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The Challenge of Diversity in a Multinational Federation: The Impact of the Judiciary on Pluralism in Canada

by

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Abstract

Political rhetoric aside, has Canada, 150 years after its foundation, achieved its goal of preserving pluralism? How is pluralism defined within the Canadian framework? What was the judiciary's contribution to that effect? In other words, how have Canadian courts dealt with pluralism throughout the years? Have they been successful in tackling such a challenge?

This paper begins with a brief description of the organization of the Canadian judicial system, namely the hierarchy of the courts, the nomination and compensation of judges, and the guarantees of judicial independence. After that, the paper discusses the evolution of pluralism within the Canadian Courts, from three different viewpoints: a) the separation of powers; b) the institutions, like Senate reform, Supreme Court composition, and Quebec secession; and c) the *Canadian Charter of Rights and Freedoms* and other parts of the *Constitution Act, 1982*, where a special focus will be given to language and Aboriginal rights.

Key-words

Canada, judicial federalism, pluralism, separation of powers, Canadian Charter of Rights and Freedoms

> "*Now, when we [are] united together, if union [is] attained, we [shall] form a political nationality with which neither the national origin, nor the religion of any individual, [will] interfere. [...] In our own Federation we [will] have Catholic and Protestant, English, French, Irish and Scotch, and each by his efforts and his success [will] increase the prosperity and glory of the new Confederacy… [W]e [are] of different races, not for the purpose of warring against each other, but in order to compete and emulate for the general welfare.*"
>
> *-George-Étienne Cartier*[I]

Introduction

Those words from one of Canada's Fathers of Confederation are certainly a fair description of the country's willingness to embrace pluralism through federalism. In fact, opting for federalism was "a legal response to the underlying political and cultural realities that existed at Confederation and continue to exist today. […] At Confederation, political leaders told their respective communities that the Canadian union would be able to reconcile diversity with unity."[II]

Political rhetoric aside, has Canada, 150 years after its foundation, achieved its goal of preserving pluralism? How is pluralism defined within the Canadian framework? What was the judiciary's contribution to that effect? In other words, how have Canadian courts dealt with pluralism throughout the years? Have they been successful in tackling such a challenge?

The present analysis will begin with a brief description of the organization of the Canadian judicial system, namely the hierarchy of the courts, the nomination and compensation of judges, and the guarantees of judicial independence. Then there will be a discussion on the evolution of pluralism within the Canadian Courts, from three different viewpoints: a) the separation of powers; b) the institutions, like Senate reform, Supreme Court composition, and Quebec secession; and c) the *Canadian Charter of Rights and Freedoms* and other parts of the *Constitution Act, 1982*, where a special focus will be given to language and Aboriginal rights.

1. Organization of the Canadian judicial system

a) Hierarchy of the courts:

The Canadian judicial system may be depicted as a pyramid, atop which sit, in decreasing order of importance, the Supreme Court of Canada, the provincial Courts of Appeal, and the provincial Superior Courts. The federal Parliament appoints the judges of all of these courts.

Beneath these – at the very base of the pyramid – are the remaining provincial courts, whose judges are appointed by their respective provincial legislatures. In most provinces, the Superior Court is a court of original general jurisdiction, and will be the starting point of a constitutional challenge.

It should be noted that there is no specific court devoted to constitutional litigation in Canada:

> The provincial power over the administration of justice in the province enables a province to invest its courts with jurisdiction over the full range of cases, whether the applicable law is federal or provincial or constitutional. […] The general jurisdiction of the provincial courts means that there is no need for a separate system of federal courts to decide "federal" questions. Nor does the power to decide federal questions have to be specifically granted to the provincial courts by the federal Parliament. On the contrary, if federal law calls for the exercise of adjudication, but is silent as to the forum, the appropriate forum will be the provincial courts (Hogg 2013: 7-3).

Therefore:

> The provincial superior courts have always occupied a position of prime importance in the constitutional pattern of this country. They are the descendants of the Royal Courts of Justice as courts of general jurisdiction. They cross the dividing line, as it were, in the federal-provincial scheme of division of jurisdiction, being organized by the provinces under s. 92(14) of the *Constitution Act* […].[III]

In parallel, the federal Parliament has established a tailor-made system of federal courts whose jurisdiction extends solely to federal matters, such as copyright, trademarks, patents, admiralty, tax, and citizenship (Hogg 2013: 7-27). The Federal Court – and its appeal division, the Federal Court of Appeal – operate under the authority of the *Federal Courts Act*[IV], in particular sections 3[V] and 4[VI] thereof, and ultimately of section 101 of the *Constitution Act, 1867*[VII] (previously known as the *British North America Act*).

b) Nomination and compensation of judges:

Pursuant to section 96 of the *Constitution Act, 1867*[VIII], the federal Parliament nominates the judges of the provincial Superior Courts and Courts of Appeal, and section 100[IX] establishes that it is also responsible for their compensation. The provincial legislatures are respectively responsible for the nomination and compensation of the remaining provincial judges.

c) Guarantees of judicial independence:

Unlike the guarantees of judicial independence for federally appointed judges which are established in the *Constitution Act, 1867*[X], those for provincially appointed judges are contained in the jurisprudence of the Supreme Court of Canada. Those guarantees consist of: security of tenure[XI], financial security[XII], and institutional independence[XIII].

Despite explicit constitutional references to these guarantees, namely sections 96 to 100 of the *Constitution Act, 1867* and 11(d) of the *Canadian Charter of Rights and Freedoms*, the Supreme Court declared that judicial independence is "at root an unwritten constitutional principle."[XIV]

The Supreme Court stressed on multiple occasions that judicial independence is "important both for public confidence in the proper administration of justice and for the constitutional separation of powers."[XV] This independence should be interpreted in the interest of the public rather than that of the judges.[XVI] Therefore, it is important that the courts not only be independent, but also be perceived, in the eyes of the public, as such.[XVII] In a pluralistic context, it is only logical – as well as essential to the stability and flourishing of the federation – that sub-national entities be confident their diversity will be recognized, and their rights, adjudicated, in an impartial manner.

2. The evolution of pluralism in the Canadian federation under the influence of the judicial power

a) The separation of powers according to the Constitution:

According to the Supreme Court of Canada, the separation of powers established in the *Constitution Act, 1867* is a core part of the country's organization.[XVIII]

Section 91 of the *Constitution Act, 1867* defines the jurisdiction of the federal Parliament and section 92 establishes that of the provincial legislatures.[XIX] According to the theory of

"watertight compartments", there should be no overlap between the respective jurisdictions of the federal and provincial legislatures.[XX] In theory, both the federal and provincial legislatures are considered equally sovereign[XXI] and exclusively competent in their respective jurisdictions – in that each may not infringe on the other's jurisdiction, even in the absence of action by the competent authority. Nonetheless, some provisions of the *Constitution Act, 1867* as well as theories elaborated by jurisprudence have nuanced or even revoked this general principle, mostly in favour of the federal Parliament. This is an obstacle to pluralism within the Canadian federation as it hinders "the reconciliation of unity with diversity within a single society" (Gaudreault-DesBiens & Fabien Gélinas 2005: 56, emphasis added).

According to the *Constitution Act, 1867*, the federal Parliament may unilaterally decide to exercise its jurisdiction over matters which it considers to be "for the general Advantage of Canada."[XXII] This "works and undertakings power" has been used 470 times between 1867 and the end of the 1960s, but only twice since then; the last instance being in 1987.[XXIII] Moreover, the *Constitution Act, 1867* grants "disallowance and reservation powers" to the federal Parliament; powers which are presently regarded as obsolete.

The federal Parliament also inherited the ability "to make Laws for the Peace, Order, and good Government of Canada" (POGG).[XXIV] It thus received the residual power to legislate over such matters which were unconceivable and that consequently could not have been divided in 1867. The courts have historically limited the scope of this power (Lysyk 1979: 545–46).

POGG has been employed as an underlying premise to other jurisprudential theories which have expanded the legislative jurisdiction of the federal Parliament. One example is the theory of "emergency power", which allows the federal government to legislate regarding a subject which would normally fall under provincial jurisdiction, given exceptional circumstances such as war or famine[XXV], or more recently, high inflation[XXVI]. Another example is the theory of "national concern", which allows the federal government to legislate over subjects which were not granted specifically to the provinces and that could not be handled efficiently by the provinces due to their nature.[XXVII] This second power is very controversial and consequently has rarely been used by the courts recently[XXVIII].

However, the separation of powers is not to be interpreted to the exclusive advantage of the federal Parliament. Rather, it is necessary to mention that some provisions of the *Constitution Act, 1867*[XXIX] list specific subjects which are of a concurrent – that is, of both federal and provincial – jurisdiction. The federal and provincial legislatures can therefore both legislate with respect to old age pensions[XXX], as well as in regards to agriculture and immigration[XXXI]. In the former case, precedence is given to the provincial law; in the latter, precedence is given to the federal law.

In addition, case law has elaborated theories which, without giving precedence to one particular level of government, emphasize the interrelation between both levels: the doctrines of "double aspect" and of "ancillary effects" are notable examples. Regarding the "double aspect" doctrine, the Supreme Court deemed that a province's exercise of its legislative jurisdiction over one subject is not incompatible with that of a concurrent exercise by the federal Parliament on the same subject (and vice-versa), so long as both legislatures could link their actions to a subject matter devoted to them by the constitutional separation of powers.[XXXII] Regarding the "ancillary effects" doctrine, the Supreme Court determined that, in certain circumstances, a legislature may exercise its jurisdiction in a manner which could entail repercussions on that of the other without being considered *ultra vires*, provided that the action in question could be justified by the separation of powers, and the legislature could demonstrate the necessity of those repercussions.[XXXIII]

In all the previously mentioned cases other than those deemed to be of concurrent jurisdiction, federal law has precedence over that of a provincial legislature if an unsolvable conflict arises between both laws (Hogg 2013: 16-2 to 16-3).

Finally, regarding to the distribution of legislative powers, the Supreme Court of Canada has recently adopted a stance which is more compatible with the essence and objectives of both federalism and pluralism. This is perhaps best exemplified by the Court's decision in the *Reference re Securities Act*, in which it reiterated the importance of provincial independence with respect to jurisdictional decision- and law-making powers:

> While flexibility and cooperation are important to federalism, they cannot override or modify the separation of powers. The *Secession Reference* affirmed federalism as an underlying constitutional principle that demands respect for the constitutional division of powers and the maintenance of a constitutional balance between federal and provincial powers.

> In summary, notwithstanding the Court's promotion of cooperative and flexible federalism, the constitutional boundaries that underlie the division of powers must be respected. The "dominant tide" of flexible federalism, however strong its pull may be, cannot sweep designated powers out to sea, nor erode the constitutional balance inherent in the Canadian federal state.[XXXIV]

The Court took a similar stance in *Quebec (Attorney General) v A* (also known as the *Lola* case), in which it demonstrated substantial deference towards the province of Quebec's historically distinct approach to private law, and more particularly to family law:

> [T]he articles of the *Civil Code of Québec* whose constitutional validity is being challenged by A do not express or perpetuate prejudice against *de facto* spouses. On the contrary, it appears that, by respecting personal autonomy and the freedom of *de facto* spouses to organize their relationships on the basis of their needs, those provisions are consistent with two of the values underlying s. 15(1) of the Charter. They were enacted as part of a long and complex legislative process during which the Quebec National Assembly was concerned about keeping step with changes in society and about adapting family law to new types of conjugal relationships in a manner compatible with the freedom of spouses.[XXXV]

It bears noting here that provinces possess jurisdiction over "property and civil rights", which practically confers them the main legislative position with respect to the enactment of statutes regarding private law matters. It is that jurisdiction which allowed Quebec to maintain the civil law tradition as the province's *jus commune*, as opposed to the other provinces where the common law constitutes that *jus commune*.

Regarding the separation of powers, these Supreme Court decisions may be regarded as a breath of fresh – or, at least, refreshed – air for the provinces. Unlike the Judicial Committee of the Privy Council, the ancestor of the Canadian Supreme Court, which was very decentralizing in nature and highly respectful of provincial autonomy[XXXVI], the Supreme Court was initially much more inclined towards centralization (Leclair 2005: 383). Furthermore, the "disallowance and reservation powers", the "works and undertakings power", and the controversial theory of "national concern", which all undermine provincial autonomy within the Canadian federation, have all fallen into obsolescence. Now that the Supreme Court embraces a more pluralistic approach to the separation of powers, it is safe to say that perspectives are looking better – if not great – for the provinces and for the federation.

b) The institutions and the secession issue:

Even though the Supreme Court of Canada had adopted since 1949 many centralizing positions, its more recent decisions have demonstrated a greater respect for provincial jurisdictions, especially for the particularities of the province of Quebec.[XXXVII] In the *Reference re Supreme Court Act, ss. 5 and 6* (also known as the *Nadon* case), the Court wrote:

> [The] function [of section 6] is to limit the Governor in Council's otherwise broad discretion to appoint judges, in order to ensure expertise in civil law and that Quebec's legal traditions and social values are reflected in the judges on the Supreme Court, and to enhance the confidence of the people of Quebec in the Court.[XXXVIII]

The Court pointed out that the confidence of Quebec in the Supreme Court has been a matter of concern since Confederation:

> Section 6 reflects the historical compromise that led to the creation of the Supreme Court. Just as the protection of minority language, religion and education rights were central considerations in the negotiations leading up to Confederation, the protection of Quebec through a minimum number of Quebec judges was central to the creation of this Court. A purposive interpretation of s. 6 must be informed by and not undermine that compromise.[XXXIX]

Thus, the Court concluded that the federal Parliament could not unilaterally modify the eligibility requirements for an appointment to the bench of the Supreme Court without contravening section 41(d) of the *Constitution Act, 1982*[XL]:

> Accepting this argument would have two practical consequences that the provinces could not have intended. First, it would mean that Parliament could unilaterally and fundamentally change the Court, including Quebec's historically guaranteed representation, through ordinary legislation. Quebec, a signatory to the April Accord, would not have agreed to this, nor would have the other provinces. Second, it would mean that the Court would have less protection than at any other point in its history since the abolition of appeals to the Privy Council. This outcome illustrates the absurdity of denying Part V its plain meaning. The framers cannot have intended to diminish the constitutional protection accorded to the Court, while at the same time enhancing its constitutional role under the *Constitution Act, 1982*.[XLI]

The Court took a similar stance in the *Reference re Senate Reform*, in which it declared that the federal Parliament could not proceed unilaterally to reform Canada's upper chamber.[XLII]

These rulings have their roots in two landmark decisions which emphasized the Court's inclination towards federalism. In *Re: Resolution to amend the Constitution*, the Court concluded to the existence of a constitutional convention that prevented the federal Parliament from proceeding on its own to the patriation of the Canadian Constitution.[XLIII] The Court intended to force the political actors to reach a consensual agreement. The government of Quebec, led at the time by the Parti québécois, a separatist party, was excluded from the final deal due to a breakdown in the political negotiations. Nonetheless, Quebec is officially a party to the Canadian Constitution, even though its legislature symbolically voted several motions to express its disagreement with the patriation and its direct consequence, the *Constitution Act, 1982* (Webber 2015: 42–47).

Likewise, the Supreme Court, basing itself on the underlying constitutional principles of federalism, democracy, respect for minority rights, and constitutionalism and the rule of law, established that the clear expression by the people of Quebec of their desire to pursue secession "would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire."[XLIV] The Court clearly stated the role of federalism in this regard: it is "inherent in the structure of our constitutional arrangements, […] the lodestar by which the courts have been guided."[XLV] Thus, Quebec could not, even with a clear majority obtained in a referendum, unilaterally invoke a right to self-determination and dictate the terms of secession to other provinces. Bilateral or multilateral negotiations would be imperative.[XLVI] That being said, the Court, basing itself on the underlying constitutional principle of democracy, stressed that "the rights of other provinces and the federal government cannot deny the right of the government of Quebec to pursue secession, should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others."[XLVII]

c) The *Canadian Charter of Rights and Freedoms* and the *Constitution Act, 1982*:

The *Canadian Charter of Rights and Freedoms* (hereafter the "Charter") is a bill of rights that "guarantees a set of civil liberties that are regarded as so important that they should receive immunity, or at least special protection, from state action" (Hogg 2013: 36-3). As the Charter consists of Part I (s. 1 to 34) of the *Constitution Act, 1982*[XLVIII], it has been incorporated into the Constitution of Canada (Hogg 2013: 34-14). Therefore, it can only be modified by constitutional amendment – unlike its predecessor, the *Canadian Bill of Rights*[XLIX], which was but an ordinary law (Hogg 2013: 36-2 to 36-3).

The late constitutional scholar Peter Hogg wrote of the Charter's influence on the Canadian federal system:

> It is sometimes said that a bill of rights is a centralizing force in a federal state. This is not true in any obvious sense. The [Charter] did not confer any additional powers on the federal Parliament. On the contrary, it limited the powers of the federal Parliament as well as the provincial Legislatures. But the Charter is a centralizing force in a subtle sense. It supplies a set of uniform national standards for the protection of civil liberties. These apply throughout the country, and in fields of formerly exclusive provincial jurisdiction. Some of these standards, namely, the mobility rights of s. 6 and the language rights of ss. 16 to 23, are avowedly directed to national unity, facilitating personal mobility and attempting to make the whole of Canada a homeland for French-speaking as well as English-speaking Canadians. But all of the provisions of the Charter give to persons whose civil liberties have been abridged by provincial (or federal) action the right to appeal to national norms which will be enforced by the court system, and ultimately by a national court, the Supreme Court of Canada (Hogg 2013, 36-4).

Section 24 of the Charter[L] grants an individual whose rights were infringed upon the right to apply for a remedy. In contrast, section 52 of the *Constitution Act, 1982*[LI] grants any individual with standing the ability to apply for a declaratory judgment regarding the constitutionality of a particular state action (Hogg 2013: 40-2). The judiciary is, according to section 52, allowed to invalidate any state action – that is, any provision of Canadian law, regulation, action or even inaction on the part of the executive power[LII] – which contravenes or is inconsistent with the Charter, or more broadly, the Canadian Constitution.[LIII]

The Canadian courts have developed certain guidelines to ensure that state actions comply with the Constitution; most of which refer to the concept of "dialogue"[LIV] between the different branches of government, especially since the advent of the Charter (Hogg et al. 2007: 45:1; Wright 2010: 625). That being said, the Court has been prone to postpone the declaration of invalidity – that is, to grant a grace period of temporary validity – when striking down an unconstitutional law.[LV] This allows Parliament or the provincial legislature, as the case may be, to react and rewrite the struck down legislation and/or pass new legislation.[LVI] Section 33 of the *Constitution Act, 1982* (also known as the "notwithstanding clause") grants Parliament and the provincial legislatures the ability to suspend the effects of a declaration of invalidity for a renewable five-year period. Such situations are rare.[LVII] Moreover, the legislative power may only use this "notwithstanding clause" regarding rights guaranteed by sections 2 and 7 to 15 of the Charter.

Accepting the premise that "the Charter is a centralizing force in a subtle sense […] [by supplying] a set of uniform national standards for the protection of civil liberties" (Hogg 2013: 36-4), one might ask whether the Supreme Court was able to embrace the challenges of pluralism within a federative context. This is effectively the case regarding language rights and, to a lesser extent, Aboriginal rights, which are protected by section 35 of the *Constitution Act, 1982*.

(i) The Charter and language rights

Sections 16 to 23 of the Charter have brought a new dimension to language rights in Canada. In addition to reinforcing the notion that Canada is a bilingual country, these sections confirm New Brunswick as the only province that is officially and institutionally bilingual (Hogg 2013: 56-22). In contrast, prior to the Charter, section 133 of the *Constitution Act, 1867*[LVIII] and section 23 of the *Manitoba Act, 1870*[LIX] only required a "limited form of bilingualism" (Hogg 2013: 56-21) in federal institutions and in the provinces of Quebec and Manitoba. It has been argued that the absence of a constitutional requirement with respect to bilingualism at the provincial level in seven of the ten provinces was an obstacle to the development of bijuralism in Canada (Gaudreault-DesBiens 2007: 23), although some pieces of legislation, such as Ontario's *French Language Services Act*[LX], Prince Edward Island's *French Language Services Act*[LXI], and Nova Scotia's *Act Respecting the Delivery of French-language Services by the Public Service*[LXII], have attempted to counterbalance this phenomenon.

While the Court's interpretation of sections 16 to 23 of the Charter has greatly favoured Francophone minorities outside of Quebec, the same cannot be said of the Anglophone minority in Quebec.

In *R v Beaulac*, the Supreme Court confirmed that section 530 of Canada's *Criminal Code*[LXIII] grants any accused in any province the right to a trial in the official language of his or her choice, and suggested that language rights ought to be interpreted liberally and extensively.[LXIV] In this case, the accused was a French-speaking individual living in British Columbia.

In *Lalonde v Ontario (Commission de restructuration des services de santé)* (2001), the Health Services Restructuring Commission of Ontario was prohibited from closing Montfort Hospital, a French-speaking institution in the region of Ottawa, on the grounds of minority language rights protection.[LXV]

In stark contrast, the decision *Baie-d'Urfé (Ville de) v Québec (Procureur général)*, rendered a few weeks later by the Court of Appeal of Quebec rejected the plaintiffs' argument that the merger of an Anglophone borough with the city of Montreal violated their right to minority protection, even though the merger resulted in the loss of decisional power and relative representation.[LXVI]

This difference between the judicial treatment of Anglophone and Francophone minorities in Canada is all the more striking through the lens of language rights in education. In fact, pursuant to section 23 of the *Constitution Act, 1982*[LXVII], the Court has been keen to force the executive power to fulfill its constitutional obligations towards the Francophone minority outside of Quebec, whereas the realities of the Anglophone minority in Quebec have been barely addressed by the Supreme Court (Bérard 2017: chapters 3 and 6).

In *Mahe v Alberta*, the Supreme Court established that section 23 of the Charter grants Francophone parents the right to manage and control the minority-language school facilities in the Edmonton region.[LXVIII]

In the *Reference re Public Schools Act*, the Court drew the distinction between formal and substantive equality – pointing out to the importance of the latter – and went on to explain that "the answers to the questions should ideally be guided by that which will most effectively encourage the flourishing and preservation of the French-language minority in the province."[LXIX]

A decade later, in *Arsenault-Cameron v Prince Edward Island*, the Court stressed that section 23 is "premised on the fact that substantive equality requires that official language minorities be treated differently, if necessary, according to their particular circumstances and needs, in order to provide them with a standard of education equivalent to that of the official language majority."[LXX]

In *Doucet-Boudreau*, the Supreme Court was particularly severe towards the Nova Scotia legislature for failing to protect the rights of the Francophone minority under section 23 of the Charter. The Court accepted that an order by the trial judge to the effect that he would personally hear progress reports from the legislature as to the construction of minority language school facilities was constitutional.[LXXI]

Finally, in *Association des parents de l'école Rose-des-vents v British Columbia (Education)*, the Supreme Court based itself on the principle of substantial equality, previously stated in

Mahe[LXXII], to establish that the British Columbia legislature was violating its obligations towards the province's Francophone minority under section 23 of the Charter.[LXXIII]

These decisions somewhat contrast with the treatment received by the Anglophone minority in Quebec. While invalidating, or attenuating the interpretation of some provisions of Quebec's Charter of French Language in light of s. 23 of the Canadian Charter, the Supreme Court managed in three cases to strike a delicate balance between the protection of minority rights and its sensitivity toward the particular socio-demographic status of the French language in Quebec.

In *Solski (Tutor of) v Quebec (Attorney General)*, the Supreme Court demonstrated great deference towards the autonomy of the Quebec National Assembly while assessing its obligations under section 23 of the Charter:

> [O]n the collective level, these language issues are related to the development and existence of the English-speaking minority in Quebec and the French-speaking minorities elsewhere in Canada. They also inevitably have an impact on how Quebec's French-speaking community perceives its future in Canada, since that community, which is in the majority in Quebec, is in the minority in Canada, and even more so in North America as a whole. To this picture must be added the serious difficulties resulting from the rate of assimilation of French-speaking minority groups outside Quebec, whose current language rights were acquired only recently, at considerable expense and with great difficulty. Thus, in interpreting these rights, the courts have a responsibility to reconcile sometimes divergent interests and priorities, and to be sensitive to the future of each language community. Our country's social context, demographics and history will therefore necessarily comprise the backdrop for the analysis of language rights.[LXXIV]

In *Nguyen*, although the Supreme Court did find certain provisions of the *Charter of the French Language*[LXXV] unconstitutional, it decided nonetheless to suspend the declaration of invalidity for one year "[b]ecause of the difficulties [it] may entail."[LXXVI] Last, in *Gosselin (Tutor of) v Quebec (Attorney General)*, where the prohibition imposed on French-speaking parents to send their children to English schools was challenged, the Court determined that "schools for the minority language community should not operate to undermine the desire of the majority to protect and enhance French as the majority language in Quebec, knowing that it will remain the minority language in the broader context of Canada as a whole."[LXXVII]

In other words, the Supreme Court, in *Solski*, *Nguyen*, and *Gosselin*, demonstrated a particular sensitivity to the reality of the French language in Quebec and towards the

autonomy of the National Assembly of Quebec as the sole North American legislature accountable to a French majority (Bérard 2017: 92-121).

Applying a Dworkinian framework to this situation, this discrepancy in the treatment received by the two minority groups embodies the "right to treatment as an equal" (in opposition to the "right to equal treatment") with the long-term perspective of "making the community more equal overall" (Dworkin 1977: 67–68). Simply put, the Supreme Court has, since the advent of the Charter, gone to a larger extent to protect the Francophone minority outside of Quebec, since it perceives that Francophones and their culture are more vulnerable in Canada as a whole (cf Hosein 1992; see also Kymlicka 2007). Notwithstanding the fact that the concept of substantive equality has been used exhaustively to protect the rights of Francophone minorities across Canada, the Supreme Court has relied on the context-based approach underlain by substantive equality to protect in an asymmetrical manner the rights of the most well-off minority of the country, that is the Anglophone minority in Quebec (Bérard 2017: 92–117).

(ii) *The Constitution and Aboriginal rights*

Part II of the *Constitution Act, 1982*, especially section 35[LXXVIII] thereof, addresses the rights of the Aboriginal peoples of Canada.

While provincial powers and linguistic minorities – the Francophone minority outside of Quebec, that is – have recently been treated with deference by the Supreme Court, the Aboriginal peoples of Canada have yet to benefit from the same degree of recognition.

To this effect, some authors have pleaded for the acknowledgement of this reality in the Canadian judicial system, in order to "respect the inevitable diversity of […] modern communities and to avoid the appeal of homogenization" (Leclair 2015: 64–66). For instance:

> Multijuridical or pluralist better describes the Canadian legal system. However, there is a schism between the de facto operation of Indigenous peoples' systems in Canada and the de jure recognition of these systems. For Canada to truly be a pluralist country there needs to be more comprehensive recognition of Indigenous laws as part of the mainstream Canadian legal system (Gunn 2007: para 15, emphasis added).

Likewise:

> Perhaps most fundamentally, the judiciary must confront and move past Eurocentric notions about the inferiority of Indigenous law that continue to permeate Canadian society (Newell 2013: para 48).

For Webber, however, all is not lost:

> [O]ne of the great developments in the last 20 years in Aboriginal rights scholarship has been a focus on the content of Aboriginal legal traditions themselves. Increasing numbers of scholars, usually Aboriginal, have moved away from discussions of the common law and the interpretation of section 35 and begun to ask, in collaboration with their communities, 'What does it mean to govern oneself as Anishinabek, Mi'kamq, Métis, or Inuvialuit?'. They have built their conception of Aboriginal constitutionalism on that foundation. They do not reject relations with non-Aboriginal governments: they generally see themselves as laying the foundations for a more equal relationship, one that draws substantially on the normative traditions of Aboriginal as well as non-Aboriginal peoples (Webber 2015: 252–53, footnotes omitted).

This perception has been enhanced by recent Supreme Court decisions on section 35 of the *Constitution Act, 1982*. Although Aboriginal rights had already been recognized in *Calder v British Columbia (Attorney-General)*[LXXIX] and *Guerin v The Queen* [LXXX], the first major case to address the question of Aboriginal rights in the post-Charter era was *R v Sparrow*[LXXXI], in which the Court recognized the "right of a member of the Musqueam Indian band to fish for salmon in the Fraser River [in British Columbia]" (Hogg 2013: 28-21).

In *R v Van der Peet*, the Supreme Court defined Aboriginal rights under the Charter as "an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right."[LXXXII] That is, the practice, custom or tradition ought to have been "one of the things which made the culture of the society distinctive"[LXXXIII] and to have developed "prior to contact between aboriginal and European societies"[LXXXIV], although there was a dissent regarding this last requirement. In *R v Sappier*[LXXXV], the Court ruled that the "harvesting of wood for domestic uses was integral to the distinctive culture of the Maliset and Mi'kamq people" (Hogg 2013: 28-24.1).

Furthermore, the Court initially gave an extensive interpretation to the notion of Aboriginal treaty rights, which are also protected under section 35 of the *Constitution Act, 1982*.[LXXXVI] The Court subsequently narrowed its position over the years.[LXXXVII]

The Court has also been keen to recognize Aboriginal titles.[LXXXVIII] In this regard, the test to be applied by the courts was defined in *Delgamuukw v British Columbia*.[LXXXIX] In *R v Côté*, the Supreme Court stressed that Aboriginal rights could exist independently of Aboriginal titles[XC], thereby upholding an Aboriginal's right to fish for food in this specific case.[XCI]

That being said:

> "Even if the courts are willing to make firm declarations of title, litigation is a long drawn-out and frustrating process, limited in what it can achieve. Moreover, until the Supreme Court's decision in *Haida Nation*[XCII] (2004), Aboriginal peoples generally had to watch in the meantime as their traditional lands were logged, mined, dammed or sold for other developments, with no control or financial return for the communities concerned. One of the most important changes has therefore been the growth of interim measures that ensure that, pending judicial determination, Aboriginal peoples can participate in the management of the land, share the benefits and have their interest in the land at least partially protected" (Webber 2015: 242, emphasis added).

An interesting illustration of the limits of litigation to promote Aboriginal rights can be found in the *Ktunaxa Nation* case, in which the Supreme Court of Canada rejected that nation's claim that a governmental approval of a resort project in an area which, in their cosmology, hosted the Grizzly Bear Spirit, violated both their freedom of religion and their Aboriginal rights.[XCIII]

Although the situation is not perfect, one must acknowledge that there have been significant judicial developments that do take into consideration the distinct realities of the Aboriginal peoples of Canada, including the differences between them[XCIV]. Progress has been made and will – should the current trend persist – continue to be made, but in an incremental way.

Conclusion

Needless to say, diversity is a challenge for all multinational federations. In order to tackle these sensitive issues, the courts have come to the rescue. Through recent decisions in three fundamental spheres, i.e. the separation of powers, the institutions and secession, and the Charter as well as the *Constitution Act, 1982*, the Supreme Court of Canada's record, albeit not perfect, gives great importance to the value of pluralism within the federal framework[XCV].

The illustrations are, in fact, numerous. While the *Lola* case and the references on the Supreme Court, Senate, Secession of Quebec and *Securities Act* all demonstrated the high regard which the Supreme Court holds for Quebec's distinctiveness, social values and legislative autonomy, the decisions rendered on language rights permeate a strong bias in

favour of Canada's most vulnerable language minority, the Francophone community outside of Quebec. Although such a favourable bias is not as obvious in terms of Aboriginal rights, recent jurisprudential developments might lead one to identify a similar tendency.

In other words, the impulse of pluralism in the Canadian federation through the judicial power is, as we write this article, some kind of a no-brainer. Indeed, the Supreme Court of Canada 2.0 tackled the challenge of diversity in offering a "legal response to the underlying political and cultural realities that existed at Confederation and continue to exist today"[XCVI], thus reconciling diversity with unity in a most Canadian way.

Yet again, it remains important to acknowledge the inherently limited reach of any judicial pronouncement on diversity. Granted, courts may mobilize constitutional provisions to protect rights against some violations. More broadly, they can (positively) alter the dynamics underlying the protection and promotion of diversity. However, their main role remains that of a watchdog. The genuine blossoming of diversity also presupposes some form of political will, particularly on the part of majorities. In Canada as in other countries, such a will is not always manifest, or, if one prefers, it sometimes reveals itself in an asymmetrical manner. For example, in spite of significant jurisprudential progress concerning the legal status of French-speaking minorities, the defense of their rights remains a daily battle against provincial governments which often see minority institutions as liabilities rather than as assets. Aboriginal peoples also suffer from a political environment which is not always optimal for the resolution of their claims. To wit, the conflict in 2020 opposing hereditary chiefs (under customary law) of the Wet'suwet'en Nation in British Columbia to elected band leaders (under the Indian Act), over the approval by the latter of a pipeline project affecting that nation's alleged traditional lands. The problem is that the latter had jurisdiction over the territory of reserves, while the former possessed residuary jurisdiction over other parts of the nation's traditional territory. Hence, a conflict of laws – state law v. customary laws -, and a conflict of legitimacies – elected officials v. hereditary chiefs. In that volatile political context, a blockade had been erected on the territory to prevent the construction of the pipeline, but it had been forcefully dismantled by the Royal Canadian Mounted Police after the issuance of a court order in that sense. News of this dismantlement provoked a wave of support across Canada for the hereditary chiefs' position, and several rail blockades were erected by

Aboriginal groups all across the country. Although this move was supported by many non-Aboriginals, it was also strongly resented by some others, as the blockades were hampering not only the country's economy, but also their very livelihood. After almost three months, the blockades were finally removed. Yet, it took such a full-fledged national crisis to prompt the federal and British Columbia governments to engage in further discussions with representatives of the Wet'suwet'en, which culminated in a provisional agreement on the latter's land rights. Diversity indeed raises challenges from both a legal and a political perspective...

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I Cited in *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 43 [*Secession Reference*].

II *Ibid.*

III *A.G. Can. v Law Society of B.C.*, [1982] 2 SCR 307 at 326–27. *Cf Ontario v Criminal Lawyers' Association of Ontario*, 2013 SCC 43 at para 18.

IV RSC 1985, c F-7.

V "The division of the Federal Court of Canada called the Federal Court – Appeal Division is continued under the name "Federal Court of Appeal" in English and "Cour d'appel fédérale" in French. It is continued as an additional court of law, equity and admiralty in and for Canada, for the better administration of the laws of Canada and as a superior court of record having civil and criminal jurisdiction." [emphasis added]

VI "The division of the Federal Court of Canada called the Federal Court – Trial Division is continued under the name "Federal Court" in English and "Cour fédérale" in French. It is continued as an additional court of law, equity and admiralty in and for Canada, for the better administration of the laws of Canada and as a superior court of record having civil and criminal jurisdiction." [emphasis added]

VII 30 & 31 Vict, c 3, s 101, reprinted in RSC 1985, Appendix II, No 5: "The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada." [emphasis added]

VIII "The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick."

IX "The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada."

X *Supra* note VII, ss 99–100.

XI *Valente v The Queen*, [1985] 2 SCR 673 at paras 27–31 [*Valente*]. Specifically, see paragraph 30 of the Court's decision: "It is sufficient if a judge may be removed only for cause related to the capacity to perform judicial functions." *Cf Ell v Alberta*, 2003 SCC 35 [*Ell*]; *Mackin v New Brunswick (Minister of Finance); Rice v New Brunswick*, 2002 SCC 13 [*Mackin*]. See also Hogg 2013: 7-14.

XII *Valente*, *supra* note XI at paras 40–46. Specifically, see paragraph 40 of the Court's decision: "The essence of such security is that the right to salary and pension should be established by law and not be subject to arbitrary interference by the Executive in a manner that could affect judicial independence." *Cf Beauregard v Canada*, [1986] 2 SCR 56. See also Hogg 2013: 7-14.

XIII *Valente*, *supra* note XI at paras 47–52. *Cf* Hogg 2013: 7-14: "This [does] not preclude involvement by the

Attorney General in the administration of the courts, but it [does] require that the judges control the assignment of judges, sittings of the court, and court lists." [footnotes omitted]

[XIV] *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3 at para 83 [*PEI Reference*].

[XV] *Conférence des juges de paix magistrats du Québec v Québec (Attorney General)*, 2016 SCC 39 at para 31 [*Conférence Québec*]. See also *Ell*, *supra* note XI at para 23; *Mackin*, *supra* note XI at para 38; *PEI Reference*, *supra* note XIV.

[XVI] *Conférence Québec*, *supra* note XV at para 33.

[XVII] *Valente*, *supra* note XI at para 22.

[XVIII] *Secession Reference*, *supra* note I at para 43.

[XIX] *Supra* note VII, ss 91–92. See also sections 94A and 95, which will be addressed shortly.

[XX] *Reference re: Weekly Rest in Industrial Undertakings Act (Can.)*, [1937] AC 326 at 354 (PC).

[XXI] *Reference re: Liquor License Act of 1877 (Ont.)*, [1883] 9 AC 117 (PC) [*Hodge*].

[XXII] *Supra* note VII, s 92(10)(c); *Ontario Hydro v Ontario*, [1993] 3 SCR 327.

[XXIII] Hogg 2013: 22-15 to 22-18. See also Lajoie 1969.

[XXIV] *Constitution Act, 1867*, *supra* note VII, s 91.

[XXV] *Cf Reference re: Board of Commerce Act, 1919 (Can.)*, [1922] 1 AC 191 (PC).

[XXVI] *Re: Anti-Inflation Act*, [1976] 2 SCR 373.

[XXVII] *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401.

[XXVIII] See, however: *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544, upholding the constitutionality of a federal statute establishing pan-Canadian pricing mechanisms to a broad set of greenhouse gas emission sources; however, see the contrary opinion of the Alberta Court of Appeal on the same statute: *Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74. It is very likely that the question of the constitutionality of this statute will reach the Supreme Court in the near future.

[XXIX] *Supra* note VII, s 94A-95.

[XXX] *Ibid*, s 94A.

[XXXI] *Ibid*, s 95.

[XXXII] *Rio Hotel Ltd v New Brunswick (Liquor Licensing Board)*, [1987] 2 SCR 59.

[XXXIII] *Attorney General (Que.) v Kellogg's Co. of Canada*, [1978] 2 SCR 211.

[XXXIV] 2011 SCC 66 at paras 61– 62. However, the Supreme Court later found that the federal Parliament could legislate, on the basis of its trade and commerce power, in respect of "systemic risk", as it may affect the financial sector, in Reference re Pan-Canadian Securities Regulation, 2018 SCC 48. This finding was notably based on the fact that provinces cannot, separately or together, effectively respond to such a risk, thereby requiring a centralized, e.g. federal, response.

[XXXV] 2013 SCC 5 at para 267.

[XXXVI] *Cf Maritime Bank of Canada (Liquidators of) v New Brunswick (Receiver-General)*, [1892] AC 437 at para 4 (PC); *Hodge*, *supra* note XXI at para 36.

[XXXVII] *Ibid.*

[XXXVIII] 2014 SCC 21 at para 59 [*Nadon*]. See also paragraphs 93 and 146 of the Court's decision. *Cf Supreme Court Act*, RSC 1985, c S-26, s 6: "At least three of the judges shall be appointed from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or from among the advocates of that Province." *Cf* Brouillet & Tanguay (2012: 81): "In addition to the three judges from Quebec, the bench of the Court is usually composed of three judges from Ontario, two from western Canada, and one from the Atlantic provinces."

[XXXIX] *Nadon*, *supra* note XXXVIII at para 48 [footnotes omitted].

[XL] *Constitution Act, 1982*, s 41(d), being Schedule B to the *Canada Act 1982* (UK), 1982, c 11: "An amendment to the Constitution of Canada in relation to the following matters may be made by proclamation issued by the Governor General under the Great Seal of Canada only where authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province: […] the composition of the Supreme Court of Canada."

[XLI] *Nadon*, *supra* note XXXVIII at para 99.

[XLII] 2014 SCC 32 at para 3.

[XLIII] [1981] 1 SCR 753 at 909.

[XLIV] *Secession Reference*, *supra* note I at para 88.

[XLV] *Ibid* at para 56.

[XLVI] *Ibid* at para 90–92.

[XLVII] *Ibid* at para 92.
[XLVIII] *Supra* note XL.
[XLIX] SC 1960, c 44.
[L] "Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."
[LI] "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."
[LII] *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at para 43 [*Doucet-Boudreau*].
[LIII] *Cf Re Manitoba Language Rights*, [1985] 1 SCR 721 at para 48 [*Manitoba Reference*].
[LIV] *Vriend v Alberta*, [1998] 1 SCR 493 at paras 138–39 [*Vriend*].
[LV] Hogg 2013: 40-4 to 40-4.1. *Cf Carter v Canada (Attorney General)*, 2015 SCC 5; *Canada (Attorney General) v Bedford*, 2013 SCC 72; *Quebec (Education, Recreation and Sports) v Nguyen*, 2009 SCC 47 [*Nguyen*].
[LVI] In a pluralistic federation, the temporary period of validity can be used to protect minority groups, such as the Francophone minority outside of Quebec. *Cf. Manitoba Reference*, *supra* note 65 at para 150: Even though this decision was not rendered under the Charter, the Supreme Court deemed that the province of Manitoba had a constitutional obligation to enact laws in both French and English, which had not been fulfilled as its laws were only enacted in English. The Court thus granted temporary validity to the laws of the province while awaiting for their translation, in order for the legislature to fulfill its obligations towards the Francophone population of the province. See also Hogg, *supra* note 3 at 40-5.
[LVII] *Cf Vriend*, *supra* note LIV. The government of Quebec notably employed the notwithstanding clause in the aftermath of the decision *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712. This decision from the Quebec legislature led some Anglophones in Quebec to petition the United Nations Human Rights Committee: *Ballantyne v Canada*, U.N. Doc. CCPR/C/47/D/359/1989 and 385/1989/Rev.1 (1993). After the Committee ruled in favour of the plaintiffs, Quebec decided not to extend the notwithstanding clause.
[LVIII] "Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec. […]" [emphasis added]
[LIX] Either the English or the French language may be used by any person in the debates of the Houses of the Legislature, and both those languages shall be used in the respective Records and Journals of those Houses; and either of those languages may be used by any person, or in any Pleading or Process, in or issuing from any Court of Canada established under the *Constitution Act, 1867*, or in or from all or any of the Courts of the Province. The Acts of the Legislature shall be printed and published in both those languages." [emphasis added]
[LX] RSO 1990, c F-32.
[LXI] RSPEI 1988, c F-15.2.
[LXII] SNS 2004, c 26, as amended by *An Act Respecting the Administration of Government*, SNS 2011, c 9, ss 17–22.
[LXIII] RSC 1985, c C-46, s 530.
[LXIV] [1999] 1 SCR 768 at paras 25, 34, 56.
[LXV] 208 DLR (4th) 577 (Ont CA).
[LXVI] [2001] RJQ 2520 (CA).
[LXVII] "Citizens of Canada (a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or (b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province, have the right to have their children receive primary and secondary school instruction in that language in that province."
[LXVIII] [1990] 1 SCR 342 [*Mahe*].
[LXIX] *Reference re Public Schools Act (Man.), s. 79(3), (4) and (7)*, [1993] 1 SCR 839 at 850; Bérard 2017: 175.
[LXX] 2000 SCC 1 at para 31.
[LXXI] *Supra* note LII.
[LXXII] *Supra* note LXVIII.
[LXXIII] 2015 SCC 21.

[LXXIV] 2005 SCC 14 at para 5. See also Bérard 2017: 92–99.
[LXXV] CQLR, c C-11.
[LXXVI] *Supra* note LV at para 46.
[LXXVII] 2005 SCC 15 at para 31.
[LXXVIII] "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."
[LXXIX] [1973] SCR 313.
[LXXX] [1984] 2 SCR 335.
[LXXXI] [1990] 1 SCR 1075.
[LXXXII] [1996] 2 S.C.R. 507 at para 46 [*Van der Peet*]; Hogg, *supra* note 3 at 28-22 to 28-23.
[LXXXIII] *Van der Peet*, *supra* note LXXXII at para 55; Hogg 2013: 28-23.
[LXXXIV] *Van der Peet*, *supra* note LXXXII at para 60; Hogg 2013: 28-23.
[LXXXV] *R v Sappier; R v Gray*, 2006 SCC 54.
[LXXXVI] *R v Marshall*, [1999] 3 SCR 456; Hogg 2013: at 28-38 to 28-39.
[LXXXVII] *R v Marshall*, [1999] 3 SCR 533; *R v Marshall; R v Bernard*, 2005 SCC 43.
[LXXXVIII] For a definition, see Hogg 2013: 28-28.
[LXXXIX] [1997] 3 SCR 1010.
[XC] [1996] 3 SCR 139 at paras 38–39.
[XCI] *Ibid* at para 71.
[XCII] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73.
[XCIII] *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations), 2017 SCC 54*.
[XCIV] *R. v. Powley*, 2003 CSC 43; *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12.
[XCV] For an analysis on the logics underlying the legal management of diversity in Canada, see Gaudreault-DesBiens 2010: 195.
[XCVI] *Secession Reference*, *supra* note I at para 43.

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