démontrent d'ailleurs très clairement qu'elle était préoccupée par cette tension lorsqu'elle jugeait que le projet de loi qui lui était soumis visait les intérêts locaux et non un éventuel intérêt national véritable.

Tel qu'il appert de la jurisprudence, le principe de subsidiarité établirait donc une présomption relative au profit de l'autonomie locale et du niveau de gouvernance le plus près des citoyens.[32] Les juges devraient en tenir compte dans l'interprétation du partage des compétences afin notamment de « combler les lacunes des termes exprès du texte constitutionnel »[33] ou ses ambiguïtés.[34] Comme nous le verrons maintenant, le partage des compétences sur le transport a été opéré dans cette logique de subsidiarité, les pouvoirs locaux étant la norme, et les pouvoirs fédéraux, l'exception.

1.1 L'autonomie locale au cœur de la compétence sur le transport

La compétence de principe sur le transport relève effectivement des provinces en vertu du paragraphe 92(10) et des paragraphes 92(13) et (16) LC 1867. Le paragraphe 92(10)a) prévoit cependant une compétence fédérale d'exception eu égard aux entreprises de transport et de communications dont les

29 *Spraytech*, *supra* note 22. Le principe de subsidiarité est aussi inscrit au cœur de la *Loi sur le développement durable*, RLRQ c D-8.1.1, art 6(g).

30 *Renvoi relatif à la Loi sur les valeurs mobilières*, 2011 CSC 66, [2011] 3 RCS 837.

31 Pour une analyse exhaustive de la valse-hésitation de la Cour suprême sur le principe du fédéralisme, dont le principe de subsidiarité est une composante, voir Jean-François Gaudreault-Desbiens, « The "Principle of Federalism" and the Legacy of the Patriation and Quebec Veto References », (2011) 54 SCLR (2d) 77 [Gaudreault-Desbiens, « The Principle of Federalism »].

32 Cyr, *supra* note 12 aux pp 21, 27. Voir aussi Gaudreault-Desbiens, « The Principle of Federalism », *supra* note 31 à la p 109; Newman, « The Emergent Principle of Subsidiarity », *supra* note 25 à la p 29.

33 *Renvoi relatif à la rémunération des juges de la Cour provinciale (Î.-P.-E.)*, *supra* note 26 au para 95. Voir également le *Renvoi relatif à la sécession du Québec*, *supra* note 24 aux para 52-54.

34 Sur l'importance et l'utilisation des principes non écrits par la Cour, voir : Eugénie Brouillet, « La dilution du principe fédératif et la jurisprudence de la Cour suprême du Canada », (2004) 45 :1 C de D 7; Gaudreault-DesBiens, « The Principle of Federalism », *supra* note 31.

activités dépassent les limites géographiques provinciales.[35] C'est ce qu'indiquait clairement la majorité de la Cour suprême en 2009 dans l'arrêt Consolidated Fastfrate Inc. c. Western Canada Council of Teamsters,[36] sous la plume du juge Rothstein, en écrivant que le paragraphe 92(10) « englobe à lui seul les principes du processus décisionnel local et du processus décisionnel centralisé qui sont essentiels à l'établissement d'un juste équilibre entre la diversité locale et l'unité nationale. »[37] Elle ajoutait que le contexte historique de même que l'objet et les termes de la LC 1867 indiquent l'intention du constituant selon laquelle « la diversité en matière de compétence était considérée comme la voie vers le développement économique de la nation »,[38] et qu'il faut en conséquence « respecter le choix de la diversité du pouvoir de réglementation en matière de travaux et d'entreprises si aucune raison ne justifie l'application de la compétence exceptionnelle du fédéral. »[39] La majorité de la Cour s'appuyait notamment sur l'intention univoque du constituant :

> Il est intéressant de noter que, à l'origine, l'al. 92(10) a) de la Loi constitutionnelle de 1867 devait conférer au gouvernement fédéral une compétence principale et ne constituait pas une exception à la compétence provinciale sur les « travaux locaux ». Selon les résolutions adoptées par les délégués des colonies de l'Amérique britannique du Nord à la conférence de Québec, en octobre 1864, le gouvernement fédéral s'est vu conférer la compétence législative principale en ce qui concerne :
>
> 29. . . .
>
> 8. Les lignes de bateaux à vapeur ou d'autres bâtiments, les chemins de fer, les canaux et autres travaux qui relieront deux ou plusieurs provinces ou se prolongeront au-delà des limites de l'une d'elles;
>
> Quant aux gouvernements provinciaux, ils se sont vu conférer la compétence en ce qui concerne :
>
> 43. . . .
>
> 13. Les travaux locaux;
>
> (Voir Résolutions relatives à l'union proposée des provinces de l'Amérique britannique du Nord (1865), p. 6 et 8.)

35 *Consolidated Fastfrate*, *supra* note 7 aux para 31, 33, 36 à 39 et 68.

36 *Ibid.*

37 *Ibid* au para 31. Voir également le para 33. De manière générale, à propos de cet équilibre dans la *LC 1867*, voir : Cyr, *supra* note 12 et Ryder, *supra* note 13.

38 *Consolidated Fastfrate*, *supra* note 7 au para 39

39 *Ibid.* Voir également le paragraphe 68. Voir aussi le para 31 : « Le paragraphe 92(10) prévoit que les "travaux et entreprises" sont assujettis à la réglementation locale. Ils ne relèvent de la compétence fédérale que si une exception est prévue. *La réglementation locale est la règle, la réglementation fédérale, l'exception* » [notre italique].

> Toutefois, au moment où la Loi constitutionnelle de 1867 a été édictée
>
> par le Parlement britannique, la préférence pour la réglementation provinciale s'est traduite par le libellé du par. 92(10) lui-même, alors que la compétence en matière de « [l]ignes de bateaux à vapeur ou autres bâtiments, chemins de fer, canaux, télégraphes et autres travaux et entreprises reliant la province à une autre ou à d'autres provinces, ou s'étendant au-delà des limites de la province » est devenue une exception à la compétence provinciale en matière de « travaux et entreprises d'une nature locale ».[40]

Cela devrait donc en principe signifier que la compétence fédérale sur le transport interprovincial devrait s'interpréter restrictivement. C'est ce que semble avoir voulu spécifier la majorité de la Cour lorsque le juge Rothstein écrivait que « la compétence fédérale est exceptionnelle et devrait être traitée comme telle. »[41]

Les juges McLachlin, Binnie et Fish étaient toutefois dissidents sur ce point.[42] La jurisprudence portant sur le partage des compétences en matière de transport, y compris d'autres jugements de la Cour suprême, ne nous paraît pas, d'ailleurs, considérer la compétence fédérale comme une exception, ni l'interpréter restrictivement au profit d'une compétence provinciale de principe dans les cas ambigus.[43] Cela semble pourtant contraire à ce qu'affirmait ci-dessus la majorité de la Cour suprême dans l'arrêt Consolidated Fasfrate dans des propos qui, à notre connaissance, n'ont jamais été explicitement remis en question par la Cour. La caractérisation de la compétence fédérale sur le transport interprovincial comme une compétence d'exception constituerait-elle donc un « accident de parcours » par une majorité de la Cour suprême, ou sont-ce les jugements ultérieurs qui ne suivent pas l'arrêt Consolidated Fasfrate? La première hypothèse serait surprenante puisque la Cour soulignait le caractère d'exception de la compétence fédérale dans un autre arrêt important;[44] deux « accidents de parcours » seraient pour le moins invraisemblables.

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40 *Ibid* aux para 34-35.

41 *Ibid* au para 68.

42 *Ibid* au para 96.

43 Voir également Peter W Hogg, *Constitutional Law of Canada*, vol 1, 5e éd, Toronto, Carswell, 2007 à la p 22-2 (feuilles mobiles; mise à jour annuelle). Pour de plus amples détails sur cette jurisprudence, voir Robitaille, « Le local et l'interprovincial », *supra* note 9.

44 *Westcoast Energy Inc c Canada (Office national de l'énergie)*, [1998] 1 RCS 322 au para 43 où la majorité de la Cour qualifie d'« exception » la compétence fédérale en vertu du paragraphe 92(10)a) [*Westcoast Energy Inc c Canada*]; Hogg *supra* note 43.

Ce point pourrait s'avérer névralgique puisqu'une interprétation large ou restrictive de la compétence fédérale – en particulier en ce qui concerne la détermination des éléments qui sont au cœur de cette compétence et la limite jusqu'à laquelle les provinces peuvent interférer avec ceux-ci – influe directement sur la capacité des provinces d'exercer les nombreuses compétences que la LC 1867 leur attribue sur le territoire local. Cela est d'autant plus vrai dans le contexte des nombreux projets de développement d'infrastructures de transport de pétrole à l'heure actuelle au Canada.[45] Quoi qu'il en soit, comme nous le verrons maintenant, c'est dans l'objectif de permettre le « développement et l'épanouissement continu de la nation canadienne »[46] sur de solides bases économiques et politiques[47] que le constituant a octroyé la compétence sur les entreprises de transport interprovincial au Parlement, dans un contexte où le pays n'en était qu'à ses balbutiements.

1.2 Le corollaire : le besoin d'infrastructures dans l'intérêt national véritable

En confiant la compétence sur le transport interprovincial au Parlement, le constituant recherchait également un certain degré d'efficacité eu égard à la construction et l'exploitation des entreprises exerçant cette activité. Dans le contexte de l'adoption de la LC 1867, l'établissement d'une voie ferrée transcanadienne revêtait un intérêt national primordial et constituait même, rappelle la majorité de la Cour, l'une des conditions de la formation du pays en permettant de relier les colonies de l'Amérique du Nord britannique.[48] Le constituant souhaitait ainsi éviter que les provinces ne puissent « paralys[er] »[49] le développement des infrastructures de transport essentielles à la nation canadienne.

Ainsi, le paragraphe 92(10)a) nous semble également constituer une incarnation particulière de la doctrine des dimensions nationales et son critère

45 Voir Dayna Nadine Scott, « The Networked Infrastructure of Fossil Capitalism : Implications of the New Pipeline Debates for Environmental Justice in Canada » (2013) 43 RGD 11.

46 *Consolidated Fasfrate*, *supra* note 7 au para 36.

47 *Ibid*. La Cour s'appuie sur Colin H McNairn, « Transportation, Communication and the Constitution: The Scope of Federal Jurisdiction » (1969) 47 R du B can 355 à la p 355 et John D Whyte, « Les dimensions constitutionnelles des mesures d'expansion économique » dans Ministre des Approvisionnements et Services Canada, *Le partage des pouvoirs et la politique d'État*, Ottawa, 1985, 31 à la p 49.

48 *Consolidated Fasfrate*, *supra* note 7 au para 38.

49 *Ibid* au para 37 [notre italique].

de « l'incapacité provinciale ».[50] Selon ce critère, des provinces se trouvant dans l'incapacité de légiférer efficacement sur un domaine dont l'importance transcende l'intérêt local verraient une partie circonscrite et spécifique de leur compétence transférée de manière permanente au Parlement.[51] Les effets de cette doctrine ont été vivement critiqués puisque le critère de l'incapacité provinciale ne semblait pas appliqué de manière très rigoureuse,[52] tandis que la préoccupation envers l'intérêt national et le souci d'uniformité et d'efficacité du droit fédéral qui en constituent les assises n'avaient pas nécessairement de pendant contraire en faveur de l'intérêt local.[53] Telle qu'interprétée alors, cette doctrine ne cadrait pas très bien avec le fédéralisme moderne que préconise la Cour suprême et n'a pas été appliquée souvent par la suite.[54] C'est d'ailleurs sur le fondement de cette doctrine, combinée au paragraphe 92(10)a), que la Cour suprême attribuait au Parlement une compétence exclusive très large sur l'aéronautique.[55]

Si elle devait refaire surface dans les plaidoiries, maintenant que le principe de subsidiarité ou d'autonomie locale semble avoir été reconnu et qu'un meilleur équilibre est en voie d'être atteint, les tribunaux devront faire preuve d'une grande prudence.[56] Ils devraient à tous le moins appliquer le même fardeau de preuve très lourd que la Cour a exigé du gouvernement fédéral dans le Renvoi relatif à la Loi sur les valeurs mobilières, consistant à démontrer que le sujet précis sur lequel le Parlement souhaite intervenir soit, non seulement en théorie, mais aussi en pratique, « d'une nature véritablement nationale et différente sur le plan qualitatif de celles qui sont visées par les chefs de compétence provinciale intéressant les matières locales ainsi que la propriété

50 *R c Crown Zellerbach*, [1988] 1 RCS 401 aux para 37-39 [*Crown Zellerbach*]. Pour une critique de cet arrêt, voir Eugénie Brouillet, *La négation de la nation. L'Identité culturelle québécoise et le fédéralisme canadien*, coll Cahiers des Amériques, Septentrion, 2005 aux pp 292-299 [Brouillet, *La négation de la nation*].

51 *Crown Zellerbach*, *supra* note 50; *Renvoi relatif à la Loi anti-inflation*, [1976] 2 RCS 373 à la p 444 (juge Beetz, non contredit sur ce point par la majorité de la Cour).

52 Brun, Tremblay et Brouillet, *supra* note 9 aux pp 592-593; Jean Leclair, « The Supreme Court of Canada's Understanding of Federalism: Efficiency at the Expense of Diversity », (2002-2003) 28 Queen's LJ 411 aux pp 429-430.

53 Brun, Tremblay et Brouillet, *supra* note 9 aux pp 539, 571-573, 592-593; Leclair, *supra* note 52 aux pp 425-430.

54 Voir notamment *R c Hydro-Québec*, [1997] 3 RCS 213 et *Friends of the Oldman River c Canada* (Ministre des Transports), [1992] 1 RCS 3 [*Friends of the Oldman River*].

55 *Johanesson et al c Rural Municipality West St Paul et al*, [1952] 1 SCR 292 aux p. 308, 314, 319, 326-327 [*Johanesson*]. Voir également l'*Affaire sur l'aéronautique* : *The Attorney-General Canada v. The Attorney-General of Ontario and others*, [1932] AC 54.

56 Brouillet « Canadian Federalism », *supra* note 21 à la p 631.

et les droits civils ».[57] Il nous semble très révélateur que la Cour l'ait réitéré quatorze fois dans le Renvoi.[58] C'est d'ailleurs pour cette raison qu'en 1949 le Conseil privé refusait de considérer le Canadien Pacifique et son chemin de fer comme une entreprise d'intérêt national en vertu de la doctrine des dimensions nationales :

> the exercise of legislative power by the Parliament of Canada, in regard to all matters not enumerated in s. 91, ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any of the classes of subjects enumerated in s. 92. To attach any other construction to the general power which, in supplement of its enumerated powers, is conferred upon the Parliament of Canada by s. 91, would, in their Lordships' opinion, not only be contrary to the intendment of the Act, but would practically destroy the autonomy of the provinces.[59]

1.3 L'interprétation coordonnée des compétences

La recherche d'un équilibre entre l'intérêt local et la diversité, d'une part, et d'autre part, l'intérêt national et un certain degré d'uniformité se trouve donc au cœur même de la LC 1867,[60] notamment du paragraphe 92(10). Lorsqu'ils sont appelés à décider de litiges mettant en jeu les compétences provinciales et fédérales interagissant en matière d'aménagement du territoire local, d'environnement, de santé et de transport, les tribunaux devraient en conséquence essayer d'en arriver au meilleur équilibre possible entre l'application régulière des lois provinciales valides et le besoin de développer efficacement des infrastructures transcanadiennes.[61] Ils devraient également favoriser les espaces d'interaction des compétences fédérales et provinciales, sauf dans les cas manifestes de conflit de lois et de prépondérance fédérale.[62]

Cela serait par ailleurs conforme à un autre principe structurant du fédéralisme canadien, celui de l'interprétation « coordonnée » qui découle lui

57 *Renvoi relatif à la Loi sur les valeurs mobilières*, *supra* note 30 au para 70

58 *Ibid* aux para 70, 83, 84, 86, 89, 90, 107, 109, 120, 121, 123, 124, 125 et 130.

59 *Attorney-General for Ontario v. Attorney-General for the Dominion*, [1896] A.C. 348, 360, cité avec approbation dans *Canadian Pacific Railway Company c British Columbia (Attorney General)*, [1949] AC 122, 141 (CP)

60 *Renvoi relatif à la sécession du Québec*, *supra* note 24 aux para 43, 58; Cyr, *supra* note 12.

61 *Nation Tsilhqot'in c Colombie-Britannique*, 2014 CSC 44 au para 148, [2014] 2 RCS 256 [*Nation Tsilhqot'in*]; Ryder, *supra* note 13 aux pp 574 et ss.

62 Voir *infra*, note 184.

aussi du principe plus large du fédéralisme.[63] Alors que seulement quatre juges de la Cour utilisaient ce principe dans le Renvoi relatif à la Loi sur la procréation assistée,[64] la Cour suprême affirmait ceci à l'unanimité dans le Renvoi relatif à la Loi sur les valeurs mobilières : « la fédération canadienne repose sur le principe selon lequel les deux ordres de gouvernement sont coordonnés, et non subordonnés. Par conséquent, un chef de compétence fédérale ne saurait se voir attribuer une teneur qui viderait de son essence une compétence provinciale. »[65] Ce principe invite donc les tribunaux à des interprétations qui ne subordonnent ou ne conditionnent pas les compétences provinciales à l'exercice à priori de compétences fédérales et au champ réduit que le Parlement laisserait aux lois provinciales valides.[66]

2. L'application des lois provinciales aux entreprises fédérales de transport

La reconnaissance des principes structurants de subsidiarité et d'interprétation coordonnée, ainsi que l'interprétation plus stricte de la doctrine de l'exclusivité par la Cour suprême invitent à une relecture contemporaine des arrêts dans lesquels les tribunaux avaient reconnu une compétence exclusive très large au Parlement en matière de transport interprovincial, d'aéronautique et de navigation, et conclu à l'inapplicabilité de normes provinciales ou municipales à des entreprises se livrant à ces activités. Nous expliciterons ci-dessous le contenu essentiel de ces compétences fédérales et la mesure dans laquelle les normes provinciales ou municipales peuvent aujourd'hui s'y appliquer.

2.1 Le contenu minimum des compétences fédérales sur le transport

Selon une jurisprudence bien établie, le Parlement dispose de la compétence de légiférer sur la structure même des installations matérielles essentielles des entreprises fédérales de transport. La structure des rails et des fossés adjacents[67] des chemins de fer ainsi que le tracé,[68] les installations de pompage,

63 *Renvoi relatif à la Loi sur les valeurs mobilières*, *supra* note 30 au para 71.

64 *Renvoi relatif à la Loi sur la procréation assistée*, *supra* note 23 aux para 182, 272, juges LeBel et Deschamps (en leurs noms et au nom des juges Abella et Rothstein).

65 *Renvoi relatif à la Loi sur les valeurs mobilières*, *supra* note 30 au para 71.

66 *Renvoi relatif à la Loi sur la procréation assistée*, *supra* note 23 aux para 182, 272; Ryder, *supra* note 13 aux pp 574-579.

67 *Canadian Pacific Railway Co c Corporation of the Parish of Notre Dame de Bonsecours*, [1899] AC 367 (CP).

68 *Décision no 40 (Trans Mountain)*, *supra* note 8 à la p 16.

de collecte, de traitement et de stockage de pipelines interprovinciaux,[69] de même que le pouvoir de vendre en justice de telles entreprises,[70] font partie du cœur de la compétence que le paragraphe 92(10)a) attribue au Parlement.[71] Il a également été décidé que l'emplacement,[72] la construction et l'exploitation d'aérodromes – incluant les méthodes de construction, la dimension et la confection des plans des terminaux, des pistes et autres installations essentielles et la nature des matériaux utilisés[73] – font partie du contenu essentiel de la compétence fédérale sur le transport interprovincial, ainsi que de son pouvoir d'adopter des lois dans l'intérêt national en vertu de la clause « paix, ordre et bon gouvernement ».[74] Il en va de même de la construction, de la vente, de l'achat, de l'entretien et de l'exploitation des infrastructures essentielles à la navigation – notamment les ports et navires – et le contrôle des voies navigables[75] en vertu des compétences fédérales sur le transport interprovincial et la navigation.[76]

Une province ou une municipalité ne pourrait donc pas adopter des normes dont le caractère véritable serait la réglementation des compétences fédérales, incluant le contenu minimum de celles-ci, sauf à devoir justifier la nécessité de cet empiétement en vertu de la doctrine des pouvoirs accessoires. Cette dernière permet en effet à un palier d'empiéter, ponctuellement et de

69 Les provinces sont toutefois compétentes pour adopter des lois dont le caractère véritable porte sur les pipelines, chemins de fer ou autres modes de transport (sauf l'aviation), leurs installations essentielles et leur construction dans la mesure où la nature de leur exploitation quotidienne révèle qu'ils sont de nature locale : *Travailleurs unis des transports c Central Western Railway Corp*, [1990] 3 RCS 1112; *Fulton et al c Energy Resources Conservation Board et al*, [1981] 1 RCS 153 à la p 162; *Canadian Hunter Exploration c Canada (National Energy Board)*, 1999 CanLII 7734 (CAF); *Office national de l'énergie (Re)*, [1988] 2 CF 196 (CAF); *Daniels et al c EOG Resources et al.*, 2014 MBQB 19 (BR Man) (CanLII); *Waschuk Pipeline Construction c General Teamster, Local 362*, 1988 CanLII 3526 (AB QB), cité comme précédent par la Cour fédérale dans *Lloyd's Register North America c Dalziel*, 2004 CF 822 au para 31.

70 *Campbell-Bennett c Comstock Midwestern Ltd*, [1954] SCR 207.

71 *Westcoast Energy Inc c Canada*, *supra* note 44; *Dome Petroleum Ltd c Canada (National Energy Board)*, [1987] ACF No 135 (QL)(CAF).

72 *Québec (Procureur général) c Canadian Owners and Pilots Association*, 2010 CSC 39 au para 29-31, 37-40, [2010] 2 RCS 536 [*COPA*]; *Québec (Procureur général) c Lacombe*, 2010 CSC 38, [2010] 2 RCS 453 aux para 26-27 [*Lacombe*]; *Johanesson*, *supra* note 55 aux pp 314 (j. Kellock), 319 (j. Estey).

73 *COPA*, *supra* note 72 au para 31; *Air Canada c Ontario (Régie des alcools)*, [1997] 2 RCS 581 au para 72; *Construction Montcalm Inc c Commission du salaire minimum*, [1979] 1 RCS 754 aux pp 770-771.

74 *LC 1867*, *supra* note 9, paragraphe introductif de l'art 91; *Johanesson*, *supra* note 55.

75 *Colombie-Britannique (Procureur général) c Lafarge Canada Inc*, 2007 CSC 23, au para 62, [2007] 2 RCS 86 [*Lafarge*]; André Braën, *Le droit maritime au Québec*, Montréal, Wilson et Lafleur, 1992 aux pp 68-75; Brun, Tremblay et Brouillet, *supra* note 9 aux pp 509 et ss; Hogg, *supra* note 43 à la p 22-21.

76 *LC 1867*, *supra* note 9 au para 91(10). Les provinces sont quant à elles compétentes pour adopter des normes dont le caractère véritable relève de la navigation intraprovinciale : *Agence Maritime Inc c Conseil canadien des relations ouvrières et al*, [1969] RCS 851.

manière limitée, sur une compétence de l'autre niveau pour autant que, selon le degré de l'empiétement, ce dernier soit justifié en fonction de son utilité pratique ou d'un critère plus lourd de nécessité.[77] Selon le professeur Ghislain Otis, cette dernière hypothèse pourrait permettre à une municipalité d'adopter un règlement visant à régir, de manière limitée ou raisonnable, la navigation sur un lac si ce dernier faisait partie d'un ensemble plus vaste de réglementation municipale valide et était justifié.[78] Et en ce qui concerne la protection de la qualité de l'eau d'un lac très achalandé et pollué, un empiétement raisonnable sur la navigation, par des mesures visant à limiter la puissance maximale des moteurs, pourrait selon nous s'avérer justifié selon les circonstances.[79] Puisque la doctrine des pouvoirs accessoires constitue un accroc toléré au principe de l'exclusivité des compétences,[80] cette dernière doctrine ne risquerait donc plus de faire écarter un empiétement dont l'utilité ou la nécessité, selon le contexte, a été démontrée.[81]

Il faut par ailleurs distinguer les normes dont le caractère véritable porte sur les compétences fédérales, qui seraient alors invalides à moins d'être justifiées en vertu des pouvoirs accessoires, de celles validement adoptées en vertu des vastes pouvoirs dont disposent les provinces, mais qui ont un impact sur des compétences fédérales.[82] Se pose alors la question de l'applicabilité des normes locales (c'est-à-dire provinciales et municipales) à des entreprises fédérales de transport en vertu de la doctrine de l'exclusivité.

77 Voir *Lacombe*, *supra* note 72 aux para 32-46; *General Motors of Canada Ltd c City National Leasing*, [1989] 1 RCS 641.

78 Voir l'argumentation écrite de l'intimée dans *Marcoux et al c Municipalité de Saint-Charles-de-Bellechasse*, Cour supérieure (300-36-000002-145), 16 janvier 2015 (Procureurs de l'intimée : Me Martin Bouffard et Me Ghislain Otis) [Bouffard et Otis].

79 C'est d'ailleurs à cette conclusion que la Cour municipale de la MRC de Bellechasse en arrivait dans le dossier dont il est question à la note précédente. Voir *Municipalité de St-Charles-de-Bellechasse c Marcoux et al*, Cour municipale (19097-1100892 RM à 19097-1100913 RM, 19097-1200929 RM et 1907-1200930 RM), 17 mars 2014 aux para 85, 94, 103-121. La Cour s'était essentiellement basée sur les développements pertinents à cet égard fournis dans les arrêts *Lacombe*, *supra* note 72 et *Chalets St-Adolphe inc c St-Adolphe d'Howard (Municipalité de)*, 2011 QCCA 1491. La Cour supérieure a toutefois récemment infirmé le jugement de la Cour municipale. Voir *Marcoux c. St-Charles-de-Bellechasse (Municipalité de)*, 2015 QCCS 4353.

80 *Lacombe*, *supra* note 72 aux para 32, 35, 37-38; Bouffard et Otis, *supra* note 78 aux para 103-105.

81 *Ibid.*

82 Fabien Gélinas, « La doctrine des immunités interjuridictionnelles dans le partage des compétences : éléments de systématisation », dans *Mélanges Jean Beetz*, Thémis, Montréal, 1995, 471 aux pp 492-493.

2.2 L'interprétation restrictive de la doctrine de l'exclusivité : vers un meilleur équilibre

Il est aisément concevable que la structure même des installations matérielles des entreprises fédérales de transport se situe au cœur de la compétence fédérale. Il ne s'agit là, cependant, que d'une première étape, la seconde étant l'examen de l'effet préjudiciable des normes provinciales ou municipales d'application générale[83] sur la compétence fédérale. À une certaine époque – révolue –, il suffisait que ces normes affectent le (ou touchent au) contenu minimum et irréductible des compétences fédérales en matière de transport pour que l'application des normes provinciales et municipales valides soit écartée par les tribunaux.[84] Les autres normes locales, n'affectant pas les activités essentielles de ces entreprises ou le contenu minimum des compétences fédérales, étaient par ailleurs applicables.[85] En vertu de cet ancien critère, il a notamment été jugé que des lois ou règlements provinciaux ou municipaux valides prévoyant l'obtention d'un certificat d'autorisation préalablement à l'élimination de la neige sur un terrain privé,[86] obligeant une entreprise à obtenir un permis préalablement à la construction d'un bâtiment voué au personnel de bureau de celle-ci,[87] prévoyant des normes en matière de pollution par le bruit[88] ou conditionnant la délivrance d'un permis de construire à des exigences relativement à la méthode de construction, au type et à la qualité des matériaux utilisés et aux usages des bâtiments,[89] ne s'appliquaient pas à des entreprises

83 Une loi est dite d'application générale lorsqu'elle ne vise uniquement ni ne distingue défavorablement les entreprises fédérales par rapport aux entreprises provinciales : *Dick c La Reine*, [1985] 2 RCS 309 aux pp 321-322; *Kruger et al c La Reine*, [1978] 1 RCS 104 à la p 110.

84 *Bell Canada c Québec (Commission de la santé et de la sécurité du travail)*, [1988] 1 RCS 749 aux pp 857, 859-860 [*Bell (1988)*]; *Commission du salaire minimum c Bell Telephone Company of Canada*, [1966] RCS 767 aux pp 772, 774. Voir également Brouillet, *La négation de la nation*, *supra* note 50 aux pp 276-278; Peter W Hogg et Rahat Godil, « Narrowing Interjurisdictional Immunity », (2008) 42 SCLR (2d) 623 à la p 637; Dale Gibson, « Interjurisdictional Immunity in Canadian Federalism », (1969) 47 R du B can 40 aux pp 53-55; Jonathan Penner, « The Curious History of Interjurisdictional Immunity and Its (Lack of) Application to Federal Legislation », (2011) 90 R du B can 1 aux pp 7-8; Paul C Weiler, « The Supreme Court and the Law of Canadian Federalism », (1973) 23:3 UTLJ 307, aux pp 340-341.

85 Voir notamment *Air Canada c Colombie-Britannique*, [1989] 1 RCS 1161 à la p 1191; *Clark c Compagnie des chemins de fer nationaux*, [1988] 2 RCS 680 au para 51; Jean Leclair, « L'étendue du pouvoir constitutionnel des provinces et de l'État central en matière d'évaluation des incidences environnementales au Canada », (1995) 21 Queen's LJ 37 aux pp 41, 60-62.

86 *Québec (Procureur général) c Compagnie des chemins de fer nationaux du Canada*, (21 avril 2005) 500-61-170552-039 (CQ.).

87 *Longueuil (Ville) c Chemins de fer nationaux du Canada*, (19 janvier 2000) 99-00317 (Cour municipale).

88 *Voisins du train de banlieue de Blainville c Agence métropolitaine de transport*, 2004 CanLII 9803 (QC CS) aux para 120-134.

89 *City of Mississauga c Greater Toronto Airports*, [2000] OJ No 4086 (CA ON).

ferroviaires et aériennes. Dans une autre affaire, un règlement municipal, adopté dans le but de protéger l'environnement et la sécurité, limitant l'amarrage de bateaux aux seules bornes municipales autorisées et à une quantité maximale d'embarcations dans des baies situées sur le territoire local a été jugé invalide par la Cour d'appel du Québec.[90] Si ce règlement avait été jugé valide, il aurait sans doute été inapplicable puisqu'il aurait touché à la navigation en vertu de l'ancien critère.

Considérant les nombreuses normes provinciales et municipales valides dont l'application a systématiquement été écartée dès qu'elles affectaient le cœur de la compétence fédérale ou les activités essentielles des entreprises fédérales de transport, cette ancienne approche minait manifestement le fédéralisme canadien et la reconnaissance de la diversité et de l'autonomie locale. Or, depuis l'arrêt Banque canadienne de l'Ouest de 2007, les normes provinciales et municipales d'application générale peuvent avoir des effets importants sur les compétences fédérales, sans toutefois pouvoir en entraver (ce qui diffère d'affecter ou de toucher) le contenu minimum irréductible ou essentiel,[91] c'est-à-dire y porter gravement atteinte,[92] sans quoi elles seront jugées inapplicables, malgré leur validité.[93]

Dans son plus récent arrêt sur la doctrine de l'exclusivité, la Cour s'exprimait ainsi sur le critère de l'entrave :

> Les banques recherchent le même type d'immunité floue qui a été rejetée dans l'arrêt Banque canadienne de l'Ouest. Elles ne peuvent éviter l'application de toutes les lois provinciales qui touchent de près ou de loin à leurs activités, dont le prêt et la conversion de devises. L'ensemble de la réglementation provinciale en matière d'hypothèques, de sûretés et de contrats peut porter sur le prêt en général et aura parfois une incidence importante sur les activités bancaires. Or, ainsi que

90 *Québec (Procureur général) c Larochelle*, [2003] JQ No 18852 (CA QC) (QL). Voir également *R c Kupchanko* (2002), 209 DLR (4th) 658, dans lequel la Cour d'appel de la Colombie-Britannique a jugé invalide un règlement provincial interdisant à certains endroits les moteurs excédant le nombre de chevaux-vapeurs prescrits par la province.

91 *Banque canadienne de l'Ouest*, *supra* note 14 aux paras 48-50. Voir également : *Banque de Montréal c Marcotte*, [2014] 2 RCS 725 au para 64 [*Marcotte*]; *Marine Services International Ltd c Ryan (Succession)*,2013 CSC 44 aux paras 54-56, [2013] 3 RCS 53 [*Succession Ryan*]; *COPA*, *supra* note 72 aux para 43-45.

92 COPA *supra* note 72 au para 45. Voir également *Marcotte*, *supra* note 91 au para 64; *Succession Ryan*, *supra* note 91 au para 60.

93 Si cette approche n'est plus nouvelle, certains continuent erronément, avec respect, d'appliquer l'ancien critère. Voir notamment : *LeFrançois c Canada (Procureur général)*, 2010 QCCA 1243 aux para 83-85.

> la Cour le souligne dans l'arrêt Banque canadienne de l'Ouest, cela ne suffit pas pour déclencher l'application de la doctrine de l'exclusivité des compétences. Les dispositions de la L.p.c. n'empêchent pas les banques de prêter de l'argent ou de convertir des devises; elles exigent seulement que ces frais de conversion soient mentionnés aux consommateurs.
>
> Les présents pourvois se distinguent de l'affaire COPA. Dans cette cause, outre l'existence de précédents qui se rapportaient directement à la compétence fédérale en matière d'aéronautique, des dispositions législatives provinciales avaient pour effet d'interdire complètement, dans certaines circonstances, l'exercice d'une activité qui relevait du contenu essentiel de la compétence fédérale en semblable matière. Comme la Cour le souligne, l'application de ces dispositions provinciales obligerait le Parlement à légiférer de manière à les écarter, à défaut de quoi, l'activité ne pourrait être exercée. Il en va autrement des dispositions de la L.p.c. en cause en l'espèce. Les dispositions qui prévoient la mention des frais et les recours possibles ont effectivement une incidence sur la façon dont les banques exercent un certain aspect de leurs activités, mais, comme nous l'avons vu précédemment, cette incidence ne saurait être assimilée à une entrave. Il est difficile d'imaginer comment ces dispositions pourraient forcer le Parlement à légiférer de manière à les écarter, à défaut de quoi, sa capacité de réaliser l'objectif pour lequel la compétence exclusive sur les banques lui a été attribuée serait entravée.[94]

La Cour suprême réduisit par ailleurs la pertinence et l'applicabilité de la doctrine de l'exclusivité à de « rares circonstances »,[95] c'est-à-dire « aux situations déjà traitées dans la jurisprudence »[96] et « aux cas où son application a déjà été jugée absolument nécessaire pour permettre au Parlement ou à une législature provinciale de réaliser l'objectif pour lequel la compétence législative exclusive a été attribuée ».[97] Pour que la doctrine de l'exclusivité s'applique, il ne suffirait donc pas qu'une compétence fédérale soit en jeu, mais que des circonstances factuelles très similaires à celles en litige aient, par le passé, donné lieu à son application.[98] Un jugement ayant appliqué la doctrine de l'exclusivité avant les changements opérés en 2007 dans l'arrêt Banque canadienne de l'Ouest dispose par ailleurs, selon la Cour suprême, d'une faible « valeur jurisprudentielle »[99]

94 *Marcotte*, *supra* note 91 aux para 68-69 [nous soulignons].

95 *Ibid* au para 64.

96 *Ibid* au para 63; *Banque canadienne de l'Ouest*, *supra* note 14 au para 77

97 *Ibid* réaffirmé dans l'arrêt *Succession Ryan*, *supra* note 91 au para 50.

98 *Marcotte*, *supra* note 91 au para 63; *Succession Ryan*, *supra* note 91 aux para 51-53; *COPA*, *supra* note 72 aux para 26, 40; *Burlington Airpark c City of Burlington*, 2014 ONCA 468 [*Burlington Airpark*]; *Châteauguay*, *supra* note 17 aux paras 80-82.

99 *Nation Tsilhqot'in*, *supra* note 61 au para 150; *Succession Ryan*, *supra* note 91 au para 64. Voir également *Châteauguay*, *supra* note 17 au para 57; *R c Leavens Aviation Inc*, 2008 ONCJ 473 (Can LII) aux para 12, 15.

(ce qui n'est pas nécessairement le cas des arrêts rendus alors que le critère de la paralysie ou de la stérilisation de la compétence fédérale était appliqué par le Conseil privé,[100] puisque ce critère était plus favorable à l'applicabilité des lois provinciales que celui de l'entrave).[101] C'est d'ailleurs pour cette raison, entre autres, que la Cour suprême refusait récemment, dans des jugements de 2014 et 2013,[102] de suivre des jugements rendus en 2006[103] et 1998[104] dans lesquels elle avait jugé applicable la doctrine de l'exclusivité à l'égard de circonstances et questions de droit similaires. Il devrait logiquement en aller de même des décisions des tribunaux canadiens dans lesquels on a écarté l'application de lois provinciales ou de règlements municipaux à des entreprises fédérales de transport au motif qu'ils en affectaient la spécificité.

Sur ce point, certains pourraient rétorquer que les changements opérés dans l'arrêt Banque canadienne de l'Ouest ne valent que pour l'avenir et ne remettent pas du tout en cause la jurisprudence passée. Ce serait là le réflexe normal d'avocats recherchant la meilleure prévisibilité possible pour leurs clientes dont les activités relèvent de compétences fédérales. Ces dernières n'apprécient pas toujours, non plus, la multiplication des sources de normes auxquelles elles sont assujetties, ni nécessairement les interventions publiques dans leurs activités. Une telle interprétation restrictive de l'arrêt Banque canadienne de l'Ouest irait toutefois à l'encontre de l'esprit d'équilibre qui anime à juste titre la Cour suprême, mais également de l'état actuel du droit.[105] À notre connaissance, d'ailleurs, nulle part dans la jurisprudence de la Cour suprême depuis 2007 on ne peut trouver de mention claire selon laquelle les décisions passées ne seront nullement remises en question par le critère de

100 Le Conseil privé tolérait que les lois provinciales aient des effets très importants sur les entreprises œuvrant à des activités faisant l'objet de compétences fédérales. Pour de plus amples détails sur ce critère et la jurisprudence l'ayant appliqué, voir notamment Gibson, *supra* note 84 aux pp 54-55; David Robitaille et Pierre Rogué, « La *Charte de la langue française* : une *entrave* aux activités essentielles des entreprises privées de compétence fédérale au Québec? », (2013) 43 RDUS 645 aux pp 666-670.

101 *Succession Ryan*, *supra* note 91 au para 56; *COPA*, *supra* note 72 au para 44; *Banque canadienne de l'Ouest*, *supra* note 14 au para 48.

102 *Nation Tsilhqot'in*, *supra* note 61 au para 150; *Succession Ryan*, *supra* note 91 au para 64.

103 *R c Morris*, 2006 CSC 59, [2006] 2 RCS 915. Dans l'arrêt *Nation Tsilhqot'in*, *supra* note 61 au para 150 la Cour s'exprime ainsi : « L'arrêt *Morris*, sur lequel le juge de première instance s'est appuyé, a été rendu avant que la Cour formule une approche moderne de l'application de la doctrine de l'exclusivité des compétences dans les arrêts *Banque canadienne de l'Ouest* et *Canadian Owners and Pilots Association* et, par conséquent, il confère peu de valeur jurisprudentielle sur ce sujet ». Dans ce contexte, la Cour estime que la conciliation entre les lois provinciales d'application générale et les droits ancestraux des autochtones doit s'effectuer selon le cadre d'analyse de l'article 35 de la *Loi constitutionnelle de 1982*, constituant l'annexe B de la *Loi de 1982 sur le Canada* (R-U), 1982, c 11.

104 *Succession Ordon c Grail*, [1998] 3 RCS 437.

105 À ce sujet, voir *supra* notes 99 et 103.

l'entrave. En outre, en affirmant que l'existence de précédents jurisprudentiels peut favoriser l'applicabilité de la doctrine de l'exclusivité à certaines situations, la Cour n'affirmait pas inversement que ces précédents ont scellé pour toujours l'issue des questions soulevées dans ces derniers. La Cour faisait plutôt référence au fait que certains domaines de compétences se prêteront davantage que d'autres, à l'avenir, à l'application de la doctrine de l'exclusivité.[106] Cela dit, une fois admise la possibilité que la doctrine s'applique à un domaine qui en a fait l'objet par le passé, encore faut-il satisfaire au test en deux étapes consistant à démontrer que la norme provinciale ou municipale entrave le cœur de la compétence fédérale. La Cour suprême le confirmait elle-même dans le récent arrêt Banque de Montréal c. Marcotte : « Dans les rares circonstances dans lesquelles la doctrine de l'exclusivité des compétences s'applique, la loi provinciale sera inapplicable dans la mesure où son application "entraverait" le contenu essentiel d'une compétence fédérale ».[107] Si nous pouvions faire une analogie avec la Charte canadienne des droits et libertés, nous rappellerions que le fait que celle-ci peut s'appliquer à un organisme, par suite d'une analyse de sa nature « gouvernementale » ou des mécanismes de contrôle gouvernemental dont il fait l'objet, n'évacue pas la question de savoir si les droits prévus par la Charte sont effectivement violés; il s'agit de deux questions différentes, comme c'est le cas en ce qui concerne la doctrine constitutionnelle de l'exclusivité.

Par ailleurs, l'arrêt Banque canadienne de l'Ouest ne remet pas nécessairement en question la jurisprudence rendue avant 2007 ni ne signifie que toutes les décisions passées auraient nécessairement été différentes aujourd'hui, mais qu'elles l'auraient peut-être été en application du critère de l'entrave. Comme la Cour l'expliquait dans l'arrêt Carter c. Canada (Procureur général), des changements fondamentaux de circonstances sociales et des modifications jurisprudentielles importantes aux principes juridiques peuvent évidemment avoir pour effet de remettre en question des jugements passés qui ne correspondent plus à l'évolution de la société.[108] C'est le cas, selon nous, en ce qui concerne l'interaction normale des compétences fédérales et provinciales en matière de transport et d'aménagement du territoire qui nécessite aujourd'hui un certain rééquilibrage.

106 *Banque canadienne de l'Ouest*, *supra* note 14 au para 77.

107 *Marcotte*, *supra* note 91 au para 64 [notre italique, nous soulignons]. Voir aussi en ce sens : *Verreault Navigation inc c Québec (Développement durable, environnement et lutte contre les changements climatiques)*, 2015 QCTAQ 04538 au para 75.

108 *Carter c Canada (Procureur général)*, 2015 CSC 5, aux para 44-47, [2015] 1 RCS 331; *Health Services and Support – Facilities Subsector Bargaining Assn c Colombie-Britannique*, 2007 CSC 27, [2007] 2 RCS 391 [*Health Services and Support – Facilities Subsector Bargaining Assn c Colombie-Britannique*].

En jugeant qu'un règlement municipal prévoyant l'obtention d'un permis et le respect d'exigences environnementales préalablement aux altérations de tout terrain, la juge Swinton de la Cour supérieure de l'Ontario remettait d'ailleurs en question en obiter,[109] sur la base des plus récents arrêts de la Cour suprême, la conclusion à laquelle en arrivait la Cour d'appel de l'Ontario en 2000 selon laquelle le Code du bâtiment de l'Ontario ne s'appliquait pas à la construction d'un aéroport.[110]

D'autres jugements de diverses cours canadiennes ont également pris acte de ce revirement majeur. Ont ainsi été jugées applicables à des entreprises fédérales des normes provinciales ou municipales : interdisant le déversement de matières dangereuses dans les cours d'eau;[111] exigeant l'obtention d'un permis et le respect de certaines normes environnementales préalablement au remplissage, nivelage ou autres altérations de terrains;[112] portant sur la sécurité routière et prescrivant le nombre de feux arrière dont doivent disposer les véhicules lourds;[113] interdisant certaines pratiques commerciales inéquitables et frauduleuses;[114] prescrivant aux collèges professionnels (en l'espèce une école de pilotage) le respect d'exigences en matière de contrats avec les étudiants, de publicité et de processus de plainte;[115] des lois sur la santé et la sécurité

109 *2241960 Ontario Inc c Scugog (Township)*, 2011 ONSC 2337au para 45 [*2241960 Ontario Inc c Scugog*].

110 Le juge Laskin de la Cour d'appel de l'Ontario s'exprimait en effet ainsi en 2000, dans l'arrêt *City of Mississauga c Greater Toronto Airports*, *supra* note 89 au para 41 : « What then is the test for interjurisdictional immunity? Mississauga says that the test is whether the provincial legislation *impairs* or *interferes* with a federally regulated enterprise or undertaking, and it points out that the applications judge made no finding of impairment or interference. But that is the wrong test. The Supreme Court of Canada no longer uses the language of "impairs" or "interferes" or "paralyzes" or "sterilizes". Instead, the Supreme Court has posited a much broader test of immunity or exclusivity. If a provincial law *affects* a vital or essential or integral part of a federally regulated enterprise, then the otherwise valid provincial law does not apply to that enterprise ». Compte tenu du critère de l'entrave (« impairment ») maintenant appliqué, il est en effet permis de penser que la conclusion aurait été différente aujourd'hui.

111 *Directeur des poursuites criminelles et pénales c Alcan inc*, 2009 QCCQ 1638 aux para 84-94.

112 *Burlington Airpark*, *supra* note 98; *2241960 Ontario Inc c Scugog*, *supra* note 109 aux para 39-48. En sens contraire, voir : *Parkland Airport Development Corporation c Parkland (County)*, 2013 ABQB 641. Ce jugement de la Cour du Banc de la Reine de l'Alberta nous semble toutefois à contrecourant de la jurisprudence récente et, à la lumière de ce que le juge écrit dès le début de ses motifs, au para 2, il semble que celui-ci ait adopté une conception rigide de l'exclusivité des compétences s'apparentant davantage à l'esprit asymétrique de l'ancienne jurisprudence : « A dispute has arisen respecting the extent to which, *if any*, the County can regulate the development of the airport within its boundaries » [notre italique].

113 *Québec (Procureur général) c Midland Transport*, 2007 QCCA 467. Il est à noter cependant que ce jugement a été rendu deux mois avant l'arrêt *Banque canadienne de l'Ouest*.

114 *Unlu c Air Canada*, 2013 BCCA 112.

115 *Northwestern Outback Aviation Ltd. c Ontario (Attorney General)*, 2011 ONSC 1063, [2011] OJ No 1081.

obligeant à fournir des plans d'urgence[116] et prévoyant des exigences concernant la composition du comité en santé et sécurité de l'entreprise;[117] prévoyant des normes d'entreposage et de manipulation de produits dangereux, l'obligation de prévoir un plan d'urgence et d'installer des détecteurs de fumée dans le but de réduire les risques de feu et protéger la santé et l'environnement;[118] prescrivant l'obtention d'un permis et le respect de normes en matière de transport, de stockage et de manipulation de BPC ainsi que la fourniture d'un certificat d'assurance d'un million de dollars;[119] prévoyant des normes concernant la fumée dégagée par le brûlage d'herbes sur l'emprise d'un chemin de fer;[120] et établissant un régime d'indemnisation sans faute en matière d'accidents du travail[121] alors que la Loi sur la responsabilité maritime,[122] adoptée par le Parlement, prévoyait que la succession d'un travailleur décédé pouvait entamer des poursuites en dommages-intérêts contre l'employeur.[123]

D'un autre côté, des lois ou règlements prévoyant, par exemple, la vente de terres appartenant à la Couronne fédérale comme sanction au non-paiement par les autorités aéroportuaires d'une dette contractuelle,[124] empêchant le lotissement et la cession de telles terres lorsqu'elles sont situées en zone agricole,[125] interdisant la construction d'un aérodrome[126] ou ne permettant pas

116 *Jim Pattison Enterprise c British Columbia (Workers' Compensation Board)*, 2011 BCCA 25.

117 *R c Leavens Aviation Inc*, *supra* note 99.

118 *TransCanada Pipelines Ltd. c Ontario (Ministry of Community Safety and Correctional Services)*, [2007] OJ No 3014 (ON CS) (QL) aux para 1, 20-25, 43, 56, 59-61. Cette affaire a été rendue avant l'arrêt *Banque canadienne de l'Ouest*, mais la Cour supérieure de l'Ontario, quoiqu'elle mentionne le critère de l'arrêt *Bell 1988*, *supra* note 84 (affecter ou toucher), s'appuie sur l'arrêt *Air Canada c Colombie-Britannique*, *supra* note 85 à la p 1191, selon lequel les entreprises fédérales ne constituent pas des enclaves soustraites aux lois provinciales applicables sur les territoires sur lesquels elles exercent leurs activités, lorsque ces lois ne les atteignent pas dans leur spécificité. Voir également *Clark c Compagnie des chemins de fer nationaux*, *supra* note 85 au para 51.

119 *Regina c TNT Canada*, [1986] OJ No 1322 (ON CA), demande de permission d'appeler refusée par la Cour suprême (4 juin 1987, dossier 20323). La Cour suprême se réfère à cet arrêt avec approbation dans l'arrêt *Banque canadienne de l'Ouest*, *supra* note 14 au para 66 et la Cour d'appel de l'Ontario y applique un critère s'apparentant à celui de l'entrave à la p 303 (« interfere in any *substantial* way ») [notre italique].

120 *Ontario c Canadian Pacific*, [1993] OJ No 1082 (ON CA) confirmé par la Cour suprême du Canada dans l'arrêt *Ontario c Canadien Pacifique Ltée*, [1995] 2 RCS 1031 et cité avec approbation par la Cour dans l'arrêt *Banque canadienne de l'Ouest*, *supra* note 14 au para 66.

121 *Succession Ryan*, *supra* note 91 aux para 59-64.

122 *Loi sur la responsabilité maritime*, LRC 2001, ch 6.

123 *Newfoundland (Workplace Health, Safety and Compensation Commission) c Ryan Estate*, [2011] NJ No 207 aux para 87-102 (NL CA).

124 *Vancouver International Airport Authority c British Columbia (Attorney General)*, 2011 BCCA 89, [2011] BCJ No. 290.

125 *Mirabel (Ville de) c Commission de protection du territoire agricole du Québec*, 2012 QCCA 368.

126 *COPA*, *supra* note 72 aux para 27-61; *Lacombe*, *supra* note 72 au para 66.

l'amarrage de bateaux aux non-résidents de la municipalité,[127] ont cependant été jugés inapplicables en raison de leurs effets considérés inacceptables sur le cœur des compétences fédérales sur l'aéronautique et la navigation. Dans un jugement récent, la Cour d'appel du Québec jugeait invalide un règlement municipal adopté spécifiquement pour interdire le démantèlement d'une voie ferrée interprovinciale;[128] à fortiori, dans un tel contexte, le règlement aurait probablement été inapplicable s'il avait été valide. Enfin, l'ONÉ jugeait récemment que deux règlements municipaux valides de la municipalité de Burnaby portant sur les parcs, la voirie et la voie publique étaient inapplicables au prolongement du pipeline Trans Mountain.[129] L'un d'eux interdisait de manière absolue « de couper, briser, détériorer, endommager, défigurer, détruire, souiller ou polluer » un parc ainsi qu'un « bien meuble ou des arbres, arbustes, plantes, pelouses ou fleurs se trouvant dans un parc ».[130] En interdisant « d'exécuter des travaux d'excavation ou de construction, nuire, grever, entraver, détériorer ou endommager une partie quelconque d'une voie publique ou d'un autre lieu public sans l'autorisation écrite du conseil et sous réserve des modalités que celui-ci peut rattacher à cette autorisation »,[131] l'autre règlement aurait pu ne pas constituer une entrave constitutionnelle. En l'espèce, à la lumière de la preuve déposée devant lui, l'ONÉ a toutefois jugé que la municipalité avait refusé de discuter de la possibilité d'accorder une telle autorisation.[132]

À la lumière de ce qui précède, il est permis de penser – sous réserve bien entendu des faits particuliers de chaque affaire – que plusieurs des exigences réclamées à l'heure actuelle par des citoyens et municipalités canadiens ne feraient pas nécessairement entrave aux compétences fédérales sur le transport, notamment : de simples inconvénients, des contraintes de temps raisonnables;[133] des coûts raisonnablement plus élevés;[134] l'obligation de fournir des informations complètes et en temps utile aux autorités provinciales et/ou municipales;[135] le

127 *Chalets St-Adolphe inc. c St-Adolphe d'Howard (Municipalité de)*, *supra* note 79 aux para 11-18, 58-63.

128 *Pontiac (Municipalité régionale de comté de) c Compagnie des chemins de fer nationaux du Canada*, 2014 QCCA 914.

129 *Décision no 40 (Trans Mountain)*, *supra* note 8.

130 *Ibid* aux pp 4, 14, 16.

131 *Ibid.*

132 *Ibid.*

133 *Regina c TNT Canada*, *supra* note 119.

134 *Irwin Toy Ltd. c Québec (Procureur général)*, [1989] 1 RCS 927 à la p 958; *Northwestern Outback Aviation Ltd. c Ontario (Attorney General)*, *supra* note 115 au para 15.

135 Voir le règlement proposé par un collectif de juristes : Richard E Langelier, « La compétence sur les pipelines interprovinciaux et les enjeux environnementaux : Prolégomènes à une analyse socio-juridique », avril 2014 aux pp 70-75, en ligne : <http://www.collectif-scientifique-gaz-de-schiste.com/fr/accueil/images/pdf/prol%C3%A9gom%C3%A8nes.pdf>. Une dizaine de municipalités

respect de processus administratifs ou d'évaluation environnementale;[136] des normes accrues en matière de sécurité; l'obligation d'installer des passages à niveau en certains points névralgiques de chemins de fer afin d'assurer la sécurité des piétons et cyclistes dans les municipalités;[137] l'obligation de prévoir des réservoirs et des bassins de récupération d'hydrocarbures d'un volume suffisamment grand;[138] l'obligation de gainer ou doubler les conduites en certains endroits névralgiques pour l'environnement et de construire des bassins de confinement de part et d'autre d'un cours d'eau[139] ou d'installer des « clapets antiretour [...] dans les sections descendantes [d'un] [...] oléoduc près des sources d'approvisionnement en eau potable et des milieux humides ».[140] Si certaines de ces mesures, en particulier celles portant sur la structure même de canalisations ou des voies ferrées affectent certainement le cœur de la compétence fédérale, elles ne nous semblent pas nécessairement l'entraver ni empêcher indûment le Parlement d'exercer sa compétence quant aux infrastructures de transport. À fortiori, comme certaines le font déjà, les instances locales pourraient adopter des « codes de conduite », protocoles ou lignes directrices symboliques,[141] c'est-à-dire non justiciables devant les tribunaux, ou mettre sur pied des comités citoyens de suivi sans craindre qu'ils ne soient invalidés ou jugés inapplicables.

québécoises auraient déjà adopté ce règlement ou un règlement similaire. C'est le cas, notamment, des municipalités de Batiscan, Lanoraie et Sainte-Justine-de-Newton qui ont adopté ce règlement à l'été 2014 : Municipalité de Batiscan, Règlement n° 171-2014 (2 juin 2014), en ligne : <http://www.batiscan.ca/admin/document/171.pdf>; Municipalité de Lanoraie, Règlement n° 87-2014(11 août 2014), en ligne : <http://www.lanoraie.ca/upload/File/reglement87-2014(1).pdf>; Municipalité de Sainte-Justine-de-Newton, Règlement n° 337 de Sainte-Justine-de-Newton, en ligne : <http://www.sainte-justine-de-newton.ca/sites/default/files/pdf/Regle%20337.pdf>.

136 En vertu du critère de l'entrave et de la nouvelle approche sur la doctrine de l'exclusivité, il est en effet permis de penser que les lois provinciales sur l'évaluation environnementale s'appliquent généralement aux entreprises fédérales. Ce n'était peut-être pas le cas lorsque prévalait l'ancien critère consistant à écarter les lois provinciales qui *touchent* au cœur des compétences fédérales : Leclair, *supra* note 85 aux pp 59-65. Pour une analyse générale des enjeux juridiques concernant le passage d'un pipeline interprovincial, voir Alexandre Desjardins, *Enjeux juridiques du déploiement d'un pipeline interprovincial sur le territoire du Québec*, Montréal, Centre québécois du droit de l'environnement, octobre 2014, en ligne : <http://www.cqde.org/wp-content/uploads/2014/10/CQDE-Guide-juridique-pipeline-v11.pdf>.

137 Voir notamment Jeanne Corriveau, « Plaidoyer en faveur de passages à niveau », *Le Devoir* (4 février 2015); Anne-Marie Provost, « Voie ferrée près du métro Rosemont : Passage à niveau réclamé dans le Mile End », TVA Nouvelles (5 février 2015).

138 Voir Gabriel Delisle, « Le projet d'oléoduc préoccupe la ville de Trois-Rivières », *Le Nouvelliste* (8 avril 2015).

139 *Ibid.*

140 *Ibid.*

141 Nickie Vlavianos et Chidinma Thompson, « Alberta's Approach to Local Governance in Oil and Gas Development », (2010-2011) 48 Alta L Rev 55 à la p 58; Jennifer Quaid, « Getting the big picture right: regulating rail transportation of crude oil after the Lac-Mégantic disaster », *The Hill Times* (6 avril 2015).

Si le critère de l'entrave favorise dorénavant une application élargie des lois provinciales qui interagissent avec certaines compétences fédérales, il reste tout de même du chemin à faire pour en arriver à un équilibre satisfaisant entre l'autonomie locale et l'intérêt national en matière de transport. Le dernier pas vers cet équilibre consiste selon nous à permettre aux instances provinciales et municipales d'avoir une voix en ce qui concerne l'emplacement des infrastructures d'entreprises fédérales.

2.3 Le dernier pas vers l'équilibre : la capacité des autorités locales de protéger certaines portions limitées du territoire

Deux jugements récents rendus par la Cour du Québec et la Cour d'appel du Québec montrent en effet une certaine ouverture en ce sens, lorsqu'il s'agit de construire des infrastructures uniques ou discontinues sur le territoire. Nous les analyserons ci-dessous, notamment dans le contexte de questions similaires qu'a eu à trancher la Cour suprême, et nous nous interrogerons ensuite, à titre prospectif, à savoir si les autorités locales pourraient avoir une voix, limitée, en ce qui concerne le tracé de voies de transport continues sur leur territoire.

2.3.1 Les infrastructures uniques ou discontinues

Dans l'affaire Pipe-lines Montréal c. Durand,[142] la Cour du Québec jugeait que la Commission de la protection du territoire agricole avait le pouvoir, en vertu de sa loi, d'exiger d'une entreprise de transport interprovincial par pipeline le fardeau de démontrer qu'il n'y avait pas d'autre endroit où construire une station de pompage qu'en zone agricole.[143] Le défaut par la compagnie de faire cette démonstration ne l'aurait pas empêchée de construire la station, mais l'aurait contrainte à le faire ailleurs que sur une terre agricole. Plus récemment, dans l'arrêt Châteauguay,[144] trois juges de la Cour d'appel du Québec ont unanimement reconnu à une municipalité le droit de refuser à une compagnie de communications la construction d'un système d'antennes à l'endroit préféré Rogers, dans la mesure où un site alternatif était disponible dans une aire territoriale préalablement établie par cette dernière.[145] La municipalité et ses citoyens, qui n'avaient pas été adéquatement consultés par l'entreprise,

142 *Pipe-lines Montréal ltée c Durand,* 2012 QCCQ 1122.

143 *Ibid* aux para 12-14, 176, 182-183, 218-229.

144 *Château, supra* note 17.

145 *Ibid* aux paras 56, 80-82, 86 et 92 (les honorables Yves-Marie Morissette, Julie Dutil et Jacques A. Léger, sous la plus de la juge Dutil).

étaient préoccupés du fait de la proximité entre le site préféré par celle-ci et les zones habitées.[146] C'est pourquoi la municipalité, appliquant le principe de précaution maintenant reconnu en droit,[147] avait refusé l'option privilégiée par Rogers. Selon la Cour, cherchant l'équilibre entre les compétences provinciales sur l'aménagement du territoire et la santé et la compétence fédérale sur les communications,[148] la décision de la municipalité n'empêchait pas l'entreprise d'exercer ses activités.[149]

À notre avis, même si le site alternatif proposé par la municipalité n'avait pas été situé dans une aire préétablie par Rogers, il n'y aurait pas eu entrave si ce site avait pu se comparer raisonnablement au site préféré par la compagnie et permettre la mise en œuvre efficace du service pour lequel l'infrastructure était envisagée. Conclure autrement reviendrait à confirmer de nouveau le principe de l'unilatéralisme fédéral sur la question tout en l'édulcorant minimalement. Serait en effet reconnue une voix très réduite aux instances locales en assujettissant, encore, leurs compétences sur le territoire local à la volonté d'entreprises privées à qui revient en partie, en raison des larges pouvoirs qui leurs sont reconnus par les lois fédérales, de mettre en œuvre les compétences du Parlement sur le territoire : le fédéralisme canadien ne saurait selon nous perpétuer un tel déséquilibre.

Ce jugement signifie donc, selon nous, que le Parlement ne peut pas écarter unilatéralement les compétences provinciales sur l'aménagement du territoire, la santé et la protection de l'environnement en exerçant sa compétence sur les communications interprovinciales. Il devrait logiquement en aller de même pour la compétence fédérale sur le transport interprovincial, puisqu'elle est elle aussi prévue au paragraphe 92(10)a) et pose des enjeux similaires.[150] Il

146 *Ibid* aux paras 15, 19-24.

147 *Ibid* au para 69. Voir également *Spraytech*, *supra* note 22 aux para 31-32 et la *Loi sur le développement durable*, *supra* note 29, art 6(g).

148 *Châteauguay*, *supra* note 17 aux paras 57, 60 et 66.

149 *Ibid* aux para 86 et 92. Dans une autre affaire, c'est justement parce qu'un règlement municipal avait pour effet de bloquer l'installation de boîtes postales par Postes Canada et qu'il avait été adopté dans ce seul objectif, que la Cour supérieure de l'Ontario le jugea non seulement inapplicable en vertu de la doctrine de l'exclusivité, mais aussi invalide. Le règlement prévoyait en effet des critères très flous relativement à l'emplacement des boîtes postales, accordait une très grande, voire une absolue discrétion au directeur municipal chargé d'accorder ou de refuser l'octroi du permis requis et imposait un moratoire de 120 jours à l'intérieur duquel aucune demande de permis ne pouvait être faite par Postes Canada. Le règlement aurait peut-être été jugé valide et applicable à Postes Canada si son but véritable avait été d'encadrer raisonnablement (et non de bloquer) la mise en place de boîtes postales afin d'assurer le développement harmonieux du territoire. Voir *Canada Post c City of Hamilton*, 2015 ONSC 3615 aux para 1, 40 à 43, 93 à 97 et 101.

150 De manière générale, voir Robitaille, « Le local et l'interprovincial », *supra* note 9.

importe de noter que cet argument se distingue de ceux que la Cour suprême a récemment rejetés dans l'arrêt Québec (Procureur général) c. Canada (Procureur général)[151] fondé sur le principe politique du fédéralisme coopératif. Une faible majorité de la Cour y spécifiait que ce principe ne peut empêcher le Parlement d'exercer unilatéralement les compétences dont il dispose en vertu de la LC 1867,[152] pour autant, comme le soulignaient les juges dissidents en citant l'opinion unanime de la Cour dans le Renvoi relatif à la Loi sur les armes à feu,[153] que cela ne nuise « pas de façon importante à la capacité des provinces de réglementer la propriété et les droits civils »[154] sur la situation. Deux nuances importantes s'imposent alors. D'abord, les décisions unilatérales de compagnies privées de construire des infrastructures de transport (ou de communications) ne devraient pas pouvoir ignorer systématiquement les normes locales visant à répondre aux besoins de la collectivité en matière d'environnement, de santé, d'agriculture et d'aménagement harmonieux du territoire. Le contraire aurait pour effet de nuire de façon très importante à la capacité des provinces d'exercer efficacement leurs compétences constitutionnelles et, pour les municipalités, celles qui leur ont été déléguées. Deuxièmement, si le principe du fédéralisme coopératif s'avère essentiellement descriptif,[155] il en va autrement des principes de subsidiarité et d'interprétation coordonnée. Comme nous l'avons observé, ces derniers ont été reconnus comme principes juridiques normatifs par la jurisprudence. Selon ces principes, l'exercice de ses compétences par le Parlement ne saurait empêcher de manière importante les provinces d'exercer leurs compétences sur le territoire local.

Pour en arriver à la conclusion qu'il n'y avait pas d'entrave dans l'arrêt Châteauguay, la Cour d'appel a dû distinguer les faits qui lui étaient soumis de ceux ayant mené au jugement de la Cour suprême dans l'arrêt Québec (Procureur général) c. Canadian Owners and Pilots Association.[156] La Cour d'appel soulignait effectivement, comme la Cour suprême le faisait d'ailleurs dans un autre contexte,[157] qu'il existait dans COPA des précédents portant spécifiquement sur les faits et la compétence fédérale en jeu, ce qui n'était pas le cas en ce qui concerne l'emplacement d'une antenne de communications.[158]

151 Voir *Québec c Canada*, 2015, *supra* note 11.

152 *Ibid* aux para 18-21, 24.

153 *Renvoi relatif à la loi sur les armes à feu*, 2000 CSC 31, [2000] 1 RCS 783.

154 *Québec c Canada*, 2015, *supra* note 11 au para 101; *Renvoi relatif à la loi sur les armes à feu*, *supra* note 153 au para 51.

155 *Québec c Canada*, 2015, *supra* note 11 au para 17.

156 *COPA*, *supra* note 72

157 *Marcotte*, *supra* note 91 au para 69.

158 *Châteauguay*, *supra* note 17 aux paras 80-81.

En outre, les exclusions d'activités aéronautiques et d'une antenne de communications sur une portion du territoire n'ont pas nécessairement le même impact sur les compétences fédérales, vu que les communications peuvent nécessiter un espace territorial moins important.

Il nous semble par ailleurs que les arrêts COPA et Lacombe auraient constitué de belles occasions de nuancer quelque peu la portée de l'arrêt Johanesson et al c. Rural Municipality West St Paul et al[159] de 1952. Une réglementation unifiée du transport aérien interprovincial ou international demeure bien entendu d'intérêt national aux fins du développement et du maintien d'un système canadien d'aviation efficace et sécuritaire.[160] Il aurait toutefois été souhaitable et plus équilibré, comme le suggéraient les juges Deschamps et LeBel,[161] que la Cour reconnaisse l'applicabilité des normes provinciales ou municipales en matière d'aménagement du territoire à la localisation des petits aérodromes locaux dont l'exploitation, plus simple, diffère de celle des gros aérodromes commerciaux.[162]

Permettre aux autorités locales de protéger une certaine portion du territoire contre le bruit et la pollution de l'air et de l'eau des lacs aurait atteint un meilleur équilibre entre les intérêts locaux et nationaux[163] en tension dans ce genre de dossiers qui sont aujourd'hui très nombreux, sans que cela affecte l'uniformité et l'efficacité du système canadien d'aviation qui repose sur une compétence fédérale déjà très vaste. Bien entendu, tout étant une question de degré, une province ou une municipalité ne saurait exclure des activités fédérales de transport sur une portion déraisonnable ou excessive de leurs territoires équivalant à une interdiction absolue déguisée.[164] En excluant complètement

159 *Johanesson*, *supra* note 55. C'est aussi l'opinion de nos collègues Brun, Tremblay et Brouillet, *supra* note 9 à la p 458 qui notent que l'arrêt *COPA*, notamment, a « mitigé [les] effets rééquilibrants » de l'arrêt *Banque canadienne de l'Ouest*, *supra* note 14. Voir également Ryder, *supra* note 13 aux pp 589-592.

160 *COPA*, *supra* note 72 aux para 2, 33; *Johanesson*, *supra* note 55 aux pp 326-327 (j. Locke).

161 *COPA*, *supra* note 72 aux para 77 (j. LeBel, dissident), 90-91 (j. Deschamps, dissidente); *Lacombe*, *supra* note 72 au para 71 (j. LeBel), 154, 156-168 (j. Deschamps, dissidente).

162 Brun, Tremblay et Brouillet, *supra* note 9 à la p 573. La majorité en a toutefois décidé autrement dans l'arrêt *COPA*, *supra* note 72 au para 32.

163 *Ibid* au para 2; Ryder, *supra* note 13 aux pp 589-592.

164 C'est également ce type de critère que nous semble avoir suggérée la juge Deschamps, dissidente, dans l'arrêt *COPA*, *supra* note 72 aux para 87-89 : « Dans l'affaire *Lacombe* (par. 81 et suiv.), j'explique qu'en dernière analyse la question consiste à juger s'il y a entrave à la petite aviation en tant que catégorie d'activités. Je précise que, à toutes fins utiles, *cette question se réduit à déterminer si la surface sur laquelle l'aménagement d'un aérodrome est ou peut être autorisé est suffisante. L'application du critère de la suffisance des espaces concrètement ou potentiellement autorisés* introduit ici une légère variation dans l'analyse par rapport à l'affaire Lacombe. Cette variation vient de la différence des

l'applicabilité des normes locales visant à protéger certaines parties du territoire dès qu'il est question d'aéronautique, la Cour suprême laisse les autorités et les citoyens impuissants face à un gouvernement central dont les besoins locaux et l'environnement ne sont pas toujours au centre des préoccupations, et les prive d'un moyen efficace d'assurer la qualité des eaux locales.[165]

Si la construction d'infrastructures uniques ou discontinues de transport interprovincial impose des défis aux citoyens locaux, il en va ainsi, et peut-être plus encore, pour le passage des voies continues de transport par trains ou pipelines. Bien entendu, le raisonnement de la Cour d'appel dans l'arrêt Châteauguay ne saurait être directement transposé à cette dernière situation, mais la question de la voix locale eu égard au tracé des voies linéaires de transport mérite néanmoins d'être posée. Les tribunaux hésiteront probablement à accepter que les instances provinciales ou municipales aient quelque mot à dire à ce sujet. Mais considérant ces enjeux sans précédent, il nous paraît très difficile de concevoir que le fédéralisme canadien puisse permettre d'écarter complètement les voix locales en cette matière. C'est pourquoi nous nous interrogerons maintenant, à titre prospectif, sur la possibilité et les limites de l'application des normes locales en ce qui concerne l'emplacement des voies continues de transport.

2.3.2 Une voix locale limitée eu égard aux voies linéaires de transport – Éléments de réflexion prospective

À notre avis, la doctrine de l'exclusivité, comprise dans le contexte des principes de subsidiarité et d'interprétation coordonnée, devrait permettre aux autorités locales d'exiger des changements circonscrits et raisonnables au tracé proposé d'un pipeline ou d'un chemin de fer.[166] S'il est évidemment difficile

faits législatifs provinciaux en cause. En effet, l'échelle de grandeur du zonage agricole n'est pas la même que celle du zonage municipal. [...] *Cela a pour conséquence que, dans le présent dossier, ce n'est pas par rapport à un territoire municipal donné que le caractère suffisant des espaces pour l'établissement de bases doit être évalué, mais par rapport à l'ensemble du territoire du Québec. Il appert du dossier que le territoire agricole désigné ne correspond qu'à quelque 63 000 km², soit environ 4 p. 100 du territoire de la province.* Situées principalement dans le sud du Québec, c'est-à-dire dans la partie de loin la plus habitée de la province, ces zones présentent sans doute un intérêt particulier pour la petite aviation, voire la grande. Il est regrettable que les débats aient peu porté sur cette question, qui était pourtant fort importante » [notre italique].

165 Voir Jean-François Girard, *La situation des lacs au Québec en regard des cyanobactéries. Mémoire du Centre québécois du droit de l'environnement présenté à la Commission des transports et de l'environnement*, Montréal, Centre québécois du droit de l'environnement, 2009, en ligne : <http://www.assnat.qc.ca/Media/Process.aspx?MediaId=ANQ.Vigie.Bll.DocumentGenerique_29789>.

166 Dans le cas de voies ferrées déjà construites, l'exigence d'une déviation serait sans doute considérée comme une expropriation et la norme locale jugée inapplicable. Voir notamment *Consolidated*

de spéculer dans l'abstrait, ce texte ne permettant pas d'appliquer la doctrine de l'exclusivité à des circonstances précises, la possibilité qu'une instance locale puisse, par exemple, exiger d'une entreprise de pipeline le contournement d'un milieu humide[167] ne nous paraît pas devoir être écartée d'emblée pour autant. Tout dépend, en effet, de l'impact concret que cela aura sur la compétence fédérale et la construction de cette infrastructure, si l'on tient compte aussi de ce que d'autres instances locales pourraient demander.

Le transport d'hydrocarbures par chemins de fer ou pipelines suscite de vives et légitimes préoccupations chez les citoyens et municipalités. Plusieurs s'inquiètent des conséquences environnementales et humaines presque inévitables que comporte le transport de pétrole ou d'autres hydrocarbures, parfois au travers de zones densément peuplées et sans toujours en être informés.[168] Dans ce contexte, bien que l'argument que nous avançons dans cette section puisse paraître audacieux, il s'inscrit selon nous dans le besoin d'une interprétation évolutive du droit constitutionnel à la lumière des enjeux contemporains et constituerait l'aboutissement logique, en matière de transport, de la nouvelle jurisprudence sur la doctrine de l'exclusivité.[169]

Avant 1867, le transport d'hydrocarbures ne constituait pas un enjeu

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Fasfrate, *supra* note 7 au para 37.

167 Delisle, *supra* note 138.

168 Voir notamment Marie-Pierre Beaubien, « Oléoduc Énergie Est : Le tracé soulève des inquiétudes au Nouveau-Brunswick », *TVA Nouvelles (Edmundston)* (19 août 2013); Guillaume Bourgault-Côté, « Matières dangereuses – Hausse importante du trafic au Canada », *Le Devoir* (16 août 2013); Renaud Gignac, « Lac-Mégantic : Au-delà de la voie de contournement », (17 juillet 2014) *Institut de recherche et d'informations socio-économiques* (blogue), en ligne : <http://iris-recherche.qc.ca/blogue/lac-megantic-au-dela-de-la-voie-de-contournement>; Isabelle Paré, « Déraillement à Gogama en Ontario : Les élus locaux pressent la ministre fédérale des Transports d'agir », *Le Devoir* (10 mars 2015); Isabelle Porter, « Les trains dans Limoilou sèment l'inquiétude chez des parents », *Le Devoir* (31 mars 2014); Annie Poulin, « Pipelines : la technologie ne détecte qu'une fuite sur 10 », *Ici Radio-Canada* (7 novembre 2013); Michel Saba, « Énergie Est : les inquiétudes pour la région de Winnipeg », *Ici Radio-Canada (Manitoba)* (12 avril 2015); Jean-Robert Sansfaçon, « Transport ferroviaire : Un moratoire s'impose », *Le Devoir* (10 mars 2015); Alexandre Shields, « Fronde municipale contre le projet Énergie Est : Au moins 75 villes ont manifesté leur inquiétude [...] », *Le Devoir* (26 février 2015); Alexandre Shields, « Pipeline Énergie Est : 20 rivières posent un risque majeur », *Le Devoir* (11 décembre 2014); Carrie Tait, « B.C. municipalities oppose Enbridge pipeline », *Financial Post* (1er octobre 2010); Les Whittington, « Unprecedented opposition may make British Columbia pipeline a non-starter », *supra* note 3.

169 Sur la nécessité d'interpréter la Constitution de manière évolutive afin de l'adapter de manière mesurée aux changements sociaux importants, voir notamment *Carter c Canada (Procureur général)*, *supra* note 108 aux para 44-47; *Health Services and Support – Facilities Subsector Bargaining Assn. c Colombie-Britannique*, *supra* note 108; *Banque canadienne de l'Ouest*, *supra* note 14 au para 23; *Edwards c Attorney General for Canada*, [1930] AC 124 (CP) à la p 136; Brun, Tremblay et Brouillet, *supra* note 9 aux pp 200-202.

crucial comme c'est le cas aujourd'hui. Les dangers générés par cette activité, bien réels pour la santé humaine et l'environnement, n'étaient pas largement connus non plus. Par ailleurs, les villes se sont transformées[170] et la gestion du territoire s'est grandement complexifiée. Autrefois, l'environnement n'était même pas reconnu en jurisprudence comme matière à compétence constitutionnelle. S'il est par ailleurs compréhensible que la réalisation de grands projets, comme des chemins de fer pancanadiens, était d'un intérêt national tel dans les années 1860 qu'elle a justifié le constituant d'attribuer une compétence d'exception sur le sujet au Parlement,[171] il est permis de douter que tous les grands projets de pipelines, en particulier ceux qui semblent essentiellement voués à l'exportation, revêtent aujourd'hui cette dimension, notamment dans le contexte urgent des changements climatiques.[172] Dans les années 1860, le Canada était à bâtir et la construction d'un chemin de fer canadien revêtait une importance nationale véritable pour la fondation du pays.[173]

Dans ce contexte, il nous paraît raisonnable que les instances provinciales ou municipales puissent exclure certaines portions limitées et circonscrites de leurs territoires du transport fédéral, dès lors qu'elles le fassent pour des raisons liées à des compétences provinciales et que cela ne constitue pas, eu égard aux faits particuliers d'une affaire, une entrave constitutionnelle. En bref, la doctrine de l'exclusivité et le droit constitutionnel nous semblent devoir évoluer proportionnellement à l'importance cruciale que les enjeux humains, collectifs et environnementaux ont prise en ce qui concerne l'exploitation et le transport d'hydrocarbures au Canada. À défaut pour le droit constitutionnel d'évoluer sur cette question et de reconnaître la légitimité des intérêts citoyens locaux, force sera de reconnaître le déficit démocratique dont il est en partie la cause, et l'écart entre les principes théoriques qu'il promeut et ce qui se vit quotidiennement dans la réalité concrète. Rappelons qu'il n'est pas question d'empêcher ou

170 Voir notamment Ron Levi et Mariana Valverde, « Freedom of the City :Canadian Cities and the Quest for Governmental Status», (2006) 44 Osgoode Hall LJ 409 aux pp 412-415; Eugene Meehan, Robert Chiarelli et Marie-France Major, «The Constitutional Legal Status of Municipalities 1849-2004 :Success is a Journey, But Also a Destination», (2007-2008) 22 NJCL 1.

171 *Consolidated Fastfrate*, *supra* note 7 aux para 31, 33, 36 à 39 et 68.

172 Kim Mackrael, « Obama Urges Action on "Growing Threat" of Climate Change », *The Globe and Mail* (24 septembre 2013); Ivan Semeniuk, « UN Report Highlights Urgency of Near-term Carbon Cutting », *The Globe and Mail* (13 avril 2014); Alexandre Shields, « Réchauffement : la responsable de l'ONU pour le climat appelle les États à "se réveiller" », *Le Devoir* (13 mai 2013). Notons que la Cour du district de La Haye au Pays-Bas a récemment ordonné à l'État de réduire d'au moins 25 % ses émissions de gaz à effet de serre d'ici 2020, par rapport aux émissions de 1990. Pour lire une version anglaise de la décision, voir, en ligne : <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:7196&keyword=urgenda>

173 *Consolidated Fastfrate*, *supra* note 7 aux para 37-38.

d'obstruer excessivement la construction de voies continues de transport, de porter gravement atteinte à l'établissement ou au maintien d'un réseau efficace et sécuritaire de transport d'intérêt national véritable,[174] ni de permettre aux instances locales de déterminer de manière très importante leur emplacement. Il s'agit plutôt de faire en sorte que les entreprises fédérales de transport respectent les compétences provinciales, les lois et règlements protégeant certaines portions ou catégories délimitées du territoire[175] et les besoins des citoyens. Une province ou municipalité ne pourrait pas non plus adopter des normes visant uniquement les entreprises fédérales de transport et leur demandant des changements de tracés. Seuls les lois et règlements d'application générale[176] peuvent en effet s'appliquer aux éléments essentiels des entreprises dont l'activité relève d'une compétence fédérale. Or, dans la mesure où certaines aires territoriales sont déjà protégées par des lois provinciales et des normes municipales d'application générale – par exemple, les terres agricoles, les milieux humides et les parcs nationaux –, une entreprise souhaitant construire un pipeline ou une voie ferrée connaîtrait à l'avance les contraintes imposées par celles-ci et pourrait concevoir son tracé en conséquence.

Le respect d'exigences environnementales municipales par une compagnie transportant des hydrocarbures par pipelines à l'extérieur d'une province n'a par ailleurs rien d'inusité. Par suite des préoccupations exprimées par la MRC de Memphrémagog quant à l'impact négatif de la construction d'un pipeline sur le paysage récréotouristique de la région et des exigences que celle-ci formulait pour l'atténuer,[177] la compagnie TQM avait accepté de modifier le tracé initialement envisagé.[178] Si l'entreprise avait bien pris soin de

174 Par analogie : *Renvoi relatif à la Loi sur les valeurs mobilières*, *supra* note 30 aux para 70, 83, 84, 86, 89, 90, 107, 109, 120, 121, 123, 124, 125 et 130.

175 Notamment la compétence provinciale sur l'aménagement du territoire et les compétences provinciales concurrentes sur l'environnement, la santé et l'agriculture : *LC 1867*, *supra* note 9 aux para 92(13) et (16), art 95; *Carter c Canada (Procureur général)*, *supra* note 108 au para 53; *COPA*, *supra* note 72 aux para 22 (j. McLachlin), 77 (j. LeBel); *Lacombe*, *supra* note 72 aux para 1, 49-50 (j. McLachlin), 154 (j. Deschamps); *RJR-MacDonald Inc c Canada (Procureur général)*, [1995] 3 RCS 199 au para 32; *Friends of the Oldman River*, *supra* note 54. Au Québec, voir les lois suivantes : *Loi sur la qualité de l'environnement*, RLRQ c Q-2; *Loi sur le développement durable*, *supra* note 29; *Loi sur la protection du territoire et des activités agricoles*, FLRQ, c P-41.1; *Loi affirmant le caractère collectif des ressources en eau et visant à renforcer leur protection*, RLRQ c C-6.2; *Loi sur la conservation du patrimoine naturel*, RLRQ c C-61.01; *Loi sur la conservation et la mise en valeur de la faune*, RLRQ c C-61.1; *Loi sur les espèces menacées ou vulnérables*, RLRQ c E-12.01; *Charte des droits et libertés de la personne*, RLRQ c C-12 (droit de toute personne à un environnement sain et respectueux de la biodiversité).

176 Voir *supra* note 83.

177 Office national de l'énergie, *Rapport d'étude approfondie - Gazoduc Trans Québec & Maritimes Inc. : Prolongement vers PNGTS,* Calgary, Office national de l'énergie, 1998 à la p 69.

178 *Ibid* aux pp 1, 3, 6, 11, 20, 30 et 69.

mentionner à l'ONÉ qu'elle préférait le tracé de rechange au tracé initial,[179] et si cet exemple ne constitue évidemment pas un précédent juridique, ce dernier montre néanmoins que la coordination des compétences fédérale et provinciale sur le territoire local est possible.

Il est à espérer que la Cour suprême confirmera le raisonnement de la Cour d'appel du Québec dans l'arrêt Châteauguay. L'esprit de coordination et d'équilibre animant le jugement de la Cour d'appel représente en effet selon nous le dernier pas afin d'en arriver à un équilibre constitutionnel satisfaisant entre l'exercice par le Parlement et les provinces de leurs compétences respectives sur le territoire local. Et si la conclusion à laquelle en arrive la Cour d'appel semble innovante en droit constitutionnel, celle-ci rappelle à juste titre que le Conseil privé avait lui-même, dès 1905, suggéré qu'une municipalité disposerait d'une voix balisée eu égard à l'emplacement des poteaux d'une compagnie de téléphonie.[180]

Une décision unilatérale fédérale en ces matières pourrait même porter atteinte au cœur de la compétence provinciale sur l'aménagement du territoire et s'avérer inapplicable aux provinces tant et aussi longtemps que leurs lois n'auraient pas été dûment considérées. Un tel scénario nécessiterait que la Cour suprême – qui a reconnu les effets asymétriques que la doctrine de l'exclusivité a eus au profit du Parlement et affirmé que celle-ci s'applique aussi, « en théorie », pour protéger le contenu essentiel des compétences provinciales –[181] donne une suite concrète à ces affirmations. Alors que le Québec et la Colombie-Britannique ont récemment souhaité voir protégé le noyau essentiel de leurs compétences en santé afin d'empêcher l'application de lois fédérales interdisant ou ayant pour effet d'interdire le suicide assisté et les centres d'injection de drogues supervisés, la Cour a systématiquement refusé de prendre cette voie.[182]

Malgré tout ce qui précède, il n'en demeure pas moins que les lois fédérales pourraient avoir préséance sur les normes locales en cas de conflit

179 *Ibid* aux pp 3 et 11.

180 *Toronto Corporation c Bell Telephone Company of Canada*, [1905] AC 52 aux pp 60-61 : « Their Lordships, however, do not think the words introduced by the amendment can have the effect of enabling the council to refuse the company access to streets through which it may propose to carry its line or lines. They may give the council a voice in determining the position of the poles in streets selected by the company, and possibly in determining whether the line in any particular street is to be carried overhead or underground. »

181 *Banque canadienne de l'Ouest*, *supra* note 14 au para 35.

182 *Carter c Canada (Procureur général)*, *supra* note 108 aux para 49-53; *Canada (Procureur général) c PHS Community Services Society*, 2011 CSC 44, aux para 57-70, [2011] 3 RCS 134.

réel. C'est donc dire que si les instances locales disposaient, comme nous le suggérons, de la compétence d'exclure, de manière limitée et dans des normes d'application générale, certaines zones névralgiques du territoire à l'installation d'infrastructures fédérales de transport, sans toutefois évidemment pouvoir les bloquer ou en rendre excessivement compliquée la construction, elles pourraient toutefois voir leur voix écartée en vertu de la doctrine de la prépondérance fédérale.[183]

2.3.3 La question du conflit de lois

La jurisprudence prévoit en effet qu'un conflit entre une loi fédérale et une loi provinciale valides se règle à la faveur de la première.[184] Il peut s'agir soit d'un conflit opérationnel (ou concret) ou d'un conflit d'intention (ou d'objet).[185] Dans ce dernier cas, le fait que la loi provinciale aille à l'encontre de l'objectif même de la loi fédérale constitue un conflit véritable au sens de la jurisprudence.[186] Le simple fait que le Parlement ait légiféré sur un sujet ou accordé à un organisme un pouvoir décisionnel relativement à des infrastructures de transport ne saurait toutefois, selon nous, être interprété comme une intention d'« occuper le champ » ou de vouloir écarter systématiquement et rendre inopérant, en application du second type de conflit de lois, le droit provincial pertinent.[187] La Cour suprême a d'ailleurs rejeté cette doctrine du champ occupé. La professeure Brouillet note toutefois à juste titre que la Cour suprême laisse implicitement entendre qu'un texte de loi fédéral clair pourrait permettre d'écarter la présomption selon laquelle la simple action de légiférer n'équivaut pas à vouloir écarter le droit provincial valide.[188]

183 Brun, Tremblay et Brouillet, *supra* note 9 à la p 573.

184 *Banque canadienne de l'Ouest*, *supra* note 14 aux para 69-75; *Rothmans, Benson & Hedges Inc c Saskatchewan*, 2005 CSC 13 aux para 11-15, [2005] 1 RCS 188; *Law Society of British Columbia c Mangat*, 2001 CSC 67, aux para 68-71, [2001] 3 RCS 113; *Spraytech*, *supra* note 22 aux para 34-42.

185 *Ibid.*

186 *Ibid.*

187 La professeure Eugénie Brouillet souligne avec raison que les tribunaux devront être prudents en appliquant ce type de conflit (loi provinciale qui déjoue l'intention de la loi fédérale) à défaut de quoi on pourrait bien assister au retour de la théorie du « champ occupé ». Voir Eugénie Brouillet, « Le fédéralisme et la Cour suprême du Canada : quelques réflexions sur le principe d'exclusivité des pouvoirs », (2010) 3 *Revue québécoise de droit constitutionnel* 1 aux pp 18-20. [Brouillet, « Le fédéralisme et la Cour suprême ». Voir également Ryder, *supra* note 13 aux pp 577-579, 594-595.

188 *Banque canadienne de l'Ouest*, *supra* note 14 au para 74; Brouillet, « Le fédéralisme et la Cour suprême » *supra* note 187 aux pp 18-20.

Il est à souhaiter que la Cour prenne ultérieurement ses distances face à ce malheureux obiter qui pourrait potentiellement saper complètement les assisses de coordination et d'équilibre sur lesquelles repose sa jurisprudence la plus récente sur le fédéralisme.

En ce qui concerne notre propos, des lois et règlements fédéraux attribuent à l'Office des transports du Canada, au ministre des Transports ou à l'ONÉ, selon le cas, des pouvoirs décisionnels ou réglementaires relativement à la construction, la conception, l'emplacement, la réparation et l'exploitation d'infrastructures de transport interprovincial sécuritaires et, en théorie, respectueuses de l'environnement.[189] Toute compagnie de transport interprovincial par chemins de fer et pipelines ainsi que les compagnies d'aéronautiques doivent obtenir un certificat ou une licence préalablement à la construction ou à l'exploitation de leurs installations.[190] Les autorités fédérales disposent en outre du pouvoir d'énoncer des conditions à l'obtention de ces autorisations.[191] Comme le soulignait l'ONÉ, cela ne signifie pas pour autant, en l'absence de conflit réel, que le Parlement ait voulu, ce faisant, écarter l'application des normes provinciales ou municipales valides.[192] Il n'existe pas non plus nécessairement de conflit insoluble ou absolu entre le fait pour une province ou une municipalité d'exclure certaines portions limitées du territoire de l'installation d'infrastructures de transport, et le simple fait que des organismes fédéraux disposent de pouvoirs eu égard à la construction, l'emplacement ou à l'exploitation de celles-ci.

Par exemple, en ce qui concerne les pipelines, lorsque la loi attribue à l'ONÉ le pouvoir de déterminer « le meilleur tracé possible et [l]es méthodes et moments les plus appropriés pour la construction »,[193] deux lectures sont possibles. L'une, rigide, consiste à considérer que ce pouvoir exclut d'emblée l'applicabilité de normes locales protégeant certaines parties du territoire. L'autre, plus conforme à l'esprit de coordination, d'équilibre et d'ouverture

189 *Loi sur l'aéronautique*, LRC 1985, c A-2; *Loi sur l'Office national de l'énergie*, LRC 1985 c N-7 [*Loi sur l'ONÉ*]; *Loi sur la sécurité ferroviaire*, LRC 1985, c 32 (4e supp); *Loi sur les transports au Canada*, LC 1996 c 10; *Loi sur le déplacement des lignes de chemin de fer et les croisements de chemin de fer*, LRC 1985 c R-4; *Règlement de l'aviation canadien*, DORS/96-433; *Règlement sur les transports aériens*, DORS/88-58; *Règlement de l'Office national de l'énergie sur les pipelines terrestres*, DORS/99-294 [*Règlement sur les pipelines terrestres*].

190 *Loi sur l'ONÉ*, *supra* note 189, art 31 à 40, 52; *Loi sur la sécurité ferroviaire*, *supra* note 189, art 17.1 et ss; *Loi sur les transports au Canada*, *supra* note 189, art 57 et 61 (transport aérien) et 90 et ss (transport ferroviaire); *Règlement sur les transports aériens*, *supra* note 189, art 10.

191 *Loi sur l'ONÉ*, *supra* note 189, art 37; *Loi sur la sécurité ferroviaire*, *supra* note 189, art 17.4(2).

192 Voir *supra* note 8.

193 *Loi sur l'ONÉ*, *supra* note 189, art 36.

du fédéralisme moderne, consiste plutôt à considérer que le « meilleur tracé possible » est celui qui respecte aussi les normes locales de protection du territoire et de l'environnement et contourne conséquemment les milieux humides, les parcs nationaux et les terres agricoles bien délimités, notamment – à moins bien sûr que la quantité d'espaces à contourner n'équivaille à une entrave constitutionnelle. Les règles fédérales prévoient également que les compagnies de pipelines doivent respecter certaines normes techniques faisant consensus dans l'industrie[194] et exploiter leurs installations de manière sécuritaire et respectueuse de l'environnement.[195] Elles énoncent également que ces compagnies doivent prévoir des mesures ou processus de sécurité, d'urgence, d'inspection, de vérification et de protection environnementale.[196] Quant aux « stations » (toute infrastructure nécessaire à l'exploitation d'un pipeline), le règlement prévoit l'obligation pour celles-ci d'être munies d'installations de confinement et d'élimination des déchets[197] – ce que demandent également parfois des municipalités – et l'obligation que les installations de stockage ne soient pas situées en des lieux instables (glissements de terrain, éboulements, failles géologiques) et soient en tout temps accessibles par route aux fins des services d'incendie.[198] Or, le fait que des provinces et municipalités prévoient des règles en matière de sécurité du transport interprovincial n'entrerait pas forcément, en soi, en conflit avec ces exigences fédérales ni nécessairement avec les normes, complexes, adoptées par l'industrie et auxquelles se réfère le Règlement sur les pipelines terrestres.[199] Pour qu'un conflit survienne, il faudrait à notre avis que les normes locales soient moins sécuritaires que les normes minimales prescrites par les lois et règlements fédéraux.[200] La Cour suprême confirmait en effet dans l'arrêt Spraytech que des lois et règlements locaux peuvent être plus stricts ou plus sévères que des normes fédérales, chacune ayant pour objectif d'assurer la sécurité, sans que cela entraîne nécessairement un conflit de lois.[201]

194 *Règlement sur les pipelines terrestres*, *supra* note 189, art 4 à 6.

195 *Ibid*, art 4 et 6.

196 *Ibid*, art 27 et ss.

197 *Ibid*, art 11 et 13.

198 *Ibid*, art 13.

199 *Ibid*, art 4(1).

200 Notons que selon l'article 5.1(2), l'ONÉ donne son approbation, notamment, lorsque « le degré de sécurité ou de protection prévu dans les documents est équivalent ou supérieur à celui prévu par une norme comparable de la CSA ou toute autre norme applicable » [notre italique]. Parmi ces « autre[s] norme[s] applicable[s] », en plus de celles en vigueur dans l'industrie du pipeline, nous pourrions considérer – du moins la généralité du texte de l'article 5.1(2) l'autorise – qu'il pourrait aussi s'agir de celles adoptées par les instances gouvernementales locales.

201 *Spraytech*, *supra* note 22 aux para 37-42. Il pourrait peut-être en aller de même en ce qui concerne le bruit produit par les aéronefs ou les trains, que le ministre fédéral des Transports est habileté à réglementer : *Loi sur l'aéronautique*, *supra* note 189, art 4.9(f); *Loi sur les transports au Canada*,

En matière de transport ferroviaire, la situation est similaire. Toute compagnie de chemin de fer dispose par exemple de vastes pouvoirs généraux en vertu desquels elle « peut » construire ou déplacer des infrastructures essentielles à son exploitation.[202] Des normes locales préservant certaines parties du territoire de la construction d'installations ferroviaires ou prévoyant des exigences visant la sécurité, par exemple l'obligation d'aménager des passages à niveau, n'empêcheraient pas nécessairement les compagnies ferroviaires d'exercer ce pouvoir. Comme la majorité de la Cour suprême le soulignait dans l'arrêt COPA, « une loi fédérale permissive, sans plus, ne permettra pas d'établir l'entrave de son objet par une loi provinciale qui restreint la portée de la permissivité de la loi fédérale ».[203] Le tracé des chemins de fer est aussi assujetti à l'approbation de l'Office des transports.[204] Celui-ci « peut accorder l'autorisation « s'il juge que l'emplacement de la ligne est convenable, compte tenu des besoins en matière de service et d'exploitation ferroviaires et des intérêts des localités qui seront touchées par celle-ci ».[205] Comme en ce qui concerne les pipelines, il ne nous semble pas que ce pouvoir de l'Office, par sa simple existence, entre en conflit avec la présence de normes locales qui excluraient certaines portions limitées du territoire à la construction d'une voie ferrée.[206]

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supra note 189, art. 95.1. Des normes locales plus sévères que les normes adoptées par le ministre pourraient ne pas constituer un conflit de loi menant à leur caractère inopérant. Sur la question, il faudra suivre l'affaire *Coalition contre le bruit c Shawinigan (Ville)*, 2012 QCCS 4142. Pour une analyse de la question du conflit entre des normes municipales et provinciales, dans le contexte d'activités intraprovinciales d'exploration et d'exploitation pétrolières, voir Guillaume Rousseau, « La prépondérance étatique et les compétences municipales sur l'eau et le forage : étude de la validité d'un règlement de la Ville de Gaspé », (2014) 55 :3 C de D 645.

202 *Loi sur les transports au Canada*, *supra* note 189, art 95.

203 *COPA*, *supra* note 72 au para 66. Voir également le para 68 : « Il faut également rejeter l'argument selon lequel le Parlement a délibérément élaboré un cadre réglementaire permissif dans le but d'encourager la construction généralisée d'installations aéroportuaires. La difficulté réside dans le fait que, bien que le Parlement ait occupé le champ, il n'existe aucune preuve que le gouverneur en conseil a délibérément adopté des exigences minimales relativement à la construction et à l'agrément des aérodromes afin d'en encourager la dissémination. Comme je l'ai indiqué précédemment, pour invoquer la prépondérance fédérale parce que la réalisation de l'objet est entravée, plutôt qu'en raison d'un conflit d'application, il faut une preuve claire de l'objet; le simple fait qu'une loi fédérale soit permissive ne suffit pas ».

204 *Loi sur les transports au Canada*, *supra* note 189, art 98(1).

205 *Ibid*, art 98(2)

206 En ce qui concerne le déplacement de voies existantes, la situation semble différente. Non seulement cela pourrait constituer une entrave à la compétence fédérale, puisqu'il pourrait s'agir d'une forme d'expropriation, mais il pourrait aussi y avoir conflit de lois dans la mesure où la *Loi sur le déplacement des lignes de chemin de fer et les croisements de chemin de fer*, *supra* note 189, prévoit en détail comment des lignes de chemins de fer peuvent être déplacées dans des zones urbaines, en accord avec les compagnies ferroviaires, les gouvernements provinciaux et municipaux touchés et sous réserve de l'approbation de l'Office des transports.

Bien que cet aperçu des lois et règlements fédéraux applicables aux pipelines et chemins de fer ne soit pas exhaustif ni ancré dans un litige factuel et juridique précis, il laisse néanmoins voir, selon nous, que l'attribution de pouvoirs à un organisme fédéral, de même que les exigences fédérales imposées aux entreprises privées ou les pouvoirs que ces lois et règlements accordent à ces entreprises, n'écartent pas systématiquement l'opérabilité des normes locales. Si elle tranchait en affirmant que l'interdiction de construire un aérodrome en zone agricole entravait le cœur de la compétence fédérale sur l'aéronautique et que cela suffisait pour mettre un terme au litige, la majorité de la Cour suprême dans l'arrêt COPA jugeait cependant que cette interdiction ne serait pas entrée en conflit avec la Loi sur l'aéronautique et ses règlements d'application.[207] Selon la majorité, le fait que le ministre dispose du pouvoir de réglementer, notamment, l'emplacement des aérodromes, tout comme le fait que les normes fédérales permettent en général à toute personne de construire un aérodrome local sans autorisation préalable n'auraient pas rendu inopérante la Loi sur la protection du territoire et des activités agricoles.[208] En matière de pipelines, cela aurait pu signifier que les vastes pouvoirs d'accès au territoire sans autorisation préalable, que l'article 73 de la Loi sur l'ONÉ accorde aux entreprises, n'auraient pas nécessairement pour effet de créer un conflit rendant les normes locales inopérantes. Dans sa Décision no 40 à propos du pipeline Trans Mountain, l'ONÉ a toutefois jugé inopérant un règlement municipal interdisant sans exception de couper ou détériorer la végétation dans un parc. Selon l'ONÉ, les examens géophysiques auxquels devait procéder l'entreprise (pour bien l'informer quant à son pouvoir de recommandation à l'égard de la prolongation envisagée du pipeline) auraient nécessité de contrevenir au règlement municipal,[209] d'où le conflit. Dans cette même affaire, l'ONÉ laissait toutefois entendre qu'un autre règlement moins drastique, interdisant notamment d'excaver, de modifier ou d'entraver la voie publique, sauf aux conditions imposées par la municipalité, aurait pu s'appliquer concomitamment à l'article 73a) de la Loi sur l'ONÉ, n'eut été le refus catégorique de celle-ci d'en discuter.[210]

Pour qu'un conflit survienne, il faut donc une preuve évidente de l'intention fédérale.[211] Ce serait le cas lorsque, comme nous le suggérions ci-dessus et tel que le démontre la Décision no 40 de l'ONÉ, une norme provinciale ou municipale interdit de manière absolue et sans nuance une activité ou un

207 *COPA*, *supra* note 72 aux para 65-74.

208 *Loi sur la protection du territoire et des activités agricoles*, *supra* note 175; *COPA*, *supra* note 72.

209 *Décision no 40 (Trans Mountain)*, *supra* note 8 aux pp 4, 14.

210 *Ibid* à la p 14.

211 *COPA*, *supra* note 72 au para 68.

projet expressément autorisé par une loi, un règlement ou une autorité fédérale, « privant [l'organisme fédéral] de son pouvoir de décision définitive » sur le projet en question.[212] La simple coexistence de normes locales et fédérales dont plusieurs visent les mêmes objectifs (construction et exploitation sécuritaire et respectueuse de l'environnement) ne se solde donc pas nécessairement par un conflit d'intention ou d'application.

Conclusion

Peu après que l'arrêt Banque canadienne de l'Ouest ait été rendu, Peter W. Hogg et Rahat Godil écrivaient ceci :

> On the other side of the issue, is the practical inconvenience that the new rule will cause for federally regulated undertaking such as telephone companies, airlines, railways and banks. These undertakings, which are already subject to federal regulation, now also have to comply with the law of every province and territory in which they operate.[213]

Il est indéniable que les entreprises fédérales de transport œuvrent maintenant dans un régime législatif plus diversifié et qu'elles doivent conséquemment respecter une pluralité de normes législatives et réglementaires. Il faut cependant nuancer l'affirmation ci-dessus reproduite puisque, même avant l'arrêt Banque canadienne de l'Ouest, les entreprises fédérales étaient assujetties aux lois provinciales d'application générale qui ne les atteignaient pas dans leur spécificité ou activités essentielles. Cet arrêt a changé le droit sur cet aspect en confirmant que les normes locales d'application générale peuvent dorénavant avoir des effets importants sur les entreprises de transport interprovincial, pourvu qu'elles n'entravent pas l'objectif fondamental pour lequel les compétences fédérales ont été attribuées. Si ce nouveau critère a élargi l'applicabilité des lois provinciales, il comporte tout de même des limites qui pourraient, si elles n'étaient pas interprétées trop largement, favoriser à la fois l'autonomie locale et l'efficacité des infrastructures de transport interprovincial.

La jurisprudence récente de la Cour suprême, et celle des tribunaux d'appel et de première instance des provinces qu'elle a insufflée ont donc permis d'élargir l'applicabilité des lois provinciales aux entreprises fédérales. Un équilibre plus satisfaisant, en accord avec le principe du fédéralisme, ne sera toutefois atteint que lorsque les compétences provinciales sur l'aménagement

212 *Lafarge*, *supra* note 75 au para 75 [notre italique].
213 Hogg et Godil, *supra* note 84 à la p 636.

du territoire, l'environnement, l'agriculture et la santé pourront soustraire aux installations d'entreprises fédérales de transport certaines portions du territoire local. Cela présenterait certes des inconvénients pour les sociétés privées exploitant ces entreprises, mais le droit constitutionnel ne devrait pas permettre à celles-ci d'ignorer les besoins locaux des citoyens qui vivent, quotidiennement, à proximité de ces installations et avec les risques qu'elles posent.

Dans ce contexte, les provinces, municipalités et citoyens s'attendent avec raison à ce que toutes les entreprises de transport respectent les normes législatives et réglementaires locales qui répondent à leurs besoins, du moins celles qui n'ont pas pour effet de bloquer ou de rendre très difficile l'exercice de la compétence fédérale. Il est à espérer que la Cour suprême confirmera l'arrêt Châteauguay et que, dans ses prochains arrêts en matière de transport interprovincial, d'aéronautique ou de navigation, elle accordera au bien commun, à la démocratie municipale et aux intérêts collectifs durables des citoyens canadiens vivant sur le territoire local le juste poids qui leur revient comparativement à l'intérêt économique privé à court terme.

War with ISIL: Should Parliament Decide?

*Ryan Patrick Alford**

The Government of Canada presently possesses the power to commit Canadian soldiers to battle without Parliamentary approval. On this basis, troops were deployed to Northern Iraq after a brief debate inaugurated by a non-binding take note motion presented in the House of Commons. This article notes that this power is anomalous in the era of responsible government, and argues that it should be reconsidered in the light of recent changes to the constitutional order of the United Kingdom.

The article describes the constitutional convention created in the United Kingdom in 2012. This requires the Government to abide with the results of a vote in the House of Commons on the deployment. This article argues that the adoption of the convention was not a response to abstract concerns about the balance of powers. Rather, it was deemed be politically necessary owing the revelations about the Blair Government's abuse of the royal prerogative.

The article further argues that the same incentives for abuse of the Government's power over combat deployments exist in Canada at present. The creation of a Canadian constitutional convention requiring prior Parliamentary approval would promote the transmission of accurate information about the factual and legal basis for military action and would serve as a check on deployments that might violate international law. Accordingly, the article describes how such a convention might be created in Canada and concludes that it is both appropriate and necessary in the current political environment.

Actuellement, le gouvernement du Canada a le pouvoir d'engager les soldats canadiens au combat sans l'approbation du Parlement. Dans ces conditions, des troupes furent déployées dans le nord de l'Iraq après un bref débat inauguré par une motion d'actualité non contraignante présentée dans la Chambre des communes. L'auteur de cet article constate que ce pouvoir est anormal à l'ère du gouvernement responsable et il soutient qu'on devrait le réexaminer à la lumière de changements récents à l'ordre constitutionnel du Royaume-Uni.

L'auteur décrit la convention constitutionnelle créée au Royaume-Uni en 2012. Ceci exige du gouvernement qu'il respecte le résultat d'un vote sur le déploiement à la Chambre des communes. Dans cet article, l'auteur soutient que l'adoption de la convention n'était pas une réponse à des inquiétudes abstraites relativement à l'équilibre des pouvoirs. Plutôt, on a jugé qu'elle était nécessaire, sur le plan politique, en raison des révélations touchant l'abus de la prérogative royale par le gouvernement Blair.

En outre, l'auteur soutient que les mêmes motivations à l'abus du pouvoir du gouvernement sur les déploiements militaires existent actuellement au Canada. La création d'une convention constitutionnelle canadienne nécessitant l'approbation préalable du Parlement favoriserait la transmission d'informations exactes par rapport au fondement factuel et juridique pour une action militaire et servirait de frein aux déploiements qui pourraient violer le droit international. Par conséquent, l'auteur explique comment une telle convention pourrait être créée au Canada et conclut qu'elle est à la fois appropriée et nécessaire dans le contexte politique actuel.

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Introduction

The Canadian Army has been engaged in ground combat in northern Iraq sporadically since January 2015, when "[i]n the first ground battles between Western troops and ISIL . . . Canadian special forces exchanged gunfire with fighters belonging to the . . . militant group."[1] The soldiers targeted by "effective mortars and small-arms fire"[2] are members of Joint Task Force Two and the Canadian Special Operations Regiment taking part in Operation Impact, the Canadian contribution to the U.S.-led campaign against the force that now has effective control of most of eastern Syria and northern Iraq.[3]

The news that these soldiers are not merely conducting air strikes or training Kurdish troops, but are instead exchanging gunfire with ISIL[4] and targeting air strikes from the ground, has catalyzed renewed criticism of the operation. The key concern is 'mission creep' — the fear that military campaigns without strictly-defined objectives will metastasize, spreading to other regions and consuming more and more resources.[5]

Reports that Canadian troops are involved in ground operations appear to justify the fears that an ill-defined mission has allowed the Cabinet to authorize military action that is considerably broader than what was originally presented to Parliament. The motion presented in October of 2014 stated that Canada would not "deploy troops in ground combat operations"; Operation Impact had been described at that time as a training mission.[6] However, the communications director in the Prime Minister's Office responded to concerns posed by the official opposition about mission creep by stating that the exchange of gunfire and advanced tactical air support do not constitute ground combat.[7]

1 "Canada's special forces clash with ISIL in Iraq", *Agence France Press* (19 January 2015).

2 *Ibid.*

3 "ISIS: Portrait of a Jihadi Terrorist Organization", *The Meir Amit Intelligence and Terrorism Information Center* (26 November 2014) at 4 [*MAITIC*].

4 The majority of the states participating in the coalition against the organization known in Arabic as ad-Dawlah al-Islāmīyah fī al-'Irāq wash-Shām refer to that group as ISIL, although the group is also commonly referred to in the West as ISIS. In the Middle East, it is more commonly known by the Arabic acronym Daesh.

5 See William J. Lahneman, "Conclusions: Third Parties and the Management of Communal Conflict" in Joseph R Rudolph & William J Lahneman, eds, *From Mediation to Nation Building: Third Parties and the Management of Communal Conflict* (Lanham, MD: Lexington Books, 2013) 481 at 487.

6 See Steven Chase, "Mission creep concerns raised in Canadian fight against Islamic State," *The Globe and Mail* (19 January 2015) [Chase, "Mission Creep"]. See also *House of Commons Debates*, 41st Parl, 2nd Sess, No 12 (6 October 2014) at 1200 (Hon John Baird).

7 Chase, "Mission Creep", *supra* note 6.

The initial reports of engagement on the ground with ISIL did not refer to isolated events, but to a change in the mission's focus, which media reports referred to as evidence of "an evolving role for this nation's soldiers" in advance of a long-anticipated Kurdish assault on the city of Mosul. While Prime Minister Stephen Harper told Parliament that the mission to train Kurdish forces would not require Canadian soldiers to accompany them into battle, the Minister of Defense subsequently argued that he was not sure that the Canadian Armed Forces ". . . could train troops without accompanying [Kurdish forces]."[8]

Moreover, Operation Impact had been scheduled to end in April 2015, at which time it was extended and expanded.[9] Parliament did not play a significant role in determining the contours of the mission extension, having once again been given only the opportunity to debate a non-binding take-note motion. The absence of meaningful debate raises the issue about whether the terms and purposes of parliamentary consultation before deployment should be re-examined. This article argues that these non-binding, take-note motions on the subject of military interventions are inadequate. They do not promote responsibility for and oversight of monumentally important decisions.

Further, a deployment protocol requiring prior parliamentary debate and approval in the service of these goals is an urgent priority. The most straightforward way to implement such a process is to create a constitutional convention mandating a decisive role for Parliament on matters of possible military engagement. An analogous constitutional convention was created in the United Kingdom in 2013 in response to the risk of approving a war of aggression based on faulty intelligence and tainted legal opinions; the article accordingly considers the past decade of constitutional history in the U.K. and argue that Canada should follow suit in establishing a similar convention.

Before turning to the example of the United Kingdom, the article will first examine the legal basis for command authority over the Canadian Armed Forces and raise the question of why Parliament has not played a more active role in the oversight of combat deployments.

8 Steven Chase, "Canadian soldiers engaged in more firefights against Islamic State, military says", *The Globe and Mail* (26 January 2015).

9 See Roland Paris, "Canada's mission creep in Iraq (and why it matters)", *Canadian International Council* (26 January 2015), online: <opencanada.org/features/canadas-mission-creep-in-iraq-and-why-it-matters/>.

I. Command Authority: Constitutional or Statutory?

In the United Kingdom, the decision to deploy the military has always been considered the Crown's prerogative.[10] The Dominion of Canada, which was guaranteed a constitution similar in principle to that of the United Kingdom,[11] inherited a royal prerogative with analogous features. However, in both countries, the doctrine of parliamentary sovereignty has long been understood to mean that legislators can replace and diminish the prerogative by statute.[12] Accordingly, before one concludes that control over the Canadian Armed Forces is a matter of prerogative, one must consider whether the Parliament of Canada has amended or replaced prerogative powers in this area with statutory statements.

Comparing constitutional developments in Canada and the United Kingdom, Ikechi Mgbeoji has pointed out a key difference: in Canada, the military command structure has been made subject to statute, the *National Defence Act*.[13] Mgbeoji notes, however, that owing to the generality of the statute's terms, "[i]t would seem that the position in Canada regarding the ambit of Crown prerogative on matters of armed conflict is somewhat unclear."[14]

This lack of clarity is evident in section 32 of the *Act*, which states:

> "[w]henever the Governor in Council places the Canadian Forces or any component or unit thereof on active service, if Parliament is then separated by an adjournment or prorogation that will not expire within ten days, a proclamation will be issued for the meeting of Parliament within ten days, and Parliament shall accordingly meet and sit on the day appointed. . ."

One reading of this section is that the reason for recalling Parliament is so that it shall debate any decision by the government (made in haste for reasons of necessity) to deploy the military. Certain legal scholars have made the contrary argument about what section 32 implies. Irvin Studin argues that this section adds only a "perfunctory measure of legislated parliamentary

10 Ikechi Mgbeoji, "Reluctant Warrior Enthusiastic Peacekeeper: Domestic Legal Regulation of Canadian Participation in Armed Conflicts" (2005) 14:2 Const Forum Const 7 at 9-11 [Mgbeoji, "Reluctant Warrior"].

11 Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5, at preamble.

12 Warren J. Newman, "The Principles of the Rule of Law and Parliamentary Sovereignty in Constitutional Theory and Litigation" (2005) 16 NJCL 175.

13 *National Defence Act,* RSC 1985, c N-5.

14 Mgbeoji, "Reluctant Warrior", *supra* note 10 at 11.

involvement" that does not give it "a legal mandate for scrutiny — let alone control, of the strategic or tactical operations of the Forces."[15] Phillipe Lagassé contends that the omission in section 32 of any stated purpose for recalling Parliament "should be interpreted to mean that parliaments must sit to debate . . . [but] not to decide whether Canada will participate in the conflict."[16]

Studin and Lagassé's arguments appear to have some merit. The wording of the *National Defence Act* (the "NDA") would seem to provide a thin reed for asserting the legal basis for a robust role for Parliament in decision-making over the deployment of Canadian forces, at least without an argument stressing the constitutional principle of parliamentary sovereignty in the context of the NDA. At the very least, such an argument would be contested. While this article acknowledges the argument for parliamentary involvement under the NDA, it emphasizes the greater utility of a constitutional convention requiring prior approval from Parliament for military deployments. [17]

II. The Anomalous Nature of Cabinet Control of Deployments

Jurists in more than one Commonwealth realm have posed the question of whether there is — or should be — a constitutional convention that requires parliamentary approval of a government's plan to send troops into battle. Although the answer to the first question has been is "no," the next logical questions should be "why not?" and "is Parliamentary oversight desirable?"[18] Before moving to answer these follow-up questions, it is helpful to examine the role of constitutional conventions, and to ask whether or not the absence of a convention regulating combat deployments in Canada is anomalous.

The Royal Prerogative can be circumscribed by Parliament at will.[19] Parliament can do so with legislation or via the creation of implicit rules that limit its use to the boundaries that Parliament deems appropriate. A. V. Dicey, who is credited with the term "conventions," describes them as the

15 Irvin Studin, "The Strategic Constitution in Action" (2012) 13 German LJ 419 at 429 [Studin "Constitution in Action"].

16 Philippe Lagassé, "Accountability for National Defence: Ministerial Responsibility, Military Command, and Parliamentary Oversight" (2010) 4 IRRP Study 1 at 8 [Lagassé, "Accountability for National Defence"].

17 Studin "Constitution in Action", *supra* note 15 at 429.

18 See e.g. Ikechi Mgbeoji, "Prophylactic Use of Force in International Law: The Illegitimacy of Canada's Participation in 'Coalitions of the Willing' Without United Nations Authorization and Parliamentary Sanction" (2003) 8:2 Rev Const Stud 169.

19 The only exception to this are the reserve powers of the head of state. See Peter Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1999) at 253.

"understandings, habits, or practices that . . . regulate the conduct of the several members of the sovereign power, of the Ministry, or of other officials. . ."[20] Ivor Jennings outlined his influential theory about the creation of these implicit understandings in 1933:[21]

> We have to ask ourselves three questions: first, what are the precedents; secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule? A single precedent with a good reason may be enough to establish the rule. A whole string of precedents without such a reason will be of no avail, unless it is perfectly certain that the persons concerned regarded them as bound by it.[22]

The Supreme Court of Canada adopted this test for the existence of a convention in 1981.[23] Accordingly, a constitutional convention requiring prior parliamentary approval of combat deployments exists if there is at least one precedent indicating that Parliament and the government believe that the government is bound to seek such approval and abide by the result should Parliament reject its plan. Currently, there is no such precedent in Canada.

Responsible government has long been considered a key feature of parliamentary democracies. Indeed, this feature is so fundamental that it is now somewhat neglected within the field of jurisprudence, which has moved on to discuss issues of more contemporary relevance, leaving the principle of responsible government to legal historians.[24] There is simply no debate over whether or not the Cabinet must answer to Parliament for its actions related to fiscal matters; any argument that it should not be responsible would be hopelessly anachronistic and out of step with a political culture that has solidified over the past two hundred years.[25]

The same level of responsibility to Parliament is curiously absent in military affairs. The governments of the Commonwealth[26] have jealously

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20 Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed (London: Macmillan, 1959) at 24.

21 Sir W Ivor Jennings, *The Law and the Constitution*, 5th ed (London: University of London Press, 1959).

22 *Ibid* at 136.

23 *Reference Re Resolution to Amend the Constitution*, [1981] 1 SCR 753 at 888, (*sub nom Reference Re Amendment of the Constitution of Canada* (*Nos 1, 2 and 3*)) 125 DLR (3d) 1 [*Patriation Reference* cited to SCR].

24 See e.g. Gordon Bale, *Chief Justice William Johnstone Ritchie: responsible government and judicial review* (Ottawa: Carleton University Press, 1991).

25 *Ibid*.

26 In the states that comprise the Commonwealth of Nations, the term "government" refers to the bodies that collectively exercise executive authority. Foremost among these is the cabinet, which is comprised of Ministers of the Crown who are collectively responsible to Parliament. See Frank

guarded the right to advise the sovereign as they see fit on the matter of deploying armed forces, even when this right entails a *casus belli*. Rodney Brazier described this anomaly as follows: "How odd — perhaps bizarre — it is that the approval of both Houses of Parliament is required for . . . trivial[] subordinate legislation, whereas it is not needed at all before men and women can be committed to the possibility of disfigurement or death."[27] In the case of the Canadian commitment to the campaign against ISIL, one might also add that this use of the Royal Prerogative also exposes the Canadian public at large to a greater risk of death, as the Government has concluded that at least one of the high-profile attacks of October 2014 was a terrorist act "inspired by" ISIL; this attack took place shortly after the initiation of Operation Impact.[28]

This anomalous absence of responsibility to Parliament for military deployments is not the product of a principled distinction that existed at some point in our constitutional history.[29] Responsible government first emerged in response to irresponsible military policy and the financial burden that it created: the first motion of non-confidence at Westminster was passed against the government of Lord North, who thereafter presented his resignation to George III. The occasion for that motion was the Surrender at Yorktown, which demonstrated that King George's military strategy in the American Revolutionary War had been a resounding and costly failure.[30]

That said, in the view of the momentum towards the creation of such a convention in various commonwealth countries, it is not inconceivable that, before long, such a convention will be seen as an essential feature of any parliamentary democracy. This possibility has been made considerably more likely with the emergence of this convention in the United Kingdom — a convention whose adoption emerged within a particular historical context. The historical moment at issue spans a decade, from the time of the inauguration of the Iraq War (in 2003) to Parliament's rejection of military operations against

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Bealey, *The Blackwell Dictionary of Political Science: A User's Guide to Its Terms* (Hoboken, NJ: Wiley-Blackwell, 1999) *sub verbo* "government".

27 Rodney Brazier, *Constitutional Reform: Reshaping the British Political System*, 2nd ed (Oxford: Oxford University Press, 1993) at 123.

28 Statement by the Prime Minister of Canada in Ottawa (22 October 2014), online: <pm.gc.ca/eng/news/2014/10/22/statement-prime-minister-canada-ottawa>.

29 See generally Ryan Patrick Alford, "Not Even Wrong: The Use of British Constitutional History to Defend the Vesting Clause Thesis", online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=2167760>.

30 John Brooke, *King George III* (London: Constable, 1972) at 183. It bears mentioning that North's acknowledgement that he did not have the confidence of Parliament did not immediately create a constitutional convention.

Syria (in 2013) and what was revealed about these military campaigns between those dates.

III. What Does the U.K. Vote on the Syria Crisis Reveal About the Creation of a Constitutional Convention?

In August of 2013, the United States and the United Kingdom were poised to intervene in the Syrian Civil War (a conflict that has subsequently shifted to a war between the Syrian and Iraqi governments against ISIL involving other combatants, including Kurdish military groups and the western states that have supported their operations).[31] The U.S. and the U.K. were prepared to initiate military operations without the mandate of the United Nations in the wake of allegations that the Syrian state had used chemical weapons.[32] However, just when it appeared that air strikes were a foregone conclusion, the unthinkable occurred: the legislatures of these countries rejected their governments' plans.

In the United States, the executive realised that it did not have the necessary support in Congress, and the bill authorizing military force was withdrawn.[33] Conversely, in the United Kingdom the government put the question before the House of Commons for debate on August 29, 2013; the resolution was defeated by 285 votes to 272.[34] Prime Minister David Cameron issued a statement that he intended to abide by Parliament's decision.[35] British constitutional scholars noted that the government had no choice or, at the very least, that it could not ignore the vote without violating a new constitutional convention.[36]

A. How Was this Convention Created and is it Relevant to Canada?

The recent work of certain scholars — in particular, that of Gavin Phillipson — has focused on addressing why the failed vote on the Syrian intervention was the final link in the chain that forged a new convention in

31 *MAITIC*, *supra* note 3 at 2-3.

32 Mark Mardell, "US ready to launch Syria strike, says Chuck Hagel", *BBC News* (27 August 2013).

33 David Espo & Julie Pace, "Obama delays Syria vote, says diplomacy may work", *Associated Press* (10 September 2013), online: <www.ksl.com/index.php?nid=235&sid=26795165&fm=most_popular>.

34 Andrew Osborn & Guy Faulconbridge, "Iraq war ghosts end UK plans to take part in Syria action", *Reuters* (30 August 2013).

35 *Ibid.*

36 Gavin Phillipson, "'Historic' Commons Syria vote: the constitutional significance (Part I)", *UK Constitutional Law Association* (19 September 2013) [Phillipson, "Historic Commons Vote"].

the U.K.[37] His analysis provides a yardstick against which the development of a similar constitutional convention in Canada can be measured. Various Canadian governments have put the question of military deployment before Parliament several times in the twenty-first century.[38] By comparing these events to those in recent British constitutional history, it is possible to discern how far Canada has moved towards the creation of a constitutional convention that requires prior parliamentary approval for military deployment.

1. The Twenty-First Century Drive for Parliamentary Approval in the U.K.

The British road to a constitutional convention that now requires a Commons vote before deployment was both short and direct, and it diverged sharply from the existing precedents. In 2002, just before the Iraq War, the government of the United Kingdom issued the following statement: "The decision to use military force is, and remains, a decision within the Royal Prerogative and as such does not, as a matter of law or constitutionality, require the prior approval of Parliament."[39]

Lord Goldsmith's statement had a firm basis at that time: there was no precedent for such a convention; neither Cabinet nor Parliament believed that the executive was bound by a rule requiring parliamentary approval, and there was no consensus about whether such a rule was justified. Accordingly, it was plain that Ivor Jennings' classic test for the existence of a constitutional convention could not be met at that time.[40]

Nevertheless, the Blair Government decided to hold a parliamentary vote on the subject of the Iraq War for political reasons. The Government feared a "massive Labour rebellion."[41] Despite its political origins, this vote served as the first precedent for the emergence of a convention. Phillipson argues that this is not paradoxical because the relevant political actors cannot believe themselves to be already bound by a convention that, by definition, cannot exist until it is brought into being by their precedent-setting behaviour. What is more important is that Parliament and the government treated that vote as if it had set a precedent.[42]

37 *Ibid.*

38 Mgbeoji, "Reluctant Warrior", *supra* note 10.

39 UK, *Lords Hansard,* vol 644 at 1138 (19 February 2003) (Lord Goldsmith).

40 See Phillipson, "Historic Commons Vote", *supra* note 36.

41 *Ibid.*

42 Joshua Rozenberg, "Syria intervention: is there a new constitutional convention?", *The Guardian* (2 September 2013) [Rozenberg, "Syria Intervention"].

Phillipson notes that the next step towards the creation of the convention was the 2011 vote in the House of Commons on military intervention into the Libyan Civil War. Sir George Young stated the following for the government during a Commons debate on the desirability of interdicting the Libyan Air Force over its own sovereign air space: "A convention has developed in the House that before troops are committed, the House should have an opportunity to debate the matter."[43]

This convention, which required prior consultation (but not prior approval) was also acknowledged in the Cabinet Manual for the year 2011, which, along with the statements of Cabinet Secretary Sir Gus O'Donnell, treated the 2003 vote on the Iraq war as the "foundational precedent" for the convention of prior debate.[44] The Manual states that "[i]n 2011, the Government acknowledged that a convention had developed that before troops were committed the House of Commons should have an opportunity to debate that matter."[45] Accordingly, it can be said that by 2011, both Parliament and the government agreed that the government would violate a constitutional convention should it use the Royal Prerogative to initiate offensive military operations without a debate in the House of Commons. Parliament and the government acted in accordance with their belief that the earlier precedents were binding.[46]

Phillipson notes that the 2013 vote on military operations in Syria built upon the earlier examples, solidifying a requirement that the vote be held before troops are committed and extending the convention to require the government to abide by its result.[47] In a manner similar to the Iraq War vote, the new element of the convention was established by all the relevant actors treating it immediately as if it had binding force. Both the Cameron Government and Parliament expected compliance with the Commons vote; there was simply no question of not abiding with the result.[48]

43 UK, HC, *Parliamentary Debates,* vol 524, col 1066 (10 March 2011) (Sir George Young).

44 Phillipson, "Historic Commons Vote", *supra* note 36.

45 United Kingdom, Cabinet Office, *The Cabinet Manual*, 1st ed (London: Cabinet Office, 2011) at para 5.38.

46 The recognition of this convention in the Cabinet Manual of the United Kingdom raises an issue about the process for the recognition of constitutional conventions in Canada, as this country has no such manual, the closest equivalent being an internal government document known as the Manual for the Procedure of the Government of Canada, which was prepared in 1968. Nicholas J. MacDonald and James W. J. Borden, "Manual for the Procedure of the Government of Canada: An Exposé" (2011) 20:1 Const Forum Const 33.

47 Phillipson, "Historic Commons Vote", *supra* note 36.

48 Rozenberg, "Syria Intervention", *supra* note 42.

This recent history provides a relevant point of comparison for the votes that took place in Canada during the same time period, which related to the deployment and extension of the Canadian military mission in Afghanistan. As the next section demonstrates, a compelling case can be made that a constitutional convention requiring a Commons debate has emerged, and furthermore, that the government's compliance with a failure of a motion on this issue would create a convention that requires compliance.

B. **Parallel Developments in Canada: Is This Country on the Same Road?**

As is the case in the United Kingdom, in Canada the right to declare war is a matter of Crown Prerogative. In the twentieth century, war was declared by means of an Order-in-Council. The Order inaugurating Canada's participation in the First World War was not preceded by a debate in Parliament. This is also true for the decision to declare war against Japan in 1941.[49] There were, however, debates in Parliament before declaring war against Germany and joining the Second World War effort, and before the mobilization of the Canadian contribution to the United Nations' mission in Korea in 1950.[50] Toward the end of the twentieth century, it would seem clear that no convention requiring parliamentary approval or debate was required before the Government's exercise of the Royal Prerogative to deploy the Armed Forces. Two conflicts that bracketed the turn of the twenty-first century, however, may serve as a stimulus for the development of an emergent convention requiring a debate on military deployments. In 1999, Canada participated in the NATO offensive against Serbia, in both the air (as part of Operation Allied Force) and by contributing a battle group and attached units to the ground force (Operation Kinetic). The legality of these deployments was not debated in Parliament, despite the fact that there was no Security Council resolution explicitly authorizing the use of force. This leaves serious doubts about the legality of the intervention,[51] despite the fact that five parties initially supported it[52] and implicitly agreed that deployment was a matter of Royal Prerogative. However, this consensus did

49 Mgbeoji, "Reluctant Warrior", *supra* note 10.

50 In the case of military action taken pursuant to a mandate issued by the United Nations Security Council, Parliament has explicitly waived any right it might have to be consulted, via the *United Nations Act*, RSC 1985, c U-2.

51 Joost P. J. van Wielink, "Kosovo Revisited: The (Il)Legality of NATO's Military Intervention in the Federal Republic of Yugoslavia" (2001) 9 Tilburg Foreign L Rev 133 at 144-48.

52 Michael W. Manulak, "Canada and the Kosovo Crisis: A 'golden moment' in Canadian foreign policy?" (2009) 64:2 Int J 565 at 572.

not last and, after some discussion of the need for parliamentary approval as a means of promoting transparency, accountability, and legitimacy, the Standing Senate Committee on Foreign Affairs opined shortly after this deployment that:

> While the requirement of an explicit and timely vote in Parliament on external military action may ultimately be deemed to be undesirable or infeasible on policy or procedural grounds, the idea should not be rejected out of hand as being incompatible with Canadian parliamentary democracy. Indeed, such a practice could have salutary effects in terms of enhancing both the involvement of parliamentarians in foreign and military affairs and the democratic legitimacy of such decisions.[53]

Canada did not participate in the coalition that launched the Iraq War without a second resolution from the Security Council that explicitly authorized the use of force against Iraq. Accordingly, there was no Canadian House of Commons debate in 2003 analogous to the one that occurred at that time in the United Kingdom. That said, there were significant steps in the development of a convention that requires debate, if not approval, in Canada. For example, in the course of responding to a motion introduced by the Bloc Québecois shortly after the 9/11 attacks that would require parliamentary approval of deployments, Minister of Defence Art Eglington said that "while the government agreed that Parliament should be consulted, it would not agree to a vote on committing the armed forces because this was the responsibility of the government."[54] Such a debate occurred, in similar circumstances in 2006, when the Harper Government proposed deploying a battle group to Kandahar, which would take over responsibility for major combat operations in southern Afghanistan.[55] Parliament voted again to extend that mission in 2007, and once more in 2008, with the aim of terminating the mission in 2011. As noted above, Canada's intervention in northern Iraq was debated in Parliament in October of 2014.

Academic and military commentators have argued that these votes did not create a constitutional convention.[56] However, their objections are misplaced for two reasons. First, the issue is not whether these votes serve as precedents for a convention that the government is bound to respect Parliament's wishes (on this point, Studin correctly notes that the conditions for the approval of

53 Standing Senate Committee on Foreign Affairs, The New NATO and the Evolution of Peacekeeping: Implications for Canada, ch. VIII, "Parliament and Canada's External Security Commitments," April 2000, at 25: quoted in Michael Dewing and Corinne McDonald, "International Deployment of Canadian Forces: Parliament's Role" (2006 Library of Parliament), at 9.

54 *Ibid* at 10

55 Studin, "Constitution in Action", *supra* note 14 at 429, n 30.

56 *Ibid.*

the second extension of the mission in Kandahar were not legally binding).[57] Rather, the issue is whether a convention has emerged that requires debate before deployment into combat operations. Second, while the Chief of Defense Staff (in a paper authored by the staff of the Office of the Judge Advocate General) concluded that the absence of debate before certain deployments demonstrates that there is no such convention, he fails to note that not all mobilizations are created equal. Those missions that are cited as proceeding without prior debate were the peacekeeping and humanitarian aid delivery missions to East Timor, Haiti, and Macedonia.[58] There is no evidence that anyone involved in planning these missions anticipated combat.[59]

It is clear from Parliament's conduct that it has recognized a difference between humanitarian assistance missions and the deployment of battle groups to Afghanistan: Parliament has recognized that only combat missions require prior political debate.

It remains to be seen whether a precedent may emerge to establish a convention requiring that the government abide by Parliament's decision. Such a vote might occur in 2016 when another take-note motion will be presented proposing a second extension of Operation Impact.

The third item of Jennings' criteria for the emergence of a convention, namely that the political actors would act in a manner consistent with its binding nature, would be met should the government abide by the result, in the manner of the Cameron Government when it lost the vote on the Syrian intervention.

The question that remains is whether an analogous Canadian convention would be a positive development. In order to answer that question, we must examine the reasons why such a convention was adopted in the United Kingdom. A review of recent British history demonstrates that the relevant political actors learned a hard lesson after Parliament gave rhetorical approval for the Iraq War without having secured an opportunity to adequately assess

57 *Ibid* at 441, n 57.

58 Canada, Office of the Judge Advocate General, "The Crown Prerogative Applied to Military Operations" (8 June 2008).

59 It should be noted that the status of a peacekeeping mission in international law does not depend in any way on whether the peacekeepers might come under fire. However, this distinction could well be made by Parliament, as this article will argue below that it has a clear incentive to exercise closer oversight over combat missions, as they create a possibility of manipulation of the political environment by the government.

flawed intelligence reports and faulty legal analysis. That war led to numerous British and Iraqi casualties and arguably, to a breakdown in social order that created fertile ground for the emergence of the movement now known as ISIL.[60] The following section describes how the concerns about alleged manipulation of the 2003 debate by the Blair Government constituted a key element of the historical context for the emergence of a convention requiring prior parliamentary approval for initiating combat. This milieu is described in detail because it is not a mere matter of historical interest. Rather, since the context of Operation Impact is remarkably similar, it will prefigure an argument that a Canadian convention of that nature is necessary for similar reasons: namely, to avoid a similar mistake of historic proportions.

IV. British Views on the Desirability of Parliamentary Control

Two reports demonstrate how opinion shifted in favour of the rebalancing of powers between the executive and the House of Commons after 2003. They are the 2006 report of the House of Lords Select Committee on the Constitution, "Waging War," and the follow-up "Second Report" in 2013.[61] [62] Their conclusions are discussed in order to outline the evolving nature of the arguments in favour of legislative constraint over the Royal Prerogative in this area at that time, an evolution that closely tracks a number of revelations about the flawed case for war presented by the Blair Government in 2002 and 2003. The 2006 report identified criticism of the government's control over the deployment power, which, it noted, is subject to a "double democratic deficit."[63] The government is not accountable either nationally or internationally for this use of force.[64] The Select Committee noted that the unaccountable use of the Royal Prerogative was out of line with the constitutional structures that had been established in Europe with the aim of implementing the rule of law. In the United Kingdom, there are no legal limitations on the government's decision to deploy soldiers other than the terms of the constitutional settlement of 1688,

60 Tom Englehardt, "ISIS Is America's Legacy in Iraq: How 13 years of the War on Terror led to the Islamic State", *Mother Jones* (2 September 2014).

61 House of Lords Select Committee on the Constitution, *Waging War: Parliament's Role and Responsibility, Volume I: Report* (London: The Stationery Office Limited, 2006) [Select Committee, *Waging War*].

62 House of Lords Constitution Committee, *Second Report of Session 2013-14: Constitutional Arrangements for the Use of Armed Force* (London: The Stationery Office Limited, 2013) [Constitution Committee, *Second Report*].

63 Select Committee, *Waging War*, *supra* note 61.

64 *Ibid*, citing Hans Born & Heiner Hänggi, "The Use of Force under International Auspices: Strengthening Parliamentary Accountability" (2005) Geneva Centre for Democratic Control of the Armed Forces Policy Paper No 7.

which transferred unaccountable powers from the King to his Ministers.[65] Accordingly, the Committee concluded that it would be desirable for the Prime Minister to possess a power to deploy troops on the basis of a grant of statutory authority from Parliament rather than the Crown.[66]

While this conclusion was predicated on the testimony of a "majority of witnesses [who] agreed that it is anachronistic, in a parliamentary democracy, to deny Parliament the right to pass judgment on proposals to use military force in pursuit of policy . . .",[67] a close reading of the report reveals that these witnesses were not wholly motivated by a sense that the formal constitutional order of the United Kingdom was anachronistic, but also by fresh memories of how these powers had apparently been abused by the government in advance of the Iraq War.

C. The Impact of the Use of the Prerogative to Launch an Illegal War

The Select Committee noted that many of its witnesses ". . . expressed concerns about the legality of deployment decisions", "[p]artly because of the controversies surrounding the decision to invade Iraq. . ."[68] This deceptively mild language conceals the very real outrage that existed in legal and parliamentary circles after the first revelations that the government abused its control over the intelligence agencies and the law officers of the Crown. The details of the Blair Government's manipulation of Parliament helps to explain why a constitutional convention requiring prior parliamentary approval has since come about.

1. The lingering effect of revelations of the manipulation of intelligence

Not long after the supposed rationale for the Iraq War was discredited (i.e., when no weapons of mass destruction were found after the invasion), questions were raised about the quality of the case for war that the government had put before Parliament.[69] The core of this case was outlined in a briefing paper commonly known as the September dossier.

65 *Ibid* at 37, 6.
66 *Ibid* at 26.
67 *Ibid* at 40.
68 *Ibid*.
69 See e.g. Lord Hutton, *Report of the Inquiry into the Circumstances Surrounding the Death of Dr David Kelly C.M.G.* (London: The Stationery Office Limited, 2004).

The Blair Government recalled Parliament on September 24, 2002 in order to debate the contents of the September dossier, which contained a number of alarming claims. The first was that Iraq had the capability to deploy chemical weapons on forty-five minutes' notice. The second was that Iraq was seeking significant quantities of uranium from Niger, presumably as part of a nuclear weapons program.[70] The claim that Iraq could deploy chemical weapons on forty-five minutes' notice caused significant alarm within the British public. The allegation was circulated in the press as a claim that the United Kingdom could itself be targeted with these weapons.[71] BBC journalist Andrew Gilligan subsequently reported that, despite objections from analysts within the Defence Intelligence Service,[72] this claim was included in the dossier on the express orders of Alastair Campbell, the government's director of communications.[73]

The second claim about uranium proved an essential part of the case for war both in Britain and the United States, as it featured prominently in President Bush's 2003 State of the Union address, in which he put the case for war to the American people. In it, he uttered his famous "sixteen words": "the British government has learned that Saddam Hussein recently sought significant quantities of uranium from Africa." The credit given to Britain was the result of a fierce battle within the American government, as the Central Intelligence Agency's 2002 National Intelligence Estimate had labelled this claim "highly suspect."[74] It was allegedly for this reason that Colin Powell refused to allude to these reports in his speech to the United Nations.[75]

The Blair Government was well aware that the Bush administration was determined to create a case for war. Within the American executive, these attempts had begun shortly after 9/11, despite unambiguous private advice from the CIA that there was no connection between Iraq and al-Qaeda.[76] The British government's awareness of the relentlessness of the American drive

70 For a discussion of this claim and the tenuous nature of the intelligence supporting it, see House of Commons Foreign Affairs Committee, *The Decision to go to War in Iraq*, Ninth Report of Session 2002-03.

71 See George Pascoe-Watson, "Brits 45 mins from doom", *The Sun* (25 September 2002).

72 See Matthew Tempest, "Memo reveals high-level dossier concern", *The Guardian* (15 September 2003).

73 Chris Ames, "Intelligence experts tried to stop Iraq dossier exaggeration", *The Guardian* (20 May 2011).

74 *NIE 2002-16HC, October 2002, Iraq's Continuing Programs for Weapons of Mass Destruction*, online: <www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB129/index.htm>.

75 Richard M. Pious, *Why Presidents Fail: White House Decision Making from Eisenhower to Bush II* (Lanham, MD: Rowman & Littlefield, 2008) at 221.

76 According to George Tenet, CIA analysts told Vice President Cheney that "If you want to go after that son of a bitch to settle old scores, be my guest. But don't tell us he is connected to 9/11 or to terrorism because there is no evidence to support that. You will have to have a better reason.": See Thomas Powers, "What Tenet Knew", *New York Review of Books* (19 July 2007).

to war was reflected in the minutes of a cabinet meeting of July 23, 2002, commonly known as the Downing Street Memo.[77] It notes that Foreign Secretary Jack Straw believed that "Bush had made up his mind to take military action, even if the timing was not yet decided. But the case was thin . . . We should work up a plan for an ultimatum to Saddam to allow back in the UN weapons inspectors. This would also help with the legal justification for the use of force."[78] It is unfortunate that the allegations about weapons of mass destruction were not scrutinized more carefully by Parliament before the Iraq War. This is understandable, however, since the members of the House of Commons understood their limited role in the oversight of military deployments in the absence of a constitutional convention that required prior approval. The government did not need the support of Parliament and was merely providing intelligence material to explain its choice of policies. Accordingly, there was no incentive or proper justification for legislative scrutiny of the dossier.

Parliament's vote on the Syrian intervention demonstrates how the new constitutional convention catalyses more effective scrutiny of debatable intelligence. In that case, the government produced a summary of reports provided by the Joint Intelligence Committee, the same body that had produced the September dossier.[79] As Peter Flatters noted, "[w]ith the Prime Minister claiming that intelligence findings were compelling enough to warrant action, the remarkable thing was Parliament's response — namely that it did not believe him, or rather that it insisted on seeing the evidence for itself."[80] It is evident that Parliament took notice of having been presented with faulty evidence in which the "intelligence and the facts were fixed around the policy."[81]

77 David Manning, "Iraq: Prime Minister's Meeting 23 July" as "The Secret Downing Street Memo", *The Sunday Times* (1 May 2005) [Manning, "Prime Minister's Meeting"]; see also Richard Norton-Taylor, "Blair-Bush deal before Iraq war revealed in secret memo", *The Guardian* (3 February 2006). General Lord Goldsmith attempted to prevent publication of details about this memorandum by stating publically that this would be a breach of Official Secrets Act and "threatened newspapers with the Act and the Contempt of Courts Act.": John Plunkett, "Memo warning 'attack on press freedom'", *The Guardian* (23 November 2005).

78 Michael Smith, "The Downing Street Memo," *The Washington Post* (16 June 2005).

79 See Tony Blair, "Foreword to the British dossier assessing weapons of mass destruction in Iraq", (24 September 2002), online: <www.theguardian.com/world/2002/sep/24/iraq.speeches>.

80 Peter Flatters, "Syria shows MPs need independent analysis of intelligence", *Politics.co.uk* (2 September 2013), online: <http://www.politics.co.uk/comment-analysis/2013/09/02/comment-mps-must-be-trusted-with-more-intelligence-info>.

81 Manning, "Prime Minister's Meeting", *supra* note 77.

2. The effect of the revelations of faulty legal advice about an aggressive war

While the British and American governments argued that the bombing and invasion of Iraq was legal, they can hardly be considered objective parties. To the contrary, United Nations Secretary-General Kofi Annan stated that, in the absence of a Security Council resolution that explicitly authorized the use of armed force to enforce a ban on the manufacturing of chemical weapons, such actions were illegal and breached the UN Charter.[82]

To date, the most comprehensive review of the legality of the Iraq War is the report of the commission of inquiry appointed by the government of the Netherlands, authored by the former President of the Dutch Supreme Court Willibrord Davids.[83] The 551-page Davids Commission report concluded that there was no legal basis for the invasion of Iraq. The report specifically rejected the theory that prior Security Council resolutions requiring Iraq to abandon its chemical weapons programs provided any authorization for the use of force.[84] Although a similar commission of inquiry set up in the United Kingdom has not yet released its results, the evidence put before that body (known as the Chilcot Inquiry)[85] appears to show that the British government presented its legal position to Parliament on the basis of the seriously flawed (and disputed) legal opinions of the law officers of the Crown, particularly those of the Attorney General, Lord Goldsmith.

When the Blair Government presented its case for war to Parliament, it noted that it had received legal advice from Lord Goldsmith that military action against Iraq would not be contrary to the Charter of the United Nations. However, it resisted calls to make that advice public. Unbeknownst to Parliament, the Attorney General's original advice to the government stated that "the language of resolution 1441 leaves the [legal] position unclear . . . Arguments can be made on both sides."[86] A month later, after Prime Minister

82 See Ewen MacAskill & Julian Borger, "Iraq war was illegal and breached UN charter, says Annan", *The Guardian* (16 September 2004).

83 WJM Davids, *Rapport Commissie van Onderzoek Besluitvorming Irak*, (Amsterdam: Wilco, 2010).

84 *Ibid* at 524. The Commission concluded that the government of the Netherlands presented arguments to the House of Representatives that Dutch participation in the invasion would be legal under international law. The Commission not only rejected this conclusion, but it noted that the government had ignored advice to the contrary, as its record included a leaked copy of a report of the Dutch foreign ministry's lawyers that concluded that the war would be illegal.

85 Statement from Sir John Chilcot, Chairman of the Iraq Inquiry (30 July 2009).

86 Memorandum from Lord Goldsmith to Prime Minister Tony Blair (30 January 2003).

Blair asked for clarification, Lord Goldsmith wrote a second memorandum, which came to the opposite conclusion.[87]

Speaking before the British Institute of International and Comparative Law in 2008, Lord Bingham (a former Lord Chief Justice) noted that Goldsmith had no legal basis to claim that the invasion was lawful. He added, "if I am right . . . there was, of course, a serious violation of international law and of the rule of law."[88] Goldsmith was confronted with the allegation that he had revised his opinion for political reasons at the Chilcot Inquiry in 2010. When asked about Tony Blair's comments on his original advice, Goldsmith responded that he "could not recall" that critical conversation. He was also confronted with the claim that he had been coerced by "close allies" of Tony Blair[89] who "pinned him up against the wall and told him to do what Blair wanted."[90]

In the wake of the invasion of Iraq, the 2006 report of the House of Lords Select Committee on the Constitution noted that, ". . . while there might be cogent objections to the imposition of a requirement for parliamentary authorisation of the overseas deployment of British forces, a more persuasive case could be made for requiring the Government formally to explain the legal justification for such a deployment. . ."[91] After it was revealed that the government had put pressure on Lord Goldsmith, the Constitution Committee was more direct about the need to ensure accurate information about the legality of the use of military force, noting that "all of our witnesses agreed that the legality of any deployment . . . is of overriding importance."[92]

While the results of the Chilcot Inquiry have yet to be released, it appears that the Parliament of the United Kingdom is acting as if a lesson was learned from the Iraq War experience — that is, if Parliament has no right to vote down the government's proposal for military intervention, it has no effective means of

87 The Attorney General's second memorandum was itself subsequently leaked and became the subject of substantial controversy. Sir Menzies Campbell (at that time, spokesperson for the Liberal Democratic Party), argued, "I have no doubt what[so]ever that if Parliament had been told these things, the Government would not have achieved its majority and [would have] been unable to go to war. Public opinion, already deeply divided, would have swung overwhelmingly against the Government". Martin Bright, Antony Barnett & Gaby Hinsliff, "Army chiefs feared Iraq war illegal just days before start", The Guardian (14 March 2003).

88 "Iraq war 'violated rule of law'", *BBC News* (18 November 2008).

89 "Goldsmith admits to changing view over Iraq advice", *BBC News* (27 January 2010).

90 Simon Walters, "Iraq Inquiry bombshell: Secret letter to reveal new Blair war lies", *Daily Mail* (29 November 2009).

91 Select Committee, *Waging War*, *supra* note 61 at 28.

92 Constitution Committee, *Second Report*, *supra* note 62 at 15.

obtaining accurate information about the factual and legal basis for that action. Without being able to dispose of the government's plans, it has no leverage to obtain anything other than the information that the government chooses to present.

V. The Desirability of a Constitutional Convention in Canada

This article has explained why the United Kingdom created a constitutional convention requiring prior parliamentary approval for combat deployments. The decision to create the convention was not wholly predicated on an academic critique of the Royal Prerogative. The convention was created by the rejection of military action against Syria in 2012. Nor was that vote motivated by purely theoretical concerns. Rather, it was motivated in part by the fact that the Parliament of the United Kingdom learned that it had been asked in 2003 to vote in favour of an illegal war on the basis of biased summaries of intelligence reports and faulty legal opinions.[93]

Having been presented with a non-binding motion addressing the deployment, the Parliament of the United Kingdom was asked to share political responsibility for the Iraq War despite having no power to hold the government accountable. The same is true for the Canadian Parliament when it is asked to consent to deployments on the basis of take-note motions presented in the House of Commons. Given the political context of the military deployments aimed at degrading ISIL, the urgent question remains as to whether a constitutional convention similar to that created in the United Kingdom in 2012 would be desirable in Canada. The first question that must be answered is whether Parliament has been presented with adequate information about the facts and legality of Operation Impact. If adequate information has not been received, the second question is whether this lack of information increases the risk that Canadian soldiers might be deployed to carry out an ill-advised or illegal combat mission.

D. The Objectives of Operation Impact are Vaguely Defined

The text of the take-note motion presented to Parliament on October 6, 2014 appears to define the scope of Operation Impact. After asking the

93 It is not the purpose of the article to conclusively demonstrate that the either the Iraq War or the bombing of Syria are contrary to international law. Rather, it raises issues with the legal justifications produced by the government as a means of demonstrating that further parliamentary oversight might have exposed problems with these arguments.

House of Commons to recognise certain alleged facts, the government asked that House to:

> (a) support the Government's decision to contribute Canadian military assets to the fight against ISIL, and terrorists allied with ISIL, including air strike capability for a period of up to six months; (b) note that the Government of Canada will not deploy troops in ground combat operations; and (c) continue to offer its resolute and wholehearted support to the brave men and women of the Canadian Armed Forces who stand on guard for all of us.[94]

It should be noted that in section (a), the government does not define its "contribut[ion] [of] Canadian military assets to the fight against ISIL," nor does it define the "assets" involved. This was left for speeches in the House and the statements of the Prime Minister that were released to the public. In his statement, Prime Minister Harper described the debate as being predicated on "a motion in Parliament to participate in air strikes against ISIL."[95] While the Prime Minister did specify that "Canada's engagement in Iraq is not a ground combat mission," later events revealed that this statement's truth depends upon a restrictive definition of that phrase, as noted above. It should also be noted that the motion does not restrict the "fight against ISIL" to the sovereign territory of Iraq, which has invited the coalition's participation. Crucially, it does not preclude combat operations within Syria, which, without Syrian approval, would constitute aggressive war, much like the invasion of Iraq.

E. **The Government Ignored the Illegality of Possible Operations in Syria**

The fact that the coalition is now targeting rebel groups on Syrian soil necessitates rigorous analysis of its compliance with international law. The United States has advanced some novel legal theories in support of its policies. Ambassador Samantha Power outlined these in her letter to Secretary-General Ban Ki Moon. She argued that because Syria is unable to prevent attacks against Iraq from being carried out from within its borders, attacks within Syria are authorised by Article 51 of the UN Charter.[96] However, the International Court of Justice has held that Article 51 applies only to attacks by states, and not to attacks by non-state actors operating from within another foreign state,

94 *House of Commons Debates*, 41st Parl, 2nd Sess, No 12 (6 October 2014) at 1200.

95 Statement from the Prime Minister of Canada (7 October 2014) on ISIL motion debated in Parliament.

96 To say that this argument is merely novel (when neither Iraq nor Syria are members of a collective defense organization) is something of an understatement.

even if that state is unwilling or unable to stop those attacks.[97]

To date, there have been only three air strikes by the Canadian Air Force in Syria.[98] As noted, it appears from the terms of the take-note motion and the Prime Minister's statements that he reserves the right to authorise them after the expansion of the mission in April 2015.[99] Leader of the Opposition Thomas Mulcair commented that the take-note motion had "opened the door to Canadian involvement in Syria's bloody civil war."[100] The United States Air Force has confirmed that coalition airstrikes in Syria have resulted in civilian casualties: in particular, it admitted that two children were killed in an air strike carried out by an unnamed coalition partner.[101] In August 2015, an independent monitoring group released a report alleging that the coalition airstrikes were responsible for 459 civilian deaths.[102] At that time it was also reported that the government of the United States has authorized air strikes against the Syrian Armed Forces,[103] a decision which may prefigure another significant and legally-problematic escalation of the conflict, in which Canada may participate without further debate in Parliament.

The absence of meaningful debate in Canada contrasts parallel developments United States. Legislative authorization for air strikes were in place before air strikes in Iraq and Syria began (in the form of the Authorizations for the Use of Military Force in Iraq of 2002[104] and Against Terrorists[105]). There is also no dispute that the deployment of ground troops would require

97 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinions, [2004] ICJ Rep 4. It should be noted that it is possible that an attack by a non-state actor that meets the Caroline test, where the need for pre-emptive self-defence is "instant, overwhelming, and leaving no choice of means, and no moment for deliberation" would be in accordance with the norms of international law. A state harboring such actors might also be deemed a legitimate target, in accordance with the Draft Articles on the Responsibility of States for Internationally Wrongful Acts of the International Law Commission.

98 Stephen Chase, "Only three Canadian airstrikes in Syria since Islamic State mission expanded", *The Globe and Mail* (9 July 2015).

99 Stephanie Levitz, "Ottawa's ISIS motion calls for airstrikes, no troops in Iraq", *The Canadian Press* (4 October 2014).

100 Postmedia News et al, "Canada at war: Vote to launch combat mission against ISIL passes 157-134 in House of Commons", *National Post* (7 October 2014).

101 Raya Jalabi, "Pentagon admits two children probably killed in US-led air strike in Syria", *The Guardian* (21 May 2015).

102 Associated Press, "Report: US-Led Strikes in Iraq, Syria Killed 459 Civilians," *The New York Times*, (3 August 2015).

103 Adam Entous, "U.S. to Defend New Syria Force From Assad Regime", *The Wall Street Journal* (2 August 2015).

104 *Iraq War Resolution*, 116 Stat. 1498 (2002).

105 *Authorization of the Use of Military Force Against Terrorists*, 115 Stat. 224 (2001).

the approval of Congress. Such an authorization was debated and rejected in 2013,[106] when Secretary of State John Kerry alleged that the Syrian government was using chemical weapons against civilians. Despite the support of the leaders of both parties in Congress, the executive's initiative failed after Kerry was subjected to intense and prolonged questioning about the need for ground troops.[107] With respect to the war against ISIL, the White House has sought legislative authorization for its actions there, but Congress has to date declined to act on this request.[108]

It is troubling that, in Canada, the executive's plans for combat deployments are not subjected to similar scrutiny; in the United States, the use of a volunteer military in this manner bears a substantial risk of moral hazard. The absence of meaningful oversight is even more problematic in Canada than it would be in the United States, as the Canadian military deployment serves American foreign policy interests; this has been the case since the United States began portraying its military interventions as the work of coalitions (the attempt to obtain military assistance against ISIL is the direct descendent of Lyndon Johnson's "More Flags" program during the Vietnam War, in which foreign contributions of marginal military significance were sought for propagandistic purposes).[109]

An independent Canadian examination of the intervention's legality is particularly important. Before the votes supporting Operation Impact, Parliament did not receive any summary of the government's legal advice. This is troubling, given the possibility that Operation Impact, as expanded, might arguably violate the most important provisions of international law that prevent wars of aggression. The nations that were forced to address the legality of the Iraq War after the fact now demonstrate the requisite attention to this issue. Operation Shader, the British air campaign in northern Iraq, was initiated with a motion in the House of Commons that explicitly limited the scope of the mission to Iraq. Prime Minister David Cameron has committed to putting another motion before the House of Commons before initiating any air strikes

106 Susan Davis, "Senate delays Syria vote as Obama loses momentum", *USA Today* (9 September 2013).

107 Nicole Gauette, "Senators Prod Kerry to Rule Out Sending Troops to Syria", *Bloomberg Business* (3 September 2013).

108 Peter Baker, "Obama's Dual View of War Power Seeks Limits and Leeway", *The New York Times* (11 February 2015).

109 Sylvia Ellis, *Britain, America, and the Vietnam War* (Westport: Greenwood Publishing Group, 2004), at 5.

on Syrian territory[110] (the territorial limitation on air strikes to Iraq alone is common to all of the European nations that have agreed to participate in the U.S.-led coalition: namely, the Netherlands, France, Belgium, and Denmark).[111]

The Canadian Prime Minister's response to questions from the opposition about the legality of the mission was problematic. When asked about Operation Impact's legal basis for action in Syria during Question Period he responded, "I'm not sure what point the leader of the NDP is making. If he is suggesting, Mr. Speaker, that there is any significant legal risk of lawyers from ISIL taking the government of Canada to court and winning — the government of Canada's view is the chances of that, Mr. Speaker, are negligible [sic]."[112] Hopefully, if Parliament has the ultimate responsibility for the approval of combat deployments — and for compliance with international law, and for avoiding the serious recriminations of the sort that followed the Iraq War in Britain and the Netherlands — then this sort of glib response will no longer be deemed satisfactory.

IV. The Justiciability of a Canadian Constitutional Convention

One might concede that greater accountability over combat deployments is necessary without accepting the conclusion that a new constitutional convention would achieve that purpose. The government could simply ignore the vote against the deployment, or could ignore any limits imposed in any vote in favour of a combat operation. The latter scenario is more likely than the former, as the government could simply avoid a public rebuke by expanding a humanitarian aid mission into combat operations, as was done shortly after Operation Impact was launched (but before the take-note motion of October 6, 2014).

In the same manner, the scope of a combat mission could be expanded in such a way that it would violate international law. This appears to have been contemplated by Prime Minister David Cameron. As noted above, the Parliament of the United Kingdom rejected combat operations in Syria. They did, however, approve air strikes in Iraq. Yet, in the wake of that vote, Cameron noted that, while he believed that this precluded "pre-meditated" military

110 UK, HC, *Daily Hansard*, "Iraq: Coalition Against ISIL" (26 September 2014).

111 See Stephen Castle and Steven Erlanger, "3 Nations Offer Limited Support to Attack on ISIL", *The New York Times* (26 September 2014).

112 Lee Berthiaume, "Harper rebuffs legal concerns over bombing Syria", *Ottawa Citizen* (25 March 2015).

action in Syria, he reserved the right to intervene without another vote in the House of Commons if "urgent action" was required to prevent a humanitarian crisis.[113] In this scenario, the Prime Minister would be making the decision on his own authority and he would be the sole judge of whether or not urgent action was necessary.

It is unclear what action the Parliament of the United Kingdom could take at this point, short of a motion to withdraw the confidence of the House of Commons. This, of course, would be very difficult given the public support for the government that is often a reflexive response to a military campaign. Accordingly, the issue might be raised about what purpose such a constitutional convention might serve in Canada. The answer presents itself when one considers the differing approaches of the judiciary in Canada and Britain to the question of the justiciability of conventions.

The decision in *Patriation Reference*[114] would provide a basis for Supreme Court review of whether a combat deployment that goes beyond what the House of Commons approved (once a constitutional convention requiring prior approval is created) is in violation of such a convention. This could be done pursuant to the referral of a private bill to the Supreme Court by either House or Parliament,[115] wherein the reference would specify the issue.[116]

A court challenge of this nature might be deemed non-justiciable on the basis identified in *Aleksic v. Canada,*[117] namely that courts are not well placed to examine matters of high policy.[118] A reference case addressing the government's decision to ignore or exceed the scope of what was specified by Parliament would not call for the court to examine whether the government's choice of policies is correct or even lawful, but rather if, in ignoring Parliament, it is in violation of a constitutional convention. In such a case, the issue would appear to be justiciable for the same reason identified by Madam Justice Wilson in her concurrence in *Operation Dismantle*, wherein she noted that review for *Charter* compliance is appropriate because it would not require the courts to "second guess" the executive on matters of defence.[119]

113 Nick Robinson, "British military action in Iraq: what next?", *BBC News* (26 September 2014).

114 *Patriation Reference*, *supra* note 23.

115 See e.g. Senate, *Rules of the Senate of Canada*, 12 February 2014 update (Ottawa: Senate of Canada, 2014) at paras 11-18.

116 *Supreme Court Act*, RSC 1985, c S-26, s 54.

117 *Aleksic v Canada (Attorney General)* (2002), 215 DLR (4th) 720 (Ont Div Ct).

118 This is not a foregone conclusion, however, as the government's high policy defence was rejected in *Amnesty International Canada v Canada (Chief of the Defence Staff)* (FC), 2008 FC 336, [2008] 4 FCR 546.

119 *Operation Dismantle v The Queen* [1985] 1 SCR 441 at para 64.

As Adam Dodek has observed, in this new century the Supreme Court has increasingly adopted the role of "a constitutional crisis manager."[120] It is possible that the threat of the Court's intervention into a constitutional crisis might deter the government from ignoring an emergent convention not to deploy combat troops without prior parliamentary approval.

In the event that the government fails to comply with the vote, a declaration against the Attorney General would be an effective means of correcting the government's behaviour. This is not because the government would be required to comply with a binding judgment from the Supreme Court of Canada: the *Patriation Reference* case explicitly states that the Court cannot grant a legal remedy. However, a political remedy (in the form of a conclusion that a constitutional convention had been violated) would likely catalyse compliance. As Dodek has argued, the distinction between the recognition of a constitutional convention and the enforcement of a convention is problematic.[121] The Court "translat[ed] this practice of 'recognition' into 'declaration' of conventions."[122] This shift approaches a legal remedy, since any government's decision to ignore such a ruling would likely be seen as an unseemly challenge to one of the nation's most trusted and prestigious institutions. The political price of such open defiance might be too costly to bear.

Accordingly, a Canadian constitutional convention would not be a paper tiger, and could serve as a powerful incentive for broad disclosure to Parliament and to a vigorous debate about the prudence and legality of combat operations.

Conclusion

A constitutional convention requiring a vote in the House of Commons before combat deployments would not be a panacea. It would not limit the government's freedom of action as effectively as legislation clarifying the *National Defence Act*. However, it is possible to create a convention merely by rejecting the government's take-note motion, should the government honour that decision. This convention would create an incentive for Parliament to demand much more in the way of factual and legal justification for combat action, something that is both necessary and lacking at present. Additionally, the justiciability of such a convention in Canada would create a stronger incentive for the government to

120 Adam M Dodek, "Courting Constitutional Danger: Constitutional Conventions and the Legacy of the *Patriation Reference*" (2011) 54 SCLR (2d) 117 at 121.

121 *Ibid* at 129.

122 *Ibid* at 141.

comply. It is likely that the next year will present a favourable opportunity for the creation of such a convention, as the government is committed to fighting ISIL in Iraq and Syria "as long as it is there."[123] However, the most recent public opinion polls gauging the outcome of the 2015 general election predict a return of a minority government, at best. This is precisely the scenario that Lagassé thought "might easily" catalyze the assertion of Parliamentary authority over military deployments.[124]

Parliament appears to be learning the lesson that the government can have perverse incentives to put Canadian troops in harm's way. It has yet to learn how to push back against ill-advised missions that nonetheless serve partisan ends. What remains to be seen is whether the House of Commons will learn the lesson the easy way — by examining the history of a Parliament that has failed to do so, but corrected itself — or the hard way.

123 Jake Edmiston, "Stephen Harper tells opposition that Canada will fight ISIS threat for 'as long as it is there'" *National Post* (24 March 2015).

124 Lagassé, "Accountability for National Defence", *supra* note 16 at 14-18.

A Book Review of Kirk Lambrecht's

Aboriginal Consultation, Environmental Assessment, and Regulatory Review in Canada

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Aboriginal Consultation, Environmental Assessment, and Regulatory Review in Canada[1] by Kirk N. Lambrecht is a valuable resource to those interested in learning about the topics in its title. Its purpose, however, is to describe and support Lambrecht's proposal for "how Aboriginal consultation can be *practically* integrated with environmental assessment and regulatory review processes of tribunals to foster relationships among Aboriginal peoples, project developers, tribunals, the Crown and the courts."[2] Although Lambrecht's intention of fostering relationships between parties is admirable, this review shows that the proposed integrated framework he puts forth should be approached with some caution; conflicting perspectives regarding issues such as how the duty to consult is to be carried out are notably absent from his analysis. Lambrecht may have considered these issues to be beyond the scope of his book. I argue, however, that any framework that is proposed to deal with Aboriginal law issues should explore both the "support for" and "opposition to" aspects upon which that framework is built.

As mentioned, Lambrecht's book offers readers a useful summary of environmental assessment [EA] and regulatory review [RR] processes, the development of Aboriginal and Treaty rights jurisprudence, and the law on Aboriginal consultation. He succinctly reviews these complex areas of law with enough depth to give readers a basic understanding of their relevant functions, processes, frameworks and limitations, and uses examples to demonstrate how these areas of law interact with one another and are applied in practice. Lambrecht also highlights several key issues within EA, RR and

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1 Kirk N. Lambrecht, *Aboriginal Consultation, Environmental Assessment, and Regulatory Review in Canada* (Regina: University of Regina Press, 2013) at XXV [Lambrecht, "Aboriginal Consultation, EA, and RR"].

2 *Ibid* at XXV [emphasis in original].

consultation processes, which he argues may be addressed through the adoption of an integrated process by tribunals such as the National Energy Board of Canada (NEB). He argues that his integrated environmental assessment/regulatory review/Aboriginal consultation (EA/RR/Consultation) framework provides a "multi-faceted relationship-building dynamic [which] can advance reconciliation with Canada's Aboriginal peoples," and a means for developing a "consensus or doctrine for how the duty to consult may be applied in project development."[3] Finally, Lambrecht asserts that an integrated process is necessary because the common law approach promotes "adversarial perspectives,"[4] and he argues that tribunals provide the preferable forum for addressing the issues he highlights. His proposed framework, he suggests, offers "a practical signpost on the long path to reconciliation."[5]

Although Lambrecht presents his proposed integrated framework as providing an efficient and reconciliatory means of satisfying the requirements of EA/RR processes and the Crown's duty to consult, a thorough review of the book finds that his proposal focuses more on addressing the issues that EA/RR and consultation raise from the proponents' side of the debate. While the integrated EA/RR/Consultation framework he advocates may provide some of his anticipated benefits, Lambrecht neglects to address a number of key issues. He assumes that regulatory and industry-led processes are the best processes in which to fulfill the duty to consult and address the concerns of Indigenous peoples affected by natural resource developments. His reliance on tribunals like the NEB to apply his proposed EA/RR/Consultation process, coupled with his (arguably) insufficient attention to the concerns of Indigenous peoples, has the potential to increase conflict and disagreement between these interests. The danger in this approach seems, to me, a potential step backward on the path to reconciliation.

Despite the critical tone of these comments, however, they are not meant to take away from the role of the book as a valuable resource for anyone interested in these areas of law. Indeed, in this chapter-by-chapter review of the book, I highlight only some of the ways in which Lambrecht's book may be a valuable resource to people interested in these areas. Still, I also look at each chapter individually in order to provide specific examples of where complications with his integrated process should be recognized and addressed.

3 *Ibid* at XXV-VI.
4 *Ibid.*
5 *Ibid.*

In his first chapter, Lambrecht begins by stating that the "fundamental proposition" of his book "is that Aboriginal consultation and environmental assessment/regulatory review of projects by tribunals can be integrated so as to operate effectively and serve the goal of reconciliation."[6] He argues that consultation requirements with Indigenous peoples and EA/RR can and should be combined "because each is a *process* that informs decision making,"[7] and that such integration would increase efficiency by reducing duplication of efforts and associated costs.[8]

To demonstrate how integration can occur, Lambrecht provides a number of models to show readers how regulatory review and corporate business models might be aligned and integrated with the functions of a tribunal.

Lambrecht then explains that, through the integration of project development processes, "relationships with Aboriginal peoples can be positively developed" if the duty to consult is delegated to and discharged by tribunals.[9] Since tribunals can consider EA/RR processes and are often empowered to consider the potential impacts of natural resource development projects on Indigenous peoples, Lambrecht argues that not only is it "consistent with the honour of the Crown to rely on such regimes to fulfill this statutory mandate,"[10] but that such integration will ensure the duty to consult is fulfilled while providing Indigenous peoples who are affected by a project with "extensive procedural fairness and natural justice rights."[11]

While I accept tribunals may provide a forum for satisfying the requirements of EA/RR and ensuring the duty to consult is satisfied, I must raise a number of concerns regarding Lambrecht's integrated EA/RR/Consultation framework. One of the most significant of these concerns stems from Lambrecht's limited discussion of Indigenous opposition to, and concerns with, an integrated EA/RR/Consultation process that is carried out entirely by a tribunal. Such limited engagement with Indigenous perspectives regarding the issues of EA/RR and consultation, I suggest, unfortunately undermines the arguments Lambrecht makes in favour of his proposed approach.

For example, Lambrecht recognizes early on that Indigenous "engagement in

6 *Ibid* at 1.
7 *Ibid* [emphasis in original].
8 *Ibid* at 3.
9 *Ibid* at 9-10.
10 *Ibid* at 10.
11 *Ibid* at 14.

environmental assessment or regulatory review is not a certainty."[12] He notes that some Indigenous groups describe "tribunal proceedings to be adversarial and therefore unacceptable," while other groups "assert the *right* to be consulted by the Crown in a process separate from Aboriginal consultation by a proponent and preceding environmental assessment or regulatory review."[13] Lambrecht notes this reflects issues of "fundamental disagreement"[14] with respect to how Indigenous peoples want to engage in EA/RR processes or how they prefer consultation to occur. Yet instead of exploring why Indigenous peoples may not participate in these processes, why they may find tribunal proceedings as adversarial and unacceptable, or whether alternative means of engaging in consultation may exist that all parties find acceptable, Lambrecht downplays the issues and simply asks readers, "[i]f Aboriginal peoples do not engage in the tribunal process to express their outstanding concerns about a project, then who will communicate to the tribunal such concerns?"[15] He responds to his own question by urging Indigenous peoples to "engage in tribunal planning processes where these are intended to gather and assess project impacts on Aboriginal rights or Treaty rights."[16]

Lambrecht's question and response reveal a seemingly paternalistic, Eurocentric perspective upon which his integrated process is based: that pre-determined EA/RR processes created by non-Indigenous institutions are best-suited for making decisions concerning Indigenous peoples, despite "fundamental disagreement" and even open opposition. However, this opposition cannot be overlooked or undermined, and doing so will only undermine reconciliation efforts.

A prime example of how Lambrecht's proposed process is exceedingly one-sided is the fact that the question he poses assumes that a tribunal is the only appropriate decision-making authority. Lambrecht does not mention that, across Canada, many Indigenous communities, tribal councils, grand councils, and other representative agencies already have their own consultation and land use policies. Lambrecht also fails to discuss opposition by Indigenous peoples to policies currently proposed by the government *primarily because* the government did not consult Indigenous peoples in preparing them.[17] The failure of, *inter*

12 *Ibid* at 13.
13 *Ibid* at 10, 14 [emphasis in original].
14 *Ibid* at 11.
15 *Ibid* at 13.
16 *Ibid* at 13-14.
17 Chief Marvin Yellowbird, "Treaty 8 Alberta Chiefs' Position Paper on Consultation" *Confederacy of Treaty Six First Nations* (30 Sep 2010) online: <http://www.treaty8.ca/documents/T6%20Consultation%20%20

alia, governments, regulatory bodies, and legal academics alike to consider Indigenous peoples' perspectives when developing policies and processes that affect them is a central issue that lies at the heart of reconciliation.[18] Therefore, any solutions proposed regarding how best to navigate matters of EA, RR, and consultation with Indigenous peoples *must* explore opposing perspectives. While the integrated process Lambrecht puts forward may ultimately increase efficiency for proponents and project decision-makers, it is not the only way to do business, and opposing or alternative perspectives are noticeably absent from his book.

A final concern with the opening chapter is that it does not offer any practical suggestions regarding how EA/RR and consultation is to be integrated, undertaken, and assessed by a tribunal.[19] Instead, the chapter is focused on streamlining EA/RR/Consultation processes to increase efficiency.[20] While Lambrecht does suggest that Indigenous peoples can be accommodated through aspects of procedural fairness, he does not address issues such as: financial and human capacity to participate in EA/RR processes (i.e. who participates and who pays for participation); the extent to which the tribunal will (or is able to) incorporate traditional or community knowledge into their EAs; or whether, and to what extent, affected communities will be able to participate in EA/RR decision-making processes. Lambrecht essentially contends that it will be sufficient if the tribunal offers Indigenous groups a forum in which to raise their concerns. Despite his best intentions, Lambrecht's integrated framework thus offers yet another top-down, potentially-adversarial approach to project development and impact management that is not conducive to reconciliation — it is likely to lead to further disagreement and opposition instead.

The second chapter of Lambrecht's book provides a lot of relevant and useful information regarding Aboriginal law in Canada. Unfortunately, Lambrecht

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Position%20Paper.pdf> (this 30-page paper, which Lambrecht references, is supported by elders and chiefs from First Nations in Treaties 6, 7, and 8, who oppose Alberta's *First Nations Consultation Policy on Land Management and Resources Development* because the government failed to, *inter alia*, work *with* First Nations to develop an appropriate consultation process).

18 Although published after Lambrecht's text *Aboriginal Consultation, Environmental Assessment, and Regulatory Review in Canada*, Arthur Manuel and Grand Chief Ronald M. Derrickson discuss these and other issues in *Unsettling Canada: A National Wake-Up Call* (Toronto: Between the Lines, 2015).

19 Lambrecht does provide some guidance on this point in chapter 6; however, his suggestions do not go beyond a consideration of the legislation that establishes the tribunal and a contextual application of the *ratio decidendi* in *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 SCR 650.

20 Lambrecht, "Aboriginal Consultation, EA, and RR", *supra* note 1 at 3.

starts out on the wrong foot when he tells readers that "[u]nderstanding the basic distinction between Aboriginal rights and Treaty rights in Canada is the first step in understanding how project development can affect such rights and therefore the first step in building relationships with Aboriginal peoples whose rights are integral to their identities."[21] While I agree that a developer must understand the types of Aboriginal rights that may be affected by a project, I disagree that this should be the very "first step" a proponent takes "in the relationship-building exercise associated with project development."[22] As essential as this understanding is, we cannot assume that a proponent knows *why* Indigenous peoples in Canada possess Aboriginal and Treaty rights or that the proponent understands the *significance* of those rights to a community's culture, especially in a time of increasing international investment and development. Indeed, if the goal is actually to foster meaningful relationships, a proponent's first steps should involve learning about the communities that will be affected by a development. Instead of being primarily concerned with which Aboriginal rights may be infringed upon, the proponent should first learn about the community and its culture, history, and its members' connections to the land. Without these basic understandings, attempts at reconciliation are unlikely to be successful.

Despite starting off on the wrong foot, Lambrecht provides a concise, well-written summary of Aboriginal law and Treaty rights in Canada that contains all of the essential information, including maps, which readers need to understand the issues at hand. Lambrecht addresses basic principles that are applicable to Aboriginal, Treaty, and Métis rights, and gives an overview of important legal and factual considerations of, and distinctions between, modern and historic/numbered Treaties. Lambrecht also recognizes the chapter's general purpose and its limitations, yet he explores this complex area of law with appropriate depth to make it practical and understandable.[23]

Lambrecht's third chapter, like the one before it, provides a general yet thorough and practical introduction to its topic of environmental assessment and regulatory review processes in Canada. Lambrecht effectively examines the source jurisprudence, legislation, and provincial-federal agreements that have

21 *Ibid* at 15.

22 *Ibid.*

23 It is worth mentioning that since the time of publication, the Supreme Court of Canada has released a number of decisions that would be appropriate to add to this chapter, such as: *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44; *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48, [2013] SCCA No 215; and, *Manitoba Métis Federation Inc. v Canada (Attorney General)*, 2013 SCC 14, [2013] 1 SCR 623.

contributed to the development of EA/RR in Canada. He also uses case studies to illustrate the implementation of joint provincial-federal project reviews and to demonstrate how provincial EA authorities have coordinated with federal tribunals to "harmonize" their overlapping processes.[24]

Lambrecht states that the purpose of EA/RR is "to contribute to sustainable development," which he defines as development that "meets the needs of the present without compromising the ability of future generations to meet their own needs."[25] Given the focus of sustainable development on the needs of future generations, and Indigenous peoples' concerns with protecting the land for future generations, Lambrecht reasons that "there is a natural relationship between Aboriginal consultation and the law of environmental assessment and regulatory review."[26]

Although this reasoning is sound in some respects, I would argue that the goal here is not to align legal processes for the sake of expediency. Although consultation is admittedly a "procedural obligation,"[27] it is also an obligation which stems, in essence, from the recognition by Canadian courts that Indigenous peoples have lived and relied on the land since time immemorial. Parliament has constitutionally protected the Aboriginal rights and interests of Indigenous peoples in Canada such that consultation is required when there are risks of adverse effects on those rights. Yet, much of the developments involved in typical EA/RR processes are based on the extraction of non-renewable natural resources, putting those constitutionally-protected rights and interests directly at risk; entire habitats are often lost or altered when a natural resource development project is built. Lakes are converted into tailings ponds, forests are cleared, mountaintops are leveled, and earth is moved so that minerals below can be extracted. Such developments can cause irreversible damage not only to the land, but also to the people and cultures that depend upon that land. Developments that are subject to EA/RR processes — and the tribunals that oversee these developments — are often inherently irreconcilable with the practice of Aboriginal rights in those affected lands. "Sustainable development" does not mean "sustainable practice of Aboriginal rights"; the parties involved in and affected by projects that have the potential to significantly undermine the practice of Aboriginal rights will continue to disagree with one another

24 Lambrecht, "Aboriginal Consultation, EA, and RR", *supra* note 1 at 45-46.

25 *Ibid* at 39.

26 *Ibid*.

27 *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388.

unless concerns are addressed and decision-making is shared.

This situation is apparent when one looks at the increase in public opposition by Indigenous peoples regarding the development of natural resources in their territories, especially since the growth of the Idle No More movement. Indigenous groups from across Canada have recently been involved in large protests against proposed pipelines such as Northern Gateway[28] and Energy East.[29] With less national attention, Indigenous trappers have been blocking roads in La Loche, Saskatchewan, to prevent exploration by tar sands and uranium exploration companies.[30] These are just a few examples, and it seems like every month more and more headlines are made of another protest, blockade, or petition opposing developments that directly conflict with Aboriginal rights and the rights of future generations. Of course, not all Indigenous communities oppose all industrial development, and many of them do want to work with proponents to develop natural resources. However, the fact remains that people are increasingly opposing developments that are potentially irreconcilable with the practice of Aboriginal rights. As such, it seems that the "natural relationship" between sustainable development and Aboriginal consultation that Lambrecht refers to may not lead to the smoother, more expedient process he envisions.

Another concern with this chapter is that it fails to address concerns raised over the scope of a tribunal's EA/RR processes, its susceptibility to legislative changes, and how these issues may affect Lambrecht's EA/RR/Consultation process.

Lambrecht points out that "legislation may limit or define the scope of the inquiry delegated to a tribunal or to any particular branch of government during environmental assessment and regulatory review," [31] and he refers, as an example, to the environmental effects listed in the *Canadian Environmental*

28 Tiffany Crawford, "More than a thousand protesters rally against Northern Gateway pipeline in Vancouver", *The Vancouver Sun* (10 May 2014), online: <http://www.vancouversun.com/news/More+than+thousand+protesters+rally+against+Northern+Gateway+pipeline+Vancouver/9827485/story.html#ixzz3LZ7OK4X>. See also: Jonathan Hayward, "Thousands Protest Northern Gateway Pipeline", *The Canadian Press* (22 October 2012) online: CTV News <http://www.ctvnews.ca/canada/thousands-protest-northern-gateway-pipeline-1.1005815>.

29 "Energy East Pipeline Proposal Meets Opposition in Winnipeg", *Red Power Media* (8 December 2014) online: <https://redpowermedia.wordpress.com/2014/12/08/energy-east-pipeline-proposal-meets-opposition-in-winnipeg/>.

30 "Trappers block northern Sask. road, says industry must consult with them", *The Canadian Press* (25 November 2014) online: Global News <http://globalnews.ca/news/1690912/trappers-block-northern-sask-road-says-industry-must-consult-with-them/>.

31 Lambrecht, "Aboriginal Consultation, EA, and RR", *supra* note 1 at 43.

Assessment Act, 2012, (*CEAA 2012*)[32] that are subject to EA/RR.[33] Lambrecht seemingly recognizes that Parliament determines a tribunal's jurisdiction, including the information or effects a tribunal can consider, as well as a tribunal's capacity to make decisions regarding, for example, the adequacy of Aboriginal consultation. What he does not mention, however, is that a tribunal's powers may be narrowly construed and are subject to sudden — and significant — change.

In 2012, for example, the *CEAA 2012*, as part of the controversial omnibus Bill C-45, the *Jobs, Growth and Long-term Prosperity Act*,[34] repealed and replaced the previous *Canadian Environmental Assessment Act* (*CEAA*)[35] in its entirety. The changes in the *CEAA 2012* were not welcomed by many Canadians, and for some the *CEAA 2012* represented "the slicing and dicing of environmental protection and any remaining trust with aboriginal peoples."[36] It is unclear to what extent, if any, Indigenous peoples in Canada contributed to the creation of the *CEAA 2012*, but some argue that the regulations were created with "very limited [public] consultation" and only involved "feedback from proponents of projects and industry associations."[37] Furthermore, the changes between the *CEAA* and the *CEAA 2012* signified a shift from determining the need for an EA based on a "trigger" approach, to a "project-based" approach, with the result that "significantly fewer environmental assessments will be required" under the *CEAA 2012*.[38] Indeed, Bill C-38 has been referred to as being "as much about speeding up decision-making on resource projects like oil sands pipelines and new mines across the country, as it is about government finances."[39] This example shows just how quickly and significantly legislation can change; accordingly, Lambrecht's proposed EA/RR/Consultation process also might be affected by

32 *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52 [*CEAA 2012*].

33 Regulations pursuant to the *CEAA 2012* identify physical activities that will be subject to an EA/RR. *Regulations Designating Physical Activities*, SOR/2012-147.

34 Canada, Bill C-45, the Jobs and Growth Act, 2012, 1st Sess, 41st Parl, 2012, Chapter 31 (assented to 14 December 2012).

35 *Canadian Environmental Assessment Act*, SC 1992, c 37.

36 Heather Scoffield, "Omnibus Budget: Bill C-45 To Deliver Profound Changes For Environment, Natives", *The Canadian Press* (21 October 2012) online: Huffington Post <http://www.huffingtonpost.ca/2012/10/21/omnibus-budget-bill-c-45_n_1997300.html>.

37 "Legal Backgrounder: Canadian Environmental Assessment Act (2012) — Regulations", Legislative Comment on *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52, Ecojustice (August 2012) online: <http://www.ecojustice.ca/wp-content/uploads/2015/03/August-2012_FINAL_Ecojustice-CEAA-Regulations-Backgrounder.pdf>.

38 *Ibid.*

39 Shawn McCarthy, "Budget bill gives Harper cabinet free hand on environmental assessments", *The Globe and Mail* (9 May 2012) online: <http://www.theglobeandmail.com/news/politics/budget-bill-gives-harper-cabinet-free-hand-on-environmental-assessments/article4105864/>.

such changes, and the author could have more fully explored these possibilities.

In contrast to chapters one and three, Lambrecht's fourth chapter strikes me as much less contentious. In chapter four, Lambrecht provides a well-organized overview of the law of Aboriginal consultation that both Indigenous communities and proponents will find useful for assessing what level of consultation and accommodation may be appropriate for a given situation. Lambrecht provides succinct case summaries and draws from them key details, examples, and lessons that can be practically applied in the future. Although these well-delivered case summaries should benefit readers unfamiliar with the law on Aboriginal consultation, the relevance of these summaries to Lambrecht's overall proposition — that is, the need for an integrated EA/RR/Consultation method — is not made as clear as it could be.

In his fifth chapter, Lambrecht looks at several decisions by tribunals dealing with Aboriginal consultation issues, including the Mackenzie Gas Project (MGP) and the Alberta Clipper, Keystone, and Southern Lights Interprovincial Pipeline projects (the "Pipeline Cases"). Although the MGP case study seemingly provides a more positive example of a reconciliatory approach that could be aligned with his integrated EA/RR/Consultation process, Lambrecht focuses on the Pipeline Cases to support his proposal.

The MGP case study involves parties negotiating a modern land claim agreement and demonstrates shared decision-making between several territorial, federal, and Indigenous organizations with planning, approval, and regulatory capacities.[40] By working together, these organizations established a joint review panel (JRP) and collectively drafted the JRP's terms of reference "specifically to emphasize Aboriginal interests," while the NEB was designated as a separate regulatory review body.[41] The responsibilities, scope, and processes of the JRP were determined through organizational cooperation, and the JRP was empowered to investigate the concerns of government, regulatory, and Indigenous organizations. Indeed, Lambrecht himself notes that "[t]he National Energy Board Reasons for Decision point out how Aboriginal consultation by the proponent, and Aboriginal engagement in the JRP and NEB processes,

40 Lambrecht, "Aboriginal Consultation, EA, and RR", *supra* note 1 at 80. The organizations involved in the Mackenzie Gas Project were the: NEB; Mackenzie Valley Environmental Impact Review Board; Mackenzie Valley Land and Water Board; Northwest Territories Water Board; Government of the Northwest Territories; Environmental Impact Screening Committee and Environmental Impact Review Board for the Inuvialuit Settlement Region; Inuvialuit Settlement Region Land Administration; Inuvialuit Game Council; Sahtu Land and Water Board; and, Gwich'in Land and Water Board.

41 *Ibid* at 83.

demonstrably resulted in modifications to the project and contributed to the NEB conclusion regarding the issuance of a Certificate of Public Convenience and Necessity for the project."[42]

However, despite this seemingly positive example of reconciliation between Indigenous groups, government, and industry, Lambrecht focuses on the Pipeline Cases to support his argument that a forum like the NEB is best-suited for applying his proposed integrated EA/RR/Consultation process. According to Lambrecht, the NEB incorporates "post-*Haida*" practices regarding Aboriginal consultation into its EA/RR and decision-making processes,[43] thus enabling the NEB to assess "the significance of project impacts on Treaty rights having regard to the implementation of mitigation measures."[44] Additionally, since the Pipeline Cases demonstrate that the government may rely on the NEB processes to fulfill the duty to consult, he reasons that tribunals like the NEB are the appropriate forums in which to address EA, RR, and consultation issues.

The distinctions between the MGP case study and the Pipeline Cases demonstrate alternative approaches to consultation, accommodation, and reconciliation, yet it is unclear why Lambrecht focuses most closely on the processes in the Pipeline Cases. The NEB operates as a quasi-judicial federal agency in which Indigenous groups may submit evidence for the Board's consideration in public hearings,[45] while the MGP JRP approach brought numerous Indigenous and non-Indigenous organizations together to determine how project assessment and review would proceed — ostensibly providing a much bigger, brighter "signpost on the path to reconciliation." Additionally, the MGP approach helps parties avoid issues that may occur from legislative changes, and inherently provides for consultation with Indigenous peoples. It is also worth mentioning that, although litigation occurred in all four case studies, it did so for very different reasons. Litigation in the MGP case was the result of a First Nation's request to be included in the JRP process, while litigation in each of the three Pipeline Cases resulted from Indigenous groups' opposition to the tribunal's decisions. These distinguishing features in themselves demonstrate that the

42 *Ibid* at 91.

43 *Ibid* at 95, citing to Indian Affairs and Northern Development, Road to Improvement: The Review of the Regulatory Systems Across the North by Neil McCrank (Ottawa: Minister of Indian Affairs and Northern Development and Federal Interlocutor for Métis and Non-Status Indians, May 2008).

44 *Ibid*.

45 National Energy Board of Canada, "What is the National Energy Board?" (3 October 2014), online: National Energy Board Fact Sheet <https://www.neb-one.gc.ca/bts/whwr/nbfctsht-eng.html>.

MGP approach is more reconciliatory, yet Lambrecht does not make this connection.

In his concluding chapter, Lambrecht argues that his proposed process will allow tribunals to take a contextual approach to the duty to consult that is "embedded in universalism rather than formalism."[46] He contends that "[h]igh-level tribunals charged with responsibility for environmental assessment and regulatory review of projects are well placed to assess project impacts on Aboriginal rights and Treaty rights and respond to those concerns within the ambits of their jurisdiction,"[47] and thus are well-suited to taking a contextual approach to the duty to consult called for by the Supreme Court in *Rio Tinto*. Lambrecht's proposed framework, he argues, "recognizes that the Supreme Court itself attempts to foster reconciliation within an existing framework of democratic institutions,"[48] while enabling tribunals to engage in a "robust" process that allows them to "meaningfully gather and assess the impact of projects on Aboriginal rights and Treaty rights."[49]

While I understand Lambrecht's reasoning that his proposed framework would allow a tribunal to gather information and enable it to engage in a contextual analysis when considering questions of consultation, he ultimately relies on an institution that is fundamentally formalistic. Although he recognizes this fact when he aligns his proposed process with the Supreme Court's attempts at fostering reconciliation within existing frameworks, he does not engage with the topic as thoroughly as he could have. Tribunals, by their very nature, are creatures of legislation, dependent on rules, precedents and categories susceptible to change by outside forces not involved in a particular case. They also serve to streamline and simplify project development and approval processes. Relying on such institutions to apply an integrated EA/RR/Consultation process in an efficient and expedient manner, therefore, may inevitably lead to a formalistic approach that is ultimately unconducive to the end goal of reconciliation. A more in-depth analysis on this point would have been beneficial, especially given the different roles played by the NEB and other organizations in the MGP and Pipeline case studies.

In the final part of this chapter, Lambrecht recognizes that the EA/RR/Consultation process he proposes has limitations regarding types of issues

46 Lambrecht, "Aboriginal Consultation, EA, and RR", *supra* note 1 at 112.
47 *Ibid* at 114.
48 *Ibid* at 113.
49 *Ibid*.

that it can address. He notes that "[b]eyond traditional activities, Aboriginal peoples may have 'broader concerns' that, while raised during environmental assessment and regulatory review of a particular project, are best addressed by other processes."[50] Unfortunately, he does not describe what those "other processes" are, and his proposed process would have Indigenous peoples' concerns confined to "traditional activities." Instead of engaging on this point, however, he discusses the tribunal's ability to give effect to an Indigenous group's procedural fairness rights[51] and, although he recognizes that Indigenous peoples may not be satisfied with his EA/RR/Consultation process, he simply suggests that their broader concerns be dealt with elsewhere.

In conclusion, Lambrecht provides readers with a helpful resource for understanding the general development and application of the law on Aboriginal consultation, Aboriginal and Treaty rights, and environmental assessment and regulatory review processes in Canada. He explores complex topics and delivers them in a coherent, easy-to-digest manner. Throughout his discussions, Lambrecht offers examples and explanations that are practical and insightful, and his book will undoubtedly provide a useful guide to anyone interested in learning about these areas of law.

As I have made clear throughout this review, however, in proposing his integrated EA/RR/Consultation process, Lambrecht fails to adequately consider matters of "fundamental disagreement" which cannot be brushed aside. I have highlighted several issues with his approach, yet its fundamental problem is its assumption that Indigenous peoples ought to accept a pre-determined set of rules in which they have had no hand in drafting, rules which are susceptible to rapid and unilateral change. If Indigenous peoples have not helped create the tribunal that is to make decisions that affect them, how can the tribunal be said to truly represent a reconciliatory process? When one considers the alternative approaches to project-related decision-making that are available, especially in light of the growing opposition to natural resource developments by many Indigenous peoples across Canada, it becomes apparent that Lambrecht's integrated EA/RR/Consultation process would require exploring alternative opinions and suggestions in order for it to meaningfully advance notions of reconciliation.

50 *Ibid* at 109.
51 *Ibid* at 110.

Book Notes

*Dwight Newman, Book Review Editor**

This section continues the new Book Notes feature commenced in the last issue, seeking to offer brief comments on a wider variety of books than has been previously possible in the *Review*. This issue's books span a range of different topics across the spectrum of constitutional issues, thus manifesting the ongoing richness of scholarship available today.

Anthony Arlidge & Igor Judge, *Magna Carta Uncovered* (Oxford: Hart Publishing, 2014)

This book, out in time for the eight-hundredth anniversary of the Magna Carta, is a very helpful introduction to that document, offering both historical background and a detailed, clause-by-clause explanation of its contents. Because the book considers the contents piece by piece, the bulk of it is divided into a large number of chapters, unfortunately diminishing the possibility of understanding the instrument in terms of more unified themes.

However, a gesture towards some possible larger themes appears at the end of the book in chapters considering what the Magna Carta foregrounded. It served, of course, as inspiration for the English Bill of Rights, but even more so for aspects of the American constitutional settlement. So, the book begins and ends with some larger context, but it is principally a book that explicates each clause of the Magna Carta.

The specific examination of the actual text of the Magna Carta and the meaning of the different provisions will, of course, be informative to many readers. Often, the instrument is discussed only as symbol; this book discusses it as a text. In doing so, it offers an important context for modern understandings of the Magna Carta. Those seeking to better understand the Magna Carta could start with this very useful book.

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Glen Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014)

Glen Coulthard's book, which has already received significant early attention, is an important work of Indigenous political theory that ultimately challenges key aspects of Canadian constitutionalism. Coulthard's take on theoretical approaches to recognition and attempts at reconciliation is that these concepts continue to operate within structures of colonial state power that entail a system of structured dispossession of Indigenous peoples from their lands and their cultures. Drawing on work by theorists ranging from Karl Marx to Frantz Fanon, Coulthard shapes his argument into a cohesive theoretical position. In doing so, he offers a work that can help many readers to better understand the voices of Indigenous resistance.

Coulthard's work is framed partly around the particular challenges and questions faced by the Dene Nation in the vicinity of the Mackenzie Valley, and one of the central chapters of the book offers an account of practical issues regarding that First Nation. Later chapters return to a theoretical attack on any notion that Indigenous communities' perspectives can be adequately addressed through a liberal "politics of recognition," with one chapter arguing that Indigenous communities are justified in offering resentment rather than forgiveness to colonial institutions. Coulthard takes great care to show that Indigenous politics are complex, giving due attention to the contemporary Indigenous contexts of urbanism, gender issues, and so on.

Coulthard's argument, though, is not a simplifying one for those who think recognition of Indigenous communities will be enough. Coulthard offers a more radical Indigenous political theory and, in doing so, certainly represents a part of Canada's Indigenous rights movement. Those grappling with issues of Canadian constitutionalism and Canada's Indigenous communities can read Coulthard's work in order to understand some of the perspectives to be considered and the differences to be bridged.

Carolyn Harris, *Magna Carta and its Gifts to Canada: Democracy, Law, and Human Rights* (Toronto: Dundurn, 2015)

Seldom does this journal carry reviews of books that contain glossy pictures. However, some of Dundurn's recent publications intended for a more general audience have caught attention in legal circles, with Adam Dodek's *The Canadian Constitution* (Toronto: Dundurn, 2013) being a noteworthy example as a book written at an introductory level about the Canadian Constitution and receiving attention for its accessibility. Now, Carolyn Harris carries on this trend with a glossy book about the Magna Carta.

The book traces the history leading up to formulation of the Magna Carta, its decline in political practice, and its revival in the commentary of Sir Edward Coke. It then seeks to trace the Magna Carta's influence on the Royal Proclamation of 1763, the American Revolution, the French Revolution, and Canadian Confederation. Throughout a short text of just over a hundred pages, the prose is accessible and lively. The text is scantly footnoted, with essentially just a few suggestions for further reading apparent at the end. However, for a simple introduction to the history and lore of the Magna Carta, this book stands out as a highly accessible, Canadian-oriented account.

Deborah Hellman & Sophia Moreau, eds., *Philosophical Foundations of Discrimination Law* (Oxford: Oxford University Press, 2013)

This recent book is a set of philosophically-grounded essays on discrimination law, with the work specifically seeking to go beyond the traditional areas of scholarship that have developed in pertinent contexts, such as general philosophical writing on equality and narrower philosophical writing on affirmative action. That said, some of the pieces, such as Denise Réaume's opening chapter, arguably ground themselves in that broader writing on equality, albeit partly with the aim of signalling some of the directions in which the scholarship and jurisprudence ought to have moved. The book itself reads swiftly, with the next chapter, by Hanoch Sheinman, immediately getting into the wrongs of discrimination in different ways. The editors, Deborah Hellman and Sophia Moreau, offer their own chapters in which they consider the possibility of shifting from an equality-based understanding to a liberty-based understanding of when discrimination is wrongful.

Later parts of the book consider questions of how to implement any theory on discrimination: for example, an interesting interplay of chapters between George Rutherglen and Tarunabh Khaitan explores how closely the law should or should not track the theory; Patrick Shin considers whether any unitary conception of discrimination is possible; and, Lawrence Blum analyzes some problems with a categories-based approach. The last part of the book, containing four additional papers, considers theoretical lessons to be derived from some of the jurisprudential experience with attempting to implement anti-discrimination norms in different ways.

This book is a challenging, but tremendously important, contribution to the complex theoretical and jurisprudential questions concerning the objects of and approaches to anti-discrimination law. As Canada's courts and lawmakers continue to struggle with some of the very concepts that were constitutionally entrenched in the equality rights guarantee, this sort of deep theoretical scholarship contributes in very significant ways to the possibilities of better understandings.

Philippe Lagassé: (1) D. Michael Jackson & Philippe Lagassé, eds., *Canada and the Crown: Essays on Constitutional Monarchy* (Kingston: Institute of Intergovernmental Relations & McGill-Queen's University Press, 2013); and (2) Michel Bédard & Philippe Lagassé, eds., *The Crown and Parliament / La Couronne et le Parlement* (Cowansville: Éditions Yvon Blais, 2015).

Philippe Lagassé is making major contributions to understandings of Canadian parliamentary governance, including to understandings of the Crown. Two co-edited collections in recent years show him and other editors pulling together sophisticated commentary by a variety of authors engaged with themes and issues related to the Crown, with both books containing English-language and French-language chapters. The first of these, a 2013 collection with Michael Jackson, contains the more foundational set of essays which explore a variety of fundamental themes in a somewhat more structured manner. The second, though, a 2015 collection with Michel Bédard, sees authors going into enormous depth on a number of often under-examined issues. Many Canadian constitutionalists are not thinking as actively as they ought to about details on

the role of the Crown. Both of these collections, in which Lagassé has played a leading role in renewing attention to these topics, are extremely worthwhile additions to the library of any Canadian constitutionalist.

Robert Leckey, *Bills of Rights in the Common Law* (Cambridge: Cambridge University Press, 2015)

Robert Leckey's new book offers a fascinating comparison of aspects of rights review in Canada, South Africa, and the United Kingdom, cutting across different types of bills of rights within particular Commonwealth contexts. The book is a monograph rather than a textbook, and it pursues several very specific arguments rather than trying to offer any comprehensive comparative analysis. Leckey is particularly interested in constitutional remedies, and they are for him a prime example of how legal culture always affects what happens with legal text, which becomes a major substantive theme of the book.

The book is interesting, in part, for how Leckey gets to those arguments. His methodology is specifically framed as an internal legal approach, one which is thus in contrast with philosophical and political science approaches to the law. Leckey gives a distinctive role to specifically legal reasoning and to the specialized meaning of judgments to legal readers. He recognizes that they are not philosophical expositions, yet they cannot be considered simply in terms of votes and outcomes. In pursuing his monograph on these terms, Leckey implicitly calls for a return to sophisticated legal scholarship of a sort that has sometimes been considered philosophically or politically old-fashioned, even unfashionable. Through his practice of this methodology, Leckey admirably exemplifies how legal reading has something to contribute to understanding the law — strange as it may be that we need reminding of that point.

Regarding the complex ways in which courts operate, the constitutional text's options on constitutional remedies do not tell us all we need to know. Constitutional remedies function in complex ways across jurisdictions like the three Commonwealth contexts at issue. Leckey ultimately frames and pursues a fascinating and challenging argument that judges may be underutilizing their possible constitutional remedies and are thus falling prey to a culture of legal caution. His argument will not convince every reader, but those on all sides of this question can be grateful for the ideas Leckey offers in this marvellous scholarly contribution.

Sylvia McAdam (Saysehwahum), *Nationhood Interrupted: Revitalizing nêhiyaw Legal Systems* (Saskatoon: Purich Publishing, 2015)

The limited writing on Indigenous legal traditions in Canada has received an important addition this year with Sylvia McAdam's book, in which she seeks to capture in writing some dimensions of *nêhiyaw* or Cree law, which has traditionally been only orally transmitted. McAdam writes from the unique perspective of being one of the four founders of Idle No More, so the book ultimately speaks more broadly of not just Indigenous law, but of her perspective on Canadian law in relation to it. The book is not written in the form of a typical, detailed legal treatise, but it is, of course, effective in its unconventional form.

The aim of the book is to engage in the task of *nêhiyaw wiyasiwêwina,* or talking about Cree law. This aim is grounded in the worldview that Cree law is a sacred gift from the Creator and that it is ultimately a spiritual form of law that needs to be respected for society to be well-ordered. Some of the middle parts of the book turn, for instance, to the complex *wâhkôhotowin* of the Cree language, which include matters such as ways in which particular individuals are addressed and spoken to, which ultimately reflects on kinship connections.

The book then turns to interpretation of Treaty 6, grounded in an understanding of Treaty 6 as a covenantal relationship in which the *nêhiyawak* adopted the Queen and her children. McAdam describes Treaty 6 as intended to preserve the *nêhiyaw pimâcihowin,* or Cree livelihood, and articulates extensive unfinished treaty business arising from a view that the Treaties did not cede or surrender land. This leads to her final chapter reflecting on Idle No More and her perspective that many actions taken by the Canadian government are illegitimate and in violation of Aboriginal and/or Treaty rights.

The book obviously has different starting points than much Canadian constitutional scholarship. Indeed, McAdam appears not to identify as a Canadian citizen but simply as a citizen of the *nêhiyaw* Nation with resulting birth rights from that status. That starting point may limit the traction of this book in many circles, but it is what makes *Nationhood Interrupted* deeply informative as to the views of some Indigenous actors with whom Canada is in an ongoing dialogue. Although the distance between understandings that is highlighted by this book emphasizes some of the challenges in ongoing

Canadian Aboriginal relations, a better understanding of some Indigenous legal concepts and perspectives cannot be anything other than helpful to all sides.

Peter J. McCormick, *The End of the Charter Revolution: Looking Back from the New Normal* (Toronto: University of Toronto Press, 2015)

That a book published a scant few months ago concerning the basic approach of the Supreme Court of Canada is arguably already outdated is a fascinating state of affairs, but this reality makes the book itself no less valuable. In *The End of the Charter Revolution*, Peter McCormick argues that the Dickson and Lamer years were ones of significant *Charter* activity, but that most *Charter* issues have since been resolved, leading to the more deferential McLachlin years. The book offers important material in support of this argument, including both a qualitative discussion of case law and statistical material.

The latter, statistical material continues Peter McCormick's longstanding work in offering statistical analyses of Canadian courts. Some of it shows a shortening lifespan for *Charter* decisions, such that the typical *Charter* case cited by the Supreme Court of Canada is tending to be newer than ever. That statistic fits with an intuition that the McLachlin court has had a distinctive jurisprudence, one that is no longer as engaged with the early *Charter* cases.

However, that distinctive jurisprudence has arguably become less deferential than what first appeared to be the case. Where the early McLachlin years saw the court quieting debates about judicial activism through the careful application of relatively-settled law, the later years have shown the Court striking out in new directions on matters like prostitution, the right to strike, and euthanasia — all while deliberately eschewing precedent.

In some respects, McCormick's book now describes the legacy that Chief Justice McLachlin might have had. But there is room for a sequel.

Roger Tassé, *A Life in the Law: The Constitution and Much More* (Cowansville: Éditions Yvon Blais, 2013)

This book, available in both English and French, is, in part, a memoir of a long legal career that began with a humble upbringing in Quebec and saw Roger Tassé climb to the highest echelons of legal power. While Tassé has not always

been a prominent figure in the public eye, he was significantly involved as a legal advisor in patriation and in later attempts at constitutional amendment.

During patriation, Tassé played a central role as Deputy Minister of Justice, working alongside Minister Chrétien, so his recollections of that period add a unique perspective that will be of value to legal scholars. The second half of the book, in particular, will be an important addition to the history of recent Canadian constitutionalism and will help shed light on some of the aims and aspirations of those developing the constitutional text. In that respect, Tassé's book joins an important, emerging collection of works on the period that will illuminate the meaning of modern Canadian constitutionalism.

Jeremy Webber, *The Constitution of Canada: A Contextual Analysis* (Oxford: Hart Publishing, 2015)

Part of Hart's *Constitutional Systems of the World* series, Jeremy Webber's latest book undertakes the challenging task of summarizing Canadian constitutionalism in under three hundred pages. That overall limit, and the challenge of explaining the various foundational elements of Canadian constitutional government, severely limits the space for each topic. The *Charter*, for instance, gets under fifty pages.

The book covers some historical background, each of the branches of government, and issues surrounding federalism, human rights and the *Charter*, and Aboriginal rights. In many ways, it is an impressive, succinct survey. Webber manages to say a great deal at a general level. Both foreign readers and Canadian readers will find this book a helpful, though abbreviated, introduction. In a Canadian context, its manageable length could well make it a useful introduction for undergraduates or even beginning law students, and it is a reasonably sophisticated book in the context of its inherent succinctness.

Its succinctness, however, is a double-edged sword in that this book is often both insufficiently detailed and slightly too perspective-laden for its lack of detail. The constitutional law cases cited in the book are arguably sparse relative to the constitutional jurisprudence, and they have some peculiar omissions — some of which are arguably the leading cases on various topics.

At the same time, the book rather strongly pursues the claim that no fundamental vision unites Canadian constitutionalism and that "agnostic constitutionalism" is the appropriate interpretation to adopt. That claim will

be unhelpful to the foreign reader and arguably undermines a unified vision that might have been found through a more detailed engagement with the case law that has become more cohesive over time. The book is, of course, a major contribution simply for what it is. But, it could have been something far greater.

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